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## PREVIEW; State v. Hinman: *Reconsidering the Retroactive Provisions of the Sexual or Violent Offender Registration Act*

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**PREVIEW; State v. Hinman: Reconsidering the  
Retroactive Provisions of the Sexual or Violent Offender  
Registration Act**

**Marisa Owens\***

The Montana Supreme Court will hear oral argument in *State v. Hinman* on Friday, April 8, 2022, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. Chad Wright and Kristina L. Neal are expected to appear on behalf of defendant-appellant, Richard Denver Hinman. Austin Knudsen and Eileen Joyce are expected to appear on behalf of plaintiff-appellee, the State of Montana.

**I. INTRODUCTION**

Richard Denver Hinman appeals from his conviction under Montana Code Annotated § 46-23-507, failure to register as a sex offender, in the Second Judicial District Court, Silver Bow County.<sup>1</sup> The Montana Supreme Court will review: (i) whether the retroactive application of the Sexual Offender Registry Act (“SORA”) has a punitive effect violating the *ex post facto* clause found at Article II, Section 31 of the Montana Constitution;<sup>2</sup> (ii) whether the lifetime registration requirement of the SORA violates Mr. Hinman’s due process rights;<sup>3</sup> and (iii) whether the SORA deprives Mr. Hinman of his civil rights under Article II, Section 28 of the Montana Constitution.<sup>4</sup> This Preview limits its focus to the first issue. For the reasons discussed below, the Court will likely find the amended SORA is a violation of the *ex post facto* clause of the Montana Constitution.

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<sup>1</sup> Brief of Appellant at 1, *State v. Hinman*, No. DA 221-0197 (Mont. Sept. 15, 2021), <https://perma.cc/X2EF-AW46>; Brief of Appellee at 1, 11 n.1, *State v. Hinman*, No. DA 221-0197 (Mont. Nov. 30, 2021), <https://perma.cc/L4RW-LENH>.

<sup>2</sup> Brief of Appellant, *supra* note 1, at 6.

<sup>3</sup> *Id.* at 17.

<sup>4</sup> *Id.* at 19.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Hinman was convicted of felony sexual assault and sentenced to prison in 1994.<sup>5</sup> He was discharged from prison six years later.<sup>6</sup> Under the SORA, Hinman was required to register as a sexual offender.<sup>7</sup> As a level two sex offender,<sup>8</sup> Hinman must submit a registration verification form biannually to the Department of Justice.<sup>9</sup> Hinman changed his residence and failed to return his registration verification form in 2019.<sup>10</sup> The Department of Justice notified law enforcement of Hinman's noncompliance.<sup>11</sup> The Silver Bow County Attorney's Office charged Hinman for failing to register as a sexual offender under Montana Code Annotated § 46-23-507.<sup>12</sup>

In the district court, Hinman filed a motion to dismiss, arguing that the retroactive application of the SORA violates the *ex post facto* clauses of the United States and Montana Constitutions.<sup>13</sup> Before a plea hearing, the State argued that the Montana Supreme Court had already upheld the retroactive application of the SORA.<sup>14</sup> The district court agreed, denying Hinman's motion.<sup>15</sup> Hinman plead guilty while reserving his right to appeal the denial of his motion to dismiss.<sup>16</sup> The district court sentenced Hinman to four years, all suspended.<sup>17</sup> Hinman appealed.<sup>18</sup>

Hinman's counsel filed a motion to withdraw as counsel of record after determining that any issue raised on appeal would be

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<sup>5</sup> *Id.* at 1.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Brief of Appellee, *supra* note 1, at 2.

<sup>8</sup> *Id.*

<sup>9</sup> MONT. CODE ANN. § 46-23-504(6)(a)(ii) (2021). Hinman was charged with failing to register under Montana Code Annotated § 46-23-507 (2017); however, SORA has not been amended in a way that affects Hinman. Accordingly, this Preview discusses the 2021 SORA currently in effect. *See* Brief of Appellant, *supra* note 1, at 11 n.1.

<sup>10</sup> Brief of Appellant, *supra* note 1, at 2–3.

<sup>11</sup> Brief of Appellee, *supra* note 1, at 2.

<sup>12</sup> *Id.* at 3, 11 n.1.

<sup>13</sup> Brief of Appellant, *supra* note 1, at 3.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

<sup>16</sup> Brief of Appellee, *supra* note 1, at 3.

<sup>17</sup> *Id.* at 1–2.

<sup>18</sup> Notice of Appeal, *State v. Hinman*, No. DA 20-0197 (Mont. Apr. 4, 2020), <https://perma.cc/PUV6-H6PU>.

frivolous or wholly without merit.<sup>19</sup> The motion accompanied a mandatory brief<sup>20</sup> pursuant to *Anders v. California*,<sup>21</sup> identifying issues that “arguably support an appeal.”<sup>22</sup> Counsel recommended the Montana Supreme Court revisit its decision in *State v. Mount*,<sup>23</sup> upholding the SORA’s retroactive application.<sup>24</sup> On August 17, 2021, the Montana Supreme Court denied the motion.<sup>25</sup> It concluded that “a nonfrivolous issue exists as to whether this Court should reconsider [its] determination in [*Mount*] upholding the retroactive provision of the Sexual or Violent Offender Registration Act.”<sup>26</sup>

### A. The Original SORA

The Montana Legislature enacted the SORA on July 1, 1989.<sup>27</sup> The law required convicted sex offenders to register with local law enforcement within fourteen days of entering a county.<sup>28</sup> Sexual offenders had the duty to inform law enforcement of any residence changes within ten days.<sup>29</sup> A sexual offender was required to register for ten years after their conviction if they were not imprisoned or ten years after release from prison.<sup>30</sup> Provided the sexual offender did not commit another sexual offense within those ten years, the duty to register automatically terminated.<sup>31</sup> A sexual offender who knowingly failed to register was subject to at least 90 days imprisonment, a fine that could not exceed \$250, or both.<sup>32</sup>

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<sup>19</sup> Motion to Withdraw as Counsel of Record, *State v. Hinman*, No. DA 221-0197 (Mont. July 12, 2021), <https://perma.cc/2FKH-SP3W>.

<sup>20</sup> MONT. CODE ANN. § 46-8-103(2) (2021).

<sup>21</sup> 386 U.S. 738 (1967).

<sup>22</sup> *Anders* Brief of Appellant at 5, *State v. Hinman*, No. DA-221-0197 (Mont. July 12, 2021), <https://perma.cc/H85V-TPZ2>.

<sup>23</sup> 78 P.3d 829 (Mont. 2003).

<sup>24</sup> *Anders* Brief of Appellant, *supra* note 22, at 5–9.

<sup>25</sup> In the Supreme Court of The State of Montana, *State v. Hinman*, No. DA-221-0197 (Mont. Aug. 17, 2021), <https://perma.cc/7MQY-TA7F>.

<sup>26</sup> *Id.*

<sup>27</sup> Sexual Offender Registration Act, S.B. 84, 51st Leg. (Mont. 1989) (in effect when Hinman plead guilty to felony sexual assault in 1994).

<sup>28</sup> MONT. CODE ANN. § 46-23-504 (1989).

<sup>29</sup> *Id.* at § 46-23-505.

<sup>30</sup> *Id.* at § 46-23-506(1).

<sup>31</sup> *Id.* at § 46-23-504(2).

<sup>32</sup> *Id.* at § 46-23-507.

### B. *State v. Mount*

Robert Mount was convicted of sexual intercourse without consent in 1984 and released from prison in 1996.<sup>33</sup> The Montana Legislature amended the SORA in 1995, changing the registration period for offenders from ten years to a lifetime.<sup>34</sup> Offenders could petition for removal from the registry after ten years if they met specific requirements, such as showing they have abided by the laws and “that relief from registration is in the best interest of society” and no longer “necessary for public protection.”<sup>35</sup> The SORA was amended again in 1997<sup>36</sup> to retroactively apply to offenders “sentenced or who are in custody or under the supervision of the department of corrections on or after July 1, 1989.”<sup>37</sup> Mount was charged in 2000 for failing to register as an offender.<sup>38</sup> Mount argued that the amendments to the SORA were “*ex post facto* because it subjected him to enhanced punishment based on his prior conviction.”<sup>39</sup> In 2003, the Montana Supreme Court reviewed Mount’s claim in *State v. Mount*.<sup>40</sup>

#### 1. *Ex Post Facto Clause*

The Montana Supreme Court determined the SORA’s requirements were not retroactive punishment prohibited by the *ex post facto* clauses of the United States and Montana Constitutions.<sup>41</sup> Lockstep with the United States Supreme Court’s analysis in *Smith v. Doe*,<sup>42</sup> the Montana Supreme Court first determined the legislature’s intent for enacting the law.<sup>43</sup> The Court must “ascertain whether the legislature meant the statute to establish ‘civil’

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<sup>33</sup> *State v. Mount*, 78 P.3d 829, 832 (2003).

<sup>34</sup> MONT. CODE ANN. § 46-23-506(1) (1995).

<sup>35</sup> *Id.* at § 46-23-506(2).

<sup>36</sup> The amendment created individualized assessments to determine the offender’s risk of recidivism from low, moderate, or high and designate the offender as level one, level two, or level three, respectively. MONT. CODE ANN. § 46-23-509 (1997).

<sup>37</sup> *Mount*, 78 P.3d at 832.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 833.

<sup>40</sup> *Id.* at 829.

<sup>41</sup> *Id.* at 835.

<sup>42</sup> 538 U.S. 84 (2003).

<sup>43</sup> *Mount*, 78 P.3d at 835.

proceedings.”<sup>44</sup> The Court gives deference to the “legislature’s stated intent;”<sup>45</sup> therefore, only upon serious proof of the contrary will the Court override the legislature’s intent “and transform what has been denominated a civil remedy into a criminal penalty.”<sup>46</sup>

To determine intent, the Court looks to the law’s declared purpose and structure.<sup>47</sup> If the Court finds either the purpose or structure to be punitive, the analysis ends.<sup>48</sup> However, if neither are punitive, the law intends “to enact a civil regulatory scheme.”<sup>49</sup> In *Mount*, the Court found the primary purpose of the law was “to provide parents with information necessary to protect themselves and their vulnerable children and to provide law enforcement with information necessary to track a class of offenders who have a high propensity for recidivism.”<sup>50</sup>

The next step of the analysis is to determine the effect of the law.<sup>51</sup> The Montana Supreme Court applied the same factors the United States Supreme Court applied in *Smith*,<sup>52</sup> known as the *Mendoza-Martinez* factors<sup>53</sup>:

- (1) whether the law imposes an affirmative restraint or disability;
- (2) the historical treatment of the law;
- (3) a finding of scienter;
- (4) whether the law was traditionally aimed at punishment;
- (5) whether the law applies to criminal behavior;
- (6) whether the law has a nonpunitive purpose; and
- (7) the excessiveness of the law in application.<sup>54</sup>

If the totality of the factors results in a nonpunitive effect, the law is constitutional.<sup>55</sup>

In *Mount*: (1) The Court found that the SORA had an indirect restraint imposed on Mount, he had to appear in person once, there was no restraint on where he lived, and could petition the Court after ten years for relief,<sup>56</sup> (2) the stigma from registering as a sex

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<sup>44</sup> *Smith*, 538 U.S. 84, 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

<sup>45</sup> *Smith*, 538 U.S. at 92 (quoting *Kansas*, 521 U.S. at 361).

<sup>46</sup> *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

<sup>47</sup> *Mount*, 78 P.3d at 835.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 838.

<sup>51</sup> *Id.* at 835 (citing *Smith v. Doe*, 538 U.S. 84, 92–93 (2003)).

<sup>52</sup> *Id.* (citing *Smith*, 538 U.S. at 97).

<sup>53</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

<sup>54</sup> *Mount*, 78 P.3d at 835 (citing *Smith*, 538 U.S. at 97).

<sup>55</sup> *Id.* at 835–36 (citing *Smith*, 538 U.S. at 97).

<sup>56</sup> *Id.* at 837–38.

offender is not from “public shaming,” rather, the embarrassment Mount experiences is from his sexual offense and does not constitute historical shaming punishments,<sup>57</sup> (3) the charge of failing to register is a separate crime from the previous sexual offense,<sup>58</sup> (4) the incidental effect of deterrence “does not . . . implicate punishment, as long as the law is reasonably related to the law’s purpose,”<sup>59</sup> (5) Mount is being punished for failing to register, a new offense,<sup>60</sup> (6) Mount conceded a nonpunitive purpose existed,<sup>61</sup> and (7) the SORA is “tailored to disclose only necessary information” limited to the individual level of the offender.<sup>62</sup> Further, although Mount was registered for life, he may petition for relief.<sup>63</sup> The Court held the SORA was nonpunitive in effect because none of the *Mendoza-Martinez* factors were met; therefore, the SORA was upheld as not violating the *ex post facto* clauses of the United States and Montana Constitutions.<sup>64</sup>

## 2. Dissent

Justice Leaphart agreed with the reasoning of Justices Stevens, Ginsberg, and Breyer in *Smith*.<sup>65</sup> Justice Stevens recognized that the “unique consequences imposed by the registration requirement are punitive in that they share three characteristics, which in the aggregate are not present in any civil sanction.”<sup>66</sup> The three characteristics are that “[t]he sanctions (1) constitute a severe deprivation of the offender’s liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals.”<sup>67</sup> Justice Leaphart reasoned that because failure to register is not imposed on anyone other than persons who commit a criminal offense and because the requirements “severely

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<sup>57</sup> *Id.* at 838.

<sup>58</sup> *Id.* at 839.

<sup>59</sup> *Id.* (citing *Smith*, 538 U.S. at 102).

<sup>60</sup> *Id.* at 839–40.

<sup>61</sup> *Id.* at 840.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 841.

<sup>65</sup> *Id.* at 842 (Leaphart, J., dissenting) (citing *Smith v. Doe*, 538 U.S. 84 (2003)).

<sup>66</sup> *Id.* (citing *Smith*, 538 U.S. at 112 (Stevens, J., dissenting)).

<sup>67</sup> *Id.* (quoting *Smith*, 538 U.S. at 112 (Stevens, J., dissenting)).

impairs a person's liberty," the SORA is punishment.<sup>68</sup> Thus, Justice Leaphart determined that the retroactive application of the SORA violated the *ex post facto* clause.<sup>69</sup>

### C. The Current SORA

There have been amendments to the SORA since the Court heard *Mount*. The Department of Justice mails a verification form to level one offenders and violent offenders every year; every 180 days for a level two offender; and every 90 days for a level three offender.<sup>70</sup> The form requires the offender's notarized signature and the form must be returned *in person* to the registration agency within ten days after receipt.<sup>71</sup> When returning the form offenders are required to take a new photograph.<sup>72</sup>

The SORA now requires that offenders must provide a DNA sample; their name and aliases; social security number; resident information; place of employment; the name and address of any school offender attends; driver's license number; "description and license number of any motor vehicle owned or operated by the offender"; and all social media screen names and email addresses.<sup>73</sup> The amount of information disseminated to the public is determined by the offender's risk level.<sup>74</sup>

Although sex offenders must register for life, regardless of their level,<sup>75</sup> a level one sex offender may petition for relief after ten years of registration, and a level two offender<sup>76</sup> may petition after twenty-five years of registration.<sup>77</sup> The court may grant the offender's petition upon finding "the offender has remained a law-abiding citizen" and "continued registration is not necessary for public protection and that relief from registration is in the best

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<sup>68</sup> *Id.* (quoting *Smith*, 538 U.S. at 112 (Stevens, J., dissenting)).

<sup>69</sup> *Id.*

<sup>70</sup> MONT. CODE ANN. § 46-23-504(6) (2021).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at § 46-23-504(3).

<sup>74</sup> *Id.* at § 46-23-508.

<sup>75</sup> *Id.* at § 46-23-506.

<sup>76</sup> A level two offender may complete a treatment program and petition the court for a change in the offender's risk level designation "if the court finds by clear and convincing evidence that the offender's risk of committing a repeat sexual offense has changed since the time sentence was imposed." *Id.* at § 46-23-509(3).

<sup>77</sup> *Id.* at § 46-23-506(3).



interest of society.”<sup>78</sup> Notably, Montana Code Annotated § 46-23-506 was amended in 2021<sup>79</sup> to reflect the Montana Supreme Court’s holding in *State v. Sedler*.<sup>80</sup> In *Sedler*, the Court held the requirement that a violent offender had to register for ten years then petition for removal unfairly extended the maximum time that a violent offender must be on the registry, the Court found this violated substantive due process rights.<sup>81</sup> The Court distinguished the difference between the petition process for violent offenders from that of sex offenders. The requirement violent offenders register for ten years was ministerial and “vastly different than the judicial determination requiring discretionary considerations that appl[y] to [sexual] offenders [who are] required to register for life.”<sup>82</sup> Montana Code Annotated § 46-23-506 now reflects violent offenders are automatically removed from the registry after ten years if they complied with the requirements over that period.<sup>83</sup>

### III. SUMMARY OF THE ARGUMENTS

#### A. Appellant’s Argument

Hinman argues the Amended SORA has a punitive effect; therefore, the retroactive application violates the Montana Constitution.<sup>84</sup> First, to support his argument that the SORA is punitive, Hinman points to other states who have determined their registration requirements violated state constitutional prohibitions against *ex post facto* laws.<sup>85</sup> Hinman notes the Supreme Court of Alaska held the retroactive application of the SORA violated the *ex post facto* clause of the Alaska Constitution even though it was Alaska’s SORA that was reviewed and held federally constitutional in *Smith*.<sup>86</sup> Hinman states the Alaska Supreme Court’s holding “significantly narrows and undercuts” *Smith*.<sup>87</sup> Hinman discusses that Indiana found its retroactive application of the SORA was

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<sup>78</sup> *Id.*

<sup>79</sup> H.B. 91, 67th Leg. (Mont. 2021).

<sup>80</sup> 473 P.3d 406 (Mont. 2020).

<sup>81</sup> *Id.* at 409.

<sup>82</sup> *Id.*

<sup>83</sup> MONT. CODE ANN. § 46-23-506(2) (2021).

<sup>84</sup> Brief of Appellant, *supra* note 1, at 6.

<sup>85</sup> *Id.* at 9.

<sup>86</sup> *Id.* (citing *Doe v. Alaska*, 189 P.3d 999 (Alaska 2008)).

<sup>87</sup> *Id.*

unconstitutional even when applying the federal test from *Smith*.<sup>88</sup> The Supreme Judicial Court of Maine distinguished its SORA from Alaska's: Maine's law required the offender to verify information in-person while Alaska's did not.<sup>89</sup> Accordingly, the court held that Maine's version of the SORA was punitive, violating both state and federal constitutions.<sup>90</sup>

Next, Hinman claims the amendments to Montana's SORA should change the Court's determination of the SORA's effect.<sup>91</sup> Since *Mount*, the SORA has been amended to increase the information disseminated to the public.<sup>92</sup> The information compiled regarding the offender's private affairs has also substantially increased.<sup>93</sup> The requirements "go beyond general notification to the public and now incorporate law enforcement surveillance goals."<sup>94</sup> Additionally, the amendments to the SORA require more intrusion into the offender's life.<sup>95</sup> To conclude his argument, Hinman points to social data supporting registration requirements do not decrease recidivism or protect the community.<sup>96</sup> Instead, it creates an obstacle for offenders to reintegrate into society.<sup>97</sup>

### *B. Appellee's Argument*

The State argues the retroactive application of the SORA is not an *ex post facto* violation.<sup>98</sup> The individualized assessment of sex offenders and the SORA's "emphasis on the risks to the community" demonstrate that the SORA is not a regulatory scheme intended to punish.<sup>99</sup>

First, the State claims the SORA is not excessive because an offender can petition to remove his registration requirement after a

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<sup>88</sup> *Id.* (citing *Wallace v. Indiana*, 905 N.E.2d 371, 378 (Ind. 2009)).

<sup>89</sup> *Id.* (citing *Maine v. Letalien*, 85 A.2d 4, 26 (Me. 2009)).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 12.

<sup>92</sup> *Id.* at 12–13 (citing MONT. CODE ANN. § 46-23-508 (2017)).

<sup>93</sup> *Id.* at 13–14 (citing MONT. CODE ANN. § 46-23-504 (2021)).

<sup>94</sup> *Id.* at 14

<sup>95</sup> *Id.* at 14–15 (citing MONT. CODE ANN. § 46-23-504 (2003) and MONT. CODE ANN. § 46-23-504 (2017))

<sup>96</sup> *Id.* at 15–16 (citing Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 LA. L. REV. 509, 520 (2013)).

<sup>97</sup> *Id.* (citing Wilson, *supra* note 96, at 525).

<sup>98</sup> Brief of Appellee, *supra* note 1, at 17.

<sup>99</sup> *Id.* at 34.

certain period.<sup>100</sup> The State concedes the amount of information the offender is required to provide has increased since *Mount* but maintains the law is similar to the information required by Alaska in *Smith*.<sup>101</sup> The State asserts that Montana's individualized assessments of sex offenders determine the registration time and the amount of information disseminated; therefore, the SORA is not excessive.<sup>102</sup>

Next, the State contends the SORA is not an affirmative restraint or disability on the offender. Although the offender is now required to appear in person,<sup>103</sup> the SORA does not restrict where the level one or two offender works or lives.<sup>104</sup> The burden of appearing one time a year for a level one offender, twice a year for a level two offender and four times a year for a level three offender does not affirmatively restrain or disable the offender.<sup>105</sup>

**IV. ANALYSIS: THE COURT WILL LIKELY FIND THAT THE AMENDED SORA HAS A PUNITIVE EFFECT; THEREFORE, THE RETROACTIVE APPLICATION OF THE SORA IS AN EX POST FACTO VIOLATION, AND *MOUNT* SHOULD BE OVERTURNED.**

The Court will likely consider the *Mendoza-Martinez* factors to determine the totality of the factors is punitive in effect; thus, the law violates the *ex post facto* clause of the Montana Constitution—and *Mount* should be overturned.<sup>106</sup>

The Court will likely find the SORA imposes more of an affirmative disability on Hinman than *Mount*. In *Mount*, the Court stated *Mount* only had to appear in person once, to register initially.<sup>107</sup> Now, Hinman is required to return in person twice a year for at least twenty-five years before he may petition a court for

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<sup>100</sup> *Id.* at 34–35.

<sup>101</sup> *Id.* at 35.

<sup>102</sup> *Id.* at 33 (citing MONT. CODE ANN. § 46-23-509 (2001), MONT. CODE ANN. § 46-23-509 (2021)).

<sup>103</sup> *Id.* at 36.

<sup>104</sup> *Id.* (citing MONT. CODE ANN. § 45-5-513(6)(b) (2021), MONT. CODE ANN. § 46-23-509).

<sup>105</sup> *Id.*

<sup>106</sup> *State v. Mount*, 78 P.3d 829, 835 (Mont. 2003).

<sup>107</sup> *Id.* at 837.

relief.<sup>108</sup> Further, offenders on internet registries may suffer from limited housing and employment opportunities.<sup>109</sup>

When evaluating whether the law resembles historical punishments, the Court will likely find that the dissemination of offenders' information on the internet serves to inform the public. Alternatively, the Court may be persuaded by Justice Leaphart's dissent in *Mount*, postulating that the registry may also embarrass and "ostracize the convicts" bearing "resemblance to shaming punishments that were used . . . to disable offenders from living normally in the community."<sup>110</sup>

The Court will likely not find Hinman is being punished for his past offense. In *Mount*, the Court determined the defendant was not being punished for previous criminal behavior because failing to register is a separate offense. However, the Court may again be persuaded by Justice Leaphart's dissent because failing to register is only imposed on sexual and violent offenders and "severely impairs [the offender's] liberty," it is punishment for the past crime.<sup>111</sup>

The Court will likely find the information disseminated is excessive to the SORA's purpose of protecting the public.<sup>112</sup> The amount of information disseminated to the public has increased since *Mount*.<sup>113</sup> Although the offender's level determines the amount of information shared, level one offenders, who are deemed at low risk of reoffending,<sup>114</sup> now have their name, address, photograph, physical description, date of birth, and offense posted on the registry. The amended SORA is no longer "tailored to disclose only necessary information."<sup>115</sup>

Lastly, the Court will likely find the requirement that all offenders register for life is excessive. The SORA does not individualize the registration term based on the offender's risk level

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<sup>108</sup> MONT. CODE ANN. § 46-23-504(6) (2021); MONT. CODE ANN. § 46-23-506(3).

<sup>109</sup> *Smith v. Doe*, 538 U.S. 84, 109 (2003) (Souter, J., concurring).

<sup>110</sup> *Id.* (citing Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991)).

<sup>111</sup> *Mount*, 78 P.3d at 842 (Leaphart, J., dissenting) (quoting *Smith*, 538 U.S. at 113 (Stevens, J., dissenting)).

<sup>112</sup> *Id.* at 840.

<sup>113</sup> MONT. CODE ANN. § 46-23-508 (2001); MONT. CODE ANN. § 46-23-508 (2021).

<sup>114</sup> MONT. CODE ANN. § 46-23-509 (2021).

<sup>115</sup> *Mount*, 78 P.3d at 840.

because all offenders are subject to register for life.<sup>116</sup> In *Mount*, the Court found the SORA's lifetime registration requirement was not excessive because *Mount* may petition for relief after ten years.<sup>117</sup> Here, the registration requirement before Hinman may even petition for relief has increased to twenty-five years.<sup>118</sup>

In *Sedler*, the Court distinguished the importance of the petition process for sexual offenders than for violent offenders.<sup>119</sup> The Court stated the process requires “judicial determinations requiring discretionary considerations.”<sup>120</sup> The petition process reviews whether the offender has remained law-abiding and whether registration is no longer necessary for protecting the public.<sup>121</sup> These discretionary considerations should be determined when imposing the registration duration rather than applying a lifetime registration to low risk and moderate risk offenders. For offenders deemed at low or moderate risk of reoffending, registration for life is excessive.

Based on the totality of the *Mendoza-Martinez* factors, the Court will likely find the SORA post-*Mount* is punitive in effect; thus, the law violates the *ex post facto* clause of the Montana Constitution. As a result, *Mount* should be overturned.

## V. CONCLUSION

The Court in *State v. Hinman* has an opportunity to reconsider whether the SORA acts as retroactive punishment prohibited by the *ex post facto* clause of the Montana Constitution. The Court will likely apply the intent-effect test used in *Mount* to assess whether the amended SORA is punitive in its effect. If the Court finds the effect of the SORA is punitive, the law violates the Montana Constitution's *ex post facto* clause. For the reasons discussed above, the Montana Supreme Court will apply the *Mendoza-Martinez* factors to determine whether the SORA is punitive in effect. Therefore, the Court will likely find the amended SORA is a violation of the *ex post facto* clause of the Montana Constitution and that *Mount* should be overruled.

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<sup>116</sup> *Id.* at § 46-23-506

<sup>117</sup> *Mount*, 78 P.3d at 837–38.

<sup>118</sup> MONT. CODE ANN. § 46-23-506(3).

<sup>119</sup> *State v. Sedler*, 473 P.3d 406, 409 (Mont. 2020).

<sup>120</sup> *Id.*

<sup>121</sup> MONT. CODE ANN. § 46-23-506(3).