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ADVANCE SHEET HEADNOTE
June 20, 2023

2023 CO 39

No. 22SC824, *Aurora Public Schools v. A.S.*—Statutes— Constitutional Law Retroactivity—Statutes of Limitation.

The supreme court holds that the Child Sexual Abuse Accountability Act (CSAAA) violates the constitutional prohibition on retrospective legislation, Colo. Const. art. II, section 11, as applied to conduct that predates the Act and for which any previously available claims would be time-barred. First, the court rejects the plaintiffs' objections to the school district's standing and concludes it has subject matter jurisdiction to review the constitutional challenge to the CSAAA. Turning to the merits, the court holds that, to the extent a statute creates a new cause of action that permits parties to bring claims for which any previously available cause of action would be time-barred, the statute creates a new obligation and attaches a new disability to past transactions, thereby violating Colorado's constitutional prohibition on retrospective legislation.

Here, because the plaintiffs' previously available claims for sexual misconduct were time-barred at the time they brought suit, the Act's creation of a new cause of action for those claims was unconstitutional. The court therefore affirms the district court's order granting the defendants' motions to dismiss.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 39

Supreme Court Case No. 22SC824
C.A.R. 50 Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 22CA1583
Arapahoe County District Court Case No. 22CV30065
Honorable Elizabeth Beebe Volz, Judge

Petitioners:

Aurora Public Schools and David James O'Neill,

v.

Respondents:

A.S. and B.S.

Order Affirmed
en banc
June 20, 2023

Attorneys for Petitioner Aurora Public Schools:
Caplan and Earnest LLC
Gwyneth Whalen
W. Stuart Stuller
Anne L. Stuller
Boulder, Colorado

Attorneys for Petitioner David James O'Neill:
Law Office of Leonard R. Higdon
Leonard R. Higdon
Greenwood Village, Colorado

Attorneys for Respondents:
Gupta Wessler PLLC
Jennifer D. Bennett
San Francisco, California

Gupta Wessler PLLC
Robert D. Friedman
Washington, District of Columbia

Avery Law Firm
James W. Avery
Denver, Colorado

Attorneys for Amici Curiae American Tort Reform Association, Colorado Civil Justice League, Colorado Chamber of Commerce, American Property Casualty Insurance Association, and National Association of Mutual Insurance Companies:
Shook, Hardy & Bacon LLP
Daniel E. Rohner
Denver, Colorado

Shook, Hardy & Bacon LLP
Cary Silverman
Washington, District of Columbia

Attorneys for Amicus Curiae Archdiocese of Denver:
Lewis Roca Rothgerber Christie LLP
Scott M. Browning
Michael D. Plachy
Caitlin C. McHugh
Denver, Colorado

Attorneys for Amicus Curiae Child USA:
Wahlberg, Woodruff, Nimmo & Sloane LLP
Michael Nimmo
Denver, Colorado

Attorneys for Amici Curiae Colorado Academy, World Leadership School, Cornerstone Safety Group, and Global Works:
Lewis Roca Rothgerber Christie LLP

Doug B. Tumminello
Kendra N. Beckwith
Denver, Colorado

Attorneys for Amici Curiae 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:
Semple, Farrington, Everall & Case P.C.
Jonathan P. Fero
Denver, Colorado

Attorneys for Amici Curiae Colorado Trial Lawyers Association and American Association for Justice:
5280 Appellate Group, a division of The Paul Wilkinson Law Firm LLC
Nelson Boyle
Denver, Colorado

Burg Simpson Eldredge Hersh & Jardine, P.C.
S. Paige Singleton
Alyssa C.E. Hill
Englewood, Colorado

Attorneys for Amici Curiae Members of the Colorado General Assembly:
Wagstaff Law Firm
Sommer D. Luther
Benjamin Gillig
Denver, Colorado

JUSTICE MÁRQUEZ delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE GABRIEL, JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 In 2021, the General Assembly passed the Child Sexual Abuse Accountability Act ("CSAAA" or "the Act"), which created a statutory cause of action for a victim of sexual misconduct that occurred while the victim was a minor participating in a youth-related activity or program. Under the Act, a victim may bring a civil claim for damages against both the actor who committed the abuse and the organization that operated or managed the youth-related activity or program, if the organization knew or should have known about the risk of sexual misconduct. As relevant here, the CSAAA established a three-year window during which a victim may bring claims under the Act for child sexual abuse that occurred between January 1, 1960, and January 1, 2022, regardless of whether previously available causes of action were time-barred. The CSAAA also waived governmental immunity for claims brought under the Act.

¶2 In January 2022, plaintiffs A.S. and her husband B.S. brought a claim under the CSAAA against a former high school athletic coach and a school district, alleging that the coach sexually abused A.S. between 2001 and 2005, when she was a minor. At the time the plaintiffs brought this suit, any previously available claims for this alleged sexual misconduct were time-barred.

¶3 We are asked to decide whether the CSAAA violates article II, section 11 of the Colorado Constitution (the "retrospectivity clause"), which prohibits the

General Assembly from passing any law "retrospective in its operation."[1] Specifically, is the CSAAA unconstitutionally retrospective to the extent that it creates a new cause of action for conduct that predates the Act and for which any previously available claims would be time-barred? The answer is yes.

¶4 First, we conclude that we have subject matter jurisdiction to address this question because the individual defendant before us has standing to challenge the CSAAA as unconstitutionally retrospective. We therefore need not separately address the school district's standing to bring the identical claim. Second, we conclude that because the CSAAA creates a new cause of action for child sexual abuse, the Act creates a new obligation and attaches a new disability with respect to past transactions or considerations to the extent it permits victims to bring claims for which any previously available cause of action would be time-barred.

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[1] We granted review under C.A.R. 50 on the following issues:

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

We therefore hold that the CSAAA amounts to unconstitutional retrospective legislation as applied to the plaintiffs' claim under the Act against the defendants here.[2] Accordingly, we affirm the district court's order granting the defendants' motions to dismiss.

I. Background

¶5 The CSAAA is the latest in a series of amendments to the limitations period for civil claims of sexual abuse. Until 1990, sexual abuse claims, like other torts, were subject to a two-year statute of limitations. In 1990, the General Assembly lengthened the limitations period to six years for civil claims of sexual misconduct, including sexual abuse of a child. Ch. 112, sec. 1, § 13-80-103.7(1), 1990 Colo. Sess. Laws 885, 885. For persons "under [a] disability," which included being under the age of majority, such claims had to be brought within six years after the disability was removed (i.e., when the child turned eighteen), or within six years after the cause of action accrued (i.e., when the victim knew or should have known of the injury and its cause), whichever occurred later. *Id.*; § 13-80-108(1), C.R.S. (1990); § 13-81-101(3), C.R.S. (1990).

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[2] Because we resolve the case on this ground, we need not address the school district's separate argument that the CSAAA's waiver of governmental immunity cannot constitutionally apply to conduct that predates the waiver, or the school district's standing to raise that distinct claim.

¶6 In 1993, the General Assembly expanded the definition of "disability" to embrace a victim's psychological or emotional inability to acknowledge an assault or the harm resulting from an assault. Following this change, a victim of child sexual abuse whose memories of the abuse were repressed until later in adulthood had six years to bring a claim, measured from the time the victim became able to acknowledge the assault and its harm. Ch. 319, sec. 1, § 13-80-103.7(3.5), 1993 Colo. Sess. Laws 1908, 1909.

¶7 During the 2020 legislative session, legislators introduced H.B. 20-1296, which sought to amend section 13-80-103.7, the statute of limitations for civil actions alleging sexual misconduct. In connection with this proposed legislation, a legislator requested an opinion from the General Assembly's Office of Legislative Legal Services ("OLLS") regarding whether "a two-year reviving window for sexual abuse victims for whom the civil statute of limitations has run to bring civil claims against their alleged abusers" would violate Colorado's constitutional prohibition on retrospective legislation. Colo. Off. of Legis. Legal Servs., Opinion Letter on the Constitutionality of a Reviving Window for Civil Claims of Sexual Abuse (Jan. 13, 2020), at 1. OLLS advised the General Assembly that it "can retroactively amend a statute of limitations so long as the change applies only to claims for which the statute of limitations has not run." *Id.* at 3–4. However, OLLS explained, the legislature cannot revive claims that are barred by

the statute of limitations, *id.* at 1–2, and because "the intent of the proposed legislation is to revive claims that are barred by the statute of limitations, it is likely that a court would find the proposal unconstitutional," *id.* at 4. In sum, OLLS concluded:

> Once a statute of limitations has run, it is unconstitutional for the general assembly to revive a claim to which the statute of limitations defense applies. Thus, the proposal to allow civil sexual abuse claims despite the statute of limitations would likely be found unconstitutional by a Colorado court.

Id. H.B. 20-1296 eventually died in committee.[3]

¶8 The following legislative session, the General Assembly passed S.B. 21-073, which amended section 13-80-103.7 to prospectively remove any limitations period for civil actions alleging sexual misconduct. Ch. 28, sec. 1, § 13-80-103.7(1)(a), 2021 Colo. Sess. Laws 117, 117. This legislation applies to causes of action accruing on or after January 1, 2022 (the effective date), and existing causes of action for which the statute of limitations had not yet run as of that date. Ch. 28, sec. 1, § 13-80-103.7(1)(b), (6)(b), 2021 Colo. Sess. Laws 117, 117, 120.

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[3] Colo. Gen. Assemb., S. Comm. on State, Veterans, & Mil. Affs., Bill Summary for H.B. 20-1296, 72d Gen. Assemb., Reg. Sess. (June 12, 2020) https://leg.colorado.gov/content/01c98b57d3da016587258585006989 7f-hearing-summary [https://perma.cc/LC5P-8DYW].

¶9 Separately, the legislature passed the CSAAA (S.B. 21-088), which was codified at sections 13-20-1201 to -1207, C.R.S. (2022). Unlike S.B. 21-073, the CSAAA creates a new statutory right of relief for a "victim of sexual misconduct that occurred when the victim was a minor." Ch. 442, sec. 2, § 13-20-1202(1), 2021 Colo. Sess. Laws 2923, 2925. The Act permits a victim to bring a civil claim for damages against both "[a]n actor who committed the sexual misconduct" and "[a] managing organization that knew or should have known that an actor or youth-related activity or program posed a risk of sexual misconduct against a minor and the sexual misconduct occurred while the victim was participating in the youth-related activity or program operated or managed by the organization." *Id.* The Act defines "managing organization" to include a "public entity" as that term is defined under section 24-10-103(5) of the Colorado Governmental Immunity Act, which includes school districts. Ch. 442, sec. 2, § 13-20-1201(4), (7), 2021 Colo. Sess. Laws 2923, 2924; *see* § 24-10-103(5), C.R.S. (2022).

¶10 In the legislative declaration of the bill, the General Assembly found that a high percentage of child sexual abuse victims "delay disclosure well into adulthood, after the expiration of the time permitted to file civil actions against those responsible for the abuse" and that because of this delayed disclosure "statutes of limitations are often used to deny and defeat claims of childhood sexual abuse." Ch. 442, sec. 1, § (3)(b), (c), 2021 Colo. Sess. Laws 2922, 2923. The

legislature thus determined that the Act "does not revive any common law cause of action that is barred" but "instead creates a new right for relief for any person sexually abused in Colorado while the person was participating in a youth-related activity or program as a child." Ch. 442, sec. 1, § (4)(a), 2021 Colo. Sess. Laws 2922, 2923. It further determined that "[c]reating a new civil cause of action" for victims "who delayed reporting the abuse well into adulthood after the statute of limitations on an action has expired" is "in the best interest of the state's public health and safety" and is "related to a legitimate government interest" of allowing victims to hold abusers and their enablers accountable. Ch. 442, sec. 1, § (4)(b), (c), 2021 Colo. Sess. Laws 2922, 2923.

¶11 The text of the Act declares that the civil action it creates is "in addition to, and does not limit or affect, other actions available by statute or common law, before or after January 1, 2022," and that a claim under the Act "must be pleaded as a separate claim for relief if a complaint also asserts a common law claim for relief." Ch. 442, sec. 2, § 13-20-1202(2), 2021 Colo. Sess. Laws 2923, 2925.

¶12 For sexual misconduct occurring on or after January 1, 2022, the Act provides that a victim "may bring an action pursuant to this [Act] at any time without limitation." Ch. 442, sec. 2, § 13-20-1203(1), 2021 Colo. Sess. Laws 2923, 2925–26. As relevant here, for sexual misconduct that occurred between January 1, 1960, and January 1, 2022, the Act creates a three-year window to bring a claim

under the Act. Ch. 442, sec. 2, § 13-20-1203(2), 2021 Colo. Sess. Laws 2923, 2926 (requiring claims for such conduct to be commenced before January 1, 2025). Finally, the Act waives governmental immunity granted to public employees and public entities for claims made under the Act. Ch. 442, sec. 2–3, §§ 13-20-1207(1)(a), 24-10-106(1)(j), 2021 Colo. Sess. Laws 2923, 2926–27.

¶13 In a meeting of the House Judiciary Committee to discuss the bill, an OLLS representative confirmed that S.B. 21-088 sought to "establish a new statutory cause of action . . . that's different from the common law cause of action." Hearing on S.B. 21-088 before the H. Judiciary Comm., 73d Gen. Assemb., Reg. Sess. (June 3, 2021) (statement of Conrad Imel, OLLS). One of the bill's sponsors reinforced this understanding of the bill, stating, "What we're doing with Senate Bill 88 is creating a brand-new cause of action that's new to the law in Colorado." *Id.* (statement of Rep. Matt Soper).

¶14 Concerns about the constitutionality of the bill were raised throughout the legislative process. In a hearing before the Senate Judiciary Committee, a University of Colorado Law School professor testified that, in his opinion, S.B. 21-088 was clearly unconstitutional retrospective legislation. According to the professor, by "creat[ing] a whole new cause of action," the bill "impose[d] new obligations on past actions, which is literally what the [s]upreme [c]ourt said is forbidden by Section 11." Hearing on S.B. 21-088 before the S. Judiciary Comm.,

73d Gen. Assemb., Reg. Sess. (Colo. March 11, 2021) (testimony of Professor Richard Collins, Colo. Cath. Conf.). The professor opined that, in that regard, S.B. 21-088 was "indistinguishable" from the 2020 legislative session proposal considered in the OLLS opinion. *Id.*

¶15 Despite the concerns expressed about the bill's constitutionality,[4] the legislature passed S.B. 21-088, and on July 6, 2021, the Governor signed the CSAAA into law.

II. Facts and Procedural History

¶16 From 2001 to 2005, A.S. was a student at Rangeview High School, which was operated by Aurora Public Schools (the "school district"). David James O'Neill worked at Rangeview as a girls' basketball and softball coach, attendance coordinator, and detention supervisor. O'Neill recruited A.S. as a student athlete,

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[4] Legislators openly acknowledged these concerns both in committee and on the floor. One legislator reasoned that "there is a powerful public interest" in providing a remedy to victims, and that even if the constitutionality of the bill was a "close call," that close call "goes to the survivors." Hearing on S.B. 21-088 before the S. Judiciary Comm., *supra* (statements of Rep. Mike Weissman). Another supported the bill because "this is the best we can do for victims," and stated that the question of the constitutionality of the bill was "not the purview of [the legislature]." *Id.* (statement of Rep. Dylan Roberts). Yet another openly acknowledged that the bill "rips up the rulebook as it relates to [the] statute of limitations," asserting that "it's time that we protect children over those who abused them . . . ." Second Reading of S.B. 21-088 on the S. Floor, 73d Gen. Assemb., Reg. Sess. (May 12, 2021) (statement of Sen. Rhonda Fields).

and after an injury sidelined her, he appointed her the "student manager" of the team. A.S. alleges that O'Neill used his position of authority to subject her to escalating levels of sexual abuse, including inappropriately touching her, exposing himself to her, and forcing her to perform oral sex on him over 100 times over the course of her four years at Rangeview, starting when she was 14 years old. A.S. claims that O'Neill threatened her when she tried to refuse or resist. She asserts that the abuse was obvious "to anyone paying attention," but that school officials did nothing to intervene or investigate, despite receiving a report from another coach who expressed concerns about O'Neill's behavior.

¶17 A.S. maintains that she was unable to recognize the impropriety and severity of O'Neill's abuse while she was a student at Rangeview, much less report it. But in 2007, when A.S. began to "fully understand the inappropriate nature of the sexual exploitation by O'Neill," she filed a report with the Aurora Police Department. The police informed her that her claims were time-barred by the applicable statute of limitations, so she did not bring any claims against O'Neill or the school district at that time.[5]

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[5] When A.S. reported the abuse to the police in 2007 (roughly three years after the alleged abuse ended), the applicable limitations period was six years. It is unclear from the record why the police incorrectly told A.S. that her claims were time-barred.

¶18 On January 13, 2022, A.S. and B.S. brought a claim under the CSAAA against O'Neill and the school district (the defendants), alleging that A.S. has suffered economic, emotional, and physical distress, including post-traumatic stress disorder, anxiety, depression, and daily "trauma triggering episodes" as a result of O'Neill's abuse, much of which continues to affect her to this day. The complaint asserts that the defendants are jointly and severally liable for the injuries and damages she has suffered due to O'Neill's sexual misconduct.

¶19 The defendants each moved to dismiss the complaint under C.R.C.P. 12(b)(5), arguing (as relevant here) that the CSAAA violates the Colorado Constitution's prohibition on retrospective legislation. The trial court granted the motions, holding that section 13-20-1202, C.R.S. (2022), is unconstitutionally retrospective as applied to the claim under the CSAAA in this case.[6]

¶20 The plaintiffs appealed the trial court's order to the court of appeals. The school district filed a motion under section 13-4-110(1)(a), C.R.S. (2022), to transfer jurisdiction from the court of appeals to this court. This court denied the motion

[6] The trial court also held that even if the statute was constitutional, the plaintiffs' claim would be time-barred under section 13-80-103.7, C.R.S. (2022). This issue is not before us, and we express no opinion on it.

but granted leave to seek certiorari review under C.A.R. 50. The school district then filed a C.A.R. 50 petition, which O'Neill joined, and which this court granted.

III. C.A.R. 50 Jurisdiction

¶21 We granted the petition for writ of certiorari under C.A.R. 50 because this case involves a matter of substance that is of sufficient public importance to justify the deviation from normal appellate processes and require immediate determination in this court. First, because this issue has been raised in at least three other pending cases, resolution of this question by this court will provide necessary guidance to the lower courts on an issue that affects numerous current and prospective litigants throughout the state. Second, swift resolution of this issue is particularly important given the three-year window provided by the CSAAA (expiring January 1, 2025), so that victims may know whether they may bring otherwise time-barred claims and defendants may know whether they may be liable for such claims. *See Ritchie v. Polis*, 2020 CO 69, ¶ 4, 467 P.3d 339, 342 (granting review pursuant to C.A.R. 50 because of a rapidly approaching statutory deadline). Finally, the court of appeals does not have initial jurisdiction to review the district court's order declaring the CSAAA unconstitutional, necessitating review by this court. *See* § 13-4-102(1)(b), C.R.S. (2022) (granting the court of appeals initial jurisdiction over interlocutory appeals and appeals of final

judgments of the district courts, except in cases in which a statute has been declared unconstitutional).

IV. Discussion

¶22 We begin by addressing two objections the plaintiffs raise to the school district's standing to challenge the constitutionality of the CSAAA and conclude that neither objection precludes our review. Turning to the merits, we discuss the Story definition[7] of an unconstitutionally retrospective law. Next, we analyze this court's application of the Story definition in *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002), and clarify that public policy considerations cannot salvage an otherwise unconstitutionally retrospective law. Finally, we apply the Story definition to the facts of this case. Because the CSAAA creates a new cause of action for sexual misconduct that predates the Act and for which any previously available claims are time-barred, it creates a new obligation and a new disability with respect to such conduct and therefore amounts to impermissible retrospective legislation under the Story definition. Accordingly, we hold that the

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[7] The "Story definition" is named for Justice Joseph Story of the United States Supreme Court, who first articulated the definition in *Society for the Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (C.C.D.N.H. 1814). *Ficarra v. Dep't of Regul. Agencies*, 849 P.2d 6, 16 n.15 (Colo. 1993).

CSAAA is unconstitutional as applied to the plaintiffs' claim against the defendants.

A. Standing

¶23 The plaintiffs do not contest O'Neill's ability to challenge the CSAAA as unconstitutionally retrospective. However, the plaintiffs argue that the school district does not have standing to challenge the constitutionality of the CSAAA for two reasons: (1) the Colorado Constitution's retrospectivity clause protects only individual persons, not the government; and (2) as a political subdivision,[8] the school district cannot challenge the constitutionality of state legislation. We conclude that neither of these contentions precludes our review. As our case law reveals, we have considered a number of retrospectivity challenges brought by public entities and have never rejected such claims on grounds that the protections of the retrospectivity clause of article II, section 11 of the Colorado Constitution are limited to individual persons. And because O'Neill clearly has standing to challenge the CSAAA as unconstitutionally retrospective, we have subject matter jurisdiction to consider his argument and need not separately address the school district's standing to bring the identical contention.

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[8] Whether the school district should be considered a political subdivision for standing purposes was not contested in this case.

1. Legal Principles

¶24 Because standing is a jurisdictional issue that "must be determined prior to a decision on the merits," *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 7, 338 P.3d 1002, 1006, we address the plaintiffs' standing arguments first.[9]

¶25 The purpose of the standing inquiry is to test a litigant's right to raise a legal argument or claim. *Reeves-Toney v. Sch. Dist. No. 1 in City & Cnty. of Denver*, 2019 CO 40, ¶ 21, 442 P.3d 81, 85–86. A party must have standing for a court to exercise jurisdiction over a dispute. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). Whether a party has standing is a question of law that we review de novo. *Reeves-Toney*, ¶ 20, 442 P.3d at 85.

¶26 To establish standing under Colorado law, a party must satisfy two criteria: (1) the party must have suffered injury-in-fact; and (2) this injury must be to a legally protected interest. *Ainscough*, 90 P.3d at 855 (citing *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977)). The second prong of this inquiry presents the question of whether a party has a claim for relief under the constitution, the common law, a statute, or a rule or regulation. *Id.* at 856.

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[9] The plaintiffs did not object to the school district's standing to challenge the CSAAA on constitutional grounds until their briefing on the merits before this court. We nevertheless address the arguments because "[s]tanding is a jurisdictional prerequisite that can be raised any time during the proceedings." *Hickenlooper*, ¶ 7, 338 P.3d at 1006.

¶27 The plaintiffs challenge the school district's standing under the second prong. First, they contend that Colorado's retrospectivity clause protects only individuals, not the government, and thus confers no legally protected interest on a political subdivision such as the school district (assuming the school district is a political subdivision for the purposes of standing). Second, and relatedly, they argue that under the political subdivision doctrine, any interest the school district may have in avoiding the harm of retrospective legislation is not legally protected, i.e., it may not be vindicated through judicial intervention. *See Denver Urb. Renewal Auth. v. Byrne*, 618 P.2d 1374, 1379 (Colo. 1980) (describing the political subdivision doctrine as raising the "question [of] whether a legally protected interest is implicated"). We address each argument in turn.

2. Retrospectivity Clause

¶28 Colorado's constitution provides: "No ex post facto law, nor law impairing the obligation of contracts, *or retrospective in its operation*, . . . shall be passed by the general assembly." Colo. Const. art. II, § 11 (emphasis added). The plaintiffs contend that Colorado's retrospectivity clause protects only individual and private rights, not those of the state or its political subdivisions. As such, the plaintiffs contend, the school district cannot claim its protections. In support of their interpretation of article II, section 11, the plaintiffs cite to a single Colorado authority: *Bedford v. White*, 106 P.2d 469 (Colo. 1940), *rev'd on other grounds, Police*

Pension and Relief Board of City and County of Denver v. Bills, 366 P.2d 581 (Colo. 1961).[10]

¶29 In *Bedford*, two retired supreme court justices brought an action against the state auditor, seeking a declaratory judgment regarding their right to pensions allegedly payable to them under a state statute. 106 P.2d at 470. The auditor argued that the pension scheme violated article V, sections 28 and 34, of the Colorado Constitution. *Id.* at 471; *see* Colo. Const. art. V, § 28 ("No bill shall be passed giving any extra compensation to any public officer or employee, agent, or contractor after services have been rendered . . . ."); Colo Const. art. V, § 34 ("No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state . . . ."). This court rejected both contentions. *Bedford*, 106 P.2d at 475–76.

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[10] To the extent the plaintiffs otherwise rely exclusively on case law from other states interpreting their respective state constitutional provisions, we are not bound by those decisions. *See People v. Davis*, 794 P.2d 159, 189 (Colo. 1990) ("[W]e are not bound by the decisions of the courts of other states interpreting their particular statutes."), *overruled on other grounds by People v. Miller*, 113 P.3d 743, 748–49 (Colo. 2005); *Curious Theatre Co. v. Colo. Dep't. of Pub. Health & Env't*, 220 P.3d 544, 551 (Colo. 2009) ("This court is the final arbiter of the meaning of the Colorado Constitution . . . .").

¶30 Relevant here, after rejecting the auditor's argument under article V, section 28, this court observed in dicta:

> Even though a law creates pensionable status based on services wholly rendered prior to its enactment and in such sense might be considered retrospective in operation, it would not offend against section 11 of article II of the Constitution, for this section, a part of the Bill of Rights, is for the protection of the rights of the citizen and is not applicable to the State.

Id. at 476 (citing *Graham Paper Co. v. Gehner*, 59 S.W.2d 49 (Mo. 1933)).

¶31 In the more than eighty years since *Bedford*, this court has never cited *Bedford* for this proposition. To the contrary, this court has reviewed retrospectivity clause challenges by public entities on multiple occasions. *See, e.g.*, *Acad. of Charter Schs. v. Adams Cnty. Sch. Dist. No. 12*, 32 P.3d 456, 465 (Colo. 2001) (permitting a school district's challenge to charter school legislation under article II, section 11 of the Colorado Constitution); *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 436–38 (Colo. 2000) (holding that Greenwood Village, a political subdivision, had standing to challenge a statute as unconstitutional retrospective legislation); *Cent. Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 348–49 (Colo. 1994) (recognizing a water conservancy district as a political subdivision and rejecting its challenge to a statute under the retrospectivity clause on the merits). We have never rejected such claims on grounds that Colorado's retrospectivity clause protects only individuals or other private parties. Indeed, by allowing such claims to be raised, we have contemplated that article II,

section 11 of the Colorado Constitution protects the rights of political subdivisions as well. *See, e.g.*, *City of Greenwood Vill.*, 3 P.3d at 438 (holding that Greenwood Village had a legally protected interest and alleged sufficient injury-in-fact to bring a retrospectivity challenge).

3. The Political Subdivision Doctrine

¶32 The plaintiffs further contend that under the political subdivision doctrine, the school district "exist[s] only for the convenient administration of the state government, created to carry out the will of the state," *Bd. of Cnty. Comm'rs of Dolores Cnty. v. Love*, 470 P.2d 861, 862 (Colo. 1970), and therefore it cannot challenge the actions of superior state entities, including legislation passed by the General Assembly, *see Denver Ass'n for [Disabled] Child., Inc. v. Sch. Dist. No. 1 in the City & Cnty. of Denver*, 535 P.2d 200, 204 (Colo. 1975). Whatever the precise contours of the political subdivision doctrine may be, we conclude we need not address whether the school district lacks standing under that doctrine to challenge the CSAAA as unconstitutionally retrospective because O'Neill clearly has individual standing to raise this claim.

¶33 In *Lobato v. State*, 218 P.3d 358 (Colo. 2009), we declined to address the school districts' standing to raise constitutional challenges to a state statute, in comparable circumstances. In *Lobato*, a group of parents and fourteen school districts in the San Luis Valley sued the State of Colorado, the Colorado State

Board of Education, the Commissioner of Education, and the Governor, claiming that Colorado's public school financing system violated article IX, sections 2 and 15, of the state constitution. *Id.* at 362. It was undisputed that the plaintiff parents had standing to bring their claims, but the defendants argued that the school districts lacked standing to challenge the adequacy of the school finance system under the political subdivision doctrine. *Id.* at 362–63 (citing *Lobato v. State*, 216 P.3d 29, 34–35 (Colo. App. 2008)). Recognizing that "[s]tanding represents a challenge to the court's subject matter jurisdiction," we held that "[b]ecause we have subject matter jurisdiction due to the standing of the plaintiff parents, it is not necessary to address the standing of parties bringing the same claims as parties with standing." *Id.* at 368.

¶34 Here, O'Neill and the school district raise the same argument regarding the unconstitutionality of the CSAAA. Both defendants contend that the Act is unconstitutionally retrospective to the extent it permits the plaintiffs to bring a claim for alleged sexual misconduct that predated the Act and for which any previously available causes of action are time-barred. No one contests O'Neill's standing to raise this argument. Because we have subject matter jurisdiction over

this dispute due to O'Neill's standing, it is not necessary to address the standing of the school district to bring the identical claim.[11] *See id.*

B. Merits

¶35 Having concluded that we have subject matter jurisdiction to address the constitutionality of the CSAAA, we now turn to the merits of this challenge. The defendants contend that the CSAAA is unconstitutionally retrospective to the extent it creates a new cause of action for sexual misconduct that predates the Act and for which any previously available cause of action would be time-barred. We agree.

1. Standard of Review

¶36 We review the constitutionality of statutes de novo, beginning with the presumption that the statute is constitutional. *Justus v. State*, 2014 CO 75, ¶ 17, 336 P.3d 202, 208; *E-470 Pub. Highway Auth. v. Revenig*, 91 P.3d 1038, 1041 (Colo.

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[11] True, the school district separately challenges the CSAAA's retroactive waiver of governmental immunity. But because we hold below that the CSAAA is unconstitutionally retrospective, the plaintiffs' claim under the Act must be dismissed, and the separate issue of whether the CSAAA's waiver of immunity is unconstitutional is rendered moot. *See In re Marriage of Wiggins*, 2012 CO 44, ¶ 16, 279 P.3d 1, 5 ("An issue is moot if 'a judgment which, when rendered, cannot have any effect upon an existing controversy.'" (quoting *Rsrv. Life Ins. Co., Dallas, Tex. v. Frankfather*, 225 P.2d 1035, 1036 (Colo. 1950))). Because we do not address that issue, we need not separately examine whether the school district has standing to raise that argument.

2004). "Declaring a statute unconstitutional is one of the gravest duties impressed upon the courts," one which we undertake only upon proof beyond a reasonable doubt that a statute is unconstitutional. *People v. Moreno*, 2022 CO 15, ¶ 9, 506 P.3d 849, 852 (quoting *People v. Graves*, 2016 CO 15, ¶ 9, 368 P.3d 317, 322).

2. Analysis

¶37 The United States Constitution prohibits both Congress and the states from enacting ex post facto laws. U.S. Const. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."); *id.* at § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . ."). Early in this country's history, the United States Supreme Court held that these ex post facto clauses apply only to criminal statutes. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

¶38 Several states, however, have adopted constitutional provisions that also prohibit after-the-fact legislation in the civil context.[12] In Colorado's constitution,

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[12] *See Ficarra*, 849 P.2d at 12 n.12 (citing 2 Norman J. Singer, Sutherland Statutes and Statutory Construction § 41.03, at 344, 346 n.9 (4th ed. 1986)) (listing seven other states that have express constitutional retrospectivity prohibitions similar to Colorado's). Other states, including some that have also passed laws retroactively removing or suspending statutes of limitation for time-barred claims of sexual misconduct, do not have constitutional prohibitions on retrospective civil legislation or interpret such prohibitions more narrowly than we do ours. *See, e.g.*, *Consol. Edison Co. of N.Y. v. State Bd. of Equalization & Assessment*, 466 N.Y.S.2d 575, 583 (N.Y. Sup. Ct. 1983) ("It is well settled that retrospective legislation is prohibited by neither the Federal nor the New York State Constitution, so long as it does not violate the general standards of due process and equal protection."

article II, section 11 prohibits both ex post facto laws as well as the enactment of any law that is "retrospective in its operation." This clause does not mean that any law that applies retroactively is unconstitutional; rather, only certain types of retroactive legislation are unconstitutionally *retrospective*. *Ficarra v. Dep't of Regul. Agencies*, 849 P.2d 6, 12 (Colo. 1993) ("[U]nder our state constitution, some retroactively applied civil legislation is constitutional, and some is not, and it is helpful to mark this distinction by using the term *retrospective* to apply only to legislation whose retroactive effect violates the constitutional prohibition."). The purpose of the retrospectivity clause is to prevent the unfairness that would otherwise result from "changing the consequences of an act after that act has occurred," *City of Colo. Springs v. Powell*, 156 P.3d 461, 465 (Colo. 2007), or from "appl[ying] . . . new law to rights already in existence," *City of Golden v. Parker*, 138 P.3d 285, 289 (Colo. 2006). In other words, the prohibition on retrospective legislation prevents the legislature from changing the rules after the fact because to do so would be unjust. *See Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990)

(citation omitted)), *aff'd* 492 N.E.2d 130 (N.Y. 1986) (mem.); *Quarry v. Doe I*, 272 P.3d 977, 983 (Cal. 2012) (holding that the legislature may revive time-barred claims if it does so with "express language of revival"); *see generally* 2 Shambie Singer, Sutherland Statutes and Statutory Construction § 41:1, at 309–31 (8th ed. 2022).

("The purpose of the constitutional ban of retrospective legislation . . . is to prevent the unfairness that results from changing the legal consequences of an act after the act has occurred."). As such, this constitutional prohibition addresses similar injustices as the ban on ex post facto laws. *See People v. D.K.B.*, 843 P.2d 1326, 1329 n.2 (Colo. 1993) ("It is well settled . . . that the purposes of the provision forbidding ex post facto laws and the provision forbidding retrospective laws are similar; both seek to prevent unfairness in altering the legal consequences of events or transactions after the fact.").

¶39 It is well established that statutes are presumed to operate prospectively unless there is legislative intent to the contrary. *City of Golden*, 138 P.3d at 289; *Brown v. Challis*, 46 P. 679, 680 (Colo. 1896); § 2-4-202, C.R.S. (2022). Here, there is no dispute that the legislature expressly intended the CSAAA to apply retroactively to conduct that predates the Act. The question is whether retroactive application of the CSAAA is unconstitutionally retrospective under article II, section 11 of the Colorado Constitution.

¶40 In *Denver, S.P. & P.R. Co. v. Woodward*, 4 Colo. 162, 167–68 (1878), this court adopted the Story definition of an impermissibly retrospective law. Under that definition, a law violates article II, section 11's prohibition if it (1) impairs a vested right; or (2) creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. *Specialty*

Rests. Corp. v. Nelson, 231 P.3d 393, 399 (Colo. 2010); *Ficarra*, 849 P.2d at 15–16. The Story definition articulates two (arguably somewhat overlapping) means of identifying the unfairness created by retrospective legislation. A law that meets either "prong" of the definition is unconstitutionally retrospective.

¶41 The Story definition focuses on laws that are substantive instead of procedural. In other words, while retroactive application of statutes is generally disfavored under both common law and statute, only retroactive application of a *substantive* law is constitutionally prohibited. *See Specialty Rests. Corp.*, 231 P.3d at 399 ("[R]etroactive operation of a substantive statute constitutes impermissible retrospective application of that statute."). By contrast, retroactive application of a law is permissible if the law effects a change that is merely *procedural* or remedial. *DeWitt*, 54 P.3d at 854.

¶42 In Colorado, "[a] statute is substantive if it creates, eliminates, or modifies vested rights or liabilities. . . . In contrast, a procedural statute relates only to remedies or modes of procedure to enforce existing substantive rights or liabilities . . . ." *Specialty Rests. Corp.*, 231 P.3d at 399; *Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm'rs*, 948 P.2d 1002, 1012 (Colo. 1997).

¶43 Any law that "takes away any legal defense" is substantive. *See, e.g.*, *City of Colo. Springs v. Neville*, 93 P. 1096, 1097 (Colo. 1908) ("[I]t was held to be incompetent for the Legislature to create a new ground for the support of an

existing cause of action, or to take away any legal defense to such an action."); *Brown*, 46 P. at 680 (same); *Woodward*, 4. Colo. at 164–65 (holding that a statute is retrospective if it affects "an existing right of defense" to a cause of action); *cf. Cont'l Title Co. v. Dist. Ct.*, 645 P.2d 1310, 1315 (Colo. 1982) (holding that a statute was not retrospective in part because "[i]t does not remove an affirmative defense that might otherwise be asserted by [the defendant]"). For example, where the statute of limitations has run and a claim is barred, "the right to plead it as a defense is a vested right which cannot be taken away or impaired by [any] subsequent legislation." *Jefferson Cnty. Dep't. of Soc. Servs. v. D.A.G.*, 607 P.2d 1004, 1006 (Colo. 1980) (quoting *Willoughby v. George*, 5 Colo. 80, 82 (1879)). In other words, when a statute of limitations bar has attached, the legislature cannot revive the action. *Id.*

¶44 The plaintiffs rely heavily on this court's application of the Story definition in *DeWitt*, so special attention to that case is warranted. In *DeWitt*, the court analyzed a 1995 amendment to the Uniform Probate Code that automatically revoked an insured's designation of a former spouse as a life insurance beneficiary upon the dissolution of the insured's marriage. 54 P.3d at 852. The case involved two decedents who died after the 1995 amendment but whose marriages had been dissolved before its enactment. *Id.* Representatives of the decedents sought a declaratory judgment to determine whether the amendment applied retroactively

to automatically revoke the decedents' designation of their former spouses as beneficiaries under their respective life insurance policies. *Id.* at 854. This court concluded that the retroactive application of the amendment was not unconstitutionally retrospective; accordingly, the designation of the decedents' former spouses as beneficiaries was automatically revoked upon the dissolution of their marriages. *Id.* at 852–53, 859. We concluded that the named beneficiaries had no vested rights under the life insurance contract, nor did retroactive application of the statute impose any new duty, obligation, or disability on them. *Id.* at 857. Turning to the decedents' interests, we concluded that the statute was "procedural because it relates only to a mode of procedure to enforce the right of each decedent to designate a beneficiary." *Id.* Moreover, because the statutory change concerned the highly regulated insurance industry, this court reasoned that the decedents in both cases could reasonably expect that their policies would be regulated by statute, including the possibility of a statute addressing procedural changes in beneficiary designation. *Id.* at 857–58.

¶45 The plaintiffs here focus on language in *DeWitt* stating that in the context of a retrospectivity analysis, the existence of a 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," and that a statute "must bear a rational relationship to the legitimate government interest that is asserted

in order to be permissibly retroactive." *Id.* at 855. Relying on this language, the plaintiffs argue that *DeWitt* stands for the proposition that even if a law is retrospective under the Story definition, it is nonetheless constitutional if it is reasonably related to a legitimate government interest.

¶46 Not so. The references in *DeWitt* to the consideration of public policy does not convert the Story definition into an ultimate balancing test of policy and constitutional interests. The quoted passage in *DeWitt* cited to three cases: *Ficarra*, 849 P.2d at 21; *Van Sickle*, 797 P.2d at 1271; and *Lakewood Pawnbrokers, Inc. v. City of Lakewood*, 517 P.2d 834, 838 (Colo. 1973). Each of these cases concerned laws that enacted or amended building safety code requirements or licensing requirements in regulated industries. In each case, the holder of a building permit or license complained that a prospective change in the regulatory scheme had the retroactive effect of impairing their vested rights in the permit or license. In each case, this court rejected the challenge to the law. *See Ficarra*, 849 P.2d at 21 (holding that plaintiffs had no vested right in the renewal of their bail bond licenses); *Van Sickle*, 797 P.2d at 1271 (holding that reliance on a building permit does not insulate the permit holder from later changes in ordinances enacted under the police power for protection of the public); *Lakewood Pawnbrokers*, 517 P.2d at 838 (holding that it was not unconstitutional to apply licensing requirements to existing pawnbroker businesses).

¶47 Thus, these cases each considered public policy in the context of whether the law was a reasonable exercise of the legislative body's *regulatory* power. And importantly, they did so only as additional grounds to buttress the court's conclusion about the law's retrospectivity, not to override that conclusion. *See DeWitt*, 54 P.3d at 857–58; *Ficarra*, 849 P.2d at 21–22; *Lakewood Pawnbrokers*, 517 P.2d at 838; *see also City of Golden*, 138 P.3d at 290 (holding that a charter amendment impaired the vested rights of a developer; additionally observing that "no overriding public policy concerns . . . justify [its] retroactive application"). Indeed, we have never relied on public policy to salvage an otherwise unconstitutional retrospective law.

¶48 We clarify today that there is no "public policy exception" to the ban on retrospective laws in article II, section 11 of the Colorado Constitution. If the constitutional proscription in article II, section 11 were required to yield to the policy preferences of the legislature, there would be no proscription at all; the legislature could make any retrospective law constitutional simply by proclaiming that the law serves a legitimate government interest. Such a back-end rational-basis balancing of an otherwise unconstitutional law against the public interest would render the retrospectivity clause meaningless. This cannot be.

3. Application

¶49 The legislature was careful with S.B. 21-088 not to directly revive time-barred claims, which would plainly impair vested rights. *See* Ch. 442, sec. 1, § 4(a), 2021 Colo. Sess. Laws 2922, 2923 ("This act does not revive any common law cause of action that is barred and instead creates a new right for relief . . . ."); *D.A.G.*, 607 P.2d at 1006 (holding that the legislature cannot revive an action to which the statute of limitations bar has attached). Instead, it created a three-year window to bring a new cause of action to accomplish the same ends. But the retrospectivity clause prohibits the legislature from "accomplish[ing] that indirectly, which it could not do directly." *Woodward*, 4 Colo. at 167. The new cause of action under the CSAAA attaches liability to conduct that predates the Act and for which previously available causes of action would be time-barred. To this extent, the Act clearly creates a new obligation and disability with respect to past transactions or considerations, and thus meets the Story definition of an impermissible retrospective law.

¶50 Overwhelming evidence in the Act's language and legislative history demonstrate that the CSAAA creates a new substantive right. The text of the Act could not be clearer: "The civil action described in this section is *in addition to* . . . other actions available by statute or common law . . . and must be pleaded as a *separate claim for relief* if a complaint also asserts a common law claim for relief."

Ch. 442, sec. 2, § 13-20-1202(2), 2021 Colo. Sess. Laws 2923, 2925 (emphasis added). The legislative declaration in S.B. 21-088 expressly confirms that the Act "creates a new right for relief." Ch. 442, sec. 1, § 4(a), 2021 Colo. Sess. Laws 2922, 2923. And OLLS testimony to the House Judiciary Committee reinforced the understanding that the CSAAA would establish a new, distinct cause of action. *See* Hearing on S.B. 21-088 before the H. Judiciary Comm. 73d Gen. Assemb., Reg. Sess. (June 3, 2021) (Conrad Imel (OLLS) stating that the bill "establish[es] a new statutory cause of action . . . that's different from the common law cause of action"). If the CSAAA does not create a new substantive right, it is difficult to imagine what law would.

¶51 By providing victims of sexual misconduct a new statutory right of relief, the CSAAA necessarily creates a new obligation and attaches a new disability upon the individuals and entities from whom that relief can be demanded. As our case law makes clear, one party's new claim for relief is another party's new obligation or disability. "Right and remedy are reciprocal." *Brown*, 46 P. at 680. Accordingly, the CSAAA's imposition of new liability to "transactions or considerations already past" is unconstitutional. *Specialty Rests. Corp.*, 231 P.3d at 399.

¶52 Although it does not directly revive time-barred claims, the CSAAA's three-year window to bring a new cause of action for sexual misconduct that occurred between January 1, 1960, and January 1, 2022, seeks to achieve the same ends by

other means. Yet for the same reason that the legislature cannot revive time-barred claims, *see D.A.G.*, 607 P.2d at 1006, it cannot create a new cause of action that covers the same conduct and apply it retroactively. *See Willoughby*, 5 Colo. at 82 (holding that the retroactive application of a newly created writ of error was unconstitutional where it had the same effect as reviving a time-barred appeal). The CSAAA attaches liability for the same conduct covered by the existing common law cause of action for sexual misconduct. *See, e.g.*, *Hurtado v. Brady*, 165 P.3d 871, 872, 875 (Colo. App. 2007) (holding that the six-year statute of limitations for common law sexual misconduct claims applied to a civil claim based on unlawful sexual contact in violation of sections 18-3-404(1)(g) and 18-6.5-104(7)(c)); Ch. 442, sec. 2, § 13-20-1201(8)(a), 2021 Colo. Sess. Laws 2923, 2924 (defining "[s]exual misconduct" under the CSAAA to include, inter alia, "[a] first degree misdemeanor or a felony offense described in part 3 or 4 of article 3 of title 18 or a felony offense described in article 6 or 7 of title 18"). Accordingly, the Act does not avoid the retrospectivity problem that plainly bars the revival of time-barred common law claims for sexual misconduct. In short, the CSAAA imposes liability for past conduct for which defendants would not otherwise be liable. That is tantamount to creating a new obligation or attaching a new disability with respect to transactions or considerations already past—the very essence of retrospective legislation.

¶53 We do not hold that the CSAAA is unconstitutional in its entirety, or that all claims made under the CSAAA are precluded by the retrospectivity clause. Our holding does not affect claims brought under the CSAAA for which the previously applicable statute of limitations had not run as of January 1, 2022. Rather, we conclude the CSAAA is unconstitutionally retrospective to the extent that it permits a victim to bring a claim for sexual misconduct based on conduct that predates the Act and for which previously available causes of action were time-barred. The plaintiffs' claim under the CSAAA against O'Neill and the school district, which would have been time-barred under the previously applicable statute of limitations, therefore must be dismissed.

V. Conclusion

¶54 Our constitutional form of government has inherent costs; namely, the limitations it places on the legislature's ability to act in ways it deems to be in the public interest. But the people of this state determined that such constitutional limitations on the legislature's power were necessary to prevent the legislature from encroaching on certain rights they considered to be crucial to a flourishing society. Article II, section 11's prohibition on retrospective legislation ensures that people have notice of the consequences of their actions *before* they act—a foundational component of due process. *See Graves*, ¶ 17, 368 P.3d at 324 ("Due process requires laws to give fair warning of prohibited conduct so that

individuals may conform their actions accordingly." (first citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); and then citing *People v. Janousek*, 871 P.2d 1189, 1195 (Colo. 1994))).

¶55 Without question, sexual abuse causes severe physical, psychological, and economic harm both to victims and their loved ones, and its destructive impact can last long after the abuse has ended. The fear of retaliation, stigmatization, or not being believed, as well as intense experiences of shame and anxiety, prevent many victims of sexual abuse, especially those who were children when the abuse occurred, from acknowledging the abuse they have suffered or the harm it has caused them until much later in life. We certainly understand the General Assembly's desire to right the wrongs of past decades by permitting such victims to hold abusers and their enablers accountable. But the General Assembly may accomplish its ends only through constitutional means. The retrospectivity clause of the Colorado Constitution prohibits retroactive legislation that creates a new obligation, imposes a new duty, or attaches a new disability with respect to past transactions or considerations. By creating a "new right for relief" that attaches liability for conduct predating the Act and for which any previously available cause of action would be time-barred, the CSAAA does just that. The CSAAA is therefore unconstitutional as applied to the plaintiffs' claim in this case.

¶56 Accordingly, the district court's order granting the defendants' motions to dismiss is affirmed.