No. 18-1111

IN THE

Supreme Court of the United States

JAMES J. KAUFMAN,

Petitioner,

v.

TONY EVERS, Governor of Wisconsin;
JOSH KAUL, Attorney General of Wisconsin;
DENISE SYMDON, Administrator,
Wisconsin Dept. of Corrections,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. The Split in Authority Is Clear and Has Recently Deepened

Wisconsin insists that certiorari should be denied because there is not a "meaningful lower court conflict." BIO at 6. But the decision of the Wisconsin Court of Appeals cannot be reconciled with the decisions of the high courts of Georgia, South Carolina and Massachusetts, all of which have found that the government may not categorically apply GPS monitoring to individuals who are not under the supervision of the criminal justice system.

- *Park v. State*, 305 Ga. 348, 825 S.E.2d 147 (Ga. 2019): The Georgia Supreme Court found that a state law authorizing lifetime satellite-based monitoring of individuals who have been convicted of sex offenses violates the Fourth Amendment on its face because such individuals do not have a diminished expectation of privacy after completing their criminal sentences;

- *State v. Ross*, 423 S.C. 504, 815 S.E.2d 754 (S.C. 2018): The South Carolina Supreme Court found that automatic imposition of lifetime electronic monitoring on individuals who had been convicted of qualifying sex offenses violated the Fourth Amendment. Electronic monitoring could only be ordered after a judicial determination that monitoring was reasonable based on the totality of the circumstances of an individual case; and

- *Commonwealth v. Feliz*, 481 Mass. 689, 119 N.E.3d 700 (Mass. 2019): Massachusetts' Supreme Court found that automatic imposition of GPS monitoring violated the state constitution's search and seizure provision because "GPS monitoring will not necessarily constitute a reasonable search for all individuals convicted of a qualifying sex offense."

The split in authority has recently deepened with the August 16, 2019, decision of the North Carolina Supreme Court in *State v. Grady*, ___ N.C. ___, No. 179A14-3, 2019 N.C. LEXIS 799 (Aug. 16, 2019) ("*Grady II*"). In *Grady II*, the North Carolina Supreme Court found the state's GPS monitoring program "unconstitutional as applied to all individuals who … are subject to mandatory lifetime [monitoring] based solely on their status as a 'recidivist.'" *Id.* at *4. Like the Supreme Courts of Georgia, Massachusetts, and South Carolina, the North Carolina Supreme Court ruled that individuals who are no longer under criminal justice supervision cannot categorically be subjected to GPS monitoring based solely on their history of having been convicted of sex offenses.

Wisconsin attempts to distinguish these decisions by pointing to insignificant factual differences (*e.g.*, Wisconsin allows individuals to seek relief from lifetime monitoring after twenty years while Georgia does not; the plaintiff in *Feliz* had been convicted of child pornography while petitioner was convicted of assault). BIO at 11–13. Notwithstanding surface differences, the reasoning and conclusions of these various decisions are in conflict. That is, the high courts of Georgia, South Carolina, Massachusetts and North Carolina have all determined that the Fourth

Amendment prohibits governments from forcing individuals who are no longer under the supervision of the criminal justice system to wear tracking devices—at least not without an individualized judicial determination that such tracking is reasonable. Wisconsin and the Seventh Circuit Court of Appeals have reached the opposite conclusion. *See* App. XI-1; *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016).[1]

Wisconsin suggests that the conflict should be allowed to further "percolate" before this Court weighs in. BIO at 8. But there is no reason for delay. There is already a deep split in authority with six conflicting decisions—two upholding lifetime monitoring schemes and four rejecting them. The lower courts are in urgent need of guidance because this issue is certain to recur. Thirteen states have passed laws calling for lifetime monitoring of individuals who have been convicted of sex offenses.[2] The Fourth Amendment rights of tens of thousands of individuals are at stake.

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[1] Wisconsin claims that Delaware's high court "agrees with the decision below." BIO at 10, *citing Doe v. Coupe*, 143 A.3d 1266, 1274–81 (Del. Ch. 2016) (*aff'd by Doe v. Coupe*, 158 A.3d 449 (Del. 2017)). But *Coupe* concerned GPS monitoring of individuals who were on parole or probation for sex offenses. Parolees and probationers have a diminished expectation of privacy by virtue of their status within the criminal justice system. *Samson v. California*, 547 U.S. 843, 850 (2006); *U.S. v. Knights*, 534 U.S. 112, 119 (2001). This case is thus of limited relevance here.

[2] These states are California, Florida, Kansas, Louisiana, Maryland, Michigan, Missouri, North Carolina, Oregon, Rhode Island, South Carolina, Wisconsin, and Georgia. Cal. Penal Code §3004(b) (West 2016); Fla. Stat. §948.012(4) (2016); Kan. Stat. Ann. §22-3717(u) (2016); La. Rev. Stat. Ann. §15:560.3(A)(3) (2016); Md. Code Ann., Crim. Proc. §11-723(d)(3)(i) (LexisNexis 2016); Mich. Comp. Laws §750.520n (2016); Mo. Rev. Stat. §217.735(4) (2016); N.C.G.S. §§14-208.40A(c),–208.40B(c); Or.

II. The Court's 'Special Needs' Jurisprudence Is In Disarray

A core source of conflict in the decisions below is the ambiguity in the Court's pronouncements concerning the "special needs" doctrine. This Court has described the special needs doctrine as "an exception to the general rule that a search must be based on individualized suspicion of wrongdoing" which authorizes "certain suspicionless searches performed for reasons unrelated to law enforcement." *City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000). It is, however, far from clear what constitutes a search "unrelated to law enforcement."[3]

Rev. Stat. §§137.700, 144.103 (2016); R.I. Gen. Laws §11-37-8.2.1 (2016); S.C. Code Ann. §23-3-540 (Supp. 2018); Wis. Stat. §301.48 (2016). The Georgia Supreme Court found Georgia's lifetime monitoring statute, Ga. Code Ann. § 42-1-14(e) (2016), unconstitutional on its face. *Park*, 305 Ga. 348, 360–61, 825 S.E.2d 147, 158. *See Grady* at *10 n.2 (summarizing statutes).

[3] This Court has used inconsistent language to describe the situations in which it is proper to apply a special needs analysis. In various cases, the Court has suggested that the special needs doctrine does not extend to searches conducted for "law enforcement ends" (*Ferguson v. City of Charleston*, 532 U.S. 67, 74 (2001)); searches conducted for the "primary purpose" of detecting "evidence of ordinary criminal wrongdoing" (*Edmond*, 531 U.S. at 41); searches that serve a "purely investigatory purpose" (*Colorado v. Bertine*, 479 U.S. 367, 372 (1987)); searches related to the "ordinary needs of law enforcement" (*Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989)); searches conducted to "discover evidence of criminal wrongdoing" (*Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)); and searches "in any way related to the conduct of criminal investigations." (*Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002)).

Scholars have long identified the lack of clarity about what constitutes a "law enforcement purpose" as a source of confusion and inconsistency in the lower courts. *See, e.g.*, Joshua Dressler, *Understanding Criminal Procedure*, 323 (3rd Ed. 2002) ("the line between … a criminal investigation and … searches and seizures designed primarily to serve noncriminal law enforcement goals, is thin and, quite arguably, arbitrary."); Edwin J. Butterfoss, *A Suspicionless Search And Seizure Quagmire: The Supreme Court Revives The Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 Creighton L. Rev. 419, 421 (2007) ("[*Edmond*] only adds to the jurisprudential mess in this area, creating nothing less than a suspicionless search quagmire."); Antoine McNamara, *The "Special Needs" of Prison, Probation, and Parole*, 82 N.Y.U. L. REV. 209, 245 n.235 (2007) ("[T]he doctrinal distinction between law enforcement and non-law enforcement needs is somewhat tenuous."); Stephen J. Schulhofer, *On The Fourth Amendment Rights of the Law-Abiding Public*, 1989 Sup. Ct. Rev. 87, 88-89 (1989) (describing "doctrinal incoherence" related to what constitutes a non-law-enforcement objective).

One need look no farther than the conflicting decisions in the lower courts concerning GPS monitoring to see the consequences of the Court's confusing and inconsistent pronouncements on this topic. The courts cannot agree on the simple question of whether "solving crime" constitutes a law enforcement purpose.

In *Grady II*, the North Carolina Supreme Court wrote as follows:

> [T]he primary purpose of [satellite based monitoring] is to solve crimes. … Because the State

> has not proffered any concerns other than crime detection, the "special needs" doctrine is not applicable here.

Grady II, 2019 N.C. LEXIS 799 at *30 (internal citations omitted).

The Wisconsin Appellate Court reached the exact opposite conclusion:

> The Fourth Amendment's "special needs" doctrine also applies to Wis. Stat. §301.48. Wisconsin's GPS tracking program effectively serves the recognized "special needs" of deterring future crimes and gathering information needed to solve them.

Kaufman v. Walker, 2018 WI App 37, ¶39, 382 Wis. 2d 774, 792, 915 N.W.2d 193, 202; App. XI-11.[4]

This case presents an ideal vehicle for the Court to explain what is meant by a "law enforcement purpose" in the context of special needs searches and to bring

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[4] The Wisconsin Court of Appeals relied on Judge Flaum's concurrence in *Belleau v. Wall*, in which he wrote that Wisconsin's GPS monitoring program should be upheld under a "special needs" analysis. *See Belleau,* 811 F.3d at 940 (Flaum, J., concurring). While acknowledging that GPS monitoring "creates a repository of information that may aid in detecting or ruling out involvement in future sex offenses," Judge Flaum concluded that a special needs analysis was still appropriate because "these goals are not focused on obtaining evidence to investigate a particular crime." *Id*. ("Wisconsin's GPS program is also designed to serve a special need. … Information gathered from this program may, at some later time, be used as evidence in a criminal prosecution, but that is not the primary purpose of the program.").

uniformity to this doctrine, which has become untenably open-ended and manipulable.

III. This Case Warrants the Court's Intervention

The implications of this case are far reaching and alarming. If a past conviction for a sex offense, standing alone, constitutes a legitimate basis for the government to deprive a citizen of his Fourth Amendment right to be free from suspicionless searches beyond the completion of his or her sentence, there will be nothing to stop state governments from placing broad swaths of the population under permanent electronic surveillance. There is no principled basis on which to distinguish individuals convicted of sex offenses from individuals convicted of other felonies.[5] People with felony convictions "account for 8 percent of the overall [U.S.] population and 33 percent of the African-American

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[5] Wisconsin repeatedly references the "frightening and high" rates of recidivism of persons who have been convicted of sex offenses as a justification for lifetime GPS monitoring. *See* BIO at 20 (citing *McKune v. Lile*, 536 U.S. 24, 33 (2002)). But that dramatic phrase was grounded on casual opinion, not data, and has since been disavowed by the very source the Court relied upon in making it (*see* Jacob Sullum, *'I'm Appalled,' Says Source of Phony Number Used to Justify Harsh Sex Offender Laws*, Reason, Sept. 14, 2017, available at: http://reason.com/blog/2017/09/14/im-appalled-says-source-of-pseudo-statis). Moreover, the claim has been thoroughly debunked by reliable, peer-reviewed research. The most recent scientific study of re-offense, for example, found that "there is no evidence that individuals who have committed such offenses inevitably present a lifelong enduring risk of sexual recidivism." R. Karl Hanson, Andrew J. R. Harris, Elizabeth Letourneau, Leslie Maaike Helmus, & David Thornton, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 Psychol. Pub. Pol'y & L. 48, 59 (2018).

male population."[6] Under the Wisconsin Court of Appeals' logic, all such individuals can be subjected to GPS monitoring for the rest of their lives without any need for a judicial determination that such monitoring is reasonable. This Court should grant review to provide guidance to the courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] *See* Sarah K. S. Shannon, *et al.*, *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States*, Demography (2017), available at: https://doi.org/10.1007/s13524-017-0611-1