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SUPREME COURT
STATE OF COLORADO

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On Certiorari to the Colorado Court of Appeals

Court of Appeals Case No. 22CA594
Jefferson County District Court Case No. 20CR2340

Petitioner,

TIMOTHY PAUL BEAGLE,

v.

Respondent,

THE PEOPLE OF THE STATE OF COLORADO.

▲COURT USE ONLY▲

Case No. 24SC154

PHILIP J. WEISER, Attorney General
JAYCEY DEHOYOS, Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 9th Floor
Denver, CO 80203
Telephone: 720.508.6000
E-Mail: jaycey.dehoyos@coag.gov
Registration Number: 55234
*Counsel of Record

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

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/s/ Jaycey DeHoyos

Jaycey DeHoyos

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STATEMENT OF THE CASE AND FACTS

The defendant, Timothy Beagle, pled guilty to attempted sexual assault and distribution of a controlled substance to a minor. (CF, pp 94-105; TR 12/10/2021, p 10:4-13.)

The defendant, who was 50, saw the victims—two 16-old girls who had run away from a residential treatment facility—walking down a highway. (CF, pp 5, 9.) He flagged them down and, after learning they were runaways, invited them to live with him. (CF, p 9.)

Both girls lived with the defendant at his home for ten days. (CF, p 2.) There, the defendant gave them gifts and drugs and helped them change their appearances to avoid being discovered. (CF, pp 4-5, 10, 13, 159.) One night, after the defendant and the victims consumed "magic mushrooms," the defendant sexually assaulted one of the girls. (CF, p 6.)

Later, the defendant's friend saw a news story reporting the victims as missing children and the defendant found a Facebook page devoted to finding the victims and news articles offering a $25,000

reward. (CF, pp 2, 9, 13.) The defendant subsequently dropped the victims off at a police station. (CF, p 2).

Initially, the victims told authorities that the defendant's daughter had found them and invited them to stay at the defendant's house. (CF, pp 1, 9-10, 12.) Later, the defendant admitted he had instructed the victims to lie. (CF, pp 158-59.)

Prior to sentencing, defense counsel filed a motion objecting to the Sexually Violent Predator Assessment Screening Instrument's (SVPASI) recommendation that the defendant be designated a Sexually Violent Predator ("SVP"). (CF, pp 209-14.) The motion cited the Eighth Amendment's prohibition of cruel and unusual punishment, but it did not ask the court to find that the designation was punishment, nor did it assert that the designation was cruel and unusual as applied to the defendant. (CF, pp 210-212.) Instead, the motion argued that the court should reject the SVP recommendation because the instrument was unreliable and improperly scored. (CF, pp 212-14.)

At sentencing, defense counsel maintained that the instrument was unreliable. Although counsel made no argument as to whether the

designation was punishment, the district court began its order by finding that the SVP designation was protective, rather than punitive. (TR 2/22/22, p 23:3-24:2.) The court then found that the instrument was reliable and properly scored. (TR 2/22/22, pp 24-27.) Ultimately, the trial court designated the defendant an SVP and sentenced him to a total of 15 years in the Department of Corrections.[1] (TR 2/22/2022, pp 30:17-31:1; CF, p 327.)

SUMMARY OF THE ARGUMENT

The SVP designation is not a punishment. The designation, which triggers lifetime sex offender registration and community notification, functions as it was intended— a civil regulatory measure aimed at increasing public awareness and education so that Coloradans may protect themselves against victimization.

The defendant's arguments misunderstand the scope and purpose of the SVP legislation. He contends that the legislative scheme punishes

[1] The defendant received a five-year determinate sentence for the attempted sexual assault conviction. (CF, p 327.)

offenders by imposing restraints on their behavior and that those restraints fail to improve public safety because they do little to help offenders limit their risk of re-offense. But the community notification and registration statutes do not impose the restrictions he claims; they do not limit what an offender may do or where an offender may live. And neither statute is aimed at helping offenders avoid re-offense. Instead, it is aimed at improving community safety through public awareness and education.

This goal is accomplished through nonpunitive means. As the Supreme Court has found, it is not punitive to require sex offenders who are likely to reoffend to provide identifying information to law enforcement on a regular basis for life. And while Colorado requires law enforcement to disseminate that information to limited sectors of the public, that dissemination is subject to strict guidelines to ensure the prioritization of education over all else. Further, these requirements are not based upon the gravity of an offender's underlying sexual crime, which would suggest a retributive intent, but upon a finding that the offender is likely to reoffend. These measures, which are used to assess

each individual sex offender, reasonably relate to the nonpunitive aim of increasing public safety through education. The SVP designation scheme is neither punitive in its intent nor its effects.

But even were the designation considered punishment, it would not be cruel and unusual as applied to this defendant because it is not grossly disproportionate to his crime. The defendant's crime was grave and serious; he harbored, groomed and assaulted a missing teenager whom he found on the highway. Considering those facts along with the defendant's risk for re-offense, which is backed by empirical data reflected in his score on the Sex Offender Risk Scale, his lengthy criminal history, including a federal weapons offense he was serving a probationary sentence for when he committed the crimes here, and the fact that the defendant was facing a far hasher penalty of an indeterminate prison sentence on his original charges, the district court did not commit obvious error in failing to discern an inference of gross disproportionality.

STANDARD OF REVIEW

This Court reviews de novo both Eighth Amendment challenges, *Lucero v. People*, 2017 CO 49, ¶13, and questions of statutory interpretation, *Dubois v. People*, 211 P.3d 41, 43 (Colo. 2009). Reviewing courts construe statutory provisions in the context of the entire statute. *City & County of Denver v. Casados*, 862 P.2d 908, 914 (Colo. 1993). Because statutes are entitled to a presumption of constitutionality, *People v. Graves*, 2016 CO 15, ¶9, it is the defendant's burden to prove, beyond a reasonable doubt, that the SVP designation is unconstitutionally punitive, *People in the Interest of T.B.*, 2021 CO 59, ¶25.

The defendant did not preserve his claims. *See People v. Beagle*, 22CA0594, January 4, 2024, ¶19 (unpublished). Though the defendant filed a motion objecting to being designated an SVP on grounds that the screening instrument was improperly scored, he did not argue that the designation was punishment nor that the punishment was cruel and unusual as applied to him. *See* CF, pp 209-14. Likewise, he never made any Eighth Amendment arguments during sentencing.

Constitutional claims require specific and timely objections, or they are waived for all but plain error review. *People v. Kruse*, 839 P.2d 1, 3 (Colo.1992). *See People v. Walker*, 2022 COA 15, ¶1 (unpreserved proportionality challenges are reviewed for plain error); *People v. Gee*, 2015 COA 151, ¶46 (reviewing defendant's Eight Amendment challenge, raised for the first time on appeal, for plain error). Under the plain error standard, reversal is warranted only if the error was obvious and so substantial as to undermine the fundamental fairness of the proceeding. *People v. Crabtree*, 2024 CO 40M, ¶43.

ARGUMENT

I. The SVP designation is not a punishment under the Eighth Amendment.

The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. By its terms, this prohibition applies only to things properly characterized as "punishment." *See Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (conditions of confinement in prison are not punishment for purposes of

Eighth Amendment). So, state law cannot violate the Eighth Amendment "unless it first qualifies as 'punishment.'" *Millard v. Camper*, 971 F.3d 1174, 1181 (10th Cir. 2020) (citation omitted).

In determining whether a statute is punitive to qualify as "punishment," courts follow the two-part intent-effects tests established in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *See T.B.*, ¶19. First, the analysis focuses on whether the legislature intended registration to be punishment. *Smith v. Doe*, 538 U.S. 84, 92 (2003). Second, courts employ a seven-factor test to evaluate whether a statute imposes a punitive sanction. *Id.* at 97 (highlighting five factors as important).

A. The SVP designation is not punitive under the intent-effects test.

Although this Court has never analyzed an SVP designation under the *Mendoza-Martinez* intent-effects test, the issue has been uniformly resolved by divisions of the court of appeals for years: the SVP designation is not a punishment under the Eighth Amendment. *See People v. Durapau*, 280 P.3d 42, 49 (Colo. App. 2011) (registration is

not punitive but rather promotes public safety); *People v. Sowell*, 327 P.3d 273, 277 (Colo. App. 2011) (registration is not punishment); *People v. Mendoza*, 313 P.3d 637, 646 (Colo. App. 2011) (SVP designation is not punishment); *People v. Rowland*, 207 P.3d 890, 895 (Colo. App. 2009); *People v. Stead*, 66 P.3d 117, 120 (Colo. App. 2002) ("[W]e conclude that the [lifetime sex-offender] registration and Internet posting provisions of § 18-314 412.5 do not constitute punishment."), o*verruled on other grounds by Candelaria v. People*, 2013 CO 47, ¶1. *See also People v. Brosh*, 251 P.3d 456, 460 (Colo. App. 2010) ("The SVP statute is protective, not punitive…").[2] *But see T.B.*, ¶58 (mandatory lifetime sex offender registration for offenders with multiple juvenile adjudications constitutes punishment despite legislature's nonpunitive intent).

The defendant fails to establish that this Court should depart from that well-reasoned and widely-accepted conclusion. Because the

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[2] The court of appeals has also concluded that the designation is a civil finding in the postconviction context. *See People v. Brosh*, 2012 COA 216M, (challenge to SVP designation cannot be raised under Crim. P. 35(b) because it is not part of a defendant's sentence); *People v. Baker*, 2017 COA 102, ¶16-17 (same) *rev'd on other grounds by People v. Baker*, 2019 CO 97M.

legislature did not intend the SVP designation to function as a punishment and because the designation does not, in its effects, function as a punishment, this Court should hold that the designation is a regulatory classification.

1. The SVP designation identifies sex offenders who are likely to reoffend and imposes upon them lifetime registration and community notification.

The SVP designation is part of Colorado's larger statutory scheme for sexual offenders. Colorado's Sex Offender Registration Act (CSORA) generally requires all sex offenders to register and update certain information with local law enforcement. *See* § 16-22-108, C.R.S. (2024). When an offender is designated an SVP, two specific conditions are triggered: lifetime sex offender registration and community notification. *See* § 16-22-108(1)(d)(I), § 16-13-903, C.R.S. (2024). Accordingly, the legislation controlling the SVP designation falls across three statutes: the SVP statute (defining the elements and procedure for designating an SVP), CSORA (outlining the registration requirements for SVPs),

and the community notification statute (outlining the notification scheme for SVPs).

To be designated an SVP, an offender must meet four statutory criteria: they must (1) be eighteen years or older, or tried as an adult, (2) be convicted of a qualifying sexual offense[3], (3) have a qualifying relationship with their victim[4], and (4) be likely to reoffend. § 18-3-414.5(1)(a)(I-IV), C.R.S. (2024). An offender may be designated an SVP by a sentencing court or by the parole board. § 18-3-414.5(2). In either case, the designation determination is aided by a screening instrument—the Sexually Violent Predator Assessment Screening Instrument (SVPASI)—developed by the Sex Offender Management Board (SOMB). This instrument is specifically designed to identify

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[3] The qualifying offenses are sexual assault in the first degree, sexual assault in the second degree, unlawful sexual contact, sexual assault on a child, and sexual assault on a child by one in a position of trust. § 18-3-414.5(1)(a)(II). The conviction qualifies even if it is an attempt, solicitation, and conspiracy or conviction. *Id.*

[4] The relationship element is met where the offender was either a stranger to the victim or established or promoted their relationship with the victim for the primary purpose of sexual victimization. § 18-3-414.5(1)(a)(III).

those who are likely to reoffend, § 18-3-414.5(1)(A)(IV), and it must consider "research on adult sex offender risk assessments," including whether the offender "suffers from psychopathy or a personality disorder that makes the person more likely to engage in sexually violent predatory offenses." § 16-11.7-103(4)(d), C.R.S. (2024).

Once designated an SVP, an adult offender is subject to lifetime registration under CSORA. § 16-22-108(1)(d)(I). SVPs are not eligible to be removed from the registry. § 16-22-113(3)(a). The goal of CSORA's registration scheme is to allow the public to access information, about those who commit unlawful sexual behavior and are more likely to reoffend, so that they may protect themselves. *See* § 16-22-110(6)(a) Accordingly, SVPs must update their information with law enforcement, in person, every three months. § 16-22-108(1)(d)(I). Law enforcement may waive the in-person requirement if the registrant meets certain disability requirements. § 16-22-108(1)(a)(II). Like all registrants, SVPs bear the costs of providing law enforcement with their image and fingerprints and law enforcement may implement a registration fee to reflect the "direct costs incurred" by the agency so

long as the initial fee does not exceed seventy-five dollars and the subsequent fees do not exceed twenty-five dollars. § 16-22-108(6)-(7).

And because SVPS pose a "high enough level of risk" to their communities, law enforcement must notify members of the public of the SVPs residing in their community. § 16-13-901; § 16-13-902(5). When an SVP is sentenced to probation, community corrections, released into the community after incarceration, or otherwise changes their residence, law enforcement must "implement community notification protocols." § 16-13-903(1)-(3). The method of community notification is determined by law enforcement and the SOMB but the manner of notification must give notice that is "as specific as possible to the population within the community that is at risk" by the offender's presence and it must include "general information and education concerning sex offenders, including treatment and supervision of sex offenders, and procedures to attempt to minimize the risk of vigilantism." § 16-13-904(2), § 16-13-905(1).

As of April 6, 2025, there are 19,376 registered sex offenders in Colorado. *See Colorado Bureau of Investigation Web Stats,*

apps.colorado.gov/apps/dps/sor/info-web.jsf (last visited May 12, 2025). Of that number, 498 offenders are SVPs. *Id.*

2. The legislature unambiguously intended the SVP designation to be part of a civil regulatory, non-punitive scheme.

The question of whether a statutory scheme is civil or criminal is a question of statutory construction. *Smith*, 538 U.S. 92. Reviewing courts owe "considerable deference" to the legislature's stated intent. *Smith*, 538 U.S. at 93. "[O]nly the clearest proof" can override legislative intent and "transform" a civil remedy into a criminal penalty. *Smith*, 538 U.S. at 92 (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997) (internal quotations removed).

There should be no dispute as to the legislature's intent here because this Court settled the issue just four years ago. *See T.B.*, ¶45-46. "Throughout the statutory scheme, the General Assembly indicated that it did not intend for CSORA to be punitive." *Id.* at ¶45. *See Millard*, 971 F.3d at 1182 (same). Because the SVP designation is part of CSORA, it is likewise intended to be a civil regulation aimed at

promoting community safety. *See* § 16-22-112(1), C.R.S. (2024). *See also Allen v. People*, 2013 CO 44, ¶7 (the "stated purpose" of the SVP designation is to "protect the community").

The defendant argues that the statute defining the SVP designation should be considered separately and apart from CSORA and the community notification requirement statutes. OB at 28. But there is no basis for such a fragmented reading.

While the SVP statute defines the term SVP, it does not lay out the registration or community notification requirements. Instead, it references both CSORA ("…the defendant shall be required to register pursuant to the provisions of section 16-22-108… ") and the community notification statutes ("…and shall be subject to community notification pursuant to part 9 of article 13 of title 16…"). *See* § 18-3-414.5(2). Likewise, both CSORA and the community notification statute reference the SVP statute. § 16-22-102(7); § 16-13-902(5). In fact, the community notification statutes are collectively titled "Community Notification Concerning *Sexually Violent Predators*." (emphasis added). The connection between these statutes and the SVP statute is also

established by the defendant's own argument; the basis of his claim is that the designation is a punishment because of the requirements set out in the registration and community notification statutes. Because interpreting any one of the aforementioned statutes requires cross-referencing the others, they are properly analyzed in concert.

While the SVP statute does not include a legislative declaration, CSORA and the community notification statutes do. CSORA explains that its registration scheme "is not intended and should not be used to inflict retribution or additional punishment on any person. *T.B.* at ¶45; § 16-22-112(1); § 16-22-110(6)(a). And the community notification statute explains that the notification is meant to provide the public the information necessary to identify these sexually violent predators and to educate the public as to "supervision and treatment of sex offenders." § 16-13-901.

Unsurprisingly, every division of the court of the appeals that has addressed the SVP designation has found that the legislature intended the designation to be nonpunitive. *People v. Williamson*, 2021 COA 77, ¶28 (the registration and community notification requirements of the

SVP designation are intended to protect the community); *People v. Valencia*, 257 P.3d 1203 (Colo. App 2011); *People v. Tuffo*, 209 P.3d 1225, 1231 (Colo App. 2009) (the SVP statute is "protective rather than punitive"). *See also People Jamison*, 988 P.2d 177 (Colo. App. 1999) (legislature did not intend sex offender registration to inflict punishment but to protect public safety). This Court too has previously described the SVP label as "not [a] punishment" but a "unique" designation intended to protect the community. *See Allen*, ¶7.

The defendant seizes upon the fact that the SVP statute is housed within Title 18, Colorado's Criminal Code and, more specifically, part 4 of article 3, titled "Unlawful Sexual Behavior." OB at 18; *see* § 18-3-414.5. But "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. This is especially true here considering that the "Unlawful Sexual Behavior" statutes include several provisions which go beyond defining crimes and punishments.

For example, section 18-3-407.9 establishes a telehealth program to increase victim access to forensic nurse examiners. And the SVP

statute directly precedes the statute requiring confidential testing for sexually transmitted diseases. *See* § 18-3-415. Neither of these statutes is punitive.

The statute's enforcement procedure further confirms that the legislature intended the designation to be non-punitive. The designation itself is subject to a civil burden of proof. *Allen*, ¶7; *Brosh*, 251 P.3d at 461; *Valencia*, 257 P.3d at 1203. While the sentencing court typically determines whether a defendant should be designated an SVP, the court does not hold that power alone. If a person is eligible for parole after serving a sentence for a qualifying sexual offense and they have not been previously evaluated for the designation, the parole board must determine whether the offender is an SVP. § 18-3-414.5(3).

True, the designation appears on the mittimus. And the SVPASI, the screening instrument that must be consulted in determining whether the defendant should be designated an SVP, is prepared alongside the presentence investigation report. OB at 10, 19. But these procedures suggest a concern with efficiency and notice. *See Smith*, 538 U.S. at 96 (rule requiring courts to notify defendant of registration

requirement as "part of the plea colloquy or the judgment of conviction" was not indicative of punitive intent). Because it is "logical" for states to provide "timely and adequate notice" of regulatory requirements, "invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." *Id.*

Therefore, the defendant fails to point to any circumstance that would render this Court's prior analysis in *T.B.* outdated or otherwise invalid. So, it remains that the legislature did not intend the SVP statute to be punitive. *See T.B.*, at ¶45

3. The SVP designation scheme is not punitive in its effects.

Where a statute lacks punitive intent, courts examine whether the statute is nonetheless so punitive in effect as to negate the legislature's intent to create a civil, non-punitive regulatory scheme. *See Smith*, 538 U.S. at 97. Because courts "ordinarily defer to the legislature's stated intent," a civil remedy may be transformed into a criminal penalty upon "only the clearest proof" that the penalty is punitive in effect *Id.* at 92.

The Supreme Court has pointed to five factors, drawn from *Kennedy v Mendoza–Martinez*, 372 U.S. 144, 168–69, 83 (1963), as particularly relevant in assessing a statute's punitive effects: (1) whether the law has been regarded in our history and traditions as punishment, (2) whether it promotes the traditional aims of punishment, (3) whether it imposes an affirmative disability or restraint, (4) whether it has a rational connection to a nonpunitive purpose, and (5) whether it is excessive with respect to that purpose. *Smith*, 538 U.S. at 97. These factors are "neither exhaustive nor dispositive,"[5] and while they aid the analysis, the ultimate question remains whether the punitive effects of the law are so severe as to negate the legislature's intent to establish a civil regulatory scheme. *Id.*

The court of appeals has repeatedly held that the effects of the SVP designation scheme—which is comprised of the statutes regarding

[5] Courts may also examine whether a regulation comes into play on a finding of scienter and whether the behavior it applies to is already a crime. *Smith*, 538 U.S. at 105. But the Supreme Court has deemed these factors unimportant in the context of sex offender registries. *Id.* at 97.

the designation, registration and community notification—are not so punitive as to override the legislature's intent that the designation function as a civil regulatory mechanism. *Rowland*, 207 P.3d at 892 (effects of community notification requirement do not render SVP designation punishment); *Stead*, 66 P.3D at 120 (effects of lifetime registration and community notification do not render SVP designation punishment), *overruled on other grounds by Candelaria*, 2013 CO 47. An independent examination of the punitive effects factors confirms those holdings.

a. The designation scheme does not resemble a traditional form of punishment.

As the supreme court recognized in *Smith*, "sex offender registration and notification statutes" do not "involve a traditional means of punishing." 538 U.S. at 97. Notably, the *Smith* court arrived at that conclusion after rejecting the same arguments the defendant puts forth here—namely that registration and notification requirements resemble public shame, banishment, and probation or parole. *See id.* at 97-99, 101-02.

The defendant contends that the community notification requirement is a form of public humiliation. OB, p 24. But *Smith* quashes that contention. *Id.* at 98-99. The traditional colonial punishment of public shame required "a direct confrontation between the offender the public" and typically held the person to his community for "face-to-face shaming." *Id.*

But community notification is different. There is no state-sponsored public shaming where the government merely "disseminat[es] accurate information about a criminal record, most of which is already public." *Id*. *See Stead*, 66 P.3d at 121. Indeed, our legal tradition "insists on public indictment, public trial, and public imposition of sentence." *Smith*, 538 U.S. at 99.

True, the community notification procedure here is "active" rather than passive, imposing an affirmative duty on law enforcement to provide "notice" of the sex offender's identity. *See* § 16-13-904(2). But courts have recognized that the "active dissemination of an individual's sex offender status is distinguishable from public shaming. *See ACLU v.*

Masto, 670 F.3d 1046, 1055-56 (9th Cir. 2012); *Kammerer v State*, 322 P.3d 827, 835-36 (Wyo. 2014).

The particulars of the notification procedure here demonstrate that difference. Law enforcement must conduct community notification according to the protocols and procedures specified by the SOMB. § 16-13-904; §16-13-905(1). And the SOMB's protocols and procedures are "rooted in the governing philosophy of public safety" and "current research in the field."[6] *SOMB Criteria, Protocol, and Procedures for Community Notification Regarding Sexually Violent Predators,* p 2 ("Protocols"). As a result, the protocols require law enforcement to take a tailored and careful approach to community notification.

For example, while the defendant contends that the "presumptive form of community notification is an in-person, town hall style meeting," OB, p 24, the SOMB materials direct local law enforcement to "determine the best method of community notification based on the

[6] Notably, the SOMB is comprised of members with varying areas of expertise, including judges, treatment providers, prosecutors, defense attorneys, law enforcement and victim rights representatives. § 16-11.7-103(1).

needs and interest of their respective community." *Protocols*, p 25. Community notification may occur through "either a town hall-style meeting or a combination of" alternative methods including "press releases, 911 reverse calls, mailings, agency website postings, social media, or local television channels." *Id.*

In any event, town hall meetings must be tightly controlled. The SOMB's sample introductory remarks inform attendees:

> You will be given an agenda for the meeting. Please note that we will address specific information regarding the SVP after we present the educational information regarding sex offenders. The reason for the order of the agenda is to ensure that you have a context to better understand sexual offenders and the risks they pose in your community. We are taking this opportunity to provide you with important general information about sex offenders and personal safety because the SVP is not the only sex offender in any given neighborhood.

Id. at 50.

As the protocols make clear, the town hall meetings are not tools for humiliation. The meetings "give community members concrete information that addresses their concerns and fears and answers their

questions about the offender and the criminal justice system." *Id.* at 48. Law enforcement must "address misinformation, quell fears, discourage vigilantism and offer actions citizens can take to enhance their safety." *Id.* In fact, in order to limit public humiliation, offenders are prevented from attending the community notification meetings. *Id.*, at 49. So, the "face-to-face shaming"—the hallmark of public-shaming punishment—is prevented. *See Smith*, 538 U.S. at 98.

The defendant points out that the notification may occur through social media, including YouTube. But while the internet increases the "reach" of this information, this "widespread public access is necessary for the efficacy of the scheme," and any resulting embarrassment is "a collateral consequence of valid regulation." *Smith*, 538 U.S. at 99. *See also Millard*, 971 F.3d at 1182; *People v. Femedeer*, 227 F.3d 1244, 1250 (10th Cir. 2000). Again, the content of the videos highlights their educational purpose. Each video lasts eight minutes and thirty seconds; but less than half of that time is devoted to specific offender information. *Denver Police (@DenverPoliceDept), Sexually Violent Predators – Community Notification Playlist, YouTube*,

https://www.youtube.com/playlist?list=PL11e6v3zMr6Gt7d2bvjbVFG6G9cigR24d (last visited April 23, 2025).

Additionally, as in *Smith*, the SVP designation scheme does not resemble banishment. *See* 538 U.S. at 98 ("[B]anishment[ ] involve[s] more than the dissemination of information."). In the twentieth-century, banishment typically involves "complete expulsion from a geographic area, such as a town, county, or state." *See Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016). As the defendant concedes, neither the SVP statute, nor CSORA, nor the community notification statutes impose any restriction on where a defendant may reside or work. OB at 25.

While it is true that several Colorado municipalities restrict where SVPs may reside, the effects of those individual ordinances present a question separate from whether the statewide SVP legislative scheme—requiring registration and community notification—has a punishing effect. *See Pellegrin v. People*, 2023 CO 37, ¶58 (legislative scheme was not punitive, in part, because it did not "*on its face*, restrict where an offender may live or work") (emphasis added). In fact, courts

have recognized that municipal ordinances limiting residency go against the spirit of the SVP legislation. *See Ryals v. City of Englewood*, 962 F. Supp. 2d 1236, 1247 (10th Cir. 2013) (municipal ordinances restricting where sex offenders may live within Colorado are "contrary to the legislature's intent to rehabilitate and reintegrate sex offenders" especially in light of the SOMB's recommendation "against residency restrictions").

Similarly, while the defendant notes that federal law prevents those "subject to a lifetime registration requirement under a state sex offender registration program" from utilizing public housing, *see* 42 U.S.C. § 13663(a), he does not cite to any decision that has relied on that *federal* law to find that a *state's* lifetime registration requirement was punitive in its effects. OB at 22.

Regardless, reasonable residency restrictions do not rise to the level of banishment. *See Shaw*, 823 F.3d at 567-68 (residency limitation was nonpunitive where it did not constitute "expulsion from a community"); *Does 1-7 v. Abbott*, 945 F.3d 307, 315 (5th Cir. 2019) (residency restriction did not create substantial burden) *Doe v. Miller*,

405 F.3d 700, 705, 718–23 (8th Cir. 2005) (residency restriction was nonpunitive).

Where offenders remain able to work in, travel through, and visit the areas they cannot reside in, the restriction on residency is unlikely to be punitive. *Shaw,* 823 F.3d at 567-68. On the other hand, a restriction may be punitive where it expels offenders from an established residency or an entire community. *See People v. Betts*, 968 N.W.2d 497, 511 (Mich. 2021) (statewide prohibition on working, living, or loitering within 1,000 feet of a school zones limited offender's access to public transportation, employment, education, and medical resources was punitive); *Does #1-5 v. Snyder*, 834 F.3d 696, 697 (6th Cir. 2016) (same); *Com. v. Baker*, 295 S.W.3d 437, 439 (Ky. 2009) (residency restriction punitive where it expelled offenders from their homes in the event a qualifying facility, such as a school, was subsequently built within 1,000 feet of their established residence.)

The defendant fails to explain how any municipal ordinance functions as banishment. *See Smith*, 538 U.S. at 100 (noting the absence of record evidence showing any "substantial occupational or

housing disadvantages" due to sex offender registration). Tellingly, he does not identify the specific ordinances he believes constitute banishment. In fact, only 9 of Colorado's 273 active municipalities[7] impose SVP-specific restrictions on residency. *See* Alamosa, CO., Mun. Code ch. 11, art III, § 11-54(b)-(d); Berthoud, CO., Mun. Code ch. 17, § 23-3; Black Hawk, CO., Mun. Code ch. 10, art XIV, § 10-263; Broomfield, CO., Mun. Code title 9, art V, ch. 9-56-020; Castle Rock, CO., Mun. Code title 9, ch. 9.30.030; Commerce City, CO., Mun. Code ch. 12, art. VI, §12-6010; Englewood, CO., Mun. Code title 7, ch. 3, § 7-3-3; Kiowa, CO., Mun. Code ch. 10, art. XI, § 10-243; Mead, CO., Mun. Code ch. 10, art. XIV, § 10-14-30. Of those 9 municipalities, only 3—Alamosa, Broomfield, and Castle Rock—are aimed at SVPs alone; the other 6 municipalities place residency limits on both SVPs and other sex offenders.[8] *See Smith* 538 U.S. at 100 (noting the lack of evidence

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[7] *See Colorado Department of Local Affairs,* https://dola.colorado.gov/dlg_lgis_ui_pu/publicMunicipalities.jsf;jsessionid=RMCT0q9Rs_t4Lm_8U16jXFH22TrI-p9KLlQXdyuU.dolaapp11 (last visited May 12, 2025) (listing Colorado's active municipalities)

[8] Because every SVP-qualifying crime requires sex offender registration, every SVP is necessarily a sex offender. Compare § 16-22-103(1) (listing

establishing that the "housing disadvantages" faced by sex offenders under the challenged act "*would not have otherwise occurred*.") (emphasis added).

Ultimately, the defendant does not allege that any ordinance prevents him from living within a particular Colorado community. *See also People v. Leroy*, 828 N.E.2d 769, 780 (Ill. App. Ct. 2005) (declining to find that residency restriction constituted banishment where the record was devoid of any evidence of an offender's inability to remain in their hometown or assimilate into a new community). Thus, even imputing the effects of the municipal ordinance restrictions to the statewide legislative scheme at issue here, there is no evidence that the designation creates a banishment-like effect.

And finally, the SVP designation does not resemble probation or parole. *See Smith*, 538 U.S. at 101. "Probation and supervised release entail a series of mandatory conditions and allow the supervising officer

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offenses which require sex offender registration) with § 18-3-414.5(1)(a)(II) (listing offenses which qualify an offender for an SVP designation)

to seek the revocation of probation or release in case of infraction." *Id.* The registration requirement triggered by the SVP designation, on the other hand, allows offenders to conduct their lives as they wish. While SVPs must disclose certain changes to their information, such as when they move residences or change employment, they do not need permission to make those changes. *See Id.* And the mere disclosure of certain information does not equate to state supervision. *Shaw*, 823 F.3d at 565.

In sum, as with the registration and notification scheme in *Smith*, the SVP designation scheme does not resemble shame, banishment, or probation. 538 U.S. at 98-102.

b. The designation scheme does not impose an affirmative disability or restraint.

The Supreme Court has rejected the idea that sex offender registries like this one involve an affirmative disability or restraint. *Smith*, 58 U.S. at 101. And the Court has set a high bar for what constitutes an affirmative disability or restraint by measuring alleged disabilities and restraints against the prototypical restraint of

imprisonment. *Smith*, 538 U.S. at 100. *See Pellegrin*, ¶58 (domestic violence treatment nonpunitive because it did not involve "restraint approaching the infamous punishment of imprisonment").

Against that benchmark, even a lifelong ban on work in a particular industry is not considered an affirmative disability. *Hudson*, 522 U.S. at 104 (occupational debarment following violation of federal banking statutes constituted a civil penalty). *See Millard*, 971 F.3d at 1183 (because effects of CSORA were "less harsh than a lifelong bar on work in a particular industry,' CSROA did not impose an affirmative disability or restraint).

Even where a law imposes an affirmative restriction or disability, it [is] unlikely to have a punitive effect if the restrictions are but "minor and indirect." *Smith*, 538 U.S. at 100. The examples cited in the Opening Brief, regarding the in-person registration requirements and the effects of the designation on parole, fall into just that category.

The registration requirements triggered by the SVP designation mandate that offenders register in-person every three months. OB, p 21. But courts across the country and across the years have found that

in-person registration requirements do not constitute an affirmative restraint or disability. *See U.S. v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2011) ("Appearing in person may be more inconvenient, but requiring it is not punitive."); *Masto*, 670 F.3d at 1056 (same); *Shaw*, 823 F.3d at 568; *Doe v. Cuomo,* 755 F.3d 105, 112 (2d Cir. 2014) (quarterly in-person reporting is not punitive); *United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013) (appearing periodically in person to verify information and submit to a photograph not an affirmative disability or restraint.); *Hatton v. Bonner*, 356 F.3d 955, 964 (9th Cir. 2003) (California statute's requirement of in-person reporting "is simply not enough to turn [the California statute] into an affirmative disability or restraint").

And further, Colorado's registration scheme allows law enforcement to waive the in-person requirement for those who have a disability that makes re-registering in person a severe hardship. § 16-22-108. Thus, registration is, at most, a minor restraint without a punitive effect.

Likewise, the defendant's arguments regarding "decreased parole opportunities" also fail to constitute an affirmative restraint given their indirect and tenuous nature. OB, p 23. As he explains, a person is "not recommended" to be paroled if they are designated an SVP, serving a determinate sentence, *and* not receiving treatment within DOC. OB, p 23. Accordingly, the recommendation is not based on the SVP designation alone, but upon the fact that the offender is not receiving treatment. *Standards and Guidelines for the Assessment, Evaluation, Treatment and Behavioral Monitory of Adult Sex Offenders*, Appendix Q (2025). That recommendation remains in place in other circumstances even when the offender is not an SVP. *Id.* And given the discretionary nature of parole, the parole board is required to consider these facts among other components including "institutional behavior, risk assessment and victim input." *Id.*

c. The designation scheme does not promote the traditional aims of punishment.

Traditionally, punishment has been intended as promoting deterrence and retribution. The SVP designation does not aim to encourage either.

The goal of the SVP designation scheme is not to deter criminal behavior; it is to increase public awareness so that the public may better protect themselves. *See* § 16-22-112 (CSORA aims to provide the public "access" to information); § 16-13-901 (goal of community notification is to alert public of the "risk" to their community and spread "information and education concerning supervision and treatment of sex offenders"). Deterrence may be a secondary effect of public awareness, but it is not the aim of the designation scheme.

Regardless, "[a]ny number of governmental programs might deter crime without imposing punishment." *Smith*, 538 U.S. at 102. Yet the defendant does not point to any evidence suggesting that the designation functions as a deterrent, let alone so strong a deterrent as to amount to punishment. *See W.B.H.,* 664 F.3d at 858 (sex offender

reporting requirements lacked a sufficiently strong deterrent effect to justify a finding that the requirements are punitive); *Doe v. Bredesen*, 507 F.3d 998, 1005–06 (6th Cir.2007) (although the sex-offender reporting requirements had some deterrent effect, the strength of the effect was not enough to make the statute punitive); *Miller*, 405 F.3d at 720 (residency restrictions lacked strong deterrent effect because they did not alter a sex offender's "incentive structure"); *Hatton*, 356 F.3d at 965 (deterrent value of sex-offender reporting statutes does not make the statutes punitive). In fact, the studies he cites in other parts of his brief seem to suggest that registration and notification do not act as deterrents at all. *See* Association for the Treatment of Sexual Abusers, *Registration and Community Notifications of Adults Conviction of a Sexual Crime: Recommendations for Evidence-Based Reform*,[9] p 9,

[9] https://members.atsa.com/ap/CloudFile/Download/LWBnWg6P

(2020) (concluding, in part, that registration does not decrease an individual's risk of recidivism).

Likewise, the defendant fails to substantiate his claim that the SVP designation scheme is retributive.

Retribution is the principle that a sentence must be "directly related to the personal culpability of the criminal offender." *Graham v. Florida*, 560 U.S. 48, 71 (2010). The Supreme Court has found that sex offender registries are not retributive, even where they appear to be "measured by the extent of the wrongdoing" as opposed to the "extent of the risk posed." *Smith*, 538 U.S. at 102. *But see T.B.*, ¶53 (deeming CSORA's lifetime registration requirement for juveniles with multiple adjudications retributive, in part, because it applied "regardless of individual risk to reoffend"). Regardless, this is a non-issue in the SVP context because the SVP designation is not imposed based solely upon the extent of person's past wrongdoing but upon a finding that the individual is likely to reoffend. *See Allen*, ¶7; § 18-3-414.5(1)(a)(IV). Thus, the designation is not premised upon an offender's culpability for

his past actions, but on the risk they pose to their community going forward.

d. The designation scheme has a rational and non-excessive connection to a nonpunitive purpose.

Whether a statute bears a rational connection to a nonpunitive purpose is the "most significant factor" in the intent-effects test. *Smith*, 538 U.S. at 102. Here, there can be little debate as to whether the SVP designation scheme has a rational connection to its nonpunitive goal of providing community members information that can help them keep safe. *See* § 16-13-901.

The Supreme Court has recognized that it is "imminently reasonable" to impose registration requirements upon the release of sex offenders for the purposes of public safety. *United States v. Kebodeaux*, 570 U.S. 387, 395 (2013). Registration and notification schemes bear a rational connection to the nonpunitive purpose of increasing community protection. *Smith,* 538 U.S. at 102-03. The SVP designation is meant to make communities aware of an offender's presence and help members of

the public make informed decisions to protect themselves against victimization. *See Rowland*, 207 P.3d at 894 (the SVP designation is aimed at community protection and education). This purpose is valid, rational, and advances nonpunitive aims. *Smith*, 538 U.S. at 103.

The defendant seems to misunderstand the nonpunitive purpose of the designation scheme. He contends that the laws at issue are not rationally tied to increasing public safety because they "create social instability" for offenders which "create[s] a risk of recidivism." OB, pp 29-30. But, for better or worse, the primary goal of the SVP designation is not to improve offender well-being or encourage rehabilitation.

The statute seeks to increase public safety by arming the public with knowledge, rather than by disarming offenders. *See United States v. Under Seal,* 709 F.3d 257, 265 (4th Cir. 2013) (concluding that notifying the public about the risk of sex offenders in the community is rationally tied to public safety). Accordingly, it is of little relevance that the designation scheme does not provide support for the offender based on their risk factors. OB, p 32. The defendant's risk for re-offense may very well be linked to his substance use disorder. OB, p 32. But because

the designation is not part of a defendant's sentence, it is not concerned with their rehabilitation. *See Adair v. People*, 651 P.2D 389, 392 (Colo. 1982) (recognizing rehabilitation as a sentencing goal). Addressing an offender's needs is surely one way to improve public safety, but it is not the only method. And it is not the method the legislature chose to adopt.

As support for his argument that the designation scheme is not rationally tied to its nonpunitive aim, the defendant asserts that the SOMB has recommended "eliminating" the SVP designation because it is "not effective." OB, p 30. But that summation is inaccurate. The 2022 SOMB materials he references recommended "replacing" the SVP designation with a tiered risk classification system because federal law no longer requires states to designate SVPs. SOMB, *Annual Legislative Report*, pp 24, 26 (Jan. 2022). And neither of the two subsequent annual legislative reports have reasserted that recommendation. *See generally* SOMB, *Annual Legislative Report* (Jan. 2023); SOMB, *Annual Legislative Report* (Jan. 2024).

And the question of excessiveness is "not an exercise in determining whether the legislature has made the best choice possible

to address the problem it seeks to remedy." *Smith*, 538 U.S. at 105. It is whether "the regulatory means chosen are reasonable in light of the nonpunitive objective. *Id.* States can create registration schemes that apply broadly. *See id*. at 103-04; *accord Shaw*, 823 F.3d at 575. A law does not fail to bear a rational connection to its purpose merely because it is imprecise. *Smith*, 538 U.S. at 103 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997)).

The defendant's contrary arguments hold little weight. OB, pp 33-35. He contends that the SVPASI assesses for "a much broader risk" of re-offense than required by the SVP statute. OB, pp 33-34. But this merely advances his theory that the statute "lacks a close or perfect fit with the nonpunitive aims it seeks to advance"—an argument that the Supreme Court has deemed irrelevant. *Smith*, 538 U.S. at 103.

And though the defendant argues that the designation is excessive due to its lifetime application, Supreme Court precedent says otherwise. *See Smith*, 538 U.S. at 104 (the "minor condition of registration," is not excessive even when required on a regular basis for the duration of an

offender's life); *Shaw*, 823 F.3d at 576 (weekly or quarterly reporting for as long as offender lived in state was not excessive).

In *Smith*, the Supreme Court found Alaska's sex offender registration act non-punitive notwithstanding the unavailability of any judicial relief from the various obligations that attached for the duration of a qualifying offender's life. 538 U.S. at 104. This was because the reporting requirements were based on a sex offender's risk of re-offense; offenders with multiple conviction report more frequently and for a longer period of time than single-conviction sex offenders. *Id*.

Here, as in *Smith*, the severity of the reporting requirements is tied to the offender's risk of re-offense, making the statutes "consistent with the regulatory objective" of protecting public safety. *Id*. at 102. *See Hatton* 356 F.3d at 965 (concluding that reporting statute was not punitive when it "tied the length of the reporting requirement to the extent of the [offender's] wrongdoing"). In fact, the SVP designation requires an explicit finding of recidivism.

"[T]he general assembly has unambiguously required the court to determine an offender's risk of recidivism based not on judicial hunch,

but instead on the risk assessment screening instrument, which incorporates factors that correlate statistically with recidivism." *Allen*, ¶38 (Marquez, J., concurring); § 16-11.7-103(4)(d). Based on the empirical research collected from Colorado sex offenders, the SVPASI sets out three ways in which a defendant may be found likely to reoffend: (1) they have been previously convicted of a particular sex offense; (2) they score above a 22 on the sex offender risk scale (SORS); or (3) they meet certain mental abnormality criteria. *See People v. Williamson*, 2021 COA 77, ¶¶6-7; SOMB*, SVPASI Handbook: Sexually Violent Predator Assessment Screening Instrument* (SVPASI) (November 2020) ("SVPASI Handbook"). The handbook details the empirical research the SOMB relied upon in determining that criminal history, the SORS, and mental abnormality criteria are reliable indicators of recidivism.

The defendant argues that he is a prime example of the SVP scheme's excessiveness. OB, p 32. The record shows the opposite. The defendant was designated an SVP due to his score on the sex offender risk scale. The SORS is an actuarial risk assessment scale that

"identifies a small group with the highest likelihood of recidivism." *SVPASI Handbook*, pp 4, 12. Those who score a **22** or higher on the SORS "fall into a risk group that has 50-60% likelihood of a new sex or violent court filing within eight years of a conviction … for one of the qualifying SVP offenses." *SVPASI Handbook*, pp 12, 13 (emphasis added). "[F]ewer than five percent of those assessed with the SORS will score 22 or more." *Id.* at 19. The defendant scored a **34.8**. (CF, p 176.)

Because the lifetime registration requirement here is "reasonably related to the danger of recidivism," it is not disproportionate to the scheme's public safety purpose. *Smith*, 538 U.S. at 102.

e. The effects-factors demonstrate that the designation is not punitive in effect.

Under the intent-effects test, the effects must override the statute's non-punitive intent "by clearest proof." *Smith*, 538 U.S. at 92. Here, that bar cannot be cleared.

The issue before this Court is whether the SVP designation constitutes punishment. The registration requirement and community

notification statutes do not banish offenders or force them to bear face-to-face humiliation, restrain where offenders may live or work, or function as retribution or deterrence. They do, however, serve the nonpunitive goal of spreading awareness and information to Colorado communities so that members of the public can make safe and informed decisions.

Reasonable minds may certainly debate how society should treat and/or assist sex offenders who reenter society after serving their sentences, and the ways in which community safety may be most efficiently increased. But the question before this Court is not whether the Court personally agrees with the regulations the legislature adopted. The question is whether those regulations constitute punishment. As both the plain language and practical effects of the statutes show, the SVP designation does not.

B. The cases the defendant relies on are incomparable because they include restrictive and punishing prohibitions

on where offenders may live, work, and loiter.

In arguing that this Court should declare the SVP designation scheme punitive, the defendant relies on three cases. *See Snyder*, 834 F.3d at 697; *Betts*, 968 N.W. 2D at 511; *Baker*, 295 S.W.3d at 439. But each case presents circumstances markedly different than those before this Court.

The glaring difference between the SVP designation scheme and the sex offender registration schemes in *Snyder*, *Betts*, and *Baker* is the imposition of residency restrictions.

Both *Snyder* and *Betts* dealt with registration schemes that not only directly restricted where offenders could live, but where they could work and, worse, where they could loiter. *Snyder*, 834 F.3d at 703; *Betts*, 968 N.W.2d at 554-55. Accordingly, the schemes limited an offender's access to public transportation, employment, education, counseling, and even sporting events. *Id*. The restrictions were so severe that they dictated the outcome of several *Martinez-Mendoza* factors. The laws both banished offenders and served the traditional

punitive goal of incapacitation— removing offenders from public life to prevent any future offenses. *See Snyder*, 834 F.3d at 704; *Betts*, 968 N.W. 2d at 554.

And while the law at issue in *Baker* was limited to restrictions on housing, it was nonetheless severely punishing because it placed registrants on the constant brink of eviction. 295 S.W. 2d at 445. It not only prohibited offenders from residing within 1,000 feet of certain establishments, like schools, daycares and playgrounds, but it expelled them from their homes in the event a qualifying establishment was subsequently built near their residence. *Id.* Again, this impacted several of the effects-factors. The restriction stopped registrants from establishing permanent homes and functioned as both banishment and harsh retribution. *Id.* at 446.

Moreover, each of the cases the defendant relies on involved restrictions imposed upon *all* offenders, regardless of their crime, criminal history, or age. *Baker*, 295 S.W. 3d at 444-45 (residency restrictions applied to all sex offenders); *Snyder*, 834 F.3d at 704 (same); *Betts*, 968 N.W. 2d at 557 (same). The SVP designation, on the

other hand, applies only to those who meet the statutory criterion, including a finding that the offender is likely to reoffend.

Neither the registration nor community notification statute impose any residency restrictions. And the SVP designation is not handed out indiscriminately; it applies only to defendants deemed likely to reoffend. Because the critical facts at issue in *Snyder, Betts*, and *Baker*, are not at play here, this Court need not follow their footsteps.

C. T.B. is inapposite because "juveniles are different."

In *People in Interest of T.B.,* 2021 CO 59, ¶58, this Court held that "mandatory lifetime sex offender registration for offenders with multiple juvenile adjudications constitutes punishment for purposes of the Eighth Amendment." This holding was premised on a core judicial principle: "Juveniles are different." *Id.* at ¶2.

Juveniles are so different that nonpunitive laws may have punitive effects when applied to kids. *Id.* at ¶41. But the Court expressly and repeatedly limited its holding to juvenile offenders; the Court did not "express [any] opinion on the legislature's ability to

mandate lifetime sex offender registration for adult offenders." *Id.* at ¶74. In fact, this Court recognized that its holding was consistent with the Tenth Circuit's holding in *Millard* that sex-offender registration is nonpunitive. *T.B.*, ¶35, n.11 ("[W]e do not perceive our opinion as conflicting with the Tenth Circuit's decision…").

Because the outcome in T.B. was driven by the ways an offender's juvenile status changed the calculus for each of the effects-factors, *T.B.* is inapposite here.

II. Assuming that the SVP designation is a punishment, it is not cruel and unusual as applied to the defendant.

"The Eighth Amendment does not require strict proportionality between crime and sentence; instead, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Wells-Yates v. People*, 2019 CO 90M, ¶5.

In assessing proportionality courts first conduct an abbreviated proportionality review comparing "the gravity of the offense [and] the harshness of the penalty." *Id.* at ¶10-14; *Ewing v. California*, 538 U.S. 11, 28 (2003). Only if the abbreviated review suggests that the offense is

"so lacking in gravity or seriousness" as to give rise to an inference of *gross* disproportionality is the defendant entitled to an extended proportionality review. *People v. Gaskins*, 825 P.2d 30, 36 (Colo. 1992) (emphasis added). Going beyond abbreviated review is exceedingly rare. *Wells-Yates*, ¶15.

Where a proportionality analysis is conducted for the first time on appeal, the reviewing court must determine whether the sentencing court committed "obvious error by failing to discern an inference of gross disproportionality in [the defendant's] sentence as compared to his offenses." *Walker*, 2022 COA 15, ¶69.

A. The defendant's sentence does not give rise to an inference of gross disproportionality.

When considering the gravity of an offense, some offenses are per se grave or serious. *Wells-Yates*. at ¶13. For all others, the court should consider the facts and circumstances underlying the offense and assess "the harm caused or threatened to the victim or to society and the offender's culpability." *Id*. at ¶¶18, 69. An "offense may be aggravated not just by its immediate circumstances but also by the offender's prior

criminal record." *People v. McCulloch*, 198 P.3d 1264, 1268 (Colo. App. 2008).

Sex crimes are generally considered grave and serious. OB, p 38. *See People v. Hargrove,* 2013 COA 165, ¶ 21 (sexual assault – force is a "grave or serious crime") *citing People v. Dash,* 104 P.3d 286, 293 (Colo. App. 2004) and *People v. Strean*, 74 P.3d 387, 396 (Colo. App. 2002). And the facts here are plainly egregious.

The defendant picked up two sixteen-year-old girls who had run away from a residential treatment facility. (TR 2/22/22, p 7:17-22.) He harbored them in his home for over a week and began "grooming" them, telling them he was sexually attracted to them, and giving them gifts and Xanax. (TR 2/22/22, pp 30.) The defendant and the victim both consumed "magic mushrooms" and the defendant took the victim into a bathroom where he digitally penetrated her vagina and forced her to touch his penis. (CF, pp 3-4, 6-7.) Though the defendant eventually turned the girls over to law enforcement, he did so after learning of the reward for their safe return and he instructed them to lie about how

they met him. (TR 2/22/22, pp 6-7.) He conceded the truth only after his own juvenile daughter spoke to police. (TR 2/22/22, p 7:11-16.)

The defendant's actions caused great harm to the victim of the assault, the other teenage runaway, the families of both girls, the defendant's daughter and wife, and those in the greater community who had been rallying to find the missing children. In her victim impact statement, the victim described the pain and fear she felt during the assault and detailed the lingering impacts—night terrors, vivid flashbacks, shame and anxiety—which required medication and therapy. (CF, pp 114-16.)

The defendant's criminal history and other risk factors only substantiate the seriousness of the situation and the defendant's personal culpability. *See Well-Yates*, ¶12. The defendant reported struggling with substance use including methamphetamine and prescription opiates; he had been using drugs daily at the time of the offense and provided the same to the victims. (CF, p 135.) Testing showed that the defendant had issues with impulsive acts and "supervision cooperation," as demonstrated by his repeated violations

during past probationary sentences. (CF, p 167.) And while the sex-offense specific evaluation placed the defendant's risk of sexual re-offense in the average range, the report noted that his risk level could be higher given his number of other risk factors and history of "undetected criminal offending." (CF, p 168.)

Indeed, the SVPASI found the defendant likely to reoffend based on his score on the Sex Offender Risk Scale. (CF, p 176.) A score above 22 puts a defendant into a risk category with a 50%-60% likelihood of a new sex or violent crime filing within eight years. (CF, p 176.) Again, the defendant scored 34.8. (CF, p 176.)

In light of these facts, the defendant's sentence is not disproportionally harsh, let alone plainly so. As this Court has recognized, in most instances where the general assembly removes a sentencing court's discretion in sentencing, that mandated sentence will most likely be "constitutionally proportionate." *Wells-Yates*, ¶21 (extended proportionality reviews in the habitual context are "rare"). Such is the case here.

Further, the court exercised its discretion where it was able. The defendant faced the possibility of up to a six- year indeterminate sentence. Yet, the court imposed a determinate five-year determinate sentence. And while the court lacked discretion in the SVP designation, the designation is excessively harsh given the defendant's risk for future criminal behavior.

The defendant's arguments otherwise are unavailing. The SVP designation does not "preclude" the defendant from parole opportunities, and he does not substantiate his claim that the designation creates "the highest hurdles" to "successfully parole." *See* OB, p 50. And though he asserts that his sentence is prohibitively harsh given his disability, this fact was not brought to the trial court's attention, and the record of the related implications is thus undeveloped. OB, p 42-43.

There is no gross inference of disproportionality in sentencing an adult with a lengthy criminal record, substance abuse issues, a demonstrated history of impulsive behavior, and an individual risk for re-offense to lifetime registration and a five-year determinate sentence

for sexually assaulting a teenage runaway who had recently consumed an intoxicating substance he provided. The trial court did not commit obvious error in failing to discern an inference of gross disproportionality in the defendant's sentence. *See Walker*, ¶69.

Because the defendant's sentence does not give rise to an inference of gross disproportionality, let alone an obvious inference, he is not entitled to an extended proportionality review, and this Court should decline to address his related arguments. OB, pp 43-45.

CONCLUSION

For the foregoing reasons and authorities, this Court should affirm the court of appeals.

PHILIP J. WEISER
Attorney General

/s Jaycey DeHoyos
JAYCEY DEHOYOS, 55234*
Assistant Attorney General
Criminal Appeals Section
Attorneys for Respondent
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** via Colorado Courts E-filing System on May 12, 2025

/s/ Jaycey DeHoyos