No. S18A1211

In the

Supreme Court of Georgia

Joseph Park,

Appellant,

v.

State of Georgia,

Appellee.

On Appeal from the DeKalb County Superior Court
Case No. 17CR2065

BRIEF OF APPELLEE

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INTRODUCTION

Appellant Joseph Park has raised an assortment of constitutional challenges to Georgia's sexual offender classification statute, which imposes electronic monitoring requirements on sexual offenders Georgia's Sexual Offender Registration Review Board ("SORRB" or the "Board") has classified as "sexually dangerous predators." O.C.G.A. § 42-1-14. All of them fail.

Res judicata bars a majority of Park's challenges: his ex post facto, double jeopardy, retroactive law, procedural due process, and vagueness challenges, and one of his self-incrimination arguments. SORRB classified Park as a sexually dangerous predator in 2011, when he was due to be released from prison for his 2003 convictions for child molestation and nine counts of sexual exploitation of a minor. As the statute permits, he sought judicial review of that classification, and as this Court recognized in *Berzett*—its last case dealing with § 42-1-14—he could have and should have brought any constitutional challenges to the classification statute at that time. (Indeed, he raised ex post facto and due process claims both there and here.) Res judicata bars those challenges now, raised in a general demurrer in a criminal prosecution for tampering with his monitor years after his classification decision.

Some of those challenges—ex post facto, double jeopardy, and self-incrimination—also fail because they rely on rights that apply only in criminal cases. Like Georgia's sexual offender registry statute (O.C.G.A. § 42-1-12) and Georgia's child abuse registry statute

(O.C.G.A. § 49-5-180 *et seq.*,), Georgia's sexual offender classification statute (O.C.G.A. § 42-1-14) is a civil regulatory statute, not a punitive one. Indeed, the majority of state and federal courts that have examined sex-offender monitoring statutes like Georgia's have reached that conclusion and upheld similar electronic monitoring schemes.

The remainder of Park's challenges relate to the monitoring system itself (and not to classification), and for that reason at least arguably could not have been adjudicated in his judicial-review proceeding. But they fare no better in the end; most lack any significant legal support, and none overcome the strong presumption that statutes duly enacted by the General Assembly are constitutional. For these reasons and more that follow, this Court should reject Park's claims and affirm the judgment of the superior court.

STATEMENT

A. Statutory Background

Like most states, Georgia has enacted laws to protect the public, and especially minors, from the grave harms caused by predatory sexual activity. To this end, in 1996, the Georgia General Assembly created the Georgia Sexual Offender Registry. 1996 Ga. Laws 1520 (codified at O.C.G.A. § 42-1-12).

In 2006, the General Assembly acted to further these purposes by addressing recidivism among sexual offenders. The legislature created SORRB, O.C.G.A. § 42-1-13, and required it to classify sexual offenders

based on how likely they are to "engage in another crime against a victim who is a minor or a dangerous sexual offense," *id.* § 42-1-14(a)(1). "Sexually dangerous predators," offenders SORRB classifies at the highest risk of reoffending, *see id.* §§ 42-1-12(a)(21)(B), 14(a)(2), must wear electronic monitoring systems to help guard against that risk, *id.* § 42-1-14(e).[1] The legislature expressly justified this classification system and the monitoring requirements for sexually dangerous predators—along with other steps to curb predatory sexual activity—on the basis that "recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety"; that "[m]any sexual offenders are extremely likely to use physical violence and to repeat their offenses"; and that "the cost of sexual offender victimization to society at large, while incalculable, [is] clearly exorbitant." 2006 Ga. Laws 379, 381.

Section 42-1-14 establishes three-tiered review of a sexual offender's classification. Under § 42-1-14(a)(2), SORRB makes an initial risk classification based on information including "'psychological evaluations, sexual history polygraph information, treatment history, ... personal, social, educational, and work history,' criminal history, and

[1] O.C.G.A. § 42-1-14 has been amended many times, most recently in 2016. The 2011 version of § 42-1-14, under which Park was classified, is substantially similar to the current version, particularly with respect to classification procedures.

court records" "provided by prosecuting attorneys, the Georgia Bureau of Investigation, the State Board of Pardons and Paroles, the Department of Corrections, the Department of Community Supervision, and the sexual offender himself." *Gregory v. SORRB*, 298 Ga. 675, 680 (2016) (citing O.C.G.A. § 42-1-14(a)(2)). An offender classified as a "sexually dangerous predator" may petition SORRB for reevaluation and may offer further documentation in support. *Id.* at 681; O.C.G.A. § 42-1-14(b). Finally, if unsuccessful, an offender may petition for judicial review by a superior court. O.C.G.A. § 42-1-14(c).

An offender whose classification as a sexually dangerous predator becomes final is subject to certain requirements beyond those for sexual offenders generally. *First*, the offender must "wear an electronic monitoring system . . . for the remainder of his or her natural life" and pay the costs of the system. *Id.* § 42-1-14(e). That system "locate[s] and record[s] the location of a sexually dangerous predator by a link to a [GPS] system"; "[r]eport[s] or record[s] a sexually dangerous predator's presence near or within a crime scene or in a prohibited area or the sexually dangerous predator's departure from specific geographic locations"; and has an "alarm that is automatically activated and broadcasts the sexually dangerous predator's location if the [GPS] monitor is removed or tampered with by anyone other than a law enforcement official." *Id.* The statutory provisions governing the monitoring system do not restrict the wearer's movement or travel.

Second, offenders classified as sexually dangerous predators must "report to the sheriff" in their county of residence twice a year—once more per year than sexual offenders who are not classified as such. *Compare id.* § 41-1-12(f)(4), *with id.* § 42-1-14(f). *See also Gregory*, 298 Ga. at 682–84 (describing requirements for sexually dangerous predators). *Third*, the offender is subject to employment restrictions if he committed the act for which he was required to register as a sexual offender after 2006. O.C.G.A. §§ 42-1-15(c)(2), 16(c)(2).[2]

B. Factual Background

In 2003—approximately three years before the General Assembly passed § 42-1-14—Park was convicted of child molestation and nine counts of sexual exploitation of a minor. T-4.[3] Park received a sentence of 12 years in prison, with a requirement to serve at least 8. *Id.*

Soon before he was released from custody in 2011, SORRB classified Park as a "sexually dangerous predator." T-5; *see* O.C.G.A § 42-1-14(a)(2)(B) ("The board shall render its recommendation for risk

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[2] Park concedes that he is not subject to those restrictions because he committed the act for which he was required to register as a sexual offender before 2006. R-45 n.3.

[3] Park does not appear to dispute that he was previously convicted of contributing to the delinquency of a minor. *See* R-45 n.2, R-103. Although delinquency is not an offense that requires registration under § 42-1-12, it is a conviction that SORRB could consider as part of Park's classification hearing under § 42-1-14. O.C.G.A. § 42-1-14(a)(2).

assessment classification within … [s]ix months prior to the sexual offender's proposed release from confinement if the offender is incarcerated.").[4] Park petitioned for judicial review of his classification in Fulton County Superior Court. Br. 1. In that proceeding, he challenged his classification under § 42-1-14 on due process and ex post facto grounds. *Parks* [sic] *v. SORRB*, No. 2011CV209476 (Fulton Cty. Superior Ct. March 21, 2012). The court denied Park's challenges, *id.*, and this Court denied Park's application for discretionary appeal. *Parks* [sic] *v. Alvord*, No. S12D1434 (Ga. June 5, 2012).

Because he has been classified as a sexually dangerous predator, Park must wear an electronic monitoring device (*i.e.*, an ankle monitor). *See* O.C.G.A. § 42-1-14(e). In February 2016, the DeKalb County Sheriff's Office received and responded to two separate "master-tamper alerts" from his monitoring device. T-20–23, 29–30. The second time, it determined that the device's "bridge clips" were broken. T-54–55. Park was arrested for tampering with an ankle monitor in violation of O.C.G.A. § 16-7-29(b)(5), a criminal offense. *See* T-29–31, 53–55.

[4] Because Park was a "sexual offender incarcerated on July 1, 2006, but convicted prior to July 1, 2006, of a criminal offense against a victim who is a minor," SORRB was required to "determine the likelihood that" Park would "engage in another crime against a victim who is a minor or a dangerous sexual offense." O.C.G.A. § 42-1-14(a)(1).

C. Proceedings Below

Park was indicted in DeKalb County Superior Court for tampering with an ankle monitor. *See, e.g.*, R-6. He filed a general demurrer challenging the constitutionality of O.C.G.A. § 42-1-14. R-27–31. At the hearing on the demurrer, the State presented testimony from Sergeant Christopher Bothwell, the investigator from the DeKalb County Sheriff's Office's Sex Offender Registration Tracking Team charged with oversight of Park's ankle monitor. T-14–15. He testified that Park's monitor tracks and produces an address for Park's location, but that it does not produce other information about Park; that the monitor does not subject Park to mandatory curfews, restrictions, or travel restrictions; and that Park's monitor is waterproof, is not visible when wearing pants, can be concealed under socks, does not restrict movement, and emits only a small vibration and low-tone beep when the battery needs to be charged. T-23, 33–34, 36, 38, 47, 49–51, 61. He also testified that Park is obligated to wear the monitor and to charge it approximately twice per day, and that the officers who monitor the data from Park's device have minimal contact with him, except for occasional phone calls—including when the battery on Park's monitor is low, and when the officers are notified of a master-tamper alert. T-17, 48, 57, 59–61. And he testified that officers do not use the data from Park's device for investigative purposes. T-38–39.

The trial court overruled Park's general demurrer. R-157–166. The court found Sgt. Bothwell's testimony "credible and persuasive."

R-159. It also found that "[n]o evidence that contradicted Sgt. Bothwell's testimony was presented," and that Park "presented no testimony, nor any documents or policy guidelines for the implementation of the GPS monitoring." R-159. The court made a number of factual findings about the electronic monitoring conducted via Park's ankle monitor, including that "[t]he purpose of the monitor is deterrence of future offenses"; there "are no limits on where Defendant Park can travel"; and there "is no restriction on travel or residency out of state." R-159–160. After making these factual findings, the trial court concluded that O.C.G.A. § 42-1-14 is a "civil regulatory mechanism" and "not a punitive measure," noting in particular that the General Assembly had identified a "compelling interest in protecting the public from sexual offenders"; agreed with the General Assembly's own statement that the "designation of a person as a sexual predator is neither a sentence nor punishment but simply a regulatory mechanism"; and identified preventing recidivism as a statutory purpose. R-160–161. The court ultimately rejected all of Park's constitutional challenges. R-162–63, 166.

At Park's request, the trial court certified the order for immediate review. R-167–172. This Court granted Park's application for an interlocutory appeal. The State was granted an extension to file this brief by July 9, 2018. *See* Ex. 1.

STANDARDS OF REVIEW

This Court reviews rulings on the constitutionality of a state statute *de novo*. *Heron Lake II Apartments, L.P. v. Lowndes Cty. Bd. of Tax Assessors*, 299 Ga. 598, 604 (2016). Statutes are presumed to be constitutional, and the burden is on the party claiming that the law is unconstitutional to prove it. *Ga. Dep't of Human Servs. v. Steiner*, No. S18A0281, 2018 WL 3014458, at *4 (Ga. June 18, 2018). "[F]indings of fact" must be affirmed "unless they are clearly erroneous." *City of Suwanee v. Settles Bridge Farm, LLC*, 292 Ga. 434, 436 (2013).

SUMMARY OF ARGUMENT

This Court should affirm the superior court's order.

First, res judicata bars more than half of Park's ten (or so) constitutional challenges. Park already challenged the constitutionality of § 42-1-14 in 2011 when he petitioned for judicial review of SORRB's decision to classify him as a sexually dangerous predator. Several of his constitutional challenges (ex post facto, double jeopardy, retroactive law, procedural due process, vagueness, and part of his self-incrimination challenge) directly target that classification decision and thus could have been brought in that prior proceeding. Res judicata thus bars them here.

Second, each of Park's constitutional challenges that rely on rights that apply only in criminal cases (ex post facto, double jeopardy, and self-incrimination) fails because Georgia's sexual offender classification statute, including its monitoring provisions, is a civil regulatory

statute. Under *Smith v. Doe*, whether the statute is civil or punitive in nature turns on the legislature's expressed intent and evidence of the statute's purpose and effect. The General Assembly expressed an intent to enact a civil regulatory scheme, not a criminal one. And applying the relevant factors from *Smith v. Doe* confirms that the statute is civil in purpose and effect—a conclusion shared by most courts evaluating similar sex offender classification statutes.

Third, Park's privacy-related challenges fail. Placing an electronic monitoring device on individuals classified as sexually dangerous predators is a reasonable "search" under the Fourth Amendment. Although electronic monitoring is intrusive, the privacy expectations of individuals classified as sexually dangerous predators are significantly diminished as a consequence of their serious crimes, and the state interests furthered by the system—protecting children and the public at large from the terrible and long-lasting harms caused by predatory sexual activity—are compelling. Moreover, Georgia's monitoring system does not implicate the narrow categories of conduct that the State constitutional right to privacy has been construed to cover.

Finally, the remainder of Park's constitutional challenges—retroactive law, due process, equal protection, vagueness, and takings—lack merit for reasons explained in detail below.

ARGUMENT

I. Res judicata bars many of Park's constitutional challenges.

Several of Park's claims—ex post facto, double jeopardy, retroactive law, procedural due process, vagueness, and one of his self-incrimination arguments—challenge the constitutionality of SORRB's 2011 decision to classify him as a sexually dangerous predator. *See, e.g.*, Br. 5–9, 16–22, 33–36, 40–41.

Park has already been party to a proceeding where he could have raised these challenges. When SORRB classified him as a sexually dangerous predator in 2011, Park sought judicial review of that decision and challenged the constitutionality of his classification under § 42-1-14 on due process and ex post facto grounds. Br. 1; *Parks* [sic] *v. SORRB*, No. 2011CV209476 (Fulton Cty. Superior Ct. March 21, 2012). The superior court rejected those challenges on the merits. *Id.* Park now raises those same challenges in this case, along with several others directed at the 2011 classification decision.

Res judicata bars Park from raising those challenges in this second proceeding. Res judicata bars litigation of all matters that have been or even could have been adjudicated in a prior action, as long as three prerequisites are satisfied: "(1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction." *Coen v. CDC Software Corp.*, No. S17G1375, 2018 WL 3194478, at *1–2 (Ga. June 29, 2018); *see also* O.C.G.A. § 9-12-40. Each element is met here.

First, each proceeding concerned the same "cause of action." Causes of action are identical for purposes of res judicata when each proceeding encompasses "the entire set of facts which give rise to an enforceable claim, with special attention given to the 'wrong' alleged." *Id.* at *6 (citations omitted). Put another way, "if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." *Id.* at *4 n.6 (quoting *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999)). That element is met even if the two actions present different procedural postures or theories of recovery. *See id.* at *4 n.7; *see also United States v. Stuart*, 689 F.2d 759, 761–762 (8th Cir. 1982) (res judicata barred defendant in criminal prosecution from raising arguments that could have been raised in a previous civil action); *accord Youngin's Auto Body v. District of Columbia*, 775 F. Supp. 2d 1, 8 (D.D.C. 2011) (res judicata barred party from re-litigating arguments previously raised as a defense in an administrative proceeding). And that element is readily met here, because Park's 2011 judicial-review proceeding and this one each arise out of the same set of facts: SORRB's decision to classify Park as a sexually dangerous predator. Notably, Park does not challenge the criminal statute under which he is being prosecuted. Rather, in 2011 and now, he challenges the same classification decision on grounds that § 42-1-14 is unconstitutional—indeed, he raised an identical ex post facto claim in each proceeding.

The remaining elements of res judicata are met, too. The 2011 judicial-review action was between Park and SORRB, and this action involves Park and the State. A state and a state agency are in privity. *See United States v. Sklena*, 692 F.3d 725, 732 (7th Cir. 2012) (agencies of the same government are privies for purposes of res judicata). And the superior court issued a judgment on the merits of Park's claims in his 2011 action. *See Parks* [sic] *v. SORRB*, No. 2011CV209476 (Fulton Cty. Superior Ct. March 21, 2012).

Since res judicata applies, it bars each of Park's constitutional challenges to his classification, because each of those challenges "could and should have been raised in his petition for judicial review of the Board's classification decision." *Sexual Offender Registration Review Bd. v. Berzett*, 301 Ga. 391, 394 (2017); *see* O.C.G.A. § 9-12-40 (res judicata bars "all matters put in issue *or which under the rules of law might have been put in issue* in the cause wherein the judgment was rendered" (emphasis added)).[5]

Although the superior court did not rely on res judicata below, this Court may affirm for "any reason" supported by the record. This Court

[5] Some of Park's challenges relate directly to § 42-1-14's monitoring requirement for individuals classified as sexually dangerous predators, as opposed to the classification itself. *See* Br. 23–33, 36–47 (self-incrimination, Fourth Amendment, right to privacy, takings, and equal-protection). To the extent these challenges could not have been raised in the judicial-review action, *see Berzett*, 301 Ga. at 394, res judicata would not bar them.

recently invoked that rule to decide a case on res judicata grounds. *See Snelson v. State*, 303 Ga. 504, 506 (2018). In addition, the Court may decide this appeal on these grounds even if not explicitly raised below. *See Pfeiffer v. Ga. Dep't of Transp.*, 275 Ga. 827, 829 & n.10 (2002) ("special circumstances" may warrant deciding arguments raised for first time on appeal); 19 Moore's Federal Practice, § 205.05[2] (3d ed.) (rule "is prudential and may be disregarded as justice requires"). And it should do so here in light of this Court's firm practice of "never decid[ing] a constitutional question if the decision … can be made upon other grounds." *Deal v. Coleman*, 294 Ga. 170, 171 n.7 (2013).

II. O.C.G.A. § 42-1-14 does not violate any constitutional rights limited to criminal cases.

A. The State's monitoring requirements for sexually dangerous predators are regulatory, not punitive.

Many of Park's challenges depend on constitutional protections that apply only in criminal cases. These challenges fail as a threshold matter because O.C.G.A. § 42-1-14 is a civil regulatory statute.

This Court evaluates whether a statute is regulatory or punitive under the analytical framework from *Smith v. Doe*, 538 U.S. 84 (2003). Under that framework, "the first step is to 'consider the statute's text and its structure to determine the legislative objective.'" *Steiner*, 2018 WL 3014458, at *8 (citing *Smith*, 538 U.S. at 92). "Where the legislature has exhibited an intention to enact a civil regulatory scheme," courts next assess "'whether the statutory scheme [is] so

punitive either in purpose or effect as to negate that intention.'" *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248–249 (1980)). Only "'*the clearest proof*' of punitive purpose or effect will serve to negate the legislature's evident intention." *Id.* (emphasis added) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

Park has not met that exacting standard. Applying the *Smith v. Doe* framework, this Court has concluded and repeatedly reaffirmed that O.C.G.A § 42-1-12, Georgia's sexual offender registry statute, is "regulatory, and not punitive, in nature." *See Rainer v. State*, 286 Ga. 675, 675–76 (2010); *see also Wiggins v. State*, 288 Ga. 169, 172 (2010); *Hollie v. State*, 287 Ga. 389, 391 (2010). More recently, this Court applied that framework and concluded that Georgia's child abuse registry statute is "civil, not punitive, in both purpose and effect." *Steiner*, 2018 WL 3014458, at *1, *8-*9. The same analysis reveals that O.C.G.A. § 42-1-14 is a civil regulatory statute, too.

1. The General Assembly expressed an intention to enact a civil regulatory scheme.

The text and structure of § 42-1-14 show that the legislature intended it to be regulatory in nature. In fact, the legislature said so explicitly: In the preamble that accompanied passage of O.C.G.A. § 42-1-14, the General Assembly stated that "the designation of a person as a sexual predator"—the classification that requires electronic monitoring under § 42-1-14—"is *neither a sentence nor a punishment but simply a regulatory mechanism*." 2006 Ga. Laws at 381 (emphasis

added); *see also, e.g.*, *Smith*, 538 U.S. at 93 ("[T]he Alaska Legislature expressed the objective of the law in the statutory text itself.").[6] And the remainder of the preamble supports that declaration; rather than evincing an intent to punish sexual offenders, it expresses the General Assembly's aims to promote public safety, prevent recidivism of sexual offenders, and protect children from the "extreme threat" of "sexual offenders who prey on children."[7] 2006 Ga. Laws at 381.

The codified statutory text also reflects its regulatory purpose. Section 42-1-14, which uses language like "evaluation" and "risk assessment classification," establishes a set of procedures for classifying individuals based on a wide variety of information and requires an "electronic monitoring system" for individuals found to be

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[6] This Court has routinely looked to uncodified preambles to help ascertain legislative purpose. *See, e.g.*, *State v. Andrade*, 298 Ga. 464, 467 (2016) (relying on preamble); *Murphy v. Murphy*, 295 Ga. 376, 377 (2014) (same). Although preambles have a more limited role in statutory construction, *see Spalding Cty. Bd. of Elections v. McCord*, 287 Ga. 835, 837 (2010) (preamble cannot control over plain meaning of statute but "may be considered as evidence of the meaning of an ambiguous, codified law"), they are direct evidence of legislative intent, which—unlike with statutory construction—is the touchstone for determining whether a statute is regulatory or punitive, *see Smith*, 538 U.S. at 92–93.

[7] These nonpunitive purposes contrast with the purposes of contemporaneous amendments to Titles 16, 17, and 35. *See, e.g.*, 2006 Ga. Laws at 379–80 (describing amendments to Titles 16, 17, and 35 as, for example, "chang[ing] punishment" and "increas[ing] the mandatory minimum term of imprisonment").

at higher risk of recidivism. Nothing in the text of the statute indicates that it is meant to punish.

The structure of the larger statutory scheme pertaining to convicted sexual offenders, of which § 42-1-14 is a part, confirms that the legislature meant it to be regulatory. *See* O.C.G.A. § 42-1-12 *et seq*. This Court has already determined that § 42-1-12, the key section in that statutory scheme that establishes the sexual offender registry, is regulatory, not punitive. Section 42-1-14's placement within a civil regulatory statutory scheme suggests that it, too, is regulatory.

2. O.C.G.A. § 42-1-14 is civil, not punitive, in purpose and effect.

Once it is established that the legislature intended to enact a civil regulatory scheme, courts then "examine whether any negative effects of the [statute] are objectively 'so punitive in form and effect as to render them criminal despite [the legislature's] intent to the contrary.'" *Steiner*, 2018 WL 3014458, at *8 (quoting *Hudson v. United States*, 522 U.S. 93, 104 (1997)). For this analysis, this Court has looked to the seven factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and focused on the five "most relevant" factors the U.S. Supreme Court relied on when evaluating Alaska's sexual offender registry statute in *Smith v. Doe*: "whether the [statute] 'has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is

excessive with respect to this purpose.'" *Id.* (quoting *Hudson*, 522 U.S. at 104). Applying those factors here confirms that § 42-1-14 "is civil, not punitive, in both purpose and effect." *Id.*

a. *First,* requiring convicted offenders classified as sexually dangerous predators to wear an electronic monitoring device "does not fit within the historic category of punishment," *id.*, because it is not akin to "public shaming, humiliation, [or] banishment," *Smith*, 538 U.S. at 98. The trial court correctly found that the statute does not create "inclusion or exclusion zones," place "limits on where … Park can travel," or "restrict[] … travel or residency out of state," R-159—let alone "banish" him. *See also State v. Bowditch*, 364 N.C. 335, 348 (2010) ("Here, the [banishment] argument is unconvincing because [North Carolina's electronic-monitoring system] expels no one from anywhere."). Nor is the monitoring requirement aimed at "shaming." If "even *publicizing* information about a sex offender's criminal record [is] not akin to historic 'shaming' punishments," *see Steiner*, 2018 WL 3014458, at *8 (citing *Smith*, 538 U.S. at 98-99), then neither is requiring an individual to wear an ankle monitoring device "small enough to be concealed by a sock" and "not visible to others when … wearing full-length pants." R-160; *see also Belleau v. Wall*, 811 F.3d 929, 943 (7th Cir. 2016) (Flaum, J., concurring) ("Early forms of shaming were designed to be noticeable, even prominent, while the GPS device is designed to be inconspicuous."); *id.* at 938 (monitoring not meant "to shame [the wearer], but to discourage him from yielding

to his sexual compulsion, by increasing the likelihood that if he does he'll be arrested").

Park's argument that electronic monitoring fits into traditional categories of punishment like probation or parole, Br. 7–9, is unavailing. "Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction." *Smith*, 538 U.S. at 101. Section 42-1-14 has no such conditions, and the requirements associated with monitoring—checking in with law enforcement twice per year, charging the monitor twice a day, and notifying law enforcement of intended travel out of state (*See* O.C.G.A. §§ 42-1-12(f)(4), 14(f); T-48; R-159–160)—are different in kind and far less onerous. Other state and federal courts agree: the Seventh Circuit concluded that Wisconsin's similar statute does not impose conditions that rise to the level of punishment, *see Belleau*, 811 F.3d at 937; *id.* at 943 (Flaum, J., concurring in judgment), and the North Carolina Supreme Court has concluded that its state's lifetime sex-offender monitoring "program is far more passive and is distinguishable from the type of State supervision imposed on probationers," *Bowditch*, 364 N.C. at 346. *But see Riley v. N.J. State Parole Bd.*, 219 N.J. 270, 275 (2014) (concluding that New Jersey's lifetime electronic-monitoring statute for sex offenders is "essentially parole supervision for life" and overturning the statute).

b. *Second*, § 42-1-14 does not promote the traditional aims of punishment in a way that would suggest it is meant to be punitive. The statute is not aimed at retribution because it makes clear that SORRB does not classify offenders based only on their convictions for sexual offenses. Rather, SORRB must evaluate "the likelihood that a sexual offender will engage in another crime against a victim who is a minor or a dangerous sexual offense" based on a wide range of available information, including "psychological evaluations, sexual history polygraph information, treatment history, and personal, social, educational, and work history, … psychosexual evaluation or sexual history polygraph[s]" and treatment records. O.C.G.A. § 42-1-14(a)(1), (2); *see also Gregory*, 298 Ga. at 680. The record is devoid of evidence pointing to a retributive purpose for § 42-1-14, and Park offers no other theory supporting one.

There is no dispute that one purpose of § 42-1-14's monitoring requirement is deterrence. *See, e.g.*, R-160 (trial court finding that "[t]he purpose of the monitor is deterrence of future offenses"). But the U.S. Supreme Court has explained that "[a]ny number of governmental programs might deter crime without imposing punishment," and holding otherwise "would severely undermine the Government's ability to engage in effective regulation." *Smith*, 538 U.S. at 102 (citation omitted). So too here. The intended deterrent effect of § 42-1-14's monitoring system is specific to the offenders subjected to it; it is meant to prevent a small group of convicted sexual offenders deemed most

likely to re-offend from committing additional offenses by making clear to the individual that he or she is likely to be caught if he or she tries to, or does, commit another sexual offense. *See* O.C.G.A. § 42-1-14(e)(2); 2006 Ga. Laws at 381; *see also Belleau*, 811 F.3d at 938, 940 (Flaum, J., concurring). And the General Assembly has chosen this method of preventing recidivism to serve its broader goal of public safety. This intended deterrent effect and its ultimate aim is different in kind from the "general deterrence" often identified as a "function[] properly … of criminal law." *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (imposing limit on civil commitment of "dangerous sexual offenders" "lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment" (citations omitted)); *see also Steiner*, 2018 WL 3014458, at *9 (concluding that listing individuals on child abuse registry could not be characterized as a "warning to others to avoid acts of abuse"); *In re Justin B.*, 405 S.C. 391, 407 (2013) (South Carolina's lifetime sex-offender electronic monitoring statute "may deter sex offenders from re-offending and thus support the civil purposes of protecting communities").

c. *Third*, § 42-1-14 does not impose an "affirmative disability or restraint" sufficient to transform a civil statute into a punitive one. *Steiner*, 2018 WL 3014458, at *9. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 U.S. at 100.

The majority of courts to assess electronic monitoring systems like Georgia's have concluded that they do not impose a significant disability or restraint. As the South Carolina Supreme Court has pointed out, wearing a monitoring device does not actually impose "physical restraint," though it does permit "non-invasive electronic monitoring." *See Justin B.*, 405 S.C. 391 at 406. Other courts have recognized that a sex offender may be affected by wearing a monitor, but that the overall effect is not significant enough to be punitive. *See, e.g.*, *Bowditch*, 364 N.C. at 348; *Belleau*, 811 F.3d at 943 (Flaum, J., concurring) (noting that "as GPS devices become smaller and batteries last longer, any affirmative restraint imposed by this law will, over time, become less and less burdensome"). *But see Riley*, 219 N.J. at 295.[8] Courts have also recognized that neither inclusion in sex-offender registries nor electronic monitoring of sex offenders amounts to affirmative disabilities or restraints because they are "less harsh than the sanctions of occupational debarment, which [the U.S. Supreme

[8] *State v. Davis*, No. S17G1333, 2018 WL 2292979 (Ga. May 21, 2018), is not conclusive of the "legal disability" analysis here. In *Davis*, this Court determined that inclusion on the sexual offender registry under § 42-1-12 is a "legal disability" in the context of pardons, but distinguished that analysis from ex post facto analysis. *Id.* at *1–2, *4–6. Nor does *Gregory* provide an answer. Acknowledging that physically affixing an electronic monitor to a sexually dangerous predator gives rise to a liberty interest that requires an evidentiary hearing for purposes of procedural due process does not answer whether electronic monitoring is a punitive "disability or restraint." *See id.* at 686–90.

Court has] held to be nonpunitive." *See Smith*, 538 U.S. at 100 (sex-offender registry); *see also, e.g.*, *Justin B.*, 405 S.C. at 406 (electronic monitoring); *Bowditch*, 364 N.C. at 348–49 (same).

The conditions Georgia's monitoring system imposes are not meaningfully distinguishable from those considered by these other courts. As with those systems, Park's monitor transmits only general location data—not his activities; it is easily concealable; and it does not restrict his freedom of movement or travel or establish a curfew. T-33–39, 50 ("He was allowed to go anyplace."). The monitor is even waterproof "to a point"; swimming or emergence is not "encourage[d]," but also not prohibited. T-33. And although he must charge the monitor "about twice a day," he can do so outside the home (*e.g.*, while driving, or with any source of electricity). T-33–39, 48, 57, 60-61. These constraints, while real, are the kind of "minor and indirect" effects that do not rise to the level of punishment. *Smith*, 538 U.S. at 100.

d. *Fourth*, § 42-1-14 is rationally connected to nonpunitive purposes—a "'[m]ost significant' factor" in the *Smith* analysis. *Smith*, 538 U.S. at 102. The General Assembly enacted an electronic monitoring system to protect children and the public from the serious physical harms of predatory sexual activity. 2006 Ga. Laws at 381; *see also supra* Part II.A.1. It sought to advance these compelling interests in part by targeting recidivism—that is, by preventing known sexual offenders from repeating their offenses. *See* 2006 Ga. Laws at 381.

Preventing recidivism, taken alone, also is not a punitive purpose. *Smith*, 438 U.S. at 102 (describing combating "the danger of recidivism" as a "regulatory objective").

Electronic monitoring of individuals classified as sexually dangerous predators is rationally connected to these nonpunitive purposes. A sexually dangerous predator who knows his location is being monitored and recorded very well may be less likely to commit another sexual offense because he knows his location data would link him to the crime. R-165; O.C.G.A. § 42-1-14(e); *see also, e.g.*, *Belleau*, 811 F.3d.at 940 (Flaum, J., concurring) ("The program reduces recidivism by letting offenders know that they are being monitored and creates a repository of information that may aid in detecting or ruling out involvement in future sex offenses."). Other courts evaluating electronic monitoring statutes like Georgia's have reached the same conclusion. *See, e.g.*, *Justin B.*, 405 S.C. at 407 ("[I]t is rational to conclude the continuous monitoring of these offenders supports the General Assembly's valid purpose of aiding law enforcement in the protection of the community.").

Park objects that the State has not shown a rational connection between its monitoring system and its goal of preventing recidivism because it has not provided enough evidence that sexual offenders are more likely to reoffend. Br. 13. But the State need not rely on statistics as justification; those individuals are monitored based on an *individualized determination* based on a variety of evidence that each

is in fact likely to commit another dangerous sexual offense in the future. In any event, both the General Assembly and many courts have acknowledged and expressed concern about the high rates of recidivism for convicted sex offenders. *See, e.g.*, 2006 Ga. Laws 381; *McKune v. Lile*, 536 U.S. 24, 33 (2002); *Belleau*, 811 F.3d at 934; *Bowditch*, 364 N.C. at 352. And in all events, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance"; a statute's nonpunitive purpose must be a "sham or mere pretext" to fail this factor. *Smith*, 538 U.S. at 103 (quoting *Hendricks*, 521 U.S. at 371). Park has not made that showing.

e. *Fifth*, § 42-1-14 is not excessive in relation to its nonpunitive purpose. The analysis of the first four *Smith* factors and the record in this case show that Georgia's monitoring system is tailored to serve nonpunitive ends without imposing restraints unnecessary to serving those ends. Electronic monitoring is required only for the narrow subset of sexual offenders whom the Board has determined are at risk of committing dangerous sexual offenses in the future. *See* O.C.G.A. §§ 42-1-12(a)(21); 42-1-14(a)(1).[9] As explained above, the monitoring is relatively narrow in scope and designed to be unobtrusive. Although some individuals in the narrow set of sexual offenders classified as

[9] Sgt. Bothwell testified that of the 256 sexual offenders that were part of his caseload, only 3 had been classified as sexually dangerous predators. T-15.

sexually dangerous predators may be required to wear an electronic monitoring device for life, that is only true so long as the offender is still classified as sexually dangerous. *See* O.C.G.A. § 42-1-14(e).[10] And finally, requiring sexually dangerous predators to pay for their monitors is not a punishment, either. Rather, that requirement merely seeks to have sexually dangerous predators internalize a small measure of the costs they have imposed on the State by engaging in conduct that demonstrates a likelihood of future engagement in predatory sexual activity. *See* 2006 Ga. Laws at 380–81; *see also* *Mueller v. Raemisch*, 740 F.3d 1128, 1133 (7th Cir. 2014) (fee for monitoring equipment imposed "in virtue of the cost of obtaining and recording information about their whereabouts and other circumstances," which the plaintiffs imposed on Wisconsin "[b]y virtue of their sex offenses").

In circumstances similar to these, other courts have concluded that electronic monitoring of the most dangerous sex offenders is not excessive. *See, e.g.*, *Belleau*, 811 F.3d at 943–94; *State v. Muldrow*, 900

[10] On September 4, 2012, SORRB promulgated a rule allowing for review of a sexually dangerous predator's classification after ten years. Ga. Comp. R. & Regs. 594-1-.04(e)(2) (2013). SORRB rescinded that rule in 2017. SORRB's standing procedures now indicate that sexually dangerous predators may be able to secure additional review ten years after their initial classification. *See* Sexual Offender Registration Review Board Standing Procedure at 7.2, goo.gl/53rS2a (last visited July 8, 2018).

N.W.2d 859, 869–70 (Wis. Ct. App. 2017); *Justin B.*, 405 S.C. at 408; *Bowditch*, 364 N.C. at 352 ("The [electronic monitoring] program at issue is reasonable when compared to the unacceptable risk against which it seeks to protect."); *cf.* *Doe v. Bredesen*, 507 F.3d 998, 1000 (6th Cir. 2007) (Tennessee's satellite monitoring for certain sex offenses during probation not punitive and does not violate prohibition against ex post facto laws); *State v. Trosclair*, 89 So.3d 340 (La. 2012) (lifetime supervision of sex offenders).[11]

* * *

In sum, Park has not met his burden of showing "the clearest proof that the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Hendricks*, 521 U.S. at 361 (alterations in original) (citations omitted). The five *Smith* factors confirm that § 42-1-14 is a civil regulatory statute, not a punitive one.

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[11] The State is aware of only one case where a state court of last resort invalidated a lifetime, non-probation, sex-offender electronic monitoring statute on ex post facto grounds. *See Riley v. N.J. State Parole Bd.*, 219 N.J. 270, 298 (2014); *cf. Commonwealth v. Cory*, 911 N.E.2d 187, 197 (Mass. 2009) (GPS monitoring during probation violates prohibition against ex post facto laws). *Riley* is not persuasive because the court improperly glossed over *Smith*'s "most significant" factor, *i.e.*, whether the statute is rationally connected to a non-punitive purpose. *See Riley*, 291 N.J. at 296–97. The statute in *Riley* also required offenders to provide access to their homes and to inform the State of their scheduled work hours on a weekly basis. *Id.* at 276–77. *Riley* is an outlier and should be treated as such.

B. O.C.G.A. § 42-1-14 does not violate the prohibition against ex post facto laws.

Because § 42-1-14 is part of a civil regulatory scheme and does not impose punishment, *see supra* II.A, the prohibition against ex post facto laws does not bar applying it to Park. The prohibition against ex post facto laws only "forbids the application of any new punitive measure to a crime already consummated." *Hendricks*, 521 U.S. at 370. It "does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 U.S. at 103. That someone may be subject to § 42-1-14's monitoring requirements in part as a result of having previously committed sexual offenses does not make those requirements "punishment" for ex post facto purposes. *Hendricks*, 521 U.S. at 370–71.

Park's ex post facto challenge also fails because § 42-1-14 did not "appl[y] retrospectively" to Park. *Thompson v. State*, 278 Ga. 394, 395 (2004); *see also Hendricks*, 521 U.S. at 370–71. Section 42-1-14's monitoring requirements were enacted in 2006 and apply only to sexual offenders SORRB has classified as "sexually dangerous predators." *See* O.C.G.A. § 42-1-14(e). The Board made that classification as to Park in 2011, more than five years after § 42-1-14's monitoring requirements went into effect. T-5. Because the basis for imposing the monitoring requirements on Park was SORRB's 2011 classification, and that occurred well after the statute went into effect, the statute was not applied to him retrospectively. *See Hendricks*, 521 U.S. at 371 (law

imposing civil commitment based on determination of person's present condition and future dangerousness did not have retroactive effect even though past criminal behavior could be taken into account). *But see Belleau v. Wall*, 811 F.3d 929, 942 (7th Cir. 2016) (Flaum, J., concurring) (expressing view that sex-offender monitoring statute applied retroactively because burden imposed by statute was attributable to defendant's original convictions).

C. O.C.G.A. § 42-1-14 does not violate the Double Jeopardy Clause.

The Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson*, 522 U.S. at 99; *accord Hendricks*, 521 U.S. at 369; *Wilbros, LLC v. State*, 294 Ga. 514, 516–17 (2014). Park's double jeopardy challenge therefore fails because SORRB proceedings under § 42-1-14 are civil, not criminal, in nature, and § 42-1-14 imposes certain regulatory requirements, not "punishment." *See supra* II.A. Moreover, as discussed above, SORRB's classification of Park as a sexually dangerous predator is ultimately based "upon a finding that a sexual offender presents a significant risk of committing additional dangerous sexual offenses," which may be based on a variety of evidence beyond the relevant sexual offenses. *Gregory*, 298 Ga. at 680.

D. O.C.G.A. § 42-1-14 does not violate the right against self-incrimination.

Both the federal and state constitutions protect a person from being compelled to produce incriminating evidence. U.S. Const. amend. V; Ga. Const. art. I, sec. I, para. XVI. Neither constitution protects a person from *voluntarily* incriminating himself. *See South Dakota v. Neville*, 459 U.S. 553, 562 (1983); *Olevik v. State*, 302 Ga. 228, 242–43 (2017). Park's novel argument concerning his right against compelled self-incrimination fails for this reason. He contends that requiring him to wear an electronic monitoring device compels him to incriminate himself because it has the capacity to record his "presence near or within a crime scene." Br. 40 (quoting O.C.G.A. § 42-1-14(e)(2)). But when Park decides where to go and what to do, he knows the device is recording his movements. This means that when Park's device records his general location data—even if that hypothetically included a location where he committed a crime—he necessarily allows his monitor's presence at that particular location to be recorded voluntarily. Using it as evidence against him therefore would not violate his right against compelled self-incrimination.[12]

Park's other self-incrimination argument fails too. He argues that his right against compelled self-incrimination was violated when the superior court reviewed SORRB's classification of Park as a sexually

[12] In addition, Park has not identified any instance where the State has in fact used this data against him in a criminal proceeding.

dangerous predator, because the superior court was permitted to draw an adverse inference from his refusal to testify at the 2011 judicial-review hearing. Br. 19 & n.9 (citing O.C.G.A. § 42-1-14(c)). This is exactly the type of claim that Park could and should have raised in the judicial-review proceeding, and res judicata bars it. *See supra* I. Moreover, neither the state nor federal constitutions forbids courts from permitting adverse inferences to be drawn from a person's refusal to testify in a civil case. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Simpson v. Simpson*, 233 Ga. 17, 20 (1974). The judicial-review hearing was a civil proceeding, so the no-adverse-inference rule does not apply.

III. O.C.G.A. § 42-1-14 does not offend Park's constitutional rights against unreasonable searches or his state constitutional right to privacy.

A. Monitoring individuals classified as sexually dangerous predators under O.C.G.A. § 42-1-14 is a reasonable search under the Fourth Amendment.

When a state attaches a device to a person's body to track that individual's movements, the state conducts a "search" subject to the Fourth Amendment. *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015). "That conclusion, however, does not decide the ultimate question of the … constitutionality" of a state program that requires such monitoring devices, because "[t]he Fourth Amendment prohibits only *unreasonable* searches." *Id.* at 1371; *see* U.S. Const. amend. IV.

Absent evidence of a clear practice at the time of ratification approving or disapproving a type of search, the reasonableness of a particular search "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (citation omitted). When law enforcement officers seek to conduct a search to find evidence of a crime, that balancing generally requires getting a warrant first. *Id.* at 653. But in other circumstances, the balance shakes out differently. For example, depending on the level of intrusion and the government interests at stake, searches meant to serve needs "beyond the normal need for law enforcement" may be conducted without a warrant or even without individualized suspicion. *Id.* (random drug testing of student athletes was reasonable). Searches may also be reasonable in light of an individual's "diminished expectations of privacy"—for example, because of his employment or legal status. *Maryland v. King*, 569 U.S. 435, 447 (2013) (quoting *Illinois v. McArthur*, 531 U.S. 326, 330 (2001)); *see Samson v. California*, 547 U.S. 843, 857 (2006) (suspicionless search of parolee was reasonable).

Applying these principles here, requiring convicted sexual offenders classified as sexually dangerous predators to wear electronic monitoring devices is a reasonable search permitted by the Fourth Amendment. Electronic monitoring is intrusive, but the privacy expectations of sexually dangerous predators are significantly

diminished as a consequence of their serious criminal activities, and the state interests furthered by the system are compelling.

1. The monitoring system imposed by O.C.G.A. § 42-1-14 implicates privacy interests. A GPS device is attached to the wearer's person and transmits the wearer's location to a contractor who monitors and records that data. *See, e.g.*, T-56–61. That intrusion is by no means insignificant. *Cf. Gregory*, 298 Ga. at 686 (concluding that the State's monitoring system for sexually dangerous predators implicates a liberty interest).

Yet "[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.'" *Vernonia*, 515 U.S. at 654. And "[w]hat expectations are legitimate varies, of course, with context." *Id.* Relevant here, certain kinds of legal relationships with the State can reduce an individual's legitimate privacy expectations. *Id.* For example, individuals on parole or probation "'do not enjoy the absolute liberty to which every citizen is entitled'" but are instead subject to various conditions that substantially limit their privacy. *Samson*, 547 U.S. at 848–49 (quoting *United States v. Knights*, 534 U.S. 112, 119 (2001)). The privacy expectations of those individuals are thus "significantly diminished," and states may subject them to highly intrusive warrantless or suspicionless searches to further a legitimate state interest. *Knights*, 534 U.S. at 120 (police may search probationer's house at any time based only on reasonable suspicion); *see also Samson*, 547 U.S. at 857.

The privacy expectations of sexually dangerous predators are diminished for similar reasons. Although they are not "on the continuum of state-imposed *punishments*" like probationers or parolees, *see Samson*, 547 U.S. at 850 (citation omitted) (emphasis added), they share the same understanding that their status—imposed as a result of their own serious criminal conduct—comes with substantially reduced expectations of privacy. Sexually dangerous predators are already "sexual offender[s]" by definition, *see* O.C.G.A. § 42-1-12(a)(21), and state law has already attached significant privacy-reducing conditions to that status: sexual offenders must register annually with law enforcement, and their current photographs, identifying information, home addresses, and convictions are made available to the public in various locations—including on a searchable website, *id.* § 42-1-12(i). Many sexual offenders (though not Park) are also subject to restrictions on where they may work. *Gregory*, 298 Ga. at 679. Finally, sexual offenders are convicted felons, a status that comes with its own set of restricted legal rights and thus further reduces expectations of privacy. *See, e.g.*, *People v. Garvin*, 847 N.E.2d 82, 93 (Ill. 2006) ("[T]he reasonable expectation of privacy of the defendant in this case is also substantially reduced due to his status as a convicted felon."); *Polston v. State*, 201 S.W.3d 406, 411 (Ark. 2005) (same); *Doles v. State*, 994 P.2d 315, 319 (Wyo. 1999) (same). Thus, sexual offenders are already "on notice… that some reasonable police intrusion on his privacy is to be expected." *King*, 569 U.S. at 447; *see also Belleau*, 811 F.3d at 936.

This means that "the *incremental effect* of the challenged statute" on legitimate privacy interests is not nearly as significant for a sexually dangerous predator as it would be for someone else. *Belleau*, 811 F.3d at 934–35. For a law-abiding citizen, attaching a device to his person that records his general whereabouts very well may upend his legitimate privacy expectations. But for an individual who, as a consequence of his serious criminal conduct, has already had his photograph, identifying information, and sexual offenses publicized on an easily accessible website, that additional measure must be viewed as relatively less significant. And it is also of less moment that the small monitoring device at issue might (but might not) identify the wearer as a sexual offender to someone in public who happens to see it; after all, the government has *already* told the public that individual is a sex offender on a website. However invasive this monitoring sounds in the abstract, it is not an unreasonable burden for sexually dangerous predators.

2. The State's monitoring system for sexually dangerous predators promotes legitimate state interests. The General Assembly enacted the monitoring requirement to protect children and the public at large from predatory sexual activity—"an extreme threat to the public safety." 2006 Ga. Laws at 381. "It is 'evident beyond the need for elaboration' that government has a compelling interest in protecting the physical and psychological well-being of children." *Scott v. State*, 299 Ga. 568, 574 (2016) (quoting *Osborne v. Ohio*, 495 U.S. 103, 109 (1990)). This

Court has also recognized a "compelling interest in protecting the public's safety." *Rhodes v. State*, 283 Ga. 361, 363 (2008). And the threat sexual predators pose to children and to the public is particularly grave in light of "the long-term effects suffered by victims of sex offenses." 2006 Ga. Laws at 381.

The General Assembly sought to advance these compelling interests in part by targeting recidivism—that is, by preventing known sexual offenders from re-offending. 2006 Ga. Laws at 380. Section 42-1-14 reflects and furthers that purpose. *Cf. Samson*, 547 U.S. at 853 (acknowledging in the context of parole and probation that "a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship … warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment."). The statute requires monitoring for only a narrow subset of convicted sexual offenders whom the Board has determined are at risk of committing dangerous sexual offenses in the future. *See* O.C.G.A. § 42-1-12(a)(21); T-15. And as the trial court explained, an offender who knows his location is being monitored and recorded is less likely to commit another sexual offense because his location data will link him to the crime. R-165; *see also Belleau*, 811 F.3d at 940 (Flaum, J., concurring) ("The program reduces recidivism by letting offenders know that they are being monitored and creates a repository of information that may aid in detecting or ruling out involvement in future sex offenses."); *Kaufman v. Walker*, No. 2017AP85, 2018 WL 2459514, at *6–7 (Wis.

Ct. App. May 30, 2018). A study of similar GPS monitoring of California parolees bears this out: they were "*half as likely* as traditional parolees to be arrested for or convicted of a new sex offense." *Belleau*, 811 F.3d at 936 (emphasis added) (citing 2012 report).[13]

Although narrow tailoring is not a prerequisite for a reasonable search, *see Vernonia*, 515 U.S. at 663, the monitoring system is nonetheless carefully tailored to serve § 42-1-14's ends without unnecessary intrusions on a sexually dangerous predator's privacy or liberty. Unlike the sexual offender registry, the monitoring of any given sexually dangerous predator is generally shielded from public view: the device is small enough to be hidden under pants or socks, R-160, and the location data is not public. The device transmits only general location data, not what the wearer "is doing at any particular location." R-164; *see also Belleau*, 811 F.3d at 936. And neither the device nor the governing statute limits the wearer's freedom of movement or travel. T-33 (device is waterproof); T-34; 60; R-159–60 (no limits on travel).

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[13] Because sexually dangerous predators' privacy expectations are diminished, the State need not rely on the "special needs" doctrine to justify monitoring without a warrant. *See, e.g.*, *King*, 569 U.S. at 462–63; *Samson*, 547 U.S. at 855 n.4. But in any event, the monitoring system does serve "special needs" "beyond the normal need for law enforcement" because the State monitors sexually dangerous predators not "to discover evidence of criminal wrongdoing," *Vernonia*, 515 U.S. at 653, but to deter those specific offenders from criminal wrongdoing, *see Belleau*, 811 F.3d at 940 (Flaum, J., concurring).

* * *

The electronic monitoring required by § 42-1-14 is a reasonable search under the Fourth Amendment. The privacy interests implicated by the monitoring system are reduced by the diminished privacy expectations of the sexually dangerous predators subject to it; the State interests in protecting children and the public from the severe and long-lasting harms of predatory sexual activity are compelling; and the monitoring system is carefully tailored to meet the special problem of sexual offender recidivism without undue burdens on privacy or liberty.[14]

B. O.C.G.A. § 42-1-14 does not violate Park's right to privacy under the Georgia Constitution.

This Court has interpreted the Georgia Constitution's Due Process Clause to include a "right of privacy." *Powell v. State*, 270 Ga. 327, 329 (1998); *see* Ga. Const. art. I, sec. 1, para. I ("No person shall be deprived of life, liberty, or property except by due process of law."). The contours of this right have not yet been fully established. Descriptions of the right in the abstract are often sweeping, *e.g. Powell*, 270 Ga. at 329–30 ("right to withdraw from the public gaze"; "right to live as one will";

[14] Park mentions the State constitutional right against unreasonable searches only in passing (Br. 33) and offers no argument or citation specific to that claim, or any suggestion that the claim stands independent of his Fourth Amendment challenge. He has therefore waived any separate claim under the Georgia Constitution. *See Steiner*, 2018 WL 3014458, at *3 n.6.

"right to be let alone"), but so are descriptions of its limits, *id.* at 330 (right to privacy not implicated when a person's "presence in public is not demanded by any rule of law," a person is "interfering with the rights of other individuals or of the public," or the case involves an issue with which the public has a "legitimate concern"). Given the absence of a clear standard for adjudicating the right—as well as the gravity of determining that it applies—it is unsurprising that this Court has applied it cautiously. So far, the Court has concluded that the right protects some, but not all, sexual conduct, *Powell*, 270 Ga. at 336 (right to privacy protects "private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent"); protects the right to refuse certain medical treatment, *Zant v. Prevatte*, 248 Ga. 832, 833 (1982); and offers some protection against disclosure of medical records, *King v. State*, 272 Ga. 788, 793 (2000).

Whatever the bounds of the State constitutional right to privacy, the monitoring system at issue in this case does not implicate it. Monitoring sexually dangerous predators places no restrictions on sexual conduct protected by the right to privacy (however far that bound extends), and it has nothing to do with medical records or treatment. Nor does electronic monitoring expose offenders to the public in a way that might implicate some of this Court's broader descriptions of the State constitutional right to privacy. Moreover, unlike the sexual offender registry—which Park does not challenge—the electronic monitoring required by § 42-1-14 generally does not

publicize anything about the offenders subject to it. The monitoring devices themselves can be concealed from public view, and—even if visible—they at most permit members of the public to speculate why an individual is wearing one (after all, GPS devices are used for more than monitoring sexually dangerous predators). And nothing in the statute or this record suggests that the location data generated by the monitoring devices is not private. This case offers no basis for extending the right to privacy beyond its present reach.

Even if § 42-1-14's monitoring system implicated the right to privacy, however, it would pass strict scrutiny for the reasons provided at length above. *See supra* III.A. If an individual has molested a child or engaged in other predatory sexual activity and has been classified as someone who is likely to do so again, the State may further its compelling interests in protecting children and the public by imposing reasonable requirements meant to deter that predatory conduct.

IV. Park's remaining constitutional challenges fail.

A. O.C.G.A. § 42-1-14 does not violate the State constitutional prohibition against retroactive laws.

As an initial matter, Park has waived his argument that O.C.G.A. § 42-1-14 violates the State constitutional prohibition against retroactive laws, Ga. Const. art. I, sec. I, para. X, because he raised it for the first time in a post-hearing reply brief in the trial court and the trial court did not address it. R-130–32; *see, e.g.*, *Barany-Snyder v. Weiner*, 539 F.3d 327, 331–32 (6th Cir. 2008) (issues raised for the first

time in a reply brief are not preserved for appeal); *Rains v. Flinn*, 428 F.3d 893, 902 (9th Cir. 2005) (same); *cf. Rickman v. State*, No. S18A0841, 2018 WL 3014212, at *4 (June 18, 2018).

Even if this Court were to reach the merits, Park's retroactive-law challenge to § 42-1-14 would still fail. A law violates the prohibition against retroactive laws only if it "takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already past." *DeKalb Cty. v. State*, 270 Ga. 776, 778 (1999) (citation omitted). Section 42-1-14 does neither of these things. Any obligations, duties, or liabilities arising from SORRB's classification of Park arose because the Board determined in 2011 that he is at risk of committing certain sexual offenses in the future, *see* O.C.G.A. § 42-1-14(a)(1), not because—or at least not only because—he was convicted of child molestation and other sexual offenses in 2003. *See supra* II.B. And this Court has previously rejected the argument that being convicted of a crime and sentenced for it somehow grants the offender a "vested right" to avoid additional negative civil consequences with some connection to the commission of that crime. *See Bryan v. Bryan*, 242 Ga. 826, 828 (1979). This makes good sense. Unlike civil judgments, which may award vested rights to payment of money or equitable relief, *see, e.g.*, *Candler v. Wilkerson*, 223 Ga. 520, 521–22 (1967), the judgment entered following Park's 2003 convictions imposed

criminal *penalties* for his conduct, not a "right" to not have any further civil consequences imposed based on that conduct.

B. Park's procedural due process challenge fails.

Park contends that his classification as a sexually dangerous predator in 2011 violated due process because due process requires (1) judicial review of that classification that includes the constitutional protections required for a criminal proceeding; and (2) an opportunity for "continuing review" of his classification. Br. 19–22.[15] To begin, res judicata bars this challenge, which could and should have been raised on judicial review of his classification in 2011. *See supra* I; *see also Berzett*, 301 Ga. at 394.

In any event, these arguments lack merit. Park contends that he should have been afforded the constitutional protections required for a criminal proceeding in his judicial-review proceeding because § 42-1-14 imposes criminal punishment. Br. 20. It does not, *see supra* II.A., so this argument fails, *see Steiner*, 2018 WL 3014458, at *7–8.

Nor does due process require "continuing review" of Park's classification as a sexually dangerous predator beyond the three-tiered review procedures the statute already affords. Classification as a

[15] Park appears to rely on only federal due process cases, so he has waived any state constitutional due process challenge. *Steiner*, 2018 WL 3014458, at *3 n.6.

sexually dangerous predator implicates a "serious" liberty interest. *Gregory*, 298 Ga. at 686. But this just means *some* degree of procedural protections are required—in general terms, "notice and an opportunity to be heard"—to reduce the risk of an erroneous deprivation with respect to the affected liberty interest. *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). Park received constitutionally sufficient process before being subjected to the regulatory consequences of classification. Section 42-1-14 allowed Park to submit a wide variety of information to inform SORRB's decision. *Gregory*, 298 Ga. at 680–81. SORRB notified Park of his classification decision and gave him the opportunity for "administrative reevaluation," where he "again ha[d] an opportunity to provide information relevant to [his] classification." *Id.* at 681 (citing O.C.G.A. § 42-1-14(b)). Then he was able to seek judicial review of that decision. *Id.* at 682 (citing O.C.G.A. § 42-1-14(c)). And on judicial review, Park was afforded an evidentiary hearing. *Id.* at 690. He does not dispute that he received all of these procedural protections before his classification became final, triggering its regulatory consequences.

Park offers no real support for his argument that due process requires additional review of his classification at some point in the future. He cites Justice Kennedy's concurrence in *Hendricks*, which noted that opportunities for future review placed Kansas's civil confinement law within the "pattern and tradition of civil confinement." *Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring). But "[d]ue process is flexible and calls for such procedural protections as the

particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Civil confinement imposes a far greater restraint on liberty than the monitoring in question, so it stands to reason that it requires stronger procedural protections. *Id.* at 335 (weighing "the private interest that will be affected by the official action"). Particularly in light of the compelling interests § 42-1-14 serves, *see id.* (weighing the government's interest), Park has not met his burden of showing that § 42-1-14's multi-tiered, pre-deprivation procedures, which include an evidentiary hearing, require even more to satisfy due process.[16]

C. O.C.G.A. § 42-1-14 is not unconstitutionally vague.

The Due Process Clause of the Fourteenth Amendment requires a statute to be definite enough that a person of ordinary intelligence can understand what it means.[17] *JIG Real Estates, LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 490 (2011); *Wiggins v. State*, 288 Ga. 169, 173 (2010). When a statute does not impose criminal penalties (and this one does not), the standard for proving vagueness is especially

[16] Although due process does not require "continuing review" for the reasons above, SORRB's standing procedures indicate that sexually dangerous predators may be able to seek further review ten years after their initial classification if they "ha[ve] not engaged in any additional criminal conduct of a violent or sexual nature." *See* Sexual Offender Registration Review Board Standing Procedure at 7.2, goo.gl/53rS2a (last visited July 8, 2018).

[17] Park does not appear to advance a separate vagueness claim under the Georgia Constitution, so any such claim is not before this Court. *See Barzey v. City of Cuthbert*, 295 Ga. 641, 643 (2014).

difficult to meet; "there is a greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Thelen v. State*, 272 Ga. 81, 82 (2000).

The term "sexually dangerous predator" as used in § 42-1-14 is not unconstitutionally vague, as Park contends. Br. 33–36. To the contrary, the statute defines the term: A "sexually dangerous predator" is a sexual offender "[w]ho is determined by [SORRB] to be at risk of perpetrating any future dangerous sexual offense." O.C.G.A. § 42-1-12(a)(21)(B). A "dangerous sexual offense" is "any criminal offense, or the attempt to commit any criminal offense" that "consists of the same or similar elements of" aggravated assault with the intent to rape, rape, aggravated sodomy, aggravated child molestation, or aggravated sexual battery. *Id.* § 42-1-12(a)(10)(A). Park identifies nothing in this definition as ambiguous; a person of common intelligence would have no trouble understanding that a "sexually dangerous predator" is a person likely to commit one of the listed offenses in the future.

Nor does the term "sexually dangerous predator" provide SORRB with the kind of carte blanche that might create a vagueness problem. "[T]o be unconstitutionally vague, a statute must go beyond simply granting some discretion to courts or juries to act within a range; it must 'impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'" *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1312 (11th Cir.

2009) (second alteration in original) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). The Board may classify an offender as a "sexually dangerous predator" only if it determines that an individual subject to classification is sufficiently likely to commit certain dangerous sexual offenses in the future, and § 42-1-14 outlines a comprehensive process that explains and specifies the evidentiary bases on which SORRB may make that determination. *See Gregory*, 298 Ga. at 680–81 (citing O.C.G.A. § 42-1-14(a)(2)). To be sure, this determination requires an exercise of judgment as to whether the constellation of submitted evidence shows that a particular individual is at risk of recidivism, but affording "some discretion" to a decisionmaker does not make a statute unconstitutionally vague. *Harris*, 564 F.3d at 1312; *see also United States v. Cox*, 719 F.2d 285, 287 (8th Cir. 1983) (agreeing with five other circuits in upholding the Dangerous Special Offender Statute against a vagueness challenge although "some discretion is afforded [to] the court in making a finding of dangerousness").

D. O.C.G.A. § 42-1-14 does not offend equal protection.

Park challenges § 42-1-14 on equal-protection grounds, arguing that, unlike other felons, he "may not travel anywhere where his GPS monitor cannot get a signal." Br. 42. This challenge fails at the outset because, as discussed above, the record contradicts his contention that § 42-1-14 restricts his ability to travel in any way. *See* R-159–160.

Moreover, he is not "similarly situated" to other felons as required under equal protection; "[c]riminal defendants are similarly situated for purposes of equal protection only if they are charged with the same crime or crimes." *Dunn v. State*, 286 Ga. 238, 242 (2009) (citation omitted). Finally, as discussed at length above, *see supra* II.A.2.d, there is a rational basis for imposing the monitoring requirements on the narrow subset of sexual offenders deemed most likely to reoffend. *See Ga. Dep't of Human Res. v. Sweat*, 276 Ga. 627, 630 (2003) (laws that do not impinge on a fundamental right or target a suspect class are subject to rational-basis review). That rational basis analysis is the same under both the federal and state constitutions. *Id.* at 629.[18]

E. Park has not stated a takings claim.

Park challenges as an uncompensated "taking" § 42-1-14's requirement that a sexually dangerous predator "shall pay the cost" of the ankle monitor that he is statutorily required to wear. *See* O.C.G.A.

[18] Park contends that § 42-1-14 must face strict scrutiny because it "impairs his right to travel anywhere he wishes." Br. 42. Again, it does not. And the constitutional "right to travel" he relies on for this point "protects a person's right to enter and leave another state, the right to be treated fairly when temporarily present in another state, and the right to be treated the same as other citizens of that state when moving there permanently." *Doe v. Moore*, 410 F.3d 1337, 1348 (11th Cir. 2005); *see also Doe v. Miller*, 405 F.3d 700, 711 (8th Cir. 2005). Park faces no impediments either in coming or going from Georgia or in traveling within the State, so his right to travel is not implicated by § 42-1-14. *See* R-159–60.

§ 42-1-14(e). But "the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause. If the Takings Clause applied to obligations of this sort, then it would seemingly apply to taxes and to all statutes and rules that routinely creat[e] burdens for some that directly benefit others." *W. Virginia CWP Fund v. Stacy*, 671 F.3d 378, 387 (4th Cir. 2011) (alteration in original) (citation omitted). Takings claims are not available "where there is a mere general liability (i.e., no separately identifiable fund of money) and where the challenge seeks to invalidate the statute rather than merely seeking compensation for an otherwise proper taking." *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1057 (11th Cir. 2008) (citing *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)); *see also McCarthy v. City of Cleveland*, 626 F.3d 280, 285–86 (6th Cir. 2010). Because Park seeks invalidation of § 42-1-14(e)'s payment requirement, not compensation for a taking, he has not presented a cognizable takings claim. And in all events, there is no evidence in the record that the Sheriff's Office has imposed fees on Park under § 42-1-14(e). R-162.

CONCLUSION

For the reasons set out above, this Court should affirm the trial court's denial of Park's demurrer.

Respectfully submitted.

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I hereby certify that on July 9, 2018, I served this brief by mailing a copy of the brief to be delivered via UPS, addressed as follows:

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Exhibit 1

SUPREME COURT OF GEORGIA
Case No. S18A1211

Atlanta, June 13, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

JOSEPH RAYMOND PARK v. THE STATE

Your request for an extension of time to file the brief of appellee in the above case is granted until **July 09, 2018.**

A copy of this order **MUST** be attached as an exhibit to the document for which the appellee received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk