COLORADO SUPREME COURT 2 EAST 14TH AVENUE DENVER, COLORADO 80203 Case No. 2024SC154 Colorado Court of Appeals Case No. 2022CA594 Jefferson County District Court Case No. 2020CR2340	DATE FILED March 17, 2025 7:12 PM FILING ID: CEE899FAA9785 CASE NUMBER: 2024SC154
Timothy Paul Beagle, Petitioner v. **The People of the State of Colorado,** Respondent	COURT USE ONLY
Timothy R. Macdonald, No. 29180 Sara Neel, No. 36904 Emma Mclean-Riggs, No. 51307 ACLU FOUNDATION OF COLORADO 303 E. 17th Avenue, Suite 350 Denver, CO 80203 P: (720) 402-3151 tmacdonald@aclu-co.org sneel@aclu-co.org emcleanriggs@aclu-co.org *Attorneys for Amicus Curiae*	Case Number: 2024SC154

AMICUS CURIAE BRIEF OF ACLU OF COLORADO IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE

I hereby certify that this Amicus Curiae brief complies with all requirements of C.A.R. 28(a)(2), 28(a)(3), 29(c), and 32. The undersigned specifically certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 4745 words. I acknowledge this brief may be stricken if it fails to comply with any requirement of the foregoing rules.

/s/*Emma Mclean-Riggs*

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IDENTITY AND INTEREST OF AMICUS CURIAE

The ACLU is a nationwide, non-partisan, non-profit organization with almost 2 million members, dedicated to safeguarding the principles of civil liberties enshrined in the federal and state constitutions. The ACLU of Colorado, with over 45,000 members and supporters, is a state affiliate of the ACLU. The ACLU is dedicated to the constitutional principles of liberty and equality, including the right to be free of cruel and unusual punishment. The ACLU has historically appeared before courts throughout the country, to defend civil rights in the context of the heavily punitive criminal and quasi-criminal regulatory schemes focused on sex offenses that proliferated in the 1990s. From *Smith v. Doe*, 538 U.S. 84 (2003), to *Millard v. Camper*, 971 F.3d 1174 (10th Cir. 2020), the ACLU has intervened to protect civil liberties where they are most likely to be first eroded: where community emotions are very high. It seeks to file here in that tradition.

INTRODUCTION

Colorado created the sexually violent predator ("SVP") designation in 1997. At the time, legislatures and the courts across the country shared beliefs about people who commit sex offenses against children: they were all at a lifetime high risk of reoffence. Based on these beliefs, legislatures articulated the purpose of laws like the SVP designation as protecting the community and courts found that such designations were not punishment because they served that purpose, no matter how much like punishment they appeared.

Nearly thirty years after the creation of the designation, the science is clear: the factual assumptions that underlay it are false. Not all sex offenders are high-risk, and even for the highest risk, risk declines over time offense-free in the community. By twenty years offense-free, even the highest-risk person's risk of committing another sexual offense has declined to the level of any random adult. This Court can and should acknowledge what is now obvious: an unappealable designation as an extraordinarily dangerous SVP, a designation that subjects a person to repeated public shaming for the rest of their life, is a punishment, not a public safety measure.

ARGUMENT

The SVP designation, under C.R.S. § 18-3-414.5(1)(a), a lifetime, unchallengeable determination that a person is high-risk to reoffend and must be subject to community notification, is punishment under the Eighth Amendment to the United States Constitution. Colorado's SVP designation is punitive in effect. A*micus curiae* writes particularly regarding the second and sixth *Mendoza-Martinez* factors: whether the sanction, as actually practiced in Colorado, resembles a traditional form of punishment, here, public shaming, and whether the sanction is rationally connected to an alternative purpose, here, "protecting the community." *Kennedy v. Mendoza-Martinez*, 372 US 144, 168-69 (1963); *People v. Williamson*, 2021 COA 77, ¶ 28 (concluding that the purpose of the SVP status is to "protect the community.")

Community notification as practiced in Colorado primarily functions as a state-sanctioned platform for the public to shame and threaten SVP-designated people. Law enforcement sometimes runs "town hall-style meetings" that are expected to draw emotional and volatile crowds. In practice, most notifications are done via social media. The comments sections, provided by law enforcement on their pages, are filled with vitriol and threats. Notification results in the destabilization of the person and harassment of those affiliated with them.

The SVP designation, and associated community notification, is not rationally connected to protecting the community. All the designation's statutory criteria sweep in people who are likely not in the highest risk group. Even if the SVP designation were only applied to those who were high risk at the point of assessment, it could not be rationally connected to protecting the community because it is a lifetime designation. A person's risk of sexual recidivism drops as they spend more time offense-free in the community, and a risk designation rationally connected to public safety requires an opportunity for reassessment.

I. Colorado's SVP Designation Is Not Rationally Related to Risk Because it Can Never Be Challenged or Altered.

In determining whether the SVP designation is rationally connected to protecting public safety, the scientific consensus matters. Courts routinely overrule prior precedent based on changed scientific understanding where "the constitutionality of a statute [is] predicated upon the existence of a particular state of facts." *United States v. Carolene Prod. Co*, 304 US 144, 153 (1938). In *Dias v. City & Cnty of Denver*, the Tenth Circuit rejected the argument that a ban on owning pit bulls was constitutional simply because past cases had upheld similar bans, as plaintiffs had plausibly alleged that "the state of science is such that [pitbull] bans are no longer rational." 567 F.3d 1169, 1183 (10th Cir. 2009). *See Henderson v. Thomas*, 891 F. Supp. 2d 1296, 1305 (MD Ala, 2012) (where plaintiffs alleged that

the factual premise underpinning a prior decision upholding a policy of segregating HIV+ prisoners was no longer true, the prior decision did not bar suit). This Court need not be beholden to prior precedent, like *Smith*, which misunderstand facts as they were known then, or was based on facts no longer believed to be true. *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016); *see also* Ellman & Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics,* 30 Const. Com. 495 (2015). The state of science today regarding sex offenses is that a lifetime risk designation is irrational. Risk of reoffence declines over time offense-free in the community, and even the highest-risk sex offenders eventually become as low-risk as a person with no previous felony.

A. It is well-established that recidivism risk, including sexual recidivism risk, declines over time spent offense-free in the community, and eventually returns to the risk level of any random community member.

The SVP designation purports to identify a person's risk of committing another SVP-qualifying crime. Whether the designation does that is dubious, as discussed below. The gold standard actuarial measurement of risk, the Static-99R, measures rearrest risk as of the time the person is released into the community. Zgoba et al., *A Multi-State Recidivism Study Using Static-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act* (2012) (research report

submitted to U.S. Department of Justice). But the risk that any individual will reoffend changes following release. Assume, for example, a group of 100 people whose Static-99R score at release predicts a 10% lifetime rearrest rate. Assume five are rearrested in the five years after the group's release. The Static-99R predicts five more will be arrested eventually from the remaining 95. That means the rearrest risk for these 95 who have been arrest-free for five years is now 5.3% (5/95). Put another way, the recidivism risk has declined from 10% percent to 5.3% percent after five years, for those who are still arrest-free. These figures are typical, as in general the likelihood a sexual offender will be arrested again for a sexual offense is approximately halved for each five years they are arrest-free following release. Thorton et. al, *Estimating Lifetime and Residual Risk for Individuals Who Remain Sexual Offense Free in the Community: Practical Applications*, 33 Sexual Abuse 3, 33 (2021).

This decline in the likelihood of rearrest with each year arrest-free after release has been described as the single most well-established finding in criminology. Blumstein & Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 Criminology 327 (2009); Kurlychek, et al., *Long-Term Crime Desistance and Recidivism Patterns–Evidence from the Essex County Convicted Felon Study*, 50 Criminology 71, 75 (2012). People convicted of sex

offenses are no different. One key study combined data collected in 21 studies that together followed 7,740 men convicted of a sexual offense for up to 24 years after release. Hanson, et al., *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J. Interpers. Violence 2792, 2794-95 (2014). The study found that rearrest risk declined with arrest-free years at liberty regardless of whether the initial risk was low or high. (Because 16 of the 21 studies followed individuals in countries that do not have community notification, declining reoffence rates cannot be attributed to community notification.)

The chance that a random man without a felony conviction, will, over their lifetime, be arrested for a sexual offense is estimated at about 2%. Lee et. al, *There is No Such Thing as Zero Risk of Sexual Offending*, 65 Canadian J. Criminology & Crim. Just. 3, 11 (2023); Hanson, et al., *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 Psych. Pub. Pol'y & L. 48–55 (2018). This risk level provides a benchmark, what the research calls "desistance," because any group that is at or below it cannot justify special regulation, when their risk level is indistinguishable from the general population.

A follow-up study from Hanson's 2014 work calculated how much rearrest declined for each succeeding year after release. It classified all 7,740 people into one

of the five risk levels based on their Static-99R score. *Id.* at 50. As those rearrested were removed from the sample, the study recalculated the rearrest risk of those still arrest-free up to that point, based on the follow-up data that showed how many of those rearrest-free at that point were in fact rearrested in the future. *Id.* The authors performed this recalculation for each six-month interval following the initial release from custody. Figure A, reproduced below, shows how the re-arrest risk declined over the 25 years following release, by risk level.

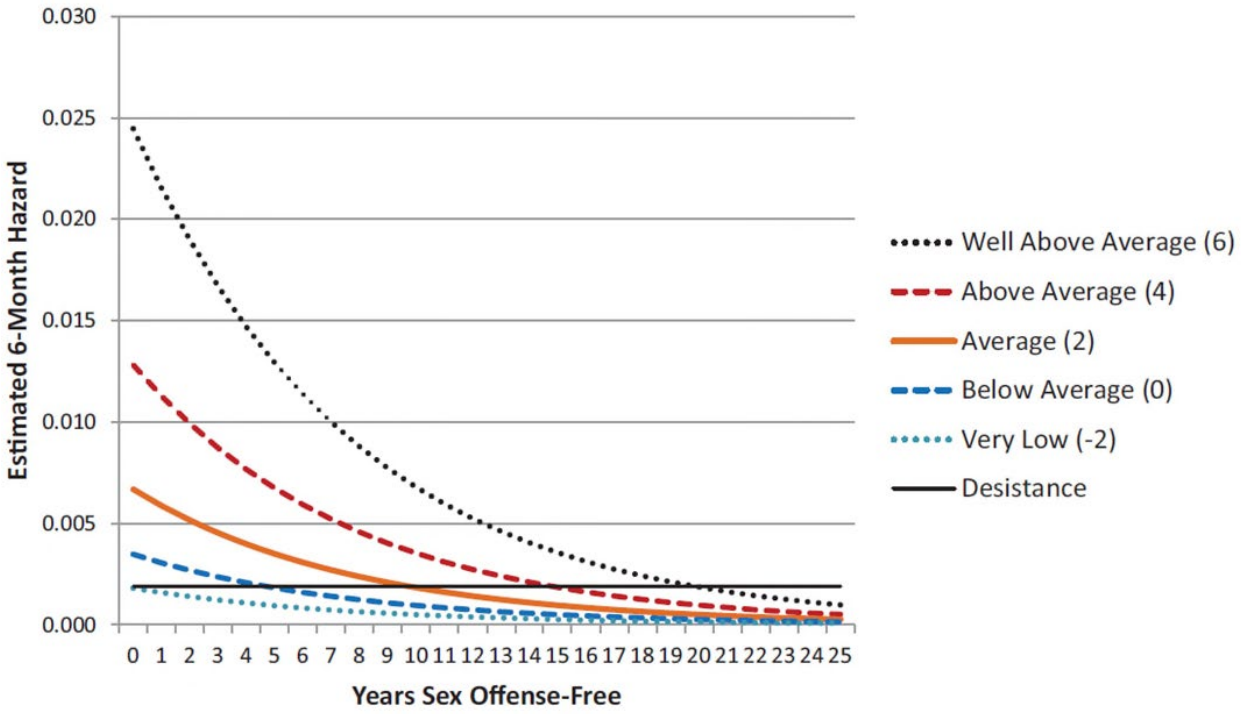

Figure 1: 6 Month Re-Arrest Risk By Years Sex Offense-Free (Hanson et. al, 2018)

The horizontal line near the bottom of the x-axis represents desistance. (Hanson used the risk of sexual recidivism for a person with a felony non-sex

conviction (2%) as desistance, which was shown to be about the same as the general population by Lee's later work). Any risk group at or below this level is indistinguishable from men without sex convictions in the general population. Very low-risk people convicted of a sex offense are below the desistance line on the day they are released from jail or prison. That is, on day one they pose less risk of being arrested for a new sexual offense than men in the general population. Above average risk people convicted of a sex offense and well above average risk people convicted of a sex offense cross the desistance line in 15 years and 20 years respectively.

Even if the SVP designation identifies the highest-risk people as well as the Static-99R (and it probably does not), after 20 years in the community without rearrest, those people have the same risk of getting arrested for a sex offense as any man without a felony conviction in the community. An SVP designation that reflected the scientific consensus would be tailored to risk and would last less than twenty years after a person's release (in some instances much less), certainly not the remainder of a person's natural life.

B. Unchallengeable lifetime risk designations have no rational connection to public safety.

Once a person has passed the point of desistance, they pose no more risk than anyone else in the community. Even before desistance, risk drops significantly over time offense-free. Colorado's SVP designation, best thought of as a sort of "super-

registry," imposing the longest and most onerous registration terms under the Colorado Sex Offender Registration Act ("CSORA") and the highly punitive community notification protocols, has no relationship to these changing risks. Even if the designation was not punishment with no public safety value when it was imposed, it is by year five, or year ten, or year twenty, or year fifty.

Courts around the country have recognized that various registry schemes are punitive under the *Mendoza-Martinez* factors because of their lack of individual, empirically supported risk assessment and lack of opportunity for removal, combined with the extraordinary harm of being labelled a sex offender. *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (retroactive lifetime registration without opportunity for removal is punitive); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1029 (Okla. 2013) (extending registration terms without individual review is punitive); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (punitive to register for long periods absent finding of dangerousness); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (registration without regard to risk is punishment); *Doe v State*, 189 P.3d 999, 1017–19 (Alaska 2008) (registration punitive because it lacked distinctions based on risk or opportunity for removal); *Doe v. State*, 111 A.3d 1077 (N.H. 2015) (registration could be retroactively applied only with periodic review to assess if person posed a risk). This Court should do the same.

II. Community Notification in Colorado Strongly Resembles the Traditional Punishment of Public Shaming.

Colorado's sex offender registration and notification program "resemble[s] traditional forms of punishment, such as public shaming and humiliation." *People in Interest of T.B.*, 2021 CO 59, ¶ 52, 489 P.3d 752, 767. Nowhere is this truer than in the context of the SVP designation. People designated SVP are subject to the maximum frequency and duration of sex offender registration. C.R.S. §§ 16-22-108, 18-3-414.5(2). Only people designated as SVPs are subject to "community notification protocols;" the requirement that every time a person moves, local law enforcement must disseminate information about them and their previous convictions to the public. C.R.S. §§ 16-22-113(3)(a), 16-13-904(1)(2); § 16-13-903(3)(a)-(b). The SVP designation is for life, with no opportunity for reconsideration. C.R.S. § 18-3-414.5.

Community notification is regulated by the Sex Offender Management Board ("SOMB"), which provides instruction to local law enforcement through the Criteria, Protocols, and Procedures for Community Notification Regarding SVPs ("Protocols"). C.R.S. §§ 16-22-108(1)(d); 16-13-904(1); SOMB, *Protocols,* (2018) https://cdpsdocs.state.co.us/dcj/DCJ%20External%20Website/SOMB/LawEnforcement/Document.pdf. The Protocols allow law enforcement to use any combination of a town-hall-style meeting, press releases, direct calls to individuals, mailings,

website postings, and traditional and social media. Protocols at 25. Pursuant to statute, specific biographical information about the SVP-designated person must be included in notifications. *Id.* at 25-27.

In theory, Colorado's community notification program is built around a town-hall-style meeting, consisting of a presentation by law enforcement to the community. Protocols at 25. The designated person is not permitted to attend the meeting because their presence could "incite fear, panic, or anger by meeting attendees, resulting in disruption of the meeting and possible harm to attendees or the SVP." *Id.* The presentation is usually a Powerpoint, including information about the designated person, the community notification program, and sexual assault prevention. *Id.*

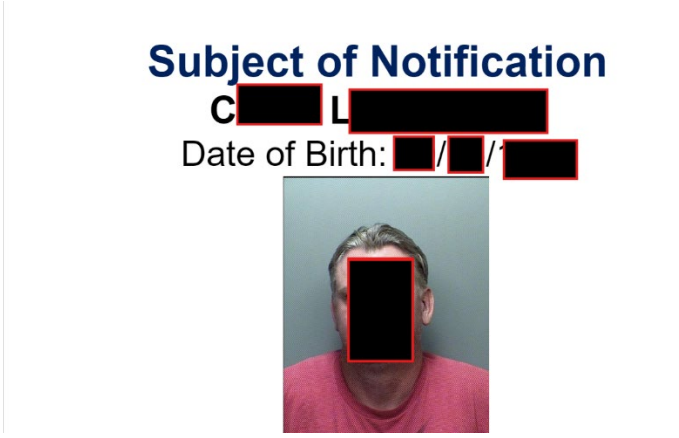

Figure 2: Example Meeting Slide, Larimer County Sheriff's Office.

The Protocols express repeated concern about vigilante violence, abusive language, and disruption at notification meetings. The Protocols warn of an "emotional crowd" and recommend that law enforcement take questions in writing to "ensure control and order." *Id.* at 49-50. Having attendees sign in is recommended, in part to create "a suspect list for vigilantism." *Id.* at 41. In short, the Protocols acknowledge the obvious: these are meetings full of fearful, angry people who are at high risk of erupting into violence. They leave the meeting armed with a photograph of the person and information about what they have done and where they live and work. *Id*. at 25-36.

NOTIFICATION

SEXUALLY VIOLENT PREDATOR

THIS IS NOT A WANTED PERSON

STATUS: PAROLE

A. DEMOGRAPHIC INFORMATION											
Name:	[redacted]	Race:	Black	Height:	6'	Weight:	170	Eyes:	Brown	Hair:	Brown
Date of Birth:	[redacted]					Scars/Marks/Tattoos:	[redacted]				
Residence Address:	[redacted]										

B. EMPLOYER /SCHOOL INFORMATION					
Occupation:	Roofer	Employer:	[redacted]	Work Address:	[redacted]

C. OFFENSE INFORMATION			
Offense(s) of Conviction	Sexual Assault – El Paso County, [redacted]	Other Criminal Convictions	Theft, Criminal Impersonation, Illegal Possession/Consumption of Alcohol-2000, DUI-2003.

D. GENERAL INFORMATION	
Conditions of Release:	Abide by parole terms and conditions, register quarterly as a sex offender, subject to Community Notification.
Sex Offending Pattern:	Sexually assaulted 16 year old female after providing her alcohol.
Vehicle Information:	[redacted] Gold, Chevrolet Impala, CO plate [redacted]
Notes	

E. PROBATION INFORMATION			
Probation Officer:	Christine Guerin	Phone Number:	719-633-1469

Colorado Springs Police Department
705 S Nevada Avenue, Colorado Springs, CO 80903
Non-Emergency (719) 444-7000
www.cspd.coloradosprings.gov

Figure 3: Example Bulletin, https://coloradosprings.gov/police-department/page/sexually-violent-predators.

A. Most Notifications Are Done by Social Media, A Medium Primed for Public Shaming.

In practice, town-hall-style meetings are rare. More often, Colorado law enforcement uses a combination of traditional and social media coverage. These avenues are no less equivalent to the colonial town square than the town-hall-style meeting, only less tightly controlled. As this Court and others have articulated, "the internet is our town square," and like the colonial town square, posting sex offenders on it serves a shaming purpose. *T.B.*, ¶ 52, 489 P.3d at 767 (internal quotation omitted).

The shaming aspect of internet posting is particularly strong when that posting occurs on modern social media platforms. Unlike the state website and television announcements, social media provides a venue for public comment. And in practice, that venue for public comment is used to denigrate, threaten, and express disgust.

Denver Police Department · Ikut
Februari 22 pada 6:00 PTG ·

ALERT: SEXUALLY VIOLENT PREDATOR IN [redacted]

Colorado Law requires police departments to publicly share information about parties determined to be "Sexually Violent Predators." This post is part of that compliance.

[redacted] is a sexually violent predator and is living at [redacted]#446 in the [redacted] Neighborhood neighborhood in Denver.

In an effort to increase the community's awareness, and out of concern for everyone's safety, we share information of sexually violent predators via YouTube and other social media outlets. Please take the time to watch this informative video on sexually violent predators in Denver and to learn more about the neighborhood in which [redacted] will be residing: https://youtu.be/n0yrA6c-xVw?t=238 .

For more information on this or any other Sexually Violent Predator in Denver, please contact the Denver Police Department Sex Offender Registration/Compliance Unit at 720-913-6511. For all video announcements on sexually violent predators in Denver neighborhoods, visit http://goo.gl/PEuTvV.

*DISCLAIMER: If this is an emergency, please call or text 911. This social media platform is not monitored 24/7. We are unable to provide police services, take reports/tips or initiate investigations via social media. To report criminal or suspicious activity, or to have officers dispatched to a location, please call our non-emergency line at 720-913-2000.

2w Like Reply 2

[redacted]
Won't be smiling if he bumps into me...

2w Like Reply 13

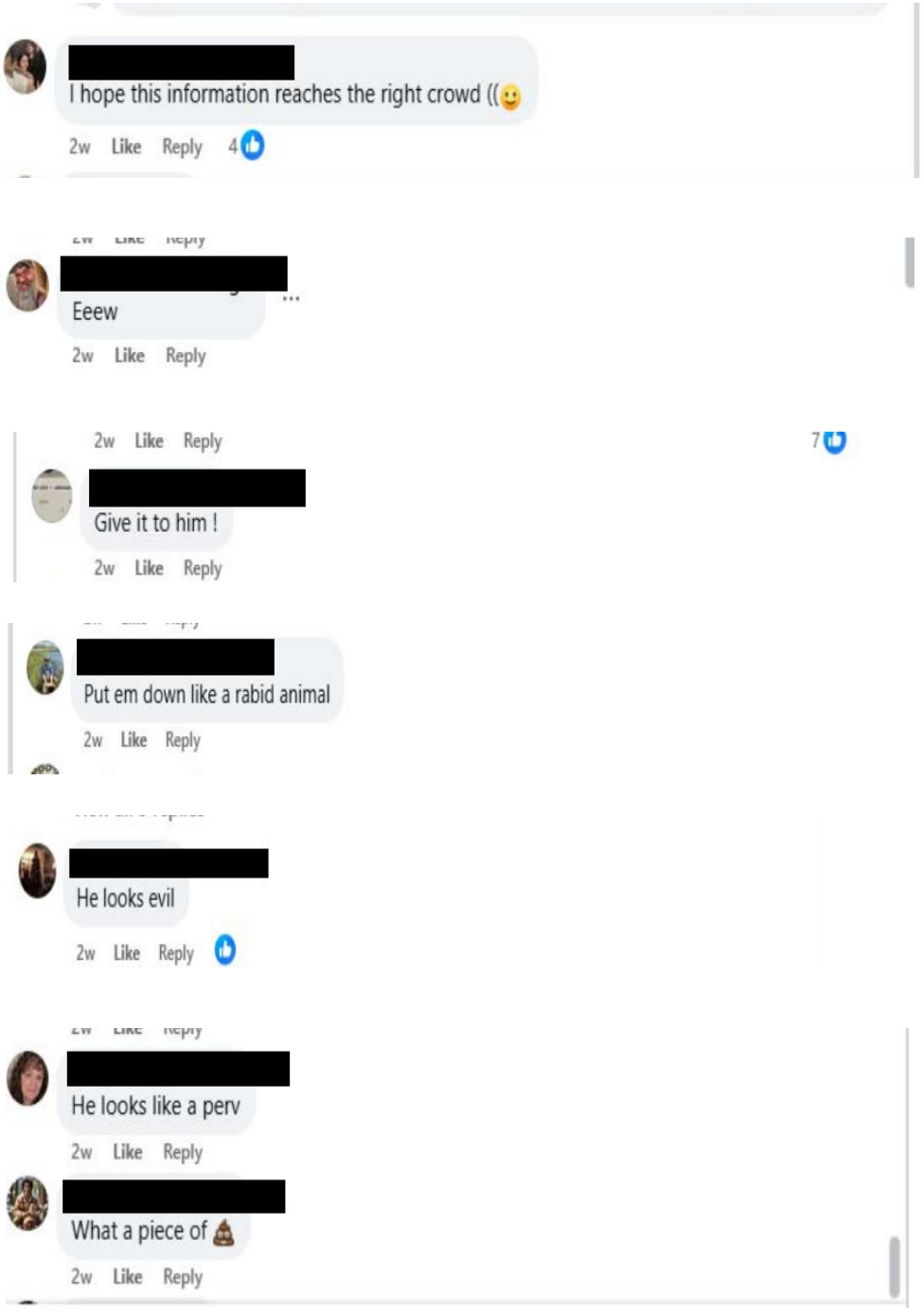

Figure 4: Example Facebook Posting and Associated Comments, https://www.facebook.com/denverpolice/

In *Smith v. Doe*, concluding that Alaska's Sex Offender Registration Act was not punishment, the Court reasoned that the posting of a person's criminal record on

the state website was no more burdensome than the existence of their criminal record in an official archive, as it required the public to affirmatively seek out information. 538 U.S. 84, 99 (2003). Community notification via social media does exactly what the Court was at pains to point out that Alaska's registry did not: "provide the public with means to shame the offender by, say, posting comments underneath his record." *Id.*; *see also State v Peterson-Beard*, 377 P3d 1127, 1145 (Kan, 2016) (Johnson, J., dissenting) (arguing that *Smith* would come out differently today because the Court "would be more attuned to the repercussions of Internet dissemination").

B. Notifications Have Counter-Productive Consequences.

Shame is not the only consequence of community notification. *See, e.g.*, Michael Lasher & Robert McGrath, *The Impact of Community Notification on Sex Offender Reintegration: A Quantitative Review of the Research Literature*, 56 Int'l J. Offender Therapy & Compar. Criminology 1, (2012) (finding that notification is associated with destabilizing housing and employment consequences). Colorado's notifications function as the literature predicts. In 2021, Tarah Morgan, designated SVP, was released from prison. Hearing on S.B. 22-089 Before the S. Comm. on Judiciary, 2022 Leg., 73rd Sess. (Colo. 2022) (statement of Tarah Morgan, representing the Coalition for Sexual Offense Restoration), https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20220303/-

1/12972. Shortly afterward, she had secured permanent housing and a job, accomplishments she was required to work toward on parole. *Id.* Subsequently, a public notification of her SVP status was made on social media and the post "went viral." *Id.* Ms. Morgan's employer received so much harassment that they fired her.

III. In Practice, SVP Designation is Primarily Determined by Criminal History.

The community notification statute purports that the designation is limited to those who are a high risk to the community. C.R.S. § 16-13-109. In practice, the SVP designation fails to identify the most high-risk people, because it relies too heavily on criminal history. To be eligible for SVP designation, a person must meet four criteria. C.R.S. § 18-3-414.5(1). Each fails to adequately capture risk.

A. The Crime of Conviction Does Not Necessarily Usefully Speak to the Facts of the Offense.

To be designated SVP, a person's crime of conviction must be enumerated in the statute: sexual assault on a child or sexual assault on a child by one in a position of trust. § 18-3-414.5(1)(a)(II). Nearly all criminal cases in Colorado end in plea agreements – 99%. Shelly Bradbury, *Most Criminal Justice in Colorado Comes Through Plea Deals, But DAs Don't Track Whether the Process Is Racially Biased*, Denver Post (Nov. 2, 2020), https://www.denverpost.com/2020/11/02/plea-deals-racial-bias-colorado/ (reporting 2019 state data). In the sex offense context, the

considerations involved in a plea are complex. People convicted of certain offenses are subjected to mandatory indeterminate sentencing, meaning that the judge is required to impose a sentence that can last, at the discretion of the state, from the statutorily defined minimum to life. C.R.S. § 18-1.3-1004. Today, because of the failure of the Department of Corrections to make available the SOMB-approved treatment that people with indeterminate sentences must complete before release, an indeterminate sentence is often functionally a life sentence. Compl. at 40-47 *Gambrell v. Stancil*, No. 1:24-cv-01853 (D. Colo. 2024).

CSORA and SVP status are obviously of great concern to any defendant, but both are dwarfed by the prospect of indeterminate sentencing. These competing pressures create perverse plea incentives. For example, a person who is originally charged with internet sexual exploitation of a child pursuant to section 18-3-405.4 – a person who never attempted to have physical contact with a child – faces a functional life sentence under the indeterminate sentencing scheme. C.R.S. §§ 18-1.3-1003(4), (5)(a)(XIII), 18-1.3.1004(1)(a). One common plea agreement allows the person to "plead down" to attempted sexual assault on a child, which is usually not subject to indeterminate sentencing. C.R.S. § 18-3-405. However, attempted sexual assault on a child *is* an SVP-eligible crime. These eligible-by-plea people have significantly different clinical profiles than people who commit contact

offenses against children. Ian Elliot et. al, *Psychological profiles of internet sexual offenders: comparisons with contact sexual offenders*, 21 Sex Abuse, 1, 76-92 (2009).

Colorado residents convicted in other jurisdictions can also be designated SVP, provided they have been "assessed or labeled at the highest registration and notification levels in the jurisdiction where the conviction was entered," and satisfy the other criteria. C.R.S. § 16-13-902(5). However, many of Colorado's surrounding states have registries that base the registration levels solely on the crime of conviction. *See, e.g.* Wyo.Stat.Ann. § 7-19-302(j), UtahCodeAnn. § 77-41-106, N.M.Stat.Ann. § 29-11A-5, Okla.Stat.tit. 57 § 584(O)(2). A person convicted of an SVP-qualifying crime in one of those states who moves to Colorado becomes an SVP-designated person without any risk assessment.

B. There is No Age Criterion for an SVP Designation, Only a Type of Conviction Criterion.

To be designated SVP, a person must be convicted as an adult. C.R.S. § 414.5(1)(a)(I). This requirement is sometimes misleadingly referred to as the "age requirement." In fact, a person need not be eighteen at the time they committed their qualifying offense; children charged under the direct filing statute, who may be as young as sixteen, meet this criterion. C.R.S. §§ 18-3-414.5(1)(a)(I), 19-2.5-801. As

T.B. recognized, people who commit sexual offenses as children "are unlikely to reoffend," and public safety cannot justify their mandatory lifetime registration. ¶ 72, 489 P.3d at 772.

C. Colorado's Risk Assessment Tool is Based on Criminal History and Three Personality Tests

To be designated SVP, a person must be found "likely to subsequently commit" an SVP-qualifying crime against someone they have an SVP-qualifying relationship with, by a "risk assessment screening instrument." C.R.S. § 18-3-414.5(1)(a)(IV). Colorado's instrument, the Sexually Violent Predator Assessment Screening Instrument ("SVPASI"), relies heavily on crime of conviction, criminal history, and incorporates poorly validated personality tests. *See Colo. SVPASI* (2020), https://dcj.colorado.gov/dcj-offices/ors/doc-risk.

The SVPASI finds a person likely to commit a subsequent SVP-qualifying crime one of three ways, represented on the form as 3A, 3B, and 3C. *Id; see also* Colo. SOMB, *SVPASI Handbook* (2023), https://dcj.colorado.gov/dcj-offices/ors/doc-risk ("Handbook"). A "yes" finding on any of the sections will satisfy the risk criteria. Handbook at 8. In 3A, if a person has one prior felony sex conviction or two prior misdemeanor sex convictions, they meet the risk criteria. *Id.* If they do not, the evaluator moves to 3B and enters their criminal history into the following formula: Score = (# Adult Cases x 2.1) + (# Juvenile Cases x 3.1) + (#

Cases with a Revocation x 2.2) – (Earliest Sex Offense Filing Age x .23). SVPASI at 6.

If the person's score exceeds 22, the SVPASI claims, they have a 50-60% likelihood of a new sex or violent crime filing—not a 50-60% likelihood of an SVP-qualifying crime, which would track the statutory criteria—and the fourth statutory criterion is met. *Id.* at 6. 3B suffers from two structural problems. First, sexual recidivism among people designated SVP is such a rare event; only 4% of people had a new sex filing within eight years of release. Handbook at 18. Rare event data like this has a low predictive value. The SVPASI attempted to compensate by adding violent crime filings, compromising its predictive value for sex offenses. *Id.*

The second statistical flaw in 3B's algorithm is the most impactful: the model has only four variables, all based on a person's criminal history. *Id.* As a result, it generates a very low pseudo-R-squared, a basic statistical measure of how much a dependent binary variable (here, reoffence or no reoffence) can be explained by the independent variables (here, criminal history). Bo Hu, et. al., PSEUDO-R 2 in Logistic Regression Model, *Statistica Sinica* 16, 847-60 (2006). 3B's formula has a 0.1213 Pseudo-R-squared, meaning that only approximately 12% of the variance of having a new sex or violent offense is explained by the model. Handbook, at 19. The model leaves approximately 88% of the variance unexplained. 3B's algorithm has

insufficient predictive value to ensure that people who meet the risk criteria through 3B represent a high risk of sexual reoffence.

Lastly, if a person's criminal history does not qualify them for SVP designation, their results on any of three personality tests, 3C, can: the Psychopathy Checklist Revised ("PCL-R"), the Million Clinical Multiaxial Inventory IV ("MCMI-IV"), or the Coolidge Correctional Inventory ("CCI"). SVPASI at 8. A qualifying score on any sustains a recommendation that the fourth criterion be considered met.

As discussed below, these personality tests are not well validated and none of them represents the gold standard for assessing risk of sexual recidivism in sex offenders. All the tests were designed to be diagnostic, not predictive. Handbook at 39. Evidence for the predictive value of each of the three personality tests could be generously described as "mixed." Dahlnym Yoon et. al, *Incremental Validity of the Psychopathy Checklist-Revised Above and Beyond the Diagnosis of Antisocial Personality Disorder Regarding Recidivism in Sexual Offenders*, 80 J. Crim. Jus., 1-8, 8 (2022)(finding that the PCL-R does not detect sexual recidivism); Lauren Price, *Millon Clinical Multiaxial Inventory-IV (MCMI-IV) Profile Patterns and Scale Correlates for Jail Inmates referred for Mental Health Services*, Scholarship Repository at Florida Tech, 70, 77 (2019)(finding that violent offenders did not have

significantly higher scores than nonviolent offenders); Frederick Coolidge et. al, *Psychometric Properties of the Coolidge Correctional Inventory in a Sample of 3,962, Behav. Sci. Law*, 713-726, 724 (finding that CCI scores differed little between nonviolent and violent Colorado prisoners).

Colorado's recidivism numbers support what available social science predicts: Colorado's SVP designation is not a good measure of risk of sexual recidivism. Most people designated SVP are in prison; about 90% in 2023, serving an average sentence of 32 years. A small number of people designated SVP live in the community, and their sexual recidivism rate is very low.

Year	People Designated SVP on Probation	People Revoked for New Sex Felony	People Revoked for New Non-Sex Felony
2023	100	0	2
2022	69	3	5
2021	96	1	0
2020	74	0	1
2019	81	0	2
2018	77	0	0
2017	76	0	1
2016	77	0	0

Figure 5: Eight-Year Recidivism Count Per SVPs Annual Report, https://cdoc.colorado.gov/about/data-and-reports/legislative-reports

It is tempting to conclude that because people designated SVP and subject to community notification have a low sexual recidivism rate, community notification reduces recidivism. This conclusion is unlikely, given that a robust body of literature

has found "no evidence that notification reduces recidivism and some evidence that it increases recidivism." Agan & Prescott, *Offenders and SORN Laws*, in Sex Offender Registration & Community Notification Laws: An Empirical Evaluation 120 (Logan & Prescott eds., 2021) (collecting and reviewing studies on the effect of notification and registration on recidivism). A single study has found that Minnesota's notification scheme – unlike Colorado's, based on an empirically validated actuarial test – may reduce recidivism slightly. Duwe & Donnay, *The Impact of Megan's Law On Sex Offender Recidivism: The Minnesota Experience*, 46 Criminology 411 (2008). That single study is not sufficient, in the face of the scientific consensus, to sustain a rational connection between notification and reoffence.

Moreover, whether community notification reduces the risk of sexual recidivism is beside the point. It is not community notification itself that renders SVP status unrelated to prevention of reoffence. It is the lifetime designation of high-risk status that renders Colorado's SVP designation fundamentally unresponsive to risk.

It defies common sense not to recognize Colorado's SVP designation as punishment under the *Mendoza-Martinez* factors. If lifetime registration under CSORA is an affirmative disability in employment and in housing, then community

notification must be. *T.B.*, ¶ ¶ 49-51, 489 P.3d at 766–67. If CSORA resembles public shaming, then community notification certainly does. *Id.* at ¶ 52, 489 P.3d at 767. Like the lifetime juvenile registration requirement found to be punishment in *T.B.*, the SVP designation bears no relationship to the threat the person currently poses to the community; it appears to be merely retribution for past crimes. And most importantly, like mandatory lifetime sex offender registration for juveniles, the SVP designation bears no rational connection to protecting the community. The SVP criteria do not adequately predict risk at sentencing, but even if they did, there is no set of criteria applied at sentencing that can identify who will be high-risk ten or twenty years after release. No lifetime, unchallengeable risk designation is supported by science.

CONCLUSION

For the foregoing reasons, this Court should hold that Colorado's lifetime SVP designation is punishment under the Eighth Amendment.

Respectfully submitted this 17th day of March, 2025.

/s/ *Emma Mclean-Riggs*

Timothy R. Macdonald, No. 29180
Sara Neel, No. 36904
Emma Mclean-Riggs, No. 51307

ACLU FOUNDATION OF COLORADO
303 E. 17th Avenue, Suite 350
Denver, CO 80203
P: (720) 402-3114
tmacdonald@aclu-co.org
sneel@aclu-co.org
emcleanriggs@aclu-co.org
Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on March 17, 2025, a true and correct copy of the foregoing **AMICUS CURIAE BRIEF OF ACLU OF COLORADO IN SUPPORT OF PETITIONER** was served via the Colorado Courts E-Filing system, which notifies all counsel of record.

/s/ *Mia Bailey*
Paralegal, ACLU of Colorado