In the

United States Court of Appeals

for the Seventh Circuit

No. 20-1059

BENJAMIN BRAAM,
ALTON ANTRIM, and
DAN OLSZEWSKI,

Plaintiffs-Appellants,

v.

KEVIN A. CARR,
Secretary of the Wisconsin
Department of Corrections,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 19-CV-396 — **Pamela Pepper**, *Chief Judge*.

ARGUED SEPTEMBER 18, 2020 — DECIDED JUNE 21, 2022

Before SYKES, *Chief Judge*, and HAMILTON and ST. EVE, *Circuit Judges*.

SYKES, *Chief Judge*. Wisconsin law requires some sex offenders to wear GPS tracking devices for life, even after they have completed post-confinement supervision. WIS. STAT.

§ 301.48. The tracking device is attached to an ankle bracelet. The tracking data is not monitored in real time; rather, officials review it every 24 hours or so to determine if an offender has been near a school, a playground, or another place that might raise a concern. The program is administered by the Secretary of the Wisconsin Department of Corrections.

The plaintiffs here are repeat sex offenders who must comply with lifetime monitoring. § 301.48(2)(a)(7) (requiring lifetime monitoring of sex offenders who have been convicted of a sex offense "on 2 or more separate occasions") (incorporating by reference section 301.46(2m)(am)). They sued the Secretary alleging that the statute violates their rights under the Fourth Amendment. They also moved for a preliminary injunction.

We have addressed section 301.48 once before. In *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016), we upheld a subsection of the statute that imposes lifetime monitoring on sex offenders who have been released from post-prison civil commitment. § 301.48(2)(b)(2) (incorporating by reference section 980.09(4)). Applying the Fourth Amendment's reasonableness standard, we held that the government's interest in deterring recidivism by these dangerous offenders outweighs the offenders' diminished expectation of privacy. *Belleau*, 811 F.3d at 935–36.

Relying on *Belleau*, the district judge denied the plaintiffs' motion for a preliminary injunction, concluding that their claim was unlikely to succeed on the merits. That ruling was sound. Any differences between the plaintiffs here and the plaintiff in *Belleau* are too immaterial to make our holding

there inapplicable. The judge properly declined to issue a preliminary injunction.

I. Background

Each of the plaintiffs has been convicted of multiple sex offenses involving children. Benjamin Braam sexually assaulted a 14-year-old boy multiple times over a four-month period between 1999 and 2000 and was convicted of two counts of sexual contact or intercourse with a child under the age of 16. *See* WIS. STAT. § 948.02(2). Alton Antrim has twice been convicted of first-degree sexual assault of a child under the age of 13, once in 1991 for molesting his five-year-old cousin and again in 1999 for molesting another child. *Id.* § 948.02(1). Daniel Olszewski was convicted in 2014 of two counts of possession of child pornography. *Id.* § 948.12(1m). The plaintiffs served prison terms and completed their post-confinement supervision. Because they have been convicted of sex offenses "on 2 or more separate occasions,"[1] § 301.48(2)(a)(7), they are subject to lifetime GPS monitoring overseen by the defendant Kevin Carr, the Secretary of Wisconsin's Department of Corrections.

The monitoring program requires the plaintiffs to wear an ankle GPS monitor for the rest of their lives unless they permanently move to a different state. The monitor is unobtrusive and fits under clothing. It has a maximum battery life of 80 hours, and the Department of Corrections recommends that offenders charge the monitor for one hour per day. A

[1] Wisconsin interprets the phrase "on 2 or more occasions" to apply to two convictions stemming from the same underlying course of conduct. Wisconsin's interpretation of its own law is not at issue here.

sex offender can request termination of tracking after he has worn the monitor for 20 years.

The ankle monitor transmits GPS data of a sex offender's location to law enforcement, but the data is not reviewed in real time. Instead, officers typically analyze the data every 24 hours to check if an offender was present at or near schools, playgrounds, crime scenes, or anywhere else that might arouse suspicion. The ankle monitor tracks location only; it does not record video or sound. It does not restrict where an offender may go, nor does it alert law enforcement when a sex offender is in or near any particular place.

The plaintiffs filed suit under 42 U.S.C. § 1983 alleging that the lifetime monitoring requirement violates their rights under the Fourth Amendment. They sought to represent a class of offenders who are no longer under post-confinement supervision by the Department of Corrections but remain subject to the monitoring requirement.[2] With their complaint, they submitted a motion for a preliminary injunction to block the enforcement of section 301.48(2)(a)(7). The judge denied the motion, ruling that in light of *Belleau*, the plaintiffs could not show a likelihood of success on the merits of their claim.

II. Discussion

We have jurisdiction under 28 U.S.C. § 1292(a)(1) to review the judge's interlocutory order. To win a preliminary

[2] The complaint contained additional claims—including some by a different group of plaintiffs who for other reasons are subject to the monitoring requirement. Secretary Carr moved to dismiss all but the Fourth Amendment claims by these plaintiffs. The judge granted the motion, and that ruling is not at issue here.

injunction, a plaintiff must show that (1) he is likely to succeed on the merits of his claim; (2) he will suffer irreparable harm without an injunction; (3) the balance of equities weighs in his favor; and (4) an injunction furthers the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The first step in the analysis—the plaintiff's likelihood of success on the merits—is often decisive. And it is here. The district court may issue a preliminary injunction only if the plaintiff demonstrates "some" likelihood of success on the merits. "What amounts to 'some' depends on the facts of the case at hand." *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020).

We begin with the background Fourth Amendment principles. The Fourth Amendment prohibits "unreasonable searches," U.S. CONST. amend. IV, and as a general matter, "warrantless searches are presumptively unreasonable," *Horton v. California*, 496 U.S. 128, 133 (1990). In *Grady v. North Carolina*, 575 U.S. 306 (2015), the Supreme Court suggested that warrantless GPS monitoring of sex offenders could be reasonable under the Fourth Amendment, depending on an evaluation of the nature and purpose of the search and the degree of intrusion on reasonable privacy expectations.

The narrow question before the Court in *Grady* was whether satellite-based monitoring of recidivist sex offenders qualifies as a search. In a brief per curiam opinion, the Court said yes, but it went no further. That is, the Court did *not* decide whether this type of search is reasonable, but instead remanded for the North Carolina courts to make that determination, with the following instructions: "The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the

circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at 310.

Assessing reasonableness under the totality of the circumstances requires "a balancing of individual privacy interests and legitimate state interests to determine the reasonableness of the category of warrantless search that is at issue." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 n.8 (2016); *see also Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) ("[W]e must evaluate the search or seizure under traditional standards of reasonableness by assessing … the degree to which it intrudes upon an individual's privacy and … the degree to which it is needed for the promotion of legitimate governmental interests."). In keeping with this principle, the Court's instructions in *Grady* included citations to *Samson v. California*, 547 U.S. 843, 853 (2006), which held that suspicionless parole searches are reasonable because parolees have diminished expectations of privacy, and *Vernonia School District 47J v. Acton*, 515 U.S. 646, 665–66 (1995), which held that random drug searches of student athletes are reasonable under the "special needs" doctrine.

Although *Grady* did not decide whether GPS monitoring of released sex offenders is reasonable, it situated the inquiry within established Fourth Amendment doctrine. Warrantless monitoring of post-supervision sex offenders is reasonable under the Fourth Amendment if the government's interest in monitoring these offenders outweighs the privacy expectations of those who must comply with the program.

In *Belleau* we balanced those interests for one class of Wisconsin sex offenders—those who are subject to lifetime GPS monitoring after completing post-prison civil commit-

ment. The plaintiffs' likelihood of success centers on the effect of *Belleau*, so some detail about that case is warranted.

Michael Belleau was convicted of second-degree sexual assault of a child and sentenced to ten years in prison. *Belleau*, 811 F.3d at 931. He was paroled after six years, but his parole was revoked and he was returned to prison after admitting to having sexual fantasies about two young girls. *Id.* Just before he finished his prison term, the state sought to have him civilly committed as a "sexually violent person" under chapter 980 of the Wisconsin Statutes. A court made the necessary findings, and he was committed. When he was discharged from civil confinement five years later, he became subject to lifetime GPS monitoring. § 301.48(2)(b)(2). Belleau challenged the statutory monitoring requirement under the Fourth Amendment. Ruling on cross-motions for summary judgment, the district court found the statute unconstitutional and issued declaratory and injunctive relief in his favor. *Belleau v. Wall*, 132 F. Supp. 3d 1085, 1110–11 (E.D. Wis. 2015).

We reversed and upheld the statute. *Belleau*, 811 F.3d at 932–38. We began by explaining that the state has a strong interest in monitoring sex offenders like Belleau. His crimes evinced that he was a pedophile "predispose[d] … to commit sexually violent acts." *Id.* at 932–33 (quotation marks omitted). Expert testimony had suggested that his particularized risk of reoffending was between 8% to 16%. That generally aligned with empirical studies estimating that "as many as 15 percent of child molesters released from prison molest again," *id.* at 934, though we also noted that "[t]here is serious underreporting of sex crimes," *id.* at 933. We concluded that convicted sex offenders like Belleau thus pose a

significant danger to the public even after they are released from prison or civil commitment.

We also determined that lifetime monitoring advances Wisconsin's strong interest in protecting the public from recidivism by sex offenders. If a sex offender has been "present at a place where a sex crime has been committed, … the police will be alerted to the need to conduct an investigation." *Id.* at 935. More importantly, monitoring "deter[s] future offenses by making the [sex offender] aware that he is being monitored and is likely therefore to be apprehended should a sex crime be reported at a time, and a location, at which he is present." *Id.* Monitoring therefore reduces the risk of recidivism. If a sex crime is "reported at a location and time at which the [GPS] map shows the person wearing the ankle[] [monitor] to have been present, he becomes a suspect and a proper target of investigation." *Id.* at 936. Monitored sex offenders are plainly aware of this, so the monitoring program is an effective deterrent of recidivism. *Id.* at 935–36.

We then turned to the intrusion on Belleau's privacy interests. We noted that the ankle device is unobtrusive and does not entail continuous surveillance. Rather, the device "just identifies locations; it doesn't reveal what the wearer of the device is doing at any of the locations." *Id.* at 936. And because Belleau, as a convicted sex offender, was required to register and remain listed on the public sex-offender registry, there was only a modest incremental burden on his privacy interests. *Id.* Given the diminished privacy expectations of convicted sex offenders and the "slight … incremental loss of privacy from having to wear the ankle[] monitor," we held that Belleau's privacy interests did not outweigh the

substantial public interest in the information collected by the monitoring program. *Id.* Because the balance of interests weighed in Wisconsin's favor, we upheld the monitoring program as reasonable under the Fourth Amendment. *Id.* at 937.

Judge Flaum concurred. He agreed with the majority that "sex offenders who target children pose a uniquely disturbing threat to public safety." *Id.* at 938 (Flaum, J., concurring). Taking a cue from *Grady*, he located the framework for analysis in "two threads of Fourth Amendment case law: searches of individuals with diminished expectation of privacy, such as parolees, and 'special needs' searches." *Id.* at 939. In his view Wisconsin's "monitoring program is uniquely intrusive, likely more intrusive than any special needs program upheld to date by the Supreme Court." *Id.* at 940. Still, he determined that the monitoring program was a permissible special-needs search, i.e., a search "designed to serve needs beyond the normal need of law enforcement," especially in light of Belleau's "diminished expectation of privacy" as a convicted sex offender. *Id.* at 939.

Relying on *Belleau*, the district judge concluded that the plaintiffs likely would not succeed on the merits of their Fourth Amendment claim. On appeal the plaintiffs argue that *Belleau* is distinguishable. They are mistaken. The only difference between the two cases is that *Belleau* concerned the subsection of the statute that imposes the monitoring requirement on sex offenders who have been discharged from civil commitment, whereas this case concerns the provision imposing the monitoring requirement on repeat sex offenders. That difference is immaterial. Wisconsin has the same strong interest in monitoring both groups of sex

offenders. And both groups have the same diminished privacy expectations.

As we observed in *Belleau*, Wisconsin's primary interest in monitoring sex offenders is public protection, achieved by deterring convicted sex offenders from committing additional sex crimes. Our conclusion in *Belleau*—that this strong governmental interest justifies Wisconsin's monitoring program—applies equally here.

The plaintiffs contend that they are categorically less dangerous because they were not civilly committed as "sexually violent persons." Like many states, Wisconsin civilly confines sex offenders who have been determined by a court to be "sexually violent" and "likely [to] … engage in one or more acts of sexual violence" on a future occasion. WIS. STAT. § 980.01(7). It does not follow, however, that the state's interest in deterring recidivism by sex offenders applies only to this subgroup. Wisconsin also has a strong public-safety interest in monitoring repeat sex offenders for deterrence purposes.

The plaintiffs also claim that social-science research demonstrates that the GPS monitoring program is unnecessary when applied to what they characterize as less dangerous classes of sex offenders. Secretary Carr marshals opposing social-science research in defense of the monitoring program. But "[o]ur role is not to second-guess the legislative policy judgment by parsing the latest academic studies on sex-offender recidivism." *Vasquez v. Foxx*, 895 F.3d 515, 525 (7th Cir. 2018). The question before us is whether, against the backdrop of *Belleau*, the plaintiffs have demonstrated a likelihood of success on their claim that the statutory GPS monitoring requirement is unreasonable.

The plaintiffs also challenge *Belleau*'s treatment of the privacy interests of sex offenders. They have not, however, made a showing that repeat sex offenders have stronger privacy expectations than sex offenders who have been released from civil commitment. *Belleau* recognized that diminished privacy interests endure after a sex offender is discharged from prison and post-confinement supervision—in part because these offenders are listed on the sex-offender registry, which means their names, addresses, criminal histories, and other identifying information are made public. 811 F.3d at 932–33. In light of the registration requirement, a sex offender's privacy interests are "severely curtailed as a result of his criminal activities." *Id.* at 935. These privacy-curtailing burdens apply to everyone on the sex-offender registry, regardless of whether he was civilly confined under chapter 980. § 301.45. So although they were never civilly confined as "sexually violent persons," the plaintiffs' diminished privacy expectations are materially the same as sex offenders who have been discharged from civil commitment.

Recognizing the difficulty of distinguishing *Belleau*, the plaintiffs seek to undermine its foundations. They argue that *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), calls *Belleau* into question. In *Packingham* the Supreme Court addressed a North Carolina statute that prohibited sex offenders from accessing websites of which minors are members. A sex offender put an innocuous post on Facebook celebrating the dismissal of a traffic ticket against him; he was convicted of violating the statute. *Id.* at 1734. He challenged his conviction on First Amendment grounds, and the Supreme Court held that the statute was unconstitutionally overbroad. Although the statute had a "preventative purpose of keeping convicted sex offenders away from vulnera-

ble victims," the state had a "burden to show that [a] sweeping law is necessary or legitimate to serve that purpose." *Id.* at 1737. The statute permissibly prevented sex offenders from using the internet for the purpose of "engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." *Id.* As the Court explained, however, the statute swept too broadly: "[W]ith one broad stroke," the law "bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.* Accordingly, the Court held that the statute was impermissibly overbroad in violation of the First Amendment. *Id.* at 1738.

The plaintiffs' reliance on *Packingham* is misplaced. That case involved an application of the First Amendment's overbreadth doctrine. This is a Fourth Amendment case. As we've explained, the application of the Fourth Amendment's reasonableness requirement has long involved balancing the government's interests against the individual's reasonable privacy expectations—not overbreadth analysis. *Packingham* thus has no relevance here.

We conclude with a few words about a procedural issue. The judge denied the plaintiffs' motion for a preliminary injunction in an oral decision. When an appeal is taken from an oral ruling, Rules 10(b) and 30(a) of the Federal Rules of Appellate Procedure and Circuit Rule 30 require the appellant to provide a transcript of the decision. This procedural requirement facilitates the appellate process by ensuring that the court and parties are in agreement as to exactly what was

said. Transcripts also eliminate the need to listen to lengthy audio recordings in order to locate relevant excerpts.

The plaintiffs did not initially provide us with a transcript of the judge's ruling. We ordinarily enforce the transcript rule by dismissing the appeal or summarily affirming the district court. *See, e.g.*, *Jaworski v. Master Hand Contractors, Inc.*, 882 F.3d 686, 689 (7th Cir. 2018); *Dupree v. Hardy*, 859 F.3d 458, 463 (7th Cir. 2017); *Tapley v. Chambers*, 840 F.3d 370, 375–76 (7th Cir. 2016). Accordingly, we ordered the plaintiffs to show cause why we should not dismiss this appeal or summarily affirm the district court's order.

In response the plaintiffs' attorney stated that the district court had publicly posted an audio recording of the proceedings. She claimed that this was highly unusual, so it was "unclear … whether it was necessary to provide a transcript in addition to the audio recording under these unusual circumstances." Counsel also told us that she had contacted our clerk's office and was told that a transcript was unnecessary under the circumstances.

That's not a proper way for counsel to discharge her duties. Circuit Rule 30(b)(1) is unambiguous. It says, "If the appellant's brief challenges any oral ruling, the portion of the transcript containing the judge's rationale for that ruling must be included in the appendix." There are no exceptions. And the role of our clerk's office is to maintain our records; attorneys should not lean on it for legal advice regarding the interpretation of our rules.[3] Attorneys who appear before

[3] Counsel's description of her conversation with someone in our clerk's office is hearsay, and we take her at her word for present purposes. We do not, however, conclude that the employee gave her erroneous advice.

our court are obligated to familiarize themselves with the Federal Rules of Appellate Procedure and our Circuit Rules; that duty may not be outsourced.

Nevertheless, counsel appropriately apologized for her error and promptly ordered and filed a transcript of the judge's ruling. Secretary Carr informed us that he did not suffer prejudice from the delay and would not seek summary affirmance or dismissal. Accordingly, we discharge the order to show cause.

AFFIRMED