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, THE ESTATE OF 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 SUPPORT OF SUMMARY JUDGMENT

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Pursuant to the Court's scheduling order (Docket No. 193), Plaintiffs Dorothy and Omar Rivera, Steven Camburn, Kathleen O'Connor, Rosemarie O'Connor, and the Estate of Thomas O'Connor respectfully submit this Memorandum of Law in support of their motion for summary judgment.

INTRODUCTION

This is a case of first impression under Article I, Section 8 of the Pennsylvania Constitution. Plaintiffs challenge the Borough's "use of administrative warrants [a]s unconstitutional because such warrants are issued without requiring any individualized probable cause to believe any building code violation exists." *Rivera v. Borough of Pottstown*, No. 722 C.D. 2019, 2020 WL 57181, at *1 (Pa. Commw. Ct. Jan. 6, 2020).

Pottstown's rental inspections are wildly intrusive. They place inspectors in a position to observe (and comment upon) teenage girls' undergarments. They allow inspectors to view naked photos of the tenants whose homes they are invading. And they put inspectors in a position to observe indications of criminal activity—indications that they are specifically instructed to share with the police. These are not hypotheticals. They are invasions of privacy that have actually happened—and that, absent this Court's intervention, will continue to happen to anyone in Pottstown who rents rather than owns their home.

After more than five years of litigation, Plaintiffs have assembled a record that shows Pottstown's rental inspection fails the basic balancing test mandated by Article 1, Section 8—measuring the intrusiveness of the search against the

government's purported interest. The inspections here are as invasive as they come—wall-to-wall searches of every rental home, inspectors reporting findings to the police resulting in arrest, police having access to the entire inspection database. The strength of the government interest, on the other hand, is vanishingly small. The inspection ordinance was adopted at a time when code violations were going down in Pottstown and has never resulted in a building condemnation or an order to vacate. Instead, the program is focused on revenue generation and citizen surveillance.

Plaintiffs do not seek to end code enforcement in Pottstown or even voluntary inspections—but in the face of such invasions of privacy and liberty, Plaintiffs have the right to a particularized search warrant when they close the door to government agents.

I. MATTER BEFORE THE COURT

1. Plaintiffs filed their Amended Complaint on July 26, 2017, challenging non-consensual government entry by Pottstown code inspectors under Article 1, Section 8 of the Pennsylvania constitution. *See* Docket No. 19.

2. Specifically, Plaintiffs seek a declaration from this Court that the mandatory inspection requirements of Sections 5-801 to 5-809 and 11-201 to 11-206 of the Pottstown Code of Ordinances are unconstitutional; and an injunction permanently enjoining the Borough from seeking warrants to conduct inspections authorized under the Ordinances with less than traditional, individualized probable

cause. *See* Am Compl. Req. Relief A, B. After protracted litigation regarding discovery, Plaintiffs now seek summary judgment on this claim.

II. STATEMENT OF QUESTIONS PRESENTED

1. Does the Borough of Pottstown violate Article 1, Section 8 of the Pennsylvania Constitution by issuing administrative search warrants without particularized probable cause? Suggested answer: Yes.

2. Are the mandatory inspection requirements of Sections 5-801 to 5-809 and 11-201 to 11-206 of the Pottstown Code of Ordinances unconstitutional under Article 1, Section 8 of the Pennsylvania Constitution to the extent they allow inspections based on search warrants supported by less than particularized probable cause? Suggested answer: Yes.

III. PROCEDURAL HISTORY

1. Most of the litigation over the past five years has centered on the Borough's resistance to basic discovery—keeping its inspection program a secret from the Plaintiffs and from the public at large.

2. The first trial judge assigned to this case dismissed it on the pleadings (after another judge had denied the Borough's nearly identical demurrer[1]) and severely limited written discovery on the grounds that Plaintiffs did not have

[1] On December 15, 2017, following oral argument, this Court overruled all the Borough's preliminary objections, which were not "well taken." *See* Order, Docket No. 30.

"standing" to seek inspection reports of homes other than their own.[2] In other words, Plaintiffs would have to first submit to the challenged inspections in order to learn how they work.

3. Plaintiffs appealed these rulings to the Commonwealth Court. *See* Docket No. 86.

4. The Commonwealth Court reversed all the merits and discovery rulings, rejecting the "standing" limitation on discovery. The Court ruled that such a limitation would require the Plaintiffs to submit to the very unconstitutional conduct they challenge—a prerequisite that would "render Tenants' Article I, Section 8 privacy rights illusory." *Rivera*, 2020 WL 57181, at *4.

5. The Commonwealth Court noted "the need for development of a full factual record on remand." *Id.* at *4 n.8.

6. Even after remand, however, Plaintiffs initially got virtually no discovery from the Borough. On October 14, 2020, this Court granted Plaintiffs' request that a computer forensics expert mirror image the Borough's responsive electronic files. Docket No. 109.[3]

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[2] *See* April 4, 2018 Order (Docket No. 41) granting in part and denying in part Plaintiffs' First Motion to Compel Discovery (Docket No. 34), *vacated* Jan. 9, 2020; February 6, 2019 Order (Docket No. 68) granting in part and denying in part Plaintiffs' Second Motion to Compel Discovery Responses (Docket No. 56), *vacated* Jan. 9, 2020; May 3, 2019 Order (Docket No. 76) granting in part and denying in part Defendants' Motion for Protective Order (Docket No. 69), *vacated* Jan. 9, 2020.

[3] This was not the first such instance of discovery misconduct. For example, Defendants' counsel directed the chief of licensing and inspection not to answer 28 questions in a deposition. (*See* Pls.' Mot. to Compel Disc. Resp., Docket No. 56.) None of those instructions were based on the need to protect attorney-client

7. On October 20, 2021 (Docket No. 137) and November 4, 2021 (Docket No. 140), Judge Haaz, the successor trial judge, heard approximately eight hours of live testimony in support of Plaintiffs' Motion for Sanctions (Docket No. 111). The sworn testimony revealed that the Borough had refused to submit documents to Plaintiffs after their motions to compel were granted. The Borough was found to be in contempt of two separate orders of this Court requiring production of all requested documents within 30 days. *See* June 23, 2020 Order, Docket No. 103.

8. On December 1, 2021, the Court sanctioned the Borough for its persistent refusal to disclose documents in the face of court orders compelling it to do so. *See* Order, Docket No. 143.

9. Plaintiffs discussed some of the results of this mirror imaging at a hearing before Judge Haaz. *See* Docket Nos. 188–189. Those documents detail the mechanics of how the rental inspection program is carried out and served as the basis for the expert reports attached to this briefing as well as depositions of inspectors and police officers involved with the inspection process.

10. On June 12, 2023, this Court accepted a report and recommendation from Special Master Andrew Braunfeld, denying many of the Borough's claims of privilege. *See* Docket No. 202.

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privilege or any other privilege and the first Court of Common Pleas Judge assigned to this case entered an order mandating that he return to answer the questions. (Order, Docket No. 68.)

IV. STATEMENT OF UNDISPUTED MATERIAL FACTS

In the following sections, Plaintiffs will describe: (A) the inspection Ordinance; (B) how the Borough used the Ordinance to obtain an administrative search warrant in an attempt to enter the Rivera family home; (C) the Borough's attempt to search the O'Connor home without a search warrant; (D) how the sole empirical support for the ordinance showed that code violations were actually going down when it was adopted; (E) how inspections under the Ordinance are highly intrusive in practice; (F) how Pottstown's police force uses the Ordinance for law enforcement; (G) how inspections under the ordinance are ineffective at identifying unsafe housing; and (H) expert evaluations of the Ordinance's inefficiency and its detrimental impact on personal privacy.

A. The Borough Adopts a Rental Inspection Ordinance and Threatens Plaintiffs with Non-Consensual Government Searches.

1. On June 8, 2015, the Borough of Pottstown enacted Ordinance No. 2137, which requires landlords and tenants to submit to *mandatory* inspections of rental properties every two years. These provisions are codified in Pottstown's Code of Ordinances ("Code") §§ 5-801 *et seq.*, "Residential Rental Licensing," and §§ 11-201 *et seq.*, "Registration and Licensing of Residential Rental Units" (collectively, the "Ordinance") (Joint Stip. Uncontested Facts ("Joint Stip.") July 20, 2022, Docket No. 166 ¶¶ 9–12).

2. The Borough requires residential rentals to be licensed. Code § 11-203(B). The Borough requires a range of businesses to have licenses to operate. *Id.* § 13-301.

3. The Plaintiffs in the matter were all subject to attempted non-consensual government searches under the Ordinance.

B. The Borough Obtains a Warrant to Search the Rivera Home

4. Plaintiffs Dottie and Omar Rivera are tenants of a rental home located in the Borough of Pottstown, at 326 Jefferson Avenue, Pottstown, Pennsylvania 19464 ("Rivera Property"). Joint Stip. ¶ 1.

5. Plaintiff Steven Camburn owns and operates rental properties in the Borough of Pottstown, including the Rivera Property, which they have been renting from him since 2010. Joint Stip. ¶ 2; Camburn Dep. Tr. Ex. 1 hereto (unless otherwise noted, "Ex." hereinafter shall refer to exhibits attached to this memorandum) at 43:1–6.

6. Mr. Camburn testified that he believes his tenants have a "right to privacy, just like an owner-occupied property." Camburn Ex. 1, 113:4–5.

7. Mr. Camburn does not feel comfortable sharing his tenants' names with the Borough, as required by the Ordinance, "[b]ecause there is the privacy of the tenants who live at the properties. They are not asking owner-occupied houses who lives in the owner-occupied houses." Camburn Ex. 1, 81:16–22.

8. When asked for "the basis of [his] disapproval of the rental inspection program?" Mr. Camburn responded "The privacy rights, the constitutional rights

violations, the using the program for a way the police can go into homes without a warrant." Camburn Ex. 1, 128:24–129:2.

9. Mr. Camburn elaborated that "tenants don't want [inspectors] to come in. I think that is unconstitutional. I think the borough is conspiring with the Pottstown Police Department to look for illegal activity in the houses and coming in without warrants, the police coming in without warrants, I think that is unconstitutional. I think the warrants that we just reviewed use the inspection code as the probable cause." Camburn Ex. 1, 115:16–25.

10. Mr. Camburn testified about private political and religious information that inspectors can see inside his tenants' homes:

> EXAMINATION BY MR. PECCOLA:
>
> Q. When you were discussing some of the inspections you observed firsthand where there may have been something improper, did you observe inspectors observing things that were private for the tenants they were inspecting?
>
> MS. BROWN: Objection to form.
>
> THE WITNESS: Yes. These are—my tenants are just normal people. They have their religious affiliation all over the house. If they have a picture of Barack Obama, or a couple of my tenants are Muslim so they have the Quran open. Or if they are—someone would have different things that I observe when I am invited into their house and the inspectors would observe the same things.

Camburn Ex. 1, 148:19–149:10.

11. Mr. Camburn protects his tenants' privacy by obtaining consent to enter tenants' home—and, relatedly, personally escorting repair people like his handyman "every time" he enters. Camburn Ex. 1, 50:20–51:9; 51:17–22.

12. 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. Joint Stip. ¶ 13.

13. Mr. Camburn paid the fee on December 21, 2016, and an inspection of the Riveras' home was scheduled for March 13, 2017. Joint Stip. ¶ 14.

14. Mr. Camburn approached the Riveras stating their home was subject to inspection. Camburn Ex. 1. 65:18–22.

15. When Mr. Camburn informed the Riveras that their home was up for inspection, Dottie testified that she told Steve "I don't want that. I don't feel comfortable—I don't want the Borough in my house." Dottie Rivera Dep. Tr. Ex. 2 at 76:19–21.

16. Dottie felt that her "privacy was being invaded," with "young kids" at home. D. Rivera Ex. 2, 78:16–17.

17. Dottie testified that she was concerned that the inspection of her home would reveal personal information about her life, including religious beliefs, personality, health, marriage and routine. D. Rivera Ex. 2, 89:7–13.

18. Dottie testified about how a rental inspection would reveal private information about her religious beliefs because she hangs images of "Jesus" on her walls. D. Rivera Ex. 2, 89:14–19.

19. When asked how an inspection "would reveal personal information regarding [her] personality," Dottie responded "[b]ecause I decorate a lot in my home." D. Rivera Ex. 2, 89:20–24.

20. An inspection could reveal information about Dottie's health because of "letters laid around from the hospitals." D. Rivera Ex. 2, 90:16–17.

21. When asked "Why do you believe that an inspection would reveal personal information about your marriage?" Dottie responded, "We have pictures on our walls. There's pictures on the walls and things with the date of our marriage on the tables[.]" D. Rivera Ex. 2, 91:4–9.

22. When asked why she believed why "an inspection would reveal personal information about [her] routine?" she responded "[I]f I'm cooking or if I'm doing laundry. There's a certain time I do laundry, a certain day I do laundry . . . I cook. I cook with the children." D. Rivera Ex. 2, 91:14–23.

23. Dottie had previously witnessed a Borough rental inspection that was invasive and during which inspectors made inappropriate comments about her adolescent daughter's bra:

> [T]hey came through the house and they were opening cabinets that I don't feel like they should have opened. And they went upstairs to my daughter's room in the attic and she was big breasted and she must have left her bra out. And I overheard them laughing and talking about a helmet. And after they left, I went upstairs and I know that that's what they were talking about.

D. Rivera Ex. 2, 63:5–15.

24. By filing this lawsuit, Dottie testified that she was "fighting for . . . my privacy and maybe everybody else's privacy, too." D. Rivera Ex. 2, 96:2–4.

25. Mr. Rivera was concerned about his family's privacy based on this prior inspection:

> Q. Okay. . . . What was it about the privacy of your daughters that you and your wife were worried about in reference to an inspection of your home?
>
> A. You know how kids can be, they leave all their stuff laying around sometimes. Like what happened with my older daughter. She left her bra on the bed and they came in and looked at it and they were making fun of that.

Eddy Omar Rivera Dep. Tr. Ex 3 at 23:16–25.

26. Mr. Rivera was also concerned about inspectors seeing information about his religious beliefs: "[W]e have pictures hanging in every room. . . . of Jesus, Virgin Mary." E.O. Rivera Ex. 3, 22:17–20.

27. On March 8, 2017, the Riveras and Mr. Camburn sent a letter to the Borough of Pottstown, Department of Licensing and Inspections, that they would not voluntarily allow the Borough of Pottstown to inspect the residence located at 326 Jefferson Avenue. Joint Stip. ¶ 15.

28. On March 13, 2017, over the Riveras' objections, the Borough applied for an administrative warrant in Magisterial District Court 38-1-11 to examine the structure for code violations in reference to the 2009 Property Maintenance Code. The court granted the administrative warrant. Joint Stip. ¶ 16.

29. That same day, the Riveras and Mr. Camburn filed a "Motion to Quash the Warrant Issued to Search Their Property." Joint Stip. ¶ 17.

30. The Magisterial District Court granted the stay of execution of the administrative warrant pending a determination of the Riveras' and Mr. Camburn's Motion to Quash. Joint Stip. ¶ 18.

31. On April 18, 2017, a Motion to Strike the Riveras' and Mr. Camburn's Motion to Quash the Administrative Warrant was filed on behalf of the Borough of Pottstown and Keith Place, through counsel. Joint Stip. ¶ 19.

32. The Borough's Motion to Quash the Administrative Warrant asserted that the Magisterial District Court lacked jurisdiction to quash an administrative warrant and that the Court of Common Pleas has jurisdiction to determine the constitutionality of the subject ordinances. Joint Stip. ¶ 20.

33. On April 27, 2017, the Magisterial District Court granted the Defendants' Motion to Strike with prejudice. After 48 hours, the administrative warrant expired. Defendants did not inspect the Riveras' home while the administrative warrant was active. Joint Stip. ¶ 21.

34. In a letter dated May 9, 2017, the Borough represented that it would not apply for additional administrative warrants to inspect the Riveras' home until the resolution of the instant lawsuit, unless a change of circumstances relating to the property occurs. Joint Stip. ¶ 22.

C. The Borough Attempts a Warrantless Inspection of the O'Connor Home

35. Plaintiffs Kathleen ("Kathy") and Rosemarie ("Rose") O'Connor live in a home owned by their late father and mother, Thomas O'Connor and Jean M.

O'Connor.[4] Their home is located at 466 N. Franklin Street, Pottstown, PA 19464 ("O'Connor Property"). Joint Stip. ¶ 3.

36. The O'Connors testified that they never paid their father rent and never had a lease for the O'Connor property. Kathy O'Connor Dep. Tr. Ex. 4, 24:14–21; Rose O'Connor Dep. Tr. Ex. 5, 18:7–12.

37. On February 26, 2016, Thomas O'Connor completed Pottstown's Tenant listing of Rental Dwellings identifying Kathy O'Connor and Rosemarie O'Connor as tenants in the first floor unit. Joint Stip. ¶ 24.

38. Although they complied with the Ordinance's registration requirements, the O'Connors objected to the Borough about being subject the Ordinance at all because "we are not a rental unit." K. O'Connor Ex. 4, 25: 9–16; 29:19–20.

39. Kathy, Rose, and Thomas O'Connor had previously witnessed a rental inspection of the O'Connor residence where the inspector "went around and he looked at everything. He was in every room, every closet." K. O'Connor Ex. 4, 54:22–56:12.

40. On March 3, 2017, the Borough informed the O'Connors that the unit was due for an inspection under the Ordinance. The Borough also sent them an invoice for $70. Thomas O'Connor paid the fee on February 28, 2017. Joint Stip. ¶ 25.

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[4] Mr. O'Connor passed away during the pendency of this litigation and his estate has been substituted as a party. Docket No. 198. Mrs. O'Connor passed away in 2011.

41. The O'Connors initially agreed to an inspection because they felt they were "forced to." K. O'Connor Ex. 4, 30:17–22.

42. In scheduling the inspection, Kathy O'Connor described a "menacing" encounter at the Borough Hall. K. O'Connor Ex. 4, 15:6–11. A man from the Licensing and Inspection department "said in a menacing tone, we don't do it on your schedule, you do it on our schedule." *Id.* at 15:22–23. "He said, well, if you don't let us in, we will take you to court and we will do an administrative warrant and you will have no choice. He was very God-like, very privileged, and very menacing. He really was scary." *Id.* At 15:25–16:5.

43. The O'Connors obtained counsel to challenge the inspection after this threat. K. O'Connor Ex. 4, 14:15 –23.

44. A Borough inspector "did show up at the house," but the O'Connors "did not let him in." K. O'Connor Ex. 4, 60:11–15. Kathy O'Connor testified:

> Q. And why did you not let him in?
>
> A. Because it was an invasion of privacy.
>
> Q. Why did you believe it was an invasion of privacy?
>
> A. Because this person who threatened me came after my safety and security and I was supposed to let him in my home?

K. O'Connor Ex. 4, 60:16–22.

45. Rose cares deeply about her privacy and takes steps in her everyday life to protect her privacy:

Q. Did you have curtains on your windows?

A. I have shades and curtains.

Q. If they were open—

A. I never opened it.

R. O'Connor Ex. 5, 26:6–9.

46. Rose O'Connor testified that she challenged the inspections because "[i]t is about my rights to privacy and strangers coming in my house and telling me to do something that they don't have a right to tell me to do." R. O'Connor Ex. 5, 13:14–17.

D. The Borough Adopted the Ordinance When Code Violations Were Going Down.

47. To determine the Borough's justification for adopting this ordinance, Plaintiffs served the Borough with a request for "[a]ll documents related to your decision to conduct Rental Inspections, including but not limited to all communications between and among Defendants, meeting minutes, agendas, transcripts, audio or video recordings of public hearings, oral and/or written testimony, and legislative findings."[5] Ex. 6 hereto, First Req. Production Documents at 7.

[5] The Borough's Amended Objections and Responses to Plaintiffs' First Request for Production of Documents are part of the existing record. They can be found in the Response to Plaintiffs' Motion to Compel Discovery Responses at Docket No. 38, Exhibit No. 1, filed February 18, 2018.

48. In the Borough's responses to Plaintiffs' request for production, the Borough identified a "Municipal Services Study, January 7, 2015, attached hereto as Pottstown 000326–471" as responsive to the following requests:

> "All documents related to your decision to conduct Rental Inspections[;]"
>
> "All investigations, studies, analyses, and/or reports conducted by Defendants regarding Rental Inspections | [;]"
>
> "All communications and documents concerning any problem(s) that you contend Rental Inspections address[;]"
>
> "All communications and documents that demonstrate that Rental Inspections effectively address any problem(s) that you identified[;]"
>
> And
>
> "All documents concerning any legislative and/or administrative proposals that you have considered or are considering that relate to Rental Inspections[.]"

See Defs.' Am. Objs. Resps. Pls.' First Req. Produc. Docs. Ex. 7, at 2, 5, 6, 9.

49. The Municipal Services Study is an eleven-page document that was the sole empirical justification for the Borough's inspection program, prepared by a contractor called Better Landlord, LLC, "to determine what the impact is on municipal services from different property types in the Borough," and, "[i]f it is determined that the impact is disproportionate . . . to determine fee rates" for a "Better Landlord program." *See* Municipal Services Study, Ex. 8 hereto at 2.

50. On September 20, 2018, Plaintiffs noticed an entity deposition of the Borough, pursuant to Rule 4007.1(e) of the Pennsylvania Rules of Civil Procedure, with a proposed list of deposition topics including "[t]he contents of the Municipal

Services Study dated January 7, 2015, Bates No. 000457–000471[.]" *See* Docket No. 56, Ex. B at 2.

51. The Borough designated Keith Place to sit for a deposition as its Borough representative on the Municipal Services Study. *See* Keith Place Dep. as Corp. Designee, Oct. 23, 2018 attached as Ex. 9 hereto ("K. Place Designee, I").

52. Defendant Keith A. Place is the Director of Pottstown's Licensing and Inspections Department (the "Department") from 2013 to the present, with an office located at 100 E. High Street, Pottstown, Pennsylvania. Joint Stip. ¶ 6.

53. Place described the Municipal Services Study as "a study that can be provided to the Borough of Pottstown to show the disproportionate costs and disparity between homeowner occupied and rental properties." K. Place Designee, I Ex. 9 at 40:4–7. Dep. of Keith Place, in his Official Capacity, October 23, 2018, Ex. 10 at 40:4–7 ("K. Place Official I").

54. The Borough paid approximately $18,000 for the study. K. Place Designee, I Ex. 9, 45:6–9.

55. During the relevant time frame considered by the study, code violations in Pottstown were going down—not up:

> Q. Do you agree, then, that there was a decline in code violations between the years 2013 and 2014?
>
> MS. BROWN: Objection. Calls for speculation. You can answer.
>
> THE WITNESS: Based on the numbers that are presented in this document [the Municipal Services Study], I would have to say yes.

K. Place Designee, I Ex. 9, 63:3–10.

56. The only policy recommendation contained in the report is to assess a fee against landlords: "$135 per unit for those landlords that do not participate in a better landlord program and a reduced fee of $25 per unit for those landlords that do participate." Municipal Services Study, Ex. 8 at 4.

57. The report did not suggest that a system of mandatory rental housing inspections was either necessary or advisable.

58. The following sections rely on the Code, the Borough's document production, deposition testimony from the fleet of Borough inspections, Pottstown police officers involved with the inspection program, the Plaintiffs, and all other discovery responses from the Borough.

E. Pottstown's Rental Inspections are Highly Intrusive.

59. When inspections take place, the Ordinance authorizes the Borough to search any and every part of a rental home for vague things like "habitab[ility]," and "relevant requirements." Code § 11-206(2).

60. Pottstown publishes a "Residential Rental & Property Transfer Checklist," a public document (the "Checklist"). *See* Licensing and Inspections, Residential Rental & Property Transfer Checklist, Borough of Pottstown, http://www.pottstown.org/DocumentCenter/View/105. Joint Stip. ¶¶ 32–33.

61. Pottstown Director of Licensing and Inspections Keith Place confirmed that he has not conducted inspections in years, Keith Place Dep. As Corp. Designee Ex. 11, Feb. 27, 2019, at 245:14–246:8 ("K. Place Designee, II"). And he emphasized

that inspectors have wide discretion to regarding how to conduct inspections, how to interpret the relevant ordinances, and how to interpret the inspection checklist:

> Q: So each inspector has the discretion to determine subjectively whether something is a life issue?
>
> A: Yes.
>
> Q: What about health issue, how does that differ from a life safety issue?
>
> * * *
>
> A: Is there a written definition? The answer is no.
>
> Q: Is there—
>
> A: It's at the discretion of the inspectors as they're inspecting.
>
> Q: So it's the subjective determination of the inspector?
>
> A: It's at their determination, yes.
>
> K. Place Designee, II Ex. 11, at 190:6–191:2.

62. The Borough also lacks any policies—written or otherwise—concerning how to conduct inspections when minor children are present, with or without their parents. Inspector Gonzalez is willing to inspect a property with only the landlord and a minor child present, Alex Gonzalez Dep. Tr. Ex. 12 48:18–21, while Inspector Drobins would not conduct an inspection in that situation without first contacting Director Place, Stephanie Drobins Dep. Tr. Ex. 13 at 34:17–35:10.

63. Inspector Gonzalez testified that he has conducted inspections where the children of non-native English speakers translate the Borough's inspection of their parents' homes. Gonzalez Ex. 12, 89:4–18.

64. Inspector Gonzalez described his "frustration" with nonconsensual tenant searches, which he described "negative" interactions including tenants "swearing" at him. Gonzalez Ex. 12, 85:6–20.

65. Inspectors have disclosed private information from inspections with third parties. Inspector Gonzalez agreed that inspectors have "enough stories . . . to write a book" and acknowledged that he discusses inspections with his family and shares "war stories" with his friends. Gonzalez Ex. 12, 93:18–22; 95:8–21.

66. Likewise, Inspector Weller has shared details of inspections with his wife and people employed at other townships. Charles Weller Dep. Tr. Ex. 14 at 34:2–13, 40:1–17.

67. At the same time, Inspector Gonzalez believes that information about his bedroom "pertain[s] solely to [him] and [his] household" and is "none of [others'] business." Gonzalez Ex. 12, 41:11–19.

68. Inspector Weller has also seen a sex swing and toys, nude photographs of tenants, bondage gear, and possible evidence of recreational drug use. Weller Ex. 14, 33:11–15; 34:18–21; 35:17–18.

69. 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." 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." *See* Checklist, Ex. 15 hereto.

70. In addition to entering closets, inspectors open cupboards and move furniture to search for potential code violations. Weller Ex. 14, 28:11–29:2.

71. Inspectors have cited tenants for having untidy homes and have insisted that interiors need to be repainted. Expert Report of David Phillips ("Phillips Report") Ex. 16 at Ex. 19.[6]

72. Inspectors have discovered highly personal information during searches. Inspector Alex Gonzalez has learned about tenants' "different lifestyles," including information about their sexual orientation, gender identity, and sex practices. Gonzalez Ex. 12, 37:20–38:20. He has also seen pill bottles, medical devices, *id.* at 43:21–24, sex toys, and pornography, *id.* at 35:4–10.

73. Inspector Gonzalez has also observed religious items in tenants' homes, including Muslim prayer rugs and Christian symbols. *Id.* at 81:2–6, 101:9–10.

74. Inspector Gonzalez attempts to break the ice or create rapport with tenants by using items that he sees in the house, such as sports memorabilia, photos of kids, or pets, as a starting point for a conversation. *Id.* at 14:2–15:15; 79:7–20.

75. The rental inspection program is also used to track the movements of tenants within Pottstown. Landlords are required to submit a "Rental Inspection

[6] The expert report of David Phillips is discussed in more detail below. *Infra* ¶¶ 113–133.

Application" form and list the tenant's name and previous address. REL00112403 Ex. 17.

76. The Borough has not proposed any plausible connection between tenant names and the safety of rental housing.

77. The Borough may revoke the rental license of a landlord who does not provide tenant names, Code § 804, take them to court, and fine them at least $600 per month while the license is revoked, Code § 809(2)(A).

78. Keith Place testified that he knew of a tenant who had moved six times in five years, underscoring the detail of the Borough's tenant tracking. *See* K. Place Official, I Ex. 10, 45:1–18.

79. The Pottstown Police Department has access to the tenant data collected through the inspection program. K. Place Designee, II Ex. 11, 169:18–21.

80. Concerns about inspection invasiveness are not limited to the Plaintiffs. On November 15, 2018, outside counsel for the Borough, Matthew Hovey, sent an email to Keith place with the Subject: "Personal Question—Rental Inspection" writing "Keith: As you know, we rent here in Pottstown. We are scheduled for a rental inspection in December. What all do they check? Do they go in every room? Wife wants to know haha." Email M. Hovey to Keith Place, REL00154622, Ex. 27 Nov. 15, 2018, 11:29:56am.

F. The Pottstown Police Department is Involved in the Rental Inspection Program.

81. Pottstown inspectors are instructed from "day one" on the job that "they are to immediately walk out of the unit and contact the police" if they see

what they subjectively believe to be drug packaging materials or paraphernalia. *See* K. Place Official, I Ex. 10 92:10–96:5, 103:20–104:2.

82. Inspectors have also threatened to call the police on tenants because of marijuana. Phillips Report Ex. 16, at Ex. 20 (memo from Keith Place noting tenant's complaint).

83. In a 2018 email, entered into the record on October 11, 2022, Sergeant Edward Kropp, Jr. directed Inspector Drobins to alert law enforcement of a range of offenses:

> In the event that you observe a minor drug infraction (drug paraphernalia for use, small amount of marijuana), we are requesting that you contact myself [Redacted] or Corporal Morrisey [Redacted]. We will make the decision regarding what type of police response is needed. If you are unable to reach either of us in one of those instances, no further notification is requested.
>
> In the event that you observe something related to potential drug dealing or firearms, please notify the patrol sergeant [Redacted] if you cannot reach myself or Corporal Morrisey.
>
> We understand that you may not feel comfortable remaining in a residence to await police arrival. Your safety is more important to us than making arrests. So I would suggest maybe sending a text or stepping out of the residence to make call [sic] in those situations.

Email from Sergeant Edward Kropp, Jr. to Stephanie Drobins (Sept. 26, 2018, 09:59:01 AM) (Docket No. 189), Ex. 18 hereto.

84. Pottstown inspectors have, in fact, called the police when they believed that they saw evidence of drug possession. For instance, on November 14, 2018, Inspector Gonzalez was conducting a rental inspection and believed that he saw marijuana in a bedroom. He called the Pottstown Police, and Sergeant Kropp and

Corporal Morrisey responded to the call. Inspector Gonzalez walked the police officers through the house to the second-floor bedroom where they observed what they believed to be marijuana and drug paraphernalia. Edward Kropp Dep. Tr. Ex. 19, at 28:2–29:14.

85. Sergeant Kropp testified that he examined the personal effects in the bedroom in order to determine who was the likely owner of the marijuana. *Id.* at 30:5–31:6. The alleged owner was ultimately charged criminally. *Id.* at 35:5.

86. Similarly, on December 6, 2018, Inspector Alex Oestreich called Sergeant Kropp to report that he had seen what he believed to be marijuana during an inspection. *Id.* at 35:13–24. Several officers, including Sergeant Kropp, responded to that call, searched parts of the house, and seized evidence. *Id.* at 36:8–23; 41:2–7.

87. Police Chief Markovich confirmed that the Pottstown Police Department does not keep records of phone or text communications with the inspections team. Michael Markovich Dep. Tr. Ex. 20 at 23:3–5.

88. The Pottstown Police Department also does not have a written policy regarding interactions with Licensing and Inspections. Markovich Ex. 20, 27:6–12. It also does not have policies governing information obtained from the Licensing and Inspections Department. *Id.* at 22:23–24, 23:1–2.

89. When Police Chief Markovich was asked if he had found Licensing and Inspection information helpful in a criminal investigation, he responded that

personally had not. He went on to say, "I'm sure there are people [police] who have used it for investigations." Markovich Ex. 20, 21:2–14.

90. Sergeant Kropp testified that, although he does not remember specific instances, he "know[s] there's been times when I may have—when I called [Licensing and Inspection] for things that we discussed, asking for any safety concerns on a residence, or information on, you know, who's in there, or those sort of things. Nothing that would have generated a police report." Kropp Ex. 19, 41:17–23.

91. Director Place confirmed that "the police department has access to the system for tenant names." K. Place Designee, II Ex. 11, 169:18–21.

92. Police officers have found the tenant name database useful "as far as providing names" and for "identify[ing] who resides [at an address]." Kropp Ex. 19, 19:1–9.

93. At least two confirmed police calls were not logged anywhere in the Inspection Department records. Phillips Report, Ex. 16 at ¶ 2 61–63 (calls from Pottstown Inspectors Alex Oestreich and Alex Gonzalez, regarding alleged marijuana seen at 446 W. Buttonwood Street and 344 Jefferson Avenue).

G. Pottstown's Rental Inspections are Ineffective and Unnecessary.

94. Although the Borough asserts that the rental inspection program is necessary to ensure that housing is safe, the record reveals that the program is both unnecessary and ineffective.

95. Director Place confirmed that no property had been condemned due to the results of a rental inspection and no property has been ordered even temporarily

vacated as the result of an inspection. K. Place Designee, II Ex. 11, 301:3–23; Keith Place, Official, Dep. Tr. Ex. 21, at 36:19–24, Apr. 21, 2023 ("K. Place Official II").

96. Director Place stated that the rental inspection checklist would not even determine if a unit was uninhabitable: "In reference to items within this checklist, those are not even ones that we would probably go through as uninhabitable." K. Place Designee, II Ex. 11, 302:4–14.

97. Inspector Weller testified that in his 16 years of inspecting Pottstown rental properties there were only "a handful of times, if that" when he came across a code violation serious enough that he insisted it be repaired in an expedited "five days or ten days," rather than the standard 30 days. Weller Ex. 14, 21:18–22:24.

98. Some of the most common reasons that rental units fail an inspection are a lack of smoke detectors, carbon monoxide detectors (or dead batteries in either), and a lack of GFI sockets. Phillips Report, Ex. 16 at ¶ 27.

99. The Borough does, however, use the inspection program to collect debts and back taxes. In a February 21, 2018 memorandum, Keith Place wrote that prior to issuing inspection permits, his department much check with "Portnoff" "for any amounts due, including but not limited to Borough taxes, School taxes and water/sewer/trash bills." K. Place Mem. Feb. 21, 2018, REL00338520, Ex. 22.

100. Portnoff is a collection agency that Pottstown's Finance Department works with. Drobins Ex. 13, 40:11–22; Pottstown 000215, Ex. 23. Inspector Drobins "receive[s] a weekly email" from a Portnoff representative listing "what properties in the Borough currently have outstanding obligations." Drobins, Ex. 13 40:22–41:7;

see also Gonzalez Ex. 12, 76:13–14 ("If people owe money to Portnoff, the phrase that's made is, 'They owe money to Portnoff.'").

101. On January 11, 2011, Inspector Drobins wrote to a landlord regarding his Portnoff debts, informing him that he needed to "contact Portnoff to get your payment plan up to date." Drobins Dep. Ex. 6, REL00307049 (Ex. 13). If the landlord did not pay off Portnoff, the Borough "will have no choice but to revoke the rental licenses for all properties and placard them." *Id.*

102. Inspector Weller testified that if a landlord has outstanding fees, he cannot get an inspection and his property cannot be legally occupied. Weller Ex. 14, 44:8–13.

103. The Borough has not explained why a comprehensive and intrusive rental inspection regime is necessary to ensure that smoke detectors and carbon monoxide are functioning. There is no evidence showing that less intrusive alternatives would not work, such as requiring tenants to submit signed self-inspection checklists or providing tenants with replacement batteries on a regular schedule. Detectors themselves are inexpensive and could be provided to tenants for far less than the cost of an inspection. Phillips Report, Ex. 16 at ¶¶ 28; 67.

104. There is no evidence indicating that a system of voluntary inspections, supplemented by inspections pursuant to warrants supported by *individualized* probable cause to believe that code violations exist, would be insufficient. Serious exterior violations, visible without entering a tenant's home, could also provide probable cause for an interior inspection. Phillips Report, Ex. 16, ¶ 66.

105. Pottstown has not seriously considered whether less intrusive alternatives to mandatory, suspicionless inspections would be insufficient to advance whatever interests it believes the inspections serve. And the Borough has no evidence that they would be less effective.

106. The Borough often reinspects units within months of a previous inspection, even if the unit passed the previous inspection. Phillips Report, Ex. 16 ¶ 47; Phillips Report Ex. 16 at Ex. 33; Drobins Ex. 13, 52:17–23. The Borough has not explained why it was necessary to reinspect a unit that had passed an inspection so recently.

107. On July 12, 2023, the Borough produced documents it had withheld subject to overruled claim of privilege.

108. That final batch of documents contains an August 2020 email—written during the heights of the COVID-19 Pandemic—from Stephanie Drobins to Inspector Place. Although the Borough redacted the answer, Inspector Drobins's questions alone are a raft of public policy concerns showing the threat that inspections posed to public health and bodily autonomy. *See* Email from Stephanie Drobins to Keith Place, Justin Keller (Aug. 14, 2020, 09:09 AM) Ex. 26.

109. In the pre-vaccine days of COVID, Drobins was still scheduling rental inspections and addressing "questions and/or concerns about COVID" including that "[s]ome landlords are stating that their tenants are hesitant to allow anyone to come through unless it's for an emergency situation. Those I am also leaving on the hold list at this time." *Id.* Drobins asked Place the following questions:

In an effort to protect the inspectors, property owners, property managers and/or tenants, we have a few suggestions/questions:

- Are we able to ask tenants and the person meeting the inspector to answer a COVID questionnaire? This will include similar questions that the staff answers daily when taking our temperature, such as, has anyone in the household had a fever or felt ill; has anyone traveled outside of the state in the past 14 days, etc.
- Are we able to request to take the temperature of the person meeting us for the inspection?
- Are medical grade masks available for the inspectors?
- For multi-unit properties:
- The proper procedure would be to change gloves and sanitize in between each unit. This will increase the number of gloves we'll need in order to accommodate the larger complexes.
- At this time, for a standard inspection, we are asking that only one person meet the inspector, are we able to ask that the tenants vacate their units during the time of inspection to limit the number of people we are coming in contact with? This isn't just for the benefit of the inspector but also to give tenants peace of mind that we're not coming in contact with multiple people in other units before we come into their unit.
- If someone is refusing to vacate their unit, we will put that unit on the hold list for when restrictions have lifted.
- Is there a liability that the inspector and/or Borough is taking by entering peoples homes?
- If we go to a property for an inspection and a tenant, property owner or property manager tests positive after the fact, can they come back on the inspector and/or Borough and hold us liable for potentially transmitting the virus?

While the inspectors are more than willing to perform inspections, we also want to make sure they're being done in the safest way possible to protect those we come in contact with, as well as our families and co-workers.

Id.

H. Experts

110. Pursuant to the Court's scheduling order (Docket No. 193), Plaintiffs served expert reports to the Borough in June 2023. Plaintiffs served the report of David Phillips ("Phillips Report," Ex. 16 hereto), discussed in subsection 1 below, and the report of Dr. Jacob Benfield ("Benfield Report," Ex. 24 hereto), discussed in

subsection 2 below. Mr. Phillips's report contains 46 exhibits of record materials and Dr. Benfield's report contains a survey of academic literature related to privacy.

111. The Borough did not disclose any rebuttal experts pursuant to the Court's order. *See* Order, Docket No. 193.

1. Phillips Report

112. David Phillips has been a licensed architect in the State of Minnesota since 1985, and a commercial and residential general contractor in the State of Minnesota since 1970. Phillips Report Ex. 16 at Ex. 1 ¶ 2. Throughout his career, he has been a real estate developer for commercial and residential properties. *Id.*

113. Mr. Phillips is currently the President of PHILLIPS Architects and Contractors, Ltd. *Id.* at Ex. 1 ¶ 3.

114. Mr. Phillips has experience inspecting the interior and exterior of residential buildings to assess safety and compliance with housing codes. *Id.* at Ex. 1 ¶¶ 5, 27.

115. The Ohio Supreme Court and Minnesota Court of Appeals have both relied on Mr. Phillips's analysis and testimony in deciding cases related to blight and eminent domain. *Id.* at Ex. 1 ¶¶ 28–29.

116. The Institute for Justice hired Mr. Phillips to review and provide his expert opinion on the Borough's mandatory inspection program. *Id.* ¶ 1.

117. On July 6, 2022, Mr. Phillips traveled to Pottstown. *Id.* ¶ 7.

118. The following morning, Mr. Phillips met with Plaintiffs Kathleen, Thomas, and Rosemarie O'Connor and Steven Camburn at the O'Connor residence. *Id.* ¶ 8. Plaintiffs expressed privacy concerns about the Borough's inspection program, including that tenants would be unable to prevent inspectors from learning their religious and political views and that inspectors would judge tenants' housekeeping. *Id.* ¶ 14. Steven Camburn also felt that the frequency of inspections was excessive. *Id.* ¶ 12.

119. In addition to visiting Pottstown and speaking with some of the Plaintiffs, Mr. Phillips reviewed over 93,000 files obtained from the Borough. *See id.* ¶¶ 15–17. These files included more than 14,500 rental inspection reports, approximately 5,850 of which described failed inspections. *Id.* ¶ 23. Mr. Phillips also reviewed deposition testimony from Borough officials in the Licensing and Inspection Department and the Police Department. *E.g.*, *id.* ¶ 3 & n.1.

120. As a result of his analysis, Mr. Phillips concluded the following:

121. Tenants do not have the choice whether to participate in inspections. *Id.* ¶ 64. Additionally, the Borough "threatens and bullies" unwilling tenants into allowing inspectors to enter their homes, and the Borough fails to inform tenants of their rights. *Id.*

122. The Borough's rental inspection program is "extremely invasive." *Id.* ¶ 2. Inspectors open closets, look under sinks, and have the discretion to go into children's bedrooms. *Id.* ¶¶ 35, 69. The Borough has no written policy for conducting inspections when minor children are present, and the verbal protocol that exists

entrusts inspectors with significant discretion. *Id.* ¶ 36. At least one inspector is willing to conduct an inspection with just the landlord and a minor child present. *Id.* ¶ 20. Additionally, inspectors have cited tenants for inadequate housekeeping standards. *Id.* ¶ 35.

123. "There are simply no exigent conditions to justify the intrusive inspections." *Id.* ¶ 68. The Borough had inspected almost all of the more than 5,000 rental units three or more times since 2014 and not a single occupied unit had been declared unsafe and ordered vacated because of the inspection. *Id.* Notably, the rental inspection checklist would not even determine if a unit was unsafe for occupancy. *Id.* ¶ 3.

124. Tenants currently can address issues in their homes. *Id.* ¶ 32. There are dozens of documents that include tenants' complaints and notes showing that they were investigated by inspectors. *Id.* ¶¶ 32–33. Tenants can also contact the Pottstown Inspection Department directly and request an inspection for any reason. *Id.* ¶ 9. If landlords fail to address tenants' complaints, tenants can apply to have rent placed in an escrow account and used to complete repairs. *Id.*

125. Alternative methods of promoting housing safety and code compliance could "reduce or eliminate the need for inspections." *Id.* ¶ 67. Many of the inspection failures are due to issues with smoke and carbon monoxide detectors and Ground

Fault (Circuit) Interrupter outlets.[7] *Id.* ¶ 67. Providing tenant education, batteries for smoke detectors, and self-checklists could replace inspections in many cases. *Id.*

126. Pottstown could also obtain warrants based on individualized probable cause in situations where a tenant does not consent to an inspection but where there are serious, visible violations on the exterior of a property, or where another unit in the same structure has serious violations. Pottstown could require mandatory inspections between tenancies, when the unit is vacant and there are no privacy implications to the search.

127. The inspection program collects tenants' names and information about their economic status, roommates, and subsequent address. *Id.* ¶ 42. This information is unnecessary to evaluate a property's condition and is an extreme privacy invasion. *Id.* ¶ 65.

128. Pottstown Police use this information and other information obtained from the Licensing and Inspections Department in conducting criminal investigations. *Id.* ¶ 71.

129. Inspectors are directed to notify the police if they think they observe illegal activity—even minor drug violations—and the licensing department fails to keep records of interactions with police. *Id.* ¶ 70. These policies "demonstrate[] a clear need for individualized probable cause warrants." *Id.*

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[7] Ground Fault (Circuit) Interrupter Outlets are designed to shut off a circuit in the event of an electrical fault and are easily identified by their "push to reset" button. Phillips Report Ex. 16 ¶ 29.

130. On at least two occasions, police have made marijuana-related arrests based on contacts from rental inspectors. *Id.* ¶¶ 61–63.

131. While the inspection program has never identified a safety hazard significant enough to warrant vacating a unit, it does appear to serve as an effective collection mechanism.

132. The inspection program serves as a collection mechanism for a variety of debts, apparently in tandem with Portnoff, a debt collection and legal firm. *Id.* ¶¶ 52–53. Many emails appear to confirm that debts with Portnoff have been settled before the Licensing and Inspection Department inspects a property or issues a rental license. *Id.* at ¶ 52.

2. Benfield Report

133. Dr. Jacob Benfield is a Professor of Psychology at Pennsylvania State University – Abington. Benfield Report Ex. 24 ¶ 1. He is an editorial board member for the *Journal of Environmental Psychology* and *Global Environmental Psychology* and is a Senior Associate Editor for *Environment and Behavior*. *Id.* All of these are flagship journals in the field of environmental psychology. *Id.*

134. Dr. Benfield completed both master's and doctoral theses in Applied Social Psychology. Both of his graduate projects pertained to privacy and territoriality research. *Id.* ¶ 2.

135. Dr. Benfield's expertise is in psychological issues related to human privacy and territoriality. *Id.* ¶ 4.

136. The Institute for Justice hired Dr. Benfield to compile a report discussing privacy issues that are relevant to this case. *Id.* ¶ 3.

137. Dr. Benfield analyzed research presented in peer-reviewed scholarly journals and academic books written or edited by leading scholars. *Id.* ¶ 5. These sources include seminal works and the most contemporary literature in the privacy and territoriality fields. *Id.*

138. Based on his analysis, Dr. Benfield concluded the following:

139. Privacy is often defined as the desire to control interactions with others, including the level of interaction, the type of interaction, and with whom the interaction occurs. *Id.* ¶ 11. In other words, there is a difference between inviting a friend into your home and being forced to admit a stranger.

140. The loss of personal control is associated with "severe psychological disorders including depression and suicidal ideation." *Id.* ¶ 14. Conversely, a high sense of personal control "is related to psychological well-being and health." *Id.*

141. Privacy could be viewed as a biologically-motivated psychological need, and some scholars have described privacy as a "universal human need." *Id.* ¶ 17. Privacy is a "primary behavior found across all variants of humanity." *Id.*

142. Three conditions are associated with a higher likelihood that people will experience a loss of privacy: "(1) information is obtained about individual traits, attitudes, or personality, (2) first-hand consent was not given to collect the information; and (3) . . . the information is obtained by social group outsiders who may be able to spread information beyond the person's control." *Id.* ¶ 19.

143. Among social group outsiders, law enforcement and government agencies are some of the least trusted groups. *Id.* ¶ 20.

144. Privacy is closely linked to the psychological ownership of a space. *Id.* ¶ 31. Accordingly, people feel a connection to their home and take steps to protect its confines. *Id.* ¶ 34. Renters and owners alike can feel a strong attachment to their home. *Id.* ¶ 47.

145. Searches of the home will always violate privacy, and searches without first-person consent are particularly distressing to residents. *Id.* ¶ 27.

146. There is a "privacy gradient" within the home, with areas like bedrooms and bathrooms being viewed as particularly private. *Id.* ¶¶ 60–61. Certain areas of the house, like a parents' bedroom, a child's bedroom, or areas designated for hobbies, are often closed off even to other members of the household. *Id.* ¶ 62. Invasions of these areas by strangers is particularly distressing. *Id.*

147. Inspections entail strangers engaging with areas of people's homes and their possessions in a way that is often more intimate than permitted, even within primary relationships like the family. *See id.* ¶ 76.

148. There is a risk that inspectors may misidentify household items. Dr. Benfield notes that:

> [S]ome objects within the home could be misidentified or given an incorrect negative attribution by outsiders leading to embarrassment, stigma, or worse. For instance, smoking tobacco from a Hookah represents a social activity with a long cultural history among many middle eastern groups but the device itself could also be assumed to be paraphernalia for cannabis or other drug use by someone unfamiliar with the cultural practice. Likewise, a diabetic pet or family member would generate the need for several syringes in the home that can also

> be interpreted by a naïve outsider as being connected to opioid abuse. A trash can full of alcohol bottles can indicate severe alcoholism in the tenant or be just the remnants of a large gathering of moderate and responsible adults the night before. . . . Large stores of guns or ammunition could indicate an impending threat to others in the community or be signs of an avid collector and/or firearms safety instructor.

Id. ¶ 68.

149. Based on these findings, inspections constitute "direct invasion[s]" of the home that are "highly intrusive," "threaten[] individual autonomy and control," and deprive tenants of privacy. *Id.* ¶ 75.

150. Because of this loss of privacy, residents are likely "suffering unnecessary stress and . . . other negative consequences." *Id.* ¶ 84.

V. LEGAL STANDARD

Pennsylvania Rule 1035.2(1) provides for summary judgment as follows:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report[.]

Pa. R.C.P. No. 1035.2(1).

"Summary judgment may be granted where there are no factual disputes and the court's only task is to determine whether, as a matter of law, a particular statute is constitutional and all relevant facts are stipulated and conceded, or where the parties agree to have the case resolved on stipulated facts and cross-motions for summary judgment." 6 Standard Pennsylvania Practice 2d § 32:73 (citing *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323 (Pa. 1986), *abrogated on other grounds*

by Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383 (Pa. 2005)).

VI. ARGUMENT

In the following sections, the Plaintiffs will demonstrate that the undisputed material facts show that Borough's use of nonconsensual, invasive, suspicionless administrative warrants to search homes violates Article I, Section 8 of the Pennsylvania Constitution.

Section (A) discusses the relevant U.S. Supreme Court precedent and its shortcomings: The Court eliminated the need for individualized probable cause for home inspections when it invented administrative warrants in *Camara*, yet Pennsylvania courts have, again and again, interpreted Article I, Section 8 to be more protective of privacy than the Fourth Amendment. Section (B) outlines the multi-factor test that Pennsylvania courts use to evaluate novel constitutional claims and explains why each factor supports interpreting Article I, Section 8 to require a warrant supported by individualized probable cause before government agents can enter someone's home.

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

To establish a Pennsylvania departure from Fourth Amendment precedent regarding administrative warrants, the constitutional starting point is the U.S. Supreme Court's decision in *Camara v. Municipal Court,* 387 U.S. 523 (1967), which the Borough urges this Court to adopt. *See* Answer Am. Compl., Docket No. 32, ¶ 67

("[T]he Ordinance permits an application for an administrative warrant where an inspection is refused and it is denied that individualized probable cause of a housing violation is required[.]" (citing *Camara*)).

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I, Section 8 of the Pennsylvania Constitution similarly provides that "no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

Historically, search warrants had to be supported by a neutral magistrate's finding of individualized probable cause, *i.e.,* evidence, presented under oath, tying a particular person or place to a crime.[8] 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.

In *Camara*, however, everything changed. The U.S. Supreme Court invented a new type of warrant—the administrative warrant—and a new type of "probable cause" needed to obtain housing-inspection warrants. In doing so, the Court

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[8] *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 (internal quotation marks omitted)).

effectively read the probable cause requirement out of the Fourth Amendment's Warrant Clause, replacing it with a reasonableness inquiry that turned probable cause into a generalized balancing of government and private interests and a requirement that searches be conducted in a standardized manner.

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

The Court held that, under the Fourth Amendment, municipalities could obtain an "administrative warrant" if they showed a more general type of "probable cause," which the Court described as "reasonable legislative or administrative standards" for conducting the inspections, which may include the passage of time, the type of housing, or the characteristics of the area. *Id.* This new type of "probable cause" was not probable cause in any sense that the phrase had previously been understood, which the dissent pointed out. *See id.* 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").

There are several reasons why this court should not reflexively follow *Camara*. Perhaps most obvious is that *Camara* contains no discussion whatsoever of the history of the Fourth Amendment specifically or of warrant requirements generally. (Obviously it does not contain any discussion of Pennsylvania's own warrant requirement.) But as explained in more detail below, *infra* pp. 47–56, Pennsylvania courts take history seriously when interpreting their own constitution.

Second, *Camara* justified its holding by the supposed need to secure "city-wide," "universal compliance" with the housing code. *Camara*, 387 U.S. at 535. The problem with such reasoning is that it is obviously impossible to secure truly "universal compliance" with any regulatory scheme. If courts are willing to accept the premise that "universal compliance" is necessary—or even possible—then courts are no longer really in the business of balancing individual privacy and governmental interests, and the government will always win.

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

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

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

Finally, the *Camara* court accepted the government's unsupported factual assertions regarding both the invasiveness of the searches at issue and the government's interest in conducting them. *See Camara*, 387 U.S. at 537 (concluding that "the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique [than mandatory inspections] would achieve acceptable results," and that mandatory inspections "involve a relatively limited invasion of the urban citizen's privacy"). Pennsylvania courts are not so credulous. They require real evidence when difficult constitutional questions are at issue, and the Commonwealth Court in this very case has already instructed this Court to review this constitutional claim with the benefit of a fully

developed factual record. *See supra* p. 4. In short, nothing in *Camara* would justify deference to the U.S. Supreme Court's approach.[9]

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

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

The Pennsylvania Supreme Court's decision in *Edmunds* lays out the mode of analysis for determining whether the Pennsylvania Constitution provides more protection than the U.S. Constitution. Courts should consider: "1) [the] text of the Pennsylvania constitutional provision; 2) [the] history of the provision, [3] including Pennsylvania case-law; [4] related case-law from other states; [and] [5] policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Edmunds*, 586 A.2d at 895; *see also Jones v. City of Philadelphia*, 890 A.2d 1188, 1194 (Pa. Commw. Ct. 2006)

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[9] It is worth noting that Pottstown's inspections are unconstitutional even under the Fourth Amendment because police have unfettered access to tenant records. In *City of Los Angeles v. Patel*, the Supreme Court affirmed the Ninth Circuit's conclusion that nonconsensual police inspection of hotel records constitutes a search because the "business records . . . are the hotel's private property and the hotel therefore has the right to exclude others from prying into the[ir] contents." 576 U.S. 409, 414 (2015) (internal quotation marks omitted). A landlord's records, like a hotel's, are business records that a proprietor can reasonably expect to shield from prying eyes. Statements of the Borough's representatives make it clear that law enforcement has unfettered access to the tenant records without even informing property owners, let alone providing them the opportunity for pre-compliance review.

("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)).

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

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 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 plac*e 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, § X.[10]

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

> [T]he people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and *therefore warrants without oaths or affirmations first made, affording sufficient foundation for*

When Pennsylvania first adopted this constitutional protection, the term "warrant" was understood to require individualized suspicion of a violation of a law. *See Warrant*, Richard Burn, *A New Law Dictionary: Intended for General Use, as well as for Gentlemen of the Profession* (1792) ("Before the granting of the warrant, it is fitting to examine upon oath the party requiring it, as well as to ascertain that there is a felony or other crime actually committed . . . [and] to prove the cause and probability of suspecting the party against whom the warrant is prayed."); *see also Search Warrant*, John Bouvier, *A Law Dictionary: Adapted to the Constitution and Laws of the United States, and of the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law* (1839) ("[T]hat [warrants] be not granted without oath made before a justice of a felony committed, and that the complainant has probable cause to suspect they are in such a house or place, and his reasons for such suspicion."); *Warrant*, Bouvier, *supra* ("The reprehensible practice of issuing blank warrants which once prevailed in England, was never adopted here.").

Further, probable cause was also understood to require individualized suspicion of a violation of the law. *See Probable Cause*, Bouvier, *supra* ("When there

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> *them*, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, *are contrary to that right, and ought not be granted.*

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

are grounds for suspicion, that a person has committed a crime or misdemeanor, and public justice and the good of the community require that the matter should be examined, there is said to be a *probable cause* for making a charge against the accused . . . ."). The plain text of Article I, Section 8 thus expressly requires warrants based on individualized probable cause to search a home and personal possessions.

Although the text of Article I, Section 8 is similar to the Fourth Amendment, 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 the court 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 (1983); *see* Pa. Const. of 1776 ch. I, § X. When Pennsylvania's framers drafted this provision, their driving

concern was protecting people's privacy. *Edmunds*, 586 A.2d at 897. This was because the British crown had used "general warrants" and "writs of assistance" to search homes and businesses. *Id.* These were effectively the same as the administrative warrants at issue in this case; general warrants authorized sweeping, suspicionless searches of people's homes and businesses, without any individualized probable cause. *Id.* (citing Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 157–58 (T. & J.W. Johnson Co., ed., 1907)).

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

Contrast these time-honored twin aims with the regulation of residential rentals, which do not have anything approaching a history stretching back to the state's founding. Even though the vast majority of residents of early American cities like Philadelphia were renters, *see* Carole Shammas, *The Space Problem in Early United States Cities*, 57 Wm. & Mary Q. 505, 529 (2000); *see also* Theodore Thayer, *Town into City: 1746–1765, in Philadelphia: A 300-Year History*, 68, 99 (Russell F. Weigley ed., 1982), laws addressing tenement health and safety were not enacted until the late 1800s, James A. Allen, *Disrupting Affordable Housing: Regulating*

Airbnb and Other Short-term Rental Hosting in New York City, 26 J. Affordable Hous. & Cmty. Dev. L. 151, 158 (2017). Accordingly, the historical record refutes the idea that the traditional privacy concerns regarding the home applied with any less strength to rental homes.

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

Thus, the administrative warrant the Magisterial District Court granted against the Riveras contravenes Article I, Section 8's history and original meaning. Similarly, the O'Connors, already threatened with a warrantless inspection, live under the threat of an administrative warrant permitting inspectors to enter Kathy and Rose's home.

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

The administrative warrants at issue are 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 (Pa. 1960). Pitt's defense of the home states:

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

Id.

The "ruined tenement" was a particularly apt description of Philadelphia leading up to the 1790 constitution: "Visitors in 1783 found the city looking as if it had survived a fearful storm: peeling paint and broken windows on houses and shops bespoke years of wartime neglect." Wendell Garrett, *Classic America: The Federal Style and Beyond* 93 (Rizzoli ed., 1992). But even when homes were visibly battered and broken from the *exterior*, privacy remained the prevailing interest for the Pennsylvania framers.

Accordingly, when governmental action threatens to diminish Article I, Section 8's protections, the Pennsylvania Supreme Court has not hesitated to interpret Article I, Section 8 to provide greater protection against unreasonable searches and seizures than the Fourth Amendment provides. Indeed, it has done so on *eleven* prior occasions.[11]

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[11] *See Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996) (limiting independent source doctrine and rejecting *Murray v. United States*, 487 U.S. 533 (1988)); *Commonwealth v. Matos*, 672 A.2d 769, 776 (Pa. 1996) (holding police pursuits are seizures and rejecting *California v. Hodari D.*, 499 U.S. 621 (1991)); *Commonwealth v. White*, 669 A.2d 896, 901 (Pa. 1995) (limiting search incident to

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 899, 901. The Pennsylvania Supreme Court was concerned that a good faith exception "would

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arrest and rejecting *New York v. Belton*, 453 U.S. 454 (1981)); *Commonwealth v. Brion*, 652 A.2d 287, 290 (Pa. 1994) (forbidding confidential informer wiretap transmission to police and rejecting *United States v. White*, 401 U.S. 745 (1971)); *Commonwealth v. Mason*, 637 A.2d 251, 256–57 (Pa. 1993) (excluding evidence forcibly obtained without a warrant and rejecting *Segura v. United States*, 468 U.S. 796 (1984)); *Commonwealth v. Martin*, 626 A.2d 556, 560–61 (Pa. 1993) (holding probable cause was necessary prior to canine sniff and extending prior rejection of *United States v. Place*, 462 U.S. 696 (1983)); *Commonwealth v. Edmunds*, 586 A.2d 887, 888 (Pa. 1991) (rejecting "good faith" exception to the exclusionary rule and *United States v. Leon*, 468 U.S. 897 (1984)); *Commonwealth v. Melilli*, 555 A.2d 1254, 1258 (Pa. 1989) (holding use of pen register requires probable cause and rejecting *Smith v. Maryland*, 442 U.S. 735 (1979)); *Commonwealth v. Johnston*, 530 A.2d 74, 79 (Pa. 1987) (requiring reasonable grounds for canine sniff and rejecting *United States v. Place*, 462 U.S. 696 (1983)); *Commonwealth v. Sell*, 470 A.2d 457, 468 (Pa. 1983) (conferring automatic standing on defendant charged with possessory offense to challenge evidence admissibility and rejecting *United States v. Salvucci*, 448 U.S. 83 (1980)); *Commonwealth v. DeJohn*, 403 A.2d 1283, 1289 (Pa. 1979) (conferring standing on depositor to challenge the seizure of bank records and rejecting *United States v. Miller*, 425 U.S. 435 (1976)).

directly clash with those rights of citizens as developed in our Commonwealth over the past 200 years." *Id.* at 901.

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"—all of which are obviously apparent inside someone's home. *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.

In *Brion*, the Pennsylvania Supreme Court held the government's warrantless use of a body wire to record a conversation in the home of a non-consenting criminal defendant violated his right to privacy in his home under Article I, Section 8. *Id.* The Court was particularly concerned that there was no prior determination of probable cause by a neutral judicial authority before the government made the recording, and the Court could not allow such an intrusion into the home to stand without a warrant supported by individualized probable cause. *Id. Brion* was "clearly based on Article I, Section 8 of the Pennsylvania Constitution and not the Fourth Amendment to the United States Constitution. The United States Supreme Court has held that the United States Constitution does not require prior judicial approval of a one-party consensual wiretap in a defendant's home." *Commonwealth v. Selby*, 688 A.2d 698, 700 n.1 (Pa. 1997) (Newman, J., dissenting) (citing *United States v. White*, 401 U.S. 745 (1971)). The thread running through all these cases is that (1) privacy is sacred in Pennsylvania, (2) it is most

sacred in the home, and (3) privacy's most protective safeguard is a warrant supported by probable cause.

Prohibition-era Pennsylvania jurisprudence underscores the importance of warrants being supported by individualized probable cause—at a time when countless private homes contained contraband. In *Commonwealth v. Kekic*, the Court of Quarter Sessions held that the search and seizure of alcohol without a warrant supported by probable cause was illegal. 3 Pa. D. & C. 273, 282 (Ct. Quarter Sess. 1923). The court emphasized that Article 1, Section 8 "intend[s] to secure the individual in his person, home and property from invasion through intolerable legislation, and from invasion through over zealous, misguided or corrupt, unrestrained administrators of the law." *Id.* at 278. Accordingly, the court concluded that a law enforcement officer without a warrant supported by individual probable cause "may not obtain entrance to a man's house." *See id.* Magistrate judges in Philadelphia likewise restrained government searches related to alcohol in service of privacy rights, "balk[ing] at issuing search warrants for private homes even when the owners were believed to be using them as outlets for the sale of illegal spirits." Arthur P. Dudden, *The City Embraces "Normalcy": 1919–1929, in Philadelphia: A 300-Year History, supra*, at 566, 577. Even in the face of significant government interest in rooting out alcohol production, Pennsylvania courts adhered to Article 1, Section 8's emphasis on securing privacy rights within the home.

The Borough has previously agreed (Defs.' Br. Supp. Prelim. Obj. Pls.' Am. Compl. 11, Docket No. 21) that no Pennsylvania court has squarely addressed the

validity of administrative warrants under the Pennsylvania Constitution. But the Borough has relied on three cases where the Commonwealth Court has considered the constitutionality of rental-inspection ordinances *under federal law*, where the landlords have lost. *Id.* at 11–12. Plaintiffs expect that the Borough will rely on these cases again, but its reliance is misplaced.

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 homes and property private. Administrative warrants authorizing the search of their homes and property are not supported by the individualized probable cause that Article I, Section 8 commands. Administrative warrants also conflict with decades of jurisprudence recognizing the important history of Article I, Section 8 and requiring individualized probable cause for warrants to issue. Accordingly, Pennsylvania caselaw shows that Article I, Section 8 protects against suspicionless searches authorized by the Ordinances and attempted by the Borough.

4. Case Law in Other Jurisdictions.

The next *Edmunds* factor 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.'").

Around the time this case was filed, the Minnesota Supreme Court held that Minnesota's constitution did not require individualized probable cause for administrative warrants. *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 154–55 (Minn. 2017). This is the only other state to squarely consider whether to depart from *Camara* as a matter of state constitutional law. There are several reasons why this Court should not follow the reasoning of the *Golden Valley* majority.

First, although the facts of *Golden Valley* are similar to this case, the operative legal test is not: Minnesota has a presumption in favor of following the federal precedent, *see id.* at 157, whereas Pennsylvania treats the U.S. Supreme Court's decisions as persuasive authority only. Rather than the *Edmunds* factors, which courts use as a guide to exercising their independent judgment about the meaning of the Pennsylvania Constitution, the Minnesota Supreme Court employed the methodology outlined in *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005), which asks a series of questions aimed at identifying deficits in federal precedent: whether (1) "the United States Supreme Court has made a sharp or radical departure from its previous decisions or approach to the law and when we discern no persuasive reason to follow such a departure"; (2) the United States Supreme Court has "retrenched on Bill of Rights issues"; or (3) federal precedent "does not adequately protect our citizens' basic rights and liberties." *Golden Valley*, 899 N.W.2d at 157 (internal citations omitted). Unlike *Edmunds*, the *Kahn* test is organized around a strong presumption that Minnesota should follow federal precedent in interpreting its own constitution. *Compare id.* (noting that Minnesota

courts "favor uniformity with the federal constitution" and will only "depart from federal precedent when we have a 'clear and strong conviction that there is a principled basis' to do so") (quoting *Kahn*, 701 N.W.2d at 828)), *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."). Moreover, the Minnesota Constitution (adopted in 1858) postdates both the U.S. Constitution and the Pennsylvania Constitution. Pennsylvania does not adopt a presumption that the meaning of its Constitution could somehow be altered by interpretations of a later document.

Second, because other states' decisions are only useful to the extent that they are persuasively reasoned, Plaintiffs urge the Court to consider Justice G. Barry Anderson's scholarly dissent in *Golden Valley*, joined in part by then-Justice David Stras (who has since been appointed to the Eighth Circuit). 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.[12]

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 adopted as a matter of state constitutional law. *But see State v. Ochoa*, 792 N.W.2d 260, 278 (Iowa 2010) (criticizing *Camara* as an example of "an increasingly broad category of administrative searches and special needs exceptions" that "go well beyond [the warrant exceptions] recognized at the time of the enactment of the Fourth Amendment").

To be sure, some state appellate courts have interpreted their constitutions as *categorically* coextensive with the Fourth Amendment—and therefore with *Camara*.[13] But such cases have no relevance in Pennsylvania, where courts are

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[12] 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).

[13] *See Fla. Dep't of Agric. & Consumer Servs. v. Haire*, 836 So. 2d 1040, 1055 (Fla. Dist. Ct. App. 2003) ("The Florida Constitution requires that Article I, Section 12, be construed in conformity with the Fourth Amendment to the United States

required to undertake a thoughtful, case-by-case analysis to determine *when* Article I, Section 8 provides more protection than the Fourth Amendment. *See Edmunds*, 586 A.2d at 894. In other cases, the courts did not consider—or the parties did not argue—whether the relevant state constitution provided greater protection than the *Camara* standard.[14] In some cases, there was no occasion to consider the question, even if the issue had been raised, because the courts found either that the ordinances failed to satisfy the *Camara* standard[15] or the court found that there was individualized probable cause for the search.[16] Another case concerned only inspections of *unoccupied* rental properties—unlike the Borough's inspection program in the present case—and the court emphasized that its holding would be different if the property were occupied.[17] To be clear, Plaintiffs here are not arguing

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Constitution."), *affirmed*, 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.").

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

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

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

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

that mandatory inspections of unoccupied properties (for instance, between tenants) would violate the Pennsylvania Constitution.

In short, one state high court adopts *Camara* by using a method of analysis wholly different from Pennsylvania's test. Another criticizes *Camara* using the sort of historical inquiry that Pennsylvania courts are supposed to employ. And the rest provide little in the way of guidance at all. And, as noted above, cases from other jurisdictions are only as useful as their reasoning. *Edmunds*, 586 A.2d at 900 (rejecting reliance on state cases that simply "affirm[ed] the logic" of a federal case "with little additional state constitutional analysis").

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

The Pennsylvania Supreme Court takes into account policy considerations in interpreting Article I, Section 8. In evaluating policy considerations, the Supreme Court requires a court to "go beyond the bare text and history of that provision as it was drafted 200 years ago, and consider its application within the modern scheme of Pennsylvania jurisprudence." *Id.* at 901. The policy considerations here must weigh Pottstown's interest in rental inspections against the extent to which they invade personal privacy. *See Pa. Soc. Servs. Union v. Commonwealth*, 59 A.3d 1136, 1144 (Pa. Commw. Ct. 2012) (Article I, Section 8 analysis requires "balancing of an individual's privacy interest against a countervailing state interest which may or may not justify an intrusion into privacy"). The record is clear: By violating

Plaintiffs' privacy without sufficient justification and giving police broad access to information obtained during inspections, the Borough's inspection policy contravenes Pennsylvania's recognition of the importance of privacy and due process rights.

i. The Borough's Searches Violate Plaintiffs' Privacy.

Search and seizure cases are, unsurprisingly, replete with discussions of privacy, but what does privacy mean? Courts are not always precise or rigorous in defining privacy interests. Plaintiffs offer the report of Dr. Jacob Benfield, a privacy researcher, in an effort to address that deficit and to aid this Court in assessing what privacy really means and how Pottstown's rental inspection program impacts it.

Privacy rights are essential to human well-being. When people feel that they can regulate their privacy, they are more likely to experience psychological well-being and health. *See* Benfield Report ¶ 14. In contrast, loss of personal control—one of the key elements of privacy—is associated with psychological disorders, including depression and even suicidal ideation. *Id.*

Privacy is closely linked to the psychological ownership and control of a space, and residents often develop a strong bond with their home and vigorously protect their privacy within its confines. *Id.* ¶¶ 31, 34, 45. Renters and owners alike can develop this relationship with their home. *Id.* ¶ 47. Recognizing this, Pennsylvania jurisprudence interpreting Article I, Section 8 places far more policy weight on protecting privacy and the sanctity of the home than the federal *Camara*

standard. *See, e.g., Brion*, 652 A.2d at 289; *Commonwealth v. Flewellen*, 380 A.2d 1217, 1220 (Pa. 1977) ("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.").

It is crucial to understand that privacy does not simply mean that an individual wishes to shut out the world and live as a recluse. Rather, privacy is about having control over who has access to one's own world. Benfield Report, Ex. 24 at ¶¶ 10–15. The principle is obvious: A person might willingly welcome a romantic partner, a new friend, or a chosen contractor into their home while still quite reasonably objecting to the forced entry of an ex-boyfriend, a traveling salesman, or a government agent. The same principle explains why someone might willingly admit a plumber to one's home to fix a leaky faucet, but might be disturbed by a mandatory rental inspection that they did not request, conducted by an individual who has discretion to go wherever he wants. As Dr. Benfield explained, this loss of control, where strangers can force their way into individuals' most intimate spaces, entails a huge violation of personal privacy.

Although the mandatory nature of the inspections alone suffices to make them a major privacy violation, the record also shows that these inspections are highly intrusive. The Ordinances empower the Borough to search any and every part of a rental home for vague things like "habitab[ility]" and "relevant requirements." Code § 11-206(2). Inspectors take full advantage of this broad authority, looking in closets and cupboards and moving furniture to search for

potential code violations. Weller Ex. 14, 28:11–29:2. Inspectors even scrutinize tenants' housekeeping and issue citations if they do not think that an apartment is adequately clean. Phillips Report Ex. 16, ¶ 35.

These comprehensive searches expose residents' personal beliefs and lifestyle traits—exactly why Plaintiffs did not consent to the Borough's inspections.[18] In depositions, Inspector Gonzalez stated that he has learned about Pottstown residents' "different lifestyles," including information about their sexual orientation. Gonzalez Ex. 12, 37:20–38:16. Inspector Gonzalez has observed items that could reveal potentially embarrassing information about residents' intimate practices or preferences, including sex toys and pornography. *Id.* at 34:15–36:4. He has also seen pill bottles in people's homes, which could reveal stigmatizing medical conditions like depression, addiction, or HIV. *Id.* at 43:21–24.

Inspections also carry a high risk of revealing personal religious practices. Inspector Gonzalez has observed Muslim prayer rugs and Christian symbols. *Id.* at 81:2–6, 101:9–10. Relatedly, the Riveras testified that they display religious symbols in their home, which they did not want inspectors to view. D. Rivera Ex. 2 89:8–19; E. O. Rivera Ex. 3, 23:16–25.

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[18] Neither the Rivera family and their landlord, Steve Camburn, nor the O'Connor family permitted inspectors into their homes. Joint Stip. ¶ 15; K. O'Connor Ex. 4 at 60:11–15. However, even if the O'Connors had allowed inspectors to enter, the ensuing search would likely not have been consensual. In a "menacing" encounter, Borough officials threatened to take the O'Connors to court if they did not allow an inspection, K. O'Connor Ex. 4 15:6–11, 15:25–16:5, and "mere acquiescence upon a show of authority is not consent." David Rudovsky, *The Law of Arrest, Search, and Seizure in Pennsylvania* 75 (11th ed. 2020).

Pennsylvania citizens have a tradition of not just displaying religious symbols in the home but *hosting* religious services in the home during the period leading up to the Pennsylvania Constitution. For example, "the first meeting of Friends, at private houses, were held sometime in the winter of 1727." W. W. H. Davis, *The History of Bucks County, Pennsylvania, From the Discovery of the Delaware to the Present Time* 403 (Doylestown, Pa., Democrat Book and Job Office Print 1876). In Bensalem, before the first church was built, "service was held at private houses." *Id.* at 155. And when the Mennonite congregation in Springfield emerged, "[t]he earliest services were held in private houses." *Id.* at 576. From the colonial era to the present day, home inspections would have been and continue to be likely to reveal personal information about residents' religious beliefs.

The exposure of highly personal information during inspections is particularly alarming for families with minor children. In her deposition, Dottie Rivera recounted a previous Borough rental inspection where inspectors entered her daughter's bedroom and made crude jokes about her bra and breast size. *See* D. Rivera Ex. 2 at 63:5–15.

Concerningly, the Borough has no written policy for conducting inspections when minor children are present, and the verbal protocol that exists entrusts inspectors with significant discretion. Phillips Report Ex. 16 ¶ 36. At least one inspector is willing to inspect a property with only the landlord and a minor child present, Gonzalez Ex. 12 48:18–21, while another would not conduct an inspection in that situation without first contacting Director Place, Drobins Ex. 13, 35:4–19.

Inspector Gonzalez goes so far as to *involve* children with the inspection when he has the children of non-native English speakers translate inspection of their parents' home. Gonzalez Ex. 12 89:4–18.

The lack of consistent policy and previous inspector misconduct mean that families with children will feel particularly violated during an inspection.

These privacy concerns are exacerbated by the fact that inspectors regularly disclose private information from inspections with third parties. Inspector Gonzalez agreed that inspectors have "enough stories . . . to write a book" and acknowledged that he discusses inspections with his family and shares "war stories" with his friends. Gonzalez Ex. 12, 95:8–21.

Likewise, Inspector Weller has shared details of inspections with his wife and people employed at other townships. Weller Ex. 14, 34:2–13, 40:1–17. This practice is particularly concerning given that inspectors may misidentify household items. In his expert report, Dr. Jacob Benfield notes that:

> [S]ome objects within the home could be misidentified or given an incorrect negative attribution by outsiders leading to embarrassment, stigma, or worse. . . . A trash can full of alcohol bottles can indicate severe alcoholism in the tenant or be just the remnants of a large gathering of moderate and responsible adults the night before.

Benfield Report Ex. 24 ¶ 68. Tenants should not have to worry that a rental inspection will spark a rumor that they are secretly alcoholics. And even if potentially embarrassing information around substance use, intimate behavior, or other characteristics is accurate, it violates tenants' privacy when that information

is shared to third parties.[19] Just as Inspector Gonzalez believes that information "pertaining solely to [him] and [his] household" is "none of [others'] business," tenants should be able to trust that personal details of their at-home life are not being shared outside of the rental inspection context. Gonzalez Ex. 12 at 41:11–19.

ii. The Borough's Invasive Searches are not Necessary to Adequately Enforce its Housing and Building Codes.

The Borough has argued that the Ordinances' purpose is to "protect and promote the public health, safety and welfare of its citizens, to establish rights and obligations of owners and occupants relating to residential rental units . . . and to encourage owners and occupants to maintain and improve the quality of life and quality of rental housing within the community." Defs.' Reply Supp. Mot. J. Pleadings 2, Docket No. 49. However, the record shows that the Borough's rental inspection program is not necessary to accomplish these goals. Perhaps most importantly, the program has not identified serious issues that would jeopardize tenant safety. Moreover, there are numerous alternative ways the Borough can enforce its housing and building codes without requiring mandatory, suspicionless

[19] The harm from such dissemination recalls the ancient concept of "lashon hara," Hebrew for "evil tongue." "A rabbinic parable about lashon hara goes, more or less, like this: A person visits their rabbi to ask why lashon hara is taken so seriously. In response, the rabbi asks them to rip open a feather pillow. When they comply, feathers go everywhere—up the chimney, under the couch, out the window, you name it. The rabbi then asks the visitor to collect all the feathers. 'That's impossible!' exclaims the visitor, and the rabbi responds, 'Exactly. You will never find all the feathers. Nor can you track down all the impacts of your speech.'" Jessica Hammer & Samantha Reig, *From Individual Rights to Community Obligations: A Jewish Approach to Speech*, Interactions, July–Aug. 2022, at 32–33.

searches of private homes, and the Borough has not demonstrated that any of these alternative methods would be ineffective.

Despite its intrusiveness, the Borough's rental inspection program has failed to uncover serious safety issues. In his expert report, David Phillips analyzed more than 14,500 rental inspection reports. Phillips Report Ex. 16 ¶ 23. He did not find a single instance where a property was deemed unsafe and the tenants were required to vacate—even temporarily—following an inspection. *Id.* ¶ 68. This analysis aligns with Director Place's comment that the Borough had not condemned a property during his tenure. K. Place Designee II Ex. 11 at 301:3–23. Accordingly, David Phillips concludes that "there are simply no exigent conditions to justify the intrusive inspections."[20] Phillips Report Ex. 16 ¶ 68.

The inspections are also unnecessary to address less severe housing code issues. First, tenants can work directly with the Borough to resolve problems with their rentals. They are empowered to complain to the Borough—David Phillips identified dozens of documents that include tenants' complaints and notes showing that Borough inspectors investigated the issues. *Id.* ¶¶ 32–33. Tenants can also contact the Pottstown Inspection Department directly and request an inspection for

[20] The Borough's invasive inspection policy can be contrasted with the laissez-faire regulation of the rental market in early Pennsylvania, when the rapid expansion of Philadelphia likely resulted in a substantially more dangerous housing stock than modern-day Pottstown's. *See* Allison Boor et al., *Philadelphia Empire Furniture* 29 (2006) ("In 1800, Philadelphia was the largest city in the United States and houses were expanding and taking over farmlands, forests and marshes. Even with an enormous amount of growth, the city remained medieval in the respect that craftsmen still lived over their shops and citizens from all walks of life lived side by side . . . .").

any reason. *Id.* ¶ 9. If landlords fail to address tenants' complaints, tenants can apply to have rent placed in an escrow account and used to complete repairs. *Id.* Second, tenant education could often replace the need to enter residences. Many failed inspections are due to issues with smoke and carbon monoxide detectors or Ground Fault (Circuit) Interrupter outlets. *Id.* ¶ 27. By educating tenants about these devices, as well as providing smoke alarm batteries and giving tenants a self-checklist to confirm common fixtures are in safe working order, the Borough could reduce or eliminate the need for inspections. *Id.* ¶ 28.

This evidence provides a powerful reason to reject the *Camara* standard because that decision was largely premised on the supposedly "unanimous agreement [in 1967] among those most familiar with this field" that mandatory, suspicionless searches were actually necessary. 387 U.S. at 535–36. In contrast, between its existing policies and straightforward tenant-education measures, the Borough can achieve its goals of promoting safety, enforcing its housing code, and improving the quality of life and rental housing without conducting invasive inspections.

iii. Cooperation Between Borough Inspections and the Pottstown Police Department Violates Principles of Due Process

The Borough attempted to justify a relaxation in the traditional probable cause by arguing that housing inspections do not carry the same "heightened consequences" of "criminal conviction, such as incarceration, disenfranchisement, prohibition on gun ownership, registration as a sex offender, revocation of

professional licensure, and other collateral consequences." Def.'s Br. Supp. Mot. J. Pleadings, Ex. 25 at 8. However, deposition testimony and records of emails between Borough officials prove this claim false.

Pottstown law enforcement leverages the rental inspection program to assist criminal investigations and make arrests. In a 2018 email, Sergeant Edward Kropp, Jr. directed Inspector Drobins to alert law enforcement of a range of offenses:

> In the event that you observe a minor drug infraction (drug paraphernalia for use, small amount of marijuana), we are requesting that you contact myself [redacted] or Corporal Morrisey [redacted]. We will make the decision regarding what type of police response is needed. If you are unable to reach either of us in one of those instances, no further notification is requested.
>
> In the event that you observe something related to potential drug dealing or firearms, please notify the patrol sergeant [redacted] if you cannot reach myself or Corporal Morrisey.
>
> We understand that you may not feel comfortable remaining in a residence to await police arrival. Your safety is more important to us than making arrests. So I would suggest maybe sending a text or stepping out of the residence to make call [sic] in those situations.

Email from Edward Kropp, Jr., Ex. 18. By discussing "making arrests," Sergeant Kropp said the quiet part out loud: Pottstown police have used rental inspections as a back door to search residential properties for drug and firearm crimes and arrest offenders, even though officers would otherwise not have had probable cause for a search. Indeed, on at least two occasions, police have made marijuana-related arrests based on contacts from rental inspectors. *See* Phillips Report Ex. 16 ¶¶ 61–63. Far from avoiding the "heightened consequences" of "criminal conviction," the partnership between police and rental inspectors exists exactly to impose those

criminal sanctions. Additionally, the practice of notifying law enforcement about perceived drug or firearm offenses rests concerningly on inspectors' ability to correctly identify crimes. When discussing potential misidentification of household objects, Dr. Benfield notes that:

> [S]moking tobacco from a Hookah represents a social activity with a long cultural history among many middle eastern groups but the device itself could also be assumed to be paraphernalia for cannabis or other drug use by someone unfamiliar with the cultural practice. Likewise, a diabetic pet or family member would generate the need for several syringes in the home that can also be interpreted by a naïve outsider as being connected to opioid abuse. . . . Large stores of guns or ammunition could indicate an impending threat to others in the community or be signs of an avid collector and/or firearms safety instructor.

Benfield Report Ex. 24 ¶ 68. Accordingly, the relationship between inspectors and police exposes Pottstown residents to *baseless* arrest or criminal investigation.

Moreover, this relationship operates entirely in the shadows. Director Place confirmed that there is no written policy to make a record of calls to the police from inspectors. K. Place Official II Ex. 21, at 9:22–24, 10:6–7. Likewise, the Pottstown Police Department does not keep records of phone or text communications with the inspections team. Markovich Ex. 20 at 23:3–5. Even though coordination between inspectors and the police has led to multiple arrests, the Pottstown Police Department does not have a single written policy regarding interactions with the Licensing and Inspections division. Markovich Ex. 20 at 27:6–12. Accordingly, the specter of criminal prosecution not only looms over rental inspections, but it does so without any guardrails to safeguard Pottstown residents' rights.

Although Pottstown Police may find it convenient to partner with the Borough's inspectors, its use of the rental inspection program to facilitate investigations violates the spirit of Article I, Section 8's mandate that "no warrant to search any place or to seize any person or things shall issue . . . without probable cause." The Pennsylvania Supreme Court has emphatically rejected "ends justify the means" reasoning that would diminish probable cause, asserting, "The seriousness of the criminal activity under investigation . . . can never be used as justification for ignoring or abandoning the constitutional right of every individual in this Commonwealth to be free from intrusions upon his or her personal liberty absent probable cause." *Commonwealth v. Rodriguez*, 614 A.2d 1378, 1383 (Pa. 1992). By using information gleaned from inspections, Pottstown law enforcement disregards this principle and circumvents the due process rights that Borough residents should expect to enjoy when facing criminal sanctions.

VII. CONCLUSION

Plaintiffs have demonstrated that Article I, Section 8 of the Pennsylvania Constitution provides a higher level of protection than does the federal constitution in the context of rental inspections and that Pottstown's inspection program violates Plaintiffs' Article I, Section 8 rights. For that reason, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment.

VIII. RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter an order:

1. Declaring that Sections 5-801 to 5-809 and 11-201 to 11-206 of the Pottstown Code of Ordinances violate Article 1, Section 8 of the Pennsylvania Constitution, to the extent that the ordinances authorize interior home inspections pursuant to search warrants based on less than individualized probable cause.

2. Permanently enjoining the Borough from conducting non-consensual home searches pursuant to Sections 5-801 to 5-809 and 11-201 to 11-206 of the Pottstown Code of Ordinances pursuant to search warrants based on less than individualized probable cause.

3. Awarding Plaintiffs the costs and expenses of this action together with reasonable attorneys' fees based on the Borough's conduct during discovery including its contempt of court orders.

DATED: July 31, 2023

Respectfully submitted,

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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, THE ESTATE OF 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

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this day a true and correct copy of *Plaintiffs' Memorandum of Law in Support of Summary Judgment*, supporting documents, and *Certificate of Service* was filed via the Court's electronic

filing system and served via electronic mail and first-class mail, postage prepaid, addressed as indicated:

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