

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals

)	
PEOPLE OF THE STATE OF)	
MICHIGAN,)	
)	
Plaintiff-Appellee,)	MSC No.: 166339
)	COA No.: 358580
v.)	Trial Court No.: 20-093153-
)	FC
DARYL WILLIAM MARTIN,)	
)	
Defendant-Appellant.)	

**BRIEF AMICI CURIAE OF PROFESSOR KATE WEISBURD AND
JAMES KILGORE IN SUPPORT OF
DEFENDANT-APPELLANT AND REVERSAL**

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INTERESTS OF *AMICI CURIAE*¹

Kate Weisburd is a Professor of Law at the University of California College of the Law in San Francisco. She teaches and writes in the areas of criminal law and civil rights. Professor Weisburd works at the forefront of legal research on electronic surveillance, having published on the subject in the *California Law Review*, *Virginia Law Review*, *Iowa Law Review*, *North Carolina Law Review*, *UCLA Law Review*, and *Michigan Law Review*. Professor Weisburd has conducted a 50-state survey on the operation of electronic ankle monitors, interviewed dozens of people on electronic monitoring, commented in mainstream media outlets, and given nearly forty presentations on the topic at law schools and community centers across the country. She offers this brief as *amicus* to highlight the tangible, real-world harms of electronic monitoring.

James Kilgore is an activist, researcher, and an award-winning writer. He was paroled from prison in 2009 and spent a year on electronic monitoring thereafter. Mr. Kilgore now dedicates his time to the study of

¹ Counsel for a party did not author this brief, in whole or in part, and did not make a monetary contribution intended to fund the preparation or submission of this brief. Nor did any person or organization other than the *amici curiae* make any monetary contributions towards the writing of this brief.

electronic monitoring and digital modes of confinement. He has written widely on the subject, in outlets such as *Dissent*, *Critical Criminology*, *Wired*, *Inquest*, and *Truthout*, and in his recently published book *Understanding E-Carceration: Electronic Monitoring, the Surveillance State, and the Future of Mass Incarceration*. He serves as the director of the Challenging E-Carceration project at MediaJustice, and the co-director of a reentry program in Champaign, Illinois. In his capacity in those positions, Mr. Kilgore routinely interviews and documents the experiences of those subject to electronic monitoring. Mr. Kilgore submits this brief as *amicus* to expand on his research, community work, and personal experience with electronic monitoring.

When this Court scheduled oral argument on Mr. Martin's application for leave to appeal, the Court instructed the parties to file supplemental briefs addressing whether: (1) lifetime electronic monitoring, when imposed without an individualized assessment of the defendant's recidivism risk and without providing a mechanism for removing the monitoring requirement, constitutes cruel or unusual punishment under Article 1, § 16 of the Michigan Constitution, or cruel and unusual punishment under the Eighth Amendment of the Federal

Constitution; (2) lifetime electronic monitoring constitutes cruel and/or unusual punishment as applied in this case; and (3) lifetime electronic monitoring constitutes an unreasonable search in violation of the Fourth Amendment of the Federal Constitution or Article 1, § 11 of the Michigan Constitution. This brief provides information helpful to the Court’s resolution of those questions.

SUMMARY OF ARGUMENT

Whether framed as cruel or unusual under the Michigan Constitution, disproportionate punishment under the Federal Constitution’s Eighth Amendment, or a constitutionally unreasonable search, lifetime electronic monitoring (hereinafter, “EM”) cannot stand. To start, EM is a form of punishment not meaningfully different from incarceration. The personal liberty of individuals on EM is significantly restrained and controlled by the state, and the privacy implications of EM mirrors that of incarceration in its imposition of 24/7 surveillance. Indeed, the logistics associated with monitoring devices—onerous charging requirements, GPS connectivity problems, and wearing the hardware itself—have sweeping consequences: restricted movement and travel, physical injuries, loss of employment and bodily autonomy, and a

tempered freedom of expression and association. Moreover, lifetime EM undermines rehabilitation by imposing substantial dignitary and mental-health harms to those subjected to it. And communities of color also disproportionately bear the harms of EM, reinforcing racialized patterns of punishment and surveillance in this country. All of these problems are magnified when a person is monitored for the rest of their life upon completion of a term of years sentence based solely on their underlying offense—without any individualized assessment of risk or way to petition for cessation.

Amici believe lifetime EM for individuals who have completed their prison sentences is cruel or unusual, a disproportionate punishment, and an unreasonable search; however, for purposes of this case, it is sufficient for this Court to conclude that—at a minimum—such lifetime EM is unconstitutional absent an individualized risk assessment.

ARGUMENT

I. Whether Framed as Cruel and/or Unusual or an Unreasonable Search, Lifetime Electronic Monitoring Violates the United States and Michigan Constitutions.

The real-world consequences of lifetime electronic monitoring renders its use unconstitutional, whether framed as disproportionate

under the Michigan Constitution’s prohibition on cruel or unusual punishments, the Federal Constitution’s proscription on punishments that are cruel and unusual, or the state and federal constitutional bans on unreasonable searches. A lifetime requirement to wear an ankle monitor that tracks every movement, that is in regular cellular communication with correctional officials, that can demand an immediate response from the wearer, and which comes with a long and onerous list of mandatory restraints on freedom of movement and action—all of which are backed by potential criminal penalties—cannot be upheld, no matter how it is analyzed. The lived experience of people subject to the rules and practices of electronic monitoring regimes makes this plain.

A. Electronic monitoring is punishment; it is a form of incarceration.

Technological advancements of electronic location data within the past few years have made it such that EM “is not an alternative to incarceration; it is an alternative *form* of incarceration.” James Kilgore, Emmett Sanders & Kate Weisburd, *The Case Against E-carceration*, INQUEST (July 30, 2021), <https://inquest.org/the-case-against-e-carceration/>. Termed “e-carceration,” “e-jail,” “digital prisons,” or

“technological incarceration,” EM is another form of carceral control that constrains movement, limits liberty, and infringes on privacy. *Id.*; Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html>; Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, 21 NEW CRIM. L. REV. 379, 419 (2018). Indeed, some individuals refer to ankle monitors as “digital shackles that deprive them of their liberties in cruel and unexpected ways.” Olivia Solon, *‘Digital shackles’: the unexpected cruelty of ankle monitors*, THE GUARDIAN (Aug. 28, 2018), <https://www.theguardian.com/technology/2018/aug/28/digital-shackles-the-unexpected-cruelty-of-ankle-monitors>. It is no surprise, then, that this Court has acknowledged that lifetime electronic monitoring is punishment. *People v. Cole*, 491 Mich. 325, 336 (2012).

With the development of EM, society is coming to recognize that “the carceral experience is no longer defined by physical walls and prison bars.” Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 148, 152 (2022). Instead, homes, workplaces, and neighborhoods become prisons. See generally Kate Weisburd, *The Carceral Home*, 103 B.U. L. REV. 1879

(2023). As Michelle Alexander put it, being sentenced to EM means “[y]ou’re effectively sentenced to an open-air digital prison One false step (or one malfunction of the GPS tracking device) will bring cops to your front door, your workplace, or wherever they find you and snatch you right back to jail.” Alexander, *supra*.

While many initially look forward to being released from prison and returning to freedom, EM and its concomitant loss of liberty is not close to freedom. “This baseball sized device strapped to the parolee’s ankle doesn’t exactly provide the freedom that the once-detained person hoped for. Indeed, living with an ankle monitor is its own brand of imprisonment.” Olivia Thompson, *Shackled: The Realities of Home Imprisonment*, EQUAL JUSTICE UNDER LAW (June 14, 2018), <https://equaljusticeunderlaw.org/thejusticereport/2018/6/12/electronic-monitoring>. Particularly relevant here, Richard Stapleton, who worked for the Michigan Department of Corrections for over three decades, including several years on EM policy, characterized monitoring people on parole as “another burdensome condition of extending . . . incarceration.” James Kilgore, *The Spread of Electronic Monitoring: No Quick Fix for Mass Incarceration*, TRUTHOUT (July 30, 2014), <https://truthout.org/>

articles/the-spread-of-electronic-monitoring-no-quick-fix-for-mass-incarceration/. And EM is all the more cruel and invasive when, as in the case of Mr. Martin, it is punishment that is *added* to a person’s term of imprisonment. See James Kilgore, Emmett Sanders & Kate Weisburd, *Carceral Surveillance and the Dangers of “Better-Than-Incarceration” Reasoning*, LPE PROJECT (June 27, 2024), <https://lpeproject.org/blog/carceral-surveillance-and-the-dangers-of-better-than-incarceration-reasoning/> (“To the extent that monitoring is used on people who would *not* otherwise be incarcerated, it offers no real benefit or discount to those people.”).

Society’s understanding of EM as another form of punitive confinement and control is also informed by people on EM who experience it as such. One person on EM in Michigan described it as a “ball and chain,” which was “exasperating . . . precisely because its wearer could never be free of it. There was no lull in the intrusion.” McJunkin & Prescott, *supra*, at 399–400. Some describe being on EM as feeling “caged” or “on a leash like an animal.” Weisburd, *Punitive Surveillance*, *supra*, at 181. A federal district court judge even characterized the government’s constant tracking of a person on EM as treating the

individual “as if he were a feral animal.” *United States v. Polouizzi*, 697 F. Supp. 2d 381, 389 (E.D.N.Y. 2010).

Indeed, the level of restraint imposed on monitored individuals is more drastic than those placed on individuals who are serving a sentence in a halfway house or work release center, or those on probation and parole. “Short of a prison cell, electronic monitoring is the most restrictive form of government surveillance and control.” Kate Weisburd et al., *Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System*, at 27, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL (2021), <https://issuu.com/gwlawpubs/docs/electronic-prisons-report?fr=sOGI5NDcxODg3>. And “[o]f all the conditions imposed on individuals on parole, likely none is more intrusive, punitive and dehumanizing than electronic monitoring.” James Kilgore, Emmett Sanders & Myaisha Hayes, *No More Shackles: Why We Must End the Use of Electronic Monitors for People on Parole*, at 3, THE CENTER FOR MEDIA JUSTICE (Sept. 16, 2018), https://mediajustice.org/wp-content/uploads/2019/05/NoMoreShackles_ParoleReport_UPDATED.pdf. Additionally, not only is the level of surveillance greater, it is also longer; as Mr. Martin notes in his

brief, parole and probation do not last for a person's lifetime. Martin Supp. Br. at 14–15.

Mr. Martin's experience is illustrative. Mr. Martin is tracked by the State 24 hours a day, every day, even within his home. *See* Martin Appendix B, MDOC LEM Program Participant Agreement.² The monitor strapped to Mr. Martin's ankle must be plugged into an outlet for at least two consecutive hours every day. *Id.* Mr. Martin must "make [himself] immediately available" to corrections officials if the device malfunctions and must allow the Department of Corrections to visually inspect the monitor at any time. *Id.* He must be prepared to respond to any alert through the monitor any time of day, every day. *Id.* Such alarms cause the ankle monitor to vibrate against Mr. Martin's skin and its LED lights to flash. *Id.* If the device signals an alarm for loss of GPS reception, Mr. Martin must immediately "[w]alk outside with the [ankle monitor] uncovered to an area with a clear view of the sky" not "under trees, building awnings, etc." and then wait until "the alarm has cleared." *Id.*

² Also available at https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/LG/Lifetime_GPS_Agreement_Form_050911_353535_7.pdf?rev=7a99b1e7142346c3b89f75ebac873c03&hash=D1DF30F1B55F5D194AAAC052193B2BA2.

at Attachment A. If the device triggers an alarm for low battery, Mr. Martin must plug the ankle monitor into an outlet and stay tethered to the wall until “the device is fully charged.” *Id.* At any time, an EM agent can send “an alert for [Mr. Martin] to contact them” by triggering an alarm on the ankle monitor. *Id.* Mr. Martin must immediately acknowledge the alarm by pressing a button on the device, then call the agent at a designated phone number. *Id.* The lifetime EM rules do not specify or limit the reasons why a correctional official may demand an immediate response from Mr. Martin in this way. Mr. Martin must also monitor the DOC website at least monthly for special instructions and must reimburse DOC for the costs of GPS monitoring and any damage to the device. *See* Martin Appendix B, MDOC LEM Program Participant Agreement. Mr. Martin must adhere to these rules (among others) until he dies. Any failure to do so “may result in referral to the Michigan State Police for criminal investigation.” *Id.*

Indeed, when EM devices fail, the people who wear them are often punished for minor and unintended violations, which can lead to reincarceration. Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 768

(2020). Potential violations include losing GPS signal (a common problem indoors) or the device running out of batteries. Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 715–16 (2019); Jenifer B. McKim, *‘Electronic Shackles’: Use Of GPS Monitors Skyrockets In Massachusetts Justice System*, WGBH (Aug. 10, 2020), <https://www.wgbh.org/news/local-news/2020/08/10/electronic-shackles-use-of-gps-monitors-skyrockets-in-massachusetts-justice-system>.

To illustrate, a mother to a newborn recounted needing to walk around outside every time her ankle monitor lost signal, and a terminally ill septuagenarian wheelchair user who relies on an oxygen tank related having to rush out of a store when his ankle monitor lost its signal. Delia Paunescu, *The Faulty Technology Behind Ankle Monitors*, VOX (Dec. 1, 2019), <https://www.vox.com/recode/2019/12/1/20986262/ankle-monitor-technology-reset-podcast>; McKim, *supra*. When the device signals a loss-of-connection, everything else in the person’s life must stop. “They would tell me to go stand outside until the satellite re-connected. I would stand there looking up at the sky as if the satellite were going to cruise past the house, beam down a signal, and I would be re-connected to my electronic ball and chain.” JAMES KILGORE, UNDERSTANDING E-CARCERATION:

ELECTRONIC MONITORING, THE SURVEILLANCE STATE, AND THE FUTURE OF MASS INCARCERATION 7 (2022).

One ankle monitor recorded its wearer as breaking curfew when she was safely in bed. Thompson, *supra*. Another new wearer of a tracking monitor found himself in jail for a week after a readjustment of the device registered as tampering. Aaron Cantú, *When Innocent Until Proven Guilty Costs \$400 a Month—and Your Freedom*, VICE (May 28, 2020), <https://www.vice.com/en/article/4ayv4d/when-innocent-until-proven-guilty-costs-dollar400-a-monthand-your-freedom>. And a Wisconsin man was jailed for four days after losing GPS signal while attending a college course. Mario Koran, *Lost signals, disconnected lives*, WISCONSIN WATCH (Mar. 24, 2013), <https://wisconsinwatch.org/2013/03/lost-signals-disconnected-lives/>. What is more, if a crime occurs near where the monitored individual happens to be, they will be subject to criminal investigation just by their unknowing, innocent presence nearby. Arnett, *supra*, at 698; Weisburd et al., *Electronic Prisons*, *supra*, at 10–11.

In some cases, complying with the technical restrictions of an ankle monitor forces wearers to choose between their physical safety and the

risk of reincarceration. When one EM wearer's apartment caught fire in Lansing, his parole officer instructed him to return to his apartment to retrieve his EM equipment. Despite the fact that he did so—and subsequently informed the police and his monitoring company that he could not stay at his home address because it had burned down—he was arrested and put in jail. See KILGORE, UNDERSTANDING E-CARCERATION, *supra*, at 91; James Kilgore, *Keith Shultz My Apartment Burnt Down*, YouTube (July 4, 2018), <https://www.youtube.com/watch?v=KZeoN4ccyNo>. Weather conditions and blackouts can also cause loss of signal that can register as a violation. See *Environmental conditions blamed for ankle monitor failure*, WSDU NEW ORLEANS (Oct. 12, 2012), <https://www.wdsu.com/article/environmental-conditions-blamed-for-ankle-monitor-failure-1/3359280>; James Kilgore & Emmett Sanders, *Ankle Monitors Aren't Humane. They're Another Kind of Jail*, WIRED (Aug. 4, 2018), <https://www.wired.com/story/opinion-ankle-monitors-are-another-kind-of-jail/>.

So-called “violations” like the ones described above are extremely common in Michigan. As noted in Mr. Martin’s brief, the Michigan Department of Corrections reported that their software received 11,990

LEM alerts from August 2023 to August 2024. Of these, 267 (or 2%) were reported to the Michigan State Police. (Those alerts comprised strap tampering alerts lasting longer than ten minutes or battery failure reports lasting longer than 24 hours.) But the Michiganders who received the remaining 11,723 alerts (or 98%) still had to immediately stop what they were doing and respond to what, apparently, was a technical failure—lest they risk being reincarcerated. *See* Martin Supp. Br. at 22.

Compounding these problems is the fact that—despite the unreliability of EM and the frequency of technical problems—most people on EM, like Mr. Martin, receive no information spelling out their rights or avenues of appeal with respect to alleged EM violations. *See* Martin Appendix B, MDOC LEM Program Participant Agreement; James Kilgore, *The Grey Area of Electronic Monitoring in the USA*, CENTRE FOR CRIME AND JUSTICE STUDIES (Mar. 11, 2014), <https://www.crimeandjustice.org.uk/grey-area-electronic-monitoring-usa>. Thus, even when an ankle monitor incorrectly signals noncompliance, most wearers don't know how to seek redress. In other words, even if a violation is unfounded, the process of clearing a false alert is not obvious, further impeding the wearer's ability to live a normal life.

In short, not only do people on EM like Mr. Martin experience a form of incarceration, but they are doubly trapped by their EM devices' technological limitations, living in constant fear of false violations and the accompanying ever-present risk of reincarceration.

B. Electronic monitoring severely limits individuals' liberty and privacy.

Like traditional incarceration, EM “depends on the loss of liberty, privacy, dignity and autonomy.” Weisburd et al., *Electronic Prisons*, *supra*, at 27. EM disrupts a person's relationships, jeopardizes their financial security, and severely limits the range of basic life choices that surveilled individuals can make. *See* Kilgore, Sanders & Weisburd, *The Case Against E-incarceration*, *supra*; Weisburd, *Punitive Surveillance*, *supra*, at 149. This is especially true when a person is monitored for the rest of their life based solely on the underlying offense—without any individualized assessment of risk or way to petition for cessation.

i. Restrictions on movement

Individuals subject to EM must orient their lives around being surveilled. They are beholden to a maze of regulations and device requirements that regulate their physical movements. *See* Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305

(2023). Individuals on EM “are discouraged from the type of daily movement that most take for granted,” and must calibrate each action—whether to find employment, secure housing, meet family, or participate in community—to the device’s requirements and the EM program’s rules. Julie Pittman, Note, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CALIF. L. REV. 587, 603 (2020).

As mentioned above, ankle monitors require extensive battery charging that restrict where individuals can go and when. These charging hours are protracted and even more burdensome for those who face “[un]predictable work schedules, unreliable access to electricity, and housing insecurity.” Weisburd et al., *Electronic Prisons*, *supra*, at 8–9. Charging requirements are “a particular challenge for the homeless.” McKim, *supra*; Solon, *supra*. To make matters worse, many companies discourage monitor wearers from charging while sleeping. Weisburd, *Punitive Surveillance*, *supra*, at 165. Battery power also tends to weaken over time, rendering subjects immobile for even longer hours. One monitored individual in New York expressed the anxiety that accompanied charging requirements:

I can plug it into a charger and stand next to the outlet, like a cell phone charging up for the day...After that, the device runs out of juice. Wherever I am, I have to find an outlet to plug myself into. If I don't, I'm likely to be thrown back onto Rikers Island.

M.M., *Living With an Ankle Bracelet*, THE MARSHALL PROJECT (July 16, 2015), <https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet>. Another person estimated that, with two hours of charging a day, he effectively “spent one month of every year leashed to a wall.” Samuel Nesbit, *Tracking the Recent Decisions in North Carolina’s Satellite-Based Monitoring Jurisprudence*, CAMPBELL LAW OBSERVER (May 4, 2020), <http://campbelllawobserver.com/tracking-the-recent-decisions-in-north-carolinas-satellite-based-monitoring-jurisprudence/>.

Likewise, GPS limitations are a considerable burden on individuals’ autonomy. Monitored individuals like Mr. Martin must walk outside at odd hours in search of a signal whenever the device signals loss of connection. *See supra*, at 10–12 (describing individuals’ experiences being forced outside unpredictably). Water can damage the device, which limits a person’s ability to swim or engage in other water sports.

See Bob Johnson, *No Swimming, Constant Monitoring and a Big Sock. What Life on a Tether is Really Like*, MLIVE (Apr. 23, 2019), <https://www.mlive.com/news/saginaw-bay-city/2019/04/no-swimming-constant-monitoring-and-a-big-sock-what-life-on-a-tether-is-really-like.html> (reporting from Saginaw County). EM devices are also in continuous contact with monitoring agents, who can trigger an alarm on the device at will to demand that the wearer contact them. See Martin Appendix B, MDOC LEM Program Participant Agreement. The person on EM must then stop everything, contact the agent, and deal with whatever issue caused the agent to trigger the alarm.

This litany of “frequent interruptions” can, in the words of the Massachusetts Supreme Court, “endanger an individual’s livelihood.” *Commonwealth v. Norman*, 142 N.E.3d 1, 9–10 (Mass. 2020). Lifetime EM conditions may therefore unreasonably burden the substantive due process right to travel. See Weisburd, *Punitive Surveillance*, *supra*, at 180 n. 205 (collecting cases finding that EM interferes with liberty interests); Eric M. Dante, *Tracking the Constitution—The Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 SETON HALL L. REV. 1169, 1196–1200 (2012) (detailing intrastate and interstate restrictions on

monitored individuals); Sarah Shekhter, *Every Step You Take, They'll Be Watching You: The Legal and Practical Implications of Lifetime GPS Monitoring of Sex Offenders*, 38 HASTINGS CONST. L.Q. 1085, 1103–05 (2011) (arguing lifetime EM is not a narrowly-tailored restriction on the fundamental right to travel).

Here, as explained above, Mr. Martin must take care to maintain a strong GPS signal at all hours and, at a moment's notice, go outside in any weather to avoid obstructing “a clear view of the sky.” See Martin Appendix B, Attachment A. He is leashed to a wall outlet at least two hours per day and can be summoned by the device to make an emergency phone call to an EM agent at any time. Taken together, these conditions deprive Mr. Martin of his fundamental right to move and travel “throughout the length and breadth of our land.” *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). Though the law has been slow to recognize EM's intrusions, monitored people understand that they are not free to move. They see the monitor for what it is: a leash, a cage—a modern-day slave shackle. Weisburd, *Punitive Surveillance*, *supra*, at 181.

ii. Burdens on employment, bodily autonomy, and medical care.

The technical limitations of EM and social stigma make it difficult for individuals on EM to find and maintain stable employment. To start, employers are often reticent to hire someone who is wearing an ankle monitor, especially if they are dealing with customers. Kilgore, Sanders & Hayes, *supra*, at 7; KILGORE, UNDERSTANDING E-CARCERATION, *supra*, at 81–83. One woman “complained that the mere presence of ‘this big old thing on my ankle’ scared away employers, especially in a job where they might have had direct contact with the public.” *Id.* at 82. Another person who was looking for a job reported a conversation going especially well—until the interviewer asked what was on his leg. See Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants Into Debt*, PROPUBLICA (July 3, 2019), <https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt>.

And those lucky enough to find a job face hurdles in keeping it. Many concrete buildings, such as warehouses—a workplace traditionally open to the previously-incarcerated—interfere with the signal of a GPS monitor. This means that a person must randomly leave work to pick up a signal or call their monitoring agency, creating tension with employers.

Kilgore, Sanders & Hayes, *supra*, at 7. Indeed, twenty-two percent of monitored individuals surveyed by the National Institute of Justice said they had been fired or asked to leave a job because of an ankle monitor. Kofman, *supra*. One working mother on EM in St. Louis, for instance, left a job because a co-worker repeatedly scrutinized her monitor; she lost her next position at a nursing home when she requested time off for court dates and check-ins. *Id.* Another young man attending a job training course was apprehended by an officer halfway through the class—his ankle monitor battery had died. *Id.* A man in Illinois was fired from his job at a sports shoe store when a co-worker noticed the monitor, which he had tried to hide underneath long pants. KILGORE, UNDERSTANDING E-CARCERATION, *supra*, at 82. The co-worker complained to her parents that she was working with a “criminal.” *Id.* “The next day, her parents came to the shop and the man with the monitor was fired.” *Id.* These barriers to employment leave monitored individuals stuck in cycles of financial hardship and instability.

Finally, ankle monitors can impose real, painful physical injuries on wearers. Whereas popular terminology like ankle “bracelet” sugarcoats the harm caused by the devices, a Cardozo Law survey found

that a majority of monitored people experience a “constant negative impact” on their health, including electrical shocks, cuts and bleeding, inflammation, scarring, numbness, aches and pains, and excessive heat. Tosca Giustini et al., *Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles*, CARDOZO LAW SCHOOL 13 (July 2021), <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1002&context=faculty-online-pubs>. One in five of those surveyed reported receiving electric shocks from their devices. *Id.*; see also Pittman, *supra*, at 601–02 (collecting accounts of physical harms from EM, including an immigrant who “almost lost his foot when a blister from his ankle monitor became infected” and a monitor that burst into flames, which resulted in permanent sores and scars). According to a young person on EM, “[t]hroughout the day, the device becomes heavier and more painful, causing me to bleed. I push it down on my ankle to let my blood circulate—but then the pain becomes unbearable, and I can’t plant my feet without crying out.” M.M., *supra*.

On top of these frequent injuries, ankle monitors impair access to medical care. Procedures including MRIs, X-rays, CT scans, and mammograms cannot be performed while a patient wears an ankle

monitor. Kilgore & Sanders, *supra*; KILGORE, UNDERSTANDING E-CARCERATION, *supra*, at 83–86. Michigan, like many states, has no clear policy for how or whether a monitor will be removed for medical reasons. In sum, in the words of a monitored person, “the device is, both literally and metaphorically, my greatest source of pain.” M.M., *supra*.

iii. Loss of privacy

An EM sentence should not permanently extinguish individuals’ privacy rights. And yet, ankle monitors open the door for law enforcement to track and analyze personal, otherwise private information on demand, 24/7. By statute, the tracking system used for lifetime EM in Michigan must allow the court or “law enforcement agenc[ies]” to “retrieve upon request” both historical records and real-time information about the person’s location and movement. MICH. COMP. LAWS § 791.285(1)(b). These archives appear to exist in perpetuity; nothing in any statute or program rules appears to limit retention or use of the information. Surveillance is thus ever-present. Weisburd, *Punitive Surveillance*, *supra*, at 160–62, 174–77. Such unyielding scrutiny intrudes on people’s “privacy, autonomy, and dignity,” making at least one woman on EM feel “like a slave.” Kilgore, Sanders & Weisburd, *The Case Against E-*

carceration, supra. Now, some devices allow authorities to listen or even converse with surveilled individuals. Weisburd et al., *Electronic Prisons, supra*, at 9.

Privacy intrusions extend even into the sanctity of the home, spilling over to the families, friends, coworkers, and houseguests of individuals on EM. One advocate explained that EM “makes everywhere you are a satellite of a prison, and it puts everybody in proximity to you kind of in a prison, too.” Lee V. Gaines, *Why Even Illinois’s Department of Corrections Wants To Fix The Way The State Does Electronic Monitor*, NPR ILLINOIS (Feb. 26, 2019), <https://www.nprillinois.org/equity-justice/2019-02-26/why-even-illinoiss-department-of-corrections-wants-to-fix-the-way-the-state-does-electronic-monitor>; *see also* Weisburd et al., *Electronic Prisons, supra*, at 27 (noting that the people who support someone on EM are, by extension, also subject to constant surveillance). All cohabitants of a person on EM can be subject to impromptu home searches or other intrusions whenever an ankle monitor registers a violation or officials demand access to the device. *Id.* at 12. Electronic monitoring accordingly regulates intimate relationships and spaces. Homes that should be places for formerly incarcerated people to rebuild

their lives are instead “subjected to surveillance where everyone is watched, and their movements are scrutinized.” Weisburd, *Punitive Surveillance*, *supra*, at 176.

People on EM also lose the ability to speak and assemble freely or anonymously because they know that the government is keeping a constant record of their movements. As Justice Sotomayor has observed, “GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.” *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring). That collection of information can be used against people on EM in many ways, and the mere accumulation of that information chills protected expression and activity, presenting First Amendment concerns. Alex Abdo, *Why Rely on the Fourth Amendment to Do the Work of the First?*, 127 YALE L.J. FORUM 444, 451 (2017).

These encroachments are flatly inconsistent with the privacy rights of citizens who live outside carceral control. Indeed, the privacy intrusion imposed by EM, “would be considered a serious limitation on freedom by most liberty-loving Americans.” *Polouizzi*, 697 F. Supp. 2d at 389. Public

polling indicates that Americans are generally averse to law enforcement mining cellphone location data. Weisburd, *Punitive Surveillance*, *supra*, at 148. It follows that EM—which is, if anything, even more intrusive—is a vastly different experience from what most Americans would want for their “normal” lives. *See id.* at 179–80. Since at least 2015, the law has been clear that attaching an ankle monitor to a person to track their physical location “effects a Fourth Amendment search.” *Grady v. North Carolina*, 575 U.S. 306, 310 (2015); *see also* Martin Supp. Br. 30. *Grady*, like this case, concerned an order requiring the petitioner to “be monitored for the rest of his life.” 575 U.S. at 307. And in a recent landmark case holding that people have an expectation of privacy in the cellphone-generated record of their physical movements, the Supreme Court reiterated the privacy concerns inherent in long-term location tracking by drawing an explicit analogy to EM: “when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.” *Carpenter v. United States*, 585 U.S. 296, 311–12 (2018).

Lifetime EM thus effectuates a permanent and ongoing Fourth Amendment intrusion in order to track and control a person’s movement.

This kind of restrictive, non-carceral deprivation of liberty forces people to navigate the myriad explicit program rules, as well as the constant fear that some movement or travel could be misinterpreted or used against them by law enforcement in some unforeseeable way.

The interest infringed by GPS monitoring is not the ability to decide to go into the bookstore or to drive a certain route home or to stay out until four in the morning; it is the capacity to make those choices without thinking “*this will be noticed, and what will they think?*”

Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1390 (2008) (emphasis added). In short, the burdens on individual liberty and privacy inherent in EM are great, making it an unreasonable search.

C. Electronic monitoring undermines rehabilitation by imposing substantial dignitary and mental-health harms on those subjected to it.

Lifetime surveillance undermines basic notions of modern-day human dignity, impeding any purported rehabilitative goals of its use. The language its subjects use to describe the experience makes this plain. As noted above, some say it makes them feel like a leashed animal, and others describe it as a modern-day slave shackle. *See supra*, at 5–6. Indeed, decades of research has shown that people on EM experience many of the same emotional pains of imprisonment, including feeling

deprived of autonomy, liberty, and intimate relationships. See Brian K. Payne & Randy R. Gainey, *A Qualitative Assessment of the Pains Experienced on Electronic Monitoring*, 42 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 149, 153–56 (1998).

Because of the stigma surrounding involvement with the criminal legal system, the visibility of the monitoring device is one of its most salient burdens. McJunkin & Prescott, *supra*, at 413. The presence of a monitoring device is expressive, signaling to its wearer that society does not forgive or trust him, and to the public that he is deviant, dangerous, and someone who has committed a serious enough crime that the state must keep him under surveillance. See *id.* at 416; James Baimbridge, *My GPS-Tracked Life on Parole*, THE MARSHALL PROJECT (Oct. 28, 2019), <https://www.themarshallproject.org/2019/10/28/my-gps-tracked-life-on-parole>. Indeed, EM has been described by many, including by members of the Sixth Circuit, as a modern day “scarlet letter.” See, e.g., *Doe v. Bredesen*, 507 F.3d 998, 1012 (6th Cir. 2007) (Keith, J., concurring in part and dissenting in part) (“A public sighting of the modern day ‘scarlet letter’—the relatively large G.P.S. device—will undoubtedly cause panic, assaults, harassment, and humiliation.”); see also Avlana K. Eisenberg,

Mass Monitoring, 90 S. CALIF. L. REV. 123, 129–30 (2017) (explaining purpose of monitoring is to show others that the monitored individual is a “wrongdoer[]”). And, contrary to the majority’s speculation in *Bredesen*, 507 F.3d at 1005, new research shows that ankle monitors *do* lead wearers to be regarded as criminals. See Lauren Kilgour, *The Ethics of Aesthetics: Stigma, Information, and The Politics of Electronic Ankle Monitor Design*, 36 THE INFORMATION SOC’Y 131, 136–42 (2020); see also *supra*, at 21–22 (recounting instances where people lost employment because of the stigma associated with the device). While the *Bredesen* Court speculated that tracking devices would “only become smaller and less cumbersome as technology progresses,” 507 F.3d at 1005, in fact “there has been very little change to the aesthetics of electronic ankle monitors’ physical form over the past forty years,” and the very “fixity of electronic ankle monitors’ aesthetics contribute to their strength as stigma symbols.” Kilgour, *The Ethics of Aesthetics*, *supra*, at 138. As the Supreme Court of New Jersey put it:

Even though [the state's lifetime EM system's] purpose is not to shame Riley, the 'effects' of the scheme will have that result. If Riley were to wear shorts in a mall or a bathing suit on the beach, or change clothes in a public locker or dressing room, or pass through an airport, the presence of the device would become apparent to members of the public. The tracking device attached to Riley's ankle identifies Riley as a sex offender no less clearly than if he wore a scarlet letter.

Riley v. New Jersey State Parole Bd., 98 A.3d 544, 559 (N.J. 2014). It is little wonder, then, that surveilled individuals report an inability to dress as they please because not every garment could properly conceal the monitor, and living in constant fear that someone might notice its presence. *M. M.*, *supra*.

The pervasive stigma resulting from EM takes a heavy toll on the mental health of its subjects. *See* Martin Supp. Br. at 18–21. In a survey of immigrants subjected to EM, the vast majority (88%) reported that wearing an ankle monitor negatively impacted their mental health—some even reporting suicidal thoughts. Giustini et al., *supra*, at 14. Many described EM as a deeply dehumanizing experience and reported feelings of anxiety, stigma, humiliation, a constant worry about concealing the ankle monitor, concern about the consequences of a potential device malfunction, feelings of being surveilled, and the fear of being arrested or detained. *Id.* at 15–16. Almost all surveyed immigrants reported

experiencing social isolation. They felt compelled to avoid social contact because of embarrassment or fear of judgment. *Id.* at 17. Lifetime EM of the sort imposed on Mr. Martin is likely even more corrosive. Feelings of anxiety and despair can only be compounded for someone who can see no end in sight.

EM is not only harmful for individuals' mental health, but also counterproductive to their rehabilitation and reintegration, pushing them to the periphery of society. Surveilled individuals face a choice of two bitter alternatives: either go out and endure public humiliation and risk societal rejection, or else avoid spending time with people they love, doing activities they enjoy, and seeking support from institutions that can help with their social reintegration. Arnett, *supra*, at 677–78, 680. Moreover, research shows that individuals in continued contact with the criminal legal system are less likely to obtain medical care when they need it, have a bank account, hold a job, or enroll in school. *Id.* at 677–78. “Detachment from pivotal institutions such as hospitals, banks, schools, and the labor market leads to marginalization and impedes opportunities for financial security and upward mobility, contributes to poor health outcomes, erects barriers to opportunities for success, and

exacerbates preexisting inequalities.” *Id.* Each of these negative effects can only be heightened through lifetime EM—an inescapable and interminable tether to the criminal legal system. *See id.* at 678.

Electronic monitoring further hinders the ability of individuals to reintegrate in their communities by creating distance or tension with their friends and family, robbing them of the much-needed support. *Id.* at 677, 678 n.148. One woman subjected to EM, recalling multiple searches of her hosts’ house, remarked that “[t]he people who have not done anything are constantly being incarcerated with the person.... Whoever lives in that house is being policed in that jail.” James Kilgore, *“You’re Still in Jail”: How Electronic Monitoring Is a Shackle on the Movement for Decarceration*, TRUTHOUT (Oct. 22, 2017), <https://truthout.org/articles/you-re-still-in-jail-how-electronic-monitoring-is-a-shackle-on-the-movement-for-decarceration/>. Another person reported that his child “straps a watch on his ankle to be like daddy.” Arnett, *supra*, at 678 n.148. The individuals subjected to lifetime EM are doubly punished then—first, through being required to wear the device; and, second, through the stigma that it imposes on them—thus undermining their ability to reenter society.

D. Electronic monitoring, like other forms of mass incarceration, has a disproportionate impact on communities of color.

It is not just individuals on LEM that suffer; their communities do as well. And just as mass incarceration disproportionately impacts people of color in general, and Black men in particular, so too does EM disproportionately impact these very same populations. KILGORE, UNDERSTANDING E-CARCERATION, *supra*, at 89–91. While data about lifetime EM does not seem to be available, the disparity with respect to EM at large is increasingly clear. A study in Wayne County in 2018 and 2019 found that Black people were twice as likely as white people to be on a monitor. *Id.* at 89. This is true not just in Michigan. In San Francisco, where just 6 percent of the population is Black, nearly half of the people on electronic monitors are Black. *Id.* Likewise, in Chicago, even though only 25 percent of the general population is Black, nearly 75 percent of the people on electronic monitors are Black. Kilgore, Sanders & Weisburd, *The Case Against E-carceration*, *supra*. EM keeps Black communities in disproportionate contact with the law and thus at disproportionate risk of reincarceration. As Professor Michelle Alexander

has written, these “digital prisons are to mass incarceration what Jim Crow was to slavery.” Alexander, *supra*.

The disparate use of EM against Black and brown people both reflects and perpetuates the United States’ history of race-based social control and inequality. Weisburd, *Sentenced to Surveillance*, *supra*, at 722. Government and police enforcement powers have long found means of systemically tracking and monitoring people of color. Enslaved people were once branded with the logo of their plantations so that they could be more easily tracked; Black civil rights leaders were surveilled heavily by the FBI; and stop-and-frisk policies largely impacted Black communities. James Kilgore, *Let’s Fight for Freedom From Electronic Monitors and E-Carceration*, TRUTHOUT (Sept. 4, 2019), <https://truthout.org/articles/lets-fight-for-freedom-from-electronic-monitors-and-e-carceration/>; Weisburd, *Punitive Surveillance*, *supra*, at 157. The large-scale deployment of EM technology, leveraged primarily against Black people, is the latest step in the United States’ history of racialized surveillance and control.

In addition, the financial cost of EM unfairly burdens communities of color. Michigan is one of forty-nine states that either allow or require

the cost of EM to be passed on to the people being monitored, with an average cost of \$10–15 per day. Jack Karsten & Darrell M. West, *Decades Later, Electronic Monitoring of Offenders Is Still Prone To Failure*, BROOKINGS INSTITUTION (Sept. 21, 2017), <https://www.brookings.edu/blog/techtank/2017/09/21/decades-later-electronic-monitoring-of-offenders-is-still-prone-to-failure/>. Because people of color are disproportionately put on EM, they also disproportionately bear its heavy financial costs—and the risk of reincarceration that comes with failure to pay.

In these ways, electronic surveillance builds upon the legacy of slavery, enforcing race and class-based subordination and marginalization, and forcing the costs of oppressive monitoring onto the communities—often communities of color—who are least able to afford it. By recognizing that lifetime electronic monitoring without an individualized risk assessment is unconstitutional, this Court would avoid imposing one more disparate and unwarranted burden on marginalized communities.

CONCLUSION

For the foregoing reasons, and those set out in Appellant's supplemental brief, this Court should hold mandatory lifetime electronic monitoring is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Michigan Court Rule 7.212, I certify that the document contains 6,789 words, excluding the parts of this document that are exempted by Court Rules MCR 7.212(C)(6). I declare under penalty of perjury that the foregoing is true and correct.

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