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

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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Pursuant to Pennsylvania Rule of Civil Procedure 1034 and Montgomery County Court of Common Pleas Local Rule 1034(a)(2), Plaintiffs Dorothy and Omar Rivera, Steven Camburn, and Kathleen, Rosemarie, and Thomas O'Connor respectfully submit this Memorandum of Law in Response to Defendants' Motion for Judgment on the Pleadings.

INTRODUCTION

This Court previously overruled Defendants' Preliminary Objections in the form of demurrer, (Order, Docket No. 30). Despite prior briefing (Docket Nos. 21, 28) and oral argument on these legal issues, Defendants repeat their prior arguments in the instant motion. But there has been no intervening factual development or case law supporting their arguments, material facts remain hotly contested, and the Court should exercise its discretion to reject these arguments as duplicative, without any further consideration.

This Court previously rejected the Borough's argument that "the Ordinance does not violate Article I, Section 8 of the Pennsylvania Constitution." (Defs.' Br. Supp. Prelim. Objs. ("Dem. Br.") at 10 (capitalizations omitted).) In the present motion, Defendants make the exact same argument, relying on the exact same cases. But as Defendants previously conceded "[n]o Pennsylvania court has squarely addressed the validity of administrative warrants pursuant to the Pennsylvania Constitution." (Dem. Br. 11.) So, as before, 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.,*

170 A.3d 414, 434–45 (Pa. 2017) (citation omitted). Because the "case law provides no clear answers," the claim cannot be dismissed on the basis of the pleadings. *Taylor v. Pa. State Police of Com.*, 132 A.3d 590, 604 (Pa. Commw. Ct. 2016).

This Court previously rejected the Borough's argument that Defendant Keith Place should be dismissed "based on official immunity." (Dem. Br. 15.) Here, again, Defendants argue that "Plaintiffs' claims against Keith Place are barred pursuant to official immunity." (Br. 9 (capitalizations omitted).) This argument, too, should be rejected as duplicative or for the same reasons that it was rejected previously.

I. MATTER BEFORE THE COURT

Defendants' Motion for Judgment on the Pleadings.

II. COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. After this Court denied their demurrer, have Defendants presented newly developed facts or new legal theories that warrant entry of judgment?

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 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 daughters' 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 was set for a period of 30 months, which was 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. (Am. Compl. ¶ 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; *see also Camara v. Mun. Ct. of City & Cty. of S.F.*, 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. (Am. Compl. ¶ 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 Prothonotary's Office 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. (*Id.* ¶ 71.) 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." *Id.*; (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/1

05. (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

Courts must treat a motion for judgment on the pleadings "as if it were a preliminary objection in the nature of a demurrer." *Piehl v. City of Phila.*, 987 A.2d 146, 154 (Pa. 2009). "Because a motion for judgment on the pleadings is in the nature of a demurrer, the trial court must accept all of the well pleaded allegations of the party opposing the motion as true, while only those facts specifically admitted by the party opposing the motion may be considered against him." *Keil v. Good*, 356

A.2d 768, 769 (Pa. 1976). As with a demurrer, "the court may consider only the pleadings themselves and any documents properly attached thereto in reaching its decision. In order to succeed on a motion for judgment on the pleadings, the moving party's right to prevail must be so clear that 'a trial would clearly be a fruitless exercise.'" *Id.* (citation omitted). When a plaintiff presents a novel constitutional claim and the "case law provides no clear answers," the claim cannot be dismissed on the basis of the pleadings. *Taylor v. Pa. State Police*, 132 A.3d 590, 604 (Pa. Commw. Ct. 2016).

V. ARGUMENT

In the following subsections, Plaintiffs will show: (A) that the Defendants have simply repeated the same arguments that this Court rejected in denying their demurrer, (B) that the Defendants cannot meet its burden of proving that the Ordinances do not violate Article I, Section 8 of the Pennsylvania Constitution; and (C) that Keith Place is a proper party to this lawsuit.

A. This Motion Should Be Denied Because This Court Has Already Rejected All of Defendants' Arguments.

Although Pennsylvania courts are not jurisdictionally precluded from reconsidering an argument rejected in a previous motion, they should not do so without a good reason, and the Defendants have presented none. Where a second "motion simply repeat[s] the earlier arguments rejected in the demurrer," the court has "discretion to deny" the successive motion without reconsidering the merits of the arguments. *DiAndrea v. Reliance Sav. & Loan Ass'n*, 456 A.2d 1066, 1069 (1983); *accord Dunn v. Orloff*, 201 A.2d 432, 433 (Pa. 1964) ("[T]his motion for

judgment on the pleadings is nothing more than an attempt to reargue a previous ruling"). The Defendants' arguments are identical to those presented in the previous demurrer, and should be rejected without further consideration.

In the previous demurrer, the Defendants cited three Pennsylvania cases, arguing that they are "instructive" and "support the constitutionality" of the Ordinance, while nonetheless conceding that "[n]o Pennsylvania court has squarely addressed" the constitutional question in this case. (Dem. Br. 11 (citing *Commonwealth v. Tobin*, 828 A.2d 415 (Pa. Cmwlth. 2003); *Simpson v. City of New Castle*, 740 A.2d 287 (Pa. Cmwlth. 1999); *Greenacres Apts. v. Bristol Twp.*, 482 A.2d 1356 (Pa. Cmwlth. 1984))). In the present motion, the Defendants rely on the same three cases, contending that they demonstrate the Pennsylvania courts have "[t]acitly" rejected the constitutional claim in this case. (Br. 7, 12–14.) Additionally, in both motions the Defendants cited *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), and argued that under that decision's analysis, the Borough's inspection program is constitutional. *Compare* (Dem. Br. 10–14) *with* (Br. 11–19). These stale arguments do not merit reconsideration.[1]

The Borough has also failed to identify any intervening authority that might justify reconsideration of previously rejected arguments. *Cf. DiAndrea*, 456 A.2d at 1069 (noting that a motion for judgment on the pleadings may "permit the trial judge to consider any relevant legal authority decided in the interim period" since

[1] Defendants cursory arguments regarding Defendant Keith Place's "official immunity" is also identical to the argument presented in the demurrer, and it should likewise rejected without further consideration. *See* (Dem. Br. 14–15; Br. 19–20).

the demurrer).

B. Defendants' Argument that the Ordinance Does Not Violate Article I, Section 8 of the Pennsylvania Constitution Should Be Rejected.

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. When a Plaintiff presents a novel constitutional claim and the "case law provides no clear answers," the claim cannot be dismissed on the basis of the pleadings. *Taylor v. Pa. State Police*, 132 A.3d 590, 604 (Pa. Commw. Ct. 2016). As this is the first case to argue that the Pennsylvania Constitution provides more protection than the U.S. Constitution in the context of housing inspections, and as Defendants concede that there is no case squarely on point (Dem. Br. 11), the motion must be denied.

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,[2] contains both a clause protecting against "unreasonable searches and 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.

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[2] 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.

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.[3] 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 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

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

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 553 n.4 (Clark, J., dissenting) (noting the "absurdity" of the majority's approach, under which "'probable cause' would . . . be present in each case and a 'paper warrant' would issue as a matter of course"). 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).[4] Although administrative warrants (warrants issued without individualized 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

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

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 Multi-Factor Analysis in Determining Whether the Pennsylvania Constitution Provides Greater Protection than the Federal Constitution.

Defendants argue that Pennsylvania Courts have "[t]acitly approved" *Camara*. (Br. 6.) But "tacit approval" is not the test set forth by the Pennsylvania Supreme Court. Rather, courts must "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* Dem. Br. 10, Defs.' Br. 11) that *Edmunds* provides the 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 case-law; (3) related case-law from other states; and (4) policy considerations, including unique issues of state and local concern, and applicability with modern Pennsylvania jurisprudence." *Edmunds*, 586 A.2d at 895. These factors provide a recommended mode of analysis rather than a rigid balancing test. *See Jones v. City of Phila.*, 890 A.2d 1188, 1194 (Pa. Commw. Ct. 2006) ("Although judges and courts are not required to follow this methodology in their opinions, we

do so here because *Edmunds* provides structure and a consistent means to analyze the issue at bar.") (citation omitted).

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*, 132 A.3d at 604 (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. X.[5]

When Pennsylvania first adopted this constitutional protection, the term "warrant" was understood to require individualized suspicion of a violation of a law. *See* 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 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

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[5] 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. X (emphasis added).

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. X. When Pennsylvania's framers drafted this provision, their driving concern was protecting people's privacy. *Edmunds*, 586 A.2d at 897. This was because the British crown had used "general warrants" 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.* (citing Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 157 (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, *supra*, 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 (Pa. 1814) (describing the Pennsylvania Constitution'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 157–58. So, to the drafters,

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

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

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

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.*, 157 A.2d 740, 746 (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. Super. Ct.*, 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 held that the government's warrantless use of a body wire to record a conversation in the home of a non-consenting criminal defendant violated his right to privacy in his home under Article I, Section 8. *Id.* The Court was particularly concerned that there was no prior determination of probable cause by a neutral judicial authority before the government 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,* 688 A.2d 698, 700 n.1 (Pa. 1997) (Newman, J., dissenting) (citing *United States v. White*, 401 U.S. 745 (1971)). The thread running through all these cases is that privacy is sacred in Pennsylvania—and it is most sacred in the home.

Defendants agree (Dem. Br. 11) that no Pennsylvania court has squarely addressed the validity of administrative warrants under the Pennsylvania Constitution. But Defendants still cite three cases (already briefed and rejected by the Court) where the Commonwealth Court has considered the constitutionality of rental-inspection ordinances under federal law, and the landlords have lost. (Br. 6.) Although these cases cited Article I, Section 8 in conjunction with the Fourth Amendment, the landlords in these cases did not press state constitutional claims *as distinct* from federal Fourth Amendment claims. *See Commonwealth v. Tobin*, 828 A.2d 415, 423–24 (Pa. Commw. Ct. 2003) (holding that administrative warrants supported by reasonable legislative and administrative standards are constitutional under the Fourth Amendment, with no discussion of the Pennsylvania Constitution); *Simpson v. City of New Castle*, 740 A.2d 287, 291 (Pa. Commw. Ct. 1999) (same); *Greenacres Apartments, Inc. v. Bristol Twp.*, 482 A.2d 1356, 1359–60 (Pa. Commw. Ct. 1984) (same). "Questions which merely lurk in the record, neither

brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004); *accord Grunwald v. McKeesport Area Sch. Dist.*, 19 Pa. D. & C.3d 79, 89 (Pa. Com. Pl. 1980). Because the landlords in those cases failed to argue that the Pennsylvania Constitution provides greater protections than the Fourth Amendment, the Commonwealth Court had no occasion to consider the history of the Pennsylvania Constitution or state case law interpreting the provision. Nor did these courts consider the privacy interests of the tenants because those cases were brought solely by landlords.

Here, 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.

I. 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.'").

Last year, 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." *Golden Valley*, 899 N.W.2d at 157 (citing *Kahn*, 701 N.W.2d at 825, 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 . . . privacy rights are at their apex in one's own home." *Id.* at 177–78 (Anderson, J., dissenting) (internal quotation marks and citations omitted). Under these principles, Justice Anderson concluded that the challenged inspection ordinance could not stand. Like Pottstown's ordinance, the offending Minnesota

ordinance was "extensive and would allow a search to occur virtually anywhere in the unit." *Id.* at 179.[6]

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

Golden Valley is the only decision that either of the parties have been able to identify where a state court squarely considered the question whether *Camara* should be rejected as a matter of state constitutional law. The other state court cases cited by Defendants are therefore inapplicable. Some of those cases were from states whose constitutions had already been interpreted as *categorically* coextensive with the Fourth Amendment.[7] Such cases have no relevance in a state like

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

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

Pennsylvania, where courts are required to undertake a thoughtful, case-by-case analysis to determine *when* Article I, Section 8 provides more protection than the Fourth Amendment. *See Edmunds*, 586 A.2d at 894. In most of the cases cited by Defendants there was also no argument that the relevant state constitution provided greater protection than the *Camara* standard.[8] In some of the cases, there would have been no occasion to consider the question, even if the issue had been raised, because the courts found either that the ordinances failed to satisfy the *Camara* standard[9] or the court found that there was individualized probable cause for a search.[10] Another case Defendants cite concerned only inspections of *unoccupied* rental properties—unlike the Borough's inspection program in the present case—and the court emphasized that its holding would be different if the property were occupied.[11] In short, none of the state court cases cited by the Defendants contain any useful analysis that could guide a Pennsylvania court in deciding the constitutional question at issue here, and, as noted above, cases from other jurisdictions are only as useful as their reasoning. *Edmunds*, *Id.* at 900

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

[9] *Crook v. City of Madison*, 168 So. 3d 930, 940 (Miss. 2015); *City of Seattle v. Leach*, 627 P.2d 159, 161 (Wash. Ct. App. 1981).

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

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

(rejecting reliance on state cases that simply "affirm[ed] the logic" of a federal case "with little additional state constitutional analysis.").

II. 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 rental property is minimal intrusion compared to the typical police officer's search for the fruits and instrumentalities of crime." (Defs.' Br. 18.) Defendants also minimize the challenged rental inspections as subjectively "negligible" invasions of privacy. (*Id.* 11.) 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 on a motion for judgment on the pleadings, 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); *Pa. Gas & Water Co. v. Kassab*, 322 A.2d 775, 777 (Pa. Cmwlth. 1974) ("[A] motion for judgment on the pleadings is subject to the same restrictions as the common law demurrer and that the rule against speaking demurrers applies to such motions.").

Despite 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.

Defendants also attempt justify a relaxation in the traditional probable cause requirement because housing inspections do not carry the same "heightened consequences" of "criminal conviction, such as incarceration, disenfranchisement, prohibition on gun ownership, registration as a sex offender, revocation of professional licensure, and other collateral consequences." (Defs.' Br. 8.) Even if true, that is entirely irrelevant. The point of constitutional protections against unreasonable searches is not to help criminals avoid punishment but to protect privacy. That is why dog sniffs, for example, which reveal "only the presence or absence of narcotics" are subject to reduced constitutional constraints, notwithstanding that a dog sniff can lead to a lengthy incarceration. *See United States v. Place*, 462 U.S. 696, 707 (1983) (holding that dog sniffs are not searches under the Fourth Amendment); *Commonwealth v. Johnston*, 530 A.2d 74, 79–80 (Pa. 1987) (holding that under the Pennsylvania Constitution, dog sniffs are permissible with a showing of only "reasonable suspicion."). Regardless of what legal consequences may flow from a search, the relevant constitutional question is the same: How invasive is the search? That is a hotly disputed factual question in this case.

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

- Voluntary inspections;
- Voluntary inspections coupled with tenant education;
- Inspections of properties with deteriorated conditions outside;
- Inspections of units where another voluntarily-inspected unit in the building had a type of violation likely to exist in other units;
- 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. This evidence will provide a powerful reason to depart from the *Camara* standard because that decision was largely premised on the supposedly "unanimous agreement [in 1967] among those most familiar with this field" that mandatory, suspicionless searches were actually necessary. 387 U.S. at 535–36.

Defendants echo the *Camara* court, contending that "periodic rental-housing inspections are the only effective way to enforce property maintenance codes." (Defs.' Br. 17.) Plaintiffs intend to prove the Borough incorrect at trial, but this is a factual dispute that must be resolved against the moving party at this stage of litigation. *See Aldi*, 2013 WL 11256800, at *2.

Another reason for departing from the *Camara* standard is that the Court 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*. The Court refused to adopt a "good faith" exception to the exclusionary rule, and in doing so it noted that there was no question that its holding imposed "some cost to society" by allowing some criminals to go free. 586 A.2d at 904 (citing *Leon*, 468 U.S. at 907). Nevertheless, the Court held that these social costs did not justify watering down Article I, Section 8's requirement that warrants be supported by individualized probable cause. *Id.*; *see also id.* at 899 (stating Article I, Section 8 "insulates from dictatorial and tyrannical rule by the state, and preserves the concept of democracy that

assures the freedom of its citizens. ***This concept is second to none in its importance*** in delineating the dignity of the individual living in a free society") (quoting *Miller*, 518 A.2d at 1192 (emphasis added)). In other words, under the Pennsylvania Constitution, the government's interest in enforcing laws must sometimes yield to the individual's interest in privacy. This is a principle that cannot be reconciled with *Camara*'s cavalier endorsement of a government interest in "universal compliance."

These policy considerations—protecting privacy and the sanctity of the home, and the availability of effective, alternative means of enforcing the property maintenance code—favor overruling Defendants' objection.

Judgment is not appropriate at this time because discovery is ongoing, and material facts remain in dispute. *See* 6 Standard Pennsylvania Practice 2d § 31:1 ("A motion for judgment on the pleadings is properly raised by a party when a controlling question of law needs to be decided and ***when the parties are not in dispute as to the material facts involved in the action***.") (emphasis added). Plaintiffs have recently retained expert consultants and have asked Defendants to identify deponents who can testify as to certain aspects of the Borough's inspection program under Pa. R. C. P. 4007.1(e), such as the Borough's contention that inspections are a "negligible invasion of Plaintiffs' privacy." (Dem. Br. at 9.) This process should not be short-circuited on the basis of previously rejected arguments.

C. Defendants' Argument 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.

Defendants' first argument is that "Plaintiffs make no factual allegations against Mr. Place regarding his role in the Ordinance process, implementation or enforcement of the rental inspection elements of the Ordinance." (Br. 19.) 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 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 because "Mr. Place's involvement in this matter solely arises out of his status as Director of the Licensing and Inspections Department," he "is entitled to official immunity from Plaintiffs' claims." (Defs.' Br. 19, 20.) This argument is deeply misguided. The plain text of the statute provides that official immunity applies only to claims for "civil damages." 42 Pa. Cons. Stat. § 8545. This is not a suit for damages, so immunity does not apply. *See Boykins v.*

City of Reading, 562 A.2d 1027, 1029 (Pa. Cmwlth. 1989) (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). It is precisely *because* Mr. Place is enforcing the law by acting in his official capacity that he is a "natural target[]" of a suit for injunctive and declaratory relief. *Supreme Ct of Va. v. Consumers Union of U.S.*, 446 U.S. 719, 736 (1980).

VI. RELIEF

Based on the foregoing arguments and authorities, Plaintiffs request this Court deny Defendants' Motion for Judgment on the Pleadings.

DATED: July 23, 2018

Respectfully submitted,

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