COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

PLYMOUTH COUNTY SJC-12483

COMMONWEALTH

v.

JAMIE BILL JOHNSON

BRIEF OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES AND THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AS AMICI CURIAE

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ISSUE PRESENTED

On February 14, 2018, this Court allowed the defendant's application for direct appellate review of the following question:

> Whether a warrantless search of a person's long-term historical GPS location data - conducted for law enforcement purposes wholly unrelated to any legitimate purpose of probation - violates the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights.

INTEREST OF AMICI CURIAE

The Committee for Public Counsel Services (CPCS), Massachusetts's public defender agency, is statutorily mandated to provide counsel to indigent defendants in criminal proceedings. G.L. c. 211D, § 5. The American Civil Liberties Union of Massachusetts (ACLUM), an affiliate of the national American Civil Liberties Union, is a statewide membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. Among the rights that ACLUM defends through direct representation and amicus briefs is the right to be free from unreasonable searches and seizures.

Amici submit this brief to assist the Court in addressing the important constitutional issues at stake in this case. It is in the interest of CPCS's clients, ACLUM members, and the fair administration of justice, that amici's views be presented to contribute to this Court's full consideration of the important issues raised in this case.

BACKGROUND

Amici refer to the defendant's brief for a full factual and procedural history. In the case below, the Commonwealth introduced evidence of the defendant's presence at certain break-ins, culled from police analysis of five months of the defendant's precise, round-the-clock location data, generated by the Global Positioning System (GPS) monitor imposed as a condition of probation in another case. [R 49, 74][1] The police did not seek or obtain a warrant before searching the defendant's GPS data archived in the probation department's Electronic Monitoring Center ("ELMO"). At the time of the police search, that probation term had been terminated for a year.[2] [R 97]

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[1] The Record Appendix is cited as "[R #]."

[2] Mr. Johnson was placed on GPS as a condition of probation on April 10, 2012. [R 49] Probation was terminated, and GPS removed, on September 10, 2012.

SUMMARY OF ARGUMENT

The last decade has witnessed an explosion in GPS technology. The criminal justice system has embraced this trend. Cell-phone "pinging" and covert GPS tracking devices are now routine tools of police work. And GPS monitoring is increasingly a condition of probation supervision. All indications suggest that this trajectory will continue.

This appeal arises at the intersection of new technology and well-settled constitutional law. This Court and the United States Supreme Court have made clear that GPS tracking by the police implicates constitutionally-protected privacy concerns and therefore requires a warrant based on probable cause. Yet police investigators and probation officers routinely skirt this basic constitutional protection to access precise, round-the-clock GPS data of probationers and ex-probationers without any level of individualized suspicion or judicial oversight. This Court should bring the Commonwealth's practices in line with long-standing constitutional safeguards. Infra at 5-10.

[R 74] The police searched Mr. Johnson's historical locational data sometime after September 2, 2013. [R. 97]

First, as a constitutional floor, probation officers need individualized suspicion and judicial approval before they may search probationers under art. 14. This threshold applies equally to searches of location data generated and maintained by the ELMO system. Infra at 11-20. Second, where, as here, the search is conducted by the police — including the mining of long-term locational data maintained by ELMO — this search must meet the traditional constitutional standard: probable cause and a warrant. Infra at 20-28.

Finally, although this case does not turn on the distinct constitutional harms implicated by attaching GPS devices to probationers, it raises this important underlying concern for the Court. Presently, probationers are ordered affixed with GPS devices under courts' authority to set conditions of probation or release. But as the Supreme Court recently made clear, the constitution requires an individual determination for each probationer that the GPS attachment is reasonable under the totality of the circumstances. Infra at 28-34.

ARGUMENT

I. New surveillance and tracking technology cannot be allowed to undermine bedrock constitutional privacy protections.

Individuals have a constitutionally protected "reasonable expectation of privacy in the whole of their physical movements." Carpenter v. United States, 138 S. Ct. 2206, 2210 (2018). Detailed location information "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" Id. at 2217, quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring). Thus, "under art. 14, a person may reasonably expect not to be subjected to extended GPS electronic surveillance by the government, targeted at his movements, without judicial oversight and a showing of probable cause." Commonwealth v. Augustine, 467 Mass. 230, 248 (2014), quoting Commonwealth v. Rousseau, 465 Mass. 372, 382 (2013).

For the past decade, this Court has endeavored to "establish a constitutional jurisprudence that can adapt to changes in the technology of real-time monitoring," to preserve the "reasonable expectation

of privacy" secured by the state and federal constitutions. Commonwealth v. Connolly, 454 Mass. 808, 836 (2009) (Gants, J., concurring). Those privacy interests are at stake here.

There is no doubt that electronic monitoring "designed to obtain [locational] information . . . by physically intruding on a subject's body" is a search in the constitutional sense. Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015). GPS ankle bracelets, like the one affixed to Mr. Johnson, continuously record an individual's location, creating a "detailed and comprehensive record of the person's movements." Carpenter, 138 S. Ct. at 2217. GPS bracelets generate location data "far beyond the limitations of where a car can travel." Augustine, 467 Mass. at 249. And because they are actually appended to the body, GPS monitors inevitably (and deliberately) "achieve[] near perfect surveillance," Carpenter, 138 S. Ct. at 2210, of probationers' private and public movements with even more precision than cell-phone tracking. Indeed, the data generated and maintained by ELMO "reveal[s] not only the defendant's location, but also his speed and direction." Commonwealth v. Johnson, 91 Mass. App.

Ct. 296, 318 (2017) (Johnson I)(Wolohojian, J., dissenting).

In Massachusetts, ELMO daily monitors over 3,500 individuals affixed with GPS bracelets as a condition of probation, parole, or pre-trial release. Probation Services, Electronic Monitoring Fact Sheet, https://www.mass.gov/info-details/learn-about-the-electronic-monitoring-program. Initially introduced to track level 3 sex offenders in 2005, the number of individuals subject to GPS monitoring has swollen as it has become commonplace for a range of offenders. See Commonwealth v. Hanson H., 464 Mass. 807, 812 (2013) (recounting origin of GPS monitoring in Massachusetts). "The offender tracking market . . . is expanding at a quick pace," and that growth is expected to continue. Natapoff, Misdemeanor Decriminalization, 68 Vand. L. Rev. 1055, 1106-07 & 1106 n.258 (2015).

The ELMO system tracks in real-time, and because the data is stored indefinitely, it may retrieve historical "minute-by-minute position points" for each monitored individual, even long after their probationary period has terminated. Johnson I, 91 Mass. App. Ct. at 301. Some GPS-monitored probationers

are subject to "exclusion zones," which may trigger "alerts" when the GPS device indicates that they have entered the restricted area, if the zone is entered into the ELMO system. See Electronic Monitoring Fact Sheet.

Currently, "[e]mployees of ELMO provide historical GPS data whenever law enforcement requests it without requiring anything more." Johnson I, 91 Mass. App. Ct. at 318 (Wolohojian, J., dissenting). See id. at 298 (describing warrantless "mapping" of GPS data from "monitor imposed as a condition of defendant's pretrial release" at the request of police in a "criminal investigation"). And police "routinely" make use of ELMO to access probationer GPS data without a warrant or any individualized suspicion. Manning, Are Police Violating Privacy With GPS Tracking? Boston Globe (April 10, 2015), https: //bit.ly/2JOku9G. For example, here the police cross-referenced five months of Mr. Johnson's minute-by-minute location data on a map of unsolved crimes. [R 97] Compare Carpenter, 138 S. Ct. at 2217 n.3 (more than six days of historical cell-site records requires a warrant under Fourth Amendment); Commonwealth v. Estabrook, 472 Mass. 852, 858 (2015) (more than six hours of historical cell-

site records requires a warrant under art. 14); Commonwealth v. Rousseau, 465 Mass. at 382 (GPS vehicle-monitoring "over a thirty-one day period" requires a warrant).

"Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so for any extended period of time was difficult and costly and therefore rarely undertaken." Carpenter, 138 S. Ct. at 2217. But GPS tracking technology now allows the police to "access [a] deep repository of historical location information at practically no expense." Id. at 2218. The hypothetical "dragnet type" "twenty-four hour surveillance" without "judicial knowledge or supervision" warned against thirty-five years ago has materialized in the ELMO database. United States v. Knotts, 460 U.S. 276, 283-284 (1983).

Where "the progress of science has afforded law enforcement" ever "subtler and more far reaching means of invading privacy," courts must "ensure" that technology "does not erode" bedrock constitutional protections. Carpenter, 138 S. Ct. at 2223, citing Olmstead v. United States, 277 U.S. 438, 473-474 (1928) (Brandeis, J., dissenting). Id. at 2271 (Gorsuch, J., dissenting) (Fourth Amendment protects

"'degree of privacy against government' . . . known at the founding [and] their modern analogues"), citing Jones, 565 U.S. at 406. See, e.g., Riley v. California, 134 S. Ct. 2473, 2494 (2014)(search of cell phone incident to arrest required warrant because of "all [cell phones] contain and all they may reveal"). This Court and the Supreme Court have therefore recognized that "constant monitoring" of the type that "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance" is a search in the constitutional sense. Jones, 565 U.S. at 429 (Alito, J., concurring).

II. The government must comply with art. 14 before mining a probationer's location data.

Notwithstanding these precedents, the motion judge concluded that the defendant's status as a probationer, and a statute authorizing police access to probation records, extinguished his subjective and objective expectations of privacy in this long-term GPS data. That was error.

"[A]rt[icle] 14 affords greater protections for probationers than does the Fourth Amendment." Commonwealth v. Moore, 473 Mass. 481, 487 (2016). Thirty years ago, this Court made clear that

probationers retain constitutionally-protected expectations of privacy against probation officers charged with supervising them. Commonwealth v. LaFrance, 402 Mass. 789 (1988). Consequently, under art. 14 probation officers require individualized suspicion and judicial approval before they may search probationers. Infra at 11-20. While this presents the floor for probationer searches, the Declaration of Rights requires more when it comes to police searches. Specifically, art. 14 provides undiminished constitutional protections for searches by police officers, as occurred here. Because art. 14 affords probationers and ex-probationers a constitutionally-protected expectation of privacy in their long-term location information, and no exception to the warrant requirement applied here, the police search violated art. 14. Infra at 20-28.

A. Probation officers need reasonable suspicion and a warrant to access location information.

In LaFrance, a special condition of the defendant's probation required her to submit to warrantless searches of "herself, her possessions, and any place where she may be" on the request of a probation officer. 402 Mass. at 790. This Court held the

condition unconstitutional. Article 14, this Court explained, commands that "a search of a probationer and her premises" by a probation officer must be justified on the basis of individualized "reasonable suspicion that a condition of the probationer's probation has been violated." Id. at 792-795. "This interpretation remains the standard for probationer searches under art. 14." Moore, 473 Mass. at 487.

LaFrance parted ways with shrinking protections afforded to probationers by the federal constitution under Griffin v. Wisconsin, 483 U.S. 868 (1987), and its progeny. And it expressly rejected federal precedent analogizing probationer searches to "warrantless administrative searches," even when conducted by probation officers. LaFrance, 402 Mass. at 382. Under the Declaration of Rights, "[i]ndividualized suspicion" is the touchstone for probationer searches, and an "important safeguard" in balancing the Commonwealth's interest in supervising probationers against probationers' diminished expectations of privacy. Moore, 473 Mass. at 304. The test for "reasonable suspicion" to search a probationer is the same as for a stop and frisk: "specific and articulable facts and reasonable

inferences therefrom" indicating that the search "would render evidence that the [probationer] has violated, or is about to violate, a condition of [probation]." Id. at 488 & n.8, citing LaFrance, 402 Mass. at 793.[3]

Judicial oversight ensures that this standard has teeth. Thus, LaFrance retained, for probation officer searches of a probationer, "the usual requirement imposed by art. 14 that a search warrant be obtained" as a "deterrent to impulsive or arbitrary governmental conduct," LaFrance, 402 Mass. at 794 (internal citations and quotations omitted), on a standard consistent with probationers' diminished privacy interests.[4] The requirement that probation officers

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[3] A special condition of probation providing for random drug and alcohol testing may withstand constitutional scrutiny if it is "reasonably related to legitimate probationary goals" of rehabilitation and protection of the public. Commonwealth v. Gomes, 73 Mass. App. Ct. 857, 859 (2009). In such circumstances, the "fact-intensive inquiry, dependent upon the circumstances and characteristics of the particular defendant and his offenses," id., stands in for the "reasonable suspicion that a search might produce evidence of wrongdoing" at the time of the search by probation officers. LaFrance, 402 Mass. at 790. Cf. LaFrance, 402 Mass. at 793 n.4 ("drug tests" are a "less intrusive means" than a "search of [a probationer's] home for drugs on less than probable cause").

establish "articulable grounds" before a neutral magistrate is a safeguard against searches based merely on the probationer's status, or on the whims of probation officers.

The upshot is that "art. 14 bars the imposition on probationers of a blanket threat of warrantless searches." Id. at 795. The floor for probationer searches in Massachusetts is either (1) a warrant based on reasonable suspicion, or (2) reasonable suspicion and an established exception to the warrant requirement (e.g., exigent circumstances). Id. at 792-795. See Cypher, Criminal Practice and Procedure § 5.22, at 305-306 (4th ed. 2014)("The Massachusetts Constitution requires a warrant for a search of a probationer or probationer's premises"). The reasonable suspicion standard strikes the constitutionally appropriate balance between probationers' diminished privacy rights and "the dual goals of probation, protecting the public and rehabilitation." LaFrance 402 Mass. at 795, quoting

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[4] The Griffin majority concluded that the Fourth Amendment does not contemplate reasonable-suspicion based warrants. 483 U.S. at 878-879. There is no such textual barrier in art. 14. Cf. LaFrance, 402 Mass. at 794 (the "dissent in the Griffin case . . . had the better of the argument concerning the propriety of a warrantless search.").

State v. Griffin, 131 Wis.2d 41, 65 (1986) (Abrahamson, J., dissenting).

Article 14's safeguards for probationer-searches apply equally to long-term GPS monitoring. Technological advances do not extinguish core art. 14 rights to "privacy against government." Kyllo v. United States, 533 U.S. 27, 34 (2001). "[E]xtended GPS electronic surveillance" without "judicial oversight" or any showing of individualized suspicion, Rousseau, 465 Mass. at 382, implicates the same "concerns about arbitrary government power," Carpenter, 138 S. Ct. at 2222, animating art. 14. So the long-term monitoring of individuals' continuous location, in public and in private (and the subsequent mining of that data) is at least as great an intrusion as the warrantless searches addressed in LaFrance.

Below, the motion judge concluded that the terms of the probation contract undermine any constitutionally protected expectation of privacy in long-term GPS data. [R 98] That is mistaken. Unconstitutional probation terms are not a "sound reason" to exempt probation-officer searches from the "usual requirement

imposed by art. 14." LaFrance, 402 Mass. at 794.[5] And consent to an "unconstitutional condition" of probation cannot extinguish a probationer's art. 14 rights. LaFrance, 402 Mass. at 791 n. 3. See Gomes, 73 Mass. App. Ct. at 859-860 ("impermissible probationary condition (particularly one carrying constitutional implications) is akin to an illegal sentence"); 5 W.R. LaFave, Search and Seizure § 10.10(b), at 530-531 (5th ed. 2012) ("consent in this context is [a] manifest fiction for the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse") (citations and quotations omitted).

For the same reason, "notice of the government's claimed search authority" does not abrogate art. 14. See 5 LaFave, § 10.10(c), at 544-545 (criticizing role of "notice" in federal probationer-search cases). See Samson v. California, 547 U.S. 843, 863 (2006) (Stevens, J., dissenting) ("[T]he loss of a subjective expectation of privacy would play 'no meaningful role'

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[5] In any event, to the extent that the defendant's consent to the probation terms is relevant, it must be construed as consent to GPS monitoring by the probation department, consistent with art. 14 safeguards, not consent to any subsequent searches of this data by probation officers or the police.

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.'"), quoting Smith v. Maryland, 442 U.S. 735, 740-741 n.5 (1979). Cf. Epstein, Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations, 24 Berkley Tech. L.J. 1199, 1205 (2009)("unilateral legislative declaration" insufficient "to undermine constitutional rights that are intended to limit the scope of permissible government action"). A contrary rule would render art. 14's protection's entirely illusory.[6]

LaFrance, of course, arose in the posture of a challenge to "special conditions" in a probation contract requiring "submi[ssion] to warrantless searches" by probation officers. Id. at 791, 795. This Court explained that "the coercive quality of the circumstance in which a defendant seeks to avoid incarceration by obtaining probation on certain

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[6] In an analogous context, this Court has held that the voluntary use of cell phones that "track the movements" of their users does not extinguish the privacy rights protected by art. 14. Augustine, 467 Mass. at 250-252. See also Carpenter, 138 S. Ct. at 2220 ("the fact that the [cell-phone records] [are] held by a third party does not by itself overcome the user's claim to Fourth Amendment protection").

conditions of probation makes principles of voluntary waiver and consent generally inapplicable." Id. at 791 n.3. It therefore ordered that the probation conditions "be revised to authorize a search only on reasonable suspicion." Id. at 793-794. More recently, Moore reiterated that probation contracts may not circumvent "the reasonable suspicion requirement" by conditioning probation "subject to suspicionless searches." 473 Mass. at 300 n.6. "Such authority," Moore explained "would inappropriately allow the parole board [or sentencing judge] to compel a parolee [or probationer] . . . to accept a condition that would unnecessarily and unreasonably limit her art. 14 privacy rights." Id. Whether framed as "notice" or "consent," reliance on special contract terms to support suspicionless, warrantless searches of probationers' GPS "cannot be justified under art. 14." LaFrance, 402 Mass. at 792.[7]

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[7] Johnson cannot be squared with LaFrance. There, the majority reasoned that a police search of two months of GPS data from an individual on pretrial release was not a search because he "voluntarily chose" the intrusion "in order to enjoy [his] liberty." 91 Mass. App. Ct at 305. But the majority opinion did not discuss LaFrance or Moore. Nor did it grapple with this Court's analysis of the "third-party

Application. LaFrance already established a balanced safeguard reflecting the "reduced level of suspicion . . . [that] will justify a search of a probationer . . . by a probation officer, or any law enforcement officer acting on the request of a probation officer." LaFrance, 402 Mass. at 792-795.

i. When a probation officer seeks to access the historical or real-time GPS data of current probationers, art. 14 requires a warrant based on reasonable suspicion of a probation violation, or a traditional exception to the warrant requirement, such as exigency. LaFrance, 402 Mass. at 792-794.[8]

ii. Where the monitor issues an "alert" that the probationer has violated a condition of probation by entering an exclusion zone or violating curfew, that alert will generally serve as reasonable suspicion for

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doctrine in relation to art. 14." Augustine, 467 Mass. at 244-246.

[8] A probation officer's supervisory authority ends upon the "termination of probation." Commonwealth v. Sawicki, 369 Mass. 377, 380 (1975). So probation officers may not search an ex-probationer's historical GPS data, stored perpetually by ELMO, after his probation has been formally terminated. Cf. G.L. c. 276, § 87 (probation officer's authority derives from court's authority to "place on probation in the care of its probation officer any person before it"). Here, the defendant's probationary period was terminated a year before the police - not the probation officer - searched his historical GPS. [R 74, 97]

the probation officer to search the probationer's current location.[9] In such circumstances, the requirement that probation officers "articulate reasons" to obtain a warrant from a judicial officer would be superfluous, because the fact of the "alert" safeguards against "impulsive and arbitrary official conduct" and "after-the-fact justification." LaFrance, 402 Mass. at 794-795 (quotation and citation omitted).

B. Police officers need probable cause and a warrant to access location information.

There is a significant difference between searches by probation officers and searches by the police. The duties of probation officers are derived from "the specific instructions of the sentencing judge" found in the "judge's conditions of probation." A.L. v. Commonwealth, 402 Mass. 234, 241-242 (1988). They are concerned primarily with "aid in the probationer's

[9] The continued prevalence of "false alerts" and other equipment malfunction may well undermine the presumption that an alert establishes reasonable suspicion that the defendant has violated a condition of probation. As a result, when there is a history of false alerts, an alert may no longer constitute reasonable suspicion on its own. The director of the ELMO program has stated that only 1% of the 1,700 alerts daily fielded by ELMO result in warrants. See Daniel Pires, Presentation at the Mass. Bar Association (March 20, 2018).

rehabilitation and ensur[ing] her compliance with the conditions of probation." LaFrance, 402 Mass. at 792-793. Police officers, on the other hand, have broad authority to investigate and arrest for crimes within their jurisdiction, or outside of their jurisdiction when permitted by statute or common law. Commonwealth v. Gernrich, 476 Mass. 249, 252-253 (2017). These expanded powers trigger enhanced constitutional protections.

LaFrance made clear that "the police may not properly use the probation office as a subterfuge to conduct a search of a probationer or her premises." 402 Mass. at 382 n.5. Cf. Moore, 473 Mass. at 483, 488 ("reasonable suspicion" standard for parolee searches limited to parole officers and police officers acting at their behest). So the "lower standard" for probationer searches set out in LaFrance applies only to searches conducted by "a probation officer" or a "law enforcement officer acting on the request of a probation officer" on a showing of "reasonable suspicion that a condition of the probationer's probation has been violated." 402 Mass. at 793, 795. This balance "protect[s] the public interest, while it also protects a probationer from unwarranted

intrusions into her privacy." Id. at 793. But LaFrance's limited exception to the warrant requirement may not be leveraged by the police for criminal investigations unrelated to the supervisory purposes of probation. Id. at 382 n.5.[10] In those circumstances, the familiar probable-cause-and-a-warrant standard applies with full force.

That makes sense. Conflating the authority of police and probation officers upsets the balance between effective supervision and probationers' art. 14 rights. Here, the police bypassed even the "lower" reasonable-suspicion-and-a-warrant standard in LaFrance, id. at 793, when they mined months of the

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[10] The police search of Mr. Johnson's long-term historical GPS location also violated the less protective Fourth Amendment standard. See United States v. Knights, 534 U.S. 112, 121 (2001) (police searches of probationers require "reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity"). A police detective's hunch that an individual arrested "near the scene of one housebreak" [R 97] may have been involved in other unsolved crimes, without more, certainly falls short of "specific and articulable facts and specific reasonable inferences" necessary for "reasonable suspicion." Moore, 473 Mass. at 488 & 488 n.8, citing LaFrance, 402 Mass. at 793 (other citations omitted). Moreover (even assuming reasonable suspicion for a limited search) there is an insufficient nexus between the suspected criminal activity and the electronic dragnet through five months of the defendant's detailed GPS data.

probationer's detailed historical GPS data in the absence of any constitutional safeguards, let alone a probable cause warrant, a year after the terms of his probation expired. [R 97] Such warrantless searches are unconstitutional.

The special needs doctrine is inapplicable. There is no legitimate basis for carving out a lower standard for police searches of probationers' long-term GPS data.[11] This Court has squarely rejected the administrative search doctrine in the probation and parole officer context. See LaFrance, 402 Mass. at 794 (rejecting administrative search theory); Moore, 473 Mass. at 300 (same). And it is plainly inapposite to the "ordinary criminal law enforcement" investigations at issue here. Johnson I, 91 Mass. App. Ct. at 324 (Wolohojian, J., dissenting). The doctrine applies only when special needs "beyond the normal need for

[11] It is difficult to imagine how the traditional exceptions to the warrant requirement, e.g., exigency and emergency aid, Commonwealth v. Waller, 90 Mass. App. Ct. 295, 305 (2016), would ever apply to police searches of historical GPS probationer (or ex-probationer) data. In any event (even assuming the officers here could establish individualized probable cause) the Commonwealth does not assert that the police did not have time to seek a warrant. See Commonwealth v. Forde, 367 Mass. 798, 807 (1975) (exigency exception applies only when the time to obtain a warrant would thwart its purpose).

law enforcement" makes it "impractical to require a warrant or some level of individualized suspicion in the particular context." O'Connor v. Police Comm'r. of Boston, 408 Mass. 324, 327 (1990), quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989). See Chandler v. Miller, 520 U.S. 305, 308, 313-314 (1997)(special needs doctrine applies only where "concerns other than crime detection" are at stake).

These conditions are manifestly absent in criminal investigations initiated and directed by the police in the course of their usual duties, as occurred here. City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000) ("narcotics checkpoint program" unconstitutional where its "primary purpose" is "to uncover evidence of ordinary criminal wrongdoing"). Nor is there anything about the historical GPS data maintained by ELMO that makes seeking a warrant "impractical," O'Connor, 408 Mass. at 327, upon a showing of probable cause to a neutral magistrate. See State v. Kern, 831 N.W.2d 149, 171-172 (Iowa 2013)(warrantless police search of parolee not justified by "special needs" where "the search . . . primarily served general law enforcement goals").

The record-sharing statute is inapposite. Reliance on a statute providing for information sharing between the probation department and the police to justify a warrantless search is also unavailing. The motion judge concluded that G.L. c. 276, § 90, which provides for "inspection" of probation office "records . . . by police officials," extinguishes probationers' objective expectation of privacy in long-term GPS data collected by ELMO. [R 98] But that is no answer to Mr. Johnson's constitutional claims. Section 90, like all statutes, must be interpreted consistent with art. 14. Augustine, after all, held that a federal statute authorizing warrantless searches of cell-site location information violated the Declaration of Rights. 467 Mass. at 255. See Carpenter, 138 S. Ct. at 2221 ("an order issued under Section 2703(d) of the [Stored Communications Act] is not a permissible mechanism for accessing historical cell-site records"). See 18 U.S.C. § 2703(d) (authorizing court orders for "records" merely upon a showing of "reasonable grounds to believe" that they are "relevant and material to an ongoing criminal investigation.").

In any event, a "normative" inquiry is appropriate when the government deploys new technologies under

legacy statutes. Smith, 442 U.S. at 740 n.5. See, e.g., Jones, 565 U.S. at 416-417 (Sotomayor, J., concurring)(doubting "the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power and 'a too permeating police surveillance.'") (citations omitted). Here, the general authority for information-sharing in a statute last amended eighty years ago, G.L. c. 276, § 90, can hardly reflect society's judgment that the police retain unfettered and indefinite access to detailed "extended GPS electronic surveillance" records of probationers (and ex-probationers) "without judicial oversight or a showing of probable cause." Rousseau, 465 Mass. at 382.[12]

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[12] Commonwealth v. Arzola, 470 Mass. 809 (2015) is not to the contrary. Arzola explained that DNA analysis of lawfully seized clothing is not a "search" in the constitutional sense, because it revealed "nothing more than the identity of the source." Id. at 816-817. The Court acknowledged, however, that "use the DNA profile for any purpose other than identifying the unknown source of the sample" was a different question. Id. at 817-818. See Borian v. Mueller, 616 F.3d 60, 68, 69 n.7 (1st Cir. 2010) ("matching of the [DNA] profile . . . for the purpose of identification is not an intrusion on the offender's legitimate

Nor does G.L. c. 276, § 90 extinguish probationers' subjective expectations of privacy, for the same reasons that the "accept[ance]" of an unconstitutional condition in LaFrance did not insulate it from constitutional scrutiny. 402 Mass. at 791. See supra at 15-18. "[P]ositive law cannot be used to" lower the "constitutional floor" protecting privacy. Carpenter, 138 S. Ct. 2271-2272 (Gorsuch, J., dissenting). And the "subterfuge" prohibited by art. 14 — where the police use the probation office to perform warrantless searches on their behalf — may not be transacted in the open under the color of legislation. LaFrance, 402 Mass. at 793 n.5.

Art. 14 applies to police-conducted searches of people on probation with full force. But that does not mean that police are barred from searching the intimate details of probationers' (and ex-probationers') lives, stored by the probation department. To paraphrase Chief Justice Roberts, it is

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expectation of privacy" but "there may be a persuasive argument on different facts that an individual retains an expectation of privacy in the future uses of her DNA profile"). In contrast to the limited identity information gleaned from DNA analysis, extended GPS electronic surveillance reveals an "all-encompassing record of [the probationer's] whereabouts [and] provides an intimate window into a person's life." Carpenter, 138 S. Ct. at 2217.

"not that the information [in the ELMO system] is immune from search; it is instead that a warrant is generally required before such search." Riley, 134 S. Ct. at 2493.

Application. The police must obtain a warrant based on probable cause before searching probationers' (and ex-probationers') GPS data in the ELMO system.

III. The imposition of GPS monitoring on a probationer must be reasonable based on the circumstances of each individual.

The defendant focuses on the police search of ELMO-generated long-term location data, without a warrant or individualized suspicion, and this Court need go no further to conclude that such a search violates art. 14. But the attachment of the GPS monitoring device pursuant to a court order is also a separate unlicensed physical intrusion upon the "person" under art. 14 and the Fourth Amendment. And, where the government monitors probationers by means of ankle bracelets, this seizure presents a threshold constitutional question. In light of the increasing prevalence of the GPS monitoring as a condition of pre-trial release, probation, and parole, this Court should make clear that judges ordering GPS monitoring

must first conclude that the trespass is constitutionally reasonable under the "totality of the circumstances." Grady 135 S. Ct. at 1371.

In Grady, the Supreme Court explained that the attachment of "a device to a person's body, without consent, for the purposes of tracking that individual's movements" implicates Fourth Amendment concerns. 135 S. Ct. at 1370.[13] In an analogous context, this Court has concluded that the installation of a GPS monitoring device on a vehicle "clearly constituted a seizure under art. 14." Connolly, 454 Mass. at 822. There is no question that affixing an "unremovable ankle bracelet" to a probationer is a trespass. Commonwealth v. Canadyan, 458 Mass. 574, 575 n.3 (2010).

"[T]he attachment of the monitoring device [is] a seizure, while the review of previously collected data is a search." Johnson I, 91 Mass. App. Ct. at 310

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[13] The Johnson majority considered Grady "inapposite" to GPS devices affixed pursuant to a probationer's "consent" to a probation contract. 91 Mass. App. Ct. at 303. As explained above (at 15-18), this holding cannot be squared with LaFrance's warning that "the coercive quality of the circumstances in which a defendant seeks to avoid incarceration by obtaining probation on certain conditions makes principles of voluntary waiver and consent generally inapplicable." LaFrance, 402 Mass. at 791 n.3.

(Grainger, J., concurring). So affixing a probationer with a GPS monitor is constitutionally significant, independent of the government's later search of the locational data cataloged by the device. See Jones, 565 U.S. at 404-405 (physical intrusion to install and operate tracking device).[14] And because the seizure continues for the duration of the probation term, GPS tracking "represents a constant government infringement on the [probationer's] body." Dante, Tracking the Constitution, 42 Seton Hall L. Rev. 1169, 1202 (2012).

The reasonableness of the seizure under Grady calls for analysis under the "totality of the circumstances, including the nature and purpose of the search." 135 S. Ct. at 1371. The intrusion here is substantial. GPS bracelets are "permanent, physical attachment[s]" that are both "intrusive and burdensome." Commonwealth v. Cory, 454 Mass. 559, 570 (2009). The infringement continues every minute of every day, for months, and

[14] Such analysis does "not make trespass the exclusive test." Jones, 565 U.S. at 411. The "transmission of electronic signals without trespass . . . remain[s] subject" to the reasonable-expectation-of-privacy analysis. Id. See, e.g., Florida v. Jardines, 569 U.S. 1, 5 (2013)(while the reasonable expectation of privacy test "may add to the baseline, it does not subtract anything from" constitutional protections against physical intrusion).

often years, during which the target must maintain the GPS bracelet by daily recharging it from a power source. That is why this Court has repeatedly recognized that GPS monitoring is a burden "far greater than that associated with traditional monitoring." Id. at 571. Commonwealth v. Goodwin, 458 Mass. 11, 23 (2010) (GPS monitoring would "increase significantly the severity of original probationary conditions").

Worse, a GPS bracelet can be "inherently stigmatizing, a modern-day scarlet letter," Hanson H., 464 Mass. at 815, "exposing [its bearer] to persecution or ostracism, or at least placing [him] in fear of such consequences." Cory, 454 Mass. at 570 n.18. And the "[a]warness that the Government may be watching chills associational and expressive freedoms," Jones, 565 U.S. at 416 (Sotomayor, J., concurring). The "power to assemble data that reveal private aspects of identity is," after all, "susceptible to abuse," id., and this risk increases when the data is stored (and subject to search) perpetually. Cf. Birchfield v. North Dakota, 136 S. Ct. 2160, 2178 (2016) ("sample that can be preserved"

creates "anxiety" "[e]ven if the law enforcement agency is precluded" from subsequent testing).[15]

On the other side of the ledger stand the purposes of GPS monitoring: "protecting the public and rehabilitation." LaFrance, 402 Mass. at 795 (citations omitted). The strength of these interests, and the extent to which they are served by affixing the probationer with a device that allows the authorities to easily locate the probationer (upon a proper constitutional showing) is inherently and necessarily different for each probationer. See Commonwealth v. Eldred, No. 12279, slip. op. at 8-9 (July 16, 2018)(emphasizing importance of "individualized approach" to setting probation terms). That is why "Grady requires case-by-case determinations of reasonableness." State v. Grady, 2018 WL 2206344, at *3 (N.C. Ct. App. May 15, 2018) (on remand from Supreme Court). See, e.g., State v. Ross, 2018 WL 2945959, at *5 (S.C. June 13, 2018) ("widely varying circumstances . . . demands an individualized inquiry into the reasonableness" of ordering GPS monitoring

[15] The constitutional implications of indefinite storage of former probationers' detailed location information are beyond the scope of this brief.

"in every case" under Grady). Moreover, "the State bears the burden of proving reasonableness at Grady hearings" on the basis of "the facts of [each] case." Grady, 2018 WL 2206344, at *8. See Commonwealth v. Berry, 420 Mass. 95, 105-106 (1995) ("government has the burden to show that its search was reasonable and, therefore, lawful.").

"[Q]uestions of reasonableness are necessarily fact-dependent." Commonwealth v. Guzman, 469 Mass. 492, 500 (2014). Yet despite this Court's recognition of the inherent intrusiveness of GPS ankle bracelets, judges in Massachusetts have not assessed the constitutionality of the infringement, as required by Grady.[16] Rather, the matter is typically approached

[16] The reasonableness of imposing GPS monitors is not susceptible to "special needs" analysis. See State v. Grady, 2018 WL 2206344, at *3-4; State v. Ross, 2018 WL 2945959, at *5. As discussed above, supra at 12, 23-25, this Court has already rejected special needs analysis for probationer searches. LaFrance, 402 Mass. at 794. And the conditions for special needs searches are not present here. The interests implicated from long-term attachment of the GPS monitor are not "minimal." Chandler, 520 U.S. at 314 (citation omitted). Compare Landry v. Attorney General, 429 Mass. 336, 347 (1999) (one-time DNA collection); Commonwealth v. Rodriguez, 430 Mass. 577, 580-581 (2000) (sobriety checkpoints). Nor is individualized suspicion "impractical." O'Connor, 408 Mass. at 327. To the contrary, judges imposing conditions of probation are well positioned to make the required constitutional determination in each case.

solely as an exercise of the court's discretionary authority to impose conditions of probation, see, e.g., G.L. c. 276, § 87; pre-trial release, see G.L. c. 276, § 58; or (in other cases) as a mandatory condition of probation. See, e.g., G.L. c. 265, § 47. This Court should make clear what Grady requires: the ongoing seizure of a defendant through GPS monitoring must be reasonable under the totality of the circumstances presented in every case.

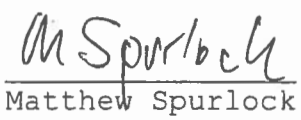
CONCLUSION

This Court should confirm that police searches of probationers' (and ex-probationers') GPS data, like the one that occurred in this case, require a warrant based on probable cause under art. 14. The Court should also clarify that, under LaFrance and art. 14, probation-officer searches of probationers' GPS data, generated and stored by ELMO as a condition of probation, require a warrant based on reasonable suspicion, or reasonable suspicion and an established exception to the warrant requirement.

Finally, the Court should clarify that, before imposing GPS monitoring as a condition of probation or release, a court must conclude that the Commonwealth has met its constitutional burden to establish that

the condition is reasonable as applied to the particular individual subject to monitoring.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to those specified in Rule 16(k).

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