TO: Representative Mike Weissman, Chair, Representative Kerry Tipper, Vice Chair, and Honorable Members of the House Judiciary Committee

FROM: Marci Hamilton, Founder & CEO, CHILD USA; Professor, University of Pennsylvania, and Kathryn Robb, Executive Director, CHILD USAdvocacy

RE: SB21-088: Constitutionality of the Child Sexual Abuse Accountability Act

DATE: June 1, 2021

Dear Chair Weissman, Vice Chair Tipper, and members of the House Judiciary Committee,

Thank you for allowing us, Professor Marci Hamilton of CHILD USA and Kathryn Robb of CHILD USAdvocacy, to submit testimony regarding SB21-088, which will increase access to justice for victims of child sexual abuse and enhance protection for children in Colorado. If passed, this legislation will make Colorado a leader in the fight to protect children.

By way of introduction, Marci Hamilton is the Founder & CEO of CHILD USA, an interdisciplinary think tank dedicated to the prevention of child abuse and neglect at the University of Pennsylvania, where she is a Professor in the Fels Institute of Government. She authored *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press 2008, 2012), which makes the case for statute of limitations (SOL) reform in the child sex abuse arena, and is the premier expert on the history and constitutionality of SOL reform.

CHILD USA is the leading nonprofit think tank dedicated to the prevention of child abuse and neglect. It is also the leader in the field of statute of limitations, or "SOL" reform, and the only organization to track child sex abuse SOLs in every U.S. state, territory, and the federal government.

Kathryn Robb is the Executive Director of CHILD USAdvocacy, a 501(c)(4) advocacy organization dedicated to protecting children's civil liberties and keeping children safe from abuse and neglect. CHILD USAdvocacy draws on the combined expertise of the nation's leading experts and child advocates, specifically its sister organization, CHILD USA. Kathryn is also a survivor of child sex abuse.

We commend you and the Committee for taking up the Child Sexual Abuse Accountability Act (the "CSA Accountability Act"), SB21-088, which will add a statutory cause of action with no statute of limitation for victims of childhood sexual misconduct against perpetrators and youth-serving organizations responsible for the abuse. The Act will create a new right to relief for all victims in Colorado, and provide long-overdue justice to older victims of child sex abuse whose injuries were compounded by historically short statutes of limitations which extinguished their claims long before they were able to tell anyone they were abused.[i] Further, as discussed in detail below, the retroactive elements of this Act are constitutional pursuant to the Colorado Constitution.

I. SOL Reform Serves the Public Good by Preventing Future Abuse and Increasing Victims' Access to Justice

Statutes of limitations, or SOLs, are judicial housekeeping rules: they set the deadline for pressing criminal charges or filing a civil lawsuit. An SOL is an arbitrary and technical legal rule that has prevented victims from obtaining justice and naming their perpetrators publicly for fear of retaliation. There are untold numbers of hidden child predators in Colorado who are preying on one child after another because the existing SOLs provide that opportunity. By making the CSA Accountability Act retroactive, access to justice for past victims will be available; this will also greatly reduce the present danger to the children of Colorado.

There are three compelling public purposes served by child sexual abuse SOL reform:

1) SOL reform **identifies hidden child predators and the institutions** that endanger children to the public, shielding other children from future abuse;
2) It **shifts the cost of abuse** from the victims and taxpayers to those who caused it; and
3) It **educates the public** about the prevalence, signs, and impact of child sex abuse so that it can be prevented in the future.

SOL reform for child sex abuse validates victims and shifts the immense cost of abuse from victims and the public to the perpetrators and enabling institutions, placing them on notice that the state no longer stands with them—but with their victims.

Historically, a wall of ignorance and secrecy has been constructed around child sex abuse, which has been reinforced by short SOLs that kept victims out of the legal system. Perpetrators and institutions have benefitted from short SOLs and until recently, most states have shut down most cases. That is a major reason we knew so little about the epidemic of child sex abuse.

Yet, it is in society's interest to have sex abuse survivors identify hidden child predators to the public—whenever the survivor is ready. By allowing claims for past abuse to be brought to court, hidden predators are brought into the light and are prevented from further abusing more children. This is especially important because predators have many victims and abuse into their elderly years. As well as providing already-existing victims of abuse a path to justice, SOL reform protects society at large. Preventing further abuse only serves to help society—by reducing the costs of healthcare for victims, allowing more healthy people into the workforce, and increasing the ability of children to grow into healthy adults.

SOL reform also educates the public about the danger of child sexual abuse and how to prevent it. When predators and institutions are exposed, particularly high-profile ones like Larry Nassar, Jeffrey Epstein, the Boy Scouts of America, and the Catholic Church, the press and media industry publish investigations and documentaries that enlighten the public about the insidious ways child molesters operate to sexually assault children and the institutional failures that enabled their abuse (i.e. Netflix's *Jeffrey Epstein: Filthy Rich* and HBO's *At the Heart of Gold: Inside the USA Gymnastics Scandal*). By shedding light on the problem, parents and others are better able to identify abusers and responsible institutions and prevent further abuse. This knowledge helps to educate children to be aware of the signs of grooming and abusive behavior and create more social awareness to help keep kids safe, while also encouraging institutions to implement accountability and safe practices.

II. A New Statutory Cause of Action for Child Sex Abuse That Applies Retroactively Is Constitutional Under the Colorado Constitution

The Colorado Constitution permits the Legislature to enact the retroactive provisions of the CSA Accountability Act. The Constitution gives the Legislature the power to enact laws with retroactive effect that are supported by strong public interests—and this Act clearly is. Holding abusers and organizations accountable for child sex abuse undoubtedly serves a compelling interest in "the state's public health and safety and is needed to address the long history of child sexual abuse that occurred within organizations that are culpable and complicit in the abuse." *Senate Bill 21-088*. The Act creates a new alternative statutory right to relief for victims of child sexual abuse without reviving any common law or statutory cause of actions that may be time-barred. The Colorado Constitution does not grant child molesters or institutions that enable abuse any absolute right to tort immunity from civil lawsuits for injury that arises from the abuse. Any illusory rights defendants may assert are eclipsed by Colorado's compelling interest in protecting children from sexual predators and opening the doors to justice for child sex abuse victims in the State.

a. The CSA Accountability Act Does Not Unconstitutionally Impair Vested Rights or Create a New Obligation, Duty or Disability

The Colorado Constitution., Art. II, Sec. 11, provides: "No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, . . . shall be passed by the general assembly." The Colorado Supreme Court consistently utilizes a two-step inquiry in assessing whether a law the legislature intended would operate retroactively is unconstitutionally "retrospective" under the Colorado Constitution. For a statute to be "retrospective" it "either (1) impairs a vested right, or (2) creates a new obligation, imposes a new duty, or attaches a new

disability[.]" *In re Estate of DeWitt*, 54 P.3d 849, 855 (Colo. 2002). The test for retrospective statutes before *DeWitt* focused on whether the statute was substantive or "'effects a change that is only procedural or remedial in nature,'" yet it ultimately hinged on whether it implicated vested rights. *Colorado Dep't of Soc. Servs. v. Smith, Harst & Assocs., Inc.*, 803 P.2d 964, 966 (Colo. 1991) (quoting *Cont'l Title Co. v. Dist. Court In & For City & Cty. of Denver*, 645 P.2d 1310, 1315 (Colo. 1982)).

There is no bright-line test for determining what is and isn't considered a vested right in Colorado. Courts look to the following considerations for determining "whether a vested right is implicated": "(1) whether the public interest is advanced or retarded; (2) whether the statute gives effect to or defeats the bona fide intentions or reasonable expectations of the affected individuals; and (3) whether the statute surprises individuals who have relied on a contrary law." *DeWitt*, 54 P.3d at 855 (citing *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 16 (Colo. 1993)). The CSA Accountability Act would further the profound public interest of protecting children from child sex abuse by allowing survivors to expose perpetrators and institutions that systemically cause abuse. It also serves the important public policy of making sure that those responsible for the devastating effects of child sex abuse are the ones who pay for the damage, rather than the victims and taxpayers. Moreover, there is no legitimate expectation for a child molester or someone responsible for the child sex abuse to claim that they raped a child under the expectation of a short statute of limitations. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. at 316 (Selling unregistered stock was not "undertaken by appellant on the assumption that the old [SOL] would be continued."). Further, a defense that the SOL for a particular common law or statutory cause of action has expired, is irrelevant to the new statutory cause of action this Act seeks to create. On balance, those responsible for sexually abusing a child would not and could not have a vested right in an SOL defense to claims brought pursuant to the Act.

Even if a statute of limitations defense could be construed to be a vested right, it would not be dispositive on the issue of unconstitutional retrospectivity. The Colorado Supreme Court has made clear that even a retroactive law that infringes on vested rights may be constitutional if the law is rationally related to a legitimate government interest. *DeWitt*, 54 P.3d at 855 ("[A] finding that a statute impairs a vested right, although significant, it is not dispositive as to retrospectivity; such a finding may be balanced against the public interest in the statute."). A vested right will be balanced against "public health and safety concerns, the state's police powers to regulate certain practices, as well as other public policy." *City of Golden v. Parker*, 138 P.3d 285, 289–90 (Colo. 2006) (quoting *DeWitt*, 54 P.3d at 855). Giving older survivors of child sex abuse a new remedy for their injuries is unquestionably reasonable and undoubtably serves the public interest. Indeed it serves multiple compelling interests. It remedies the longstanding injustice to victims of extinguishing their claims long before they were able to get to court and protects children from further abuse by hidden predators. This is why every appellate court across the nation to consider the rationality of a retroactive cause of action for child sexual abuse has found the remedial statutes to be reasonable.[ii]

Colorado's compelling interest in protecting its youth from sex abuse is already well-established in legislative enactments and judicial rulings.[iii] The Colorado Supreme Court recognized that the Legislature "has demonstrated an on-going commitment to afford minors significant safeguards from harm by passing numerous statutes designed to protect minor children." *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1233 (Colo. 2002).[iv] When the Legislature outlawed the production and

possession of sexually exploitative materials depicting minors, it explicitly acknowledged Colorado's compelling interest in protecting "the privacy, health, and emotional welfare of its children". COLO. REV. STAT. § 18-6-403 (2015). Colorado courts also make clear that the "prevention of sexual exploitation and abuse of children constitutes a government objective of paramount importance." *People v. Grady*, 126 P.3d 218, 221 (Colo. App. 2005). *See also People v. Maloy*, 465 P.3d 146, 158 ('"[i]t is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling,"' and that the 'prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."') ((quoting *New York v. Ferber*, 458 U.S. 747, 756-57 (1982)) (((quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982))); *Watso v. Colorado Dep't of Soc. Servs.*, 841 P.2d 299, 308 (Colo. 1992) ("the state has a substantial interest in ensuring that children are not subject to abuse or neglect"); *People v. Madril*, 746 P.2d 1329, 1334 (Colo. 1987) (state has "legitimate interest in protecting children against sexual abuse by persons who . . . assume varying duties of care and responsibility toward the child"). "There is also no doubt that[] '[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (citing *Ashcroft*, 535 U.S. at 244).

The next consideration in determining the constitutionality of retrospectivity is whether it would impose a new obligation, new duty, or new disability to past transactions or considerations. *DeWitt*, 54 P. at 855. Sexually abusing children has long been a crime and actionable civilly pursuant to common law torts. Perpetrators have always had an obligation not to rape and molest children, and institutions have a duty to protect the children in their care from abuse. *See Hickman v. Catholic Health Initiatives*, 328 P.3d 266, 272–75 ("Abrogating the hospital's immunity from damages did not create a new duty or obligation because, under the former statute, the hospital had a duty of care in credentialing medical professionals."); *Colorado Dep't of Soc. Servs.*, 803 P.2d at 966–67 (giving remedy to state for overpayment doesn't create new duty for nursing homes because they have always had a fiduciary duty to maintain patient's accounts in trust and failure to do so could result in criminal penalties). A statutory cause of action would not impose a new duty or obligation because it does not change the standard applicable to child sex abuse when the crime was committed; it has always been illegal.

Similarly, the CSA Accountability Act would not impose a new disability. There is no new disability because defendants would not be prohibited from doing something they were previously permitted to do; they never had a right to sexually abuse children or cover up the abuse. Even if the Act did impose a new disability, the disability must be of "constitutional magnitude" for the court to find it retrospective. *DeWitt*, 54 P.3d at 857. Courts have found that no disability of constitutional magnitude existed when the Legislature shifted its policy in an arena that it typically regulates because defendants should expect shifts over time in regulated industries. *See DeWitt*, 54 P.3d at 857 (insurance and probate); *Hickman*, 328 P.3d at 273 (healthcare). Statutes of limitations for torts are "traditional legislative power[s]" that are "inherently the province of the legislature." *DC Auto., Inc. v. Kia Motors Am., Inc.*, 411 F. Supp. 3d 1137, 1146 (D. Colo. 2019) (citations omitted). Tort reform is heavily regulated by the Legislature and a policy shift increasing liability for tortfeasors could be anticipated and any ensuing disabilities are not of "constitutional magnitude." Therefore, the statutory cause of action would not retroactively impose a new duty, obligation, or disability on a defendant relating to their already criminal or tortious conduct.

b. Any Reliance on the Antiquated *Jefferson County* Case Is Misplaced

Opponents in Colorado may attempt to scare legislators and decision makers by citing to a case from nearly 40 years ago that is not applicable to a new statutory cause of action for child sex abuse and which may have been overruled by a standard in a subsequent case. *Jefferson County Dep't of Social Services v. G*, 607 P.2d 1004 (Colo. 1980). In *Jefferson*, the Court held that a paternity action by the State that was time-barred by the prior paternity statute, which was later repealed, could not be constitutionally revived by a new paternity statute. While the limited holding in *Jefferson* may still stand, its outdated approach to vested rights and retrospectivity has been superseded by subsequent Colorado Supreme Court decisions. Further, because the CSA Accountability Act is not a revival law, *Jefferson* is irrelevant.

The *Jefferson* case had a completely different type of statute at issue with a set of constitutional problems unique to that law which are not present in this retroactive cause of action for child sex abuse. *Jefferson* involved a very specific circumstance where a law both created a right but limited it at the same time. The paternity statute at issue gave the State the right to seek paternity but only for a limited amount of time. In contrast, a new statutory cause of action stands alone and separate from any existing causes of action or any time limits; the common law provides that a person who is sexually abused has a right to bring a civil claim for battery and a claim for negligence if an institution was responsible for the abuse. And importantly here, there is no constitutional problem with implementing a different statute of limitations for a new cause of action that exists separate and apart from any other statutory or common law time limits. The statute at issue in *Jefferson* was also radically different factually from the Act proposed. The new paternity statute repealed the previous statute and adopted a new SOL without explicit language regarding retroactivity. The Court cited no legislative intent or policy considerations for why revival of the paternity action by the State should be permitted under the new statute. Whereas the CSA Accountability Act is supported by an extensive legislative declaration identifying widespread incidence of child sex abuse, the long-term injuries victims suffer and the strong public health and safety policies in favor of giving survivors of child sex abuse the opportunity to pursue justice. Unlike in *Jefferson*, the Legislature is clear here about its intent to establish a civil cause of action that allows survivors to seek justice whenever they are ready—and explicitly includes older survivors whose claims expired before they disclosed that they were abused, and well before they were ready to come to court.

Due process and retrospectivity at the state level has been a time evolving doctrine, with states moving away from an antiquated vested rights approach to statutes of limitations defenses and deferring to legislative judgment instead for revival of previously expired claims. *See Landgraf*, 511 U.S. at 272. The standard of review for retroactive statutes has been changed in the 40 years since the *Jefferson* decision. Since *DeWitt* in 2002, the Colorado Supreme Court has used a completely different test to evaluate the constitutionality of a retroactive statute. *DeWitt*, 54 P.3d 849.

The *Jefferson* Court espoused no test for determining whether a right is vested. It cited to dicta in old cases supporting a defendant's vested right to an SOL defense and held the legislature could not constitutionally revive the paternity action which had been barred by the prior SOL.[v] In contrast, the *DeWitt* Court acknowledges "[t]here is no bright-line test" for vested rights and the determination of whether a right is vested requires balancing of the public interest, reasonable

expectations, and reliance on the old law. *DeWitt*, 54 P.3d at 855. The new test for vested rights is flexible and takes into account the public policy interests achieved by the statute. The *Jefferson* Court undertook no such vested rights review, and therefore, its finding that the paternity action could not be constitutionally revived should have no bearing on whether perpetrators who sexually abused children and those who enabled them have vested rights in an SOL defense for a different cause of action. That particular vested rights determination would be subject to the public policy, reasonable expectations and unfair surprise considerations in *DeWitt*.

Further, the current Colorado Supreme Court approach to vested rights makes clear that they are not absolute. *Jefferson* relied on a decision from 1878 for its determination that vested rights in that case were absolute and could not be impaired by subsequent legislation. The *Jefferson* Court explained, "[t]his provision against retrospective laws has been interpreted to mean 'every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability to transactions or considerations already past, must be deemed retrospective.'" *Jefferson*, 199 Colo. 315, 318 (quoting *Denver, etc., Ry., Co. v. Woodward*, 4 Colo. 162, 167 (1878)). However, in 2002 the Colorado Supreme Court made clear in *DeWitt* and its progeny that vested rights are no longer absolute and "can be balanced against the public interest in the statute." *DeWitt*, 54 P.3d at 855 ("[A] finding that a statute impairs a vested right, although significant, it is not dispositive as to retrospectivity."). Therefore, even if defendants assert some sort of absolute rights against liability for the child sex abuse they perpetrated or enabled, the constitutionality inquiry would not end there as the Supreme Court now allows even vested rights to be infringed upon by the legislature for the benefit of public safety.

III. Conclusion

Once again, we commend you for supporting this legislation, which is desperately for Colorado's children now and would validate survivors of childhood sexual abuse. Colorado's children deserve SOL reform to protect them today and into the future. Establishing a new civil cause of action that allows victims of child sexual abuse to file suit for their injuries when they are ready is a positive step for the safety of Colorado's children and families. Please do not hesitate to contact us if you have questions regarding SOL reform or if we can be of assistance in any way on other child protection issues.

Sincerely,

Marci A. Hamilton, Esq.
Professor, Fels Institute of Government
University of Pennsylvania

Founder & CEO, CHILD USA
3508 Market Street, Suite 202
Philadelphia, PA 19104
mhamilton@childusa.org
Tel: (215) 539-1906

Kathryn Robb, Esq.
Executive Director
CHILD USAdvocacy
3508 Market Street, Suite 201
Philadelphia, PA 19104
krobb@childusadvocacy.org
Tel: (781) 856-7207

[i] For a more detailed analysis of the science of delayed disclosure, the national trend toward SOL reform, and the financial benefits to Colorado of passing this bill, please reference CHILD USA's testimony submitted to this Committee on May 20, 2021.

[ii] *Hartford Roman Catholic Diocesan Corp.*, 119 A.3d at 496 (rejecting challenge because revival law "is a rational response by the legislature to the exceptional circumstances and potential for injustice faced by adults who fell victim to sexual abuse as a child" and the "revival of child sexual abuse victims' previously time barred claims serves a legitimate public interest and accomplishes that purpose in a reasonable way"); *Sliney*, 41 N.E.3d at 741 (rejecting challenge because the revival statute was reasonable and "tied directly to the compelling legislative purpose" of giving access to justice for child sex abuse survivors who do not process their injuries well into adulthood); *Cosgriffe*, 864 P.2d at 779–80 (rejecting challenge because the discovery statute "has a reasonable relation to the legitimate purpose of the State"); *Hoffman*, 452 N.W.2d at 514 (rejecting challenge because "the statute has a reasonable relation to the state's legitimate purpose of affording sexual abuse victims a remedy").

[iii] *Ashcroft v. Free Speech Coal*, 535 U.S. 234, 263 (2002) (O'Connor, J., concurring) ("The Court has long recognized that the Government has a compelling interest in protecting our Nation's children."); *Maryland v. Craig*, 497 U.S. 836, 837 (1990) ("States have a compelling interest in protecting minor victims of sex crimes from further trauma"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (It is clear that a state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."); *New York v. Ferber*, 458 U.S. 747, 756- 57 (1982) ("*First*. It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling.") (quoting *Globe Newspaper Co.*, 457 U.S. at 607); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) ("The well-being of children is of course a subject within the State's constitutional power to regulate").

[iv] Citing, C.R.S. § 18–3–412 (2001) (possibility for increased criminal penalties for habitual sex offenders against children); C.R.S. § 17–22.5–405(5)(b) (possibility for increased criminal penalties for certain violent crimes committed against a minor); C.R.S. § 26–6–101 to 307 (2001) (comprehensive regulations in the Child Care Licensing Act).

[v] *Jefferson County Dep't of Social Services v. G*, 607 P.2d 1004 (Colo. 1980) ("Where a statute of limitations has run and the bar attached, 'the right to plead it as a defense is a vested right which cannot be taken away or impaired by subsequent legislation.' *Willoughby v. George*, 5 Colo. 80, 82 (1879). See also *Fischer v. Kuiper*, 187 Colo. 221, 529 P.2d 641 (1974); *People in Interest of L. B.*, 179 Colo. 11, 498 P.2d 1157 (1972); and *Dietemann v. People*, 76 Colo. 378, 232 P. 676 (1924). When the bar of the statute of limitations has once attached, the legislature cannot revive the action. *Edelstein v. Carlile*, 33 Colo. 54, 78 P. 680 (1904).").