No. 15-3225

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL J. BELLEAU,
Plaintiff-Appellee,

v.

EDWARD WALL and DENISE SYMDON,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, CASE NO. 12-CV-1198, JUDGE WILLIAM C. GRIESBACH, PRESIDING

BRIEF OF PLAINTIFF-APPELLEE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-3225

Short Caption: Belleau v. Wall

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Plaintiff Michael J. Belleau

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Law Offices of James A. Walrath, LLC

American Civil Liberties Union Foundation (new information)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Not applicable

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable

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JURISDICTIONAL STATEMENT

The jurisdictional summary in the appellants' brief is complete and correct.

STATEMENT OF THE ISSUES

1. Does the Fourth Amendment require a warrant when government officials impose nonconsensual lifetime GPS monitoring, without any possibility for relief, upon a person not subject to a criminal sentence, and primarily to serve general law enforcement purposes?
2. Even if no warrant is required, is nonconsensual attachment of a GPS device and lifetime surveillance of an individual's every movement and activity—including within his home—reasonable under the Fourth Amendment when there has been no finding that it is necessary, and when justified solely by the State's asserted interest in addressing the possibility of reoffense by an individual the State has found not likely to reoffend?
3. Does the State violate the Ex Post Facto Clause by imposing continuous, lifetime GPS monitoring by means of a device permanently and conspicuously attached to the ankle of a person after the person has completed all criminal sentences for a sex offense he committed prior to enactment of the law authorizing the GPS monitoring?

STATEMENT OF THE CASE

Michael Belleau will turn seventy-three early in 2016. (Belleau Decl. (Dkt. 71), ¶3.) For the remainder of his life, the Wisconsin Department of Corrections' (DOC) Monitoring Center will track his precise locations and movements—minute-by-minute,

twenty-four hours a day, seven days a week—by means of a GPS device strapped to his ankle. (Decision & Order (Dkt. 104), at 7.) Belleau must tether himself to an electrical outlet every day to charge the device's battery. (*Id.*) He may never remove the device from his leg, even in his home, or otherwise "tamper" with it. (*Id.*)

The GPS device transmits Belleau's coordinates to the Monitoring Center, where each night teams of DOC Operators review his movements and the movements of approximately 200 other "maximum discharge offenders"—people who committed sex crimes in the past but have completed and been discharged from their criminal sentences. The Operators scrutinize Belleau's movements on interactive maps and record on spreadsheets locations or events (including gaps in location data or battery problems) that they deem suspicious or otherwise of interest. (Dkt. 104, at 8; Joint Stipulations (Dkt. 68), ¶¶3-6, 15-17, 20, 22.) Among other observations, Operators have noted when individuals under surveillance, including Belleau, go to churches, public libraries, hospitals or nursing homes, movie theaters, bars, restaurants, professional sports venues, when they are "home all day" or when they are not home overnight.[1] (Dkt. 68, ¶¶16-17, 21.) Operators forward their observations to the DOC's "GPS Specialist," who may call Belleau to check on him or contact other DOC employees or local law enforcement to do so. (*Id.* ¶18.) In some instances Operators may contact local law enforcement officials directly. (*Id.* ¶13.) As a result of these reports, Belleau must

[1] Although the State's GPS supplier, BI Inc., promises accuracy to ±30 meters, the federal government indicates that GPS coordinates are generally accurate to at least about 8 meters and sometimes to 3.5 meters or better. GPS.gov, GPS Accuracy, http://www.gps.gov/systems/gps/performance/accuracy/ (last visited Dec. 13, 2015).

submit to intrusions into his life from DOC staff, technicians, and police. (Dkt. 104, at 7, 9.)

The Monitoring Center retains the GPS location information indefinitely and makes it available upon request to law enforcement agencies investigating crimes, with no need for a warrant or other order. (Dkt. 68, ¶19.) Indeed, shortly after his release, local police investigating a possible violation of an ordinance restricting sex offender residency obtained information about Belleau's location from the Monitoring Center without a warrant. (Pl. Reply to Defs.' Suppl. Findings of Fact (Dkt. 101), ¶¶68-69.)

DOC also subjects monitored offenders to "inclusion" zones, which a person is prohibited from leaving during certain times, and "exclusion" zones, which the person is prohibited from entering except to pass through, "if necessary to protect the public." Wis. Stat. §301.48(3)(c). Although most maximum discharge offenders, including Belleau, have no exclusion zones, DOC policy allows imposition of such zones "if deemed appropriate by the GPS Specialist and approved by the Sex Offender Programs Director." (Dkt. 104, at 9.)

At no time before the attachment of the device to his leg or at any time since did a judge issue a warrant, make a determination of probable cause, or in any other way determine that GPS monitoring of Belleau is necessary or reasonable. (Dkt. 68, ¶34.)

In the early 1990s, Belleau pleaded guilty to sexually assaulting two children. The assaults occurred in the late 1980s, more than twenty-five years ago, when Belleau was in his 40s. Belleau has not been accused of committing any sexual crimes since the late 1980s. For his crimes, Wisconsin courts sentenced him to five years probation, with one

year in county jail, for the first conviction and ten years in prison for the second. He was released on parole in 2000, but his parole was revoked in October 2001, after he told a therapist that he had thought about molesting two girls. (Dkt. 104, at 2.)

Before the January 3, 2005, expiration of his remaining prison sentence, the State of Wisconsin filed a petition under Chapter 980 of the Wisconsin Statutes seeking to have Belleau committed as a "sexually violent person." (Dkt. 104, at 2-3.) Chapter 980 defines a sexually violent person as one "who has been convicted of a sexually violent offense . . . and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." Wis. Stat. §980.01(7). Both of Belleau's convictions qualified as "sexually violent offenses" under the commitment statute. *Id.* §980.01(6)(a). In September 2004, he was determined to be a sexually violent person and committed to a state treatment center. (Dkt. 104, at 3-4.)

In 2006, more than sixteen years after Belleau committed his last offense, the State enacted 2005 Wisconsin Act 431, which, among other things, imposes lifetime GPS monitoring on individuals who committed specified sexually violent offenses, including the ones Belleau committed. (Dkt. 104, at 6.) Under the statute, GPS monitoring begins when a person convicted of certain offenses is released from jail, prison, treatment, or civil commitment, including commitment under Chapter 980, after January 1, 2008, regardless of the date of the offense and without any determination of individualized risk of recidivism. Wis. Stat. §301.48(2)(a)1, 2 & 3; *id.* §301.48(2)(b)1, 2 & 3. Although some persons subject to GPS monitoring under the statute may petition to be released

from monitoring upon a showing that it is "no longer necessary to protect the public," *id.* §301.48(6), Belleau and others who begin GPS monitoring following their release from civil commitment may not, *id.* §301.48(6)(b)3.

In February 2010, Richard Elwood, Ph.D., a psychologist at the State's sex offender evaluation unit, who was also designated as Defendants' expert witness in this case, completed an annual evaluation of Belleau's risk of reoffense as part of a regular review to determine whether civil commitment could continue under Chapter 980. His risk assessment relied primarily on the results of the Static-99R, an actuarial risk-assessment scale that takes into account a subject's age, relationships, prior convictions involving violence and sex offenses, sentencing dates, convictions for non-contact offenses, and the nature of the victims (whether related, strangers, or male) and produces a score that is then compared to the observed rates of recidivism in particular samples of sex offenders with the same score. (Elwood Aff. (Dkt. 77), ¶22 & Ex. 1006 (Dkt 65-1).) Elwood concluded that Belleau's Static-99 score of zero corresponded to a pool of offenders with an estimated recidivism rate of approximately 13% over ten years. (Dkt. 77, ¶22.) In other words, of 100 similar individuals with the same risk score, only thirteen would be expected to have been arrested for another sex offense in ten years, while eighty-seven would *not*. (Dkt. 104, at 5 n.3.) Elwood described this score as "exceptionally low," placing Belleau among the two or so lowest-risk offenders he had ever evaluated. (Elwood Dep. (Dkt. 85-3), at 114, 120-21.) Elwood indicated that none of the individuals released from Chapter 980 confinement based on his opinion that the person was not "sexually violent" has been arrested for or convicted of a subsequent

sexual offense. (*Id.* at 118-19). And Belleau is, according to Elwood, "lower risk than the—even the average of those I recommended for discharge." (*Id.* at 121.) After evaluating other factors, Elwood made further adjustments, estimated Belleau's risk of reoffending over ten years at 16%, (Dkt. 77, ¶¶27-28), and concluded that he did not meet the statutory definition of a sexually violent person. Elwood also estimated that Belleau's risk of recidivism would be reduced by about half—to 8% over ten years—after spending five years in the community without sexually reoffending, as Belleau now has. (Dkt. 77, ¶34.)

As a result of Elwood's evaluation, the State stipulated that it could not prove that Belleau was a sexually violent person and agreed to his release. On July 2, 2010, the Circuit Court for Brown County ordered that he be released from civil commitment. (Dkt. 104, at 6.) Neither the State's stipulation nor the court's order purported to determine Belleau's risk of recidivism or the utility of GPS monitoring to reduce any such risk. (Discharge Order (Dkt. 71-1), Stipulation to Discharge (Dkt. 71-2).) However, by operation of statute, agents of the State attached a GPS device to Belleau's ankle soon after he was released from commitment on July 7, 2010. (Dkt. 104, at 6-7.)

Although the device may be worn under a pants leg, it is not always covered and has been seen by the public. It may emit audible messages when, for example, its battery is low. (*Id.* at 7-8.) A neighbor who learned Belleau was a sex offender brandished a gun and warned him to stay away, and others stopped speaking with him. (*Id.* at 7.) One of Belleau's fellow churchgoers saw the device when Belleau was kneeling for communion. (Dkt. 71, ¶15.)

The district court held that the "effects of the [GPS] law are so punitive" that their retroactive application to Belleau "violates the Ex Post Facto Clause," and that "the Fourth Amendment does not permit [GPS] surveillance absent a warrant issued upon a showing of probable cause or special conditions not present here." (Dkt. 104, at 32, 42.) The district court did not reach Belleau's equal protection claim. (*Id.* at 23 n.6.)

SUMMARY OF ARGUMENT

Both the Fourth Amendment and the Ex Post Facto Clause prohibit Wisconsin from fastening a GPS monitor to Belleau's leg and tracking his every movement for the rest of his life, without a warrant or individualized suspicion, and without any opportunity for relief, pursuant to a statute enacted long after he was convicted and sentenced.

Fastening a GPS device to a person's body and perpetually monitoring its location is an unreasonable Fourth Amendment search. Reasonableness generally requires obtaining a warrant based on probable cause. No warrant was obtained in this case, and no individualized finding was made that monitoring Belleau is necessary. The State relies on two narrow exceptions to the warrant requirement: "special needs" cases and cases involving reduced privacy expectations. Both exceptions, however, are inapplicable: monitoring Belleau serves primarily to further general law enforcement goals, and Belleau—who is not a probationer, parolee, student, or government employee—has undiminished privacy expectations. But even if one of these exceptions applied, the State's interest in addressing the *possibility* of re-offense by an individual who has been found *not likely to reoffend* cannot justify a search as pervasive and

intrusive as Wisconsin's permanent attachment of a GPS device, which lays bare Belleau's movements, activities, and associations on a minute-by-minute basis, including when he is within his home.

The Wisconsin scheme also violates the Ex Post Facto Clause. It operates retroactively because it imposes monitoring for offenses committed more than sixteen years before it was enacted. And it is punitive both in its intent and because it serves the classically punitive goals of shaming and deterring, using means at least as pervasive and severe as probation or parole. Indeed, continuous GPS monitoring effectively subjects a person to "prison without walls." (BI Website Article (Dkt. 70-9).) Multiple courts have, for these reasons, found lifetime GPS monitoring to violate the Ex Post Facto Clause, and this Court should do the same.

ARGUMENT

I. Lifetime GPS Monitoring Violates the Fourth Amendment.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides that "no Warrants shall issue, but upon probable cause." Defendants concede that GPS monitoring by means of an ankle monitor is a search: as the Supreme Court recently explained, "a State . . . conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (per curiam). The question here is whether this warrantless, non-consensual, suspicionless search is reasonable. It is not.

"Reasonableness generally requires the obtaining of a judicial warrant," *Riley v. California*, 134 S. Ct. 2473, 2482 (2014), and the State's conceded failure to do so before fastening the GPS device to Belleau's ankle renders the search "presumptively unreasonable,"[2] *Doe v. Heck*, 327 F.3d 492, 513 (7th Cir. 2003). Defendants invoke the "special needs" exception to the warrant requirement, but this "closely guarded" exception is inapplicable when, as here, a search program is "designed to obtain evidence of criminal conduct." *Ferguson v. City of Charleston*, 532 U.S. 67, 84, 86 (2001). Defendants also rely on a category of cases involving individuals with diminished privacy expectations, *see Samson v. California*, 547 U.S. 843 (2006) (parolees); *Skinner v. Rwy. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (railway workers involved in train accidents), but these cases are inapplicable because Belleau's interests in privacy and liberty are undiminished.

Even assuming, however, that some exception to the warrant requirement applied, the GPS monitoring in this case still would be constitutional only if the State's interest in monitoring Belleau outweighed Belleau's right to privacy in his home and in his daily activities, as well as his rights to move, associate, and worship freely. *See e.g.*, *Chandler v. Miller*, 520 U.S. 305, 314 (1997). No court has ever countenanced such a

[2] *Grady* does not hold, as Defendants argue, that the ad hoc balancing test from *Samson v. California*, 547 U.S. 843 (2006), and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), is applicable in the GPS monitoring context. (Defs.' Br. 12-13.) *Grady* holds only that fastening a GPS tracking device to the body is a search. It cites *Vernonia* and *Samson* for the uncontroversial proposition that searches must be reasonable to pass muster under the Fourth Amendment. Nothing about the brief per curiam opinion overturns the bedrock principle—reaffirmed just last term in *City of Los Angeles v. Patel*—that reasonableness generally requires obtaining a warrant. *See* 135 S. Ct. 2443, 2452 (2015).

prolonged and invasive suspicionless intrusion on an individual's Fourth Amendment rights as the one at issue in this case.

A. The GPS Monitoring of Belleau Is Unlawful Without a Warrant.

"[S]earches conducted outside the judicial process, without prior approval by a judge or a magistrate judge, are *per se* unreasonable subject only to a few specifically established and well-delineated exceptions." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (alterations omitted). Warrants are presumptively required because they "provide[] the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *United States v. Leon*, 468 U.S. 897, 913-14 (1984) (quotation marks omitted). The process of obtaining a warrant also serves the crucial function of preventing the government from conducting searches solely at its discretion. *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971). Thus, warrants are "an important working part of our machinery of government, not merely an inconvenience to be somehow weighed against the claims of police efficiency." *Riley*, 134 S. Ct. at 2493 (quotation marks omitted).

The safeguard of the warrant requirement is particularly important in the context of GPS monitoring, which "is cheap in comparison to conventional surveillance techniques." *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring); see also *id.* at 963-64 (Alito, J., concurring in the judgment) (noting historical difficulty and expense of continuous, extended location tracking). If GPS monitoring is not subject to a warrant requirement, it can "evade[] the ordinary checks that constrain abusive law

enforcement practices: limited police resources and community hostility." *Id.* at 956 (Sotomayor, J., concurring) (quotation marks omitted).

Wisconsin's statute imposes no constraints on the scope of the State's intrusion on Belleau's privacy and liberty: at any time over the course of Belleau's lifetime, the State may watch his every movement in private and public, impose inclusion and exclusion zones, visit Belleau's home to check on the device, and share information with law enforcement—all without any judicial supervision. This is precisely the sort of unfettered discretion that the Warrant Clause was designed to prevent. *See Riley*, 134 S. Ct. at 2494 ("[T]he Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."); *United States v. Sims*, 553 F.3d 580, 582 (7th Cir. 2009) ("[Warrants] limit[] the discretion of officers . . . to determine the permissible scope of their search.").

B. No Exception to the Warrant Requirement Applies.

In light of these principles, the State may only impose GPS tracking on Belleau without a warrant if one of the "well delineated" and "grudgingly granted" exceptions to the warrant requirement applies. *Heck*, 327 F.3d at 513, 515. Defendants' invocation of the "special needs" exception and their reliance on cases involving classes of individuals with diminished privacy expectations are both misplaced.

1. No Special Need Justifies the GPS Monitoring.

Defendants argue that the "special needs" exception justifies the warrantless lifetime GPS monitoring in this case. But this "closely guarded" exception applies only

"in those exceptional circumstances in which special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable." *Ferguson*, 532 U.S. at 74 n.7, 84 (emphasis added). Because Belleau is tracked for the purpose of retroactively connecting his daily whereabouts to possible crime scenes, the search in this case is not "divorced from the State's general interest in law enforcement," *id.* at 79, and the special needs exception does not apply.

The Supreme Court has approved warrantless search programs under the "special needs" rubric when such programs are "designed primarily to serve [non-law-enforcement] purposes." *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000). By contrast, when the primary purpose "actually served by the [search program] is ultimately indistinguishable from the general interest in crime control," the special needs exception is unavailable and the Fourth Amendment's warrant and probable cause requirements apply. *Ferguson*, 532 U.S. at 81. In determining whether a special need is the primary purpose of a warrantless search program, courts do "not simply accept the State's invocation of a 'special need.' Instead, [they] carr[y] out a 'close review' of the scheme at issue." *Id.* (quoting *Chandler*, 520 U.S. at 322).

The primary purpose of tracking Belleau's movements is "indistinguishable from the general interest in crime control." *Edmond*, 531 U.S. at 44. Defendants claim the purpose of tracking Belleau is "*prevent*[*ing*] re-offense." (Defs.' Br. 25-27.) But "simply invoking the importance of deterrence is insufficient" to support a finding that the special needs exception applies, because the overarching purpose of all criminal law enforcement is to deter individuals from committing crimes. *Willis by Willis v. Anderson*

Cmty. Sch. Corp., 158 F.3d 415, 423 (7th Cir. 1998). If the special needs exception could be justified "solely [by] the benefits of deterrence," it would sanction virtually all searches. *Id.* at 422; *see also Ferguson*, 532 U.S. at 70 (finding "the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine" insufficient to justify purported special needs search program).

The language of the Wisconsin GPS tracking statute reveals that the true primary purpose of the tracking is "to discover evidence of criminal wrongdoing" — which does not qualify as a special need. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). The statute defines GPS monitoring as "tracking using a system that actively monitors and identifies a person's location and timely reports or records the person's *presence near or at a crime scene* or in an exclusion zone or the person's departure from an inclusion zone." Wis. Stat. §301.48(1)(b) (emphasis added). Determining a person's presence near a crime scene is plainly an ordinary criminal investigatory purpose, and therefore not a special need. While the statute arguably articulates a second purpose — limiting an individual's movements by establishing inclusion and exclusion zones — that purpose plays no role in tracking Belleau, because no such zones have been established for him.[3] *Cf. Ferguson*, 532 U.S. at 81 (considering the purpose "actually served" by the search regime in question). Indeed, although Belleau's movements are tracked on a minute-by-minute basis, they are not reviewed until the end of each day, and they are stored indefinitely for possible retrieval for law enforcement upon discovery of a crime

[3] Exclusion zones have been established for only nine out of 200 maximum discharge registrants. (Dkt. 68, ¶10.)

scene. It is therefore plain that the tracking serves primarily, if not exclusively, to uncover evidence of "criminal wrongdoing." *Edmond*, 531 U.S. at 38.

The general law enforcement purpose of the search in this case is further evidenced by the routine involvement of law enforcement officers in Wisconsin's GPS monitoring scheme. This is a decisive factor in determining whether a search furthers a special need. *Compare Ferguson*, 532 U.S. at 82-84 (no special needs exception because of law enforcement's involvement in administration of hospital drug testing policy), *with Vernonia*, 515 U.S. at 658 (emphasizing, in upholding suspicionless school drug testing, that "the results of the tests are . . . not turned over to law enforcement authorities or used for any internal disciplinary function"), *and Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (finding it "clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement" because "[t]est results may not be used in a criminal prosecution of the employee without the employee's consent"). Here, law enforcement officers have unfettered access to data generated by the GPS tracking. Indeed, they request it—among other reasons—for the specific purpose of pursuing criminal investigations. (Dkt. 68, ¶19.) The threat of criminal consequences is also a critical means of enforcing the tracking scheme: tampering with a GPS device is a crime, *see* Wis. Stat. §946.465, and "tamper alerts" therefore trigger mandatory notification of law enforcement, (2013 Policy Directive (Dkt. 62-1), at 6); *cf. Ferguson*, 532 U.S. at 84 (special needs exception inapplicable where means used to enforce search program was "threat of arrest and prosecution"). The intimate involvement of law enforcement officers in Wisconsin's GPS tracking scheme

undermines any assertion that there is a special need for it "divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 79.

2. Belleau's Expectations of Privacy Are Undiminished.

Defendants' reliance on cases involving categories of individuals with diminished expectations of privacy is similarly misplaced, because Belleau does not fall into any such category.

The Supreme Court has upheld warrantless searches of parolees and probationers because such individuals remain subject to criminal sentences. *See Samson*, 547 U.S. at 850 (parolees); *United States v. Knights*, 534 U.S. 112, 119-21 (2001) (probationers). In doing so, it has reasoned that probationers and parolees find themselves "on a continuum of possible punishments" and therefore, by virtue of their status, cannot reasonably expect "the absolute liberty to which every citizen is entitled." *Samson*, 547 U.S. at 848-49 (quoting *Knights*, 534 U.S. at 119); *see also Knights*, 534 U.S. at 119 ("Probation, like incarceration, is a form of criminal sanction . . . ." (quotation marks omitted)). Belleau, in contrast, has long-since served his sentence, and is not subject to probation, parole, or any other form of supervised release. He therefore enjoys the full extent of privacy expectations protected by the Fourth Amendment. *See Trask v. Franco*, 446 F.3d 1036, 1043-44 (10th Cir. 2006) ("[P]robationers do not enjoy the absolute liberty to which every citizen is entitled . . . . [Plaintiff's] probation, however, had already been discharged when the probation officers [searched] her home in June 2001. Thus, she enjoyed the full protection of the Fourth Amendment . . . ." (alteration, citation, and quotation marks omitted)); *Moore v. Vega*, 371 F.3d 110, 116 (2d Cir. 2004) ("Because

plaintiff is not a parolee, she cannot be subjected to the same burdens upon her privacy, and the departures from the usual warrant and probable-cause requirements allowed with respect to parolees are not justified for her."); *cf. United States v. White*, 781 F.3d 858, 862 (7th Cir. 2015) ("[The defendant's] status as a parolee is *the critical factor* showing that the search was nonetheless reasonable under the Fourth Amendment." (emphasis added)).

There is no basis for Defendants' assertion that individuals with prior criminal convictions have reduced expectations of privacy simply by virtue of having been previously convicted of a crime. No federal court has ever so held,[4] and those few courts to have reached the issue have held to the contrary. *See Friedman v. Boucher*, 580 F.3d 847, 858 (9th Cir. 2009) (distinguishing *Samson* by declining to find non-parolee ex-convict had reduced expectations of privacy); *Trask*, 446 F.3d at 1043-44 (individual whose supervision had ended "enjoyed the full protection of the Fourth Amendment");

[4] Defendants cite only one (state court) decision that even arguably supports its position. *See State v. Bowditch*, 700 S.E.2d 1, 11 (N.C. 2010) ("[C]onvicted felons do not enjoy the same measure of constitutional protections, including the expectation of privacy under the Fourth Amendment, as do citizens who have not been convicted of a felony."). But *Bowditch* is hardly persuasive: none of the cases it cites in support of its conclusion involved a Fourth Amendment claim by an individual who was not on the continuum of possible punishments. *See Velasquez v. Woods*, 329 F.3d 420 (5th Cir. 2003) (per curiam) (prisoners); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997) (no Fourth Amendment claim); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) (prisoners); *Standley v. Town of Woodfin*, 661 S.E.2d 728 (N.C. 2008) (no Fourth Amendment claim); *State v. Bryant*, 614 S.E.2d 479 (N.C. 2005) (no Fourth Amendment claim). For the same reason, the concurring opinion in *Green v. Berge* is unpersuasive: it cites no cases finding that ex-convicts have constitutionally reduced privacy expectations. *See* 354 F.3d 675, 680 (7th Cir. 2004). Moreover, *Green* involved prisoners undoubtedly on the continuum of possible punishments, so the majority opinion is also of no relevance. Similarly, Defendants' citation to *Johnson v. Quander*, 370 F. Supp. 2d 79 (D.D.C. 2005), *aff'd*, 440 F.3d 489 (D.C. Cir. 2006), is unhelpful because it involved probationers.

Doe v. Prosecutor, Marion Cty., 566 F. Supp. 2d 862, 878 (S.D. Ind. 2008) (Hamilton, C.J.) (same).

Probationers and parolees, unlike those who have completed their sentences, are spared incarceration in exchange for other, less-severe intrusions on their privacy and liberty. *See, e.g.*, *Samson*, 547 U.S. at 850 ("In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements."). Their release from incarceration—where privacy expectations are at a minimum—is regarded as an act of grace, and they therefore cannot reasonably expect the same privacy as individuals who are not on the "continuum of possible punishments." *Samson*, 547 U.S. at 848; *see Knights*, 534 U.S. at 112 ("Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."). "[S]ince imprisonment is a greater invasion of personal privacy than being exposed to searches of one's home on demand, the bargain that [a probationer or parolee strikes is] not only advantageous to him but actually more protective of Fourth Amendment values than the alternative of prison would have been." *United States v. Barnett*, 415 F.3d 690, 691-92 (7th Cir. 2005).

Consent also plays an important part in the diminished privacy expectations of individuals subject to criminal supervision, as these individuals must agree to search conditions and other limitations on their privacy and liberty in exchange for release from incarceration. *See Samson*, 547 U.S. at 846; *Knights*, 534 U.S. at 114; *Barnett*, 415 F.3d at 691-92.

Unlike probationers and parolees, Belleau has served his sentence, is no longer subject to the "continuum of possible punishments," *Samson*, 547 U.S. at 848, and has never consented to pervasive electronic monitoring. His freedom from State intrusion is not the result of an act of grace or a beneficial bargain; it is, rather, an undiminished constitutional right.

Other "diminished expectations" cases marshaled by Defendants are equally inapposite. Defendants cite *Skinner*, 489 U.S. 602, for the proposition that "diminished expectations [of privacy] are not limited to just inmates or probationers." (Defs.' Br. 15.) But unlike the accident-involved railway workers who were subject to suspicionless drug testing in *Skinner*, Belleau has not forfeited his reasonable expectations of privacy "by reason of [his] participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of . . . employees." 489 U.S. at 627. *Skinner*, moreover, was a special needs case, and therefore, unlike this one, presented a government purpose—promoting railway safety—"beyond the normal need for law enforcement." *Id.* at 619.

Cases involving warrantless searches of students likewise have no bearing here, as they rely on a recognition that "students within the school environment have a lesser expectation of privacy than members of the population generally." *Vernonia*, 515 U.S. at 657. They also involve special needs, such as the need "to maintain order in the schools." *Id.* at 653.

In short, Belleau—unlike probationers, parolees, railway workers, and students—"enjoy[s] the full breadth of privacy interests owed to him under the

Constitution." *United States v. Katzin*, 732 F.3d 187, 200 (3d Cir.), *vacated pending reh'g en banc*, No. 12-2548, 2013 WL 7033666 (Dec. 12, 2013).[5] The Fourth Amendment's warrant and probable cause requirements therefore apply.

C. Under the General Reasonableness Balancing Test, the Balance of Interests Requires Invalidating Belleau's Lifetime GPS Monitoring.

Even if one of the exceptions to the warrant requirement applied, the Court would then need to apply the general reasonableness balancing test to determine whether the search regime chosen by the State to further its interests is reasonable in light of all of the interests involved. When a special need or diminished privacy expectation is asserted "in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 314 (special need); *see also Samson*, 547 U.S. at 848-49 (diminished privacy expectations). Because this case involves a perpetual invasion of Belleau's privacy in his home and in all of his activities, and a concomitant infringement of his right to move, associate, and worship freely, interest balancing requires invalidating the GPS monitoring scheme.

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[5] The persuasive force of the panel's decision in *Katzin* "does not vanish" even though it was vacated pending rehearing en banc. *In re Mem'l Hosp. of Iowa Cty., Inc.*, 862 F.2d 1299, 1302 (7th Cir. 1988). That decision is of particular relevance here because *Katzin* is the only federal appellate case to have reached the question of whether the GPS tracking of a vehicle is reasonable after the Supreme Court in *Jones* confirmed that attaching such a device to a vehicle is a search. *See Jones*, 132 S. Ct. at 949-54. The *Katzin* panel held that such a search requires a warrant. *See* 732 F.3d at 193-205. The full court granted rehearing on the sole and separate issue of whether the good-faith exception to the exclusionary rule applied. *See United States v. Katzin*, 769 F.3d 163, 169, 182 (3d Cir. 2014) (en banc).

1. Belleau's Privacy Interests Are at Their Zenith.

Defendants' facile claim that the privacy interests at stake in this case are minimal because Belleau's tracked movements "simply appear[] as a dot on a map," (Defs.' Br. 26), could hardly be farther from the reality.[6] These "dots"—one of which is generated for every minute of every day of Belleau's entire life, (Dkt. 68, ¶5)—represent "a precise, comprehensive record" of his movements and therefore "reflect[] a wealth of detail about h[is] familial, political, professional, religious, and sexual associations," *Riley*, 134 S. Ct. at 2490 (quoting *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring)). "Disclosed in the data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on." *People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009). Limitless surveillance of this sort, which results in a permanent government repository of personal information, is a severe intrusion on an individual's reasonable privacy expectations. *See Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment) ("[S]ociety's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could

[6] Any assertion that the intrusion in this case is less severe because Belleau's location is not watched in real time, (Defs.' Br. 18), is equally inaccurate. Belleau's location is *recorded* in real time, (Dkt. 68, ¶24), reviewed on a nightly basis, and stored indefinitely. A "picture of [a person's] life . . . is no less intimate simply because it has already been painted." *In re Application of the U.S. for Historical Cell Site Data*, 747 F. Supp. 2d 827, 839 (S.D. Tex. 2010), *rev'd on other grounds*, 724 F.3d 600 (5th Cir. 2013).

not—secretly monitor and catalogue every single movement of an individual[] . . . for a very long period."); *see also id.* at 955 (Sotomayor, J., concurring).

The intrusion in this case is especially problematic because it crosses the threshold of Belleau's home—a space entitled to paramount Fourth Amendment protection, and which, absent exigent circumstances, cannot be entered without a warrant. *See Kyllo v. United States*, 533 U.S. 27, 40 (2001); *United States v. Karo*, 468 U.S. 705, 714-15 (1984); *see also United States v. Garcia*, 474 F.3d 994, 996-97 (7th Cir. 2007) (holding, prior to *Jones*, that GPS "tracking of a vehicle on public streets . . . is not a search," but citing *Kyllo* in recognition that "the use of [technology] to reveal details of the interior of a home that could not otherwise be discovered without a physical entry" is a Fourth Amendment search). The monitor on Belleau's leg enables the State to confirm at any time of the day or night whether he is at home. Indeed, Monitoring Center Operators have specifically noted when Belleau "stayed home all day." (Dkt. 68, ¶17.) The use of electronic monitoring equipment to confirm that an individual is at home, or to learn information about the location and movements of items and people within a home, requires a warrant to the same extent that a physical search of the home would. *See Kyllo*, 533 U.S. at 40 (thermal imaging device); *Karo*, 468 U.S. at 715 (electronic tracking "beeper"); *United States v. Powell*, 943 F. Supp. 2d 759, 775 (E.D. Mich. 2013) (cell phone); *Tracey v. State*, 152 So. 3d 504, 524 (Fla. 2014) (cell phone). Because invasion of the home is the "chief evil against which the wording of the Fourth Amendment is directed," *Payton v. New York*, 445 U.S. 573, 585 (1980), its suspicionless and perpetual infliction is unreasonable.

The extent of the intrusion into Belleau's home is exacerbated by two additional factors. First, Belleau's tracking device must be charged for an hour each day. (Dkt. 68, ¶36.) During this hour, Belleau must confine himself to the immediate proximity of an electrical outlet; if he fails to charge the device and it runs out of batteries, he faces a visit from law enforcement officers. (Dkt. 62-1, at 6.) For hundreds of hours each year, then, Belleau is not "at liberty to . . . go about his business." *United States v. Smith*, 794 F.3d 681, 684 (7th Cir. 2015). Second, routine maintenance of the device requires frequent home visits by DOC officials, sometimes accompanied by police. (Dkt. 68, ¶37.) These repeated intrusions of State personnel into the sanctity of Belleau's home cross the "firm line" drawn by the Fourth Amendment "at the entrance to [his] house"—a threshold that "may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590.

The GPS monitoring in this case also exposes patterns of activity, such as visits to libraries and places of worship, that are independently entitled to constitutional protection. As the D.C. Circuit has observed, "[a] person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts." *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff'd sub nom.*, *Jones*, 132 S. Ct. 945. Indeed, Monitoring Center operators have specifically noted when Belleau was near a church, in a city park, and went to the public library. (Dkt. 68, ¶17.) "Awareness that the Government [is] watching [these activities] chills

associational and expressive freedoms." *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring); *see also, e.g.*, *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (striking down statutory provision that required petition circulators to wear identification badges in recognition of chilling effect of disclosure on First Amendment rights); *Talley v. California*, 362 U.S. 60, 64 (1960) (finding that ordinance requiring disclosure of names and addresses on handbills "restrict[ed] freedom to distribute information and thereby freedom of expression"). This chilling effect on independently protected rights enhances the Fourth Amendment concerns in this case. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (requiring "scrupulous exactitude" under Fourth Amendment when government activity would also interfere with activity protected under First Amendment).[7]

The search in this case intrudes into Belleau's home and every other aspect of his life, including his protected ability to express himself, access information, associate freely, and worship without being subjected to pervasive government surveillance. It does so day after day, in perpetuity. The individual interests at stake are paramount.

[7] In light of the chilling effect of surveillance, privacy has well-recognized efficiency-enhancing attributes. *See, e.g.*, Posner, *Privacy, Surveillance, and Law*, 75 U. Chi. L. Rev. 245, 246 (2008) (noting that "[c]omplete transparency paralyzes planning and action" and discourages communication of all types); *see also* Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 Geo. L.J. 2381, 2416 (1996) ([T]here are . . . substantial economic benefits to personal privacy . . . , including the willingness of people to engage in activities that they would not in the absence of anonymity . . . ."). By contrast, the economically inefficient effects of privacy that have been noted in other contexts, such as when individuals seek to prevent the public disclosure of information, are absent here.

2. The State's Interest in Preventing Sex Offenses Does Not Outweigh Belleau's Privacy Interests, and the Means It Has Chosen to Further This Interest Are Not Justified.

Against these privacy interests, the Court must weigh the strength of the State's competing interest and the extent to which it is furthered by the means of searching Belleau it has chosen. *Samson*, 547 U.S. at 848; *Vernonia*, 515 U.S. at 661. The State's interest in preventing sex offenses is undoubtedly legitimate, but that is not the end of the inquiry. As the Supreme Court has observed, "[p]rivacy comes at a cost," and even the most "important tools" in collecting information and investigating crime must sometimes yield to the protections of the Fourth Amendment. *Riley*, 134 S. Ct. at 2493; *see also Edmond*, 531 U.S. at 42 ("[T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.").[8]

The Supreme Court has repeatedly refused to countenance searches that are not tailored to the government's objectives, even when the asserted government interests are weighty. For example, a state unquestionably has a compelling interest in promoting highway safety. *See Delaware v. Prouse*, 440 U.S. 648, 658 & n.14 (1979). It may not, however, address this problem by using roving, suspicionless stops to detain drivers and check their licenses, given the narrower alternative of non-discretionary

[8] Although Wisconsin's current GPS monitoring scheme must yield in this case, that is not to say that Wisconsin can never use GPS technology to monitor sex offenders. No warrant could authorize lifetime monitoring, but the legislature could likely create a scheme consistent with Supreme Court precedent if it incorporated safeguards similar to those required for civil commitment, including, among other things, a hearing and individualized finding of future dangerousness. *See, e.g.*, *Jones v. United States*, 463 U.S. 354, 368 (1983); *Addington v. Texas*, 441 U.S. 418, 427 (1979). Thus, the cost of privacy need not be complete disavowal of GPS technology.

roadblock checks. *Id.* at 663; *see also Chandler*, 520 U.S. at 319 (invalidating suspicionless drug testing of political candidates on finding that search was "not well designed"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (invalidating roving border patrol stops as unduly "broad" means of addressing illegal immigration problem); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) ("Here, the 'need for the *particular* search,' a strip search, is hardly substantial enough, in light of the evidence regarding the incidence of weapons and contraband found in the body cavities of women minor offenders, to justify the severity of the governmental intrusion." (citation omitted)).

Here, there has been no finding of any "need for the *particular* search" at issue. *Mary Beth G.*, 723 F.2d at 1273. In fact, the only finding that has been made—that Belleau cannot be civilly committed—is favorable to him. Elwood concluded that Belleau's risk of re-offense is "exceptionally low" and decreasing, and that Belleau is among the two or so lowest-risk offenders he has ever evaluated. (Dkt. 85-3, at 114, 120-21.) More importantly, no one has determined whether there is any need for GPS monitoring in Belleau's case, or whether there are less-restrictive alternatives to perpetual, suspicionless, lifetime monitoring. While the fit between means and ends need not be perfect under the Fourth Amendment, an utter lack of any support for the chosen means is intolerable—especially when, as here, the search regime is targeted at a member of the general public, and serves the general purpose of crime control. *See Edmond*, 531 U.S. at 43 ("We are particularly reluctant to recognize exceptions to the

general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.").

The fact that Wisconsin provides no opportunity for pre- or post-deprivation review compounds the risk that surveillance will be applied unnecessarily. Studies generally agree that there is substantial variation in recidivism rates among sex offenders based on the personal characteristics of the offenders—including, in particular, that recidivism rates decrease significantly with age and time since last offense. *See, e.g.*, Blumstein & Nakamura, *"Redemption" in an Era of Widespread Criminal Background Checks*, U.S. Dep't of Justice, Nat'l Institute of Just. J., No. 263, at 11-13 (2009); Heilbrun, *Sexual Offending: Linking Assessment, Intervention, and Decision Making*, 4 Psychol. Pub. Pol'y & L. 138, 139-43, 151 (1998); Zimring & Leon, *A Cite-Checker's Guide to Sexual Dangerousness*, 13 Berkeley J. Crim. L. 65, 69-74 (2008).[9] A severely intrusive scheme that requires no particularized finding of need and provides no opportunity for modification as circumstances change is not remotely tailored to its objective, however legitimate that objective may be.

More fundamentally, the State's interest in this case—which boils down to addressing the *possibility* of re-offense by an individual who has been found *not likely to*

[9] Furthermore, although the public—and legislative—perception is that sex offenders reoffend at high rates, "[i]n reality, the most current research indicates that sex offenders, as a group, reoffend less than other criminal offenders as confirmed by federal, state, and academic studies." Tennen, *Risky Policies: How Effective Are Restrictions on Sex Offenders in Reducing Reoffending?*, 58 Boston Bar J. 25, 27 (2014) (collecting sources). For this reason, cases cited by Defendants for the proposition that recidivism rates among sex offenders are high, including *Smith v. Doe*, 538 U.S. 84 (2003), and *McKune v. Lile*, 536 U.S. 24 (2002), (Defs.' Br. 18), have been criticized as inaccurate, *see* Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 Buff. L. Rev. 1, 57-58 (2010).

reoffend—does not outweigh Belleau's undiminished interest in not having his every move tracked and recorded for every minute of the rest of his life. A search this pervasive is inimical to the most fundamental precept in Fourth Amendment jurisprudence: the State is not entitled to obtain limitless private information about an individual any time it pleases. *See Riley*, 134 S. Ct. at 2494 ("[T]he Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' . . . .").

II. Lifetime GPS Monitoring Violates the Ex Post Facto Clause.

Article I, Section 10 of the United States Constitution provides that "No state shall . . . pass any . . . ex post facto Law." Alexander Hamilton, in Federalist No. 78, described the ex post facto prohibition as a "specified exception[] to the legislative authority" and recognized the importance of courts in enforcing it: "[l]imitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void." Federalist Papers 394 (Garry Wills, ed., Bantam 1982); *see also Peugh v. United States*, 133 S. Ct. 2072, 2081 (2013) (courts have "given [the ex post facto prohibition] substance by an accretion of case law" (quoting *Dobbert v. Florida*, 432 U.S. 282, 292 (1977))).

The Ex Post Facto Clause not only "forbids . . . the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed," but also any law that "imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981); *see also Calder v. Bull*, 3 U.S. (3

Dall.) 386, 390 (1798) (listing four categories of laws "within the words and the intent of the prohibition," including "3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed").

Multiple courts have struck down GPS surveillance programs indistinguishable from Wisconsin's scheme on ex post facto and other grounds. *See Commonwealth v. Cory*, 911 N.E.2d 187 (Mass. 2009); *Riley v. N.J. State Parole Bd.*, 98 A.3d 544 (N.J. 2014); *see also State v. Dykes*, 744 S.E.2d 505, 508-09 (S.C. 2014) (lifetime GPS surveillance without opportunity to be removed from monitoring on showing of lack of dangerousness "is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending"). In holding that imposing GPS monitoring constituted forbidden retroactive punishment, *Cory* noted that "[t]here is no context other than punishment in which the State physically attaches an item to a person, without consent and also without consideration of individual circumstances, that must remain attached for a period of years and may not be tampered with or removed on penalty of imprisonment." 911 N.E.2d at 196. Similarly, *Riley* held that "the real world effects of the twenty-four-hour GPS monitoring regime on [the plaintiff's] life are unmistakably punitive in nature," noting that an offender "is condemned to wear the electronic monitoring device for the rest of his life," and that the device could under certain circumstances become visible and "send audible messages" that "identif[y] [the plaintiff] as a sex offender no less clearly than if he wore a scarlet letter." 98 A.3d at 557-59. In short, as aptly described in an article once touted on the website of Wisconsin's GPS vendor (BI, Inc.), electronic monitoring constitutes a "prison

without walls."[10] (Dkt. 70-9.)

For the reasons explained below, Wisconsin's GPS monitoring scheme—like the schemes invalidated in *Riley* and *Cory*—violates the Ex Post Facto Clause.

A. The GPS Law Retroactively Punishes Belleau, and Is Therefore Unconstitutional.

1. The GPS Law Operates Retroactively

The GPS law imposes burdens on Belleau as a result of offenses that occurred more than sixteen years before the enactment of the GPS law, and therefore operates retroactively. Defendants assert that the law applies to Belleau "because of his civil commitment," not because of his crime, and thus does not operate retroactively. (Defs.' Br. 9, 28-29.) But the statute does not impose monitoring on Belleau *because* of his civil commitment. Rather, it provides that monitoring *begins* when a person who has committed certain sexual crimes is released from *any* form of secure detention, including not only civil commitment, Wis. Stat. §301.48(2)(b)1, 2 & 3, but also *jail or prison*, *id.* §301.48(2)(a)1, 2 & 3. As the District Court observed, other people who committed the same offense as Belleau before the effective date of the statute, but who completed their sentences after, are also required to submit to GPS tracking, even

[10] *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007), and *State v. Bowditch*, 700 S.E.2d 1, relied upon by Defendants, (Defs.' Br. 33), are not to the contrary. *Bredesen* upheld a tracking scheme that applied only "for the duration of [an individual's] probation," and the devices used were not permanently affixed to the individual's body, as Belleau's device is, but worn on a belt like a nondescript phone or pager. *See* 507 F.3d at 1000, 1002, 1005. *Bredesen* also was decided before the Supreme Court made clear that longer-term GPS tracking intrudes significantly on privacy rights. Similarly, the scheme upheld in *Bowditch* was of "potentially limited duration" and allowed each person subject to the scheme an opportunity for an "[i]ndividual determination[]" that continued monitoring was unnecessary because the "person is not likely to pose a threat to the safety of others" or an "individualized assessment" that the person "requires the highest possible level of supervision and monitoring." 700 S.E.2d at 12-13 & n.4.

though they were never committed under Chapter 980. (Dkt. 104, at 13-14); Wis. Stat. §301.48(2)(a)1, 2 & 3. The fact that release from prison *or* Chapter 980 commitment triggers monitoring demonstrates that monitoring results from the *conviction* for a sexually violent offense, not from civil commitment. Although the State initiated Belleau's GPS monitoring when he was discharged from commitment, he was only subject to commitment because he had been convicted of "sexually violent" offenses for conduct that occurred in the late 1980s, long before Wisconsin created the GPS monitoring requirement. Wis. Stat. §980.01(7) (person "who has been convicted of a sexually violent offense . . . ." is subject to commitment).

Defendants suggest that the Chapter 980 evaluation and adjudication process constituted a "risk assessment" justifying lifetime GPS monitoring, independent of the prior convictions. (Defs.' Br. 29.) But the finding necessary to discharge Belleau from civil commitment, which resulted from an evaluation that he did *not* pose a sufficient risk to justify continued detention, does not logically entail a finding that his risk, currently or at the time of his release, *is* sufficient to justify lifetime GPS monitoring. Imposition of GPS monitoring is not contingent upon a finding of any risk in the discharge proceeding or at any other time in the civil commitment process. A person with absolutely *no* risk of reoffense would be subject to lifetime GPS surveillance upon discharge from commitment. Accordingly, the district court recognized that, as a matter of procedural due process, a determination that there is *not* sufficient risk to continue civil commitment does not justify imposing the intrusions of GPS tracking. (Dkt 104, at 14-15); *see also Schepers v. Comm'r, Ind. Dep't of Corr.*, 691 F.3d 909, 914-16 (7th Cir. 2012)

(due process requires some opportunity to contest designation as "sexually violent predator," where designation imposes enhanced restrictions).

In *Riley*, the state argued, as Defendants argue here, that its GPS tracking law was not retroactive because its application was triggered "not [by] the offense conduct," but by a "Tier 3 designation" of the offender that occurred after the enactment of GPS tracking. 98 A.3d at 556. The *Riley* court "reject[ed] that argument," noting that the Supreme Court had held that "penalties that 'relate to the original offense' are applied retroactively," even if some intervening action or conduct also leads to the enhanced penalty. *Id.* at 556-57 (quoting *Johnson v. United States*, 529 U.S. 694, 701 (2000)). In *Johnson*, the Supreme Court rejected an argument that an extension of a sentence due to the subsequent conduct of a person on supervised release should not be considered "retroactive" because it constituted punishment not for the original offense, but for the subsequent conduct. 529 U.S. at 699-700. Here, there is an even stronger reason to reject Defendants' argument: while in parole revocation cases the offender engaged in some additional conduct after sentencing that led to the increased sentence, in this case no additional post-sentencing conduct was required to commit Belleau under Chapter 980.

Imposing GPS monitoring on Belleau without any further conduct on his part also distinguishes this case from the only case cited by Defendants in support of their retroactivity argument, *United States v. Leach*, 639 F.3d 769 (7th Cir. 2011). (Defs.' Br. 28.) In *Leach*, the defendant was punished with incarceration for conduct (traveling interstate without registering) that violated a law already in effect at the time he engaged in the conduct. 639 F.3d at 773. Thus, the law did not fit into category 1 of

Calder's taxonomy of ex post facto laws: one that makes criminal an action that was not prohibited at the time the action was taken. *Id.*; *compare Calder*, 3 U.S. at 390. The *Leach* court then rejected the further argument that the registration requirement itself constituted increased punishment (*Calder* category 3), because it was indistinguishable from the registration requirement upheld in *Smith v. Doe*, *not* because the registration requirement did not apply retroactively. *Leach*, 639 F.3d at 773. Thus, the criminal penalty of imprisonment for violating the registration statue was not applied retroactively, and the registration requirement itself, though retroactive, was not "punitive." *Id.* at 772.

B. The GPS Law Imposes Punishment.

The Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84 (2003), provides the framework for determining whether a state regulation is "punitive," and thus violates the Ex Post Facto Clause if imposed retroactively. *Smith* applied a two-part "intent-effects" test. If a statute is intended by the legislature to be punitive, the inquiry ends and the law may not be applied retroactively. If "the intention was to enact a regulatory scheme that is civil and nonpunitive, [the court] must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* at 92.

The question of whether a law is punitive cannot be "reduced to 'a single formula,'" but is instead "a matter of degree." *Peugh*, 133 S. Ct. at 2082; *see also Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1995).

Here, there is substantial evidence that the Wisconsin legislature intended GPS tracking to impose punishment. But even if it did not, the law's effects are unmistakably punitive.

1. The GPS Law Has a Punitive Purpose.

In determining whether a legislature intends a law to be regulatory or punitive, courts first consider the legislature's expressed intent, or its intent as implied in the statute's "text and . . . structure." *Smith*, 538 U.S. at 92. A court may also consider "[o]ther formal attributes of [the] legislative enactment, such as the manner of its codification or [its] enforcement procedures," which may be "probative of the legislature's intent." *Id.* at 94. Particularly in cases like this one, "it would be naïve to look no further [than the face of the statute], given pervasive attitudes toward sex offenders." *Id.* at 108-09 (Souter, J., concurring).

In this inquiry, it is not the form of the enactment that matters, but its substance. *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 325 (1867). Here, the legislature did not specify whether it intended GPS tracking to be punitive. Its punitive purpose nonetheless appears from its text, legislative history, and structure.

The GPS monitoring provisions are codified in Chapter 301, the "Corrections" section of the Wisconsin Statutes, and assign tracking and monitoring responsibility to the DOC. DOC executes criminal sentences.[11] Its principal purposes involve "the

[11] *See, e.g.*, Wis. Stat. §973.10(1) ("Imposition of probation shall have the effect of placing the defendant in the custody of the department [of corrections] and shall subject the defendant to the control of the department . . . ."); *id.* §973.01(1) (describing sentences of "imprisonment in the Wisconsin state prisons"); *id.* §302.01(1) (defining "state prisons" as correctional facilities under DOC control).

custody and discipline of all prisoners" and supervision of people on "parole, extended supervision and probation." Wis. Stat. §301.03(2) & (3). The statute's plain language also reveals that its purpose is the detection, apprehension, and punishment of offenders: "Global positioning system tracking" is defined as "tracking using a system that . . . timely reports or records the person's presence *near or at a crime scene*." Wis. Stat. §301.48(1)(b) (emphasis added).

The legislative history is also telling. The initial version of the bill would have imposed GPS tracking by DOC only for individuals on probation, parole, or extended supervision, and the duration of tracking would have been limited to the period of supervision. (2005 Assembly Bill 591 (Dkt. 70-3).) The fact that GPS monitoring and criminal supervision were coterminous indicates that the law's sponsors considered GPS tracking to be a part of a person's criminal sentence.

Legislators were aware that the GPS requirement could be viewed as punishment, but persisted in expanding its scope. An October 12, 2005, email to Legislative Reference Bureau staff from an aide to bill sponsor Rep. Scott Suder initially instructed that the bill "[m]ake sure that GPS is ordered at the time of criminal sentencing rather than the civil sentencing, to eliminate the constitutionality concerns." (2005 Drafting File Excerpts (Dkt. 70-5), at 12.) On October 13, an attorney in the Legislative Reference Bureau warned legislative staffers that "requiring lifetime supervision for someone [who has already been sentenced] arguably violates the constitutional prohibition on ex post facto laws." (*Id.* at 7.) The sponsor decided to press ahead nonetheless, responding: "As far as the constitutionality of lifetime for offenders

who are already in prison, we have already discussed this scenario and would like to move forward with the bill as it is written." (*Id.* at 6.)

Defendants cite a single excerpt from a potential GPS vendor's email to a legislative aide to argue the legislature's "number one reason" for enacting the law was reducing recidivism. (Defs.' Br. 30.) But the fact that the law seeks, among other things, to reduce recidivism does not undermine the conclusion that it was intended to be punitive. As this Court has noted, "all criminal laws generally 'punish' those who have 'already committed' a crime. The punishment is what 'prevent[s] and deter[s]' undesirable behavior. Thus, characterizing the new statute as preventative and the existing statutes as reactive is questionable." *Doe v. Prosecutor, Marion Cty.*, 705 F.3d 694, 701 (7th Cir. 2013).

2. Lifetime GPS Surveillance Is Punitive in Effect.

In determining whether the effects of a law render it punitive, courts apply a multi-factor test derived from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), asking whether: (1) the law imposes "affirmative disabilities or restraints"; (2) it promotes the traditional aims of punishment; (3) its impositions have historically been regarded as punishment; (4) an "alternative purpose to which it may rationally be connected is assignable for it"; and (5) it appears excessive in relation to the alternative purpose assigned. *Smith*, 538 U.S. at 97. The factors are "neither exhaustive nor dispositive," but merely "useful guideposts." *Id.* Not all factors must tip in one direction to warrant a finding of punitive effect. *Hudson v. United States*, 522 U.S. 93, 101 (1997).

Defendants lean heavily on *Smith*'s statement that only the "clearest proof" will

overcome the presumption that a law designated by its drafters as civil is not in practice punitive. (Defs.' Br. 32.) However, as the district court noted, Wisconsin's GPS law "has not been 'denominated' civil," which calls into question the applicability of the "clearest proof" standard. (Dkt. 104, at 19 (citing *Smith*, 538 U.S. at 107 (Souter, J., concurring in judgment) ("clearest proof" burden "makes sense only when the evidence of legislative intent clearly points in the civil direction")).)

In any event, *Smith*'s "clearest proof" standard does not insulate every sex-offender law that a state dubs "regulatory" from challenge. Sex offender "regulations," like other regulations, can cross the line between civil safety measures and punitive infringements of the Ex Post Facto Clause. Numerous courts have recognized the punitive and unconstitutional nature of the new generation of intrusive sex offender restrictions, including GPS tracking laws. *See Cory*, 911 N.E.2d 187 (invalidating GPS monitoring scheme on ex-post-facto grounds); *Riley*, 98 A.3d 544 (same); *see also Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) (expanded sex offender registration law violates ex post facto prohibition); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (same); *Doe v. Dep't of Public Safety & Corr. Servs.*, 62 A.3d 123 (Md. 2013) (plurality opinion) (same); *Doe v. State*, 111 A.3d 1077 (N.H. 2015) (same); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013) (same). In applying the *Mendoza-Martinez* factors, the Supreme Judicial Court of Massachusetts in *Cory*, the Supreme Court of New Jersey in *Riley*, and the district court in this case all concluded that GPS monitoring has a punitive effect. This Court should do the same.

i. Lifetime GPS Monitoring Resembles Traditional Forms of Punishment.

As the district court noted, GPS surveillance amounts to "the State's supervision of individuals" who have committed a crime, which has "been regarded as a traditional form of punishment, whether in the form of probation, parole, supervised release, or other variations of the same." (Dkt. 104, at 21); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) ("Probation, like incarceration, is 'a form of criminal sanction . . . .'"); *United States v. Caputo*, 978 F.2d 972, 977 (7th Cir. 1992) (even "unsupervised probation" is "a punishment method"). Unlike sex offender registration, which left offenders "free to move where they wish . . . *with no supervision*," *Smith*, 538 U.S. at 101 (emphasis added), here "supervision is the whole point," (Dkt. 104, at 21.) As the New Jersey Supreme Court noted in *Riley*, while there "are no direct historical analogues to a twenty-four-hour-a-day electronic surveillance that can track an individual's every movement," the "closest analogue . . . is parole and, more particularly, parole supervision for life." 98 A.3d at 558.

Riley found that New Jersey's GPS law "looks like parole, monitors like parole, restricts like parole, serves the general purposes of parole, and is run by the Parole Board. Calling this scheme by another name does not alter its essential nature." *Id.*; *cf. Schepers*, 691 F.3d at 914 ("[The enhanced registration law] deprives [registrants] of a variety of rights and privileges held by ordinary Indiana citizens, in a manner closely analogous to the deprivations imposed on parolees or persons on supervisory release."). The same is true in Wisconsin, where DOC monitors mandatory discharge registrants like Belleau and probationers and parolees. Further, as the district court

explained, "GPS tracking is more intrusive than probation or parole since, unlike those forms of supervision as traditionally implemented, it allows DOC agents to monitor Belleau's whereabouts at all times for the remainder of his life." (Dkt. 104, at 22.)

Defendants attempt to distinguish *Riley* on the ground that the New Jersey law "came with 'a monitoring parole officer.'" (Defs.' Br. 34.) However, Wisconsin has a similar "GPS Specialist," (Dkt. 68, ¶12), and team of Monitoring Center Operators watching Belleau and others like him, (*id.* ¶6.) Indeed, GPS Specialists have repeatedly contacted Belleau or had police officers do so. (GPS Specialist Log (Dkt. 70-10).) Wisconsin's GPS monitoring amounts, in substance, to lifetime electronic parole.

Having a device affixed to one's body that can be seen by the public, transmits audible messages, and results in frequent visits from DOC officials or police, predictably subjects offenders to face-to-face humiliation and thus closely resembles historical shaming punishments. *See Smith*, 538 U.S. at 97-98. Belleau has had a gun brandished at him and been confronted by a church member who saw his GPS device.

Defendants argue that any shame from wearing the device is "merely a 'collateral consequence' of a regulation designed for another purpose." (Defs.' Br. 35.) But unlike the registration and Internet-publication requirements upheld in *Smith*, which furthered the "dissemination of accurate information" by means that did not involve a "direct confrontation between the offender and the public," 538 U.S. at 98, observing a GPS device or hearing a DOC message necessarily entails the observer's immediate presence with the offender. As the New Jersey Supreme Court noted in *Riley*:

> Even though [the GPS monitoring law]'s purpose is not to shame Riley, the "effects" of the scheme will have that result. If Riley were to wear shorts in a mall or a bathing suit on the beach, or change clothes in a public locker or dressing room, or pass through an airport, the presence of the device would become apparent to members of the public. The tracking device attached to Riley's ankle identifies Riley as a sex offender no less clearly than if he wore a scarlet letter. His parole officer may also send audible messages to Riley on the tracker that he may receive in a public place.

98 A.3d at 559. This scarlet letter conveys no information whatsoever aside from an ominous message that the wearer is a dangerous person to be feared and reviled—or even attacked. (Dkt. 104, at 23-24.)

ii. GPS Tracking Imposes an Affirmative Disability or Restraint.

In considering the extent to which a law subjects a plaintiff to an "affirmative disability or restraint," a court must "inquire how the effects of the Act are felt by those subject to it." *Smith*, 538 U.S. at 99-100. Belleau experiences:

- 24-hour-per-day, minute-by-minute supervision for the remainder of his life;
- wearing a visible device strapped to his skin at all times;
- receiving audible messages from this device;
- tethering himself to an electrical outlet for at least an hour each day to recharge the device's battery; and
- frequent in-person and telephone contact from law enforcement, DOC personnel and GPS vendor technicians.[12]

[12] Defendants assert that contacts with local police or DOC staff other than the GPS Specialist and Monitoring Center staff should not be attributed to the GPS law. However, as the record reflects, separating contacts by GPS staff from contacts by other DOC staff and law enforcement takes far too narrow a view of the GPS program, which is inextricably intertwined with Sex Offender Registry staff and, by design, relies on local law enforcement. (Dkt. 68, ¶8 ("The Specialist may follow up with the local Sex Offender Registry Specialists or law enforcement to alert them of concerns, if that has not already occurred."), Dkt 62-1, at 6 (requiring contact between GPS Monitoring Center staff or GPS Specialist and local law enforcement when there is a tamper alert or other problem), Larrabee Dep. (Dkt. 70-13) at 35-36 (options include contacting registrant and contacting local law enforcement to resolve alerts), Dkt. 70-10 (June 6, 2012 entry showing police dispatched for battery problem).)

GPS monitoring is thus more accurately characterized as punitive than the Alaska registration law at issue in *Smith*, which imposed none of these intrusions or burdens. *See Riley*, 98 A.3d at 559 (unlike Alaska's registration law, GPS monitoring "could hardly be called 'minor and indirect'").

Defendants argue that the GPS scheme does not impose "a legally sufficient restraint" because constant lifetime surveillance is not as severe as imprisonment and does not "force him to be in a certain location." (Defs.' Br. 37-38.) However, the Supreme Court has never said that imprisonment or confinement are the *only* restraints that qualify as punitive; if it had, the multi-factor *Mendoza-Martinez* inquiry would be superfluous and probation would not be considered punishment. *Smith* merely notes that imprisonment is "the paradigmatic affirmative disability or restraint," 538 U.S. at 100, but other restraints can be punitive under the multi-factor test. Here, the "requirement permanently to attach a GPS device" to one's body is "dramatically more intrusive and burdensome" than a mere requirement to register. *Cory*, 911 N.E.2d at 196. Continuous surveillance is comparable to "having a personal guard constantly and physically present" and "represents an affirmative burden on liberty." *Id.* And being tethered to an outlet every day and confined to home for repairs physically restrains Belleau's freedom of movement. As the district court noted, Belleau has been "tied to an electrical outlet" for the equivalent of two weeks per year—more than seventy-five days since his release from commitment. (Dkt. 104, at 25.)

The frequent visits to Belleau's home by DOC agents or local police that result from GPS surveillance add to the law's burdens. As the New Hampshire Supreme

Court noted, frequent "checks by the authorities at the petitioner's residence do entail a level of oversight by the State to which few citizens are subject. Such requirements . . . exceed simply burdening or disadvantaging the petitioner, and we can no longer find that the effects are 'de minimis.'" *Doe*, 111 A.3d at 1096.

iii. GPS Surveillance Advances the Traditional Aims of Punishment Through Traditional Methods of Crime Detection.

Defendants recognize that the asserted purpose of reducing recidivism by sex offenders amounts to deterrence, one of the traditional aims of punishment. *Smith,* 538 U.S. at 102. However, they also assert, without support, that deterrence in this case "is a regulatory aim, not a punitive one." (Defs.' Br. 39.) This argument holds no water: unlike registration and notification, which do not directly enhance detection and punishment of reoffense, but give members of the public information to protect themselves, GPS monitoring is just another criminal investigation method that deters through threat of punishment.

As the Court explained in *Smith*, registration and notification deters by "mak[ing] the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary." 538 U.S. at 101. This "public education" model departs from traditional criminal justice methods, which rely on detection and punishment of crime to achieve deterrence.

GPS tracking, in contrast, is not about public education, but law enforcement surveillance. It provides no additional information to the public, which has no access to DOC's location data. Rather, it expressly facilitates conventional law enforcement

detection of completed crimes so they can be punished. *See* Wis. Stat. §301.48(1)(b) (GPS tracking defined as "tracking using a system that . . . timely reports or records the person's presence *near or at a crime scene*" (emphasis added)).

The legislative history of Act 431 supports this conclusion. Emails from the CEO of a tracking technology company to legislative aides disclaimed the ability to *prevent* a sex crime from occurring: "It is important that the public does not perceive this as a tool that will stop a crime from occurring." (Dkt. 70-5, at 9.) Instead, GPS tracking provides the ability "to use GPS tracking data, or other non compliance [data] like tampering [incidents] that would implicate them in a crime." (*Id.* at 10.) To the extent the legislature intended GPS tracking as a deterrent, then, it intended it to operate in exactly the same way as any other criminal investigation techniques: by making possible detection of and punishment for already completed crimes.

iv. Lifetime GPS Tracking Is Excessive in Relation to Any Non-Punitive Purpose.

Although listed as separate factors in *Smith*, the inquiries into whether a challenged law "has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose," 538 U.S. at 97, are interrelated. The first factor requires asking whether the State can assert a plausible non-punitive purpose for the law. *Mendoza-Martinez*, 372 U.S. at 168-69. The second factor emphasizes the "fit" of the law to its non-punitive objectives and weighs the costs of the law on offenders against benefits to society.

The Court in *Smith* endorsed a sliding scale approach, where "the magnitude of the restraint" affects how narrowly tailored a law must be to its purpose to survive ex post facto review. 538 U.S. at 104. The Court distinguished the civil commitment statute at issue in *Kansas v. Hendricks*, 521 U.S. 346 (1997), where it required strong procedural protections to ensure that only "particularly dangerous individuals" were subject to the onerous restraint of confinement, from Alaska's "more minor condition of registration" and publication of "accurate, nonprivate information about the registrant's convictions," which allowed the legislature to "dispense with individual predictions of future dangerousness," *Smith*, 538 U.S. at 104.

Thus, significant physical restraints or intrusions into other rights, even when used in a purportedly civil context, can be imposed only where "the State has . . . limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; . . . and permitted immediate release upon a showing that the individual is no longer dangerous . . . ." *Hendricks*, 521 U.S. at 368-69; *see also Doe*, 705 F.3d at 701 (lack of procedures to limit application of ban on use of social networking sites "illuminates the imprecision of the . . . statute"). Without such protections, significant restraints or intrusions "become a mechanism for retribution or general deterrence—functions properly those of the criminal law, not civil commitment." *Kansas v. Crane*, 534 U.S. 407, 412 (2002).

While GPS monitoring may not require *all* the procedural and substantive protections necessary to impose civil commitment, Wisconsin's GPS law has *none* of these limitations to ensure that it is applied only when reasonably necessary to achieve

the government's asserted public safety purpose. Consequently, its burdens are excessive in relation to their marginal public safety benefit.

This Court's cases reviewing imposition of conditions of supervised release, including sex offender conditions, are instructive because they employ a balancing test similar to the ex post facto excessiveness inquiry. Such conditions of release "must be reasonably related to . . . the need for adequate deterrence [and] the need to protect the public from further crimes of the defendant." *United States v. Goodwin*, 717 F.3d 511, 522 (7th Cir. 2013); *see also Brown v. Phillips*, 801 F.3d 849, 854 (7th Cir. 2015) ("some data is needed to connect the goal of reducing recidivism of sex offenders with" supervised release conditions under 18 U.S.C. §3563, or conditions of civil detention under *Turner v. Safley*'s "rational relationship" test). "'[T]he more onerous the term [of supervised release], the greater the justification required—and . . . a term can become onerous because of its duration as well as its content.'" *United States v. Kappes*, 782 F.3d 828, 845-46 (7th Cir. 2015) (quoting *United States v. Quinn*, 698 F.3d 651, 652 (7th Cir. 2012)); *accord Doe*, 111 A.3d at 1095, 1100 (lifetime duration of registration and notification particularly excessive, but opportunity to obtain early termination on showing lack of need "decreased the potential affirmative disability or restraint involved").

Under these precedents, the lack of sufficient tailoring in Wisconsin's GPS scheme is plain. Wisconsin's scheme, which is not just intrusive but indefinite, is particularly onerous, and yet no individualized assessment of need was made in Belleau's case, and he has no opportunity to seek relief in the future. *Cf. United States v. Taylor*, 796 F.3d 788, 795 (7th Cir. 2015) (noting that "overly broad search conditions

[imposed] as conditions of supervised release or probation" must "be 'connected to [the defendant's] offense, history and personal characteristics'"). Perhaps recognizing the problematic fact that no individualized assessment of need has been made, Defendants argue that *any* risk is sufficient to justify lifetime GPS surveillance. (Defs.' Br. 42.) But this amounts to a mere assertion that tracking is justified because "the future cannot be predicted," which cannot justify the imposition of onerous conditions. *United States v. Thompson*, 777 F.3d 368, 375 (7th Cir. 2015).

Here, of course, Belleau must wear the GPS device for his entire life, with no opportunity to show it no longer serves a public safety purpose. Lifetime duration and lack of a mechanism to terminate sex offender regulations have led a number of courts to find those regulations impermissible.[13] *See, e.g., Dykes*, 744 S.E.2d at 508-09 (lifetime GPS monitoring without opportunity to demonstrate it is no longer necessary to protect public safety violates substantive due process, because such an intrusion without judicial review "is arbitrary and *cannot be deemed rationally related* to the legislature's

[13] Defendants note that GPS tracking terminates if an offender moves out of state or if DOC and a court find he is permanently physically incapacitated. (Defs.' Br. 31.) However, termination when a registrant leaves the state simply reflects the territorial limits of the state's criminal jurisdiction. *Mueller v. Raemisch*, 740 F.3d 1128, 1132-33 (7th Cir. 2014). In addition, the fact that Belleau could theoretically move out of state to exercise his constitutional liberties does not diminish Defendants' duty to respect them. *See Planned Parenthood of Wis., Inc. v. Schimel*, __ F.3d __, 2015WL7424017, at *10-11 (7th Cir. 2015) (describing as "untenable" state's argument that availability of abortion in neighboring state excused imposition of undue burden on abortion in state). With regard to the incapacitation provision, the statute permits DOC, not an offender, to petition a court for termination. Wis. Stat. §301.48(7)(a) ("The *department* may file a petition requesting that a person's lifetime tracking be terminated if the person is permanently physically incapacitated." (emphasis added)). In practice, DOC seeks termination for physical incapacitation only in extreme cases. (Larrabee Dep. Excerpts (Dkt. 93-2), at 7 (only two instances of termination involved registrants who were comatose).) Termination under such extreme conditions is akin to compassionate release from prison, *see* Wis. Stat. §302.113(9g), which does not render imprisonment any less punitive.

stated purpose of protecting the public from those with a high risk of reoffending" (emphasis added)); *Cory*, 911 N.E.2d at 197 (lifetime GPS requirement "appears excessive . . . to the extent that it applies without exception to convicted sex offenders sentenced to a probationary term, regardless of any individualized determination of their dangerousness or risk of reoffense").

Even if, as Defendants argue, Belleau remains somewhat more likely to commit a sexual offense than a person never convicted of such an offense, (Defs.' Br. 40), his actual risk is, under the statute, irrelevant to whether and how long he is subject to GPS surveillance. Moreover, some increased risk is not sufficient justification to invade constitutional rights. *Cf. Doe,* 705 F.3d at 699 ("Indiana prevents Doe from using social networking sites for fear that he *might*, subsequent to logging on to the website or program, engage in activity that Indiana is entitled to prevent. But . . . Indiana has other methods to combat unwarranted and inappropriate communication between minors and sex offenders." (emphasis added)); (Dkt. 104, at 29 ("[A] psychologist's opinion that a particular person is more likely than others to commit a serious crime has never in our nation's past been held a sufficient justification for the State to restrain one's liberty in such a fashion.")). And as the district court noted, a recidivism rate for a sample of people sharing certain characteristics does not predict what an individual with those characteristics will do. (Dkt. 104, at 29.) This Court, too, has noted "the difficulty of predicting recidivism." *United States v. Siegel*, 753 F.3d 705, 708 (7th Cir. 2014). "[S]tatistical studies are unlikely to enable a confident prediction that a *particular* inmate will or will not commit crimes after he is released." *Id.* at 709. Even assuming risk

assessments did allow sufficiently confident predictions about individual behavior, Belleau's risk is extraordinarily low. As Defendants' expert testified, Belleau had one of the two or three lowest risk scores he had ever seen. (Dkt. 85-3, at 114, 120-21.)

Nor do the limited empirical studies that exist support the effectiveness of GPS surveillance for offenders, like Belleau, who are not still serving sentences of probation or parole.[14] And even in the context of community supervision, the efficacy of GPS monitoring remains controversial. *See, e.g.*, Armstrong & Freeman, *Examining GPS Monitoring Alerts Triggered by Sex Offenders: The Divergence of Legislative Goals & Practical Application in Community Correction*, 39 J. Crim. Just. 175, 180-81 (2011) (noting limited deterrent effect of GPS tracking of sex offenders and unintended result of increased workload of community supervision staff to respond to false alerts); Renzema & Mayo-Wilson, *Can Electronic Monitoring Reduce Crime for Moderate to High-risk Offenders?* 1 J. Experimental Criminology 215 (2005); *see Siegel*, 753 F.3d at 709 (noting controversy over efficacy of conditions of supervised release).

Defendants conclude their ex post facto argument by asserting that Belleau should be glad he is subject to GPS tracking, because a "legislature could properly conclude that someone with his history should never leave prison. Here, the legislature has struck a different balance that gives . . . Belleau another chance to be out." (Defs.' Br. 42.) This argument exposes Wisconsin's lifetime GPS surveillance scheme for what it is: a sentence to a new form of criminal supervision that, like probation or parole, is an

[14] The studies cited by Defendants involved offenders still serving terms of parole. (Defs.' Br. 19, 41.) Because offenders' risk of recidivism declines over time, (Dkt. 77, ¶34), those still serving sentences are not similar to Belleau, who long ago completed his sentence.

alternative to long-term incarceration. It may be that such an alternative sentence would be permissible for some offenders, if applied *prospectively*. However, the Ex Post Facto Clause prohibits the government from *retroactively* imposing such a sentence on people who have already done their time. Sentencing judges must prospectively make this sort of trade-off between punishments. Because GPS monitoring was not available at the time, Belleau's sentencing judge could not "strike the different balance" of giving him a shorter prison or probation sentence and longer GPS monitoring. The legislature may not, after the fact, purport to strike a "different" balance and simply add to the sentence already imposed.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court affirm the decision of the district court holding that the GPS tracking of him under Wisconsin's statutory scheme violates the Fourth Amendment and Ex Post Facto Clause.[15]

[15] Because the district court did not decide Belleau's equal protection claim, this Court should remand that claim for the district court's consideration in the first instance.

Dated December 15, 2015, in Milwaukee, Wisconsin.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(C) & 28(b)

The undersigned counsel of record certifies that this brief complies with the type-volume limitations set forth in F.R.A.P. 32(a)(7)(B) for an appellee's brief produced with a proportionally spaced font. The length of the brief, exclusive of captions, tables, signature blocks, and certificates, is 13,960 words.

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CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that this brief was served on counsel of record for defendants-appellants, Abigail C.S. Potts and Anthony D. Russomanno, who are registered ECF users, by electronic case filing pursuant to Seventh Cir. Rule 25(a) and Electronic Case Filing Procedure (e)(1). Two paper courtesy copies are also being sent by first class mail to counsel at the Wisconsin Department of Justice, P.O. Box 7857, Madison, WI 53707-7857.

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