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C.A.R. 50 Certiorari to the Court of Appeals, Case No. 2022CA1584 Appeal from Arapahoe County District Court, Case No. 2022CV30065	**▲COURT USE ONLY▲**
AURORA PUBLIC SCHOOLS AND DAVID JAMES O'NEILL, Defendants-Petitioners, v. ANGELICA SAUPE AND BRIAN SAUPE, Plaintiffs-Respondents.	Case No. 22 SC 824
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RESPONDENTS' ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief contains 12,670 words and therefore exceeds the applicable word limit set forth in C.A.R. 28(g)(1). But a motion to exceed the word limit has been filed along with the brief, as required by C.A.R. 28(g)(3).

The brief complies with the standard of review requirements set forth in C.A.R. 28(b). It states whether respondents agree with the statements of review provided in the petitioners' briefs, and to the extent possible, states whether they agree with petitioners' preservation statements.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Jennifer D. Bennett

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INTRODUCTION

For years, victims of child sexual abuse were far too often unable to seek justice because the harm caused by that very abuse prevented them from coming forward in time. Between the trauma sexual abuse inflicts on children and threats of retaliation by their abusers, it can take decades for victims to be capable of coming forward. Even then, institutional cover-ups mean that victims may still not know whether their abuse was caused solely by their abuser, or whether it was also caused by an institution that could have, but failed, to protect them. And so, until very recently, by the time many victims were able to bring a claim, the statute of limitations on their only remedy had lapsed.

After years of trying to solve the problem, the General Assembly enacted the Child Sexual Abuse Accountability Act by an overwhelming bipartisan majority. The statute does not revive any expired statute of limitations; instead, it offers an additional remedy to victims of child sex abuse. That remedy, available for a limited amount of time to victims of past abuse, serves the public interest in several ways: It not only provides some measure of justice to victims, but it also helps to alleviate the tremendous financial burden sex abuse imposes on them—a burden that otherwise must be borne by the victims themselves and the state. And it protects the public by

bringing to light abusers and the institutions that enabled them, as well as the ways in which abuse has thrived, so that we can prevent it in the future.

Angelica Saupe was sexually abused for years by her high school basketball coach. After the CSAAA was passed, she filed this lawsuit against the coach and her school district, which did nothing to protect her. But both defendants now claim that the statute cannot constitutionally serve its purpose. The Colorado Constitution's prohibition on retrospective legislation, they contend, prohibits the General Assembly from offering a remedy to anyone whose common-law claims are time-barred—and, the district asserts, from waiving its governmental immunity.

The school district's constitutional challenge fails at the threshold: The Bill of Rights protects the people against their government, not the other way around. School districts, therefore, cannot hide behind the Retrospective Clause to avoid remedying the harm that they have inflicted on the children in their care.

And, in any event, the CSAAA is not unconstitutionally retrospective. In arguing otherwise, the defendants both make the same fundamental mistake: They rely on per se rules that don't actually exist. According to the defendants, the legislature can *never* provide an additional remedy if the statute of limitations on the previous one has lapsed; nor can it *ever* waive a defense. But as this Court has made clear, "there are no bright line tests to determine" when retroactive application of a

law is so unjust that it is unconstitutional. *Kuhn v. State*, 924 P.2d 1053, 1059 (Colo. 1996). A law is only unconstitutionally retrospective if (1) it imposes a new duty, obligation, or disability or impairs a vested right; *and* (2) there is no overriding public interest that outweighs that new duty, obligation, disability, or impairment. *In re Estate of DeWitt*, 54 P.3d 849, 855 (Colo. 2002). Neither defendant even tries to apply this standard—perhaps because it leads so clearly to the conclusion that there is no constitutional bar to retroactive application here.

The CSAAA imposes no new obligation: It's undisputed that teachers have always been prohibited from sexually abusing children, and school districts have always had a duty not to ignore such abuse. And defendants have no vested right to avoid remedying the severe harm they caused to child sexual abuse victims. Even if they did, it would be vastly outweighed by the overriding public interest in affording these victims a remedy and protecting the public from future abuse.

The CSAAA is not unconstitutionally retrospective. This Court should reverse.

STATEMENT

I. The Retrospective Clause

Article II, section 2 of the 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." This section of the Bill of Rights has been a part of Colorado's Constitution since its adoption in 1876. "The purpose" of its "proscription" on retrospective laws "is to prevent unfairness that would result from changing the consequences of an act after that act has occurred." *In re Estate of DeWitt*, 54 P.3d 849, 854 (Colo. 2002). And since its enactment, its touchstone has been equity.

In an opinion influential at the time of Colorado's Constitutional Convention, Justice Story provided a framework designed to guide the inquiry into which laws may permissibly operate on past events. *See Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D. N.H. 1814). As Justice Story framed it, a law is unconstitutionally retrospective if it "impairs vested rights" or if it "imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* The application of this test, Justice Story made clear, depended not on bright-line rules, but on fairness: retroactive laws were impermissible if they caused "injustice." *Id.* at 767-68.

His decision in *Wheeler* reflects this approach. In that case, a religious society that owned land sued to get it back from tenants who were unlawfully occupying it. *Id.* at 767. The tenants argued that the society was required to pay them for improvements they'd made to the land without its knowledge or consent. *Id.* Although the law had always been that there was no such requirement, the

legislature had recently enacted a statute retroactively imposing one. *See id.* Justice Story held the statute was unconstitutionally retrospective. *Id.* at 768. The outcome might be different, he explained, if the law had been limited to "visible erections" made by a tenant who had a "a supposed legal title"—that is, if the statute had been just. *Id.* But "[i]t is difficult to perceive the foundation of the equitable or moral obligation, which should compel a party to pay for improvements, that he had never authorized, and which originated in a tort." *Id.*

Justice Story's opinion reflects the guiding principle of retrospectivity analysis at the time of Colorado's Constitutional Convention: whether the law, by operating retroactively, accomplishes an injustice. As the Massachusetts Supreme Court observed, the legislature "cannot be charged with violating its duty" when it provides "remedies for the furtherance of justice." *Foster v. President, etc., of Essex Bank*, 16 Mass. 245, 273 (1819). Such remedies, even if retroactive, are not unconstitutionally retrospective, because "there is no such thing as a vested right to do wrong." *Id.* Thus, tools like Justice Story's test or distinctions between rights and remedies or substance and procedure were just that: tools to determine whether a retroactive law worked an injustice. Ultimately,

> the test given by the bill of rights is, not the distinction between right and remedy, but the distinction between right and wrong. On other subjects the ground of judicial decision is not ordinarily understood to be so broad as the general principles of justice, but, on this subject of

> retrospective legislation, those principles are the constitutional ground amply supported by the authorities.

Brown v. Challis, 46 P. 679, 680 (Colo. 1896).

In its early cases interpreting the prohibition on retrospective legislation, this Court incorporated this equity-focused approach. *See, e.g.*, *id.*; *Titus v. Titus*, 41 P.2d 244, 246 (Colo. 1935) ("A law, although it be retrospective, if conformable to entire justice, this Court has repeatedly decided, is to be recognized and enforced."). And it has continued to analyze cases under the Retrospective Clause with a focus on whether the law under consideration ultimately advances or impedes the public interest. *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."); *Ficarra v. Dep't of Regul. Agencies, Div. of Ins.*, 849 P.2d 6, 21 (Colo. 1993) ("Public policy considerations further contribute to the conclusion that the bail bond licensing statute does not constitute retrospective legislation."); *Colo. Off. of Consumer Couns. v. Pub. Serv. Co. of Colo.*, 877 P.2d 867, 872 (Colo. 1994) (prohibition may not apply to public utility rate setting if natural disaster created exigent circumstances).

In *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002), this Court distilled the case law into a two-step test. First, the Court asks whether the challenged law impairs any vested right or imposes a new duty, obligation, or disability with "respect to

transactions or considerations already past." *Id.* at 854. If it does, the Court determines whether the law is nonetheless justified by an overriding public interest. *Id.* at 855.

II. The Child Sexual Abuse Accountability Act

For most of Colorado's history, child sexual abuse received the same treatment in the courts as any ordinary tort. That meant that the ordinary statute of limitations rules applied. Statutes of limitation were tolled until the child reached age 18 and, if the circumstances warranted, under the discovery rule. C.R.S. § 13-80-108. But they were no longer than for any other tort. In addition, under the Colorado Governmental Immunity Act, public entities were immune from liability for their role in enabling abuse. *See* C.R.S. § 13-80-108.[1]

That began to change in the late 1970s. Researchers, the public, and eventually legislators became increasingly aware that child sexual abuse not only caused severe long-term harm—but that this harm itself prevented victims from coming forward. *See* Gregory G. Gordon, *Adult Survivors of Childhood Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 Pepp. L. Rev. 1359, 1362 (1993). Short statutes of limitations, therefore, made it impossible for victims to have

[1] Internal quotation marks, citations, and alterations are omitted throughout the brief.

their day in court—a problem that prompted the General Assembly's first attempt to secure justice for victims. In 1990, just four years after the General Assembly had shortened all statutes of limitations as part of a general tort reform project, it undid those efforts in the case of child sexual abuse. *See Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 600 (Colo. App. 2000). It replaced the recently enacted two-year limitations period with a six-year limitations period. 1990 Colo. Legis. Serv. H.B. 90-1085.

But the fix proved insufficient. It often takes years or decades for victims of child sexual abuse to become "[ ]aware of the nature, depth, and cause" of their injury. *Cassidy v. Smith*, 817 P.2d 555, 558 (Colo. App. 1991) (Dubofsky, J., dissenting); *see* Ramona Alaggia, et al., *Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000–2016)*, 20(2) Trauma, Violence, & Abuse 260, 279 (2019). Nevertheless, the Court of Appeals held that the discovery rule did not toll the statute of limitations for sexual abuse victims even if they were unable to process "the wrongful nature of the [abuse], the resulting damage from the acts, [or] the causal relationship between the two." *Cassidy*, 817 P.2d at 557. This meant that for many victims, the statute of limitations expired before they even knew they had a claim.

The General Assembly responded in 1993 by enacting a new tolling provision that attempted to better address the inherent difficulties that child sexual abuse survivors face. Under the 1993 amendment, the six-year statute of limitations was

tolled not just until the victim turned 18, but until the victim became "psychologically [and] emotionally []able to acknowledge the assault or offense and the harm resulting therefrom." 1993 Colo. Legis. Serv. H.B. 93-1259 § 3.5(a).

It soon became clear, however, that this amendment was still not enough. It addressed the delay in victims' ability to understand the connection between their abuse and the mental, physical, and social problems they later suffer. But there are many other factors that prevent victims from coming forward even after they are able to "acknowledge" the abuse—threats of retaliation, ostracization, and lost economic opportunities, as well as intense guilt, shame, and anxiety. *Cassidy*, 817 P.2d at 558 (Dubofsky, J., dissenting); Alaggia, *supra*, at 279 ; David E. Poplar, *Tolling the Statute of Limitations for Battered Women After Giovine v. Giovine: Creating Equitable Exceptions for Victims of Domestic Abuse*, 101 Dick. L. Rev. 161, 193, 197-98 (1996). And so tolling the statute of limitations just until acknowledgment proved to be insufficient. This problem was exacerbated by a Court of Appeals decision holding that even the limited tolling provided by the 1993 amendment applied only to claims against "perpetrator[s]," not the organizations that enabled them. *Sandoval*, 8 P.3d at 601.

The General Assembly responded by passing the CSAAA. In enacting the statute, the Assembly relied on a mountain of evidence demonstrating that the pre-existing law left many victims without a remedy, and abusers and enablers without

accountability. Approximately 13 percent of children are sexually assaulted, *Hearing on S.B. 21–088 Before the S. Judiciary Comm.*, Mar. 11, 2021 (statement of Kathryn Robb, Exec. Dir. of Child USAdvocacy). And the average age of childhood sexual assault victims is just nine years old, *Hearing on S.B. 21-088 Before the H. Judiciary Comm.*, May 25, 2021 (statement of Jennifer Stith, Exec. Dir. of WINGS Found.). Children suffer abuse not just at home or at private institutions, the Assembly heard, but also at school and other government-run programs. *See, e.g.*, *S.B. 88 S. Judiciary Comm. Hearing* (statement of Jill Brogdon); *id.* (statement of Jean McAllister, Rocky Mountain Victim Law Ctr. & Colo. Org. for Victim Assistance).

Because of the severe "trauma" sexual abuse inflicts on children—in addition to stigma, fear of retaliation, and the fact that most children are abused by adults they trust—victims can take well over a decade to come forward. *S.B. 88 S. Judiciary Comm. Hearing* (statement of Jennifer Stith); *id.* (statement of Ellen Giarratana, Colo. Bar Ass'n); *S.B. 88 H. Judiciary Comm. Hearing*, May 25, 2021 (statement of Kenneth Power, survivor of childhood sexual abuse); *id.* (statement of Jill Brogdon, survivor of childhood sexual abuse). Before the CSAAA, that meant that by the time many victims were able to come forward, it was too late to seek a remedy for their abuse.

This had a devastating impact on victims and on the public. Child sexual abuse "victims suffer neurodevelopmental issues, impaired social, emotional,

cognitive development, psychiatric and physical disease, disability, educational struggles, depression, anxiety, post-traumatic stress, substance abuse, alcoholism, suicide and negative impacts on employment, achievement, and success." *S.B. 88 S. Judiciary Comm. Hearing* (statement of Kathryn Robb). In addition to the obvious physical and psychological harm, child sexual abuse imposes a substantial financial burden on its victims. To even begin to recover, victims require physical and mental healthcare, therapy, and "specialized long-term counseling." *Id.* (statement of Jennifer Stith). The average cost to victims of their abuse is approximately $830,000. *Id.* (statement of Kathryn Robb). Without the ability to seek compensation from their abusers, this cost was falling on the victims themselves and on the public. *See id.*; S.B. 88 H. Judiciary Comm. Hearing, May 25, 2021 (statement of Marci Hamilton, CEO of Child USA) ("So much of this [cost of abuse] gets pushed, the medical part, over to Medicaid and the states end up paying.").

After studying the issue at length, the General Assembly made a series of legislative findings. The CSAAA declares that child sexual abuse "is a significant public health problem in Colorado" with "long-term effects on the physical and mental health of children." S.B. 21–088 § 1(1)(b)-(c). Abuse, the legislature found, decimates academic performance; saddles victims with "financial burdens"; and often leads to self-harm, substance abuse, crime, and even suicide. *Id.* But many

victims are unable to come forward until "well into adulthood," at which point statutes of limitations "are often used to deny and defeat claims of childhood sexual abuse." *Id.* § 1(3)(a)-(b). Providing a meaningful remedy to victims, the General Assembly declared, would be "in the best interest of the state's public health and safety." *Id.* § 1(4)(b)-(c).

To that end, the CSAAA provides a new remedy for child sexual abuse. C.R.S. § 13-20-1202(2). The Assembly recognized that child abuse was caused not just by abusers themselves, but by institutions that enable and even "cover up" abuse. *Id.* § 1(2)(a)(b). So the statute allows victims to seek relief against the person who abused them, as well as an organization that "knew or should have known" of the risk. *Id.* § 13-20-1202(1).

This new remedy fixes the prior shortcomings in the law in two principal ways. First, it lacks the insurmountable time barriers that rendered the prior remedies illusory for so many victims. No statute of limitations applies to claims brought under the Act if the victim is abused after January 1, 2022. *Id.* § 13-20-1203(1). And for victims injured prior to that date, the Act provides a three-year window, ending on January 1, 2025, during which they may bring claims. *Id.* § 13-20-1203(2). In enacting this provision, Colorado joined over 20 states that have passed laws to ensure that outdated statutes of limitations do not prevent victims of childhood sexual abuse

from seeking a remedy. Second, in response to the large body of evidence that public institutions, like private ones, enable child sexual abuse, the Act waives governmental immunity for claims brought under it. *Id.* § 13-20-1207(1).

At the same time, the CSAAA imposes substantial limits on the remedy it provides. It applies only to people abused after January 1, 1960. And it imposes damages caps. The Governmental Immunity Act's limit on liability applies to claims against public bodies and their employees, capping damages at $424,000. *Id.* § 13-20-1205(3)(a). And claims against private actors are capped at $500,000. *Id.* § 13-20-1205(3)(b).[2]

III. Factual background

In 2001, Angelica Saupe was a freshman at Rangeview High School. CF, pp 4-5. The basketball coach, David O'Neill, personally recruited Angelica to join the team. *Id.*, p 4. And when she was injured, O'Neill made her a "student manager" of two sports teams. *Id.* But O'Neill's interest in Angelica turned out to have little to do

[2] The damages cap for private actors (but not government entities) extends to a maximum of $1,000,000 if (1) limiting damages to $500,000 would be "unfair," and (2) the court finds "by clear and convincing evidence" that the defendant knew or should have known of a risk of sexual misconduct and failed to take "remedial action," C.R.S. § 13-20-1205(3)(b).

with her athletic ability. Instead, he used his position of authority over her to sexually abuse her—for years. *Id.*, pp 4-5.

After gaining Angelica's trust, O'Neill began subjecting Angelica to escalating levels of sexual abuse: "inappropriately touching" her, "showing his penis to her," and eventually forcing her to perform oral sex. CF, pp 4-5. During her four years at Rangeview High, O'Neill forced Angelica to perform oral sex on him over 100 times, all on school grounds. *Id.* If Angelica "tried to resist," O'Neill threatened her, "punish[ing] and bull[ying]" her to get his way. *Id.* And he forced Angelica to sign notes attesting that "any time spent alone with Mr. O'Neill was spent doing work or assisting with basketball/softball/school." *Id.*, p 4.

Not content to assault Angelica after school hours, O'Neill also removed Angelica from class to assault her. *Id.*, p 5. To anyone paying attention, O'Neill's conduct was brazen and unusual. He met frequently in private with a student sports-team manager even when her sport was not in season, even taking her out of class to do so. *Id.*, pp 4-5. Indeed, the school had a report from another coach concerned about O'Neill's behavior. *Id.*, p 7. Nevertheless, the school did nothing. Rather than investigate the report—which would have revealed the abuse and protected Angelica—the school covered it up. *Id.* Only graduating from Rangeview freed Angelica from O'Neill's grip. *Id.*, p 5.

At the time, "due to her youth and immaturity"—and her trust of O'Neill—Angelica "did not fully understand the inappropriate nature of" the abuse she suffered. *Id.* Even once she did, she "felt powerless to report it for fear of retaliation" and concern about the response she might receive. *Id.*[3]

The severe harm O'Neill and the school caused Angelica continues to this day. She was diagnosed with post-traumatic stress disorder; she suffers anxiety and depression; and she faces "trauma triggering episodes" daily. *Id.*, pp 5-6. So, following the passage of the CSAAA, Angelica sued O'Neill and the school district.[4]

With little analysis, the trial court dismissed the complaint. As relevant here, the court held that application of the CSAAA to Angelica's claims was unconstitutionally retrospective.[5] CF, pp 140-41. Although the court cited *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002), it did not consider the three factors *DeWitt* instructs courts to analyze in determining whether a statute impairs a vested right. Instead, it simply asserted that "the U.S. Supreme Court and other courts have concluded that application of a statute of limitations is . . . a vested right." *Id.*, p 137.

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[3] Once she felt able to do so, Angelica did eventually try to file a police report, but the police told her—incorrectly—that the statute of limitations had run. CF, p 5.

[4] Angelica—and her husband—also sued for loss of consortium, but that claim is not relevant to the questions presented here.

[5] The court dismissed Angelica and her husband's claims on other grounds, but those rulings are not relevant to the issues on which this Court granted certiorari.

The only authority the court cited for this proposition was a U.S. Supreme Court case involving the federal ex post facto clause, which applies solely to criminal laws. *Id.*, p 138. The court did not mention that in the civil context, the U.S. Supreme Court has held that, ordinarily, there is no vested right in a statute of limitations. *See, e.g.*, *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Campbell v. Holt*, 115 U.S. 620, 628 (1885). Having relied on a federal criminal case to conclude that the civil CSAAA impairs a vested right, the trial court ended its analysis of retrospectivity. It did not consider whether any such impairment was outweighed by the public interest and statutory objectives, as required by this Court's decision in *DeWitt*. *See DeWitt*, 54 P.3d at 856-57.

SUMMARY OF ARGUMENT

The CSAAA is not unconstitutionally retrospective.

I. The school district's effort to cloak itself in the Bill of Rights fails from the start. The Retrospective Clause protects the people, not the government. The district, therefore, cannot rely on it to avoid its obligations to its students.

II. Indeed, the Retrospective Clause protects neither defendant here because the CSAAA isn't unconstitutionally retrospective. Under this Court's precedent, retrospectivity requires a two-step inquiry. *First*, the Court considers whether the statute "impairs a vested right" or "creates a new obligation, imposes a new duty, or

attaches a new disability." *DeWitt*, 54 P.3d at 855. And if so, *second*, that impairment or new obligation must be "balanced against the public interest and statutory objectives." *Id.* The defendants' arguments fail at both steps.

A. The remedy the CSAAA provides to sexual abuse victims does not impair any vested right. To determine whether a law impairs a vested right, this Court examines the public interest advanced by the law and the nature of the affected party's reliance interests. *DeWitt*, 54 P.3d at 855. Both point in the same direction here.

1. The CSAAA advances exceedingly important interests. It provides a mechanism for victims grappling with devastating and lasting injuries to obtain the resources they need, shifting the financial burden of abuse from victims and the public to abusers. And it facilitates the identification of abusers and organizations that facilitated abuse, preventing them from doing the same thing to other children.

2. Reliance on the statute of limitations governing child sexual abuse claims is minimal, if it exists at all. The defendants gesture to the possibility of "stale allegations," but that has nothing to do with the CSAAA. The possibility between of a long delay between a victim's abuse and their lawsuit is inherent in child sexual abuse claims. Even applying ordinary tolling rules, there is typically at least a decade between the abuse and the end of the limitations period.

Those tolling rules are critical for a second reason: They make it virtually impossible for a defendant to know when, if ever, a claim against them will be time-barred. Because of the discovery rule—under which a claim accrues only when the victim should have known of the defendant's role—institutions can, and have been, sued based on facts exposed decades later. And since 1993, the statute of limitations on a victim's claim has only started to run when the victim is emotionally able to acknowledge the abuse—a juncture a defendant has no insight into. Because defendants cannot rely on statutes of limitations they don't know have expired, the CSAAA cannot upset any prior expectations.

3. Rather than offer any serious argument about the public interest or reliance, the defendants ask this Court to adopt a per se rule that an expired statute of limitations is always a vested right that cannot be impaired. But this Court has already rejected the contention that retrospectivity is governed by bright-line rules. None of the out-of-context dicta the defendants rely on proves otherwise.

B. The CSAAA also does not impose any new duty or obligation. O'Neill has always had an obligation not to sexually abuse children. And the school district always had a duty not to ignore that abuse. All the CSAAA does is provide an additional remedy for these longstanding requirements.

C. Even if affording child sex abuse victims a remedy did somehow impair a vested right or create a new obligation, it still would not be unconstitutionally retrospective because it serves an overriding public interest. It provides a remedy to child sex abuse victims who otherwise would not have one and protects the public by bringing abusers—and the institutions that enable them—to light.

III. Finally, the school district cannot claim a special exemption from the CSAAA simply because the legislature previously granted it immunity from other claims. The district's argument begins and ends with the observation that immunity is a defense. But, again, the law is clear that a statute is not unconstitutional just because it waives a defense. And, indeed, courts have repeatedly held that government entities, like the school district, have no vested right to immunity from claims. So there is no bar to its waiver.

Even if there was some circumstance in which a school district could claim that the Retrospective Clause bars the state from waiving its immunity, it cannot do so here. Any vested right the district may have or new obligation the CSAAA might create is vastly outweighed by the overriding public interest in remedying child sex abuse and preventing its continuation.

STANDARD OF REVIEW

We agree with the standard of review set forth in both Aurora Public School and O'Neill's briefs. "The constitutionality of a statute is a question of law subject to de novo review." *People v. Graves*, 368 P.3d 317, 322 (Colo. 2016). Statutes are "presumed to be constitutional"—a presumption that is "rooted in the doctrine of separation of powers and in the judiciary's respect for the roles of the legislature and the executive in the enactment of laws." *Id.* This Court, therefore, will not take the "grave[]" step of declaring a statute unconstitutional unless the party challenging the statute has proven its "unconstitutionality beyond a reasonable doubt." *Id.*[6]

ARGUMENT

I. The Retrospective Clause protects the people, not the government.

The school district's argument is particularly bold: that it, a subdivision of the state that exists to carry out state functions for the benefit of the people, has a *constitutional right* to avoid liability for injuries it caused to the people of Colorado. But Colorado's Bill of Rights protects the citizens against the government, not vice versa.

[6] Aurora Public Schools did not provide any citations to where the issues were preserved in its opening brief, and O'Neill only stated generally that the issue relevant to him is preserved, so we cannot respond as required by C.A.R. 28(b). Nevertheless, we agree that there is no preservation problem with either issue on which this Court granted certiorari.

And this Court has held that the Retrospective Clause in particular "is for the protection of the rights of the citizen and is not applicable to the State." *Bedford v. White*, 106 P.2d 469, 476 (Colo. 1940), *overruled on other grounds by Police Pension & Relief Bd. of City & Cnty. of Denver v. Bills*, 366 P.2d 581, 583 (1961). The school district cannot invoke the Retrospective Clause to avoid the responsibility the legislature has placed upon it.

1. Since before the Colorado Constitution was enacted, it has been "crystal clear that a municipality acting in its governmental capacity can possess no vested right as against the state." *Douglas Cnty. v. Indus. Comm'n*, 81 N.W.2d 807, 810 (Wis. 1957) (citing *City of Trenton v. State of New Jersey*, 262 U.S. 182, 187 (1923)). A political subdivision "is established for public purposes alone, and to administer a part of the sovereign power of the State over a small portion of its territory. It is created by the Legislature and is entirely subject to Legislative will." *Police Jury of Bossier v. Corp. of Shreveport*, 5 La. Ann. 661, 665 (1850); *see also, e.g.*, *Appeal of Borough of Dunmore*, 52 Pa. 374, 376 (1866); *Sloan v. State*, 8 Blackf. 361, 364 (1847); *Conner v. Bent*, 1 Mo. 235, 240 (1822). As the U.S. Supreme Court has explained, "[i]n the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state." *City of Trenton*, 262 U.S. at 187 (rejecting claim under Fourteenth Amendment and Contracts Clause).

A political subdivision "may not," therefore, "invoke the protection provided by the Constitution against its own state and is prevented from attacking the constitutionality of state legislation on the grounds that its own rights had been impaired." *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 56 N.E.3d 950, 960 (Ohio 2016). Courts across the country have long applied this fundamental principle. *See, e.g.*, *Honors Acad., Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 67 (Tex. 2018); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 11 (La. 2001); *Baier v. City of St. Albans*, 39 S.E.2d 145, 152 (W.V. 1946); *McSurely v. McGrew*, 118 N.W. 415, 419 (Iowa 1908); *State v. Williams*, 35 A. 24, 31 (Conn. 1896); *Johnson v. City of San Diego*, 42 P. 249, 251 (Cal. 1895).[7]

This Court has come to the same conclusion. *See, e.g.*, *Denver Ass'n for Retarded Child., Inc. v. Sch. Dist. No. 1 in City & Cnty. of Denver*, 535 P.2d 200, 204 (Colo. 1975). Political subdivisions, this Court has explained, are not "independent governmental entit[ies] existing by reason of any inherent sovereign authority of its residents." *Bd. of Cnty. Comm'rs of Dolores Cnty. v. Love*, 470 P.2d 861, 862 (Colo. 1970). Rather, they "exist[] only for the convenient administration of the state government, created to carry out the will of the state," *id.*, and possess "no privileges or immunities which

[7] *Accord, e.g.*, *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363-64 (2009); *Sanitary & Improvement Dist. No. 67 of Sarpy Cnty. v. Dep't of Roads*, 961 N.W.2d 796, 804-05 (Neb. 2021); *Exira Cmty. Sch. Dist. v. State*, 512 N.W.2d 787, 790 (Iowa 1994); *Minnesota Ass'n of Pub. Schs. v. Hanson*, 178 N.W.2d 846, 850 (Minn. 1970); *Sanger v. City of Bridgeport*, 198 A. 746, 748 (Conn. 1938).

[they] may invoke in opposition to the will of [their] creator," *Dist. 50 Metro. Recreation Dist., Adams Cnty. v. Furbush*, 441 P.2d 645, 646 (Colo. 1968). School districts fit squarely within this rule. *See, e.g.*, *Denver Ass'n*, 535 P.2d at 204; *Clear Creek Sch. Dist. RE-1 v. Holmes*, 628 P.2d 154, 155 (Colo. App. 1981). Each is "merely [an] instrument[] of the state government chosen for the purpose of effectuating its policy in relation to schools." *Denver Ass'n,* 535 P.2d at 204.[8]

2. The only argument the school district has offered for why the General Assembly cannot require it to compensate those who were abused on its watch is that the Retrospective Clause prohibits the legislature from doing so. But as this Court has explained, the Retrospective Clause—and the Bill of Rights of which it is a part—"is for the protection of the rights of the *citizen*" from the state. *Bedford*, 106 P.2d at 476 (emphasis added). It does not protect the state (or its subdivisions) from the claims of its citizens. *See id.*

This commonsense principle is not unique to Colorado. Indeed, five years before Colorado adopted its Retrospective Clause, the Missouri Supreme Court held that Missouri's constitutional prohibition on retrospective legislation protected only

[8] This Court has made an exception to this doctrine for home rule cities because of their distinct constitutional status independent of the state. *See, e.g.*, *Denver Urb. Renewal Auth. v. Byrne*, 618 P.2d 1374, 1380 (Colo. 1980). That exception doesn't apply here.

"individuals," not the county that invoked it. *Barton Cnty. v. Walser*, 47 Mo. 189, 201 (1871). One year earlier, the Ohio Supreme Court reached the same result interpreting its prohibition on "retroactive laws." *State ex rel. Bates v. Trs. of Richland Twp.*, 20 Ohio St. 362, 371 (1870). Before that, the New Hampshire Supreme Court, discussing its prohibition on retrospective legislation (the country's first), admonished that legislative acts cannot come within that "prohibition[], unless they operate on the interests of individuals or of *private* corporations." *Merrill v. Sherburne*, 1 N.H. 199, 213 (1818) (emphasis in original).

Since the ratification of the Colorado Constitution, these states, and others that had not yet considered the issue, have continued to apply the same rule: Prohibitions on retrospective legislation do "not protect political subdivisions, like school districts, that are created by the state to carry out its governmental functions." *Toledo City*, 56 N.E.3d at 961-62 (examining pre-ratification understanding of retrospectivity, constitutional debates, and case law); *see also, e.g.*, *City of New Orleans v. Clark*, 95 U.S. 644, 654-55 (1877) (interpreting Louisiana's now-repealed clause); *Honors Acad.*, 555 S.W.3d at 60; *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo.*, 950 S.W.2d 854, 858 (Mo. 1997); *Town of Nottingham v. Harvey*, 424 A.2d 1125, 1131 (N.H. 1980); *Wooster v. Plymouth*, 62 N.H. 193, 208 (1882).

3. Applying these principles, courts have routinely upheld laws that revive time-barred claims against subdivisions or withdraw from them the privilege of immunity. *See Caldwell Cnty. v. Crocket*, 4 S.W. 607, 612 (Tex. 1887) ("[T]here can be no constitutional objection to the power of the legislature to require a municipal subdivision of the state, such as a county, to provide for and pay any just claim against it, after the lapse of such time as would ordinarily bar the claim."); *Tooke v. City of Mexia*, 197 S.W.3d 325, 345 (Tex. 2006) ("A governmental entity cannot complain of a retroactive waiver of immunity, since all governmental immunity derives from the State, and a governmental entity acquires no vested rights against the State."); *see also, e.g.*, *Jackson Hill Coal & Coke Co. v. Bd. of Comm'rs of Sullivan Cnty.*, 104 N.E. 497, 499 (Ind. 1914) (statute of limitations); *State v. City of Seattle*, 110 P. 1008, 1011 (Wash. 1910) (same); *O'Neill v. City of Hoboken*, 60 A. 50, 51 (N.J. Sup. Ct.1905) (same); *Marriott Corp. v. Bd. of Assessment Appeals of Montgomery Cnty.*, 438 A.2d 1032, 1035 (Pa. Commw. 1982) (same).

The General Assembly, as the representative body of the people of Colorado, has made the determination that it is just and right for the State and subordinate subdivisions to account for injuries that they caused to victims of child sexual abuse. The school district, as a political subdivision, has no basis to question that state

policy. The prohibition on retrospective legislation—a safeguard for individuals and private rights—does not change that.[9]

II. The Constitution does not bar the legislature from retroactively affording victims of child sex abuse an additional remedy.

The CSAAA does nothing more than create a new remedy for an existing obligation not to subject children to sexual abuse. That additional remedy does not affect any statute of limitations defense a defendant might have to common law claims. Nonetheless, the defendants argue that the CSAAA somehow impairs what they (incorrectly) claim is a vested right to raise a statute of limitations defense.

The problem with this argument is simple: The claimed vested right still exists. If Angelica had brought common law claims, the defendants could have raised the statute of limitations in defense. And that defense matters: Among other differences, the CSAAA limits victims' recovery. The common law does not. And the CSAAA also limits prejudgment interest to that which accrues after filing the complaint;

[9] There are a handful of cases in which this Court reviewed constitutional challenges by political subdivisions without actually considering whether they could bring those challenges. Those cases do not control here. As the Ohio Supreme Court recently explained in considering the same question, cases that are "silent on the threshold issue"—"whether political subdivisions have rights under [the prohibition on retrospective legislation"—"lack precedential value." *Toledo City Sch. Dist. Bd. of Edn.*, 2016-Ohio-2806, ¶ 39; *see also, e.g.*, *Khrapunov v. Prosyankin*, 931 F.3d 922, 933 (9th Cir. 2019) ("It is axiomatic that cases are not authority for issues not considered.").

interest is not so limited for common law claims. C.R.S. § 13-20-1205(2). So, because the common-law statute of limitations defense continues to protect the school district and O'Neill, it is in no way impaired.

But even if the defendants were correct that the CSAAA revives claims previously barred by the statute of limitations, there still would be no constitutional infirmity. Neither the school district nor O'Neill has a vested right in a statute of limitations defense to sexual abuse claims. Nor does the CSAAA create any new obligation. There's no dispute that teachers have always had a duty not to sexually abuse children; and school districts have always had an obligation not to turn a blind eye to abuse. And, even if the CSAAA did somehow impair a vested right or create a new obligation, the state's overriding interest in providing a remedy for victims and rooting out the scourge of child sexual abuse in Colorado justifies the law's retroactive application.

A. The defendants have no vested right to rely on a statute of limitations defense against child sexual abuse claims.

To determine whether a "vested right is implicated," this Court balances: "(1) whether the public interest is advanced or retarded; (2) whether the statute gives effect to or defeats the bona fide intentions or reasonable expectations of the affected individuals; and (3) whether the statute surprises individuals who have relied on a contrary law." *DeWitt*, 54 P.3d at 855. The defendants do not even attempt to analyze

these factors. Perhaps that's because each factor points to the same conclusion. The defendants have no vested right.

The public interest. Retroactive application of the CSAAA's remedy serves an exceedingly strong public interest. For many victims of childhood sexual abuse, the preexisting remedies had proven illusory. The trauma sexual abuse causes a child and the all-too-common threats of retribution prevented them from coming forward until long after the statute of limitations for common law claims had expired. *See supra* at 10-11. In other words, the very abuse that inflicted their injuries also prevented child sexual abuse victims from pursuing a remedy. The CSAAA provides that remedy.

And that remedy is crucial to the "public health and safety" of Coloradans. S.B. 21-088 §§ 1(1)(b)-(c), 1(4)(b). As the General Assembly recognized, the harm caused by child sexual abuse is severe and long-lasting. Its "long-term effects" include "trauma, increased risk for unintended pregnancy, sexually transmitted infections, low academic performance, truancy, dropping out of school, eating disorders, substance abuse, [and] self-harm, [among] other harmful behaviors." S.B. 21-088 § 1(1)(b). And along with this physical and emotional harm, child sex abuse also imposes substantial "financial burdens" on victims—often for a lifetime. S.B. 21-088 § 1(1)(c). "Child sex abuse victims" are "disproportionately in need of medical care," physical and psychological. *S.B. 88 S. Judiciary Comm. Hearing* (statement of Kathryn

Robb); *id.* (statement of Paul Quinn, survivor of childhood sexual abuse); S.B. 21-088 § 1(1)(c). And the ongoing effects of the abuse render victims less able to support themselves, making them more likely to need "governmental support." *S.B. 88 S. Judiciary Comm. Hearing* (statement of Kathryn Robb); *id.* (statement of Jean McAllister); S.B. 21-088 § 1(1)(c). Absent a remedy, these financial costs fall entirely on the victims of child sexual abuse themselves—and the general public.

The CSAAA ameliorates these harms by shifting some of the financial burden of sexual abuse from its victims and the public to the abusers and the institutions that enabled the abuse. It ensures that victims of sexual abuse are not denied a remedy simply because their abuse prevented them from coming forward sooner. "This is unquestionably an important public purpose." *Sliney v. Previte*, 41 N.E.3d 732, 740 (Mass. 2015) (upholding a law modifying the statute of limitations for child-sex-abuse victims).

So too is preventing future abuse—another purpose served by retroactive application of the CSAAA. When victims don't come forward, abusers and their enablers face no consequences. That means that abusers remain in a position to prey on other children, institutions don't take the steps necessary to prevent abuse from happening again under their watch, and the public remains in the dark about the full extent of the risk that children face. *S.B. 88 H. Judiciary Comm. Hearing*, May 25,

2021 (statement of Marci Hamilton); *id.* (statement of Paul Quinn). The CSAAA fixes all that by providing an incentive for victims to reveal known abusers and the organizations that enable them. *See Doe v. Hartford Roman Cath. Diocesan Corp.*, 119 A.3d 462, 514-15 (Conn. 2015) ("[L]awsuits filed under window legislation have led to the public identification of previously unknown child predators, which reduces the odds that children will be abused in the future."). That, too, is a "strong" public interest. *Sliney*, 41 N.E.3d at 740.[10]

The defendants do not dispute that affording sexual abusers—and the institutions that enable them—a vested right to avoid liability for the ongoing harm they caused would undermine these exceedingly important public interests.

Reliance interests. Nor can the defendants seek refuge in the latter two factors of the vested rights analysis—whether the change in law upsets the "reasonable expectations" of affected parties or surprises those who relied on prior law. *DeWitt*, 54 P.3d at 855.[11] Neither perpetrators of sexual abuse nor the institutions

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[10] The school district suggests (at 38-39), without evidence, that the 1993 amendments to the common-law statute of limitations were sufficient to achieve these aims. But, as explained above, those amendments did not address many of the difficulties victims face coming forward.

[11] These factors "are obviously related," so we discuss them together here. *See Doe v. Sundquist*, 2 S.W.3d 919, 924 (Tenn. 1999).

that enable them can have any reasonable expectation that the passage of time will protect them from liability.

Indeed, neither O'Neill nor the school district actually asserts any reliance interest. They do complain (vaguely) that they should be protected from "stale allegations." *See* O'Neill Br. 9; Aurora Br. 42. And the school district notes that with "the passage of time, the memories of witnesses" may fade or evidence may be lost. Aurora Br. 42. But this truism is really a complaint about *long* statutes of limitations, not about *reviving* statutes of limitations. The defendants would have the same complaint even if the CSAAA had been in effect when Angelica was abused. *Cf. Sliney*, 41 N.E.3d at 741-42 ("compelling" public interest in affording a remedy to victims of child sexual abuse, who "in many cases" are unable to come forward "for many years after the abuse has ended" outweighs any interest defendants might have in not "having to defend against stale claims").[12]

[12] Several causes of actions—including some crimes—have long *or no* statutes of limitations. *See, e.g.*, C.R.S. § 16-5-401 (sexual offenses against children, murder, kidnapping, treason, and forgery); *Martinez v. Archuleta-Padia*, 143 P.3d 1112, 1115 (Colo. App. 2006) (quiet title action). That does not render them unconstitutional. Of course, if a defendant proves that evidence was actually lost due to undue delay, rather than merely speculating about that possibility, it can raise an as-applied due process challenge. *See, e.g.*, *United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977); *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1260 (Del. 2011).

A lengthy "passage of time" between abuse and litigation has always been part and parcel of child sex-abuse claims. These claims have long been tolled until the victim reaches the age of eighteen. *See In re Archdiocese of Denver Cases*, 2007 WL 1234831 (Colo. Dist. Ct. Mar. 26, 2007). They are tolled where the victim is reasonably unaware of the cause of their injury—such as, for example, the negligence of a supervising institution—which could be decades after the abuse occurred. *See, e.g.*, *id.* (rejecting statute-of-limitations defense for claims based on abuse "between 1960 and 1974" because the plaintiffs lacked knowledge of the defendant's culpability). And for thirty years, sex abuse claims have been tolled where the victim is "unable to acknowledge the assault or offense and the harm resulting therefrom." 1993 Colo. Legis. Serv. H.B. 93-1259 § 3.5(a). Not to mention that since 2006 there has been no statute of limitations at all for criminal prosecutions of child sexual offenses. 2006 Colo. Legis. Serv. H.B. 06-1088 §§ (1)(a), (1.5)(a). Put simply, the time within which child sex abuse claims could be brought has always been long.[13]

More importantly, it's also been uncertain enough to preclude reasonable reliance. The CSAAA cannot possibly upend anyone's reasonable expectations that

[13] To be clear, as explained above, that doesn't mean that victims consistently have sufficient time for the remedy to be meaningful. It merely means that, in the cases in which their claims are timely, they are still often brought long after the abuse occurs and at unpredictable junctures.

it's past the time they will have to answer for such abuse.[14] The prior state of the law already meant they could have no such expectations. Potential defendants have always had to structure their conduct on the assumption that child sexual abuse claims have no definitive expiration date.

And that's critical. It's long been settled, even in the criminal context, that extending a non-lapsed statute of limitations is permissible. *E.g.*, *People v. Holland*, 708 P.2d 119, 120 (Colo. 1985). Functionally, that's all the CSAAA does for the average defendant, who, because of the interaction between tolling rules and the forced secrecy inherent in child sexual abuse, will not know when a claim expires. There is no difference, from a reliance perspective, between extending a non-lapsed statute of limitations and extending one that the defendant doesn't know has lapsed. Any claim to the contrary necessarily rests on the type of formalistic technicality that the vested rights doctrine has long rejected. *See Farnik v. Bd. of Cnty. Comm'rs of Weld Cnty.*, 341 P.2d 467, 472 (Colo. 1959). At most, any reliance is illegitimate, enabled only by the defendant's own misconduct. *Cf. Klammshell v. Berg,* 441 P.2d 10, 12 (Colo. 1968) ("[E]quity contains within its purview overriding concepts which proclaim that a

[14] In addition, child sexual abuse is no ordinary claim. The court of public opinion can be just as harsh as the courts of Colorado, and it has no statute of limitations. Those who have exculpatory evidence, therefore, are unlikely to destroy it simply because the statute of limitations on civil claims has lapsed.

defendant on the basis of plain justice should not be allowed to rely on a statute of limitations, where his intentional tort has caused mental incapacity arising after the cause of action accrued but before the expiration of the period of limitation.").

But even if, at some point, there could have been reasonable reliance on a statute-of-limitations defense to child sexual abuse claims (and there could not), that ended with the 1993 amendment. That amendment—which was passed years before O'Neill abused Angelica—provides that the statute of limitations on common-law sex abuse claims doesn't begin to run until the victim is emotionally and psychologically capable of acknowledging the abuse and harms suffered. Defendants, of course, can have no way of knowing when that occurs. So as far as defendants are concerned, at least beginning with the 1993 amendment, there has been no definitive statute of limitations—or, at least, no way in which defendants could rely on it.[15]

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[15] The school district suggests that the 1993 amendment didn't affect the conduct of managing organizations because a single division of the Court of Appeals held that the amendment applied only to "perpetrators." *See* Aurora Br. at 12-13 n.2 (citing *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 604 (Colo. App. 2000)). That's wrong for two reasons. First, entities that shape their conduct around statutes of limitations are unlikely to rest on a single decision of a lower court when this Court has not yet spoken on the matter, especially when other courts have disagreed with that interpretation. *See DeLonga v. Diocese of Sioux Falls*, 329 F. Supp. 2d 1092, 1103 (D.S.D. 2004) (discussing split in authority). Second, it takes little imagination to see how a victim could allege a claim to frame the managing organization as a perpetrator by, for example, alleging aiding and abetting liability. *See Holmes v. Young*, 885 P.2d 305, 308 (Colo. App. 1994) (applying Restatement (Second) of Torts to decide aiding-and-abetting breach-of-fiduciary-duty claim).

O'Neill certainly cannot have relied on the statute of limitations. That's because the criminal statute of limitations against him still has not expired. He first abused Angelica, then only 14, in 2001. The statute of limitations that applied to criminal prosecution at the time was ten years. 2000 Colo. Legis. Serv. Ch. 171 (H.B. 00–1107) § 29. So it had not yet run when, in 2006, the General Assembly removed the statute of limitations altogether. 2006 Colo. Legis. Serv. H.B. 06-1088 §§ (1)(a), (1.5)(a). Well before the CSAAA was enacted, therefore, O'Neill knew his liability for abusing Angelica had no expiration date. *See Colorado Dep't of Soc. Servs. v. Smith, Harst & Assocs.*, Inc., 803 P.2d 964, 966 (Colo. 1991) (where criminal statute of limitations has not expired, addition of civil remedy is not unconstitutionally retrospective).

The defendants' per se rule. All three factors thus point decisively against a vested right. Again, neither defendant even attempts to argue otherwise, let alone meet the reasonable-doubt standard that applies to constitutional challenges. Instead, they contend that a statute-of-limitations defense is *always* a vested right. But, as this Court has repeatedly held, "there are no bright line tests to determine what constitutes a vested right." *Kuhn v. State*, 924 P.2d 1053, 1059 (Colo. 1996). That's the why the balancing test that this Court—along with many others—has adopted exists. *See, e.g.*, *Sundquist*, 2 S.W.3d at 924.

Neither defendant offers any principled justification for excluding statutes of limitation from the ordinary vested rights analysis. Instead, they seize on some loose language in old cases they say articulates a categorical rule that statute of limitations defenses are vested rights. *See, e.g.*, Aurora Br. 8. But there's loose language going both ways. This Court has also stated just as categorically that retroactive application of a statute "does not violate the prohibition of retrospective legislation where" it is "remedial in nature," and that "[s]tatutes of limitation . . . are remedial in nature." *Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm'rs*, 948 P.2d 1002, 1012 (Colo. 1997).

Broad dicta aside, the defendants cite just one case (from over forty years ago) in which this Court actually held that a law reviving an expired statute of limitations violated the Retrospective Clause, *Jefferson County Department of Social Services v. D.A.G.*, 607 P.2d 1004 (Colo. 1980). That case only reinforces the conclusion that the CSAAA does not impair any vested right. In *D.A.G.*, the legislature provided a three-year window during which the state could bring otherwise time-barred paternity actions, which under the previous statute had to be brought within five years of a child's birth. *Id.* at 1005-06. Without much explanation, this Court held that reviving the time-barred action impaired a vested right. *See id.* at 1006. But applying the balancing this Court has since adopted, it's easy to see how it reached that result.

Unlike here, there was little need for retroactive application of the statute. Even though, absent the revival provision, the *state* couldn't bring paternity actions, the *child* could. *See id.* So the public interest in having paternity actions brought was still satisfied. And, on the other side of the balance, the defendant's reliance interest in *D.A.G.* was far stronger than it is here. The paternity statute had previously provided a clear statute of repose—once the child turned five, the state was prohibited from bringing claims. No such statute of repose has ever governed claims based on child sexual abuse—which have always been subject to extended, and often unpredictable, tolling. There has never been, therefore, any clear deadline for defendants to rely on. This case is thus the opposite of *D.A.G.* in virtually every way.

What's more, even though the *D.A.G.* Court held that the Retrospective Clause barred the legislature from reviving the statute of limitations for *preexisting* remedies, it concluded that the legislature could nevertheless provide a *new* remedy for paternity without running afoul of the Constitution. *Id.* at 1006. That's precisely what the Assembly did here.

The school district also cites (at 8) *Willoughby v. George*, 5 Colo. 80 (1879), but that case is even less helpful to its argument. In *Willoughby*, this Court held that where a final judgment was entered, and the time to appeal had elapsed, a new statute authorizing parties to seek Supreme Court review could not be applied retroactively

to reopen final judgments. *Id.* at 80-81. Otherwise, the Court explained, judgments would always be at "perpetual" risk "of defeasance resting in possible future legislation." *Id.* at 82. Although *Willoughby* contains broad dicta about statutes of limitations, the decision itself is not a statute of limitations case. It stands for the commonsense proposition that the legislature cannot reopen final judgments. The vested interest in final judgments—where both the public interest and the parties' reliance interests weigh heavily on the side of finality—only serves to highlight how child sex abuse is different.

Both *Willoughby* and *D.A.G.* are consistent with the three-factor test this Court has distilled from the case law and now employs, and neither compels the per se rule that the defendants urge.

B. Providing a new remedy to child sex abuse victims does not impose any new duty, obligation, or disability.

Neither O'Neill nor the school district seriously contend that retroactive application of the CSAAA's remedy imposes upon them any new duty, obligation, or disability. Nor could they. Neither disputes that they've always had a duty, in O'Neill's case, not to sexually abuse children and, in the school's, not to turn a blind eye to sexual abuse. Indeed, the defendants' vested rights argument depends on their contention that the duties and obligations imposed by the CSAAA are *the same* as

those that predated the statute; otherwise, the common law statute of limitations would be irrelevant. They cannot have it both ways.[16]

Recognizing this problem, the school district engages in wordplay: Even if the CSAAA does not impose a new duty, the district claims (at 29), it imposes upon the school a "new liability." But what the district calls a "new liability" is nothing more than an additional *remedy* for conduct everyone agrees has always been unlawful. *See Sliney*, 41 N.E.3d at 742 (holding Massachusetts revival statute for child sex abuse did "not create a new liability" because "there can be no claim . . . that acts of sexual abuse committed on a child were permissible"). And the law has long been clear that statutes that "relate[] only to remedies" do not run afoul of the prohibition on retrospective legislation. *Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393, 399 (Colo. 2010); *accord D. A. G.*, 607 P.2d at 1006 (holding it does not violate the Retrospective Clause to "merely create[] a remedy" a party didn't previously possess).

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[16] To the extent the defendants contend that the expiration of the statute of limitations on Angelica's common law claims extinguished their obligations, they are wrong. Statutes of limitations ordinarily "operate[] only to bar the remedy, not to extinguish the . . . cause of action." *Foot v. Burr*, 92 P. 236, 237 (Colo. 1907). The duty and obligation that a defendant owes continues even after a statute of limitations expired. *See, e.g.*, *Mitchell v. Auto. Owners Indem. Underwriters*, 118 P.2d 815, 817 (Cal. 1941); *Cooper v. First Interstate Bank of Denver, N.A.*, 756 P.2d 1017, 1021 (Colo. App. 1988). That is why when someone waives the statute of limitations, they do not "incur[] a new obligation"; rather, "if he waives the statute, it is the old obligation that is enforced." *Cent. Hanover Bank & Tr. Co. v. United Traction Co.*, 95 F.2d 50, 55 (2d Cir. 1938).

C. Even if the CSAAA impairs a vested right or imposes a new obligation, it is justified by the overwhelming public interest in providing a remedy to victims of child sexual abuse.

1. "[W]hile an important consideration," a statute is not necessarily unconstitutionally retrospective simply because it impairs a vested right or retroactively imposes a new obligation. *DeWitt*, 54 P.3d at 855. This Court's "retrospectivity jurisprudence requires that any new obligation, duty, or impairment that is asserted . . . be balanced against the public interest and statutory objectives." *Id.* at 855, 857. That's because, ultimately, the Retrospective Clause is about equity; it does not serve "to thwart the reasonable exercise" of the legislature's power "for the public good." *Id.*; *see also Ficarra*, 849 P.2d at 17 (the term "vested right" "sums up a judicial determination that the facts of the case render it inequitable that the State impede the individual from taking certain action"). A statute, therefore, is not unconstitutionally retrospective if it advances an "overriding" public interest, *City of Golden v. Parker*, 138 P.3d 285, 294 (Colo. 2006), and the means used "bear a rational relationship" to that interest, *DeWitt*, 54 P.3d at 855. The remedy provided by the CSAAA easily meets this standard.

There can hardly be a more compelling public interest than providing child sex abuse victims a remedy and protecting the public from further abuse. The remedy that the CSAAA provides helps ensure that victims have the resources they

need to obtain necessary healthcare and be productive members of society. It transfers the financial burden of child sexual abuse from the victims and the public to the abusers and their enablers. And it helps prevent further abuse by identifying abusers still at large and shortcomings in organizational oversight. *A.M. v. A.C.*, 296 P.3d 1026, 1037 (Colo. 2013) ("protect[ing] the long-term welfare of children" is a "substantial" government interest).

Numerous courts upholding similar laws have recognized the critical importance of these interests. *See, e.g., Sliney*, 473 Mass. at 292 ("[T]here is a strong interest and a well-established community consensus in favor of protecting children from abuse."); *Hartford*, 119 A.3d at 517 (revival of claims serves a "legitimate public interest" in view of "unique psychological and social factors that often result in delayed reporting of childhood sexual abuse, which frustrated the ability of victims to bring an action under earlier revisions of the statute of limitations"); *Bernard v. Cosby*, 2023 WL 22486, at *8 (D.N.J. Jan. 3, 2023) ("[T]he revival statute's public purpose of correcting injustices suffered by victims of sexual offenses outweighs any expectation in an earlier statute of limitations for conduct that was illegal at the time of commission."); *PC-41 Doe v. Poly Prep Country Day Sch.*, 590 F. Supp. 3d 551, 563 (E.D.N.Y. 2021) ("[T]he Legislature here identified a serious harm as well as a substantial barrier to timely filing by plaintiffs seeking redress – specifically that most

survivors report or come to terms with their abuse long after the abuse occurred."); *K.E. v. Hoffman*, 452 N.W.2d 509, 514 (Minn. Ct. App. 1990) ("[T]he distinction between victims of sexual abuse and victims of other torts is not arbitrary or fanciful. Sexual abuse victims are more likely to repress the memory of the abusive incident, and the psychological injuries caused by sexual abuse are different than for victims of other torts. These differences reasonably justify the legislature's decision to entitle sexual abuse victims to a specific statute of limitations."); *Liebig v. Super. Ct.*, 209 Cal. App. 3d 828, 834 (1989); *see also Sheehan*, 15 A.3d at 1259; *Harvey v. Merchan*, 860 S.E.2d 561, 565 (Ga. 2021); *Shirley v. Reif*, 920 P.2d 405, 413 (Kan. 1996); *Cosgriffe v. Cosgriffe*, 864 P.2d 776, 779 (Mont. 1993); *A.K.H. v. R.C.T.*, 822 P.2d 135, 137 (Or. 1991); *Roe v. Ram*, 2014 WL 4276647, at *5 & n.6 (D. Haw. Aug. 29, 2014).

There is no dispute that the CSAAA bears a rational relationship to these interests. Indeed, it is far more closely tailored to its aims than the law requires. For example, the Act's limitation to people abused after January 1, 1960 reflects a judgment that providing a remedy to those abused earlier is less likely to benefit the victim or the general public. People abused after 1960 are more likely to be in the work force if healthy, more likely to be dependent on public resources if not, and more likely, in the worst-case scenarios, to engage in crime or substance abuse. Their abusers are also more likely to still be in a position to abuse others. Extending the

CSAAA's remedy to these people thus maximizes the potential positive impact of the law to the public while not imposing liability in the case of older victims where the public impact will be slighter.

Similarly, the General Assembly's decision to apply the CSAAA only to managing organizations that operate youth-related activities also demonstrates a tighter fit between the means and the end than is required. Although child sexual abuse surely happens elsewhere, entities that operate youth-related programs are the most likely to come into future contact with children. That means that imposing liability on these organizations presents the strongest likelihood of identifying organizations that may facilitate abuse in the future and of learning valuable lessons about what leads to abuse in those institutions and how the public can prevent it.

2. The defendants are unable to argue otherwise. So instead, they argue that it doesn't matter—that a statute that impairs a vested right or imposes a new duty is unconstitutional, regardless of whether it serves an overriding public interest. That assertion simply cannot be reconciled with this Court's decisions. Although the district does its best to contort the test set out in *Dewitt*, this Court could hardly have stated it more clearly: "[A] determination that a statute implicates a vested right is *not* dispositive"; rather, the vested right "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 (emphasis added); *see also id.* at 857 ("[O]ur retrospectivity jurisprudence requires that any new obligation, duty, or impairment that is asserted on behalf of the decedents be balanced against the public interest and statutory objectives."); *accord City of Golden*, 138 P.3d at 294 ("We find *all three* of the DeWitt factors for implication of a vested right are met . . . . *Additionally*, we find no overriding public policy concerns that would justify retroactive application of the Charter Amendment." (emphasis added)).

This also comports with the historical understanding of the Retrospective Clause. Article II, clause 2 does not prohibit "impairment of vested rights" or "new duties, obligations, and disabilities." It prohibits "laws retrospective in operation." As we explained above, that phrase was understood at the time of the Constitution's adoption to distinguish not mechanically between "right and remedy"—though those will often be useful proxies—but ultimately "between right and wrong." *Brown v. Challis*, 46 P. 679, 680 (Colo. 1896). The examination into vested rights and new duties, obligations, and disabilities is thus just one tool in that ultimate inquiry. Indeed, the district concedes that examination of the public interest is properly part of the inquiry; it just contends that it must only be considered in determining whether a vested right exists in the first instance. The district, however, offers no justification—beyond its tortured reading of *Dewitt*—for this arbitrary dividing line.

Nor does it matter. Whether balanced as part of the vested rights analysis or separately afterwards, the result here is the same—the CSAAA is constitutional.

This consistent historical and modern treatment also reveals why the school district reaches so often (at 17, 21, 33) for the ex post facto clause in asking the Court to strike down the CSAAA's remedial measures. Both clauses, of course, aim to combat the potential for injustice that retroactive laws present when new rules are applied to old conduct. But whether that injustice results depends, in large part, on the consequences of the new rule. The retroactive imposition of criminal penalties—punishment—produces an injustice in all cases. But the retroactive application of civil laws does not—a fact reflected in the school district's concession that consideration of the public interest is relevant to determining whether a vested right exists. Thus, a retroactive expansion of compensatory damages may be permissible while punitive damages are not. *Hess v, Chase Manhattan Bank, N.A.,* 220 S.W.3d 758, 769-70 (Mo. 2007); *French v. Deane,* 36 P. 609, 612 (Colo. 1894) (holding exemplary damages unconstitutionally retrospective because of their punitive nature).

Greater protection against criminal and punitive sanctions makes good sense—indeed, it is commonplace in the law. "[L]aws imposing civil penalties generally require less demanding scrutiny" for impermissible vagueness "than those with criminal consequences." *Melendez v. City of New York*, 16 F.4th 992, 1015 (2d Cir.

2021); *see also Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498-99 (1982) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."). The Constitution affords special protection against excessive criminal penalties. *See Browning-Ferris Indus. Of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989) (excessive fines clause does not apply to civil penalties). And Colorado treats statutes of limitations as jurisdictional in criminal cases, allowing the defense to be raised at any time. *See Nowakowski v. Dist. Ct. In & For Denver Cnty.*, 664 P.2d 709, 711 (Colo. 1983); *see also Atchison, T. & S.F.R. Co. v. Tanner*, 36 P. 541, 543 (Colo. 1894) (statute of limitations for "penal" civil claims is jurisdictional). Thus, to ask, as the district does, whether the CSAAA would, if a criminal law, be constitutional in no way aids the resolution of this case—it fundamentally changes it.[17]

III. The CSAAA's immunity waiver does not violate the Retrospective Clause.

Unable to show that it's unconstitutional for the General Assembly to create an additional remedy for child sexual abuse, the school district argues that nevertheless *it* should not have to provide this remedy precisely because it is a school

[17] Indeed, if the two clauses were applied in the same exact manner, one would expect courts to have just adapted the undisturbed, and inflexible, four-factor test of *Calder v. Bull*, 3 U.S. 386, 389 (1798), rather than grapple for over a century with the scope of vested rights.

district. According to the district, even though the legislature waived governmental immunity for these claims, that waiver is itself unconstitutionally retrospective. Again, the district gets things exactly backwards. The Retrospective Clause protects the people from their government, not the reverse. As explained above, the school district cannot invoke the Bill of Rights to avoid its statutory obligations to the children it injured.

The district attempts to cling to the privilege of immunity by offering another simplistic per se rule, based solely on out-of-context dicta: that *any* statute that could be characterized as removing *any* potential defense is automatically unconstitutional. Of course, that's not the case. *See, e.g.*, *DeWitt*, 54 P.3d at 855 (whether a law is unconstitutionally retrospective requires balancing several factors); *Hickman v. Cath. Health Initiatives*, 328 P.3d 266, 273 (Colo. App. 2013) (rejecting this very argument); *Smith v. Putnam*, 250 F. Supp. 1017, 1020 (D. Colo. 1965) (retroactive expansion of long-arm statute to defeat personal jurisdiction defense). But whatever may be true for private parties, government entities like the school district have no vested rights against the state. *See supra* Part I. And so there is no bar to the state choosing to waive their immunity from suit. *See id.*; *Honors Acad.*, 555 S.W.3d at 67-68 ("A governmental entity cannot complain of a retroactive waiver of immunity, since all

governmental immunity derives from the State, and a governmental entity acquires no vested rights against the State.").

In arguing otherwise, the district relies heavily on *City of Colorado Springs v. Neville*, 93 P. 1096 (Colo. 1908), but *Neville* failed to even consider whether a political subdivision can assert a retrospectivity challenge against the state or its citizens. And, in any case, its discussion of retrospectivity was dicta because the Court held that the statute at issue wasn't meant to apply retroactively in the first place.[18] *Id.* at 224; *see Hickman*, 328 P.3d at 272 n.8. The school district offers no reason that this Court should rely on century-old dicta from an outlier case that didn't even consider the issue. *Cf. Toledo City*, 56 N.E.3d at 959-60 (rejecting virtually identical argument).

But even if a state's waiver of governmental immunity could ever be unconstitutionally retrospective, it is not here. First, the school district cannot claim a vested right in having the privilege of immunity against sexual abuse claims. The public interest in victims' ability to seek remedies for the severe and ongoing harm caused by schools that enabled their abuse—and in bringing these failures to light so they can be prevented in the future—far outweighs any interest that might be served

[18] Even *Neville*'s dicta is wrong. *Neville* held that there was a vested right to a particular form of notice, but this Court has repeatedly made clear that "the benefit of particular procedures" is not a "vested right[]." *Comm. for Better Health Care for All Colo. Citizens by Schrier v. Meyer*, 830 P.2d 884, 891 (Colo. 1992).

by allowing the district to retain what this Court and the legislature have both recognized is an unjust shield. *See Open Door Ministries v. Lipschuetz*, 373 P.3d 575, 578 (Colo. 2016) (recognizing the "injustice and inequity—even absurdity" of governmental immunity); C.R.S. § 24–10-102 (similar).

And, on the other side of the balance, the school district cannot claim reasonable reliance on the continued ability to invoke immunity to shield itself from claims that it harmed its students. Immunity is a tool the legislature uses to better enable the government to *serve* the public. *See* C.R.S. § 24–10-102. The district can hardly be surprised that where it fails that function—where it harms the public, rather than simply enabling government entities to more efficiently do their jobs—the legislature will waive it. *Cf. DeWitt*, 54 P.3d at 857 (there is no vested right in a mere "expectancy interest"). The school vaguely suggests (at 40) that the immunity waiver will have some impact on its "allocation of resources," but it doesn't—and, of course, can't—assert that it would be reasonable for a school district to assume that its budget will always be free from democratic control. The people of Colorado—through an overwhelming, bipartisan majority of their elected representatives—decided that school districts should not be immune for the harm they caused to child sexual abuse victims. The school district has no vested interest in preventing them from doing so.

Nor does the immunity waiver impose upon the district any new duty or obligation. As explained above, the district does not dispute that it already had a duty to protect children from sexual abuse. The CSAAA merely adds a remedy. *Cf., e.g.*, *Hickman*, 328 P.3d at 273 ("Abrogating the hospital's immunity from damages did not create a new duty or obligation because, under the former statute, the hospital had a duty of care in credentialing medical professionals."); *Wilkes v. Missouri Highway & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. 1988) ("An act abrogating sovereign immunity does not create a new cause of action but provides a remedy for a cause of action already existing" and is therefore not retrospective); *Hess*, 220 S.W.3d at 769-70 (because defendant "was always affirmatively obliged not to employ [relevant] unlawful practice," retroactive statute that may enlarge recoverable damages was permissible); *cf. Chasse v. Banas*, 399 A.2d 608, 611 (N.H. 1979) ("Because [laws that abrogated immunity] imposed no new duties on the defendants, it is not unfair or inequitable to apply this statute retroactively to plaintiff's actions.").

In arguing otherwise, the school district claims (at 40-41) that the law retroactively imposes on it an obligation to have behaved in the past according to today's standards for preventing abuse. But this argument rests on a misunderstanding of the law. The statute only imposes liability on institutions if they actually knew or "should have known" of the risk of sexual abuse. C.R.S. § 13-20-

1203(1)(b). And Colorado law is clear that whether a defendant "should have known" of a risk is determined based on the standard of care that existed "at the time." *See, e.g.*, *United Blood Servs., a Div. of Blood Sys., Inc. v. Quintana*, 827 P.2d 509, 521 (Colo. 1992); *Bennett v. Greeley Gas Co.*, 969 P.2d 754, 760 (Colo. App. 1998).

In any event, the immunity waiver bears a rational relationship to an overriding governmental interest. So even if the school district could rely on the Retrospective Clause to avoid its obligations to its students, and even if the legislature impaired some vested right or imposed some new duty on the district by waiving immunity, the waiver would still be constitutional. The public interest in the CSAAA is furthered just as much, if not more, when a school is responsible for the abuse. Not only is there the same obviously powerful interest in providing justice to child sex abuse victims who otherwise would not receive it and ameliorating the long-term impact on their well-being by providing them the means to seek the treatment they need, there is an even stronger interest in public safety. Few abusers have such extensive access to such a large number of children on a constant basis like those who work in schools. Identifying schools where children suffered abuse—and the institutional failings that caused them to do so—is crucial to preventing it in the future.

The district cannot dispute that the CSAAA is rationally related to these interests. Indeed, the legislature took careful steps to ensure that the statute furthered the interests it was designed to protect, without unduly hampering governmental entities, by allowing only a limited set of claims for a limited amount of time and, most importantly, imposing a cap on damages. *Cf. Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 435 (Ohio 2007) (recognizing damages cap's potential to "maximize benefits to the public while limiting damages to litigants").

The school district cannot invoke the Retrospective Clause against the state or the citizens of Colorado. But even if it could, the CSAAA is not unconstitutionally retrospective.

CONCLUSION

This Court should reverse.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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