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COLORADO SUPREME COURT Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	
C.A.R. 50 CERTIORARI TO THE COURT OF APPEALS Case No. 2020CA1583	
DISTRICT COURT, ARAPAHOE COUNTY Honorable Elizabeth Beebe Volz Case No. 2022CV30065	
Petitioners: AURORA PUBLIC SCHOOLS; and DAVID JAMES O'NEILL, v. **Respondents:** ANGELICA SAUPE; and BRIAN SAUPE.	**▲ COURT USE ONLY ▲** Case No.: 2022SC824
Attorneys for Amicus Curiae Archdiocese of Denver: Scott M. Browning, #23118 Michael D. Plachy, #22014 Caitlin C. McHugh, #45097 LEWIS ROCA ROTHGERBER CHRISTIE LLP 1601 19th Street, Suite 1000 Denver, CO 80202 Phone: 303-623-9000 Email: sbrowning@lewisroca.com mplachy@lewisroca.com cmchugh@lewisroca.com	

ARCHDIOCESE OF DENVER'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER AURORA PUBLIC SCHOOLS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29, C.A.R. 32, and C.A.R. 53(g), including all formatting requirements set forth in these rules. Specifically, the undersigned counsel certifies that

The brief complies with the applicable word limits set by C.A.R. 53(g) because it contains 4,737 words.

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c) and C.A.R. 53(g).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29, C.A.R. 32, and C.A.R. 53.

Dated: January 17, 2023

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INTEREST OF THE AMICUS

The retroactive private cause of action in the Child Sexual Abuse Accountability Act (the "Act") has and will in the future have a dramatic and potentially fatal impact on non-profits across the state of Colorado, including the Archdiocese of Denver ("Archdiocese"). These non-profits have long provided essential services to underprivileged communities in our state. The retroactive law threatens the financial viability of those non-profits and their ability to continue to serve those in need.

The Archdiocese's impact on Colorado is wide-reaching. There are 149 locations within the Archdiocese where more than 162,000 individuals worship actively and dedicate time to the community. The Archdiocese operates 35 schools serving 9,100 students. It is the largest private provider of human services and second only to the State of Colorado in total human services provided. Catholic Charities of Denver shelters, feeds, houses, educates, and provides emergency assistance to individuals in our State. In fiscal year 2021, Catholic Charities served 53,100 Coloradans, including 125,000 nights of shelter and 400,000 meals. It coordinated the services of 2,200 volunteers donating over

30,000 hours. Catholic Charities, through funds raised throughout the Archdiocese, spent $58.7 million dollars, with more than $.88 of every dollar went directly to serve those in need. These services are the culmination of many small actions that provide critical services to Coloradoans. Just one such example is that last year Catholic Charities provided 500,000 free diapers to people in need in Colorado.

In 2019 and 2020 the Archdiocese cooperated with the Attorney General's Office for an independent review of its records by a Special Master, a former United States Attorney. This exhaustive review and culminating report confirmed that there were historic cases of sexual abuse of children by clergy within the Archdiocese—almost all of those were more than 30 years ago. That review and report also confirmed that there were no known cases of abuse in over 20 years. At the same time, the Archdiocese as well as the Diocese of Colorado Springs and Diocese of Pueblo initiated an independent reparations program that led to payments totaling over $7,000,000 to survivors of abuse. In the last 30 years, the Archdiocese has also implemented stringent policies to prevent abuse of minors and to investigate all allegations of abuse.

To date, three claims have been filed against the Archdiocese alleging a cause of action under section 13-20-1203, C.R.S., and many others have been threatened.

SUMMARY OF ARGUMENT

Since 1879, just three years after Colorado attained statehood, this Court has held that Colo. Const. art. II, § 11 bars the legislature from reviving previously time-barred claims. Despite extensive testimony that sections 13-20-1202 and 1203, C.R.S were unconstitutional and statements by Colorado's Attorney General that the bill was unnecessary, the legislature enacted the law. In so doing, it disregarded its obligation to interpret and uphold Colorado's constitution, brushing aside obvious constitutional objections on the grounds that it was the courts, and not the legislature, that should be concerned with constitutionality. The Archdiocese asks this Court to do what the legislature did not – enforce Colorado's Constitution as written and stand by its long-standing precedent that revival of time barred claims is unlawful.

ARGUMENT

I. Colorado Law Does Not Support Using "Public Policy" to Avoid the Explicit Constitutional Ban on Retrospective Laws.

The Archdiocese acknowledges that the legislature has an interest in preventing and remedying child abuse in Colorado. Nonetheless, its efforts to remedy past abuse by reviving time-barred claims is explicitly prohibited under Colorado's constitution.

One purported justification for the constitutionality of the Act is that it is supported by public policy considerations as identified by the Legislature. *See* Senate Bill 21-088 § 1. However, this proposition is inconsistent with controlling law.

The language in Colorado's constitution is explicit: "No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly." Colo. Const. art. II, § 11. "Each word embodied in the Constitution must be given its meaning, and courts should not construe away that which the sovereign has embodied in its fundamental law." *City & Cnty. of Denver v. Mountain States Tel. & Tel. Co.*, 184 P. 604, 608 (1919),

overruled on other grounds by, *People ex rel. Pub. Utilities Comm'n v. Mountain States Tel. & Tel. Co.*, 243 P.2d 397 (1952). "When construing a constitutional provision, this court must give effect to the intent of the electorate that adopted it," and to do so, give[] "words 'their ordinary and popular meaning.'" *Keim v. Douglas Cnty. Sch. Dist.*, 2017 CO 81, ¶ 18 (citing *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20). "If the language of a provision is clear and unambiguous, it must be enforced as written." *Id.*

There is no provision in art. II, § 11 that provides a public policy exception to the ban on retrospective laws. To the contrary, the ban is absolute. And it is logical that there is no such exception—if such public policy carve-out existed it would render meaningless the proscription on retroactive laws. It is the job of the legislative branch to determine public policy and apply it through statutes. *See* Colo. Const. art. V, § 1. If the proscription on retrospective laws were required to yield to the policy preferences of the legislature there would be no proscription at all. Any time the legislature wanted to enact a retrospective law it would merely have to state it was the public policy to do so. This

workaround is contrary to established principles of constitutional interpretation because it renders art. II, § 11 meaningless. As the Missouri Supreme Court observed when interpreting identical constitutional language, "[r]egardless of legislative intent, it should be obvious that a statute cannot supersede a constitutional provision." *Doe v. Roman Cath. Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. 1993) (holding that retrospective law was unconstitutional); *see also Mitchell v. Roberts,* 469 P.3d 901, 913-14 (Utah 2020) ("We can appreciate the moral impulse and substantial policy justifications for the legislature's decision to revive previously time-barred claims of victims of child sexual abuse . . . The question presented for us, however, is not a matter of policy. We are asked to give voice to the limitations on our government established in the charter—the constitution—ratified by the voice of the people. The terms of that charter merit our respect unless and until they are amended or repealed. And we must enforce the original understanding of those terms whether or not we endorse its dictates as a policy matter.").

Colorado's precedent does not support relying on public policy in determining the constitutionality of the Act. The Archdiocese recognizes that in some cases, the court has included a discussion of public policy considerations in upholding the constitutionality of laws that have been challenged as retrospective. However, the court has never relied on public policy to uphold an otherwise unconstitutional retrospective law. *See, e.g.*, *In re Estate of DeWitt*, 54 P.3d 849, 855 (Colo. 2002).

In cases where the court has included a discussion of public policy considerations, it has most often been in the context of analyzing whether an asserted right is actually a vested right. For example, in *Lakewood Pawnbrokers Inc. v. City of Lakewood*, the court commented, "[v]ested rights do not accrue to thwart the reasonable exercise of the police power for the public good." 517 P.3d 834, 838 (Colo. 1973). Similarly, in *Ficcara v. Dept. of Regulatory Agencies, Div. of Ins.,* the court already determined that the bail bondsmen's right to renew their license was not a vested right before also considering the public policy implications. 849 P.2d 6, 21-22 (Colo. 1993). *DeWitt* is the only Colorado Supreme Court case the Archdiocese identified where the public policy

analysis was discussed in the context of a new obligation, duty, or disability. Again, prior to its public policy analysis, the court had already made the dispositive determination that the statute was remedial. 54 P.3d at 857. Its discussion of public policy is merely an additional ground that supports its conclusions that the regulatory scheme for life insurance policy beneficiary designations was constitutional. *Id.* at 858. There is no case where this court has found that public policy alone is sufficient to allow an otherwise retrospective law that implicates a vested right or creates a new obligation, duty, or disability.

In contrast to this precedent, the Act undoubtedly impairs a vested right or creates a new obligation, duty, or disability. Since 1879, Colorado has recognized that expiration of the statute of limitations is a vested right that cannot be taken away. *Willoughby v. George,* 5 Colo. 80, 82 (1879)*; Jefferson Cnty. Dep't Of Soc. Servs. v. D.A.G.*, 607 P.2d 1004, 1006 (Colo. 1980).[1] "[W]here the statute has once run and the bar

[1] *Jefferson County* does include language at the end of the opinion regarding the constitutionality of a child's right to bring a cause of action. First, this is non-binding dicta. *D.A.G.*, 607 P.2d at 1006. Second, a parent would not have

has attached, the right to plead it as a defense is a vested right which cannot be taken away or impaired by any subsequent legislation." *Willoughby*, 5 Colo. at 82. Even if the legislature's attempt to avoid this vested rights analysis is accepted, the statute cannot survive because then the Act created a new obligation, duty, or disability. Per the legislature's own declaration, the statute "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." Senate Bill 21-088 § 1(4)(a). The Act goes on to state that it "creates a new civil cause of action . . . ." *Id.* at 4(b). Logically, if a new right to relief or cause of action is created, the reciprocal effect is that a new obligation, duty, or disability is created for those required to defend under the new right for relief or civil cause of action. The Act should not be interpreted to allow the legislature to do something indirectly that it is prohibited

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a vested right as to the defense of expiration of the statute of limitations on claims brought by a minor child because a minor is considered "under disability" until the age of majority and the minor's claims do not accrue for purposes of statute of limitations until the disability has resolved. *See* C.R.S. § 13-81-101; C.R.S. § 13-81-103. Thus, there could be no expiration of statute of limitations for claims held by the child.

from doing directly. *Smith v. Turner*, 48 U.S. 283, 458 (1849) ("It is a just and well-settled doctrine established by this court, that a State cannot do that indirectly which she is forbidden by the Constitution to do directly.") (Grier, J. concurring).

Finally, application of public policy considerations in this context would be of a wholly different kind than past precedent. In the circumstances where the court has considered public policy in the retrospectivity analysis, it has done so in the context of whether the law was a reasonable exercise of the legislature's regulatory power. For example, in *Ficarra*, the court reasoned that the nature of bail bond business is "without question a matter of substantial public concern subject to reasonable regulation under the police power of the State." 849 P.2d at 21. Similarly, in its public policy analysis, the *DeWitt* court again analyzed reasonable regulation. The court explained "[b]oth the insurance industry and the probate process is highly regulated by statute in Colorado. As a result, the decedents in these cases could reasonably expect that their life insurance policies would be regulated by statute, including the possibility of a statute addressing procedural

changes in beneficiary designation." 54 P.3d at 857-58; *see also Lakewood Pawnbrokers*, 517 P.3d at 838 ("Vested rights do not accrue to thwart the reasonable exercise of the police power for the public good."). In contrast, here, the legislature has not created a reasonable regulatory scheme that—despite being forward looking—has a retroactive impact. Instead, it created a *private* right of action for *past* conduct. This circumstance is not analogous to any statute that has been held as constitutional, and "public policy" should not form a basis to transform an unconstitutional statute into a constitutional statute.

II. The Court Should Not Presume the Statute is Constitutional Because the Legislative History Shows the Legislature Abrogated its Duty to Abide by Constitutional Provisions.

In Colorado, a statute is generally presumed to be constitutional until clearly shown otherwise. *In re United States Dist. Court*, 179 Colo. 270, 274 (1972). "The presumption of constitutionality is rooted in the doctrine of separation of powers; thereby, the judiciary respects the roles of the legislature and the executive in the enactment of laws." *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). "This presumption reflects the premise that

legislative and executive branches of government validly observe and effectuate constitutional provisions in exercising their powers." *Id.* When the legislative branch fails in its obligation to observe and effectuate constitutional limitations in exercising its powers, however, its actions should not be entitled to this Court's presumption of constitutionality.

Here, the legislative history of SB21-088 shows that the General Assembly did not attempt to observe the constitution's prohibition on retrospective legislation. During the 2020 legislative session, members of the House introduced HB20-1296 concerning changing the statute of limitations applicable to actions alleging sexual misconduct. In response, the Office of Legislative Legal Services ("OLLS"), a non-partisan body and in-house counsel for the General Assembly, issued a Legal Opinion concerning the constitutionality of the bill. Colo. Office of Legislative Legal Services, Legal Opinion to Rep. Soper, January 13, 2020 App., pp. 10-13). Citing this Court's precedent dating from 1879, OLLS concluded that HB20-1296 would likely be considered unconstitutionally retrospective in that it attempted to revive claims

barred by the statute of limitations. *Id.* (App., pp. 11-13). HB20-1296 died in Committee.

SB21-088 was introduced in the Senate at the beginning of the next legislative session and was assigned to the Senate Committee on Judiciary. During its first hearing on the bill, Committee members heard testimony from both proponents and opponents of SB21-088, including Colorado constitutional law scholar Professor Richard B. Collins, Professor of Law at the University of Colorado Law School. Hearing of the Senate Judiciary Committee, 2021 73rd Sess. (Colo. March 11, 2021) (testimony of witness Professor Richard Collins). UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE (2018) (App., pp. 14-16). Professor Collins testified that SB21-088, in the same manner as HB20-1296, violates the Colorado constitution's prohibition on retrospective legislation because it both impairs vested rights and imposes new obligations on past actions. Professor Collins agreed with and cited OLLS's Legal Opinion concluding that HB20-1296 was unconstitutionally retrospective and testified that it applied equally to

SB21-088, calling the pieces of legislation "indistinguishable." *Id.* at 13. In other words, SB21-088 does not rectify the constitutional deficiencies that were fatal to HB20-1296. Any other conclusion would require this Court to reverse its long-standing jurisprudence on Art. II, Sec. 11 and Article XV, Sec. 12 of the Colorado constitution. *Id.*

Numerous other experts agreed with Professor Collins and OLLS that SB021-088 is unconstitutional. (*See*, *e.g.*, Hearing of the Senate Judiciary Committee, 2021 73rd Sess. (Colo. March 11, 2021) (testimony of witness Mark Behrens) ("This cosmetic change does not change the fact that the law is unconstitutional.") (App., p. 22); Hearing of the Senate Judiciary Committee, 2021 73rd Sess. (Colo. March 11, 2021) (testimony of witness Rosa Dereiux) (on behalf of the Colorado Civil Justice League, "[i]n the cases I did review, any time we went back and created a new duty it was deemed unconstitutional.").(App., p. 24.))

When it came time for members of the General Assembly to debate and vote on SB21-088, several indicated that rather than grapple with the constitutionality of the bill and make sure that they were enacting a constitutional bill, they would leave the determination

to the judiciary. In Representative Robert's June 3, 2021 statement that he supports SB21-088, he directly abdicated his responsibility, stating the bill "is the best we can do for victims and the on whether it's constitutional or not is not the purview of this body. That is the purview of the, of another branch of government." Meeting of House Committee on Judiciary, 2021 73rd Sess. (Colo. June 3, 2021) (Statement of Representative Dylan Roberts)) (App., p. 25.)). Similarly, Chair Weissman commented, "[w]e shouldn't hold this bill to a standard of certainty [referring to constitutionality]." Meeting of House Committee on Judiciary, 2021 73rd Sess. (Colo. June 3, 2021) (Statement of Representative Mike Weissman) (App., p. 27)); *see also* Meeting on the Senate Floor, 2021 73rd Sess. (Colo. May 12, 2021) (statement of Senator Rhonda Fields) ("What this bill does is it rips up the rulebook as it relates to statute of limitations. And I think it's time.") (App., p. 28). These statements evidence a disregard for the General Assembly's duty to exercise its powers within the mandates of the Colorado constitution and this Court's interpretation of the same. Consequently, because the General Assembly did not attempt to observe and effectuate

Colo. Const. art. II, § 11 when enacting SB21-088, it is not entitled to the presumption of constitutionality.

III. The Act is Not a Reasonable Exercise of the State's Regulatory Authority.

If the Court does look beyond the language of the constitution and considers public policy, it will see that the risk to children and the need for intervention that existed decades ago does not exist today. The Act is not a reasonable act of the state's regulatory powers to protect children. Instead, the Archdiocese has worked for more than two decades to repair past harm and prevent future abuse.

A. Child Protection in the Archdiocese.

In the early 1990s the Archdiocese adopted a sexual misconduct policy aimed at protecting children and holding abusers accountable. A decade later, in 2002 the United States Catholic Conference adopted The Charter for the Protection of Young People, commonly referred to as the Dallas Charter. The Dallas Charter established procedures for responding to allegations of abuse, guidelines for preventing future acts of abuse, and policies for reconciliation, healing and accountability. The Dallas Charter has been updated several times since 2002, most

recently in 2018. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE (2018)(App., pp. 29-58).

The Archdiocese has numerous programs and policies in place to protect the youth that it serves. The Archdiocese has a specific department, the Office of Minor and At-Risk Adult Protection ("OMP"), to oversee the Archdiocese's efforts. Office of Minor and At-Risk Adult Protection, ARCHDIOCESE OF DENVER, https://archden.org/protection/ (last visited Jan. 17, 2023). Through OMP, the Archdiocese provides training to adults and children, enforces a code of conduct, conducts background checks, and identifies safe environment site coordinators. *Id.*

To be eligible to serve as an employee or volunteer, all adults (including clergy, deacons, seminarians, archdiocesan employees, parish employees, school employees, and volunteers) must read and sign the Code of Conduct. They must submit to an approved background check and complete Adult Safe-Environment Training. Since 2003, the

training has been offered at least 275 times per year, and over 85,000 adults have been trained. *Id.*

The Archdiocese also provides mandated safety training to all children in Catholic Schools or parish religious education classes. Through the program, children are taught how to identify healthy and appropriate relationships and report inappropriate adult behavior. The Archdiocese trains and retrains 20,000-25,000 children per year through this program. *Id.*

B. Voluntary Efforts to Right Past Abuse.

In addition to adopting programs that keep kids safe today, the Archdiocese has also engaged in programs to offer reconciliation and healing to victims of abuse and to increase transparency and trust within the community.

In 2005, the Archdiocese became the first diocese in the country to create a voluntary reconciliation program for victims of clergy abuse. The Archdiocese used the services of Judge Dick Dana (Ret.), Police Chief Heather Coogan and Rehabilitation Specialist Jack Dahlberg to determine reparations for dozens of cases between 2006 and 2010.

In 2019 the three Colorado Dioceses (Archdiocese of Denver, Diocese of Colorado Springs and Diocese of Pueblo) entered into a voluntary agreement with the Attorney General's Office whereby a special master would be appointed to review the records of the Archdiocese and publish a public report regarding claims of historic abuse, current practices, and recommendations for improving policies and protocols. The Attorney General's Office acknowledged that unlike in places like Pennsylvania, it did not have statutory authority to investigate the Colorado Diocese. Instead, the Colorado Dioceses chose to voluntarily participate in a process that would provide needed transparency and healing for the community. Robert Troyer was appointed as the Special Administrator and he published his report in November 2019. The investigation was publicly advertised and a phone line for reporting historic abuse was established. At the same time, the Colorado Dioceses were also running a reconciliation program that urged survivors to come forward. The Colorado Dioceses agreed to a second report by Mr. Troyer that included additional survivors who came forward after the 2019 report. In the subsequent report,

Mr. Troyer also reported on the additional policy changes the Dioceses made in response to his recommendations in the 2019 report. ROBERT TROYER, ROMAN CATHOLIC CLERGY SEXUAL ABUSE OF CHILDREN IN COLORADO FROM 1950 TO 2019 (October 22, 2019) ("Special Master Report") (App., pp. 59-321); ROBERT TROYER, ROMAN CATHOLIC CLERGY SEXUAL ABUSE OF CHILDREN IN COLORADO FROM 1950 TO 2020 (December 1, 2020)("Special Master Supplemental Report") (App., pp. 322-414)

As part of the 2019 reconciliation process, the Colorado Dioceses, working with the Attorney General, retained Ken Feinberg and Camille Biros[2] to create and run the Independent Reconciliation and Reparations Program ("IRRP"). Through the program, Mr. Feinberg and Ms. Biros evaluated claims of abuse against the three dioceses and determined the reparations payment that should be made to each survivor. Each of the Dioceses agreed to pay all amounts determined by the administrators. To increase transparency, the IRRP had an

[2] Mr. Feinberg and Ms. Biros have run settlement programs and reconciliation programs around the country including the BP Oil Spill, 9/11 Victim Compensation Fund, Newton-Sandy Hook Community Foundation, and Aurora Shooting victims fund.

oversight board chaired by former University of Colorado president Hank Brown, as well as Judge David Crockenberg (ret.), former El Paso Country District Attorney Jeanne Smith, former manager of Colorado's Office for Victim's Programs Nancy Feldman, and community leader Laura Morales. The oversight board issued an interim and final report. INDEPENDENT OVERSIGHT COMMITTEE OF THE COLORADO INDEPENDENT RECONCILIATION AND REPARATIONS PROGRAM, FINAL REPORT OF THE INDEPENDENT OVERSIGHT COMMITTEE OF THE COLORADO INDEPENDENT RECONCILIATION AND REPARATIONS PROGRAM (December 1, 2020) (App., pp. 415-421). Through the program 81 survivors completed the claims process and over 95% of them accepted settlement offers from the IRRP Administrators. The IRRP paid $7,312,500. IRRP Oversight Committee Final Rep., (App., pp. 419-420).

The Attorney General Investigation and IRRP highlighted that while there was a documented problem of historic child sexual abuse within the Archdiocese, the reforms the Archdiocese implemented were working. The two programs combined publicly asked survivors to come forward in a safe and confidential manner. Of all of the claims identified

in the Special Master Report and of the 81 eligible claims in the IRRP, the most recent claim was 1999 and no survivor alleged abuse within the Archdiocese of Dener within the last 20 years. Special Master Supplemental Report (App., p. 408). As Attorney General Phil Weiser stated, "all of the dioceses in Colorado implemented every recommendation in the first report, and the reforms they have made appear to be meaningful and sound." Press Release, Office of the Attorney General Colorado, Follow-up report on child sex abuse by Catholic priests uncovers additional 46 claims of abuse in Denver and Pueblo diocese of last 70 years (Dec. 1, 2020), https://coag.gov/press-releases/12-1-20/ (App., p. 424). When asked whether he believed a "window" bill was necessary, Attorney General Weiser responded that he did not believe a bill was necessary because the process [Special Master Investigation and IRRP] addressed the need for accountability and compensation. *Colorado Attorney General Discussed Catholic Sex Abuse Report,* 9News, December 1, 2020, available at https://www.youtube.com/watch?app=desktop&v=Z3K6Hk4tTOo (20:36 and 22:37).

The Archdiocese is one of many organizations that has reckoned with its history of abuse and has worked to account for past abuse while preventing future abuse. Youth sports (led by the US Olympic and Paralympic Committee and the creation of SafeSport) and scouting are also examples of organizations with histories of abuse that have put in place stringent programs for protecting children and investigating claims of abuse. The steps taken by the Archdiocese show that rather than a private cause of action, voluntary cooperation among youth organizations, law enforcement, and survivors and their advocates is a path for individual and communal healing that does not impact the vested rights recognized in Colorado's constitution.

IV. The Archdiocese's Voluntary Participation in the Attorney General Investigation and IRRP, in Reliance on the Expiration of Statutes of Limitations, Unfairly Prejudices the Archdiocese.

The Archdiocese has acted openly and transparently in a voluntary effort to reconcile the actions of its predecessors. The Archdiocese's ability to engage voluntarily with the Attorney General's Office and to engage independent administrators to offer reparations was in part due to the historic nature of the claims and Colorado's

proscription on retrospective litigation. These actions helped the Archdiocese and community to confront a history of child abuse, but it also created a significant risk of fraudulent claims in the event the ban on retrospective laws was abolished.

The Special Master created a detailed list of what was determined to be credible allegations of abuse. The assignment histories and patterns of abuse by offending priests are all public. This is helpful for survivors to heal, but it also creates an incentive and tool for less scrupulous persons to bring false claims.

The Special Master's Report showed that of the 150 survivors who were abused by priests in the Archdiocese of Denver, 138 of them were abused in 1989 or before, and more than two-thirds of these survivors (102 of 150) were abused in 1969 or earlier—54+ years ago. *See* Supplemental Report (App., p. 408). There are no longer witnesses for the Archdiocese to even begin to determine whether the abuse occurred. For the two-thirds of cases that occurred in 1969 or before, an Archdiocesan employee or volunteer who was 40 in 1969 is 94 today.

Identifying any person with knowledge as to the claim of abuse and the Archdiocese's role is often no longer possible.

This difficulty is compounded because the majority of priests who are known bad actors are now deceased. Of the 28 Archdiocesan priests identified in the Special Master's Report, at least 20 are now deceased, accounting for approximately 85% of the claims. With the priests who abused them deceased, plaintiffs will bring claims against the Archdiocese. Data from New York's look back window shows that only 15% of all claims were brought against the perpetrators. ChildUSA, Statute of Limitations Serves the Public Interest: A Preliminary Report of the New York Child Victims Act (August 23, 2021) https://childusa.org/wp-content/uploads/2021/08/A-Preliminary-Report-on-the-New-York-Child-Victims-Act.pdf (App., p. 432). Colorado has long recognized that where a critical witness is deceased, personal motive can increase the risk of perjury, particularly where there are no longer living witnesses to rebut such testimony, and additional safeguards are needed. *See, e.g., Baker v. Wood, Ris & Hames, Pro. Corp.*, 364 P.3d 872, 878 (Colo. 2016) (explaining, in the context of

Colorado's Deadman Statute, "[t]hat statute limits the admissibility of statements made by persons who are incapable of testifying, and thereby seeks 'to guard against perjury by living interested witnesses when deceased persons cannot refute the testimony, thus protecting estates against unjust claims.'").

While the Archdiocese has more data than other institutions because of the Special Master's Reports and IRRP, the evidentiary problems are not unique to the Archdiocese. Managing organizations across the state will be unfairly prejudiced by the Act.

CONCLUSION

For the reasons stated herein, the Court should find that the retroactive cause of action created by the Child Sexual Abuse Accountability Act is unconstitutional.

DATED: January 17, 2023.

Respectfully submitted,

LEWIS ROCA ROTHGERBER CHRISTIE LLP

s/ Michael D. Plachy
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Archdiocese of Denver

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, I filed this COLORADO ACADEMY'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER AURORA PUBLIC SCHOOLS with the Colorado Supreme Court and served true and accurate copies on the following parties via Colorado Courts E-Filing:

s/ Tracy M. King
Of Lewis Roca Rothgerber Christie LLP