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COMMONWEALTH COURT OF PENNSYLVANIA

No. 722 CD 2019

DOROTHY RIVERA, EDDY OMAR RIVERA, KATHLEEN O'CONNOR, ROSEMARIE O'CONNOR, THOMAS O'CONNOR, and STEVEN CAMBURN,

Appellants,

v.

BOROUGH OF POTTSTOWN and KEITH A. PLACE,

Respondents.

BRIEF FOR APPELLANTS

Appeal from the April 3, 2018, February 5, 2019, May 3, 2019, and May 6, 2019, Orders of the Montgomery County Court of Common Pleas Docket No. 2017-04992

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INTRODUCTION

What factual record is needed for a constitutional case? The trial court, through its rulings limiting discovery and granting judgment on the pleadings, answered that facts do not matter in analyzing constitutional claims. That was reversible error.

This case is about whether—as a matter of first impression—Article 1, Section 8 of the Pennsylvania Constitution mandates a higher level of probable cause than the United States Constitution for so-called "administrative warrants." The Borough of Pottstown obtains such warrants to conduct invasive interior home inspections under its mandatory rental-inspection program, even when the Borough has no suspicion of a housing-code violation.

Plaintiffs/Appellants are a coalition of Pottstown landlords, tenants, and other residents who were subjected to attempted searches of their family homes under this inspection regime (collectively, "the Families"). The Borough obtained an administrative warrant to search the home of one set of plaintiffs and attempted a warrantless search inside the home of the other set of plaintiffs.

After the Families filed suit seeking declaratory and injunctive

relief, the trial court committed reversible error by holding that the Families had no "standing" to obtain documents related to completed rental inspections. Because of this ruling, the Families were denied discovery—over the course of three motions to compel and a motion for a protective order—regarding how inspections are conducted, what inspection forms look like when completed, and what type of housing code issues they have revealed. This information is especially critical given that Pottstown's head of licensing and inspections admitted in his deposition that rental inspections are sometimes used as covert police searches for drug activity.

The trial court, by its own admission, also committed reversible error in granting the Borough's motion for judgment on the pleadings because in Pennsylvania, novel constitutional questions cannot be determined on the papers alone. The trial court also did not address *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), which provides the framework for determining when the Pennsylvania Constitution is more protective of rights than the federal constitution. That framework, in turn, requires a factual record regarding how the program operates in the real world. This Court should remand with instructions to allow

the Families to develop a record that will support meaningful constitutional analysis.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 42 Pa. Cons. Stat. § 762(a)(4)(i)(B) because the trial court entered final judgment in a matter involving the application, interpretation, and enforcement of a local ordinance. This judgment made final the court's interlocutory discovery orders.

ORDERS IN QUESTION

I. Order Denying Plaintiffs' Motion to Compel Discovery Responses

The order of April 3, 2018 (Docket No. 41), denying Plaintiff's Motion to Compel Discovery Responses, states:

> **AND NOW,** this 3rd day of April, 2018, upon consideration of Plaintiffs' Motion to Compel Discovery Responses and Defendants' Response thereto, and after argument before a Discovery Master and consideration of the supplemental authorities provided by counsel, it is hereby **ORDERED** and **DECREED** that the Motion is **GRANTED IN PART** and **DENIED IN PART**.
>
> Subject to the following limitations, Defendants shall provide full and complete responses to Plaintiffs' Interrogatories and Request for Production of Documents, and provide copies of all responsive documents, within thirty (30) days of the date of this Order:

1. The beginning date of the period encompassed by the discovery responses shall be June 2014.

2. Where appropriate given the nature of the request, the discovery requests shall be construed to only request information and documents related to the named Plaintiffs in this action, as Plaintiffs lack standing to pursue an "as applied" constitutional challenge regarding landlords, tenants and citizens who are not parties to this case. *See Berwick Area Landlord Assoc. v. Borough of Berwick,* 48 A.3d 524, 533 and n.6 (Pa. Commwlth. 2012).

3. Any responses or documents withheld on account of a claim of privilege or other protection shall be reported on a log with sufficient information for the Court to assess the appropriateness of the privilege or protection upon subsequent motion, which log shall be produced simultaneously with the responses and responsive documents.

In all other respects, the Motion is **DENIED.**

A copy of the April 3, 2018, order is attached under Appendix Tab A.

II. Order Granting In Part and Denying In Part Plaintiffs' Second Motion to Compel Discovery Responses

The order of February 5, 2019, (Docket No. 68), granting in part and denying in part Plaintiffs' Second Motion to Compel Discovery Responses, states:

AND NOW, this 5th day of February, 2019, upon consideration of the Second Motion of Plaintiffs to Compel Discovery Responses, and Response thereto, it is hereby **ORDERED** and **DECREED** that said Motion is **GRANTED** in part and **DENIED** in part.

It is further **ORDERED** that Defendants will produce a corporate designee to answer questions relating to the Borough of Pottstown's policy in enforcement of its Code of Ordinances, Residential Rental Licensing and Registration and Licensing of Residential Rental Units within thirty (30) days of the date of this Order or suffer sanctions upon further application to the Court. Plaintiffs Motion to Compel document production is denied, without prejudice.

A copy of the February 5, 2019, order is attached under Appendix Tab B.

III. The Order Granting In Part and Denying In Part Defendants' Motion for Protective Order

The order of May 3, 2019, (Docket No. 76), granting in part and denying in part Defendants' Motion for a Protective Order, states:

AND NOW, this 3rd day of May, 2019, upon consideration of the Defendants' Motion for Protective Order, and Response thereto, it is hereby **ORDERED** and **DECREED** that said Motion is **GRANTED** in part and **DENIED** in part.

It is further **ORDERED** that the depositions of Keith Place and all four (4) inspectors will not be permitted in this action. Defendants will identify and produce one (1) inspector who will answer questions relating to the Borough of Pottstown's policy in enforcement of its Code of Ordinances, Residential Rental Licensing and Registration and Licensing of Residential Rental Units within thirty (30) days of the date of this Order or suffer sanctions upon further application to the Court.

A copy of the May 3, 2019, order is attached under Appendix Tab C.

IV. The Order Granting Defendants' Motion for Judgment on the Pleadings

The order of May 6, 2019, (Docket No. 77), granting Defendants' Motion for Judgment on the Pleadings:

> AND NOW, this 6th day of May, 2019, upon consideration of, Defendants' 6/21/18 Motion for Judgment on the Pleadings (#42) and Plaintiff's 7/23/18 Response (#43) thereto, it is hereby ORDERED said Motion is **GRANTED.**

A copy of the May 3, 2019, order is attached under Appendix Tab D.

SCOPE AND STANDARD OF REVIEW

An appellate court's review of a judgment entered on the pleadings "is limited to whether the trial court committed an error of law or whether unresolved questions of material fact remained. Because the question of whether judgment on the pleadings was proper is a question of law, [the] scope of review is plenary." *Grimes v. Enter. Leasing Co. of Phila., LLC*, 105 A.3d 1188, 1192–93 (Pa. 2014).

Discovery rulings are reviewed for abuse of discretion. *Hill v. Kilgallen*, 108 A.3d 934, 941 (Pa. Commw. Ct. 2015). "An abuse of discretion occurs," however, whenever "the law is overridden or misapplied." *Pelzer v. Wrestle*, 49 A.3d 926, 929 n.3 (Pa. Commw. Ct. 2012) (citation omitted). The basis for the trial court's discovery rulings

appears to be its determination that the Families do not have "standing" to pursue discovery related to completed rental inspections (which encompasses most information about how the program operates). That is a straightforward question of law that is reviewed *de novo*. *Johnson v. Am. Standard*, 8 A.3d 318, 326 (Pa. 2010) ("Threshold issues of standing are questions of law; thus, our standard of review is *de novo* and our scope of review is plenary.").

STATEMENT OF THE QUESTIONS INVOLVED

1. Did the trial court err in entering judgment in favor of the Borough without analyzing the governing legal test and without allowing the Families to present evidence?

   Suggested Answer: Yes.

2. Did the trial court err in denying the Families access to documents and deposition testimony about how the challenged inspection program works, on the ground that the Families do not have "standing?"

   Suggested Answer: Yes.

STATEMENT OF THE CASE

In the following sections, the Families will summarize: (A) The challenged rental-inspection Ordinances; (B) the Borough's attempts to

search the Families' homes under the Ordinances; and (C) the procedural history of the Families' lawsuit below.

A. Pottstown's Rental-Inspection Program.[1]

On June 8, 2015, the Borough of Pottstown enacted Ordinance No. 2137, which requires landlords and tenants to submit to mandatory inspections of rental properties every two years. These provisions are codified in Pottstown's Code of Ordinances ("Code") §§ 5-801 *et seq.*, "Residential Rental Licensing," and §§ 11-201 *et seq.*, "Registration and Licensing of Residential Rental Units" (collectively, the "Ordinances"). The Ordinances authorize invasive inspections, and the Borough attempted to inspect the Families' homes—over their objections.

1. Inspections Authorized by the Program Are Invasive.

When inspections take place, the Ordinances authorize the Borough to search any and every part of a rental home. (R. 37a–39a.) Inspectors check for vague things like "habitab[ility]," and "relevant requirements." Code § 11-206(2). (R. 37a.) Given this lack of codified inspection guidance, Pottstown publishes a "Residential Rental &

[1] Unless otherwise noted, these facts are all allegations in the Amended Complaint, which must be accepted as true at this stage of litigation. *Keil v. Good*, 356 A.2d 768, 769 (Pa. 1976).

Property Transfer Checklist" (the "Checklist"). (R. 37a.) The Checklist standards are so vague that they permit inspectors to enter any interior room and open any interior door. (R. 38a.) Inspectors enter closets under the Checklist, for example, because "[a]ll incandescent bulbs located in closets or over shelves must be protected with permanent covers over bulbs." (R. 247a.)

The Checklist also allows inspectors to view and handle personal property within the home. The Checklist permits inspection of "[a]ll electrical equipment, wiring and appliances," to see if they are "properly installed and maintained in a safe and approved manner." (*Id.*) The Borough's inspectors check to make sure all outlets are operational. In some cases, the outlets are behind the bed, which the inspectors would have to move. On some occasions, the tenants store personal items under the bed, and these items are revealed when the bed is moved. (R. 39a.) The Ordinances authorize the Borough to enter and search bedrooms, living rooms, hallways, bathrooms, kitchens, attics, utility rooms, and basements, and to search inside storage areas, bedroom closets, kitchen cabinets, and bathroom vanities. (*Id.*) Furniture and appliances, such as refrigerators, stovetops, washers, stereos, and even

computers, are within the scope of the inspection regime established by the Borough and the Ordinances. (*Id.*)

The Borough's inspections reveal private, personal details about tenants. Appellant Camburn has been present at rental inspections where inspectors saw political and religious symbols such as a framed photograph of President Obama or an open Quran. (*Id.*)

2. Inspections Allow Police to Enforce Criminal Statutes without Probable Cause to Enter Homes.

Nothing in the Ordinances prevents inspectors from bringing police into tenants' homes or from sharing information with law enforcement or any other person. (R. 39a.) Indeed, discovery confirmed that Pottstown inspectors are instructed from "day one" on the job that "they are to immediately walk out of the unit and contact the police" if they see anything they subjectively believe to be drug packaging materials or paraphernalia. (R. 527a, 576a–77a, 580a–82a.)

If a landlord or tenant objects to an inspection, Borough inspectors may seek an administrative warrant to inspect the premises, which—unlike a criminal warrant—does not require any evidence of a

suspected housing-code violation in the home to be searched, let alone violation of criminal statutes. (R. 35a.)

B. The Borough Attempts to Search The Families' Homes.

In Spring and Summer of 2017, the Borough attempted to search the Rivera and O'Connor family homes without their permission and without suspicion of a code violation.

1. The Attempted Search of the Rivera Family Home.

The Rivera family and their landlord, Steve Camburn, objected to their scheduled rental inspection with a letter to Defendant Keith Place, informing Mr. Place that they would not voluntarily allow an inspector inside. (R. 31a.) The Borough then applied for an administrative warrant *ex parte* in Pottstown's Magisterial District Court to inspect the Riveras' home. This warrant application was not supported by individualized probable cause of a housing-code violation, but the court granted the administrative warrant nonetheless. (*Id.*)

The Riveras and Camburn moved to quash the warrant, but the district court struck the motion to quash. (*Id.*) After 48 hours, the administrative warrant expired; the Defendants did not inspect the

Riveras' home while the warrant was active. (R. 31a–32a.) The Riveras and Camburn sought to appeal the issuance of the warrant and striking of their motion to quash, but neither order was appealable. (R. 32a.)

2. The Attempted Search of the O'Connor Family Home.

Appellants Kathleen and Rosemarie O'Connor have resided at their home for the last 20 years. Their home is owned by their father, Appellant Thomas O'Connor, who has lived next door for 57 years. (R. 33a.) Kathleen and Rosemarie do not pay rent to live in the property, and they do not have a lease. (*Id*.) In spite of that, the Borough scheduled an inspection of Kathleen and Rosemarie's home, and a Borough inspector threatened to take them to court if they did not allow the inspection. (R. 34a.) The O'Connors informed the Borough that they objected to an inspection of their property without a warrant supported by individualized probable cause and notified Defendants of their intent to join this action. (*Id*.) Nevertheless, the Borough attempted a warrantless search of the O'Connor home after the O'Connor family invoked their rights under Article I, Section 8. (*Id*.) Counsel was present and prevented the inspection from taking place.

C. Procedural Background and Discovery Disputes.

The following sub-sections cover: 1. The Families' Amended Complaint and the trial court's rejection of the Borough's preliminary objections to that amended complaint; 2. The trial court's limitation of written discovery based on "standing;" and 3. The Borough's refusal to comply with the rules governing depositions, and the trial court's limitations on permissible deposition testimony.

1. The First Amended Complaint Survives Demurrer.

The Families filed an Amended Complaint on July 26, 2017 challenging Pottstown's rental inspection program. (R. 29a, 42a–43a.) On August 15, 2017, Defendants filed Preliminary Objections seeking demurrer on the grounds that Plaintiffs would be unable to prove facts sufficient to establish that Article I, Section 8 of the Pennsylvania Constitution requires probable cause of a housing-code violation for a search warrant to issue and that Defendant Keith Place, Director of Licensing and Inspections, was immune from suit.[2] (R. 50a–57a.)

[2] Keith Place is a proper party, which the court below correctly held in rejecting the demurrer. To the extent the court's entry of judgment on the pleadings may have held otherwise (although the opinion does not mention it) that decision was also incorrect for the reasons states in Appellants' briefing below.

The Borough plainly disagrees with the Families' allegations about the nature of the inspections. In its Preliminary Objections, the Borough disputed the invasiveness of the Pottstown's rental inspections: "A routine inspection of the physical condition of private property is minimal intrusion compared to the typical police officer's search for the fruits and instrumentalities of crime." (R. 73a.) The Borough minimized the challenged rental inspections as, in their view, "negligible" invasions of privacy. (R. 68a.) On December 15, 2017, following oral argument, the trial court overruled all of the preliminary objections, which were not "well taken." (R. 158a.) The Borough filed an Answer and New Matter on January 2, 2018. (R. 159a.)

2. The Trial Court Limits Documentary Discovery Based on "Standing."

On January 15, 2018, the Families filed their First Motion to Compel Discovery Responses. That motion concerned document production and interrogatories. The Families sought, among other things, copies of all inspection reports that had been produced under the Borough's rental-inspection program. (R. 214a.) The trial court, however, ruled that *Berwick Area Landlord Association v. Borough of Berwick*, 48 A.3d 524 (Pa. Commw. Ct. 2012) foreclosed discovery about

any properties other than those inhabited by the Families because they did not have "standing." (App. A.)

3. The Borough Resists—and the Trial Court Limits—Deposition Testimony.

The trial court's first discovery ruling on documentary evidence affected the deposition testimony that followed. Under the trial court's ruling, the Families were not permitted to collect information regarding completed inspections, which would have shown how invasive the searches were, how many code violations were caught, and whether serious violations were found in routine inspections—or in ones based on complaints or individualized probable cause. The Families next noticed an entity deposition of the Borough, pursuant to Rule 4007.1(e) to learn about the Borough's inspection policies. (R. 645a–46a.) The Borough designated Appellee Keith Place, and the Families also took his non-entity deposition in his capacity as director of Licensing and Inspections. Mr. Place testified that inspectors are instructed from "day one" on the job that "they are to immediately walk out of the unit and contact the police" if they see what they subjectively believe to be drug packaging materials or paraphernalia. (R. 527a, 576a–77a, 580a–582a.)

Inspired by the trial court's earlier ruling on standing, the Borough's counsel instructed Mr. Place not to answer twenty eight questions on the ground that the "law of the case" (the prior "standing" ruling foreclosing written discovery) forbade questions about rental-inspection policies or how the program operated in reality. (R. 530a–36a.) During the course of the deposition, the Families also learned about reports and databases responsive to existing requests for production that the Borough had not produced, listed in a privilege log, or even acknowledged. The Families followed up with a Second Motion to Compel, and although the trial court required the deponent to return and answer questions, it still denied Plaintiffs' request for Documents, albeit without prejudice or explanation. (App. B.)

Once compelled to return for deposition, two things became apparent: First, Mr. Place did not know what happens during inspections; he testified that the people who do know are the inspectors. (R. 889a–90a, 944a, 947a, 977a–79a, 982a–83a.) And second, the individual inspectors have wide discretion in the field to determine how to conduct inspections and what constitutes a violation, making each of them effectively a policymaker with information relevant to how

enforcement is conducted. (R. 890a–91a, 933a, 936a–37a, 939a–41a, 970a, 985a.) Indeed, Mr. Place testified that he has not been in the field on an inspection in approximately five years. (R. 947a–48a.)

Accordingly, the Families noticed depositions for each of the four inspectors on Mr. Place's staff. (R. 758a–59a.) The Families also re-noticed the Borough representative deposition so that the representative could answer questions regarding policy memoranda stored on his computer that he had not reviewed prior to his previous testimony. (R. 767a, 774a.) The Borough refused to produce anyone for a deposition, and instead filed a motion for protective order. The Court granted this protective order, in part, allowing the Borough to cherry-pick a single inspector to represent policies of all other inspectors. (App. C.) Three days after issuing this order compelling this deposition testimony, the trial court dismissed this case in its entirety on the pleadings. (App. D.)

The trial court ordered the Families to file a Concise Statement of Matters Complained of on Appeal. (R. 1015a–22a.) After the Families complied with this order, the trial court issued a written opinion suggesting remand was appropriate. (App. E.)

SUMMARY OF THE ARGUMENT

The orders under review appear to be based on a single, common misconception about constitutional litigation—that when plaintiffs challenge the constitutionality of a law, facts do not matter. That is wrong. Yet it is the necessary implication of the trial court's entering judgment on the pleadings, without any consideration of the developing record. It is also the only conceivable basis for refusing to allow the Families to inquire into issues like: how the challenged program actually functions in practice, the degree to which the program invades protected privacy interests, and the basis that the Borough has for thinking that the program is necessary and will solve a real problem. These are crucial questions under the governing substantive law. Not only are the Families entitled to discovery on those questions, but the Borough is required to produce evidence on them in order to prevail.

The Families respectfully ask that this Court reach all of the questions presented because the errors under review are likely to require appellate resolution at some point.

ARGUMENT

In the following sections, the Families will:

I. Show why, under the relevant legal test, the trial court committed reversible legal error in entering judgment against the Families and not requiring the Borough to carry their burden on a motion for judgment on the pleadings;

II. Show that the trial court's limitation on discovery was reversible error because it does not allow a full and fair analysis of the constitutional question.

I. The Trial Court Committed Reversible Error in Entering Judgment Against the Families.

The trial court never articulated the respective burdens on the Families and the Borough in entering its judgment. Its opinion seems to rest on a presumption that the Families bore the burden on this motion. But that is legally incorrect. To prevail on a motion for judgment on the pleadings, the Borough was required to show that it is "clear and free from doubt" that the Families will be unable to prove facts legally sufficient to establish that the Inspection Program violates Article I, Section 8. The Borough did not come close to meeting this burden below.

In the following sub-sections, the Families will address two aspects of the trial court's erroneous dismissal: (A) rejecting the Families' novel constitutional claim without a fully developed factual record; and (B) following federal Fourth Amendment precedent without separately analyzing Article I, Section 8 of the Pennsylvania Constitution.

A. The Trial Court Erred in Dismissing the Families' Novel Constitutional Claim without Considering a Factual Record.

This Court has held that when a plaintiff presents a novel constitutional claim and the "case law provides no clear answers," the claim cannot be dismissed on the basis of the pleadings. *Taylor v. Pa. State Police*, 132 A.3d 590, 604 (Pa. Commw. Ct. 2016). As the Borough and the trial court have conceded below, this is the first case to argue that the Pennsylvania Constitution provides more protection than the U.S. Constitution in the context of housing inspections. (App. E at 4.) That means that this case should have proceeded through discovery so that the novel issues raised in this case can be decided on a fully developed factual record.

The need for a factual record is well illustrated by the Supreme Court's decision in *Theodore v. Delaware Valley School District*, 836 A.2d 76 (Pa. 2003). That case concerned a school district's policy of conducting random drug and alcohol tests of high school students. Parents filed a lawsuit on behalf of their children, challenging the search program under Article I, Section 8 of the Pennsylvania Constitution. Like the Families here, the parents acknowledged that the Fourth Amendment could not protect them because of U.S. Supreme Court precedent, but they argued that the court should, as a matter of first impression, interpret the Pennsylvania Constitution more expansively. The trial court sustained the school district's preliminary objections in the form of a demurrer, this Court reversed, and the Supreme Court affirmed this Court's decision.

After a detailed discussion of its own precedents, the Supreme Court held that there was "no doubt that [the drug testing policy] cannot survive an Article I, Section 8 challenge on its face." 836 A.2d at 90. Defendants were therefore not entitled to demurrer. *Id*. In a discussion particularly relevant to this appeal, the Court emphasized

that, to prevail, the government would have to put forth evidence to support the constitutionality of its suspicionless search program:

> On the current state of this record, the suspicionless search policy at issue has not been supported by sufficient proof that there is an actual drug problem in the Delaware Valley School District; by individualized proof that the targeted students are at all likely to be part of whatever drug problem may (or may not) exist; or by reasonable proof that the policy actually addresses whatever drug problem may exist.

Id. at 96. *Theodore* thus stands for the proposition that in a constitutional challenge under Article I, Section 8, unless existing case law clearly entitles the defendant to prevail, the case must be decided on the basis of a fully developed factual record.

The present case stands on the same footing: The kinds of facts that matter are those that support or disprove the purported reason for the government's rental inspection-program action and whether the program achieves its goals.

B. In the Context of Rental Inspections, the Pennsylvania Constitution is More Protective than the United States Constitution.

By entering judgment against the Families, the trial court also failed to grapple with the law governing the Appellants' Article I, Section 8 claim, apparently following Fourth Amendment precedent

without analysis. That was error. *See Commonwealth v. DeJohn*, 403 A.2d 1283, 1289 (Pa. 1979) ("[O]pinions of the United States Supreme Court are like opinions of sister state courts or lower federal courts. While neither binding in a constitutional sense nor precedential in a jurisprudential one, they are entitled to whatever weight their reasoning and intellectual persuasiveness warrant.").

It is well established that Article I, Section 8 of the Pennsylvania Constitution provides greater search and seizure protection than does the Fourth Amendment to the United States Constitution. On eleven prior occasions, the Pennsylvania Supreme Court has explicitly rejected, as a matter of state law, U.S. Supreme Court precedent governing searches and seizures.[3] The present case should be the twelfth occasion.

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[3] *See Commonwealth v. Melendez*, 676 A.2d 226 (1996) (limiting independent source doctrine and rejecting *Murray v. United States*, 487 U.S. 533 (1988)); *Commonwealth v. Matos*, 672 A.2d 769, 776 (Pa. 1996) (holding police pursuits are seizures and rejecting *California v. Hodari D.*, 499 U.S. 621 (1991)); *Commonwealth v. White*, 669 A.2d 896, 901 (Pa. 1995) (limiting search incident to arrest and rejecting *New York v. Belton*, 453 U.S. 454 (1981)); *Commonwealth v. Brion*, 652 A.2d 287, 290 (Pa. 1994) (forbidding confidential informer wiretap transmission to police and rejecting *United States v. White*, 401 U.S. 745 (1971)); *Commonwealth v. Mason*, 637 A.2d 251, 256–57 (Pa. 1993) (excluding evidence forcibly obtained without a warrant and rejecting *Segura v. United States*, 468 U.S. 796 (1984)); *Commonwealth v. Martin*, 626 A.2d 556, 560–61 (Pa. 1993) (holding probable cause was necessary prior to canine sniff and extending prior rejection of *United States v. Place*, 462 U.S. 696 (1983)); *Commonwealth v.*

The ultimate question here is whether Pennsylvania's Constitution permits Pottstown to compel all residential tenants to open their homes to invasive, wall-to-wall searches, without any individualized suspicion that these searches will reveal housing code violations. The U.S. Supreme Court answered that question in the affirmative as a matter of federal law in *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), a case the trial court adopted as the law of Pennsylvania. (*See* App. E at 3.)

But as explained in more detail below, there is a line of Pennsylvania cases that throw serious doubts onto *Camara*, suggesting it is inconsistent with Pennsylvania's own constitutional heritage and

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Edmunds, 586 A.2d 887, 888 (Pa. 1991) (rejecting "good faith" exception to the exclusionary rule and *United States v. Leon*, 468 U.S. 897 (1984)); *Commonwealth v. Melilli*, 555 A.2d 1254, 1258 (Pa. 1989) (holding use of pen register requires probable cause and rejecting *Smith v. Maryland*, 442 U.S. 735 (1979)); *Commonwealth v. Johnston*, 530 A.2d 74, 79 (Pa. 1987) (requiring reasonable grounds for canine sniff and rejecting *United States v. Place*, 462 U.S. 696 (1983)); *Commonwealth v. Sell*, 470 A.2d 457, 468 (Pa. 1983) (conferring automatic standing on defendant charged with possessory offense to challenge evidence admissibility and rejecting *United States v. Salvucci*, 448 U.S. 83 (1980)); *Commonwealth v. DeJohn*, 403 A.2d 1283, 1289 (Pa. 1979) (conferring standing on depositor to challenge the seizure of bank records and rejecting *United States v. Miller*, 425 U.S. 435 (1976)).

[3] *See McCarthy v. De Armit*, 99 Pa. 63, 69 (1881) (requiring "a reasonable ground for belief of guilt" for a warrant to issue); *see also Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (stating that the government must put forth sufficient evidence that "a man of reasonable caution" would believe that "an offense has been or is being committed" for a warrant to issue).

that it is poor public policy. It was error for the trial court to make this important constitutional determination without analyzing the governing law.

1. In *Camara*, the U.S. Supreme Court Reduced the Concept of Probable Cause to a Minimal Consideration of Procedural Regularity.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I, Section 8 similarly provides that "no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." Historically, search warrants had to be supported by a neutral magistrate's finding of individualized probable cause, *i.e.,* evidence, presented under oath, tying a particular person or place to a crime.[4] This requirement of individualized probable cause protects individuals

[4] *See McCarthy v. De Armit*, 99 Pa. 63, 69 (1881) (requiring "a reasonable ground for belief of guilt" for a warrant to issue); *see also Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (stating that the government must put forth sufficient evidence that "a man of reasonable caution" would believe that "an offense has been or is being committed" for a warrant to issue).

from improper government action by ensuring that there is sufficient evidence of a violation of the law and that the evidence is linked to the person or place to be searched.

In *Camara*, however, everything changed. The U.S. Supreme Court invented a new type of warrant—the administrative warrant—and a new type of "probable cause" needed to obtain housing-inspection warrants. In doing so, the Court effectively read the probable cause requirement out of the Fourth Amendment's Warrant Clause, replacing it with a reasonableness inquiry that turned probable cause into a generalized balancing of government and private interests and a requirement that searches be conducted in a standardized manner.

In *Camara*, a tenant in San Francisco was arrested for objecting to a warrantless rental-housing inspection of his apartment home. He challenged the warrantless inspection as a violation of the Fourth Amendment. 387 U.S. at 525–27. The U.S. Supreme Court sided with the tenant in part, ruling that the government cannot conduct a rental housing inspection over the tenant's objection without first obtaining a warrant. *Id*. at 538. At the same time, however, the Court did

something puzzling. It invented a previously unknown type of warrant—the administrative warrant.

The Court held that, under the Fourth Amendment, municipalities could obtain an "administrative warrant" if they showed a more general type of "probable cause," which the Court described as "reasonable legislative or administrative standards" for conducting the inspections, which may include the passage of time, the type of housing, or the characteristics of the area. *Id.* This new type of "probable cause" was not probable cause in any sense that the phrase had previously been understood, which the dissent pointed out. *See Camara*, 387 U.S. 541, 553 n.4 (Clark, J., dissenting) (noting the "absurdity" of the majority's approach, under which "'probable cause' would . . . be present in each case and a 'paper warrant' would issue as a matter of course").

There are several reasons why the trial court should not have reflexively followed *Camara*. Perhaps most obvious is that the opinion contains no discussion whatsoever of the history of the Fourth Amendment specifically or of warrant requirements generally—nor does it contain a similar examination of the Pennsylvania warrant requirement. But as explained in more detail below, *infra* 34–37,

Pennsylvania courts take history seriously when interpreting their own constitution.

Second, *Camara* justified its holding by the supposed need to secure "city-wide," "universal compliance" with the housing code. The problem with such reasoning is that it is obviously impossible to secure truly "universal compliance" with any regulatory scheme. If courts are willing to accept the premise that "universal compliance" is necessary—or even possible—then courts are no longer really in the business of balancing individual privacy and governmental interests, and the government will always win.

Unsurprisingly, the Pennsylvania Supreme Court has rejected precisely this kind of reasoning in its polestar decision, *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). In *Edmunds*, the Court refused to adopt a "good faith" exception to the exclusionary rule, and in doing so it noted that there was no question that its holding imposed "some cost to society" by allowing some criminals to go free. 586 A.2d at 904 (citing *United States v. Leon*, 468 U.S. 897, 907 (1984)). Nevertheless, the Court held that these social costs did not justify watering down Article I, Section 8's requirement that warrants be supported by individualized

probable cause. *Id.*; *see also id.* at 899 (stating Article I, Section 8 "insulates from dictatorial and tyrannical rule by the state [], and preserves the concept of democracy that assures the freedom of its citizens. This concept is second to none in its importance in delineating the dignity of the individual living in a free society") (quoting *Commonwealth v. Miller*, 518 A.2d 1187, 1192 (Pa. 1986)).

In other words, under the Pennsylvania Constitution, the government's interest in enforcing laws must sometimes yield to the individual's interest in privacy. *See Commonwealth v. White*, 669 A.2d 896, 902 (1995) (stating that in Pennsylvania "an individual's privacy interests are given greater deference than under federal law."). This is a principle that cannot be reconciled with *Camara's* cavalier endorsement of a government interest in "universal compliance."

Finally, the *Camara* court accepted the government's unsupported factual assertions regarding both the invasiveness of the searches at issue and the government's interest in conducting them. *See id.* at 537 (concluding that "the public interest demands that all dangerous conditions be prevented or abated," "it is doubtful that any other canvassing technique [than mandatory inspections] would achieve

acceptable results," and that mandatory inspections "involve a relatively limited invasion of the urban citizen's privacy"). Pennsylvania courts are not so credulous. They require real evidence when difficult constitutional questions are at issue. See *supra* 21–22. In short, nothing in the *Camara* opinion would justify reflexive deference to the U.S. Supreme Court's approach.

2. Pennsylvania Courts Conduct a Multi-Factor Analysis for Novel Constitutional Claims.

Pennsylvania courts must "undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated." *Edmunds*, 586 A.2d at 894–95 (holding that Pennsylvania courts are free to reject federal precedent in interpreting Article I, Section 8). The trial court failed to do this.

The Pennsylvania Supreme Court's decision in *Edmunds* lays out the mode of analysis for determining whether the Pennsylvania Constitution provides more protection. Courts should consider: "1) [the] text of the Pennsylvania constitutional provision; 2) [the] history of the provision, [3] including Pennsylvania case-law; [4] related case-law from other states; [and] [5] policy considerations, including unique issues of

state and local concern, and applicability within modern Pennsylvania jurisprudence." *Edmunds*, 586 A.2d at 895; *see also Jones v. City of Philadelphia*, 890 A.2d 1188, 1194 (Pa. Commw. Ct. 2006) ("Although judges and courts are not required to follow this methodology in their opinions, we do so here because *Edmunds* provides structure and a consistent means to analyze the issue at bar.") (citation omitted).

The Families will address each factor in turn, demonstrating that under the Pennsylvania Constitution, individuals cannot be required to open their homes to inspection unless the government has a warrant supported by individualized probable cause.

a. The Text of Article I, Section 8 Protects the Home from Unreasonable Searches and Seizures and Requires Warrants Based on Individualized Probable Cause.

Turning to the first factor, the Families analyze the text of Article I, Section 8. The text of Article I, Section 8 is similar to the Fourth Amendment and provides:

> *Security from Searches and Seizures*
>
> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and *no warrant to search any pla*ce or to seize any person

> or things *shall issue* without describing them as nearly as may be, nor *without probable cause*, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. Art. I, § 8 (emphasis added). Article I, Section 8 was first adopted in 1790, but the Pennsylvania Constitution's probable cause requirement dates back to Pennsylvania's first constitution in 1776. *See* Pa. Const. of 1776 ch. I, cl. X.[5]

When Pennsylvania first adopted this constitutional protection, the term "warrant" was understood to require individualized suspicion of a violation of a law. *See Warrant*, Richard Burn, *A New Law Dictionary: Intended for General Use, as well as for Gentlemen of the Profession* (1792) ("Before the granting of the warrant, it is fitting to examine upon oath the party requiring it, as well as to ascertain that

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[5] Chapter I, Clause 10 of the Pennsylvania Constitution of 1776 provided:

> [T]he people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and *therefore warrants without oaths or affirmations first made, affording sufficient foundation for them*, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, *are contrary to that right, and ought not be granted*.

Pa. Const. of 1776 ch. I, cl. X (emphasis added). The language of the 1790 Constitution appears to exhibit an even stronger commitment to the warrant principle, replacing "ought not be granted" with "no warrant . . . shall issue."

there is a felony or other crime actually committed . . . [and] to prove the cause and probability of suspecting the party against whom the warrant is prayed."); *see also Search Warrant*, John Bouvier, *A Law Dictionary: Adapted to the Constitution and Laws of the United States, and of the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law* (1839) ("[T]hat [warrants] be not granted without oath made before a justice of a felony committed, and that the complainant has probable cause to suspect they are in such a house or place, and his reasons for such suspicion."); *Warrant*, Bouvier, *supra* ("The reprehensible practice of issuing blank warrants which once prevailed in England, was never adopted here.").

Further, probable cause was also understood to require individualized suspicion of a violation of the law. *See Probable Cause*, Bouvier, *supra* ("When there are grounds for suspicion, that a person has committed a crime or misdemeanor, and public justice and the good of the community require that the matter should be examined, there is said to be a *probable cause* for making a charge against the accused . . . ."). The plain text of Article I, Section 8 thus expressly

requires warrants based on individualized probable cause to search a home and personal possessions.

The text of Article I, Section 8 is similar to the Fourth Amendment; however, the Pennsylvania Supreme Court has held that, in interpreting Article I, Section 8, courts are "not bound to interpret the two provisions as if they were mirror images, even where the text is similar or identical" and has looked to the other factors to determine the protection that Article I, Section 8 offers. *Edmunds*, 586 A.2d at 895–96 (citing *Commonwealth v. Tarbert*, 535 A.2d 1035, 1038 (Pa. 1987)). Additionally, where the U.S. Supreme Court has interpreted the federal Constitution in a manner that rejects the plain meaning of that text, *see Camara*, 387 U.S. at 538, then it is particularly important for Pennsylvania courts to exercise their own judgment rather than deferring to such a non-textual interpretation.

b. The History of Article I, Section 8

Pennsylvania's "constitutional protection against unreasonable searches and seizures existed . . . more than a decade before the adoption of the federal Constitution, and fifteen years prior to the promulgation of the Fourth Amendment." *Commonwealth v. Sell*, 504

Pa. 46, 470 A.2d 457, 466 (1983); *see* Pa. Const. of 1776 ch. I, cl. X. When Pennsylvania's framers drafted this provision, their driving concern was protecting people's privacy. *Edmunds*, 586 A.2d at 897. This was because the British crown had used "general warrants" and "writs of assistance" to search homes and businesses. *Id.* Like the administrative warrants here, these general warrants authorized sweeping, suspicionless searches of people's homes and businesses. *Id.* (citing Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 157–58 (T. & J.W. Johnson Co., ed., 1907)).

In his 1907 Commentaries on the Constitution of Pennsylvania, Thomas Raeburn White would describe the general warrant as "one of the most arbitrary measures of tyranny ever invented." White, *supra*, at 157. George III abused general warrants in England until judges began to rebuke the practice—reining in search warrants to reasonable and proper cases in strict accord with the law. *Id.*; *see also Wakely v. Hart*, 6 Binn. 316, 319 (Pa. 1814) (describing the Pennsylvania Constitution's rejection of general warrants as a "*solemn veto* against this powerful engine of despotism"). Article I, Section 8's protections were devised to abolish these infamous general warrants. White, *supra*, at 157–58. So,

to the drafters, requiring warrants based upon individualized probable cause was essential to fully safeguard privacy in the Commonwealth.

Today, the language of Article I, Section 8 remains nearly identical to the language in its counterpart in Pennsylvania's first constitution more than 200 years ago. The Pennsylvania Supreme Court recognizes that "[t]he survival of th[is] language . . . through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as a part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth." *Sell*, 470 A.2d at 467.

Accordingly, Article I, Section 8's "twin aims" are—and have always been—"the safeguarding of privacy and the fundamental requirement that warrants shall *only* be issued upon probable cause." *Edmunds*, 586 A.2d at 899 (emphasis added). Indeed, individualized probable cause is the "linch-pin" courts use in safeguarding privacy and determining whether a search warrant may issue. *See id.* (quoting *Commonwealth v. Miller*, 518 A.2d 1187, 1191–92 (Pa. 1986)). The requirement of individualized probable cause is important because it "is designed to protect us from unwarranted and even vindictive incursions

upon our privacy," to "insulate[] [us] from dictatorial and tyrannical rule by the state, and [to] preserve[] the concept of democracy that assures the freedom of its citizens." *Id.* (quoting *Miller*, 518 A.2d at 1191–92).

Contrary to the ruling of the trial court, administrative warrants violate Article I, Section 8's twin aims. Rather than safeguarding privacy and ensuring that individualized probable cause exists before the Borough may enter the Families' homes, they closely resemble the general warrants of the past that Article I, Section 8 was adopted to forbid. Just as general warrants authorized the British to invade colonists' homes and businesses to search for violations of British law, these administrative warrants authorize the Borough to invade the Families' privacy to search for housing-code violations without even generalized suspicion—only a demand for compliance. And, as explained above, they also allow searches without a warrant based upon individualized probable cause.

Thus, the administrative warrant the Magisterial District Court granted against the Riveras contravenes Article I, Section 8's history and original meaning. Similarly, the O'Connors live under the threat of

an administrative warrant permitting inspectors to enter Kathy and Rosemarie's home. The trial court denied the Riveras and the O'Connors the opportunity to test these searches against Article 1, Section 8.

c. Pennsylvania Case Law Interpreting Article I, Section 8.

The administrative warrant at issue is also incompatible with Pennsylvania case law interpreting Article I, Section 8, and the Borough did not meet its preliminary objection burden of proving otherwise. The Pennsylvania Supreme Court has adopted Sir William Pitt's classic defense of one's home, "not only with sentimental appreciation, but with legalistic approval." *Dussell v. Kaufman Constr. Co.*, 157 A.2d 740, 746 (Pa. 1960). Pitt's defense of the home states:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter, the rain may enter,—but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement.

Id. The "ruined tenement" was a particularly apt description of Philadelphia leading up to the 1790 constitution: "Visitors in 1783 found the city looking as if it had survived a fearful storm: peeling paint and broken windows on houses and shops bespoke years of wartime

neglect." Wendell Garrett, *Classic America: The Federal Style and Beyond* 93 (Rizzoli ed., 1992). But even when homes were visibly battered and broken from the *exterior*, privacy remained the prevailing interest for the Pennsylvania framers.

Accordingly, when governmental action threatens to diminish Article I, Section 8's protections, the Pennsylvania Supreme Court has not hesitated to interpret Article I, Section 8 to provide greater protection against unreasonable searches and seizures than the Fourth Amendment provides. Indeed, it has done so on eleven prior occasions. *See, e.g., Sell*, 470 A.2d at 467–69 (rejecting *United States v. Salvucci*, 448 U.S. 83 (1980), and granting defendant charged with a possessory crime automatic standing to challenge the admissibility of seized property because Article I, Section 8 "mandates greater recognition of the need for protection . . . of privacy"); *see also Commonwealth v. Shaw*, 770 A.2d 295, 299 (Pa. 2001) (holding a warrant is required for seizure of hospital-administered blood-alcohol results under Article I, Section 8 although the Fourth Amendment did not require a warrant); *Theodore*, 836 A.2d at 88 (applying a stricter test compared to the test articulated by the U.S. Supreme Court under the Fourth Amendment and finding

that a suspicionless student-search program violated Article I, Section 8 because the school could not show that the program addressed an actual problem); *supra* 21–22. Pennsylvania's higher privacy safeguards are especially acute when the government seeks to depart from the traditional requirement of individualized probable cause.

For example, in *Edmunds*, 586 A.2d at 901, 905–06, the Pennsylvania Supreme Court declined to adopt a "good faith" exception to the exclusionary rule under Article I, Section 8, even though the U.S. Supreme Court had adopted the good faith exception in *United States v. Leon*, 468 U.S. 897 (1984). The Pennsylvania Supreme Court rejected *Leon* because Article I, Section 8 protects "a strong right of privacy" and has a "clear prohibition against the issuance of warrants without probable cause." *Edmunds*, 586 A.2d. at 901. The Pennsylvania Supreme Court was concerned that a good faith exception "would directly clash with those rights of citizens as developed in our Commonwealth over the past 200 years." *Id.*

The Pennsylvania Supreme Court's deep concern for safeguarding Article I, Section 8's strong right of privacy also drove it to reject federal precedent in *DeJohn*, in which it held that a depositor has standing to

challenge the seizure of his or her bank records. 403 A.2d at 1289–91. In contrast, the U.S. Supreme Court had held in *United States v. Miller* that citizens have no legitimate expectation of privacy in their bank records because they assume the risk that information shared with a bank may be revealed to the government. 425 U.S. 435, 443 (1976). The Pennsylvania Supreme Court disagreed and found that Pennsylvanians have a reasonable expectation of privacy in their bank records. *DeJohn*, 403 A.2d at 1291. The Pennsylvania Supreme Court was particularly concerned about the private information that the government could discover in a depositor's bank records without a warrant, including "many aspects of his personal affairs, opinions, habits and associations"—all of which are obviously apparent inside someone's home. *Id*. at 1289 (quoting *Burrows v. Super. Ct. of San Bernardino Cty.*, 529 P.2d 590, 596 (Cal. 1974)). The Pennsylvania Supreme Court simply could not accept this type of invasion into people's private lives in light of the mandates of Article I, Section 8. *Id.*

Pennsylvania jurisprudence also repeatedly recognizes that a person's privacy is at its greatest in the home. *See Commonwealth v. Brion*, 652 A.2d 287, 289 (Pa. 1994) ("Upon closing the door of one's

home to the outside world, a person may legitimately expect the highest degree of privacy known to our society.") (quoting *Commonwealth v. Shaw*, 383 A.2d 496, 499 (Pa. 1978)); *Commonwealth v. Mason*, 637 A.2d 251, 256–57 (Pa. 1993) (finding that the police's forcible entry into an apartment without a warrant or exigent circumstances violated Article I, Section 8); *Commonwealth v. Bricker*, 666 A.2d 257, 261 (Pa. 1995) ("We have long recognized the sanctity of the home in this Commonwealth . . . ."). That is because "[f]or the right to privacy to mean anything, it must guarantee privacy to an individual in his own home." *Brion*, 652 A.2d at 289.

In *Brion*, the Pennsylvania Supreme Court held that the government's warrantless use of a body wire to record a conversation in the home of a non-consenting criminal defendant violated his right to privacy in his home under Article I, Section 8. *Id*. The Court was particularly concerned that there was no prior determination of probable cause by a neutral judicial authority before the government made the recording, and the Court could not allow such an intrusion into the home to stand without a warrant supported by individualized probable cause. *Id. Brion* was "clearly based on Article I, Section 8 of

the Pennsylvania Constitution and not the Fourth Amendment to the United States Constitution. The United States Supreme Court has held that the United States Constitution does not require prior judicial approval of a one-party consensual wiretap in a defendant's home." *Commonwealth v. Selby*, 688 A.2d 698, 700 n.1 (Pa. 1997) (Newman, J., dissenting) (citing *United States v. White*, 401 U.S. 745 (1971)). The thread running through all these cases is that privacy is sacred in Pennsylvania, it is most sacred in the home, and privacy's most protective safeguard is a warrant supported by probable cause.

The Borough agreed below (R. 70a) that no Pennsylvania court has squarely addressed the validity of administrative warrants under the Pennsylvania Constitution. But the Borough still cited three cases where the Commonwealth Court has considered the constitutionality of rental-inspection ordinances under federal law, where the landlords have lost. (R. 71a.) Although these cases cited Article I, Section 8 in conjunction with the Fourth Amendment, the landlords in these cases did not press state constitutional claims *as distinct* from federal Fourth Amendment claims. *See Commonwealth v. Tobin*, 828 A.2d 415, 423–24 (Pa. Commw. Ct. 2003) (holding that administrative warrants

supported by reasonable legislative and administrative standards are constitutional under the Fourth Amendment, with no discussion of the Pennsylvania Constitution); *Simpson v. City of New Castle*, 740 A.2d 287, 291 (Pa. Commw. Ct. 1999) (same); *Greenacres Apartments, Inc. v. Bristol Twp.*, 482 A.2d 1356, 1359–60 (Pa. Commw. Ct. 1984) (same). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004); *accord Grunwald v. McKeesport Area Sch. Dist.*, 19 Pa. D. & C.3d 79, 89 (Pa. Com. Pl. 1980). Because the landlords in those cases failed to argue that the Pennsylvania Constitution provides greater protections than the Fourth Amendment, the Commonwealth Court had no occasion to consider the history of the Pennsylvania Constitution or state case law interpreting the provision. Nor did these courts consider the privacy interests of the tenants because ***those cases were brought solely by landlords***.

Here, the Families simply want to keep their homes and property private. Administrative warrants authorizing the search of their homes and property are not supported by the individualized probable cause

that Article I, Section 8 commands. Administrative warrants also conflict with decades of jurisprudence recognizing the important history of Article I, Section 8 and requiring individualized probable cause for warrants to issue. Accordingly, Pennsylvania caselaw shows that Article I, Section 8 protects against suspicionless searches authorized by the Ordinances and attempted by the Borough.

d. Case Law in Other Jurisdictions.

The next factor the trial court failed to consider in interpreting Article I, Section 8 is the case law in other jurisdictions, including other courts' analyses under their own constitutions. This is the least significant factor, as other states' decisions are only as useful as their reasoning. *See Edmunds*, 586 A.2d at 900 ("A mere scorecard of those states which have accepted and rejected *Leon* is certainly not dispositive of the issue in Pennsylvania. However, the logic of certain of those opinions bears upon our analysis. . . ."); Leonard Sosnov, *Criminal Procedure Rights Under the Pennsylvania Constitution: Examining the Present and Exploring the Future*, 3 Widener J. Pub. L. 217, 234 (1993) ("[T]he decisions of other states, [are] really more properly seen as no

more than an occasional, useful subfactor in considering the fourth factor, 'policy.'").

The Minnesota Supreme Court recently held that Minnesota's constitution did not require individualized probable cause for administrative warrants. *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 154–55 (Minn. 2017). *Golden Valley* is distinguishable. Although the facts of *Golden Valley* are similar to this case, the operative legal test is not: Minnesota has a presumption in favor of following the federal precedent, *see id.* at 157, whereas Pennsylvania treats the U.S. Supreme Court's decisions as persuasive authority only.

Rather than the *Edmunds* factors, which courts use as a guide to exercising their independent judgment about the meaning of the Pennsylvania Constitution, the Minnesota Supreme Court employed the methodology outlined in *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005), which asks a series of questions aimed at identifying deficits in federal precedent: whether (1) "the United States Supreme Court has made a sharp or radical departure from its previous decisions or approach to the law and when we discern no persuasive reason to follow such a departure"; (2) the United States Supreme Court has "retrenched

on Bill of Rights issues"; or (3) federal precedent "does not adequately protect our citizens' basic rights and liberties." *Golden Valley*, 899 N.W.2d at 157.

Unlike *Edmunds*, the *Kahn* test is organized around a strong presumption that Minnesota should follow federal precedent in interpreting its own constitution. *Compare id.* (noting that Minnesota courts "favor uniformity with the federal constitution" and will only "depart from federal precedent when we have a 'clear and strong conviction that there is a principled basis' to do so") (quoting *Kahn*, 701 N.W.2d at 825)), *with DeJohn*, 403 A.2d at 1289 ("[O]pinions of the United States Supreme Court are like opinions of sister state courts or lower federal courts. While neither binding in a constitutional sense nor precedential in a jurisprudential one, they are entitled to whatever weight their reasoning and intellectual persuasiveness warrant.").

Because other states' decisions are only useful to the extent that they are persuasively reasoned, the Families urge the Court to consider Justice G. Barry Anderson's scholarly dissent in *Golden Valley*, joined by then-Justice David Stras. Justice Anderson wrote that "the search that the City seeks to perform violates the reasonableness clause" of the

Minnesota Constitution because "the home is first among equals[,] representing the very core of a person's constitutional protections [,] and . . . privacy rights are at their apex in one's own home." *Id.* at 177–78 (Anderson, J., dissenting) (internal quotation marks and citations omitted). Under these principles, Justice Anderson concluded that the challenged inspection ordinance could not stand. Like Pottstown's ordinance, the offending Minnesota ordinance was "extensive and would allow a search to occur virtually anywhere in the unit." *Id.* at 179.[6]

Significantly, Justice Anderson emphasized that the administrative warrants at issue were similar to the "general warrants" and "writs of assistance" that were so odious to the founding generation. *Id.* at 174. The entire dissenting opinion deserves careful attention. Given Pennsylvania's privacy-minded founding principles, Justice Anderson's reasoning should carry the day here.

Golden Valley is the only decision that either of the parties have been able to identify where a state court squarely considered the

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[6] Now-retired Justice Paul H. Anderson filed a concurrence making similar points in *McCaughtry v. City of Red Wing*, writing that "*Camara* is not the appropriate standard to apply because the Minnesota Constitution mandates a higher standard than the federal constitution as interpreted in *Camara* for allowing an inspection of an individual's private residence." 831 N.W.2d 518, 527 (Minn. 2013) (Anderson, J., concurring).

question whether *Camara* should be adopted as a matter of state constitutional law. To be sure, some state appellate courts have interpreted their constitutions as *categorically* coextensive with the Fourth Amendment—and therefore with *Camara*.[7] But such cases have no relevance in Pennsylvania, where courts are required to undertake a thoughtful, case-by-case analysis to determine *when* Article I, Section 8 provides more protection than the Fourth Amendment. *See Edmunds*, 586 A.2d at 894. In other cases, the courts did not consider—or the parties did not argue—whether the relevant state constitution provided greater protection than the *Camara* standard.[8] In some cases, there was no occasion to consider the question, even if the issue had been raised, because the courts found either that the ordinances failed to satisfy the

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[7] *See Fla. Dep't of Agric. & Consumer Servs. v. Haire*, 836 So. 2d 1040, 1055 (Fla. Dist. Ct. App. 2003) ("The Florida Constitution requires that Article I, Section 12, be construed in conformity with the Fourth Amendment to the United States Constitution."), *approved*, 870 So. 2d 774 (Fla. 2004); *Iowa v. Carter*, 733 N.W.2d 333, 337 (Iowa 2007) ("The scope and purpose of Iowa's search and seizure clause is coextensive with the federal court's interpretation of the Fourth Amendment."); *Ashworth v. City of Moberly*, 53 S.W.3d 564, 579 (Mo. Ct. App. 2001) ("Missouri's constitutional guarantee against unreasonable searches and seizures, found in Mo. Const. art. I, § 15, is coextensive with that of the Fourth Amendment.").

[8] *See Griffith v. City of Santa Cruz*, 207 Cal. App. 4th 982, 993 (Cal.App.6th Dist. 2012); *City and Cty. of San Francisco v. Mun. Ct.*, 167 Cal. App. 3d 712, 720–21 (Cal.App.1st Dist. 1985); *Town of Bozrah v. Chmurynski*, 36 A.3d 210, 215 n.4 (Conn. 2012); *Bd. of Cty. Comm'rs of Johnson Cty. v. Grant*, 954 P.2d 695, 699 (Kan. 1998); *Logie v. Town of Front Royal*, 58 Va. Cir. 527, 533–34 (2002); *State v. Jackowski*, 633 N.W.2d 649, 654 (Wis. Ct. App. 2001).

Camara standard[9] or the court found that there was individualized probable cause for the search.[10] Another case concerned only inspections of *unoccupied* rental properties—unlike the Borough's inspection program in the present case—and the court emphasized that its holding would be different if the property were occupied.[11]

In short, no state court cases other than *Golden Valley* contain any useful analysis that could guide a Pennsylvania court in deciding the constitutional question at issue here, and, as noted above, cases from other jurisdictions are only as useful as their reasoning. *Edmunds*, 586 A.2d at 900 (rejecting reliance on state cases that simply "affirm[ed] the logic" of a federal case "with little additional state constitutional analysis").

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[9] *Crook v. City of Madison*, 168 So. 3d 930, 939 (Miss. 2015); *City of Seattle v. Leach*, 627 P.2d 159, 161 (Wash. Ct. App. 1981).

[10] *Owens v. City of North Las Vegas,* 450 P.2d 784, 787 (Nev. 1969).

[11] *Louisville Bd. of Realtors v. Louisville*, 634 S.W.2d 163, 165–66 (Ky. Ct. App. 1982).

e. Policy Considerations Favor Interpreting Article I, Section 8 to Forbid the Borough's Use of Administrative Warrants to Search Without Suspicion.

Finally, the trial court jettisoned *Edmunds*' "public policy" prong by entering judgment without considering the Borough's reasons for implementing the Ordinances—or how they operate as enforced. But the Pennsylvania Supreme Court takes into account policy considerations in interpreting Article I, Section 8. In evaluating policy considerations, the Supreme Court requires a court to "go beyond the bare text and history of that provision as it was drafted 200 years ago, and consider its application within the modern scheme of Pennsylvania jurisprudence." *Id.* at 901. By not considering this prong (or any facts) the trial court committed reversible error.

Pennsylvania jurisprudence interpreting Article I, Section 8 places far more policy weight on protecting privacy and the sanctity of the home than the federal *Camara* standard. But by using *Camara*-style administrative warrants, Borough inspectors have unfettered access to every square foot of renters' homes, including their bedrooms, bathrooms, closets, and cabinets. (R. 37a–39a.) And Borough

inspections reveal all kinds of information about renters' private lives, including their political and religious beliefs, romantic lives, and health—information the Pennsylvania Constitution guards from prying government eyes. (R. 26a, 39a.) *Camara* eviscerates Article I, Section 8's strong protection of privacy and its warrant requirement by forcing people to open their homes for the government's suspicionless searches.

Here, the trial court erred in ruling for the Borough because the Borough's interest in enforcing its housing and building codes does not justify departing from Pennsylvania's longstanding requirement that warrants be supported by individualized probable cause. The trial court may have been persuaded by the Borough brushing off this invasiveness question. The Borough argued: "[A] routine inspection of the physical condition of private rental property is minimal intrusion compared to the typical police officer's search for the fruits and instrumentalities of crime." (R. 431a.) The Borough also minimized the challenged rental inspections as subjectively "negligible" invasions of privacy. (R. 424a.) These are factual issues, and by relying on the Borough's unverified assertion, the trial court impermissibly allowed a "speaking demurrer," which "aver[s] the existence of facts not apparent from the face of the

challenged pleading." *Beaver v. Coatesville Area Sch. Dist.*, 845 A.2d 955, 958 (Pa. Commw. Ct. 2004) (citation omitted); *Pa. Gas & Water Co. v. Kassab*, 322 A.2d 775, 777 (Pa. Commw. Ct. 1974) ("[A] motion for judgment on the pleadings is subject to the same restrictions as the common law demurrer and that the rule against speaking demurrers applies to such motions.").

Despite the Borough's unsworn statement to the contrary, the inspections are in fact deeply invasive—covering homes wall-to-wall and revealing private information that families would never want the government to see regarding their religious, political, and marital lives. (R. 26a–27a, 37a–39a.) The Borough attempted to justify a relaxation in the traditional probable cause by arguing that housing inspections do not carry the same "heightened consequences" of "criminal conviction, such as incarceration, disenfranchisement, prohibition on gun ownership, registration as a sex offender, revocation of professional licensure, and other collateral consequences." (R. 421a.) As previously discussed, this is not an accurate statement regarding the rental-inspection program. Again, the program *does* enforce criminal law and share information with the police.

Even if the Borough's characterization of these inspections were accurate, it misses the constitutional principle. The point of constitutional protections against unreasonable searches is not to help criminals avoid punishment but to protect privacy. Regardless of what legal consequences may flow from a search, the relevant constitutional question is the same: How invasive is the search? That is a hotly disputed factual question, and the Families should be permitted on remand to develop a comprehensive record addressing it.

Whether the Borough has an interest in conducting these searches is also a contested factual question. The Families intend to present evidence—likely through the testimony of experts who were retained over a year ago—demonstrating that there are many alternative ways the Borough can enforce its housing and building codes without requiring mandatory, suspicionless searches of private homes. Some of these approaches include:

- Voluntary inspections;
- Voluntary inspections coupled with tenant education;
- Inspections of properties with deteriorated conditions outside;

- Inspections of units where another voluntarily-inspected unit in the building had a type of violation likely to exist in other units;
- Inspections upon complaint;
- Inspections when units are vacant between tenancies; and
- Self-inspections with owners providing sworn statements of compliance, and inspections if owners do not provide these sworn statements.

These approaches should have been considered by the trial court before it entered judgment. It is possible that exterior conditions and/or tenant complaints would reveal all serious conditions—something that could only be established by way of a factual record.

All of the above alternatives would permit the Borough to enforce its housing and building codes without violating citizens' privacy and property rights. Many jurisdictions successfully use such alternatives, and many other jurisdictions do not inspect rental properties at all. This kind of evidence would provide a powerful reason to reject the *Camara* standard because that decision was largely premised on the supposedly "unanimous agreement [in 1967] among those most familiar with this

field" that mandatory, suspicionless searches were actually necessary. 387 U.S. at 535–36. The Borough echoes the *Camara* court, contending that "periodic rental-housing inspections are the only effective way to enforce property maintenance codes." (R. 430a.) The Families intend to prove the Borough incorrect, but this is a factual dispute that must be resolved against the moving party at this stage of litigation.

Judgment was thus not appropriate because discovery was ongoing, and material facts remained in dispute. *See* 6 Standard Pennsylvania Practice 2d § 31:1 ("A motion for judgment on the pleadings is properly raised by a party when a controlling question of law needs to be decided and ***when the parties are not in dispute as to the material facts involved in the action***.") (emphasis added). The Families have retained expert consultants and have asked the Borough to identify deponents who can testify as to certain aspects of the Borough's inspection program under Pa. R. C. P. 4007.1(e), such as the Borough's contention that inspections are a "negligible invasion of Plaintiffs' privacy." (R. 424a.) This process should not be short-circuited.

II. The Trial Court Improperly Denied Access to Relevant and Discoverable Information About How Searches Are Actually Conducted.

Discovery in this case has been contentious, largely because the Borough does not believe that *any* facts are relevant in constitutional cases. (R. 499a ("Since the constitutionality of Pottstown's Ordinance is purely a question of law, there is no need to resolve these 'material' facts.").) That is simply wrong. The importance of factfinding in constitutional litigation is well established. *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1131 (10th Cir. 2012) (rejecting government's argument that a "facial challenge is a 'purely legal inquiry' in which 'factual issues have no bearing'"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[F]acts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.") (internal citation omitted)); *cf. City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2447 (2015) ("We hold facial challenges can be brought under the Fourth Amendment."); *Del. State Sportsmen's Ass'n v. Garvin*, 196 A.3d 1254, 1276 (Del. Super. Ct. 2018) ("As *Patel* makes

clear with regard to facial challenges, the Court need not look at the circumstances in which a search is already authorized by sufficient evidence of criminal activity, but at those where it is not. The searches that must be examined are searches where there is *not* reasonable articulable suspicion of criminal activity.").

Indeed, just last year, the Pennsylvania Supreme Court struck down a redistricting statute, partly on the basis of extensive expert testimony. *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737, 818–21 (Pa. 2018) (sustaining a facial challenge to a statute partly on the basis of extensive expert testimony). And as noted above, the Pennsylvania Supreme Court has held in an Article I, Section 8 case that the government was required to prove *with evidence* that its new search program was constitutional. *Theodore*, 836 A.2d at 76.

This disagreement about the role of evidence in constitutional litigation has led to three motions to compel, a motion for sanctions, and a motion for a protective order. (*See* R. 181a–82a, 515a–16a, 694a–95a, 750a–51a.) In addressing these motions, the trial court appears to have largely embraced the Borough's "facts don't matter" position. As a

result, the Families have been unable to obtain basic discovery regarding how the Borough's rental inspection program actually functions.

Although the Families recognize that this Court can resolve this appeal without reaching the discovery issues, they nevertheless urge this Court to correct those errors. If this Court reverses the judgment on the pleadings entered for the Borough, that will necessarily mean that this case should be decided on a full record. Yet if the trial court's discovery rulings are allowed to stand, that record will be severely circumscribed, and a subsequent appeal will likely be necessary.

A. The Ruling on the First Motion to Compel Denies the Families' Request for Relevant Documents Regarding Rental Inspections.

The Families' first motion to compel sought, *inter alia*, inspection reports that Pottstown inspectors have prepared after each rental inspection.[12] The Families sought this material because it has the potential to demonstrate both the intrusiveness of Pottstown's

[12] The Families also sought any databases or spreadsheets of completed rental inspections; landlord and/or tenant refusal of a rental inspection and related warrant requests; citations and reports related to rental inspections; inspector training, documents inspectors use in the field, and any inspection photographs or recordings; warrant applications and warrants; and citizen complaints. (R. 211a–17a.)

inspection program and the degree to which the program advances the Borough's interests. The Families even gave the Borough the option to present this information with the names redacted. (R. 208a.) The trial court, however, denied the motion to compel with regard to these documents, explaining that:

> Where appropriate given the nature of the request, the discovery requests shall be construed to only request information and documents related to the named Plaintiffs in this action, as Plaintiffs lack standing to pursue an "as applied" constitutional challenge regarding landlords, tenants and citizens who are not parties to this case. *See Berwick Area Landlord Assoc. v. Borough of Berwick*, 48 A.3d 524, 533 and n.6 (Pa. Commwlth. 2012).

(App. A. at 1)

This was a misinterpretation of the case. In *Berwick*, a group of landlords (tenants were not parties) challenged the penalty provisions of another rental inspection program. Their "primary concern" was that the ordinance imposed vicarious liability for violations that were the fault of their tenants. *Berwick Area Landlord Ass'n v. Borough of Berwick*, 48 A.3d 524, 538 (Pa. Commw. Ct. 2012).[13] The legal question was whether the landlords' challenge should be treated as an as-applied

[13] The landlords did not challenge the inspections or administrative warrants authorizing inspections under Article I, Section 8, as in the present case.

challenge or a facial one. This Court concluded that because there had been no enforcement or threat of enforcement against the Berwick landlords, any as-applied challenge was unripe. The landlords disputed this, pointing to "notices of disruptive conduct" that had been issued to non-plaintiff landlords, but this Court held that the plaintiffs themselves did not have "standing" to assert the rights of non-parties. *Id.* at 533.

Of course, whether one can establish constitutional standing by pointing to something that happened to someone else has nothing to do with whether discovery is relevant. The question in discovery is different: When individuals challenge a policy and practice as unconstitutional, is information about how the policy has been applied to others relevant in proving how it is likely to be applied to the plaintiffs? The answer is obviously yes. For instance, no one would doubt that a plaintiff alleging employment discrimination is entitled to see complaints filed by non-parties against the defendant—not to assert their rights, but because the complaints are relevant to show what the defendant's policy really is. *See, e.g., Moll v. Telesector Res. Grp., Inc.*, 760 F.3d 198, 204 (2d Cir. 2014) (holding that the trial court abused its

discretion in denying a motion to compel production of documents relating to similarly situated individuals). Indeed, even the plaintiffs in *Berwick* were able to obtain those "notices of disruptive conduct" directed towards non-party landlords. While this Court held that those notices could not establish *standing*, it never suggested that the notices were irrelevant to the claim.

The Families need the Borough's inspection reports because they will help to establish how invasive the searches are and whether the searches are revealing dangerous conditions (which bears on the Borough's interest in conducting the searches). These are the exact factual issues that must be explored before a court can rule on the ultimate question. *See Pa. Soc. Servs. Union v. Commonwealth*, 59 A.3d 1136, 1144 (Pa. Commw. Ct. 2012) (Article I, Section 8 analysis requires "balancing of an individual's privacy interest against a countervailing state interest which may or may not justify an intrusion into privacy").

This Court should reverse that portion of the trial court's first discovery order that relied on *Berwick* and explicitly hold that plaintiffs challenging a rental inspection program are entitled to discovery

regarding how that program has been applied—including information about how it has been enforced against others.

B. The Second Motion to Compel.

As far as the Families can tell, the trial court's discussion of *Berwick* in its first discovery order was also the basis for two subsequent adverse discovery rulings. One of those rulings concerned documents referenced during the deposition of Mr. Place. He testified that he prepares annual reports about the inspection program for the Borough manager. He also testified about the existence of other documents, none of which had been previously disclosed, notwithstanding that they were plainly responsive the requests for production. (R. 545a–48a.)

The Borough refused to produce these documents, so the Families moved to compel. The Borough argued in their responsive brief that the Families were not permitted to seek "generalized" information about the inspection program, but must confine their inquiry to "Plaintiffs' experiences in inspections." (R. 654a, 657a.) Of course, as the Borough acknowledged, ***the Families have not yet been inspected*** because they sued to prevent inspections. The Borough agreed not to inspect

while the case was pending, so their position is essentially that the Families are not entitled to any discovery because they did not submit to the challenged inspections.

The trial court denied the Families' motion to compel with regard to these documents, without prejudice, but also without explanation. To the extent that the trial court accepted the Borough's arguments, that was error. As explained above, information regarding how the program has been implemented against other individuals is relevant to how it is likely to be implemented against the Families. For example, evidence of what parts of a residence inspectors have searched and what violations they searched for is plainly relevant to how inspectors would search the Families' residences. General information about the program is also obviously relevant. The implication of the Borough's argument is that the only way to create a factual record to challenge an inspection program is to first submit to it. That would make injunctive relief to prevent imminent constitutional violations categorically unavailable.

This Court should reverse that portion of the trial court's order denying Appellants access to the requested documents.

C. The Borough's Motion for a Protective Order.

The final adverse discovery ruling concerned noticed depositions. As explained in more detail above, Mr. Place testified at his deposition that he has not witnessed an inspection in approximately five years, that the inspectors have wide discretion when they are in the field, and that he has no way of knowing exactly how his staff conducts inspections. (R. 889a–91a.) For instance, while he initially expressed confidence that inspectors did not open cabinets, he ultimately admitted that he could not "specifically say what the inspector does or doesn't do out there." (R. 850a.) The only way to find out what actually happens during inspections, therefore, is to ask the people who conduct the inspections. Accordingly, the Families noticed depositions for all four of Pottstown's inspectors.[14]

The Borough filed a motion for a protective order, seeking to stop the depositions on the grounds that the Families were seeking irrelevant material. (R. 697a, 711a.) At the same time, the Borough told the Families in no uncertain terms that it would not produce witnesses

[14] The Families also re-noticed Mr. Place for an entity deposition on the grounds that he had not adequately prepared because he could not recall the contents of relevant memos and reports on his computer. At the same time, Appellants offered to cancel the noticed deposition if Appellees would simply produce the requested documents. (R. 774a.)

for a deposition while the motion was pending, (R. 788a), notwithstanding that the rules "clearly provide[] that a deposition may not be stayed without a court order" and that the mere filing of a motion seeking a protective order does not stay discovery. *Kirk v. St. Clair Mem'l Hosp.*, 37 Pa. D. & C.3d 63, 65–66 (Com. Pl. 1982). On May 3, 2019, the trial court granted in part and denied in part the motion, ordering the Borough to produce just one of the inspectors for a deposition.

This was error. The main reason it is necessary to depose each inspector is because Mr. Keith has testified that each individual inspector has discretion about how to conduct the inspections. No single inspector can provide testimony sufficient to show how the program functions in practice because each inspector gets to decide for him or herself. It is likely that some inspectors will conduct more intrusive inspections than others.[15] The testimony that they can provide would go directly to the ultimate issue in this case.

[15] The Families made every effort to minimize the burden of these depositions by offering almost an entire month of possible dates. (R. 783a–84a.)

This Court should reverse the trial court's order on the motion for a protective order and hold that the Families are entitled to depose all of the Borough's inspectors.

CONCLUSION

Because the trial court erred in limiting the record below—both in its discovery rulings and judgment on the pleadings—this Court should vacate the judgment against Plaintiffs/Appellants and remand to the trial court with instructions to permit discovery regarding the rental-inspection program's enforcement.

Dated: September 11, 2019

Respectfully submitted,

/s/ Michael F. Faherty

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Counsel for Appellants

**Admitted Pro hac vice*

CERTIFICATE OF WORD COUNT

I certify that this brief contains 13, 230 words, exclusive of the materials listed in Pa.R.A.P. 2135(b) and therefore complies with Pa.R.A.P. 2135.

/s/ Michael F. Faherty
Michael F. Faherty
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2019, true and correct copies of *Appellants Opening Brief* have been electronically filed with the Court and that a true and correct copy was served upon the following via the Court's PACFile system:

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I further certify that four copies of the brief will be mailed to the Court via commercial carrier within seven days of September 11, 2019.

Respectfully submitted,

/s/ Michael F. Faherty
Michael F. Faherty
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellee and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: September 11, 2019

Respectfully submitted,

/s/ Michael F. Faherty
Michael F. Faherty
Counsel for Appellants

APPENDIX
TAB A

Brief for Appellants

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

DOROTHY RIVERA, et al.,	:	
Plaintiffs,	:	
	:	**No. 2017-04992**
v.	:	
	:	
BOROUGH OF POTTSTOWN, et al.,	:	
Defendants	:	

ORDER

AND NOW, this 3rd day of April, 2018, upon consideration of Plaintiffs' Motion to Compel Discovery Responses and Defendants' Response thereto, and after argument before a Discovery Master and consideration of the supplemental authorities provided by counsel, it is hereby **ORDERED** and **DECREED** that the Motion is **GRANTED IN PART** and **DENIED IN PART.**

Subject to the following limitations, Defendants shall provide full and complete responses to Plaintiffs' Interrogatories and Request for Production of Documents, and provide copies of all responsive documents, within thirty (30) days of the date of this Order:

1. The beginning date of the period encompassed by the discovery responses shall be June 2014.

2. Where appropriate given the nature of the request, the discovery requests shall be construed to only request information and documents related to the named Plaintiffs in this action, as Plaintiffs lack standing to pursue an "as applied" constitutional challenge regarding landlords, tenants and citizens who are not parties to this case. *See Berwick Area Landlord Assoc. v. Borough of Berwick*, 48 A.3d 524, 533 and n.6 (Pa. Commwlth. 2012).

3. Any responses or documents withheld on account of a claim of privilege or other protection shall be reported on a log with sufficient information for the Court to assess the appropriateness of the privilege or protection upon subsequent motion, which log shall be produced simultaneously with the responses and responsive documents.

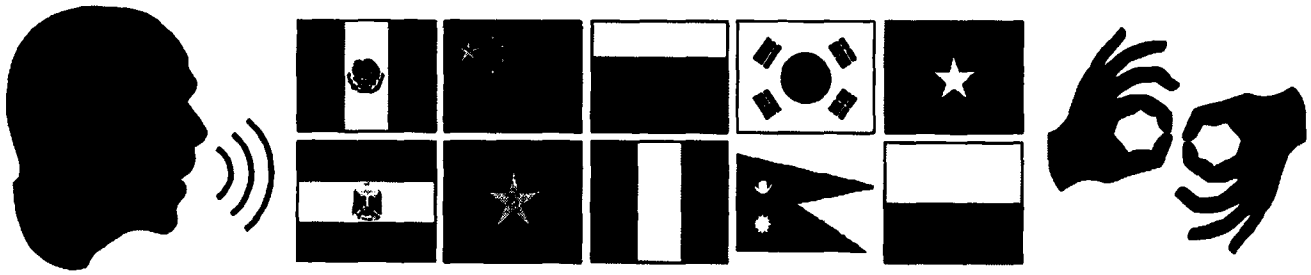
In all other respects, the Motion is **DENIED**.

BY THE COURT:

Weilheimer, J.

E-filed 4.4.18:
Counsel
Court Administration
Norm Corkett

Notice of Language Rights



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APPENDIX
TAB B

Brief for Appellants

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

Dorothy Rivera, et al.	:	
	:	NO. 2017-04992
Plaintiffs	:	
	:	
vs.	:	
	:	
Borough of Pottstown, et al.	:	
Defendants	:	

ORDER

AND NOW, this 5th day of February, 2019, upon consideration of the Second Motion of Plaintiffs to Compel Discovery Responses, and Response thereto, it is hereby **ORDERED** and **DECREED** that said Motion is **GRANTED** in part and **DENIED** in part.

It is further **ORDERED** that Defendants will produce a corporate designee to answer questions relating to the Borough of Pottstown's policy in enforcement of its Code of Ordinances, Residential Rental Licensing and Registration and Licensing of Residential Rental Units within thirty (30) days of the date of this Order or suffer sanctions upon further application to the Court. Plaintiffs Motion to Compel document production is denied, without prejudice.

BY THE COURT:

Gail A. Weilheimer, J.

E-filed 2.6.19:
Counsel
Court Administration

APPENDIX
TAB C

Brief for Appellants

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

Dorothy Rivera, et al.	:	
	:	NO. 2017-04992
Plaintiffs	:	
	:	
vs.	:	
	:	
Borough of Pottstown, et al.	:	
Defendants	:	

ORDER

AND NOW, this 3rd day of May, 2019, upon consideration of the Defendants' Motion for Protective Order, and Response thereto, it is hereby **ORDERED** and **DECREED** that said Motion is **GRANTED** in part and **DENIED** in part.

It is further **ORDERED** that the depositions of Keith Place and all four (4) inspectors will not be permitted in this action. Defendants will identify and produce one (1) inspector who will answer questions relating to the Borough of Pottstown's policy in enforcement of its Code of Ordinances, Residential Rental Licensing and Registration and Licensing of Residential Rental Units within thirty (30) days of the date of this Order or suffer sanctions upon further application to the Court.

BY THE COURT:

Gail A. Weilheimer, J.

filed 5-3-19
Counsel
Court Administration

APPENDIX
TAB D

Brief for Appellants

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION

DOROTH RIVERA, et al.	:	NO. 2017-04992
v.	:	
BOROUGH OF POTTSTOWN, et al.	:	

ORDER

AND NOW, this 6th day of May, 2019, upon consideration of, Defendants' 6/21/18 Motion for Judgment on the Pleadings (#42) and Plaintiff's 7/23/18 Response (#43) thereto, it is hereby ORDERED said Motion is **GRANTED**.

BY THE COURT:

GAIL A. WEILHEIMER, J.

E-filed on May 6, 2019:
Court Administration – Civil Division
Counsel

APPENDIX
TAB E

Brief for Appellants

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION

DOROTHY RIVERA, et al.	:	Common Pleas Court No.: 2017-04992
v.	:	
BOROUGH OF POTTSTOWN, et al.	:	Commonwealth Court No.: 722 CD 2019

OPINION

WEILHEIMER, J. **July 11, 2019**

The underlying Plaintiffs/Appellants, Dorothy Rivera, Eddy Omar Rivera, Steven Camburn, Kathleen O'Connor, Rosemarie O'Connor, and Thomas O'Connor ("Appellants") instantly appeal to the Commonwealth Court of Pennsylvania ("Commonwealth Court") from the May 6, 2019 Order entered by this Court of Common Pleas of Montgomery County ("trial court") granting underlying Defendants', Borough of Pottstown and Keith A. Place, May 1, 2018 Motion for Judgment on the Pleadings. (***See*** Order, 5/6/19 (#79).) Based upon the following, the trial court respectfully suggests that the Commonwealth Court remand this matter for further consideration.

FACTUAL & PROCEDURAL HISTORY

The instant matter commenced on March 13, 2017, when Plaintiffs Dorothy Rivera, Eddy Omar Rivera, and Steven Camburn ("Appellants"), filed Complaint in Civil Action seeking a Declaratory Judgment determining that the Borough of Pottstown's ("Appellee") rental-inspection ordinance is unconstitutional pursuant to Article 1, Section 8 of the Pennsylvania Constitution. (***See*** Complaint, 3/13/17 (#0).)

The underlying facts which resulted in the instant civil action began after Appellee scheduled administrative inspections of the Rivera residence pursuant to Chapter 5, Code Enforcement, and Chapter 11, Housing ("the Ordinances") of the "Code of Ordinances, Borough of Pottstown" ("the Code"). The Ordinances were promulgated and adopted on June 8, 2015, the purpose of which was to "protect and promote the public health, safety, and welfare of its citizens, to establish rights and obligations to owners

and occupants relating to residential rental units, and to encourage owners and occupants to maintain and improve the quality of rental housing within the community". (***See*** Code, Chap. 11 § 101). The Code is a public document and can be found online by searching for its title.[1]

The Code, and specifically the Ordinances at issue "provide for a systematic inspection program, registration and licensing of residential rental units and penalties." (***See*** Am. Cmplt., at ¶ 41; Ans. Am. Cmplt., at ¶ 14, 17, 41, 7/26/2017 (#19).) Residential rental units ("rental units") are defined as any rooming or dwelling unit occupied by someone other than the owner. (***See*** Ordinance, Chap. 11 § 206). All rental units in the Borough are subject to registration, licensing, and a systematic inspection for lawful rentals to third parties and occupancy by third parties, unless the rental unit is exempt from the licensing provisions. (***See*** Ans. Am. Cmplt., at ¶ 4, 6, 7, 17, 66, 69-71; ***see*** Code, Chap. 11 § 201, *et seq.*, Chap. 5 §§ 701, *et seq.*, and 801, *et seq.*).

Pursuant to the Ordinances, an owner shall permit an inspection by the Borough's Licensing and Inspections Officer at a reasonable time with reasonable notice. (***See*** Ans. Am. Cmplt., at ¶ 45, 54, 1/2/2018 (#32).) If the owner does not permit such inspection, an application for administrative search warrant is permitted. (***See*** Am. Cmplt., Doc. 20, at ¶ 45; Ans. Am. Cmplt., Doc. 32, at ¶ 45, 67, 72; Code Chap. 11 § 203(I)(3)). Failure to comply with the biennial inspection may result in the suspension and revocation of the residential rental license. (***See*** Ans. Am. Cmplt., at ¶ 50; Ordinance Chap. 11 § 206).

Appellants Dorothy Rivera, and her husband, Eddy Omar Rivera (collectively referred to as "Rivera"), are tenants currently renting their home at the property located at 326 Jefferson Avenue in Pottstown from Appellant Camburn. On November 16, 2016, Appellant Camburn received written notice from the Borough that an inspection was scheduled for March 13, 2017.

On March 8, 2017, five (5) days before the scheduled inspection, Appellants wrote to the Borough of Pottstown Department of Licensing and Inspections objecting to the voluntary inspection, and instead required that a warrant to inspect be obtained. (***See*** Am. Cmplt., at ¶ 20; Ans. Am. Cmplt., at ¶ 20.)

[1] https://ecode360.com/28387978

Appellants asserted that under Article I, Section 8 of the Pennsylvania Constitution, the government must meet a higher standard of probable cause to gain entry than required under the U.S. Constitution as articulated in *Camara v. Mun. Ct. of City & Cty. Of S.F.*, 387 U.S. 523 (1967). Thus, on March 17, 2017, the Borough applied for, and the Magisterial District Court authorized, an administrative warrant to inspect the Rivera residence in accordance with Ordinance No. 2137. (***See*** Am. Cmplt., at ¶ 21).

Appellants Kathleen and Rosemarie O'Connor live at 466 N. Franklin Street, in a home owned by their father, Appellant Thomas O'Connor (the "O'Connors"). Similar to the events surrounding the Rivera home, Mr. O'Connor received an invoice for $70 from the Borough, which was paid, and an inspection was scheduled for April 10, 2017. Because the O'Connors never confirmed the April 10 inspection, however, the Borough rescheduled the inspection for July 6, 2017. Prior to the rescheduled date, the O'Connors informed Appellees of their intent to join the underlying action.

On April 5, 2017, an Answer with New Matter was filed. (***See*** "Answer and New Matter", 4/5/2017 (#12).) On April 25, 2017, Appellants filed an Answer to New Matter. (***See*** "Reply to New Matter", 4/25/2017 (#16).) Appellants filed an Amended Complaint with additional factual allegations, and added Thomas O'Connor, Kathleen O'Connor, and Rosemarie O'Connor. (***See*** "Amended Complaint", 7/26/2017 (#19).)

On January 2, 2018, Appellees answered the Amended Complaint with New Matter. (***See*** "Answer to Amended Complaint", 1/2/2018 (#32).) Appellants then filed an Answer to Defendant's New Matter on January 15, 2018. (***See*** "Answer/Response", 1/15/2018 (#35).) After the relevant pleadings closed, Appellees filed their motion for judgment on the pleadings on June 29, 2018. (***See*** "Motion for Judgment on the Pleadings", 6/29/18 (#42).)

On August 1, 2018, Appellees filed a motion for leave to file a reply brief in support of a judgment on the pleadings. (***See*** "Motion for Leave to File a Reply Brief in Support of Judgment on the Pleadings", 8/1/2018 (#44).) On September 24, 2018, the trial court granted said motion. (***See*** "Order", 9/24/2018

(#48).) Subsequently, on May 6, 2019, upon consideration of Appellees' motion and Appellants' response, the trial court granted the motion for judgment on the pleadings. (***See*** "Order", 5/6/2019 (#77).)

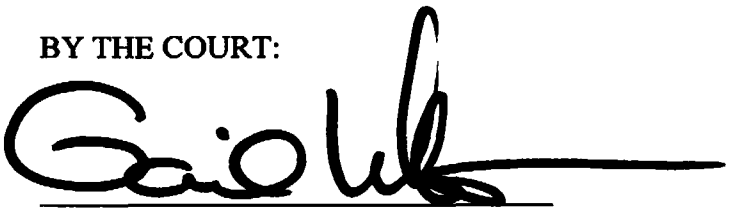
On May 29, 2019, Appellants filed their timely Notice of Appeal from the May 6, 2019 Order. (***See*** "Notice of Appeal", 5/29/19 (#86).) The trial court required a clarification of the errors complained of on appeal, and thus, directed Appellants to file a Concise Statement of Issues Complained of on Appeal, within twenty-one (21) days, in accordance with Pa. R.A.P. 1925(b). (***See*** Order, 6/5/19 (#86).)

On June 25, 2019, Appellants filed their Concise Statement of Issues Complained of on Appeal in accordance with Pa. R.A.P. 1925(b). (***See generally*** Appellant's Concise Statement, 6/25/19 (#90).) After the trial court reviewed Appellants' Concise Statement, the trial court concedes that the claim should not have been dismissed on the pleadings as Appellants present a novel constitutional claim. (***Id.*** p. 4 ¶ e.)

DISCUSSION

Upon further review of the record, the trial court respectfully requests that jurisdiction be relinquished and the matter be remanded.

BY THE COURT:



GAIL A. WEILHEIMER, J

Copies sent on July 11, 2019, to:
Commonwealth Court Prothonotary
Court Administration – Civil Division
Plaintiff Counsel, Michel F. Faherty, Esq.
Defense Counsel, Sheryl Brown, Esq.