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COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203 C.A.R. 50 Certiorari to the Court of Appeals, 2022CA1583 District Court, Arapahoe County, 2022CV30065	
PETITIONERS: Aurora Public Schools and David James O'Neill, v. **RESPONDENTS:** Angelica Saupe and Brian Saupe.	**▲COURT USE ONLY▲**
Attorney for Amici Curiae: Jonathan P. Fero, No. 35754 Semple, Farrington, Everall & Case P.C. 1120 Lincoln Street, Suite 1308 The Chancery Building Denver, CO 80203 Phone Number: (303) 595-0941 FAX Number: (303) 861-9608 E-mail: jfero@semplelaw.com	Supreme Court Case No: 2022SC824

BRIEF OF 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 IN SUPPORT OF PETITIONER AURORA PUBLIC SCHOOLS' OPENING BRIEF

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 the applicable word limit set forth in C.A.R. 29(d).

- It contains 4,007 words (does not exceed 4,750 words).

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

I acknowledge that 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.

By: *s/Jonathan P. Fero*
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INTRODUCTION

This case concerns the constitutionality of the Child Sexual Abuse Accountability Act ("CSAAA" or "the Act") and whether it can create a new cause of action and retroactively waive sovereign immunity for alleged conduct that occurred anytime over the last 62 years. Amici curiae the Colorado School Districts Self Insurance Pool ("CSDSIP"), the Colorado Association of School Boards ("CASB"), the Special District Association of Colorado ("SDA"), the Colorado Rural Schools Alliance (the "Rural Alliance"), and the Colorado Association of School Executives ("CASE") agree with Petitioner Aurora Public Schools ("APS") that the Act violates the Colorado Constitution's prohibition of ex post facto laws. CSDSIP, CASB, SDA, the Rural Alliance, and CASE write separately to further explain why the CSAAA is fundamentally unfair to local governmental entities, and if allowed to stand, will result in a costly and unjustified expansion of public liability.

ISSUES ANNOUNCED FOR REVIEW

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.

IDENTITIES AND INTERESTS OF AMICI CURIAE

CSDSIP was created in 1981 after authorization by the state legislature as a direct response to shortcomings in the commercial insurance market. With six initial school district members, CSDSIP quickly grew and now counts 133 school districts, 18 boards of cooperative services, and 13 independent charter schools as members.

CASB was established in 1940 to provide a structure through which school board members could unite in their efforts to promote the interests and welfare of Colorado's 178 school districts. Today, CASB represents and advocates for more than 1,000 school board members and superintendents statewide to groups both within and outside the K–12 education community. CASB also provides services, information, and training programs to support school board members as they govern their

local districts.

SDA is a Colorado nonprofit corporation that was established in 1975 to provide better communication, research, legislative input, administrative support, and training opportunities for its member districts. SDA helps to preserve and enhance the legal and political environment for the existence and successful operation of the special district form of government, and to assist special districts to operate efficiently and appropriately. SDA's membership consists of 2,527 special districts located throughout the State of Colorado. Including those members, the total number of special districts in Colorado is 3,493.

The Rural Alliance is a nonprofit corporation organized in 2003 to advocate for the interests of rural schools and communities. The Rural Alliance serves as the voice of Colorado's 146 rural school districts at the State Capitol and with state and federal policy makers. The Rural Alliance also provides legal services, trainings and scholarship opportunities for rural schools and students.

CASE was established in 1969 to support Colorado public education administrators, and to advance K–12 interests and priorities at the state Capitol and in other policy settings. CASE currently serves more than

3,300 members from across the state through a mix of professional learning opportunities, lobbyist services, communications, legal support and by providing a strong professional network. CASE also works closely with other public education stakeholder organizations on shared priorities and goals.

As representatives and insurers of Colorado local governmental entities and employees, CSDSIP, CASB, SDA, the Rural Alliance, and CASE all have a major interest in the constitutionality of the CSAAA and a valuable statewide perspective for this Court. For the reasons discussed below, the Act will allow unjust adjudications and expose governmental entities to catastrophic losses, without making children any safer.

REASONS WHY AMICI CURIAE SUPPORT PETITIONER APS' ARGUMENTS THAT THE CSAAA IS UNCONSITUTIONAL

I. The Act Allows Unjust Adjudications Because Governmental Entities are Unlikely to Have Relevant and Reliable Evidence Regarding Claimants' Allegations.

There is no dispute that child sexual abuse is abhorrent and unacceptable. But allowing individuals to bring claims based on allegations dating as far back as 1960 does not mean that justice will be done. The CSAAA does not further the legislature's stated interest in

punishing "culpable and complicit" organizations or compensating victims, S.B. 21-088, Ch. 442, Sec. 1, Colo. Sess. Laws 2922, 2923 (2021), because the passage of time extinguishes any realistic possibility of just adjudications. Governmental entities are unlikely to have access to relevant evidence regarding old abuse allegations, from which organizational responsibility could be reliably determined.

It is extremely difficult for an organization to even investigate claims based on allegations that are decades old. The farther back in time allegations go, the more likely there will be no individuals with knowledge or relevant documents available. One of CSDSIP and CASB's member school districts recently received notice of an alleged abuse claim dating back to the early 1980s, prompting an extensive search for records or witnesses available to confirm whether the alleged perpetrator had been an employee, let alone whether and to what degree the individual may have interacted with the claimant. A 30-year-old employee in 1980 would be over 80 years old today, if they were still alive, and memories fade. The odds that employees from the 1970s are still available to provide information now are even more remote and become miniscule when reaching back another decade into the 1960s.

The likelihood that no relevant documents will be available is similarly high. How organizations generate and retain records has changed over the last 60 years. Yet, for governmental entities at least, retention has long been dictated by reasonable need, informed by records retention standards and applicable statutes of limitations, as well as the reality of available resources. Not all governmental entities have had the economies of scale to shift from physical files to electronic records at the same pace, and regardless, the arrival of the digital age does not mean historic documents have all been digitized and are being kept indefinitely. Until recently, school districts and other local governmental entities have had no reason to indefinitely retain records that could be relevant to sexual abuse claims.

The Colorado State Archives publishes records retention manuals for governmental entities.[1] The relatively few documents identified for permanent retention generally relate to organization governance. In contrast, groups of documents implicated by the CSAAA are classified for short term retention. For example, school districts need only keep records

[1] Current versions are available at https://archives.colorado.gov/records-management. CASB publishes a model school board policy EHB that provides for approval of the State Archives' manual for school districts.

regarding the use of school premises for purposes other than regular school activities (such as a community group gathering), for two years. Colo. State Archives, *Records Mgmt. Manual, Sch. Dists.*, p. 13, *available at* https://tinyurl.com/5885rtv8. Consistent with federal law, 29 C.F.R. 516.5, school districts, municipalities, and county governments must keep employment contracts for just three years after their expiration, while only some specific employment records are to be maintained for as much as 10 years after separation—far longer than federal law requires, but still well short of the more than 60 years covered by the Act. *See, e.g.*, Colo. State Archives, *Records Mgmt. Manual, Sch. Dists.*, pp. 33–35, *available at* https://tinyurl.com/5885rtv8. Records for temporary and seasonal employees, like coaches, are to be kept for just three years. *See, e.g.*, *id.* at 35. Compliance with these standards means documents relevant to old abuse claims are not going to be available.

For over half a century, tort and other claims against governmental entities have been subject to a two- or three-year statute of limitations. § 13-80-102(1)(a), (f), (h), C.R.S. (providing for specific two-year limitation since 1986); § 13-80-108(1)(b), C.R.S. (1973), and § 87-1-9(2), C.R.S. (1953) (providing for catch-all three-year limitation before 1986). The

general statute of limitations included claims based on sexual misconduct until 1990, when the legislature adopted a short extension of the statute of limitations for such claims to a total of six years. H.B. 90-1085, Ch. 112, sec. 1, Colo. Sess. Laws 885, 885 (1990). That was the law for the next 30 years until 2021, when the legislature removed the statute of limitations for sexual abuse claims. S.B. 21-073, Ch. 28, sec. 1, Colo. Sess. Laws. 117, 117–18 (2021), *codified at* § 13-80-103.7(1), C.R.S. But that change was prospective only; it did not resurrect claims for which the previous statute of limitations had run.

Governmental entities also long had absolute immunity from sexual abuse claims arising under state law, § 24-10-106(1), C.R.S., though claimants always could seek recourse from current and former government employees for injuries arising from "willful and wanton" conduct during the performance of their duties and within the scope of their employment, §§ 24-10-105(1), -118(1), C.R.S., subject to an inflationary damages cap, § 24-10-114(1)(a)(II), (b), C.R.S. Starting in 2015, the legislature enacted a limited waiver of sovereign immunity for school districts, schools, and school employees arising from incidents of school violence. *See generally* § 24-10-106.3, C.R.S. Such claims could be

based on sexual abuse if the conduct amounted to felony sexual assault and caused serious bodily injury. *Id.*, -106.3(2), (4). As with previous legislative changes affecting the potential liability of governmental entities, the creation of a duty of care and allowance of certain claims based on incidents of school violence were prospective only, and the applicable statute of limitations and damages limitations remained unchanged.

It is not unreasonable to expect governmental entities to respond to changes in the law on a go-forward basis, given sufficient resources. The CSAAA, however, is retroactive, and there is nothing that can be done now regarding past records retention policies and practices or witnesses who cannot be located or are otherwise unavailable. Why would a governmental entity have allocated limited funds to indefinitely maintain records pertaining to who participated in a seasonal sport or extracurricular club? Why would documentation of a community group's use of government property be kept for more than a few years? Or even employment records for decades after separation? Before 2021, there was no reason to classify any of those records for indefinite retention.

There is no presumption of innocence for the accused in civil litigation, and the CSAAA allows a claimant to rely on their own testimony, without risk of having to pay the government's attorney's fees. § 13-20-1206, C.R.S. Moreover, a severe stigma comes with even the allegation of sexual abuse, and governmental entities have every incentive to investigate and determine whether abuse occurred and if so, whether they bore any responsibility. But their ability to respond to a claimant's allegations diminishes greatly the farther back allegations go. *See, e.g.*, *Malm v. Villegas*, 342 P.3d 422, 426 (Colo. 2015) (recognizing "presumption that lengthy delay in notifying another of the need to defend himself is inherently prejudicial"). By allowing claims from times when little or no evidence regarding an allegation is available, the Act leaves governmental entities at an extreme disadvantage and all but assures that there cannot be just adjudications.

II. The Act Exposes Local Governmental Entities to Catastrophic Financial Loses and Will Increase the Cost of Insurance.

The CSAAA also will impose significant financial costs on governmental entities even though they may not have contributed to the alleged abuse. Investigating and defending abuse claims is costly, and

given the unavailability of relevant evidence, governmental entities face a greater risk of loss. The fiscal impact of the CSAAA is multiplied by its narrow window for bringing resurrected claims. ***All*** abuse claims that arose between January 1, 1960 and January 1, 2022 must be brought before January 1, 2025. § 13-20-1203(2), C.R.S. This means that the cost of defending 62 years of accrued claims must be borne over only three years. Local government budgets and their insurers simply are not structured to bear such costs over such a short period of time.

Indeed, available estimates of how many claims to expect suggest catastrophic exposure. The fiscal note attached to the CSAAA acknowledged that state and local governments would incur substantial costs for legal fees and damages awards. Colo. Leg. Council, *S.B. 21-088 Final Fiscal Note*, pp. 3–4 (Aug. 23, 2021), *available* at https://tinyurl.com/2me42gl7. For state programs serving approximately 60,000 youth, it was assumed that at least 300 historical sexual abuse claims could arise during the three-year filing window. *Id.* at 2. Applying the same rate to the significantly higher number of students who have been served in Colorado's public schools would amount to over 4,300

claims![2] Even if only a fraction of claims is filed, the potential fiscal impact is astounding.

Over a 12-year period spanning parts of the last two decades, the Los Angeles Unified School District, which enrolls approximately 565,000 students, incurred losses of $553,000,000 on sexual assault and misconduct claims. Ex. A, Bickmore, *Actuary Rpts.*, pp. 8, 29 (2019). Colorado enrolls approximately 855,000 students statewide, Colo. Dep't Educ., *Dist. Funding Calculation Worksheet* (Jan. 11, 2023), *available at* https://tinyurl.com/2hjt65xa, and on a per pupil basis, the same rate of loss would amount to over $72,000,000 per year to Colorado's school districts. Legislation in California that would have extended the statute of limitations for abuse claims by 14 years—less than a quarter of the 62 years that the CSAAA reaches back—was conservatively estimated to impose another $560,000,000 in costs on the state's public schools. Ex. A, Bickmore, *Actuary Rpts.*, p. 3.

[2] Nearly 11,000 suits were filed in New York during a similar two-year window for expired sex abuse claims. Sonia Moghe, *Flood of Lawsuits Expected*, CNN (Nov. 24, 2022), *available at* https://tinyurl.com/292r7xx9. Colorado is approximately 30 percent as populous as New York. U.S. Dep't of Commerce, Bureau of Census, *Annual Estimates of Population 2020–2022*, *available at* https://tinyurl.com/5n894kxj.

Damages against Colorado governmental entities could not exceed $424,000 per claimant, *see* § 13-20-1207(1)(c), C.R.S.; Colo. Sec. State, *Certification of Limitations on Judgments* (Jan. 5, 2022), *available at* https://tinyurl.com/2k4n6jkq, but the cost of defense must be considered, too, along with the availability of $250,000 for plaintiffs' attorney's fees in class actions, § 24-10-114.5, C.R.S. In CSDSIP's experience, defense costs can amount to several hundred thousand dollars per case—much more than the approximately $45,500 per case estimated by Colorado Legislative Council staff for the state government's cost of defense. *See* Colo. Leg. Council, *S.B. 21-088 Final Fiscal Note*, pp. 2–4 (Aug. 23, 2021), *available* at https://tinyurl.com/2me42gl7.[3] Altogether, school districts and other local governmental entities conservatively estimate a potential loss of at least $600,000 per case in which the organization is found liable. Even the filing of just 1,000 historical claims could easily amount to $600,000,000 in defense costs and damages awards, and that only counts the anticipated claims against school districts and schools. Factoring in

[3] Colorado Legislative Council staff also assumed that only 20 percent of the estimated 300 historical claims would actually be filed during the three-year window, and of those, it was assumed that just six would receive a damages award, with three recovering the full amount allowed and three recovering half. *Id.* at 2–3. These assumptions seem wildly optimistic and do not match CSDSIP's claims experience.

all local governmental entities, it is not a stretch to project several ***billion*** dollars in losses.

To put these amounts in context for just school districts, public K–12 funding in the current 2022–2023 school year amounts to approximately $8,500,000,000. *See* Colo. Dep't Educ., *Dist. Funding Calculation Worksheet* (Jan. 11, 2023), *available at* https://tinyurl.com/2hjt65xa. The state contributes a little more than half of that amount from its general fund, while the rest is funded through local taxes. *See id.* Yet, available revenue does not fully fund public schools under the state's formula, and school districts are currently short over $320,000,000 that the state does not have to meet its funding obligation. *Id.*; *see generally* § 22-54-104(5)(g)(I), C.R.S. (providing for reduction of state education funding through "budget stabilization factor").

The CSAAA is yet another unfunded mandate, and Colorado's Constitution prohibits local governmental entities from just raising taxes or borrowing money to pay the bill. Art. X, § 20(4); Art. XI, § 6 (requiring voter approval for new debt or tax). Just as it is at the state level, local government budgeting is a zero-sum game; the damages and defense

costs that will result from the Act probably will have to be satisfied by cutting other expenditures. For school districts and other local governmental entities, where personnel can be the largest expenditure, it will be very challenging to keep cuts away from the classroom and other public services.

Insurance cannot be expected to cover all the Act's costs. CSDSIP, for example, did not exist in the 1960s or 1970s, and obtaining coverage for old claims requires documentation of historical policies, which, as already discussed, may no longer exist. Even if coverage can be obtained under prior policies, limits were lower, and there is no mechanism to account for inflation. Consequently, the older the claim, the more likely it is that the applicable limits will be inadequate to cover damages and the cost of defense in today's dollars. Both uninsured and underinsured claims must be covered out of a governmental entities' very limited budgets, which, again, diverts funds from ongoing expenses, including the provision of public services.

In addition, governmental entities may have deductibles to pay on top of annual premiums. Deductibles help keep premiums lower, and accepting such a degree of self-insurance is reasonable, particularly given

that the Colorado Constitution prohibits "ex post facto law[s]." Art II, § 11. Deductibles and coverage limits are based in part on an analysis of past claims to project future exposure under prevailing legal standards, and governmental entities can budget the amount of risk they are willing and able to accept. Retroactive changes in the law, however, cannot be anticipated. When, as here, such changes impose additional costs, they break governmental entities' risk analyses and budgets. The Act's allowance of old claims spanning six decades during a three-year filing window will trigger a mass of old claims that could not have been anticipated. Even for covered claims, there will be significant costs to local governmental entities in the form of a higher number of deductibles and ultimately, higher premiums.

Insurers engage in complex actuarial projections, and unanticipated losses necessarily result in increased costs of coverage that must be passed on to insureds. The CSAAA also injects unpredictability in how many old claims will be filed and how much losses will result. Insurers cannot be too conservative and must consider worst case scenarios. This means that even if the financial impact of the Act turns

out to be less than it now appears, it will still have resulted in higher insurance costs for governmental entities.

Of course, the potential exposure from a burst of over 60 years of abuse claims is so significant that it will greatly stress insurers' resources. Major property loss events are always anticipated, but Colorado is not in a hurricane alley, for example, and there is no reason to expect that every governmental entity will suffer hail damage in a single year, or even a three-year span. Abuse claims are not determined by geography or other natural conditions and can arise wherever children are involved in government programs. The CSAAA's resurrection of so many old claims creates an unprecedented actuarial event that goes far beyond the loss contingencies public insurers or insureds have ever had reason to expect.

III. The Act Will Not Make Children Safer and Will Punish Governmental Entities for Past Conduct Even Though Much More is Known Today about Investigating and Mitigating Sexual Abuse.

The CSAAA also unreasonably holds school districts and other governmental entities responsible for past conduct under a modern-day duty of care, with no benefit of making any child safer when receiving public services.

A cause of action under the Act may target "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." § 13-20-1202(1), C.R.S. (emphasis added). The primary problem with this standard is that the Act applies it to ***all*** abuse claims, regardless of when they arose.

Since 1960, perpetrators certainly have known or should have known that sexual abuse of a child was wrong. One of the fundamental policies underlying waivers of governmental immunity, however, is to "hold[] governmental entities responsible for ***their*** actions." *Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1387 (Colo. 1997) (emphasis added). Organizations have learned a lot about sexual abuse over the last 62 years, and the methods and practices for recognizing, investigating, and responding to abuse allegations have undergone extensive evolution.

The statutory definition of child abuse for purposes of mandatory reporting by certain caregivers did not include sexual molestation until 1969, S.B. 57, Ch. 57, Sec. 1, Colo. Sess. Laws 197, 197 (1969), and even then, the focus was watching for signs of abuse that took place at home. Acquaintance abuse and the concept of "grooming" did not begin to be

appreciated until the 1980s. *See, e.g.*, Kenneth Lanning, *The Evolution of Grooming*, 33 J. Interpersonal Violence, 7 (2018), *available at* https://tinyurl.com/yfrae8bw. Recognition of the different types of perpetrators for whom prevailing treatment modalities may not be effective was slow, as evidenced by the passage of the first federal law requiring states to track sex offenders in 1994, 42 U.S.C. § 14071, and the creation of the national sex offender registry in 2006, 42 U.S.C. 16911. Title IX was enacted in 1972, but a liability standard for teacher-on-student sexual harassment was not recognized until 1998. *See generally Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998). Colorado's Safe2tell anonymous reporting program was not created until 2014. *See generally* §§ 24-31-601 *et seq.*, C.R.S. Accordingly, a governmental entity's acts or omissions regarding alleged abuse from the 1960s, 1970s, 1980s, 1990s, 2000s, etc. cannot be properly evaluated based on what is known today.

Nor will allowing a mass of old claims with a retrospective duty of care will make today or tomorrow's children safer. School districts and other governmental entities devote resources to ensuring prevailing best practices are implemented to prevent and mitigate child sexual abuse.

No one wants to find out that a child has been abused, let alone under circumstances that might have been avoidable. Recent allegations may inform whether current policies and practices are effective, but there is nothing governmental entities can do about what may have happened decades ago when much less was known.

CONCLUSION

Child sex abuse is horrible and cannot be tolerated. All organizations, including governmental entities, must take measures to protect the children who participate in their programs. Affording another opportunity for victims to seek justice against their perpetrators is laudable, but the CSAAA's creation of a new cause of action against organizations and its retroactive waiver of governmental entities' sovereign immunity dating back to 1960 goes too far. Not only is the Act unconstitutional, it is fundamentally unfair to local governmental entities, and if allowed to stand, will result in a costly and unjustified expansion of public liability.

Submitted this 17th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2023, a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE** was served electronically via Colorado Courts E-Filing on the following:

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