
NOTE

Severing the Invisible Leash: A Challenge to Tennessee's Sex Offender Monitoring Act in *Doe v. Bredesen*

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TABLE OF CONTENTS

INTRODUCTION	685
I. BACKGROUND	686
A. <i>The Ex Post Facto Clause</i>	688
B. <i>The Ex Post Facto Clause and Sex Offender Registration and Monitoring Acts</i>	690
C. <i>The Due Process Clause and Sex Offender Monitoring Statutes</i>	693
D. <i>Tennessee's Sex Offender Registration and Monitoring Laws</i>	694
II. <i>DOE V. BREDESEN</i>	696
III. ANALYSIS	699
A. <i>The Sixth Circuit Incorrectly Applied Smith to Uphold Tennessee's Monitoring Act</i>	700
B. <i>The Monitoring Act Violates the Ex Post Facto Clause as a Law that Is Punitive in Effect</i>	704

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C. *The Monitoring Act Is Expensive and Fails to Achieve
Tennessee's Goal of Reducing Recidivism* 710

CONCLUSION..... 712

INTRODUCTION

Imagine the following scenario: Steven Perth is on the fringes of society.¹ In July 2004, Perth pleaded guilty to attempted aggravated kidnapping and two counts of sexual battery by an authority figure in Bardon state court.² Bardon state law defined each of the offenses as “sex offenses” and classified Perth as a “sex offender.”³ On August 1, 2004, the Bardon legislature passed two acts amending the state penal code.⁴ The new laws retroactively reclassified Perth’s offenses as “violent sex offenses” and retroactively reclassified Perth as a “violent sex offender.”⁵ Due to the new classifications, the state required Perth to comply with new registration, verification, and tracking requirements for the rest of his life.⁶ The revised laws further required Perth to wear a global positioning system (“GPS”) as a monitoring device at all times.⁷ Perth challenged these new state laws on grounds that they violated the Ex Post Facto Clause.⁸ The United States Court of Appeals for the Sixth Circuit recently encountered a similar fact pattern concerning Tennessee’s sex offender laws in the 2007 case *Doe v. Bredesen*.⁹

This Note argues that, contrary to the Sixth Circuit’s decision in *Doe v. Bredesen*, Tennessee’s Monitoring Act violates the Ex Post Facto Clause.¹⁰ Part I explores the legal background regarding the Ex Post Facto Clause, Tennessee’s Registration and Monitoring Acts, and prior

¹ The following hypothetical represents a variation of the facts in *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007), and the parties are fictitious.

² *Id.* at 1000.

³ *See id.*

⁴ *See* Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004, TENN. CODE ANN. §§ 40-39-201 to -215 (2004) (explaining legislative findings, intent, and goals of Registration Act); Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. §§ 40-39-301 to -306 (2004) (explaining Monitoring Act’s requirements, legislative findings, and experimental nature).

⁵ *See Bredesen*, 507 F.3d at 1001.

⁶ *See id.*

⁷ *See id.* (requiring Tennessee Board of Parole and Probation to carry out registered sex offender monitoring).

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.* at 1001; *infra* Part III (arguing that court applied improper precedent, that monitoring act is punitive in effect, and that monitoring act does not accomplish nonpunitive goals).

case law interpreting monitoring acts.¹¹ Part II discusses the facts, procedure, and rationale in *Bredesen*.¹² Part III argues that the *Bredesen* court erred by holding that the Tennessee Monitoring Act did not violate the Ex Post Facto Clause.¹³ First, the Sixth Circuit was incorrect to rely on the Supreme Court case *Smith v. Doe* because *Smith*, unlike *Bredesen*, did not involve a challenge to a monitoring act.¹⁴ Second, the *Bredesen* court should have found Tennessee's Monitoring Act to be punitive in effect, such that its retroactive application in this case violated the Ex Post Facto Clause.¹⁵ Finally, the *Bredesen* court's ruling fails to recognize that the Monitoring Act does not accomplish Tennessee's intended goal of reducing sex offender recidivism rates.¹⁶ Thus, the Sixth Circuit should have invalidated Tennessee's Monitoring Act, which abrogated constitutional rights and failed to achieve Tennessee's legislative goals.¹⁷

I. BACKGROUND

Legislation requiring sex offender registration gained national prominence in the U.S. following the death of Megan Kanka at the hands of a convicted child molester.¹⁸ In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act.¹⁹ The legislation encouraged states to

¹¹ See *Smith v. Doe*, 538 U.S. 84, 91 (2003); *infra* Part I (establishing framework to understand monitoring acts).

¹² See *infra* Part II (outlining essential parts of Sixth Circuit's opinion).

¹³ See *infra* Part III (arguing that Sixth Circuit misapplied precedent, incorrectly analyzed *Mendoza-Martinez* test, and should have invalidated statute on policy grounds).

¹⁴ See *infra* Part III.A (distinguishing *Smith* because it involved challenge to registration statute, not monitoring statute). See generally *Smith*, 538 U.S. at 105-06 (holding that sex offender registration law, not monitoring law, is constitutional).

¹⁵ See *infra* Part III.B (applying several *Mendoza-Martinez* factors to find that statute is punitive in effect and concluding that balancing factors leads to finding Monitoring Act unconstitutional).

¹⁶ See *infra* Part III.C (arguing that Monitoring Act does not increase recidivism, but instead increases cost of enforcement).

¹⁷ See *infra* Conclusion.

¹⁸ See *Smith*, 538 U.S. at 84 (explaining that Kanka death inspired Congressional action); Joseph Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 347 (2007); Monica Davey, *Abduction Case Shows Limits of Sex Offender Alert Programs*, N.Y. TIMES, Sept. 1, 2009, at A1, available at <http://www.nytimes.com/2009/09/02/us/02offenders.html>.

¹⁹ 42 U.S.C. § 14071 (2006) (requiring states to pass their own Megan's Law bill); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat.

adopt sex offender registration laws.²⁰ By 1996, every state, the District of Columbia, and Congress adopted a version of a sex offender registration law, often called Megan's Law.²¹ Megan's Law allowed for public dissemination of the names of registered sex offenders for the purpose of protecting the public from registered sex offenders.²²

Many states also enacted sex offender monitoring statutes that enabled the state to monitor sex offenders through GPS monitoring devices.²³ These statutes require that convicted sex offenders wear a GPS device outside of their clothing.²⁴ Through use of GPS monitoring, states can track the location of a convicted sex offender twenty-four hours per day, seven days per week.²⁵ Sex offenders who retroactively needed to satisfy registration and monitoring

590-91 (2006); David Unze, *20 Years Spent Keeping Vigil for Abducted Son*, USA TODAY, Oct. 22, 2009, at 3A, available at http://www.usatoday.com/news/nation/2009-10-21-wetterling_N.htm (reporting about Jacob Wetterling's family twenty years after Jacob's murder and discussing push for congressional action on sex offender laws).

²⁰ See *United States v. Jensen*, 278 Fed. App'x 548, 551 (6th Cir. 2008) (explaining that possible reason for compliance was that government would not give states federal funding otherwise); Davey, *supra* note 18, at A1 (reporting thirteen year old girl's rape and murder); Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance*, N.Y. TIMES, Feb. 8, 2009, at A1 (stating such legislation might fail because punishment is same for high risk offenders and low risk offenders).

²¹ See, e.g., Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996); *United States v. Gould*, 568 F.3d 459, 464 (4th Cir. 2009) (describing Maryland's sex offender registration statute); *United States v. Ensminger*, 567 F.3d 587, 588 (9th Cir. 2009) (describing Washington's sex offender registration statute); *A. A. v. New Jersey*, 341 F.3d 206, 208 (3d Cir. 2003) (describing New Jersey's sex offender registration statute).

²² See Megan's Law § 2 (noting that law enforcement is authorized to release information about registered sex offenders necessary to protect public). See generally Daniel L. Feldman, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1085 (1997) (describing constitutional challenges to Megan's Law such as cruel and unusual punishment, and due process violations); Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1036 (2008) (describing various pieces of legislation from Congress designed to reduce sex offender recidivism); Jessica Varnon, *Difficult Decisions: Should Alabama Laws Be Tougher on Juvenile Sexual Offenders?*, 57 ALA. L. REV. 205, 205 n.2 (2005) (identifying that Megan Kanka's death was reason for President Bill Clinton to sign Megan's Law).

²³ See, e.g., MASS. ANN. LAWS ch. 265, § 47 (LexisNexis 2010) (requiring Massachusetts sex offenders to enroll in GPS monitoring); N.C. GEN. STAT. § 14-208.40 (2009) (requiring North Carolina sex offenders to enroll in GPS monitoring); Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. §§ 40-39-301 to -306 (2004) (requiring Tennessee sex offenders to enroll in GPS monitoring).

²⁴ See § 47; § 14-208.40; §§ 40-39-301 to -306.

²⁵ See § 47; § 14-208.40; §§ 40-39-301 to -306.

requirements challenged the validity of their respective states' Megan's Law on Ex Post Facto grounds.²⁶

A. *The Ex Post Facto Clause*

The U.S. Constitution prohibits lawmakers from enacting any Ex Post Facto law.²⁷ In the criminal context, courts define Ex Post Facto laws as those that retroactively alter the punishment that the offender received at sentencing.²⁸ Courts conduct a two-part analysis whenever a defendant brings an Ex Post Facto challenge alleging that a new law changes the initial terms of punishment.²⁹ First, a court must consider whether the state legislature intended for the statute to be civil or punitive.³⁰ If the court determines that the legislature's intent was punitive, then the statute violates the Ex Post Facto Clause, and the analysis ends.³¹ If the legislature's intent was civil, then the court must

²⁶ See *A. A.*, 341 F.3d at 208 (denying motion for preliminary injunction to stay New Jersey from collecting sex offender information); *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997) (affirming dismissal of plaintiff's Ex Post Facto challenge to New York's Megan's Law); *Doe v. Biang*, 494 F. Supp. 2d 880, 897-98 (N.D. Ill. 2006) (dismissing Ex Post Facto challenge against Illinois's Notification Law).

²⁷ U.S. CONST. art. I, § 9, cl. 3 (prohibiting Congress from passing Ex Post Facto laws); *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 513-14 (1995) (holding amendment unconstitutional because it affected prisoners who committed crimes before legislature enacted amendment); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395 (1798) (explaining Ex Post Facto law and its relation to state laws).

²⁸ See *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding that amended statute that punishes more severely than previous statute violates Ex Post Facto Clause); *Calder*, 3 U.S. at 390-91 (explaining meaning of Ex Post Facto Clause); *Doe v. Otte*, 259 F.3d 979, 985 (9th Cir. 2001) (stating that Ex Post Facto analysis inquires whether statute increases penalty for crime already committed).

²⁹ See *Smith v. Doe*, 538 U.S. 84, 84 (2003); *Otte*, 259 F.3d at 982; *Russell v. Gregoire*, 124 F.3d 1079, 1086-87 (9th Cir. 1997) (applying *Ursery-Hendricks* intent-effects test, which is functionally similar to *Mendoza-Martinez* test).

³⁰ See *United States v. Ward*, 448 U.S. 242, 248 (1980); *Otte*, 259 F.3d at 979; William Shimko, Note, *Constitutional Law — The Supreme Court Still Hasn't Found What It Should Be Looking for: A Test that Effectively and Consistently Defines Punishment for Constitutional Protection Analysis*, 4 WYO. L. REV. 477, 484-85 (2004). In determining whether a statute is civil or punitive, the Court has found a law terminating benefits to a deported alien is a civil regulatory scheme. The Court stated "where a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'" *Smith* 538 U.S. at 93-94 (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)).

³¹ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (ruling that Selected Training and Service Act of 1940 violated U.S. Constitution's Fifth and Sixth Amendments); *Doe v. Miller*, 405 F.3d 700, 718 (8th Cir. 2005) (explaining that court would end Ex Post Facto analysis after finding that legislature's intent was punitive);

decide whether the statute is so punitive in effect that the statute is in fact properly characterized as punishment.³²

Courts rely on a multi-factor test, set forth in the 1963 case, *Kennedy v. Mendoza-Martinez*, to determine whether a civil statute is punitive in effect.³³ First, courts consider whether the punishment is a type of punishment present in U.S. history or recognized in U.S. traditions.³⁴ Second, courts look to whether the statute imposes an affirmative disability or restraint on the person suffering the punishment.³⁵ In the third step, courts ask whether the statute promotes the traditional aims of punishment — retribution and deterrence.³⁶ Fourth, courts determine if the statute requires that the defendant know that his or her act is a crime prior to committing it.³⁷ Under the fifth step, courts evaluate whether the statute prohibits a behavior that other laws already prohibit.³⁸ Sixth, courts consider whether the statute has a rational connection to a nonpunitive purpose.³⁹ Finally, courts evaluate whether the statute is overly broad or unduly burdensome with respect to the statute's purpose.⁴⁰

After considering the *Mendoza-Martinez* factors, courts decide whether the statute is punitive in effect, and thus, violates the Ex Post Facto Clause.⁴¹ Most courts give equal weight to each factor, with the result that courts do not automatically invalidate a statute even if some

Otte, 259 F.3d at 986.

³² *Ward*, 448 U.S. at 248 (holding that federal act is civil and does not trigger constitutional protections); *Miller*, 405 F.3d at 719; *Otte*, 259 F.3d at 986-88 (analyzing Alaska's SORA to determine if law has punitive effect).

³³ See *Mendoza-Martinez*, 372 U.S. at 168-69 (creating seven-factor test based on prior judicial decisions); *Simmons v. Galvin*, 575 F.3d 24, 44 (1st Cir. 2009) (implementing *Mendoza-Martinez* to determine whether new laws disenfranchising imprisoned felons violate Ex Post Facto Clause); *Myrie v. Comm'r*, 267 F.3d 251, 256 (3d Cir. 2001) (applying *Mendoza-Martinez* test to evaluate New Jersey law that violated Ex Post Facto Clause); *Doe v. Lee*, 132 F. Supp. 2d 57, 68 (D. Conn. 2001) (applying *Mendoza-Martinez* test to Connecticut's sex offender registration act).

³⁴ See *Mendoza-Martinez*, 372 U.S. at 168-69.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *Simmons v. Galvin*, 575 F.3d 24, 44 (1st Cir. 2009) (analyzing Massachusetts constitutional amendment to determine whether it has punitive effect); *Myrie v. Comm'r*, 267 F.3d 251, 256 (3d Cir. 2001) (challenging new surcharge on items sold in prison commissary as punitive in effect); *Doe v. Lee*, 132 F. Supp. 2d 57, 68 (D. Conn. 2001) (implementing *Mendoza-Martinez* effects test after finding Connecticut legislature intended civil scheme for sex offender registration).

Mendoza-Martinez factors indicate a punitive effect.⁴² Additionally, courts do not need to analyze all seven factors because the factors are merely useful, nondispositive guideposts to help courts determine if a statute is punitive.⁴³ Recently, courts have used the *Mendoza-Martinez* test to determine whether sex offender monitoring laws violate the Ex Post Facto Clause.⁴⁴

B. *The Ex Post Facto Clause and Sex Offender Registration and Monitoring Acts*

The Supreme Court analyzed the validity of a retroactive sex offender registration act in the 2003 case, *Smith v. Doe*.⁴⁵ The *Smith* Court evaluated the Alaska Sex Offender Registration Act (“SORA”), which required sex offenders in the state to register with the state Department of Corrections.⁴⁶ The respondents in *Smith*, two convicted sex offenders released from prison in 1990, challenged the new state requirement that they comply with the SORA’s registration program despite committing sex offenses prior to the SORA’s enactment date.⁴⁷ Respondents alleged that the SORA retroactively altered their terms of punishment and, therefore, violated the Ex Post Facto Clause.⁴⁸

The Court applied the two-prong Ex Post Facto test. First, the Court found that the Alaska legislature intended to create a civil, rather than punitive, scheme.⁴⁹ Second, the Court analyzed the punitive effect of

⁴² See *Hudson v. United States*, 522 U.S. 93, 100-03 (1997); *Mendoza-Martinez*, 372 U.S. at 169; *SEC v. Palmisano*, 135 F.3d 860, 865 (2d Cir. 1998) (holding that no single factor is dispositive in *Mendoza-Martinez* analysis); *State v. Ward*, 869 P.2d 1062, 1068-69 (Wash. 1994) (stating that court weighs *Mendoza-Martinez* factors equally).

⁴³ See *Hudson*, 522 U.S. at 99 (stating that factors are useful guideposts for determining whether statute is punitive in effect); *United States v. Ward*, 448 U.S. 242, 249 (1980) (stating that factors are neither exhaustive nor dispositive); *Simmons v. Galvin*, 652 F. Supp. 2d 83, 92 (D. Mass. 2007) (concluding that two factors are not relevant to determine constitutionality of law).

⁴⁴ See *Smith v. Doe*, 538 U.S. 84, 106 (2003) (challenging Alaska’s sex offender registration law); *Kansas v. Hendricks*, 521 U.S. 346, 361-63 (1997) (overruling Kansas Supreme Court’s decision that Kansas sex offender registration act violates Ex Post Facto Clause); *United States v. Young*, 585 F.3d 199, 205 (5th Cir. 2009) (applying *Mendoza-Martinez* effects test to Texas’s sex offender registration law); *Doe v. Bredesen*, 507 F.3d 998, 1001 (6th Cir. 2007) (challenging courts required use of *Mendoza-Martinez* to evaluate Tennessee’s sex offender registration and monitoring acts).

⁴⁵ See *Smith*, 538 U.S. at 106.

⁴⁶ See *id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *id.* at 97.

the SORA.⁵⁰ The Court determined that the SORA's punitive effect was not sufficient to overcome the Alaska legislature's intent to create a civil statute.⁵¹ The Court found the *Mendoza-Martinez* factor concerning the law's rational connection to a nonpunitive purpose to be most persuasive, holding that the law rationally related to the government's desire to protect the public.⁵² Therefore, the *Smith* Court held that the SORA was not punitive and did not violate the Ex Post Facto Clause.⁵³

Courts often analyze *Smith* when evaluating whether sex offender monitoring acts similarly violate the Ex Post Facto Clause.⁵⁴ Massachusetts, for instance, has distinguished *Smith* as only applying to retroactive registration requirements, not monitoring acts.⁵⁵ In *Commonwealth v. Cory*, the Massachusetts Supreme Court determined that a Massachusetts law requiring sex offenders to wear GPS monitoring devices was punitive in effect.⁵⁶ The court found that requiring sex offenders to wear GPS monitoring devices was an affirmative restraint under the *Mendoza-Martinez* test.⁵⁷ As such, the court held that the physical attachment and constant surveillance through use of a GPS device was punitive in effect.⁵⁸

The *Cory* court distinguished *Smith* by emphasizing that GPS monitoring during probation or supervised release imposed greater restraints on sex offenders than mere registration requirements.⁵⁹ The court stated that probation and supervised release, unlike registration, required state surveillance and permission to do basic tasks.⁶⁰ The court found that GPS monitoring requirements were even more

⁵⁰ *Id.*

⁵¹ *Id.* at 105.

⁵² *Id.* at 102.

⁵³ *See id.*

⁵⁴ *See, e.g., Commonwealth v. Cory*, 911 N.E.2d 187, 198 (Mass. 2009) (holding that monitoring act violates Ex Post Facto Clause). *See generally Commonwealth v. Vallejo*, 914 N.E.2d 22 (Mass. 2009) (vacating sex offender's sentence that imposed GPS monitoring); *Doe v. Chairperson of the Mass. Parole Bd.*, 911 N.E.2d 204, 205-06 (Mass. 2009) (vacating lower court's denial for preliminary injunction and allowing sex offenders challenge to continue on remand).

⁵⁵ *See Cory*, 911 N.E.2d at 194 n.11 (distinguishing *Smith*).

⁵⁶ *See id.* at 197.

⁵⁷ *Id.* at 195.

⁵⁸ *Id.* at 195-98 (labeling GPS monitoring as more burdensome than registration requirement).

⁵⁹ *Id.* at 194 n.11.

⁶⁰ *See Smith v. Doe*, 538 U.S. 84, 101-02 (2003) (rejecting registration system as parallel to probation or supervised release in terms of restraint imposed); *Cory*, 911 N.E.2d at 194 n.11.

burdensome than normal probation and supervised release, due to continuous tracking of an offender's location as opposed to probation's intermittent tracking.⁶¹ As a result, the Massachusetts court did not extend the holding of *Smith* to cases evaluating the constitutionality of a monitoring act, but instead found that the retroactive monitoring requirements violated sex offenders' constitutional rights.⁶²

The Massachusetts court's refusal to uphold a monitoring act under an Ex Post Facto analysis has not convinced other states to make the same distinction between retroactive registration and monitoring requirements.⁶³ In *State v. Bare*, the North Carolina Court of Appeal held that GPS monitoring for sex offenders does not violate the Ex Post Facto Clause.⁶⁴ Bare, a convicted sex offender, was required to submit to GPS monitoring upon his release from prison in 2007.⁶⁵ Bare challenged the monitoring statute for violating the Ex Post Facto Clause under the U.S. and North Carolina Constitutions.⁶⁶ The court held that although the monitoring law did not exist at the time Bare committed his crimes, the statute did not increase his punishment.⁶⁷ Applying the *Mendoza-Martinez* test, the court determined that the monitoring statute was a civil regulatory scheme because lawmakers enacted the law to protect the public.⁶⁸ Additionally, the court found that GPS monitoring was nonpunitive because it did not restrict Bare's freedom to move, and history did not consider monitoring punitive.⁶⁹ In its analysis, the court opined that the GPS monitoring device could not be a shame sanction because many people in the public would think it was an innocuous device like a cell phone, not a tracking

⁶¹ See *Cory*, 911 N.E.2d at 194 n.11, 196.

⁶² See generally *id.* at 189 (distinguishing *Smith* because it did not involve monitoring act).

⁶³ See *United States v. Morris*, No. 08-0142, 2008 U.S. Dist. Lexis 104029, at *2 (W.D. La. Nov. 14, 2008) (dismissing Ex Post Facto challenge against Louisiana's sex offender monitoring law); *Uresti v. Collier*, No. H-04-3094, 2005 U.S. Dist. LEXIS 34292, at *35 (S.D. Tex. June 23, 2005) (dismissing Ex Post Facto challenge to Texas's sex offender monitoring law); *State v. Bare*, 677 S.E.2d, 518, 531 (N.C. Ct. App. 2009) (finding North Carolina's satellite-based monitoring constitutional).

⁶⁴ For purposes of this paper, GPS monitoring includes satellite-based monitoring because both use the same type of GPS devices. See *Bare*, 677 S.E.2d at 531. Compare *State v. Stines*, 683 S.E.2d 411, 414 (N.C. Ct. App. 2009) (detailing satellite-based monitoring program), with *Cory*, 911 N.E.2d at 189 (detailing GPS program).

⁶⁵ See *Bare*, 677 S.E.2d at 531.

⁶⁶ See *id.* at 518.

⁶⁷ *Id.* at 522.

⁶⁸ See *id.* at 526-28.

⁶⁹ See *id.* at 527-28.

device for sex offenders.⁷⁰ Therefore, the court held that North Carolina could require sex offenders who were convicted prior to the passage of the state's monitoring laws to wear GPS monitoring devices upon release without violating the Ex Post Facto Clause.⁷¹

A similar case brought in North Carolina challenged retroactive monitoring requirements under both the Ex Post Facto Clause and procedural due process rights. In *State v. Stines*, the North Carolina Court of Appeal upheld its prior ruling in *Bare*, rejecting the argument that a retroactive law requiring the monitoring of sex offenders through GPS devices violates the Ex Post Facto Clause.⁷² *Stines*, a convicted sex offender, appealed a decision requiring him to enroll in North Carolina's GPS monitoring program.⁷³ In *Stines*, the defendant claimed that the GPS monitoring program violated the Ex Post Facto Clause.⁷⁴ The court relied on *Bare* to dismiss *Stines*'s Ex Post Facto claim and reaffirmed that GPS monitoring does not violate the Ex Post Facto Clause.⁷⁵ However, *Stines* also argued that GPS monitoring violated his procedural due process rights, allowing the court to reach a different outcome from *Bare*.⁷⁶

C. *The Due Process Clause and Sex Offender Monitoring Statutes*

The U.S. Constitution's Due Process Clause guarantees that no state shall deprive any person of life, liberty, or property without due process of law.⁷⁷ As part of this protection, the Due Process Clause assures that all U.S. persons receive procedural due process throughout the criminal law conviction and sentencing procedures.⁷⁸ Procedural due process prevents the state from taking a person's liberty interest

⁷⁰ See *id.* at 528.

⁷¹ See *id.* at 530-31.

⁷² See *State v. Stines*, 683 S.E.2d 411, 413 (N.C. Ct. App. 2009).

⁷³ *Id.*

⁷⁴ See *id.* at 413.

⁷⁵ *Id.*

⁷⁶ *Id.* at 412.

⁷⁷ U.S. CONST. amend. V, § 1; U.S. CONST. amend. XIV (applying Fifth Amendment against states); see *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (upholding Fifth Amendment's due process protection in racial segregation case); see also N.C. CONST. art. 1, § 19 (analogizing Law of Land to similar due process protection found in Federal Constitution).

⁷⁸ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (stating laws should not erode procedural due process); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (holding that notice is fundamental premise of procedural due process); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (holding that notice is essential principle of due process).

without fair procedure, which includes notice of the crime.⁷⁹ Courts have held that other protected liberty interests include an opportunity for a trial in front of a neutral arbiter and freedom to move.⁸⁰ In monitoring cases, courts first analyze whether physical GPS monitoring deprives a convicted sex offender of a protected liberty interest.⁸¹ Next, courts determine if the state deprived a sex offender of that interest by requiring him or her to wear a GPS monitoring device.⁸²

In *Stines*, the court held that the monitoring statute unconstitutionally infringed on the defendant's protected liberty interest in having freedom to move, by requiring constant surveillance and through permanent attachment of GPS devices.⁸³ The GPS monitoring program limited Stine's ability to travel to certain locations and could provide the state with a near real-time account of his location.⁸⁴ Therefore, the court held that GPS monitoring violated Stines's due process rights because it infringed on a protected liberty interest.⁸⁵

D. Tennessee's Sex Offender Registration and Monitoring Laws

In July 2004, Tennessee Governor Phil Bredesen and the General Assembly enacted two statutes expanding the powers of Tennessee's Board of Probation and Parole ("BOPP").⁸⁶ The Tennessee Sexual

⁷⁹ See *Hamdi*, 542 U.S. at 533 (stating notice and opportunity to be heard are fundamental to citizens' due process); *Loudermill*, 470 U.S. at 542; *Mullane*, 339 U.S. at 313.

⁸⁰ *Wolf v. McDonnell*, 418 U.S. 539, 559 (1974) (stating that liberty interest includes right to neutral and objective arbiter and opportunity to be heard); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (same); *Specht v. Patterson*, 386 U.S. 605, 610 (1967) (holding Colorado's Sex Offender Act as unconstitutional because it violated liberty interests like right to neutral arbiter and opportunity to be heard).

⁸¹ See *United States v. Smedley*, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009); *United States v. Merritt*, 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009); *State v. Stines*, 683 S.E.2d 411, 413 (N.C. Ct. App. 2009).

⁸² See *Smedley*, 611 F. Supp. 2d at 975; *Merritt*, 612 F. Supp. 2d at 1079; *Stines*, 683 S.E.2d at 413.

⁸³ See *Merritt*, 612 F. Supp. 2d at 1079; *Commonwealth v. Cory*, 911 N.E.2d 187, 196-97 (Mass. 2009); *Stines*, 683 S.E.2d at 413.

⁸⁴ *Stines*, 683 S.E.2d at 413.

⁸⁵ *Id.* at 418.

⁸⁶ See Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004, TENN. CODE ANN. §§ 40-39-201 to -215 (2004); Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. §§ 40-39-301 to -306 (2004); MONITORING TENNESSEE'S SEX OFFENDERS USING GLOBAL POSITIONING SYSTEMS: A PROJECT EVALUATION 12 (2007) [hereinafter GPS: PROJECT EVALUATION], available at <http://www.state.tn.us/bopp/Docs/>

Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004 (“Registration Act”), requires sex offenders to register with the BOPP.⁸⁷ Under the Registration Act, convicted sex offenders must provide the state with their name, address, a DNA sample, and a description of their sex offense.⁸⁸ A sex offender who violates this statute commits a felony, and the BOPP may return the violator to custody for more than one year.⁸⁹

The second act, the Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act (“Monitoring Act”), authorizes the BOPP to monitor sex offenders through GPS.⁹⁰ The legislature instituted the Monitoring Act as a one-year pilot program to evaluate its success in reducing recidivism rates in a cost-effective manner.⁹¹ In 2008, the state legislature extended the program for an additional five years.⁹² The Monitoring Act requires sex offenders to wear a GPS device twenty-four hours per day, seven days per week.⁹³ The BOPP may punish any person who tampers with or removes the GPS device with 180 days in county jail or with immediate parole revocation.⁹⁴

2008-GPS%20follow-up%20report.pdf (reporting Monitoring Act results and conclusions).

⁸⁷ § 40-39-201 to -215.

⁸⁸ *Id.* (requiring sex offender to provide information such as physical address, offender’s email address, instant message aliases, and photo to Tennessee Bureau of Investigation).

⁸⁹ *Id.* (allowing BOPP to return parolee back to custody for violation of his or her parole terms).

⁹⁰ *Id.* (detailing statutes experimental nature to evaluate whether GPS tracking reduces recidivism).

⁹¹ *Id.* (stating Tennessee had interest in utilizing technology to reduce recidivism to protect public safety).

⁹² Memorandum from James W. White, Executive Dir., Fiscal Review Comm. (May 30, 2007) (summarizing Tennessee Senate Bill 2235/House Bill 2314 and showing increased expenditures for BOPP); MONITORING TENNESSEE’S SEX OFFENDERS USING GLOBAL POSITIONING SYSTEMS: A FOLLOW-UP EVALUATION 1 (2008) [hereinafter GPS: FOLLOW-UP EVALUATION], available at <http://www.tn.gov/bopp/Docs/2008-GPS%20follow-up%20report.pdf> (reporting that Jessica’s Law expanded BOPP’s global positioning system pilot project for five years from 2007); Press Release, Board of Probation and Parole, Operation Compliance 2009: BOPP Places Restrictions on Sex Offenders During Halloween Season (Oct. 26, 2009), available at <http://www.tn.gov/bopp/Press%20Releases/Sex%20Offender%20Activities%20Restricted%20During%20Halloween.pdf> (furthering restrictions on sex offenders during 2009 year).

⁹³ Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-301 (2004) (describing that Tennessee legislature requires continuous monitoring, as opposed to once-daily sex offender monitoring for GPS monitoring).

⁹⁴ *Id.* (punishing anyone who aids and abets person with GPS device).

The Tennessee legislature intended both Acts to further deter sex offenses and to decrease sex offender recidivism.⁹⁵ Like in other states, many previously convicted sex offenders became subject to these new laws after their initial sentencing.⁹⁶ These persons challenged Tennessee's requirement that they comply with the new Registration and Monitoring Acts, alleging that the Acts violate the Ex Post Facto Clause.⁹⁷

II. *DOE V. BREDESEN*

The Sixth Circuit Court of Appeals recently decided a challenge to Tennessee's Registration and Monitoring Acts in the 2007 case, *Doe v. Bredesen*.⁹⁸ Prior to 2004, Doe pleaded guilty to attempted aggravated kidnapping and two counts of sexual battery by an authority figure in Tennessee state court.⁹⁹ At the time of Doe's convictions, Tennessee categorized his offenses as "sex offenses" and Doe himself as a "sex offender."¹⁰⁰ In August 2004, the Tennessee Registration and Monitoring Acts went into effect,¹⁰¹ leading Tennessee to re-categorize Doe's offenses as "violent sex offenses" and Doe as a "violent sex offender."¹⁰² The Registration Act required violent sex offenders to comply with registration, verification, and tracking requirements (though not electronic monitoring) for life.¹⁰³ The Monitoring Act

⁹⁵ See *id.* (reporting general assembly's finding that repeat sex offenders are danger to society and registration will increase public safety).

⁹⁶ See *Doe v. Bredesen*, 507 F.3d 998, 1008 (6th Cir. 2007) (affirming Tennessee's Registration and Monitoring Acts); *Doe v. Miller*, 405 F.3d 700, 723 (8th Cir. 2005) (upholding Iowa's sex offender statutes against Ex Post Facto challenge); *State v. Germane*, 971 A.2d 555, 593 (R.I. 2009) (dismissing Ex Post Facto challenge to Rhode Island's sex offender statute).

⁹⁷ See *Bredesen*, 507 F.3d at 1008 (challenging Tennessee's sex offender registration and monitoring acts); *A. A. v. New Jersey*, 341 F.3d 206, 208 (3d Cir. 2003) (denying motion for preliminary injunction for New Jersey to collect sex offender information); *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997) (affirming dismissal of plaintiffs Ex Post Facto challenge to New York's Megan's Law); *Doe v. Biang*, 494 F. Supp. 2d 880, 888 (N.D. Ill. 2006) (dismissing Ex Post Facto challenge to Illinois's Notification Law).

⁹⁸ See *Bredesen*, 507 F.3d at 1008.

⁹⁹ See *id.* at 1000.

¹⁰⁰ See *id.* (stating that Tennessee Registration and Monitoring Acts of 2004 included more stringent registration requirements and GPS tracking than preexisting sex offender registration law).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

separately required Doe to wear a GPS device at all times for GPS monitoring by BOPP.¹⁰⁴

Doe filed a complaint in Tennessee's Federal District Court alleging that the Registration Act and Monitoring Act requirements violated the Ex Post Facto Clause of the U.S. and Tennessee Constitutions.¹⁰⁵ The court found no constitutional violations and dismissed Doe's claims.¹⁰⁶ Doe appealed the decision and the Sixth Circuit affirmed the dismissal.¹⁰⁷

The Sixth Circuit held that the Registration Act and Monitoring Act did not violate the Ex Post Facto Clause of the U.S. Constitution.¹⁰⁸ In reaching this conclusion, the court followed the Supreme Court's two-part framework from *Smith* for evaluating an Ex Post Facto claim.¹⁰⁹ First, the court examined the actual language of both acts and found that the legislature's intent was to ensure public safety and rehabilitate sex offenders.¹¹⁰ Based on this finding, the court found that the legislature intended both the Registration Act and the Monitoring Act to be civil and not to function as retroactive punishments.¹¹¹ Furthermore, the court relied on *Smith* to hold that monitoring sex offenders with GPS devices is nonpunitive.¹¹² The court equated Alaska's SORA in *Smith* to Tennessee's Acts in *Bredesen* and found that nothing on the face of the statutes suggested anything other than a civil scheme.¹¹³

In evaluating the effects of the Tennessee statutes, the Sixth Circuit examined the Registration Act and Monitoring Act using five of the

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 1000 (noting also that Doe raised due process violation claim but abandoned it by failing to support claim in opposing government's motion to dismiss).

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at 1003.

¹¹⁰ Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004, TENN. CODE ANN. § 40-39-201(b)(8) (2004) (stating that high sex offender recidivism rates concerned Tennessee's legislature, prompting stricter legislation); Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-301 (2004) (outlining that GPS monitoring offers potential to lower sex offender recidivism).

¹¹¹ *See* § 40-39-201(b)(8) (stating that legislature did not intend for law to have punitive or retributive effect); *Bredesen*, 506 F.3d at 1007.

¹¹² *See Smith v. Doe*, 538 U.S. 84, 93 (2003) (holding that Alaska's sex offender registration requirement is not punitive in either intent or effect); *Bredesen*, 507 F.3d at 1003-07.

¹¹³ *See Bredesen*, 507 F.3d at 1003-07.

seven factors in the *Mendoza-Martinez* test.¹¹⁴ The court relied heavily on *Smith* as controlling precedent in applying the test to both Tennessee laws.¹¹⁵ First, the court determined that the Acts did not impose an affirmative disability on Doe.¹¹⁶ Second, the court held that tradition and history did not support finding that the registration or monitoring requirements were punishments.¹¹⁷ The court stated the registration and monitoring requirements were less harsh than other penalties found to be nonpunitive, such as revocation of a medical license.¹¹⁸ Specifically, the requirements did not increase length of incarceration or prevent offenders from changing jobs.¹¹⁹ Under these two factors — the lack of an affirmative disability and the historical analysis of punitive statutory schemes — the court determined that the Registration Act and Monitoring Act were nonpunitive.¹²⁰

The next *Mendoza-Martinez* factor that the court considered was whether the statutes' intended deterrent effect promoted a traditional aim of punishment.¹²¹ The *Bredesen* court stated that a deterrent effect alone does not make the Acts punitive under the Ex Post Facto Clause.¹²² The court reasoned that most statutes have a deterrent effect, so finding that deterrent effect alone violated the Ex Post Facto Clause would require courts to invalidate many state regulations.¹²³ Therefore, the court stated the Acts could have deterrent effects, without necessarily having a punitive effect under the *Mendoza-Martinez* test.¹²⁴

The court also found that the Acts satisfied the sixth *Mendoza-Martinez* factor because the legislature's goals rationally related to a nonpunitive purpose.¹²⁵ The court deferred to the legislature's

¹¹⁴ See *id.* at 1004-07 (finding two *Mendoza-Martinez* factors unnecessary and inapplicable).

¹¹⁵ See *id.* at 1005.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *Smith v. Doe*, 538 U.S. 84, 100 (2003); *Hawker v. New York*, 170 U.S. 189, 200 (1898) (holding that medical license revocation is not punitive).

¹¹⁹ See *Bredesen*, 507 F.3d at 1005.

¹²⁰ See *id.* (concluding that two *Mendoza-Martinez* factors were not relevant and would not change outcome).

¹²¹ See *id.* (stating that courts define tradition through American history and that GPS monitoring is novel technology).

¹²² See *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (holding that while forfeiture has deterrent effect, it is distinct from any punitive purpose); *Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-78 (1974); *Bredesen*, 507 F.3d at 1006.

¹²³ See *Bredesen*, 507 F.3d at 1005.

¹²⁴ See *id.* at 1005-06.

¹²⁵ See *id.* at 1006.

judgment that the Acts could lower recidivism and protect public safety in Tennessee neighborhoods without further punishing sex offenders.¹²⁶ Finally, the court analyzed whether the Acts exceeded their regulatory purpose of lowering sex offender recidivism rates.¹²⁷ The court found no basis for excessiveness because Doe failed to argue this point in his briefs.¹²⁸ Ultimately, the court held that under the *Mendoza-Martinez* test, Tennessee's Registration and Monitoring Acts did not violate the Ex Post Facto Clause.¹²⁹

III. ANALYSIS

The Sixth Circuit erred in finding that Tennessee's Monitoring Act did not violate the Ex Post Facto Clause.¹³⁰ The Sixth Circuit misapplied *Smith* as controlling precedent in evaluating Tennessee's Monitoring Act because *Smith* only evaluated the constitutionality of a registration act.¹³¹ *Smith* did not evaluate whether constant GPS monitoring violated the Ex Post Facto Clause and should not have precedential effect on this issue.¹³² The *Bredesen* court also incorrectly determined that the Monitoring Act's retroactive punishment of sex offenders was not punitive in effect under the *Mendoza-Martinez* test.¹³³ Finally, the court failed to consider that the Monitoring Act is expensive and fails to achieve Tennessee's goal of reducing recidivism.¹³⁴ Ultimately, the *Bredesen* court should have found that Tennessee's Monitoring Act retroactively punishes sex offenders and therefore violates the Constitution.¹³⁵

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.* at 1007 (affirming dismissal of offender's complaint).

¹³⁰ See *infra* Part III.B (arguing that *Mendoza-Martinez* test and policy disfavor upholding *Bredesen*).

¹³¹ See *infra* Part III.A (outlining *Smith* and demonstrating that *Smith* is distinguishable).

¹³² See generally *Smith v. Doe*, 538 U.S. 84 (2003) (ruling on Alaska's Registration Act but not ruling on monitoring act).

¹³³ See *infra* Part III.B (arguing that many factors show that Monitoring Act is punitive).

¹³⁴ See *infra* Part III.C (detailing failed Monitoring program's finance reports and evaluations).

¹³⁵ See *infra* Conclusion (concluding that Monitoring Act is unconstitutional and inefficient).

A. *The Sixth Circuit Incorrectly Applied Smith to Uphold Tennessee's Monitoring Act*

The *Bredesen* court relied heavily on the holding in *Smith* to find that Tennessee's Monitoring Act was constitutional.¹³⁶ In its analysis, the *Bredesen* court acknowledged that Tennessee's Registration Act and Monitoring Act were separate and distinct.¹³⁷ However, the Sixth Circuit used *Smith* as guiding precedent to uphold Tennessee's Monitoring Act, even though *Smith* did not challenge a monitoring act.¹³⁸

Unlike Tennessee's Monitoring Act, Alaska's SORA only contained a registration requirement and a dissemination of registration information.¹³⁹ The SORA did not retroactively require sex offenders to wear GPS devices through the registration requirement.¹⁴⁰ Additionally, *Smith* noted that a registration requirement is distinguishable from mandatory conditions of parole because registration allows a parolee to live and work without supervision.¹⁴¹ A mandatory condition of parole, like GPS monitoring, imposes an affirmative restraint that is unlawful if it severely infringe a person's liberty interests.¹⁴² Tennessee's Monitoring Act is burdensome because the law imposes a lifelong parole condition that requires sex offenders to bind obtrusive GPS devices onto their bodies.¹⁴³ Yet, the *Bredesen*

¹³⁶ See *Smith*, 538 U.S. at 1004-07. See generally *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007) (citing *Smith* over fourteen times in majority opinion).

¹³⁷ See *Bredesen*, 507 F.3d at 1000 n.1.

¹³⁸ See *Smith*, 538 U.S. at 91; *Bredesen*, 507 F.3d at 1003.

¹³⁹ Compare *Smith*, 538 U.S. at 91 (describing challenge to registration law, not monitoring law), with *Bredesen*, 507 F.3d at 998 (contrasting Tennessee's Monitoring Act with Alaska's registration requirement).

¹⁴⁰ See *Bredesen*, 507 F.3d at 998-1000. See generally *Smith*, 538 U.S. 84 (2003) (ruling in case that involved registration act but not monitoring act).

¹⁴¹ See *Smith*, 538 U.S. at 101; *Cunningham v. Lemmon*, No. 6:06-cv-00169, 2007 U.S. Dist. LEXIS 97020, at *22-23 (S.D. W. Va. Feb. 14, 2007) (applying *Smith*'s reasoning to West Virginia's sex offender registration requirement); *State v. Bare*, 677 S.E.2d 518, 526 (N.C. Ct. App. 2009) (citing *Smith* as authority to distinguish registration requirement from parole condition).

¹⁴² See *Doe v. Otte*, 259 F.3d 979, 985 (9th Cir. 2001); *Kansas v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) (holding that parole condition that allowed for public inspection of sex offender records and permitted newspapers to disseminate that information was affirmative restraint); *Commonwealth v. Cory*, 911 N.E.2d 187, 196-97 (Mass. 2009). *Contra Doe v. Pataki*, 120 F.3d 1263, 1269-70 (2d Cir. 1997) (limiting public inspection and dissemination to some cases only).

¹⁴³ See *Cory*, 911 N.E.2d at 196 (concluding that permanently wearing GPS device is more burdensome than yearly registration requirement); *Doe v. Sex Offender Registry Bd.*, 882 N.E.2d 298, 308 (Mass. 2008) (quoting *Doe v. Att'y Gen.*, 715 N.E.2d 37, 43 (Mass. 1997) (Fried, J., concurring)) (characterizing yearly registration requirement as intrusive and humiliating); see also *Smith*, 538 U.S. at 116-17

court relied on *Smith*, even though *Smith*'s registration requirement was less burdensome than a lifelong monitoring requirement.¹⁴⁴ The *Bredesen* court should not rely on *Smith* as controlling precedent because permanently wearing a GPS device is different from providing basic registration information.¹⁴⁵

The *Bredesen* court should have distinguished *Smith* because a registration requirement punitively differs from a monitoring requirement.¹⁴⁶ GPS monitoring has more in common with formal probation and supervised release because it allows the state to track sex offenders continuously, twenty-four hours per day.¹⁴⁷ *Smith* specifically highlighted that registration requirements were less burdensome than supervised release because supervised release allows a supervising officer to enforce mandatory parole conditions.¹⁴⁸ *Smith* should not apply because Tennessee's Monitoring Act requires GPS monitoring as a mandatory condition that results in supervised release rather than mere registration.¹⁴⁹ Tennessee's Monitoring Act imposes significantly more control over sex offenders through GPS monitoring

(Ginsburg, J., dissenting) (finding quarterly registration requirements onerous).

¹⁴⁴ See *Bredesen*, 507 F.3d at 1005.

¹⁴⁵ See *Smith*, 538 U.S. at 102 (stating that other constitutional objections to mandatory reporting requirement are beyond opinion's scope); *Jones v. United States*, 527 U.S. 373, 404 (1999) (distinguishing *Clemons v. Mississippi*, 494 U.S. 738, 753-54 (1990), on factual grounds); *Bredesen*, 507 F.3d at 998-1000 (applying *Smith* to uphold GPS monitoring law); *Cory*, 911 N.E.2d at 194 n.11.

¹⁴⁶ See *Cory*, 911 N.E.2d at 194 n.11; *State v. Vogt*, 685 S.E.2d 23, 28 (N.C. Ct. App. 2009) (Elmore, J., dissenting) (reasoning that monitoring effects substantially differ from registration effects); *State v. Wagoner*, 683 S.E.2d 391, 400 (N.C. Ct. App. 2009) (Elmore, J., dissenting).

¹⁴⁷ See *Commonwealth v. Vallejo*, 914 N.E.2d 22 (Mass. 2009); *Doe v. Chairperson of the Mass. Parole Bd.*, 911 N.E.2d 204, 205-06 (Mass. 2009); *Cory*, 911 N.E.2d at 192-93.

¹⁴⁸ See generally *Johnson v. United States*, 529 U.S. 694 (2000) (revoking parole for violating mandatory condition of parole); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (stating that state Department of Health and Human Services imposed mandatory conditions of parole on defendant and that state could revoke parole).

¹⁴⁹ Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-302 (2004) (outlining general guidelines, including real-time and continuous tracking requirement of GPS monitoring); § 40-39-303 (2004) (granting Tennessee BOPP authority to make GPS monitoring mandatory condition of release); *Smith*, 538 U.S. at 90-92; *Bredesen*, 507 F.3d at 1001-03; *United States v. Smedley*, 611 F. Supp. 2d 971, 972 (E.D. Mo. 2009) (stating that electronic monitoring is release condition); *United States v. Merritt*, 612 F. Supp. 2d 1074, 1075 (D. Neb. 2009) (describing GPS requirement as parole condition); *Cory*, 911 N.E.2d at 197 (explaining that electronic monitoring requirement is parole condition).

than *Smith's* registration requirement.¹⁵⁰ Therefore, the Sixth Circuit erred in applying *Smith* to uphold the Monitoring Act in *Bredesen*.¹⁵¹

Yet, some courts confirm that *Bredesen's* holding was correct and have similarly upheld sex offender monitoring requirements against Ex Post Facto challenges without relying on *Smith*.¹⁵² In *Bare*, the North Carolina Court of Appeal analyzed a GPS monitoring statute by using the Ex Post Facto analysis.¹⁵³ That court upheld a GPS monitoring act as a civil regulatory scheme by determining that the legislature enacted the requirement with civil intent.¹⁵⁴ After finding civil intent, the *Bare* court applied the *Mendoza-Martinez* factors and found that the monitoring law was not punitive in effect.¹⁵⁵ Based on these findings, *Bare* held that the GPS monitoring law did not violate the Ex Post Facto Clause.¹⁵⁶ Therefore, even without relying on *Smith*, courts can find that monitoring acts do not impose retroactive punishment that violates the Ex Post Facto Clause.¹⁵⁷

However, this argument fails here because even if Tennessee's Monitoring Act satisfies the Ex Post Facto analysis, the Act violates the Due Process Clause.¹⁵⁸ In *Stines*, the North Carolina Court of Appeal rejected an Ex Post Facto argument but conceded that continually monitoring convicted sex offenders violated their due process liberty interests.¹⁵⁹ In addition, the Massachusetts Supreme Court held in *Cory* that wearing a GPS monitoring device burdened an individual's

¹⁵⁰ Compare § 40-39-302 (b)(1) (describing continuous surveillance through GPS devices attached to sex offenders), with *Smith*, 538 U.S. at 90 (requiring sex offenders to provide basic information such as name, address, and birth date).

¹⁵¹ See *Cory*, 911 N.E.2d at 196; *Vogt*, 685 S.E.2d at 28 (Elmore, J., dissenting); *Wagoner*, 683 S.E.2d at 400 (Elmore, J., dissenting).

¹⁵² See *Vogt*, 685 S.E.2d at 28; *State v. Morrow*, 683 S.E.2d 754, 758 (N.C. Ct. App. 2009); *State v. Stines*, 683 S.E.2d 411, 414 (N.C. Ct. App. 2009); *Wagoner*, 683 S.E.2d at 400; *State v. Bare*, 677 S.E.2d 518, 531 (N.C. Ct. App. 2009) (holding that North Carolina's monitoring project is not punitive in intent or effect).

¹⁵³ See *Bare*, 677 S.E.2d at 522.

¹⁵⁴ *Id.* at 531; see also *Vogt*, 685 S.E.2d at 28; *Morrow*, 683 S.E.2d at 758; *Stines*, 683 S.E.2d at 413; *Wagoner*, 683 S.E.2d at 399.

¹⁵⁵ See *Bare*, 677 S.E.2d at 527-31 (explaining that history and tradition do not regard GPS monitoring as shame because it does not impose more affirmative restraints than registration requirements).

¹⁵⁶ *Id.* at 531-32.

¹⁵⁷ See *Vogt*, 685 S.E.2d at 28; *Morrow*, 683 S.E.2d at 758; *Wagoner*, 683 S.E.2d at 399; *Bare*, 677 S.E.2d at 531-32.

¹⁵⁸ See *United States v. Merritt*, 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009); *United States v. Smedley*, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009); *Stines*, 683 S.E.2d at 413 (involving challenge to North Carolina's monitoring act under both Due Process and Ex Post Facto Clauses).

¹⁵⁹ See *Stines*, 683 S.E.2d at 413.

liberty through its physical, permanent nature and continuous surveillance.¹⁶⁰ Tennessee's Monitoring Act similarly imposed continuous surveillance on convicted sex offenders through permanent GPS monitoring.¹⁶¹

Additionally, the Supreme Court has held that long-term government surveillance is punishment because enduring regulations are as restraining as prisons.¹⁶² Tennessee's GPS monitoring constitutes this sort of long-term surveillance by continuously tracking and monitoring sex offenders throughout the state.¹⁶³ Therefore, the *Bredesen* court improperly upheld Tennessee's Monitoring Act, which violates sex offenders' liberty interests through constant GPS surveillance.¹⁶⁴ The Monitoring Act infringes convicted sex offenders' liberty interests and retroactively imposes punishment after they serve their sentences in prison.¹⁶⁵

¹⁶⁰ See *id.* at 413. But see *Commonwealth v. Cory*, 911 N.E.2d 187, 196 (Mass. 2009) (citing *Stines*'s language from *Cory* court's analysis in Ex Post Facto argument that held that Massachusetts's monitoring statute was punitive in effect).

¹⁶¹ See Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-302(b)(1)(A) (2004). Compare *Doe v. Bredesen*, 507 F.3d 998, 1001 (6th Cir. 2007) (describing Tennessee's GPS monitoring law), with *Cory*, 911 N.E.2d at 191-95 (describing Massachusetts's GPS monitoring law), and *Stines*, 683 S.E.2d at 412-13 (describing North Carolina's GPS monitoring law).

¹⁶² See *Weems v. United States*, 217 U.S. 349, 381 (1910) (detailing different forms of punishment, including surveillance, through American history); Michele L. Earl-Hubbard, Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 819 (1996) (arguing that case law historically recognizes government surveillance as punishment); Symposium, *Brief on Behalf of the Public Defender, Amicus Curiae*, 6 B.U. PUB. INT. L.J. 107, 123 (1996) (noting that sentence of permanent government surveillance was cruel and unusual permanent surveillance).

¹⁶³ Compare Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-301(b)(1)(B), GPS: PROJECT EVALUATION, *supra* note 86, at 13 (stating that Tennessee's GPS monitoring tracks offenders throughout state), and GPS: FOLLOW-UP EVALUATION, *supra* note 92, at 8 (stating that Tennessee GPS monitoring follows offenders in several counties at nearly continuous intervals), with *Weems*, 217 U.S. at 381 (1910) (describing constant surveillance as punishment).

¹⁶⁴ See *United States v. Smedley*, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009) (holding that GPS monitoring infringed liberty interest); *Cory*, 911 N.E.2d at 196 (holding that GPS monitoring unduly burdens sex offenders' rights); *State v. Vogt*, 685 S.E.2d 23, 28 (N.C. Ct. App. 2009) (Elmore, J., dissenting) (explaining that GPS monitoring violates offenders' liberty rights); *State v. Wagoner*, 683 S.E.2d 391, 400 (N.C. Ct. App. 2009) (Elmore, J., dissenting) (same).

¹⁶⁵ See *Cory*, 911 N.E.2d at 196 (explaining that wearing GPS monitoring devices is more intrusive and burdensome than sex offender registration); *Vogt*, 685 S.E.2d at 28 (Elmore, J., dissenting) (discussing how GPS monitoring is illegal as post-probation punishment); *Wagoner*, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).

B. *The Monitoring Act Violates the Ex Post Facto Clause as a Law that Is Punitive in Effect*

The *Bredesen* court should have found that Tennessee's Monitoring Act was unconstitutional because the statute retroactively punishes convicted sex offenders.¹⁶⁶ Under the *Mendoza-Martinez* test, the Monitoring Act is clearly punitive in effect and, therefore, violates the Ex Post Facto Clause.¹⁶⁷ In *Bredesen*, the court found that a majority of *Mendoza-Martinez* factors weighed in favor of finding that the Monitoring Act was not punitive.¹⁶⁸ The court, however, improperly analyzed three factors that would have resulted in finding that the Monitoring Act imposed retroactive punishment and was thus constitutionally invalid.¹⁶⁹

The first *Mendoza-Martinez* factor considers whether history and tradition regard the statute as punishment.¹⁷⁰ The *Bredesen* court failed to acknowledge that history and tradition consider public shaming a form of punishment.¹⁷¹ Public shaming is a traditional form of punishment that carries symbolic meaning.¹⁷² Early American colonists required that criminals wear visible symbols, like brands or

¹⁶⁶ See *Smedley*, 611 F. Supp. 2d at 975; *Cory*, 911 N.E.2d at 196; *Vogt*, 685 S.E.2d at 28 (Elmore, J., dissenting); *Wagoner*, 683 S.E.2d at 400 (Elmore, J., dissenting).

¹⁶⁷ See *Cory*, 911 N.E.2d at 196 (holding Massachusetts's similar monitoring act is punitive in effect); *Vogt*, 685 S.E.2d at 28 (Elmore, J., dissenting) (explaining that six of seven *Mendoza-Martinez* factors show that monitoring act is punitive in effect); *Wagoner*, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).

¹⁶⁸ See *Doe v. Bredesen*, 507 F.3d 998, 1007-08 (6th Cir. 2007).

¹⁶⁹ See *Cory*, 911 N.E.2d at 196 (holding that Massachusetts's similar monitoring act is punitive in effect); *Vogt*, 685 S.E.2d at 28 (Elmore, J., dissenting) (explaining that six of seven *Mendoza-Martinez* factors show that monitoring act is punitive in effect); *Wagoner*, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).

¹⁷⁰ See *Kennedy v. Martinez-Mendoza*, 372 U.S. 144, 168-69 (1963).

¹⁷¹ See *State v. Noble*, 829 P.2d 1217, 1222 (Ariz. 1992) (stating that history traditionally considered sex offender requirement punitive); *In re Birch*, 515 P.2d 12, 17 (Cal. 1973) (describing sex offender requirement as ignominious badge); *Cory*, 911 N.E.2d at 197 (describing how other courts have found that permanently affixing GPS devices on parolees is punitive); *Vogt*, 685 S.E.2d at 30 (Elmore, J., dissenting) (characterizing monitoring as akin to public shaming, humiliation, and banishment). See generally NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Bantam Classic 1986) (1850) (explaining how society forced protagonist to wear symbol as public shaming).

¹⁷² See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991) (discussing psychological and social consequences of public shaming in American culture); Michelle Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 VAND. L. REV. 219, 224-25 (1995) (stating that public shaming would lead to community shunning). See generally HAWTHORNE, *supra* note 171 (explaining how society forced protagonist to wear symbol as public shaming).

patches affixed to clothing, so that people would publicly ridicule or ostracize them.¹⁷³ GPS monitoring is a form of public shaming because it requires that sex offenders wear visible GPS devices.¹⁷⁴ The multicomponent, bulky, conspicuous GPS device signals to onlookers that the wearer is a sex offender, which carries a similar shame stigma.¹⁷⁵ Sex offenders cannot wear GPS devices under any outer garment because doing so would block the device's signal.¹⁷⁶ Thus, requiring that sex offenders wear GPS devices is akin to public shaming because GPS devices are visible, eye-grabbing symbols that stigmatize the people wearing them.¹⁷⁷ This shame stigma makes the GPS device punitive in effect because history and tradition regard shaming as a form of punishment.¹⁷⁸

¹⁷³ Massaro, *supra* note 172, at 1912-13; see EDWIN POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS 195 (1966); Adam Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1223-24 (1982).

¹⁷⁴ See *Noble*, 829 P.2d at 1222 (stating that history has traditionally considered sex offender requirement punitive); *In re Birch*, 515 P.2d at 17 (describing sex offender requirement as ignominious badge); *Cory*, 911 N.E.2d at 196 (noting that wearing GPS device is similar to wearing some item for length of time as retribution for crime which people consider punitive); *Vogt*, 685 S.E.2d at 28 (characterizing monitoring as akin to historical punishments like public shaming, humiliation, and banishment). See generally HAWTHORNE, *supra* note 171 (retelling story where government forced woman to wear symbol as punishment).

¹⁷⁵ See *Doe v. Bredesen*, 507 F.3d 998, 1010 n.3 (6th Cir. 2007) (Keith, J., dissenting) (characterizing GPS device as catalyst for public ridicule due to its visibility); Massaro, *supra* note 172, at 1912-13; GPS: PROJECT EVALUATION, *supra* note 86, at 15 (describing actual GPS device dimensions); ISECURETRAC, GPS, <http://www.isecuretrac.com/Services.aspx?p=GPS#twopiece> (last visited Jan. 15, 2010) (reporting and illustrating two-part GPS device for sex offenders).

¹⁷⁶ See *Bredesen*, 507 F.3d at 1002 (stating that GPS device is visible to onlooker); *Vogt*, 685 S.E.2d at 28 (Elmore, J., dissenting) (noting that defendant cannot conceal or camouflage GPS device); *State v. Wagoner*, 683 S.E.2d 391, 400 (N.C. Ct. App. 2009) (Elmore, J., dissenting) (same).

¹⁷⁷ See *Bredesen* 507 F.3d at 1002 (Keith, J., dissenting) (describing GPS device as obvious to any onlooker); *State v. Morrow*, 683 S.E.2d 754, 758 (N.C. Ct. App. 2009) (Elmore, J., concurring in part, dissenting in part) (agreeing with Judge Keith that GPS monitoring is similar to public shaming); *Wagoner*, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).

¹⁷⁸ See *Noble*, 829 P.2d at 1222 (stating that history traditionally considered sex offender requirement punitive); *In re Birch*, 515 P.2d at 17 (describing sex offender requirement as ignominious badge); *Cory*, 911 N.E.2d at 196 (noting that wearing GPS device is similar to wearing some item for length of time for a crime, which people consider punitive); *Vogt*, 685 S.E.2d at 28 (characterizing monitoring as akin to historical punishments like public shaming, humiliation, and banishment). See generally HAWTHORNE, *supra* note 171 (retelling story in which woman had to wear symbol as punishment).

The Tennessee Monitoring Act also fails under the second *Mendoza-Martinez* factor because electronic monitoring imposes an affirmative disability or restraint.¹⁷⁹ GPS monitoring actively restrains a person's movement by limiting where an offender can go and by being more intrusive than traditional parole monitoring.¹⁸⁰ GPS monitoring laws enable authorities to bar sex offenders from certain locations or implicate them in crimes.¹⁸¹ The Monitoring Act allows authorities to include nearby sex offenders in investigations by using an automated system that compares crime locations with sex offender locations.¹⁸² In effect, the Monitoring Act illegally allows police to harass sex offenders by investigating them whenever someone commits a crime near their location.¹⁸³ GPS devices also report to authorities whenever a sex offender travels to a prohibited location, but the Monitoring Act fails to define areas where sex offenders may not travel.¹⁸⁴ As a result, sex offenders could violate the monitoring requirements by simply stepping outside their home if the authorities decide their

¹⁷⁹ See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *Cory*, 911 N.E.2d at 196-97; *State v. Stines*, 683 S.E.2d 411, 414 (N.C. Ct. App. 2009).

¹⁸⁰ See Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-303(b)(1)(B) (2004) (reporting violations of location requirements); *Smith v. Doe*, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting); *Cory*, 911 N.E.2d at 196-97 (stating that GPS monitoring is more invasive than traditional parole).

¹⁸¹ MASS. ANN. LAWS ch. 265, § 47 (LexisNexis 2010) (prohibiting sex offenders from exclusion zones, but not clarifying exclusion zones' locations); § 40-39-303(b)(1)(B) (prohibiting sex offenders from undefined locations); *Cory*, 911 N.E.2d at 196 n.19 (holding that Massachusetts monitoring law is vague and could dramatically limit offender's freedom of movement).

¹⁸² Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-302(b)(1)(C) (2004).

¹⁸³ *United States v. Laughrin*, 438 F.3d 1245, 1247 (10th Cir. 2006) (stating that Constitution and society do not allow police officers to round up usual suspects); *United States v. Rideau*, 969 F.2d 1572, 1584 (5th Cir. 1992) (Smith, J., dissenting) (expressing concerns that approving law that allows for authorities to frisk any person in high-crime area late at night condones rounding up usual suspects); *United States v. Giangola*, No. CR 07-0706 JB, 2008 U.S. Dist. LEXIS 108747, at *44 (D.N.M. July 24, 2008) (stating that Fourth Amendment prohibits laws that allow officers to round up usual suspects).

¹⁸⁴ § 40-39-302(b)(1)(B) (prohibiting sex offenders from undefined locations); see, e.g., Jill Levenson, *Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?*, 71 FED. PROBATION 2, 4 (2007) (describing how sex offender laws exclude sex offenders from most urban areas); Keith O'Brien, *Towns Push Sex Offender Limits*, BOS. GLOBE, June 15, 2008, at 1, available at http://www.boston.com/news/local/articles/2008/06/15/towns_push_sex_offender_limits/ (reporting that monitoring law excludes ninety percent of town from travel).

neighborhood is off-limits.¹⁸⁵ By prohibiting sex offenders from traveling to certain locations, the Monitoring Act violates an individual's freedom to move.¹⁸⁶

Courts have held that statutes limiting a person's freedom to move implicate a fundamental right to travel.¹⁸⁷ GPS monitoring curtails a sex offender's right to travel, which prevents the offender from rehabilitation through gainful employment.¹⁸⁸ Therefore, Tennessee's Monitoring Act limits a parolee's ability to move freely and constitutes an affirmative restraint.¹⁸⁹ GPS monitoring's physical restrictions suggest that the *Bredesen* court should have found that the Monitoring Act does not satisfy the second *Mendoza-Martinez* factor.¹⁹⁰

The third *Mendoza-Martinez* factor that the court evaluated asks whether the statute promotes traditional aims of punishment.¹⁹¹ GPS monitoring arguably promotes traditional aims of punishment — deterrence and retribution.¹⁹² The *Bredesen* court stated that a statute

¹⁸⁵ § 40-39-302(b)(1)(B) (prohibiting sex offenders from undefined locations); see, e.g., *Levenson*, *supra* note 184, at 4 (describing how sex offender laws exclude sex offenders from most urban areas); *O'Brien*, *supra* note 184, at 3 (reporting monitoring law excludes ninety percent of town from travel).

¹⁸⁶ *United States v. Merritt*, 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009); *United States v. Arzberger*, 592 F. Supp. 2d 590, 600 (S.D.N.Y. 2008); *State v. Stines*, 683 S.E.2d 411, 414 (N.C. Ct. App. 2009).

¹⁸⁷ See *Jones v. Helms*, 452 U.S. 412, 418 (1981) (recognizing travel as fundamental right); *United States v. Torres*, 566 F. Supp. 2d 591, 597 (W.D. Tex. 2008) (holding that sex offender law implicates right for individual to move from place to place); *United States v. Natividad-Garcia*, 560 F. Supp. 2d 561, 570 (W.D. Tex. 2008) (dismissing defendant's violation of statute because it retroactively punished travel and violated Ex Post Facto Clause).

¹⁸⁸ See CTR. FOR SEX OFFENDER MGMT., TIME TO WORK: MANAGING EMPLOYMENT OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION 2 (2002), available at <http://www.csom.org/pubs/timetowork.pdf> (citing employment as critical factor in lowering recidivism); CTR. FOR SEX OFFENDER MGMT., RECIDIVISM OF SEX OFFENDERS I (2001), available at <http://www.csom.org/pubs/recidsexof.html> (citing high recidivism rates for unemployed sex offenders); Russell L. Curtis & Sam Schulman, *Ex-Offenders, Family Relations, and Economic Supports: The "Significant Women" Study of the TARP Project*, 30 CRIME AND DELINQ. 507, 507-28 (1984).

¹⁸⁹ See *Doe v. Bredesen* 507 F.3d 998, 1010 (6th Cir. 2007) (Keith, J., dissenting); *Commonwealth v. Cory*, 911 N.E.2d 187, 198 (Mass. 2009); *State v. Stines*, 683 S.E.2d 411, 414 (N.C. Ct. App. 2009).

¹⁹⁰ See *Bredesen*, 507 F.3d at 1010 (Keith, J., dissenting); *Cory*, 911 N.E.2d at 196; *Stines*, 683 S.E.2d at 414.

¹⁹¹ See *Bredesen*, 507 F.3d at 1010 (Keith, J., dissenting); *Cory*, 911 N.E.2d at 196-97; *Stines*, 683 S.E.2d at 415.

¹⁹² See Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. §§ 40-39-303 to -304 (2004) (making GPS monitoring mandatory condition of parole and providing additional punishments for interfering with

must have more than a deterrent effect because deterrence can have civil or punitive effects.¹⁹³ However, the court failed to recognize that, in addition to deterrence, the Monitoring Act promotes retribution.¹⁹⁴ The Monitoring Act retroactively re-punishes defendants for their sex offenses even though they have already paid their debt to society through incarceration.¹⁹⁵ The Monitoring Act forces sex offenders to wear GPS devices, bans them from certain locations, and allows the state to monitor their every movement.¹⁹⁶ The Monitoring Act promotes retribution because participants in the Act must acquiesce to new requirements that severely limit their rights and liberty throughout their life.¹⁹⁷ GPS monitoring qualifies as retribution because it continuously restrains and violates sex offenders' rights.¹⁹⁸ Therefore, Tennessee's Monitoring Act is punitive because it advances retribution.¹⁹⁹

The *Bredesen* court only considered five *Mendoza-Martinez* factors.²⁰⁰ Proper analysis of these factors exposes the Monitoring Act's punitive effect.²⁰¹ As such, the Monitoring Act violates the Ex Post Facto Clause

condition of parole); *Marshall v. Garrison*, 659 F.2d 440, 443 (4th Cir. 1981) (noting that Congress requires retribution factor in parole evaluation); *Cory*, 911 N.E.2d at 197 (stating that GPS monitoring as condition of probation promotes both deterrence and retribution).

¹⁹³ See *Hudson v. United States*, 522 U.S. 93, 105 (1997); *Bredesen*, 507 F.3d at 1005.

¹⁹⁴ See Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-301 (2004) (addressing Tennessee's goals of reducing recidivism and punishing violators); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2662 (2008) (defining retribution as offender's repayment for harm to society and victim); *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (stating that retribution is criminal sentence that must directly relate to criminal offender's personal culpability).

¹⁹⁵ See *Bredesen*, 507 F.3d at 1000-01.

¹⁹⁶ See § 40-39-301; Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-302 (2004); *Bredesen*, 507 F.3d at 1001-03.

¹⁹⁷ See § 40-39-302; *Cory*, 911 N.E.2d at 195 n.16 (noting that statute that expands probation length is clearly punitive); *Commonwealth v. Talbot*, 830 N.E.2d 177, 185 (Mass. 2005) (reasoning that lifelong community parole is enhanced penalty for sex offenders that government cannot impose retroactively).

¹⁹⁸ *Cory*, 911 N.E.2d at 196; *Commonwealth v. Powers*, 650 N.E.2d 87, 90 (Mass. 1995); Megan Janicki, Note, *Better Seen than Herded: Residency Restrictions and Global Positioning System Tracking Laws for Sex Offenders*, 16 B.U. PUB. INT. L.J. 285, 300 (2007).

¹⁹⁹ See *Cory*, 911 N.E.2d at 196 (holding that similar Massachusetts monitoring act advances both retribution and deterrence); *State v. Vogt*, 685 S.E.2d 23, 28 (N.C. Ct. App. 2009) (Elmore, J., dissenting) (explaining that deterrent effect is not incidental and must weigh in favor of punitive effect); *State v. Wagoner*, 683 S.E.2d 391, 400 (N.C. Ct. App. 2009) (Elmore, J., dissenting) (same).

²⁰⁰ See *Bredesen*, 507 F.3d at 1007.

²⁰¹ See *Cory*, 911 N.E.2d at 196 (holding that similar Massachusetts monitoring act

because it imposes a retroactive punishment on previously sentenced sex offenders.²⁰²

However, the *Smith* court elevated one *Mendoza-Martinez* factor above others, specifically, a rational connection to a nonpunitive purpose.²⁰³ Using this analysis as the primary basis for its decision, the *Bredesen* court cited the legislature's intent to protect the public by reducing recidivism through the use electronic surveillance of sex offenders.²⁰⁴ The court reasoned this is a nonpunitive purpose because the legislation focused on protecting the public, not punishing offenders.²⁰⁵ When there is any reasonable connection to a nonpunitive purpose, courts must defer to the legislature's decision and uphold the law.²⁰⁶ Therefore, the *Bredesen* court held that the Monitoring Act is not punitive in effect because it rationally relates to the nonpunitive purpose of protecting the public from sex offenders.²⁰⁷

This argument fails because precedent suggests that each *Mendoza-Martinez* factor serves as an equal guidepost to determine whether statutes violate the Ex Post Facto Clause.²⁰⁸ The Supreme Court and

advances both retribution and deterrence); *Vogt*, 685 S.E.2d at 28 (Elmore, J., dissenting) (explaining that six of seven *Mendoza-Martinez* factors demonstrate that monitoring act is punitive in effect); *Wagoner*, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).

²⁰² See *Bredesen*, 507 F.3d at 1008 (Keith, J., dissenting); *United States v. Smedley*, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009) (holding that monitoring law violated Constitution); *Cory*, 911 N.E.2d at 198; *Vogt*, 685 S.E.2d at 30 (Elmore, J., dissenting) (finding majority, but not all of *Mendoza-Martinez* factors, in favor of punitive effects and finding North Carolina's GPS monitoring statute invalid); *Wagoner*, 683 S.E.2d at 400 (Elmore, J., dissenting) (same).

²⁰³ See *Smith v. Doe*, 538 U.S. 84, 102 (2003); *United States v. Ursery*, 518 U.S. 267, 290 (1996) (characterizing rational connection as most significant factor); *Schall v. Martin*, 467 U.S. 253, 269 (1984) (stating that rational connection factor is dispositive for *Mendoza-Martinez* test).

²⁰⁴ See *Bredesen*, 507 F.3d at 1006.

²⁰⁵ See *id.*

²⁰⁶ See *Smith*, 538 U.S. at 103 (finding that statute does not fail because there is deterrent effect and stating that courts should not second guess whether law best promotes nonpunitive purpose); *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005) (explaining that reasonable connection is not demanding standard and most nonpunitive purposes can meet this low standard).

²⁰⁷ See *Smith*, 538 U.S. at 102; *Bredesen*, 507 F.3d at 1006. *Contra Cory*, 911 N.E.2d at 196 (explaining that Massachusetts Supreme Court's view is consistent with other jurisdictions).

²⁰⁸ See *Hudson v. United States*, 522 U.S. 93, 100-01 (1997) (holding that previous Court erred by elevating one *Mendoza-Martinez* factor to dispositive status); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (holding that court should not consider any one factor controlling); *Lee v. State*, 895 So. 2d 1038, 1042 (Ala. Crim.

other courts instruct that no single factor is controlling.²⁰⁹ Just as the presence of one factor does not prove that the entire law is unconstitutional, neither should the absence of one factor be used to show that the law is nonpunitive.²¹⁰ The *Bredesen* court should have invalidated the Monitoring Act because a majority of *Mendoza-Martinez* factors indicate that the law is punitive in effect.²¹¹ The Monitoring Act fails to show that its effects are not punitive under a multi-factor analysis, even though the legislature intended for the law to have a nonpunitive purpose.²¹²

C. The Monitoring Act Is Expensive and Fails to Achieve Tennessee's Goal of Reducing Recidivism

The Tennessee legislature enacted the Monitoring Act to protect the community through increased supervision of sex offenders.²¹³ The legislature instituted the Monitoring Act as a one-year pilot program to evaluate whether GPS monitoring reduced sex offender recidivism.²¹⁴ However, the one-year report found there was no statistically significant difference between those offenders monitored with GPS devices and those without.²¹⁵ These statistics refute the *Bredesen* court's statement that constant surveillance will reduce the

App. 2004); *Cory*, 911 N.E.2d at 195 n.14; *State v. Geyman*, 729 P.2d 475, 479 (Mont. 2003).

²⁰⁹ See *Hudson*, 522 U.S. at 100-01 (holding previous Court erred by elevating *Mendoza-Martinez* factor to dispositive status); *Mendoza-Martinez*, 372 U.S. at 169 (holding that court should not consider any one factor as controlling); *SEC v. Palmisano*, 135 F.3d 860, 865 (2d Cir. 1998) (stating that nature of sanction cannot turn on one issue); *Cory*, 911 N.E.2d at 196 (noting that *Smith* does not overrule *Hudson*'s precaution against elevating factors to dispositive status).

²¹⁰ See *Hudson*, 522 U.S. at 100-01 (noting that courts err by considering one factor as controlling because factors point in differing directions); *Mendoza-Martinez*, 372 U.S. at 169 (holding that all factors are relevant); *Miller*, 405 F.3d at 719 (noting that *Ward* court erred by elevating one factor as dispositive).

²¹¹ See *Bredesen*, 507 F.3d at 1003; *Cory*, 911 N.E.2d at 198 (holding that similar Massachusetts monitoring act advances both retribution and deterrence); *State v. Vogt*, 685 S.E.2d 23, 28 (N.C. Ct. App. 2009) (Elmore, J., dissenting); *State v. Wagoner*, 683 S.E.2d 391, 400 (N.C. Ct. App. 2009) (Elmore, J., dissenting) (same).

²¹² Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act, TENN. CODE ANN. § 40-39-301(a) (2004); see *Bredesen*, 507 F.3d at 1003; *Cory*, 911 N.E.2d at 197; Janicki, *supra* note 198, at 300.

²¹³ § 40-39-301(a) (laying out legislature's intent to create experimental program to test if communal safety increases).

²¹⁴ § 40-39-301 (stating Tennessee had interest in utilizing technology to reduce recidivism to protect public safety and extended program for five years).

²¹⁵ GPS: PROJECT EVALUATION, *supra* note 86, at 4.

risk of recidivism.²¹⁶ Once paroled, both GPS-monitored and parole officer-monitored offenders had similar numbers of violations and new charges, and committed their first violations within similar numbers of days.²¹⁷

Many people believe that GPS monitoring prevents crime.²¹⁸ However, GPS monitoring only explains a sex offender's location at the time that a crime occurs and is not effective as a tool to stop crime.²¹⁹ Rather than preventing crime, GPS monitoring requires an increased budget that impedes Tennessee from hiring more police officers who could actually stop crime.²²⁰ In effect, this inefficient use of funds hinders Tennessee's crime prevention goal.²²¹ The Monitoring

²¹⁶ See *Bredesen*, 507 F.3d at 1006 (stating that registration requirements and constant satellite surveillance reduce recidivism); GPS: FOLLOW-UP EVALUATION, *supra* note 92, at 8 (reporting that more funds will increase greater success in recidivism). *Contra* *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005) (holding that government satisfied rational connection easily).

²¹⁷ GPS: FOLLOW-UP EVALUATION, *supra* note 92, at 3 (reporting numerous problems with GPS tracking including overextending resources and increasing danger for probation officers reporting to crime scenes without weapon).

²¹⁸ Christine Clarridge, *How GPS Bracelets Keep Track of Sex Offenders*, SEATTLE TIMES, Apr. 29, 2009, at A1, available at http://seattletimes.nwsourc.com/html/localnews/2009098690_gps22m.html (quoting Kings County supervisor as saying GPS monitoring prevents reoffense incidents because it removes secrecy); Chris Megerian, *GPS Units Help N.J. Parole Officers Monitor Sex Offenders*, NJ.COM, Aug. 2, 2009, at A2, available at http://www.nj.com/news/index.ssf/2009/08/nj_parole_board_officers_use_g.html (reporting that sex offenders acknowledge that wearing GPS device prevents their own recidivism). *Contra* Jim McKay, *Sex Offenders' GPS Devices Not a Silver Bullet, States Say*, GOV'T TECH., Feb. 1, 2009, at 4, available at <http://www.govtech.com/gt/596099?topic=117699> (reporting how GPS monitoring creates false sense of security because devices are passive reporting instruments rather than active crime prevention).

²¹⁹ Clarridge, *supra* note 218, at A1; McKay, *supra* note 218, at 4; Megerian, *supra* note 218, at A2.

²²⁰ BOPP, PROGRAM PERFORMANCE PLAN 261 (2007), available at <http://www.tn.gov/bopp/Docs/07-08%20BOPP%20Performance%20Measures.pdf> (noting that original program's limited duration required extra funding for training); GPS: FOLLOW-UP EVALUATION, *supra* note 92, at 7 (requesting funds in order to meet deficiencies in program such as lack of staffing, equipment, and training); GPS: PROJECT EVALUATION, *supra* note 86, at 7 (calling Monitoring Act success but acknowledging that funding must address major flaws in Act).

²²¹ BOPP, ANNUAL REPORT 2008-2009, at 15 (2009) [hereinafter ANNUAL REPORT], available at <http://www.tn.gov/bopp/Docs/ANNUAL%20REPORT%202008-2009.pdf>; BOPP, AGENCY STRATEGIC PLANS VOLUME 2 PROGRAM PERFORMANCE MEASURES, at 307 (2009) [hereinafter STRATEGIC PLANS], available at <http://www.tn.gov/bopp/Docs/2009%20BOPP%20Strategic%20Plan.pdf>; GPS: PROJECT EVALUATION, *supra* note 86, at 4-7 (reporting no statistical significance between experimental and control groups, but still requesting more funding).

Act did not show any significant improvements since its enactment in reducing recidivism and thereby fails its statutory mission.²²²

Despite these shortcomings, the legislature continued the program for five more years.²²³ In 2008, BOPP requested nearly two million dollars from the legislature to maintain the program.²²⁴ BOPP will use the funds to monitor twenty-three offenders convicted of rape of a child, which is approximately \$87,000 per sex offender.²²⁵ The court erred in failing to consider that, despite exorbitant expense, the program did not demonstrate any real progress toward crime prevention or recidivism reduction.²²⁶ The Monitoring Act failed to achieve its statutory purpose while simultaneously imposing retroactive punishment that infringed sex offenders' individual liberty interests.²²⁷

CONCLUSION

The *Bredesen* court wrongly decided that Tennessee's Monitoring Act did not violate the Ex Post Facto Clause.²²⁸ *Bredesen* misapplied the Supreme Court's reasoning in *Smith* to uphold the Monitoring Act as constitutional, despite the punitive differences between registration acts and monitoring acts.²²⁹ In addition, the Monitoring Act in *Bredesen* imposes an affirmative restraint on movement and publicly

²²² ANNUAL REPORT, *supra* note 221, at 15; STRATEGIC PLANS, *supra* note 221, at 307; GPS: PROJECT EVALUATION, *supra* note 86, at 4-7 (reporting no statistical significance between experimental and control groups, but still requesting more funding).

²²³ Memorandum from James W. White, *supra* note 92, (summarizing Senate Bill 2235/House Bill 2314 and showing increased BOPP expenditures); GPS: PROJECT EVALUATION, *supra* note 86, at 1 (reporting that Jessica's Law expanded BOPP's global positioning system pilot project for five years from 2007); Press Release, *supra* note 92 (furthering sex offender restrictions during 2009 year).

²²⁴ ANNUAL REPORT, *supra* note 221, at 15; STRATEGIC PLANS, *supra* note 221, at 307; GPS: FOLLOW-UP EVALUATION, *supra* note 92, at 2 (reporting that entire budget was two million dollars from 2009 to 2010).

²²⁵ ANNUAL REPORT, *supra* note 221, at 15 (detailing sex offender population and total program cost); STRATEGIC PLANS, *supra* note 221, at 307; GPS: FOLLOW-UP EVALUATION, *supra* note 92, at 4 (reporting sex offender population as of 2008).

²²⁶ GPS: FOLLOW-UP EVALUATION, *supra* note 92, at 8 (reporting that GPS will not prevent sex crimes from occurring); GPS: PROJECT EVALUATION, *supra* note 86, at 8 (reporting no statistical significance in recidivism rates between experimental and control groups); ANNUAL REPORT, *supra* note 221, at 15 (totaling BOPP budget expenses with significant funding for Monitoring Act).

²²⁷ See *supra* Part III.A-C.

²²⁸ See *supra* Part III.A-C.

²²⁹ See *supra* Part III.A (arguing that registration acts differ significantly from monitoring acts).

shames sex offenders, a punitive effect making the law's retroactive application to sex offenders unconstitutional.²³⁰ Finally, the Monitoring Act is a costly program that has not fulfilled its goal of creating a safer community.²³¹ States should find ways to reduce sex offender recidivism rates without infringing upon the rights of those who have already served time for the crimes they committed.²³² Sacrificing the rights that protect Americans from government intrusion in order to achieve illusory public safety goals leads society down a slippery slope.²³³ Monitoring acts in general strip away liberties from citizens and bring the country perilously closer to dystopian fiction governments with constant monitoring of all citizens.²³⁴

²³⁰ See *supra* Part III.B (analyzing *Mendoza-Martinez* effects test to determine that monitoring act is punitive).

²³¹ See *supra* Part III.C (demonstrating how GPS does not increase safety or reduce cost).

²³² Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 672-75 (2008); Janicki, *supra* note 198, at 295-97; Robin Morse, Note, *Federalism Challenges to the Adam Walsh Act*, 89 B.U. L. REV. 1753, 1793-94 (2009).

²³³ See Vitiello, *supra* note 232, at 672; Janicki, *supra* note 198, at 296; Morse, *supra* note 232, at 1795.

²³⁴ See sources cited *supra* note 233. See generally RAY BRADBURY, *FAHRENHEIT 451* (Ballantine Books 1973) (1953) (presenting future where government bans critical thought and controls what citizens may read or not read); ALDOUS HUXLEY, *BRAVE NEW WORLD* (Chatto & Windus 1962) (1932) (describing world where government controls citizens lives); GEORGE ORWELL, 1984 (Secker & Warburg 1984) (1949) (describing post-modern world where totalitarian government monitors and prescribes all activities for its citizens).