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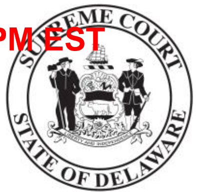

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN DOE 1, *et al.*, Plaintiffs below, Appellants, v. ROBERT M. COUPE, Defendant below, Appellee.	)))))))))))	No. 458, 2016 Court Below: Court of Chancery of the State of Delaware C.A. No. 10983-VCMR PUBLIC VERSION December 20, 2016

APPELLEE'S ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

On September 7, 2016, Plaintiffs filed this instant appeal. (D.I. 1). The action below, filed on May 4, 2015, seeks to strike as unconstitutional 11 *Del. C.* 4121(u), which requires Plaintiffs and other Tier III sex offenders on supervised release to be monitored by GPS tracking. On August 12, 2016, the Court of Chancery issued an opinion (the "Opinion") in which the court granted Commissioner Coupe's motion for summary judgment and denied Plaintiffs' cross-motion for summary judgment. On October 24, 2016, Plaintiffs filed their opening brief ("OB") on appeal. (D.I. 6). The following is Commissioner Coupe's Answering Brief in response thereto.

SUMMARY OF ARGUMENT

1. Denied. The constitutionality of a search under the Fourth Amendment turns upon its reasonableness. The Fourth Amendment does not impose a minimum level of suspicion for a search to be reasonable. Searches may be reasonable without a showing of reasonable suspicion. Admitted, however, that the search at issue here qualifies as a special need of the State.

2. Denied. The Court of Chancery properly applied the special needs test in finding § 4121(u) to be reasonable under the Fourth Amendment.

3. Denied. Plaintiffs, probationers and parolees, have no legitimate expectation of privacy not to be monitored by GPS (a condition of their probation and parole).

4. Denied. The incremental burden posed by GPS tracking of Plaintiffs is slight.

5. Denied. GPS monitoring of Tier III sex offenders, those that the General Assembly have concluded are the most dangerous, during their period of probation and parole is efficacious and reduces the risk of recidivism.

6. Denied. The Delaware Constitution does not impose a different standard of reasonableness than that under the Fourth Amendment.

7. Denied. § 4121(u) is a remedial, regulatory measure designed to promote public safety. Accordingly, § 4121(u) does not implicate the *Ex Post Facto* Clause.

8. Denied. Stare decisis requires that the Court follow its prior precedent, including not only *Hassett v. State*, but also *Helman v. State*, which upheld community notification requirements against an *ex post facto* challenge.

STATEMENT OF FACTS

The central issue in this case is whether a state may constitutionally determine how best to supervise and reintegrate into society its most serious sex offenders. To this end, Delaware properly enacted a statute that requires those sex offenders (Tier III offenders) to be supervised more closely through GPS technology during probation or parole. This requirement, the constitutionality of which Plaintiffs contest in this action, is but one component of a broader, comprehensive regulatory scheme in place designed to successfully reintegrate sex offenders back into society in lieu of incarceration without causing further harm to the public as a result. Delaware is not alone in establishing a system that pays heed to sex offenses and their societal costs.[1] Encouraged by the federal government, by 1996 "every State, the District of Columbia and the Federal Government" had enacted laws seeking to minimize risks associated with releasing sex offenders into the community. *Smith v. Doe*, 538 U.S. 84, 90 (2003).

I. Delaware's Sex Offender Classification and Regulatory Design

Pursuant to its "Sex Offender Management and Public Safety" statute, Delaware, like many other states, follows a "compulsory approach" in determining whether (and to what degree) a convicted sex offender is subject to the requirements

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[1] "According to the National Institute of Corrections (NIC), effectively managing sex offenders is one of the top criminal justice concerns nationwide." DOC000029 (A058).

under its sex offender regulatory scheme. *Helman v. State*, 784 A.2d 1058, 1065 (Del. 2001). This approach to sex offender classification does not afford individuals a hearing prior to designating sex offenders to a classification level, but instead looks solely to "offense-related criteria." *Id.* at 1066. The sentencing judge is required to designate an offender to a tier based upon the crime for which they were convicted. *Id.* (citing 11 *Del. C.* § 4121(e)). The judge has no discretion in designating an individual, as the statute is "offense driven" and does not permit consideration of mitigating facts of the offender.[2] *Id.*

Tier III is reserved for the most egregious sex crimes. *Id.* (citing 11 *Del. C.* § 4121(e)(1)(a)). Tier III crimes include rape in the first and second degree, unlawful sexual contact in the first degree, continuous sexual abuse of a child, and sexual exploitation of a child. § 4121(e)(1)(a). "Tier III crimes are more dangerous, by definition than their Tier II counterparts." *Id.* at 1075.

Classification to either Tier II or Tier III triggers the community notification requirements of the statute. *Id.* at 1066. "Designation as a Tier III sex offender results in the broadest community notifications possible." *Id.* Mandatory notification for Tier III sex offenders include searchable records available to the

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[2] The statute does permit a mechanism through which a sex offender, after the passage of a certain period of time, may petition for a "tier reduction" and thus relief from the other requirements imposed by a tier level. *Helman*, 784 A.2d at 1067-68 (citing 11 *Del. C.* § 4121(f)(2)).

public as well as community notifications tailored to those who are likely to encounter the sex offender. *Id.* Community notifications may include: "door-to door appearances, mail, telephone, newspapers or notices to schools and licensed day care facilities within the community, or any combination thereof. *Id.* (citing 11 *Del. C.* § 4121(a)(1)). Community notifications may also include a photograph of the offender." *Id.* (citing 11 *Del. C.* § 4121(a)(1)). Tier III offenders must comply with the mandatory registration and requirements for life. *Id.* (citing 11 *Del. C.* § 4121(f)(1)). In contrast to offenders in others tiers, required to register annually, Tier III offenders must register every 90 days. *Id.*

Tier III sex offenders on probation or parole are additionally required to be supervised through GPS surveillance. Enacted in 2007, this part of the statute mandates that:

> Notwithstanding any provision of this section or title to the contrary, any Tier III sex offender being monitored at Level IV, III, II, or I, shall as a condition of their probation, wear a GPS locator ankle bracelet paid for by the probationer. The obligation to pay for the GPS locator ankle bracelet shall not apply to any juvenile who is adjudicated delinquent and designated a Tier III sex offender pursuant to this title.

11 *Del. C.* § 4121 (u). Unlike the notification and registration component, tracking of Tier III sex offenders is only required while the offenders are serving sentences of probation or parole. *See* § 4121(u).

II. DOC's Individualized Supervision of Sex Offenders

The Delaware DOC, through its Bureau of Community Corrections Probation and Parole ("P&P"), supervises all of DOC's population released on community supervision (levels 1-4), including the hundreds of sex offenders currently on probation or parole. Of the approximately 4,721 total registered sex offenders in Delaware (109 of whom were homeless), 945 were registered as Tier III sex offenders.[3] DOC000028 (A057). P&P supervises all 217 registered Tier III sex offenders on community supervision. DOC000029 (A058). P&P Director John Sebastian testified that there are nine specialized sex offender P&P officers statewide to supervise Tier III offenders. Sebastian 119:3-15 (A046). Thus, each officer supervises 20-25 Tier III offenders at any given time. *Id.* at 126:7-11. (A048).

Supervision of Tier III offenders is highly individualized. P&P officers go into the community, conduct face-to-face interviews and investigations, including home visits. Sebastian at 10:4-11. (A019). Offenders are required to seek treatment from trained providers, who also provide risk-assessment tests for treatment and supervision. *See* Sebastian 85:5-89:14 (A038-A039). Both P&P and providers perform individual assessments, which include actuarial risk assessment tools, and

[3] These figures are obtained from a 2014 DOC report to the Joint Finance Committee. DOC000028-DOC000035 (A057-A064).

targeted treatment to meet individual needs of offenders. *Id.* at 92:21-93:16 (A039-A040).

GPS surveillance serves as an additional "tool" that assists P&P in supervising Tier III sex offenders. Sebastian 10:12-15 (A019). GPS helps monitor an offender's compliance. If an offender enters or leaves designated areas in violation of the terms of supervised release, "alerts" notify the officer. Sebastian 10:16-11:19 (A019). Officers routinely check tracking devices to ensure offenders are not entering ---**REDACTED**--. Sebastian 11:8-23; 12:4-8 (A019). As of September 2015, there were roughly 47 separate exclusion zones for 35 Tier III offenders. *Id.* at 12:4-8 (A019). Other areas that generate alarms should an offender enter it are --------**REDACTED**---------. Sebastian 12:10-23 (A019). Lastly, GPS tracking designates and monitors -----------**REDACTED**---------------. *Id.* at 13:1-7 (A020).

In addition to monitoring areas where offenders are precluded from entering and those that may cause concern, GPS surveillance plays an integral part in other aspects of supervision as well. It permits the officers to determine where an offender is at any time and -----------------------------**REDACTED**---------------------. Sebastian 14:24-15:4; 114:17-22 (A020; A045). ----------------**REDACTED**-- Sebastian 115:18-21 (A045). Director Sebastian discussed an instance where monitoring showed an offender spending an unusual

amount of time at a McDonald's restaurant. Sebastian 47:7-48:9 (A028). The officers then found the offender in the parking lot using McDonald's WIFI to watch pornography on a prohibited device with his zipper down. *Id.* (A028).

GPS also saves time. ------------------**REDACTED**--------------------. Sebastian 15:8-16:3 (A020). Surveillance also increases the chances that an offender, which includes many homeless offenders, will comply with registration. Leon Dep. Ex. 9 (B1). GPS surveillance, as Sebastian pointed out, serves as a means of deterrence since they "know someone is watching." Sebastian 47:7-16 (A028).

The GPS anklets used for monitoring are 3.5' x 2.5" 1.5" in dimension, and weigh well under one pound at 8.7 oz. (not 5 pounds as alleged by Plaintiffs in the Complaint). DOC0000026-DOC000027 (B3-B4). The bracelet is waterproof, and an offender wearing it may shower, bathe and swim in water up to 15 feet. Sebastian 122:17-19 (A047). The device powers with rechargeable battery technology, providing up to 80 hours of battery life for a single charge. Sebastian 76:20-78:2 (A035-A036); DOC000026 (B3). The device is off while an offender is home, providing longer battery life. Sebastian 56:15-24 (A030).

GPS monitoring of Tier III sex offenders pursuant to § 4121(u) does not preclude GPS supervision of other offenders, should P&P or the sentencing authority deem it appropriate. As Sebastian explained, Procedure 6.16 authorizes P&P to implement GPS monitoring for any offender—not just those Tier III offenders

required to be monitored by statute—and P&P does so, particularly in cases where there is an identifiable victim. DOC000001-DOC000004 (B7-B10). Tier I and Tier II offenders are sometimes monitored as well. Sebastian 40:13-24; 112:2-113:11 (A026, A044-A045). Also, P&P sometimes requires monitoring for other offenders as special conditions until final court approval. *Id.* at 40:16-24 (A026). Asked whether mandatory GPS monitoring of Tier III offenders could divert needed monitoring devices from more dangerous, non-Tier III offenders Sebastian testified that P&P had never encountered such a situation but pointed out that, in that situation, P&P would simply order more. *Id.* at 41:1-3 (A027).

III. Plaintiffs' Challenge to Closer Supervision Through GPS Monitoring

Plaintiffs, two Tier III sex offenders serving terms of probation and parole, seek to strike mandatory GPS monitoring for all offenders, claiming that they are both rehabilitated and pose no risk to society. John Doe 1 was convicted in 1979 ---------------------**REDACTED**------------------ 47-year woman. John Doe 1 000953-54 (B16-B17). For these crimes,[4] the trial judge sentenced John Doe 1 to level 5 incarceration for life, plus eleven years. *See* John Doe 1 000890, 000979-980 (B38, B19-B20). In **REDACTED**, John Doe 1 was released from level 5 incarceration and placed on parole. Compl. ¶ 24. As part of his conditions of parole, John Doe 1

[4] ---------------**REDACTED**----------------. See John Doe 1 000979 (B18). ---------------**REDACTED**-----------------. *Id.* (B18).

was required to submit to DNA testing and register as a Tier III sex offender. *See* John Doe 1 000870 (B21). Because John Doe 1 was designated as a Tier III sex offender, he was subject to § 4121(u)'s requirement of GPS tracking during the period of his parole. Compl. ¶ 26; *see* Aff. John Doe 1 ¶ 4 (A129.) And on May 11, 2009, John Doe 1 signed as Conditions of Level IV Parole Supervision in which John Doe 1 agreed to follow any special rules and conditions imposed at any time by the Court and by others. John Doe 1 000867 (B20).

John Doe 1 claims to have led a productive life since his parole in REDACTED, providing as support character references in connection with his 1996 parole application from three state employees, all of whom described John Doe 1's efforts at rehabilitation during his time in prison. Aff. John Doe 1 (A130-A142). Since being paroled in 2009, John Doe 1 obtained full-time employment and purchased a home. *Id.* (A130). Not noted by Plaintiffs, however, is the fact that in March of 2012, GPS monitoring detected a curfew violation, which in turn led to a search of John Doe 1's cellphone and numerous photographs of unsuspecting women on a beach. *See* John Doe 1 001241-47 (B24-B30). John Doe 1 was found guilty of violating the conditions of his parole but was nevertheless re-paroled. *See* John Doe 1 0001237 (B23).

In -------------------------**REDACTED**-------------------------. Compl. ¶ 35; *see* Aff. John Doe 2 ¶ 1 (A143). John Doe 2 was released from prison and placed on

probation in 20**REDACTED**. Compl. ¶ 35; Aff. John Doe 2 ¶ 1 (A143). Because John Doe 2 was convicted of a sex offense requiring classification as a Tier III offender, John Doe 2 was subject to the GPS monitoring requirements upon release. *See* Aff. John Doe 2 ¶ 2 (A143). John Doe 2 claims that GPS tracking affected his employability, citing one instance where he was let go from employment ------------ ----**REDACTED**------------------------. *See* Aff. John Doe 2. ¶¶ 5-6 (A144). John Doe 2 further claims that he was unaware of P&P practice, as testified to by Sebastian, of making exceptions in instances where P&P knows a certain area to have bad GPS reception, but where an offender is nevertheless scheduled to be. *See* Supplemental Aff. John Doe 2 ¶¶ 2-3 (A156-A157).

John Doe 2 is not currently being monitored because, in **REDACTED**, he violated his probation and was incarcerated. John Doe 2 was caught operating a Facebook account under a pseudonym and attempting to use that account to create sexual opportunities, though his conditions of probation prohibited him from accessing a computer or being in possession of pornography. Admin Warrant. John Doe 2 000338 (B35). John Doe 2 was also arrested for getting into an altercation with his then girlfriend and was charged with Offensive Touching. *Id.* (B35). Thereafter, on **REDACTED**, the Superior Court sentenced John Doe 2 to 10 years at a level 5 facility, suspended for 1 year at Level 3 supervision contingent upon the completion of Family Problems. *See* Sentencing Order John Doe 2 000334 (B31).

Plaintiffs contest the constitutionality of 4121(u) under two constitutional provisions. First, Plaintiffs claim that that GPS monitoring constitutes an unreasonable search under the Fourth Amendment of the United States Constitution and under Article I, Section 6 of Delaware's Constitution. Second, Plaintiffs argue that 4121(u) violates the *Ex Post Facto* Clause, contending GPS tracking to be punitive in effect. The Court of Chancery properly rejected both of these arguments and its decision should therefore be affirmed.

ARGUMENT

I. § 4121(U) IS A REASONABLE SEARCH UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. Question Presented

Whether the Court of Chancery properly concluded that § 4121(u)'s requirement of closer supervision of Tier III sex offenders on probation and parole through GPS tracking is a reasonable special need under the Fourth Amendment?

B. Scope of Review

This Court "reviews *de novo* a trial court's grant of a motion for summary judgment both as to the fact and the law." *DeBaldo v. URS Energy & Const.*, 85 A.3d 73, 77 (Del. 2014).

C. Merits of the Argument

1. State laws, including § 4121(u), are presumed constitutional

Acts of the General Assembly are presumptively constitutional. *Helman v. State*, 784 A.2d 1058, 1068. (Del. 2001). "This presumption not only imposes on one attacking the constitutionality of a statute the burden of demonstrating its invalidity, but also requires a measure of self-restraint upon courts sitting in review over claims of unconstitutionality." *Id.* "Courts are not super-legislatures and it is not a proper judicial function to decide what is or is not wise legislative policy." *Id.* "[T]he General Assembly's articulation of public policy, while not conclusive, is entitled to great weight in assessing the need for legislative change." *Id.* Deference

is owed to legislative matters that are "fairly debatable" and courts will not substitute the policy determinations of the General Assembly with that of its own or of those seeking to strike down the law as unconstitutional. *Id.* This is because the "[t]he General Assembly is in a far better position than this Court to gather the empirical data and make the fact finding necessary to determine what the public policy should be." *Shea v. Matassa*, 918 A.2d 1090, 1094 (Del. 2007). Nor will courts "second-guess the judgment of a legislative body when it enacts economic or social regulations that create statutory classifications." *Williamson v. New Castle Cty.*, 2003 WL 549082, at *3 (Del. Ch. Feb. 20, 2003). To overcome the strong presumption of constitutionality accorded to a legislative enactment, a party must negate "every conceivable basis on which it might stand." *State v. Virdin*, 1999 WL 743988, at *2 (Del. Super. Ct. Aug 20, 1999).

2. § 4121(u) is reasonable under the Fourth Amendment

This Court previously ruled en banc that "Tier III crimes are more dangerous, by definition, than their Tier II counterparts" and that "the General Assembly could have [therefore] rationally concluded that more dangerous offenders [Tier III offenders] present a greater risk to the community, justifying heightened [requirements] vis-à-vis those who commit acts of lesser gravity." *Helman*, 784 A.2d at 1075. Disregarding this holding, Plaintiffs contest the rationality of this classification system, arguing (through the guise of a Fourth Amendment challenge)

that using sex offense convictions as a categorical measure of a sex offender's dangerousness and risk to society is irrational and unreasonable. To be clear, Plaintiffs' challenge to the reasonableness § 4121(u) is not based on an argument that GPS surveillance of probationers and parolees who do pose a risk to society and a risk of reoffending is an ineffective means of promoting rehabilitation. Rather, Plaintiffs' claim of unreasonableness is based entirely on a contention that the General Assembly's use of an offense-based scheme is irrational. But as this Court has already held that this offense-driven, classification structure is rational, Plaintiffs' position arguing that it is not should be rejected.

The Fourth Amendment does not mandate a particular level of suspicion, but rather employs a reasonableness standard. *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013). It imposes no "irreducible [quantum of individualized] suspicion" absent which a search is rendered unreasonable. *United States. v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Reasonableness, under the Fourth Amendment, is a context-specific inquiry, highly dependent on the specific circumstances under which the search takes place. *Maryland*, 133 S. Ct. at 1978. Although a search may normally be undertaken pursuant to a warrant, the Supreme Court has permitted exceptions when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (citations omitted).

Supervision of probationers and parolees is one such special need. The Supreme Court has found that "[a] State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, [] presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 874. Moreover, because probation, like incarceration, is a form of criminal sanction imposed by a court, it is always true of probationers, as the Court has said of parolees, that they do not enjoy the absolute liberty to which every citizen is entitled, but only conditional liberty dependent on observance of special probation restrictions. *Id.* These restrictions, the Supreme Court explained, are "meant to assure that probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Id.* at 875. Thus, supervision is a special need of the State, "permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Id.*

In light of the special need presented by supervised release, the United States Supreme Court has upheld the constitutionality of blanket searches of probationers conducted pursuant to state law or regulation—without requiring an individualized determination that each probationer subject to the search condition exhibits characteristics justifying the need for warrantless searches. *See, e.g., United States v, Knights*, 534, U.S. 112, 117 (2001) (discussing *Griffin*'s decision upholding a

search condition that applied to all probationers "with no need for a judge to make individualized determinations that the probationer's conviction [*i.e.*, their individualized circumstances] justified the need for warrantless searches" (citing *Griffin*, 483 U.S. 868)).[5]

Plaintiffs agree that the standard under which the reasonableness of § 4121(u) is assessed is one of special needs. Under the special needs test, warrantless searches are valid when carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles. *Griffin*, 483 U.S. at 880. The following three-factor test governs whether the regulation in question is reasonable: (1) the nature of the privacy interests upon which the search intrudes; (2) the character of the intrusion that is complained of; and (3) the nature and immediacy of the governmental concern and the efficacy of the means for meeting it. *See generally Vernonia Sch. Dist. 47J v. Action*, 515 U.S. 646 (1995). The Court of Chancery properly analyzed § 4121(u) under this test, holding that it was reasonable in light of the State's special need to monitor and supervise its probation and parole population.

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[5] Despite this clarification from the Supreme Court, Plaintiffs nevertheless maintain that some individual level of suspicion is required for a search to be reasonable under the special needs standard. This argument conflates the state law or regulation pursuant to which the special needs search occurs (in *Griffin* the regulation required reasonable suspicion) and the level of individualized determination for each and every probationer to warrant deviating from the normal warrant and probable cause requirement—which as the *Knights* case noted is none.

a. Plaintiffs' significantly diminished expectation of privacy against GPS monitoring

With regard to the first factor, the court below correctly found that Plaintiffs, as probationers and parolees, do not have an expectation of privacy against being monitored by GPS that society would recognize as legitimate. Op. at 18. The Opinion noted that not all subjective expectations of privacy are protected under the Fourth Amendment: only those that society recognizes as legitimate. Op. at 17 (citing *Vernonia*, 515 U.S. at 654). Here, as Plaintiffs are still serving sentences as probationers and parolees (except now John Doe 2 has returned to prison), they have significantly diminished expectations of privacy. *Knights*, 534 U.S. at 119-20. As the court below noted, a probationer's status is "salient." Op. at 18 (citing *Samson v. California*, 547 U.S. 843 848 (2006)); *see also Knights*, 534 U.S. at 119 ("Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." (internal quotation marks and citations omitted)). Any expectation of privacy for parolees is less than that of probationers, because parole is more akin to imprisonment: "the State is willing to extend parole only because it is able to condition it upon the compliance with certain requirements." *Samson*, 547 U.S. at 850. Any expectation of privacy that Plaintiffs may have is further diminished, as the Court of Chancery noted, by the fact that Plaintiffs agreed to GPS surveillance as part of their respective conditions of probation and parole. Op. at 18; *Samson*, 547 U.S. at 852 (explaining that in *Knights* any expectation of

privacy was reduced by the fact that *Knights* was clearly informed about the search conditions (citing *Knights*, 534 U.S. at 119)).

Plaintiffs mischaracterize the court's finding that Plaintiffs lacking a legitimate expectation of privacy in not being tracked by GPS as Plaintiffs lacking any expectation of privacy. OB at 11-12. Plaintiffs cite to cases where courts have held that probationers do not lack all expectation of privacy, particularly from those searches to which they neither consented nor which were authorized by DOC regulation.[6] For example, the probationer in *Murray* agreed to searches of his home pursuant to P&P regulation 7.19. *Murray v. State* 45 A.3d 670, 678 (Del. 2012). The Court found that the probationer did not forfeit all expectations to privacy because of his status as a probationer, that he retained an expectation of privacy against a search that lacked reasonable suspicion—searches to which the probationer did not agree as part of his probation. *Id.* In contrast here, the Court of Chancery did not find that Plaintiffs lacked all expectation of privacy; rather, the court found that in light of their status as parolees and probationers, and given that they had

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[6] Plaintiffs also try to distinguish the Supreme Court's holding in *Samson* (which was not a special needs case), from the instant action, claiming that the need to monitor sex offenders on parole and probation is not as warranted here as it was in *Samson*, because Delaware had not shown that sex offender recidivism was anywhere near the rate of recidivism of parolees in California. Putting aside the fact that Plaintiffs have failed to demonstrate how this argument has any legal bearing on the expectation of privacy retained by Plaintiffs under this *Vernonia* factor, deciding what sex offender recidivism rate poses too much of a societal cost and warrants closer supervision is a policy decision best left to the legislative branch.

agreed to GPS surveillance as a condition of their release from prison, Plaintiffs lacked a legitimate expectation of privacy from GPS surveillance.

b. GPS monitoring poses a slight incremental effect on privacy

The second factor of the special needs test focuses on the *net* incremental effect GPS monitoring has on a Tier III sex offender. *See Belleau*, 811 F.3d 929, 934-35 (7th Cir. 2016). The Court of Chancery found that the increment effect of tracking was not unduly burdensome. Op. at 21. For one thing, GPS tracking reveals only information that an offender is already required to disclosure to his or her probation or parole officer. The device does not track an offender in his or her home. Nor does GPS tracking limit an offender's movement in any way. An offender may shower, bather or swim in up to 15 feet of water. And the device has up to 80 hours of battery life. Though the Court of Chancery noted that the device may cause some embarrassment, the court held that any embarrassment caused by the appearance of the device was not incrementally intrusive given that sex offeder status is already public information.[7] Op. at 19-20; *see also Belleau*, 811 F.3d at 933

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[7] Plaintiffs argue that the GPS device is far more intrusive than registration and community notification requirements because the latter is tailored to those in the community with whom the sex offender is likely to come in contact, whereas the appearance of GPS device attached to an offender's leg is not. OB at 14. This argument fails for several reasons. First, notification involves informing community members that the offender committed a sex crime; such information cannot be gleaned from the appearance of a GPS bracket. Moreover, community notification of Tier III sex offenders occurs on a periodic basis, every 90 days, and can take the

(finding that the additional loss due to someone seeing the GPS device and believing that person to have committed a sex crime to be slight). Though wearing a GPS device is burdensome, that burden is slight compared to other conditions of probation and parole (*e.g.*, warrantless searches, drug testing, DNA testing, registering and notification requirement). As the court below noted in finding that this requirement was not overly intrusive, and as Judge Posner observed in upholding a Fourth Amendment challenge to GPS monitoring, "having to wear a GPS anklet monitor is less restrictive, and less invasive on privacy, than being in jail or prison." Op. at 20; *Belleau*, 811 F.3d at 932.

c. The efficacy of § 4121(u) meets the nature and immediacy of the State's concerns.

Under the third factor, the relevant inquiry is whether the State's interests "appears important enough to justify the particular search at hand, in light of the other factors that show the search to be relatively intrusive upon a genuine issue of privacy." *Vernonia*, 515 U.S. at 660. Plaintiffs do not dispute that the State has a "great" legitimate interest in avoiding recidivism, but instead argue that Delaware's classification system is irrational and inefficacious.[8] OB at 16. Again, this

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form of door-to-door notification, public postings and may even include a recent photograph of the offender. Notification and registration requirements thus disseminate significantly more information about an individual's status as a sex offender.

[8] Aside from arguing that tier classification has no direct bearing on an offender's risk to reoffend, Plaintiffs also contend that GPS monitoring reduces employability

argument is one that this Court has already rejected in the context of notification and registration requirements. The Court explained that it was rational for the General Assembly to conclude that Tier III offenders are more dangerous and thus deserving of more intense notification and registration requirements. *Helman*, 784 A.2d at 1075. Along these lines, it is certainly rational for the General Assembly to conclude that Tier III sex offenders are more dangerous and should be more closely supervised through GPS surveillance.

In determining that § 4121(u) was helpful to reduce recidivism, the Court of Chancery did not resolve the issue of whether the risk of recidivism for sex offenders was in fact lower than that for other offenders. Rather the court determined that irrespective of this dispute,[9] there were "at least some benefits" to GPS monitoring

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which is counterproductive to the goals of rehabilitation. But Plaintiffs cite to merely once instance where monitoring affected employment of one of the current 217 Tier III supervised offenders.

[9] Dr. Leon contests the efficacy of Section 4121(u), arguing (1) that sex offenders recidivate at a lower rate than other offenders and (2) that categorical monitoring by GPS jeopardizes public safety by reducing an offender's employability and preventing the individualized supervision of offenders otherwise provided by P&P (without stating exactly how that is and though at the same time arguing that certain offenders should be more closely supervised through tracking).

The State contests these factual allegations, pointing to a national study (referenced in Dr. Leon's report) showing that sex offenders are ***four times more likely than other offenders*** to commit a sex offender. *See McKune v. Lile*, 536 U.S. 24, 33 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism

including reducing the rate or mitigating harm by recidivism. Op. at 23; see *also Griffin*, 483 U.S. at 882 (Blackmun, J. dissenting) (explaining that close supervision of probationers "provides a crucial means of advancing rehabilitation by allowing a probation [officer] to intervene at the first sign of trouble"). GPS monitoring here has done exactly that: GPS tracking allowed P&P to determine that one offender was spending an unusual amount of time at McDonalds that in turn led the officers to discovering that the offender was violating his probation and watching pornography on his computer. GPS surveillance also played a crucial part, as Sebastian testified, to finding out that another offender was taking inappropriate pictures of women at the beach.

There is no question that closer supervision is a critical part of advancing the "period of genuine rehabilitation" for offenders on probation and parole. Nor do Plaintiffs dispute this point. Rather, Plaintiff argue that closer supervision, through GPS tracking, serves no purpose for a certain subset of probationers and parolees, presumably because they are entirely rehabilitated (though still on probation and parole). Plaintiffs' argument, in essence, is that there are assessment tools in place that provide perfect measures of whether or not an offender is at a risk to reoffend and as such the efficacy in categorical GPS monitoring is non-existent. Leaving

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of Prisoners Released in 1983, p. 6 (1997))); *see also Smith v. Doe*, 538 U.S. at 103 (stating that the "risk of recidivism posed by sex offenders is 'frightening and high.'" (citations omitted)).

aside the procedural mechanisms by which an offender may seek early release from probation or parole should they believe themselves to be completely rehabilitated (*e.g.*, pardon, early discharge[10]), Plaintiffs have provided no support for their claim that risk assessment scores are error-free. As the court below noted, "the General Assembly may reasonably view sex crimes as more detrimental to public safety than other crimes and that *any* sex offender recidivism is more egregious than recidivism of other crimes." Op. at 23-24. It is within the purview of the legislature, therefore, to minimize *any* risk of sex offender recidivism and other risks unable to be gleaned from the risk assessment tools. In light of these considerations, and weighing these three factors under the special needs test, the Court of Chancery properly found Section 4121(u) to be reasonableness and to pass muster under the special needs test.

[10] *See, e.g., Baltazar v. State*, 108 A.3d 1224 (Del. 2015) (noting a probationer's early discharge from probation by the sentencing court).

II. ARTICLE I, SECTION 6 OF THE DELAWARE CONSTITUTION DOES NOT IMPOSE A HEIGHTENED STANDARD OF REASONABLENESS FOR SEARCHES OF PROBATIONERS AND PAROLEES.

A. Question Presented: Whether the Court of Chancery was correct in finding that Article I, Section 6 of the Delaware Constitution does not impose a heightened requirement of reasonableness for special need searches?

B. Scope of Review:

See discussion *supra* Part I.B.

C. Merits of the Argument

Reasonableness under Delaware's Constitution is the same as its federal counterpart. Plaintiffs seek to elevate the level of suspicion required for a search to be reasonable under the special needs test employed under Delaware law. Yet, Plaintiffs cite no authority that suggests that Delaware uses a different approach in determining the reasonableness of a search pursuant to a regulation under the special needs test from that articulated by the United States Supreme Court. To the contrary, and as the court below observed in rejecting Plaintiffs' argument, Plaintiffs' authority (all of which discuss searches conducted pursuant to P&P Procedure 7.19 requiring reasonable suspicion to search a probationer's home) either point to the special needs analysis under federal law or refer to both the state and federal

standards of reasonableness as one in the same.[11] Op. at 28; *see, e.g.*, *Sierra v. State*, 958 A.2d 825, 829 (Del. 2008) ("The United States Supreme Court and this Court have held that a warrantless administrative search of a probationer's residence requires the probation officer to have 'reasonable suspicion' or 'reasonable grounds' for the search."); *see also Fuller v State*, 844 A.2d 290, 294 n.6 (Del. 2004) (noting that "a subject's 'status as a probationer and his limited privacy rights resulting therefrom' alter the reasonableness analysis for a search under the Fourth Amendment of the U.S. Constitution and Article I, Section 6 of the Delaware Constitution" (citations omitted)). None of these cases distinguish federal search standards from that required under Delaware's Constitution.

That Delaware does not apply a different test of reasonableness was made unequivocal by this Court in *Culver v. State*. *Culver v. State*, 956 A.2d 5 (Del. 2008). There, the Court struck down as unreasonable a search conducted pursuant to P&P Procedure 7.19, which enables probation officers to search a probationer's home only upon a showing of reasonable suspicion. *Id.* at 15. The Court found that the particular search in question lacked reasonable suspicion and was therefore not

[11] This argument also overlooks the special needs design underlying a search's reasonability. Under the special needs test, a search is reasonable if it is conducted pursuant to a regulation that itself is reasonable. *Griffin*, 483 U.S. at 880. The only thing that these cases recognized was that the search in question was not reasonable under a special needs analysis because it failed to comply with the requirements of Procedure 7.19.

authorized by Procedure 7.19. *Id.* The Court, however, explained that its decision was reached "not because of constitutional debate, but instead over the conduct the Procedures authorizes." *Id.* The Court reasoned that probation officers may be able to search a probationer's home absent reasonable suspicion but explained that the procedure authorizing them to do so should be clear: "[I]f the duly selected social policy choice is that probation officers are to use their probationary supervisory authority to search a probationer's dwelling where the police lack a reasonable basis to search, then that policy should be clearly, consciously, and openly adopted." *Id.*

Delaware has recognized a standard for searches different from its federal counterpart, but it has only done so in the context of determining whether a search or seizure under Delaware's Constitution has occurred at all. It has not employed a different analysis of the reasonableness of the search or seizure. *See, e.g.*, *Jones v. State*, 745 A.2d 856, 86-67 (Del. 1999) (finding that "seized" within the meaning of Article I, § 6 was more expansive than under the Fourth Amendment); *Dorsey v. State*, 761 A.2d 807, 821 (Del. 2000) (rejecting the good faith exception recognized under the federal exclusionary rule). Moreover, each time the Court has recognized differences in constitutional standards between the federal and Delaware's constitutions, it has provided lengthy explanations for the different interpretations, including an analyses of text, legislative history, preexisting state law, and structure. *See* Op. at 30 n.101 (citing *Jones v. State* and *Dorsey v. State* in illustrating that when

this Court seeks to expand Delaware Constitution's protections against searches and seizures beyond that provided for under the Fourth Amendment, this Court does so explicitly and with clear references to Article 1, Section 6 of the Delaware Constitution). Without engaging in any of this analysis, Plaintiffs simply seek to equate the greater privacy rights recognized, in some instances, for free citizens to mean that the special needs test of reasonableness under Article I, Section 6 of the Delaware Constitutional requires a more exacting level of individualized suspicion than under the Fourth Amendment for searches of probationers and parolees to be reasonable. The Court of Chancery correctly rejected Plaintiffs' attempt to engraft into Delaware's Constitution a heightened standard of reasonableness, particularly where cases from this Court had construed both constitutional provisions under a special needs framework of probationers and parolees in a consistent and similar manner.

III. AS THIS COURT RECOGNIZED IN BOTH *HELMAN* AND *HASSETT*, THE OFFENSE-BASED TIERING OF SEX OFFENDERS AND REGULATIONS TAILORED TO THOSE CLASSIFICATIONS, INCLUDING GPS MONITORING FOR TIER III SEX OFFENDERS, ARE CIVIL IN DESIGN AND MEANT TO PROTECT THE PUBLIC AND DO NOT THEREFORE VIOLATE THE *EX POST FACTO* CLAUSE.

A. Question Presented

Whether Section 4121(u)'s GPS tracking requirement are punitive in purpose and effect so as to render it an impermissible punishment under the *Ex Post Facto* Clause?

B. Scope of Review

See discussion *supra* Part I.B.

C. Merits of the Argument

1. Principles of stare decisis require the Court's adherence to its prior decisions.

Stare decisis compels this Court against reconsidering its holdings in *Hassett*, a decision strongly rejecting the argument that § 4121(u) violates the *Ex Post Facto* Clause. A well-established principle in Delaware jurisprudence, the doctrine of stare decisis requires that "[o]nce a point of law has been settled by decision of this Court, 'it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside.'" *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001) (citations omitted). Unlike decisions of a lower court's or an agency's longstanding interpretation of a statute, stare decisis requires that prior decisions by *this* Court be

followed except for urgent reasons and upon clear manifestation of error. *Id.* The reason upon which the doctrine of stare decisis is founded is "the need for stability and continuity in the law and respect for the court precedent." *Id.* As this Court explained, "if the doctrine of stare decisis applies, this Court should examine whether there is 'a judicial opinion by the [C]ourt, on a point of law, expressed in a clear decision." *Id.* (citations omitted). *Hassett*, coupled with and fully supported by *Helman*, is that decision.

In *Hassett*, the Court rejected an *ex post facto* challenge to the retroactive application of § 4121(u), holding that the statute "does not implicate the *Ex Post Facto* Clause because the statute is intended for public safety and is not punitive in nature." *Hassett v. State*, 2011 WL 446561, at *1 (Del. Feb. 8, 2011) (TABLE). The Court acknowledged its analysis in *Helman*, a few years prior, in which the Court described in detail the sex offender classification scheme of § 4121, analyzed the community notification requirements tailored to that classification system under the *Mendoza-Martinez* factors, and found that this scheme was "intended for public safety and is not punitive in nature." *Id.* (citing *Helman*, 784 A.2d at 1075-79). For those same, thoroughly-analyzed reasons, this Court found that GPS monitoring under § 4121(u), a part of the classification and regulatory scheme the Court previously found to be a public safety measure, did not violate the *Ex Post Facto* Clause.

Plaintiffs seek to toss *Hassett* aside, arguing that the Court's analysis was incomplete. "Incomplete" is certainly not the standard, and Plaintiffs have not demonstrated any clear manifest error as to the Court's finding that GPS surveillance of its most egregious sex offenders was a public safety measure to justify once again reexamining this legal issue. Instead, Plaintiffs cite to what they characterize as a "weight of authority," four successful challenges under the *Ex Post Facto* Clause regarding sex offender community registration and notification and GPS surveillance requirements. OB at 36. Two of those cases discussed community registration and notification and GPS surveillance requirements of free individuals (not those serving sentences of community supervision). *See, e.g.*, *Riley v. New Jersey State Parole Bd.* 98 A.3d 554 (N.J. 2014) (requiring GPS monitoring those who completed their sentence); *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (state notification and registration requirements that required free individuals to physically appear in certain places and prohibited them from entering others). Of the two GPS cases in the context of probation and parole conditions, one does not even analyze the *ex post facto* challenge under the *Mendoza-Martinez* factors (something that Plaintiffs accuse this Court of failing to do in *Hassett*), but determined that GPS monitoring was punishment because it was one of the enumerated forms of punishments under state law. *Witchard v. State*, 68 So. 3d 407 (Fla. Dist. Ct. App. 2011). The last case—decided well before *Hassett*—is a

decision in which the Massachusetts state court (in a 4-3 decision) found a state law requiring certain sex offenders on probation to be tracked by GPS to be punitive. *Com. v. Cory*, 911 N.E.2d 187 (Mass. 2009). This lone decision (which did not discuss at all the statutory design in place to protect the public from sex offenders—apart from describing its own community notification and registration requirements as continuing, intrusive, and humiliating) in the face of many contrary holdings finding GPS surveillance to be civil in design, is woefully insufficient to show a clear manifest error required for this Court to reexamine its holding in *Hassett*. Accordingly, this Court should reject Plaintiffs' invitation to examine the validity of § 4121(u) under the *Ex Post Facto* Clause.

2. Application of the *ex post facto* analysis confirms § 4121(u)'s civil design

Should this Court decide to revisit *Hassett*, the Court should nevertheless affirm its decision that § 4121(u) is a regulatory measure designed to protect the public and is not so punitive in effect so as to render it an impermissible retroactive punishment. The *Ex Post Facto* Clause is implicated "only where a statute is criminal or penal, i.e., where the statute imposes punishment." *Helman*, 784 A.2d at 1076. "[N]ot every retroactively applicable statutory change creating a risk of affecting a parolee's terms or conditions is prohibited." *Mickens-Thomas v. Martinez*, 2005 WL 1586212, at *3 (3d Cir. July 7, 2005). The relevant inquiry is whether retroactive application of a later-instituted law or policy would create a

sufficient risk of increasing the measure of punishment attached to the covered crimes. *Id.* "[T]he fact that a law simply operates to the general disadvantage of a parolee (or a parole seeker) is insufficient." *Id. The Ex Post Facto* Clause "does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. *Smith v. Doe*, 538 U.S. at 103. "The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individualized determinations of their dangerousness does not make the statute a punishment under the *Ex Post Facto* Clause." *Id.*

This Court in *Helman* and *Hassett* previously considered the tier-based, sex offender classification scheme and found that scheme to be remedial, not a violation of the *Ex Post Facto* Clause. In its analysis, this Court applied the two-prong test articulated by the United States Supreme Court, looking first at "whether the legislature has expressly or impliedly indicated a preference that the statute be considered punitive or remedial," and if remedial or unclear, considering next whether the statute was "so punitive in purpose or in effect," to constitute punishment. *Helman*, 784 A.2d at 1077 (citations omitted).

a. Section 4121(u)'s legislative intent, like community notification, is remedial

This Court previously explained, in the context of community notification requirements, that even though the "General Assembly chose not to include a

statement of purpose in the statute upon its adoption," the "remedial intent of the statute can nonetheless be divined from the statute itself," and the "overarching legislative purpose is protection of the public."[12] *Id.* In so finding, the Court rejected the notion that "simply because the statute was included in the criminal code it necessarily evidences a legislative intent to make the statute penal. *Id.* at 1077 n.19. This Court, a few years after *Helman*, similarly found § 4121(u) to be "intended for public safety," likening it to the community notification requirements of § 4121. *Hassett*, 2011 WL 446561, at *1.

Disagreeing with this comparison, Plaintiffs attempt to distinguish § 4121(u), claiming that unlike community notification requirements, § 4121(u) is tied to an offender's period of supervised release and that, in their opinion, GPS monitoring is not sufficiently tailored to render it a public safety measure. OB at 26. Neither of these arguments demonstrate how § 4121(u) is meant for anything other than protecting the public. Requiring closer monitoring of sex offenders during the remainder of their sentence in which they have interaction with the public at large (a

[12] Plaintiffs argue that the finding as to legislative intent in *Helman* should not control here because the plaintiff in that case seemed to concede the statute's remedial purpose. The *Helman* Court, however, did not merely rely on this admission in finding that community notifications were intended for public safety. Rather the Court examined the requirements to those likely to encounter a sex offender in finding it to be a "***strong indication*** that the intent of the statute is to protect the community, not to punish the offender." *Helman*, 784 A.2d at 1077 (emphasis added).

period meant for rehabilitation and reintegration into society) strongly suggests its intent to protect the public. And like community notifications (and the requirements thereunder), § 4121(u)'s applicability is tied to an offender's tier—required only for Tier III offenders committing the most serious crimes. As nothing on the face of § 4121(u) suggests that the legislature sough to create anything other than a civil scheme designed to protect the public from harm, only the "clearest proof" that the effects of § 4121(u) are so punitive will suffice to trump this legislative intent. *Smith v. Doe*, 538 U.S. at 92

b. Section 4121(u) is a measured response to advance public safety

The United States Supreme Court articulated seven, non-dispositive, non-exhaustive factors (the "*Mendoza-Martinez* factors") used to determine the effect or purpose of a legislation. *Id.* at 97. These factors include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has been historically regarded as a punishment; (3) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (4) whether an alternative purpose to which it may rationally be connected is assignable to it; (5&6) whether it comes into play only on a finding of scienter and whether the behavior to

which it applies is already a crime;[13] and (7) whether it appears excessive in relation to the alternative purpose assigned. *Helman*, 784 A2d at 1077.

Applying these seven factors, this Court found the notification provisions to not constitute punishment. In so holding, the Court rejected an argument, like Plaintiffs' here, that the notification requirements "'goes far beyond what is necessary to achieve' the purpose of protecting the public because Delaware [imposes this requirement] even without evidence than an individual is dangerous." *Id.* at 1076 (citations omitted); *see also Smith v. Doe*, 538 U.S. at 103 (noting that a State could conclude that "conviction for a sex offense provides substantial risk of recidivism"). The Court explained that despite there being no individualized determination of dangerousness, the notification provisions are a measured response to the goal of protecting the public as "[o]nly those individuals who commit the more serious crimes are subject to [it]." *Helman*, 784 A.2d at 1078. Explaining further that notification was not required for Tier II offenders under the notification scheme, the Court noted that "these distinctions illustrate the measured response of the statute to the need for community protection." *Id.* Accordingly, the Court held the notification provisions to be civil in both design and effect.

[13] The Supreme Court has held these two factors to have little-to-no weight in an *ex post facto* analysis where, as here, the regulatory scheme applies to past conduct which was a crime—as that is consistent with its regulatory purpose. *See Smith v. Doe*, 538 U.S. at 104 ("This is a necessary beginning point, for recidivism is the statutory concern.").

Along these lines, the Court rejected an *ex post facto* challenge to § 4121(u), finding that it was not punitive in effect. *Hassett*, 2011 WL 446561, at *1. Plaintiffs argue that § 4121(u) is somehow different in its purpose and effect than community notifications, raising the exact arguments under the *Mendoza-Martinez* factors that have consistently been rejected under an *ex post facto* challenge.[14] **First**, while recognizing that wearing a GPS device does impose some burden, the restraints it imposes do not transform § 4121(u) into a punishment. Wearing a GPS device, as the *Bowditch* court noted, is less harsh than post-incarceration, involuntary confinement of sex offenders that the Court found to be non-punitive. *See State. v. Bowditch*, 700 S.E. 2d 1, 6(N.C. 2010) (noting that the Supreme Court found civil commitment to involve an affirmative restraint but nevertheless concluding that even detainment does not inexorably lead to the conclusion that the government has imposed punishment). And GPS monitoring does "not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *Smith v. Doe*, 538 U.S. at 100. And though GPS devices require recharging after 80 hours of use, an offender may recharge anywhere there is an electrical outlet. *Belleau*, 811

[14] Seizing on the fact that § 4121(u) serves as a deterrent, as many public safety measures do, Plaintiff's contend that this renders § 4121(u) a punishment. The Supreme Court has declined to take such a view, explaining that "[a]ny number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrence purpose renders sanctions criminal . . . would severely undermine the Government's ability to engage in effective regulation." *Smith v. Doe*, 538 U.S. at 102.

F.3d at 931-32. Nor does GPS tracking create a risk of job and business loss. *Smith v. Doe*, 538 U.S. at 100. Plaintiffs cite to one instance in which an offender claimed to lose a job because of monitoring. This is clearly insufficient evidence to justify a conclusion that the statute is unconstitutionally punitive in effect.[15]

Second, GPS monitoring—a relatively new technology—cannot be considered a historical form of punishment. Arguing that GPS devices are by effect punishment, Plaintiffs exaggerate the level of shame caused by wearing a GPS device, comparing it to a modern day scarlet letter. This argument has been rejected by the Supreme Court. Contrasting between colonial shaming punishments (directly meant to inflict public disgrace, like whipping and pillory) from any adverse consequences like embarrassment and social ostracism as a result of dissemination of already-public information in furtherance of a legitimate governmental objective, the United States Supreme Court reasoned that the latter was not punishment. *Id.* at 86; *see Belleau*, 811 F.3d at 938 (rejecting the *Riley* court's characterization of the GPS device as a scarlet letter, noting that the aim of GPS tracking was not to shame the offender but increasing the likelihood that the offender would be arrested should he reoffend). The GPS device used in Delaware

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[15] Neither is there sufficient evidence in the record that GPS devices inflict pain. P&P remedied the one instance in which an offender felt some pain from wearing the device.

is much smaller than other ones that courts have characterized as unobtrusive. *See Doe v. Bredesen*, 807 F.3d 998, 1005 (6th Cir. 2007) (finding that the GPS device in question looked like any other electronic device and that its appearance did not suggest to the casual observer that the offender wearing it was a sex offender). Nor is there any evidence in the record, apart from the claims by Plaintiff that they are embarrassed by having to wear the device, that any sex offender has faced personal embarrassment or social ostracism for wearing a GPS device.

Lastly, Plaintiffs once again find fault with the offense-specific sex offender tiering system, claiming this to be unreasonable and excessive in promoting public safety. However, this inquiry is not an "exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy." *Smith v. Doe*, 538 U.S. at 105. This factor only asks whether the regulatory means chosen are reasonable in light of the non-punitive objective. *Id.* This Court has already ruled that it is. Plaintiff's argument that closer monitoring through GPS surveillance frustrates public safety contradicts common sense is completely unsupported by the record. Evidence that one offender lost a job from monitoring is insufficient to invalidate the statute. And Dr. Leon's comments about GPS tracking somehow diverting P&P's attention and resources is unsupported and contradicted by Sebastian's testimony that if there is a shortage of devices, P&P can order more.

In short, the General Assembly indicated a preference that § 4121(u) be a remedial, regulatory measure designed to minimize the risk of sex offender recidivism. Application of the *Mendoza-Martinez* confirms this preference. Merely because the General Assembly chose to impose GPS surveillance across the board to all Tier III sex offenders does not transform this civil requirement into an impermissible punishment. This Court should, as it did in *Hassett* and *Helman*, hold that the notification and registration provisions, as well as GPS tracking, do not violate the *Ex Post Facto* Clause.

CONCLUSION

For the foregoing reasons, Commissioner Coupe respectfully requests that this Court affirm the decision of the Court of Chancery and reject Plaintiffs' attempt to strike § 4121(u) as unconstitutional.

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