EFiled: Nov 07 2016 12:17PM EST
Filing ID 59797561
Case Number 458,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN DOE NO. 1 and JOHN DOE NO. 2.,	)	
Plaintiffs Below, Appellants,	)	
v.	)	No. 458, 2016
ROBERT M. COUPE, solely in his official capacity as Commissioner of the Delaware Department of Correction,	)	Chancery Court of the State of Delaware, C.A. No. 10983-VCMR
Defendant Below, Appellee.	)	

APPELLANTS' OPENING BRIEF – PUBLIC VERSION

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November 7, 2016

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NATURE OF THE PROCEEDING

This action challenges the constitutionality of 11 Del. C. § 4121(u), which requires all probationers and parolees listed on Tier III of the sex offender registry (Tier III registrants) to wear GPS monitors at all times.

Plaintiffs filed suit on May 4, 2015 to obtain an order preventing Defendant from requiring them to wear GPS monitors as conditions of parole and probation, and declaratory and injunctive relief preventing Defendant from requiring any person to wear a GPS monitor as a condition of probation or parole unless ordered by a judicial officer upon a constitutionally sufficient finding. D.I. 1.

Defendant Robert M. Coupe is Commissioner of the Delaware Department of Correction, which includes the Office of Probation and Parole ("P&P"). P&P administers 11 *Del. C.* § 4121(u). D.I. 30, ¶ 8. Commissioner Coupe is sued solely in his official capacity. D.I. 1, ¶8.

On August 12, 2016 the Court of Chancery granted Defendant's motion for summary judgment and denied Plaintiffs' cross-motion for summary judgment. Plaintiffs appealed from that decision.

This is Appellants' Opening Brief.

SUMMARY OF ARGUMENT

1. Because the GPS monitoring program established by §4121(u) requires searches without a requirement of reasonable suspicion, it can comply with the Fourth Amendment of the United States Constitution and Article I, § 6 of the Delaware Constitution only if the searches it requires are permissible "special needs" searches.

2. Chancery Court's application of the special needs analysis to the GPS monitoring program was erroneous in three respects.

3. First, contrary to the ruling below, Plaintiffs do have a legitimate, albeit reduced, expectation of privacy.

4. Second, contrary to the ruling below, the intrusion resulting from constant GPS monitoring is substantial.

5. Third, the GPS monitoring program required by §4121(u) is not an effective means for meeting the governmental concern it is intended to address.

6. 11 *Del. C.* §4121(u) is unconstitutional because it requires searches without reasonable suspicion, and does not satisfy the special needs exception to the Fourth Amendment and Del. Const., Art. I, § 6.

7. The Ex Post Facto Clause applies to §4121(u) because the GPS requirement is punitive under *Kennedy v. Martinez-Mendoza*.

8. The doctrine of *stare decisis* does not justify preserving the ruling, *Hassett v. State*, 2011 Del. LEXIS 86 (Del. Supr.) (ORDER), that §4121(u) is not subject to the Ex Post Facto Clause.

STATEMENT OF FACTS

The statute under review, 11 *Del. C.* §4121(u), states:

> 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.

To comply with the statute, P&P attaches GPS monitors to every Tier III registrant who is on probation or parole. JS 37, 110[1],[2]. The Tier III registrants must wear the monitors at all times for the duration of their probation or parole.

The monitors transmit to a host server at P&P's monitoring center, creating tracking points on a minute by minute basis. The tracking points are overlaid on a map that P&P can play back to show the wearer's location at any point in time. P&P officers routinely check the tracking points. JS 11, 53-55. P&P's monitoring system retains a historical record of each wearer's location from when it is attached until it is removed. CSL 44.[3]

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[1] The deposition of John Sebastian is cited herein "JS ___". He is the director P&P probation and parole. JS 3.

[2] The statute makes monitoring "a condition of their probation," but P&P interprets the statute to make it a condition of parole also.

[3] The deposition of Chrysanthi S. Leon, Ph.D., J.D. is cited herein "CSL ___." Dr. Leon is, a tenured professor in the University of Delaware Department of Sociology with secondary appointments in the departments of Women and Gender Studies, and Legal Studies, A108.

P&P officers monitor "alerts" generated by the system as the result of equipment problems or violations, such as the wearer's entry into an "exclusion" zone. An exclusion zone is an area the wearer is not allowed to enter. JS 10-14. The monitoring system also informs P&P if the wearer goes into an "area of interest" or an "inclusion zone." *Id.* 11. An area of interest is "an area that the officer wants to pay closer attention to to make sure that the offender enters it or does not enter it." *Id.* 12. "An inclusion zone is an area that is mandatory for the offender to stay in during a certain period of time. *Id.* 13.

REDACTED

REDACTED . JS 105. It is a great deal of data. *See,e.g.*, A51-56, 66-72. P&P officers can use the GPS monitors for convenience. If they want to do a home visit, they "ping" the monitor to see if the wearer is home before traveling there. JS 14-16.

Approximately 80 probationers and parolees wear GPS monitors because the parole board or Superior Court specifically imposed the requirement. *Id.* 18-19. Most commonly, that occurs when the court is protecting a specific victim of domestic violence, or wants to keep a drug offender from specific locations. *Id.* 23-

24. Judicial and parole board decisions to impose GPS monitoring on specific probationers and parolees are not an issue in this case.[4]

Two hundred seventeen monitors were being worn by Tier III registrants as of the August 2015 deposition of its director, John Sebastian. JS 16-18. They must wear the monitors because they were assigned to Tier III of the sex offender registry. JS 108-10. Assignment to a tier is based on the crime for which they were convicted or plead guilty. Tier assignment does not correlate with dangerousness, and individual assessments are not performed to determine whether a particular Tier III registrant should wear a monitor. 11 *Del. C.* § 4121(d); CSL 107.

The monitors are attached to the wearers' legs, so they are often visible. When a pants leg raises, the casual observer can see the device and know that the wearer is being surveilled by the authorities. One plaintiff described trying to cover the monitor as best he can whenever outside his home in order to reduce the frequency with which people see it and ask questions, because of the embarrassment. Affidavit of John Doe No. 1 ¶8. Likewise, the female plaintiff was

[4] The essence of Plaintiffs' position is that the Fourth Amendment and Art. 1, § 6 require such individualized decision making, so the statute is unconstitutional because it purports to eliminate that requirement.

embarrassed by the monitor, wore clothes to try to hide it, and has had it affect time with her family.[5]

The monitors require the wearers to be attached to an electrical wall outlet twice a day, for up to two hours each time, in order to keep the monitors adequately charged. JS 77.

They are physically painful. CSL 109. In one plaintiff's case it caused physical injury. A130. The GPS monitor caused his leg to become infected and, although that has been remedied, causes pain whenever his ankle is bumped. P&P recently changed the ankle to which the monitor was attached because it was injuring the first leg. *Id.* ¶9. The female plaintiff has also had pain and bruising from the monitor. A147-48.

The monitor requirement delayed one plaintiff's release from prison for eight months, from September 2008 to May 2009, because a GPS monitor was not available. *See* September 10, 2008 letter from the Board of Parole (approval for parole requiring that he be held in prison "until GPS is available"), Affidavit of John Doe No. 1 (indicating May, 2009 release from prison); A128, A151.

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[5] P&P ceased requiring her to wear the monitor when New York discharged her from parole, and she was dismissed from the case. Stipulation of Dismissal of Mary Doe. She is referred to herein merely as an example.

A visible GPS monitor on the leg of a job applicant undoubtedly reduces one's chance of getting hired. But the monitoring requirement can also cost a registrant his job after he is hired, as occurred to one of the plaintiffs. He worked inside a power plant, performing cleaning services. The building disrupted the monitor signal, prompting his probation officer repeatedly to instruct him by cellphone to step outside the plant so they could pick up the signal. As the result of frequently walking off the job for that purpose, he lost the job and became unemployed. A143-44.

This highly intrusive, suspicionless state surveillance scheme has been imposed on Tier III sex offenders even though the sole peer-reviewed study in the record shows that categorical monitoring does not prevent sex crimes, and despite the evidence that the monitoring itself increases recidivism by harming employment prospects.

ARGUMENT

I. 11 *DEL. C.* § 4121(u) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. Question Presented

Does 11 *Del. C.* §4121(u) violate the Fourth Amendment because it authorizes and requires searches not based on reasonable suspicion that do not qualify as special needs searches? This question was presented in the briefing below. *See, e.g.,* Plaintiffs' Opening Brief in Support of Motion for Summary Judgment, pp. 20-27; D.I. 66.

B. Scope of Review

On appeal from a decision granting summary judgment, this Court's scope of review is de novo. *Gilbert v. El Paso Co.*, 575 A.2d 1131 (Del. 1990).

C. Merits of the Argument

GPS monitoring of a person is subject to the Fourth Amendment because attaching a GPS monitor to the subject is a search. *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015); Opinion Below (hereinafter "Op.") at 12. Generally, individualized suspicion of wrongdoing or probable cause is required for a governmental search. Op. 14-15. The court below held that § 4121(u) satisfied the Fourth Amendment under the "special needs" exception to that requirement recognized by *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646 (1995). Op. 14-15. It

erred in finding that §4121(u) satisfied the "special needs" exception applicable to the Fourth Amendment.

Vernonia approved a three-factor test for determining when "special needs beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." 515 U.S. at 653 (quoting *Griffin v.* Wisconsin, 483 U.S. 868, 873 (1987)). The factors are the nature of the privacy interest upon which the search intrudes, *id*. at 654, "the character of the intrusion," *id.* at 658, and "the nature and immediacy of the governmental concern and the efficacy of this means for meeting it." *Id.* at 660.

The court below erred in its evaluation of plaintiffs' privacy interests, the character of the intrusion resulting from the GPS monitoring, and the efficacy of GPS monitoring in meeting the governmental concern. As a result, it erred when it balanced of the *Vernonia* factors to conclude that §4121(u) does not violate the Fourth Amendment. Op. 26-27.

1. Plaintiffs have legitimate privacy interests

Noting Plaintiffs' status as parolees and probationers, the court below stated that "[Plaintiffs] [do] not have an expectation of privacy that society would recognize as legitimate.'''Op. 18 (bracketed material in Opinion) (quoting *Samson v. California*, 547 U.S. 843, 852 (2006) and citing *United States v. Knights*, 534 U.S. 112, 119-20 (2001)). That determination was based on Plaintiffs' acceptance of GPS

monitoring as a condition of probation or parole condition, and their knowledge of being tracked. Op. 18.

The finding that Plaintiffs have no privacy interests that society would find legitimate disregards controlling Delaware law. Probationers and parolees in Delaware have a limited expectation of privacy, not a null expectation. *Sierra v. State*, 958 A.2d 825, 832 (Del. 2008) ("By agreeing to probation, individuals sacrifice some of their privacy rights in exchange for freedom from incarceration . . . [they] do not surrender all of their privacy rights".).

Moreover, the court's reliance on Plaintiffs' acceptance of a GPS monitoring condition to find the absence of a legitimate privacy right disregards *Murray v. State*, 45 A.3d 670, 678 (Del. 2012) ("Delaware case law and administrative law do not permit suspicionless probationer searches, even though probationers sign waivers as a condition of probation.").

The court's reliance on Plaintiffs' knowledge of the monitoring to find an absence of any privacy right also runs afoul of *Murray*. If consent to monitoring cannot eliminate the privacy right, then that right cannot be eliminated by P&P's invoking the consent in order to attach a monitor, and then saying "since you know about it you no longer have a privacy right."

This Court need not rely solely on its own decisions to find that parolees and probationers have a legitimate privacy right. It has long existed under federal law.

See Griffin, 483 U.S. at 873 ("A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'").

Samson v. California, upon which court below relied, did not find suspicionless searches permissible under the circumstances §4121(u) addresses, and does not show that §4121(u) does not intrude on a legitimate privacy interest. *Samson* upheld a California statute permitting suspicionless searches of parolees, but it did so in reliance on facts that render its rationale inapplicable to §4121(u). Presented with California's 68-70% parolee recidivism rate and 130,000 parolees, the Court agreed that suspicionless searches were necessary to enable the state to provide the intense supervision needed for the parolees to reintegrate themselves back into productive society. 547 U.S. at 854. That justification does not apply to the suspicionless searches required by §4121(u) because there is no indication in this record that the recidivism rate for sex offenders in Delaware is anywhere near 68%.

Moreover, *Samson* was grounded on the Court's acceptance of a supervisory need for suspicionless searches found to exist under California's facts.[6] Nothing in the record before this Court shows that P&P attaches GPS monitors to all of the Tier III registrants because it needs to do so to provide adequate supervision. To the

[6] California is an outlier in permitting parolee searches without some level of suspicion. 547 U.S. at 855.

contrary, P&P's director indicated that P&P attaches the monitors to all Tier III registrants because it is required by §4121(u), and solely for that reason. JS 37, 110. When asked whether it made sense from a public safety perspective to use GPS monitoring on all the Tier III registrants but not on the other people P&P supervises he ultimately responded: "I've never given great thought to as a whole whether it makes sense or doesn't make sense or whether we should or shouldn't. It's a requirement, therefore, we do it." JS 109-10.

The court below's reliance on *United States v. Knights* is also misplaced. *Knights* did not change the rule that parolees and probationers have a legitimate privacy interest against suspicionless searches. *Knights* said it was "not address[ing] the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." 534 U.S. at 120 n. 6. Moreover, the *Knights* did not involve a search authorized by a one-size-fits-all statute. In *Knights*, "[t]he judge who sentenced Knights to probation determined that it was necessary to condition the probation on Knights's acceptance of the search provision." 534 U. S. at 119.

The court below erred in finding that Plaintiffs had no legitimate privacy right.

2. Constant, long-term GPS monitoring is intrusive

The court below stated that the GPS monitoring is not unduly burdensome for two reasons. First, it discounted the intrusion on privacy from wearing a GPS monitor because "wear[ing] a GPS anklet monitor is less restrictive, and less invasive of privacy, than being in jail or prison." Op. 20, quoting *Belleau v. Wall*, 811 F.3d 929, 932 (7th Cir. 2016). The comparison is not apt. Prisoners are in prison because they have been sentenced to incarceration. When people are made to wear GPS transmitters by § 4121(u), it is because the sentencing judge did not order them to wear a transmitter as part of their sentence. The constitutionality of § 4121(u) is in issue because it requires GPS monitoring absent a court's finding that it is appropriate in a given case.

Second, referring to the incremental effect of the statute on Plaintiffs' privacy, the court stated that plaintiffs are already required to register publicly as sex offenders and are subject to community notification. Op. 19-20. It is true that plaintiffs must register with the Delaware State Police, 11 *Del. C.* § 4120(d)(1), and then local law enforcement officials notify "members of the public who are likely to encounter a sex offender." 11 *Del. C.* § 4120(a), (i). But requiring them to wear an ankle monitor constantly that can be seen whenever a pants leg raises, and to be tracked minute-by-minute throughout the day, is an intrusion an order of

magnitude greater than the privacy intrusion resulting from tailored community notification.

As the Superior Court recognized when describing long-term GPS monitoring:

> The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods possible limited only by the need to change the transmitting unit's batteries. Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue, or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations-political, religious, amicable and amorous, to name a few-and of the pattern of our professional and advocational pursuits.

State v. Holden, 54 A.3d 1123, 1130 (Del. Super. 2010) (suppressing evidence obtained through use of GPS transmitter that was placed on defendant's car without a warrant or his consent) (quoting *People v. Weaver*, 909 N.E.2d 1195, 1201 (N.Y. 2009))*; see also United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff'd sub nom*, *United States v. Jones*, 132 S. Ct. 945 (2012) (listing decisions recognizing "prolonged surveillance of a person's movements may reveal an intimate picture of his life" and suppressing evidence obtained through use of GPS monitor).

The intrusion on privacy under §4121(u) is substantial.

3. The GPS monitoring program lacks efficacy

The governmental concern in preventing future sex offenses is great. But the efficacy of the monitoring scheme required by § 4121(u) for addressing that concern is non-existent, as is demonstrated by its results.

Section 4121(u) made GPS monitoring mandatory in 2007, and P&P devotes substantial manpower to the monitoring program. *See* JS 17,105; A51-56, A66-69, A130, A144; D.I. 30, ¶1. Yet P&P has provided in this case only one example of GPS monitoring being used to stop crime: a man prohibited from having a computer device was found in a McDonald's parking lot with his zipper down using the free WiFi to view pornography. JL 47-48. Likewise, P&P's director did not know of a single instance of P&P learning from GPS monitoring information that someone had loitered near a school in violation of 11 *Del. C.* § 1112, which prohibits registrants from loitering within 500 feet of a school. JS 46.

One might expect that the results of monitoring would mostly be seen as the absence of further crime, as a result of deterrence. But the only peer-reviewed empirical study of GPS monitoring of registered sex offenders found no evidence that the monitoring reduced any form of sexual offending. A120.

Consideration of efficacy must also take into account the ways in which the state action is counter-productive. The monitoring required by § 4121(u) increases

the likelihood of criminal activity by making it more difficult for the wearers to find employment. The empirical literature shows that stable employment is crucial for keeping former offenders productive, law-abiding members of our community. The GPS monitors reduce wearers' employability. CSL 110.

The monitoring scheme required by §4121(u), far from being even a minimally efficacious way meeting an important concern, decreases public safety.

The court below found Dr. Leon's analysis irrelevant because the court focused on her statements about how the program could be more effective. Op. 23-26. The court reasoned that there were at least some benefits to monitoring, no matter how slim, and that a search need not be the least intrusive search practicable to be reasonable under the Fourth Amendment. Op. 26, citing *Vernonia*, 515 U.S. at 663. That conclusion overlooks the important implications of Dr. Leon's analysis for this case, since it does not address either the increase in recidivism that results from impairing employability, nor does it address the negative consequences of forcing P&P to monitor offenders who are not high-risk,[7] either of which may result in a net harm to public safety even if it were true that there were public safety benefits to GPS monitoring.

[7] One reason that § 4121(u) is not efficacious is that it causes P&P to put the GPS monitors on the wrong people and distracts P&P from doing its important work. CSL 22, 37-39, 41-42, 45, 66, 107; A120-22.

4. When the *Vernonia* factors are properly assessed with respect to § 4121(u), the searches cannot be justified

In sum, § 4121(u) requires that GPS monitors be used in a manner that significantly intrudes on the lives and privacy of people who do not present risk levels justifying the intrusion, physically injures them and harms their employment prospects and social lives, and distracts P&P from focusing on the people who do present a high risk. No government interest is achieved by doing so—on the contrary, there is strong evidence that the program is counter-productive. The GPS searches are sufficiently intrusive and ineffective that they violate even the diminished privacy rights enjoyed by probationers, rendering § 4121(u) invalid under the Fourth Amendment.

II. 11 *DEL. C.* § 4121(u) VIOLATES ARTICLE I, § 6 OF THE DELAWARE CONSTIUTION

A. Question Presented

Does 11 *Del. C.* §4121(u) violate Del. Const., Art. I, § 6 because it authorizes and requires searches not based on reasonable suspicion that do not qualify as special needs searches? This question was presented in the briefing below. *See, e.g.,* Plaintiffs' Opening Brief in Support of Motion for Summary Judgment, pp. 20-27; D.I. 66.

B. Scope of Review

On appeal from a decision granting summary judgment, this Court's scope of review is de novo. *Gilbert v. El Paso Co.,* 575 A.2d 1131 (Del. 1990).

C. Merits of the Argument

1. This Court Determines the Meaning of Art. I, § 6

The court below did not independently consider whether §4121(u) violated Article I, § 6 of the Delaware Constitution because it had found that "Article I, § 6 does not provide broader search protections than the Fourth Amendment." Op. 30. The decisions of this Court are to the contrary. *See, e.g., Jones v. State*, 745 A.2d 856, 873-74 (Del. 1999) (holding that the unique history of Delaware's Constitution provided greater protection from unreasonable seizure in a situation in which officers lacked reasonable suspicion); *Dorsey v. State,* 761 A.2d 807, 817 (Del. 2000) (holding that the Delaware Constitution's explicit requirement of

probable cause means that, unlike under the Fourth Amendment, mere good faith belief in probable cause is insufficient under Delaware law).

The court below rejected Plaintiffs' reliance on decisions by this Court, most importantly for present purposes *Sierra*, *supra*, and *Murray*, *supra*, because they involved searches conducted pursuant to a Delaware Department of Correction regulation that required a probation officer to have "reasonable suspicion" to conduct a search of a probationer's residence. Op. 28, quoting Probation and Parole Procedure 7.19. The court reasoned that while the "decisions admittedly do state that 'reasonable suspicion' is required for a warrantless search, the contexts in which those statements are made indicate that such a rule is limited to administrative searches of probationers' residences and vehicles pursuant to P&P Procedure 7.19." Op. 29. That finding is inconsistent with the reasoning in those cases, and it disregards the Delaware Constitution's "paramount concern" for "protecting the privacy of [Delawareans]," *Jones*, 745 A.2d at 866; *Holden*, 54 A.3d at 1128, *supra*, 54 A.3d at 1128, and the historical role of this Court.

Murray did not limit itself to the protections of privacy adopted by the Department of Correction. *See* 45 A.3d at 678 (citing P&P Procedure 7.19 but stating "Delaware case law and administrative law do not permit suspicionless probationer searches, even though probationers sign waivers as a condition of probation.") (citing *Sierra*, 958 A.2d at 829). Likewise, while acknowledging P&P

7.19, *Sierra* observed that 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." 958 A.2d at 828, citing *Griffin, supra,* 483 U.S. at 872-73, *Knights, supra,* 534 U.S. at 118-19, and *Donald v. State,* 903 A.2d 315, 318-19 (Del. 2006).

The courts are the guardian of the Delaware and federal constitutions. *Wheeler v. State,* 135 A.3d 282, 307 (Del. 2016). It reverses cause and effect to suggest that this Court's recognition of the need for reasonable suspicion before a probationer or parolee is subjected to a search is the result of a Department of Correction regulation. *See State v. Tucker,* 2007 Del. Super. LEXIS 100, *10-11 (Del. Super. April 10, 2007) ("An administrative search of a probationer's residence must also be based on 'reasonable grounds.' Accordingly, the Department of Corrections ('DOC') has established procedures for conducting administrative searches.").

2. Application of the *Vernonia* factors under Delaware law demonstrates that this search regime is unconstitutional

The special needs exception to the Fourth Amendment's requirements of warrant and probable cause also applies to Art. I, § 6 of the Delaware Constitution. *See State v. Caulk,* 2015 Del. Super. LEXIS 485, at *7 (Del. Super. Sep. 14, 2015); *State v. Christopher,* 2014 Del. Super. LEXIS 138, at *4-5 (Del. Super. Mar. 17, 2014). However, the results of a special needs analysis under Art. I, § 6 may differ

from the identical analysis under the Fourth Amendment because one of the critical inputs in the special needs balancing test is the degree of privacy interest recognized. *See Vernonia*, 515 U.S. at 654 (holding that the first factor to be balanced against the others is the privacy interest upon which the search intrudes). Because of Delaware's greater recognition of the privacy rights of probationers, Defendant's burden to show that the special needs exception is justified is heavier under Delaware law. In particular, Defendant must demonstrate a proportionally greater "immediacy of the governmental concern and the efficacy of this means for meeting it." *See Vernonia*, 515 U.S. at 660. Given the lack of evidence that Delaware's GPS monitoring scheme is an effective means of protecting public safety, that burden has not been met on this record.

III. APPLICATION OF 11 DEL. C. § 4121(u) TO PERSONS CONVICTED OF OFFENSES OCCURING BEFORE ITS ENACTMENT VIOLATES THE EX POST FACTO CLAUSE BECAUSE OF ITS PUNITIVE NATURE

A. Question Presented

Does 11 *Del. C.* §4121(u) violate the Ex Post Facto Clause of the United States Constitution. This question was presented in the briefing below. *See, e.g.*, Plaintiffs' Opening Brief in Support of Motion for Summary Judgment, pp. 28-33; D.I. 66.

B. Scope of Review

On appeal from a decision granting summary judgment, this Court's scope of review is de novo. Gilbert v. El Paso Co., 575 A.2d 1131 (Del. 1990).

C. Merits of the Argument

1. Section 4121(u) is subject to the Ex Post Facto Clause if it is punitive in purpose or effect

The Ex Post Facto Clause prohibits "any statute . . . which makes more burdensome the punishment for a crime, after its commission." *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169 (1925)). In addition to ensuring fair notice of punishment, the Ex Post Facto Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The legislature's "responsivity to political pressures poses a risk that it may be tempted to use

retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). The Framers "viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment," and adopted the Ex Post Facto Clause to shield against "those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810) (Marshall, C.J.).

A court evaluating whether the Clause applies must engage in statutory construction to determine whether the legislature intended the statute to be civil or criminal. If the purpose is to impose punishment, then it applies. *Smith v. Doe*, 538 U.S. 84, 92 (2003). If, on the other hand, the legislature intended to enact a regulatory scheme that is civil and non-punitive, then a court must examine whether that scheme is "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Kansas v. Hendricks*, 521 U.S. 346, 361 (2003) (internal citation and quotation omitted); *see also Smith*, 538 U.S. at 92. Several factors determine whether a statute is punitive in purpose or effect. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). In determining whether Alaska's sex offender registration and notification statute was punitive, the United States Supreme Court identified five of those factors as "most relevant":

> [W]hether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a

> rational connection to a non-punitive purpose; or [5] is excessive with respect to this purpose.

Smith, 538 U.S. at 971; *see also Doe v. Snyder*, 2016 U.S. App. LEXIS 15669, at *12 (6th Cir. Aug. 25, 2016) (using these factors to assess Michigan Sex Offender Registration Act). These factors "often point in differing directions," *Kennedy*, 372 U.S. at 169, and "are neither exhaustive nor dispositive." *Smith*, 538 U.S. at 97 (internal quotation marks and citations omitted).

2. The purpose of § 4121(u) is punitive

The analysis of whether a statute is punitive begins with the question of the legislature's purpose in enacting it. *See Smith*, 538 at 92. The statutory text of § 4121(u) contains no statement of legislative intent.[8] Nor does the legislative history of § 4121(u) provide any guidance. However, the legislature did place the provision in the criminal code, and (unlike the registration and community notification provisions) made it an express condition of probation—a criminal punishment.

In finding that the Ex Post Facto Clause applies to Massachusetts's sex offender GPS requirement, the court in *Commonwealth v. Cory* observed that the

[8] Where the legislative intent to enact a non-punitive regulatory scheme is clear, "the clearest proof" is required to "transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 at 92 (internal quotation and citation omitted). However, where the legislative intent is unclear, there is no heightened burden on one challenging the law. *Id.* at 107 (Souter, J., concurring).

Legislature had not included any of the "recognized indicators that the Legislature intended a civil categorization" such as a statement of that purpose, had placed the requirement in the criminal code, and had imposed the requirement exclusively on certain categories of probationers for the period of their probation. 911 N.E.2d 187, 193 (Mass. 2009). These facts, which are all also true of Delaware's statute, suggested a punitive purpose. *Id.*

While the manner of codification and method of enforcement are not necessarily determinative, they are probative of the legislature's purpose that the law be part of the system of criminal punishment. *See Smith*, 538 U.S. at 94.

3. Based on the *Mendoza-Martinez* factors, § 4121(u) is punitive in effect

The legislative evidence that the statute is punitive is fully supported by consideration of the *Mendoza-Martinez* factors as to the statute's effect. In the end, "it is the effect, not the form, of the law that determines whether it is ex post facto." *Snyder*, 2016 U.S. App. LEXIS at *8 (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)).

a. Section 4121(u) lacks a rational connection to public safety because it harms public safety, and its known burdens are excessive in comparison any speculative benefits

The record in this case shows that the public safety benefits of § 4121(u) are speculative, with the only peer-reviewed study showing no benefit. (A120). Much of the perceived benefit of § 4121(u) flows from the misperception that those

convicted of sex crimes are at a higher risk of re-offending than other categories of people convicted of crimes. According to the Delaware Sex Offender Management Board 2012 Report, the sex offender recidivism rate was 5.3%.[9]

Moreover, GPS monitoring hurts employment and the public safety costs resulting from impairing the employment of Tier III probationers (many of whom are not otherwise at high risk of re-offending) are concrete and well-established in the scientific literature. CSL 110.[10] If a sex offender statute does not improve public safety, or if it makes the public less safe, then it lacks a rational connection to that putative purpose. *Snyder*, 2016 U.S. App. LEXIS at *18-19 (finding a lack of rational relation to a non-punitive purpose because "the record before us provides scant support for the proposition that [Michigan Sex Offender Registration Act] in fact accomplishes its professed goals"). In light of the

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[9] Many non-peer-reviewed attempts to study sex offender monitoring lack scientific rigor, and provide inaccurate claims concerning recidivism. For example, they frequently include failing to register as recidivism even though it is not predictive of further sex crimes. A121. The relative complexity of the issue, including the many different definitions and measurements of recidivism, provides a good reason for the Court to rely on expert opinion when assessing the effect of GPS tracking on public safety, and provides a cautionary note when attempting to interpret the data without the aid of expert opinion.

[10] The record in this case showing a lack of public safety benefit distinguishes this case from some of the cases in which GPS monitoring has been upheld against Ex Post Facto challenge. *See, e.g., Belleau v. Wall*, 811 F.3d 929, 931 (7th Cir. 2016) (finding that a law that targeted civilly-committed pedophiles protected public safety and therefore had a non-punitive purpose).

evidence that the statute may breed more crime than it prevents, speculation about the undocumented benefits cannot serve as a basis to prove its rationality. *See Bannum, Inc. v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992) (invalidating a regulation restricting housing for released prisoners because the city's only justification was the unsupported assertion that prisoners are likely to reoffend).

Even if one presumes that § 4121(u) has some public safety benefits which are simply too small to reliably measure with scientific rigor, the means chosen to achieve those benefits must not be excessive. While the legislature need not have made "the best choice to address the problem," "the regulatory means chosen [must be] reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105. The means chosen here are not reasonable in light of the speculative benefits of the statute, as they categorically shackle all Tier III probationers with a GPS device without any consideration of whether location-tracking is relevant to their likelihood to re-offend. *See Snyder*, 2016 U.S. App. LEXIS at *20 (finding that Michigan sex offender registration statute was excessive with respect to any non-punitive purpose because "while the statute's efficacy is at best unclear, its negative effects are plain on the law's face").

The lack of tailoring in Delaware's GPS scheme also distinguishes it from the aspects of sex offender schemes which have been upheld against challenge under the Ex Post Facto Clause. Although community notification and registration

requirements often apply to large categories of offender, the question of who they are obligated to notify is tailored. Courts have emphasized the requirement in those statutes that "'community notification' is limited to those 'likely to encounter a sex offender,'" as proof of the non-punitive intent of the statutes because of the focus on limiting the impact to individualized consideration of public safety. *See Helman v. State*, 784 A.2d 1058, 1077 (Del. 2001); *see also E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997) (noting the importance of individualized tailoring to the determination that community notification was non-punitive).

By contrast, § 4121(u)'s GPS monitoring contains no individualized tailoring and no focus on what members of the community, if any, might be impacted by the offender's release. Proven tools, using empirically-validated characteristics, are available to assist P&P in identifying those who present a high risk. CSL 38-39; A21-22. Instead of using those tools to decide who should wear the GPS monitors,[11] P&P complies with the statute and attaches them to all Tier III registrants, although "the tiers do not accurately represent people's risks … for new sexual offending." CSL 107.[12] A registrant's assignment to a specific tier is

[11] Upon deciding to recommend that a probationer or parolee wear a monitor, P&P would have to request court approval. JS 21-22.

[12] Information produced in discovery indicated when P&P was supervising 855 registered sex offenders, P&P and its consultant had determined that 7% (60 people) had been determined to be high risk by P&P. GPS monitors were being

not based on an assessment of that person, but solely on the offense for which they were convicted or plead guilty. 11 Del. C. § 4121(d).

b. Section 4121(u) imposes an affirmative disability or restraint

Section 4121(u) also imposes an affirmative disability or restraint. As the court found in *Cory*, "[t]he GPS device burdens liberty in two ways: by its permanent, physical attachment to the offender, and by its continuous surveillance of the offender's activities." *Cory*, 911 N.E.2d at 196; *see also Gregory v. Sexual Offender Registration Review Bd.*, 784 S.E.2d 392, 400 (Ga. 2016) ("The requirement that Gregory submit to such electronic monitoring and tracking by means of a device attached to his person is — quite clearly, we think — a serious restraint of his liberty."). The devices are physically, and often painfully, attached to the monitored individuals. The GPS monitors and the people to whom they are attached must remain plugged into an electrical outlet twice a day, for up to two hours each time. And a monitored individual cannot stray from the signal reach of

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worn by 217 Tier III registrants, so at least 157 monitors were on probationers and parolees who were not high risk. JS 74-75, 96-97; A57-58. In contrast the P&P Monthly Report discussed by Mr. Sebastian at his deposition shows that in June, 2015, of the 3661 probationers and parolees P&P had classified as high risk, no more than 79 of them (plus the approximately 60 high risk sex offenders) were wearing monitors. A65. Thus, GPS monitors were on 157 Tier III registrants who were not determined to be high risk, and not placed on 3522 parolees and probationers who P&P had determined were high risk.

the monitoring system (as in the case of John Doe No. 2 whose location at work would cause his unit to sporadically disconnect from the monitoring) without triggering instructions from a probation officer to return to the signal range for tracking purposes. JS77; A130, 144, 174. Such restraints are more severe than restraints that have been sufficient to render statutes punitive. *See, e.g.*, *State v. Letalien*, 985 A.2d 4, 18 (Me. 2009) (finding that a quarterly, in-person reporting requirement for the remainder of an offender's life "is undoubtedly a form of significant supervision by the state" that "imposes a disability or restraint that is neither minor nor indirect"); *see also Cory*, 911 N.E.2d at 196 ("As continuing, intrusive, and humiliating as a yearly registration requirement might be, a requirement permanently to attach a GPS device seems dramatically more intrusive and burdensome.").

The court below principally relied upon a case upholding GPS monitoring against an Ex Post Facto Clause challenge, *Belleau v. Wall*, which reasoned that "if civil commitment is not punishment, as the Supreme Court has ruled, then *a fortiori* neither is having to wear an anklet monitor." *Belleau v. Wall*, 811 F.3d 929, 937 (7th Cir. 2016). But civil commitment is not punishment because it is based on an individualized finding of ongoing dangerousness, not because it is not a severe restraint. *See Hendricks*, 521 U.S. at 357-363 (upholding involuntary commitment of sexually violent persons because the statute "unambiguously

requires a finding of dangerousness"). *Hendricks* held that a state statute's intent was not punitive because it "permitted immediate release upon a showing that the individual is no longer dangerous." *Id.* Severe restraints cannot be based simply on a prior conviction but must turn on an individualized finding that the individual is likely to re-offend. *See id.* at 368-69. In contrast, § 4121(u) applies restraints without any case-by-case consideration of whether particular Tier III registrants actually pose a danger to the public.[13]

c. Section 4121(u) promotes the traditional aims of punishment

Section 4121(u) promotes the traditional aims of punishment—retribution and deterrence—since it makes people wear an embarrassing and uncomfortable device that creates debt and reduces their employability in an effort to prevent them from committing future crimes. *See Snyder*, 2016 U.S. App. LEXIS at *17

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[13] In *Belleau*, "the statute applied to any sex offender released from civil commitment" who had "demonstrated a compulsion to commit very serious crimes and have been civilly determined to have a more likely than not chance of reoffending." *Belleau v. Wall*, 811 F.3d 929, 931, 935 (7th Cir. 2016). This is a substantially more narrow and targeted group than offenders convicted of a Tier III sex offense. This narrow application allowed the court to focus on the propriety of a program that targets those with a "psychiatric compulsion to abuse children sexually." *Id.* at 938. Moreover, those subject to the Wisconsin law had been individually determined to be so dangerous that civil commitment was appropriate. *See* Wis. Stat. § 980.01(7). Delaware's GPS requirement is neither limited to those with a psychological "compulsion" to commit violent sexual acts, nor does it involve any individualized consideration as to the registrants' likelihood to reoffend.

(finding that efforts to "keep sex offenders away from opportunities to reoffend" that are imposed based solely on the conduct giving rise to the criminal conviction meet the traditional aims of punishment of retribution, deterrence, and incapacitation).

The retributive nature of § 4121(u) is underscored by the lack of individualized consideration. When a restriction is "imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than regulation intended to prevent future ones." *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009); *see also Doe v. State*, 111 A.3d 1077, 1098 (N.H. 2015) (same).

The record in this case demonstrates that the ankle-worn device effectively shames and embarrasses plaintiffs, marking them conspicuously as criminals worthy of continued close supervision. A130, 148.[14] The device is like a scarlet letter—a public shaming consistent with the oldest traditions of punishment. *See id.* at 1097 ("Although the act's requirements do not exactly replicate the historical

[14] The record in this case stands in contrast to the record in *Doe v. Bredesen*, 507 F.3d 998, 1005 (6th Cir. 2007), in which the court found that the GPS device in that case was "hooked to a belt" and "appears very similar to a walkie-talkie or other nondescript electronic device," and in which there was not evidence of the shaming effect present in this case.

form of shaming, this factor inquires only whether the act is analogous to a historical punishment, not whether it is an exact replica.").

In addition the five factors that *Smith* identified as most relevant to sex offender management schemes discussed above (rational connection to a non-punitive purpose, excessive with respect to this purpose, affirmative disability or restraint, history and traditions as a punishment, and traditional aims of punishment), the two remaining factors identified in *Mendoza-Martinez*—whether the sanction results from finding scienter and whether the behavior to which it applies is already a crime—also reinforce the conclusion that the *Ex Post Facto* Clause applies. These two factors also indicate that the GPS requirement is punitive because it applies only if one pleads guilty to or is convicted of a crime, and virtually all of the crimes whose commission results in the application of §4121(u) require scienter. *See Cory*, 911 N.E.2d at 195 (finding that imposing GPS monitoring "as a mandatory condition of a probationary sentence for convicted sex offenders" is a punitive scheme under these two factors).

Taken together in this case, the *Mendoza-Martinez* factors show conclusively that the effect of § 4121(u) is sufficiently punitive that it may not be applied to persons whose offense predated its adoption.

4. This Court's prior holding on this issue in *Hassett* should be overruled because it relied on inapplicable precedent and in doing so failed to examine the factors that determine whether § 4121(u) is subject to the Ex Post Facto Clause

In *Hassett v. State*, a *pro se* litigant challenged the application of § 4121(u) to him under the Ex Post Facto Clause. 2011 Del. LEXIS 86, at *3 (Del. Feb. 8, 2011). A155. The Court summarily rejected the claim, noting that it had previously "held that the sex offender registration and community notification requirements . . . are not punitive in nature," and finding that "[s]imilarly, we conclude that the retroactive application of Section 4121(u) requiring registered Tier III sex offenders to wear GPS monitoring bracelets while on supervision at Levels IV-I does not implicate the ex post facto clause because the statute is intended for public safety and is not punitive in nature." *Id.* at *3-4 (citing *Smith v. State*, 919 A.2d 539 (Del. 2006); *Helman v. State*, 784 A.2d 1058 (Del. 2001)).

The court in *Hassett* did not have the benefit of advocacy by counsel on both sides of the issue and relied upon *Helman* instead of performing a separate analysis of whether § 4121(u) was punitive under *Mendoza-Martinez*. *Helman*, 784 A.2d at 1064. Given that § 4121(u) was a new statute with different punitive effects passed after *Helman* was decided, this reliance was a mistake. *Helman* was a challenge to the community notification requirements of 11 *Del. C.* § 4121(a). *Helman*, 784 A.2d at 1064. *Helman's* analysis of the legislature's intent in passing the community notification provisions of 11 *Del. C.* § 4121(a) and the potential

punitive effect of that notification burden is inapplicable to § 4121(u). In *Helman*, the Court found that the plaintiff "seem[ed] to concede that the purpose of the statute is protection rather than punishment," *id.* at 1077; that "community notification is limited to those 'likely to encounter a sex offender'" and therefore "the intent of the statute is to protect the community, not to punish the offender," *id.*; and that the "scheme does not involve an affirmative disability or restraint." *Id.* As explained above, none of those propositions is true of § 4121(u), and many additional factors further distinguish it (such as it being applied exclusively to probationers and parolees and involving more severe restraints, among others). [15]

This Court should overrule *Hassett's* incomplete analysis because careful consideration of Delaware's GPS monitoring scheme in light of the *Mendoza-Martinez* factors (as detailed above) demonstrates that it is punitive, as the weight of authority across the country has increasingly concluded with respect to similar schemes. *See Cory*, 911 N.E.2d at 197 (holding that Massachusetts's GPS monitoring scheme was subject to the Ex Post Facto Clause); *Riley v. New Jersey*

[15] *Hassett* also cited another *pro se* case, *Smith v. State*, that involved an Ex Post Facto challenge to the community notification obligations. *Smith v. State*, 919 A.2d 539, 541 (Del. 2006). Since *Helman* had already addressed that precise issue and the *pro se* plaintiff had not raised any new facts or legal arguments, the Court simply observed that *Helman* had already resolved the question of whether community notification was punitive. *Id.*

State Parole Bd., 98 A.3d 544, 560 (N.J. 2014) (holding that New Jersey's GPS monitoring scheme was subject to the Ex Post Facto Clause); *Witchard v. State*, 68 So. 3d 407, 410 (Fla. Dist. Ct. App. 2011) (holding that Florida's GPS monitoring scheme was subject to the Ex Post Facto Clause); *see also Snyder*, 2016 U.S. App. LEXIS at *8 (holding that Michigan Sex Offender Registration Act as a whole was subject to the Ex Post Facto Clause).

Stare decisis—the doctrine under which a court defers to its earlier decisions—is not an "inexorable command." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). A "case wrongly decided at the inception" does not become correct simply because it becomes old. *Keeler v. Harford Mut. Ins. Co.*, 672 A.2d 1012, 1017 (Del. 1996). When a prior ruling is clearly incorrect, this Court has not hesitated to overrule it. *See, e.g.*, *LeCompte v. State*, 516 A.2d 898, 904 (Del. 1986) (overruling a decision that enhanced robbery and weapons charges could not both be brought under Double Jeopardy Clause because of that decision's "lack of attention" to the relevant statutes). Stare decisis is least applicable when the analysis in the earlier decision was "incomplete," *see id.*, as it was in *Hassett* which did not consider the *Mendoza-Martinez* factors. This case also lacks the factors that sometimes elevate the importance of preserving settled law, namely that it has been "relied upon by the public." *See State v. Barnes*, 116 A.3d 883, 890-92 (Del. 2015). Unlike the interpretation of the scope of a criminal statute, *see, e.g., id.*, or a ruling that has

been relied upon for economic development, *see, e.g.*, *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486 (1924), there is no reason to believe that *Hassett* has resulted in the "kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *See Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

CONCLUSION

For the reasons stated hereinabove, Plaintiffs Below, Appellants respectfully request that this Court reverse the decision of the Court of Chancery, and remand this action for entry of an order consistent with this Court's decision.

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Dated: October 24, 2016