

COLORADO SUPREME COURT  
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Certiorari to the Court of Appeals, Case  
No. 22CA1583  
Appeal from Arapahoe County District  
Court, Case No. 2022CV30065

**Petitioner:** AURORA PUBLIC  
SCHOOLS  
  
v.  
  
**Respondents:** ANGELICA SAUPE,  
BRIAN SAUPE and DAVID JAMES  
O'NEILL

**▲ COURT USE ONLY ▲**

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Case No. 22 SC 824

**PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO C.A.R. 50**

## CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Writ of Certiorari complies with all requirements of C.A.R. 32 and C.A.R. 53(a), including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 53(f)(1).

Choose one:

It contains 3,068 words.

*s/W. Stuart Stuller*  
\_\_\_\_\_  
W. Stuart Stuller, #22082

## TABLE OF CONTENTS

|  |     |
|--|-----|
| CERTIFICATE OF COMPLIANCE.....   | i   |
| TABLE OF CONTENTS .....  | ii  |
| TABLE OF AUTHORITIES.....  | iii |
| INTRODUCTION.....  | 1   |
| ISSUES PRESENTED .....   | 3   |
| DECISION TO BE REVIEWED .....  | 4   |
| GROUND ON WHICH JURISDICTION IS INVOKED .....  | 4   |
| PENDING CASES IN WHICH THE SUPREME COURT HAS<br>GRANTED CERTIORARI REVIEW ON THE SAME LEGAL<br>ISSUE ON WHICH REVIEW IS SOUGHT .....   | 5   |
| STATEMENT OF THE CASE .....  | 6   |
| ARGUMENT .....   | 8   |
| A. The case involves two matters of substance not yet determined by<br>the Colorado Supreme Court .....  | 9   |
| B. The court of appeals is being asked to decide two important state<br>questions that have not been, but should be, determined by the<br>Colorado Supreme Court.....                            | 10  |
| C. The case is of such imperative public importance as to justify the<br>deviation from normal appellate processes and to require<br>immediate determination in the Colorado Supreme Court ..... | 11  |
| APPENDIX.....  | 14  |
| CONCLUSION .....   | 17  |

## TABLE OF AUTHORITIES

### Cases

|  |        |
|--|--------|
| <i>Coursey &amp; Tischler v. Boulder Valley Sch. Dist.</i> , 22CV30042, Div. 3,<br>(Dist. Ct. of Boulder County) ..... | 6, 9   |
| <i>Elrod v. Burns</i> , 427 U.S. 347 (1976) .....  | 11, 13 |
| <i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....  | 12     |
| <i>Matter of Adoption of T.K.J.</i> , 931 P.2d 488 (Colo. App. 1996).....  | 12     |
| <i>McPhee v. Kelly</i> , Case No. 22CV204, Div. 7 (Dist. Ct. of Jefferson<br>County) .....                             | 6, 9   |
| <i>N.Y. Times Co. v. United States</i> , 403 U.S. 713 (1971).....  | 11, 13 |
| <i>Norris v. Cherry Creek Sch. Dist.</i> , 22CV30137 (Dist. Ct. of Arapahoe<br>County) .....                           | 9      |
| <i>Peoples Natural Gas v. Publ. Utilities Commission</i> , 590 P.2d 960 (Colo.<br>1979) .....                          | 10     |
| <i>Planned Parenthood Fed'n of Am. v. Bowen</i> , 680 F. Supp. 1465 (D. Colo.<br>1988) .....                           | 11, 13 |
| <i>Ritchie v. Polis</i> , 467 P.3d 339 (Colo. 2020).....   | 13     |
| <i>Yakutat Land Corp. v. Langer</i> , 462 P.3d 65 (Colo. 2020).....  | 14     |

### Statutes

|                           |   |
|---------------------------|---|
| C.R.S. § 13-20-1201 ..... | 6 |
| C.R.S. § 13-20-1202 ..... | 6 |

|                           |          |
|---------------------------|----------|
| C.R.S. § 13-20-1203 ..... | 1, 7, 13 |
| C.R.S. § 13-20-1207 ..... | 1, 7     |
| C.R.S. § 13-4-102 .....   | 2, 4, 14 |
| C.R.S. § 13-4-109 .....   | 4        |
| C.R.S. § 13-4-110 .....   | 2, 3     |

**Session Laws**

|   |      |
|---|------|
| Sen. Bill 021-088, § 6, 2021 Colo. Sess. Laws 2928..... | 1, 7 |
|---|------|

**Rules**

|                |                |
|----------------|----------------|
| C.A.R. 50..... | 1, 3, 4, 8, 13 |
| C.A.R. 53..... | 3              |

**Constitutional Provisions**

|                                  |         |
|----------------------------------|---------|
| COLO. CONST. art. II, § 11 ..... | 1, 7, 9 |
| COLO. CONST. art. VI, § 2.....   | 4       |

Aurora Public Schools (“School District”) petitions for a writ of certiorari to the Colorado Supreme Court pursuant to C.A.R. 50.

## INTRODUCTION

The issues presented in this petition concern the constitutionality of the recently enacted Child Sexual Abuse Accountability Act (“CSAAA”). This new cause of action became effective on January 1, 2022,<sup>1</sup> yet it allows individuals to bring a claim based on alleged conduct that occurred prior to the CSAAA’s enactment so long as the conduct “occurred on or after January 1, 1960.” C.R.S. § 13-20-1203(2) (2022). The CSAAA also waives immunity granted to public entities, such as the School District, under the Colorado Governmental Immunity Act (“CGIA”) for conduct that occurred while the public entity was immune. C.R.S. § 13-20-1207(1)(a) (2022). The School District contends that these provisions violate article II, section 11 of the Colorado Constitution, which provides: “No ex post facto law . . . or (law) retrospective in its operation . . . shall be passed by the general assembly.” COLO. CONST. art. II, § 11.

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<sup>1</sup> Sen. Bill 021-088, § 6, 2021 Colo. Sess. Laws p. 2928.

Plaintiff Angelica Saupe brought a claim against the School District under these provisions of the CSAAA.<sup>2</sup> *App. A*, Compl. The School District moved to dismiss, arguing that the application of the statute violated article II, section 11 of the Colorado Constitution. *App. B*, APS Mot. to Dismiss.

The district court agreed and dismissed the case. *App. C*, Combined Order Re: Defs. Mot. to Dismiss Pls.’ Compl. Ms. Saupe filed a notice of appeal with the Colorado Court of Appeals. Relying on C.R.S. § 13-4-102(1) (2022), which provides that the court of appeals has initial jurisdiction over appeals from final judgments “except in cases in which a statute has been declared unconstitutional,” the School District timely moved to transfer jurisdiction to this Court pursuant to C.R.S. § 13-4-110(1)(a) (2022), which provides that when a party alleges that a case is not within the jurisdiction of the court of appeals, it “shall refer the case to the supreme court.” *See app. D*, APS Mot. to Transfer Case for Lack of Jurisdiction.

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<sup>2</sup> Ms. Saupe also brought a claim against an individual defendant, David O’Neill who was, and is, represented by separate counsel.

The court of appeals denied the motion, stating that relief should be sought with this Court. **App. E**, Order of the Court of Appeals. The School District then filed a motion with this Court to transfer jurisdiction to this Court consistent with C.R.S. § 13-4-110(1)(b), or in the alternative, per C.A.R. 50(b) seeking certiorari prior to the judgment of the court of appeals. **App. F**, APS Mot. to Transfer or, Alternatively Pet. for Writ of Cert.

This Court declined to revisit the court of appeals decision but granted the School District leave to file a C.A.R. 50 petition in compliance with C.A.R. 53(a). **App. G**, Order of the Court.

The School District hereby files this petition.

### ISSUES PRESENTED

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.



## DECISION TO BE REVIEWED

Pursuant to C.A.R. 50, the School District petitions this Court to review an Order from the District Court of Arapahoe County, dated August 3, 2022, holding that the CSAAA violates the federal and state constitution's prohibition against retrospective legislation. *App. C*, Combined Order Re: Defs. Mot. to Dismiss Pls.' Compl. To date, no briefs have been submitted to the court of appeals. Plaintiffs filed a motion for an enlargement of time to file their opening brief, citing the filing of this petition. *App. H*, Pls.' Mot. for Enlargement of Time to File Opening Brief. The court of appeals granted the motion. *App. I*, Order Granting Pls.' Mot. for Extension of Time.

Plaintiffs' attorney affirmed that Plaintiffs do not oppose the exercise of jurisdiction by the Supreme Court over this matter as to a Rule 50 petition.

## GROUND ON WHICH JURISDICTION IS INVOKED

**Basis for Jurisdiction:** This petition invokes this Court's jurisdiction under C.A.R. 50, C.R.S. § 13-4-102(1)(b), C.R.S. § 13-4-109(3), and COLO. CONST. art. VI, § 2.

**Date of Order:** The district court issued its order on August 3, 2022.

**Order Regarding Timeliness:** This Court set a deadline of November 18, 2022, to file this petition. *App. G*, Order of the Court.

**PENDING CASES IN WHICH THE SUPREME COURT  
HAS GRANTED CERTIORARI REVIEW ON THE SAME LEGAL  
ISSUE ON WHICH REVIEW IS SOUGHT**

The School District is not aware of any pending cases in which the Colorado Supreme Court has granted certiorari review on the same issues on which review is sought.

The School District, however, notifies the Court that a second district court (“*Norris* court”) reached the opposite conclusion with respect to the same constitutional issues addressed by the court below here, and denied the defendant’s motion to dismiss. *Compare app. J*, Order Denying Def. Mot. to Dismiss *with app. C*, Combined Order Re: Defs. Mot. to Dismiss Pls.’ Compl. The *Norris* court, however, permitted the defendant to seek interlocutory review. *App. K*, Order Granting Def. Mot. for Certification. A petition for interlocutory appeal is pending in the court of appeals. *App. L*, CCSD Pet. for Interlocutory Appeal.

The School District is aware of at least two other cases pending in district courts (*Coursey & Tischler v. Boulder Valley Sch. Dist., et al.*, 22CV30042, Div. 3, (Dist. Ct. of Boulder County) and *McPhee v. Kelly, et al.*, Case No. 22CV204, Div. 7 (Dist. Ct. of Jefferson County)) that involve the constitutionality of the CSAAA. In *Coursey*, the district court has stayed its ruling on the school district’s motion pending the outcome of the appeal for this case. **App. M**, Order re. Pending Defs. Mot. for Judgment on the Pleadings.

### STATEMENT OF THE CASE

This case challenges the constitutionality of two provisions of the Child Sexual Abuse Accountability Act (“CSAAA”), C.R.S. § 13-20-1201, *et seq.* The CSAAA creates a new right to relief by allowing “[a] person who is a victim of sexual misconduct that occurred when the victim was a minor [to] bring a civil action for damages” against the perpetrator and “[a] managing organization,” such as the School District, if the managing organization “knew or should have known” that the perpetrator, who was an employee, agent, or volunteer of the organization, “posed a risk of sexual misconduct against a minor.” C.R.S. § 13-20-1202 (2022).

The new cause of action became effective on January 1, 2022. Sen. Bill 021-088, § 6, 2021 Colo. Sess. Laws p. 2928. The CSAAA permits the new cause of action to be applied to conduct that allegedly occurred prior to its enactment so long as the conduct “occurred on or after January 1, 1960.” C.R.S. § 13-20-1203(2) (2022). The CSAAA also waives immunity under the CGIA for conduct that occurred prior to its enactment and while the public entity had immunity. C.R.S. § 13-20-1207(1)(a) (2022).

Ms. Saupe brought a CSAAA claim against the School District. She alleged David O’Neill, a former basketball coach at Rangeview High School, engaged in sexual misconduct with her 20 years ago, when she was a student. *See* compl. ¶ 9.

The School District moved to dismiss, arguing that applying the CSAAA’s new cause of action and waiver of immunity to conduct that occurred prior to its enactment violated article II, section 11 of the Colorado Constitution which provides: “No ex post facto law . . . or (law) retrospective in its operation . . . shall be passed by the general assembly.” The School District argued the CSAAA violates this prohibition by (1) creating a cause of action that applies to conduct that

occurred prior to the creation of the cause of action, and (2) by waiving immunity for conduct that occurred prior to the creation of the waiver.

The district court held that the CSAAA violated both the federal and state constitutions and dismissed the Saupes' complaint on August 3, 2022.<sup>3</sup> The Saupes filed a timely notice of appeal on September 18, 2022.

### ARGUMENT

Per C.A.R. 50(a), this Court may review a case pending in the court of appeals before judgment upon a showing of *any* one of the following three criteria: (1) the case involves a matter of substance not yet determined by the supreme court; *or* (2) the court of appeals is being asked to decide an important state question which has not been, but should be, determined by the supreme court; *or* (3) the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate determination in the supreme court. C.A.R. 50. The issues presented by this petition satisfy all three independent criteria.

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<sup>3</sup> The School District challenged the constitutionality of the CSAAA only under the Colorado Constitution.

**A. The case involves two matters of substance not yet determined by the Colorado Supreme Court.**

The CSAAA went into effect on January 1, 2022. Since the date of effectiveness, cases involving the CSAAA, and the same constitutional issues presented by this petition have appeared in multiple district courts. *See Norris v. Cherry Creek Sch. Dist., et al.*, 22CV30137 (Dist. Ct. of Arapahoe County); *Coursey & Tischler v. Boulder Valley Sch. Dist., et al.*, 22CV30042, Div. 3, (Dist. Ct. of Boulder County); *McPhee v. Kelly, et al.*, Case No. 22CV204, Div. 7 (Dist. Ct. of Jefferson County).

The first matter of substance—whether applying the CSAAA’s new cause of action to conduct that occurred prior to the creation of the cause of action violates article II, section 11—has not been determined by this Court. The second matter of substance—whether the CSAAA’s waiver of sovereign immunity for conduct that occurred prior to the waiver and when the public entity had immunity—also has not been determined by this Court. Thus far, two district courts have reached opposite conclusions regarding the constitutionality of the CSAAA. *Compare app. J*, Order Denying Def. Mot. to Dismiss *with app. C*, Combined Order Re: Defs. Mot. to Dismiss Pls.’ Compl. For purposes of this petition, the question is not whether this statute is constitutional or unconstitutional.

Instead, the question presented by this petition is whether this case involves a matter of substance not yet determined by this Court. The answer is yes.

By accepting jurisdiction, the Colorado Supreme Court can address this important constitutional issue which is burdening at least four district courts in an expeditious manner. Resolving this issue quickly will save the parties in this case and other cases significant time and resources, and provide a clear path forward for current and potential litigants.

**B. The court of appeals is being asked to decide two important state questions that have not been, but should be, determined by the Colorado Supreme Court.**

As explained above, this Court has not ruled on the issues presented. But it should. This case presents two important questions involving the constitutional right to be free from retrospective legislation. The purpose of the constitutional prohibition against retrospective legislation is “to prevent the unfairness entailed in altering the legal consequences of events or transactions after the fact.” *Peoples Natural Gas v. Publ. Utilities Commission*, 590 P.2d 960, 962 (Colo. 1979). Even a momentary deprivation of constitutional rights constitutes irreparable

harm. *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1473 (D. Colo. 1988) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)).

The provision of the CSAAA expressly authorizing the application of a newly created cause of action to conduct that occurred before the creation of the cause of action is unprecedented in Colorado history—and it directly challenges an express constitutional barrier that prohibits changing the legal consequences for conduct after the conduct has occurred. The CSAAA’s removal of immunity for conduct that occurred prior to the waiver and when immunity existed is similarly unprecedented and challenges the same constitutional barrier.

The resolution of these questions also will provide important guidance to a General Assembly regarding the extent to which the legislature can change the legal consequences for conduct after the conduct has occurred.

**C. The case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate determination in the Colorado Supreme Court.**

The issues presented are of such imperative public importance that they justify immediate determination from the Colorado Supreme Court.



*First*, the CSAAA may be violating the School District's (and other managing organizations') constitutional right to be free from retrospective legislation. Retrospective legislation, among other things, deprives persons of notice of the consequences of their actions before they act, a basic tenet of due process. *Matter of Adoption of T.K.J.*, 931 P.2d 488, 494 (Colo. App. 1996) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). Notice provides managing organizations an opportunity to determine the preventative measures that are appropriate at the time in question. It provides the opportunity to mitigate the harm to its legitimate interest by, for example, purchasing insurance should a bad actor disregard the preventative measures, such as training.

Retrospective legislation also deprives the targets of the legislation the opportunity to raise a meaningful defense against claims that might be informed by documents that may have been discarded for legitimate reasons or simply lost through carelessness; by the loss of persons with personal knowledge of the relevant events who may have drifted out of reach; and by memories that may have been corrupted by dementia or erased by death. Again, even a momentary deprivation of constitutional rights constitutes irreparable harm. *Planned Parenthood Fed'n of Am. v.*

*Bowen*, 680 F. Supp. 1465, 1473 (D. Colo. 1988) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)).

*Second*, this case is also of imperative public importance because of the time limits to bring these claims. The CSAAA requires individuals who alleged the misconduct occurred on or after January 1, 1960 to bring a claim before January 1, 2025. C.R.S. § 13-20-1203(1)(b). In the past, this Court has considered imminent statutory deadlines in granting certiorari pursuant to C.A.R. 50. *See, e.g., Ritchie v. Polis*, 467 P.3d 339 (Colo. 2020) (per curiam) (“Because the deadline to gather signatures is fast approaching, we took jurisdiction of the appeal pursuant to C.A.R. 50(b) and ordered expedited, simultaneous briefing.”). Litigating a novel issue can be slow moving. By granting certiorari under C.A.R. 50, the Court will provide individuals and managing organizations alike clear guidance on whether such claims can even be brought before the January 1, 2025 deadline.

Finally, and dispositively, the questions presented in this petition are *constitutional* questions. The General Assembly has determined that constitutional questions are of such public importance that deviating

from the normal appellate process is appropriate where, as here, a statute has been declared unconstitutional. *See* C.R.S. § 13-4-102(1)(b). C.R.S. § 13-4-102(1)(b) divests the court of appeals of initial jurisdiction in “[c]ases in which a statute, a municipal charter provision, or an ordinance has been declared unconstitutional.” *See also Yakutat Land Corp. v. Langer*, 462 P.3d 65, 69 (Colo. 2020) (“Because the district court found a provision of the Code to be unconstitutional, the court of appeals filed motions for determination of jurisdiction pursuant to C.A.R. 50 in this court, observing that the court of appeals does not have jurisdiction over ‘[c]ases in which a statute, a municipal charter provision, or an ordinance has been declared unconstitutional.’”). Here, the district court below declared the CSAAA unconstitutional. Therefore, this Court should accept jurisdiction consistent with the legislative determination embodied in C.R.S. § 13-4-102(1)(b).

## **APPENDIX**

APPENDIX A: Complaint, *Angela Saupe, et al. v. Aurora Public Schools, et al.*, 22CV30065, Div. 202, Dist. Ct. of Arapahoe County (January 13, 2022).

APPENDIX B: Defendant Aurora Public Schools’ Motion to Dismiss Plaintiffs’ Complaint Pursuant to C.R.C.P. 12(b)(5), *Angela Saupe, et al. v. Aurora Public Schools, et al.*, 22CV30065, Div. 202, Dist. Ct. of Arapahoe County (May 6, 2022).

APPENDIX C: Combined Order Re: Defendants Aurora Public Schools and David O’Neill’s Motions to Dismiss Plaintiffs’ Complaint, *Angela Saupe, et al. v. Aurora Public Schools, et al.*, 22CV30065, Div. 202, Dist. Ct. of Arapahoe County (August 3, 2022).

APPENDIX D: Defendant-Appellee’s Motion to Transfer Case to Supreme Court, *Angela Saupe, et al. v. Aurora Public Schools, et al.*, 22CA1583, Court of Appeals (October 18, 2022).

APPENDIX E: Order of the Court, *Angela Saupe, et al. v. Aurora Public Schools, et al.*, 22CA1583, Court of Appeals (October 28, 2022).

APPENDIX F: Defendant-Appellee’s Unopposed Motion to Transfer Case to Supreme Court Pursuant to C.R.S. 13-4-110 or, alternatively, C.A.R. 50(b) Petition for Writ of Certiorari, *Angela Saupe, et al. v. Aurora Public Schools, et al.*, 22SC824, Supreme Court (November 2, 2022).

APPENDIX G: Order of Court, *Aurora Public Schools v. Angela Saupe, et al.*, 22SC824, Supreme Court (November 4, 2022).

APPENDIX H: Plaintiffs-Appellants' Motion for Enlargement of Time to File Opening Brief, *Angela Saupe, et al. v. Aurora Public Schools*, 22CA1583, Court of Appeals (November 10, 2022).

APPENDIX I: Order for Extension of Time to File Opening Brief, *Angela Saupe, et al. v. Aurora Public Schools*, 22CA1583, Court of Appeals (November 14, 2022).

APPENDIX J: Order Denying Defendant Cherry Creek School District's Motion to Dismiss Plaintiff's Complaint Pursuant to C.R.C.P. 12(b)(5), *Cydny Norris v. Cherry Creek School District, et al.*, 22CV30137, Div. 21, Dist. Ct. of Arapahoe County (September 21, 2022).

APPENDIX K: Order Granting Defendant Cherry Creek School District's Opposed Motion for Certification of Court's Order Pursuant to C.A.R. 42, *Cydny Norris v. Cherry Creek School District, et al.*, 22CV30137, Div. 21, Dist. Ct. of Arapahoe County (October 14, 2022).

APPENDIX L: Petition for Interlocutory Appeal and Request for Oral Argument, *Cherry Creek School District v. Cydny Norris*, 22CA1801, Court of Appeals (October 28, 2022).

APPENDIX M: Order re: Pending Defendants' Motion for Judgment on the Pleadings, *Brian Coursey, et al. v. Boulder Valley School*

*District, et al.*, 22CV30042, Div. 3, Dist. Ct. of Boulder County (November 7, 2022).

## CONCLUSION

Petitioner Aurora Public Schools respectfully requests that this Court grant its petition for writ of certiorari.

Respectfully submitted this 14th day of November 2022.

*s/W. Stuart Stuller*

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## CERTIFICATE OF SERVICE

This is to certify that on this 14th day of November 2022, a true and correct copy of the foregoing was electronically served through CCES, which will serve the same via e-mail to the following:

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