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COLORADO SUPREME COURT 2 East 14th Avenue, 4th Floor Denver, Colorado 80203 (720) 625-5150	
C.A.R. 50 Certiorari to the Court of Appeals, Case No. 2022CA1583 Appeal from Arapahoe County District Court, Case No. 2022CV30065	**▲COURT USE ONLY▲**
Petitioners: Aurora Public Schools and David James O'Neill v. Respondents: Angela Saupe and Brian Saupe	Case No. 22 SC 824
Attorneys for Petitioner Aurora Public Schools Gwyneth Whalen, #20027 W. Stuart Stuller, #22082 Anne L. Stuller, #54031 CAPLAN AND EARNEST LLC 3107 Iris Avenue, Suite 100 Boulder, CO 80301 303-443-8010 gwhalen@celaw.com; sstuller@celaw.com astuller@celaw.com	

OPENING BRIEF OF PETITIONER AURORA PUBLIC SCHOOLS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

☑ It contains 8,266 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(b).

☑ **For each issue raised by the petitioner:**

The brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/W. Stuart Stuller
W. Stuart Stuller, #22082

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Session Laws

Rules

Constitutional Provisions

Other

Hearings

ISSUES PRESENTED FOR REVIEW

Whether applying a newly created cause of action to conduct that occurred prior to the creation of the cause of action violates the Colorado constitutional prohibition against laws that are retrospective in operation.

Whether applying a newly enacted waiver of immunity from suit to conduct that occurred prior to the enactment of the waiver, and at a time when the immunity was in effect, violates the Colorado constitutional prohibition against laws that are retrospective in operation.

STATEMENT OF THE CASE

Nature of the Case

This case involves a constitutional challenge to provisions of the Child Sexual Abuse Accountability Act (CSAAA) that permit a newly-created private right of action and new waiver of Colorado Governmental Immunity Act immunity to be applied to conduct that occurred prior to the creation of the right of action and waiver of immunity.

Relevant Facts

Respondents Angelica Saupe and Brian Saupe sued Petitioner Aurora Public Schools (the "School District") and David James O'Neill asserting a claim under the Child Sexual Abuse Accountability Act ("CSAAA"). CF pp. 6–7. The Act provides:

> A person who is a victim of sexual misconduct that occurred when the victim was a minor may bring a civil action for damages against . . . a managing organization that knew or should have known that an actor or youth-related activity or program posed a risk of sexual misconduct against a minor and the sexual misconduct occurred while the victim was participating in the youth-related activity or program operated or managed by the organization.

C.R.S. § 13-20-1202(1)(b) (2022). The CSAAA became effective on January 1, 2022. Sen. Bill 21-088, § 6, 2021 Colo. Sess. Laws p. 2928. The claim may be based on conduct that occurred prior to the date of its enactment including conduct on or after January 1, 1960. C.R.S. § 13-20-1203(2) (2022).

The Act also waives immunity granted to public entities by the Colorado Governmental Immunity Act (CGIA). C.R.S. § 13-20-1207(1)(a) (2022); C.R.S. § 24-10-106(1)(j) (2022). The waiver is applicable to conduct that allegedly occurred before January 1, 2022.

The Respondents' complaint alleged:

David O'Neill coached the girls' basketball and softball teams at Rangeview High School in the School District. CF, p. 1, ¶ 3. O'Neill also monitored attendance and supervised detentions. *Id.* In Spring 2001, O'Neill recruited Ms. Saupe, then fourteen years old, to play basketball. CF, p. 4, ¶ 7. He began grooming her for later sexual exploitation. *Id.* After an injury, Ms. Saupe became the student manager for Rangeview's basketball and baseball teams. *Id.*

The Complaint alleges, without elaboration, that the School District had "full knowledge and consent" that O'Neill began isolating Ms. Saupe in "off camera" areas at Rangeview. CF, p. 4, ¶ 8. Between 2001 and 2005, O'Neill engaged in sexual misconduct with Ms. Saupe while hidden in private spaces at the school, such as a small room at the end of a corridor with no windows and one locking door. CF, p. 4, ¶ 9. The Complaint also alleges that unnamed agents of the School District deliberately disregarded and covered up a report from another coach that, had it been investigated, would have revealed O'Neill's alleged sexual misconduct. CF, p. 7, ¶ 23.

Ms. Saupe reported O'Neill's misconduct to the police in March 2007. CF, p. 5, ¶¶ 10 & 12. According to the complaint, she was told "that her claims were 'time-barred' by the Colorado statute of limitations and prosecution would not move forward." CF, p. 5, ¶ 12.

The School District filed a motion to dismiss pursuant to Rule 12(b)(5), arguing that applying the CSAAA's cause of action and waiver of immunity to conduct that occurred prior to their creation violated section 11 of article II of the Colorado Constitution which forbids the General Assembly from passing legislation that is "retrospective in its operation." CF, pp. 34–52.

The court granted the motion. CF, pp. 133–41.

Procedural History

The Respondents' complaint asserted three claims for relief: (1) negligence against Mr. O'Neill; (2) a CSAAA claim against Mr. O'Neill and the School District; and (3) a loss of consortium claim against Mr. O'Neill and the School District. CF, pp. 3–8.

The School District moved to dismiss pursuant to Rule 12(b)(5) arguing that (1) the application of the CSAAA claim and waiver to

conduct that occurred prior to their enactment violated the Colorado Constitution's prohibition against retrospective legislation; (2) the complaint was not sufficiently specific to state a claim for relief against the School District; and (3) Mr. Saupe's claim for lack of consortium was derivative of the CSAAA claim and failed to state a claim for relief because the alleged injury occurred prior to his marriage to Ms. Saupe. CF, pp. 34–52. Mr. O'Neil, represented by separate counsel, also moved to dismiss. CF, pp. 69–81.

The trial court granted the School District's motions to dismiss, holding that the application of the CSAAA to conduct that occurred prior to its enactment was unconstitutional. CF, pp. 133–41.

Respondents filed a timely notice of appeal. CF. pp. 160–64.

The School District filed a motion with the Colorado Court of Appeals to transfer the case to this Court pursuant to C.R.S. § 13-4-102(1)(b) which vests initial appellate jurisdiction in the court of appeals "except in: Cases in which a statute . . . has been declared unconstitutional." *Saupe v. Aurora Publ. Schs.*, case no. 22 CA 1583, Mot. to Trans., (Oct. 18, 2022). The court of appeals denied the motion

instructing the School District to seek relief with this Court. *Saupe v. Aurora Publ. Schs.*, case no. 22 CA 1583, Order, (Oct. 18, 2022). The School District then filed a motion to transfer jurisdiction to this Court pursuant to §13-4-102(1)(b) or, in the alternative, a petition for a writ of certiorari prior to judgment pursuant to Rule 50 of the Colorado Rules of Appellate Procedure. *Aurora Publ. Schs. v. Saupe*, case no. 22 SC 824, Mot. to Trans., (Nov. 2, 2022). This Court granted the School District leave to file a petition for certiorari before judgment. *Aurora Publ. Schs. v. Saupe*, case no. 22 SC 824, Mot. to Trans., (Nov. 4, 2022).

The School District filed a petition for certiorari before judgment. *Aurora Publ. Schs. v. Saupe*, case no. 22 SC 824, Pet. Cert., (Nov. 14, 2022). Mr. O'Neill moved to join the petition. *Aurora Publ. Schs. v. Saupe*, case no. 22 SC 824, Mot. to Join, (Nov. 28, 2022). This Court granted the motion and later granted the petition. *Aurora Publ. Schs. v. Saupe*, case no. 22 SC 824, Orders, (Nov. 29, 2022) & (Dec. 21, 2022).

SUMMARY OF ARGUMENT

The Colorado Constitution provides: "No ex post facto law . . . or (law) retrospective in its operation . . . shall be passed by the general assembly." COLO. CONST. art II, § 11.

The Child Sexual Abuse Accountability Act ("CSAAA") creates a new right for relief and waives immunity otherwise granted to public entities. The School District does not question the General Assembly's authority to create a new right for relief or waive public entities' immunity. The CSAAA, however, makes the new right for relief and waiver of immunity applicable to allegations of misconduct that occurred prior to the creation of the right and waiver. Applying the new right and waiver to conduct that preceded their enactment is a *per se* violation of the prohibition against legislation that is "retrospective in its operation."

The controlling constitutional analysis asks whether the challenged legislation (1) impairs vested rights acquired under existing laws, or (2) imposes a new duty, obligation, or disability on past conduct. *E.g., Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393, 399 (Colo. 2010). If

the legislation does either, then it is unconstitutional. *See id.* The CSAAA does both.

The CSAAA attempts to evade more than a century of settled constitutional law holding that the legislature may not revive causes of action for which the applicable statute of limitations has run. *Willoughby v. George*, 5 Colo. 80, 82 (1879). A lapsed statute of limitations gives rise to a vested right to a defense that cannot, consistent with the constitutional prohibition against retrospective legislation, be removed by subsequent legislation. *Jefferson Cnty. Dep't of Soc. Serv. v. D.A.G.*, 607 P.2d 1004, 1006 (Colo. 1980). This principle applies even when the legislature creates a new cause of action with a new statute of limitations that replaces the cause of action for which the statute of limitations has lapsed.

The mechanisms by which the CSAAA attempts to evade the precedent discussed above constitutes a second additional, and independent, violation of the prohibition against retrospective legislation. The prohibition forbids the General Assembly from imposing a new duty, obligation, or disability on conduct that occurred prior to

creation of the duty, obligation, or liability. *In re Estate of DeWitt v. USAA*, 54 P.3d 849, 857 (Colo. 2002). By creating a new right for relief and waiving immunity for conduct that occurred prior to their creation, the CSAAA does exactly what the constitution forbids. The constitution prohibits the application of substantive, as opposed to procedural, changes to conduct that occurred prior to the changes. *In re Estate of DeWitt v. USAA*, 54 P.3d 849, 857 (Colo. 2002). Substantive changes create new rights or liabilities. *People v. D.K.B.*, 843 P.2d 1326, 1331 (Colo. 1993). The CSAAA creates a new right for relief that did not exist at the time of the underlying conduct and waives immunity from liability that did exist at the time of the conduct.

ARGUMENT

I. Standard of Review

The constitutionality of a statute is a question of law and reviewed de novo. *People v. Graves*, 368 P.3d 317, 322 (Colo. 2016). Although a statute is presumed constitutional, this presumption can be overcome when the party challenging the statute shows the enactment is unconstitutional beyond a reasonable doubt. *Id.*

II. The Application of the CSAAA's Right for Relief and Waiver of Liability to Conduct that Occurred Prior to Their Creation Violates the Constitutional Prohibition Against Retrospective Legislation.

A. The Development of the CSAAA.

At legislative hearings for the CSAAA on May 25, 2021, a sponsor of the bill acknowledged: "The threshold issue that we face is the constitutionality." H.R. Hearings, May 25, 2021, 2:09:10–25 p.m. (Stmt. of Rep. Soper). The sponsor's trepidation arose because a year earlier he had solicited an opinion from the Office of Legislative Legal Services (OLLS) on a "proposal to provide a two-year reviving window for sexual abuse victims for whom the civil statute of limitations has run." OLLS, Legal Opinion to Rep. Soper, January 13, 2020, CF, pp. 84–87.

The OLLS pointed out that section 11 of article II of the Colorado Constitution prohibits the General Assembly from passing laws that are "retrospective in operation." Cf, p. 85 n. 2, *quoting* COLO. CONST. art. II, § 11. The OLLS further noted that a law is unconstitutionally retrospective if takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability to past transactions. CF, p. 85*, citing Ficarra v. Dep't of*

Reg. Agencies, 849 P.2d 6, 15 (Colo. 1993). Quoting this Court, the OLLS stated: "Where a statute of limitations has run and the bar attached, the right to plead it as a defense is a vested right which cannot be taken away or impaired by subsequent legislation. When the bar of the statute of limitations has attached, the legislature cannot revive the action."[1] CF, p. 86, *quoting Jefferson Cty. Dep't of Soc. Serv. v. D.A.G.*, 607 P.2d 1004, 1006 (Colo. 1980).

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[1] Colorado law is consistent with precedent from states that have constitutional prohibitions against retrospective legislation. *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999); *Johnson v. Garlock, Inc.*, 682 So. 2d 25, 28 (Ala. 1996); *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341–42 (Mo. 1993); *Gould v. Concord Hospital*, 493 A.2d 1193, 1195–96 (N.H. 1985); *Wright v. Keiser*, 568 P.2d 1262, 1267 (Okla. 1977); *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 696–97 (Tenn. 1974). Other state courts, most recently including Utah, have held that reviving claims for which the statute of limitations has lapsed violates state constitutional Due Process provisions. *See, e.g.*, *Mitchell v. Roberts*, 469 P.3d 901, 912–14 (Utah 2020); *Doe v. Crooks*, 613 S.E. 2d 536, 538 (S.C. 2005); *Wiley v. Roof*, 641 So.2d 66, 67–69 (Fla. 1994); *State of Minn. ex rel Hove v. Does*, 501 N.W.2d 366, 370–71 (S.D. 1993); *Mayock v. Gravely Corp.*, 508 A.2d 330, 333–34 (Pa. Super. Ct. 1986). In addition, while the federal ex post facto clauses apply only to criminal laws, the ex post facto clause applicable to the states prohibits states from reviving criminal charges for child sex-related offenses after a prior statute of limitations has lapsed. *Stogner v. California*, 539 U.S. 607, 609–10 (2003); *see also People v. Shedd*, 702 P.2d 267, 268 (Colo. 1985) (reviving charge of child sex abuse after statute of limitations has run violates state constitution's ex post facto clause).

The OLLS opinion concluded: "Thus, the proposal to allow civil sexual abuse claims despite the statute of limitations would likely be found unconstitutional by a Colorado court." CF, p. 4.

B. The CSAAA's Legislative Declaration Acknowledges that the Act Attempts to Evade Constitutional Limitations.

The legislative declaration supporting the CSAAA states: "When victims of child sexual abuse do report [sexual abuse], a high percentage of them delay disclosure well into adulthood, after the expiration of the time permitted to file civil actions against those responsible for the abuse." Senate Bill 21-088, § 1(3)(b); 2021 Colo. Sess. Laws 2923.

Colorado's laws regarding statutes of limitations for claims of sexual misconduct were by no means draconian prior to the CSAAA. In 1990, the General Assembly consolidated civil actions based on sexual assault under a six-year statute of limitations that commenced when the claim accrued, that is, when the victim knew, or in the exercise of reasonable diligence should have known, of the injury and its cause.[2]

[2] This six-year statutory period, however, was not applicable to derivative claims against employers which continued to be governed by

C.R.S. § 13-80-103.7 (1990); C.R.S. § 13-80-108 (1990). If the victim was "under a disability," which included being under the age of majority, the statute would commence when the disability was removed. C.R.S. § 13-80-103.7 (1990); C.R.S. § 13-81-101(3) (1990).

In 1993, the General Assembly changed the definition of person under a disability to include a victim who was psychologically or emotionally unable to acknowledge the assault or the harm resulting from the assault. C.R.S. § 13-80-103.7(3.5) (1994), 1993 Colo. Sess. Laws p. 1908. In 1999, the Colorado Court of Appeals held that where a victim's repressed memories prevented the victim from recalling the trauma, the victim's claim does not accrue until memories of the abuse become available to the victim. *Sailsbery v. Parks*, 983 P.2d 137, 139-40 (Colo. App. 1999), *cert. denied* August 23, 1999.

Early in the 2021 legislative session, the General Assembly amended the statute of limitations for sexual misconduct claims to provide that "any civil action based on sexual misconduct including

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the general two-year limitations period. *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 604 (Colo. App. 2000).

derivative claims may be commenced at any time without limitation." Sen. Bill 21-073, 2021 Colo. Sess. Laws pp. 117–18, *codified at* C.R.S. § 13-80-103.7(1)(a) (2022). The new statute became effective on January 1, 2022. The statute provides that this change applies "to causes of action accruing on or after January 1, 2022, and to causes of action accruing before January 1, 2022, if the applicable statute of limitations, as it existed prior to January 1, 2022, has not yet run on January 1, 2022." C.R.S. § 13-80-103.7(1)(b) (2022).

In contrast, the CSAAA's legislative declaration states:

> Because of the delay in disclosure, statutes of limitations are often used to deny and defeat claims of child sexual abuse.
>
> Therefore, the general assembly determines that:
>
> This act does not revive any common law cause of action that is barred and instead creates a new right for relief for any person sexually abused in Colorado while the person was participating in a youth-related activity or program as a child;
>
> Creating a new civil cause of action that allows all victims of child sexual abuse, including those who delayed reporting the abuse until well into adulthood *after the statute of limitations on the action has expired* to hold abusers and organizations accountable is in the best interest of the state's public health and safety and is needed to address the long

> history of child sexual abuse that occurred within organizations that are culpable and complicit in the abuse.
>
> Sen. Bill. 21-088, § 1(3)(c) & 1(4), 2021 Colo. Sess. Laws 2923.

Thus, the legislative declaration acknowledges that the CSAAA right for relief is intended to replace claims for which the statute of limitations has lapsed.

As explained below, the CSAAA cannot escape the controlling precedent identified by the OLLS by creating a new cause of action. It is a *per se* violation of the prohibition against retrospective legislation.

C. The Text of the CSAAA.

The right to relief created by the CSAAA permits a person who was the victim of sexual misconduct when the victim was a minor participating in a youth-related activity or program to bring a claim against the "managing organization" of the activity or program if the organization knew or should have known "that an actor or youth-related activity or program posed a risk of sexual misconduct against a minor." C.R.S. § 13-20-1202(1) (2022). The term "managing organization" includes public entities. C.R.S. § 13-20-1201(4), (7) (2022); C.R.S. § 24-

10-103(5) (2022). "Youth-related activities or programs" include educational programs. C.R.S. § 13-20-1201(9).

The Act also waives immunity granted to public entities under the Colorado Governmental Immunity Act ("CGIA") for this newly created cause of action. C.R.S. § 24-10-106(1)(j) (2022).

The new cause of action and waiver of immunity became effective on January 1, 2022. Sen. Bill 21-088, § 6, 2021 Colo. Sess. Laws p. 2928. Nonetheless, the Act provides that the new right for relief and waiver of immunity may be applied to conduct dating back to January 1, 1960, sixty-two years before the CSAAA became effective. C.R.S. § 13-20-1203(2) (2022); *see also* C.R.S. § 13-20-1207 (2022); C.R.S. § 24-10-106(1)(j) (2022).

D. The Historical Antecedents to Colorado's Prohibition Against Retrospective Legislation.

The term "ex post facto" is Latin for "after the fact." *Ex Post Facto*, BLACK'S LAW DICTIONARY (11th ed. 2019). The notion that it is unjust to change the legal consequences for conduct after the conduct has occurred was recognized in both Greek and Roman law. Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20

MINN. L. REV. 775, 775 (1936). English common law courts treated the ex post facto principle as a rule of a statutory construction that statutes were presumed to operate prospectively. *Id*. at 776.

James Madison wrote: "[E]x post facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation." THE FEDERALIST No. 44. The Framers of the United States Constitution made the ex post facto principle an individual right that was enforceable against Congress,[3] *and the states*. U.S. CONST. art. I, § 10, cl. 1 ("No *state* shall . . .pass any . . . ex post facto law.") (emphasis added). Chief Justice John Marshall described the prohibition against ex post facto laws as part of a "bill of rights for the people of each state." *Fletcher v. Peck*, 10 U.S. 87, 138 (1810). This "bill of rights" was established *before* the first ten amendments to the constitution were adopted and more than a century before the individual rights in the first ten amendments began to be enforceable against the states. *See Gitlow v. New York*, 268 U.S. 652 (1925) (holding for the first time that the First Amendment's free speech clause applied to the states).

[3] U.S. CONST. art. I, § 9.

Associate Justice of the United States Supreme Court Joseph Story wrote: "The terms, ex post facto laws, in a comprehensive sense, embrace all retrospective laws, or laws governing, or controlling past transactions *whether they are of a civil, or a criminal nature*." Joseph Story, *Commentaries on the Constitution of the United States*, § 679, p. 485 (Carolina Academic Press 1987) (emphasis added). Nonetheless, in 1798, the United States Supreme Court held that the ex post facto clauses apply only to criminal statutes, reasoning that the constitutional prohibition against laws that impair the obligations of contracts protected citizens from after-the-fact legislation affecting private rights. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

Many states, however, adopted constitutions that prohibited after-the-fact legislation in the civil context.[4] New Hampshire is considered the first State to do so. *Denver, South Park & Pacific Railway v. Woodward*, 4 Colo. 162, 164 (1878). The New Hampshire Constitution

[4] At least eight states, including Colorado, have constitutional provisions that prohibit retrospective laws. *Ficarra*, 849 P.2d at 12 n.12 (citing GA. CONST. art. I, § 1, ¶ 10; IDAHO CONST. art. XI, § 12; MO. CONST. art. I, § 13; N.H. Const. pt. I, art. 23; OHIO CONST. art. II, § 28; TENN. CONST. art. I, § 20; TEX. CONST. art. I, § 16.)

provides: "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses." N.H. CONST. part 1, art. 23.

It fell to Associate Justice Story, riding circuit, to develop the analytical framework for determining when new statutes constitute retrospective legislation. Justice Story first considered the possible scope of the prohibition:

> What is a retrospective law, within the true intent and meaning of this article? Is it confined to statutes, which are enacted to take effect from a time anterior to their passage? Or does it embrace all statutes, which, though operating only from their passage, affect vested rights and past transactions?

Soc. For the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814).

Justice Story's analysis identifies two types of retrospective statutes: (1) statutes that apply to a time "anterior to," that is, prior to, their passage, and (2) statutes that operate only from the date of their enactment, but nonetheless affect vested rights and past transactions. *Id.* He concluded that: "[i]t would be a construction utterly subversive of all the objects of the provision to adhere to the former definition. It would

enable the legislature to accomplish that *indirectly*, which it could not do *directly*." *Id.* (emphasis added). Justice Story then devised a two-pronged analysis to cover both indirect violations of the ex post facto principle – statutes that operate only from the date of enactment but impair vested rights – and direct violations of the ex post facto principle – statutes that change the legal consequences for conduct that occurred prior to the change:

> Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws [indirect violations], ***or*** creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions already past [direct violations], must be deemed retrospective . . . .

Id. (emphasis added).

E. Colorado's Constitution Forbids Direct and Indirect Violations of the Ex Post Facto Principle in Both the Civil and Criminal Context.

Colorado's Constitution was adopted more than seventy-five years after the United States Supreme Court limited the federal ex post facto clauses to the criminal context. Our state constitution provides: "No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, . . . shall be passed by the general

assembly." COLO. CONST. art. II, § 11. "The purpose of the constitutional ban of retrospective legislation, like the ban on *ex post facto* laws, is to prevent the unfairness that results from changing the legal consequences of an act after the act has occurred. *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990).

This Court adopted Justice Story's two-pronged test in 1878. *Denver, S.P. & P.R*, 4 Colo. at 166–67. The Story test remains the controlling analysis. *See, e.g., Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393, 399 (Colo. 2010); *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006).

To be sure, a statute is not unconstitutional "merely because the facts upon which it operates occurred before its adoption." *Bush v. Roche Constructors, Inc.*, 817 P.2d 608, 612 (Colo. App. 1991). For example, a building owner must comply with changes to safety codes that are adopted after the building has been constructed. *Van Sickle*, 797 P.2d at 1271. The legislature can require persons to take additional action to preserve the status quo, that is, the holder of an earlier, but unrecorded, deed can be required to record the deed to maintain its priority. *Moore*

v. Chalmers-Galloway Live Stock Co., 10 P.2d 950, 952 (Colo. 1932). Similarly, the holder of a life insurance policy can be required to take additional action to maintain the effectiveness of an earlier designation of a beneficiary. *In re Estate of DeWitt v. USAA*, 54 P.3d 849 (Colo. 2002).

Legislation that is constitutionally permissible is deemed "retroactive." *Id.* at 854. Legislation that is not constitutionally permissible is "retrospective." *Id.* at 854.

1. Article II, Section 11 Prohibits Statutes that Impair Vested Rights (Indirect Violations).

The notion that it is fundamentally unfair to change the legal consequences for conduct after the conduct has occurred is so straightforward, intuitive, and universally accepted that statutes that directly violate the principle are extremely rare. As a result, the majority of Colorado's retrospective case law focuses on indirect violations of the principle; statutes that arguably impair vested rights.

These cases turn on whether the interest impacted by the new legislation constitutes a vested right. *Ficarra*, 849 P.2d at 21 (no vested right in licensing standards); *Colo. Dept. of Soc. Serv. v. Smith, Harst & Assoc.*, 803 P.2d 964, 966 (Colo. 1991) (no vested right in recovery

procedures); *Martin v. Bd. of Assessment*, 707 P.2d 348, 354 (Colo. 1985) (no vested right in assessment procedures); *Continental Title v. Dist. Ct.*, 645 P.2d 1310, 1315 (Colo. 1982) (no vested right in jurisdictional procedures).

Statutes that require persons to take additional action to maintain the status quo do not implicate vested rights. *DeWitt*, 54 P.3d at 860 (statute requiring holder of life insurance policy to take action to maintain validity of prior designation did not implicate a vested right); *Moore*, 10 P. at 953 (statute requiring deed to be recorded to maintain priority not retrospective).

Vested rights cases also turn on *when* the affected interest reaches the point that it becomes a vested right. *People v. D.K.B.*, 843 P.2d 1326, 1331 (Colo. 1993) (right to have records sealed vests when request to seal is made); *Wood v. Beatrice Foods Co.*, 813 P.2d 821, 823 (Colo. App. 1991) (right to unemployment benefits vests when benefits award is made); *Bush*, 817 P.2d at 611 (law governing legal dispute vests when claim accrues).

a. The CSAAA's New Right for Relief Is an Indirect Violation of the Prohibition Against Retrospective Legislation.

Here, there is no question as to whether a vested right exists and when it vested. Colorado law has been clear for more than a century: "Where a statute of limitations has run and the bar attached, 'the right to plead it as a defense is a vested right which cannot be taken away or impaired by subsequent legislation.'" *D. A. G.*, 607 P.2d at 1006, *quoting Willoughby v. George*, 5 Colo. 80, 82 (1879).

The CSAAA attempts to escape this precedent by stating that the CSAAA "does not revive a common law claim that is barred and instead creates a new right for relief." Sen. Bill 21-088, § 1(4)(a), 2021 Colo. Sess. Laws 2923. The legislative declaration, however, forthrightly acknowledges that the new right was created to allow victims of child sexual abuse to hold managing organizations accountable "*after the statute of limitations on the action has expired*." Sen. Bill. 21-088, § 1(4)(b), 2021 Colo. Sess. Laws 2923. In short, the CSAAA attempts to *revive* the lapsed claim by *replacing* it with a new claim.

The text of the Colorado Constitution does not countenance subterfuge. It prohibits legislation that is "retrospective *in its operation*." COLO. CONST. art. II, § 11 (emphasis added). The prohibition against retrospective legislation "goes to the substance of the evil, not the shadow." *Brown v. Challis*, 46 P. 679, 680 (Colo. 1896). Permitting the legislature to revive a claim for which the statute of limitations has run by replacing it with a new one would, in Justice Story's words, "enable the legislature to accomplish that indirectly, which it could not do directly." *Wheeler*, 22 F. Cas. at 767.

The case cited in the OLLS opinion illustrates this principle. *D.A.G.* involved a paternity action against the putative father of a child who was born when the statute of limitations for paternity actions lapsed when the child turned five years old. 607 P.2d at 1005. Two years after the statute of limitations lapsed, the child's mother and the local department of social services brought a claim under a new statute, the Uniform Parentage Act (U.P.A.), which "repealed the previous paternity statute and adopted a new statute of limitations." *Id.* This Court held: "The singular question presented is whether this paternity action . . . which

was barred . . . by the appliable statute of limitations may be constitutionally *revived by the U.P.A.* We hold that it may not." *Id.* (emphasis added). In short, the General Assembly may not revive a lapsed cause of action by replacing it with a new cause of action. The right to raise the statute of limitations defense vested when the prior period of limitations lapsed and cannot be withdrawn by subsequent legislation.

2. Article II, Section 11 Prohibits Statutes that Impose a New Duty, Obligation, or Disability on Conduct that Already Occurred (Direct Violations).

The creation of a new right for relief and waiver of immunity also violates the second prong of the Story test, which asks whether the statute imposes a new duty, obligation, or disability on past conduct. The inquiry may, but need not, involve a vested right because the right to be free from laws that change the legal consequences for conduct that already has occurred is a *constitutional* right that does not depend on any prior statute.

Whether a statute creates a new duty, obligation, or disability depends on whether the statutory change is procedural or substantive.

DeWitt, 54 P.3d at 857. "[R]etroactive application of a statute is not retrospective where it effects a change that is procedural or remedial as opposed to substantive." *Id.* In contrast, "retroactive operation of a substantive statute constitutes impermissible retrospective application of that statute." *Specialty Restaurants*, 231 P.3d at 399.

Substantive statutes create, eliminate, or modify rights or liabilities, while procedural statutes relate only to modes of procedure to enforce existing rights or liabilities. *D.K.B.*, 843 P.2d at 1331; *DeWitt*, 54 P.3d at 854 n. 3. For example, a newly-enacted long-arm jurisdiction statute may be used to exercise jurisdiction over a non-resident defendant in a claim arising out of an automobile accident that occurred before the long-arm statute was enacted. *Smith v. Putnam*, 250 F. Supp. 1017, 1018 (D. Colo. 1965). The statute's "effect is not to create a right or liability where none existed before." *Id.* It simply creates a procedure for adjudicating a claim that existed at the time of the accident. *Id.* Similarly, a statute that changes the process for adjudicating a discrimination claim that existed at the time of the underlying conduct is procedural because the statute does "not create substantive rights by

retroactively changing what was formerly a lawful employment practice into a discriminatory practice." *Continental Title*, 645 P.2d at 1315.

In contrast, substantive statutes create rights and claims that did not exist at the time of the underlying conduct. *Id.* The Colorado Constitution "denies the right of the legislature to create a new ground for the support of an existing cause of action." *Brown*, 46 P. at 680. A substantive statute "create[s] a right or liability where none existed before." *Smith*, 250 F. Supp. at 1018; *see also Curtis v. McCall*, 244 P. 70, 71 (Colo. 1926) ("The amendment purports to give the guilty party in a divorce action a right which he did not theretofore possess; *i.e.*, the right to demand that the divorce decree be entered."); *French v. Deane*, 36 P. 609, 613 (Colo. 1894) (statute authorizing exemplary damages may not be applied to civil actions to cases that accrued prior to statutory change).

a. The CSAAA's New Right for Relief and Waiver of Liability Are Separate and Independent Violations of the Prohibition Against Retrospective Legislation.

The CSAAA does exactly what the second prong of the Story test prohibits. It "creates a new right for relief,"[5] and makes this new right applicable to conduct that occurred prior to its creation. C.R.S. § 13-20-1203(2). A new right for relief clearly is, if not a new duty (and it surely is a new duty), a new *liability* that cannot be applied to conduct that preceded the creation of that right. *Smith*, 250 F. Supp. at 1018 (statute that "create[s] a right or liability where none existed before" is unconstitutional); *Curtis*, 244 P. at 71 (statute giving party "a right which he did not theretofore possess" is unconstitutional); *Brown*, 46 P. at 680 (prohibition against retrospective legislation "denies the right of the legislature to create a new ground for the support of an existing cause of action"); *see also French*, 36 P. at 613 (statute authorizing exemplary

[5] Sen. Bill 21-088 § 1(4)(a), 2021 Colo. Sess. Laws 2923.

damages may not be applied in action that accrued before statute was enacted).

The conclusion is even more clear with respect to the application of the CSAAA's waiver of immunity to conduct that occurred prior to the creation of the waiver. The Colorado Governmental Immunity Act grants public entities, such as the School District, immunity from tort claims unless the immunity is specifically waived. C.R.S. § 24-10-106(1) (2022). The CGIA did not waive immunity for tort claims based on sexual misconduct prior to the CSAAA. Sen. Bill 21-088 § 3, 2021 Colo. Sess. Laws 2927 (adding waiver of immunity for CSAAA claims), codified at C.R.S. § 24-10-106(1)(j). The CSAAA's waiver became effective on January 1, 2022,[6] but may be applied to conduct that occurred before its enactment. C.R.S. § 24-10-106(1)(j).

Precedent is clear: "[T]he rule has become fixed, which, on the one hand denies the right of the legislature to create a new ground for the support of an existing cause of action, *or to take away any legal defense to such action*." *Brown*, 46 P. at 680 (emphasis added); s*ee also*

[6] Sen. Bill 21-088, § 6, 2021 Colo. Sess. Laws p. 2928.

Continental Title, 645 P.2d at 1315 (statute that does not remove defense permissible); *City of Colo. Spgs v. Neville*, 93 P. 1096, 1097 (Colo. 1930) (statute depriving city of defense available at time of underlying conduct impermissible); *Pollock v. Highlands Ranch Community Ass'n, Inc.*, 140 P.3d 351, 354 (Colo. App. 2006) (statute affecting defense to negligence claim is "substantive rather than remedial or procedural"); *see also Hickman v. Catholic Health Initiatives*, 328 P.3d 266, 273–74 (Colo. App. (2013) (noting distinction between immunity from damages and immunity from liability).

City of Colo. Spgs v. Neville is directly on point. There, the General Assembly amended the notice requirements for tort suits against public entities to eliminate the requirement that the notice describe the extent of the claimant's injuries. 93 P. at 1096. The plaintiff was injured in a slip and fall accident on a city sidewalk after the amendment was passed but before it took effect. *Id.* at 1096–97. The plaintiff filed a notice that did not describe the extent of her injuries as required by the statute in place at the time of her injuries. *Id.* The trial court entered judgment for the plaintiff over the city's objection that the notice did not comply

with the notice requirements in place at the time of her injury. The city appealed. This Court reversed: "It was not competent for the General Assembly, even if it so intended, which it did not, after the defendant's right of defense became vested, thereafter seriously to impair or take it away." *Id.* at 1097–98.

Here, the School District was protected by immunity at the time of the alleged misconduct. *See* C.R.S. § 24-10-108 (2001); C.R.S. § 24-10-108 (2002); C.R.S. § 24-10-108 (2003); C.R.S. § 24-10-108 (2004); C.R.S. § 24-10-108 (2005); C.R.S. § 24-10-108 (2006). The removal of that defense clearly created a new liability imposed on past transactions and, per *Neville*, impaired a vested right to that defense.

b. The Application of the CSAAA's New Right for Relief and Waiver of Liability to Conduct that Occurred Prior to Their Creations is a *Per Se* Violation of the Prohibition Against Retrospective Legislation.

In the end, the application of the new right for relief and waiver of immunity for conduct that occurred prior to their enactment constitute a *per se* violation of the prohibition against retrospective legislation. This Court has repeatedly stated that the constitutional prohibitions against

ex post facto laws and retrospective law both "prevent the unfairness that results from changing the legal consequences of an act after the act has occurred." *Van Sickle*, 797 P.2d at 1291; *Peoples Nat. Gas Div. of N. Nat. Gas Co. v. Pub. Utilities Comm'n*, 590 P.2d 960, 962 (Colo. 1979) (prohibition against retrospective legislation "parallels" prohibition against ex post facto laws); *French*, 36 P. at 612 (prohibition against retrospective laws "is synonymous with the term 'ex post facto,' as applied to the criminal law").

Given the similar scope and purpose of these provisions, a relevant question then is whether the General Assembly could impose criminal fines on managing organizations for failing to detect and prevent potential sexual misconduct that occurred before the criminal sanction was created. The answer is obviously no. The statute would violate the federal constitution's prohibition against ex post facto laws,[7] the state prohibition against ex post facto laws,[8] *and* the prohibition against laws that are retrospective in operation. *French*, 36 P. at 613 (exemplary

[7] U.S. Const. art. I, § 10.
[8] COLO. CONST. art. II, § 11

damages may not be imposed in civil action that accrued before exemplary damages were authorized).

The application of the new right for relief and waiver of liability to conduct that occurred prior to their creation clearly is "retrospective in its operation." COLO. CONST. art. II, § 11.

3. Constitutional Policy Concerns May Not Be Subordinated to Statutory Policy Concerns.

In the trial court, Respondents focused their argument on the policy considerations underlying the CSAAA, contending that those statutory concerns outweigh any concerns about the constitution's concern about the unfairness of changing the legal consequences for conduct after it has occurred. The argument misunderstands the relationship between statutes and constitutions and misreads the manner in which policy considerations factor into the analysis of retrospective claims.

First, it is axiomatic that constitutional policy interests cannot be subordinated to statutory policy interests. Therefore, this Court's observation that "vested rights do not accrue to thwart the reasonable

exercise of the police power for the public good,"[9] does not mean that the constitutional barrier against retrospective legislation may be crossed for sufficiently good cause. Instead, this Court's prior decisions demonstrate that public policy interests may play a role *in determining whether a vested right exists*, but once a vested right is identified, the public policy interests embodied in the constitution may not be subordinated to the policy interests of the statute.

For example, in *Ficarra*, this Court stated:

> [I]t is also sometimes said that *in determining whether a retroactive statute impairs or destroys vested rights*, the most important inquiries are (1) whether the public interest is advanced or retarded, (2) whether the retroactive provision gives effect to or defeats the *bona fide* intentions or reasonable expectations of affected persons, and (3) whether the statute surprises persons who have long relied on a contrary state of the law.

Id. at 16 (emphasis added). As the foregoing passage makes clear, policy concerns may play a role in determining whether the constitutional barrier has been breached, *not* whether the breach of the constitutional

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[9] *Ficarra*, 849 P.2d at 21, *quoting Lakewood Pawnbrokers, Inc. v. City of Lakewood*, 517 P.2d 834, 838 (Colo. 1974). The prohibition against retrospective legislation was not at issue in *Lakewood Pawnbrokers*.

barrier is justified.

The question before the Court in *Ficarra* was whether adding a new condition to receive an annual license constituted retrospective legislation. *Id.* at 8–9. This Court considered the policy concerns focused on the legislature's efforts to tighten up the licensing requirements for the bail bond industry, specifically by making what had previously been consideration (prior felony convictions) for receipt of an annual license under the old licensing scheme, a disqualification for receiving an annual license under the new licensing scheme. *Id.* Relying on an earlier case holding that a licensing board can deny a liquor license to a hotel that received a license two years earlier, *Ficarra* held that there is no vested right to receive a new license under a new licensing scheme merely because the person received a license under an old licensing scheme. *Id.* at 17–22 (discussing *Bd. of Cnty Comm'rs v. Buckley*, 213 P.2d 608 (Colo. 1949)). Again, "vested rights do not accrue to thwart the reasonable exercise of the police power for the public good." *Id.* at 21 (citation omitted).

In *DeWitt*, this Court stated: "[W]e have held that a vested right,

while an important consideration in our determination regarding retrospectivity, may be balanced against public health and safety concerns, the state's power to regulate certain practices, as well as other public policy considerations." 54 P.3d at 855. The question in *DeWitt*, however, was whether a statute that required the holder of a life insurance policy to take additional action to preserve an earlier designation of his spouse as a beneficiary after the couple divorced impaired a vested right held by the divorced spouse. *Id.* at 852. This Court held: "Our case law makes clear that a beneficiary to a life insurance policy does not possess a vested interest in that contract." *Id.* at 856. The Court also held that the statutory change was remedial, rather than substantive. *Id.* at 857. Thus, to the extent that policy was a consideration, it was a consideration in determining whether the constitutional barrier was breached,[10] not whether the breach of the constitutional barrier was justified.

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[10] This is how *DeWitt* has been understood by lower courts. *See generally Estate of Petteys v. Farmers State Bank of Brush*, 381 P. 3d 386, 393 ¶ 36 (Colo. App. 2016) ("In determining whether a statute impairs a vested right we consider 'whether the public interest is advanced or retarded . . . .'") (*quoting DeWitt*, 54 P.3d at 855).)

Finally, in *City of Golden v. Parker*, this Court stated: "[W]e turn now to the *DeWitt* factors to determine whether application of [an amendment to a city charter requiring prior voter approval for development subsidies] to the [existing Development] Agreements *implicates a vested right* of the Developers." 138 P.3d at 293 (emphasis added). This Court held that public policy considerations did favor recognition of a vested right, therefore, the constitutional prohibition against retrospective legislation prohibited the application of the new charter amendment to existing development agreements. *Id.* at 294.

In short, while there may be some balancing of interests in determining whether a vested right exists, the inquiry does not reduce either prong of the Story test to a balancing of statutory and constitutional interests.

Moreover, even if statutory policy interests could subordinate constitutional policy interests, any argument must start with the recognition that the policy interests underlying the CSAAA – the difficulty of childhood victims of sexual assault coming forward with their allegations – were not overlooked by prior Colorado law which held that

if repressed memories prevented the victim from recalling the trauma, the victim's claim did not accrue until the memories became available[11] and, if the victim was psychologically or emotionally unable to acknowledge the assault or the harm resulting from the misconduct, the statute of limitation was tolled until the victim was free of that disability.[12] C.R.S. § 13-80-103.7(3.5) (1994) – (2021).

Thus, if this Court rules that the new right for relief and waiver of liability cannot be applied to conduct that occurred prior January 1, 2022, then childhood victims of sexual assault for whom the statute of limitations had not lapsed prior to January 1, 2022, due to repressed memories or a psychological or emotional barriers, still may, under new legislation that is not challenged here, bring those claims "at any time without limitation." C.R.S. § 13-80-103.7(1)(a) & (b) (2022). Similarly, victims of childhood sexual assault that occurred on or after January 1, 2022, may bring CSAAA claims against both public and private

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[11] *Sailsbery*, 983 P.2d 139-40.

[12] The statute of limitations on Ms. Saupe's claim would have commenced and run no later than March 2007 after she had turned eighteen years of age and had notified police of the alleged assault. Compl. ¶¶ 10 & 12.

managing organizations at any time without limitations.

The public policy interests of the Colorado Constitution arise from the unfairness that results from changing the legal consequences of an act after the act has occurred. *Van Sickle*, 797 P.2d at 1271. The prohibition against retrospective legislation insures that persons have notice of the consequences of their actions before they act, a basic tenet of due process. *Matter of Adoption of T.K.J.*, 931 P.2d 488, 494 (Colo. App. 1996). Notice allows public entities that provide important benefits to the public to allocate their resources, train their staffs, preserve their records, and purchase insurance in light of known liabilities. The imposition of a new liability on public entities for conduct that already has occurred inevitably forces public officials to change the allocation of current and future resources to the detriment of, in this case, current and future students.

The defining inquiry of the CSAAA cause of action is whether the managing organization "knew should have known that an actor . . . posed a risk of sexual misconduct." C.R.S. § 13-20-1202(1)(b). Perceptions of what persons should know or do, change over time. The CSAAA's cause

of action may be asserted against conduct that occurred on or after January 1, 1960, three years before Colorado enacted a mandatory child abuse reporting statute. C.R.S. § 22-13-1 (1963). The statute was applicable only to physicians, not educators. The statute required physicians to report physical (not sexual) abuse. *See id.* It was not until 1969 that the definition of "abuse" was amended to include "sexual molestation," and school employees were included as mandatory reporters. C.R.S. § 22-10-1 (1969); C.R.S. § 22-10-2 (1969); *see also* S.B. 57, 47th Gen. Assemb., Reg. Sess. (Colo. 1969). The concept of "grooming" did not emerge until the 1980s. *See* Kenneth Lanning, MS, *The Evolution of Grooming: Concept and Term*, Journal of Interpersonal Violence, Vol. 33(1) at 7. Grooming often is outwardly innocent conduct – providing extra assistance to a struggling student – that is later put to a secret illicit use. The ability to recognize when the outward innocent conduct is indicative of hidden illicit conduct, and regulate the innocent conduct appropriately, involves an evolving standard of care. The prohibition against retrospective legislation "denies the right of the legislature to create a new ground for the support of an existing cause of action."

Brown, 46 P. at 680. Applying 2022 perceptions to conduct that occurred sixty, forty, or even twenty years earlier inevitably creates a new ground to support an existing cause of action.

Finally, the bedrock principle of the judicial system is to provide a fair opportunity to the parties to adjudicate the charges at issue. A "cause of action brought at any distance of time would be utterly repugnant to the genius of our laws. Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985); *see also Stogner*, 539 U.S. at 611 (reviving charge after statute of limitations has lapsed deprives defendant of fair warning to preserve exculpatory evidence).

Statutory policy interests cannot override constitutional policy interests. As the Utah Supreme Court recently noted in holding that a statute that revived time-barred claims for sexual assault violated its state constitution:

> The question presented for us, however, is not a matter of policy. We are asked to give voice to the limitations on our government established in the charter—the constitution — ratified by the voice of the people. The terms of that charter

> merit our respect unless and until they are amended or repealed. And we must enforce the original understanding of those terms whether or not we endorse its dictates as a policy matter.

Mitchell, 469 P.3d at 914.

CONCLUSION

WHEREFORE, the Aurora Public Schools respectfully request that this Court hold that the application of the cause of action and waiver of liability in the Child Sexual Abuse Accountability Act may not be applied to conduct that occurred prior to January 1, 2022 and affirm the district court's order dismissing the Respondents' complaint with prejudice.

Respectfully submitted this 17th day of January 2023.

CAPLAN AND EARNEST LLC

s/W. Stuart Stuller
Gwyneth Whalen, #20027
W. Stuart Stuller, #22082
Anne L. Stuller, #54031
CAPLAN AND EARNEST LLC
Attorneys for Petitioner
Aurora Public Schools

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, a true and accurate copy of the foregoing document was served via Colorado Courts E-Filing, the court's online filing system, on the following:

James W. Avery, Esq.
Denver Injury Law, LLC
averylawfirm@gmail.com
Attorney for Respondents

Leonard R. Higdon, Esq.
Law Office of Leonard R. Higdon
lhigdon@lrhlaw.com
Attorney for Petitioner David O'Neill

I further certify that a true and accurate copy of the foregoing document was personally served on the Office of the Attorney General in compliance with C.R.S. § 13-51-115.

s/Shelley McKinstry
Shelley McKinstry, Paralegal