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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' REPLY BRIEF – PUBLIC VERSION

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

A. Introduction

The parties agree that the searches mandated by 11 *Del. C.* § 4121(u) – GPS monitoring imposed whether or not reasonable suspicion justifies a particular search – are "special needs" searches. *See* Plaintiffs' Opening Brief ("POB") at 2; Defendant-Appellee's Answering Brief ("DAB") at 2. It is also undisputed that "whether a particular search meets the reasonableness standard [of the Fourth Amendment] 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests.'" *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-53 (1995).

Vernonia establishes how the balancing must be done when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.*, 653, quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (internal quotation marks omitted). As recognized below, Op. 15-16, *Vernonia* identifies the three factors that must be used for the balancing: the nature and immediacy of the governmental concern at issue and the efficacy of the means for meeting it, 515 U.S. at 660, the nature of the privacy interest upon which the search at issue intrudes, *id.* at *654*, and the character of the intrusion. *Id.* at 658.

The parties dispute whether these factors were applied correctly below. Plaintiffs' Opening Brief reviewed the record and applicable case law to show that correct application of the *Vernonia* factors shows § 4121(u) violates the Fourth Amendment. The search program it mandates has minimal efficacy: [redacted] – a man stopped from using free Wifi to watch pornography. The statute requires the misuse of resources that could otherwise be used to increase public safety and it increases the likelihood of crime by reducing the employability of probationers and parolees. POB 16-17. Plaintiffs retain privacy rights, even if those rights are reduced by their status, POB 10-11, and the minute by minute GPS monitoring significantly intrudes into Plaintiffs' privacy. POB 14-15.

The Answering Brief does not show otherwise. It fails to refute the analyses presented by Plaintiffs, refutes arguments Plaintiffs did not make, and misstates the record.

B. The GPS Monitoring Program is Counterproductive and Lacks Efficacy

With regard to the governmental concern and the efficacy of the means for meeting it, Commissioner Coupe says "the relevant inquiry is whether the State's interests 'appears [sic] 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.'" DAB 24, quoting *Vernonia*, 515 U.S. at 661.[1] That misstates what is at issue. Plaintiffs do not dispute the importance of the state's interest. See Op. 21 and n. 78. The dispute on this *Vernonia* factor is over the monitoring program's efficacy, or lack thereof, for meeting that interest.

The choice of an ineffective practice over an effective one is generally the legislature's prerogative and not subject to judicial review. In this matter, however, because § 4121(u)'s monitoring scheme may be found to comply with the Fourth Amendment only under the special needs rationale adopted by *Vernonia*, this Court must consider all of the facts relevant to efficacy to determine whether it meets the reasonableness standard of the Fourth Amendment. *Vernonia*, 515 U.S. at 573-82.

The Answering Brief asserts GPS monitoring is a tool that assists P&P[2] in supervising Tier III registrants. DAB 8, citing the deposition testimony of John Sebastian ("Sebastian"), P&P's director, at JS 10:12-15. He did not say that. The cited testimony was given when he was answering the general question, "Does P&P use GPS monitors to help it do its job?" *Id.* Later in the deposition, when specifically addressing the use of GPS monitors on Tier III registrants, he made clear that they were used on all Tier III registrants solely because § 4121(u)

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1 The reference to page 660 in DAB 24 appears to be a typographical error.

2 Capitalized terms defined in Plaintiffs' Opening Brief have the same meaning in this brief.

requires that, not because P&P has an independent reason for believing that is a good use of the devices. JS 37, 109-10; POB 12-13.

Section 4121(u) does not increase P&P's ability to use GPS monitoring to supervise the Tier III registrants it believes should be monitored. Commissioner Coupe states "there were roughly 47 separate exclusion zones for 35 Tier III offenders." DAB 9, citing JL 12:4-8. This Court should not infer that those exclusion zones were created because those probationers and parolees were Tier III registrants or that those zones were created for the monitoring required by § 4121(u). The witness said nothing to indicate that. In fact, he did not testify that there were roughly 47 separate exclusion zones for 35 Tier III offenders. Neither on page 12, nor anywhere else in his deposition.

If there are 47 exclusion zones for 35 Tier III offenders, it is not because of § 4121(u). When asked for the practice, if any, in creating exclusion zones for Tier III registrants, Sebastian said P&P looked to see whether the sentencing authority had imposed a no contact order, there was a victim P&P should be concerned about, or there was a location where the offender had repeatedly committed crimes. JL 42:7-43:3. Under those circumstances P&P has, or can get, an order enabling it to use monitors on a probationer or parolee. Its practice is to employ GPS monitoring during an interim when it is seeking court approval. JL 19:22-21:2.

Whenever P&P has a judicially acceptable reason to use a GPS monitor to see whether a Tier III registrant enters an exclusion zone, it does so without regard to § 4121(u). It is not relying on the statute.

The only statutory limitation governing the movement of registrants within Delaware, 11 *Del. C.* § 1112, prohibits them from loitering within 500 feet of a school. [redacted] - a registrant who was prohibited from having a computer device was apprehended while using free WiFi to watch pornography. POB 16. The Answering Brief does not dispute this. It merely adds that GPS monitoring "played a crucial part, as Sebastian testified, to finding out that another offender was taking inappropriate pictures of women at the beach." DAB 25-26. The brief does not say that was a crime.

Dr. Leon, the only expert in the case, described the negative consequences of § 4121(u)'s causing P&P to focus the GPS monitoring on many offenders who are not high risk rather than those who are high risk, and the fact that doing so decreases public safety. POB 17 and n. 7. She explained how proven assessment

tools, using empirically validated characteristics are available to enable P&P to decide who should be monitored if the focus was on safety rather than meeting § 4121(u)'s requirement. CSL 37-39, 107; A121-22.

The Answering Brief responds to these facts by asserting that "Plaintiffs' argument, in essence, is that there are assessment tools in place that provide perfect measures of whether or not an offender is at risk to reoffend and as such the efficacy in categorical GPS monitoring is non-existent." DAB 26. Plaintiffs make no such argument. Plaintiffs' point is not that relying on the assessment tools would result in absolute safety, but that, as shown by Dr. Leon's testimony, it would result in much greater safety than following § 4121(u).

The Answering Brief argues that P&P's use of monitors need not be limited by § 4121(u). P&P Procedure 6.16 authorizes it to use GPS monitoring with any probationer or parolee, and Sebastian testified that it can order additional monitors if it needs them. *See* DAB 10. That is true in theory. But the reality is different. What P&P actually does, in order to comply with the statute, is put most of the monitors on Tier III registrants who don't need to be monitored, and leave them off people who might be profitably monitored. Documents produced in discovery show that of 855 registered sex offenders P&P was supervising, it had determined that 7% (60 people) were high risk, yet approximately 217 were monitored by GPS. A057-58; JS 96-97. Of another 3661 probationers and parolees P&P had

determined were high risk, no more than 79 of them (plus the approximately 80 high risk sex offenders) were monitored by GPS. A065.

The Answering Brief does not address Dr. Leon's testimony on the effect of wearing a GPS monitor on employability and the importance of employment in keeping former offenders productive, law abiding members of our community. POB 17. It merely responds that only one of the three plaintiffs lost employment because of GPS monitoring. DAB 24 n. 8.

Rather than address Plaintiffs' criticism of Chancery Court's determination that it need not consider the misallocation of GPS monitors caused by § 4121(u), Commissioner Coupe takes refuge in the court's conclusion that there were "at least some benefits" from GPS monitoring, DAB 24-25, quoting Op. 23. The finding of "some benefits" might be sufficient if the applicable standard were rational basis review, but it cannot end the analysis when, as here, the reasonableness of the searches must be determined by weighing their efficacy against the character of the intrusion and the nature of the privacy interest intruded upon.

Reasonableness is the standard under the Fourth Amendment. *See, e.g.*, *Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct. 1368, 1371 (2015) (reversing decision approving GPS monitoring of certain sex offenders because lower "courts did not examine whether the State's monitoring program is reasonable"). Rational

basis is not the standard of review under the Fourth Amendment, since saying "that a policy is unreasonable is very different from saying that the policy is irrational." *Hough v. Shakopee Pub. Schs,* 608 F. Supp. 2d 1087, 1114 (D. Minn. 2009) (finding that school administrative search violated Fourth Amendment). [3]

Nevertheless, Commissioner Coupe relies on language from a discussion of an equal protection claim where rational basis review applied, DAB 16, quoting *State v. Virdin*, 1999 WL 743988, at *2, 1999 Del. Super. LEXIS 358, *8 (Del. Super. August 20, 1999); attributes to Plaintiffs the argument that Delaware's tier classification system is irrational, even though Plaintiffs do not take that position, DAB 24; and asserts that "Plaintiffs' claim of unreasonableness [of § 4121(u) and the search program it mandates] is based entirely on a contention that the General Assembly's use of an offense-based scheme is irrational [,]" DAB 17, although the words "rational" and "irrational" do not appear in Plaintiffs' argument that § 4121(u) fails to meet the Fourth Amendment's reasonableness standard or in the opinion below. That is not the issue before this Court.

[3] In the proceedings below, Commissioner Coupe sought to have the court apply the rational basis standard, and Plaintiffs demonstrated that is was inapplicable. D.I. 65 at 24, 36-37; D.I. 74 at 2-5. When the court asked at oral argument why the brief had argued the rational basis standard, counsel's response began with an apology. Transcript at 13; AR014.

C. Plaintiffs Have a Recognized Expectation of Privacy

The court below concluded that Plaintiffs do not have an expectation of privacy society would recognize as legitimate because they agreed to GPS monitoring as a condition of probation or parole. Op. 18. As demonstrated at POB 10-11, that contravenes this Court's rulings in *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.") and *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".).

In response, Commissioner Coupe mischaracterizes *Murray*, stating this Court found the probationer "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." DAB 22, citing 45 A.3d at 678. Only the first part is accurate. *Murray* states "probation officers must have a reasonable suspicion of illegal activity to seize or search a probationer." *Id*. But nothing in the opinion equates searches lacking reasonable suspicion with searches to which the probationer did not agree.

The Answering Brief does not discuss *Sierra* on this issue.

The Answering Brief cites two U.S. Supreme decisions, *Samson v. California*, 547 U.S. 843 (2006) and *United States v. Knights*, 534 U.S. 112 (2001), to argue that Plaintiffs lack a legitimate expectation of privacy. DAB 20-21. Neither supports that conclusion.

Samson was grounded on facts justifying the suspicionless searches under review. Analogous facts are absent from the record before this Court. *See* POB 12-13, 27 (discussing the California facts relied in *Samson*, including its 68-70% parolee recidivism rate[4] and the Delaware facts in this record, including testimony showing P&P attaches GPS monitors to Tier III registrants solely because that is required by § 4121(u), and not because it needs to do so to provide adequate supervision).

Knights also fails to show that a probationers and parolees have no privacy right against suspicionless searches. *Knights* said it "need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." 534 U.S. at 120 n. 6. Its conclusion that a probationer had a diminished expectation of privacy, so he could be subjected to a warrantless search when reasonable suspicion was present, *id.* at 120-21, provides

[4] In contrast, the Delaware sex offender recidivism rate is 5.3%. A154.

no support for the conclusion that the suspicionless searches mandated by § 4121(u) are constitutional.

D. Constant GPS Monitoring Intrudes on Plaintiffs' Privacy

POB 14-15 explains why the court below erred in discounting the intrusiveness of constant GPS monitoring. The Answering Brief does not show otherwise.

To argue that the incremental effect of GPS monitoring is not unduly burdensome, DAB 22 asserts "GPS tracking reveals only information an offender is already required to disclosure [sic] to his or her probation or parole officer." But nothing in the record shows that probationers and parolees are required to tell P&P where they are every minute of the day. Only the GPS monitoring makes them provide that information to P&P.

DAB 23 argues that the embarrassment from wearing a GPS transmitter is not incrementally intrusive because a sex offender's status is already public information. That disregards the substantial difference between always wearing a visible transmitter, which prompts stares and questions from anyone Plaintiffs come in contact with (*see* A130, A148), and having information about oneself available to someone who decides to do an internet search.

DAB 23 asserts that the "burden [of wearing a GPS monitor] is slight compared to other conditions of probation and parole (*e.g.*, warrantless searches,

drug testing, DNA testing, registering and notification).” But the incremental intrusion on one’s privacy is no less because one may also be subjected to other types of intrusions in other circumstances. The privacy intrusion from minute by minute GPS tracking is no less because one is listed on the sex offender registry or may be required to undergo a drug test.

Finally, the brief repeats Chancery Court’s observation that GPS monitoring is “less restrictive, and less invasive on privacy, than being in jail or prison.” DAB 23, quoting Op. 20. Incarceration is punishment. The comparison might be relevant if Plaintiffs were making an Eighth Amendment claim, but they are not. The minute-by-minute monitoring is no less intrusive because people in prison have less privacy.

E. Balancing the Three *Vernonia* Factors Shows that the Suspicionless GPS Monitoring Does Not Comply with the Fourth Amendment

The Answering Brief seeks to cast the Fourth Amendment issue before this Court as a dispute over policy, where the decision would rest with the General Assembly which may choose an ineffective or counterproductive policy. *See* DAB 15-16. But because the constitutional standard is reasonableness, and this Court is required by *Vernonia* to determine whether the benefit, or lack thereof, of the suspicionless monitoring program justifies the intrusion on privacy.

Section 4121(u) causes intrudes on privacy without increasing P&P's ability to monitor the whereabouts of Tier III registrants it believes should be monitored. GPS monitoring may be a useful tool for monitoring specific parolees and probationers – people P&P now monitors through GPS without relying on §4121(u) – but the statutory program adds nothing other than an unnecessary intrusion on the lives of people who have released from prison. And it causes P&P to misuse resources. Plaintiffs have not surrendered all of their privacy rights, and the monitoring program required by § 4121(u) has minimal, if any, efficacy.

Balancing the *Vernonia* factors shows that § 4121(u) does not comply with the Fourth Amendment.

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

This Court has clearly rejected the view that "the search and seizure language in the Delaware Constitution means the same thing as the United States Supreme Court's construction of *similar* language in the United States Constitution." *Jones v. State*, 745 A.2d 856, 873 (Del. 1999) (emphasis in original). The history of Art. I, § 6 reflects "*different* and *broader* protections than those guaranteed by the Fourth Amendment. *Id.* at 866 (emphasis in original), citing *Commonwealth v. Edmunds*, 586 A.2d 887, 895-99 (Pa. 1991).

Jones recognized that "[t]o stop and detain an individual pursuant to the Delaware detention statute and the Delaware Constitution, a peace officer must have a reasonable and articulable suspicion of criminal activity[,]" 745 A.2d at 858. The court below did not consider this. The Answering Brief seeks to sidestep that gap in the analysis by identifying a different issue (the determination of when a seizure has occurred) on which *Jones* also found Art. I, § 6 provided greater rights than the Fourth Amendment. DAB 30. The additional holding does not change *Jones's* recognition of the greater privacy protection provided by the Delaware Constitution.

The court below did not independently determine whether § 4121(u) complied with Art. I, § 6 because it concluded that "Article I, § 6 does not provide

broader search protections than the Fourth Amendment." (Op. 30). The Answering Brief seeks to support that conclusion by citing *Culver v. State*, 956 A.2d 5 (Del. 2008), for the proposition that a search meeting the reasonableness requirement of the Fourth Amendment necessarily meets the reasonableness requirement of Art. I, § 6, so a separate analysis under Delaware law is unnecessary. DAB 29. It quotes two statements in *Culver*. They do not support its position.

The first statement is that evidence was being suppressed "'not because of constitutional debate, but instead over the conduct the Procedures authorizes.'" DAB 30 (quoting 956 A.2d at 15). That provides no insight on what the Delaware Constitution requires, since the Court had no need to address the constitutional protections. *See* 956 A.2d at 7 n.1 ("Because we find that probation officers violated their clear statutory mandate, we do not reach any constitutional questions.").

The second quotation recognizes the state may adopt a policy allowing probation officers to search a probationer's home under circumstances that would not give the police a reasonable basis to search. DAB 30 (quoting 956 A.2d at 15). Since Art. I, § 6 generally requires to police to have probable cause to perform a search, *see Dorsey v. State*, 761 A.2d 807, 815 (Del. 2000), this Court's recognition that a lesser standard might apply to probation officers indicates only that Art. I, § 6 will permit P&P searches on something less than probable cause --

presumably, reasonable suspicion -- not that it will permit searches where even that is lacking.

The court below rejected the holdings of *Sierra* and *Murray,* discussed supra at 9, and *Shepeard v. State*, 2016 Del. LEXIS 87, *4 (Del. Feb. 18, 2016) (reaffirming that "[a] warrantless search of a probationer's residence requires reasonable grounds or reasonable suspicion for the search") (internal quotations omitted), in part, because it considered the requirement of reasonable suspicion recognized by those decisions to apply only to searches done pursuant to a P&P regulation. Op. 28-30.

POB 20-21 shows that was error because of the inconsistency of that conclusion with the reasoning of those three cases and *State v. Holden*, 54 A.3d 1123, 1128 (Del. Super. 2010), and the difference between the roles of the courts and administrative agencies in protecting the privacy rights of Delawareans. The Answering Brief does not address that.

Sierra, Murray and *Shepeard* show that probationers are not excluded from the greater level of privacy protection provided by Art. I, § 6. Thus, any consideration of overriding the reasonable suspicion requirement for searches of probationers and parolees because of a special need must recognize Delaware's greater privacy protection. POB 21-22 explains why that should result in a finding that § 4121(u) violates Art. I, § 6. The Answering Brief does not address that.

If this Court determines that weighing under *Vernonia* does not show § 4121(u) to violate the Fourth Amendment, putting the stronger privacy interests established by the Delaware Constitution in the balance should result in a finding of state unconstitutionality. The intrusion on the greater privacy rights provided by Art. I, § 6 is not justified by any benefits of the monitoring program.

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. *Stare Decisis* Should Not Be Applied to Leave the Erroneous Ruling of *Hassett* in Place

Stare decisis does not compel this Court to follow *Hassett v. State*, 2011 Del. LEXIS 86 (Del. Supr.) (ORDER) and refrain from considering whether the Ex Post Facto Clause applies to §4121(u). *Hassett* assumed without analysis that because the registration and community notification requirements of 11 *Del. C.* §§ 4120 and 4121 were not punitive in nature, the GPS monitoring requirement also was not punitive in nature. The opinion did not acknowledge *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) or *Smith v. Doe*, 538 U.S. 84 (2003), let alone do the analysis they require to determine whether § 4121(u) must be deemed punitive for purposes of the Ex Post Facto Clause. It was manifest error for this Court to conclude without doing the analysis that the Ex Post Facto Clause is inapplicable. This Court should correct that error by doing the analysis now.

B. Section 4121(u) is Punitive in Effect Under the *Mendoza-Martinez* Factors

Commissioner Coupe asserts that the "'clearest proof'" of punitive effect is needed to make the Ex Post Facto Clause applicable because the face of §4121(u) does not suggest a legislative intent to create something other than a civil scheme

designed to protect the public. DAB 38, quoting 538 U.S. at 92. The General Assembly did not make its intent clear. Neither § 4121(u) nor its the synopsis[5] state the legislative intent, and one could infer that it was intended to regulate, to add to punishment, or both.[6] The "clearest proof" standard "makes sense only when the evidence of legislative intent clearly points in the civil direction. *Smith*, 538 U.S. at 107 (Souter, J., concurring).

Moreover, as demonstrated at POB 26-34, there is clear proof of § 4121(u)'s punitive effect under the *Mendoza-Martinez* factors. To argue the contrary, the Answering Brief relies heavily on *Helman v. State,* 784 A.2d 1058 (Del. 2001). *See, e.g,* DAB 39-40 (noting its finding that "the notification provisions are a measured response to the goal of protecting the public). The statute reviewed in *Helman* did not require GPS monitoring, so *Helman* provides no guidance on the intent or effect of the monitoring requirement. Likewise, the statue under review in *Smith v. Doe* did not require GPS monitoring, relied on at DAB 36, so it provides no guidance.

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[5] The synopsis of H.B. 100, 144th General Assembly, which became § 4121(u), states, in full: "This Bill provides for GPS tracking for Tier III sex offenders while they are on probation being supervised by the Department of Correction." *See* http://delcode.delaware.gov/sessionlaws/ga144/chp123.shtml.

[6] DAB 37 n. 12 quotes *Helman's* finding of "a 'strong indication that the intent of the statute is to protect the community, not to punish the offender'" (emphasis omitted), but the statute being reviewed did not have require GPS monitoring.

To discount the effect of wearing a GPS monitor, the Answering Brief observes that it is less harsh than civil commitment. DAB 41, citing *State v. Bowditch*, 700 S.E. 2d 1, 6 (N.C. 2010) and noting its reference to a U.S. Supreme Court decision finding "that even detainment does not inexorably lead to the conclusion that the government has imposed punishment[.]" The case cited in *Bowditch*, *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997), upheld a commitment statute against an Ex Post Facto challenge because it authorized commitment only after a finding of dangerousness, and provided for release upon a showing that the individual was no longer dangerous. In contrast to that Kansas statute, § 4121(u) is imposed equally on all Tier III registrants without regard to an individual's dangerousness. As such, it is retributive, not regulatory. See POB 33.

In discussing why the burdens of suspicionless GPS monitoring are excessive in comparison with the claimed benefits, and therefore lack a rational connection to a non-punitive purpose, *Doe v. Snyder*, 2016 U.S. App. LEXIS 15669 (6th Cir. August 25, 2016),[7] Plaintiffs' Opening Brief addresses the negative effect on the employment prospects of those who must wear the monitors. POB 8, 16 – 17 and 27, citing Dr. Leon's testimony and the Affidavit of John Doe No. 2.

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[7] The seven factors to be considered in determining whether a statute is punitive because of its effect include whether it has a rational connection to a non-punitive purpose. *Smith*, 538 U.S. at 97. Ex Post Facto analysis differs in this respect from Fourth Amendment analysis.

The Answering Brief disregards Dr. Leon's testimony on that issue, and mischaracterizes John Doe No. 2's unchallenged description of how the GPS monitoring resulted in his losing employment. *See* A 143-44 and DAB 12-13, 41. To support its contention that GPS tracking does not create a risk of job loss, it merely cites *Smith*, 538 U.S. at 100. DAB 41. The statute under review in *Smith* did not require, or even provide for, GPS monitoring. *See* 538 U.S. at 90.

In response to the fact that by making Tier III registrants wear a device that is embarrassing and uncomfortable § 4121(u) promotes the traditional aims of punishment, *see* POB 32-33, DAB 41 contends that Plaintiffs exaggerate the shame caused by wearing the visible transmitter. It cites nothing in the record to support that contention. Its assertion that GPS monitoring "cannot be considered a historical form of punishment" because it is a relatively new technology, disregards that it is analogous to an historical form of punishment even if it isn't an exact replica. *See Doe v. State*, 111 A.3d 1077, 1098 (N.H. 2015). While DAB 41-42 cites *Smith v. Doe* to support its assertion that the shaming effect of wearing a visible GPS transmitter does not make it analogous to an historical form of punishment. The statute under review in *Smith* did not require that anything be worn.

The effect of § 4121(u) is punitive, so it may not be applied to persons whose offenses predated its 2007 enactment.

CONCLUSION

For the reasons stated hereinabove and in Plaintiffs' Opening Brief, 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.[8]

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Dated: December 16, 2016

[8] DAB 13 states that John Doe No. 2 is not being monitored because he is incarcerated. That was accurate at the time of the decision below. However, he has since been released from incarceration and is currently being monitored. This fact is not in the record, since it post-dates argument on the cross-motions for summary judgment, and counsel for Commissioner Coupe were not aware of it when the Answering Brief was filed. They have consented to the inclusion of this footnote in order to clarify the record.