COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-13600

COMMONWEALTH,
APPELLEE,

v.

ANTHONY N. GOVAN,
DEFENDANT-APPELLANT.

ON APPEAL FROM AN ORDER OF THE SUFFOLK SUPERIOR COURT

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC., COMMITTEE FOR PUBLIC COUNSEL SERVICES, ELECTRONIC FRONTIER FOUNDATION, AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT SEEKING REVERSAL

Jessie J. Rossman (BBO 670685)
American Civil Liberties Union
Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
(617) 482-3170
jrossman@aclum.org

Matthew Spurlock (BBO 601156)
Committee for Public Counsel Services
Public Defender Division
75 Federal Street
Boston, MA 02108
(617) 482-6212
mspurlock@publiccounsel.net

Nathan Freed Wessler (BBO 680281)
American Civil Liberties
Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
nwessler@aclu.org

Kit Walsh (BBO 673509)
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
kit@eff.org

(*Additional counsel on next page*)

Sara Silva (BBO 645293)
Massachusetts Association of
Criminal Defense Lawyers
Silva Kettlewell & Pignatelli LLP
10 High Street, Suite 505
Boston, MA 02110
(617) 351-9093
sara.silva@skpboston.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the American Civil Liberties Union of Massachusetts, Inc. (ACLUM) and the Electronic Frontier Foundation (EFF) represent that they are a 501(c)(3) organization under the laws of the Commonwealth of Massachusetts. The American Civil Liberties Union (ACLU) is a District of Columbia non-profit membership organization and 501(c)(4) organization. The Massachusetts Association of Criminal Defense Lawyers (MACDL) represents that it is a 501(c)(6) organization under the laws of the Commonwealth of Massachusetts. ACLU, ACLUM, EFF, and MACDL do not issue any stock or have any parent corporation, and no publicly held corporation owns stock in ACLU, ACLUM, EFF, or MACDL.

The Committee for Public Counsel Services is a statutorily created agency established by G.L. c. 211D, §1.

PREPARATION OF AMICUS BRIEF

Pursuant to Appellate Rule 17(c)(5), amici and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;

(b) no party or party's counsel contributed money to fund preparing or submitting the brief;

(c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

INTERESTS OF AMICI

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 rights that CPCS defends through direct representation and amicus briefs include the right to be free from unreasonable searches and seizures. The issues addressed in this case will affect numerous indigent defendants whom CPCS attorneys are appointed to represent.

The American Civil Liberties Union of Massachusetts (ACLUM) and the American Civil Liberties Union (ACLU) are membership organizations dedicated

to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. The rights they defend through direct representation and amicus briefs include the right to be free from unreasonable searches and seizures.

The Electronic Frontier Foundation (EFF) is a member-supported, non-profit civil liberties organization that has worked to protect free speech and privacy rights in the online and digital world for 30 years. With over 38,000 active donors, EFF represents the interests of people impacted by new technologies in court cases and broader policy debates surrounding the application of law in the digital age. EFF has special familiarity with and interest in constitutional issues that arise with surveillance technologies and served as amicus in cases challenging warrantless searches involving people's location information.

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association representing more than 1,000 experienced trial and appellate lawyers of the Massachusetts Bar who focus a substantial part of their practices on criminal defense. MACDL devotes much of its energy to identifying, and seeking to avoid or correct, problems in the Commonwealth's criminal justice system, including by filing amicus briefs in cases raising questions central to the administration of justice.

INTRODUCTION

In the Commonwealth, courts are empowered to impose GPS monitoring on pretrial releasees only for specific purposes: to "ensure the appearance of the person before the court and the safety of the alleged victim, any other individual or the community." G.L. c. 276, § 58. Because pretrial releasees have not been convicted, they retain a presumption of innocence and a categorically greater set of liberty and privacy interests than probationers and other post-conviction supervisees, who this Court has held may be monitored for broader purposes of deterring recidivism and investigating possible criminal conduct. Pretrial releasees retain an expectation of privacy against unfettered police search of their precise GPS location data, so Article 14 and the Fourth Amendment require police to get a valid warrant before requesting these releasees' GPS data to investigate a crime unrelated to compliance with their conditions of release. Yet, in this case the Commonwealth claims the startling authority to expose pretrial releasees' precise GPS location data to law enforcement search without a warrant, a particular surveillance target, or any indication that a person on GPS committed the alleged crime. Instead, on the Commonwealth's reading, an investigator's mere whim will suffice. It does not.

The facts here display the extraordinary breadth of the Commonwealth's position. As this case illustrates, the Electronic Monitoring Unit (ELMO) "provide[s] historical GPS data whenever law enforcement requests it without

requiring anything more." *Commonwealth v. Johnson* ("*Johnson I*"), 91 Mass. App. Ct. 296, 318 (2017) (Wolohojian, J., dissenting). It appears that police routinely access ELMO's GPS data without a warrant or individualized suspicion, and without regard to whether the data disclosed corresponds to individuals monitored as a condition of pretrial release, as opposed to post-conviction probation or parole.[1] As occurred here, ELMO also responds to queries for bulk GPS data, providing law enforcement with the identities and location information of "anyone who was on GPS" in or near a geographic area during a specified timeframe, even when the police have neither a particular surveillance target nor any indication that a person who was on GPS committed the alleged crime. [Add. 45].[2]

In this case, without a warrant, police requested the identities and locations of "anyone who was on GPS near 547 Columbia Road" for a period of twenty minutes,

---

[1] *See* Br. of Mass. Probation Serv. at 8, *Commonwealth v. Johnson* ("*Johnson II*"), 481 Mass. 710 (2019) (SJC-12483). ELMO tracks all GPS-monitored individuals in the Commonwealth, including those on pretrial release, post-conviction probation, and parole. *See id.* at 6. In 2018, ELMO monitored 3,490 people on GPS, including 1,811 individuals monitored as a condition of pre-trial release, 1,678 on post-conviction probation, and 465 parolees. *Id.* Although the police here sought ELMO's historical GPS data, ELMO can also provide real-time GPS location information to law enforcement. *Id.* at 10.

[2] The addendum to the defendant's brief is cited as [Add. #]. The defendant's record appendix is cited as [RA#]. The defendant's supplemental appendix is cited as [SA#]. The defendant's brief is cited as [DB#]. The Commonwealth's brief is cited as [CB #]. The Commonwealth's Appendix is cited as [CA#].

which yielded five individuals. [Add. 45]. *See* [RA127, 130].[3] The lack of a warrant decides this case, and requires reversal of the lower court. But in crafting its opinion, the Court should be mindful of two implicit premises on which the Commonwealth's claim of authority to engage in this bulk search rests: First, that all pre-trial releasees are automatically suspects for *any* crime committed during the pendency of their release, even though they share the same presumption of innocence of any resident of the Commonwealth. And second, that pretrial releasees lose their expectation of privacy merely by the happenstance of being near the scene of a crime. Those premises cannot stand. *See Commonwealth v. Rodriguez*, 437 Mass. 554, 560 (2002) ("presumption of innocence remain[s] throughout the entirety of the case"); *Ybarra v. Illinois*, 444 U.S. 85, 86 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."). This Court should reject the Commonwealth's position, and provide guidance to lower courts to ensure that GPS searches are authorized only pursuant to valid and particularized warrants.

[3] A second warrantless query to ELMO sought "Anthony Govan's precise GPS points" for one hour. [RA128].

SUMMARY OF ARGUMENT

I. The lower court erred by concluding that the pretrial GPS monitoring of the defendant was justified by consent. As this Court has held, the "coercive quality of the circumstance in which a defendant seeks to avoid incarceration by obtaining [pretrial release] on certain conditions makes principles of waiver and consent generally inapplicable." *Commonwealth v. Norman*, 484 Mass. 330, 335 (2020) (citation omitted). That principle controls here, and renders the imposition of GPS monitoring in this case unreasonable. (pp. 12–16).

II. Even if initial imposition of GPS monitoring had been justified in this case to ensure compliance with statutorily authorized conditions of pretrial release, the later query of the GPS data by police to gather evidence in an unrelated criminal investigation is a separate search under Article 14 and the Fourth Amendment, for which a warrant is required. The Commonwealth's reliance on cases permitting access to GPS-monitoring data of *post-conviction* probationers is inapposite to this case, which involves a *pretrial* releasee with a categorically greater expectation of privacy against unfettered law enforcement tracking. The absence of a warrant renders the law enforcement search of protected location data unreasonable. (pp. 17–28).

III. Although the lack of a warrant decides this case, this Court should provide guidance to avoid future use of overbroad general warrants that purport to authorize

bulk queries of GPS data based only on the fact that pretrial releasees have been accused (but not convicted) of a crime, and that an unknown number of those releasees *might have been* near the scene of a crime. Any such warrant on the facts in this case would have been categorically unreasonable. But even if this Court believes that some bulk GPS warrants might pass constitutional muster, it should make clear that their scope and execution must be limited to comply with the nexus and particularity constitutional requirements. (pp. 28–37).

ARGUMENT

I. The imposition of pretrial GPS monitoring on Mr. Govan was not justified by any agreement because the coercive quality of the circumstances rendered the principles of consent inapplicable.

The motion judge concluded that the pretrial GPS monitoring was lawful for two reasons: (1) Mr. Govan's "free and voluntary consent," and (2) "'legitimate justifications' for imposing GPS that are 'authorized by statute.'" [Add. 46], quoting *Norman*, 484 Mass. at 336. As to the second justification, amici agree with Mr. Govan that the "permissible goals of pretrial [electronic monitoring] conditions" in the circumstances presented did not outweigh the defendant's constitutionally protected privacy interests. *See id.* at 338–40; [DB16–28]. In this section, amici address the motion judge's consent-based justification. As explained below, this approach ignores this Court's precedent, and (if adopted) would upend the statutory and constitutional scheme governing pretrial electronic monitoring conditions.

This Court has already held that the "coercive quality of the circumstance in which a defendant seeks to avoid incarceration by obtaining [pretrial release] on certain conditions makes principles of waiver and consent generally inapplicable." *Norman*, 484 Mass. at 335, quoting *Commonwealth v. Feliz*, 481 Mass. 689, 702 (2019). The motion judge's conclusion that "at arraignment, defendant did consent to GPS," [Add. 46], and that this consent was "unfettered by coercion, express or implied," *id.*, flies in the face of this authority. As the motion judge acknowledged, the "agreement" to wear GPS was "made between the parties in lieu of a § 58A hearing." *Id*. Section 58A provides that "[t]he commonwealth may move, based on dangerousness, for an order of pretrial detention." G.L. c. 276, § 58A(1). In these circumstances, it is plain that Mr. Govan "s[ought] to avoid incarceration," *Norman,* 484 Mass. at 335, by "consent[ing] to GPS," [Add. 46]. This is the "coercive quality of the circumstance" that this Court's precedent establishes obviates any purported consent to pretrial GPS monitoring. *Norman,* 484 Mass. at 335. Indeed, it is difficult to imagine a more straightforward application of that rule.

The motion judge relied entirely on the fact that "both parties came to an agreement and represented as such to the court." [Add. 46]. But it is the character of the agreement that matters. And here, the purpose of the "agreement" was plainly to

"avoid" the "consequence [of] . . . pretrial detention." *Norman*, 484 Mass. at 335.[4] This Court's clear statement in *Norman* controls this case. It is irrelevant that *Norman* observed that in *other* situations, *other* pretrial conditions of release might be "justified by free and voluntary consent." *Id.* at 335 n.4. The motion judge's reasoning boils down to an attempt to distinguish *Norman* on the basis that there the purported consent was provided through a defendant's signature on a written form, while here it was provided orally by the defendant's attorney at a court hearing. Nothing about the form of the purported consent undermines this Court's clear rule in *Norman*. To the contrary, the lower court's approach to "consent" would render *Norman* a dead letter.

Moreover, reliance on purported consent poses practical problems.

First, a "consent search can be withdrawn or limited at any time before [its] completion." *Commonwealth v. Stewart,* 469 Mass. 257, 261–62 (2014), quoting 4 W. LaFave, Search and Seizure § 8.1(c) at 58 (5th ed. 2012). As a result, consent-based pretrial monitoring would empower each defendant to terminate electronic monitoring at their discretion. This makes little sense from an administrative perspective.

---

[4] As the prosecutor put it at the bail hearing: "We've reached a resolution; that we'll withdraw the 58A . . . to have an agreement as to conditions of release, which include . . . a GPS." [SA5]. *See also* [CB22] (acknowledging that the condition was "presented as an alternative to moving forward with the dangerousness hearing").

Second, the scope of a consent-based search is circumscribed where "some limitation was intended by the consent giver." *Commonwealth v. Hinds*, 437 Mass. 54, 59 (2002) (citation omitted). Reliance on "consent" to authorize GPS monitoring would require assessing the scope of the pretrial releasee's consent—at the arraignment—where the Commonwealth later seeks to use the GPS location data. This case illustrates this difficulty. *See* [DB32–36]. Even if consent in the face of pretrial detention could somehow be deemed "free and voluntary," *Norman*, 484 Mass. at 335, there is nothing to indicate that Mr. Govan consented to the use of GPS data in an unrelated future criminal investigation. *See Florida v. Jardines,* 569 U.S. 1, 9 (2013) (scope of consent limited by "a specific purpose"); *Walter v. United States*, 447 U.S. 649, 656 (1980) ("[T]he scope of the [consent] search is limited by the terms of its authorization.").

It makes good sense, then, that "principles of voluntary consent and waiver are generally inapplicable," to pretrial electronic monitoring. *Norman*, 484 Mass. at 335.[5] Instead, "[w]hen a search, such as GPS monitoring, is conducted as a pretrial

[5] The Commonwealth's reliance on *Johnson I* to suggest the opposite is misguided. *See* [CB28–30], citing *Johnson I*, 91 Mass. App. Ct. at 305. This Court has rejected the lead opinion's view that "consent" to GPS monitoring extinguishes privacy interests, three times over.

First, in *Feliz,* this Court explained that when a post-conviction "probationer accedes to a contract of probation . . . to establish GPS monitoring . . . the acceptance cannot be viewed as consent." *Feliz*, 481 Mass. at 701–02.

Next, in *Johnson II*, where the post-conviction probationer "requested that he be subject to GPS monitoring in an effort to avoid incarceration," the Court readily

condition of release, the only legitimate justifications for doing so are those authorized by statute." *Id.* at 336.

The bail judge endeavored to follow that procedure here. The "Reasons for Ordering Bail, G.L. c. 276, § 58" form setting out the "GPS prior to release" condition does not invoke—or even mention—consent, focusing instead on statutory "factors". [RA125]. While this statutory focus was correct, the motion judge erroneously concluded that these factors were "legitimate justifications" for imposing electronic monitoring pursuant to § 58. [Add. 47]. General deterrence is not a permissible purpose of pretrial GPS monitoring under the statute. *See* G.L. c. 276, § 58. And as Mr. Govan explains, [DB20–28], the electronic monitoring here could not enforce a stay away order from a person whose whereabout was unknown to ELMO.[6] Consequently, "the GPS monitoring at issue here did not serve the

---

concluded that a search occurred "when the GPS monitoring condition was imposed." 481 Mass. at 718. Bypassing "consent," the Court focused on whether "GPS monitoring was imposed . . . for [] legitimate probationary purposes," *id.* at 719, and whether in light of those purposes he retained a "reasonable expectation of privacy in the data . . . to target criminal activity during the probationary period," *id.* at 725.

Finally, *Norman* made plain that *Johnson I's* consent theory was not the law in the pretrial releasee context. *See Norman*, 484 Mass. at 335 ("coercive quality of the circumstance . . . makes principles of waiver and consent generally inapplicable").

[6] The motion judge concluded "there were legitimate justifications in placing Govan on GPS to keep [the alleged victim] and her daughter safe." [Add. 47]. But the motion judge did not explain how GPS could serve these purposes, where both before and after the bail hearing the Commonwealth did not know the victim's location, and therefore, ELMO would not alert in the event Mr. Govan violated the

purposes of the statutory scheme [and] the monitoring did not further any legitimate governmental interests." *Norman*, 484 Mass. at 339.

II. Warrantless law enforcement query of pretrial GPS data for investigative purposes constitutes a separate search that is unlawful where, as here, no warrant exception applies.

Because *Norman* held that the imposition of pretrial GPS-monitoring in that case was unlawful since it did not further any "permissible goal[] of pretrial conditions," *id.* at 338, the Court did "not reach the question whether, had the initial imposition been constitutional, police use of the data for a criminal investigation would have been permissible." *Id.* at 333. The Court has now asked amici to address that question here. *See* Amicus Solicitation Announcement (May 8, 2024). The answer is straightforward. A police query of pretrial releasee GPS data in a new criminal investigation is a search under art. 14 and the Fourth Amendment that is unlawful in the absence of a warrant or warrant exception.

The lower court and the Commonwealth agree that the subsequent police investigation of Mr. Govan's GPS data requires a constitutional analysis separate and apart from the analysis of the initial imposition of GPS monitoring. *See* [Add. 48; CB26]. For good reason. This Court has already held that the "Commonwealth's retrieval and review of this historical [GPS] data requires a separate constitutional

---

order. As this Court has explained, the Commonwealth must "establish <u>how</u> GPS monitoring, when viewed as a search, furthers its interests." *Feliz*, 481 Mass. at 705 (emphasis in original).

inquiry under the Fourth Amendment and art. 14" where "it was conducted by the police, not the probation service, for investigatory, rather than probationary, reasons." *Johnson II*, 481 Mass. at 720. This inquiry, in turn, requires an analysis of whether Mr. Govan had a subjectively and objectively reasonable expectation of privacy that his pretrial GPS—collected by the probation department for statutory purposes that do not include deterrence of future crimes—would be accessed by the police for criminal investigatory purposes.

Contrary to the lower court's holding and the Commonwealth's argument, *see* [Add. 48–49; CB27–30], Mr. Govan retained such an expectation of privacy. As a result, even if this Court were to find that GPS monitoring was properly imposed on Mr. Govan in the first instance (though it was not), law enforcement warrantless investigative access to that data in an unrelated criminal investigation where there was no warrant exception was an unreasonable search.

A. GPS allows police to gather a category of information that was not available through traditional law enforcement tools.

As this Court has repeatedly held, government use of surveillance technology that erodes the "degree of privacy against government that existed when the Fourth Amendment" and art. 14 were adopted triggers constitutional protection. *Commonwealth v. Perry*, 489 Mass. 436, 444 (2022), quoting *Carpenter v. United States*, 585 U.S. 296, 305 (2018). GPS tracking, disclosing precise and continuous location (plus speed and direction of movement) derived from a monitor attached to

the body, easily triggers such protections because it makes surveillance of myriad privacies of life "relatively easy and cheap." *United States v. Jones*, 565 U.S. 400, 429 (2012) (Alito, J., concurring in the judgment).

GPS monitors "store information about a wearer's latitude and longitude, gathered via communication with a network of satellites." *Feliz*, 481 Mass. at 694. "A GPS-monitored person's location information continuously is gathered and uploaded to [] computer systems" at the probation department's electronic monitoring program (ELMO) center. *Id.* The monitored individual's location is continuously "recorded and stored by the device once every minute." *Johnson II*, 481 Mass. at 713. The location information discloses whether the monitored person is stationary or mobile, the speed and direction of her movement, *id.* at 714; *see* [RA131–42], and is "ninety percent accurate within thirty feet." *Feliz*, 481 Mass. at 694.

Given these characteristics, there is little question that continuous and precise location information generated by GPS monitoring allows police to gather "a category of information that *never* would be available through the use of traditional law enforcement tools of investigation." *Commonwealth v. Augustine* ("*Augustine I*"), 467 Mass. 230, 254 (2014).

First, GPS monitoring allows for "continuous, tireless, effortless, and absolute surveillance." *Commonwealth v. McCarthy*, 484 Mass. 493, 500 (2020), citing

Jones, 565 U.S. at 429 (Alito, J., concurring). Because GPS monitors are actually attached to a person's body, the location data they generate is far more seamless and accurate than the data from GPS devices attached to vehicles or cell phones that (at least sometimes) leave their owner's sides. Indeed, "it is almost impossible to think of late–18th-century situations that are analogous" to GPS monitoring. *Jones*, 565 U.S. at 420 (Alito, J., concurring).

Second, a GPS monitor affixed to a person's body "follows its [wearer] beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." *Carpenter*, 585 U.S. at 311. To illustrate, "12% [of smart phone users] admit[] that they even use their phones in the shower." *Riley v. California*, 573 U.S. 373, 395 (2014). But all persons electronically monitored by ELMO must shower with the devices attached. The same goes for every other private and "constitutionally sensitive location[]," *McCarthy,* 484 Mass. at 506, from the prayer group to alcoholics anonymous meeting. "Of course, police cannot know in advance" of an ELMO query whether detailed GPS location information "will locate [a person] in a private residence." *Commonwealth v. Almonor*, 482 Mass. 35, 63 (2019) (Lenk, J., concurring). As the Supreme Court has explained, the ability to detect "a particular article—or a person, for that matter . . . that has been withdrawn from public view would present [a]

serious . . . threat to privacy interests in the home." *United States v. Karo*, 468 U.S. 705, 715 (1984).

Third, "the retrospective quality" of ELMO's GPS database magnifies its power as surveillance tool. *Carpenter*, 585 U.S. at 312. That is particularly so where, as here, GPS data is stored indefinitely, allowing the government to "efficiently mine [GPS location data] for information years into the future." *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring).

B. Individuals subject to pretrial GPS monitoring for statutory purposes maintain a subjective expectation of privacy that this data will not be accessed by police for law enforcement investigations.

Given the high degree of precision and intrusion described above, it is reasonable to assume on this record that Mr. Govan held a subjective expectation of privacy that the detailed GPS location data held by ELMO would not be shared with law enforcement for criminal investigatory purposes. *Cf. Commonwealth v. Fulgiam,* 477 Mass. 20, 33–34 (2017) (inferring from the record subjective expectation of privacy even in the absence of an affidavit or testimony on that topic); *McCarthy,* 484 Mass. at 497 n.5 (same); *Carpenter*, 585 U.S. at 310–13 (finding reasonable expectation of privacy without separately analyzing subjective expectation).

The Commonwealth counters that Mr. Govan's knowledge that probation officers could monitor his location via GPS eliminated his subjective expectation that this information would not separately be shared with police, *see* [CB27–28]; *see*

also [Add. 27], but this widely misses the mark. Adopting this argument would collapse the inquiry back into an analysis of the initial imposition of the GPS monitoring, because an individual is always *aware* they are on a GPS-monitor when it is affixed to their ankle. Yet time and again this Court has made clear that these two inquiries—the imposition of GPS monitoring by probation officials, and the inquiry into this GPS data by law enforcement—must remain distinct. *See, e.g., Johnson II*, 481 Mass. at 720; *Norman*, 484 Mass. at 333. To follow that mandate, an individual's knowledge that they are subject to GPS monitoring as a condition of pretrial release cannot on its own erase a subjective expectation that police will not access the GPS data for a criminal investigatory purpose.

Indeed, it is reasonable for a person to expect that a government agency that receives certain information for a specific purpose "will use those materials solely for the purposes intended and not disclose them to others in ways that are unconnected with those intended purposes." *Commonwealth v. Buccella*, 434 Mass. 473, 485 (2001). *Johnson II* expressly clarified that this Court was *not* suggesting "that a defendant forfeits his or her expectation of privacy upon notice of government surveillance." *Johnson II*, 481 Mass. at 725, n.12 (internal quotations omitted). Because the Commonwealth's argument suggests exactly that erroneous conclusion, this Court should reject it.

C. Individuals subject to pretrial GPS monitoring for statutory purposes maintain an objectively reasonable expectation of privacy that this data will not be accessed by police for law enforcement investigations.

The expectation that GPS data collected from a pretrial releasee for statutory purposes will not be shared with police for criminal investigations is one that society recognizes as objectively reasonable.

Courts have routinely recognized that a government actor's access to information for a specific purpose does not automatically extinguish an objectively reasonable expectation that a government actor would not access that piece of information for a different purpose. *See, e.g., Buccella*, 434 Mass. at 485 ("[A] student may reasonably expect that papers handed in to public school teachers will be used solely for educational purposes and not disclosed outside the educational setting."). In *Commonwealth v. Yusuf*, this Court held that the plain-view doctrine justified an officer's body-camera recording of his lawful (consent-based) entry into a home, but distinguished the subsequent warrantless review of the body-camera footage to seek evidence in a different criminal investigation. 488 Mass. 379, 394 (2021). As the Court explained, review of the body camera footage violated an objectively reasonable expectation of privacy because it fell "outside of the rationale justifying the recording in the first instance . . . [:] protecting police officers from accusations of misconduct, ensuring police accountability, or preserving a record of police-civilian interaction." *Id.* at 395. In effect, "[t]he ability of police officers, at

any later point, to trawl through video footage to look for evidence of crimes unrelated to the officers' lawful presence in the home when they were responding to a call for assistance is the virtual equivalent of a general warrant." *Id*.

So too here. Pretrial releasees are presumed innocent and enjoy substantial privacy interests. What is more, the "permissible goals of pretrial [electronic monitoring] conditions" under § 58 are limited to assuring appearance at court proceedings, safeguarding the integrity of the judicial process by protecting witnesses and victims, and protecting the safety of "alleged victim[s]" of domestic abuse. *Norman*, 484 Mass. at 338. Conditions imposed on pretrial releasees pursuant to § 58 are therefore "not intend[ed] . . . to address dangerousness or deterrence of future crimes." *Id*. In other words, the police search of Mr. Govan's location data was unrelated to the purposes of the imposition of GPS and was conducted by a separate entity from the probation department that collected the GPS data. This infringed upon an objectively reasonable expectation of privacy.

The Commonwealth relies on two arguments—diminished expectations of privacy and the length of time requested by law enforcement—to propose the alternate conclusion. *See* [CB28–32; CA36–37]; *see also* [Add. 49–50]. Both are mistaken.

As to the first, the Commonwealth leans heavily on *Johnson II*'s conclusion that a probationer had no objectively reasonable expectation that police would not

query his GPS data under the specific facts of that case, arguing that "there is no substantive difference between a probationer and a pretrial defendant released on GPS monitoring in terms of their objective" expectation of privacy. [CB27–28]. But this is a category error. The Commonwealth elides the principal "salient" consideration in *Johnson II*: "the defendant's status as a probationer." 481 Mass. at 722. In so doing, it ignores the crucial difference that "[t]he reasonable expectation of privacy of a defendant pretrial . . . is greater than that of a probationer." *Norman*, 484 Mass. at 334.

Johnson II addressed the government's "particularized reasons" for round-the-clock GPS monitoring of post-conviction probationers: "to rehabilitate the defendant, deter and detect criminal activity, and protect the public." *Johnson II*, 481 Mass. at 719, 725 n.13. The government's deterrent interest in monitoring of post-conviction probationers is consistent with the purposes of probation, which is "a form of criminal punishment." *United States v. Scott*, 450 F.3d 863, 871–72 (9th Cir. 2009), citing *United States v. Knights*, 534 U.S. 112, 119 (2001). This Court concluded that because "a probationer is subject to regular government supervision," probationers' "expectations of privacy while on probation . . . are significantly diminished." *Johnson II*, 481 Mass. at 722. Further, this Court determined, a probationer subject to GPS monitoring due to "concern over [his] demonstrated risk

of recidivism" would "objectively understand" that location data could be used "to deter him or her from committing future crimes while wearing the GPS device." *Id*.

The government's interests in monitoring pretrial releasees stand on an entirely different footing. Unlike conditions of probation, § 58 conditions of release are not "address[ed] to dangerousness or deterrence of future crimes." *Norman*, 484 Mass. at 338.[7] Under § 58, "the only permissible goals of pretrial conditions of release" are ensuring appearance, safeguarding the integrity of the judicial process by protecting witnesses and victims, and protecting the safety of "alleged victims" of domestic abuse. *Id.*; G.L. c. 276, § 58. It follows that—unlike post-conviction probation—pretrial GPS monitoring does "not operate to eliminate [the] expectation of privacy" in detailed location information "unrelated to [those] condition[s]." *Johnson I*, 91 Mass. App. Ct. at 314–15 (Wolohojian, J., dissenting). Moreover, a pretrial releasee retains both a presumption of innocence and robust expectations of privacy "greater than that of a probationer." *Norman*, 484 Mass. at 334. *Accord, e.g.*, *Scott*, 450 F.3d at 873 (pretrial releasee's "privacy and liberty interests [are] far

[7] This distinction reflected in the limited statutory purposes of § 58 pretrial conditions has a constitutional basis. Unlike probation conditions, pretrial conditions are not punishment. *United States v. Salerno*, 481 U.S. 739, 746 (1987). Consequently, detention prior to trial is permitted only "in carefully circumscribed circumstances and subject to quite demanding procedures." *Brangan v. Commonwealth*, 477 Mass. 691, 705 (2017).

greater than a probationer's"). Given the crucial distinction between the privacy afforded to pretrial releasees and post-conviction probationers, *Johnson II* is inapplicable here.

Before the motion judge, the Commonwealth also contended that a "one hour period" [CB31] of warrantless and suspicionless cell site location information (CSLI) does not implicate art. 14. *See* [CA36–37]. But this ignores the crucial differences this Court has recognized between episodic location information (like telephone-call CSLI) and continuous location tracking (like registration CSLI). *Commonwealth v. Henley*, 488 Mass. 95, 112 n.10 (2021), citing *Commonwealth v. Estabrook,* 472 Mass. 852, 858 n.12 (2015).

As this Court has explained, the six-hour "exception" for CSLI "without obtaining a search warrant" "applies only to 'telephone call" CSLI. *Id.* "The distinction is an important one." *Id.* "Telephone call CSLI is episodic; the frequency of the location points depends on the frequency and duration of the telephone calls to and from the telephone." *Augustine I*, 467 Mass. at 259 (Gants, J., dissenting). On the other hand, "[r]egistration CSLI, for all practical purposes, is continuous, and therefore is comparable to monitoring the past whereabouts of the telephone user through a global positioning system (GPS) device on the telephone, although it provides less precision than a GPS device regarding the telephone's location." *Id.* That is why "the Commonwealth ordinarily may not access registration CSLI

without a warrant." *Almonor*, 482 Mass. at 47 n. 15. As with registration CSLI, any duration of GPS location data infringes on constitutionally protected expectations of privacy. *Estabrook*, 472 Mass. at 858 n. 12.

* * * * *

In sum, law enforcement's investigative inquiry into Mr. Govan's GPS data held by the probation office for statutory purposes violated a subjectively and objectively reasonable expectation of privacy. Of course, the probation department—which supervises pretrial releasees—may access GPS location for an authorized purpose, for example, to locate a pretrial defendant who has failed to appear or has violated an order to stay away from a person or place. Where, however, the police seek the GPS data of a pretrial releasee "for purposes of a new criminal investigation," [Solicited Amicus Question], it "falls outside the rationale justifying the" pretrial monitoring condition "in the first instance." *Yusuf,* 488 Mass. at 395. Where, as here, there was no warrant and no warrant exception, the evidence must be suppressed.

III. A warrant for bulk pretrial releasee ELMO GPS data must at least meet art. 14's nexus and particularity requirements.

Because a police query of pretrial releasees' GPS location in an investigation unrelated to § 58 conditions of release is a search in the constitutional sense, a warrant—or some exception to the warrant requirement—is required. Where the police seek the GPS data of a specific lawfully monitored pretrial releasee, the

procedure is straightforward. The police "may obtain a search warrant for [GPS location information] by establishing probable cause that the suspect committed a crime, the suspect's location would be helpful in solving or proving that crime, and that the suspect [was monitored by GPS] at the relevant times." *Commonwealth v. Jordan*, 91 Mass. App. Ct. 743, 751–52 (2017), citing *Commonwealth v. Augustine* ("*Augustine II*"), 472 Mass. 448, 443–46 (2015).

Here, however, law enforcement's initial query for "anybody in the area . . . on electronic monitoring," [RA51, 127], was not so particularized. Although the absence of any warrant or warrant exception decides this case, to avoid issuance of unconstitutional general warrants in future investigations, this Court should provide guidance regarding art. 14 and the Fourth Amendment's constraints on general searches of GPS data.

In the first instance, amici argue that the bulk ELMO GPS request in this case constitutes an electronic dragnet for which no valid warrant could have issued. No warrant could authorize such a trawling through the precise location of every pretrial releasee affixed with GPS "in an unrestrained search for criminal activity." *Commonwealth v. Mora*, 485 Mass. 360, 370 (2020) (describing unconstitutional "general warrants").

In the alternative, if this Court concludes that warrants for such requests do not categorically violate the prohibition on general warrants, then it must at least

ensure that where the police seek bulk ELMO GPS data, the constitution's nexus and particularity requirements do not fall by the wayside. The mere fact that a person has been charged—but not convicted—of a crime does not supply probable cause that they have engaged in unrelated criminal activity. *Norman,* 484 Mass. at 334–35. At a minimum, an application for a bulk GPS ELMO warrant must establish that the search "would produce evidence of the crimes under investigation" (nexus), *Perry*, 489 Mass. at 455, and "describe the object of the search with enough specificity . . . [to] ensur[e] that [police] search only those items for which probable cause exists." (particularity), *id.* at 459.

A. The bulk GPS ELMO request was an unconstitutional general search.

This Court has previously found police searches to be unconstitutional when they sweep up information that is overbroad and lack particularity. *See, e.g., Yusuf*, 488 Mass. at 394. Law enforcement's bulk GPS ELMO request here was likewise inherently unreasonable because it constitutes bulk surveillance of many people without probable cause to believe that most—or even any—of those affected have committed a crime.

Article 14 and the Fourth Amendment "were enacted, in large part, in response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Mora*, 485 Mass. at 370 (some internal quotation

marks omitted). These instruments allowed officials to look everywhere without requiring any showing of a close connection to the crime. Like these searches, bulk ELMO requests compel disclosure of the location information of individuals with no connection to the crime under investigation. The pre-digital analog, a government agent examining documents or searching houses based on mere proximity to a crime scene, would never have been accepted at the time art. 14 or the Fourth Amendment were adopted. As this Court has made clear, a warrant authorizing the search of any person present "can only be valid where the underlying circumstances presented to the issuing judge or clerk clearly demonstrate probable cause . . . to believe that *all* persons present are involved in the criminal activity afoot." *Commonwealth v. Smith*, 370 Mass. 335, 344 (1976) (emphasis added).

Here, the search was overbroad in two respects. First, in conducting the query at law enforcement's request, ELMO searched the location information of *all* individuals in the ELMO database to look for location points near the scene of the crime under investigation. Such "rummag[ing] through troves of location data . . . without any description of the particular suspect or suspects to be found" is a general search. *United States v. Smith*, 110 F.4th 817, 837–38 (5th Cir. 2024). And second, the search swept in people who happened to be near the scene of the crime but as to whom police lacked probable cause, [Add. 45], a classic example of an overbroad

search. *See Smith*, 370 Mass. at 344. Any warrant purporting to authorize this bulk request would have failed as an unconstitutional general warrant.

B. Even assuming that Bulk GPS ELMO warrants may sometimes be permissible, this Court must ensure that the warrant requirements of nexus and particularity do not go by the wayside, and must impose additional safeguards against abuse.

i. A warrant application for bulk GPS ELMO data must establish a nexus between the GPS data requested and the crime.

The nexus inquiry requires that the affiant establish a "substantial basis to believe that a search of the requested [data] would produce evidence of the crimes under investigation, or would aid in the apprehension of the perpetrator." *Perry,* 489 Mass. at 455. In other words, the affidavit "must demonstrate probable cause to believe that . . . enumerated evidence of the offense will be found in the place searched." *United States v. Roman*, 942 F.3d 43, 50 (1st Cir. 2019) (citation omitted). In the context of CSLI "tower dumps," this Court has held that "the nexus requirement is satisfied as long as there is substantial basis to conclude that the defendant used his or her cellular telephone during the relevant time frame, such that there is probable cause to believe the sought after CSLI will produce evidence of the crime." *Perry*, 489 Mass. at 455. For GPS queries, the warrant application must set out a substantial basis to believe that the target was electronically monitored by ELMO.

Perry illustrates this approach. There the Court considered two warrants for a series of tower dumps providing police with telephone-call CSLI "for all devices that connected to specific cell towers during a particular time frame." *Id.* at 437. The first warrant fell short, the Court explained, because it "did not . . . set forth any particularized information that the perpetrator or the coventurer . . . communicated with each other from a distance" via cell phones. *Id.* at 458. The second warrant, by contrast, "described facts suggesting some reason to believe that the defendant and a coventurer had communicated with one another from a distance, either prior to or after the commission of the offense." *Id.* at 457; *see also id.* at 456 (affidavit "described evidence indicating that a suspected coventurer acted as a getaway driver in at least three of the offenses under investigation"). This (second) warrant application met constitutional muster, because the "evidence that the perpetrator and the coventurer communicated from a distance, when combined with the affiant's statements about the over-all ubiquity of cellular telephones, provided reasonable grounds to believe that the robber and the getaway driver had used cellular telephones to communicate." *Id.* at 457.

These principles apply here. "[P]robable cause must be based on particularized facts, not 'simply general conclusions.'" *Perry*, 489 Mass. at 458, quoting *Commonwealth v. Rossetti*, 349 Mass. 626, 632 (1965). The mere hope that an electronic dragnet of every GPS monitored pretrial releasee present around the

time and place of a crime will yield evidence of a suspect falls far short of the required nexus. Here the detective "sent an email to [ELMO] to request -- to know if anybody . . . in that immediate area and immediate time frame was on electronic monitoring." [RA51]. But the detective had no basis to believe that the perpetrator was affixed with GPS. Because it is tantamount to asserting probable cause to search each and every pretrial releasee in the Commonwealth, this approach is inconsistent with art. 14 and the Fourth Amendment.

Where police seek bulk precise GPS data of every pretrial releasee in the vicinity of a crime, the supporting affidavit must at least establish "a substantial basis to conclude" that the suspect was electronically monitored. *Perry*, 489 Mass. at 455. This standard could be met, for example, by information that an unidentified suspect was seen affixed with the GPS ankle bracelet, or probable cause that a person known to be monitored by GPS is involved in the crime under investigation. An unsupported guess that a pretrial releasee was involved in an unrelated crime will not do.

ii. A warrant for bulk ELMO GPS data must be particularized.

Article 14 and the Fourth Amendment "require that a search warrant describe with particularity the places to be searched and the items to be seized." *Perry*, 489 Mass. at 459 (citation omitted). Requests for GPS data for *every* person monitored by ELMO run headlong into concerns about lack of particularity and overbreadth that lie at the heart of art. 14 and the Fourth Amendment. *See Stanford v. Texas*, 379

U.S. 476, 481 (1965) (Fourth Amendment protects against general warrants, which were "the worst instrument of arbitrary power . . . that ever was found in an English law book." (quoting founding father James Otis)); *Mora*, 485 Mass. at 370.

Here, again, *Perry* is instructive. There, "a cursory examination of anonymized CSLI" did not implicate constitutionally protected expectation of privacy. 489 Mass. at 460. And the Court concluded that the (second) warrant was sufficiently particularized because it permitted the police to "isolate and analyze the CSLI of those telephone numbers that appeared in two or more tower dumps, but no others." *Id.* at 461. That requirement was critical because it ensured that police would only obtain information about people who were at or near two or more crime scenes in a multi-scene investigation, reducing the chance of sweeping in innocent people who just happened to be in proximity to one crime scene near the time of the alleged offense. Unlike the CSLI in *Perry*, the GPS data disclosed by ELMO is not anonymized. *See* [RA130] (ELMO response disclosing five monitored individuals). And where, as here, the police seek ELMO data in non-serial investigations, there are no comparable "limits [to] the scope of the search and seizure" 489 Mass. at 549, to "only a narrow subset" of ELMO monitored individuals. *Id.* at 461.

If this Court concludes that bulk ELMO queries could sometimes be permissible with a warrant, it must ensure that any warrant is "appropriately limited," to render bulk ELMO queries "sufficiently particular." *Id.* at 461–62.

Whether the warrant is sufficiently particularized depends on the facts of each case. The question is whether there are grounds to distinguish the *relevant* GPS data from other GPS data swept up in the bulk ELMO query. A sufficiently particularized warrant may, for example, require anonymization of the bulk GPS data until the police "isolate potential suspects." *Id.* at 457. As in *Perry*, the particularity requirement may limit bulk GPS warrants to investigations of multiple temporally and geographically distinct crimes, where there is probable cause to believe the crimes were committed by the same person. *Id.* at 461. Alternately, because GPS data is more precise than CSLI, and bulk GPS query will produce fewer data points than a tower dump, a warrant could establish parameters that would "enable investigators to isolate potential suspects," *id.* at 457–58, for non-serial crimes in appropriate circumstances.[8] In all cases, the "scope of the search" must be limited in geography and duration. *Id.* at 461.

iii. Bulk ELMO GPS searches require additional protections for "uninvolved third parties whose [identity and GPS location] is revealed once an application for a search warrant is allowed."

Both tower dumps and bulk ELMO GPS searches sweep up location information of "uninvolved third parties" who will "never know that their [location information] was provided to law enforcement, let alone be able to exercise any sort

[8] For example, video or witness evidence could provide the police with GPS coordinates for a narrow ELMO request.

of control or oversight over how their data is used." *Perry*, 489 Mass. at 462. Accordingly, the procedural safeguards provided for tower dumps under this Court's supervisory authority, should apply to bulk GPS ELMO searches as well. First, "only a judge may issue a search warrant" for bulk ELMO GPS searches. *Id.* at 462. Second, "the warrant [for bulk GPS searches] must include protocols for the prompt and permanent disposal of any and all data that does not fit within the object of the search following the conclusion of the prosecution." *Id.* at 463.

CONCLUSION

For the reasons above, this Court should order suppression of the GPS data, and provide guidance to prevent unconstitutional general searches of releasees' GPS data in future investigations.

Dated: October 16, 2024

/s/ Matthew Spurlock
Matthew Spurlock (BBO 601156)
Committee for Public Counsel Services
Public Defender Division
75 Federal Street
Boston, MA 02108
(617) 482-6212
mspurlock@publiccounsel.net

Jessie J. Rossman (BBO 670685)
American Civil Liberties Union
Foundation of Massachusetts, Inc
211 Congress Street
Boston, MA 02110
jrossman@aclum.org

Nathan Freed Wessler (BBO 680281)
American Civil Liberties
Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
nwessler@aclu.org

Kit Walsh (BBO 673509)
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
kit@eff.org

Sara Silva (BBO 645293)
Massachusetts Association of
Criminal Defense Lawyers
Silva Kettlewell & Pignatelli LLP
10 High Street, Suite 505
Boston, MA 02110
(617) 351-9093
sara.silva@skpboston.com

CERTIFICATION OF COMPLIANCE

I, Matthew Spurlock, 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 Rules 16, 17, and 20. It complies with the length limit because it contains 7,203 non-excluded words. It complies with the type-style requirements because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

Dated: October 16, 2024

/s/ Matthew Spurlock
Matthew Spurlock

CERTIFICATE OF SERVICE

I, Matthew Spurlock, do hereby certify that on October 16, 2024, I served this brief on the Commonwealth and the defendant by directing an electronic copy of the foregoing brief to the following counsel.

Benjamin Brooks (BBO 661763)
Good Schneider
Cormier, Fried & Brooks
83 Atlantic Avenue
Boston, MA 02110
bb@gscfb.com

Mackenzie Slyman (BBO 705884)
Assistant District Attorney
For the Suffolk District
One Bulfinch Place
Boston, MA 02114
Mackenzie.Slyman@mass.gov

Dated: October 16, 2024

/s/ Matthew Spurlock
Matthew Spurlock