No. 18-1111

In the

Supreme Court of the United States

JAMES J. KAUFMAN,

Petitioner,

v.

SCOTT WALKER, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Wisconsin

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can the State of Wisconsin subject child sex offenders and repeat sex offenders to lifetime location tracking, consistent with the Fourth Amendment?

2. Can the State of Wisconsin impose location tracking requirements on child sex offenders and repeat sex offenders retroactively, consistent with the Ex Post Facto clause?

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INTRODUCTION

"Sex offenders are a serious threat in this Nation," *McKune v. Lile*, 536 U.S. 24, 32 (2002). State legislatures thus rightfully have "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Smith v. Doe*, 538 U.S. 84, 103 (2003).

To address this "serious threat," Wisconsin requires sex offenders who have assaulted children or committed multiple sex crimes to undergo lifetime location tracking. A small anklet device transmits their location at all times to the Wisconsin Department of Corrections (DOC) using global positioning system (GPS) data. By letting child and repeat sex offenders know that DOC could place them at the scene of a future crime, Wisconsin's program deters these offenders from committing more heinous sex offenses.

Like every federal circuit court to consider similar sex offender tracking programs, the lower court here correctly upheld Wisconsin's program against a Fourth Amendment and ex post facto challenge. Because no circuit split exists, certiorari should be denied. And although a few state high courts have reached superficially different results, a close examination shows that the tracking programs at issue in those cases differed from Wisconsin's in important ways. Because the Wisconsin Court of Appeals decision does not directly conflict with the decision of any federal circuit or state high court, certiorari should be denied.

Even assuming some limited tension exists in state courts, it is far from developed. Again, the federal circuits to consider these issues have all agreed with the decision below. Further percolation in the lower courts is therefore warranted, even if this Court is someday inclined to review the issues raised here.

The decision below also was right on the merits. Searches under the Fourth Amendment are reasonable either when they serve a special need or when they fulfill a strong government interest that outweighs a reduced expectation of privacy. Both are true here, given Wisconsin's strong interest in deterring sex crimes and the reduced privacy expectations of child and repeat sex offenders (who are already subject to public sex offender registry requirements). And because this important deterrent effect is achieved through an incrementally burdensome measure, Wisconsin's tracking program does not impose retroactive punishment that violates the Ex Post Facto clause.

The petition for certiorari should be denied.

STATEMENT OF THE CASE

I. Wisconsin's sex offender location tracking program.

In 2005, the Wisconsin Legislature enacted Wis. Stat. § 301.48, which requires the Wisconsin Department of Corrections to use GPS tracking to monitor released offenders who have committed

either sex crimes against children or multiple sex crimes. Wis. Stat. § 301.48(2)(a)1.–8. Qualifying offenders must wear a device that tracks their physical location at all times. Wis. Stat. § 301.48(3). The monitoring device does not record video or sound. Resp'ts' App. 2a.

By default, the GPS tracking requirement lasts for life, but offenders may petition a state trial court to terminate tracking after 20 years. Wis. Stat. § 301.48(2)(a), (6). DOC may also petition to end lifetime tracking of physically incapacitated offenders. Wis. Stat. § 301.48(7). GPS tracking terminates if the offender moves out of Wisconsin, but it resumes if the offender returns. Wis. Stat. § 301.48(7m).

The tracking statute does not empower DOC officials to search or otherwise enter the home of a tracked offender. *See* Wis. Stat. § 301.48. Nor does the tracking program impose any movement or travel restrictions on Petitioner. Resp'ts' App. 2a.

II. Petitioner's sex offenses.

In November 1997, Petitioner pleaded guilty to his first of three child sex crimes, felony first-degree sexual assault of a child, for fondling an eleven-year-old boy. App. B3. Soon after, in connection with a separate incident, Petitioner again pleaded guilty to both felony sexual exploitation of a child and felony possession of child pornography. App. B3. Witness statements indicate that Petitioner paid around $300 to $500 to his cousin's underage boyfriend for

Petitioner to perform and videotape oral sex on the boyfriend, while Petitioner's cousin watched. App. B3.

The court sentenced Petitioner for his multiple sex crimes in June 1998. He received nine years in prison and 20 years of probation that began upon his release. App. B3. Petitioner served his entire prison term and was released in June 2007. App. B4.

Only a few months later, Petitioner began violating his probation terms. Petitioner was barred from using the internet except for employment purposes, but in December 2007 authorities discovered that he had created a MySpace social media account and viewed pornography. App. B4.

Rather than revoke Petitioner's probation, DOC allowed him to participate in a sex offender treatment program. App. B4. He completed that program and was released on July 2, 2008. App. B4. But soon after leaving the program, he again impermissibly accessed internet pornography. App. B4. Some of that pornography included sexually explicit stories about adults having intercourse with underage males. App. B4.

This time, DOC recommended that Petitioner's probation be revoked. App. B4. An administrative law judge concluded that Petitioner "was and remains a serious threat to children" and revoked his probation, a decision that was affirmed in an administrative appeal. App. B4.

Petitioner returned to the trial court for sentencing in March 2009. The court commented that "the most concerning thing about it . . . is that you did it within weeks of being released from the most significant and beneficial treatment you'd had in the past ten years, where you learned the most and understood the most about your criminal activity." App. B5. The court sentenced Petitioner to eight more years in prison. App. B4–5. After serving around four years of that sentence, Petitioner was granted supervised release in May 2013; his supervision ended in January 2016. App. B5.

Upon Petitioner's release in May 2013, he began wearing a GPS tracking anklet. App. B5. His multiple sex crime convictions triggered Wis. Stat. § 301.48(2)(a)7., which requires GPS location tracking of recidivist offenders who have committed multiple sex crimes.

III. The litigation below.

In April 2015, Petitioner filed a complaint in state court seeking a declaratory judgment that Wis. Stat. § 301.48 enables unreasonable searches under the United States and Wisconsin Constitutions, violates the Ex Post Facto clauses of the United States and Wisconsin Constitutions, and violates his due process rights under the United States Constitution. App. B5.

The state trial court entered an order denying Petitioner's motion for a declaratory judgment. App. B5. The state court of appeals affirmed.

The court of appeals rejected Petitioner's ex post facto claim, holding that imposing location tracking does not inflict retroactive "punishment" under *Smith*. App. B7–9. The court relied on the Wisconsin Supreme Court's decision in *State v. Muldrow*, 912 N.W.2d 74 (Wis. 2018), which held that Wis. Stat. § 301.48 was not intended to be punitive because "the intent of lifetime GPS tracking centers more closely around the protection of the public than it does punishment of the offender."[1] App. B8 (quoting *Muldrow*, 912 N.W.2d at 86). *Muldrow* also applied the "intent-effects" test outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–70 (1963), which examines whether a sanction's effects amount to punishment even if the legislature did not intend to punish. After analyzing *Mendoza-Martinez*'s seven factors, *Muldrow*—applied by the court of appeals here—held that "neither the intent nor the effect of the lifetime GPS tracking is punitive." App. B8–9 (quoting *Muldrow*, 912 N.W.2d at 89).

The court of appeals also rejected Petitioner's Fourth Amendment claim. It relied on *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), where this Court held that GPS tracking constitutes a "search" for Fourth Amendment purposes but declined to resolve whether the search was "reasonable" and thus passed

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[1] Although *Muldrow* addressed whether guilty pleas can be rendered involuntary due to the failure to advise defendants that lifetime location tracking will result from the plea, the Wisconsin Supreme Court noted that "[t]he threshold question for ex post facto violations is the same as the threshold question" presented in *Muldrow*. 912 N.W.2d 74, 78–79 (Wis. 2018).

Fourth Amendment muster. *Grady* cited *Samson v. California*, 547 U.S. 843 (2006) and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) as guideposts for that "reasonableness" analysis.

Both *Samson* and *Vernonia* provided a doctrinal framework for the court of appeals' decision. Under *Samson*, a search is reasonable under the totality of the circumstances if the governmental interest outweighs the intrusion on individual privacy. 547 U.S. at 848. The search here passed that test, the court of appeals held, because convicted sex offenders have diminished privacy expectations and location tracking serves the strong government interest in deterring repeat child sex offenders from assaulting more children. App. B13–15.

The court also held that Wisconsin's tracking program also passed muster under *Vernonia*, which allows "special needs" searches when the warrant and probable-cause requirement is "impracticable." 515 U.S. at 653. The "special need" here—deterring future sex offenses—cannot be accomplished under a warrant requirement and outweighs child and repeat sex offenders' reduced privacy expectations. App. B15–18.

The Wisconsin Supreme Court denied a petition for review of the court of appeals' decision. This petition followed.

REASONS FOR DENYING THE PETITION

I. Petitioner does not identify a split of authority that merits this Court's review.

Petitioner does not identify a meaningful lower court conflict that merits certiorari. In fact, Petitioner has not cited (and Respondents are not aware of) a single federal circuit court that has invalidated a state's sex offender location tracking program under either the Fourth Amendment or the Ex Post Facto clause. The only federal circuits to consider these issues align with the decision below. And although a few state high courts have reached different results, those courts all agree on the controlling legal tests. Dissimilarities between Wisconsin's program and those at issue in other cases explain the differing results—not a true "conflict" of authority. Certiorari is not warranted simply because some state courts have reached different results after considering different tracking programs.

Even if some tension does exist among a few state court decisions, that still does not warrant certiorari. Only one circuit court and four state high courts have grappled with Fourth Amendment issues in the sex offender location tracking context. Likewise, only two circuit courts and four state high courts have applied the Ex Post Facto clause to tracking programs. There thus is good reason to allow these novel constitutional issues to percolate further in the lower courts, especially since there is no federal circuit split.

A. The Wisconsin Court of Appeals decision does not conflict with the only federal court of appeals decision on the Fourth Amendment issue or with any of the state high court decisions on that issue.

The only federal circuit decision that Petitioner cites upheld Wisconsin's sex offender location tracking program against a Fourth Amendment challenge.

In *Belleau v. Wall*, 811 F.3d 929, 932–37 (7th Cir. 2016), Judge Posner relied on *Samson*'s "totality of the circumstances" test—one of the two Fourth Amendment doctrines this Court cited in *Grady*—to uphold Wisconsin's tracking program. *Belleau*, like the decision below, explained that repeat sex offenders have lower privacy expectations due in part to sex offender registry requirements like those this Court upheld in *Smith*. *Belleau*, 811 F.3d at 934–35. *Belleau* also noted statistics concerning the high rate of recidivism for sex offenders, which establishes Wisconsin's significant interest in measures aimed to reduce that rate. *Id.* at 933–34. Finally, *Belleau* emphasized that location tracking is less intrusive than alternatives that might be necessary absent such a program, like further imprisonment or civil commitment. *Id.* at 933.

Judge Flaum concurred, writing that *Vernonia*'s "special needs" analysis—the other doctrine this Court cited in *Grady*—supported Wisconsin's program. *Id.* at 939–41. He reasoned, like the lower

court did, that Wisconsin's tracking program serves the special need of "reduc[ing] recidivism by letting offenders know that they are being monitored and creat[ing] a repository of information that may aid in detecting or ruling out involvement in future sex offenses." *Id.* at 940. Although the information gathered may ultimately be used in a prosecution, "the program is setup to obviate the likelihood of such prosecutions." *Id.*

Respondents are not aware of any other circuits that have considered, let alone invalidated, a sex offender location tracking program on Fourth Amendment grounds. No circuit split exists that would justify this Court's review.

Examining state high court decisions does not reveal a meaningful split, either.[2] At least one other state high court—Delaware's—agrees with the decision below. In *Doe No. 1 v. Coupe*, No. 458, 2016, 2017 WL 837689 (Del. Mar. 3, 2017) (mem.), the Delaware Supreme Court affirmed a decision that largely tracks the lower court's Fourth Amendment analysis here. *See Doe v. Coupe*, 143 A.3d 1266, 1274–81 (Del. Ch. 2016).

The only arguably conflicting state court decision that Petitioner identifies is *Park v. State*, 825 S.E.2d 147 (Ga. 2019). There, Georgia's high court held that the state's sex offender location monitoring program

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[2] To the extent Petitioner relies on intermediate state court cases, such decisions do not create a "conflict" that justifies certiorari. Sup. Ct. R. 10(b).

did not survive Fourth Amendment scrutiny. *Id.* at 158. But *Park* noted that the case was "distinguishable" from other states' statutory schemes that had survived Fourth Amendment scrutiny. *Id.* 156. Importantly, Georgia's scheme did not allow sex offenders to ever lift location tracking requirements, while Wisconsin's scheme does. *See* Wis. Stat. § 301.48(6)–(7). This distinction reduces the burden of Wisconsin's program on sex offenders' privacy interests and indicates that *Park* does not directly conflict with the decision below.

Petitioner cites no other conflicting state high court decisions, but Respondents' research reveals two candidates: *Commonwealth v. Feliz*, 119 N.E.3d 700 (Mass. 2019), and *State v. Ross*, 815 S.E.2d 754 (S.C. 2018). Both decisions, like *Park*, do not directly conflict with the decision below given factual distinctions between the tracking programs at issue.

Feliz held that Massachusetts violated its state constitution's search and seizure provision by tracking an offender through a program like Wisconsin's. But *Feliz* is distinguishable both on the facts and the law. First, Massachusetts' state constitution offers more protections than the Fourth Amendment. *See, e.g.*, *Feliz*, 119 N.E. 3d at 711 n.18. By deciding the case solely under its state constitution, the Massachusetts court did not purport to resolve whether the Fourth Amendment itself requires invalidation of sex offender tracking programs.

Moreover, *Feliz*, an as-applied challenge, "emphasize[d] that the defendant's circumstances differ substantially from cases in other jurisdictions where GPS monitoring of a sex offender has been upheld as a reasonable search" and expressly distinguished the case from *Belleau* (which, again, upheld Wisconsin's tracking program). 119 N.E. 3d at 715. Most importantly, Massachusetts assigned the *Feliz* offender a "low risk of reoffense and a low degree of risk to the public," *id.*, whereas here a Wisconsin judge revoked Petitioner's probation after he repeatedly violated terms of his release, concluding that Petitioner "was and remains a serious threat to children." App. B4. Moreover, the *Feliz* offender was convicted on child pornography charges, while the *Belleau* offender—like Petitioner here—was a repeat offender who sexually assaulted children. Because Petitioner's as-applied challenge here depends on his facts and circumstances (notably his status as a repeat child sex offender), *Feliz*'s factual distinctions mean it would not conflict with the decision below, even if the decision had rested on the Fourth Amendment.

As for *Ross*, another as-applied challenge, it invalidated South Carolina's application of its location tracking program to a sex offender on Fourth Amendment grounds. 815 S.E.2d at 759. But that case also differs factually from this one: the *Ross* offender qualified for tracking solely due to a failure to properly register for South Carolina's sex offender registry. *Id.* at 755. That presents a much different Fourth Amendment issue. Here, the tracking

requirement arose out of Petitioner's substantive sex offense, not a failure to properly register on Wisconsin's sex offender registry. While it is reasonable to track offenders because of their sex crimes for deterrence purposes, the analysis may differ for an offender not otherwise subject to tracking who simply failed to properly register. Because this distinction matters to an as-applied Fourth Amendment challenge like this one, *Ross* does not conflict with the decision below.

In sum, only one federal circuit and four state high courts have analyzed sex offender tracking programs like Wisconsin's under the Fourth Amendment. There is no federal circuit split. And given this small sample and the material factual differences among the state programs, no conflict of authority exists with state court decisions that would justify certiorari.

Even if this Court is inclined to someday review this issue, other lower courts should be given the opportunity to weigh in first. As Judges Posner's and Flaum's separate opinions in *Belleau* show, multiple strands of Fourth Amendment doctrine can be used to analyze tracking programs like Wisconsin's. And, again, states' tracking programs differ in meaningful ways. Decisions from other circuit courts exploring different facts and different doctrines would aid any decision this Court might ultimately render. Further percolation should be allowed before this Court considers stepping in.

B. The Wisconsin Court of Appeals decision does not conflict with the only two federal courts to consider the ex post facto issue or with any state high court decisions on that issue.

Petitioner also does not identify any federal circuit decisions that conflict with the lower court's ex post facto holding. Again, he identifies only circuits that have upheld location tracking programs against ex post facto challenges. Respondents are unaware of other circuits that have addressed the issue, and so no circuit split exists that would justify certiorari.

In *Belleau*, the Seventh Circuit also rejected an ex post facto challenge to Wisconsin's tracking program. Judges Posner and Flaum wrote separately to explain why retroactively imposing location tracking on sex offenders is not ex post facto "punishment" under *Smith* and the relevant factors from *Mendoza–Martinez*.

As Judge Posner succinctly explained, "[t]he monitoring law is not punishment; it is prevention." *Belleau*, 811 F.3d at 937. He cited *Kansas v. Hendricks*, 521 U.S. 346, 368–69 (1997), where this Court held that the civil commitment of dangerous sex offenders is prevention, not punishment. If civil commitment—undoubtedly a more onerous condition than location tracking—is not punishment, then neither is location tracking. Judge Flaum concurred after analyzing the five *Mendoza-Martinez* factors

emphasized in *Smith*'s analysis of the non-punitive nature of sex offender registries.

The Sixth Circuit rejected a similar ex post facto challenge to Tennessee's sex offender location tracking program in *Doe v. Bredesen*, 507 F.3d 998, 1008 (6th Cir. 2007). *Bredesen*, again citing *Smith*'s approval of retroactive sex offender registries and *Hendricks*' approval of civil sex offender confinement, explained that "the imposition of restrictive measures on sex offenders adjudged to be potentially dangerous is 'a legitimate nonpunitive governmental objective.'" 507 F.3d at 1004 (citation omitted). The Sixth Circuit then analyzed the same *Mendoza-Martinez* factors as Judge Flaum and concluded that retroactive tracking does not have a sufficiently punitive effect to amount to "punishment." *Id.* at 1004–07.

As for state high courts, one agrees with the decision below: *State v. Bowditch*, 700 S.E.2d 1 (N.C. 2010). After applying *Smith* and the *Mendoza-Martinez* factors, North Carolina's high court concluded that "[t]he [location tracking] program at issue was enacted with the intent to create a civil, regulatory scheme to protect citizens of our state from the threat posed by the recidivist tendencies of convicted sex offenders" and that "neither the purpose nor effect of the [tracking] program negates the legislature's civil intent." *Bowditch,* 700 S.E.2d at 13.[3]

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[3] *See also In re Justin B.*, 747 S.E.2d 774, 781–83 (S.C. 2013) (holding that South Carolina's sex offender location tracking program did not impose punishment for Eighth Amendment purposes, after analyzing the *Mendoza-Martinez* factors).

Two state high courts have reached an arguably different result: *Riley v. New Jersey State Parole Board*, 98 A.3d 544 (N.J. 2014), and *Commonwealth v. Cory*, 911 N.E.2d 187 (Mass. 2009). Like in the Fourth Amendment context, however, those cases do not actually conflict with the decision below. Applying the multi-factor *Mendoza-Martinez* test requires careful attention to the specific tracking scheme at issue to determine whether it falls on the remedial or punitive side of the spectrum. Different courts reviewing different location tracking schemes may well come to different conclusions. That does not mean a conflict exists; it means that facts specific to each state's tracking program matter.

Begin with *Riley*, which held that retroactive application of New Jersey's tracking program violated the Ex Post Facto clause. 98 A.3d at 557–60. But New Jersey's program differed from Wisconsin's in several ways material to the ex post facto analysis. First, New Jersey's program had significant parole officer involvement—offenders had to notify officers of changes in residence, employment, employment schedule, and permit officers to enter their homes to maintain equipment and monitor noncompliance. *Id.* at 558. Wisconsin's program has no such parole officer involvement. Second, any violation of these requirements subjected offenders to a felony charge, *Id.* at 548, 558. while offenders in Wisconsin are subject to criminal charges only for tampering with their tracking devices. *See* Wis. Stat. § 946.465. Third, New Jersey offenders could never be released from their tracking obligation, whereas Wisconsin

offenders can. *Riley*. 98 A.3d at 548. Fourth, *Riley* emphasized travel limitations imposed on offenders by the tracking requirements, but Petitioner here is not subject to any such restrictions. *Id.* at 559; App. B12. Each of these facts mattered to one of the *Mendoza-Martinez* factors, and none of them are present here.

And the *Cory* case out of Massachusetts considered a program meaningfully different from Wisconsin's. Most prominently, the Massachusetts program accompanied tracking with geographic exclusion zones that subjected offenders to a crime for trespassing in them. 911 N.E. 2d at 190–91. Again, no such zone applied to Petitioner. Resp'ts' App. 2a.

Like with the Fourth Amendment issue, no meaningful split of authority exists that warrants review of the ex post facto question. The only two federal circuits to consider the issue reached results consistent with the decision below, and the only two arguably contrary high court decisions addressed programs distinguishable from Wisconsin's. Novel applications of the settled, multi-factor *Mendoza-Martinez* test to different tracking programs does not justify certiorari. And to the extent some tension does exist among the lower courts, this ex post facto issue also should be given more time to percolate given the small number of courts to consider it.

II. The lower court properly applied this Court's Fourth Amendment and ex post facto tests.

Setting aside the lack of a meaningful split of authority, the decision below reached the correct result.

First, the lower court faithfully applied both Fourth Amendment doctrines this Court cited in *Grady* to guide the analysis of whether sex offender location tracking programs are reasonable: the totality of the circumstances, under *Samson*; and special needs, under *Vernonia*. In a nutshell, Wisconsin's strong interest in deterring child and recidivist sex offenders outweighs those offenders' reduced privacy expectations.

The decision below also correctly resolved the ex post facto issue. Wisconsin's tracking program has the non-punitive intent and effect of protecting the public by deterring future sex offenses.

A. The decision below complies with the Fourth Amendment.

In *Grady*, this Court explained that "[t]he reasonableness of a [sex offender location tracking program] depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." 135 S. Ct. at 1371. To guide the reasonableness analysis, *Grady* pointed to *Samson* and *Vernonia*.

135 S. Ct. at 1371. The lower court here properly concluded that both decisions support Wisconsin's tracking program.

1. Totality of the circumstances.

Samson, which upheld suspicionless searches of parolees, sets out the Fourth Amendment's "totality of the circumstances" doctrine. This test "assess[es], on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." 547 U.S. at 848. If this balance favors the government, the search is reasonable under the Fourth Amendment.

On the first *Samson* prong—privacy—the lower court correctly noted that "repeat sex offenders have diminished privacy expectations," primarily due to pre-existing sex offender registry requirements. App. B13; *see also Belleau*, 811 F.3d at 934–35. Petitioner responds that that location tracking is more burdensome than registry requirements, Pet. 6–8, but, even if true, that misses the point. Existing registry requirements (which include public access to offenders' criminal records and home addresses) show that society recognizes that sex offenders do not have a reasonable expectation of privacy regarding their location, even after a parole or probation period ends. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (the Fourth Amendment protects privacy expectations "that society is prepared to recognize as 'reasonable'").

Petitioner thus cannot reasonably dispute that, given his repeated sex crimes against children, he has a reduced reasonable privacy expectation.

The Fourth Amendment question thus becomes whether the governmental interest in tracking him outweighs the incremental privacy intrusion. It does, given the State's powerful interest in deterring child and repeat sex offenders from committing more sex crimes. App. B14–15; *see also Belleau*, 811 F.3d at 933–34. This Court has correctly concluded that sex offenders' recidivism rates are "frightening and high." *McKune*, 536 U.S. at 34. It noted that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 33.

Although *McKune*'s recidivism discussion has faced recent critique, that criticism is inapt because it rests on reoffense *conviction* or *arrest* rates. As Judge Posner explained in *Belleau*, "[t]here is serious underreporting of sex crimes, especially sex crimes against children." 811 F.3d at 933. Two studies indicate that between 70 and 86 percent of child sexual assaults go unreported. *Id.* One recent study concluded that, depending on the assumptions made about reporting and conviction rates, true sex offender recidivism rates may range from 70–90% over a 30-year period.[4] An analysis based solely on arrests and convictions therefore seriously

[4] *See also* Nicholas Scurich & Richard S. John, *The Dark Figure of Sexual Recidivism* 37 Behav. Sci. & L. 158 (2019).

understates the true recidivism risk posed by child sex offenders.

But even a recidivism analysis based on rearrest rates is alarming. One study showed that "'[r]eleased child molesters with more than 1 prior arrest for child molesting' had a 7.3% chance of being rearrested for child molesting." App. B14 (quoting *Recidivism of Sex Offenders Released From Prison in 1994*).[5] Moreover, rearrest rates do not consistently decrease as offenders age, which supports the lifetime nature of Wisconsin's tracking program. App. B14–15. And even if, as Petitioner says, some non-sex offenders do reoffend at higher rates (which he offers no proof of), Pet. 10, that is an apples-to-oranges comparison given the uniquely heinous nature of child sex offenses. Even a 7.3% reoffense rate is far too high for such a crime.

The decision below thus properly concluded that "under the totality of the circumstances, given the diminished nature of Petitioner's privacy interest and Wisconsin's particularly strong interest in reducing recidivism through the information collected by the tracking device, the Wisconsin tracking requirement for convicted sex offenders is reasonable under the Fourth Amendment." App. B15. *See also Belleau*, 811 F.3d at 936 (Wisconsin's program is reasonable "[g]iven how slight is the incremental loss of privacy from having to wear the anklet monitor, and how

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[5] Bureau of Justice Statistics, U.S. Dep't of Justice, *Recidivism of Sex Offenders Released From Prison in 1994*, 1 (Nov. 2003), http://www.bjs.gov/content/pub/pdf/rsorp94.pdf.

valuable to society (including sex offenders who have gone straight) the information collected by the monitor is").

2. Special needs.

Under *Vernonia*'s "special needs" test, "[a] search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" 515 U.S. at 653 (citation omitted). The "special needs" doctrine does not apply, however, if the "primary purpose of the . . . program is to uncover evidence of ordinary criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000). If a "special need" exists, then the need must be balanced against the affected privacy interest. *Id.* at 47.

Wisconsin's tracking program serves the special need of "reducing recidivism by letting offenders know that they are being tracked and creating a repository of information that may assist in detecting or ruling out future sex offenses." App. B16–17. Petitioner responds that the program improperly seeks evidence of ordinary criminal wrongdoing under *Edmond*. Pet. 8. But this Court has repeatedly recognized protecting the public by deterring unlawful conduct as a legitimate "special need." *See Vernonia*, 515 U.S. at 653 (drug testing program served special need of deterring drug use among student athletes); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (same, among railway workers); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (same, among

customs officials); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (sobriety checkpoints served special need of deterring drunk driving). All those programs also had the secondary effect of uncovering evidence of criminal wrongdoing, but they passed Fourth Amendment muster because that was not their *primary* purpose—deterrence was. The same is true here.

On the next step of the "special needs" analysis, the need to deter child and repeat sex offenders from committing more sex crimes outweighs those offenders' reduced privacy interests in their location. App. B17. This balancing analysis mirrors the one above—sex offenders have a reduced reasonable expectation of privacy that is outweighed by the State's need to reduce the alarmingly high sex offender recidivism rate.

Petitioner tries to alter the special needs doctrine by arguing that it applies only to "temporary" or "emergency" situations, Pet. 11–12, but none of the cases he cites limited the doctrine in that way. The special needs doctrine focuses on situations where it is impracticable to obtain a warrant, not necessarily because of time pressures but because of the program's nature. For example, the sobriety checkpoints in *Sitz* were driven not by temporary emergencies, but by the impossibility of getting warrants before randomly administering sobriety tests to drivers and thus deterring drunk driving. The same is true here because Wisconsin's goal is to prevent future sex crimes. Because "there is no

specific crime to give rise to probable cause. . . the traditional safeguards of the Fourth Amendment, such as the warrant requirement, are unworkable." *Belleau*, 811 F.3d at 941.

The lower court thus properly concluded that "in light of the State's special need to protect children from sex offenders, the GPS's relatively limited scope, and [Petitioner's] diminished expectation of privacy, the GPS monitoring program constitutes a reasonable special needs search." App. B18.

B. The Wisconsin statute complies with the Ex Post Facto clause.

The Wisconsin Supreme Court decision on which the decision below relied—*State v. Muldrow*, 912 N.W.2d 74 (Wis. 2018)—faithfully applied this Court's ex post facto test under *Smith*. In *Smith*, this Court emphasized five factors from *Mendoza-Martinez* in deciding that Connecticut's sex offender registry was not "punitive" and thus could be applied retroactively: "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith*, 538 U.S. at 97.[6]

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[6] Petitioner's position that Wisconsin's tracking program imposes punishment relies on the wrong test. Rather than discuss the *Mendoza-Martinez* factors, he addresses five factors

Muldrow rightly reasoned that: (1) Wisconsin's program does not involve an affirmative disability or restraint because the offender "is not confined and has substantial freedom of movement," 912 N.W.2d at 86; (2) location tracking does not involve traditional indicia of punishment, as any shaming effect is minimal and incidental, *id.* at 86–87; (3) although tracking deters crime—one traditional aim of punishment—*Smith* teaches that this factor is not determinative, *id.* at 87; (4) tracking serves the non-punitive purpose of protecting the public against future sex offenses, again as this Court recognized in *Smith*, *id.* at 88; and (5) Wisconsin's program is properly tailored to this purpose, because it occupies the middle ground between unsupervised release into the community and civil commitment, *id.*

Petitioner attempts a strained analogy to parole and probation, arguing that Wisconsin's tracking program is akin to those kinds of punishment. Pet. 15. That ignores the many ways in which supervised release in Wisconsin is far more burdensome and restrictive than a system that only tracks Petitioner's location. For one, parolees may have their residences and property searched at any time. Wis. Stat. § 304.06(1r); Wis. Admin. Code DOC § 328.04(3)(g). Petitioner must only allow entrance to private technicians who contract with the state to maintain his tracking device if it becomes inoperable. Moreover, offenders on supervised release are

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from a book authored by the legal philosopher H.L.A. Hart. Pet. 14.

"subject . . . to the control of the [Wisconsin Department of Corrections (DOC)] under conditions set by the court and rules and regulations established by [DOC]." Wis. Stat. § 973.10(1). Some standard conditions include obtaining DOC permission before changing residence or employment, Wis. Admin. Code DOC § 328.04(3)(h), traveling out of state, Wis. Admin. Code DOC § 328.04(3)(i), buying a car, Wis. Admin. Code DOC § 328.04(3)(j), or borrowing money or purchasing on credit, Wis. Admin. Code DOC § 328.04(3)(k). None of these restrictions compare to the location tracking of sex offenders.

Petitioner's reliance on *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), does not help his cause, either. Pet. 16. First, that case concerned a sex offender registry, not a location tracking system. Second, *Snyder*'s registry program involved extremely burdensome mandatory geographical restrictions that are absent here. *Snyder,* 834 F.3d at 701–02. Third, the lack of individualized assessments posed a problem in *Snyder* because Michigan publicized a tier system that purported to estimate the offender's present dangerousness. *Id.* at 702–03. Wisconsin's tracking program has no such analogue. Last, this Court did not "uphold" *Snyder* as Petitioner asserts; it declined to grant certiorari. That is exactly the result this Court should reach here, for (presumably) the same reason it declined to review *Snyder*—no conflict of authority exists. This Court's decision not to review *Snyder* simply underlines that lower courts can faithfully apply *Mendoza-Martinez*'s multi-factor

test to sex offender programs with different attributes and reach different results.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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June 19, 2019

RESPONDENTS' APPENDIX

RESPONDENTS' APPENDIX A

STATE OF WISCONSIN
CIRCUIT COURT DANE COUNTY BRANCH 13

JAMES J. KAUFMAN,
PLAINTIFF,

v. Case No. 15CV1128
Declaratory Judgment: 3071

SCOTT WALKER, ET AL.,
DEFENDANTS.

AFFIDAVIT OF GRACE KNUTSON

GRACE KNUTSON, being first duly sworn, on oath states as follows:

1. I am employed by the Wisconsin Department of Corrections (DOC) as the Director of Sex Offender Programs. I have held this position since July, 29, 2012.

2. I make this affidavit on the basis of my personal knowledge and review of the regularly maintained institutional records.

3. In my capacity as the Director of Sex Offender Programs, my duties and responsibilities include ongoing development and oversight of several Department of Corrections sex offender operations

including sex offender registration, community notification, pharmacological treatment, polygraph examination, and direct administration of the Electronic Monitoring Center. I am personally familiar with GPS monitoring of Mr. James J. Kaufman

4. Mr. Kaufman's GPS monitoring does not restrict him from going anywhere. He has no location or travel prohibitions.

5. GPS monitoring does not empower DOC to enter the home of a registrant, take custody of a registrant, or request that law enforcement enter the home of a registrant.

6. DOC employees do not make in-person visits to registrants in conjunction with the GPS program.

7. If a registrant decides to move out of state, the GPS monitoring ceases. DOC or the contracted vendor removes the device in those instances.

8. Registrants' location is recorded, and locations are normally reviewed retroactively ever 24 hours. This is done at night, where a DOC employee views a Bing computer map, which displays points showing the locations and movements of a particular person over the last 24 hours.

9. The GPS monitoring devices do not record video or sound.

10. Mr. Kaufman is monitored because he committed a "level 1" child sex offense and was released from supervision after January 1, 2008.

s/ Grace Knutson
GRACE KNUTSON

Subscribed and sworn to before me
this 9th day of August 2016.

Linda A. Lembcke
[Sign Name]

Linda A. Lembcke
[Print Name]
Notary Public, State of Wisconsin
My Commission expires: 7-2-17.