IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
38TH JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

DOROTHY RIVERA, an Individual, EDDY OMAR RIVERA, an Individual, KATHLEEN O'CONNOR, an Individual, ROSEMARIE O'CONNOR, an Individual, THOMAS O'CONNOR, an Individual, and STEVEN CAMBURN, an Individual, Plaintiffs, v. BOROUGH OF POTTSTOWN, and KEITH A. PLACE, in his official capacity as Pottstown Director of Licensing and Inspections, Defendants.	COURT OF COMMON PLEAS CIVIL ACTION NO: 2017-04992

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' ANSWERS TO DEFENDANTS' PRELIMINARY OBJECTIONS

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Pursuant to Pennsylvania Rule of Civil Procedure 1003, Montgomery County Court of Common Pleas Local Rule 1028(c)(2), and this Court's August 21, 2017 Order (Docket No. 25), Plaintiffs Dorothy and Omar Rivera, Steven Camburn, and Kathleen, Rosemarie, and Thomas O'Connor respectfully submit this Memorandum of Law in Support of their Answers to the Preliminary Objections by Defendants Borough of Pottstown and Keith Place.

INTRODUCTION

This case is about whether—as a matter of first impression—Article I, Section 8 of the Pennsylvania Constitution mandates a higher level of probable cause than the federal constitution for so-called "administrative warrants." Defendants obtain such warrants *ex parte* with no suspicion of a housing-code violation. The tenant has no way to appeal the warrant, and the Borough gains access to every square inch of the residence—a flagrant violation of longstanding Pennsylvania constitutional principles protecting the sanctity of the home.

Defendants raise three preliminary demurrer objections. For each objection, Defendants do not, and cannot, carry their burden in proving it is "clear and free from doubt" that Plaintiffs will be unable to prevail on their claim. *See William Penn Sch. Dist. v. Pa. Dep't of Educ.*, No. 46 MAP 2015, 2017 WL 4287879, at *15 (Pa. Sept. 28, 2017).

First, Defendants concede that "[n]o Pennsylvania court has squarely addressed the validity of administrative warrants pursuant to the Pennsylvania Constitution." (Defs.' Br. Supp. Prelim. Objs. ("Defs.' Br.") at 11.) Accordingly, the operative

question—whether Pennsylvania courts should reject federal precedent in interpreting Article I, Section 8—is certainly not free from doubt. An analysis of the four-part *Edmunds* analysis actually shows that the Pennsylvania Constitution is stronger and more protective of rights than the federal constitution and that those stronger protections must apply here.

Second, Defendants invoke a constitutional provision not at issue in this case—Article I, Section 1—in the hopes of travelling under Pennsylvania's due process rational-basis test. This argument is a non sequitur—Plaintiffs do not challenge the adoption of the rental-inspection ordinances as a violation of due process. Someone may bring such a claim in the future, and may or may not prevail, but it is not an issue poised for resolution by this Court.

Third, Defendant Keith Place—the head of the agency that applies for the challenged administrative warrants—seeks to avoid being a party in this action by arguing that he is immune under the Pennsylvania Tort Claims Act. This, too, is a non sequitur. The Tort Claims Act provides immunity for employees like Place when their employer (here, the Borough) is also immune. But the Borough makes no such immunity defense. Defendants also incorrectly argue that Plaintiffs make no allegations against Place. On the contrary, Plaintiffs seek an injunction to prevent Place from doing precisely what he is doing: filling out warrant application forms not supported by individualized probable cause.

I. MATTER BEFORE THE COURT

Preliminary Objections of Defendants.

II. COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Have Defendants met their burden in showing it is clear and free from doubt that Article I, Section 8 of the Pennsylvania Constitution does not require individualized probable cause of a housing-code violation for a search warrant to issue?

Suggested answer: No.

2. Is Article I, Section 1 of the Pennsylvania Constitution at issue in this case?

Suggested answer: No.

3. Have Defendants met their burden in showing it is clear and free from doubt that Defendant Keith A. Place is entitled to Official Immunity?

Suggested answer: No.

III. STATEMENT OF FACTS

The Borough of Pottstown's rental-inspection ordinances allow government officials to conduct highly intrusive, wall-to-wall searches for compliance with standards that in many cases are so vague as to leave inspectors with complete discretion regarding where to search and what constitutes a violation. (Am. Compl. ¶ 1.) If a landlord or tenant refuses to "voluntarily" permit an inspection, the Borough may seek an administrative warrant, which does not require any evidence of a suspected housing-code violation in the home to be searched. Inspectors may then enter every area of a rental home—areas where information about a tenant's

private family relationships, personal belongings, political or religious affiliations, romantic lives, or health may be visible. (*Id.*)

A. The Plaintiffs Are Subjected to Invasive Rental Inspections.

Plaintiffs Dottie and Omar Rivera are tenants who live in a rental home located in the Borough of Pottstown. They brought this suit because their home was subject to rental inspection by Pottstown's Licensing and Inspections Department. (*Id.* ¶ 4.) The Riveras care deeply about maintaining the privacy in their home—including their right to determine who will enter and who will have access to their home. (*Id.*) Plaintiff Steven Camburn owns and operates rental properties in the Borough of Pottstown, including the home the Riveras rent. He is unwilling to allow the Borough to intrude into his tenants' homes without their consent. (*Id.* ¶ 5.)

Plaintiffs Kathleen and Rosemarie O'Connor live in a home owned by their father, Plaintiff Thomas O'Connor, and also joined this suit because their home was subject to the Borough's rental-inspection regime. They value their privacy and security in their home and do not want Borough inspectors to enter. (*Id.* ¶ 6.) Kathleen and Rosemarie's home is adjacent to Thomas's home, and Thomas views his daughter's residence as part of their family home. He cares about maintaining a safe and private home for his daughters, and he is not willing to allow Defendants to enter their home without their consent. (*Id.* ¶ 7.)

B. The Controversy over the Pottstown Licensing Code.

On or about June 8, 2015, the Borough of Pottstown, Pennsylvania, enacted Ordinance No. 2137, which requires landlords and tenants to submit to mandatory inspections of rental properties within Borough limits 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"). (Am. Compl. ¶ 12.)

The Code broadly defines a "residential rental unit" as "a rooming unit or dwelling unit let for rent, or a rooming unit or dwelling unit occupied by someone other than the owner." Code § 11-202. Thus, a home can fall under the Code even if its occupants do not have a lease or pay rent. If a home's occupant is not the owner, that home is subject to the Borough's inspection regime. (Am. Compl. ¶ 13.)

Though inspections are supposed to occur on a biennial basis, the initial inspection cycle has been set for a period of 30 months, which is scheduled to conclude on December 31, 2017. Code § 11-206. (Am. Compl. ¶ 14.) When a property is due for an inspection, the Borough first sends the landlord an invoice for his or her rental license. When the landlord pays the fee (which varies depending on the type of property), the Borough schedules the inspection and sends notice of the scheduled inspection to the landlord. (*Id.* ¶ 15.) The inspections need not be predicated on any particular reason to suspect that a violation of any law has occurred or is occurring in the targeted rental property. (*Id.* ¶ 16.) The 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, including any occupied dwelling unit, and to obtain an administrative search warrant if access is refused. (*Id.* ¶ 17.)

C. Defendants' Attempt to Inspect the Property of Plaintiffs Dorothy Rivera, Eddy Omar Rivera, and Steven Camburn.

On November 16, 2016, the Department sent Plaintiff Camburn a "Rental Inspection Notice" requesting a fee of $70 for the Riveras' home located at 326 Jefferson Avenue. (*Id.* ¶ 18.) Camburn paid the fee on December 21, 2016, and an inspection of the Riveras' home was scheduled for March 13, 2017. (*Id.* ¶ 19.)

On March 8, 2017, the Riveras and Camburn sent a letter to Defendant Keith Place, informing Mr. Place that they would not voluntarily allow the Borough of Pottstown to inspect their home and property. They further invoked their rights under Article I, Section 8 of the Pennsylvania Constitution, which they asserted "requires the government to meet a higher standard of probable cause to obtain a warrant to search a rental home than the standard articulated in *Camara*." (*Id.* ¶ 20 (*citing Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523 (1967).) The Borough then applied for an administrative warrant *ex parte* in Pottstown's Magisterial District Court to inspect the Riveras' home. The Borough's application for this warrant was not supported by individualized probable cause of a housing-code violation. The court granted the administrative warrant. (*Id.* ¶ 21.)

That same day, Plaintiffs the Riveras and Camburn moved to quash, or, in the alternative, to stay the execution of, the administrative warrant in the Magisterial District Court. The court tabled the motion to quash, but stayed the

execution of the warrant pending a later determination of the Riveras' and Camburn's motion. (*Id.* ¶ 22.)

On April 18, 2017, Defendants filed a Motion to Strike the Riveras' and Camburn's Motion to Quash the Administrative Warrant. Defendants' motion asserted that the Magisterial District Court lacked jurisdiction to quash an administrative warrant on the basis that the warrant violates the Pennsylvania Constitution. (*Id.* ¶ 23.)

On April 27, 2017, the Riveras and Camburn sent a letter to the Magisterial District Court informing the Court of their intent to file a response to Defendants' Motion to Strike by May 8, 2017, in accordance with the Pennsylvania Rules of Civil Procedure. (*Id.* ¶ 24.) That same day—absent any briefing or advocacy from the Riveras and Camburn—the Magisterial District Court granted the Defendants' Motion to Strike with prejudice, thereby activating the administrative warrant. After 48 hours, the administrative warrant expired. Defendants did not inspect the Riveras' home while the warrant was active. (*Id.* ¶ 25.)

Camburn does not want Borough inspectors to enter the portions of his properties that are not open to the public. (*Id.* ¶ 65.) The Riveras do not want Borough inspectors entering their home against their will and searching every area of their home. Their home is not open to the public. Even invited guests do not have permission to search their closets and cabinets or to look under their beds. (*Id.* ¶ 66.)

D. There Is No Avenue to Appeal an Administrative Warrant.

The Magisterial District Court did not send the Riveras and Camburn a copy of the order granting Defendants' Motion to Strike. Nevertheless, the Riveras and Camburn received a courtesy copy of the order from Defendants and attempted to appeal the order. However, they quickly learned that there was no avenue for appeal. (*Id.* ¶ 26.) When the Riveras and Camburn attempted to effectuate their appeal in this Court, the Clerk of Court would not accept their filing because there was no record of the underlying matter in the Magisterial District Court. (*Id.* ¶ 27.) The Riveras' and Camburn's counsel then requested a docket number from the Magisterial District Court's clerk, but the clerk informed counsel that if an administrative warrant is not executed, it is court policy not to docket the warrant or any orders related to the warrant. (*Id.* ¶ 28.)

Without any record of the underlying matter in Magisterial District Court, the Riveras and Camburn have been unable to seek judicial review of the Magisterial District Court's order striking their motion to quash and issuing the administrative warrant. (*Id.* ¶ 29.) In a letter dated May 9, 2017, Defendants represented that they would not apply for additional administrative warrants to inspect the Riveras' home until the resolution of the instant lawsuit. Nevertheless, because Defendants routinely seek these warrants *ex parte*, the Riveras and Camburn continue to fear that Defendants may attempt to inspect their property without their knowledge or consent. (*Id.* ¶ 30.) If Plaintiffs do not receive the

declaratory and injunctive relief they seek in this action, the inspections will resume. (*Id.* ¶ 68.)

E. Defendants' Attempt to Inspect the Property of Plaintiffs Kathleen, Rosemarie, and Thomas O'Connor.

Plaintiffs Kathleen and Rosemarie O'Connor have resided at their home for the last 20 years. Their home is owned by their father, Plaintiff Thomas O'Connor, who has lived next door for 57 years. (*Id.* ¶ 31.) Kathleen and Rosemarie do not pay rent to live in the property, and they do not have a lease. The two homes share a backyard and garage, and the O'Connors consider Kathleen and Rosemarie's home at 466 N. Franklin St. to be a part of their family home. (*Id.* ¶ 32.) Although Thomas does not live at 466 N. Franklin St., he frequently spends time with his daughters at their home. (*Id.* ¶ 33.) On March 3, 2017, the Borough informed the O'Connors that Kathleen and Rosemarie's home was due for an inspection under the Ordinances. The Borough also sent them an invoice for $70. Thomas paid the fee. (*Id.* ¶ 34.) The Borough scheduled an inspection of Kathleen and Rosemarie's home for April 10, 2017. Defendants instructed the O'Connors to confirm that the property could be inspected on this date. (*Id.* ¶ 35.)

The O'Connors were disturbed to learn that their property was scheduled for an inspection. Not wanting the inspection, they never confirmed that the inspection could occur on April 10, 2017. (*Id.* ¶ 36.) The O'Connors do not want the Borough to enter any part of their home without their consent. (*Id.* ¶ 37.) The Borough did not inspect the O'Connors' property on April 10 and rescheduled the inspection for July

6, 2017. A Borough inspector threatened to take them to court if they did not allow the inspection. (*Id.* ¶ 38.)

On June 30, 2017, the O'Connors informed Defendants that they objected to an inspection of their property without a warrant supported by individualized probable cause. They further invoked their rights under Article I, Section 8 of the Pennsylvania Constitution and notified Defendants of their intent to join this action. (*Id.* ¶ 39.)

Thomas O'Connor does not want Borough inspectors entering his daughters' home against their will. Their family home is private, and only invited guests may enter. He thinks that they should have the right to control who enters the property. (*Id.* ¶ 69.) Kathleen and Rosemarie do not allow strangers in their home under any circumstances. The prospect of having strangers entering every part of their home undermines their security in their home. They fear that an inspection will reveal personal details about themselves—including where they store their personal items, where they sleep, their medical history, and their spiritual practices. These are things that they wish to keep private. (*Id.* ¶ 70.) Because of this fear, they have already taken steps to hide and store some items that they wish to keep private in the event inspectors force their way inside. Without a judgment declaring Pottstown's Ordinances to be illegal and an injunction against their enforcement,

the O'Connors will be subjected to repeated attempts to inspect their property, including *ex parte* attempts to obtain warrants, and to unconstitutional searches. Kathleen and Rosemarie O'Connor plan to continue living in their home for many more years, through one or more additional biennial inspection cycles, and Thomas O'Connor plans to continue allowing them to live in this family property through one or more additional biennial inspection cycles. (*Id.* ¶ 73.)

F. Overview of the Pottstown Rental Inspection Code

The Ordinances provide for "a systematic inspection program, registration and licensing of residential rental units and penalties." Code § 11-201. (Am. Compl. ¶ 41.) The Ordinances require landlords to obtain, and keep current, a license to lawfully rent to third parties for each "residential rental unit in the Borough of Pottstown." Code § 11-202. (Am. Compl. ¶ 42.) The Ordinances require rental inspections to take place "biennially, upon a property transfer, upon a complaint that a violation has occurred, or where the Licensing and Inspections Officer has reasonable cause to believe that a violation is occurring." Code § 5-801. This lawsuit concerns the first-listed "biennial" inspections, and not the provisions based on complaints or reasonable beliefs that there is a code violation. (Am. Compl. ¶ 43.) The Borough issues and renews rental licenses when properties are inspected. Code § 11-202. Under the Ordinances, landlords are also required to permit inspections "at reasonable times upon reasonable notice." Code § 11-203(I)(3). (Am. Compl. ¶ 44.)

G. Defendants Obtain Administrative Warrants With No Individualized Probable Cause.

If a landlord or tenant objects to an inspection, Borough inspectors may seek an administrative warrant to inspect the premises. (*Id.* ¶ 45.) The concept of an administrative warrant comes from *Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523 (1967), in which the U.S. Supreme Court held a warrant was required to enter a home to conduct a nonconsensual housing inspection. *Id.* at 539. The Court did not require these warrants to be supported by traditional individualized probable cause. *Id.* at 538. Instead, "probable cause" for these warrants was to mean "reasonable legislative or administrative standards." (Am. Compl. ¶ 46.)

Reasonable legislative or administrative standards under *Camara* could be things like "the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area" and could "vary with the municipal program being enforced." (*Id.* ¶ 47.) Pottstown's enforcement of its mandatory inspection of rental properties against unwilling tenants and landlords shows *Camara*-inspired administrative warrants in action. The administrative warrants Pottstown obtains do not have to be supported by any reasonable belief that a code violation exists, has existed, or will exist in a targeted rental home. (*Id.* ¶ 48.) The Affidavit of Probable Cause that accompanies the administrative warrant application is barebones in its statement of probable cause. In one example, the affiant merely stated that the Ordinances required biennial inspections, without listing any facts suggesting that something was wrong or unsafe with the property.

(*Id.* ¶ 49.) If a landlord or tenant refuses entry, "[t]he penalty for not allowing an inspection shall be revocation of the residential rental registration and/or the residential rental license." Code § 5-801(B). (Am Compl. ¶ 50.)

H. The Ordinances Authorize—And Pottstown Conducts—Intrusive Inspections

When inspections take place, the Ordinances authorize the Borough to search any part or portion of a rental home for conformity with the Ordinances. (Am Compl. ¶ 51.) The Ordinances authorize inspections for the purpose of determining whether rental properties "demonstrate compliance" with certain standards. Code § 11-206(2). (Am. Compl. ¶ 52.) The Ordinances instruct inspectors to check for "habitability." The Ordinances do not contain a comprehensive definition of habitability, but they do specify that the term encompasses the following: A) one 120 square-foot habitable room; B) 70 habitable square feet for all other spaces—other than kitchens and bathrooms; C) 70 square feet per bedroom "plus an additional 50 square feet for each additional person occupying the same room"; D) "No basement space may be considered habitable unless it meets the requirements for secondary means of egress/escape as defined by the applicable Borough Building or Property Maintenance Code." Code § 11-206(2)(A)–(D). (Am. Compl. ¶ 53.) The Ordinances also allow inspectors to search any area within a person's home pursuant to a vague catchall standard—"any other relevant requirements"—which the Ordinances do not define. Code § 11-206(2). (Am. Compl. ¶ 54.)

As a supplement to the scant guidance in the Ordinances, Pottstown publishes an inexhaustive "Residential Rental & Property Transfer Checklist" (the

"Checklist"). *See* Licensing and Inspections, Residential Rental & Property Transfer Checklist, Borough of Pottstown, http://www.pottstown.org/DocumentCenter/View/105. (Am Compl. ¶ 55.) The Checklist contains vague standards that open up the entire home to inspection. The Checklist provides that "[t]he interior & exterior of property and premises must be maintained in a clean, safe & sanitary condition." (*Id.* ¶ 56.) It also states that "[i]nterior doors must function as intended." (*Id.*) The Checklist uses "good repair" as a standard nine times without defining it. (*Id.*)

Inspectors can enter any interior room and open any interior door under the standards articulated in the Checklist. Nothing in the Ordinances places any restriction on the locations inside a rental property in which such inspection authority may be exercised. (*Id.* ¶ 57.) Inspectors enter closets under the Checklist because "[a]ll incandescent bulbs located in closets or over shelves must be protected with permanent covers over bulbs." (*Id.* ¶ 58.) Inspectors also open closets to inspect the closet ceilings. (*Id.*)

Thus, the Checklist gives inspectors permission to open and search all closets without having to show a neutral arbiter that they suspect there is a safety concern stemming from closet lightbulbs. In fact, under the administrative warrant standard, inspectors are able to obtain a warrant giving them access to all the closets in a home without even showing that the house in question has closet lightbulbs at all. (*Id.* ¶ 59.)

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.* ¶ 60.) 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. (*Id.* ¶ 61.) 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.* ¶ 62.) 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. Plaintiff 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.* ¶ 63.) Nothing in the Ordinances prevents inspectors from bringing police into tenants' homes or from sharing information with law enforcement or any other person. (*Id.* ¶ 64.)

IV. LEGAL STANDARD

"It is axiomatic in the law of pleading that preliminary objections in the nature of a demurrer admit as true all well and clearly pleaded material, factual averments and all inferences fairly deducible therefrom." *Sinn v. Burd*, 486 Pa. 146, 149 (1979) (reversing demurrer based on novel cause of action: negligently caused

mental trauma). Preliminary objections should be sustained "only when, based on the facts pleaded, it is *clear and free from doubt* that the complainant will be unable to prove facts legally sufficient to establish a right to relief." *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, No. 46 MAP 2015, 2017 WL 4287879, at *15 (Pa. Sept. 28, 2017) (citation omitted) (emphasis added); *id.* at *31 (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").

"The question presented in a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. If doubt exists concerning whether the demurrer should be sustained, then this doubt should be resolved in favor of overruling it." *Bruno v. Erie Ins. Co.*, 630 Pa. 79, 91 (2014) (internal citations omitted); *see id.* at 93 (reversing demurrer against Plaintiff who contended that superior court insurance law precedent was "wrongly decided"). Questions of first impression can almost never be resolved on a demurrer:

> [W]here the propriety of an order sustaining a demurrer is being reviewed by a court of last resort, the fact that the theory for recovery relied upon has not been previously sanctioned, is not conclusive. It must be remembered that every cause of action . . . was once a novel claim, and the absence of Pennsylvania authority for appellant's proposition is not an end to the issue.

Sinn, 486 Pa. at 150.

Finally, where the contours of constitutional rights have not been established "with a sufficient degree of certainty," it is premature to construct the constitutionality of a statute at the preliminary objection stage of a proceeding. *See*

Pa. Chiropractic Fed'n v. Foster, 136 Pa. Cmwlth. 465, 479 (1990) (overruling demurrer to due-process challenge where "it has not been established with a sufficient degree of certainty what Petitioners' due process rights require in the present context").

V. ARGUMENT

In the following subsections, Plaintiffs will show: (A) why the Borough cannot meet its burden of proving that the Ordinances do not violate Article I, Section 8; (B) that Defendants' attempt to shoehorn this case into an Article I, Section 1 due-process cause of action is a non-starter; and (C) why Keith Place is a proper party to this lawsuit.

A. Defendants' Preliminary Objection for Demurrer on the Ground that the Ordinance Does Not Violate Article I, Section 8 of the Pennsylvania Constitution Should Be Overruled.

Defendants have not met their burden in showing that it is clear and free from doubt that the Plaintiffs will be unable to prove facts legally sufficient to establish that the Ordinances violate Article I, Section 8.

i. Traditional Search Warrants Require Evidence Tying a Particular Person or Place to a Crime.

Article I, Section 8 of the Pennsylvania Constitution, like the Fourth Amendment,[1] contains both a clause protecting against "unreasonable searches and

[1] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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." U.S. Const. amend. IV.

seizures" and a clause requiring warrants to issue based on probable cause. Thus, under Article I, Section 8, all searches must be reasonable *and* search warrants must be supported by probable cause.

Before the U.S. Supreme Court's decision in *Camara*, if a search required a warrant, the warrant had to be supported by a neutral magistrate's finding of individualized probable cause—evidence, presented under oath, tying a particular person or place to a crime.[2] This requirement of individualized probable cause protects individuals 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. But in *Camara*, 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 and replaced it with a reasonableness inquiry, turning probable cause into a generalized balancing test of government and private interests.

ii. In *Camara*, the U.S. Supreme Court Invented Administrative Warrants and Departed from Traditional Probable Cause.

In *Camara*, a tenant in San Francisco was arrested for objecting to a warrantless rental-housing inspection of his apartment home, and he challenged

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[2] *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).

the warrantless inspection under the Fourth Amendment. 387 U.S. at 525–27. The U.S. Supreme Court ruled that a warrant was required under the Fourth Amendment before the city could enter the tenant's home. *Id.* at 538. At the same time, however, the Court invented a previously unknown type of warrant—the administrative warrant.

The Court found that, under the Fourth Amendment, municipalities need only show a more general type of "probable cause" in order to obtain an administrative warrant. *Id.* And the Court stated that this type of probable cause exists so long as there are "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. *See Camara*, 387 U.S. at 541, 554 n.4 (Stewart, J., dissenting) (noting the "absurdity" of the majority's approach, under which "'probable cause' would therefore be present in each case and a 'paper warrant' would issue as a matter of course"). The majority justified this lesser standard of probable cause because it found these inspections were not personal in nature and "involve[d] a *relatively limited invasion of the urban citizen's privacy*." *Camara*, 387 U.S. at 537 (emphasis added).[3] Although administrative warrants (warrants issued without individualized

[3] Several years before *Camara*, the Supreme Court actually approved suspicionless housing inspections without any type of warrant. *See Frank v. Maryland*, 359 U.S. 360, 373 (1959). *Camara* partially overturned *Frank* by requiring an "administrative warrant" for such inspections. For the most part,

probable cause) are currently permissible under the Fourth Amendment as interpreted in *Camara*, administrative warrants to search people's homes and properties have no place under the Pennsylvania Constitution, which protects people's privacy to a greater degree than the federal Constitution and requires traditional, individualized probable cause for searches of the home. Some Pennsylvania municipalities, like Pottstown, use *Camara*-style warrants to enforce local laws—even though these warrants have never been sanctioned by the Pennsylvania Supreme Court.

iii. Pennsylvania Courts Conduct a Four-Factor Analysis in Determining Whether the Pennsylvania Constitution Provides Greater Protection than the Federal Constitution.

In Pennsylvania, courts "undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated." *Commonwealth v. Edmunds*, 586 A.2d 887, 894–95 (Pa. 1991) (holding that Pennsylvania courts are free to reject federal precedent in interpreting Article I, Section 8). Defendants agree (*see* Defs.' Br. 10) that *Edmunds* provides the four factors that are relevant to determining whether the Pennsylvania Constitution secures more rights than its federal counterpart: "(1) the text of the Pennsylvania constitutional provision; (2) the history of the provision, including Pennsylvania caselaw; (3) related caselaw from other states; and (4) policy considerations, including unique issues of state and local concern, and applicability with modern

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however, *Camara* approved of *Frank*'s reasoning for not requiring individualized probable cause for these searches.

Pennsylvania jurisprudence." *Id.* These four factors provide a recommended mode of analysis rather than a rigid balancing test. *See Jones v. City of Philadelphia*, 890 A.2d 1188, 1194 (Pa. Commw. Ct. 2006) ("[J]udges 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).

On demurrer, it is Defendants' burden to prove to the Court that Article I, Section 8, does not provide more protection than the Fourth Amendment in the context of administrative warrants. *See Taylor v. Pa. State Police*, 132 A.3d 590, 604 (Pa. Commw. Ct. 2016) (holding that when "case law provides no clear answers" it is impossible to "say with certainty that [the] Pennsylvania Constitution[]. . . does not provide more protection than its federal counterpart"). Defendants cannot meet that burden here because, as they admit, no Pennsylvania court has squarely addressed the question in this case.

Plaintiffs address each factor below and show that Pottstown's rental-inspection regime violates Article I, Section 8 of the Pennsylvania Constitution. Article I, Section 8 provides a higher level of protection against invasions of privacy in the home than the Fourth Amendment as interpreted in *Camara* and does not allow for completely suspicionless warrants to search peoples' homes.

1. 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, Plaintiffs first 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. 10.[4]

When Pennsylvania first adopted this constitutional protection, the term "warrant" was understood to require individualized suspicion of a violation of a law. *See* Richard Burn, *A New Law Dictionary: Intended for General Use, as well as for Gentlemen of the Profession* 718 (1792) (internal citations omitted) ("Before the granting of the warrant, it is fitting to examine upon oath the party requiring it, as well as to ascertain that 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* John Bouvier, *A Law Dictionary: Adapted to the*

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

> That the 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 a 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 to be granted.*

Pa. Const. of 1776 ch. I, cl. 10 (emphasis added).

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 499, 641 (1848) ("That [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 . . . . 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* Bouvier, *supra*, at 371 ("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 . . . .") (emphasis in original). 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.

2. 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*, 470 A.2d 457, 466 (Pa. 1983); *see* Pa. Const. of 1776 ch. I, cl. 10. 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" to search colonists' homes and businesses. *Id.* Like the administrative warrants here, these general warrants authorized sweeping, suspicionless searches of people's homes and businesses. *Id.* at 897 (citing Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 157–58 (Philadelphia, 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, *Commentaries on the Constitution of Pennsylvania* at 157. George III even 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.* (citing *May's Constitutional History of England*, Chap. II) ; *see also Wakely v. Hart*, 6 Binn. 316, 319 (1814) (describing Article I, Section 8's rejection of general warrants as a "*solemn veto* against this

powerful engine of despotism") (emphasis in original). Article I, Section 8's protections were devised to abolish these infamous general warrants. White, *supra*, at 157. And to the drafters, requiring warrants based upon individualized probable cause was essential to fully safeguard privacy in the Commonwealth. *Id.*

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).

The administrative warrants Defendants obtain 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 Riveras' home, it closely resembles 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, this administrative warrant authorizes the Borough to invade Plaintiffs' privacy to search for housing-code violations based merely on generalized, highly speculative suspicion. And, as explained above, it also allows a search 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. The O'Connors live under the threat of an administrative warrant permitting inspectors to enter Kathy and Rosemarie's home.

3. 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. 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.*, 398 Pa. 369, 380 (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 (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. *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 v. Del. Valley Sch. Dist.*, 836 A.2d 76, 88 (Pa. 2003) (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).

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 *Commonwealth v. DeJohn*, in which it held that a depositor has standing to challenge the seizure of his or her bank records. 403 A.2d 1283, 1289–91 (Pa. 1979). 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." *Id.* at 1289 (quoting *Burrows v. Superior Court*, 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.

For instance, in *Brion*, the Pennsylvania Supreme Court found 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. 652 A.2d at 289. The Court was particularly concerned that there was no prior determination of probable cause by a neutral judicial authority

before the government intercepted 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,* 547 Pa. 31, 36 n.1 (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—and it is most sacred in the home.

Defendants agree (Defs.' Br. 11) that no Pennsylvania court has squarely addressed the validity of administrative warrants under the Pennsylvania Constitution. On three occasions, the Commonwealth Court has considered the constitutionality of rental-inspection ordinances under federal law, and the landlords have lost. 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). 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.

Here, Plaintiffs simply want to keep their home and property private. The administrative warrant authorizing the search of their home and property is not supported by the type of individualized probable cause that Article I, Section 8 commands. It also conflicts 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 the instant suspicionless searches authorized by the Ordinances.

4. Case Law in other jurisdictions.

The next factor Pennsylvania courts 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.'").

In July, the Minnesota Supreme Court held that Minnesota's constitution did not require individualized probable cause for administrative warrants. *See 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.

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 *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." *Wiebesick*, 899 N.W.2d at 157 (citing *Kahn*, 701 N.W.2d at 828, and *State v. McMurray*, 860 N.W.2d 686, 690 (Minn. 2015)).

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."), *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, Plaintiffs urge this Court to consider Justice G. Barry Anderson's scholarly dissent in *Golden Valley*, joined by Justice 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 that 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.[5]

[5] 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).

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.

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

Finally, the Pennsylvania Supreme Court takes into account policy considerations in interpreting Article I, Section 8. In evaluating policy considerations, the Pennsylvania Supreme Court "go[es] beyond the bare text and history of that provision as it was drafted 200 years ago, and consider[s] its application within the modern scheme of Pennsylvania jurisprudence." *Edmunds*, 586 A.2d at 901.

As the Plaintiffs have already shown, *Camara* is incompatible with the modern scheme of Pennsylvania jurisprudence interpreting Article I, Section 8, which places far more weight on protecting privacy and the sanctity of the home. *Camara* opens up law-abiding citizens' homes to invasive rental inspections without a shred of evidence that anything is wrong inside. Using *Camara*-style administrative warrants, Borough inspectors have unfettered access to every square foot of renters' homes, including their bedrooms, bathrooms, closets, and cabinets. (Am. Compl. ¶¶ 51, 53–54, 58–59, 62.) 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. (*Id.* ¶¶ 1, 63.) *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 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. Defendants brush off how invasive the inspections are: "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." (Defs'. Br. 14.) Defendants also minimize the challenged rental inspections as subjectively "negligible" invasions of privacy. (Defs.' Br. 9.) These are factual issues, and Defendants are impermissibly attempting to contradict the Amended Complaint by way of "speaking demurrer." "A 'speaking demurrer' is defined as 'one which, in order to sustain itself, requires the aid of a fact not appearing on the face of the pleading objected to, or, in other words, which alleges or assumes the existence of a fact not already pleaded.'" *Aldi v. Thomas Jefferson Univ.*, No. 1850 EDA 2012, 2013 WL 11256800, at *2 (Pa. Super. Ct. July 16, 2013) (citation omitted). A "speaking demurrer" cannot be considered in sustaining a preliminary objection, and this Court should reject it. *See id.* at *3 (reversing trial court for "looking beyond matters raised in Appellant's amended complaint" in granting demurrer).

Despite Defendants' unsworn statement to the contrary, the inspections are in

fact deeply invasive—covering Plaintiffs' homes wall-to-wall and revealing private information that Plaintiffs would never want the government to see regarding their religious, political, and marital lives. This will not do under Pennsylvania law.

Notably, the *Camara* majority justified its holding on the government's supposed need to secure "city-wide . . . universal compliance" with the housing code. *Camara*, 387 U.S. at 535–36. 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.

Yet in *Edmunds*, the Pennsylvania Supreme Court rejected the kind of reasoning that the Supreme Court applied in *Camara*, refusing to accept the government's need to enforce the law as a justification for departing from Article I, Section 8's warrant requirement when it refused to accept the "good faith" exception to the exclusionary rule. *Edmunds*, 586 A.2d at 899. *Edmunds* seriously questioned the U.S. Supreme Court's concern for the "social costs" (criminals going free) exacted by the exclusionary rule. *Id.* at 904 (citing *Leon*, 468 U.S. at 907). The Pennsylvania Supreme Court deemed this public safety concern "open to serious debate" and held that it did not justify watering down Article I, Section 8's requirement that warrants be supported by individualized probable cause. *Id.* at 904; *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 *Miller*, 513 Pa. at 127 (emphasis added)). Just as the Pennsylvania Supreme Court declined to accept this speculative justification in *Edmunds*, so should this Court here.

Further, 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;
- Inspection upon complaint;
- Inspections when units are vacant between tenancies;
- Self-inspections with owners providing sworn statements of compliance, and inspections if owners do not provide these sworn statements.

These approaches would all 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. Of course, to the extent that there is any dispute about the likely efficacy of these methods, that would merely underscore how this case cannot be resolved at this early stage of litigation.

These policy considerations—protecting privacy and the sanctity of the home—favor overruling Defendants' objection.

B. Defendants' Preliminary Objection for Demurrer on the Ground that the Ordinance Is a Constitutional and Permitted Use of the Borough's Power Should Be Overruled.

It does not matter if under Article I, Section 1, Defendants could prove that the Ordinances are a constitutional and permitted use of the Borough's Police Power. Plaintiffs never asserted that the Ordinances violate Article I, Section 1—and whether they would hypothetically win or lose on such a claim is not at issue here. The cases cited by the Borough resolved *due-process* claims, not search and seizure claims. (Defs.' Br. 6–7.) Indeed, none of the cited cases raise Article I, Section 8 claims.[6] Here, however, Plaintiffs do not argue that the Borough violated due

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[6] *See Nat'l Wood Preservers, Inc. v. Com., Dep't of Envtl. Res.*, 414 A.2d 37, 42 (Pa. 1980) ("Appellants' second contention is that . . . The Clean Streams Law is an impermissible exercise of the police power, in violation of the Fourteenth Amendment of the United States Constitution and Article I, section 10 of the Pennsylvania Constitution."); *Commonwealth v. Barnes & Tucker Co.*, 371 A.2d 461, 464 (Pa. 1977) ("Appellant argues that, since the requirements of The Clean Streams Law already have forced it for economic considerations to cease operation of Mine No. 15, to further compel it to take affirmative steps to treat the acid mine drainage emanating from its now abandoned mine is . . . an unreasonable exercise of the state's police power."); *Commonwealth v. Campbell*, No. 1962 C.D. 2013, 2014 WL 3537956, at *2 (Pa. Commw. Ct. July 17, 2014) ("Campbell's arguments concerning the constitutionality of the tenant registration requirement, we note that he has preserved only a very general argument that the Borough's provisions are unconstitutional."); *Berwick Area Landlord Ass'n v. Borough of Berwick*, 48 A.3d 524, 527 (Pa. Commw. Ct. 2012) ("This case involves a challenge to the legality of the Landlord Registration Ordinance . . . because . . . the Ordinance violates

process in adopting the Ordinances. The contention between the parties is, as discussed above, rooted in a difference about the search and seizure protections of Article I, Section 8. The Borough believes that the government has the power to institute a system of comprehensive, suspicionless, universal inspections, and that a rubber-stamp, *Camara*-style administrative warrant is sufficient to protect privacy rights. Plaintiffs, on the other hand, assert that this court should affirm the longstanding rule barring government entry into homes without individualized probable cause, and that a departure from this rule would seriously endanger the liberty and security of people in their homes.[7]

Finally, Defendants argue that "[t]he court is obligated to adopt a reasonable construction which will save the constitutionality of an ordinance," and that "[a]n ordinance may not be held to be facially unconstitutional unless every reasonable interpretation of the ordinance would be unconstitutional." (Defs.' Br. 7. (citing *Lock Haven Property Owners Ass'n v. Lock Haven*, 911 F. Supp. 155 (M.D. Pa. 1995)

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substantive due process rights under Article I, Section 1, of the Pennsylvania Constitution."); *McSwain v. Commonwealth*, 520 A.2d 527, 528 (Pa. Commw. Ct. 1987) (challenging vacant property ordinance on the ground it violates the Pennsylvania and United States Constitutions' due-process provisions, finding Fourth Amendment claim was waived).

[7] Defendants cite two other inapposite cases. (Br. 7.) *Fidler v. Zoning Bd. of Adjustment of Upper Macungie Twp.*, 182 A.2d 692, 694 (Pa. 1962), is a zoning case involving interpretation of "agriculture" or "agricultural," in a statute. But this is not a case about statutory interpretation, and *Fidler* simply has no bearing on the objections before this Court. And in *Atlantic-Inland, Inc. v. Bd. of Supervisors of W. Goshen Twp.*, 410 A.2d 380, 382 (Pa. Commw. Ct. 1980), in which an entrepreneur sought to become a government-approved inspector, the court did not reach the constitutional issue because there were other reasons for disqualifying the inspector.

(rejecting a facial challenge to an ordinance because it was doubtful that it would ever be enforced against plaintiffs)).

But Defendants have not proposed any saving construction of the statute, nor is there any dispute about what the statute means. Place and his agency *actually use* the ordinances to apply for warrants, including warrants against Plaintiffs' homes. Defendants' Second Preliminary Objection simply has nothing to do with this case.

C. Defendants' Preliminary Objection for Demurrer on the Ground that Keith Place Is Not a Proper Party Should Be Overruled.

Defendants have not met their burden in proving that it is clear and free from doubt that Plaintiffs will be unable to prove facts legally sufficient to establish Keith Place, in his official capacity, is a proper party.[8]

Defendants' first argument is that "Plaintiffs make no specific factual allegations against Defendant Place with regard to his role in the enactment or approval of the Ordinance or the implementation or enforcement of the rental inspection elements of the Ordinance." (Defs.' Br. 14.) This is not true. Plaintiffs' allegations make clear that Place's office was instrumental in the administrative warrant process. Plaintiffs Rivera and Camburn wrote to Place's office to object to

[8] Rule 1030 technically requires that the affirmative defense of immunity "be pleaded in a responsive pleading under the heading 'New Matter,'" rather than being raised in preliminary objections, but Plaintiffs waive any objection to this Court's consideration of the issue at this time. *See Orange Stones Co. v. City of Reading*, 87 A.3d 1014, 1022 (Pa. Commw. Ct. 2014) ("[W]here a party erroneously asserts an immunity defense in a preliminary objection, the failure of the opposing party to file a preliminary objection to the defective preliminary objection in the nature of a motion to strike for lack of conformity to law waives the procedural defect and allows the trial court to rule on the immunity defense.").

the inspection, and it is his office that applied for the warrant. (Am. Compl. ¶¶ 20–21.) In the Amended Complaint, Plaintiffs seek declaratory and injunctive relief as opposed to the "civil damages" contemplated by The Pennsylvania Tort Claims Act. *Compare* (Am. Compl. Req. Relief) *with* 42 Pa. Cons. Stat. § 8545. Plaintiffs simply seek that Place be enjoined "from seeking warrants to conduct inspections"—in other words for Place to stop doing what he is presently doing. (Am. Compl. Req. Relief B.) This is appropriate injunctive relief.

Defendants also argue that "this litigation is more appropriately directed at the Borough and not Mr. Place." (Defs.' Br. 15) (emphasis removed). Because "Mr. Place's involvement in this matter solely arises out of his status as Director of the Licensing and Inspections Department," Defendants argue that he "is entitled to official immunity from Plaintiff's [sic] claims." (Defs.' Br. 15 (citing 42 Pa. Cons. Stat. § 8545).) They assert that "[p]ursuant to the Pennsylvania Tort Claims Act, '[a]n employee of a local agency is liable for civil damages on account of any injury . . . caused by acts of the employee which are within the scope of his office or duties ***only to the same extent as his employing local agency*** . . . .'" (Defs.' Br. 15 (citing 42 Pa. Cons. Stat. § 8545)) (emphasis added). Section 8545 simply provides for coterminous liability between a municipality and its employee. To prevail, Defendants' argument for Mr. Place being immune from suit based on Section 8545 would have to rest on government immunity from this suit for the Borough itself. But the Borough makes no claim of immunity, so Place cannot rely on Section 8545 to be dismissed from this action.

II. RELIEF

Defendants' preliminary objections are legally unsupportable. They should be overruled.

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Respectfully submitted,

FAHERTY LAW FIRM
Michael F. Faherty (Attorney I.D. No. 55860)
75 Cedar Avenue
Hershey, PA 17033
E-mail: mfaherty@fahertylawfirm.com
Tel: (717) 256-3000
Fax: (717) 256-3001

INSTITUTE FOR JUSTICE
Robert Peccola*
Jeffrey Redfern*
901 North Glebe Road
Suite 900
Arlington, VA 22203
E-mail: rpeccola@ij.org; jredfern@ij.org
Tel: (703) 682-9320
Fax: (703) 682-9321

Attorneys for Plaintiffs

* Admitted *Pro Hac Vice*