No. 22-275

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

BRIEF IN OPPOSITION

JOSHUA L. KAUL
Wisconsin Attorney General

JODY J. SCHMELZER
Assistant Attorney General
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 266-3094
schmelzerjj@doj.state.wi.us

QUESTION PRESENTED

Wisconsin law requires certain sex offenders who reside in the state to wear GPS devices. The GPS system is in place to reduce the danger these types of offenders pose to the public and deter them from committing more sex crimes. The law applies to repeat child sex offenders such as petitioners, even though they are no longer on post-conviction supervision such as probation, parole, or extended supervision. Petitioners are subject to GPS monitoring for as long as they reside in Wisconsin. The GPS monitoring device is unobtrusive and tracks an offender's location only, and the data is not reviewed in real time.

Did the Seventh Circuit correctly hold, in an appeal from a denial of a preliminary injunction, that petitioners did not have a likelihood of success on the merits of their Fourth Amendment claim because Wisconsin's lifetime GPS monitoring program was reasonable when balancing Wisconsin's strong interest in protecting the public and deterring convicted sex offenders from reoffending against petitioners' diminished expectation of privacy?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Repeat child sex offenders pose a threat to society given the heinousness of their crimes and high recidivism rates. To reduce the danger they pose and deter them from committing more sex crimes, the Wisconsin Legislature enacted Wis. Stat. § 301.48 implementing a location monitoring system that tracks certain dangerous sex offenders using a GPS device.

Petitioners Benjamin Braam, Alton Antrim, and Daniel Olszewski qualify for GPS monitoring under Wisconsin law because they are repeat sex offenders. They sought a preliminary injunction enjoining enforcement of Wisconsin's GPS monitoring law against them, contending that submitting them to GPS tracking is an unreasonable search under the Fourth Amendment.

The district court denied their request for a preliminary injunction, and the Seventh Circuit affirmed. Both courts correctly found that petitioners did not have a likelihood of success on the merits under Seventh Circuit precedent upholding Wisconsin's GPS monitoring law. In that precedent, the Seventh Circuit acknowledged that Wisconsin's interest in deterring sex crimes using GPS monitoring outweighs the slight privacy loss to repeat sex offenders. Thus, it is a reasonable search under the Fourth Amendment's "totality of the circumstances" test. Wisconsin's GPS monitoring law is also reasonable under the Fourth Amendment "special needs" doctrine—an issue not yet specifically

examined by either the district court or the court of appeals.

The Seventh Circuit correctly applied this Court's Fourth Amendment precedent to hold that petitioners were not entitled to preliminary injunctive relief. The petition should be denied.

STATEMENT OF THE CASE

I. Factual background.

A. The petitioners.

Each of the petitioners is a repeat child sex offender.

Benjamin Braam was convicted of second-degree sexual assault of a child on December 14, 2000, for violating Wis. Stat. § 948.02(2), which prohibits sexual contact or sexual intercourse with a child under the age of 16. (Dkt. 19, Ex. H:1–2); Wis. Stat. § 948.02(2). The victim was the 14-year-old younger brother of Braam's friend. (Dkt. 19, Ex. H:4.) Between December 22, 1999, and May 1, 2000, Braam engaged in sexual acts with the 14-year-old, including penis to mouth and penis to anus intercourse. (Dkt. 19, Ex. H:4.) He was convicted of two criminal counts, with sentences of 7 years and 10 years. (Dkt. 19, Ex. H:1.) His sentence ended in March 2018. (Dkt. 5 ¶ 6.)

Alton Antrim was first convicted of a child sex crime in January 1991 for first degree sexual assault of a child in violation Wis. Stat. § 948.02(1), which

prohibits sexual contact or intercourse with a child under the age of 13. (Dkt. 19, Ex. A:1); Wis. Stat. § 948.02(1). He touched his five-year-old cousin's vagina after he took her to get ice cream, which resulted in his receiving six years of probation. (Dkt. 19, Ex. B:2.) His next conviction was for first degree sexual assault of a child in April 1999, again for violating Wis. Stat. § 948.02(1), sexual contact or intercourse with a child under the age of 13. (Dkt. 19, Ex. D:1); Wis. Stat. § 948.02(1). This time, he received a 20-year sentence. (Dkt. 19, Ex. D:1.) He rubbed the vaginal area of a third-grade girl on multiple occasions. (Dkt. 19, Ex. E:1–2.) Alton admitted to the sexual contact, stating "I get these urges to touch little girls. Usually I ask them first and after they say yes I rub their vagina with my fingers. I don't remember touching any other girls but I know I have a problem and need professional help." (Dkt. 19, Ex. E:2.) Antrim's sentence ended in October 2018. (Dkt. 5 ¶ 7.)

Daniel Olszewski was convicted in May 2014 of two counts of possession of child pornography in violation of Wis. Stat. § 948.12(1m), prohibiting possessing or accessing photographs or videos "of a child engaged in sexually explicit conduct." (*See* Dkt. 19, Ex. P:1.) Eleven other counts were read in at sentencing: ten additional counts of possession of child pornography and one of disorderly conduct. (Dkt. 19, P:3.) Olszewski's girlfriend discovered pictures of girls as young as four or five years old giving oral sex to grown men on Olszewski's phone. (Dkt. 19, Ex. Q:4–5.) A forensic review of the phone

uncovered 31 images of child pornography. (Dkt. 19, Ex. Q:4–5.) Many of the children were under the age of eight and engaged in sex acts with adult men. (Dkt. 19, Ex. Q:4–5.) When questioned by police, Olszewski "admitted that he had an addiction to child pornography." (Dkt. 19, Ex. Q:5.) Olszewski was sentenced to three years confinement and two years extended supervision. (Dkt. 19, Ex. P:1.) His extended supervision ended on January 17, 2020. (Dkt. 20 ¶ 43.)

All three petitioners are lifetime sex offender registrants and are currently enrolled in Wisconsin's sex offender registry. (Dkt. 20 ¶¶ 33, 38, 45; 19, Ex. G.) Because they have been convicted of sex offenses "on 2 or more separate occasions," Wis. Stat. § 301.48(2)(a)(7), they are also subject to lifetime GPS monitoring overseen by the respondent Kevin Carr, the Secretary of Wisconsin's Department of Corrections (hereafter the "Department").

B. Wisconsin's GPS monitoring program.

Wisconsin law requires GPS monitoring for people who have committed serious sex offenses, including offenses against children. Wis. Stat. § 301.48(2)(a). One category of offenders subject to GPS monitoring is sex offender registrants who are also subject to law enforcement bulletin notices. (Dkt. 20 ¶ 5); Wis. Stat. §§ 301.48(2)(a)7., 301.46(2m). This means that they are considered so risky that community law enforcement may be notified when an offender lives, works, or attends school in the community. (Dkt. 20

¶ 5); Wis. Stat. §§ 301.48(2)(a)7., 301.46(2m). People subject to these bulletins include offenders convicted "on 2 or more separate occasions" of a qualifying sex offense. (Dkt. 20 ¶ 5); Wis. Stat. § 301.46(2m)(am).

Though sometimes called "lifetime" GPS tracking, some offenders may be released from tracking. Wis. Stat. § 301.48(6)–(7m). An offender who was not convicted of a crime during the period of tracking and who was not previously civilly committed pursuant to Wis. Stat. ch. 980 may petition for termination of lifetime tracking after 20 years. Wis. Stat. § 301.48(6)(b). In addition, the Department may petition to terminate lifetime tracking of an offender who is "permanently physically incapacitated." Wis. Stat. § 301.48(7)(a).

For all offenders, lifetime GPS tracking is terminated if the offender moves out of Wisconsin. Wis. Stat. § 301.48(7m).

The Department uses a GPS monitor that attaches to the offender's ankle. (Dkt. 20 ¶ 11.) With dimensions of 2.5 inches by 3.5 inches by 1.5 inches, the monitor is unobtrusive and fits under clothing. (Dkt. 20 ¶ 12; Petitioners' App. 3a (hereafter "Pet. App.").) The device has up to 80 hours of battery life on a single charge. (Dkt. 20 ¶ 13.) It is waterproof and can be submerged in water up to 15 feet, which allows offenders to shower and bathe normally. (Dkt. 20 ¶¶ 13, 24.)

GPS data from the devices is not reviewed in real time. Instead, a record of GPS locations is normally retroactively reviewed every 24 hours. (Dkt. 20 ¶ 19.) The GPS devices do not record video or sound and do not limit where a person can go or what they can do. (Dkt. 20 ¶¶ 20–21.) The device also does not automatically alert law enforcement when a sex offender is in or near any particular location, such as a school, daycare, or park. (Dkt. 20 ¶ 22.)

II. District court proceedings.

Petitioners filed this action on March 18, 2019. (Dkt. 1.) The operative complaint set forth four claims on behalf of eight named plaintiffs and two proposed classes. (*See* Dkt. 5 ¶¶ 6–13, 39.) The legal claims included Fourth Amendment and Fourteenth Amendment procedural due process claims against both proposed classes of plaintiffs. (*See generally* Dkt. 5.)

Along with the complaint, petitioners Braam, Antrim, and Olszewski filed a motion for preliminary injunction. (Dkt. 7.) They sought to enjoin the defendants "from continuing to subject individuals who are not under any criminal justice supervision to GPS monitoring" both "individually and on behalf of all similarly situated individuals." (Dkt. 7:1.)

The Department moved to dismiss all claims except the Fourth Amendment claim brought on behalf of Braam, Antrim, and Olszewski—the only named plaintiffs that were no longer on any form of Department supervision. (Dkt. 14–15.) At the same

time, the Department filed its response in opposition to petitioners' motion for a preliminary injunction. (Dkt. 17.)

The district court held a hearing on December 17, 2019, to address both the Department's motion to dismiss and petitioners' motion for a preliminary injunction. (Pet. App. 18a–54a.) It granted the motion to dismiss, dismissing all claims except the Fourth Amendment claim brought by petitioners Braam, Antrim, and Olszewski. (Pet. App. 16a–17a.)

The district court denied the petitioners' motion for a preliminary injunction. (Pet. App. 17a.) It found that they did not meet the threshold showing that they had a likelihood of success on the merits of their Fourth Amendment claim. (Pet. App. 47a–50a.) It noted that the case is a facial challenge to Wisconsin's GPS monitoring law, and that the Seventh Circuit previously considered a Fourth Amendment facial challenge in *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016.); (Pet. App. 49a ("the Seventh Circuit has already concluded in that balancing that the that the privacy right, which is already diminished even for people who are off paper, is outweighed by the interest of the State . . .").)

The district court acknowledged that there is a "substantial impact of GPS monitoring on privacy interest." (Pet. App. 49a) But, just like the Seventh Circuit in *Belleau*, the district court reasoned that offenders' expectation of privacy is diminished as a result of being a convicted sex offender, and that their

privacy expectations are outweighed by the state interests. (Pet. App. 49a–50a.)

The district court also considered petitioners' claims of irreparable harm, noting that "some of the claims of irreparable harm don't hold up under the evidence that was presented by the defense." (Pet. App. 52a.) However, because petitioners did not meet their threshold burden of demonstrating a likelihood of success on the merits, the district court did not make any definitive ruling concerning the other preliminary injunction factors. (Pet. App. 52a.)

Finally, the district court addressed petitioners' argument that the GPS monitoring law was not justified as a special needs search. (Pet. App. 50a.) Without conducting any analysis of the special needs doctrine, the district court noted that petitioners' argument had been rejected by both the concurring opinion in *Belleau* and by the Wisconsin Court of Appeals in *Kaufman v. Walker,* 2018 WI App 37, 382 Wis. 2d 774, 915 N.W.2d 193.

Petitioners appealed to the Seventh Circuit, challenging the district court's denial of their request "to enjoin the Wisconsin Department of Corrections from subjecting people who are no longer under the supervision of the criminal justice system to GPS monitoring." (Dkt. 33:1.)

III. The Seventh Circuit's decision.

A unanimous panel of the Seventh Circuit affirmed the district court's denial of petitioners'

request for a preliminary injunction. (*See* Pet. App. 1a–15a.) The Seventh Circuit first acknowledged that this Court established in *Grady v. North Carolina,* 575 U.S. 306 (2015), that warrantless satellite-based monitoring of recidivist sex offenders qualifies as a search under the Fourth Amendment. (Pet. App. 5a–6a.) While *Grady* did not decide whether such a search was reasonable, the court noted *Grady*'s instruction that "[t]he 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." (*Id.* at 6a–7a (*citing Grady,* 575 U.S. at 310).)

The Seventh Circuit then discussed its prior decision in *Belleau,* where it "balanced those interests for one class of Wisconsin sex offenders," and noted that petitioners' "likelihood of success centers on the effect of *Belleau."* (Pet. App. 7a.) The court explained that in *Belleau,* it applied "the Fourth Amendment's reasonableness standard" and found that "the government's interest in deterring recidivism by these dangerous offenders outweighs the offender's diminished expectation of privacy." (*Id.*) It did so after citing empirical studies and other findings supporting that "convicted sex offenders [like Belleau] pose a significant danger to the public even after they are released from prison or civil commitment." (*Id.* at 8a.) The court then noted that it found in *Belleau* that Wisconsin had a strong interest in "protecting the public," and that "the monitoring program is an effective deterrent of recidivism." (*Id.*)

In discussing *Belleau,* the Seventh Circuit went on to note that it found that the ankle device is "unobtrusive," "does not entail continuous surveillance," and "doesn't reveal what the wearer of the device is doing at any of the locations." (*Id.* at 9a.) It also explained that because Belleau was required to register and remain listed on Wisconsin's public sex offender registry, "there was only a modest incremental burden on his privacy interests." (*Id.*) The Seventh Circuit summarized that given the diminished privacy expectation of convicted sex offenders and the slight incremental loss of privacy from having to wear the ankle monitor, that "privacy interests did not outweigh the substantial public interest in the information collected by the monitoring program." (*Id.*) Thus, it noted that the balancing of the interests weighed in favor of Wisconsin in *Belleau*, and the GPS monitoring program was upheld as reasonable under the Fourth Amendment. (*Id.*)

The Seventh Circuit also acknowledged Judge Flaum's concurring opinion in *Belleau*, where he determined that the monitoring program was a permissible special needs search because it is designed to serve needs beyond the normal need of law enforcement and given Belleau's diminished expectation of privacy as a convicted sex offender. (*Id.* at 9a–10a.)

The Seventh Circuit rejected petitioners' argument that *Belleau* is distinguishable because, there, the repeat sex offender had been released after being civilly confined under Wis. Stat. ch. 980. (*Id.* at 10a.) The court found that difference "immaterial" because "Wisconsin has the same strong interest in monitoring both groups of sex offender," and "both groups have the same diminished privacy expectations." (*Id.*)

Lastly, the Seventh Circuit determined that *Packingham v. North Carolina,* 137 S. Ct. 1730 (2017), did not call *Belleau* into question. (Pet. App. 12a–13a.) It noted that *Packingham* involved a First Amendment challenge where this Court that found that an internet restriction for convicted sex offenders was unconstitutionally overbroad. (*Id.*) The court explained that the Fourth Amendment reasonableness requirement is different from the First Amendment's overbreadth analysis, so "*Packingham* thus has no relevance here." (*Id.* at 13a.)

REASONS FOR DENYING THE PETITION

The question presented does not warrant review for several reasons.

First, the Seventh Circuit's decision is correct and consistent with this Court's precedent. It applies settled Fourth Amendment law, and petitioners' argument that the law was misapplied does not warrant certiorari review.

Second, Petitioners exaggerate the disagreement among the Seventh Circuit and the highest courts in four states. Those states' Fourth Amendment analysis largely differed from the Seventh Circuit's because of key distinctions between their GPS monitoring schemes and Wisconsin's.

Third, the petition comes to this Court on an appeal of a non-final order. Petitioners intend to pursue discovery and offer expert opinions in support of the merits of their Fourth Amendment claim. This could moot the issue, rendering any certiorari relief a waste of judicial time and resources.

Fourth, a pending Wisconsin Supreme Court case, *State v. Rector*, Case No. 2020AP1213-CR (Wis.), could moot the Fourth Amendment issue here for petitioners Braam and Olszewski by construing statutory language contained in the GPS monitoring law in such a way that would remove them from lifetime monitoring. Certiorari relief before *Rector* is decided would be imprudent.

Finally, nothing in the Seventh Circuit's decision is inconsistent with this Court's holding in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). That case was a First Amendment overbreadth challenge to a blanket internet restriction for sex offenders. The Fourth Amendment issue addressed in the Seventh Circuit's decision involves a different test and analysis. Certiorari review is not necessary to correct an inconsistency that does not exist.

I. Certiorari is unwarranted because the Seventh Circuit's decision is correct and consistent with this Court's precedent.

Certiorari may be appropriate when "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Review is unnecessary here because the Seventh Circuit's decision is correct and was consistent with this Court's Fourth Amendment precedent.

In *Grady*, this Court held that North Carolina's satellite based monitoring system for tracking the movement of convicted sex offenders was a search within the meaning of the Fourth Amendment. *Grady,* 575 U.S. at 310. "That conclusion, however, does not decide the ultimate question of the . . . constitutionality" of a state program that requires such monitoring devices, because "[t]he Fourth Amendment prohibits only *unreasonable* searches." *Id.* The reasonableness of a search "depends on the totality of the circumstances," *id.*, and "is judged by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (citations omitted).

Following *Grady,* the Seventh Circuit correctly analyzed Wisconsin's GPS monitoring program under the "totality of the circumstances" test and found that it is a reasonable search. That decision was not

contrary to any Fourth Amendment precedent from this Court. And while the Seventh Circuit did not directly address the applicability of the "special needs" test to the GPS monitoring program, the program also meets the requirements for a permissible special needs search.

The petition makes several arguments, but none warrant granting certiorari review.

A. Wisconsin's GPS monitoring program is reasonable under the Fourth Amendment's "totality of the circumstances" test.

The Seventh Circuit held below and in *Belleau* that repeat sex offenders have diminished privacy expectations, noting that that convicted sex offenders in Wisconsin—even those no longer on parole or probation—are already subject to sex offender registry requirements. (Pet. App. 11a.) Additionally, Wisconsin's online public registry contains a sex offender's criminal history, along with his or her home address and photograph. *See* Wis. Stat. § 301.45(2). The Seventh Circuit concluded that because these "privacy-curtailing burdens" apply equally to everyone on the sex offender registry—regardless of whether they were released from civil commitment like Belleau or released directly from prison like petitioners—there was no material difference in their diminished privacy expectations. (Pet. App. 11a–12a.)

The Seventh Circuit decision approvingly cited *Belleau*'s determination that an offender's loss of privacy as a result of GPS monitoring was "slight" and "incremental." (*Id.* at 9a.) *Belleau* explained that "[t]he 'search' conducted in this case via the [GPS] anklet monitor is less intrusive than a conventional search." *Belleau*, 811 F.3d at 937 (citation omitted). It explained that "[f]or it's not as if the Department of Corrections were following the [offender] around [and] peeking through his bedroom window . . . . The fruits of such surveillance techniques would be infringements of privacy that the Supreme Court deems serious." *Id.* at 935. Consequently, the privacy loss to a sex offender when "occasionally his trouser leg hitches up and reveals an anklet monitor that may cause someone who spots it to guess that this is a person who has committed a sex crime must be slight." *Id.* No Fourth Amendment cases from this Court have called the Seventh Circuit's findings regarding the diminished privacy expectations of repeat convicted sex offenders into doubt.

As to the second part of the reasonableness test, the Seventh Circuit decision incorporated its holding in *Belleau* that Wisconsin's strong governmental interest in protecting the public and deterring convicted sex offenders from committing additional offenses justified Wisconsin's GPS monitoring law. (Pet. App. 10a.) "Sex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002). Guided by this premise, *Belleau* noted the remarkably "high rate of recidivism among convicted sex offenders and their dangerousness as a class," and the

fact that the "risk of recidivism posed by sex offenders is 'frightening and high.'" *Belleau*, 811 F.3d at 934 (citation omitted.) It also found that recidivism statistics do not capture the full extent of recidivism because sex crimes are largely unreported; it cited studies that found that 70% to 86% of sex crimes against children are never reported, and are therefore not factored into recidivist arrest or conviction rates. *Id.* at 933. *Belleau* further recognized that the threat sexual predators pose to children and to the public is particularly grave in light of "the lifelong psychological scars that such molestation frequently inflicts." *Id.* at 934.

The Seventh Circuit correctly balanced Wisconsin's compelling interest in protecting the public from sex offender recidivism with the diminished privacy rights of offenders. Given the Seventh Circuit's findings that the incremental loss of privacy from having to wear the anklet monitor is slight, and how valuable to society the information collected by the monitor is, it held that Wisconsin's GPS monitoring law was reasonable under the totality of the circumstances. (Pet. App. 10a.)

Petitioners advance three main arguments for the position that the Seventh Circuit's application of the totality of the circumstances test was erroneous. None have merit. They first make the factual argument that "[t]he magnitude of the intrusion is severe" in this case. (Pet. 10.) Essentially, Petitioners are arguing that the Seventh Circuit misapplied the Fourth Amendment's "totality of the circumstances"

test—a test that exists by way of settled law. They are also asking the Court to reject facts found by both the district court and Seventh Circuit regarding the nature and intrusiveness of Wisconsin's GPS monitoring program. Neither are proper for certiorari review: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual finding or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Petitioners attempt to demonstrate a misapplication of the Court's precedent by citing to cases such as *United States v. Jones*, 565 U.S. 400 (2012), and *Riley v. California*, 573 U.S. 373 (2014). (Pet. 10–11.) In *Jones*, the Court held that the attachment of a GPS device to a vehicle constitutes a search under the Fourth Amendment. *Jones*, 565 U.S. at 404. No one disputes that Wisconsin's GPS monitoring program involves a search. And *Riley* held that a warrant was generally required before searching information contained in a cell phone. *Riley*, 573 U.S. at 401. But that type of search is materially different from the monitoring at issue here.

Petitioner's reliance on *Smith v. Doe*, 538 U.S. 84 (2003) and *Kansas v. Hendricks*, 521 U.S. 346 (1997), is also misplaced. In *Smith*, the Court upheld Alaska's sex offender registry in light of an ex post facto challenge. *Smith,* 538 U.S. at 105–06. And in *Hendricks*, the Court considered Kansas' involuntary civil commitment scheme for sex offenders, upholding it under a substantive due process challenge.

Hendricks, 521 U.S. at 357. Neither of these cases discussed these offenders' reasonable expectations of privacy in a Fourth Amendment context. And petitioners' contention that GPS monitoring is more akin to indefinite involuntary civil commitment than to placement on a sex offender registry is simply absurd (*see* Pet. 13a), especially given the Seventh Circuit's findings that the monitor is "unobtrusive" and an offender's loss of privacy as a result of GPS monitoring was "slight" and "incremental" (Pet. App. 3a, 9a).

Second, Petitioners argue that the Wisconsin law categorically applies to qualifying sex offenders without an individualized assessment. (Pet. 13–16.) They attempt to undermine the Seventh Circuit' factual findings regarding Wisconsin's governmental interest supporting the GPS monitoring law. (Pet. 16–18.) This type of challenge, again, is not a proper basis for certiorari review. *See* Sup. Ct. R. 10.

These arguments are also meritless because individualized suspicion is not required in every Fourth Amendment case. "The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); *see also Maryland v. King*, 569 U.S. 435, 447 (2013) ("[T]he Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

Further, *Grady* requires a Fourth Amendment analysis of a GPS tracking program as a whole, not the application to individual sex offenders. This Court remanded *Grady* so that North Carolina courts could "decide the ultimate question of the *program's* constitutionality." 575 U.S. at 310 (emphasis added). It explained that "North Carolina courts did not examine whether the State's monitoring *program* is reasonable—when properly viewed as a search—and we will not do so in the first instance." *Id.* (emphasis added).

Both of these passages direct lower courts to examine a GPS monitoring "program," not the program's application to each affected individual. That is, under *Grady*, courts must determine whether GPS monitoring laws are "reasonable" when applied to the affected class of persons. If the program is "reasonable" when applied to the class, it is "reasonable" when applied to each member of the class. Hence, the Seventh Circuit properly evaluated the GPS monitoring law under this programmatic framework.

The other cases cited in *Grady* support this approach analyzing programs, not individuals. In *Samson*, the Court upheld a California statute that permitted suspicionless searches of parolees. In so holding, it considered "the totality of the circumstances pertaining to *petitioner's status as a parolee*." 547 U.S. at 852 (emphasis added). The "circumstances" relevant to that "status" all involved parolees as a class. *All* "parolees have fewer

expectations of privacy," and the state's "ability to conduct suspicionless searches of parolees"—all of them, that is—"serves its interest in reducing recidivism." *Id.* at 850, 854. Given parolees' circumstances, "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id.* at 857. The individual petitioner's circumstances had no relevance to this analysis, beyond his status as a parolee.

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995), also cited in *Grady*, uses the same programmatic approach. There, the Court analyzed "[l]egitimate privacy expectations . . . with regard to student athletes." *Vernonia,* 515 U.S. at 657. The government interest at stake was "[d]eterring drug use by our Nation's schoolchildren," and the Court found that "a drug problem largely fueled by the 'role model' effect of athletes' drug use . . . is effectively addressed by making sure that athletes do not use drugs." *Id.* at 661, 664. Like *Samson*, the individual plaintiff's circumstances did not matter, aside from his membership in the group affected by the program at issue.

This Court's decision in *Smith* further supports that individualized assessments are not required. In *Smith*, the Court examined whether Alaska's sex offender registry law was excessive in relation to its regulatory purpose because it applies to all convicted sex offenders without regard to their future dangerousness. *Smith*, 538 U.S. at 103. The Court

rejected this argument, noting that "[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." *Id.* at 104. This conclusion applies with equal force here.

In light of *Grady, Samson*, *Vernonia*, and *Smith,* there does not need to be an individualized assessment for Wisconsin's GPS monitoring law to survive constitutional scrutiny under the Fourth Amendment.

Third, petitioners argue that the Seventh Circuit erred in finding that repeat convicted child sex offenders have a diminished expectation of privacy. (Pet. 18–20.) However, none of the authority they rely upon is convincing. *Sampson* upheld the suspicionless search of a parolee's person, which the Seventh Circuit distinguished in *Belleau:* "[t]he 'search' conducted in this case via the [GPS] anklet monitor is less intrusive than a conventional search." 811 F.3d at 937.

Additionally, in upholding Alaska's sex offender registry, *Smith* found relevant that registrants were still "free to move where they wish and to live and work as other citizens, with no supervision." 538 U.S. at 89. The Seventh Circuit similarly found that GPS monitoring "just identifies location; it doesn't reveal what the wearer of the device is doing at any of the locations." *Belleau*, 811 F.3d at 936. And unlike the

sexual offender registry, the monitoring of any given offender is generally shielded from public view: the device is small enough to be hidden under pants or socks, and the location data is not public. (Dkt. 19 ¶¶ 11–12, 19.) Neither the device nor the governing statute limits the offender's freedom of movement or travel. (Dkt. ¶¶ 21–22.) So contrary to petitioner's argument, *Smith* supports the Seventh Circuit's decision finding that the diminished expectation of privacy offenders experience under the GPS monitoring law is constitutional.

Petitioners fail to demonstrate that the Seventh Circuit's decision conflicts with this Court's Fourth Amendment precedents applying the "totality of the circumstances" test, so certiorari review should be denied.

B. Petitioners seek review regarding the application of the "special needs" doctrine, which was not an issue addressed by the lower courts.

Petitioners also seek certiorari on the question of whether the "special needs" doctrine applies to Wisconsin's GPS monitoring law and, if so, whether the law fails under such an analysis. (Pet. 20–25.) They admit, though, that the Seventh Circuit decided the case under the "totality of the circumstances" test "without undertaking any consideration of whether the search fell under the 'special needs' exception." (Pet. 23.) This is not surprising, since petitioners have never argued before that it would be improper to apply the "totality of the circumstances" test to

Wisconsin's GPS monitoring law, or that the *only* proper analysis was under the "special needs" doctrine. (*See generally* Dkt. 7, 21, 25.) Petitioners are making an argument that neither the district court nor the Seventh Circuit reached, and on this basis, alone, certiorari should be denied.

Further, Wisconsin's GPS monitoring law is constitutional under the Fourth Amendment's "special needs" doctrine. This Court explained in *Vernonia* that "[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.'" *Vernonia*, 515 U.S. at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). 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 privacy interest of affected people, much like in *Samson*. *See Belleau*, 811 F.3d at 940. The task is to "balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context." *Skinner v. Ry. Lab. Exec. Ass'n*, 489 U.S. 602, 619 (1989).

The Seventh Circuit's decision found that the primary purpose of Wisconsin's GPS monitoring law was to deter sex offenders from committing additional future offenses. (Pet. App. 8a, 10a.) This Court has

recognized that deterrence is a legitimate special need, and that "special needs, beyond the normal need for law enforcement" include "the need to deter drug use in public schools [and] the need to ensure that railroad employees engaged in train operations are not under the influence of drugs or alcohol." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (citing *Vernonia*, 515 U.S. at 653; *Skinner v. Ry. Lab. Exec. Ass'n*, 489 U.S. 602 (1989)).

In *Vernonia*, a program of random, suspicionless drug testing of student athletes permissibly served to deter drug use. Similar drug testing programs properly deterred particularly dangerous and improper drug use in *Skinner*, as well as in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989). And in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 455 (1990), the Court held that preventing drunk driving through sobriety checkpoints served a legitimate special need. *Skinner* explained the deterrent logic of programs like these: "By ensuring that employees . . . know they will be tested . . . , the timing of which no employee can predict with certainty, . . . the likelihood [increases] that employees will forgo using drugs or alcohol . . . ." *Skinner*, 489 U.S. at 630.

Wisconsin's GPS monitoring law deters repeat child sex offenders like petitioners from committing more child sex crimes. "The program reduces recidivism by letting offenders know that they are being monitored," just like the preventative effects in *Vernonia* and *Skinner*. *Belleau*, 811 F.3d at 940.

Wisconsin's interest in reducing the uniquely dangerous risk posed by repeat child sex offenders at least matches—and likely exceeds—the deterrence interests at stake in these other programs.

Further, the governmental interests at stake outweigh the privacy interests involved. As discussed above, the GPS monitoring law advances the important interest of preventing future child sex offenses, vile crimes with uniquely vulnerable victims. Moreover, the state's strong interest outweighs the diminished privacy expectations of repeat child sex offenders like Braam, Antrim, and Olszewski who are already listed on Wisconsin's public sex offender registry.

Consequently, the GPS monitoring law serves a permissible special need under the Fourth Amendment and survives Fourth Amendment scrutiny under this alternative basis.

Petitioners contend that certiorari review is needed to clarify what constitutes a search "unrelated to law enforcement." (Pet. 24.) They note that respondent articulated that another purpose served by the GPS monitoring law is to gather information to solve future crimes, and argue that this is a law enforcement purpose, making the special needs doctrine inapplicable. (Pet. 24–25.) But as noted above, that is not the only purpose of GPS monitoring—its more significant purposes are to deter further offenses, reduce recidivism and reintegrate offenders while mitigating risk.

Petitioners have failed to set forth any law by this Court that calls application of the "special needs" doctrine to this case into question. Certiorari is not warranted to review this question.

II. Petitioners exaggerate the split of authority between the Seventh Circuit and four state supreme courts.

Petitioners contend that certiorari should be granted based on the premise that there is a split of authority between the Seventh Circuit and four state supreme courts on the issue of whether GPS monitoring of released sex offenders violates the Fourth Amendment. However, there are key differences in the laws at issue, which results in an exaggeration of this purported split of authority.

The court in *State v. Grady*, 372 N.C. 509 (N.C. 2019), took pains to distinguish North Carolina's law from Wisconsin's. In *Grady*, the North Carolina Supreme Court noted that "North Carolina makes more extensive use of lifetime SBM than virtually any other jurisdiction in the country," and that "most of the other eleven state lifetime SBM . . . apply to persons convicted of a smaller category of offenses, which typically include only the most egregious crimes involving child victims." *Id.* at 515. The *Grady* court devoted an entire footnote to distinguishing its law from Wisconsin's GPS monitoring law in this key respect, explaining that "Wisconsin's program subjects only child sex offenders to lifetime SBM," that the Department "can substitute passive position system monitoring for

active SBM," and that "both the offender and the [D]epartment can apply to a court to request termination of lifetime tracking." *Id.* at 515, n.3.

Another key distinction *Grady* noted is that North Carolina's monitoring program required equipment checks performed by government officers every three months, during which the offender must allow them entrance into his home. *See id.* at 528. This, the court found, implicated Grady's "right . . . to be secure in his . . . house." *Id.* (citation omitted.) This is not a part of Wisconsin's monitoring law.

The Georgia law at issue in *Park v. State*, 305 Ga. 348 (Ga. 2019), is also distinguishable from Wisconsin's. Under the law analyzed in *Park*, location information collected for each offender was "immediately reported to law enforcement." 305 Ga. at 357. This is different from Wisconsin's law, where police "do not . . . even access the GPS data unless they have some reason to specifically request it." *Belleau*, 811 F.3d at 941. These distinctions were instrumental in the *Park* court's conclusion that the primary purpose behind Georgia's statute was to assist law enforcement, and thus it was not a permissible special needs search.

Similarly, the aspect of South Carolina law at issue in *State v. Ross*, 423 S.C. 504 (S.C. 2018), is not a feature of Wisconsin's statute. In *Ross,* the South Carolina Supreme Court examined a unique component of South Carolina's monitoring law that imposed lifetime GPS monitoring for failure to abide

by the state's sex offender registry law. *See id.* at 511. The offender in *Ross* had been convicted only of one prior misdemeanor sex offense when he failed to register as a sex offender. This resulted in his being placed on electronic monitoring thirty-six years after his conviction, and at least twenty-nine years after completing his punishment for that crime. *Id.* The *Ross* court was concerned that "a relatively innocent technical failure to register may lead to automatic, mandatory electronic monitoring," so it found that an "individualized inquiry into the reasonableness of the search" in these circumstances was required. *Id.* at 511–513. Wisconsin's GPS monitoring law does not apply to the circumstances litigated in *Ross*.

Finally, *Commonwealth v. Feliz*, 481 Mass. 689 (Mass. 2019), does not support a split of authority because *Feliz* relied on a state constitution provision more expansive than the Fourth Amendment. In *Feliz*, the Massachusetts Supreme Court determined that its GPS monitoring law violated a provision of the Massachusetts Declaration of Rights that "requires individualized determinations of reasonableness" in order to impose GPS monitoring as a condition of probation. *Id.* at 700. The *Feliz* court expressly noted that this state constitutional provision "prohibits suspicionless searches of parolees," and thus extends protections "beyond those of the Fourth Amendment." *Id.* at 700, n.18. Citing *Belleau,* the *Feliz* court recognized that "[o]ther jurisdictions to have considered the issue have taken varying approaches, often in the context of a more

particularized statute requiring monitoring of a specific subset of sex offenders." *Id.* at 697, n.13.

The laws at issue in *Grady, Park* and *Ross* featured key distinctions from the laws at issue here. And *Feliz* was not decided under Fourth Amendment law.

III. Certiorari should be denied given the procedural posture of this case.

Petitioners are appealing the denial of a preliminary injunction, which is a non-final order. Absent extraordinary circumstances, the interlocutory status of a case is sufficient to justify denial of a petition for certiorari. *See Virginia Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of petition) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

This procedural posture supports denial of certiorari review. Petitioners have indicated that despite the Seventh Circuit's decision, they can still pursue discovery and elicit expert testimony to create a record for summary judgment in the district court that would distinguish *Belleau* from petitioners here. (*See* Dkt. 41.) Respondents do not agree with their assessment regarding the dispositive effect of the Seventh Circuit's decision, but acknowledge petitioners' intent to continue to develop the factual record in the district court. Given petitioners' position, this petition is not yet ripe for review.

If petitioners are correct, it is possible that the Fourth Amendment issue urged to be reviewed here could be mooted if they were to prevail on the merits below. Review now could be a "mischief of economic waste" that this Court has previously cautioned against. *See Radio Station WOW v. Johnson,* 326 U.S. 120, 124 (1945).

IV. A pending Wisconsin Supreme Court case overlaps with the issue here, and this Court should not grant certiorari while that case is pending.

Petitioners Braam and Olszewski are subject to lifetime GPS monitoring because they have been convicted of a qualifying sex offense on "2 or more separate occasions" even though their offenses were part of the same criminal complaint. *See* Wis. Stat. §§ 301.46(2m)(am), 301.48(2)(a)(7). The Wisconsin Supreme Court is currently deciding whether the Department's interpretation of the "2 or more separate occasions" language for purposes of Wisconsin's lifetime sex offender registry statute can include convictions from the same criminal complaint. *See State v. Rector,* No. 2020AP1213-CR (Wis.). A decision in favor of *Rector* in the Wisconsin Supreme Court could moot Braam's and Olszewski's Fourth Amendment claims by removing them from GPS monitoring based on the interpretation of the statutory language at issue. Hence, certiorari review before a decision in *Rector* would be imprudent.

V. The Seventh Circuit's decision was not inconsistent with this Court's decision in *Packingham*.

Petitioners conclude by arguing that certiorari is necessary to "give substance to" this Court's decision in *Packingham v. North Carolina,* 137 S. Ct. 1730 (2017). This is not a consideration for granting certiorari review under Sup. Ct. R. 10, and the petition should be denied on this basis.

Further, the Seventh Circuit's decision does not conflict with *Packingham*. *Packingham* analyzed whether an across-the-board ban on accessing social networking websites violated the First Amendment rights of convicted sex offenders. Unlike the law at issue in *Packingham*, GPS monitoring does not restrict petitioners from going anywhere or from engaging in everyday activities. Also, the First Amendment inquiry in *Packingham* was whether the law was narrowly tailored to serve a significant governmental interest. *Packingham*, 137 S. Ct. at 1736. But here, the Seventh Circuit applied established Fourth Amendment law looking at the totality of the circumstances and employing a balancing test to determine if Wisconsin's GPS monitoring law passed constitutional scrutiny. Nothing in *Packingham* suggests that the Seventh Circuit's decision is flawed, and certiorari review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JODY J. SCHMELZER
Assistant Attorney General
Counsel of Record

Attorneys for Respondent

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 266-3094
schmelzerjj@doj.state.wi.us

October 21, 2022.