IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0197

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RICHARD DENVER HINMAN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, The Honorable Robert J. Whelan, Presiding

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STATEMENT OF THE ISSUES

1. Whether the retroactive application of the Sexual and Violent Offender Registration Act (Act) violates the *Ex Post Facto* Clause of the Montana Constitution.

2. Whether Hinman has met his burden to demonstrate that this Court should review his claim that the Act violates due process under the plain error doctrine.

3. Whether the Act violates the constitutional and statutory provisions requiring offenders' rights to be restored after completing the sentence.

STATEMENT OF THE CASE

Appellant Richard Denver Hinman was charged in Montana Second Judicial District, Silver Bow County, Cause No. DC-19-142, with failure to register as a sexual offender. (Doc. 3.) He filed a motion to dismiss, arguing that requiring him to register violated the prohibition on the *ex post facto* application of laws under the United States and Montana Constitutions. (Doc. 27.) The district court denied the motion. (10/2/19 Tr. at 6.) Hinman pleaded guilty to failure to register, but he reserved the right to appeal the denial of his motion to dismiss. (*Id*. at 11; Doc. 29.)

On appeal, Hinman argues that the retroactive application of the Sexual and Violent Offender Registration Act (Act) violates the *Ex Post Facto*, Due Process, and Restoration of Rights Clauses of the Montana Constitution.

STATEMENT OF THE FACTS

Because Hinman pleaded guilty to failure to register, the facts of the offense come from the charging documents. Hinman is required to register as a sexual offender because of his 1994 conviction for sexual assault. (Doc. 1 at 2.) He has been designated a level 2 sexual offender. https://app.doj.mt.gov/apps/svow/search/ (search for Richard Denver Hinman); *see also* Appellant's Br. at 17.

In 2019, law enforcement in Silver Bow County was notified by the Department of Justice Sexual and Violent Offender Registry Unit that Hinman was noncompliant with his registration because he had failed to return an address verification letter. (Doc. 1 at 1-2.) The letter had been mailed on January 30, 2019, and Hinman had failed to return the letter within ten days as required by Mont. Code Ann. § 46-23-504(6)(c) (2017). (Doc. 1 at 2.) Hinman's last contact with the Butte Silver Bow Sexual and Violent Offender Unit had been on August 8, 2018, when he had returned his address verification letter listing an address on Park Street in Butte. (*Id.)*

Law enforcement in Butte was aware that Hinman had been convicted of failing to register in 2012. Law enforcement had also been notified that Hinman was residing in an apartment that was different than his prior address, and he was attempting to become a personal caretaker for the female who resided there. (*Id.)* Based on these facts, Hinman was charged with failure to register as a sexual offender in June 2019. (Docs. 1, 3.)

Hinman filed a Motion to Dismiss as Violation as an Ex Post Facto Law in which he argued that the retroactive application of the Act violated the *Ex Post Facto* Clauses under the United States and Montana Constitutions. (Doc. 27.) He argued that the requirements of the Act had increased since he was convicted of sexual assault in 1994. (*Id*. at 7.) He argued that the lifetime registration requirement was punitive, and therefore the retroactive application of the Act violated the *Ex Post Facto* Clauses. (*Id*. at 7-8.)

Hinman subsequently entered into a plea agreement in which he agreed to plead guilty but reserved his right to appeal the denial of his motion to dismiss. (Doc. 29.) At the beginning of the change of plea hearing, the parties addressed the outstanding motion to dismiss. (10/2/19 Tr. at 5.) The State argued that the motion should be denied because the Montana Supreme Court had already upheld the Act. (*Id*. at 6.) The court denied the motion based on this Court's precedent. (*Id*.) The court noted that Hinman would be able to appeal. (*Id*.)

Hinman pleaded guilty to failure to register, but he explained that he failed to register because he did not believe that he had to. (*Id*. at 11.) Hinman stated, "I didn't figure I broke any laws because under post – or ex post facto that law was enacted after I was already discharged and everything else." (*Id*. at 13-14.)

The Presentence Investigation Report indicates that Hinman was charged with failure to register three times before this offense, but was convicted only one time. (Doc. 39 at 2.) However, the Department of Corrections's website lists Hinman as having two prior convictions for failure to register, and his counsel acknowledged in the motion to dismiss that he had two prior convictions for failure to register.

(https://app.mt.gov/conweb/Offender/35891/637704204908697269/d1ca214546ab1011ed40d69e8dedec7d28be8520; Doc. 27 at 1.)

At the sentencing hearing, Hinman's counsel explained that "Mr. Hinman doesn't believe he's done anything wrong in this case. He doesn't think he needs to be required to register. He understands the law very well because he spent a lot of his time studying it and doing his own appeals." (2/12/20 Tr. at 4.) Hinman's counsel explained that "The reason for this plea agreement, . . . was always to allow Mr. Hinman to continue the many arguments that he's made to this Court and to others to allow it to go forward into the appellate division." (*Id*. at 4-5.)

Hinman's counsel explained that "Hinman pled guilty to a sex assault back in . . . 1994. Ever since that day, he has been trying to fight that conviction . . . and the subsequent convictions for failure to register." (*Id*. at 5.)

The court committed Hinman to the Department of Corrections for four years, with all of the time suspended, as recommended by the plea agreement. (*Id*. at 7; Doc. 40.) The court repeatedly told Hinman that he would have to continue to register, unless this Court determined that he did not need to. (2/12/20 Tr. at 8.) The court noted that he had "numerous issues with registration before" and explained that he needed to continue to register. (*Id*.)

The Judgment states that Hinman waived his right to appeal his conviction, (Doc. 40 at 2), but based on the transcript of the change of plea hearing, the State agrees that he reserved his right to appeal the denial of his motion to dismiss.

SUMMARY OF THE ARGUMENT

This Court held in *State v. Mount*, 2003 Mont. 275, 317 Mont. 481, 78 P.3d 829, that the retroactive application of the 2001 version of the Act does not violate the prohibition on the *ex post facto* application of laws because the Act is a civil regulatory scheme designed to promote public safety, rather than a punitive measure. *Mount* was consistent with the United States Supreme Court's decision

in *Smith v. Doe*, 538 U.S. 84 (2003), which demonstrates that it was correctly decided and should not be overruled.

Further, changes that have been made to the Act since 2001 do not make the current Act punitive. The intent of the Act continues to be protecting the public from repeat sexual offenders. The current version of the Act is similar to the Alaska registration act that the Supreme Court held was not punitive in *Smith*. The requirements of Montana's Act are based on an individualized determination of an offenders risk, and removal from registration is dependent upon a showing that the offender is no longer a risk to the public. The emphasis on an offender's risk, and the eventual ability for most offenders to petition for removal, demonstrates Montana's Act is a reasonable, nonpunitive scheme designed to protect the public. This Court should continue to hold that the Act is not punitive, and thus does not violate the *Ex Post Facto* Clause under the Montana Constitution.

Hinman did not raise a due process claim in the trial court, and he has failed to meet his burden to demonstrate that his due process claim should be reviewed under the plain error doctrine. He has not even specified whether he is raising a procedural or substantive due process claim. But neither would prevail. This Court held in *Mount* that the Act is narrowly tailored to promote the State's

compelling interest in protecting the public from the recidivism of sexual offenders. Hinman has not demonstrated that failing to review his due process claim would result in a manifest miscarriage of justice.

Hinman has similarly failed to demonstrate that this Court should overrule its holding in *Mount* concluding that the Act does not violate the Restoration of Rights Clause in the Montana Constitution or Mont. Code Ann. § 46-18-801 because the Act does not implicate the civil and political rights that those clauses address. Accordingly, Hinman's conviction for failing to register should be affirmed.

ARGUMENT

I. Standard of review

A district court's denial of a motion to dismiss in a criminal case presents a question of law this Court reviews for correctness. *State v. Jensen*, 2020 MT 309, ¶ 9, 402 Mont. 231, 477 P.3d 335. This Court exercises plenary review of constitutional issues. *Id.* Statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute bears the burden or proving the statute conflicts with the constitution beyond a reasonable doubt. *Id.*

II. The district court correctly denied Hinman's motion to dismiss because the retroactive application of the Sexual and Violent Offender Registration Act does not violate the *Ex Post Facto* Clause.

A. History of the Act

Montana enacted the Sexual Offender Registration Act (Act) in 1989. 1989 Mont. Laws, ch. 293. The 1989 version of the Act was still in effect, without amendment, when Hinman pleaded guilty to sexual assault of a child in 1994. Mont. Code Ann. §§ 46-23-501 to -507 (1989). Under the 1989 Act, a sexual offender was required to register with the local law enforcement agency within 14 days of coming into a county. Mont. Code Ann. § 46-23-504 (1989). The definition of sexual offender included an offender, like Hinman, who committed sexual assault against a child under the age of 16 when he was three or more years older. Mont. Code Ann. § 46-23-504 (1989) (defining a sexual offender to include a person who commits a violation of Mont. Code Ann. § 45-5-502(3)). The 1989 Act required an offender who changed his residence to notify his registration agency within 10 days of his move. Mont. Code Ann. § 46-23-505 (1989). A sexual offender was required to register for ten years after the conviction or ten years after the offender's release from prison. Mont. Code Ann. § 46-23-506(1) (1989). If the offender was not convicted of another sexual offense within that time, the offender's duty to register terminated at the end of ten years. Mont. Code Ann. § 46-23-506(2) (1989).

The requirement that violent offenders register was added in 1995, and the Act was renamed the Sexual or Violent Offender Registration Act. 1995 Mont. Laws, ch. 407. The 1995 amendments added a requirement that an offender provide information required by the Department of Corrections and Human Services, provide fingerprints, and be photographed. Mont. Code Ann. § 46-23-504(2) (1995); 1995 Mont. Laws, ch. 407, § 7. The 1995 amendments also required that sexual offenders register for life, but allowed offenders to petition for removal from the registry, which required a demonstration that the offender had remained law abiding and that "continued registration is not necessary for public protection and that relief from registration is in the best interests of society." Mont. Code Ann. § 46-23-506(1)-(2) (1995); 1995 Mont. Laws, ch. 407, § 9. A provision allowing for dissemination of registry information was added, but only the offender's name could be disseminated without a court order. Mont. Code Ann. § 46-23-508 (1995); 1995 Mont. Laws, ch. 407, § 11.

In 1997, the Act was amended to add the requirement that trained sexual offender evaluators conduct an individualized assessment of each sexual offender before the offender is sentenced and that a district court designate an offender a level 1, 2, or 3 based on the offender's risk of committing another sexual offense.

Mont. Code Ann. § 46-23-509 (1997); 1997 Mont. Laws, ch. 375, § 12. The 1997 amendments also required that offenders register before release from confinement and required that the Department of Justice and the local law enforcement agency be given the offender's registration information. Mont. Code Ann. § 46-23-503(2), 46-23-504(1)(b); 1997 Mont. Laws, ch. 375, §§ 6-7. The dissemination of registry information was expanded. The amount of information that could be disseminated was dependent on the offender's designated risk level. Mont. Code Ann. § 46-23-508; 1997 Mont. Laws, ch. 375, § 11. The Act provided that the registration agency could release information to protect the public, and provided a list of information to be released "at a minimum," based on the offender's risk level. Mont. Code Ann. § 46-23-508(1)(b); 1997 Mont. Laws, ch. 375, § 11. The 1997 amendments made the Act apply retroactively to all "sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989." 1997 Mont. Laws, ch. 375, § 18.

Amendments in 1999 and 2001 made the offender's address public information and allowed the publication of information on the internet. 2001 Mont. Laws, ch. 222, § 2; 1999 Mont. Laws, ch. 219, § 1. As addressed below, this Court upheld this version of the Act in *Mount*.

B. The current Act

The Act has continued to evolve since 2001. Under the 2021 version of the Act, the offenses that qualify as a "sexual offense" for which an offender can be required to register have expanded.[1] But Hinman's offense, sexual assault of a victim under the age of 16 by an offender who is 3 or more years older, has been classified as a sexual offense since the Act was originally passed in 1989. *Compare* Mont. Code Ann. § 46-23-502(3)(a) (1989) (listing a violation of Mont. Code Ann. § 45-5-502(3) as a sexual offense), *with* Mont. Code Ann. § 46-23-502(9)(a) (2021) (same). Most offenses that qualify as a sexual offense qualify only if the victim is under a certain age set out in the definition of sexual offense, with the exception of sexual intercourse without consent. Mont. Code Ann. § 46-23-502(9)(a). Offenders are required to register immediately upon the conclusion of a sentencing hearing if not placed in custody, at least ten days prior to release from confinement, or within three business days of entering a county for the purpose of residing or setting up a temporary residence or if a transient. Mont. Code Ann. § 46-23-504(1).

[1] When Hinman was charged with failing to register, the 2017 version of the Act was in effect. Because the Act was not amended in a way that effects Hinman, the State addresses the 2021 version currently in effect. All citations to the statutes refer to the 2021 unless otherwise noted.

When registering, an offender is required to provide: the name of the offender and any aliases used, the offender's social security number, residence information, the name and address of any place where the offender will be employed, the name and address where the offender will be a student, the offender's driver's license number, the description and license plate number of any vehicle operated by the offender, and all of the offender's email addresses and social media screen names. Mont. Code Ann. § 46-23-503(3). The local law enforcement agency, referred to as the registration agency, must obtain the offender's fingerprints, a photograph, and a DNA sample. Mont. Code Ann. § 46-23-503(3); *see also* Mont. Code Ann. § 46-23-502(6).

The Department of Justice is required to mail a registration verification form to violent offenders and level 1 sexual offenders every year, to level 2 sexual offenders every 180 days, and to level 3 sexual offenders every 90 days. Mont. Code Ann. § 46-23-503(6)(a). Sexual offenders must return the form in person to the registration agency within 10 days after receipt and must be photographed. Mont. Code Ann. § 46-23-503(6)(c). The information is sent to the DOJ. Mont. Code Ann. § 46-23-503(7). Transient offenders are required to report every month. Mont. Code Ann. § 46-23-503(5).

If an offender "has a change of name or residence or a change in student, employment, or transient status, the offender shall within 3 business days of the change appear in person and give notification of the change to" the appropriate registration agency. Mont. Code Ann. § 46-23-505(1). Offenders are required to report to the appropriate registration agency for a new photograph every year. Mont. Code Ann. § 46-23-505(1).

Sexual offenders are required to register for life, but after ten years, a level 1 sexual offender may petition the appropriate court for an order relieving the offender of the duty to register. Similarly, a level 2 offender may petition to terminate the registration obligation after 25 years. Mont. Code Ann. § 46-23-506(3). The court may grant the petition upon a finding that the offender has remained law abiding and "continued registration is not necessary for public protection and that relief from registration is in the best interests of society." Mont. Code Ann. § 46-23-506(3)(b). The ability to petition for removal does not apply to offenders who committed sexual intercourse without consent or incest under aggravated circumstances, to offenders who have committed a second or subsequent sexual offense, and to level 3 offenders who are designated sexually violent predators. Mont. Code Ann. § 46-23-506(5). An offender designated a level 2 offender may petition the court to change the offender's designation if the

offender has successfully completed an approved treatment program. Mont. Code Ann. § 46-23-509(4). Thus, a level 2 offender who successfully petitions to be reclassified as a level 1 offender would be able to petition for removal from the registry after registering for 10 years.

The Act provides that the name and address of a registered offender are public criminal justice information. Mont. Code Ann. § 46-23-508(1)(a). Additionally, it provides a list of information that the DOJ shall and the registration agency may, at a minimum, disseminate. For level 1 offenders whose offense was committed against an adult, the Act authorizes the distribution of: the offender's name, address, and date of birth; the conviction(s) that qualified the offender for registration; a photograph and the physical description of the offender; and the offenses for which the offender is required to register. Mont. Code Ann. § 46-23-508(1)(b)(ii). For level 1 offenders whose sexual offense was committed on a minor or level 2 offenders, the Act authorizes the distribution of the information listed above in addition to the type of victim targeted by the offense, the license plate number and a description of any vehicle used by the offender, and any conditions imposed by the court upon the offender for the safety of the public. Mont. Code Ann. § 46-23-508(1)(b)(iii). For level 3 offenders, the Act authorizes the distribution of all of the same information as level 2 offenders in addition to the date of the offender's release from confinement or, if not confined, the date the

offender was sentenced and the community in which the offense occurred. Mont. Code Ann. § 46-23-508(1)(b)(iv).

C. This Court correctly held in *Mount* that the retroactive application of the Act is not an *ex post facto* violation.

This Court reviewed the retroactivity of the Act in *Mount* and held that it did not violate the *Ex Post Facto* Clauses of the United States or Montana Constitutions. *Mount*, ¶ 90. Mount committed a sexual offense in 1984 before the initial Act existed. *Mount*, ¶¶ 5, 9. He was required to register for life, however, because the 1997 amendments made the Act apply retroactively to him. *Mount*, ¶ 8. In *Mount*, this Court addressed whether the retroactive application of the 2001 version of the Act violated the prohibition on the *ex post facto* application of laws.[2]

This Court's analysis in *Mount* relied heavily on and is consistent with *Smith v. Doe*, 538 U.S. 84 (2003), which the United States Supreme Court had recently decided. In *Smith*, the Supreme Court held that Alaska's sexual offender registration act did not violate the prohibition on the *ex post facto* application of laws because it was not punitive. 538 U.S. at 105-06. The requirements of Alaska's sexual offender registration act were similar to the requirements of the Montana Act that this Court analyzed in *Mount*. *See Smith*, 538 U.S. at 90.

[2] Appellant references the 2003 version of the Act when discussing *Mount*, but *Mount* cites to the 2001 version, which would have been the version applicable to Mount. *Mount*, ¶¶ 28-29.

Indeed, Alaska's Act disseminated even more information than the Montana Act that was analyzed in *Mount*. *Compare Smith*, 538 U.S. at 90-91 (listing information that is made public in Alaska, which included the information that was disclosed in Montana in addition to the offender's place of employment, date of birth, and compliance with registration), *with* Mont. Code Ann. § 46-23-509(1)(b) (2001) (creating a tiered system for disseminating information in Montana based on an offender's risk of reoffense).

Applying *Smith*, this Court clarified in *Mount* that the test to apply when addressing an *ex post facto* challenge to a civil sanction under the United States or Montana Constitutions is the intents-effects test from federal law. *Mount*, ¶ 26. The first step in the test is to determine the intent of the law at issue by analyzing: (1) the declared purpose of the law and (2) the structure of the law. *Mount*, ¶ 33. If the declared purpose of the law, the structure of the law, or both, is punitive, the retroactive application of the law is prohibited by the *Ex Post Facto* Clauses. *Id*.

If both the declared purpose and the structure of the law are nonpunitive, then the intent of the law is to enact a civil regulatory scheme. *Mount*, ¶ 34. It is then necessary to determine "whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it civil." *Smith*, 538 U.S. at 92 (citation omitted). Because courts "ordinarily defer to the

legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id*. (internal quotation marks and citation omitted); *see also Mount*, ¶ 43.

The effect of the law is determined by applying seven non-exclusive factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), which are: (1) whether the law imposes an affirmative restraint or disability; (2) the historical treatment of the law; (3) a finding of scienter; (4) whether the law was traditionally aimed at punishment; (5) whether the law applies to criminal behavior; (6) whether the law has a nonpunitive purpose; and (7) the excessiveness of the law in application. *Mount*, ¶ 35. If these factors, when viewed in totality, demonstrate that the effect of the law is nonpunitive, then the law does not violate the *Ex Post Facto* Clauses. *Mount*, ¶ 36.

This Court correctly applied *Smith* in *Mount* and determined that the Act was nonpunitive.

1. Intent

This Court determined that the intent of the Act was regulatory and nonpunitive in nature based on the declared purpose of the act. *Mount*, ¶¶ 45, 48-49. When addressing intent, this Court explained that the "[i]mposition of restrictive measures to further a law's declared purpose has been held to be 'a

legitimate nonpunitive governmental objective.'" *Mount*, ¶ 43 (quoting *Kansas v. Hendricks*, 521 U.S. 346 (1997)). "Thus, where a legislative restriction exists which falls under the State's power to protect the health and safety of its citizens, the legislative restriction will be construed as evidencing a regulatory and not a punitive power." *Mount*, ¶ 43 (quoting *Hawker v. New York*, 170 U.S. 189 (1898)).

This Court examined the Preamble to the 1997 amendments to the Act and noted that the concerns expressed by the Legislature were "strikingly similar to the declared purpose of Alaska's Act," which the *Smith* Court held evidenced a nonpunitive intent. *Mount*, ¶ 45 (citing the Compiler's Comments to Montana Code Annotated, Title 46, Chapter 23, Part 5); *see also Smith*, 538 U.S. at 96. Those concerns included: "(1) the danger of recidivism and protection of the public; (2) the impairment of law enforcement efforts from lack of information; (3) the prevention of victimization and prompt resolution of sexual or violent offenses; (4) the offender's reduced expectation of privacy because of the public's interest in safety; and (5) the protection of specific vulnerable groups and the public in general." *Mount*, ¶ 44; *see also* Preamble attached to 1997 Mont. Laws, ch. 375.

Further, this Court noted that "nothing on the face of the Act indicates that it is anything other than a civil regulatory scheme intended to protect the public." *Mount*, ¶ 45 (citing *Hendricks*, 521 U.S. at 361). This Court emphasized that the "protection of the public from recidivism is of 'paramount concern to the government and the people' of Montana," and that the requirements of the Act are regulatory in nature. *Mount*, ¶ 45 (quoting Preamble attached to 1997 Mont. Laws, ch. 375). This Court concluded "that the declared purpose of the Act—that of protecting the public—is nonpunitive for purposes of first prong of our 'intents' analysis." *Mount*, ¶ 45. This Court correctly concluded that the Montana Legislature demonstrated that its intent was to create a civil, regulatory scheme to further the protection of the public.

While not discussed in *Mount*, several aspects of the Act further demonstrate the nonpunitive intent of the Act. For example, the Act requires that a trained evaluator conduct an individualized assessment of the offender and designate the offender a risk level based on the risk of reoffense that the offender poses. Mont. Code Ann. § 46-23-509 (2001). The amount of information that may be disseminated and the length of the registration obligation are based on the offender's risk level. Mont. Code Ann. §§ 46-23-506, -508 (2001). Similarly, an offender's ability to petition for removal from the registry is based on whether an offender's continued registration is necessary for the protection of the public.

Mont. Code Ann. § 46-23-506(3)(b) (2001). This Court correctly held in *Mount* that the Legislature intended to create a civil regulatory scheme, which is a nonpunitive intent. *Mount*, ¶¶ 48-49.

Addressing the structure of the Act, this Court acknowledged in *Mount* that it is included in the code of criminal procedure in Title 46. *Mount*, ¶ 47. But the Supreme Court explained in *Smith* that where a law is codified is "not dispositive," and the "location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Smith*, 538 U.S. at 94. Consistent with *Smith*, this Court concluded that because "the declared purpose of the Act is clearly nonpunitive, . . . the fact that the Act is codified in the code of criminal procedure does not, in and of itself, transform the Act's nonpunitive, civil regulatory scheme into a criminal one." *Mount*, ¶ 48. Thus, this Court concluded that the intent of the Act was nonpunitive. *Mount*, ¶ 49.

2. Effects

The *Mount* Court addressed the *Mendoza-Martinez* factors and concluded that, in totality, the effect of the Act is nonpunitive. That analysis is consistent with the Supreme Court's analysis in *Smith*. *See Smith*, 538 U.S. at 97-106.

a. Affirmative restraint or disability

In *Smith*, the Supreme Court explained that if the disability or restraint caused by a law "is minor and indirect, its effects are unlikely to be punitive."

538 U.S. at 99-100. *Smith* noted that the consequences Alaska offenders faced "flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." 538 U.S. at 101. *Smith* also noted that although the Alaska Act required offenders to register, they were not prohibited from any employment, from moving, or from changing their facial features. *Id*. at 101. *Smith* also noted that offenders in Alaska were not required to appear in person to update their registration. *Id*. at 101. Smith explained that "the registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto* Clause." 538 U.S. at 102.

Mount was required to register for life, but had the ability to petition to remove that obligation after ten years. *Mount*, ¶ 55. He was required to initially register in person, had to verify his address by mail once a year afterward, and was required to notify law enforcement within ten days if he changed his address. *Id*. Like the offenders in *Smith*, Mount was not prohibited from any employment, from moving, or from changing his appearance.

This Court correctly determined that the registration requirements imposed an indirect restraint on Mount and were, therefore, "more consistent with a regulatory scheme." *Mount*, ¶ 56. This Court noted that Mount "can move wherever he desires and he can petition a court for an order relieving him of the

registration requirement." *Id*. This Court correctly concluded that the requirements of the Act did "not impose an affirmative restraint or disability on Mount." *Id*.

b. Historical treatment

Like the Supreme Court in *Smith*, this Court correctly rejected Mount's argument that the disclosure requirements of the Act and publication of the information on the internet resembled the traditional punishment of shaming. *Mount*, ¶¶ 59-63. In *Smith*, the Court held that the Alaska law, which allowed significant information about offenders to be published on the internet, did not resemble traditional forms of punishment, including public shaming, humiliation, and banishment. 538 U.S. at 90-91, 98-99. The Court explained that the Alaska Act merely allowed "the dissemination of accurate information about a criminal record, most of which is already public." *Id*. at 98. The Court stated that the dissemination of truthful information in furtherance of a legitimate governmental objective is not punishment. *Id*. The Court noted that, in contrast to traditional shaming punishments, "the publicity and the resulting stigma [were not] an integral part of the objective of the regulatory scheme." *Id*. at 99.

The *Smith* Court concluded that the publication of the information on the internet did not alter the conclusion. *Id*. The Court explained that "[w]idespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Id*.

This Court correctly relied on *Smith* in determining that Montana's Act does not resemble traditional forms of punishment because the purpose is to provide parents with the information necessary to protect children, rather than to shame an offender. *Mount*, ¶ 63. This Court explained that the "primary purpose of the registration and disclosure requirements of the Act are not to shame or embarrass the registrant, but rather, to provide parents with information necessary to protect themselves and their vulnerable children and to provide law enforcement with information necessary to track a class of offenders who have a high propensity for recidivism." *Mount*, ¶ 60.

This Court concluded that "[a]ny shame that Mount may experience results from his previous conviction, not from disclosure of that fact to the public." *Mount*, ¶ 63. This Court noted that Mount's conviction and sentence were already a matter of public record, and "the availability of the information about Mount provides parents with the ability to protect themselves and their vulnerable children." *Id*. This Court noted that "protection from recidivism of sex offenders is the Act's paramount purpose." *Id*. Based on this reasoning, this Court

concluded that "the registration and disclosure requirements of the Act do not constitute historical shaming or punishment." *Id*. Montana's Act, like the Alaska Act in *Smith*, does not resemble traditional forms of punishment because causing stigma is not an objective of the Act.

c. Finding of scienter

In *Smith*, the Court concluded that this factor had "little weight" when analyzing the Alaska registration act because the obligation required by the act was registration, which was not predicated upon some present or repeated violation of the law. 538 U.S. at 105.

In *Mount*, this Court correctly explained that a law does not violate the prohibition on *ex post facto* laws merely because it operates on events antecedent to its effective date. *Mount*, ¶ 67 (quoting *State v. Brander*, 280 Mont. 148, 154, 930 P.2d 31, 35 (1996)). As this Court noted, the Ninth Circuit previously stated, "it is hornbook law that no ex post facto problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct took place after the law was passed." *Mount*, ¶ 67 (quoting *Russell v. Gregoire*, 124 F.3d 1079, 1089-90 (9th Cir. 1997) (holding that Washington's registration act was not an *ex post facto* violation)). This Court noted that Mount was being punished for his failure to register, which occurred

after the law was passed, not his prior sexual offense. *Mount*, ¶ 67. Thus, this Court correctly concluded that the Act does not implicate a finding of scienter. *Mount*, ¶¶ 68, 89.

d. Traditional aims of punishment

The fourth *Mendoza-Martinez* factor examines whether the law promotes the traditional aims of punishment—retribution and deterrence. *Mount*, ¶ 70. This Court correctly held that the Act, like the Alaska Act in *Smith*, is not retributive. *Smith* held that categories determining the length of reporting in Alaska were "reasonably related to the danger of recidivism," which was "consistent with the regulatory objective" and not retributive. 538 U.S. at 102. Similarly, this Court concluded in *Mount* that "the Act's main purpose is protection of the public from the recidivism of sex offenders and not to inflict retribution on sex offenders." *Mount*, ¶¶ 71-72.

Further, *Smith* explained that the fact that the Alaska Act might deter future crimes did not make the Alaska Act punitive. *Id*. The Court explained that "governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation." *Id*. (internal quotation marks and citation omitted; omission in original).

Relying on *Smith*, this Court explained that although the Act "may have an incidental deterrent effect," that "does not necessarily implicate punishment as long as the law is reasonably related to the law's purpose." *Mount*, ¶ 73. This Court emphasized the nonpunitive purposes of the Act and determined that the disclosure requirements established a regulatory scheme that furthered the purposes of the Act. *Mount*, ¶ 74. Because the requirements of the Act were reasonably related to the Act's purposes, this Court correctly concluded that the requirements did not promote retribution. *Mount*, ¶ 75.

e. Criminal behavior

Like the scienter factor, the *Smith* Court explained that this factor has "little weight" in the analysis. 538 U.S. at 105. This Court again relied on the Ninth Circuit's decision in *Russell*. *Mount*, ¶ 78. In *Russell*, the Ninth Circuit determined that the fact that a prior conviction for a sexual offense was an element of failing to register was "of no consequence" because failing to register was a separate offense. *Mount*, ¶ 78 (quoting *Russell*, 124 F.3d at 1088). This Court correctly concluded that Mount was being punished for his present offense—failing to register—rather than his prior sexual offense. *Mount*, ¶ 79.

f. Nonpunitive purpose

Mount conceded that the purpose of the Act was nonpunitive. This Court agreed, noting that the purpose of the Act was protection of the public from

recidivism of sexual offenders. *Mount*, ¶ 80. The Supreme Court explained in *Smith* that the "Act's rational connection to a nonpunitive purpose is a 'most significant factor' in our determination that the statute's effects are not punitive." *Id*. at 102-03.

g. Excessiveness

Smith rejected the claim that the Alaska statute was not drawn narrowly enough, explaining that a "statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id*. at 103. The Court explained that the "question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective," not "whether the legislature has made the best choice possible." *Id*. at 105. The Court concluded that Alaska's means were reasonable because

> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high."

Id. at 104 (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002) (citing U.S. Dept. of Justice, Bureau of Justice Statistics)).

The Court concluded that the duration of registration—15 years—was also not excessive based on research showing that most reoffenses occur many years

after release. *Smith*, 538 U.S. at 104. The Court also concluded that the wide dissemination did not make the law excessive, noting that dissemination was a passive system that only informed individuals who sought access to the information. *Id*. at 104-05.

The *Smith* Court concluded that the effects of the law did not negate Alaska's intention to establish a civil regulatory scheme. *Id*. at 105. Therefore, the Alaska Act was nonpunitive, and its retroactive application did not violate the *Ex Post Facto* Clause. *Id*. at 105-06.

The same analysis applies to Montana's Act, which is similar to Alaska's. This Court concluded that the "registration and disclosure requirements are tailored to disclose only necessary information and, as already noted, these requirements do not impose an excessive burden on the registrant." *Mount*, ¶ 84. This Court noted that the Act made the names and addresses of registered offenders public criminal justice information and provided law enforcement officials the discretion to determine whether to release additional information if they deemed it necessary to protect the public. *Mount*, ¶¶ 85, 87. While the 2001 Act also listed some information that had to be disseminated, "at a minimum," that information was not excessive and was based on an offender's level of risk. *See* Mont. Code Ann. § 46-23-508 (2001). This Court correctly concluded that the Act "is a reasonable effort on the part of the Legislature to tailor what information is and is not

disclosed." *Mount*, ¶ 88. Accordingly, this Court concluded that "the registration and disclosure requirements are reasonable in light of the Act's nonpunitive purpose" and "are not excessive." *Id*.

h. Summary

Evaluating the totality of the factors, this Court correctly concluded that both the intent and the effect of the Act was nonpunitive. Specifically addressing the effects of the Act, this Court concluded that:

> (1) the Act imposes no affirmative restraint or disability on Mount; (2) the Act does not shame Mount; (3) the Act does not implicate a finding of scienter; (4) the Act can deter crime and is not retributive in effect; (5) the Act does not impose criminal sanctions on Mount for previous conduct; (6) a nonpunitive purpose—i.e., protection of the public—exists for the Act; and (7) the registration and reporting requirements are not excessive.

Mount, ¶ 89. Accordingly, this Court held that "the Act does not violate the *ex post facto* clauses of either the United States or Montana Constitutions." *Mount*, ¶ 90. The similarities between the Alaska registration statutes that the Supreme Court held in *Smith* were not punitive and this Court's proper application of *Smith* to the Montana Act demonstrate that *Mount* was correctly decided.

D. *Mount* should not be overruled.

This Court should not overrule *Mount* because it was correctly decided and the doctrine of *stare decisis* counsels against overruling precedent. The doctrine of *stare decisis* serves a valuable role by "protect[ing] the stability and predictability

of law in order to ensure equal treatment." *Guethlein v. Family Inn*, 2014 MT 121, ¶ 16, 375 Mont. 100, 324 P.3d 1194. "Though *stare decisis* is not a rigid doctrine preventing reexamination of past cases, 'weighty considerations underlie the principle that courts should not lightly overrule past decisions.'" *Id*. (quoting *Certain v. Tonn*, 2009 MT 330, ¶ 19, 353 Mont. 21, 220 P.3d 384). "*Stare decisis* provides the 'preferred course' when faced with viable alternatives." *Guethlein*, ¶ 16 (quoting *State v. Demontiney*, 2014 MT 66, ¶ 17, 374 Mont. 211, 324 P.3d 344). Individuals in Montana have relied on *Mount* for more than a decade, and it should not be overruled when it is not manifestly wrong.

Further, several other courts found that the retroactive application of registration requirements was not an *ex post facto* violation before *Mount* was decided. *See Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir. 1999) (holding that Tennessee's registration act with more limited dissemination of information was not punitive); *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997) (holding Washington's registration act allowing for limited dissemination of information about level 2 and 3 sexual offenders was not punitive); *Femedeer v. Haun*, 227 F.3d 1244, 1246-53 (10th Cir. 2000) (holding that Utah's registration act allowing for internet publication was not punitive); *People v. Malchow*, 193 Ill. 2d 413 (Ill. 2000) (holding Illinois's registration act with more limited dissemination of information was not punitive).

More recent decisions from other courts finding some state registration acts to be punitive does not render *Mount* incorrect. First, many state court decisions finding sexual offender registration to be punitive have relied on state constitutions. *See Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011); *Doe v. Dept. of Public Safety*, 62 A.3d 123 (Md. App. 2013); *Doe v. State*, 111 A.3d 1077 (N.H. 2015); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *Doe v. State*, 189 P.3d 999 (Alaska 2008). Some of those decisions are inconsistent with this Court's analysis under the Montana Constitution in *Mount*. For example, after *Smith*, the Alaska Supreme Court on remand declined to follow *Smith* and held that Alaska's registration act violated the *Ex Post Facto* Clause of the Alaska Constitution. *Doe*, 189 P.3d at 1018-19. And in *Doe v. Dept. of Public Safety*, the Court of Appeals of Maryland chose to apply a broader *ex post facto* test under its own constitution. 62 A.3d at 132-37. Those decisions are contrary to *Mount*, which applied the Montana Constitution consistent with the Supreme Court's analysis of the federal Constitution in *Smith*.

Hinman has not demonstrated that those courts, rather than this Court in *Mount*, are correct. This Court held in *Mount* that the 2001 version of the Act did not violate the *Ex Post Facto* Clause of the Montana Constitution based on the

Supreme Court's decision in *Smith*. Statutes are presumed to be constitutional, and that presumption may be overcome only after careful consideration of the purpose and effect of the statute. *State v. Smith*, 2021 MT 148, ¶ 56, 404 Mont. 245, 488 P.3d 531. "The party challenging the constitutionality of a statute has the burden of proving beyond a reasonable doubt that it is unconstitutional." *Id.* (citation omitted). A contrary decision by another state court does not demonstrate that *Mount* was incorrect, particularly in light of the presumption that statutes are constitutional.

Second, a determination of whether a state registration act is punitive is a fact-specific inquiry that depends on the requirements of the act being interpreted. Many of the acts that other courts have found to be punitive were more burdensome than Montana's. For example, some of the registration acts that have been found to be punitive prohibited all sexual offenders from living or working within 1,000 feet of a school or lacked an individualized assessment of an offender's risk. *People v. Betts*, 2021 Mich. LEXIS 1304 (relying in part on school exclusion zones and lack of individualized risk assessment); *Williams*, 952 N.E.2d 1108 (relying in part on school exclusion zones, lack of individualized risk assessment, requirement to register with multiple sheriffs, and lack of possibility of having the sexual predator label removed); *Starkey*, 305 P.3d 1004, ¶¶ 50, 60

(relying in part on restrictions on where and with whom offenders may live); *State v. Letalien*, 985 A.2d 4, ¶¶ 48, 55, 62 (Me. 2009) (relying on lack of opportunity to ever be relieved of the duty to register); *Wallace*, 905 N.E.2d at 379, 383-84 (relying in part on school exclusion zones, lack of individualized risk assessment, inability to petition for removal, and requirements that sexual offenders provide notice if gone for three days, allow searches of their computers, and allow in-person visits to confirm their address).

In contrast, Montana's 2001 Act, and the current Act, are far different than many of the registration acts that have been found to be punitive. Significantly, in 2001 and at present, Montana's Act has required trained evaluators to examine sexual offenders and produce a report recommending that the offender be designated a level 1, 2, or 3, based on the offender's risk of a repeat sexual offense. Mont. Code Ann. § 46-23-509 (2001), (2021). As a result, the duration of an offender's registration and the amount of information that can be disseminated is dependent on the risk posed by the offender. *See* Mont. Code Ann. § 46-23-506, -509 (2001), (2021).

Further, although sexual offenders were required to register for life in 2001, most level 1 and level 2 offenders could petition for relief from the duty to register after ten years. Mont. Code Ann. § 46-23-506(1), (3), (5) (2001). A court was permitted to relieve a qualifying offender from the duty to register if the offender

had remained law abiding and continued registration was not necessary for the protection of the public. Mont. Code Ann. § 46-23-506(3) (2001). Also, school exclusions zones did not exist in 2001.

Montana's 2001 Act did not contain many of the features that courts have found to be punitive. An examination of these cases does not demonstrate that *Mount* was incorrectly decided. Instead, in *Mount*, this Court correctly applied *Smith* to Montana's 2001 Act and held that it was not punitive.

E. Changes to the Act don't make the current Act punitive.

Modifications to the Act since 2001 do not make the 2021 Act punitive. Instead, the Act's continued reliance on an individualized risk assessment and the Act's emphasis on the risks to the community demonstrate that the Act continues to be a nonpunitive regulatory scheme.

The duration of registration has not significantly changed since 2001. With some exceptions, a level 1 offender continues to be able to petition to remove the obligation to register after 10 years, and a level 2 offender is able to petition for removal after 25 years. Mont. Code Ann. § 46-23-506(3) (2021). Additionally, a level 2 offender may petition to change his designation "if the offender has enrolled in and successfully completed" a qualifying treatment program. Mont. Code Ann. § 46-23-509(4) (2021). The ability for an offender to remove the

obligation to register if he is able to demonstrate a lack of risk to the community supports the conclusion that the Act is nonpunitive.

The amount of information an offender is required to provide upon registration has increased, but it is similar to the amount of information required by the Alaska registry, which the Supreme Court held was not punitive in *Smith*. *Compare* Mont. Code Ann. § 46-23-504(3) (2021) (requiring offender to be photographed and provide his name, social security number, residence information, employment information, driver's license number, vehicle information, email addresses, screen names, fingerprints, and a DNA sample), *with Smith*, 538 U.S. at 90 (listing similar information required by Alaska's registration act). Similarly, the Supreme Court in *Smith* held that the Alaska act, which disseminated information similar to Montana's Act, was not punitive. *Compare* Mont. Code Ann. § 46-23-508, *with Smith*, 538 U.S. at 91 (disseminating similar information to Montana). Further, the amount of information that can be disseminated in Montana is based on the risk level that the offender has been designated or the age of the victim. Mont. Code Ann. § 46-23-508(1)(b). The emphasis on the offender's individualized risk determination supports the conclusion that the Act is a civil, regulatory system and is not punitive.

The State acknowledges that offenders are now required to appear in person every year if a level 1 offender, twice a year if a level 2 offender, and quarterly if a level 3 offender, and are photographed at that time. Mont. Code Ann. § 46-23-504(6). But the requirement to appear between one and four times a year is not so burdensome that it makes the effect of the Act punitive. The Act still does not impose any active restraint on a level 1 or 2 offender because it does not place any limitations on where the offender lives or works. Further, the number of times per year that the offender is required to appear in person is reasonably related to the offender's risk level.

Although Montana now has school exclusion zones, they apply only to sexual offenders who have been designated a level 3 sexual offender and have committed a sexual offense against a child 12 years of age or younger. Mont. Code Ann. §§ 45-5-513(6)(b), 46-23-509 (2021). The school exclusion zone in Mont. Code Ann. § 45-5-513 does not apply to Hinman because he is a level 2 sexual offender.

Further, this Court has held that standard conditions of probation placed on a sexual offender's sentence are not punitive. *State v. Piller*, 2014 MT 342A, 378 Mont. 221, 343 P.3d 153; *State v. Tirey*, 2010 MT 283, 358 Mont. 510, 247 P.3d 701. This suggests that registration requirements, which are intended to promote public safety, are not punitive.

In sum, the 2021 Act continues to be a civil, regulatory scheme that is rationally related to its purpose of providing the public with information that allows people to protect their children and provides law enforcement with valuable information that can be used to promote public safety. Recent statistics demonstrate that offenders convicted of rape or sexual assault are three times more likely than other felons released from a state prison to be arrested for rape or sexual assault during the nine years following release. Bureau of Justice Statistics, U.S. Dept. of Justice, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14)* 5 (2019). The Act provides a rational scheme designed to promote public safety based on the risk posed by individual offenders. Because it is nonpunitive, it does not violate the *Ex Post Facto* Clause of the Montana Constitution.

III. Hinman has failed to demonstrate that his due process claim should be reviewed under the plain error doctrine.

Hinman did not raise a due process claim in the trial court. (*See* Doc. 27.) This Court has consistently held that it will not consider issues raised for the first time on appeal, including claims of constitutional error. *See, e.g.,* S*tate v. Taylor,* 2010 MT 94, ¶ 12, 356 Mont. 167, 231 P.3d 79. But this Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine. "To obtain review under the plain error

doctrine, the defendant must: (1) show the claimed error implicates a fundamental right; and (2) firmly convince this Court that failure to review the error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process." *State v. Hatfield*, 2018 MT 229, ¶ 28, 392 Mont. 509, 426 P.3d 569. This Court invokes plain error review "sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." *State v. Williams*, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127.[3]

[3] In *State v. Sedler*, 2020 MT 248, ¶ 11, 401 Mont. 437, 473 P.3d 406, the majority opinion incorrectly relied on case law about the review of unpreserved sentencing claims to determine whether to apply plain error review to a constitutional challenge to a failure to register conviction. This Court applies a different standard to unpreserved sentencing claims, reviewing claims that a sentence is facially unconstitutional, regardless of whether the claim was preserved. *State v. Coleman*, 2018 MT 290, ¶ 9, 393 Mont. 375, 431 P.3d 26 (citing *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979)). That standard applies only to sentencing claims, and should not be applied to claims challenging a conviction. Instead, a constitutional claim challenging a conviction cannot be reviewed unless this Court invokes its authority to review the claim under the plain error doctrine. *State v. Reim*, 2014 MT 108, ¶¶ 38-40, 374 Mont. 487, 323 P.3d 880; *see also Sedler*, ¶¶ 21-31 (Rice, J., dissenting). The majority's analysis in *Sedler* was based on *State v. Hansen*, 2017 MT 280, 389 Mont. 299, 405 P.3d 625, which this Court has since overruled because it incorrectly treated a challenge to a conviction as a sentencing claim. *Gardipee v. Salmonsen*, 2021 MT 115, ¶ 10, 404 Mont. 144, 486 P.3d 689. This Court's correction of *Hansen* demonstrates that Sedler's analysis is erroneous and should not be applied in this case.

Because Hinman does not allege that he meets the standard for review under the plain error doctrine, he cannot meet his burden to demonstrate that his unpreserved claim should be reviewed. Indeed, he has not even clarified whether his due process claim is procedural or substantive and whether it relies on the United States or Montana Constitution. His vague claim that the Act is "excessive" is insufficient to demonstrate that he is entitled to plain error review.

The Supreme Court held in *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 7-8 (2003), that procedural due process does not require offenders to have a hearing on their dangerousness where a state registration statute required registration based solely on the offender's prior conviction. Because an offender's risk level in Montana is based on an offender's dangerousness, this Court has held that an offender is entitled to an opportunity to know what information the designation is based on and to contest that information. *State v. Samples*, 2008 MT 416, ¶ 34, 347 Mont. 292, 198 P.3d 803. Hinman does not argue that he did not have an opportunity to challenge his risk level designation, so he cannot demonstrate that failing to review a procedural due process claim would result in a manifest miscarriage of justice.

Hinman also has not demonstrated that he is entitled to review of a substantive due process claim. Substantive due process examines whether "restrictions are unreasonable or arbitrary when balanced against the purpose of the

legislature in enacting the statute." *State v. Webb*, 2005 MT 5, ¶ 21, 325 Mont. 317, 106 P.3d 521. While addressing the restoration of rights claim in *Mount*, this Court addressed the reasonableness of the Act. This Court noted that the right to privacy is a fundamental right in Montana and that "Mount's right to privacy may be implicated by having to register and disclose his whereabouts." *Mount*, ¶¶ 98-99. But, this Court concluded that the State's interest in enacting the Act was compelling. *Mount*, ¶ 99. This Court explained that the "Act was adopted to protect the public from the recidivism of sex offenders; to prevent victimization of vulnerable children; and to assist law enforcement in keeping track of the whereabouts of sex offenders." *Id.* This Court concluded that the "Act is narrowly tailored in its registration and disclosure requirements to effect only those purposes in a reasonable manner." *Id.*

Mount demonstrates that the Act is appropriately tailored and does not violate substantive due process. Further, other courts that have held that other state's registration acts violated due process based their decisions on the individual state's registration act's lack of an individualized determination or an offender's inability to obtain judicial review to determine whether they remained dangerous. *See Powell v. Keel*, 860 S.E.2d 344 (S.C. 2021) (requiring judicial review); *Doe v. Dept. of Public Safety*, 444 P.3d 116, 133-35 (Alaska 2019) (requiring individualized determination); *State v. Bani*, 36 P.3d 1255 (Haw. 2001) (same).

Montana's Act, in contrast, assigns risk levels based on an individualized determination of an offender's dangerousness. Mont. Code Ann. § 46-23-509. It also allows level 1 and 2 offenders to petition for removal after 10 or 25 years, respectively. Mont. Code Ann. § 46-23-506(3)(b). And level 2 offenders who have completed treatment may petition to be reclassified as a level 1 offender, which would allow the offender to petition for removal after 10 years. Mont. Code Ann. § 46-23-509(4). This scheme properly focuses on the risk posed by sexual offenders and allows opportunities for removal from the registry for offenders who can demonstrate that they are not a risk. Because the Act is narrowly tailored to promote the compelling purposes of the act in a reasonable manner, Hinman has not met his burden to demonstrate that failing to review this claim would result in a manifest miscarriage of justice.

IV. The Act does not violate the Restoration of Rights Clause of the Montana Constitution or Mont. Code Ann. § 46-18-801.

This Court has already held that the Act does not violate the Restoration of Rights Clause in the Montana Constitution or Mont. Code Ann. § 46-18-801 because those clauses apply to civil and political rights incident to citizenship that are not implicated by the Act. *Wagner v. State*, 2004 MT 31, ¶¶ 13-16, 319 Mont. 413, 85 P.3d 750; *Mount*, ¶ 95-100.

Article II, section 28(2), of the Montana Constitution provides that "Full rights are restored by termination of state supervision for any offense against the state." Similarly, Mont. Code Ann. § 46-18-801(2) provides that "if a person has been deprived of a civil or constitutional right by reason of conviction for an offense and the person's sentence has expired or the person has been pardoned, the person is restored to all civil rights and full citizenship, the same as if the conviction had not occurred."

In *Mount*, this Court relied on the Montana Constitutional Convention to interpret the restoration of rights provision, quoting language from a delegate indicating that "once a person who has been convicted has served his sentence and is no longer under state supervision, he should be entitled to the restoration of all civil and political rights, including the right to vote, hold office, and enter occupations which require state licensing." *Mount*, ¶ 95 (quoting Montana Constitutional Convention, Verbatim Transcript, March 9, 2017, p. 1800). Because those rights are not implicated by the Act and because the Act is narrowly tailored to not violate the right to privacy, this Court concluded in *Mount* and *Wagner* that the Act does not deprive offenders of any rights under article II, section 28, of the Montana Constitution or Mont. Code Ann. § 46-18-801. *Wagner*, ¶ 16; *Mount*, ¶ 100. Hinman has not demonstrated that those cases were

wrongly decided, so this Court should continue to hold that the Act does not violate the Restoration of Rights Clause.

CONCLUSION

The district court correctly denied Hinman's motion to dismiss. His conviction for failing to register should be affirmed.

Respectfully submitted this 30th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,838 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-30-2021:

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