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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.

REPLY 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

The Borough's opposition does not, because it cannot, argue that the Borough satisfied its burden in the trial court on a motion for judgment on the pleadings. That burden was to prove that it was "clear and free from doubt" that the Families[1] could never prevail on their constitutional claim. But this case is demonstrably not "clear and free from doubt[2]" because—as the lower court acknowledged—no Pennsylvania case has addressed the constitutionality, under Article I, Section 8, of entering the homes of tenants who do not consent to rental inspections without a warrant supported by individualized probable cause.

It is understandable why the Borough does not want to go past the pleadings in this case—the invasiveness of the challenged rental-inspection ordinance is a hotly contested factual issue. And the limited record already establishes that the challenged inspection warrants can have criminal consequences for Pottstown citizens—inspectors are instructed from "day one" on the job that "they are to immediately walk

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[1] The Borough misidentifies the Families as "Landlord/Tenants" in the brief. The O'Connor family consists of neither landlords nor tenants.

[2] *See William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 434–45 (Pa. 2017) (citation omitted).

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.)

The Borough's brief attempts to salvage an erroneous order that even the trial court acknowledges should be vacated. First, it argues, incorrectly, that *Taylor v. Pa. State Police*, 132 A.3d 590 (Pa. Commw. Ct. 2016) is wrong, and that novel questions like this one should be resolved on the pleadings alone. (Borough Br. 14–16.)

Second, it argues, again incorrectly, that the caselaw is settled beyond room for disagreement, and the question is actually not novel at all. (*Id.* 16–29.)

Third, it argues in the alternative that even if the question is novel, this Court should hold that Article I, Section 8 of the Pennsylvania Constitution does *not* provide more protection than the Fourth Amendment in the context of rental home inspections. Yet the Borough fails to support that argument with any connection to the operative allegations, the record, or Pennsylvania's constitutional history, as required by the *Commonwealth v. Edmunds*, 586 A.2d 887

(Pa. 1991), framework for addressing issues of constitutional first impression in Pennsylvania. (Borough Br. 29–44.)

Fourth, in keeping with these efforts to avoid the facts of the case, the Borough also continues to take the position—again, unsupported by any case law—that "no discovery is relevant" for constitutional questions. (*Id.* 58; *see also* 55–59.)

Finally, the Borough manufactures a trial court ruling that Director Keith Place was immune from suit—an argument with no support from the written opinion of the lower court and plainly contradicted by all available statutory and legal authority. (*Id.* 44–46.)

ARGUMENT IN REPLY

This Court should reverse the lower court's dismissal. Below, the Families will show that (I) Whether Article I, Section 8 of the Pennsylvania Constitution allows for rental inspections without individualized probable cause is a question of first impression that requires factual determinations to resolve; (II) The framework for addressing that issue of first impression, *Edmunds*, demonstrates that the Pennsylvania Constitution is more protective of the Families' privacy rights than is the Fourth Amendment; (III) The Families are

entitled to discovery about how the challenged program is actually enforced; and (IV) Director Keith Place is not immune from suit, and nothing in the trial court's order indicates otherwise.

I. Whether Article I, Section 8 of the Pennsylvania Constitution allows for rental inspections without individualized probable cause is a question of first impression that requires factual determinations to resolve.

As the lower court recognized, and as the Borough previously acknowledged, the question of whether Article I, Section 8 of the Pennsylvania Constitution provides more protection than the Fourth Amendment in the context of rental inspections is one of first impression in this state. (*See* Borough Demurrer Br., R. 70a ("No Pennsylvania court has squarely addressed the validity of administrative warrants pursuant to the Pennsylvania Constitution.").) Now, however, it appears that the Borough has finally recognized that, in light of the standard of review, that concession was fatal. *See Taylor*, 132 A.3d at 604 (holding 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). So, the Borough makes two arguments, apparently in the alternative: (a) *Taylor* is irrelevant, and the issue of first impression can be decided on

the pleadings (Borough Br. 14–16); and (b) whether Article I, Section 8 provides more protection here is "not a novel constitutional question" (*id.* 16–18). Neither argument holds water.

The Borough does not like *Taylor* and offers several reasons for this Court to disregard the case. None are persuasive. First, the Borough complains that *Taylor* is a "sole" decision that has not been cited outside of the Sex Offender Registration context. (*Id.* 14, 16.) But that makes it no less a precedential holding of this Court, and notably, none of the cases citing *Taylor* have ever suggested that it did not accurately state the standard for dismissing a case on the pleadings.

Second, the Borough claims that *Taylor* was "limited to the circumstances presented." (*Id.*15.) But nothing in the decision itself purports to limit its holding to any specific circumstances. Moreover, there is nothing unique about the holding. *Taylor*'s "no clear answers" articulation of the standard of review is simply another way of saying that judgment on the pleadings must not be entered unless it is "clear and free from doubt" that the plaintiff cannot prevail. *See William Penn Sch. Dist.*, 170 A.3d at 434–45, 457 (reversing demurrer in constitutional challenge in light of "irreconcilable deficiencies in the

rigor, clarity, and consistency of the line of cases" applicable to the challenge and giving the parties "an opportunity to develop a record"); *see also Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 88–89 (Pa. 2003) (holding that where defendant's right to prevail on novel Article 1, Section 8 claim was not clear from the caselaw, judgment should not have been entered on the pleadings).) As the lower court acknowledged, the constitutional question here is hardly "clear and free from doubt."

Next, the Borough argues in the alternative that the constitutional question is not novel. (Borough Br. 16). The Borough cites one case in support of this proposition, *Simpson v. City of New Castle*, 740 A.2d 287, 291 (Pa. Commw. Ct. 1999) (Borough Br. 16–18), which upheld the constitutionality of an inspection ordinance. As the Families explained in their opening brief, *Simpson* did not answer any of the constitutional questions posed by this case. (Opening Br. 44.) The landlords in *Simpson* did not press their state constitutional arguments as distinct from their federal constitutional arguments. Accordingly, this Court did not consider the history of the Pennsylvania Constitution or state caselaw interpreting Article I, Section 8, as the Borough seems to acknowledge by addressing those specific legal questions in a

separate portion of its brief (*see* Borough Br. 29–44). The *Simpson* Court also did not address the *tenants'* privacy interests—the case was brought only by landlords—and tenant privacy is the linchpin of the Families' constitutional claim and the basis for this entire lawsuit.

Relatedly, the Borough argues that "Pennsylvania courts have relied upon the sound reasoning in *Camara* [*v. Mun. Ct.*, 387 U.S. 523 (1967),] pertaining to the issuance of administrative warrants to conduct rental inspections." (*Id.* 21.) In addition to *Simpson*, the Borough cites *Commonwealth v. Tobin*, 828 A.2d 415 (Pa. Commw. Ct. 2003), and *Greenacres Apts., Inc. v. Bristol Twp.*, 482 A.2d 1356 (Pa. Commw. Ct. 1984) (*see, e.g.*, Borough Br. 12–13, 21–23, 27–79), which, as explained in the Families' opening Brief do not apply here. Neither *Tobin* nor *Greenacres* resolved—or even addressed—the question of whether the Article I, Section 8 provides *more* protection against administrative search warrants not supported by individualized probable cause. (Opening Br. 44.)

The Borough now adds another case: *Commonwealth v. DeLuca*, 6 Pa. D & C. 5th 306 (Pa. Com. Pl., Del. Cty. 2008). (Borough Br. 13, 22, 26.) Aside from the fact that this case is non-binding and contains no

analysis of Article I, Section 8, there is a more basic reason the Families did not discuss the case in their opening brief: The administrative warrant at issue in *DeLuca* was supported by an affidavit establishing individualized probable cause based on "an anonymous complaint . . . . taken from the Health Department . . . about the deplorable condition of the property." 6 Pa. D. & C. 5th at 309–10. "The complainant stated that the property had trash around the entire property, and graffiti on the garage." *Id*. at 310. Code Enforcement Officers were "on the scene and observed trash around the entire property, graffiti on the garage and graffiti on the ceiling of the top floor bedroom (observed from the rear common drive)." *Id*. Also in support of probable cause, the file for this building revealed "a history of complainants addressing the violations . . . as far back as July of 2003." *Id*.

The detailed warrant at issue in *DeLuca* has nothing to do with the warrants the Families are challenging. For these warrants, "[t]he mere existence of a non-owner-occupied property is all that is needed for the Borough to demand access to the interior of the property." (R. 30a.) And the Borough obtained a search warrant against the Rivera family that was not supported by probable cause. (R. 31a.)

The Borough makes another alternative argument that "[e]ven assuming *Taylor* applies, (which is denied) this Court may maintain jurisdiction, and decide the merits, if doing so serves the interests of judicial economy." (Borough Br. 19). In so arguing, the Borough cites three cases where the appellate court resolved legal issues despite having doubts about its jurisdictional hold on the case. (*Id.*) Those cases are non-sequiturs because they were resolved after fact-finding by the trial court, not based on the pleadings alone. *See Estate of Kinert v. Pa. Dep't of Revenue*, 693 A.2d 643, 645 (Pa. Commw. Ct. 1997) (analyzing whether "the court's factual findings are supported by the evidence" in probate matter); *Bukics v. Bukics*, 570 A.2d 1364, 1365 (Pa. Commw. Ct. 1990) (analyzing support order following evidentiary hearing in the trial court); *Derry Twp. Sch. Dist. v. Suburban Roofing Co. Inc.*, 517 A.2d 225, 226 (Pa. Commw. Ct. 1986) (hearing appeal "from the entry of a judgment upon a jury verdict").

By citing these cases, the Borough is saying this Court should engage in factual analysis to determine the merits question based on the benefit of the fully developed factual record. Here, this Court has only a *partial* record since summary judgment and trial have not

happened, and the court below did not base its ruling on any part of the factual record. Accordingly, those cases do not provide a roadmap for ruling on the merits of this case, which was dismissed on the pleadings—all of which are to be presumed true and in favor of the Families.

II. The *Edmunds* factors all weigh in favor of requiring individualized probable cause for rental inspections.

In their opening brief, the Families analyzed, in detail, each of the *Edmunds* factors used by Pennsylvania courts to determine whether the Pennsylvania Constitution provides greater protection than the U.S. Constitution. The Borough's response misunderstands *Edmunds,* fails to grapple with the history of the Pennsylvania Constitution, and is replete with unsupported factual assertions that are contradicted by the allegations in the Amended Complaint.

A. The Borough does not follow *Edmunds* correctly.

According to the Borough, "Courts are to construe the Pennsylvania Constitution as providing greater rights to its citizens than the federal constitution **only where there is a compelling reason** to do so." (Borough Br. 29 (emphasis in original).) The Borough repeats "compelling reason" throughout its brief. (*Id.* 16, 23, 34, 37, 44.) But this

is not the test articulated by the Pennsylvania Supreme Court in *Edmunds*—it was the test rejected in *Edmunds*. The language—"only where there is a compelling reason"—comes from a Superior Court Opinion, *Commonwealth v. Moore*, 928 A.2d 1092, 1101 (Pa. Super. 2007). *Moore*, in turn, paraphrased *Commonwealth v. Gray*, 503 A.2d 921, 926 (Pa. 1985), a pre-*Edmunds* case, which—though it stated there "should be a compelling reason" to depart from the Fourth Amendment—is not consistent with *Edmunds*. *Edmunds* was a watershed case, joining a "recent focus on the 'New Federalism,' . . . emphasiz[ing] the importance of state constitutions with respect to individual rights and criminal procedure." *Edmunds*, 586 A.2d at 895 (footnote omitted).

Indeed, *Edmunds* **reversed** the Superior Court panel's finding that there was "no compelling reason to deviate from the decision of the United States Supreme Court." *Id.* at 890. Instead the Pennsylvania Supreme Court made clear that upholding Pennsylvania's independent constitutional prerogatives was paramount:

> Here in Pennsylvania, we have stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, *each time* a provision of that fundamental

> document is implicated. Although *we may* accord weight to federal decisions where they are found to be logically persuasive and well reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees . . . *we are free to reject the conclusions of the United States Supreme Court so long as we remain faithful to the minimum guarantees established by the United States Constitution*.

Id. 894–95 (emphasis added; internal quotation marks and citations omitted).[3] Indeed, *Edmunds* emphasized that even "[t]he United States Supreme Court has repeatedly affirmed that the states *are not only free to, but also encouraged* to engage in independent analysis in drawing meaning from their own state constitutions." *Id*. at 894 (emphasis added). By misarticulating what *Edmunds* requires, the Borough misapplies *Edmunds* factors throughout its brief. Criminal cases are relevant to determining the scope of protection provided by Article I, Section 8.

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[3] The Borough also argues that "the Pennsylvania Supreme Court has previously concluded that Article I, §[ ]8 is co-extensive with the Fourth Amendment." (Borough Br. 28–29 (citing *Commonwealth v. Harris*, 176. A.3d 1009 (Pa. Super. 2017).) This is wrong. *Harris* was not a Pennsylvania Supreme Court case and did not articulate a general co-extensive Fourth Amendment principle. It merely stated that the two constitutional provisions were co-extensive regarding "a warrant exception for automobile searches so long as probable cause to search exists." *Harris*, 176 A.3d at 1023.

The Borough attempts to discount many of the cases cited in the Families' opening brief by arguing that those cases were in a criminal context and are therefore "irrelevant." (Borough Br. 31; *but see Theodore*, 836 A.2d at 88 (departing from Fourth Amendment precedent in the context of a non-criminal, warrantless search program)). This is wrong, for several reasons.

First, the Borough again misunderstands *Edmunds* when it insists that Pennsylvania caselaw is only relevant if it directly addressed the constitutionality of rental inspections. If there were caselaw directly on point, then *Edmunds* analysis would not be necessary. The entire point of the *Edmunds* analysis is to draw on cases that, while not directly answering the constitutional question, are nonetheless instructive and invite robust analysis of record evidence and policy arguments.

For instance, when the Pennsylvania Supreme Court held that Article I, Section 7 provides more protection for nude dancing than does the First Amendment, the court had no prior nude dancing cases on which to rely. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). Instead the court cited cases about commercial speech, leafletting, and motion picture censorship. *Id.* The court found those cases relevant

because they established the general principles that Pennsylvania values freedom of expression and that Article I, Section 7 is more protective of freedom of expression than the First Amendment. *Id.* at 606.

The Families have cited Pennsylvania caselaw in precisely the same way. To be sure, the cases in the opening brief do not directly address rental inspections, just as the cases in *Pap's A.M.* did not directly address nude dancing. But these cases are instructive nevertheless:

- They establish the general proposition that the Pennsylvania Supreme Court has routinely been willing to depart from the Fourth Amendment. (Opening Br. 23–24 n.3, 39–45.)

- They establish the specific proposition that Pennsylvania's Constitution is primarily interested in protecting personal privacy. (*Id.* 39–43.)

- They establish the specific proposition that Pennsylvania is most protective of personal privacy when it is in the home. (*Id.* 41–43.)

- And they establish the specific proposition that one of the primary purposes of Article I, Section 8 was to outlaw general warrants and writs of assistance. (*Id.* 35.)

Second, the Borough's grounds for disregarding criminal cases—that the consequences in such cases are more severe—is misguided on the

facts and on the law. The Borough identifies "the heightened consequences for a criminal conviction, such as incarceration, disenfranchisement, prohibition on gun ownership, registration as a sex offender, revocation of professional licensure, and other collateral consequences." (Borough Br. 26.) Yet all of these "heightened consequences" *do* flow from the challenged searches, which can, according to the well-pleaded allegations, allow "police into tenants' homes and "sharing [of] information with law enforcement." (Opening Br. 10; R. 39a.) And Mr. Place testified that "[t]he protocol is for [inspectors] to notify the police and then the police take it from there." (R. 809a.) The Borough's distinction of criminal constitutional authority based on the consequences at issue in those cases ignores the facts here—both as alleged and as a developed in the record.

Even if the consequences of the inspections were strictly administrative—which they distinctly are not—the Pennsylvania constitution is not concerned with protecting wrongdoers from being punished for their acts; it is concerned with *personal privacy*. (Opening

Br. 36–37.)[4] The constitutional injury is the search itself, not whatever consequences may flow from it. And, in any event, the record in this case shows that the Borough's rental inspections do lead to criminal prosecutions.

The Families provided a comprehensive survey of rental inspection caselaw from around the country. As explained in the opening brief (*id.* 47–48), cases from other jurisdictions are only as useful as their reasoning, and only one case has squarely considered whether *Camara* should be followed as a matter of state law: *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152 (Minn. 2017). Although that case answered the question—mostly—in the negative, the Families urge the Court to follow the superior reasoning in the dissent, which is more in keeping with Pennsylvania's jurisprudence.[5]

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[4] The Borough also suggests that tenants have a diminished privacy interest in their homes as compared to homeowners. (Borough Br. 31 (criticizing the families for "conflat[ing] the sanctity of the home with rental properties").) Why the home should be any less sacred for renters is unclear.

[5] All but three of the cases from other jurisdictions cited by the Borough are addressed in the Families' opening brief. (*See* Borough Br. 37–41; Opening Br. 45–50.) The three new cases are irrelevant for some of the same reason: None of them separately analyzed their state constitutions as distinct from the U.S. Constitution. *See City of Seattle v. McCready*, 931 P.2d 156, 159 (Wash. 1997); *In re Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273, 276 (Minn. Ct. App. 1998); *Sokolov v. Vill. of Freeport*, 420 N.E.2d 55, 58 (N.Y. 1981). Indeed, the *Sokolov* court would have had no occasion to consider the question because the court

B. The Borough's policy arguments for following *Camara* all implicate factual disputes.

The Borough argues that its rental inspections are minimally invasive and that inspections are the only way to protect tenants.[6] (Borough Br. 43.) But these inspections are certainly not limited to "a routine inspection of the physical condition of private rental properties" nor a "minimal intrusion compared to the typical police officer's search for the fruits and instrumentalities of crime" because, as previously discussed, the full weight of criminal punishment flows from Pottstown rental inspections. (*Id.*) The Borough also reasons that suspicionless search warrants are the only way to address code violations: "If no administrative search warrant is issued, then no inspection occurs, and the code violation continues unabated, putting the tenant's and the

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struck down the challenged ordinance even under *Camara.* 420 N.E.2d at 346–49. And in the *McCready* litigation, the Washington Supreme Court explicitly reserved the question whether to depart from *Camara* because it held that the challenged ordinances were unconstitutional on other grounds. *City of Seattle v. McCready*, 868 P.2d 134, 138 (Wash. 1994) ("We appreciate the parties' desire to attain a definitive ruling from this court on the status of administrative search warrants in Washington, but we find that such a ruling is unnecessary to the resolution of this case."). The *Edmunds* court did not rely on cases that simply "affirm[ed] the logic" of a federal case "with little additional state constitutional analysis," much less cases that conducted no "independent analysis under their state constitutions." 586 A.2d at 900 & n.11.

[6] The Borough claims the "undisputed purpose of the ordinance" is to promote health and safety. (Borough Br. 42.) The Families do dispute that is the true purpose of the ordinance.

public's health and safety at risk." (*Id.*) But this suit simply seeks to abolish *mandatory* suspicionless inspections; tenants will always have the right to consent to an inspection, so they are not helpless.

The Borough's logic also presumes that inspectors never have any suspicion of code violations that could be sufficient for probable cause to enter the home when the tenant does not consent. But this speculation ignores that even the exterior of the home on truly dangerous properties is likely to raise sufficient suspicion for a real search warrant in these limited circumstances. The Borough even cites a case, *DeLuca*, where that exact probable cause was present. 6 Pa. D. & C. 5th at 309 (explaining that warrant was based on probable cause of housing code violations based on exterior trash and graffiti).

Moreover, the Borough does not explain why the good or bad will of the searcher changes the invasiveness of the search. Nor does the Borough address the invasiveness as alleged, with Borough inspectors having complete access to renters' bedrooms, bathrooms, closets, and cabinets. (Opening Br. 51–52; R. 37a–39a.) And the Borough never considers renters' private affairs, including their political and religious beliefs, romantic lives, and health, which are all on view in an interior

home inspection. (Opening Br. 51–52; R. 26a, 39a.) But as the Families have already explained, that is all beside the point. These are factual questions. The Borough is entitled to test these factual assertions through the adversarial process, but it cannot prevail on the pleadings. *See Theodore*, 836 A.2d at 94–95 (recognizing that "[i]t may be that, upon the trial of the matter, the District can produce evidence" sufficient to uphold its warrantless search program).

III. The Families are entitled to discovery.

The Borough defends the trial court's discovery orders on two erroneous grounds: (A) a misapprehension of how appellate courts review interlocutory orders after final judgment; and (B) a theory—without support in the caselaw—that facts do not matter in constitutional analysis.

A. The Discovery Orders became final after the Trial Court's Judgment.

The Borough argues that discovery questions are never appealable because they are "interlocutory." (Borough Br. 54–55.) The Borough is not using the term "interlocutory" correctly. While it is true that there is no right to an immediate or "interlocutory" appeal from most adverse discovery rulings, PA. R. APP. P. 311; 341(c), all rulings in a case become

appealable once final judgment is entered. *See* PA. R. APP. P. 313(b) (specifying that a collateral order is subject to "interlocutory" review when it "is such that *if review is postponed until final judgment* in the case, the claim will be irreparably lost") (emphasis added). The Borough's argument appears to be that appellate courts categorically lack jurisdiction to decide any discovery matters, even after entry of final judgment. That is obviously untrue. *See, e.g.*, *McNeil v. Jordan*, 894 A.2d 1260, 1268 (Pa. 2006) (reviewing the lower court's discovery orders).

B. The Families Are Entitled to Factual Development Related to Their Claim.

The Families have explained why they need discovery regarding both the intrusiveness of the searches at issue and the Borough's interest in conducting them. (Opening Br. 59–66.) Both are material questions under the operative legal framework. *See Pa. Soc. Servs. Union v. Commonwealth*, 59 A.3d 1136, 1144 (Pa. Commw. Ct. 2012) (explaining that 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" (citation omitted)). The Families contend that the Ordinances are unconstitutional on their face

because they permit suspicionless administrative search warrants. This requires an examination of how the authorized searches are applied in the real world. *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2451 (2015) ("[T]he constitutional 'applications' that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve *actual applications* of the statute.") (emphasis added); *Peake v. Commonwealth*, 132 A.3d 506, 523 (Pa. Commw. Ct. 2015) (striking down ban on convicts working in elder care because "because *a substantial number of its applications are invalid*, making it unconstitutional on its face.") (emphasis added).

The Borough responds, however, by asserting a blanket rule that discovery is impermissible in facial constitutional challenges, so therefore there can be no material facts. (Borough Br. 55–56.) If the Borough's "no discovery in constitutional cases" rule were correct, there would be a conflict between the standard of review and the merits question—one rule requiring consideration of facts, the other denying access to such facts—but the Borough's rule is an invention without any support in the caselaw. *Cf. Free Speech Coal., Inc. v. Att'y Gen. of the U.S.*, 677 F.3d 519, 538 (3d Cir.2012) (reversing the district court in

dismissing a facial claim without the factual record needed to "intelligently weigh the legitimate versus problematic applications of the [challenged statutes]").

No cases cited by the Borough concern the general availability of discovery for facial constitutional claims. Most involves the appellate standard of review in appeals brought after proceedings with adversarial factfinding.[7] One simply observed that for the particular constitutional claim at issue, the court did not need factual development. *See Paustian v. Pa. Convention Ctr. Auth.*, 561 A.2d 1337, 1338–39 (Pa. Commw. Ct. 1989) (holding that "the constitutional issues presented [were] primarily legal in nature" based on two prior on-point tax rulings)). *Paustian* actually indicates that the need for discovery will depend on the specific claim at issue. It follows that where the constitutional question turns in part on disputed issues of facts, as in the present case, discovery is necessary.

Indeed, the Borough, in attempting to distinguish cases in which constitutional plaintiffs were given access to discovery, apparently

[7] *See Commonwealth. v. Turner*, 80 A.3d 754, 759 (Pa. 2013) (appeal following evidentiary hearing); *Ario v. Ingram Micro, Inc.*, 965 A.2d 1194, 1200 (Pa. 2009) (appeal following summary judgment); *Buffalo Twp. v. Jones*, 813 A.2d 659, 661 (Pa. 2002) (appeal following entry of permanent injunction); *Commmonwealth. v. Thompson*, 106 A.3d 742, 748 (Super. Ct. 2014) (appeal following criminal trial).

concedes that its no-discovery rule is not really a blanket rule. The Borough suggests that *Theodore v. Delaware Valley School District*, 836 A.2d 76 (Pa. 2003), is distinguishable because the challenged policy in that case only applied to a particular group, whereas the inspection program in Pottstown supposedly applies to everyone. (Borough Br. 51–52.) The Borough does not explain why this distinction matters, but it is not even a real distinction: Pottstown too is targeting a subset of its residents for intrusive searches—those who do not own their own homes.

The Borough's discussion of *League of Women Voters v. Commonwealth,* 178 A.3d 737 (Pa. 2018) also misses the mark. In that case, the Pennsylvania Supreme Court struck down a statute, *in its entirety*, on the basis of extensive expert testimony. The Borough argues that this case was not really a facial challenge, however, because the plaintiffs included voters from each affected district. That argument conflates standing with the scope of the remedy. The court struck down a statute in its entirety. That is the definition of facial relief. *See Constitution Party of Pa. v. Cortes*, 824 F.3d 386, 394 (3d Cir. 2016) ("The distinction between facial and as-applied challenges . . . goes to

the breadth of the remedy employed by the Court.") (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010))).[8]

In any event, the question of discovery with regard to facial challenges is beside the point. Even the Borough does not argue that discovery is impermissible for as-applied challenges. Instead, the Borough simply argues that the Families have not brought an as-applied challenge. (*See* Borough Br. 53 ("There is no 'as-applied' theory considering no inspections of the subject properties ever took place.").) Such an as-applied challenge is impossible, the Borough argues, because the Families have not yet been searched. (*Id*. 50 ("An as-applied challenge is ripe only where a plaintiff has been affected.")) This is quite wrong. This case is not seeking an advisory opinion on an unripe academic question; it is responding to real-world attempted searches. The Borough here obtained the very type of warrant that is at the center of this litigation against one of the Families. And the Borough has tried to search all of the Families' homes—including a

[8] The Borough makes the same mistake with *Theodore*, arguing that the case is distinguishable because the plaintiffs had already been searched and were thus necessarily brining as-applied challenges. (Borough Br. 52.) But the record does not reflect that there was any as-applied challenge brought, and the fact that individual plaintiffs may have been injured by the policy before filing suit has no bearing on whether the relief sought was as-applied or facial.

search after the objection of the tenant and without any kind of search warrant at all. The only reason the Borough has not done so is because of this litigation. There is no question that the Borough intends to subject the Families to the challenged searches, and no precedent supports the proposition that citizens must submit to unconstitutional practices in order to challenge them. That is more than sufficient for an as-applied challenge. *See Ladd v. Real Estate Comm'n of Commonwealth*, 187 A.3d 1070, 1077 (Pa. Commw. Ct. 2018) (finding that case was ripe—prior to enforcement—where there was no question that the defendant intended to enforce the statute against the plaintiff).

IV. Keith Place is not immune.

The Borough argues that Keith Place is immune from suit and that the Families are precluded from arguing otherwise because they did not do so in their opening brief. (Borough Br. 44–46.) The Borough is mistaken.

First, there is no merit to the Borough's argument that the families "waived" their opportunity to offer argument about official immunity. (*Id.* 44.) There was nothing in the trial court's opinion suggesting that it relied on immunity in reaching its conclusion. So, although appellees

are of course entitled to defend the judgment on "any ground supported by the record," *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 469 (3d Cir. 2015), it is not the duty of appellants to preemptively contradict appellees' alternative grounds.[9] Indeed, the entire point of reply briefs is to allow appellants to respond to new arguments raised by appellees. *See* PA. R. APP. P. 2113(a) ("[T]he appellant may file a brief in reply to matters raised by appellee's brief or in any *amicus curiae* brief and not previously addressed in appellant's brief.").

As to the merits of the question, it is equally obvious that Keith Place has no immunity. The plain text of the statute provides that official immunity applies only to claims for "civil damages." 42 Pa. Cons. Stat. § 8545; *accord* 42 Pa. Cons. Stat. § 8546 ("In any action brought against an employee of a local agency *for damages* . . . ") (emphasis added). This is not a suit for damages, so immunity does not apply. *See Boykins v. City of Reading*, 562 A.2d 1027, 1028–29 (Pa. Commw. Ct. 1989)

[9] The only legal authority the Borough cites in support of its waiver argument involved an undecipherable brief, not one that waived any particular argument. *Commonwealth v. Taylor,* 451 A.2d 1360, 1361 (Pa. Super. 1982) ("The inadequate aspects of appellant's brief are not mere matters of form or taste, rather they are the complete absence of those material sections of the brief which facilitate appellate review. Essentially, the brief consists of a three page hodgepodge of facts and argument which is scantily augmented by the citation of authority. The entire content of the brief is contained under the heading '*Brief for Appellant*.' There are no other headings or sub-headings.").

(holding that the trial court erred in denying a preliminary injunction on the grounds that damages were an available remedy because the trial court had overlooked the fact that official immunity precluded damages).

Rather than a suit for damages, this is an official capacity suit for injunctive relief against unconstitutional enforcement of the law. Because Mr. Place is the one enforcing the law he is the "natural target[]" of a suit for injunctive and declaratory relief. *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736 (1980).[10] The right to file such suits for injunctive relief has been recognized at least since *Ex parte Young*, 209 U.S. 123 (1908); *accord Philadelphia Life Ins. Co. v. Commonwealth*, 190 A.2d 111, 114 (Pa. 1963) ("[S]uits which simply seek to restrain state officials from performing affirmative acts are not within the rule of immunity.") (emphasis omitted).

[10] The Borough also complains that there are no factual allegations tying Mr. Place to the challenged program. (Borough Br. 45.) This is not true. Plaintiffs alleged that Place was instrumental in the administrative warrant process. Plaintiffs Rivera and Camburn wrote to Place to object to the inspection, and it is his office that applied for the warrant. (R. 30a–31a.; ¶¶ 20–21.)

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed.

Dated: October 25, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 5,777 words, exclusive of the materials listed in PA. R. APP. P.2135(b), and therefore complies with PA. R. APP. P. 2135.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, true and correct copies of *Reply Brief of Appellants* 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 on this date two copies will be mailed via commercial carrier to Defendants Counsel at the address noted above. Additionally, four copies of the brief will be mailed to the Court via commercial carrier within seven days of October 25, 2019.

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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.

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