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COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

C.A.R. 50 Certiorari to the Court of Appeals
2020CA1583
District Court, Arapahoe County 2022CV30065

Petitioners:

AURORA PUBLIC SCHOOLS; and
DAVID JAMES O'NEILL

v.

Respondents:

ANGELICA SAUPE; and
BRIAN SAUPE

▲ COURT USE ONLY ▲

Case No.: 2022SC824

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PETITIONER O'NEILL'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the requirements of C.A.R. 28.1 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned counsel certifies that this brief contains 5,687 words (not more than 5,700).

I hereby acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28.1 and C.A.R. 31.

Date: March 14, 2023

s/ Leonard R. Higdon
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INTRODUCTION

The Answer Brief seeks to elicit a sentimental review by the Court in an effort to save what is plainly an unconstitutional retrospective law. A substantive review of the law belies any facial appeal the Answer Brief may possess. Examination of the arguments offered demonstrates that they are divorced from the law, facts, and record.

The parties agree that the purpose of Colo. Const. art. II, §11 is to prevent the unfairness that results from changing the consequences of an action after it occurs. Ans. Br. p. 4 (quoting *In re Estate of DeWitt,* 54 P.3d 849, 854 (Colo. 2002)). The parties agree that since the constitution's enactment, a touchstone of this provision has been equity. Ans. Br. pp. 3-7. However, Plaintiff then turns on its head a century of case law to erroneously suggest that this equity analysis is focused on the public interest. It is not. The Court's equity analysis has always been *upon the effects to person for whom the consequences have changed and whether application of a retroactive law would serve an injustice. Denver, S.P. & P.R. Co. v. Woodward*, 4 Colo. 162, 167 (1878). It is critical that the statute under consideration, do "no violence to the rights of defendant." *Titus v. Titus,* 41 P.2d 244, 246 (Colo. 1935). This is at the heart of the Story test—a test that has been

reaffirmed as the controlling analysis for more than eight decades. *Id*.; *City of Colorado Springs v. Powell*, 156 P.3d 461, 465 (Colo. 2007).

The crux of the analysis regarding retrospectivity is one of fairness for defendants. In its most recent decisions, the Court continues to recognize the inherent unfairness that results to defendants when retrospective laws are permitted. In *City of Colorado Springs v. Powell,* 156 P.3d 461, 465 (Colo. 2007), the Court restated the *Story* test and reiterated the constitutional proscription "is intended to prevent the unfairness that would otherwise result from changing the consequences of an act after that act has occurred." *Id.*

The CSAAA undeniably works an irreparable injustice, against which the constitutional provision was meant to protect. It changes the consequences of alleged conduct decades after their alleged occurrence. The resulting harm and injustice to defendants is *not hypothetical*. The *amici* provide examples of the prejudice and unfairness that comes from that application of this new law. The Colorado School Districts Self Insurance Pool, Colorado Association of School Boards, Special District Association of Colorado, Colorado Rural Schools Alliance, and Colorado Association of School Executives explain that they will be unable to reasonably investigate allegations of abuse from more than sixty years ago because records of activities on the premises and personnel records are long

gone. Colorado School Districts Self Insurance Pool Amicus Br. p. 13. Witnesses that were 30 at the time of alleged abuse in 1970 would be in their 80s today, if living. *Id.* Memories will have faded and testimony unreliable as a result. Other witnesses necessary to defense, may be otherwise unavailable. *Id.* Colorado Academy, World Leadership School, Cornerstone Safety Group, and Global Works explain that entities are unlikely to have insurance coverage for historic abuse because they had no way of knowing that they would need tail coverage lasting 60 years. Colorado Academy Amicus Br. p. 21. A single claim of historic abuse could decimate the small non-profits that provide essential services to Colorado communities. *Id.* at 21-22. Of course, even more undeniable is the devastating burden this places upon an individually targeted defendant who is without the ability to conduct historical investigation and evidence gathering. This is undeniably the very "violence to the rights of defendants" that is prohibited under §11.

Plaintiff's position suffers from three fundamental flaws. *First*, her reliance on public policy to save what is an otherwise unconstitutional statute is misplaced. Under the constitution, the legislature does not have authority to enact a retrospective law, and *no public policy justification can grant the legislature a power that it does not have*.

Second, Plaintiff ignores binding precedent that expiration of the statute of limitations is a vested right. Plaintiff's attempts to minimize and distinguish these cases should be rejected as the cases unequivocally recognize the presence of a fully vested and inalienable right.

Third, the CSAAA also must fail because it creates a *new duty, obligation, or disability*. Plaintiff tries to avoid this outcome by mischaracterizing the law as a remedy. This effort was rejected more than a century ago. In her Answer Brief, Plaintiff misleadingly cites to *Brown v. Challis,* 46 P.2d 679 (Colo. 1986), to suggest that the Court's inquiry is one of "right and wrong." Ans. Br. pp. 5-6. What that opinion actually made clear, is that a party cannot save an unconstitutional law by framing it as *a mere change to the remedy*. The Court explained,

> In one sense, such legislation would affect the remedy only; but, in the constitutional sense, it would be retrospective, injurious, oppressive, and unjust, and therefore unconstitutional; and it is not apparent how the constitutional sense, in such a case, would be elucidated by a distinction between a right and a remedy. The injustice would be manifest, and the test given by the bill of rights is, not the distinction between right and remedy, but the distinction between right and wrong.

Id. at 680. Mischaracterizing the CSAAA as a remedy cannot save it.

Because the CSAAA impairs a vested right and creates a new duty obligation or disability, it is unconstitutional.

I. PUBLIC POLICY CANNOT SAVE THE OTHERWISE UNCONSTITUTIONAL STATUTE.

Plaintiff incorrectly asserts that an otherwise unconstitutional retrospective law is permissible if it advances a public interest and the statute bears a rational relationship to the interest. Ans. Br. p. 40. This interpretation would expand the legislature's power beyond its constitutional limits and make obsolete the constitution's ban on retrospective laws.

The Colorado Constitution could not be more clear regarding retrospective laws. It states plainly, "no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, shall be passed." Colo. Const. art. II, §11. As this Court held in 1878:

> The fundamental law could not well have been more comprehensive. The term retrospective was intended to apply to laws which could not properly be said to be included in the description of ex post facto, or laws impairing the obligation of contracts.

Woodward, 4 Colo. at 164. The Court explained that Colorado made an unequivocally clear decision to be *more protective than the federal constitution,* and many of its sister states, and took from the legislature the power to enact retrospective laws.

> Retrospective laws . . . are not in terms inhibited by the Constitution of the United States. Although such laws are often oppressive and unjust, amounting to a practical denial of justice, the courts have frequently asserted the right of the legislature to enact them, when not prohibited

> by the Constitution. . . . But here no such power exists. It was wrested from the legislature by the framers of the Constitution.

Id. at 163-64 (emphasis added).

No public policy exception can give the legislature a power it does not have. "Under our constitution, the General Assembly is vested with the legislative power of the state." *In re Interrogatories on Senate Bill 21-247 Submitted by Colorado Gen. Assembly*, 2021 CO 37, ¶41, 488 P.3d 1008, 1020. "This power, however, is not absolute." *Id.* The General Assembly's powers "are subject to express or implied restraints reflected in the Constitution itself." *Colorado Ass'n of Pub. Employees. v. Lamm*, 677 P.2d 1350, 1353 (Colo. 1984). "The legislature cannot enact a law contrary to those constitutional restraints." *Id.*; *see also Godlier v. Denver Election Comm'n,* 191 Colo. 328, 331, 552 P.2d 1010, 1012 (1976) ("The legislature may not with one broad stroke nullify a constitutionally-created power.").

It is irrelevant whether the legislature believes public policy justifies the enactment of a retrospective law. If the law is retrospective—if it impairs a vested right or creates a new duty, obligation or disability—it is outside the General Assembly's powers to enact such a law. Colo. Const. art. II, §11.

Moreover, allowing a public policy exemption to the proscription on retroactivity would nullify the protections Colo. Const. art. II, §11 affords. If the

legislature could avoid the ban on retrospective laws by simply identifying a public interest, nearly *every* retrospective law would be permissible. This is contrary to both the explicit language and the purpose of § 11. *See, e.g., Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 207 (Colo. 1991) ("A 'cogent element' in our construction of general terms of the constitution is the consideration of the object to be accomplished and the mischiefs to be avoided: we are obligated to construe the constitution in such a manner as will prevent an evasion of its legitimate operation."); *People v. Cali,* 459 P.3d 516, 521 (Colo. 2020) (holding that the Court must avoid constructions that "swallow the rule" and leave the provision "meaningless."). Allowing a broad public interest exception would avoid the legitimate limits set forth in the constitution and allow this "exception" to swallow the rule.

Mr. O'Neill acknowledges that there are cases that have included a discussion of public policy in relation to retrospectivity. However, most often, this discussion is in the context of a vested rights analysis. *See, e.g., Lakewood Pawnbrokers Inc. v. City of Lakewood*, 517 P.2d 834, 838 (Colo. 1973) ("Vested rights do not accrue to thwart the reasonable exercise of the police power for the public good."); *Kuhn v. State*, 924 P.2d 1053, 1059–60 (Colo. 1996) ("In addition, in determining whether rights have vested, "courts should apply a balancing test

that weighs public interest and statutory objectives against reasonable expectations and substantial reliance.'").[1]

In a handful of opinions, the Court discusses the role of public policy more generally.[2] *Ficarra v. Dep't of Regulatory Agencies, Div. of Ins.*, 849 P.2d 6, 21 (Colo. 1993); *In re Estate of DeWitt*, 54 P.3d 849, 857 (Colo. 2002). However, all of these discussions are non-binding dicta because the application of public policy was never the question before the Court. *People v. Caro*, 753 P.2d 196, 201 (Colo. 1988) ("Stare decisis 'is limited to actual determinations in respect to litigated and

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[1] Public policy is a part of the vested rights analysis, because in analyzing a party's reasonable expectations, the Court must also consider the reasonable exercise of police power for the public good. *See Lakewood Pawnbrokers,* 517 P.2d at 838. Because the Court has already held that expiration of the statute of limitations is a vested right, *see infra* §II.A., no public policy analysis is necessary in this circumstance.

[2] In *Ficarra,* the court already determined no vested right was implicated, a determination that was dispositive to its analysis. 849 P.2d 6. It then went on to comment in dicta that some courts consider public policy in their retroactivity analysis, and in this case, public policy also supported the Court's decision. *DeWitt,* relying on *Ficarra's* dicta commented that "We 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 police powers to regulate certain practices, as well as other public policy considerations." 54 P.3d at 855. The *DeWitt* court determined that the statute at issue did not impair a vested right or create a new duty, obligation, or disability. Because this determination was dispositive that the statute was not retrospective, its subsequent discussion as to the public policy considerations of the state were mere dicta.

necessarily decided questions.'"); *People in Int. of Clinton*, 762 P.2d 1381, 1385 (Colo. 1988) (noting that when language in an opinion "was not necessary to the disposition of the issues presented," such language "should be recognized as dictum without precedential effect"). This Court has never used public policy to opine that an otherwise unconstitutional retrospective law is constitutional.

Plaintiff asserts that *DeWitt requires* the Court to determine (1) whether the statute impairs a vested right or creates a new duty, obligation, or disability and (2) whether the law is nonetheless justified by an overriding public interest. Ans. Br. pp. 6-7. Since *DeWitt* was decided, *no Court has adopted the supposed two-step test that Plaintiff asserts*. This Court has decided three retrospectivity cases since *DeWitt* and has never adopted this test. *City of Golden v. Parker,* 138 P.3d 285, 290 (Colo. 2006); *City of Colorado Springs v. Powell*, 156 P.3d 461, 465 (Colo. 2007); *Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393 (Colo. 2010). Rather, in each case, it identifies the *DeWitt* two-part test as being (1) determine whether the law is meant to be retroactive, and (2) "determine whether the retroactively applied law is retrospective." *Parker,* 138 P.3d at 290. While the Court has restated *DeWitt's* broad pronouncements related to public policy, *it has never used public policy to permit an otherwise unconstitutional retrospective law*

to stand. *Matter of Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶28 (explaining the recitations of prior dicta are not binding).

The Court should not allow *DeWitt's* broad dicta to subvert the plain language of the constitution and more than a century of binding precedent. "When the language of the Constitution is plain and unambiguous there is no room for construction. What the words declare is the meaning, and courts have no right to add to or take from that meaning." *People ex rel. Tate v. Prevost*, 55 Colo. 199, 209, 134 P. 129, 132 (1913). In *Prevost,* the Court rejected its power to amend through construction an unambiguous provision of the constitution. *Id.* at 133. "The wisdom or policy of [a proposed amendment] is not a judicial question, but a political one to be fought out on the hustings and determined by the people at the polls. The people have the sovereign right to amend their Constitution if they so desire, and courts have no power to amend it for them." *Id.*

While public policy might rightfully be a factor in the identification of a vested right, once a vested right is identified, public policy cannot contravene the protections enshrined in Colo. Const. art. II, §11. Accordingly, Plaintiff's plea to public policy must be summarily rejected.

II. THE CSAAA IS UNCONSTITUTIONALLY RETROSPECTIVE BECAUSE IT IMPLICATES A VESTED RIGHT AND/OR CREATES A NEW DUTY, OBLIGATION, OR DISABILITY.

The CSAAA is unconstitutional because it changes the consequences of alleged past conduct and in doing so implicates one or both the prohibitions on implicating a vested right or creating a new duty, obligation or disability. If, as Plaintiff insists, the CSAAA is merely a restatement of common law obligations that have always existed (Ans. Br. p. 39), it eviscerates the vested right of protection from liability following the expiration of the statute of limitations. If, as the legislature stated, the CSAAA created a "new civil cause of action", it also created a new duty, obligation or disability. Under either theory it is unconstitutional.

A. The CSAAA Impairs a Vested Right.

1. Expiration of the Statute of Limitations Has Long Been Recognized as a Vested Right.

Plaintiff argues a multifactor analysis in effort to assert that expiration of the statute of limitations is not a vested right. This analysis is unnecessary because the Court has recognized expiration of the statute of limitations as a vested right for more than a century.

First, in *Willoughby v. George,* 5 Colo. 80 (1879), the Court examined whether a statute allowing for a writ to the Colorado Supreme Court was

unconstitutional where it applied to judgments when the time to appeal had already expired. In analyzing the issue, the Court relied on the well-settled law regarding statutes of limitations. *Id.* at 81. The Court held, "As the law then stood, the controversy respecting the subject-matter of the suit was closed; the issues involved were res judicata; George's right of property in the judgment was indefeasible, and his right to plead the lapse of time as a bar to an appeal, was a vested right and beyond the peril of subsequent legislation." *Id.* at 82. The Court explained, "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 has 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.* Central to the Court's holding was the fundamental legal determination that once a statute of limitations has expired, the defense of statute of limitations is a vested right.

A century later, the Court again reached the same conclusion in *Jefferson Cnty. Dep't of Soc. Services v. D.A.G.,* 607 P.2d 1004 (Colo. 1980). At the time the child was born, there was a five-year statute of limitations to bring paternity actions that commenced at the child's birth. After the statute of limitations expired, a new law changed when paternity suits could be brought. The question

was whether the Department of Social Services could bring a claim based on the new statute. The Court held that the Department of Social Services could not rely on the new statute because at the time it was adopted, the statute of limitations had already expired (just as is the case here). The Court held, "[w]here 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 litigation.'" *Id.* at 318 (quoting *Willoughby,* 5 Colo. at 82).

Plaintiff tries to reframe these cases by attempting to improperly force application of the Court's decisions using a balancing test that neither opinion employed. Instead, in both cases the Court unequivocally held that the defense of expiration of the statute of limitations is a vested right. Nothing in these cases, or any other, supports Plaintiff's assertion that expiration of the statute of limitations in this circumstance is not a vested right. *See also Dietmann v. Blackman,* 232 P.676, 678 (Colo. 1925) ("The Attorney General does not seriously claim that the repeal of the limitation, without a saving clause, revives the right to sue without regard to time, and could not well do so in view of our own decisions like *Willoughby v. George*, 5 Colo. 80, and subsequent cases following it, and by *Chambers v. Gallagher*, 177 Cal. 704, 171 P. 931, which hold that, when the bar of a limitation statute once attaches, the Legislature, by an amending or repealing act,

may not revive the action."); *Fischer v. Kupier,* 529 P.2d 641, 643 (Colo. 1974) ("At least so far as real estate is concerned, once the bar of a limitations statute attaches, repeal of the act may not revive the action.")

In an effort to distract from the unambiguous language establishing expiration of the statute of limitations as a vested right, Plaintiff cites to multiple cases that do not alter or deviate from this precedent.

First, Plaintiff relies on *Kuhn v. State*, 924 P.2d 1053, 1059 (Colo. 1996), for the general proposition that "there are no bright line tests to determine what constitutes a vested right." Ans. Br. p. 35. Defendant does not disagree with this statement in the abstract, but it has no bearing on the Court's analysis here—the Court has already, twice, identified expiration of the statute of limitations as a vested right.[3]

[3] Plaintiff also relies on *Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm'rs*, 948 P.2d 1002, 1012 (Colo. 1997), for another general proposition that statute of limitations are remedial in nature. Again, Defendant does not disagree with this general statement, but it is inapplicable to the Court's analysis in this circumstance. The Legislature can change a statute of limitations so long as it has not expired, but upon expiration, it can no longer remove that vested right. *People v. Holland*, 708 P.2d 119, 120 (Colo. 1985); *D.A.G.*, 607 P.2d at 1006. *Shell*, a case that does not analyze statute of limitations and but merely uses them as an example of a remedial statute and does not discuss expiration of the statute of limitations, does not suggest otherwise. 948 P.2d 1002.

Finally, Plaintiff relies on the final paragraph of *D.A.G.* to argue that the Court found that "the legislature could nevertheless provide a *new* remedy for paternity without running afoul of the Constitution." Ans. Br. p. 37. What the Court actually stated was: "[a]n action brought by the child does not suffer the same constitutional infirmities as does an action brought by the mother, the father, or the Department in this case." First, this statement is dicta, as the Court acknowledged a suit was not maintained on behalf of the child and the child was not a party to the appeal, and therefore the Court was not adjudicating the child's rights on appeal. 607 P.2d at 1005-1006. Second, the Court explained in this dicta that the child never had a right to bring a claim under the prior statute, and thus there was no revival of a previously barred claim. *Id.* at 1005. Finally, the court also elaborated in its dicta that this would not run afoul of the constitution because the "fundamental action against the putative father is the same." *Id.*

Contrary to Plaintiff's statement, this is not "precisely what the Assembly did" regarding the Act. Ass. Br. p. 37. Unlike in *D.A.G.*, the fundamental action against the defendants under the CSAAA is not the same. And, unlike the child in *D.A.G.*, Plaintiff had a remedy prior to the CSAAA.

The CSAAA blatantly attempts to remove the defense of expiration of the statute of limitations. Because this has long been recognized as a vested right, the statute is unconstitutional.

2. A Multi-Factor Analysis Also Supports the Conclusion That Expiration of the Statute of Limitations Is a Vested Right.

In trying to relitigate the established issue that expiration of the statute of limitations is a vested right, Plaintiff relies on the three-factors identified in *DeWitt*: (1) Whether the public interest is advanced or retarded, (2) whether the statute gives effect to or defeats the bona fide intention or reasonable expectations of the parties, and (3) whether the statute surprises individuals who have relied on contrary law.

Plaintiff's argument is based almost exclusively on conjecture and speculation that is contrary to the record in this case and is not even internally consistent. First, Plaintiff alleges that this law is necessary because survivors of sexual abuse are not able to come forward within the limitations period to bring a claim because of the trauma of the abuse and thus this law is necessary. Ans. Br. p. 28. That is not the circumstance in this case. Per her own complaint, Plaintiff alleges that she understood the alleged misconduct against her around her twentieth birthday and reported it to the police. CF, pp 4-5. This was well within the six-year statute of limitations that accrued when Plaintiff turned eighteen.

Despite understanding the nature and gravity of her claims, Plaintiff did not pursue a civil action.

While Plaintiff's Complaint does not support the public interest need for this lawsuit, her Answer Brief concedes that such a law is unnecessary for the "average" case. Ans. Br. p. 33. Plaintiff asserts that as to the "average defendant," the CSAAA merely extends a statute of limitations that has not expired. *Id*. If this is the case, there is no compelling reason to create a new cause of action—the public interest will be met by the Legislature merely extending the statute of limitations for claims *that have not expired*, an action that was already taken and to which there is no constitutional challenge.

Plaintiff's additional public policy arguments fair no better. Plaintiff asserts that this law serves to prevent future abuse, but there is no evidence in the record to support that is what this law does. All the CSAAA does is create a new <u>private</u> cause of action for old claims. There are no public reporting requirements, no law enforcement involvement, and no way to know if or how the law could prevent future child abuse when it relates to allegations of abuse that are 60 *plus* years old.

Plaintiff also asserts, without any support, that the CSAAA shifts the financial burden of sexual abuse from the public to "the abusers and the institutions that enable abuse." Plaintiff provides no record evidence to support this argument.

To the contrary, amici explain that this law will divert resources from many private non-profit entities that serve Colorado communities and impact their ability to provide essential services. Colorado Academy Br. p. 28.

There are public policy rationales on both sides of this issue. While the Legislature identified reasons it believed this law would further the public interest, the Legislature and courts have always acknowledged there are also public interest rationales for statutes of limitations. *See, e.g., Lake Canal Reservoir Co. v. Beethe*, 227 P.3d 882, 886 (Colo. 2010) ("Statutes of limitations serve several important purposes within the justice system. They 'promote justice, discourage unnecessary delay and forestall prosecution of stale claims.'"). Given the public interest justifications on both sides of the issue, it cannot be said that the CSAAA furthers the public interest in applying a balancing test.

The remaining two factors—whether the statute gives effect to, or defeats, the bona fide intentions or reasonable expectations of the parties, and whether the statute surprises individuals who have relied on contrary law—weigh decisively in favor of recognizing a vested right. The CSAA is contrary to the reasonable expectations of the parties. There has been a statute of limitations in place related to alleged sexual abuse for as long as the tort has been recognized. Once the statute of limitations expired, the parties reasonably relied on the defense of

expiration of the statute of limitations. As the amici all explained that their records retention policies and insurance coverages did not anticipate claims that could go back more than sixty years.

Finally, the CSAAA will surprise individuals who have relied on contrary law. For over 140 years, Colorado has held that once a statute of limitations has expired, it is a vested right that cannot be revived. Finding the CSAAA does not implicate a vested right would be an abrupt, about-face to over a century of law and would cause significant surprise and harm to individuals who relied on this precedent.

A multi-factor analysis confirms why the Court has recognized expiration of the statute of limitations as a vested right for eight decades. Statutes of limitations serve the public interests in ensuring claims are brought timely and decided in a fair and even-footed manner *before evidence is lost*. *Beethe*, 227 P.3d at 886. Retroactively removing a statute of limitations would be contrary to the reasonable expectations of defendants and cause unnecessary and unfair surprise. There is no reason for the Court to depart from established precedent that expiration of the statute of limitations is a vested right.

B. The CSAAA Creates a New Duty, Obligation, or Disability.

Next, Plaintiff seeks to avoid the required analysis of whether the CSAAA creates a new duty, obligation, or disability by wrongly (and flippantly) stating "[n]either O'Neill not the school district seriously contend that retroactive application of the CSAAA's remedy imposes upon them any new duty, obligation, or disability." Ans. Br. p. 38. To the contrary, in his Opening Brief, Mr. O'Neill specifically argued the law was impermissible because it created a new cause of action, created rights and claims that did not exist at the time of the underlying conduct, and creates exposure to litigation and damages under circumstances that are virtually impossible to defend. Op. Br. p. 7.

Plaintiff's only response is that the statute does not create a new duty, obligation, or disability because it is "nothing more than an additional remedy for conduct everyone agrees has always been unlawful." Ans. Br. p. 39. This argument is contrary to the plain language of the Senate Bill. 21-088 and Colorado's definition of remedy.

First, the language of S.B. 21-088 makes clear that what the Legislature did is more than add a mere remedy. The Legislature specifically describes the CSAAA as "a new civil cause of action" and states that it *"does not revive any common law cause of action that is barred and instead creates a new right for*

relief." Senate Bill 21-088 §1(4)(a). A new cause of action that is separate from the common law and is not subject to statutes of limitations that have previously expired is, at its core, *a new obligation and imparts a new disability*.

The CSAAA cannot be read in a manner so distorted so as to avoid this conclusion. The Court has long held that retrospectivity cannot be thwarted by recasting a substantive change as a "remedy." *Brown v. Challis,* 46 P.679, 680 (Colo. 1986) ("In one sense, such legislation would affect the remedy only; but, in the constitutional sense, it would be retrospective, injurious, oppressive, and unjust, and therefore unconstitutional; and it is not apparent how the constitutional sense, in such a case, would be elucidated by a distinction between a right and a remedy. The injustice would be manifest, and the test given by the bill of rights is, not the distinction between right and remedy, but the distinction between right and wrong."); *Denver, S.P. & P.R. Co. v. Woodward*, 4 Colo. 162, 165 (1878) ("[I]f a statute in form affects the remedy only, yet substantially taken away accrued rights, it is unconstitutional and void.").

The distinction between substantive and remedial statutes lies in the fact that substantive statutes create, eliminate, or modify vested rights or liabilities, while procedural statutes relate only to remedies or modes of procedure to enforce such rights or liabilities. *Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm'rs*, 948 P.2d

1002, 1012 (Colo. 1997), *as modified on denial of reh'g* (Dec. 15, 1997). The question is whether the statute "leaves the rights and obligations of each party in balance." *Specialty Restaurants Corp. v. Nelson,* 231 P.3d 393, 399-400 (Colo. 2010).

The CSAAA's elimination of an affirmative defense shows that the statute, for retrospectivity analysis, is not a remedy but a substantive statute. For example, in *Continental Title Co. v. District Court In & For City & Cnty. of Denver,* 645 P.2d 1310, 1315 (Colo. 1982), the Court held that a change to the statute was not impermissibly retrospective because "[i]t does not remove an affirmative defense that might otherwise be asserted . . . ." There, the Court implicitly recognized that had the statute removed an affirmative defense it would not be procedural but impair a substantive right.

Plaintiff also asserts that because it was always unlawful to abuse a child, the CSAAA cannot create a new duty, disability, or obligation. There is no legal support for this contention. It has long been recognized that there is a difference between criminal statutes, enacted for protection of the general public, and private rights of action, and creation of a criminal statute does not create a corresponding private right of action. *See, e.g., Smith v. Hickenlooper,* 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016); *City of Arvada ex rel. Arvada Police Dep't v. Denver Health*

& Hosp. Auth., 2017 CO 97, ¶25, 403 P.3d 609, 614. Adding a civil cause of action fundamentally changes the consequences of an action. It is a separate cause of action that must be brought involving different standards, rules, burdens of proof, and consequences. A new cause of action cannot be reduced to a remedy.

The only case Plaintiff cites in support of this notion is *Colorado Dep't of Soc. Services v. Smith, Harst & Associates, Inc*., 803 P.2d 964, 966 (Colo. 1991). *Smith, Harst & Associates* does not support this proposition. There, the Legislature created a new administrative remedy for recoupment of misappropriated nursing home funds through withholding Medicaid payments. The Court held that this statute was not unconstitutionally retrospective because it was remedial, not procedural in nature. *Id.* The statute did not create a new cause of action, it simply allowed another mechanism for the state to enforce its supervisory role over nursing homes. In contrast, CSAAA creates a new civil cause of action that did not exist before.

Common sense dispenses with Plaintiff's argument. Creating a new cause of action—devoid of prior defenses, that allows up to $1,000,000 in damage—creates a new obligation or disability for defendants.

III. SECTION 11 OF THE CONSTITUTION WAS INTENDED TO PROTECT DEFENDANTS LIKE MR. ONEILL.

Plaintiff devotes a significant portion of the brief arguing that challenge to the law is improper and that Colorado's constitution is meant to protect the people, not the state. Ans. Br. p. 20. However, this argument ignores that, even accepting it as true, one of the two defendants in the case, Mr. O'Neill, is precisely within the class of people the constitution was meant to protect. Of the approximately half dozen lawsuits that have been filed under this law, there are three claims against governmental institutions and 25 claims against private institutions and individuals.[4] This law negatively impacts private individuals across the state by unfairly changing the consequences of actions after they are alleged to have occurred—the very action the Constitution sought to prevent. Plaintiff's arguments regarding the School District's ability to bring this claim are inapposite because it is undisputed that Mr. O'Neill can challenge the constitutionality of the CSAAA.

[4] *McPhee v. Kelly,* 2022CV000204; *Callahan v. O'Brien*, 2021CV34038; *Verti v. Archdiocese of Denver*, 2023cv30176; *Gonzales v. Archdiocese,* 2022cv32465; *Norris v. Cherry Creek Schools,* 2022cv30137; *Coursey v. Boulder Valley School District,* 2022cv30042.

CONCLUSION

The CSAAA violates Colorado's constitution. The statute impacts a vested right and creates a new obligation and is thus unconstitutionally retrospective. The constitutional prohibition is clear—the legislature does not have the power to enact retrospective laws and thus, regardless of any public interest rationales, the statute must be struck down as unconstitutional and outside the authority of the legislature.

DATED this 14th day of March, 2023.

Respectfully submitted,

s/ Leonard R. Higdon
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, I served true and correct copies of the foregoing **PETITIONER O'NEILL'S REPLY BRIEF** via Colorado Courts E-Filing on all counsel having entered their appearance(s) in this case, as follows:

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