No. ____

IN THE
Supreme Court of the United States

BENJAMIN BRAAM, ALTON ANTRIM and DANIEL OLSZEWSKI,
Petitioners,

v.

KEVIN CARR,
Secretary of the Wisconsin Department of Corrections,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Wisconsin law requires persons convicted of certain sex offenses to wear GPS tracking devices for life even after they have completed post-confinement supervision (*e.g.*, probation, parole, or extended supervision). Wis. Stats. §301.48(2). Pursuant to the statute, the Wisconsin Department of Corrections affixes an unremovable GPS ankle monitor to individuals and "monitors, identifies, and records" everywhere the person who wears the device goes 24 hours a day, every day for the rest of the person's life. §301.48(1)(dm).

The question presented is:

Whether the Wisconsin Department of Corrections' program categorically requiring lifetime GPS tracking of individuals who have been convicted of certain sex offenses but who are no longer under the supervision of the criminal justice system violates the Fourth Amendment under either a "Totality of the Circumstances" or "Special Needs" Analysis.

PARTIES TO THE PROCEEDING

Petitioners are Benjamin Braam, Alton Antrim and Daniel Olszewski.

Respondent is Kevin Carr, Secretary of the Wisconsin Department of Corrections.

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The opinion of the Seventh Circuit Court of Appeals is reported at 37 F.4th 1269 and reproduced in Petitioners' Appendix at 1a–15a. The opinion of the U.S. District Court for the Eastern District of Wisconsin is not reported and is reproduced in Petitioners' Appendix at 18a–54a.

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals from which review is sought was entered on June 21, 2022 (App. 1a–15a). This Petition has been timely filed in accordance with U.S. Supreme Court Rule 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …

The Wisconsin statute challenged in this case, §301.48, is reproduced in full at App. 55a.

STATEMENT OF THE CASE

This case involves a law that is alien to our legal tradition. The law compels all persons with past convictions for certain sex offenses to wear a GPS monitor for the rest of their lives after they are no longer under any form of criminal justice supervision.

The law violates the Fourth Amendment because it authorizes intrusive searches without any individualized consideration of risk and cannot be upheld under the totality of circumstances test or the special needs test.

The Seventh Circuit's decision conflicts with the decisions of four state supreme courts that have struck down similar GPS monitoring schemes and rests on the mistaken premise that individuals who have been convicted of a sex offense at any time in the past have diminished privacy expectations that subverts any right to be free from having an unremovable GPS monitor permanently affixed to their leg.

I. Wisconsin's Program of Lifetime GPS Monitoring

In 2005, the Wisconsin Legislature enacted Wis. Stat. §301.48, which requires the Wisconsin Department of Corrections to maintain lifetime GPS monitoring of individuals who are not subject to any criminal justice supervision (*e.g.,* probation, parole, or extended supervision) but who have been convicted of

certain sexual offenses. Wis. Stat. §301.48(2)(a)1–8.[1] Individuals with qualifying convictions must wear a device that tracks their physical location at all times. Wis. Stat. §301.48(3). The Department's system "monitors, identifies, and records" everywhere a person who wears the device goes 24 hours a day, every day for the rest of the person's life. §301.48(1)(dm). The State charges a person who is subject to monitoring up to $240 per month for being on GPS monitoring. §301.48(4).

Petitioners are subject to lifetime monitoring under §301.48(2)(a)(7), pursuant to which any individual who has been convicted of a sex offense "on 2 or more separate occasions" is deemed to be a "Special Bulletin Notification" offender ("SBN") and subject to lifetime monitoring. Until September 2018, the Department interpreted the phrase "2 or more separate occasions" to mean two or more separate cases. In September 2018, the Department changed its interpretation of the statute to conclude that convictions on "two or more separate occasions" refers to multiple convictions regardless of whether they were part of the same proceeding, occurred on the same date, or were

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[1] In particular, Wisconsin imposes lifetime GPS tracking on persons who: (1) have been convicted of a "level 1" or "level two" sex offense against a minor victim (§301.48(2)(a)(1)–(3)); (2) have been discharged from conditional release after being found not guilty by reason of mental disease of a "serious child sex offense" (§301.48(2)(a)(5)); (3) have been convicted of a sex offense on "two or more separate occasions" (§301.48(2)(a)(7)); (4) have been discharged from civil commitment (§301.48(2)(b)(1) and (3)); or (5) are not otherwise subject to lifetime monitoring who has been convicted of a "serious child sex offense" is "appropriate" based on a "standard risk assessment instrument." (§301.48(2g)). *See* App. 57a–58a.

included in the same criminal complaint. App. 27a–28a. Since September 2018, the Department has applied GPS monitoring to everyone convicted of more than one count of any sex offense, even where the two counts arose from the same conduct and were charged in the same criminal case.

The Department of Corrections does not take into account an individualized assessment of an individuals' dangerousness to the public or likelihood of re-offense before imposing GPS monitoring. By default, the GPS tracking requirement lasts for life, but individuals subject to monitoring may petition a state trial court to terminate tracking after 20 years. Wis. Stat. §301.48(2)(a), §301.48(6).

II. The Petitioners

Petitioners Benjamin Braam, Alton Antrim and Daniel Olszewski are all individuals who have completed their prison sentences and periods of post-incarceration supervision but are subject to mandatory lifetime GPS monitoring because they have been convicted of more than one count of a sex offense.[2]

Petitioner Daniel Olszewski: Petitioner Daniel Olszewski is a 41-year-old resident of Salem, Wisconsin. R. 3-3, Decl. of Olszewski, at ¶1. He pled guilty in 2013 to two counts of possession of child pornography (Wis. Stats. §948.12) and was sentenced to three years in prison and two years of supervised release. *Id*. at ¶2. Olszewski's supervised release ended on January

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[2] Petitioners refer to the entries on the district court's electronic record as R.__.

16, 2020. *Id.* at ¶3-4. Nevertheless, he is required to wear a GPS monitor for the rest of his life because he was convicted of two counts of possession of child pornography. *Id.*

Petitioner Benjamin Braam: Petitioner Benjamin Braam is a 44-year-old resident of Racine, Wisconsin. R. 1-1, Decl. of Braam, at ¶1. He was convicted of two counts of second-degree sexual assault of a minor in December 2000. *Id.* at ¶2. Both counts resulted from a single criminal complaint and involved sexual contact with the same 14-year-old victim, the brother of Braam's friend, when Braam was 21 years old. *Id.* Braam was sentenced to ten years of incarceration and seven years of probation. *Id.* at ¶3. Braam discharged his sentence in March 2018 and is not under any kind of criminal justice supervision. *Id.* Braam is subject to lifetime GPS monitoring because the Department interprets "2 or more occasions" to apply to persons who were convicted of two counts in a single case.

Petitioner Alton Antrim: Petitioner Alton Antrim is a 66-year-old resident of Kenosha, Wisconsin. R. 3-2, Decl. of Antrim, at ¶1. Antrim was convicted of one count of first-degree sexual assault in 1990 and of one count of first degree sexual assault in 1999. *Id.* at ¶2. Antrim successfully completed his period of community supervision in October 2018 and is not under any kind of criminal justice supervision. *Id.* at ¶4. Antrim is subject to GPS monitoring pursuant to Wis. Stats. §301.48(2)(a)(7) because he has been convicted of more than one sex offense.

III. Proceedings Below

Petitioners filed a complaint and motion for a preliminary injunction in the U.S. District Court for the Eastern District of Wisconsin on March 18, 2019. They alleged that Wisconsin's statutory scheme of categorically subjecting individuals who have been convicted of certain sex offenses to lifetime GPS monitoring after they are no longer under the supervision of the criminal justice system violates the Fourth Amendment. R. 1.

On December 17, 2019, the district court denied Petitioners' motion for a preliminary injunction, finding that they had not demonstrated a likelihood of success on the merits of their claim that the GPS monitoring scheme violates the Fourth Amendment under Seventh Circuit precedent. App. 16a–54a.

Petitioners timely appealed. The Seventh Circuit affirmed the district court's decision in its entirety on June 21, 2022. App. 1a–15a.

In its opinion, the Seventh Circuit relied on its previous decision in *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016), as controlling precedent. In *Belleau*, the Seventh Circuit upheld a subsection of §301.48 that imposes lifetime monitoring on sex offenders who have been released from post-prison civil commitment. §301.48(2)(b)(2). App. 2a. Applying the Fourth Amendment's reasonableness standard, the Seventh Circuit held that the government's interest in "protecting the public from recidivism by sex offenders" outweighs the monitored individuals' "diminished

privacy expectations." *Id*. at 8a–9a (citing *Belleau*, 811 F.3d at 935).

Extending that precedent to the present case, the Seventh Circuit concluded that the statute satisfied the Fourth Amendment's "totality of the circumstances" test because anyone who has been convicted of a sex offense has "diminished privacy interests" and Wisconsin has a "strong governmental interest" in monitoring persons with sex offense convictions. App. 10a–11a.

REASONS FOR GRANTING THE PETITION

This Court's review of the question presented is warranted for several reasons: First, certiorari should be granted because the decision below conflicts with this Court's Fourth Amendment jurisprudence under either a totality of the circumstances or special needs analysis.

Second, certiorari should be granted because the Seventh Circuit decision deepened a split among the lower courts regarding whether categorical GPS monitoring schemes violate the Fourth Amendment and what the applicable test is to determine whether such schemes are constitutional, *e.g*., totality of the circumstances or special needs.

And third, certiorari should be granted to give meaning to this Court's warning in *Packingham v. North Carolina*, ___ U.S. ___, 137 S.Ct. 1730 (2017) that states are not free to disregard the constitutional rights of individuals with sex offense convictions

beyond the completion of their criminal sentences. *Id.* at 1737.

I. Certiorari Is Warranted Because the Seventh Circuit's Decision Conflicts with this Court's Fourth Amendment Jurisprudence

The Court should grant certiorari under Supreme Court Rule 10(c) because the Seventh Circuit's analysis of the constitutionality of Wisconsin's scheme of GPS monitoring departs from this Court's Fourth Amendment jurisprudence.

There are two tests used to evaluate the constitutionality of a search under the Fourth Amendment—whether the search is reasonable based on the "totality of the circumstances" (*Grady v. North Carolina*, 575 U.S. 306, 310 (2015)); and whether the search is justified under the "special needs" test which permits certain suspicionless searches where the "primary purpose" of the search is distinguishable from the general interest in crime control. *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). Under either approach, Wisconsin's lifetime GPS monitoring program is unconstitutional.

A. Wisconsin's Statutory Scheme Is Unreasonable under a Totality of the Circumstances Analysis

In *Grady*, 575 U.S. 306, this Court held that the imposition of GPS monitoring constitutes a warrantless search under the Fourth Amendment, requiring an inquiry into the reasonableness of the search under the totality of the circumstances. *Id.* at 310 ("The

reasonableness of a search 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."). Application of the balancing test under a totality-of-the-circumstances analysis cannot support Wisconsin's statutory scheme given the intrusiveness of the search and the lack of a valid state interest served by a *per se* rule that all persons convicted of qualifying sex offenses must be subjected to GPS monitoring for life.

First, GPS monitoring imposes a severe intrusion on a person's privacy interest even if imposed only for a short period of time, and the lifetime duration of Wisconsin's statutory scheme greatly increases the magnitude of the intrusion here. This Court has emphasized that the greater the intrusion into a person's privacy, the more individualized suspicion is called for under the Fourth Amendment. In addition, by analogy the magnitude of the intrusion is relevant because in other cases involving restrictions imposed on individuals who have been convicted of sex offenses after they have completed their criminal supervision (*i.e.*, registration requirements), this Court has emphasized that the magnitude of the restraint matters in determining its constitutional validity.

Second, while no one can dispute the validity of the state interest in protecting public safety, Wisconsin does not have an interest in subjecting individuals who do not present any risk to public safety to lifetime GPS monitoring. But by categorically imposing searches on all individuals convicted of certain sex offenses, Wisconsin's scheme does just that. Wisconsin could protect its interest by undertaking

individualized determinations of risk before placing individuals on lifetime GPS monitoring.

Third, individuals with past convictions who have completed their sentences and are no longer under any form of supervision have a reasonable expectation of privacy that they will not be subjected to GPS monitoring for the rest of their lives. In holding otherwise, the Seventh Circuit improperly analogized this case to cases involving individuals under the supervision of the criminal justice system (*e.g.*, they are in prison, on parole or under arrest for a felony) where this Court has found such individuals have diminished expectations of privacy such that suspicionless searches may be justified.

1. GPS Tracking of Persons Who Have Completed their Criminal Sentences Is a Severe Intrusion into an Individual's Privacy

The magnitude of the intrusion here is severe. Forcing an individual to wear a monitoring device on his person that cannot be removed and collecting data about the individual's whereabouts 24 hours a day, seven days a week, for decades is a weighty intrusion on the privacy of anyone. *See*, *e.g., Carpenter v. United States,* 138 S. Ct. 2206, 2215 (2018) (electronic surveillance of an individual's "physical location and movements" implicates privacy interests under the Fourth Amendment).

As Justice Sotomayor noted in her concurrence in *United States v. Jones,* 565 U.S. 400 (2012), "GPS monitoring generates a precise, comprehensive record

of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id*. at 415; *see also Riley v. California,* 573 U.S. 373, 396 (2014) (noting that GPS tracking allows the government to "reconstruct someone's specific movements down to the minute."); *Carpenter*, 138 S. Ct. at 2218 (comparing the effectiveness of surveillance offered by cell phone tracking techniques with GPS tracking and explaining, "[W]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.")

Given the magnitude of the intrusion, this Court's precedent suggests that imposing lifetime GPS monitoring, absent individualized consideration, is constitutionally suspect. *See Maryland v. King*, 569 U.S. 435, 435-36 (2013) (allowing the categorical performance of DNA swabs on all persons arrested for felonies, explaining, "[T]he fact that the intrusion is negligible is of central relevance to determining whether the search is reasonable.").

Moreover, this Court's precedent indicates that where restraints are imposed on persons convicted of sex offenses who are no longer under any criminal supervision, the magnitude of the intrusion is an important factor in determining the validity of the restraint. In *Smith v. Doe*, 538 U.S. 84 (2003), this Court considered an ex post facto challenge to an Alaska law that required people convicted of sex offenses to register with the state annually and made registrants' names, addresses and other identifying information public. *Id*. at 90. The Court upheld the law, finding

that the registration requirement was not punitive. *Id.*

In so holding, the Court explained that whether the absence of individual review makes a law excessive in relation to its purported non-punitive purpose depends in part on "[t]he magnitude of the restraint." *Id.* 104. In *Smith*, this Court held that Alaska's conviction-based registration scheme was valid because it imposed only "minor and indirect" consequences (*id.* at 100), given that Alaska's law did not require in-person reporting; registrants were not subject to supervision; and there was "no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred." *Id.* at 100–01.

But while concluding that the "minor and indirect" consequences resulting from Alaska's registry scheme allowed "the State [to] dispense with individual predictions of future dangerousness," (*id.* at 104), the Court distinguished the case from *Kansas v. Hendricks*, 521 U.S. 326, 368 (1997), in which the Court case upheld Kansas' civil commitment scheme by explaining that "The magnitude of the restraint [in *Hendricks*] made individual assessment appropriate." *Smith,* 538 U.S. at 104. *See also Stanley v. Illinois*, 405 U.S. 645 (1972) (parental rights of unwed fathers could not be terminated on a categorical basis without an individualized determination concerning parental fitness); *see also Packingham,* 137 S. Ct. 1730 (2017) (people convicted of sex offenses could not categorically be denied First Amendment rights).

Given the severe intrusion of wearing a GPS monitor for life, this case is much more akin to *Hendricks* than *Smith*. Accordingly, Wisconsin cannot simply presume dangerousness of all individuals who have been convicted of certain sex offenses for the remainder of their lives. To comport with the requirements of the Fourth Amendment, the state must undertake individualized consideration of an individual's risk of recidivism.

2. The State's Interest in Promoting Public Safety Does Not Justify Categorically Imposing GPS Monitoring

The reasonableness of a search also depends on the "purpose of the search." *Grady* at 310. Here, the purpose of imposing lifetime GPS monitoring is to promote public safety by "protecting the public from recidivism by sex offenders." App. 8a. But the categorical nature of the law makes it overly broad and therefore unreasonable. It sweeps in individuals who do not present any risk to public safety. In addition, Wisconsin's scheme is at odds with the state interest in promoting public safety for four additional reasons.

a. The Main Problem With the Law Is Its Categorical Nature

The norm under the Fourth Amendment is that individualized suspicion is required for a search to be reasonable. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.") (citation omitted). To be sure,

this Court has identified four exceptions to the requirement of individualized suspicion:

(1) searches designed to serve "special needs beyond the normal need for law enforcement." *See, e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes);

(2) searches that take place at certain sensitive locations such as international borders, airports, and government buildings "where the need for such measures to ensure public safety can be particularly acute." *Edmond*, 531 U.S. 32, 47-48;

(3) minimally intrusive searches conducted for administrative purposes. *See e.g., Michigan v. Tyler*, 436 U.S. 499, 507-509 (1978) (inspection of fire-damaged premises to determine cause of the fire); and

(4) searches wherein an individual has a diminished expectation of privacy due to their status within the criminal justice system. *See e.g., Samson v. California*, 547 U.S. 843, 846 (2006) (upholding suspicionless searches of parolees because "parolees have severely diminished privacy expectations by virtue of their status alone").

Crucially, none these exceptions apply here, and this Court has never carved out an exception to the requirement of individualized suspicion based solely on a person's past conviction.

The categorical nature of the law makes it unnecessarily broad and therefore unreasonable, which is to say that it is the means by which Wisconsin has

chosen to protect public safety that makes Wisconsin's scheme unreasonable. No one disputes that Wisconsin has a legitimate state interest in promoting public safety, but Wisconsin does not have any interest in subjecting individuals who do not present any risk to public safety to lifetime GPS monitoring.

To be sure, if it were impossible or unduly burdensome for Wisconsin to undertake individualized determinations, then the law's *per se* rule would be permissible, but we know that individualized determinations of whether GPS monitoring is reasonable are possible here because Wisconsin routinely performs them.[3]

Moreover, individuals who have been convicted of sex offenses are not a homogenous group. They comprise a diverse group of individuals, each different

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[3] In addition to the qualifying offenses that automatically subject a person to GPS tracking for life (*see* §301.48(2)(a)(1)–(3), Wis. Stats §301.48 calls for Wisconsin to individually assess whether others should be required to wear a GPS for life. *See* Wis. Stats §301.48(2g) ("If a person who committed a serious child sex offense … is not subject to lifetime tracking under sub. (2), the department shall assess the person's risk using a standard risk assessment instrument to determine if global positioning system tracking is appropriate for the person."). Additionally, pursuant to Wis. Stats. §301.48(6), an individual who has been on GPS monitoring for 20 years without being convicted of any other offense can file a petition to terminate GPS tracking in the circuit court. §301.48(6)(b). Following the filing of a petition, the court orders an examination of the petitioner by an approved physician or psychologist. §301.48(6)(d) and (e). The examining physician renders an opinion concerning whether the petitioner "is a danger to the public." §301.48(6)(e) ("The physician or psychologist who conducts an examination under this paragraph shall prepare a report of his or her examination that includes his or her opinion of whether the person petitioning for termination of lifetime tracking is a danger to the public.").

from the next in terms of past criminal history, capacity for rehabilitation, and risk of recidivism. Thus, contrary to the presumption made by this law, not everyone who has been convicted of a qualifying sex offense presents a danger to recidivate.

For example, the categories of individuals subject to lifetime monitoring under Wisconsin's law include many individuals who have never touched a child and do not present a serious risk to recidivate. *See, e.g.*, R. 3-3, at ¶¶2, 8 (Petitioner Olszewski never touched a child and pled guilty in 2013 to two counts of possession of child pornography (Wis. Stats. §948.12) and was discharged from sex offender treatment with a recommendation that no further treatment was needed, due to "low" treatment needs in every category, including "deviant arousal," "criminal thinking," and "denial/minimization.").

b. There Are Four Other Reasons to Call Into Question the State Interests Served by the GPS Monitoring Law

The legitimacy of Wisconsin's interest in categorically subjecting all persons with qualifying convictions to lifetime GPS monitoring is called into question for at least four other reasons:

First, Wisconsin's program is fundamentally inconsistent with reintegrating felons back into society. Forcing ex-offenders who do not present a risk of recidivism to wear a GPS monitor for life imposes a lifetime scarlet letter on the person, all but foreclosing full reintegration back into society. *Cf. Richardson v. Ramirez*, 418 U.S. 24, 55 (1974) (identifying a "more

modern view" of reintegration of ex-felons as one in which "it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term.")

Second, Wisconsin's program not only violates the Fourth Amendment; it is also unnecessary. It's unnecessary because there are constitutionally permissible ways to keep individuals on GPS for life without abandoning Fourth Amendment principles. As this Court explained in *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992), the interest in preventing recidivism may be vindicated "by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct."[4]

Third, although the law applies categorically to anyone who has been convicted of more than one count of possession of child pornography, GPS monitoring does not provide any utility to law enforcement

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[4] One possible solution is to do what both New Jersey and Montana have done which is to impose supervision for life on individuals designated as high-risk offenders, with GPS monitoring being one of the conditions of lifetime supervision. *See, e.g., H.R. v. New Jersey State Parole Bd.*, 242 N.J. 271, 293 (N.J. 2020) ("H.R.'s [parole supervision for life] status is critical to our conclusion. His privacy interests must be regarded in this balancing as extremely low; the GPS monitoring does not amount to as substantial of an invasion of privacy as it would on individuals not subject to [parole supervision for life])"; *see also State v. Smith*, 2021 MT 148 (Mont. 2021) (upholding lifetime GPS monitoring where lifetime supervision was a mandatory part of the sentence for sexual abuse of a minor).

officials who seek to prevent or solve child pornography offenses. It's hard to imagine how geographical monitoring of an individual's whereabouts would prevent someone from using a computer to view illegal images; nor is it readily ascertainable how having geographical data about a person's movements could result in the apprehension of a person who viewed or downloaded illegal images.

Fourth, Wisconsin has produced no evidence demonstrating that GPS monitoring of sex offenders has any positive impact on reducing recidivism. The state admitted at oral argument that, even though its GPS monitoring program has been in place since 2006, it has no data on the recidivism rate of people who are subject to the monitoring. *See* Sept. 18, 2020, Seventh Circuit Oral Argument, available at: http://media.ca7.uscourts.gov/sound/2020/cm.20-1059.20-1059_09_18_2020.mp3, at 25:00-25:12.

3. Persons Not Under the Supervision of the Criminal Justice System Have a Reasonable Expectation of Privacy

The Seventh Circuit found that Wisconsin's scheme of suspicionless lifetime GPS monitoring was reasonable under a "totality of circumstances" standard in significant part because it concluded that individuals who have been convicted of sex offenses in the past have "diminished privacy expectations" that "endure after [they are] discharged from prison and post-confinement supervision." App. 11a. The court found that in light of the requirement that persons with such convictions must register as sex offenders their "privacy

interests are severely curtailed." *Id.* (citation omitted). [5]

The Seventh Circuit's holding that all persons convicted of sex offenses have a diminished expectation of privacy is a troubling and unwarranted extension of this Court's precedents. This Court has held that certain suspicionless searches may be reasonable due to a person's status within the criminal justice system, as when a person is in custody or under post-confinement supervision. *See Samson*, 547 U.S. 852 (upholding the suspicionless search of a parolee's person because a parolee, whose liberty in the community is conditioned upon his compliance with conditions that restrict his freedom, "did not have an expectation of privacy that society would recognize as legitimate."); *King*, 569 U.S. at 463 (upholding DNA swabs of

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[5] The Seventh Circuit's claim that placement on a state sex offender registry diminishes one's privacy expectations so severely that registrants have no legitimate objection to lifetime GPS monitoring undermines the entire foundation of this Court's decision in *Smith v. Doe*, 538 U.S. 84 (2003), in which this Court held that sex offender registries are constitutional precisely because persons "subject to [registration] are free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 89. In addition, the Seventh Circuit's reasoning that placement on a sex offender registry deprives an individual of any legitimate privacy expectations is circular—*i.e.,* the government cannot say a person has a diminished expectation of privacy because the government has chosen to diminish the person's expectation of privacy. *See Samson*, 547 U.S. at 863 (Stevens, J., dissenting) ("the loss of a subjective expectation of privacy would play 'no meaningful role' in analyzing the legitimacy of expectations, for example, 'if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry.'") (*citing Smith v. Maryland*, 442 U.S. 735, 740-741, n 5 (1979)).

persons arrested for felonies because "[o]nce an individual has been arrested on probable cause for a dangerous offense that may require detention before trial," his or her "expectations of privacy and freedom from police scrutiny are reduced."); *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) ("prisoners have no legitimate expectation of privacy" in prison cells.)

But this Court has never found that a person has diminished privacy expectations based solely on a past conviction. To the contrary, this Court has distinguished parolees from free citizens, holding that it is constitutionally permissible to "restrict [parolees'] activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972). The Seventh Circuit erred in finding that persons with past convictions lack a reasonable expectation of privacy in not being subjected to GPS monitoring for life, absent individualized consideration.

For all of these reasons, the Seventh Circuit's decision is in conflict with this Court's Fourth Amendment precedents regarding the totality of the circumstances analysis.

B. The Seventh Circuit's Decision Conflicts with this Court's Special Needs Jurisprudence

Under this Court's special needs doctrine, an analysis of whether a suspicionless search applied to a group of persons on a categorial basis is constitutional has two distinct parts. First, a determination has to be made that the search serves a special need "beyond

the normal needs of law enforcement." *See New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). Second, if a special need is shown to exist beyond the normal needs of law enforcement, then a balancing analysis is undertaken to "balance the governmental and privacy interests" affected by the search. *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 619 (1989).

The Seventh Circuit disregarded this Court's special needs precedents in two principal ways. First, given that Wisconsin's scheme involves a programmatic, suspicionless searches the analysis of its validity calls for application of the special needs test, but the Seventh Circuit did not apply it here. Second, under a proper application of this Court's special needs cases, the Seventh Circuit should have found this law unconstitutional.

1. The Seventh Circuit Misidentified the Proper Test

The Seventh Circuit held that the relevant test for whether Wisconsin's lifetime GPS monitoring scheme is constitutional is a "reasonableness" analysis pursuant to which "[w]arrantless monitoring of post-supervision sex offenders is reasonable under the Fourth Amendment if the government's interest in monitoring these offenders outweighs the privacy expectations of those who must comply with the program." App. 7a.

In exclusively focusing its attention on the reasonableness of the search and weighing the state interests against the monitored individuals' privacy interests, the decision departed from this Court's

precedents regarding programmatic, suspicionless searches. Under this Court's precedents, programmatic, suspicionless searches are ordinarily unconstitutional unless they serve special needs divorced from the regular needs of law enforcement. In particular, the special needs doctrine provides a narrow exception to the "general rule that a search must be based on individualized suspicion of wrongdoing" where a search is "performed for reasons unrelated to law enforcement." *Edmond*, 531 U.S. at 54; *see also Ferguson v. City of Charleston*, 532 U.S. 67, 80 n.17 (2001) (describing the special needs doctrine as a "closely guarded" exception to the requirement of individualized suspicion). For the special needs exception to apply, the purpose advanced to justify the search must be "divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 79.

In other words, a court should only reach the balancing of governmental interests against individual privacy interests if it first finds that the search serves "special needs." Programmatic, suspicionless searches that do not serve "special needs" are unconstitutional, notwithstanding what government interests might be advanced by the searches. *See, e.g.*, *Edmond*, 531 U.S. at 47-48 ("When law enforcement authorities pursue primarily general crime control purposes … stops can only be justified by some quantum of individualized suspicion. … Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.")

The Seventh Circuit disregarded this precedent, holding that that Wisconsin's GPS monitoring law,

which authorizes suspicionless, programmatic searches, is constitutional without undertaking any consideration of whether the search fell under the "special needs" exception. *See* App. 7a – 12a (engaging in a balancing analysis without first considering whether the search serves "special needs" apart from investigating and solving crimes).[6]

GPS monitoring is clearly connected to the State's interest in law enforcement, thus placing this case beyond the proper scope of the "special needs" exception. In the district court, Wisconsin conceded that its GPS monitoring program serves the purpose of "gathering information to solve future crimes." R.17 at 39. This is a quintessential law enforcement function. *See State v. Grady,* 372 N.C. 509, 527 (N.C. 2019) ("*Grady III*")

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[6] The risks of expanding the exception to the requirement of individualized suspicion beyond the narrow confines of special needs searches has been identified by the dissenting justices in *Samson* and *King*—namely, that a free-ranging "reasonableness" inquiry that balances the benefits and costs of programmatic, suspicionless searches will lead to courts' countenancing serious intrusions on the privacy of citizens in the absence of individualized suspicion. *See Samson*, 547 U.S. at 866 (Stevens, J., dissenting) ("The requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment. To say that those evils may be averted without that shield is, I fear, to pay lipservice to the end while withdrawing the means.") (citations and quotations omitted); *King*, 569 U.S. at 482 (Scalia, J., dissenting) ("Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane …, applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.") (citations and quotations omitted).

("[T]he primary purpose of [GPS 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.") Because Wisconsin's scheme of GPS monitoring serves general law enforcement interests, it fails scrutiny under the special needs test.

2. Under Proper Application of this Court's Special Needs Cases, Wisconsin's Scheme Fails

Even if the Court finds that Wisconsin's GPS monitoring program serves a "special need" apart from general law enforcement, the law still fails when subjected to the second prong of the special needs analysis—that is, whether the invasion of Petitioners' privacy interests is reasonable when weighed against the public interest served. *See Chandler v. Miller*, 520 U.S. 305, 314 (1997) (holding that even if a search serves a special need, a court must still "undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."). Wisconsin's GPS monitoring scheme intrudes severely on Petitioners' reasonable expectations of privacy in the absence of evidence that it will meaningfully advance public safety goals. *See* discussion in §I(A), *supra*.

3. The Doctrine Is in Disarray

Implicit in whether the special needs doctrine applies to this case is the question of what constitutes a search "unrelated to law enforcement." *Edmond*, 531 U.S. at 54. This Court's pronouncements on this point

are far from clear and lower courts have diverged widely on what they deem to be a "law enforcement purpose." *Compare Grady III*, 372 N.C. at 526 (finding "solv[ing] crimes" is a law enforcement purpose) with *Kaufman v. Walker*, 2018 WI App 37, ¶39, 382 Wis. 2d 774, 792 (Wis. App. 2018) (finding that "gathering information needed to solve [crimes]" is not a law enforcement purpose). Scholars have long identified a lack of clarity about what constitutes a "law enforcement purpose" as a source of confusion and inconsistency in the lower courts.[7]

This Court should grant this petition to clarify that where, as here, a law subjects a group of citizens to suspicionless searches on a categorial basis, courts should apply the special needs analysis and to clarify what constitutes a "law enforcement purpose" under the special needs test.

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[7] *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.R. 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).

II. Certiorari Should Be Granted Because There Is a Split in Authority on Important and Recurring Questions of Law

The Court should also grant certiorari under Supreme Court Rule 10(a) because there is a split of authority between the Seventh Circuit and several state courts of last resort on important and recurring questions of federal law—namely, whether the categorical imposition of GPS monitoring on persons with past sex offense convictions violates the Fourth Amendment and what standards govern the analysis of whether such schemes are constitutional.

A. The Seventh Circuit Is in Conflict with Four State Supreme Courts with Regard to Whether Suspicionless GPS Tracking of Persons with Sex Offense Convictions Violates the Fourth Amendment

In conflict with the Seventh Circuit, the Supreme Courts of North Carolina, South Carolina, Georgia, New Jersey and Massachusetts have concluded that lifetime GPS monitoring schemes violate the Fourth Amendment:

- *State v. Grady*, 372 N.C. 509 (N.C. 2019) ("*Grady III*"). The North Carolina Supreme Court found that lifetime GPS tracking of individuals who are no longer under criminal justice supervision "based solely on their status as a 'recidivist,'" violates the Fourth Amendment;

- *Park v. State*, 305 Ga. 348 (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 (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 (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 decisions above are impossible to square with the Seventh Circuit's decision in *Braam*, in which the court concluded that that GPS monitoring for life is "reasonable" under the Fourth Amendment absent any individualized consideration.

B. The Lower Courts Disagree About What Legal Standards Govern the Analysis of GPS Monitoring Schemes' Constitutionality

There is good reason for the split in authority. The Court's decision in *Grady* left substantial ambiguity about the Fourth Amendment standards applicable to suspicionless, programmatic GPS monitoring.

In *Grady*, this Court wrote that an analysis of whether a GPS monitoring scheme is constitutional "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." *Grady*, 575 U.S. at 310 (citing *Samson*, 547 U.S. 843 and *Vernonia*, 515 U.S. 646).

One obvious source of the lower courts' confusion is that the Court's explicit language in *Grady* refers to the "totality of circumstances," thus implying that totality of the circumstances is the applicable test; whereas the citations are to a special needs case (*Vernonia*) and to a case in which the Court recognized an exception to the requirement of individualized suspicion based on an individual's diminished expectation of privacy while on parole (*Samson*). *Grady* sent mixed messages about the proper test to use.

As a result, the lower courts have given a variety of different interpretations to this language when analyzing the constitutionality of GPS monitoring laws. Applying a hodgepodge of inconsistent standards, the lower courts have reached a variety of different

conclusions about whether warrantless, suspicionless GPS monitoring violates the Fourth Amendment.

Some courts have read *Grady* as requiring them to first determine whether the GPS law serves a "special need" or is justified by another recognized exception to the general requirement of individualized suspicion before weighing the private and public interests affected by the law. *Park*, 305 Ga. at 353 (striking down statute authorizing lifetime GPS monitoring of individuals classified as "sexually dangerous predators" under a "special needs" analysis); *H.R. v. N.J. State Parole Bd.*, 242 N.J. 271, 286 (N.J. 2020) (applying a special needs analysis to uphold GPS monitoring of an individual on parole supervision for life after having been convicted of a sex offense).

Others, including the Seventh Circuit, have interpreted *Grady* as requiring only a balancing of the government purposes served by the GPS monitoring against the burdens it places on the monitored individuals. *State v. Hilton*, 378 N.C. 692 (N.C. 2021) (upholding North Carolina's GPS monitoring statute as applied to persons convicted of "aggravated" sex offenses); *Ross*, 423 S.C. at 514 (applying a balancing analysis to strike down a statute that required lifetime GPS monitoring of all persons convicted of failure to register as a sex offender); *Feliz*, 481 Mass. 689 (applying a balancing analysis to strike down GPS monitoring as a condition of probation for individuals convicted of most sex offenses unless a judge conducts an individualized balancing of the state's "need to impose

GPS monitoring" and "the privacy invasion occasioned by such monitoring.")[8]

Others have applied a special needs analysis but held that a suspicionless search that does not serve a "special need" may still be permissible based on a balancing of an individual's privacy interests with the government's interests. *Grady III*, 372 N.C. at 539.

These inconsistent decisions reflect the ambiguity of the Court's *Grady* decision regarding the standards applicable to programmatic, suspicionless GPS monitoring programs, whether such programs are properly seen as serving "special needs" and whether GPS monitoring programs that do not serve special needs may nonetheless be upheld if a court determines that they serve sufficiently important government interests. The lower courts are in urgent need of guidance because these questions are certain to recur as 13 states have passed laws calling for lifetime monitoring of individuals who have been convicted of sex offenses.[9]

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[8] Two other state Supreme Courts have upheld GPS monitoring of individuals on parole or supervision. *Doe No. 1 v. Coupe*, 143 A.3d 1266, 1274-1279 (Del. Ch. 2016), *aff'd*, 158 A.3d 449 (Del. 2017) (applying a "special needs" framework to determine that mandatory GPS monitoring of "Tier III," highest risk, sex offenders was reasonable); *State v. Smith*, 2021 MT 148 (Mont. 2021) (upholding lifetime GPS monitoring where lifetime supervision was a mandatory part of the sentence for sexual abuse of a minor).

[9] 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

The Court should grant the petition to resolve these important issues to provide necessary guidance to the lower courts.

III. This Court Should Give Substance to Its Admonition in *Packingham*

Finally, certiorari should be granted to give substance to this Court's warning in *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017), that states may not freely curtail the constitutional rights of persons who have been convicted of sex offenses after they have discharged their sentences.

In *Packingham*, this Court noted the "troubling fact" that a law imposed on people who have been convicted of sex offenses "imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system" and cautioned that, while "a legislature may pass valid laws to protect children and other sexual assault victims ... the assertion of a valid governmental interest 'cannot, in every context, be insulated from all constitutional protections." *Id*. at 1737 (citation omitted).[10]

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. 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).

[10] Over the past several of decades, it is well documented that states have imposed ever-increasingly harsh restrictions on

The Seventh Circuit dismissed this Court's warning by noting the obvious: "That case involved an application of the First Amendment's overbreadth doctrine. This is a Fourth Amendment case." App. at 13a. There is no indication in *Packingham* that this Court's concerns were limited to the First Amendment context.

This case presents an opportunity for the Court to impose Fourth Amendment limits on states' ability to impose severe restrictions on persons convicted of sex offenses who are no longer under supervision of the criminal justice system.

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individuals who have been convicted of sex offenses, including registration requirements and onerous housing restrictions after completion of their criminal sentences. *See, e.g.*, Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality of Sex Offender Laws*, 63 Hastings L.J. 1071, 1076-1100 (2012) (tracing the escalating burdens of registration and notification schemes since they were first enacted in 1994); *see also* Catherine L Carpenter, *All Except For: Animus that Drives Exclusions in Criminal Justice Reform*, 50 SW. L. REV. 1, 9-17 (2020) (showcasing a myriad of criminal justice reform efforts to which those convicted of sex offenses were not entitled).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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