IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ALTON ANTRIM, individually and on behalf of all others similarly situated, Plaintiff, v. KEVIN CARR, in his official capacity as Secretary of the Wisconsin Department of Corrections, Defendant.	19-cv-396 Judge Brett H. Ludwig

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Plaintiff, through counsel, respectfully moves this court to enter summary judgment in his favor on his claim that Wis. Stat. 301.48(2)(a)(7), which requires lifetime GPS monitoring of individuals who have been convicted of more than one count of a sex offense, violates the Fourth Amendment. In support, Plaintiff states as follows:

FACTUAL BACKGROUND

I. Plaintiff Alton Antrim

Plaintiff Alton Antrim is a 67-year-old widow. He resides in Kenosha, Wisconsin, with a roommate. Plf. Statement of Undisputed Facts ("SOF") at ¶118. In 1991 he was convicted of first-degree sexual assault of a minor and sentenced to six years of probation. SOF at ¶119. In 1998 he was convicted of first-degree sexual assault of a minor and sentenced to 20 years in the Wisconsin Department of Corrections ("WDOC"), of which he was required to serve 14 years and seven months in prison and five years and three months on supervision. He was discharged from supervision in October 2018 and is not under any form of criminal supervision. SOF at ¶120. Due to his convictions, Antrim is subject to lifetime GPS monitoring pursuant to Wis. Stat. 301.48(2)(a)(7). Antrim, individually and on behalf of a class of similarly situated individuals who are not under criminal supervision, challenges the constitutionality of this statute. ECF 62 at 4.

II. Wisconsin's Program of Lifetime GPS Monitoring

A. Relevant Statutes

Wis. Stat. 301.48(2)(a)(7) provides that the WDOC "shall maintain lifetime GPS

tracking" of a person who "on or after January 1, 2008" becomes the subject of a "special bulletin notification" pursuant to Wis. Stat 301.46(2m)(am). 301.48(2)(a)(7). Wisconsin law defines a "special bulletin notification" ("SBN") offender as an individual who has "been convicted 2 or more times, including convictions that were part of the same proceeding, occurred on the same date, or were included in the same criminal complaint, for a sex offense." 301.46 (2m)(am). Under a previous version of the law, only individuals who were convicted of sexual offenses on "2 or more separate occasions"—meaning two or more separate sentencing dates—were classified as SBNs and thus subject to monitoring. *See State v. Rector,* 2023 WI 41 (Wis. 2023).[1] An amendment that went into effect on March 30, 2024, expanded the definition of SBN to include individuals convicted of more than one count in a single case. An individual is subject to monitoring pursuant to 301.48(2)(a)(7) based solely on whether he falls into the statutory category of having been convicted of more than one count of a sexual offense. There is no individualized evaluation of the risk posed by the person. SOF at ¶1.

Wisconsin law makes it a felony offense to "refuse[], resist[] or obstruct[] the instillation" of a GPS device mandated by 301.48 or to "tamper with, block, diffuse or prevent the clear reception of a signal transmitted by" a GPS device mandated by 301.48. Wis. Stat. 946.465.

Under Wisconsin law, the device remains on a person's ankle for life with two exceptions: the device is removed if the person moves out of state (301.48(7m)), or

[1] *See also* 2023 Wisconsin Act 254 (showing amendments to the statute enacted on March 30, 2024) (https://docs.legis.wisconsin.gov/2023/related/acts/254).

after twenty years, individuals on GPS monitors who have not been convicted of any subsequent crime may petition a court to have the device removed (301.48(6)). Pursuant to 301.48(6)(h), the court may terminate tracking if it determines, based on a physician or psychologist's evaluation and other evidence, "that lifetime tracking is no longer necessary to protect the public."

According to data provided by the WDOC, there are currently 680 persons subject to monitoring pursuant to 301.48(2)(a)(7). The Department anticipates than another 59 persons will be added to the class in the near future. SOF at ¶2.

B. The Monitoring Program

The monitoring device is comprised of a strap that goes around a person's ankle that is attached to a black box. The strap cannot be removed without triggering a "tamper" alert to the WDOC. The device must be charged for two and half hours at time. SOF at ¶3. The monitors use GPS and cellular connections to continuously collect geolocation data for each monitored individual. The monitors transmit location data to the WDOC once per minute and create a "time correlated record" of each monitored person's movements, 24 hours per day. SOF at ¶4.

WDOC considers all GPS data to be a "public record" that must be turned over to anyone who requests it pursuant to Wisconsin's Open Records Act. SOF at ¶5. The data is never deleted and the WDOC does not restrict or limit how other law enforcement agencies use, store, or share GPS data. SOF at ¶4, ¶6.

The device currently used by the WDOC relies on lights and vibrations to alert the wearer of suspected non-compliance, including when the battery is low, the

device is unable to connect to GPS or cellular networks, or there is a suspected "strap tamper." SOF at ¶7.

C. Enforcement of the Monitoring Requirement

WDOC has discretion as to how it treats non-compliance with GPS monitoring requirements. For example, if the battery dies or the user loses signal, it is up to the individual state agent to determine when to contact law enforcement or refer the matter to the local district attorney's office for potential criminal charges. SOF at ¶8. There is no written policy about how or when state agents should contact police or refer the case to prosecutors. *Id*.

III. The State's Rationales for the Program

The state has put forth two main rationales for its program of lifetime GPS monitoring of individuals with sex offense convictions: (1) monitoring deters individuals from re-offending; and (2) monitoring assists law enforcement with criminal investigations by, for example, allowing them to identify or rule out suspects; locate suspects; or find evidence. SOF at ¶9.

IV. The Evidence Does Not Show that the Program Advances the State's Interests

A. No Data or Studies Support the Conclusion that GPS Monitoring Reduces Crime in Wisconsin

The Department identified Karissa Tillich, the Sensitive Crimes Project Coordinator for the Milwaukee Police Department, as an expert witness to testify to the usefulness of GPS monitoring to law enforcement. In connection with preparing her declaration, Tillich was unable to identify any "studies or data that reflect on

the effect of GPS monitoring on re-offense rates" in Wisconsin or elsewhere. SOF at ¶¶10-12. Tillich did not know whether GPS monitoring reduced re-offense rates or overall rates of sexual offending in Milwaukee. SOF at ¶12. Tillich testified that six states had enacted laws imposing post-supervision GPS monitoring but was not aware of any data or studies that compare re-offense rates in states that impose post-supervision GPS monitoring versus states that do not impose post-supervision monitoring. SOF at ¶13. Ultimately, Tillich testified that she believed that people in the community "feel safer" when people with sex offense convictions are subject to GPS monitoring, but conceded that there "isn't the documentation available" to determine whether they are safer. SOF at ¶14.

The Department identified Zach Baumgart, the Director of Research and Policy with the WDOC, as its 30(b)(6) witness regarding any WDOC studies showing the effects of the GPS monitoring program. SOF at ¶15. Baumgart testified that the WDOC maintains and publishes data about recidivism rates of persons released from WDOC custody but has not analyzed the effect of GPS monitoring on re-offense rates. *Id.* at ¶15-16. When asked why WDOC has not undertaken such an analysis, Baumgart testified that the necessary data was available, but no one has asked the WDOC's research and policy unit to look into the efficacy of GPS monitoring as it relates to reducing recidivism or solving crimes. *Id.* at ¶16-17. Similarly, the WDOC has not reviewed data or studies regarding the effect of GPS monitoring on recidivism in other jurisdictions where it is used. *Id.* at ¶16. As far as Baumgart knows, the Department is not planning to study the impact of GPS

monitoring on recidivism and as a result the Department has not drawn any conclusions about the efficacy of GPS monitoring as a tool to reduce recidivism. *Id*.

Plaintiff's expert witness, Dr. Kelly Socia, a criminologist who has studied the effects of post-release policies applied to persons convicted of sexual offenses, testified that the relevant research offers little support for the use of post-incarceration GPS tracking as a means of reducing sexual recidivism. SOF at ¶19. A review conducted by the federal Sex Offender Management Assessment and Planning Initiative concluded that "research studies have demonstrated no significant reductions in sexual recidivism for those on electronic monitoring, or in the rate of violent crime and rape in jurisdictions utilizing this strategy." *Id*. Another study cited by Dr. Socia was a 2015 pilot study of GPS tracking for individuals with sex crime convictions in San Diego, California. The study concluded that "the cost of monitoring sex offenders on GPS may outweigh these benefits, given the fact that GPS sex offenders were no more likely to commit a new sexual offense compared to their comparison group counterparts." *Id*. at ¶20.

B. Defendant Did Not Identify Any Circumstance in Which GPS Monitoring Pursuant to the Challenged Statute Solved a Crime

There is no evidence that long-term post-supervision GPS monitoring is useful for assisting law enforcement with investigating or solving crimes. Defendant's expert Karissa Tillich expressed the opinion that "GPS monitoring is beneficial for law enforcement." SOF at ¶21. In support of that opinion, Tillich conducted a search of 10 years of Milwaukee police department reports, reviewed all of the reports that mentioned the term "GPS," and identified the six examples that she believed were

relevant to the case and supported her opinion. *Id*. at ¶25. But most of the examples Tillich provided are irrelevant to the questions at issue in this case—*i.e*., whether long-term post-supervision GPS monitoring is beneficial to public safety.

Four of the six examples she provided involved persons who were under active supervision by the WDOC (*e.g*., they were on probation or parole), one of whom was not a sex offender (*id*. at ¶26-33); a fifth case involved a person who had been released from civil commitment pursuant to Chapter 980 and was therefore not a member of the class (*id*. at ¶30); the final individual she identified was not on supervision but she did not know why he was subject to monitoring (*id*. at ¶28). Tillich also cited four news articles about cases in other jurisdictions that involved GPS monitoring. SOF at ¶23. Three of these involved persons who were under criminal supervision (probation or parole), and she did not know why the fourth individual was subject to monitoring. SOF at ¶24. Tillich admitted that her opinion that GPS monitoring was "beneficial" did not differentiate between persons on supervision and those off supervision, although she knows this case concerns only the latter category. SOF at ¶22, ¶26.

V. The Program Is Not Evidence Based Because It Doesn't Consider Risk

A. Risk Assessments Are Available and Could Be Used to Identify Persons who Present a Heightened Risk of Re-offense

Several risk assessment tools exist accurately estimate the recidivism risk of individuals convicted of sex crimes. The validated risk assessment tools include the Static-99, Static-99R, MnSOST-R, RRASOR, Stable-2007, RRASOR, and SAPROF. SOF at ¶34. Such assessments take into account a variety of factors regarding the

individual offender's characteristics and assign a risk level (*e.g.*, "low, medium, or high risk") or a numerical score that is correlated with the individual's risk of re-offending. *Id.*

The WDOC uses several risk assessments to evaluate risk and set the level of supervision when an individual with a sex offense conviction is released from prison. SOF at ¶37. The risk assessments currently used by the WDOC include the Static-99R, Stable-2007, and the SAPROF. *Id.* The Department also uses the COMPAS assessment tool, which is a "general risk and needs assessment tool" used with every person in the WDOC system. *Id.* However, because GPS monitoring is imposed on a categorical basis, none of these risk assessment tools are considered to determine who is subject to lifetime GPS tracking. *Id.*

Autumn Lacy, the WDOC's Assistant Administrator of the Division of Community Corrections, who testified as a 30(b)(6) witness for the Department regarding risk assessments, testified that it "wouldn't be out of the ordinary" and would be "consistent with normal standards of supervision" to look at risk assessments to determine whether an individual should be subject to GPS monitoring. SOF at ¶38. Likewise, Defendant's expert, Karissa Tillich, who worked as a sex offender probation/parole agent for 22 years, agreed that it is an evidence-based practice to use risk assessments to inform decisions regarding the level of supervision to which an individual is subject. *Id.* at ¶39.

B. Persons Convicted of Sexual Offenses Have a Low Rate of Recidivism and Recidivism Risk Declines Over Time

The WDOC published a paper in 2015 on the recidivism rates of individuals

released from Department custody. The report noted lower rates of recidivism among persons convicted of sexual offenses than individuals convicted of any other offense category. SOF at ¶40; WDOC, *Sex Offender Recidivism after Release from Prison*, at 9 (Sept. 2015) (the rate of recidivism for persons convicted of sexual offenses was 10-18 percent lower "across each cohort year and follow-up period, suggesting that the risk for re-offense among sex offenders is markedly lower.")[2]

That trend has continued to hold true in more recent research. According to data published by the Department in 2021, there continues to be a lower incidence of re-offense among persons convicted of sexual offenses than individuals convicted of other offense categories. SOF at ¶40; WDOC, *Recidivism After Release From Prison* (Aug. 2021) ("Wisconsin data shows that recidivism rates for those convicted of sex offenses are much lower than rates for other individuals.").[3] Among persons with sexual offense convictions released from the WDOC in 2008, 1.4 percent re-offended sexually within three years of release and 1.7 percent re-offended within five years of release. SOF at ¶41.

Not only are recidivism rates low to begin with, but they decline significantly over time. Plaintiff's expert, Dr. Socia, concluded that requiring monitoring for a minimum of 20 years is inconsistent with a large body of research on desistence from sexual offending. SOF at ¶42. In particular, the research shows that most

[2]https://doc.wi.gov/DataResearch/ArchivedReports/Recidivism/0915SexualOffenderRecidivismReport.pdf

[3]https://doc.wi.gov/DataResearch/RecidivismReincarceration/0821RecidivismAfterReleaseFromPrison.pdf

recidivism occurs within the first several years after release, after which the risk of committing a future offense significantly declines. For example, the WDOC's study of recidivism among persons with sexual offense convictions released from Department custody between 1992 and 2010 showed that 75 percent of recidivism occurred within the first 22 months after release. SOF at ¶43.

Social science research confirms that an individual's re-offense risk declines over time the individual spends offense-free in the community. SOF at ¶44. The relevant social science research refers to the "desistence threshold" as the time when an individual's risk of committing a new sexual offense is no different than the risk of a spontaneous first-time sexual offense among individuals who have no prior sexual offense history but who have a history of nonsexual crime. SOF at ¶44. Based on studies showing an average two percent rate of first-time sexual offending among nonsexual offenders after five years, several studies suggest that a "sexual recidivism rate of less than 2% after 5 years is also a defensible threshold below which individuals with a history of sexual crime should be released from conditions associated with the sexual offender label," such as GPS monitoring. *Id*.

The research demonstrates that individuals evaluated using a standard risk assessment such as the Static-99 to be "very low risk" at the time of release are already at the "desistance threshold" at their time of release from prison, while those who are "below average" risk hit the threshold between three and six years after release, and those who are "average risk" hit the threshold between eight and 13 years after release. No one who remained sexual offense-free for 18 years

presents an above average risk. SOF at ¶45.

Based on this research, Dr. Socia concluded that GPS monitoring for a minimum of 20 years is not an evidence-based policy because it results in monitoring of individuals who do not pose a risk of sexual offending that is higher than the risk of sexual offending by an individual with no prior history of sexual offending.

C. Wisconsin Applies Lifetime Monitoring in a Blanket Fashion to a Heterogenous Group of People

The evidence in this case shows that the category of people subject to monitoring pursuant to 301.48(2)(a)(7) is a heterogenous group which includes many people who do not present a significant risk of committing another criminal offense.

1. Having Been Convicted of Offenses in Two Cases Is Not a Reliable Proxy for Future Risk

Social science research establishes that, standing alone, having recidivated is not a reliable predictor of future re-offense risk. While a history of recidivism is one factor taken into account in several of the risk assessment tools, no one factor is correlated sufficiently with sexual recidivism to function as a sole predictor of future risk. SOF at ¶48. As a result, all of the validated risk assessment tools take into account a number of risk factors to determine an individual's re-offense risk. SOF at ¶35. There are many factors that better inform recidivism risk than either the crime of conviction or the presence of multiple prior convictions. These factors include treatment success, socioeconomic support, age at release, current age, relationship to the victim, victim characteristics, and time spent offense-free in the community. SOF at ¶49. Research has shown that classification schemes based on single factors

(such as criminal history, as here) are less effective at protecting the public than classification schemes that rely on validated, multi-factor risk assessments. *Id*.

2. The Number of Counts in a Single Case Is Not Correlated with Risk of Committing a Future Offense

Applying GPS monitoring to individuals based solely on having been convicted of more than one count in a single case is not an evidence-based policy because the number of counts in a single case is not directly correlated with future risk. SOF at ¶50. As explained, recidivism is one risk factor that some validated risk assessment tools take into account. SOF at ¶52. However, having been convicted of more than one count in a single case is not equivalent to being a recidivist. The relevant literature defines recidivism as committing a new offense after having been charged, convicted, and punished for a sexual offense. SOF at ¶51.

As noted, the fact that an individual recidivated, standing alone, is a weak predictor of future recidivism risk. Having been convicted of more than one count in a single case is an even less reliable proxy for future risk. SOF at ¶52. Studies have shown that individuals convicted of more than one count in a single case are not more likely to re-offend than those convicted of a single count. *Id*. Thus, there is no direct correlation between the number of counts a person has been convicted of and their risk of committing another offense in the future. As a result, actuarial risk assessments like the Static-99R, Static-2002R, and RRASOR do not consider the number of counts in the index offense (*i.e.*, the current case) when predicting the risk of committing another offense in the future. In short, the number of current counts is largely irrelevant when determining recidivism risk. SOF at ¶52.

3. Persons with Convictions for Possession of Child Pornography Are Lower Risk than Persons with Other Types of Offenses

Application of lifetime GPS monitoring to individuals with one conviction for non-production child pornography offenses, even if for multiple counts, increases the likelihood that low-risk individuals fall within the statute's scope. This is so for two reasons: (1) individuals convicted of non-production child pornography offenses have a very low rate of re-offense and (2) research demonstrates that the number of counts (which oftentimes is based on the number of images possessed) is not correlated with future recidivism risk.

Individuals convicted of non-production child pornography offenses have an overall low rate of re-offense for child pornography, as well as a low rate of committing future contact offenses. Numerous studies have concluded that the risk of committing a future contact sexual offense for this group is typically much lower than the (already low) risk of re-offense posed by prior contact sexual offenders. SOF at ¶53. The consensus among researchers is that a history of having been convicted of a child pornography offense is not directly correlated with future contact offending. SOF at ¶54. Based on the foregoing, the challenged statute results in lifetime GPS monitoring of individuals who present a low risk of committing contact offenses even upon their initial release from prison. *Id*. at ¶55.

Moreover, the evidence shows that of the small group of child pornography offenders who do re-offend, most do so relatively quickly after they return to the community. For example, in the Federal Sentencing Commission's three-year follow-up study, among the 4.3 percent of CP offenders who recidivated, more than

half of the new offenses occurred within the first 12 months after release. SOF at ¶56. An earlier Sentencing Commission study, which had a longer follow-up period, found that the recidivism rate was relatively steady for the first three years after release, after which the recidivism rate dropped significantly. *Id.*

Given the low overall risk for a new contact sexual offense and the rapid decrease in risk the longer one remains in the community, most child pornography offenders reach a desistance threshold for contact sexual offenses (2% after five years) within just a few years after their release, if not within a matter of months. SOF at ¶57. Thus, imposing GPS monitoring for a minimum of 20 years on this group does not make sense from a public safety or economic standpoint. *Id.* at ¶58.[4]

In addition, the number of images possessed is not correlated with recidivism risk. It is common for an individual convicted of possession of child pornography to have multiple images due to how child pornography images are distributed on the Internet. That is, individuals typically obtain illegal pornography by downloading a zip file containing multiple images. SOF at ¶60. Because each downloaded image can be charged as a separate count, individuals charged with possession of child pornography are routinely charged with multiple counts. *Id.* at ¶61 (*citing State v. Multaler*, 2002 WI 35, 252 Wis. 2d 54, 643 N.W.2d 437) (each image possessed can

[4] Moreover, even assuming that people with past convictions for child pornography possession have slightly higher rates of child pornography recidivism, GPS monitoring has no discernable relationship to preventing or solving child pornography offenses. SOF at ¶59. It's hard to imagine how geographical monitoring of an individual's whereabouts would prevent someone from using a computer to view illegal images; nor is it readily ascertainable how having geographical data about a person's movements could result in the apprehension of a person who viewed or downloaded illegal images.

be prosecuted and punished separately)).

Because of this, the U.S. Sentencing Commission has determined that the number of images an individual possesses is not reflective of the seriousness of the offense, noting that sentence enhancement based on number of images "no longer effectively differentiates among offenders in terms of either the seriousness of the offense or culpability of the offender." SOF at ¶62.

VI. Effects of Monitoring on Those Subject to the Program

Lifetime GPS monitoring profoundly affects every aspect of a person's life. Plaintiff's expert Kate Weisburd, a law professor who studies the effect of surveillance technology on individuals in the criminal justice system, identified a variety of the burdens in her report. *See* SOF at ¶65-109.

A. Charging Requirements

People subject to monitoring are told that they should charge their devices for a minimum of 2.5 hours at a time. Unlike a cellphone that can be plugged into an outlet and left, the person wearing the ankle monitor must sit next to the outlet for the entire time the GPS device charges. SOF at ¶65. People are told not to sleep while charging the device because the movements that occur during sleep could disconnect the device from the outlet. SOF at ¶66. Time that could be spent with family, taking care of dependents, working or getting exercise is instead spent tethered to an outlet. *Id*.

Although people can charge their devices outside of their homes, to do so is humiliating and stigmatizing. SOF at ¶67. The charging requirements also put

people in difficult circumstances and cause unnecessary stress. SOF at ¶68. For example, if someone is stuck in traffic or on a slow bus or train, their battery may die before they get home. People on monitors report being late to take care of a family member, or canceling a medical appointment, because they were stuck at home charging their device. Leaving home before the device is fully charged is risky as it could result in non-compliance. *Id*.

The battery life of the device is supposed to be 40 hours, but it is less if the device struggles to connect with GPS or cellular networks. SOF at ¶69. This means that if a person is in a remote area, or working in a factory with lots of metal, the battery will drain faster as it attempts to establish a signal. *Id.* Unlike a cellphone or tablet that shows how much battery life is left, there is simply a light that alerts when the battery is low and/or dead. *Id*.

B. Violations and Faulty Devices

The failure to comply with the monitoring requirements (such as keeping the device charged and connected via GPS or cellular networks), as well as device malfunctions, can lead to the police being called, felony charges and possible incarceration. SOF at ¶70. Even short of these consequences, people on monitors must be constantly attuned to their device, which means that their daily lives are often dictated and/or interrupted by potential monitoring violations. *Id.*

In Wisconsin, the GPS device sends "alerts" to the GPS monitoring center operated by the WDOC whenever there is a loss of signal, suspected tampering with the device, or the battery runs low. SOF at ¶71. The loss of a signal or a low battery

are common occurrences, which trigger responses that may include a phone call from the monitoring center anytime between 5:00 a.m. and 11:00 p.m. *Id.* Upon receiving this call, the person must stop what they are doing and try to reestablish a signal. This could involve moving closer to a window, walking around outside or driving to a location with a stronger GPS signal. *Id.* The same general process applies when the battery dies. If phone calls from the monitoring center do not resolve an alert, staff may request that police go to the wearer's house or job or refer the violation to the district attorney for prosecution. *Id.*

Alerts for non-compliance are frequent. Plaintiff Antrim's experience is illustrative. Logs show that in July of 2021 he routinely had 10-15 alerts a day—most often for "no motion" or "low battery" or "tracker missed callback." SOF at ¶73. When the device signals a loss of connection or low battery, everything in Mr. Antrim's life must stop until he resolves the alert. *Id.*

GPS ankle monitors are often faulty. SOF at ¶74. The devices often issue false alerts, and the connection to GPS networks is often disrupted. Weather conditions and blackouts, for example, can cause the loss of signal that can register as a violation. *Id.* The alerts are also not always reliable or accurate. For example, in May of 2017, the WDOC lost GPS signals for 895 people, generating 32,766 alerts. SOF at ¶75. Not only do people on monitors live in fear of their lives being disrupted by calls from the monitoring center due to GPS alerts, but they also live in fear of being arrested and jailed for GPS-related malfunctions. SOF at ¶76.

C. Activity and Travel Restrictions

Many healthy aspects of life that most people take for granted are incompatible with wearing a GPS monitor. People on monitors cannot wear a GPS device under ski boots or ice skates, for example, and sports where players are expected to wear shorts, or have contact with one another, are impossible to play unless the monitor is visible and/or protected. The devices cause some users irritation when they engage in physical activities such as running or swimming. SOF at ¶77. Some monitored individuals report that they cannot go on camping or hiking trips because it is impossible to charge the device and the GPS device requires cell phone coverage, which is often spotty in camping areas. *Id*. at ¶78. Although people on lifetime GPS monitoring are allowed to travel, the fear that something could go wrong with the device makes some individuals hesitant to do so. *Id.* at ¶80.

D. Social Stigma and Impact on Relationships

Wearing a GPS ankle monitor is a modern-day scarlet letter. SOF at ¶81. One person described it as "a badge of shame" that makes him feel "socially and morally inferior." *Id.* Research confirms that ankle monitors lead wearers to be regarded as criminals. *Id*. Plaintiff Antrim's experience is illustrative. Mr. Antrim explained that after seeing his GPS device, people sometimes cross the street, avoid him in stores, treat him differently in restaurants, or make insulting comments. *Id*. Another class member explained that the "change in the demeanor of everyone after seeing the device is palpable." *Id*.

Given the stigma surrounding involvement with the criminal justice system, the visibility of the GPS device is a significant burden. SOF at ¶82. One person reported being constantly worried that his coworkers would find out about his GPS device, complain to management and he would be fired. *Id*. In his prior job, this individual told coworkers about his device and as a result "became a social pariah." *Id*.

Everyday activities such as going through a metal detector often cause stress and embarrassment. For example, one person explained that every time he flies, he must explain to the TSA agent that he is wearing a monitor and then show the device in a way that everyone in the security line can see. SOF at ¶84.

GPS monitoring also undermines critical social and familial relationships. SOF at ¶85. In a 2011 study of people on electronic monitors by the Department of Justice, almost half of the people interviewed believed that monitoring negatively affected their relationships with friends and family members, and 89 percent of probation officers reported that monitoring changed people's relationship with family and friends. *Id*. Mr. Antrim's experience is consistent with these findings. He testified that some of his close friends do not want to be seen in public with him, even if his monitor is covered by pants. *Id*. Another person reported that because of the requirements related to charging and being connected to cellular or GPS networks, his ability to participate in activities with his friends is limited. As a result, he has "lost almost all of [his] friends … because [he has] to say no to their invitations so many times." *Id*. Maintaining strong social and emotional bonds with loved ones is important for everyone, especially people coming out of prison. SOF at

¶86. Yet monitoring undermines these crucial relationships. *Id*.

E. Loss of Employment Opportunities

GPS monitoring makes it difficult for people to find and maintain stable employment. SOF at ¶87. To start, interviewing for jobs is challenging for people on monitors. *Id.* Even if an employer does not say anything, if they can see the device it may bias them against hiring the person. Mr. Antrim reported applying for two auto repair jobs and in both interviews he could feel the interview change after the interviewer noticed the device. He got neither job. *Id.*

GPS monitoring requirements also make it difficult to maintain a job. SOF at ¶88. Charging requirements do not allow people to work a flexible schedule and devices often alert while people are at work. *Id*. Having to randomly leave work to pick up a signal or call the GPS center creates tension with employers. *Id.*

The physical burden of wearing the device also interferes with work. SOF at ¶89. One person reported working with machinery and having his GPS device caught in a machine, causing bruising and pain. *Id*. Another time the GPS device got caught on a ladder rung, causing him to fall and trigger a "strap alarm." *Id*. The police showed up the next day, and he had to stay home for a day to wait for a new strap to be installed. *Id*. This same person is required to wear steel-toed boots for work, but because boots do not fit over the GPS device he has to purchase his own steel-toe shoes, resulting in both an inconvenience and an additional work expense. *Id.*

Decades of research show that obtaining a job with a criminal record is difficult, and it is even more difficult for someone who must wear a GPS monitor. SOF at

¶91. Not surprisingly, 22 percent of monitored individuals surveyed by the National Institute of Justice said they had been fired or asked to leave a job because of an ankle monitor. *Id.*

F. Loss of Privacy

GPS ankle-monitoring is a significant privacy intrusion. SOF at ¶92. The GPS device monitors individuals' every move by collecting their geolocation data every minute and generating a time correlated record of a their movements, which is received by WDOC in "near real time." *Id*. There are no privacy protections for this data. SOF at ¶93. The data is never deleted. *Id*. And the Department discloses the data to anyone who requests it, without regard to the reason for the request. *Id*.

The loss of privacy also stems from the visibility of the monitor, which broadcasts the wearer's involvement in the criminal legal system to who sees it. SOF at ¶94. The device is hard to hide unless the person is wearing loose pants. The devices also light up and vibrate, which nearby people can see and hear. *Id*.

G. Mental Health Harms

Monitoring takes a heavy toll on people's mental health. Research shows that people on monitors experience many of the same emotional harms caused by imprisonment, including feeling deprived of autonomy and intimate relationships. SOF at ¶95. The mental health harms are so significant that the United Nations Special Rapporteur on the Human Rights of Migrants has stated that "the stigmatizing and negative psychological effects of the electronic monitoring are likely to be disproportionate to the benefits of such monitoring." *Id*.

Given the discretion afforded to the state agents about when to call the police or refer a violation to a local prosecutor, people on monitors are often anxious that any wrong move or false alert will result in phone calls from WDOC or, even worse, land them back in custody. SOF at ¶96-98. The mental health costs of being on a monitor are compounded by the social and emotional isolation that occurs when people's lives are oriented around complying with the monitoring rules. Rather than spend time working, or with family or friends, people stay home and self-isolate, pushing them further to the periphery of society. SOF at ¶99.

H. Physical Discomfort and Pain

Wearing a GPS monitor 24/7 causes physical discomfort and sometimes pain. SOF at ¶¶100-101. The strap can rub against the skin, causing abrasions, scabs or cuts. One person reported having edema, which caused his ankle to swell. *Id.* Another person reported a rash from the monitor strap, which has over time turned into a callus. *Id*. Another person explained that he gets sores from the device. *Id*. Instances of GPS monitors causing pain and discomfort are well documented. SOF at ¶102. A study by Cardoza Law School revealed that a majority of people subject to ankle monitoring experienced a "constant negative impact" on their health. *Id.*

I. Interference with Medical Care

GPS monitors are an impediment to receiving medical care. SOF at ¶103. Procedures including MRIs, X-rays, CT scans, and mammograms cannot be performed while a patient wears an ankle monitor. *Id*. Yet the process in Wisconsin for removing the device is cumbersome. To have the device removed for a medical

procedure requires that the individual call the GPS monitoring center, who then calls a private company (JusticePoint) who then sends out a technician to temporarily remove the device. *Id*. One class member reported having to postpone an MRI until the monitor could be removed, which in turn delayed his surgery. *Id*.

J. Financial Burdens

The fees associated with monitoring also undermine people's financial security and can drive people further into debt and/or poverty. SOF at ¶105-106. In Wisconsin, people are required to "help pay" for the cost of the monitor up to $240/month; the exact amount is determined based on a person's finances. *Id*. One class member explained that he is charged $240 per month which is taken out of his state tax refund. *Id*. Over the past five years the state has withheld $4,416.120. *Id*.

ARGUMENT

At the outset, Plaintiff acknowledges that in *Braam v. Carr*, 37 F.4th 1269 (7th Cir. 2022), the Seventh Circuit upheld the district court's denial of a preliminary injunction against Wisconsin's lifetime GPS program. At that stage in the case, the Court lacked a developed factual record and thus decided the case "against the backdrop of *Belleau*." *Id*. at 1269. In *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016) the Seventh Circuit upheld GPS monitoring of an individual who had been released from civil commitment against a Fourth Amendment challenge.

This brief is intended to meet head on the concerns expressed by the Seventh Circuit in *Braam* about whether this case can be distinguished from *Belleau*. For example, the Court explained that "[Plaintiffs] have not … made a showing that

repeat sex offenders have stronger privacy expectations than sex offenders who have been released from civil commitment." 37 F.4th at 1275. Through fact and expert discovery, Plaintiff has developed evidence addressing recidivism, risk, and desistence from offending. In the analysis below, Plaintiff shows that the privacy interests of persons subject to monitoring pursuant to 301.48(2)(a)(7) are entitled to greater consideration. The statute applies to such a broad and heterogenous group that it is unreasonable to categorically subject them to lifetime GPS monitoring without an individualized assessment of risk. Given that the Fourth Amendment requires a "fact-specific" inquiry into the reasonableness of a particular search (*Missouri v. McNeely*, 569 U.S. 141, 150 (2013)) and given the evidence now in the record, Plaintiff shows that *Belleau* should not be extended to the class that challenges lifetime GPS monitoring here.

I. Lifetime Monitoring Violates the Fourth Amendment Under a Totality of the Circumstances Analysis

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. Amend. IV. The Fourteenth Amendment "extends this constitutional guarantee to searches and seizures by state officers." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U. S. 646, 652 (1995). To be deemed reasonable, it used to be that "a search" had to "be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313 (1997). But beginning in the late 1960s, the Supreme Court began finding certain programmatic searches to be reasonable where "special

needs" made individualized suspicion impracticable.[5] Since then, the Court has approved the constitutional validity of many different types of "special needs" searches, prompting one court to note that the "special needs exception" is "perhaps more accurately described as a set of exceptions." *Verdun v. City of San Diego*, 51 F.4th 1033, 1038 (9th Cir. 2022).[6]

The test for evaluating the reasonableness of a search is "the totality of the circumstances, which weighs the nature and government purpose of the search against the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 575 U.S. 306, 310 (2015) (*citing Samson v. California*, 547 U.S. 843, 848 (2006) ("Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995) ("[W]hether a particular search meets the reasonableness

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[5] As explained by one scholar, "The gradual transition to a reasonableness-based Fourth Amendment inquiry can be traced back to the Court's decisions in *Camara v. Municipal Court* [387 U.S. 523 (1967)] and *Terry v. Ohio* [392 U.S. 1 (1968)]. Prior to that time, although not always a model of consistency, the Court generally had insisted that the Warrant Clause was the primary source of Fourth Amendment protections." Scott E. Sundby, "*Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 Colum. L. Rev. 1751, 1766, fn. 50 (1994).

[6] As explained by the court in *Verdun*, "Housed within this broader category of administrative or special needs searches lie several archetypal situations in which the Supreme Court has recognized that countervailing interests outweigh the Fourth Amendment's default insistence on a warrant." 51 F. 4th at 1038. These archetypes include "warrantless searches of certain closely regulated businesses for specified purposes"; "various types of dragnets in which police indiscriminately stop motorists without individualized suspicion or a warrant"; "warrantless search of particular types of persons thought to have reduced expectations of privacy, or persons in particular settings in which the same is true"; and "particular settings" such as airports and government buildings. *Id*. at 1038-40.

standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.")

To determine whether a search is reasonable under the totality of the circumstances, courts consider (1) the individual expectation of privacy; (2) the nature and extent of the invasion of reasonable privacy expectations; (3) the legitimacy of the government interest; and (4) the efficacy of the search in advancing that interest. *Vernonia*, 515 U.S. at 645-60; *see also Maryland v. King*, 569 U.S. 435 (2013) (considering each of these factors and concluding that DNA swabs of individuals in custody for felony offenses was reasonable under the Fourth Amendment).

Plaintiff shows in the analysis below that Wisconsin's program of lifetime GPS monitoring pursuant to 301.48(2)(a)(7) violates the Fourth Amendment under the totality of the circumstances standard.

A. The Privacy Interests Affected by the Search Are Significant

In addressing the search's "intrusion on the individual's Fourth Amendment interests," "[t]he first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes," or, in other words, "the scope of the legitimate expectation of privacy at issue." *Vernonia*, 515 U.S. at 652-54, 658. Notably, "[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate,'" which "varies … with context." *Id.* at 654 (citation omitted). Wisconsin's program implicates at least two constitutionally recognized privacy concerns.

First, Wisconsin's GPS program requires "attach[ing] a device to a person's body, without consent," *Grady*, 575 U.S. at 309, and prohibits the removal of that device, thereby implicating Plaintiff's Fourth Amendment interest in "be[ing] secure in [his] person." U.S. Const. Amend. IV. In *Grady*, the Supreme Court concluded that requiring a person to wear a GPS monitor constitutes a search, noting that the GPS monitoring program "is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Grady*, 575 U.S. at 310.

Second, the search's GPS location monitoring implicates Plaintiff's "expectation of privacy in his physical location and movements." *Carpenter v. U.S.,* 585 U.S. 296, 306 (2018). The Court in *Carpenter* explained that "when the Government accessed CSLI [cell-site location information] from the [petitioner's] wireless carriers, it invaded [the petitioner's] reasonable expectation of privacy in the whole of his physical movements." *Carpenter*, 585 U.S. at 313. GPS monitoring data provides an even more detailed record of a monitored individuals' locations than the cellular data at issue in *Carpenter*.

Now, following the lead of the Seventh Circuit in *Braam*, it is likely that Defendant will argue that Plaintiff and the class have diminished expectations of privacy because they have been convicted of sex offenses and are listed on a public sex offender registry. *See Braam*, 37 F.4th at 1275 (the "privacy interests [of persons on a sex offender registry] are severely curtailed.") (citation omitted).

There are four problems with this argument. First, while it is indisputable that persons on a sex offender registry are forced to publicly reveal "their names, addresses, criminal histories, and other identifying information" (*id.*) and thus lose a certain amount of privacy, this diminishment of privacy is relatively minor in comparison to the intrusiveness of lifetime GPS monitoring, which, as shown in §B below, affects every aspect of a person's life. It is illogical to insist that, because there is a modest loss of privacy in one area of a person's life, that justifies a loss of privacy of significantly greater magnitude in other areas. *See, e.g., State v. Grady,* 372 N.C. 509, 531 (2019) ("Even if defendant has no reasonable expectation of privacy concerning where he lives because he is required to register as a sex offender, he does not thereby forfeit his expectation of privacy in all other aspects of his daily life," adding "The State does not explain how defendant's provision of limited information concerning his address, employment, and appearance, in addition to his photograph and fingerprints, as part of a 'civil, regulatory scheme' meaningfully reduces his expectation of privacy in his body and in his every movement every day for the rest of his life.'") (citation omitted).[7]

Second, there is no precedent for the proposition that persons who have served their sentences and whose legal rights have been restored to them (with the

[7] Indeed, in *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court noted that a sex offender registry simply facilitates "the dissemination of accurate information about a criminal record" and individuals "subject to the Act are free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 89, 101. In stark contrast, lifetime GPS monitoring constitutes a constant and far-reaching intrusion into every aspect of a monitored person's life. The search reveals every place the person goes, how long they remain there, how often they frequent any place. *See* SOF at ¶4.

exception of the right to possess firearms) have a diminished expectation of privacy in their person and in their physical locations at any and all times of the day or night for the rest of their lives based solely on a past conviction. A finding that all persons convicted of sex offenses have a diminished expectation of privacy would be a troubling and unwarranted extension of existing precedent.[8]

Third, the Seventh Circuit's reasoning that placement on a sex offender registry deprives an individual of *any* legitimate privacy expectations is circular—*i.e.,* the government cannot say a person has a diminished expectation of privacy because the government has chosen to diminish the person's privacy. *See Samson*, 547 U.S. at 863 (Stevens, J., dissenting) ("the loss of a subjective expectation of privacy would play 'no meaningful role' in analyzing the legitimacy of expectations, for example, 'if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry.'") (citation omitted).

Fourth and finally, persons with sex offense convictions are not unique; and thus holding that a person convicted of a sex offense has a permanently diminished

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[8] To be sure, the Supreme Court has held that certain suspicionless searches may be reasonable due to a person's status within the criminal justice system, such as when a person is in custody or under post-confinement supervision. *See Samson*, 547 U.S. at 852 (upholding the suspicionless search of a parolee because a parolee, whose liberty is conditioned upon his compliance with conditions that restrict his freedom, "did not have an expectation of privacy that society would recognize as legitimate."); *King,* 569 U.S. at 463 ("[o]nce an individual has been arrested on probable cause for a dangerous offense that may require detention before trial," his or her "expectations of privacy and freedom from police scrutiny are reduced."); *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) ("prisoners have no legitimate expectation of privacy" in prison cells). But the Supreme Court has never found that a person has diminished privacy expectations based solely on a past conviction. To the contrary, the Court has distinguished parolees from free citizens, holding that it is constitutionally permissible to "restrict [parolees'] activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972).

expectation of privacy would, logically speaking, allow lifetime GPS monitoring of any and all convicted felons, for there is no sound basis to limit GPS monitoring to individuals convicted of sex offenses. *Cf. King,* 569 U.S. at 481 (Scalia, J., dissenting) ("If one believes that DNA will 'identify' someone arrested for assault, he must believe that it will 'identify' someone arrested for a traffic offense. This Court does not base its judgments on senseless distinctions. At the end of the day, logic will out. When there comes before us the taking of DNA from an arrestee for a traffic violation, the Court will predictably (and quite rightly) say, 'We can find no significant difference between this case and *King*.'")

For all of these reasons, Wisconsin's lifetime GPS monitoring program affects significant privacy interests.

B. The Magnitude of the Intrusion into Privacy Is Great

After considering "the scope of the legitimate expectation of privacy at issue" the court must next examine "the character of the intrusion that is complained of, which contemplates the degree of and manner in which the search intrudes upon legitimate expectations of privacy." *State v. Grady*, 372 N.C. at 534 (*citing Vernonia*, 515 U.S. at 658). As shown below, lifetime GPS monitoring is unreasonable because of the burdensome effect of the program on those subject to it.

1. Lifetime GPS Monitoring Is Uniquely Burdensome

The magnitude of the intrusion is severe. Forcing an individual to wear a monitoring device on his person that cannot be removed and collecting data about the individual's whereabouts 24 hours a day, seven days a week, for decades is a

weighty intrusion on the privacy of anyone. *See, e.g., Carpenter*, 585 U.S. 296 (electronic surveillance of an individual's "physical location and movements" implicates privacy interests under the Fourth Amendment). As set forth in the Factual Background and detailed in Kate Weisburd's expert report, GPS monitoring profoundly affects every aspect of a person's life. *See* SOF at ¶¶65-109. The burdens fall into three main categories.

a. Permanent Loss of Privacy

As Justice Sotomayor noted in her concurrence in *U.S. v. Jones*, 565 U.S. 400 (2012), "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* at 415; *see also Riley v. California*, 573 U.S. 373, 396 (2014) (noting that GPS tracking allows the government to "reconstruct someone's specific movements down to the minute.").

For persons subject to lifetime monitoring, the loss of privacy is great. Wisconsin continuously collects geolocation data, recording a data point every minute to create a time correlated record of each monitored person's movements 24 hours per day for life. SOF at ¶4. WDOC never deletes the data. *Id.* at ¶93.

The privacy loss is compounded by the WDOC's indiscriminate dissemination of tracking data. The Department discloses the data to any law enforcement agency or member of the public who asks for it; and the requestor does not have to give any reason for seeking the data. *Id*. at ¶5-6. If police seek to investigate a property crime or traffic accident, they are free to obtain GPS data for that purpose. *Id.* If an

employer, neighbor, or ex-partner wants to investigate someone's whereabouts, they are free to obtain GPS data for those purposes. *Id.* In short, a monitored persons' every movement is subject to public inspection and scrutiny every day of their life for as long as they live.

b. The Time and Burden of Complying with Monitoring

Wisconsin's lifetime GPS tracking program is also uniquely onerous because of the daily burdens associated with monitoring. As explained in the factual background, an individual subject to monitoring is tethered to an electrical outlet for 2.5 hours at a time. SOF at ¶9. In addition, a monitored individual has to be constantly vigilant to alerts from the bracelet or calls from the WDOC regarding dropped signals, low battery level, device malfunctions, or suspected tampering. *Id.* at ¶¶70-73. When an individual receives such a call, he must drop everything and respond by charging the device, moving to another location to reestablish signal, or responding to law enforcement inquiries. *Id.* People are forced to organize their lives around these intrusions or face potential felony charges. *Id.* at ¶70, 76. These disruptions interfere with every aspect of life—class members reported being late to care for a family member, missing doctors appointments, cutting vacations short, and leaving work meetings due to obligations associated with being on a GPS monitors. *Id.* at ¶66, 68, 72, 88.

c. Dignitary Harms

A GPS monitor is a badge of criminality and a constant physical reminder of one's outsider status. An individual who has paid his debt to society, taken

accountability for the harm he has caused, worked hard on his rehabilitation, and established a positive, law abiding life is never free from the shameful scarlet letter of GPS monitoring. Monitoring causes shame, embarrassment and humiliation and has a profound effect on the mental health of those who are subject to it. SOF at ¶¶95-99. Not only must they live in fear of reimprisonment for violations of the monitoring law, but they are also passed over for employment opportunities, isolated from their friends and loved ones, treated differently by strangers, and unable to participate in normal activities such as camping, sports, or travel. *Id.* at ¶¶77-91. In addition, people on monitors report interference with their ability to obtain medical care, physical pain, stress and anxiety. *Id*. at ¶¶100-104.

It never gets easier to live with an ankle monitor. The burdens are constant. As one person reported, the "shame and embarrassment do not go away. … When the bracelet is on you, you never stop feeling it or thinking about it. It is irritating and mentally torturous." *Id*. at ¶108. As another person put it, the GPS device is "always on my mind, not only because of the physical way it interacts with my body, but the way I have to navigate the world." *Id*. These harms are exacerbated by the long duration of monitoring under Wisconsin law. *Id*. at ¶¶107-110.

When compared to cases where the Supreme Court has upheld programmatic searches, it is clear that the burdens at issue in this case are unlike anything the Court has considered. Where searches have been upheld, the data collected is used only for a limited purpose,[9] the results of the search are protected from public

[9] *See e.g.*, *Vernonia*, 515 U.S. 646 (urinalysis to determine eligibility to participate in high school sports); *King* ("Only DNA records that directly relate to the identification of

disclosure,[10] and, most importantly, the searches are brief and minimally intrusive.[11] The burdens at issue here are in a different class.

2. The Program Is Unreasonable Because It Is Imposed Categorically and for an Unreasonable Duration

Along with the burdens imposed by wearing a GPS monitor, two other aspects of Wisconsin's lifetime GPS program make it unreasonable—(1) the absence of any individualized consideration of whether an individual presents a risk of re-offending (SOF at ¶1); and (2) the duration of the program, in particular the prohibition on seeking termination of GPS monitoring for 20 years (301.48(6))).

First, the program's failure to provide for an individualized hearing prior to placing a person on lifetime GPS monitoring is unreasonable because it results in monitoring of individuals who do not present a likelihood of re-offending. The undisputed evidence in this case shows that not everyone in the class presents an elevated risk of recidivism. *See* SOF at ¶¶40-63. A hearing would allow the state to

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individuals shall be collected and stored. No purpose other than identification is permissible."); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (drug and alcohol testing of railroad employees involved in accidents or safety violations).

[10] *Compare King,* 569 U.S. at 464 (emphasizing that the DNA collection law limited the disclosure of DNA data and explaining that "[t]his Court has noted often that a statutory or regulatory duty to avoid unwarranted disclosures generally allays privacy concerns.") (citations omitted) (cleaned up); *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) ("The invasion of privacy in this case is far more substantial than in [cases where drug testing has been upheld]. In the previous four cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties.")

[11] *See, e.g., U.S. v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (border stops that "usually consume[] no more than a minute"); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (brief frisk after a traffic stop); *King*, 569 U.S. at 438 (describing a buccal swab as a "brief and minimal intrusion with virtually no risk, trauma, or pain").

differentiate between high- and low-risk individuals and direct resources to monitoring those who actually represent a risk to the public while protecting against the imposition of monitoring on individuals who do not. *Id.* at ¶¶111-117.

Defendant likely will object to the feasibility of providing such hearings. But the record belies any such objection. The evidence shows that accurate and cost-effective tools for assessing individual risk are readily available. *See* SOF at ¶¶34-39; ¶¶111-117.[12] The record also establishes that individualized assessments are possible because Wisconsin routinely performs them.[13] Indeed, it is odd that a risk assessment is conducted in conjunction with applications to terminate tracking after 20 years, but Wisconsin does not initially use such an assessment to decide whether to impose monitoring in the first instance. When asked why the state does not consider risk assessments in connection with imposing lifetime GPS monitoring, the Department's 30(b)(6) witness Autumn Lacy said only that such an assessment

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[12] Indeed, Defendant's own expert testified that risk assessments can be used to determine whether a particular offender presents a high or low risk of re-offense and that it is an evidence-based practice to use risk assessments to inform decisions regarding the level of supervision to which an individual is subject when released from prison. SOF at ¶39. Likewise, the evidence also shows that the WDOC already routinely uses risk assessment tools in connection with evaluating supervision level and treatment needs. *Id*. at ¶¶37-38.

[13] In addition to statutorily subjecting certain persons to GPS tracking for life (*see* 301.48(2)(a)(1)–(7)), Wis. Stats. 301.48(2)(a)(8) calls for Wisconsin to individually assess whether others should be subject to lifetime monitoring. *See* Wis. Stats 301.48(2g) ("If a person who committed a serious child sex offense … is not subject to lifetime tracking under sub. (2), the department shall assess the person's risk using a standard risk assessment instrument to determine if global positioning system tracking is appropriate for the person."). Additionally, pursuant to Wis. Stat. 301.48(6), an individual who has been on GPS monitoring for 20 years without being convicted of any other offense can file a petition to terminate GPS tracking in the circuit court. 301.48(6)(b). Following the filing of a petition, the court orders an examination of the petitioner by an approved physician or psychologist. 301.48(6)(d) and (e). The examining physician renders an opinion concerning whether the petitioner "is a danger to the public." 301.48(6)(e).

"would not have any impact on the fact that the person is subject to GPS due to the statutory language." SOF at ¶2.

In support of the reasonableness of the its lifetime GPS monitoring program, it is also likely that Defendant will argue that the constitution "does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith v. Doe*, 538 U.S. 84, 103 (2003). But any such reliance on *Smith v. Doe* is misplaced, because in *Smith* the Court emphasized it was the "minor and indirect" consequences of Alaska's registry scheme that permitted "the State [to] dispense with individual predictions of future dangerousness." *Id.* at 104. In contrast, there is nothing "minor and indirect" about Wisconsin's scheme of lifetime monitoring. *See also id.* at 104 (distinguishing registration schemes from civil commitment schemes and explaining that "The magnitude of the restraint [in the civil commitment context] made individual assessment appropriate.")

The second aspect of the program that makes it unreasonable is the requirement that a person remain on GPS monitoring for a minimum of 20 years before he or she can petition to be removed. As explained, the long duration of Wisconsin's monitoring scheme all but ensures that people will remain on GPS monitors long after they have ceased to present any heightened risk of sexual offending. *See* SOF at ¶¶42-47. This is so because recidivism rates are low to begin with and decline significantly over time, such that within a few years of release, most individuals with a history of sexual offending pose no greater risk of future sexual offending

than a non-sexual offender. *Id.* By way of contrast, in North Carolina, the lifetime GPS monitoring scheme allowed individuals to petition for removal after one year, and the scheme was still found to violate individual's Fourth Amendment rights. *See State v. Grady*, 372 N.C. at 534.

For all of these reasons, the burden of the search weighs in favor of a determination that Wisconsin's lifetime GPS monitoring program violates the Fourth Amendment.

C. The Search Does Not Meaningfully Advance State Interests

This prong of the balancing test "consider[s] the nature and immediacy of the governmental concern at issue," and "the efficacy of [the state's] means for meeting it." *Vernonia*, 515 U.S. at 660.

The state has put forth two interests that it says are served by the program of lifetime GPS monitoring: (1) deterrence of re-offending; and (2) assisting law enforcement with criminal investigations. SOF at ¶9. Plaintiff acknowledges that these are legitimate public interests.[14] As to the degree to which lifetime GPS

[14] As a preliminary matter, it must be said that under the Supreme Court's "special needs" cases, it has historically been the case that programmatic searches conducted in the absence of individualized suspicion of wrongdoing are impermissible when the search is conducted for ordinary "law enforcement purposes" such as "investigating crimes." *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000); *see also Samson*, 547 U.S. at 858 (Souter, J., dissenting) ("While individualized suspicion is not an irreducible component of reasonableness under the Fourth Amendment, the requirement has been dispensed with only when programmatic searches were required to meet a special need divorced from the State's general interest in law enforcement.") (citations omitted). According to the testimony of the Department's own expert witness, Wisconsin's GPS monitoring program is principally used for typical law enforcement purposes such as finding evidence, identifying perpetrators, and arresting suspects. *See* SOF at ¶9, ¶¶21-33. Nonetheless, Plaintiff proceeds as if the program is not used for ordinary law enforcement purposes because, as a practical matter, the Court has mostly dispensed with the requirement that programmatic searches may only be done for purposes separate from law enforcement and instead considers the reasonableness of the

monitoring advances the stated interests, Plaintiff shows below that the challenged scheme does not sufficiently promote the state's interest to satisfy the reasonableness test in light of the burdens imposed by lifetime GPS monitoring. *See King*, 569 U.S. at 461 ("[A] significant government interest does not alone suffice to justify a search. The government interest must outweigh the degree to which the search invades an individual's legitimate expectations of privacy.").

There are two main reasons that this element of the balancing test favors Plaintiff. First, there is little evidence that the statute effectively advances either of the state's stated interests. Second, the scheme is not reasonably calculated to advance the state's interests because it applies broadly to a heterogenous group of people, many of whom do not present a meaningful risk of re-offending.

1. The Evidence Does Not Show that the Statute Advances State Interests in Reducing Recidivistic Sexual Offending

a. Recidivism Is Low Among the Population Subject to Monitoring and Declines Significantly Over Time

As set forth in the factual background, the WDOC's own data shows that persons with sex offense convictions released from WDOC custody recidivate infrequently and their recidivism rates are "markedly lower" than those of individuals convicted of any other category of offenses. SOF at ¶40 (the overall recidivism rate of persons with sex offense convictions was 10-18 percent lower than that of any other group);

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search by balancing the private and governmental interests at stake. *See State v. Grady* 372 N.C. at 525, fn. 9 ("We note that the balancing test articulated in *Vernonia* … is not unique to special needs cases, but rather is the same general Fourth Amendment balancing test that weighs 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'") (citing *King*, 569 U.S. at 448).

Id. at ¶41 (1.4 percent of individuals with sex offense convictions released in 2008 recidivated sexually within three years after release and 1.7 percent recidivated within five years after release). The WDOC's own data also shows that the risk of recidivism drops quickly over time in the community without committing another offense. SOF at ¶¶42-43. This data is consistent with a large body of social science research on desistence from sexual offending described by Dr. Socia in his report. *See* SOF at ¶¶44-47. As described, this research demonstrates that at the time of their release from prison, low-risk persons convicted of sexual offenses already present no greater likelihood of committing another sexual offense than a person with no history of sexual offending. *Id.* at ¶45. Below-average-risk persons hit this threshold between three and six years after release; average-risk persons hit the threshold between eight and 13 years after release; and even the highest risk persons hit the threshold after 18 years. *Id.* at ¶45. The Department has not brought forth any evidence to rebut Dr. Socia's testimony.

The data on recidivism and desistence demonstrates a significant disconnect between the state's program and the interest it is alleged to serve. Put simply, sexual recidivism is already uncommon, and sexual recidivism two decades after release (which is the earliest that an individual can even petition for termination of monitoring) is almost unheard of. This strongly suggests that lifetime GPS monitoring of everyone convicted of more than one count is not a reasonable means of advancing the state's alleged interest in crime reduction.

b. The State Has Not Brought Forth Any Evidence that Monitoring Reduces Recidivism

A central issue in this case is whether GPS monitoring actually has any positive effect on public safety in Wisconsin, but none of the state's witnesses could answer the simple question of whether the monitoring program had done anything to reduce recidivistic sexual crime.

Defendant's expert Karissa Tillich did not identify any "studies or data that reflect on the effect of GPS monitoring on re-offense rates" in Wisconsin or elsewhere and did not know whether monitoring had reduced overall sexual crime rates. SOF at ¶¶10, 12. The WDOC has not studied the impact that its GPS monitoring program has had on recidivism, and is not planning to do so. *Id*. at ¶¶15-16. The Department's 30(b)(6) witness Zach Baumgart testified that the Department possesses the data necessary to determine whether GPS monitoring has had an effect on recidivism, but no one has asked the Department's policy professionals to study the matter. *Id*. at ¶17. Tellingly, Defendant's own expert admitted that while GPS monitoring makes people "feel safer," there "isn't the documentation available" to determine whether they actually are safer. *Id*. at ¶14.

While the state of Wisconsin has studiously avoided learning whether its GPS monitoring program is effective, there are studies on the efficacy of GPS monitoring to reduce recidivism. Dr. Socia reviewed the relevant social science research and noted that "relevant research offers little support for the use of post-incarceration GPS tracking as a means of reducing sexual recidivism." SOF at ¶19. Another study concluded that the costs of such programs outweigh their benefits. *Id*. at ¶¶19-20.

This casts further doubt on the efficacy of the program as a means of advancing state interests.

c. The State's Evidence that the Statute Assists Law Enforcement Is Lacking

Defendant also contends that the program is justified because GPS monitoring is "beneficial for law enforcement." SOF at ¶21. As shown below, the Department brought forth scant evidence in support of this proposition.

Defendant's expert, Karissa Tillich, reviewed ten years' worth of Milwaukee police department reports to find investigations where police utilized GPS data. SOF at ¶25. She identified six examples that she thought were relevant. *Id*. at ¶¶25-33. But almost all of the examples Tillich offered are irrelevant to the specific question in this case: whether there are law enforcement benefits to long-term monitoring of persons who are no longer under criminal supervision.

Five of the six people Tillich identified were not members of the class. Four of them were under criminal supervision (*e.g.,* probation or parole). SOF at ¶¶27, 29, 31, 32. Of those four, one had never been convicted of a sex offense and was on supervision for armed robbery. *Id*. at ¶29. The fifth example involved an individual who was on a monitor because he had been released from civil commitment. *Id*. at ¶30. Plaintiff is not challenging the constitutionality of GPS monitoring of individuals on supervision or who have previously been civilly committed. Tillich only identified one report involving an individual who was (possibly) a member of

the class. *Id.* at ¶28.[15] When she prepared her expert report, Tillich knew that this case was about the monitoring of individuals who are not on supervision and that her testimony would be used in support of that particular provision of the law. *Id*. at ¶26. Presumably if there were more evidence that the relevant statute actually aided law enforcement, she would have provided it.[16]

It's also worth looking more closely at how GPS data was actually used in the examples Tillich identified. The state's theory is that monitoring is beneficial because law enforcement will be able to identify perpetrators of crimes by correlating GPS data to the locations where sexual crimes are reported. *See Belleau*, 811 F.3d at 936 ("Every night [WDOC] downloads the information collected that day by the anklet monitor and creates a map showing all the locations at which the wearer was present during the day and what time he was present at each location. Should a sexual offense be reported at a location and time at which the map shows the person wearing the anklet to have been present, he becomes a suspect and a proper target of investigation.")

But Tillich did not provide any example of GPS data being used in this manner

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[15] Tillich did not know why this particular individual was subject to monitoring (*e.g*., whether he was convicted of a Level 1 offense or whether he had been convicted of offenses on more than one occasion) and therefore it is unclear whether he was a member of the class. SOF at ¶28.

[16] Based on the decline in re-offense rates over time spent in the community discussed above, it makes sense that Tillich struggled to identify examples where GPS data was used in an investigation into a person who was no longer under criminal supervision. *See* SOF at ¶21-33. Numerous studies and the WDOC's own data confirm that recidivism, when it happens, most commonly occurs soon after an individual's release (*i.e*., when a person is likely to still be on parole or probation). *See* SOF at ¶41-46.

with regard to a member of the class. In two of the cases, GPS data was used to locate and arrest the perpetrators after they were reported to police. SOF at ¶30, 31. Both of these perpetrators were known to their victims and there was no evidence that they would have evaded justice in the absence of monitoring. *Id.* In a third case, the monitored person committed a murder and then killed himself. GPS data was used to locate the body of the victim. *Id.* at ¶29. In two cases, it is not clear that GPS data was used in connection with the investigation or prosecution at all. SOF at ¶32 (The alleged perpetrator was wearing a monitor because he was on probation but Tillich did not know whether GPS data was used in connection with investigating the alleged offense); *Id.* ¶27 (GPS data was not obtained by Milwaukee PD until a month after the perpetrator confessed to and was charged with the crime).

The only time that GPS data was used in the manner the court envisioned in *Belleau* was with regard to the investigation of an assault committed by a person who was on a GPS monitor because he was on supervision for an armed robbery. SOF at ¶29. He was not a sex offender and therefore did not fall under any section of 301.48. *Id.*

Lifetime GPS monitoring of more than 700 people who have served their time and been released from criminal supervision is a massive dragnet. The state collects a staggering amount of data—a minimum of 10.5 million geolocation data points for each monitored person (1 per minute for 20 years). Despite retaining an expert to defend the program and demonstrate its usefulness as a law enforcement tool, the

state was unable to produce much evidence at all that the program actually has been used to advance law enforcement goals. The dearth of evidence casts serious doubt on the state's law-enforcement justification. As the North Carolina Supreme Court explained in *Grady*, "[t]he extent of a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government." *State v. Grady*, 372 N.C. at 540-41 (*citing Samson*, 547 U.S. at 661-63; *Vernonia*, 515 U.S. at 853).

2. The Statute Reaches Much More Broadly than Necessary to Serve the State's Interests

The second reason that the state interest prong of the balancing test favors Plaintiff is that the statutory scheme wrongly presumes that everyone with a history of having been convicted of more than one count of a sexual offense presents an ongoing risk of committing additional sexual offenses for decades after their release from prison. As shown below, this not only imposes an enormous burden on monitored individuals but also results in a massive waste of state resources that could be used in a more effectively.

a. Both Because of Its Breadth and Duration, the Statute Is Not an Effective Means of Advancing State Interests

As explained in detail in Dr. Socia's report, decades of research on recidivism and risk assessment establish that neither a history of recidivism nor having been convicted of more than one count in a single case is a reliable proxy for determining an individual's future risk of committing a sexual offense. SOF at ¶¶48-52. This is

particularly true with regard to individuals convicted of child pornography offenses because of their low rates of re-offense, the rarity with which such individuals go on to commit future contact offenses, and the lack of correlation between the number of counts (*i.e.*, images possessed) and future risk. *Id.* at ¶¶53-63. And, as explained, the mere fact of having past convictions becomes an even less reliable proxy for ongoing risk over time due to the well-documented decline in recidivism rates as individuals spend time offense free in the community. *Id*. at ¶¶40-47.

It is well established that there is no single factor that accurately predicts future risk of recidivism. As a result, schemes that use a single factor, such as criminal history, to impose restrictions are less effective public safety measures than those that rely on valid multi-factor assessments. *Id*. at ¶49. Factors such as having successfully completed treatment, age, victim characteristics, and time spent offense-free in the community are all stronger predictors of future risk than criminal history, and validated risk assessments incorporate such factors to predict risk more accurately. *Id*.

Because the Wisconsin GPS monitoring scheme applies categorically for a minimum of 20 years based on a single factor—whether the individual has been convicted of more than one count—it results in the expenditure of resources on monitoring individuals who likely present little risk of committing a future offense.

b. Risk Assessments Could Be Used to Impose Monitoring in a More Targeted Manner

The state does not have to subject hundreds of people to long-term monitoring in a blanket manner to effectively advance its goals. As Dr. Socia's report explains,

state resources could be more efficiently and effectively deployed through individualized assessment. The simple proxy risk assessment instruments that the Department already utilizes with individuals released from prison with sexual offense convictions (*e.g.*, the Static-99) could be used to screen individuals who may present a heightened risk who can then be evaluated for potential placement on monitoring. SOF at ¶¶111-117. Not only would individualized consideration lessen the inclusion of low-risk individuals in the monitoring program, but it also would properly focus resources on those who may present a real risk and save the state money in the process. *Id.*

Dr. Socia's conclusions regarding the validity and utility of risk assessments for determining who should be subject to monitoring have gone unrebutted by the Department.

In conclusion, no one doubts that the state's desire to prevent re-offense and solve crimes are worthy goals. But a "benign" motive "cannot justify a departure from Fourth Amendment protections … '[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.'" *Ferguson v. City of Charleston*, 532 U.S. 67, 85-86 (2001) (*quoting City of Indianapolis v. Edmond*, 531 U.S. 32, 42-43 (2000) ("[I]n determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue.").

As shown, the state's evidence that this program actually advances its goals is

flimsy. This case stands in sharp contrast to those where the Supreme Court has found the evidence sufficient to justify programmatic searches, even where the search at issue was minimally intrusive and burdensome. *See, e.g.*, *Vernonia*, 515 U.S. at 661-63 (drug testing of student athletes was upheld where the evidence showed that disciplinary problems "fueled by alcohol and drug abuse," particularly among students involved in interscholastic athletics, "had reached epidemic proportions" in the school district); *King*, 569 U.S. at 459 (buccal swabs of arrestees upheld where the evidence showed that "DNA is a markedly more accurate form of identifying arrestees" than fingerprinting and photographing alone).

The absence of proof that the lifetime GPS monitoring program actually serves state interests is particularly troubling in light of the fear and revulsion evoked by sexual offenses. Such strong emotions may lead lawmakers to disregard the facts about whether any public purpose is in fact served by this scheme and the actual risk posed by the persons who are subject to it. *See, e.g., Does 1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016) (noting that sex offense laws brand "registrants as moral lepers solely on the basis of a prior conviction."). It is precisely where, as here, fear, disgust and moral outrage may drive legislative excess that scrupulously upholding constitutional safeguards is most important. There is no state of exception from the constitution for persons convicted of sexual offenses.

Based on the undisputed evidence regarding the heterogeneity of the class of persons subject to monitoring, the burdens of GPS monitoring on those subject to it, and the absence of evidence that the program advances the state's interests,

Plaintiff is entitled to summary judgment on his claim that lifetime GPS monitoring pursuant to 310.48(2)(a)(7) violates the Fourth Amendment under the totality of the circumstances analysis.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Honorable Court grant summary judgment in his favor on his Fourth Amendment claim.

Respectfully submitted,

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