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

BENJAMIN BRAAM, ALTON ANTRIM, DANIEL OLSZEWSKI, ANDREW CHRISTENSEN, WILLIAM PERSON, ELIZABETH DILLETT, GUY GIESE, and BRIAN CLAPPER on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	Case No. 19-396
v.	)	Judge
CATHY JESS, in her official capacity as Secretary of the Wisconsin Department of Corrections,	)	
Defendant.	)	

CLASS ACTION COMPLAINT FOR CIVIL RIGHTS VIOLATIONS, DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs, through counsel, complain against Defendant Cathy Jess, in her official capacity as Secretary of the Wisconsin Department of Corrections, as follows:

Nature of the Case

1. This case challenges the constitutionality of the State of Wisconsin's program of lifetime GPS monitoring of people who have been convicted of certain sex offenses.

2. Plaintiffs Benjamin Braam and Alton Antrim are individuals subject to lifetime GPS monitoring pursuant to Wisconsin law who are no longer under any supervision of the criminal justice system. Braam and Antrim, on behalf of themselves and all others similarly situated, contend that the State's program of

continued GPS monitoring of people who are no longer under the supervision of the criminal justice system violates their rights under the Fourth and Fourteenth Amendments to the United States Constitution. Plaintiffs Daniel Olszewski, Andrew Christensen, William Person, Elizabeth Dillett, Guy Giese, and Brian Clapper are individuals on supervised release who are subject to lifetime GPS monitoring pursuant to DOC policy. Christensen, Person, Dillett, Giese and Clapper, on behalf of themselves and all others similarly situated, contend that placing them on lifetime GPS monitoring violates their rights under the Fourteenth Amendment's due process clause.

Jurisdiction and Venue

3. Jurisdiction is proper in federal court pursuant to 28 U.S.C. §1331 because this action arises under 42 U.S.C. §1983 and the United States Constitution.

4. Venue is proper in this District pursuant to 28 U.S.C. §1391 because the events alleged below occurred in the Eastern District of Wisconsin.

5. Declaratory relief is authorized under 28 U.S.C. §2201. A declaration of law is necessary and appropriate to determine the respective rights and duties of parties to this action.

The Plaintiffs

6. Plaintiff Benjamin Braam is a 40-year-old resident of Racine, Wisconsin. Braam was convicted of two counts of second degree sexual assault of a minor in 2000. Both counts resulted from a single criminal complaint and involved

sexual contact with the same teenaged victim. Braam discharged his sentence in March 2018 and is not under any kind of criminal justice supervision. When Braam was released from prison, he was not subject to GPS monitoring. In October 2018, seven months after he was discharged from the Wisconsin Department of Corrections' supervision, Braam received a letter from the DOC informing him that he would be required to wear a GPS device for the rest of his life. Presently, Braam is forced to wear a GPS ankle monitor and is subject to lifetime GPS monitoring pursuant to the statutes challenged herein.

7. Plaintiff Alton Antrim is a 63-year-old resident of Bristol, Wisconsin. Antrim was convicted of one count of first degree sexual assault in 1990 and of one count of first degree sexual assault in 1998. Antrim successfully completed his period of community supervision in October 2018 and is not under any kind of criminal justice supervision. He is currently forced to wear a GPS ankle monitor and is subject to lifetime GPS monitoring pursuant to the statutes challenged herein.

8. Plaintiff Daniel Olszewski is a 37-year-old resident of Salem, Wisconsin. Olszewski pled guilty in 2013 to two counts of possession of child pornography and was sentenced to three years in prison and two years of supervised release. Both counts resulted from a single criminal complaint. Olszewski was released from prison on January 16, 2018, and is currently on supervised release, which ends January 16, 2020. When he was released from prison, he was on GPS monitoring for five months, at which time his parole officer

decided that he no longer would be required to be on GPS monitoring. In September 2018, he was informed that he would again be placed on GPS monitoring. He is currently forced to wear a GPS ankle monitor and is subject to lifetime GPS monitoring pursuant to the statutes challenged herein.

9. Plaintiff Andrew Christensen is a 26-year-old resident of Bristol, Wisconsin. Christensen was convicted of three counts of possession of child pornography in 2014. All three counts resulted from a single criminal complaint. Christensen was sentenced to three years in prison and five years of extended supervision. He was released in October 2017 and is currently on supervised release, which ends in 2022. When he was initially released, he was not subject to GPS monitoring. In September 2018, 11 months after his release, Christensen was placed on GPS monitoring. He is currently forced to wear a GPS ankle monitor and is subject to lifetime GPS monitoring pursuant to the statutes challenged herein.

10. Plaintiff William Person is a 44-year-old resident of Burlington, Wisconsin. Person was convicted of three counts of possession of child pornography. All three counts resulted from a single criminal complaint. Person was sentenced to three years in prison and three years of community supervision. He was released from prison in April 2018 and is currently on supervised release, which ends in 2021. When he was initially released, he was not subject to GPS monitoring. In September 2018, Person was placed on GPS monitoring. He is currently forced to wear a GPS ankle monitor and is subject to lifetime GPS monitoring pursuant to the statutes challenged herein.

11. Plaintiff Elizabeth Dillett is a 34-year-old resident of Milwaukee, Wisconsin. Dillett was convicted of two counts of sexual assault of a child by person who works or volunteers with children, a class H felony. Dillett had a sexual relationship with a 16-year-old male when she was a teacher and he was a volunteer at the school where she worked. She was sentenced to two years of imprisonment and three years of supervision. She was released from prison in November 2018 and is currently on supervised release, which ends in 2021. Dillett was placed on GPS monitoring immediately after her release. She is currently forced to wear a GPS ankle monitor and is subject to lifetime GPS monitoring pursuant to the statutes challenged herein.

12. Plaintiff Guy Giese is a 66-year-old resident of West Milwaukee, Wisconsin. Giese was convicted of two counts of first degree sexual assault in 1995. Both counts arose from a single criminal complaint. Giese was released from prison in November 2017 and is currently on supervised release, which ends in May 2020. When he was initially released, he was not subject to GPS monitoring. In September 2018, Giese was placed on GPS monitoring. He is currently forced to wear a GPS ankle monitor and is subject to lifetime GPS monitoring pursuant to the statutes challenged herein.

13. Plaintiff Brian Clapper is a 57-year-old resident of West Allis, Wisconsin. Clapper was convicted of six counts of first degree sexual assault in 1984. All counts arose from a single incident and were brought in a single criminal complaint. Clapper was released from prison in July 2018 and is currently on

supervised release, which ends in 2035. When he was initially released, he was not subject to GPS monitoring. In September 2018, he was placed on GPS. He is currently forced to wear a GPS ankle monitor and is subject to lifetime GPS monitoring pursuant to the statutes challenged herein.

The Defendant

14. Defendant Cathy Jess is sued in her official capacity as Secretary of the Wisconsin Department of Corrections.

15. Wisconsin law charges the Department of Corrections with enforcement of the state's GPS monitoring program, including the lifetime monitoring challenged herein. Wis. Stats. §301.48(2)(a).

16. In her capacity as the Director of the Department of Corrections, Defendant Jess has final authority for enforcing the statutes challenged herein against Plaintiffs and the members of the proposed classes.

Relevant Statutory Provisions

17. Pursuant to Wis. Stats. §301.48(2), individuals who have been convicted of certain sex offenses are subject to lifetime GPS monitoring by the Wisconsin Department of Corrections.

18. The lifetime GPS monitoring requirement applies to persons who have been convicted of "level 1" or "level 2" sex offenses against minors; persons who are placed on lifetime supervision for a "serious sex offense" pursuant to Wis. Stats. §939.615; and persons who are deemed "special bulletin notification" offenders ("SBNs") pursuant to Wis. Stats. §301.46 (2m) (am).

19. Any individual who has been convicted of a sex offense "on 2 or more separate occasions" is deemed to be a "Special Bulletin Notification" offender ("SBN"). Wis. Stats. §301.46 (2m) (am).

20. Until September 2018, the Wisconsin Department of Corrections interpreted the phrase "2 or more separate occasions" to mean that the SBN statute applied only to persons who were convicted of sex offenses in two or more separate cases. Under this interpretation, Plaintiffs Braam, Christensen, Person, Dillett, Giese and Clapper were not deemed to be SBNs and were not subject to GPS monitoring because, although they were convicted of more than one count, each count stemmed from a single criminal complaint.

21. In September 2017, former Wisconsin Attorney General Brad Schimel issued a guidance to the Wisconsin Department of Corrections concerning the meaning of the SBN statute in which he concluded that "convictions on 'separate occasions' in Wis. Stat. §301.46 (2m)(am) refers to multiple convictions regardless of whether they were part of the same proceeding, occurred on the same date, or were included in the same criminal complaint." Former Secretary of the Wisconsin Department of Corrections Jon Litscher took no action based on Schimel's guidance.

22. Jon Litscher retired from his position as Secretary of the Wisconsin Department of Corrections in May 2018. Defendant Jess replaced Litscher.

23. In September 2018, Defendant Jess adopted Schimel's reinterpretation of the SBN law and began applying lifetime GPS monitoring to anyone convicted of more than one count. Pursuant to this reinterpretation of the law, Plaintiffs Braam,

Olszewski, Christensen, Person, Dillett, Giese and Clapper are now deemed to be SBN offenders and are subjected to GPS monitoring for life.

24. A person who is subjected to lifetime GPS cannot challenge that decision until after they have worn the monitor for 20 years. Wis. Stats. §301.48(6).

25. If a person subject to GPS monitoring is convicted of *any* criminal offense (presumably even a misdemeanor traffic offense) during the time period they are subject to monitoring, he forever forfeits his opportunity to challenge the Department's decision to subject him to lifetime GPS monitoring. Wis. Stats. 301.48(6)(b)(1).

26. When a person in the custody of the Department of Corrections for a felony sex offense is nearing the end of his or her sentence, the Department conducts an End of Confinement Review to determine if the person might meet the criteria for referral to civil commitment proceedings (*i.e.*, he or she "currently has a mental disorder that makes it more likely than not that the person will engage in future acts of sexual violence.") Wis. Stats. §980.01. None of the Plaintiffs were deemed to meet the criteria for civil commitment after such an evaluation.

27. The Department does not take into account the results of the End of Confinement Review when determining whether to subject a person who has been convicted of two or more counts to GPS monitoring. All such individuals are subjected to lifetime GPS monitoring even if they are evaluated to be a "low" risk of re-offense.

The Effects of GPS Monitoring

28. Lifetime GPS monitoring imposes a severe burden on the lives of people who are subjected to it long after they have completed their criminal sentences and are no longer under the supervision of the criminal justice system.

29. GPS tracking is an intrusive search that provides the government detailed, real-time data about a person's every move. The system "monitors, identifies, and records" everywhere a person who wears the bracelet goes for the rest of their lives. Wis. Stats. §301.48(1)(dm).

30. People who wear the GPS monitor are at constant risk of being arrested based on equipment errors such as false alerts and lost signals. There is a well-documented history of problems with the state's GPS technology. See Riley Vetterkind, *Wisconsin doubles GPS monitoring despite five years of malfunctions, unnecessary jailings*, Milwaukee Journal Sentinel, March 8, 2018 (available at: https://www.jsonline.com/story/opinion/contributors/2018/03/08/wisconsin-doubles-gps-monitoring-despite-big-problems/395517002/) ("Five years after the Wisconsin Center for Investigative Journalism documented serious problems with the state's GPS monitoring program for offenders — false alerts that have landed offenders in jail, disrupting family lives and causing them to lose jobs — inefficiencies and inaccuracies with the system remain, according to state and county records and 16 offenders interviewed for this story.")

31. If the Department determines that an individual subject to GPS monitoring is capable of paying, it charges a monthly fee of up to $240 per month

($2,880 per year) for life. If an individual does not pay this fee, the State automatically deducts the amounts owed from any tax refund to which the person is entitled.

32. The GPS unit cannot be submerged underwater, so people who are forced to wear the monitor cannot swim or take a bath.

33. The GPS monitor cannot be removed and must be charged for a minimum of an hour twice per day to maintain sufficient battery power. Thus, people who are forced to wear a GPS monitor must be tethered to an electrical outlet for at least that amount of time or face arrest.

34. The GPS monitoring device is a bulky plastic unit that is clearly visible if the wearer wears shorts, a skirt or a dress. The presence of the GPS ankle monitor functions as a scarlet letter that denotes criminality, even if the wearer is no longer under any kind of criminal justice supervision.

35. The device communicates with the wearer with alarms and a pre-recorded electronic voice that causes embarrassment for the wearer. For example, when the battery life on the unit is low, the device emits a series of beeps and directions to charge the device; or if a person wearing a GPS monitor is on a bus or other public transportation vehicle that goes past a school, the monitor will announce that the wearer must contact the monitoring service. Thus, even when the device is not visible, it draws unwanted attention to the wearer and alerts others to its presence.

36. The device causes many wearers discomfort and injury, including scabs, blistering, chafing and skin irritation.

Class Action Allegations

37. This action is maintainable as a class action for injunctive relief under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

38. **Class Definition.** There are two proposed classes, defined as follows:

(1) All persons subjected to lifetime GPS monitoring pursuant to Wis. Stats. §301.48 beyond the time that they are subject to the supervision of the criminal justice system; and

(2) All persons who are subjected to GPS monitoring while on supervised release from the Department of Corrections.

39. **Numerosity.** According to media reports, the state currently subjects more than 1,200 people to GPS monitoring, and the state added more than 200 people to its lifetime GPS monitoring program when Defendant Jess adopted former AG Brad Schimel's interpretation of the meaning of the "2 or more occasions" language. Plaintiffs' counsel thus believe that there are hundreds of people who meet the class definitions, making joinder impracticable, if not impossible.

40. **Common Questions of Law and Fact Predominate.** Members of the potential classes have identical questions of law and fact, to wit:

- What are the State's rationales for lifetime GPS monitoring;
- What are the technological capabilities of the GPS tracking system;
- What is the proper meaning of the "2 or more occasions" language contained in Wis. Stats. §301.46 (2m) (am);

- Whether GPS monitoring of people who are no longer subject to criminal justice supervision constitutes an unreasonable search in violation of the Fourth Amendment;

- Whether people on supervised release are entitled to due process before being placed on lifetime GPS supervision;

- Whether people placed on GPS monitoring are entitled to a mechanism that allows them to challenge ongoing monitoring before living in the community without committing an offense for 20 years.

41. **Typicality.** The claims of the named Plaintiffs are typical of the claims of the members of the classes. Each of the named Plaintiffs in Class 1 (Braam and Antrim) contends that being subjected to lifetime GPS monitoring constitutes an unreasonable search in violation of the Fourth Amendment. Each of the named Plaintiffs in Class 2 (Olszewski, Christenson, Person, Dillett, Giese and Clapper) contends that they are entitled to a hearing and an opportunity to contest (1) whether they have been convicted of a sex offense on "2 or more occasions" within the meaning of Wis. Stats. §301.46 (2m) (am); and (2) whether there is a legitimate penological need for GPS monitoring of their whereabouts while on supervised release or another form of community supervision. All Plaintiffs contend that they should be entitled to a process that allows them to challenge continued GPS monitoring after they have lived in the community for a period of time without committing another offense.

42. **Adequacy.** The named Plaintiffs have no conflict of interest or unusual fact pattern that would render them inadequate class representatives. The named Plaintiffs are represented by experienced counsel who have conducted numerous civil rights class actions.

43. The challenged laws and policies apply generally to all members of the classes, so that final injunctive relief and corresponding declaratory relief is appropriate respecting each class as a whole.

COUNT I
42 U.S.C. § 1983 – Fourth Amendment
(Fourth Amendment Claim on Behalf of Class 1)

44. Plaintiffs re-allege and reincorporate, as though fully set forth herein, each and every allegation above.

45. Lifetime GPS monitoring of individuals who are no longer subject to the supervision of the criminal justice system constitutes an unreasonable search.

46. Wisconsin Stats. §301.48 violates the Fourth Amendment on its face and as applied to Plaintiffs.

WHEREFORE, Plaintiffs respectfully request that this Court:

(a) enter an order certifying that this case may be maintained as a class action on behalf of the members of Class 1 and appointing the undersigned attorneys as class counsel;

(b) issue a judgment declaring that lifetime GPS monitoring of people who are no longer subject to the supervision of the criminal justice system is unconstitutional in violation of the Fourth Amendment of the U.S. Constitution on its face and as applied;

(c) enter a preliminary and then permanent injunction prohibiting Defendant from continuing enforcement of the unconstitutional laws and policies identified herein;

(d) award Plaintiffs their reasonable attorneys' fees and cost pursuant to 42 U.S.C. § 1988, and other applicable law; and

(e) grant such other relief as this Court deems just and proper.

COUNT II
42 U.S.C. §1983 – Fourth Amendment
(*Monell* Express Policy Claim on Behalf of Classes 1 and 2)

47. Plaintiffs reallege and reincorporate, as though fully set forth herein, each and every allegation above.

48. Defendant Jess has an official policy and practice of misinterpreting Wis. Stats. §301.46 (2m) (am). In particular, Defendant misinterprets the requirement of convictions on "2 or more separate occasions" a to refer to multiple convictions that were part of the same proceeding and were included in the same criminal complaint.

49. Pursuant to this official policy, Defendant applies lifetime GPS monitoring to people who have only been convicted of a sex offense on one occasion.

50. Defendant's misinterpretation of the statute violates the Fourth Amendment rights of Plaintiffs Braam, Olszewski, Christensen, Person, Dillett, Giese, Clapper and all others similarly situated because it subjects them to unreasonable searches.

WHEREFORE, Plaintiffs respectfully requests that this Court:

(a) issue a preliminary and then permanent injunction prohibiting Defendant from misinterpreting Wis. Stats. §301.46 (2m) (am) to apply to individuals who have been convicted of a sex offense on only one occasion;

(b) issue a declaratory judgment that states that the policy of applying Wis. Stats. §301.46 (2m) (am) to Plaintiffs and others who are not subject to its terms violates the Fourth Amendment;

(c) award Plaintiffs their reasonable attorneys' fees and cost pursuant to 42 U.S.C. § 1988, and other applicable law; and

(d) grant such other relief as this Court deems just and proper.

COUNT III
42 U.S.C. §1983 – Fourteenth Amendment
(Procedural Due Process Claim on Behalf of Class 1)

51. Plaintiffs reallege and reincorporate, as though fully set forth herein, each and every allegation above.

52. The Department of Corrections automatically applies lifetime GPS monitoring to every person who has been convicted of more than one count of a sex offense. This policy deprives the members of Class 1 of their due process rights because for 20 years there is no opportunity for people who have lived in the community without committing another offense to challenge the reasonableness of continuing to subject them to GPS monitoring.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

(a) enter an order certifying that this case may be maintained as a class action on behalf of the members of Class 1 and appointing the undersigned attorneys as class counsel;

(b) issue a preliminary and then permanent injunction requiring Defendant to provide an individualized opportunity to be heard before applying lifetime GPS monitoring to every person on supervision for a sex offense who has been convicted of more than one count;

(c) issue a declaratory judgment that states that the Department's current policy violates the Fourteenth Amendment guarantee of procedural due process;

(d) award Plaintiffs their reasonable attorneys' fees and cost pursuant to 42 U.S.C. § 1988, and other applicable law; and

(e) grant such other relief as this Court deems just and proper.

COUNT IV
42 U.S.C. §1983 – Fourteenth Amendment
(Procedural Due Process Claim on Behalf of Class 2)

53. Plaintiffs reallege and reincorporate, as though fully set forth herein, each and every allegation above.

54. The Department of Corrections automatically applies lifetime GPS monitoring to every person on supervision for a sex offense who has been convicted of more than one count. This policy violates the Fourteenth Amendment guarantee of procedural due process because it deprives the members of Class 2 of their Fourth Amendment rights without any opportunity to contest (1) whether they have been convicted of a sex offense on "2 or more occasions" within the meaning of Wis. Stats. §301.46 (2m) (am); and (2) whether there is a legitimate penological need for GPS monitoring of their whereabouts while on supervised release or another form of community supervision.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

(a) enter an order certifying that this case may be maintained as a class action on behalf of the members of Class 2 and appointing the undersigned attorneys as class counsel;

(b) issue a preliminary and then permanent injunction requiring Defendant to provide an individualized opportunity to be heard before applying lifetime GPS monitoring to every person on supervision for a sex offense who has been convicted of more than one count;

(c) issue a declaratory judgment that states that the Department's current policy violates the Fourteenth Amendment guarantee of procedural due process;

(d) award Plaintiffs their reasonable attorneys' fees and cost pursuant to 42 U.S.C. § 1988, and other applicable law; and

(e) grant such other relief as this Court deems just and proper.

Respectfully submitted,

/s/ Mark G. Weinberg
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BENJAMIN BRAAM, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 2:19-cv-396
	)	
v.	)	
	)	Judge
CATHY JESS,	)	
	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. Pro. 65, Plaintiffs Benjamin Braam, Alton Antrim, and Daniel Olszewski, individually and on behalf of all similarly situated individuals, respectfully request that this Honorable Court enter a preliminary injunction prohibiting Defendant from continuing to subject individuals who are not under any criminal justice supervision to GPS monitoring. In support thereof, Plaintiffs state as follows.

FACTUAL BACKGROUND

I. Wisconsin's Program of Lifetime GPS Monitoring

Under Wisconsin law, people who have been convicted of certain sex offenses are subject to lifetime GPS monitoring by the Wisconsin Department of Corrections ("the Department"). Wis. Stats. §301.48(2). Pursuant to this statute, the Department forces hundreds of people who are not subject to any criminal justice supervision (*e.g.*, probation, parole, or extended supervision) to wear an unremovable ankle monitor that provides the government detailed, real-time data about their every move. The

system "monitors, identifies, and records" everywhere a person who wears the device goes. Wis. Stats. §301.48(1)(dm). If a person subject to GPS tracking is deemed capable of paying, the State charges him up to $240 per month ($2,880 per year) for being on electronic monitoring.

The GPS monitor causes many wearers discomfort and injury, including scabs, blistering, chafing and skin irritation. The device cannot be removed and must be charged for a minimum of an hour twice per day. Thus, people who are forced to wear a GPS monitor must be tethered to an electrical outlet for at least that amount of time. The GPS unit cannot be submerged underwater, so people who are forced to wear the monitor can never swim or take a bath. The monitoring device is a bulky plastic unit that is clearly visible if the wearer wears shorts, a skirt or a dress. The device communicates with the wearer with alarms and a pre-recorded electronic voice. For example, when the battery life on the unit is low, the device emits a series of beeps and directions to charge the device. Thus, even when the device is not visible, it draws unwanted attention to the wearer and alerts others to its presence.

Wisconsin requires lifetime GPS monitoring of persons who are deemed "special bulletin notification" offenders ("SBNs") pursuant to Wis. Stats. §301.46 (2m) (am). Any individual who has been convicted of a sex offense "on 2 or more separate occasions" is deemed to be an SBN. Wis. Stats. §301.46 (2m) (am). Until September 2018, the Wisconsin Department of Corrections interpreted the phrase "2 or more separate occasions" to mean two or more separate cases. In September 2017, former Wisconsin Attorney General Brad Schimel issued a guidance to the Wisconsin

Department of Corrections in which he concluded that "convictions on 'separate occasions' in Wis. Stat. §301.46 (2m)(am) refers to multiple convictions regardless of whether they were part of the same proceeding, occurred on the same date, or were included in the same criminal complaint." Ex. 4, Schimel Letter. Former Secretary of the Wisconsin Department of Corrections Jon Litscher took no action based on Schimel's guidance. When Defendant Cathy Jess replaced Litscher in 2018, she adopted Schimel's reinterpretation of the SBN law and began applying lifetime GPS monitoring to anyone convicted of more than one count, even if they were only convicted in one case.

When a person in the custody of the Department of Corrections for a felony sex offense is nearing the end of his or her sentence, the Department conducts an End of Confinement Review to determine if the person meets the criteria for referral to civil commitment proceedings (*i.e.*, he or she "currently has a mental disorder that makes it more likely than not that the person will engage in future acts of sexual violence.") Wis. Stats. §980.01. None of the Plaintiffs was deemed to meet the criteria for civil commitment. The Department does not take into account the results of the End of Confinement Review when deciding whether to place someone on lifetime GPS monitoring. Rather, the Department categorically subjects everyone who has been convicted of more than one count to lifetime GPS.

A person who is subjected to lifetime GPS cannot challenge that decision until after they have worn the monitor for 20 years. Wis. Stats. §301.48(6). If a person subject to GPS monitoring is convicted of *any* criminal offense (presumably even a

misdemeanor traffic offense) during that time period, he forever forfeits his opportunity to challenge the Department's decision to subject him to lifetime GPS monitoring. Wis. Stats. §301.48(6)(b)(1).

II. The Plaintiffs

Plaintiffs Benjamin Braam, Alton Antrim and Daniel Olszewski bring this suit on behalf of themselves and all others similarly situated to challenge the constitutionality of continued GPS monitoring of persons who have completed their sentences and been discharged from any supervision of the criminal justice system.[1] Plaintiffs contend that Wisconsin's lifetime GPS monitoring law violates the Fourth Amendment both on its face an as applied to them.[2]

Plaintiff Benjamin Braam is a 40-year-old resident of Racine, Wisconsin. Ex. 1, Decl. of Braam, at ¶1. Braam was convicted of two counts of second degree sexual

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[1] Plaintiffs Braam and Antrim represent a class of individuals who are subject to lifetime monitoring beyond the expiration of their sentences under Wisconsin law (identified as "Class 1" in the complaint). A separate class of Plaintiffs who are subjected to GPS monitoring while on parole, probation or extended supervision (identified as "Class 2") have also challenged the constitutionality of the State's electronic monitoring scheme. At this time, Plaintiffs only seek a preliminary injunction on behalf of Class 1. Plaintiff Olszewski's period of supervised release does not end until January 2020. He is seeking a preliminary injunction because he is taking active steps to move out of state at the end of his period of supervision because of the prospect of lifetime GPS monitoring.

[2] It is possible to regard Plaintiffs' Fourth Amendment challenge as either facial or as applied. The Seventh Circuit has noted that the distinction between facial and as-applied challenges "is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. ... [T]he distinction between facial and as-applied challenges informs only the choice of remedy, not what must be pleaded in the complaint. A court may construe a challenge as applied or facially, as appropriate." *Six Star Holdings, LLC v. City of Milwaukee*, 821 F. 3d 795, 803 (7th Cir. 2016). Here, Plaintiffs' challenge can be seen as facial because the GPS law authorizes unreasonable searches on its face. Or, it can be seen as an as-applied challenge because the statute's authorization of lifetime GPS monitoring of Plaintiffs who are not dangerous is unreasonable.

assault of a minor in 2000. *Id.* at ¶2. Both counts resulted from a single criminal complaint and involved sexual contact with the same teenaged victim when Braam was 21 years old. *Id*. Braam discharged his sentence in March 2018 and is not under any kind of criminal justice supervision. *Id*. at ¶3. In October 2018, seven months after he was discharged from the Wisconsin Department of Corrections' supervision, Braam received a letter from the DOC informing him that he was required to come to a parole office to be fitted with a GPS device that he would be required to wear for the rest of his life. *Id*. at ¶4. Braam is subject to GPS monitoring because Defendant Jess decided to reinterpret the meaning of "2 or more occasions" to apply to people such as Braam who were convicted of two counts in a single case. Braam is currently forced to wear a GPS ankle monitor and is subject to lifetime GPS monitoring. *Id*.

Wearing the GPS monitor has many negative effects on Braam. The ankle strap causes him persistent skin irritation, including rawness, blisters and scabs. *Id*. at ¶5. The GPS device with which Braam was fitted does not maintain sufficient battery power unless he charges it for an hour in the morning and an hour in the evening. *Id*. at ¶6. Braam works as a general manager at a pizza restaurant in Racine. With his work schedule, he often has difficulty finding the time to charge the device for the required two hours a day during which he must remain tethered to an electrical outlet. *Id*. If he works a long shift, the GPS device often begins emitting an alarm and a pre-recorded voice message telling him to "recharge immediately." *Id*. at ¶7.

Braam was told by the person who attached the tracker to him that the device cannot be submerged in water, so Braam cannot ever take a bath or swim. *Id*. at ¶8.

Braam fears that if the device gets wet or if he bumps it into something while he is at work, he will face felony charges for "tampering" with the device. *Id*. at ¶9. Because Braam has steady employment, the Department deems him capable of paying $240 per month ($2,880 per year) for electronic monitoring. *Id*. at ¶10. This imposes a substantial financial hardship on Braam and makes it impossible for him to save money for the future. *Id*. The device is embarrassing and makes it difficult for Braam to move on with his life even though his criminal sentence is over and he has not committed any misconduct since his release. *Id*. at ¶11.

Plaintiff Alton Antrim is a 63-year-old resident of Bristol, Wisconsin. Ex. 2, Decl. of Antrim, at ¶1. Antrim was convicted of one count of first degree sexual assault in 1990 and of one count of first degree sexual assault in 1998. *Id*. at ¶2. Antrim successfully completed his period of community supervision in October 2018 and is not under any kind of criminal justice supervision. *Id*. at ¶4. He is currently forced to wear a GPS ankle monitor and is subject to lifetime GPS monitoring. *Id*. at ¶5.

Electronic monitoring causes many hardships to Antrim, including the following. He cannot get the ankle bracelet wet, and so he can't swim or take a bath. When he takes a shower, he wraps the bracelet in a plastic garbage bag to avoid damage. *Id*. at ¶6(a). The GPS bracelet causes blisters and open wounds on his ankle. *Id*. at ¶6(b). The bracelet is programmed to emit warning messages whenever he is near a day care, school or public park, even unintentionally. Antrim went to a coffee shop that was, unbeknownst to him, too close to a harbor, and the device began emitting warnings. *Id*. at ¶6(e). When the GPS monitor goes off, it directs Antrim in a loud

voice to "contact the monitoring service." *Id*. at ¶6(c). Since October 28, 2018, the bracelet has malfunctioned twice. In November of 2018, the GPS was not properly charging. Its red light would not go off (indicating it was not charged); and charging it more did not help. Antrim contacted the monitoring service and obtained a new GPS bracelet. The second GPS monitor also had a faulty battery indicator light. This caused Antrim to receive more calls from the monitoring service regarding the lost signal. He eventually had to obtain a third GPS unit. *Id*. at ¶6(d).

Plaintiff Daniel Olszewski is a 37-year-old resident of Salem, Wisconsin. Ex. 3, Decl. of Olszewski, at ¶1. He pled guilty in 2013 to two counts of possession of child pornography (Wisc. Stats. §948.12) and was sentenced to three years in prison and two years of supervised release. *Id*. at ¶2. When Olszewski was initially released from prison on January 16, 2018, he was placed on GPS monitoring. *Id*. at ¶¶3–4. In June 2018, Olszewski's parole officer decided to take him off GPS. *Id*. In September 2018, when Defendant Jess reinterpreted the meaning of "2 or more occasions," Olszewski was placed back on GPS monitoring. *Id*. He is now required to wear a GPS ankle bracelet for the rest of his life even after his supervised release ends on January 16, 2020. *Id*. at ¶¶3–4.

Wearing a GPS ankle monitor imposes many serious hardships on Olszewski. For example, he lives in constant fear that he will end up in jail due to being accused of tampering with his GPS. *Id*. at ¶5(a). Olszewski works as a union heavy-equipment operator, a physically demanding job at which he is frequently climbing on and off machinery. He lives in fear and anxiety that he will accidently damage the GPS while

at his job or even while playing with his young daughter. *Id*.

Wearing a GPS monitor also affects Olszewski's work prospects. *Id*. at ¶5(b). He is unable to attend his union's training classes in northern Wisconsin because heavy snow often interferes with the GPS signal. He does not want to put himself in a situation where the GPS signal will go out and result in a warrant being issued for his arrest. *Id*. His union requires 400 hours of classroom training to obtain journeyman status. He has four years to complete the requirements or else he will be kicked out of the union. *Id*. He fears that he will be unable to complete the requirements in time. *Id*. Olszewski had to cut his $250 work boots so that the GPS bracelet fit under them; and the GPS gouges into his ankle when he wears rubber boots for work. *Id*. at ¶5(c).

Olszewski has a five-year-old daughter. *Id*. at ¶5(d.) He hides the GPS from her because he can't explain to her what it is. He cannot get the GPS wet, and thus he can't take his daughter swimming. *Id*. Olszewski gets off supervision in less than ten months. Olszewski wants to remain in Wisconsin because he has a good job there and his family and friends live nearby. *Id*. at ¶6. But if he is forced to wear a GPS ankle bracelet after the termination of his supervision, he will leave the state permanently. *Id*. He has already undertaken efforts to look for housing and work in Illinois. *Id*.

The state of Wisconsin's own psychological evaluation shows that Olszewski is not a threat to public safety. *Id*. at ¶7. The Department of Correction's "Sex Offender Program Report," dated November 3, 2017, indicates that Olszewski presents "low risk" in all assessment categories, including deviant arousal, anger control, criminal thinking, deceptiveness, and impulsivity. *Id*. The report recommended that he be

discharged with "no further sex offender treatment." *Id*.

ARGUMENT

In the Seventh Circuit, a party seeking a preliminary injunction must establish four elements: (1) some likelihood of success on the merits; (2) that they lack an adequate remedy at law; (3) a likelihood that they will suffer irreparable harm if the injunction is not granted; and (4) that the balance of hardships tips in the moving party's favor. *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). In the analysis below, Plaintiffs show, first, that there is a substantial likelihood that they will succeed on the merits of their claim that lifetime GPS monitoring of people who are not under any criminal justice supervision violates the Fourth Amendment. Next, Plaintiffs show that they lack an adequate remedy at law and are suffering irreparable harm in the absence of injunctive relief, and the balance of harms tips in their favor.

I. Plaintiffs Have a Likelihood of Success on their Fourth Amendment Claim

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, "a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313 (1997). Thus, the government generally must obtain a search warrant based on a showing of probable cause that the search will reveal evidence of a crime. *See Skinner*

v. Ry. Labor Executives' Ass'n, 489 U. S. 602, 619 (1989).

There are two tests used to evaluate the constitutionality of a search under the Fourth Amendment: (1) whether the search is reasonable based on the "totality of the circumstances" (*Grady v. North Carolina*, __ U. S. __, 135 S.Ct. 1368, 1371 (2015)); and (2) whether the search is justified by "special needs" which make the warrant and probable-cause requirement impracticable and where the "primary purpose" of the search is distinguishable from the general interest in crime control (*Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)).

In the analysis below, Plaintiffs show (1) that GPS monitoring of all individuals who have been convicted of two or more counts of a sex offense constitutes a search within the meaning of the Fourth Amendment; and (2) that the searches authorized by Wisconsin law fail under either a totality of the circumstances analysis or a "special needs" analysis.

A. GPS Monitoring Is a Search Within the Meaning of the Fourth Amendment

In *Grady v. North Carolina*, __ U. S. __, 135 S.Ct. 1368 (2015), the U.S. Supreme Court analyzed the constitutionality of a North Carolina law similar to the Wisconsin law at issue here. North Carolina imposes lifetime GPS monitoring on persons whom it deems to be "recidivist sex offenders," (*i.e.*, people who have been convicted of more than one sex offense). *Id*. at 1370. Such individuals are required to wear an ankle bracelet equipped with a GPS monitoring device that provides "[t]ime-correlated and continuous tracking of the geographic location of the subject [and] reporting of subject's violations of prescriptive and proscriptive schedule or location

requirements." *Id*. at 1371. The Supreme Court concluded that such monitoring constitutes a search within the meaning of the Fourth Amendment because it "is plainly designed to obtain information … and does so by physically intruding on a subject's body." *Id.* (citing *United States v. Jones*, 565 U.S. 400 (2012) (police officers engaged in a search within the meaning of the Fourth Amendment when they installed and monitored a GPS tracking device on a suspect's car); *Florida v. Jardines*, 569 U. S. ___, 133 S. Ct. 1409 (2013) (bringing a drug-sniffing dog to a suspect's front porch was a search)).

Similarly, in *Park v. State*, No. S18A1211, 2019 Ga. LEXIS 138, at *7 (Mar. 4, 2019), the Supreme Court of Georgia also concluded that a state law that "requires all sex offenders classified as sexually dangerous predators to wear a GPS monitoring device that locates, records, and reports their location to State authorities, even after they have completed their criminal sentences … on its face authorizes a search that implicates the Fourth Amendment." *Id*. at *7–8 (citing *Grady*, 135 S.Ct. at 1370).

The Wisconsin law at issue here similarly authorizes searches that implicate the Fourth Amendment's protections because it forces persons subject to the law to wear an ankle monitor that tracks and records their every movement.

B. Lifetime GPS Monitoring of Individuals Who Are Not Under Any Criminal Justice Supervision Is Unreasonable Under a Totality of the Circumstances Analysis

The principal 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*, 135 S. Ct. at 1371 (*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.")).

As shown below, lifetime GPS monitoring of individuals who are not under the supervision of the criminal justice system fails constitutional scrutiny under a totality of the circumstances analysis because people who have completed their sentences have a reasonable expectation of privacy in their movements that is invaded by permanent government tracking; and there is not a sufficient connection between government interests in public safety, crime prevention, and crime investigation and the state's broad GPS tracking program.

1. GPS Tracking of People Who Have Completed their Criminal Sentences Has a Substantial Impact on Plaintiffs' Reasonable Privacy Interests

Individuals who have completely discharged their criminal sentences including any period of community supervision have a reasonable expectation of privacy that the government will not track and record their movements for the rest of their lives.

Forcing an individual to wear a monitoring device on his person that cannot be removed and collecting data about the individual's whereabouts twenty-four hours a day, seven days a week, for decades is a weighty intrusion on the privacy of the individual being monitored. As Justice Sotomayor noted in her concurrence in *United States v. Jones*, 565 U.S. 400, 415 (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." *See also Riley v. California,* 134 S. Ct. 2473, 2490 (2014) (Noting that GPS tracking allows the government to "reconstruct someone's specific movements down to the minute.")

As set forth in the factual background above, GPS monitoring has a substantial impact on the Plaintiffs in numerous ways. Plaintiffs' every move is monitored and recorded. The ankle strap causes the Plaintiffs pain and injury. Ex.1 at ¶5; Ex. 2 at ¶6(b); Ex. 3 at ¶5(c). The monitors emit embarrassing alarms and instructions when the Plaintiffs are at their jobs or out in public at restaurants or other places that they are lawfully allowed to be. Ex. 1 at ¶6; Ex. 2 at ¶6(e). The monitoring interferes with the Plaintiffs' employment. Ex. 1 at ¶7; Ex. 3 at ¶5(a)(b).

Where, as here, the person subjected to the search is no longer under the supervision of the criminal justice system, such an intrusive and ongoing search that is accomplished by attaching a device to Plaintiffs' bodies cannot be seen as reasonable. *See, Price* at *14 ("Individuals who have completed their sentences do not have a diminished expectation of privacy that would render their search by a GPS monitoring device reasonable.")[3]

[3] The Seventh Circuit has considered various categories of people to be on a continuum for the purpose of Fourth Amendment reasonableness analysis. *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004). Prisoners are on one end of the spectrum and individuals who have "never been convicted of a felony" are on the other. *Id*. Using this analysis, the Seventh Circuit decided in *Green* that the collection of a DNA sample from all persons convicted of a felony was reasonable because it constituted only an "incremental invasion" of an individual's privacy that was justified by the government interests served. *Id*. at 681. The law at issue here goes far beyond a simple, one-time collection of a sample, and thus the severe intrusion into their privacy cannot be deemed reasonable, notwithstanding the Plaintiffs' prior felony convictions.

2. There's an Insufficient Connection Between Legitimate Government Interests and Wisconsin's Broad Program of GPS Monitoring

While it is clear that GPS tracking has a substantial impact on reasonable privacy interests, that does not end the inquiry. 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." *Samson*, 547 U.S. at 848.[4] Wisconsin's GPS tracking program presumably is intended to serve government interests in crime investigation, crime deterrence, and general public safety. Of course, such interests are significant. However, Wisconsin's broad GPS monitoring program is not properly tailored to advance those goals.

a. The Department's 'One-Size-Fits-All' GPS Program Is Unreasonably Broad

The Department of Corrections does not take into account an individualized assessment of an individuals' dangerousness to the public or likelihood of re-offense before applying GPS monitoring. The state's GPS monitoring program applies with equal force to Plaintiff Olszewski, who has never been convicted of a sex offense involving physical contact of any kind, and Plaintiff Braam, who had a relationship with a teenager when he was 21, as it does to someone who has kidnapped and

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[4] The Supreme Court has noted that someone's involvement with the criminal justice system can be "salient" to the Fourth Amendment analysis of the person's expectations of privacy and the reasonableness of a particular search. *Samson v. California*, 547 U. S. 843, 848, 852 (2006) (finding that people on parole can be required to submit to suspicionless searches as a condition of their parole because they "have severely diminished expectations of privacy by virtue of their status.")

sexually assaulted small children on several occasions. It is unclear what, if any, government interests are served by intrusive lifetime monitoring of individuals such as Plaintiffs who have not been shown to pose any particular risk of committing an offense against a child.

b. The Department Ignores Its Own Risk Evaluations

The Department disregards the recommendations rendered by its own evaluators when applying GPS monitoring. The Department's treatment providers conduct evaluations of individuals who have undergone sex offender treatment while in the Department of Corrections. *See* Ex. 3(A) (Daniel Olszewski's Sex Offender Program Report). This evaluation assesses the individual's treatment needs and re-offense risk factors and makes a series of "discharge recommendations." *Id*. Olszewski underwent such an evaluation, was judged to have "low" needs in every category, including "deviant arousal," "criminal thinking," and "denial/minimization" and was discharged with a recommendation that "no further sex offender treatment" was needed. *Id*. at 2. The Department nonetheless has him on GPS monitoring for life.

Similarly, near the end of any person's sentence in the Department of Corrections for a felony sex offense, the Department conducts an End of Confinement Review to determine if the person meets the criteria for referral to civil commitment proceedings (*i.e.*, he or she "currently has a mental disorder that makes it more likely than not that the person will engage in future acts of sexual violence.") Wis. Stats. §980.01; *see also,* Wisconsin Legislative Fiscal Bureau, *Civil Commitment of Sexually Violent*

Persons, at 9 (2015) (describing the end of confinement review process).[5] None of the Plaintiffs were deemed to meet the criteria for civil commitment. The Department completely disregards its own risk assessments when placing people on lifetime GPS monitoring. Rather than monitoring only those people who have been adjudged a public safety risk, the Department categorically subjects everyone who has been convicted of more than one count to lifetime GPS. This further tilts the balance of the "reasonableness" analysis in Plaintiffs' favor.

c. The Department Disregards Relevant Social Science Research

The reasonableness of Wisconsin's lifetime GPS monitoring scheme is further undermined by the fact that it applies to individuals such as Plaintiffs Daniel Olszewski, Andrew Christensen, and William Person who have never been convicted of an offense involving physical contact (*i.e.*, those whose only conviction is for possession of child pornography). A substantial body of research suggests that those convicted of possession of illegal pornography rarely commit contact offenses when released. For example, a study by the U.S. Sentencing Commission followed the 610 individuals released from federal custody in 1999 and 2000 who were convicted of a child pornography offense and had no convictions for any other sex offense. U.S. Sentencing Comm'n, *2012 Report to the Congress: Federal Child Pornography*

[5] Available at: https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2015/0053_civil_commitment_of_sexually_violent_persons_informational_paper_53.pdf

Offenses, 295-96 (2012).[6] All but 22 of the 610 (96.4%) remained free of a contact sex offense of any kind. *Id*. at 300. Fourteen looked at pictures again. The overwhelming majority did neither.[7] *Id*. The rate sexual offending by individuals convicted only of child pornography offenses is similar to the rate of spontaneous "out of the blue" sexual offending among those with a criminal conviction but no history of sexual offenses. Rachel E. Kahn, Gina Ambroziak, R. Karl Hanson & David Thornton, *Release from the Sex Offender Label*, 46 Archives Sexual Behav. 861, 862 (2017).

d. GPS Monitoring Can Properly Be Imposed through Criminal Sentencing

If Wisconsin wants to impose GPS monitoring, there is a proper way to do so. The proper way is through criminal sentencing, not through the Department of Corrections' continuing to exercise authority over individuals who are no longer under the supervision of the criminal justice system. In *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992), the Supreme Court noted that re-offense should be dealt with "by the ordinary

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[6] Available at: https://www.ussc.gov/sites/default/files/pdf/news/congressional- testimony-and-reports/sex-offense-topics/201212-federal-child- pornography-offenses/Full_Report_to_Congress.pdf.

[7] These results are replicated in numerous other studies. *See*, Michael C. Seto, R. Karl Hanson, and Kelly M. Babchishin, *Contact Sexual Offending by Men With Online Sexual Offenses*, 23 Sexual Abuse: A Journal of Research and Treatment 124, 136 (2011) (finding only 2 percent of people convicted solely of child pornography offenses committed contact offenses after release); *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts* 61 HASTINGS L.J. 1281, 1294-97 (2010) (collecting additional studies); *see also* Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC PSYCHIATRY, July 14, 2009 (Study of Swiss offenders concludes that "the consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses.")

criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct."[8]

e. *Belleau v. Wall* Does Not Support the Reasonableness of the State's GPS Monitoring Scheme

Plaintiffs anticipate that the State will point to the Seventh Circuit decision in *Belleau v. Wall,* 811 F.3d 929 (7th Cir. 2016) to support the reasonableness of its GPS monitoring scheme. But this decision is quite narrow in its scope. In *Belleau*, the Seventh Circuit conducted a "totality of the circumstances" analysis of GPS monitoring of an individual who was released from civil commitment and found that monitoring was reasonable as applied to that individual. The plaintiff in *Belleau* was convicted of having sexually assaulted a boy repeatedly for five years beginning when the boy was eight years old. *Id*. at 931. Then while on probation for that offense, he was convicted of having sexually assaulted a nine-year-old girl. *Id*. And then while on parole for that offense, he was revoked and subjected to civil commitment after he admitted that he had sexual fantasies about two girls, one four years old and the other five, and that he planned to sexually abuse them when he had an opportunity to do so. *Id*. A psychologist who evaluated him determined that he was a "pedophile" and that he could not "suppress or manage his deviant desire." *Id*. at 932. Under those circumstances, the Court held that GPS monitoring of the plaintiff was reasonable because "persons who have demonstrated a compulsion to commit very serious crimes and have been civilly determined to have a more likely than not chance of reoffending

[8] *See also Park v. State*, 2019 Ga. LEXIS 138, at *26 (Blackwell, J., concurring) ("our decision today does not foreclose the possibility that the General Assembly could (at least prospectively) authorize or require that the worst sexual offenders be subjected to GPS monitoring for life as a condition of a sentence of probation for life.")

must expect to have a diminished right of privacy as a result of the risk of their recidivating." *Id*. at 935.

Belleau cannot be read to mean that all individuals who have been convicted of any sex offense can properly be subjected to GPS monitoring. The State does not seek to apply GPS monitoring only to those who have been released from civil commitment or those who have re-offended compulsively. To the contrary, the State applies lifetime GPS monitoring to individuals who have been convicted only of non-contact offenses and individuals who have been evaluated by the Department's own psychologists to present low risk.[9]

The Supreme Court has cautioned that the fact that someone has been convicted of a sex offense doesn't mean that a state can curtail their constitutional rights at will.

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[9] If the Department contends that it is necessary to apply GPS monitoring to those individuals who present a public safety threat, then there should be a process by which one can challenge the reasonableness of his being subjected to GPS monitoring. The Department already has in place the infrastructure to provide such a process. As noted above, at the end of every prison sentence for a felony sex offense, the Department conducts an End of Confinement Review to determine if the person meets the criteria for referral to civil commitment proceedings. Additionally, pursuant to Wis. Stats. §301.48(6), someone 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). The court orders an examination of the petitioner by an approved physician or psychologist. §301.48(6)(d) and (e). The examining physician renders an opinion concerning whether the petitioner "is a danger to the public." §301.48(6)(e). The Department is also permitted to submit a report "concerning the person's conduct while on lifetime tracking and an opinion as to whether lifetime tracking of the person is still necessary to protect the public." §301.48(f). The court then hears evidence "relevant to the issue of the person's dangerousness and the continued need for lifetime tracking." §301.48(6)(g). If the court determines that "lifetime tracking is no longer necessary to protect the public" tracking is terminated. §301.48(6)(h). There is no logical reason why the Department's own evaluation of people being released from its custody should not be taken into account when deciding whether an individual should be placed on GPS monitoring. Likewise, if the Department decides to subject someone to GPS monitoring, there is no reason that a person deemed subject to monitoring should not have an opportunity to avail him or herself of the procedure set forth in §301.48(6) at the time his supervision by the Department of Corrections ends, rather than 20 years later.

Packingham v. North Carolina, ___ U.S. ___, 137 S.Ct. 1730, 1737 (2017) (noting the "troubling fact" that a law imposed on people who have been convicted of sex offenses "imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system" and finding that while "a legislature may pass valid laws to protect children and other sexual assault victims ... the assertion of a valid governmental interest 'cannot, in every context, be insulated from all constitutional protections.'")

While the temptation to expand the power of the state to restrain the liberty of people who have been convicted of serious crimes in the past is understandable, constitutional constraints must be respected. If the mere perception that someone is "dangerous" is enough to deprive them of their constitutional rights, where does it end? Today, it is sex offenders whose rights are being eroded, based on a perception that they are potentially dangerous to the public, but there are other groups perceived as potentially dangerous to the public too—people with mental illness, people with alien status, or those previously convicted of criminal behavior. There is no principled way to protect these groups from a GPS tracking law if it upheld as applied to Plaintiffs.[10]

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[10] There is an additional reason why the state's GPS monitoring scheme should be found unreasonable. It would pervert the proper use of prosecutorial discretion. As long as the Department continues to interpret the "2 or more occasions" language of Wis Stats. §301.48 to mean "2 or more counts," prosecutors can determine whether an individual will be subject to GPS for life based simply on how they chose to prosecute the same offense. For example, a person who viewed illegal pornography on one occasion could be prosecuted with separate counts for viewing two different images, thus subjecting them to GPS monitoring for life.

C. The Search Authorized by Wisconsin Law Is Not Justified by the 'Special Needs' Doctrine

The Supreme Court has recognized an exception to the requirements of a warrant and individualized suspicion where "special needs … make the warrant and probable-cause requirement impracticable," and where the "primary purpose" of the searches is "[d]istinguishable from the general interest in crime control." *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (citing *Skinner*, 489 U.S. at 619) (internal quotations omitted). The Supreme Court has described the special needs doctrine as a "closely guarded" exception to the warrant requirement that only applies to a limited "class of permissible suspicionless searches." *Ferguson v. City of Charleston*, 532 U.S. 67, 80 n.17 (2001). For the special needs exception to apply, the purpose advanced to justify the warrantless search must be "divorced from the State's general interest in law enforcement." *Id*. at 79.

Here, the special needs exception does not support the statute's constitutionality for two reasons. First, the purposes advanced by Wisconsin's GPS monitoring regime are clearly connected to the State's interest in law enforcement. Wisconsin's GPS monitoring law on its face sets forth the law enforcement purposes for which it will be used, such as providing "local law enforcement agenc[ies]" with an "immediate alert" if the person subject to GPS monitoring stays in any area the Department has deemed to be an "exclusion zone" for any longer period than the time needed to travel through the zone. Wis. Stats. 301.48(3)(a)(3).

Second, even if the Court finds that Wisconsin's GPS monitoring system serves a "special need" apart from general law enforcement, the statute still must be subjected

to a "reasonableness" balancing analysis under the Fourth Amendment. The Georgia Supreme Court wrote as follows when analyzing Georgia's GPS monitoring scheme:

> When special needs are alleged 'in justification of a Fourth Amendment intrusion, courts must still undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties. … In limited circumstances, where the privacy interests implicated by the search are *minimal*, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.'

Park v. State, at *18-19 (emphasis in original) (quoting *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (internal citations omitted).

Here, as in *Park*, the imposition of lifetime GPS monitoring on someone who is no longer under criminal justice supervision cannot be characterized as a "minimal" interreference with privacy interests and thus cannot be justified under the special needs test.

In summary, Wisconsin law allows for warrantless searches of individuals for the rest of their lives, despite the fact that they have completed serving their entire sentences and are not under the Department's continued supervision. Such searches are unreasonable, and thus Plaintiffs have a substantial probability of success on their claim that Wis. Stats. §301.48 violates their Fourth Amendment rights.

II. The Balance of Equities Favors Plaintiffs

Having demonstrated a likelihood of success on the merits, Plaintiffs must also demonstrate (1) they lack an adequate remedy at law and (2) there is likelihood that they will suffer irreparable harm if the injunction is not granted. *Ty, Inc*, 237 F.3d at 895. If these conditions are met, a court must then balance the hardships the moving

party will suffer in the absence of relief against those the nonmoving party will suffer if the injunction is granted. *Id*.

A. Plaintiffs Lack an Adequate Remedy at Law

Here, Plaintiffs and the members of the proposed class lack an adequate remedy at law for several reasons. First, because Defendant Jess is a state official sued in her official capacity, she has Eleventh Amendment immunity from claims for money damages and may only be sued for prospective equitable relief. *See, Council 31 of the Am. Fed'n of State, Cty. & Mun. Emples. v. Quinn*, 680 F.3d 875, 881-82 (7th Cir. 2012) ("The Eleventh Amendment … bars actions in federal court against a state, state agencies, or state officials acting in their official capacities. … The *Ex parte Young* doctrine allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law.") (citations omitted). Second, damages suits alone, even if available, will not remedy the harms caused by constitutional violations or insure cessation of the unconstitutional conduct. *Illinois Migrant Council v. Pilliod*, 540 F. 2d 1062 (7th Cir. 1976) ("Plaintiffs also established that defendants' conduct caused irreparable harm because the wrongs inflicted were not readily measurable in terms of monetary damages and the recovery of damages alone would not insure the cessation of such invasions in the future."); *Mathias v. Accor Economy Lodging, Inc.,* 347 F. 3d 672, 677 (7th Cir. 2003), ("[T]o limit the plaintiff to compensatory damages would enable the defendant to commit the offensive act with impunity provided that he was willing to pay.")

B. Plaintiffs and Members of the Class Are Suffering and Will Continue to Suffer Irreparable Harm in the Absence of an Injunction

Plaintiffs can readily establish that members of the class will suffer irreparable harm in the absence of injunctive relief. As set forth above, GPS monitoring of people who are not under the supervision of the criminal justice system violates the Fourth Amendment. When deprivation of a constitutional right is alleged, "most courts hold that no further showing of irreparable injury is necessary." *Ezell v. City of Chicago*, 651 F. 3d 684 (7th Cir. 2011) (quoting Alan Wright et al., Federal Practice and Procedure § 2948.1 (2d ed. 1995)). And where, as here, a statute or government policy violates the Fourth Amendment on its face, courts have repeatedly found that equitable relief is appropriate to prevent future Fourth Amendment violations. See, *e.g.*, *Illinois v. Krull*, 480 U.S. 340, 354 (1987) ("[A] person subject to a statute authorizing searches without a warrant or probable cause may bring an action seeking a declaration that the statute is unconstitutional and an injunction barring its implementation"); *Los Angeles v. Patel*, 576 U.S. ___, 135 S. Ct. 2443, 2249 (2015) (declaring municipal ordinance requiring hotel operators to turn over customer information to police violated the Fourth Amendment on its face, writing "facial challenges under the Fourth Amendment are not categorically barred or especially disfavored."); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (declaring federal statute providing for warrantless, nonconsensual searches of businesses violated the Fourth Amendment on its face).

C. The Balance of Harms Tips in Plaintiffs' Favor

Finally, because Plaintiffs have established a high likelihood of success on the merits of their claims, the balance of hardships clearly tips in favor of granting preliminary injunctive relief. The public has a powerful interest in protecting constitutional rights. See, *ACLU v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012) ("[T]he public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional.") Nor would an injunction harm the Defendant, who has no legitimate interest in infringing upon class members' rights. *Joelner v. Vill. Of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004).

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant a preliminary injunction enjoining Defendant from continuing to subject people who are no longer under the supervision of the criminal justice system to GPS monitoring and grant such additional and further relief as the Court deems just and proper.

Respectfully submitted,

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