

COLORADO SUPREME COURT
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203

C.A.R. 50 CERTIORARI TO THE COURT OF APPEALS
Case No. 2020CA1583

DISTRICT COURT, ARAPAHOE COUNTY
Honorable Elizabeth Beebe Voltz
Case No. 2022CV30065

Petitioners:

AURORA PUBLIC SCHOOLS and DAVID JAMES O'NEILL,

v.

Respondents:

ANGELICA SAUPE and BRIAN SAUPE

Attorney for Amici Curiae Colorado Academy, World Leadership School, Cornerstone Safety Group, and Global Works:

Doug B. Tumminello, #27523
Kendra N. Beckwith, #40154
LEWIS ROCA ROTHGERBER CHRISTIE LLP
1601 Nineteenth Street, Suite 1000
Denver, Colorado 80202
Phone: 303-623-9000
Email: dtumminello@lewisroca.com
kbeckwith@lewisroca.com

▲ COURT USE ONLY ▲

Case No.: 2022SC824

AMICI CURIAE COLORADO ACADEMY, WORLD LEADERSHIP SCHOOL, CORNERSTONE SAFETY GROUP, AND GLOBAL WORKS' 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 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with all the applicable word limit set forth in C.A.R. 29(d).

It contains 4,033 words (not to exceed 4,750 words).

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

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

Dated: January 17, 2023

LEWIS ROCA ROTHGERBER
CHRISTIE LLP
s/ Kendra N. Beckwith
Kendra N. Beckwith, #40154
Doug B. Tumminello, #27523
1601 Nineteenth Street, Suite 1000
Denver, Colorado 80202
Phone: 303-623-9000
Email: dtumminello@lewisroca.com
kbeckwith@lewisroca.com

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	iv
INTRODUCTION.....	1
IDENTITY OF AMICI CURIAE	3
A. Colorado Academy.....	3
B. World Leadership School.....	3
C. Cornerstone Safety Group.....	4
D. Global Works.....	5
ARGUMENT	5
I. THE ACT DEPRIVES YOUTH-SERVING ORGANIZATIONS OF THEIR VESTED RIGHTS.....	5
II. THE ACT IS UNFAIRLY PREJUDICIAL TO YOUTH- SERVING ORGANIZATIONS BECAUSE ITS EXPANSIVE RETROACTIVE NATURE MEANS THE EVIDENCE TO INVESTIGATE AND RESOLVE THESE CLAIMS NO LONGER EXISTS.....	7
III. THE ACT PUNISHES PRESENT-DAY YOUTH-SERVING ORGANIZATIONS FOR THE ALLEGED CONDUCT OF PAST ENABLERS, DEFEATING THE GENERAL ASSEMBLY’S PURPOSE IN PASSING THE ACT.....	13
IV. THE ACT IMPERILS THE FINANCIAL VIABILITY OF TODAY’S YOUTH-SERVING ORGANIZATIONS.....	20
V. THE ACT’S IMPACT ON YOUTH-SERVING ORGANIZATIONS IS NOT FULLY KNOWN.....	23
CERTIFICATE OF SERVICE.....	26

TABLE OF AUTHORITIES

Cases

<i>Conrad v. Scott</i> , 278 P. 798 (Colo. 1929)	8
<i>Creacy v. Indus. Comm’n</i> , 366 P.2d 384 (Colo. 1961)	7
<i>Jefferson Cnty. Dep’t of Soc. Servs. v. D.</i> , 607 P.2d 1004 (Colo. 1980)	5
<i>Lake Canal Reservoir Co. v. Beethe</i> , 227 P.3d 882 (Colo. 2010)	8
<i>Malm v. Villegas</i> , 342 P.3d 422 (Colo. 2015)	8
<i>McPhee v. Kelly</i> , 2022CV000204 (Jefferson County).....	3
<i>Mitchell v. Roberts</i> , 469 P.3d 901 (Utah 2020)	6, 7
<i>Order of R.R. Telegraphers v. Ry. Express Agency</i> , 321 U.S. 342 (1944).....	8, 9
<i>People v. Porter</i> , 2015 CO 34 (Colo. 2015)	7
<i>Rice v. Eriksen</i> , 476 P.2d 579 (Colo. App. 1970).....	12
<i>Roessler v. O’Brien</i> , 201 P.2d 901 (Colo. 1949)	12
<i>Rudnicki v. Bianco</i> , 2021 CO 80 (Colo. 2021)	9

Willoughby v. George,
 5 Colo. 80 (1879)..... 5

Statutes

C.R.S. § 13-20-1203 (2022) 3, 9
 C.R.S. § 13-20-1205(3)(2)..... 20
 Colorado Child Abuse Protection Act 1
 Utah Code Sec. 78B-308(7) 6

Other Authorities

2SB21-088 Legislative Declaration §1(4)(b)-(c) 2, 13
 Alex Derr, Colorado Nonprofit Economic Impact Report
 (2017)..... 20
<https://www.acacamps.org> (last visited Jan. 17, 2023) 18
<https://www.charitynavigator.org/> (last visited Jan. 17, 2023)..... 22
<https://www.nais.org/articles/pages/independent-school-task-force-on-educator-sexual-misconduct-report-prevention-response/> (last visited Jan. 17, 2023) 17
<https://www.nais.org/membership/international-council-advancing-independent-school-accreditation/criteria-for-effective-independent-school-accredit/> (last visited Jan. 17, 2023)..... 15
 Siobhain P. Minarovich, Insurance Coverage Issues
 Presented by Child Victim’s Act, Summer 2022 USLaw
 Magazine (8) (2002) 21

Nat'l Ass'n of Indep. Schs., <i>Prevention and Response: Recommendations for Independent School Leaders from the Independent School Task Force on Educator Sexual Misconduct</i>	17
<i>Our Journey Toward Safer Sport</i> , U.S. Center for SafeSport, March 2022	19
Statute of Limitations Reform Serves the Public Interest, August 23, 2021	23

INTRODUCTION

Public and private youth-serving organizations across the state are an essential component of growing up in Colorado. These organizations include public and private schools, childcare facilities, youth sports leagues, and other cultural and community centers. They provide safe, reliable access to all Colorado has to offer, including the arts and humanities, outdoor education, community building, science and technology enrichment, mentoring programs, mental health services, among the many other countless opportunities and services.

The Colorado Child Abuse Protection Act (Act) threatens these youth-serving organizations. It includes these organizations as part of the “managing organizations” subject to the Act’s retroactive window, inviting lawsuits to be filed against them for historical claims concerning decades-old alleged conduct that would otherwise be time-barred.

This puts these youth-serving organizations in an unfair and untenable position. It takes (and will continue to take) what are often limited resources from supporting these programs and directs them to

defending claims based on conduct that bears no relationship to the organizations as they exist and serve children today. Those resources—which should be spent funding field trips and hiring educators—are instead spent hiring lawyers, trying to recreate the past, and defending lawsuits.

The General Assembly’s explicit motives for passing the Act—to “hold enablers accountable” and make those who were “complicit and culpable” liable for actions that occurred decades ago—are not served here. 2SB21-088 Legislative Declaration §1(4)(b)-(c). Today’s youth-serving organizations are not enablers and are not complicit or culpable for alleged child sexual abuse in the decades past.

Instead, these organizations are on the frontlines of child safety, investing millions of dollars and hours in developing the best policies, practices, and procedures to prevent abuse from occurring. They cannot and should not be punished for alleged past conduct in which they were not involved and which they have no ability to effectively investigate, much less defend themselves against.

For these reasons, and those further detailed below, the amici respectfully request the Court follow the plain language of Colorado’s constitution and conclude that the Act’s retroactive provision—section 13-20-1203, C.R.S. (2022)—is void as an unconstitutional retrospective law.

IDENTITY OF AMICI CURIAE

A. Colorado Academy.

Colorado Academy is an independent, co-ed school located in Jefferson County, Colorado serving students in grades K-12. Founded in 1906, it has taught families for over a century with a focus on group and individual study of the liberal arts and sciences and engagement through experiential and service learning.

The Act raises concerns for Colorado Academy. Consistent with its mission, it has robust programs in place to ensure child safety and prevent abuse. Colorado Academy is a defendant in one case brought under the Act, *McPhee v. Kelly*, 2022CV000204 (Jefferson County).

B. World Leadership School.

World Leadership School partners with K-12 schools to reimagine learning and create next-generation leaders. World Leadership School

helps its school partners send 1,000 students per year on immersive partnership-based travel experiences, and World Leadership School coaches 500 teachers per year to bring greater purpose to learning. World Leadership School also provides risk management training to help schools launch off-campus learning programs. World Leadership School provides an annual training for its instructors, which includes training on group dynamics, curriculum, risk management, and sexual assault prevention. The Act, through its retroactive application, threatens WLS's ability to continue providing these services and educational experiences.

C. Cornerstone Safety Group.

Cornerstone Safety Group helps travel and experiential education organizations develop and maintain world-class safety systems to protect children. Cornerstone has twenty-five member organizations across the United States, including six in Denver. The Act creates an unknown litigation risk for Cornerstone's member organizations. This lack of predictability impairs Cornerstone and its members' ability to plan for and operate in the future.

D. Global Works.

Global Works has been providing authentic travel experiences for students for over thirty years. It provides custom travel for schools, educators, and private groups, and it provides summer service adventures for high school students. Like the other youth-serving amici in this brief, the Act decreases predictability and, if claims are brought, threatens Global Travel’s ability to continue providing its programming.

ARGUMENT

I. THE ACT DEPRIVES YOUTH-SERVING ORGANIZATIONS OF THEIR VESTED RIGHTS.

Colorado has long recognized that the expiration of the statute of limitations is a vested right. “[W]here the statute has once run and the bar has attached, the right to plead it as a defense is a vested right which cannot be taken away or impaired by any subsequent legislation.” *Willoughby v. George*, 5 Colo. 80, 82 (1879) (emphasis added). “When the bar of the statute of limitations has once attached, the legislature cannot revive the action.” *Jefferson Cnty. Dep’t of Soc. Servs. v. D.A.G.*, 607 P.2d 1004, 1006 (Colo. 1980) (emphasis added).

The Utah Supreme Court recently applied this long-established principle in *Mitchell v. Roberts*, 469 P.3d 901 (Utah 2020). There, the court struck down the state legislature’s statute that retroactively revived otherwise time-barred civil causes of action for child sexual abuse. *Id.* at 903 (striking down Utah Code Sec. 78B-308(7)). It held—as Colorado does—that the defendant had a vested right in a limitations defense. *Id.* “This principle is well-rooted in our precedent, a point meriting respect as a matter of stare decisis,” the court observed. *Id.* The court held the founding-era understanding of “due process” and “legislative power” foreclosed “legislative enactments that vitiate a ‘vested right’ in a statute of limitations defense.” *Id.*; *see also id.* at 913 (holding “stale claims [] decades after repose had been granted” would not only be unwise but triggered due process considerations (citing *Ireland v. Mackintosh*, 61 P. 901, 904 (Utah 1900))).

The court made clear its decision was not a question of “the reasonableness of [the legislature’s] policy judgment, but rather a question of constitutional magnitude. *Id.* at 903. Because a retroactive law of this nature (a) could not vitiate a “vested right in a ripened

limitations defense”; (b) was protected by the “original understanding of due process”; and (c) could not be salvaged using the policy considerations applicable to the reasonable basis test, it declared the legislation unconstitutional. *Id.*

Stated simply, the Utah Supreme Court held the obvious: reviving stale claims raises concerns of a constitutional magnitude that must be avoided. And for many of the same reasons—the least of which is respect for Colorado’s well-established precedent prohibiting this type of retrospective legislation—the same result applies here. *See People v. Porter*, 2015 CO 34, ¶ 23 (Colo. 2015) (“The doctrine of stare decisis requires that we follow pre-existing rules of law.”); *Creacy v. Indus. Comm’n*, 366 P.2d 384, 386 (Colo. 1961) (“Under the doctrine of stare decisis courts are very reluctant to undo settled law.”).

II. THE ACT IS UNFAIRLY PREJUDICIAL TO YOUTH-SERVING ORGANIZATIONS BECAUSE ITS EXPANSIVE RETROACTIVE NATURE MEANS THE EVIDENCE TO INVESTIGATE AND RESOLVE THESE CLAIMS NO LONGER EXISTS.

Colorado courts have long acknowledged that the justice system’s critical purpose is its truth-seeking function and that statutes of

limitations further this goal by requiring claims to be brought while the best evidence still exists. *See, e.g., Malm v. Villegas*, 342 P.3d 422, 426 (Colo. 2015) (“[A] legislatively prescribed statute of limitations sets a predetermined time-bar, premised largely on the presumption that lengthy delay in notifying another of the need to defend himself is inherently prejudicial.” (quoting *Jones v. Cox*, 828 P.2d 218, 224 (Colo. 1992)); *Lake Canal Reservoir Co. v. Beethe*, 227 P.3d 882, 886 (Colo. 2010) (“Statutes of limitations serve several important purposes within the justice system. They ‘promote justice, discourage unnecessary delay and forestall prosecution of stale claims.’”); *Conrad v. Scott*, 278 P. 798, 799 (Colo. 1929) (“[L]apse of time has a tendency to obscure evidence, and often makes it impossible to discover the truth[.]”).

“Statutes of limitation ... in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944). The rationale is two-fold. First, “even if one has a just claim it is unjust not

to put the adversary on notice to defend within the period of limitation[.]” *Id.* at 349. Second, “the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Id.*

Here, the Act reaches back sixty years, resuscitating claims that may have occurred years if not decades ago. Any assumption that these organizations have the files or even access to the memories of those alleged to have been involved is misplaced. Witnesses have died, those who remain are difficult to locate and their memories have faded. These concerns weigh in favor of enforcing statutes of limitation. *See, e.g., Rudnicki v. Bianco*, 2021 CO 80, ¶ 67 (Colo. 2021) (Hart. J, dissenting) (noting that litigating stale claims means “[r]ecords could be gone. Memories will have faded. Experts will have to opine on decades-old standards of care in fast-changing industries. Statutes of limitations exist precisely to avoid these challenges.” (emphasis added)).¹

This prejudice is particularly evident when the youth-serving organization’s position is juxtaposed against a plaintiff’s, or even a

¹ Justice Hart’s concerns in *Rudnicki* are exacerbated here. *Rudnicki* allowed claims that were, at most, twenty years old. Claims under section 13-20-1203, C.R.S., could be over sixty years old.

perpetrator's. Both individuals can rely on their personal memories as evidence in the case. A managing organization—that undoubtedly has changed leadership and staff, as well as complied with document retention policies and purged decades-old papers—lacks that knowledge. The institutional knowledge necessary to defend the institution is and can only be based on that information. Absent access to the individuals who were part of the organization at the time of the activities alleged, organizations are unable to even investigate the veracity of conduct that may have occurred decades ago, much less defend themselves against a lawsuit.

The lack of digitized information compounds this harm. On a conservative assumption, information about claims concerning alleged conduct in the 1960s, 1970s, and 1980s will likely not be found in electronic employee and volunteer databases. They simply did not exist. Files were paper. And locating and reviewing paper files from over sixty years ago is in most cases a fruitless endeavor. The cost of retaining and digitizing those types of records—much less six decades of them—was cost prohibitive for youth-serving organizations.

Setting aside the cost, absolutely no organization would have reasonably believed that it needed to keep records from forty to sixty years ago on the off chance the General Assembly would resuscitate long-expired claims against it.

Moreover, section 1203 forces the managing organization to prove a negative—the question for the jury is whether the managing organization knew the actor posed a risk to youth, but the managing organization has no records and no witnesses to show what the organization did or did not know.

California Governor Jerry Brown vetoed retroactive bills in 2013 and 2018 on this basis, succinctly explaining that “[t]he issue of who is subject to liability is an important distinction as the law in this area has always and rightfully imposed longer periods of liability for an actual perpetrator of sexual abuse than for an organization that employed that perpetrator. This makes sense as third parties are in a

very different position than perpetrators with respect to both evidence and memories.” Brown Veto Statement, App.² at 2 (emphasis added).

The challenges youth-serving organizations face in defending these claims does not end with the lack of evidence. The standard against which the youth-serving organization’s care will be measured is that which existed at the time of the alleged conduct. *See Roessler v. O’Brien*, 201 P.2d 901, 903-04 (Colo. 1949) (holding to establish negligence “it is incumbent upon plaintiff to show that the defendant owed him a legal duty in the capacity in which he was acting at the time of the injury.” (emphasis added)); *Rice v. Eriksen*, 476 P.2d 579, 580 (Colo. App. 1970) (“The standard of care to which a defendant in a negligence action is held is that of a reasonably prudent person under the same or similar circumstances.”).

Present understandings, biases, and impressions are ubiquitous as to these sorts of claims, as is the need to have sufficient protections in place. Jurors will be challenged to divorce themselves from those

² “App.” refers to the appendix filed herewith. The page cite corresponds to the PDF number.

standards and fairly evaluate conduct occurring sixty years ago, when those standards and understanding were not in place.

The unfair and untenable position in which section 1203 places youth-serving organizations because of these difficulties is contrary to the well-settled goal of factfinding through the judicial system. It does not serve the General Assembly’s express purpose—to hold those managing organizations accountable that were “culpable” or “complicit” decades ago. Instead, it punishes the present versions of the organization, unconstitutionally prejudicing them.

The amici therefore respectfully request that this Court follow the plain language of Colorado’s constitution and declare section 1203 an unconstitutional retrospective law.

III. THE ACT PUNISHES PRESENT-DAY YOUTH-SERVING ORGANIZATIONS FOR THE ALLEGED CONDUCT OF PAST ENABLERS, DEFEATING THE GENERAL ASSEMBLY’S PURPOSE IN PASSING THE ACT.

Allowing claims to be brought against managing organizations decades after the alleged conduct occurred to “hold enablers accountable” is problematic and illogical. 2SB21-088 Legislative Declaration §1(4)(b)-(c), App. at 6.

Today's organizations share little resemblance to the youth serving organizations of the past with respect to protecting children from sexual abuse. Organizations act through only the people that run them—senior leadership, management, members, directors, faculty, staff, counselors, and others. The professionals leading, working, and volunteering in these organizations today are staunch protectors of children and advocates for child safety—making it wholly unfair to punish them for the acts of their predecessors.

The voluntary efforts that organizations across Colorado have put into place to protect children have created an entirely different environment than existed decades ago. Today precautions are taken before adults ever interact with children to prevent abuse and detailed reporting requirements are in place to ensure that if misconduct does occur, the child is quickly protected and law enforcement contacted.

For example, the Association of Colorado Independent Schools (ACIS) accredits thirty-eight independent schools in Colorado serving over 11,000 children. As part of its accreditation process, ACIS requires that all schools:

- Provide evidence of conducting criminal background checks for every employee, including regular checks on established employees;
- Provide evidence of policies/practices regarding criminal background checks for school volunteers;
- Provide documents that clarify behavioral expectations and disciplinary policies related to child protection;
- Provide description of core values or general behavioral expectations for sustaining safe and supportive learning environments;
- Have a crisis management plan that includes proactive systems in place for responding to allegations or instances of sexual misconduct or abuse;
- Provide evidence of periodic professional development for teachers on mandatory reporting requirements in Colorado, boundary setting, and other topics related to child protection;
- Provide evidence of student programs designed to educate them about the Safe2Tell program in Colorado for anonymous reports about school safety concerns; and
- Provide evidence of student programs designed to help them recognize boundary crossing and assert themselves to avoid becoming a victim of sexual misconduct.

See <https://www.nais.org/membership/international-council-advancing-independent-school-accreditation/criteria-for-effective-independent-school-accredit/> (last visited Jan. 17, 2023). App. at 11-16.

Colorado Academy, an ACIS-accredited school, is required to follow each of these criteria to maintain its licensure. Colorado Academy staff attend training on mandatory reporting and child sexual abuse annually. The Employee Policy Handbook provides additional guidance to faculty and staff. Colorado Academy Employee Handbook, App. at 68-70. The Handbook further explains:

Roles: Faculty and staff must stay in their professional roles in all interactions with students and families and avoid personal roles, which send mixed or ambiguous signals to students. Adults should act as a role model, always making the student's interests primary and never meeting the adult's needs through the student.

Boundaries: Boundaries are the physical and emotional limits individuals set in their interactions and relationships with others. Boundary violations occur when a person in a position of responsibility crosses a boundary with someone who is vulnerable to meet their own needs.

Power: Faculty and staff are in positions of perceived and actual power over students and should always be alert to this inherent power imbalance. It is the responsibility of teachers to assist students with developing into autonomous individuals.

Accountability: Faculty and Staff should avoid even the appearance of impropriety. Leave the door to the room open and avoid repeated unscheduled meetings alone with students. Be especially careful to stay in a professional role and maintain boundaries when using technology to communicate privately with students.

Handbook at 43-44, App. at 68-69.

The Handbook then goes on to prohibit specific conduct, including private one-on-one social contact with students outside of regular school hours, meeting with students behind closed doors, and meeting with students using video conferencing after school hours. Students at Colorado Academy are also trained to identify and report misconduct.

The evolution of these principles for child safety continues. The National Association of Independent Schools partnered with The Association of Boarding Schools in 2016 to form the Independent School Task Force on Educator Sexual Misconduct. *See* <https://www.nais.org/articles/pages/independent-school-task-force-on-educator-sexual-misconduct-report-prevention-response/> (last visited Jan. 17, 2023). The task force conducted significant research and in 2018 published recommendations for independent school leaders. Nat'l Ass'n of Indep. Schs., *Prevention and Response: Recommendations for Independent School Leaders from the Independent School Task Force on Educator Sexual Misconduct*, App. at 132. Independent schools across

Colorado have worked to implement these recommendations to ensure best practices are employed to keep kids safe.

Outside of schools, other youth-serving organizations have put in place detailed protocols to protect children. For example, the American Camp Association (ACA) provides research, education, standards, and training to promote safe and healthy camp experiences. *See* <https://www.acacamps.org> (last visited Jan. 17, 2023). Camps that are ACA-accredited are required to follow what is considered to be the industry standards. These focus on health, safety, and risk management. These standards also promote quality staff hiring and include extensive background checks. Many of the ACA standards are also used as benchmarks in the Child Care Licensing regulations of Colorado. The Colorado Camp Network similarly serves as a resource to assist camps in adopting similar policies. ACA Accreditation Requirements, App. at 172.

Youth sports and the protection of youth athletes has also changed dramatically to ensure children are protected. The U.S. Center for SafeSport, codified in 2017 by Congress, is a nonprofit that creates a

community safe from emotional, physical, and sexual abuse and misconduct for coaches, parents, athletes, youth, and amateur sports organizations. SafeSport provides online and in-person trainings to increase abuse prevention, education, and accountability, publishes minor athlete abuse prevention policies and prevention and awareness resources, and has a mechanism on its website for reporting safety concerns. It has delivered more than 2 million abuse prevention trainings. Importantly, SafeSport receives all sexual misconduct reports from anyone in the U.S. Olympic & Paralympic Committee, investigates such reports, issues decisions on violations of the SafeSport Code, and sanctions individuals found to be in violation of the Code. SafeSport is committed to preventing child sexual abuse and misconduct throughout all levels of youth sport. *Our Journey Toward Safer Sport*, U.S. Center for SafeSport, March 2022, App. at 184.

In addition to these voluntary actions, the Colorado General Assembly and federal government have also implemented statutes and regulations aimed at child safety. Appendix pages 194-210 contain a

chart of numerous statutes that have been put in place in just the last few years.

The point is simple: the youth-serving organizations of today are dramatically different from those which the General Assembly seeks to hold accountable. Today's organizations are accountable and the Act is therefore punitive and unnecessary.

IV. THE ACT IMPERILS THE FINANCIAL VIABILITY OF TODAY'S YOUTH-SERVING ORGANIZATIONS.

It is the organizations committed to child safety that exist today and the children that they serve—not the managing organizations of the 1960s, 1970s, and 1980s—that will shoulder the burden of the Act's consequences.

The Act permits plaintiffs to seek damages of up to \$500,000 (which can be doubled to \$1,000,000 upon clear and convincing evidence). C.R.S. § 13-20-1205(3)(2). Over 73% of Colorado's non-profits operate on annual budgets of \$500,000 or less. Alex Derr, Colorado Nonprofit Economic Impact Report, (2017), App. at 211-14 (emphasis added).

Unlike typical tort claims that occur within a proscribed limitations period, youth-serving organizations are more likely to have insufficient insurance coverage to defend these claims. Insurance policies in place today often will not cover claims for abuse that occurred in the past. Siobhain P. Minarovich, Insurance Coverage Issues Presented by Child Victim's Act, Summer 2022 USLaw Magazine (8) (2002), App. at 215-16.

Even if a managing organization had coverage at the time the abuse occurred, it is nearly impossible to determine what coverage existed thirty, forty, fifty or even sixty years ago. Thus, in many cases, these claims and the cost to defend them will be shouldered by the operating budget of the youth serving organizations. Anecdotally, organizations are already reporting increased insurance costs.

These organizations do not have significant reserves; in many circumstances, litigation costs and claims will have to be satisfied through their operating budgets. A single claim of historic abuse, unknown to any person currently working at the non-profit, could

decimate smaller youth-serving organizations and prevent them from continuing to provide critical community services.

Larger youth-serving organizations are not likely to fare much better. While a single claim may not cripple the organization, all of the funds that are used to hire lawyers and settle claims are funds that are not utilized to serve kids. Even large organizations have finite resources and defending or responding to these claims of abuse will require a shift in resources. Fewer programmatic resources lead to increases in tuition and decreases in financial aid, resulting in fewer children being served through these youth serving organizations.

The Act will further infect youth-serving organization's fundraising efforts. Many of these organizations rely on donations, grants, and government funding to survive. Different foundations, institutional donors, and government programs require that a certain percentage of an organization's budget be used for programming as opposed to overhead expenses. Websites such as Charity Navigator help donors evaluate non-profits and a common metric is whether funds are being spent on programming or other overhead. *See, e.g.,*

<https://www.charitynavigator.org/> (last visited Jan. 17, 2023). Legal fees, settlements, or judgments are likely to make managing organizations unattractive for funding, given the large amount of overhead necessary to defend these claims. Although the abuse is alleged to have occurred decades ago, it is donations from today's supporters that will be used to cover legal costs. The public relations damage a youth-serving organization will suffer—even from the mere allegation of a forty-year-old claim—is devastating.

V. THE ACT'S IMPACT ON YOUTH-SERVING ORGANIZATIONS IS NOT FULLY KNOWN.

Although the window has been open for over a year, it is largely unknown how many cases will be filed and the types of managing organizations that will face claims. Data from other states in which similar window legislation has passed demonstrates that most plaintiffs do not file claims until the end of the limitations period.

For example, New York opened a two-year window in August 2019. Nearly 11,000 claims were filed during the window—4,000 of which were filed in the window's last month. *Statute of Limitations Reform Serves the Public Interest*, August 23, 2021 at 5, App. at 221.

New York's experience shows that claims are brought against all types of organizations. Claims were brought against schools and religious organizations, mentoring organizations, community groups, youth sports, scouting, and social services non-profits. Of all the claims brought against organizations, only 15% of claims were brought against individual perpetrators. *Id.* at 222. This means that institutions or organizations were the defendant in 85% of the cases. Under the circumstances, Colorado's youth-serving organizations cannot—and should not—bear that burden.

CONCLUSION

For the reasons stated herein, Colorado Academy, World Leadership School, Cornerstone Safety Group, and Global Works urge this Court to apply the plain language of Colorado's constitution and hold that section 1203 is unconstitutional.

Dated: January 17, 2023

LEWIS ROCA ROTHGERBER
CHRISTIE LLP

s/ Doug B. Tumminello
Doug B. Tumminello, #40154

s/ Kendra N. Beckwith
Kendra N. Beckwith, #40154
1601 Nineteenth Street,
Suite 1000
Denver, Colorado 80202
Phone: 303-623-9000
Email: dtumminello@lewisroca.com
kbeckwith@lewisroca.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of January, 2023, a true and correct copy of the foregoing was filed and served on the following via the Colorado Courts E-Filing System which will serve all counsel of record at the time of filing.

s/ Kendra N. Beckwith _____

Kendra N. Beckwith