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Certiorari to Colorado Court of Appeals Court of Appeals Case No. 2022 CA 1583	
Appeal from Arapahoe County District Court Honorable Peter Frederick Michaelson, Judge Case No. 2022 CV 30137	**▲COURT USE ONLY▲**
Petitioners: AURORA PUBLIC SCHOOLS and DAVID JAMES O'NEILL v. **Respondents**: ANGELICA SAUPE and BRIAN SAUPE	Case No. 2022SC824

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AMICUS BRIEF OF MEMBERS OF THE COLORADO GENERAL ASSEMBLY IN SUPPORT OF RESPONDENTS ANGELICA SAUPE AND BRIAN SAUPE

CERTIFICATE OF COMPLIANCE

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

The amicus brief complies with the applicable word limits set forth in C.A.R. 29(d). It contains 4,082 words (does not exceed 4,750 words).

The amicus brief complies with the 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.AR. 29 and C.A.R. 32.

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STATEMENT OF INTEREST

Amici are members of the Colorado General Assembly, including members who were in the House of Representatives and Senate when the General Assembly passed Senate Bill 21-088, the Child Sexual Abuse Accountability Act ("the CSAAA" or "the Act"). The CSAAA creates a statutory cause of action for victims of child sexual abuse against actors who committed the abuse and organizations that enabled the abuse. Certain provisions of the Act operate prospectively. Other provisions operate retroactively to make remedies available for victims abused prior to the Act's effective date, but only for injuries occurring during certain years, and only if a lawsuit is commenced by the statutory deadline. This case concerns only those retroactive portions of the Act.

As members of the General Assembly, amici have a strong interest in the proper application and interpretation of the CSAAA's retroactive provisions. Amici are well-positioned to describe the Act's intent: to make certain limited remedies available for victims of child sexual abuse without unfairly impeding on the rights of defendants like Petitioners here. The Act's

legislative history and purpose make it clear that, in passing the CSAAA, the General Assembly was acting at the pinnacle of its legislative power to provide remedies closely tailored to the ongoing harms to health and safety caused by child sexual abuse. Because retrospectivity analysis involves ends-means balancing, *In re Dewitt*, 54 P.3d 849 (Colo. 2002), amici are uniquely situated to explain why the CSAAA is not unconstitutionally retrospective.

Amici are a bipartisan group of legislators: Senator Jessie Danielson, Senator Chris Kolker, Representative Cathy Kipp, Representative Marc Snyder, Representative Matt Soper, and Representative Mike Weissman.

SUMMARY OF ARGUMENT

The trial court erred in holding that the CSAAA's retroactive provisions—which were enacted by a substantial bipartisan majority of the General Assembly[1]—are unconstitutionally retrospective beyond a reasonable doubt. At the outset, Petitioners have failed to demonstrate that

[1] The CSAAA passed third reading in the House with fifty votes in favor, fourteen against, and one excused, with the House Amendments considered, concurred, and repassed by the Senate with thirty-three votes in favor, one against, and one excused. *See Child Sexual Abuse Accountability Act*, https://leg.colorado.gov/bills/sb21-088 (last accessed Feb. 21, 2023).

the Act's retroactive provisions would cause the types of harms that trigger constitutional retrospectivity concerns. Further, and importantly to amici, the General Assembly carefully calibrated the Act's retroactive provisions to address the ongoing harms wrought by child sexual abuse. This careful tailoring does not offend the Colorado Constitution's retrospectivity clause and is squarely within the General Assembly's police powers.

Retrospectivity analysis asks whether a statute's retroactive application[2] will unfairly harm defendants. The retrospectivity clause was added to the Colorado Constitution to protect ordinary people from powerful interests (at the time of the framing, the railroads and other well-established, moneyed interests) that might capture or co-opt the legislative process to obtain unfair benefits. The clause guarded against legislative abuse; it did not supplant legislative discretion aimed at legitimate governmental interests. Accordingly, this Court's retrospectivity jurisprudence is narrow.

[2] That the General Assembly made portions of the CSAAA retroactive is not in dispute. The statute makes that perfectly clear. C.R.S. § 13-20-1203(2) (providing for "retroactive application" to sexual misconduct that occurred between 1960 and 2022).

To start, only two harms are relevant to the retrospectivity inquiry: abrogation of a defendant's vested substantive rights, and creation of new substantive obligations or disabilities that did not exist at the time of a defendant's wrongful conduct. *DeWitt*, 54 P.3d at 855, 858. If a defendant shows that either (or both) of those harms are caused by the retroactive application of the legislation, reviewing courts proceed to consider "the public interest." *See id*. This Court's cases teach that the public interest is measured using a familiar means-ends test: so long as the legislation is a "reasonable exercise of the police power for the public good," it is not unconstitutionally retrospective. *Id.*

Viewed properly, the CSAAA is plainly not retrospective. As a threshold matter, Petitioners have not demonstrated that the Act imposes either of the harms necessary to raise retrospectivity concerns. They have identified only statutory and common law interests (which are not "vested," as relevant here), and they have cited to no new duties or disabilities created by the Act (it has always been unlawful to sexually abuse children in Colorado).

But even if Petitioners could identify a harm that would trigger retrospectivity analysis, those harms cannot overcome the legitimate public interests that the Act codified. The General Assembly was acting at the pinnacle of its police powers when it passed the CSAAA and the Act's retroactive provisions are reasonably related to legitimate government interests. Indeed, the General Assembly took great care to tailor the Act's retroactive provisions to the specific harms it identified, and imposed limits on liability to mitigate the same types of (constitutionally irrelevant) harms Petitioners now complain of. The retroactive provisions of the CSAAA are constitutional.

ARGUMENT

I. The Retrospectivity Clause Was Added to the Constitution as a Bulwark Against Corruption of the Legislative Process

The retrospectivity clause, Colo. Const. art. II § 11, is designed to "prevent unfairness that would result from changing the consequences of an act after that act has occurred." *DeWitt*, 54 P.3d at 854. The framers' interest in fairness, however, was not general or abstract. It was quite particularized. In drafting one of the longest state constitutions in the nation, Colorado's

constitutional delegates evinced their "skepticism of state legislators' ability to resist the corrupting temptations offered by corporations in general and railroads in particular." Richard B. Collins & Dale A. Oesterle, *The Colorado State Constitution (Oxford Commentaries on the State Constitutions of the U.S.)* (2d ed.) (2020) at 3. With the "poor performance of the Colorado territorial legislature and railroad bribery scandals in the eastern states" fresh on their minds, the framers drafted a governing charter that codified their "belief that the constitution could protect citizens from legislative misbehavior." *Id*. at 3-4. The retrospectivity clause was one such constraint, designed to thwart corruption of the legislative process in favor of powerful, but ultimately undeserving, private interests. *See id*. at 323.

1. This Court's retrospectivity cases bear out the clause's limited purpose as a bulwark against manipulation of the legislative process. First, only certain harms will trigger retrospectivity concerns. *DeWitt*, 54 P.3d at 855, 858. These harms—deprivation of a vested right or imposition of a new duty or disability—are in keeping with the clause's purpose. Deprivation of a right "not dependent on the common law or statute" and creation of new (and unforeseeable) consequences of a past action (on a right rather than an

expectancy) both implicate the sort of unfairness that may indicate a corrupt legislative purpose. *See DeWitt*, 54 P.3d at 855, 856-57.

2. But that does not end the inquiry. In order to serve its structural purpose of protecting the legislative process, the retrospectivity clause next requires that unfairness caused by retroactive application be "balanced against the public interest in the statute." *Id.* at 855, 857. This public-interest test is not a terribly exacting one and follows the same formula as rational-basis review: so long as the "statute at issue [is] reasonably related to the asserted public interest and statutory objectives," it is not unconstitutionally retrospective. *Id.* at 857. Again, this means-ends analysis is entirely consistent with the clause's purpose. So long as the courts can identify a "legitimate government interest" that is "rational[ly]" related to the statute's provisions, the risk of unfair legislative co-opting by outside interests is low. *Id.* at 855. Illegitimate interests—such as codifying unfair retroactive benefits for powerful actors—will not survive this analysis. *Id.* Nor will retroactive laws unrelated to accomplishing legitimate ends. *Id.* But retroactive laws reasonably related to a legitimate governmental interest will survive.

The CSAAA is one such law.

II. The Act is Tailored to Serve Legitimate Government Interests at the Core of the General Assembly's Police Powers

At the outset, amici do not believe that Petitioners (or their amici) have identified a constitutionally-relevant harm caused by the CSAAA's retroactive provisions. The harms they cite—which are based on the statute of limitations and the doctrine of sovereign immunity—are quintessentially "dependent on the common law or statute." *DeWitt*, 54 P.3d at 854. They have no "independent existence." *Id.* Thus, no vested right—within the meaning of this Court's retrospectivity jurisprudence—is implicated. Nor does the Act impose a new duty or disability. It has always been unlawful to sexually abuse children in Colorado. It was unlawful when the Constitution was ratified in 1876;[3] when this Court abrogated sovereign immunity in 1971;[4] when the General Assembly reimposed limited sovereign immunity

[3] *See* Colorado Territory Session Laws of 1861, An Act Concerning Criminal Jurisprudence, section 44 ("Every male person . . . who shall have carnal knowledge of any female child under the age of ten years, either with or without her consent, shall be adjudged guilty of the crime of rape."); *see also* Colorado Territory Session Laws of 1861, An Act Concerning Fugitives from Justice, section 8 (empowering the territorial governor to offer a reward for fugitives duly convicted of rape).

[4] C.R.S. § 40-3-401(d) (1971) (setting out the crime of rape as to a "female [that] is less than sixteen years old"); *id.* § 40-3-403(d) (same for crime of "[d]eviate sexual intercourse"); *id.* § 40-3-408 (making sexual assault on a child a felony); *see also generally Evans v. Board of*

in 1972;[5] and when the CSAAA came into effect on January 1, 2022.[6] The CSAAA creates no new substantive duties or disabilities for past acts. It merely provides new procedures and remedies for enforcing the duties and obligations that Petitioners (and those like them) have always been subject to. Petitioners have not invoked a constitutionally relevant harm.

But even if they had, this Court should still reverse the trial court because the Act plainly serves legitimate governmental interests and its retroactive provisions are rationally related to those interests. More than that, the CSAAA's limited retroactive provisions are *closely* tailored to the powerful government interests the General Assembly identified. Such carefully-crafted legislation will only rarely be unconstitutionally retrospective in all conceivable circumstances and beyond a reasonable doubt. The CSAAA is no such outlier.

A. The CSAAA Serves Legitimate Governmental Interests

County Comm'rs, 174 Colo. 97, 482 P.2d 968 (Colo. 1971) (abrogating sovereign immunity); *Flournoy v. School Dist. No. 1*, 174 Colo. 110, 482 P.2d 966 (Colo. 1971) (same); *Proffitt v. State*, 174 Colo. 113, 482 P.2d 965 (Colo. 1971) (same).

[5] *See id.* (statutory sections); *see also generally* C.R.S. § 24-10-106 (1972).

[6] C.R.S. § 18-3-405 (2017).

The Act serves legitimate governmental interests at the core of the General Assembly's police powers. To "determin[e] the intention of the General Assembly when enacting [a] statute," courts "look first to the legislative declaration of purpose." *Regional Transportation District v. Jackson*, 805 P.2d 1190, 1192 (Colo. App. 1991). The legislative declaration is "[o]ne of the best guides to legislative purpose," *Common Sense Alliance v. Davidson*, 995 P.2d 748, 755 (Colo. 2000) and, because "[l]egislative intent is the polestar of statutory construction," *State v. Nieto*, 993 P.2d 493, 502 (Colo. 2000) (quotation omitted), an authoritative source of statutory meaning. The CSAAA's legislative declaration is no exception. It makes clear (1) what governmental interests the CSAAA was enacted to serve, and (2) that those interests fall comfortably within the heartland of the General Assembly's police powers.

1. There can be no doubt as to the governmental interests that the Act seeks to serve. A substantial majority of the General Assembly adopted a detailed legislative declaration that (a) expressly identified the relevant governmental interests, which (b) are not subject to second-guessing by the parties or the courts.

a. After careful study, the General Assembly concluded that "[c]hild sexual abuse is a significant public health problem in Colorado with long-term effects on the physical and mental health of children, including trauma, increased risk for unintended pregnancy, sexually transmitted infections, low academic performance, truancy, dropping out of school, eating disorders, substance abuse, self-harm, and other harmful behaviors." Appx. at sec. 1, subsec. (1)(b). These public health problems are pervasive and ongoing, even when the abuse occurred in the past: "[c]hild sexual abuse creates financial burdens for victims, including costs associated with health care, child welfare, special education, short- and long-term physical and mental health treatment, violence and crime, suicide, productivity, and loss of future wages." *Id.* at sec. 1, subsec. (1)(c).

The General Assembly also reasoned that "[c]hild sexual abuse differs from adult sexual abuse." *Id.* sec. 1, subsec. (1)(a). In particular, "[c]hild sexual abuse frequently occurs as repeated episodes that become more invasive over time. Perpetrators . . . are typically known and trusted caregivers with unsupervised access to children who engage child victims in a gradual process of sexualizing the relationship, known as 'grooming'." *Id.*

This acute power imbalance between victims and individual perpetrators is exacerbated by supervising organizations that, "while . . . often in the best position to identify perpetrators of child sexual abuse . . . may cover up instances of child sexual abuse perpetrated by members, employees, agents, and volunteers of the organization." *Id.* sec. 1, subsec. (2)(a). These supervising organizations inflict further, "distinct[]" harm on child sex abuse victims "when [they] choose to protect their power and profit by concealing the truth" from victims and the public. *Id.* sec. 1, subsec. (2)(b).

Further, "[t]he vast majority of child sexual abuse goes unreported because children often lack the knowledge needed to recognize sexual abuse or lack the ability to articulate that they've been abused." *Id.* sec. 1, subsec. (3)(a). The General Assembly found that, because of the aforementioned imbalance of power, "it may be hard for the child to view the perpetrator in a negative light and, therefore, identify what has been done to them as abuse." *Id.* As a result, the legislature concluded that "victims of child sexual abuse . . . [often] delay disclosure well into adulthood, after the expiration of the time permitted to file civil actions against those responsible for the abuse." *Id.* sec. 1, subsec. (3)(b).

But that delay does nothing to diminish the ongoing harms to victims. Their "physical and mental health" continues to suffer due to past trauma; they suffer collateral consequences such as "increased risk for unintended pregnancy, sexually transmitted infections, low academic performance, [and] truancy." *Id.* sec. 1, subsec. (1)(b). They are more likely to "drop[] out of school" and develop "eating disorders, substance abuse, self-harm, and other harmful behavior" years after the abuse occurred. *Id.*

Each of these ongoing harms comes with ongoing costs. The General Assembly found that "[c]hild sexual abuse creates financial burdens for victims, including costs associated with health care, child welfare, special education, short- and long-term physical and mental health treatment." *Id.* sec. 1, subsec. (1)(c). And beyond the many individual victims, child sex abuse also imposes ongoing costs on the State. These statewide costs include increases in "violence[,] crime [, and] suicide;" loss of "productivity;" and "loss of future wages." *Id.*

b. These legislative determinations—again, enacted by a substantial bipartisan majority of the General Assembly—are not subject to second-guessing by Petitioners or the courts. "The General Assembly has the sole

power to enact general laws which formulate the state's public policy." *Denver and Rio Grande v. Denver*, 673 P.2d 354, 359 (Colo. 1983). This is as true of contentious questions as it is for the mundane. *See generally In re A.T.M*, 250 P.3d 703, 705 (Colo. App. 2010) (noting that "particularly difficult cases" often involve "competing interests [that] all merit great respect. . . . Ultimately, however, it is for our legislature to make the broad policy decisions on how best to balance those interests."). And this is true whether or not a court or the litigants in a particular case (for instance, Petitioners here) agree with the General Assembly's formulation or balancing of the relevant interests. *See generally, e.g.*, *Shootman v. Department of Trans.*, 926 P.2d 1200, 1204 (Colo. 1996) ("If the General Assembly wishes to restore sovereign immunity and governmental immunity in whole or in part," even after the Court had abrogated the doctrine, "it has the authority to do so"). Those determinations are solely within the province of the General Assembly.

Perhaps realizing this, Petitioners and their amici resort to ad hominem attacks and invective—they accuse the General Assembly of "subterfuge" in attempting to make certain provisions of the CSAAA retroactive, and of abdication (or even outright rejection) of their

constitutional obligations. *See* Aurora Public Schools Opening Br. at 25; Archdiocese of Denver's Amicus Br. at 14-15. Through implication, Petitioners suggest that the General Assembly's purpose was something other than the one identified in the legislative declaration. But Petitioners and their amici supply nothing authoritative on this point. True, a few individual legislators stated that this Court would ultimately be called upon to decide whether the CSAAA is retrospective.[7] But these comments do not evidence anything but respect for the different roles of judges and legislators—a difference that Petitioners and their amici seem to forget. The legislative branch acts through *enacting* laws. And here, the General Assembly enacted a detailed declaration of legislative purpose that clearly explained their balancing of the various competing interests. Petitioners' and their amici's *policy* concerns with the Act and its downstream implications

[7] For instance: "to the retrospectivity concern, look, I've spent some time on the case law. I know most of us probably have. Our court, the high court, has said the finding that a statute impairs a vested right, although significant, is not dispositive as to retrospectivity. Such a finding may be balanced against the public interest in the statute. . . we take the question of constitutionality seriously." Meeting of House Committee on Judiciary, 2021 73rd Sess. (Colo. June 3, 2021) (Statement of Representative Mike Weissman) (Archdiocese of Denver Appx., pp. 26-27)

should be directed to the General Assembly (as they surely were during the debate over the CSAAA), and not to this Court.

2. In addition to being legitimate on their face, the governmental interests the General Assembly cited go to the heart of the State's police power. "In order for a statute to be within the police power of the state, the provisions of the statute must be reasonably related to the public health, safety and welfare." *Love v. Bell*, 465 P.2d 118 (Colo. 1970). The CSAAA is plainly concerned and related to public health, safety, and welfare. As the General Assembly explained, it was concerned with the ongoing public health and safety harms caused by child sexual abuse. *See* Appx. sec. 1, subsec. (1)(b). Because the General Assembly is the principal instrumentality of the State charged with exercising the police power, *see supra*, it was acting at the pinnacle of its authority when it passed the CSAAA. There is no risk that the legislative purpose or motivations behind the Act were illegitimate.

B. The CSAAA's Retroactive Provisions Are Rationally Related To Legitimate Government Interests

The CSAAA's retroactive provisions—the only provisions at issue here—are rationally related to the governmental interests that the General

Assembly identified. Indeed, they are *closely* tailored—due to their limited scope and effect—to those interests. Read properly, the Act's retroactive provisions are modest and impose no sweeping burdens on Petitioners and defendants like them.

1. The Act's retroactive provisions (means) are rationally related to the governmental interests (ends) that the General Assembly identified. *See supra*. The rational-relationship test (also sometimes called a "reasonable" relationship) is a permissive one and it is easily satisfied here.

a. As is true in every state and in federal court, "[r]ational basis is the least intrusive review standard and provides a presumption of constitutionality." *Stud. for Conc. v. the Regents of the Univ.*, 280 P.3d 18, 27 (Colo. App. 2010). "Under the rational basis test, the classification challenged need only be rationally related to a legitimate state interest." *May v. Town of Mountain Village*, 969 P.2d 790, 793 (Colo. App. 1998). "A presumption of constitutionality attaches to a classification analyzed under the rational basis standard of review, and the challenging party must prove its unconstitutionality beyond a reasonable doubt." *Harris v. The Ark*, 810 P.2d 226, 230 (Colo. 1991). Thus, under the rational-basis regime, a challenged

provision "can be invalidated only if *no set of fact*s can reasonably be conceived to justify it." *May*, 969 P.2d at 793 (emphasis added). "Those attacking the legislation's rationality bear the burden to negative every *conceivable* basis which might support it." *Regents*, 280 P.3d at 27 (emphasis added) (quotation omitted).

b. The CSAAA's retroactive provisions undoubtedly satisfy this least-intrusive standard of review. In relevant part, the Act provides that "a person who was the victim of sexual misconduct that occurred when the victim was a minor that occurred on or after January 1, 1960, but before January 1, 2022, may bring a [civil] action pursuant to [the Act]," so long as it is "commenced before January 1, 2025." C.R.S. § 13-20-1203(2). The CSAAA provides (as to both its retroactive and non-retroactive provisions) that lawsuits brought under the Act are not subject to the Colorado Governmental Immunity Act. *Id.* § 24-10-106(j). Recovery under the Act (again, retroactive and non-retroactive alike) is subject to a cap. *Id.* § 13-20-1205(3).

These provisions are rationally related to the General Assembly's articulated interests. The General Assembly's legislative declaration made

clear that the harms of child sexual abuse are pervasive and long-lasting. *See* Appx. at sec. 1, subsec. (1)(b)-(c). At least a portion of these harms are born by the victims themselves. *Id.* at sec. 1, subsec. (1)(c). Allowing a mechanism whereby victims may be made whole for the harms they have suffered—or, subject to the Act's cap on damages, at least partially whole—is rationally related to the General Assembly's interests. The same can be said of the costs of child sexual abuse born by the State. *See id.* Allowing victims to recover may well reduce the costs of care and collateral consequences that are currently borne by the State. *See id.*

So too for the explicit waiver of governmental immunity, which serves a similar purpose. Instead of leaving the State responsible for nearly all of the governmental costs of the ongoing harms wrought by child sexual abuse, the Act reallocates some of those costs to the governmental subdivisions that had a hand in creating the costs in the first place. *See id.* sec. 1, subsec. (1)(a), (2)(a)-(b). Far from unfair, these policy choices are perfectly sound and reasonable. They are rationally related to the governmental interests that the General Assembly identified. Thus, the Act's retroactive provisions are not

unconstitutional in any respect (let alone in *all* circumstances *beyond a reasonable doubt*).

2. Furthermore, even though the rational-basis framework applies here, it is not difficult to imagine that the Act's retroactive provisions would satisfy more exacting scrutiny as well. To start, one need not hypothesize the "conceivable" governmental interests that the Act serves. *See Regents*, 280 P.3d at 27. The General Assembly authoritatively declared precisely what its interests and motivations were. *See* Appx. at sec. 1. Nor would the Act run afoul of the constitution if something more than a "reasonable relationship" between those ends and the Act's provisions was required. The CSAAA's new remedies are carefully calibrated to balance the ongoing harms suffered by victims of child sexual abuse against the interest in finality in civil litigation (though that latter interest was not expressly a motivator of the General Assembly's actions here). The Act's retroactive provisions have a short sunset. After just a few years, by January 1, 2025, the Act will no longer apply to pre-passage events. *See* C.R.S. § 13-20-1203(2). And damages—as against individuals and entity defendants alike—are capped. *Id.* § 13-20-1205(3). Though not necessary to satisfy this Court's retrospectivity analysis,

these closely-tailored provisions make clear just how far the district court's decision veered outside of the mainstream (and how extreme Petitioners' position is on appeal). If legislation can survive heightened scrutiny (as the CSAAA can), then it passes the applicable rational-basis test. Otherwise, this Court's standard-of-review cases don't mean much. And if legislation this carefully tailored cannot survive this Court's limited retrospectivity analyses, especially when the General Assembly is acting at the apex of its police power, then the General Assembly's undisputed power to enact retroactive legislation does not mean much either. *See DeWitt*, 54 P.3d at 854.

CONCLUSION

The Court should hold that the CSAAA's retroactive provisions are constitutional, reverse the district court, and remand for further proceedings.

Dated this 21st day of February, 2023.

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I certify that on February 21, 2023, I served this AMICUS BRIEF OF MEMBERS OF THE COLORADO GENERAL ASSEMBLY on all parties to this case, as identified below, using the Colorado Courts E-filing System.

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