DATE FILED: March 14, 2023 3:27 PM

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
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REPLY 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 5,413 words (does not exceed 5,700 words).

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

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INTRODUCTION

This case remains very straightforward. The first question presented asks whether applying a new cause of action to conduct that occurred prior to the creation of the cause of action is legislation that is retrospective in its operation.

The second question presented asks whether applying a waiver of immunity to conduct that occurred prior to the waiver is legislation that is retrospective in its operation.

The answer to both questions is obvious. Yes.

The case becomes difficult only when one tries to avoid the obvious conclusions.

ARGUMENT

I. Political Subdivision Doctrine.

Respondents incorrectly assert that the School District cannot challenge the constitutionality of the Child Sexual Abuse Accountability Act because it is a political subdivision. (Ans. Br. 20.) Respondents' assertion is not rooted in the text of the Colorado Constitution or Colorado case law.

Respondents did not raise this issue before the district court or in their response to the petition for a writ of certiorari. While Respondents have not cast the argument as one of subject matter jurisdiction, the issue may be seen as one. However, given that there are two petitioners – the School District and Mr. O'Neill – the Court need not address whether the School District has standing. *See Lobato v. State*, 218 P.3d 358, 367–68 (Colo. 2009) (declining to address standing when petitioners included school districts and private citizens). Nonetheless, the School District does.

A. The Political Subdivision Doctrine is Inapplicable.

Respondents rely on a principle referred to as the "political subdivision doctrine." (*See* Ans. Br. 22 (citing *Denver Ass'n for Retarded Child., Inc. v. Sch. Dist. No. 1 in City & Cnty. of Denver*, 535 P.2d 200, 204 (Colo. 1975)). The political subdivision doctrine "limits a political subdivision's ability to challenge the constitutionality of state statutes *directing the performance of its duties*." *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000) (emphasis added). The doctrine operates on the principle that where

there is a dispute between a subordinate and a superior state agency, the dispute should be resolved within the executive branch. *Romer v. Bd. of Cnty. Comm'rs of Cnty. of Pueblo, Colo.*, 956 P.2d 566, 573 (Colo. 1998), *as modified on denial of reh'g* (Apr. 27, 1998) (quoting *Maurer v. Young Life*, 779 P.2d 1317, 1323 (Colo. 1989)).

This litigation is not a dispute between a subordinate and a superior state agency. It is a tort action by private individuals acting in their personal capacity in which the School District raises a defense rooted in the Colorado Constitution. As the Colorado Court of Appeals put it in another case in which a school district raised a constitutional challenge to a statute: "In this case . . . the school district is seeking to enforce rights protected by the state constitution; it is not challenging a specific action of a superior agency." *Boulder Valley Sch. Dist. RE-2 v. Colorado State Bd. of Educ.*, 217 P.3d 918, 924 (Colo. App. 2009).

B. School Districts Are Permitted to Raise Constitutional Challenges Under the Political Subdivision Doctrine.

Moreover, even if this case involved a statute directing the School District's performance, the School District has authority to defend itself under the Constitution.

The political subdivision doctrine is a prudential consideration, and prudential limitations are inapplicable when a statute threatens a legally protected interest conferred by the Constitution. *Greenwood Vill.*, 3 P.3d at 438; *Denver Urb. Renewal Auth. v. Byrne*, 618 P.2d 1374, 1380–81 (Colo. 1980). Thus, an exception to the political subdivision doctrine exists when a statute threatens a legally protected interest. This Court has applied that exception in a home rule city's challenge to a state statute on the ground that the statute violated Article II, Section 11's prohibition against retrospective legislation. *Greenwood Vill.*, 3 P.3d at 437.

Greenwood Village concerned a challenge to an amendment to statutes governing the municipal annexation process. *Id.* at 431, 436–39 (2000). This Court noted that home rule cities are not the sole creatures of the General Assembly, but created pursuant to constitutional authority. *Greenwood Vill.*, 3 P.3d at 438 (citing Colo. Const. art. XX, § 6). Therefore, a home rule city has an independent interest in its own viability that permits the city "to challenge an act of the General

Assembly that affects annexation proceedings [the city] has initiated." *Id.* at 438. This same principle applies to school districts.

School districts, like home rule cities, are created pursuant to the Constitution and governed by locally elected officials who are charged with independent constitutional authority. Colo. Const. art IX, §§ 15–16. "The framers' inclusion of article IX, section 15 makes Colorado one of only six states with an express constitutional provision for local governance, underscoring the importance of the concept to our state. As a result, this court has consistently emphasized principles of local control." *Bd. of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, 646. (Colo. 1999); *see also Lujan v. Colo. St. Bd. of Educ.*, 649 P.2d 1005, 1022–23 (1982) (discussing constitutional status of school districts).

School districts are funded by state and *local* tax revenue. C.R.S. § 22-54-104 (2022) (funding formula for public schools). Consequently, this Court has "held that control over locally-raised funds is essential to effectuating the constitutional requirement of local control over education." *Owens v. Cong. Of Parents, Teachers, and Students*, 92 P.3d 933, 939 (Colo. 2004). As a result, even prior to *Greenwood Village*, this

Court entertained constitutional challenges brought by school districts to state statutes. *See generally Booth*, 984 P.2d 639 (Colo. 1999) (challenging constitutionality of Charter Schools Act); *Adams Cnty. Sch. Dist. 50 v. Heimer*, 919 P.2d 786 (Colo. 1997) (challenging constitutionality of Teacher Employment Compensation and Dismissal Act). Indeed, one year after *Greenwood Village*, this Court entertained a school district's challenge under Article II, Section 11 to charter school legislation. *See Academy of Charter Schs. v. Adams Cnty. Sch. Dist. No. 12*, 32 P.3d 456, 465 (Colo. 2001).

School districts have a constitutional interest in protecting local tax revenue from the retrospective application of a new cause of action and waiver of immunity.

II. The Story Test is Not Subordinate to a Balancing Test.

Respondents incorrectly read this Court's jurisprudence regarding the constitutional prohibition against laws that are retrospective in operation.

This Court applies the test set forth by Justice Story; a statute violates the prohibition against retrospective legislation if it impairs a

vested right or imposes a new duty, obligation or disability on past conduct. *Society For the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814); *Denver, South Park & Pacific Railway v. Woodward*, 4 Colo. 162, 166–67 (1878) (adopting Story test). This Court never has held a statute to be constitutional after determining that the statute violated either prong of the Story test.

Despite Article II, Section 11's text, principles, and case law, Respondents contend that the Story test plays a preliminary, subordinate, and non-dispositive role in the retrospective analysis; that is, if a court determines that the challenged statute violates a prong of the Story test, the court then asks whether the statute is a good idea notwithstanding its retrospective application. Respondents do not cite a single case in which this Court has upheld a statute after determining that it violated either prong of the Story test. There is no such case.

Ultimately, Respondents' account is inconsistent with the constitutional text, the principles upon which the text is based, and the case law upon which they rely most heavily.

A. The Text of the Constitution Forbids Retrospective Legislation.

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 plain language of the text permits only one inquiry: Is the law retrospective in its operation? *See Keim v. Douglas Cnty. Sch. Dist.*, 397 P.3d 377, 392 (Colo. 2017) ("When construing a constitutional provision, this court must give effect to the intent of the electorate that adopted it. To do so, this court gives words their ordinary and popular meaning. If the language of a provision is clear and unambiguous, it must be enforced as written.") (internal citations and quotation marks omitted).

Unlike the Federal Constitution's Fourth Amendment, which protects persons from "unreasonable" searches and seizures, and thus permits courts to use a balancing test to determine when a search is unreasonable,[1] no "reasonableness" qualifiers exist in the text of Article

[1] *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652–53 (1995) (whether search meets the "reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its

II, Section 11. The text is one of those rare constitutional provisions that draws a clear line. The line is after the fact. Once conduct has occurred, the law cannot be changed to impose new duties, obligations, and disabilities on the conduct.

B. The Constitution's Principles Cannot be Subordinated to a Statute's Principles.

The constitutional text draws a clear line because the principle underlying the text is straightforward: It is unfair to change the legal consequences of conduct after the conduct has occurred. *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990).

Respondents argue that "retrospective laws [a]re impermissible *if they cause[] 'injustice,'*" attributing this proposition to Justice Story's opinion in *Wheeler*. (Ans. Br. p. 4 (emphasis added) (quoting *Wheeler*, 22 F. Cas. at 767–68).) This proposition, however, is never stated in *Wheeler*. Respondents quote only one word from the opinion. The quoted word is "injustice" which appears only once in the decision: "The reasoning in these authorities, as to the nature, effect and *injustice*, in general, of

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promotion of legitimate governmental interests") (internal quotations omitted).

retrospective laws, is exceedingly able and cogent . . . .” 22 F. Cas. at 767 (emphasis added). In other words, retrospective laws are unjust in and of themselves, not merely when they are unjust for reasons unrelated to their retrospective application. *See Wheeler*, 22 F. Cas. at 767 (“‘[R]etrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made either for the decision in civil cases or the punishment of offenses.’”) (quoting N.H. Const. art. 23).

Again, the constitutional prohibition on retrospective legislation arises from the unfairness of changing the legal consequences of conduct after the conduct has occurred. *Van Sickle*, 797 P.2d at 1271.

C. The Case Law Demonstrates that the Story Test is not Subordinate to a Balancing Test.

Respondents anchor their argument that the constitutional prohibition on retrospective legislation can be subordinated for good cause to the following passage from *In re Estate of DeWitt v. USAA*: “[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 849, 855

(Colo. 2002). *DeWitt*, however, also states that a finding of retrospectivity with regard to either prong of the Story test "will render the statute *unconstitutionally retrospective* ***for all purposes***." *Id.* at 855–56 (emphases added). *DeWitt* is not internally inconsistent. Respondents take the first passage out of context.

The passage upon which Respondents rely is in part II A of the opinion, captioned, "Analysis." *Id.* at 854. The opinion states: "Because a statute is retrospective if it either (1) impairs a vested right, or (2) creates a new obligation, imposes a new duty, or attaches a new disability, our retrospectivity analysis consists of two inquiries. First, we must consider the 'vested right' prong of retrospectivity." *Id.* at 855. The opinion then discusses the nature of the vested rights inquiry, noting that there are no bright lines, and public policy may play a role in determining whether a vested right is implicated. *Id.* The passage upon which Respondents rely appears in the discussion as to whether a vested right is present. *Id.*

The opinion turns to the next inquiry: "Second, if a vested right is not implicated, we must consider the new obligation, new duty or new disability prong of retrospectivity." *Id.* The opinion then discusses the

nature of this inquiry. *Id.* Again, public policy can play a role in determining whether a new duty, obligation, or disability is of "constitutional magnitude," that is, whether it is substantive or remedial. *Id.* at 857.

Part II A of *DeWitt* does not discuss an overarching balancing test in which a finding that a statute has violated either prong of the Story test is balanced against other considerations.

DeWitt involved a statute that required the holder of a life insurance policy who had designated his spouse as the beneficiary to take additional action to preserve the designation after the couple divorced. *Id.* at 852.

Part II B of the opinion, captioned, "Application," notes that the Court must consider the interest of the decedent and the interest of the beneficiary, then states: "A finding of retrospectivity with regard to either of these interests will render the statute *unconstitutionally retrospective* ***for all purposes***." *Id.* at 855–56 (emphases added). In short, *DeWitt* expressly forecloses the possibility of a final step to decide whether the statute's violation of the Story test is constitutionally justified.

The passage from *DeWitt* upon which Respondents rely cites three cases. *See id.* at 855. None of these cases support the idea that a violation of the Story test must be balanced against other considerations. The first citation is to page seventeen of *Ficarra v. Dep't of Regul. Agencies* – part III A of the opinion – discussing when and how a vested right accrues. 849 P.2d 6, 17 (Colo. 1993). *Ficarra* held that holders of a current license did not have a vested right to licenses under future licensing schemes. The second citation is to page 1271 of *Van Sickle*, where the Court rejected a commercial real estate owner's argument that an earlier building permit gave him a vested right that exempted him from keeping his building in compliance with future changes in safety codes. 797 P.2d at 1271. The final citation is to page 838 of *Lakewood Pawnbrokers, Inc. v. City of Lakewood*, where the Court rejected the notion that a municipal ordinance imposing new regulations on pawn shops was improper because it did not exempt existing pawnbroker shops from the new regulations. 517 P.2d 834, 838 (Colo. 1973).

In each case, a business owner insisted that he had a vested right not to comply with future changes in the law. In each case, this Court

held that there was no such right: "Vested rights do not accrue to thwart the reasonable exercise of the police power." *Lakewood,* 517 P.2d at 838. *DeWitt*, *Ficarra*, *Van Sickle*, and *Lakewood* all involved changes in the law that governed plaintiffs' future actions. None involved statutes that imposed sanctions on past conduct. While sentences like, "Vested rights do not accrue to thwart the reasonable exercise of the police power" can be misconstrued, this Court has never upheld a statute, regulation, or ordinance after finding that it violated either prong of the Story test.

D. Constitutional Interests Cannot be Subordinated to Statutory Interests.

The bulk of Respondents' argument is a policy argument. Their balancing test, however, is not a balancing test to assign meaning to an open-ended constitutional term, such as unreasonable or due process. *See generally, Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652–53 (1995) (balancing interests to determine reasonableness); *Mathews v Eldridge*, 424 U.S. 319, 335 (1976) (balancing interests to determine what process is due under Due Process Clause). The Story test is used to determine whether a statute is retrospective. There is no reasonableness inquiry beyond the constitutional barrier. Again, this Court has never held a

statute to be constitutional after finding that the statute violated either prong of the Story test.

As discussed in the opening brief, Colorado's prior statute of limitations law was not insensitive to the difficulty of reporting sexual abuse. Respondents make the conclusory assertion that Colorado law "proved insufficient." (Ans. Br. pp. 8 & 9.) Respondents do not cite any case law narrowing the scope of the 1993 tolling provisions, nor any case law narrowing the holding of *Sailsbery v. Parks* that a cause of action accrues when the survivor recovers memories of the assault. 983 P.2d 137, 139–40 (Colo. App. 1999).

The harm suffered by survivors of sexual assault is real and significant, but it does not diminish their suffering to recognize that the judicial system is structured, and expected, to adjudicate cases involving tragedy and harm, sometimes catastrophic harm,[2] consistent with the

[2] *See generally, Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1163–71 (D. Colo. 2001) (seeking to hold educators responsible for students' attack on Columbine High School); *Nowlan v. Cinemark Holdings, Inc.*, 2016 WL 4092468 (D. Colo. June 24, 2016) (seeking to hold movie theater chain responsible for outside gunman's attack); *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287 (Colo. 2020) (seeking to hold

law, not the harm suffered. The facts and allegations in such cases may be difficult, but they cannot be used as a lever to overturn constitutional limitations.

The prohibition against retrospective legislation is based on the fundamental principle that it is unfair to change the legal consequences for conduct after the conduct has occurred. *Van Sickle*, 797 P.2d at 1271. A statute, like the CSAAA, that applies a new cause of action and waiver of liability to conduct that occurred prior to their creation, in this case conduct that occurred more than sixty years before its creation, does exactly what the Constitution forbids.

While this Court must decide this case assuming that the allegations of the complaint are true, it need not assume that every allegation in every complaint brought under the CSAAA will be true. It needs to consider the full scope and time period embraced by the CSAAA and whether there will be sufficient processes and opportunities in place to fairly adjudicate allegations across that period of time. It needs to

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health care facility responsible for ideologically-motivated murder attack on facility).

assume that there will be cases where the alleged perpetrator is no longer living, no longer able to deny or refute the allegations of the living accuser, and persons who, under ordinary circumstances, might have been in a position to have personal knowledge regarding the allegations, have little, if any, recollection of the time or the student, leaving the managing organization with little more than inadmissible hearsay to offer in response. While managing organizations are the nominal defendants, the employees and volunteers who staff the organizations will be the evidentiary and reputational targets accused of failing to detect and prevent hidden conduct. Those people deserve the opportunity to fairly protect their reputations. This Court needs to consider whether contemporary eyes will view seemingly innocent conduct that occurred in earlier eras for its nefarious intent.

This Court should not assume, even as to large school districts, much less small local youth clubs, that insurance is available to cover the cost of litigation and liability for a claim that did not exist at the time of the coverage.

The constitutional principle that it is unfair to change the legal consequences for conduct after it has occurred cannot be overcome by a good cause argument. This principle ensures that our conduct will be judged in our own time, and against the standards, perceptions, and knowledge of our own time.

In the end, Respondents invite the Court to liberate itself from constitutional text, principles, and precedent. The invitation is a disguised call to surrender. This Court is not a third house of the legislature, but a third and independent branch of government that uses legal text, principles, and precedent to ensure fidelity to our state constitution; to ensure that the government plays by the rules in place at the time the conduct occurred.

III. The Application of the CSAAA's Right of Action to Prior Conduct Violates Both Prongs of the Story Test.

A. The CSAAA's New Cause of Action Violates the First Prong of the Story Test.

The first prong of the Story test asks whether the statute impairs a vested right. *DeWitt*, 54 P.3d at 855. Respondents argue: "Neither the

school district nor O'Neill has a vested right in a statute of limitations defense to sexual abuse claims." (Ans. Br. p. 27.)

The argument ignores controlling precedent: "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." *Jefferson County Department of Social Services v. D.A.G.*, 607 P.2d 1004, 1006 (Colo. 1980).

Respondents do not address *D.A.G.* until deep in their brief and dismiss this Court's analysis as cursory: "Without much explanation, this Court held that reviving the time barred action impaired a vested right." (Ans. Br. p. 36.) *D.A.G.*'s explanation could be brief because it is anchored to precedent. *See* 607 P.2d at 1006 (quoting *Willoughby v. George*, 5 Colo. 80, 82 (1879) ("the right to plead [statute of limitations] as a defense is a vested right which cannot be taken away or impaired by subsequent legislation") (citing *Fischer v. Kuiper*, 529 P.2d 641, 643 (Colo. 1974) ("[O]nce the bar of limitations attaches, repeal of the act may not revive the action"); *Edelstein v. Carlile*, 78 P. 680, 681 (Colo. 1904) ("When the

bar of the statute has once attached, the Legislature cannot, by an amendatory act, revive the action").)

Respondents contend that the passage from *Willoughby* quoted in *D.A.G.* is "broad dicta." (Ans. Br. p. 38.) They are wrong. In *Willoughby*, a litigant suffered an adverse judgment, and then failed to timely appeal. 5 Colo. at 80–81. The General Assembly then passed a statute permitting litigants who suffered adverse judgments to seek a writ of error by which appellate courts could direct lower courts to transmit the record for appellate review, and permitted the statute to be applied to judgments rendered before its enactment. *Id.*, at 81–82; s*ee generally, Vance's Heirs v. Rockwell*, 3 Colo. 240, 242–43 (1877) (discussing writs of error). The disappointed litigant pursued a writ of error and this Court dismissed, explaining:

> There is no difference in principle between this case and the ordinary case of a right of action barred by the Statute of Limitation. In such a case, where the statute has once 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 any subsequent legislation.

Id. at 82 (citations omitted). The passage from *Willoughby*, quoted in *D.A.G.*, is this Court's holding and rationale, not dicta. *See Hardesty v.*

Pino, 222 P.3d 336, 340 (Colo. App. 2009) (defining dicta). *Willoughby's* holding remains controlling law. *D.A.G.*, 607 P.2d at 1006; *Fischer*, 529 P.2d at 643; *Edelstein*, 78 P. at 681.

Respondents also argue: "The claimed vested right still exists. If [Ms. Saupe] had brought common law claims, the defendants could have raised a statute of limitations defense." (Ans. Br. p. 26.) Respondents are correct that the School District would be entitled to raise a statute of limitations defense to a common law claim, but they ignore that the General Assembly may not "revive" a time-barred action. *D.A.G.*, 607 P.2d at 1006. *Willoughby* rejected the notion that a time-barred claim can be replaced by a new cause of action: "It is true that a writ of error is the commencement of a new suit, and an appeal but a continuation of a suit, but the character and effect of the limitation are the same." 5 Colo. at 82.

The application of the CSAAA's new cause of action to conduct for which the opportunity to bring a common law claim has lapsed violates the first prong of the Story test.

B. <u>The Application of the CSAAA's Cause of Action to Conduct that Occurred Prior To Its Creation Violates the Second Prong of the Story Test</u>.

Even if this Court were to find that the School District did not have a vested right in a lapsed statute of limitations, the CSAAA violates the second prong of the Story test.

The second prong of the Story test asks whether the statute imposes a new duty, obligation, or liability on conduct that occurred prior to the creation of the duty, obligation, or liability. *DeWitt*, 54 P.3d at 855. This prong turns on whether the statutory change is substantive or procedural, sometimes referred to as remedial. *Id.* at 857. Substantive statutes create, eliminate, or modify rights or liabilities, while procedural statutes relate only to modes of procedure to enforce *existing* rights or liabilities. *Id.* at 854 n.3; *People v. D.K.B.*, 843 P.2d 1326, 1331 (Colo. 1993). A statute that requires a person to take action to stay consistent with changes in law may impose a duty,[3] but it is a remedial duty requiring future action. A statute that imposes a new cause of action on past conduct is substantive. *See Cont'l Title v. Dist. Ct.*, 645 P.2d 1310, 1315 (Colo. 1982).

[3] *DeWitt*, 54 P.3d at 857.

Respondents contend that "[t]he CSAAA merely adds a remedy." (Ans. Br. p. 50.) The CSAAA, however, does not add a new remedy—e.g., an award of attorneys fees—to an existing cause of action. Instead, it "creates a new *right* for relief." Sen. Bill 21-088, § 1(4)(a), 2021 Colo. Sess. Laws 2923. If the CSAAA did not create the new right for relief, there would be no mechanism for obtaining the new remedy.

Respondents' argument that the CSAAA does not impose a new duty because the common law already imposed a duty admits that the CSAAA tries to revive a time-barred common law claim by creating a statutory claim. Thus, the CSAAA has to create a new statutory cause of action for the old common law duty. C.R.S. § 13-20-1202(1)(b) (2022). The creation of a new cause of action is substantive and thus prohibited by the constitution. *DeWitt*, 54 P.3d at 857.

Respondents attempt to reduce the distinction between right and remedy into an equity-based analysis quoting the following proposition from *Brown v. Challis*: "The test given by the bill of rights is, not the distinction between right and remedy, but the distinction between right

and wrong." (Ans Br. pp. 5–6, *quoting* 46 P. 679, 680 (Colo. 1896).) The quoted passage, however, continues:

> It is idle to attempt to draw a distinction in law between a right which does not exist and one that cannot be enforced. Right and remedy are reciprocal. Take away a plaintiff's remedy and you destroy the value of his right.

Brown, 46 P.2 at 680.

Thus, *Brown* does not reduce the constitutional inquiry to a stand-alone assessment as to what is fair. Instead, *Brown* makes clear that the constitutional inquiry does not turn on labels. "A constitutional inhibition goes to the substance of the evil, not the shadow." *Id.* If the remedy that is removed eliminates the right, the change is substantive. Conversely, a new right of action—whether a stand-alone right of action or a replacement for a lapsed right of action—cannot be dismissed as simply a new remedy.

Finally, the CSAAA's cause of action is a new disability exposing defendants to the burdens of litigation and the possibility of damages. Respondents accuse the School District of engaging in "wordplay:" "[W]hat the district calls a 'new liability' is nothing more than an additional *remedy* for conduct everyone agrees has always been

unlawful." (Ans. Br. p. 39.) A plaintiff's remedy, of course, is a defendant's liability.

C. The Application of the CSAAA's Waiver of CGIA Immunity to Conduct that Occurred Prior to the Waiver's Creation Violates Both Prongs of the Story Test.

The CSAAA waives public entities' immunity under the CGIA, something that the General Assembly is entitled to do, but extends that waiver back to conduct that occurred when public entities did have immunity, something that Article II, Section 11 prohibits.

D.A.G. stands for the proposition that the General Assembly may not deprive a litigant of an accrued defense. This proposition is not limited to defenses arising from lapsed statutes of limitations. *City of Colorado Springs v. Neville*, 93 P. 1096, 1097 (Colo. 1930); *Brown*, 46 P. at 680 (legislature may not "take away any legal defense to such action"); *Pollock v. Highlands Ranch Comty. Ass'n, Inc.*, 140 P.3d 351, 354 (Colo. App. 2006) (statute affecting defense is substantive).

As the School District pointed out in its opening brief, *Neville* is directly on point. Respondents make three arguments to deflect *Neville.* First, they contend that, given the political subdivision doctrine, *Neville*

never should have been decided. *Greenwood Village*, of course, demonstrates the *Neville* was appropriately decided.

Second, Respondents argue that the passage about the inability of the General Assembly to remove a defense after it has vested is non-binding dicta. (Ans. B. p. 48.) This is not accurate. The plaintiff in *Neville* was injured when she fell on a city sidewalk. 93 P. at 1096. She failed to comply with the notice requirement at the time of her injury, a failure that immunized the city from liability. 93 P. at 1096. The plaintiff sued the city, arguing that a subsequent statute applied to her cause of action. This Court responded: "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. The Court's decision was not a matter of statutory construction unrelated to the constitution, but statutory construction driven by the constitution. Moreover, the proposition recited in *Neville*

was settled constitutional law before *Neville*,[4] and remains settled today. *See D.A.G.*, 607 P.2d at 1006; *Fischer*, 529 P.2d at 643.

Finally, Respondents contend that the dicta was wrong, stating "*Neville* held that there was a vested right to a *particular form of notice*." (Ans. Br. p. 48, n. 18 (emphasis added).) This is incorrect. *Neville* stated that "after the defendant's *right of defense* became vested." 93 P.3d at 1097–98 (emphasis added).

Again, the General Assembly cannot remove a defense—be it a defense based on a lapsed statute of limitations or otherwise—after the fact because its removal is substantive in nature. *Cont'l Title* at 1315 (Colo. 1982) (explaining statute that does not remove defense permissible); *Pollock v. Highlands Ranch Comty. Ass'n, Inc.*, 140 P.3d 351, 354 (Colo. App. 2006) (explaining statute affecting defense is substantive).

The Colorado Court of Appeals' decision in *Hickman v. Catholic Health Initiatives*, holding that the retroactive waiver of hospital's

[4] *Edelstein*, 78 P. at 681 (General Assembly may not remove vested statute of limitations defense); *Brown*, 46 P. at 680 (legislature may not take away any legal defense).

immunity from *damages* is not to the contrary. 328 P.3d 266 (Colo. App. 2013). The court noted that "the former statute did not provide immunity from suit, but only immunity from damages." *Id.* at 273. Therefore, the court held that the waiver of immunity to damages pursuant to an existing cause of action was remedial. *Id.* The immunity afforded to public entities by the CGIA is not merely immunity from damages pursuant to an existing cause of action, but a jurisdictional prerequisite to suit. *Tidwell ex rel. Tidwell v. City & Cnty. of Denver*, 83 P.3d 75, 86 (Colo. 2003). The waiver of a jurisdictional prerequisite to suit is substantive and violates Article II, Section 11.

CONCLUSION

Again, the School District is not challenging anything about the CSAAA other than the application of its new cause of action and waiver of liability to conduct that occurred prior to January 1, 2022. Victims of conduct that occurs after January 1, 2022 will be able to bring CSAAA claims against managing organizations, including organizations that formerly were afforded immunity under the CGIA.

The School District attempts to do the best for its students, and acknowledge consequences when it fails. Those consequences, however, should be, and per the Colorado Constitution, must be, the consequences in place at the time the conduct occurred.

WHEREFORE, Aurora Public Schools respectfully requests 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 14th day of March 2023.

CAPLAN AND EARNEST LLC

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 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:

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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
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