

**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' RESPONSE IN OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

Pursuant to the Court’s Scheduling Order (Docket No. 193), Plaintiffs Dorothy and Eddy Omar Rivera, Steven Camburn, Kathleen O’Connor, Rosemarie O’Connor, and the Estate of Thomas O’Connor (the “Plaintiffs”) respectfully submit this response in opposition to Defendant Borough of Pottstown and Keith Place’s (collectively the “Borough”) Motion for Summary Judgment and Memorandum in Support (Docket No. 205). Plaintiffs file herewith a factual response; and a separate memorandum of law responding to the Borough’s legal arguments.

### FACTUAL RESPONSE

Because the Borough cobbles together facts in both its motion and memorandum, Plaintiffs must reconstitute the facts. In the first section below, Plaintiffs quote, and respond to, factual representations in the Borough’s motion. In the second section, Plaintiffs quote, and respond to, factual representations in the memorandum.

As an initial matter, the Borough’s motion and brief cite Keith Place’s deposition testimony as (idealized) evidence of how inspections are conducted. This is inadmissible because Keith Place has not conducted inspections in years and does not have any direct knowledge about what inspectors do—at their own discretion—in the field. Keith Place Dep. as Corp. Designee Ex. 11 to Plfs.’ Mot. Summ. J., Feb. 27, 2019, at 190:6–191:2, 245:14–246:8.

Pennsylvania forbids this kind of inadmissible speculation and hearsay on summary judgment. *Petrina v. Allied Glove Corp.*, 46 A.3d 795, 800 (Pa. Super. 2012) (“We rejected these efforts to defeat summary judgment because these declarants had

no direct knowledge as to whether or not the products at issue contained asbestos, as they all admitted that ‘they had been told so by others.’”); *Rosenberry v. Evans*, 48 A.3d 1255, 1264 (Pa. Super.2012) (“Mother had no personal knowledge of the facts underlying the rumors, and we will not rely on inadmissible hearsay to find a genuine issue of material fact.”); *Godlewski v. Pars Mfg. Co.*, 597 A.2d 106, 110 n.5 (Pa. Super. 1991) (“Our examination of Slusser’s deposition testimony indicates that his knowledge of the identity of Stic-tite as one of the [asbestos-containing] products used at Foster–Wheeler was based upon out of court statements made by his co-workers.”).

Accordingly, all references to Keith Place’s testimony regarding how inspections are actually conducted in the field—as opposed to broad policies the Borough adopts—must be stricken.

Below, Plaintiffs respond to the specific factual assertions (I) in the Borough’s Motion for Summary Judgment; and (II) in the Borough’s Memorandum of Law.

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## **I. Factual Representations from the Borough’s Numbered Motion for Summary Judgment.**

1. Pottstown is a municipality subject to the Pennsylvania Borough Code, and has the authority to enact and amend ordinances consistent with Pennsylvania law. 8 Pa.C.S.A. § 1006. **Borough Mot. Summ. J. ¶ 4.**

**RESPONSE: Admitted. By way of further response, Pottstown does not have the authority to enact ordinances inconsistent with the Pennsylvania Constitution.**

2. In June 2015, Pottstown promulgated and adopted the Code of Ordinances, Chapter 5, *Code Enforcement*, and Chapter 11, *Housing* (collectively referred to herein as the “Rental Ordinances”) (See Ex. C, Rental Ordinances, attached to Brief). **Borough Mot. Summ. J. ¶ 5.**

**RESPONSE: Admitted.**

3. As amended by Ordinance 2137 on June 8, 2015, the Rental Ordinances require residential rental licenses along with biennial residential rental inspections (See Ex. D, Meeting Minutes and Ordinance No. 2137, attached to Brief). **Borough Mot. Summ. J. ¶ 6.**

**RESPONSE: The Ordinance speaks for itself. Inspections are not, in practice, biennial. The Borough often reinspects units within months of a previous inspection, even if the unit passed the previous inspection. Phillips Report, Ex. 16 to Plfs.’ Mot. Summ. J. ¶ 47 & Ex. 33; Drobins Ex. 13 to Plfs.’ Mot. Summ. J., 52:17–23.**

4. The purpose of the Rental Ordinances is to “protect and promote the public health, safety, and welfare of its citizens relating to residential rental units in the Borough and to encourage owners and occupants to maintain and improve the quality of life and quality of rental housing within the community.” (Ex. C; Rental Ordinances; Chapter 11, § 201). **Borough Mot. Summ. J. ¶ 7.**

**RESPONSE: The Ordinance speaks for itself. By way of further response, see Plfs.’ Mot. Summ. J. ¶¶ 47–58 (discussing the lack of necessity for the Ordinance).**

5. In accordance with the Rental Ordinance, rental property owners must apply for a rental lease application and are provided a Rental Packet consisting of a Rental Registration Application, Rental License Application, Rental Inspection Application, Tenant List, and the Residential Rental & Property Transfer Checklist (See Ex. E, Rental Packet, attached to Brief). **Borough Mot. Summ. J. ¶ 8.**

**RESPONSE: Admitted.**

6. Owners are provided with at least 10 days’ notice of a scheduled inspection (Ex. C; Rental Ordinances; Chapter 11 §203(1)(H)). **Borough Mot. Summ. J. ¶ 9.**

**RESPONSE: Admitted in part that owners, and not tenants, receive inspection notices. Denied in part as stated. Kathy O’Connor testified that she was threatened and verbally abused while trying to schedule an appointment and was told that the Borough would not accommodate her schedule. K. O’Connor Ex. 4 to Plfs.’ Mot. Summ. J. 15:6–11, 15:25–16:5**

7. If the owner does not consent to a rental inspection, the Borough may obtain an administrative warrant to conduct the inspection (Ex. C; Rental Ordinances; Chapter 11, § 203(1)(3)). **Borough Mot. Summ. J. ¶ 10.**

**RESPONSE:** Admitted. By way of further response, the Borough obtains search warrants *ex parte* without tenant involvement. By way of further response, the Pottstown Police Department's collaboration with Pottstown's Licensing and Inspection Department is not part of the Ordinance. *See* Plfs.' Mot. Summ. J. ¶¶ 79–93. Administrative warrants are purposely being requested, and granted, without the entire scope of the search (and police access to the results) being stated.

8. Employees of the Borough's Licensing and Inspection Department conduct the rental property inspections. **Borough Mot. Summ. J. ¶ 11.**

**RESPONSE:** Admitted in part. By way of further response, Licensing and Inspection employees work closely with Pottstown police officers, and police officers have full access to the inspection database. K. Place Designee, II Ex. 11 to Plfs.' Mot. Summ. J., 169:18–21. 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 to Plfs.' Mot. Summ. J., 41:17–23.

9. The Inspectors undergo continual training and certification at the local, state, and national levels (*See*, Place (Corporate Designee) Dep., Ex. J at pg. 252, ln. 12-18, attached to Brief). **Borough Mot. Summ. J. ¶ 12.**

**RESPONSE:** Denied as stated. Keith Place and Inspector Gonzalez testified that there is no formal or consistent training required for inspectors.

**Keth Place testified:**

**Q.** What about written materials provided by the Borough?

**MS. BROWN:** Objection to form.

**THE WITNESS:** There is not a training manual provided by the Borough.

**Keith Place Dep. as Corp. Designee Ex. 11 to Plfs.' Mot. Summ. J., Feb. 27, 2019, at 252:20 –253:1.**

Moreover, Place testified that he himself was never even trained on inspections:

**Q.** And did someone give you training or protocol with regard to

the program that existed when you began your job?

MS. BROWN: Objection. Form.

Go ahead.

THE WITNESS: No training.

Dep. of Keith Place, in his Official Capacity, October 23, 2018, Ex. 10 at 9:18–23

Inspector Gonzalez testified:

Q. What's your procedure for training new inspectors?

A. Well, we take a look at the schedule. Obviously, we know where we're going. We get to the property, and the inspection takes place as normal.

Q. Do you have a sort of training protocol that you follow to be consistent?

MS. BROWN: Objection to form. Go ahead.

WITNESS: It's not a training protocol. It's, more so, just a routine.

Alex Gonzalez Dep. Tr. Ex. 12 to Plfs.' Mot. Summ. J. 72:23–73:10,

10. The Pottstown employees use the same checklist/report, which is an itemized list, separated by room for the routine and periodic rental property inspections. (See Ex. F and M, Rental Checklist and Rental Inspection Report, attached to Brief). **Borough Mot. Summ. J. ¶ 13.**

**RESPONSE: Denied in part as stated. The Borough's inspection form in 2016 required inspectors to check for about 30–35 different things. This number increased to about 102 different 15 months later. Alex Gonzalez Dep. Tr. Ex. 12 to Plfs.' Mot. Summ. J. 55:24–58:23.**

11. Pottstown's Inspectors look for safety hazards that would jeopardize the public's health, safety, and welfare (Place (Corporate Designee) Dep., Ex. O at pg. 22, ln. 4-12, attached to Brief). **Borough Mot. Summ. J. ¶ 14.**

**RESPONSE: Denied as stated. Inspectors search for far more than this. Inspectors have cited tenants for having untidy homes and have insisted that interiors need to be repainted. Expert Report of David Phillips, Ex. 16 to Plfs.' Mot. Summ. J. at Ex. 19.**

12. If there are any issues found during the inspections, an inspection report is provided to the landlord and 30 days is given to correct any deficiencies (Ex. C; Rental Ordinances; Chapter 11, § 201(H)(1),(2)). **Borough Mot. Summ. J. ¶ 15.**

**RESPONSE: Admitted that inspectors can punish landlords for subjective “issues”—as opposed to concrete code violations.**

13. Steven Camburn is a landlord who operates about 28 rental properties in Pottstown. (See Camburn Dep., Ex. T pg. 7, ln. 21-24; pg. 10, ln. 5-16, attached to Brief). **Borough Mot. Summ. J. ¶ 16.**

**RESPONSE: Admitted.**

14. Although he asserts that the periodic and routine inspections, based upon administrative warrants violate his and his tenant’s rights pursuant to the Pennsylvania Constitution, Camburn has repeatedly permitted rental inspections following the issuance of administrative warrants (Camburn Dep., Ex. T at pg. 109, ln. 23-25 — pg. 110, ln. 1). **Borough Mot. Summ. J. ¶ 17.**

**RESPONSE: Admitted, but not material. Plaintiffs challenge inspections that are non-consensual and performed by the government. See First Am. Compl. ¶ 3 (“Plaintiffs . . . unite[] in this lawsuit to . . . vindicate their state constitutional rights to be free from unreasonable government searches.”). Mr. Camburn and his tenants are required by law to comply with an executed search warrant.**

15. Dorothy Rivera and Eddy Omar Rivera rent property owned by Camburn (326 Jefferson Avenue) (ACOM, ¶ 4-5). **Borough Mot. Summ. J. ¶ 18.**

**RESPONSE: Admitted.**

16. Prior to 2023, Kathleen and Rosemarie O’Connor lived at their father’s property, Thomas O’Connor (466 N Franklin St), and thus were subject to the Ordinances (See K. O’Connor Dep., Ex. X at, pg. 75, ln. 1-6, attached to Brief). **Borough Mot. Summ. J. ¶ 19.**

**RESPONSE: Admitted. By way of further response, 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. 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.**

17. After Mr. O’Connor’s passing in late 2022<sup>1</sup>, the properties which he

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<sup>1</sup> See Notice of Death (Docket No. 191).

owned (462 N Franklin — his personal residence and 466 N Franklin — his daughters' residence) have been deeded over to the O'Connor sisters (See Deeds, Ex. Y, attached to Brief). **Borough Mot. Summ. J. ¶ 20.**

**RESPONSE: Admitted, but not material.**

18. The O'Connor sisters now reside at 462 N Franklin and no tenant resides in 466 N. Franklin (See R. O'Connor Dep. Ex. Z at pg. 7, ln. 17-20, attached to Brief; K. O'Connor Dep, Ex. X at pg. 38, ln. 20-22, attached to Brief). **Borough Mot. Summ. J. ¶ 21.**

**RESPONSE: Denied as stated and not material. Kathy and Rose O'Connor have always lived as one home/compound even though it consisted of two houses, spending time at both 466 and 462 on a daily basis. See, e.g., K. O'Connor Ex. 4 to Plfs.' Mot. Summ. J., 38:25–39:1. (“We moved our beds in. We have half our stuff in 462 and half of our stuff in 466.”).**

19. There are approximately 4,000 residential rental properties in Pottstown subject to the Rental Ordinances, which are divided into eight (8) rental zones (See, Place (Corporate Designee) Dep., Ex. K at pg. 21, attached to Brief; and Ex. S, Rental Zone Chart, attached to Brief). **Borough Mot. Summ. J. ¶ 22.**

**RESPONSE: Denied as stated. Place testified that there were “approximately 5800 units.” Keith Place Dep. as Corp. Designee Ex. 11 to Plfs.' Mot. Summ. J., Feb. 27, 2019, at 336:24–337:1.**

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## **II. Factual Averments in the Borough's Memorandum of Law**

20. The Rental Checklist is used as a guideline during the inspection (See, Rental Checklist attached hereto as Exhibit “F”). In addition to the Rental Checklist, the inspectors are guided by Rental Inspection Standard Operating Procedures (“SOP”) (See, SOP attached hereto as Exhibit “G”). The SOPs and the Rental Checklist ensure all Inspectors operate in a consistent and transparent manner ((N.T. Keith Place (Corporate Designee), 10/23/18, pg. 96, ln. 24 pg. 97, ln. 1-3) attached hereto at Exhibit “H”). **Mem. Supp. Mot. Summ. J. pg. 4, §III(A)(3).**

**RESPONSE: Denied. This paragraph is a mischaracterization of the record and cited deposition testimony. Pottstown Director of Licensing and Inspections Keith Place has not conducted inspections in years. Keith Place Dep. as Corp. Designee Ex. 11 to Plfs.' Mot. Summ. J., Feb. 27, 2019, at 245:14–246:8. Inspectors have wide, subjective, discretion—far beyond any written SOP—regarding how to conduct inspections, how to interpret the relevant ordinances, and how to interpret the inspection checklist. *Id.* at 190:6–191:2.**



Inspector Drobins testified that at time, standard operating procedures involved debt collection with the Portnoff firm:

**Q.** So is it standard operating procedure in your role to verify with Portnoff for all inspections?

**MS. BROWN:** Objection to form. Go ahead.

**THE WITNESS:** In the past, yes. Currently, no.

**Stephanie Drobins Dep. Tr. Ex. 13 at 71:24–72:6.**

**Place testified:**

**Q.** So for the standard operating procedure, that can be different from day to day?

**MS. BROWN:** Objection. Form and scope.

**THE WITNESS:** Possibly, depending on the situation. You don't honestly know what you're going to run into.

**Keith Place Dep. as Corp. Designee Ex. 11 to Plfs.' Mot. Summ. J. at 349:19–350:3.**

21. Pottstown currently employs five (5) inspectors (N.T. Keith Place (Individual Capacity), 4/21/23, pg. 4, ln. 11-24) attached hereto at Exhibit "T"). Inspectors must undergo continuing education credits and maintain both state and national certifications (N.T. Keith Place (Corporate Designee), 2/27/19, pg. 252, ln. 12-18) attached hereto at Exhibit "J"). Specifically, Inspectors are trained in policy education, code changes promulgated throughout the state, UCC requirements, and ICC requirements ((N.T. Keith Place (Individual Capacity), 10/23/18, pg. 25, ln. 14-22) attached hereto at Exhibit "K"). Pottstown requires: a Property Maintenance Inspector certification; a Residential Building Inspector certification issued by the Department of Labor and Industry; and a Commercial Building Inspector certification issued by the Department of Labor and Industry (See, Job Description attached hereto as Exhibit "L"). The Inspectors' training is continually ongoing, and prior to being able to conduct inspections independently, all new inspectors shadow a senior inspector for three (3) months (Place (Individual Capacity) Dep., Ex. K at pg. 26, ln. 18-24; pg. 30). **Mem. Supp. Mot. Summ. J. p. 5, § III(C).**

**RESPONSE: Denied as stated. See Paragraph 9 above.**

22. The Inspectors use the same Rental Inspection Report (the "Report") during the inspection (See, Report attached hereto and marked as Exhibit "M"). The Checklist contains an itemized list, separated by room, to include a pass or fail designation. Id. The tenants may attend the inspection ((N.T. Alex Gonzalez, 4/20/23,

pg. 13, ln. 23-24 pg. 14, ln. 1) attached hereto as Exhibit “N”). Inspections do not occur if there is only a minor child present ((N.T. Keith Place (Corporate Designee ), 4/21/23, pg. 46, ln. 14-24 - pg. 47, ln. 1-6; pg. 47 ln. 14-24 - pg. 48, ln. 1) attached hereto as Exhibit “O”); see also (N.T. Charles Weller, 4/20/23, pg. 27, n. 22-24 pg. 28, ln. 1-3) attached hereto as Exhibit “P”); and ((N.T. Stephanie Drobins, 4/20/23, pg. 33, ln. 9-22) attached hereto as Exhibit “Q”). **Mem. Supp. Mot. Summ. J. p. 5, § III(C).**

**RESPONSE:** This paragraph is a mischaracterization of the record. The Borough 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 to Plfs.’ Mot. Summ. J. 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.

23. Inspectors do not look under beds or move items (Place (Corporate Designee) Dep., Ex. H at pg. 91, ln. 1-4 ). Inspectors check all electrical outlets, if furniture or another item is blocking an outlet, the Inspector notes on the Report that he/she was unable to access the outlet (Place (Corporate Designee) Dep., Ex. H at pg. 92, ln. 2-14). The only item the Inspectors move is if a unit has a gas stove, he/she will slide the stove out to ensure there is a shut-off valve, as this is a safety concern. (Place (Corporate Designee) Dep., Ex. J at pg. 259, pg. 7-24, 260, ln. 1-10). Generally, Inspectors do not open closet doors (Place (Corporate Designee) Dep. Ex. H at pg. 111). If there is a light in a closet (which requires permanent covers for safety reasons), the Inspector will open the closet only to ensure there is a permanent cover. (Place (Corporate Designee) Dep., Ex. H at pg. 124-125). **Mem. Supp. Mot. Summ. J. p. 6, § III(C).**

**RESPONSE:** Denied as stated. This paragraph is a mischaracterization and falsification of the record. Keith Place testified “I’m hoping they don’t bend over and look under somebody’s bed, I can’t validate what anybody is ever going to do.” Keith Place Dep. as Corp. Designee Ex. 11 to Plfs.’ Mot. Summ. J. at 295:24–296:3. 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 to Plfs.’ Mot. Summ. J., 54:22–56:12. In addition to entering closets, inspectors open cupboards and move furniture to search for potential code violations. Weller Ex. 14 to Plfs.’ Mot. Summ. J., 28:11–29:2.

24. The Inspectors only contact the police if they fear for their safety during an inspection. (Weller Dep., Ex. P at pg. 35, ln. 23-24 pg. 36, ln. 1-4); (Drobins Dep., Ex. Q at pg. 81, ln. 6-13). The rental inspection program does not have a law

enforcement policy as making arrests is not the intended purpose of the program (Place (Individual Capacity) Dep., Ex. K at pg. 43, ln. 9-11). **Mem. Supp. Mot. Summ. J. pg. 6, §III(C).**

**RESPONSE:** Denied. This paragraph is a mischaracterization and falsification of the record. 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 to Plfs.’ Mot. Summ. J. at 92:10–96:5, 103:20–104:2. Inspector Gonzalez testified that when he called the police after seeing what he believed to be drug paraphernalia, he “d[id]n’t remember” how he felt about the situation. Alex Gonzalez Dep. Tr. Ex. 12 to Plfs.’ Mot. Summ. J. at 31:19. At no point did he suggest that he felt fear for his safety, and he testified that he would not call the police in a similar situation in the future. *Id.* at 32:7–8. The Pottstown inspectors have a policy of calling police on tenants, and tenants have been arrested pursuant to that policy. *See* Plfs.’ Mot. Summ. J. ¶¶ 79–93. The Pottstown Police Department has access to the tenant data collected through the inspection program. K. Place Designee, II Ex. 11, 169:18–21. 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. *See* Docket No. 189.

25. If there are any issues found during the inspections, an inspection report is provided to the landlord and 30 days are given to correct any deficiencies (Ex. C; Chapter 11, § 203(l)(H)(l-2)). If a landlord requires more than 30 days to correct any issues, a written request may be submitted. *Id.* The inspection fee covers the initial inspection and one re-inspection. *Id.* After a unit has passed inspection and the names of the current tenants are provided, a rental license is issued. *Id.* **Mem. Supp. Mot. Summ. J. pp. 6–7, § III(C).**

**RESPONSES:** Admitted that inspectors can punish landlords for subjective “issues”—as opposed to concrete code violations.

26. An inspector will complete an affidavit of probable cause and obtain the warrant from the local Magisterial Judge (See, Ex. R, containing examples of packets of Affidavits of Probable Cause and Administrative Warrants as issued). **Mem. Supp. Mot. Summ. J. p. 7, § III(D).**

**RESPONSE:** Admitted. By way of further response, if the tenants do not allow the inspector in with the administrative warrant, the rental license can be revoked, which could require the tenants to move and in turn leading to their arrest or to their homelessness. *See* Code § 5-801(B) (revocation of rental license for refusal to comply with inspection).

27. There are over 4,000 rental units within Pottstown. (Place (Corporate Designee) Dep., Ex. H at pg. 51). Pottstown's map was split into eight (8) rental zones for purposes of conducting the inspections (Place (Corporate Designee) Dep., Ex. Kat pg. 21; See also Rental Zone Chart attached hereto as Exhibit "S"). **Mem. Supp. Mot. Summ. J. p. 7, § III(E).**

**RESPONSE: Admitted in part. By way of further response, Place testified that there "was approximately 5800 units." Keith Place Dep. as Corp. Designee Ex. 11 to Plfs.' Mot. Summ. J., Feb. 27, 2019, at 336:24–337:1.**

28. Mr. Camburn owns and operates approximately 28 rental properties in Pottstown ((N. T. Steven Camburn, 4/4/23, pg. 7, ln. 21-24; pg. 10, ln 5-16) attached hereto at Exhibit "T"). Since the enactment of the Inspection Ordinances, Mr. Camburn and/or his tenants have requested Pottstown obtain an administrative warrant before conducting the rental inspections (See, Samples of Administrative Warrants, Ex. R). **Mem. Supp. Mot. Summ. J. p. 7, § III(F)(i).**

**RESPONSE: Admitted.**

29. Mr. Camburn does not oppose inspections once an administrative warrant has been issued. (Camburn Dep., Ex. T at pg. 93-94; pg. 109, ln 23-25; pg. 110, ln. 1). In fact, he works with Pottstown to schedule an agreeable date and time for the biennial inspection to occur. *Id.* Also see, Exhibit "U". **Mem. Supp. Mot. Summ. J. pg. 7, §III(F)(i)(2).**

**RESPONSE: Denied. This is a mischaracterization and falsification of the record. Mr. Camburn testified that he not only objected to the inspections, but to the search warrants themselves: "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 to Plfs.' Mot. Summ. J., 115:16–25.**

**Inspections are not, in practice, biennial. The Borough often reinspects units within months of a previous inspection, even if the unit passed the previous inspection. Phillips Report, Ex. 16 ¶ 47 & Ex. 33; Drobins Ex. 13, 52:17–23.**

30. Additionally, several units owned by Camburn have tenants who receive Housing Choice Vouchers from the Montgomery County Housing Authority (Camburn Dep., Ex. T at pg. 13, ln. 12-17). Similar to Pottstown, the Housing

Authority requires bi-annual rental inspections to ensure safety (Camburn Dep., Ex. T at pg. 16, ln. 4-12; pg. 17, ln. 9-15; pg. 18, ln. 1-6). The Housing Authority provides notice of and a final report (See, sample notifications from the Montgomery County Housing Authority marked Exhibit “V”). The inspections conducted on behalf of the Housing Authority include that the “inspector will need access to all rooms and areas of the unit, checking for any damages or required repairs. In addition, the inspector will determine whether smoke alarms and fire detection devices are properly mounted and in working order. Please make sure that the refrigerator and stove are clean and in working order, as these areas will also be inspected.” See, e.g., Plaintiffs00004889, Ex. U). Mr. Camburn nor his tenants object to the Housing Authority’s rental inspection as the tenants could lose their Housing Choice Vouchers (Camburn Dep., Ex. T pg. 13-18). **Mem. Supp. Mot. Summ. J. p. 8, § III(F)(i).**

**RESPONSE: Admitted in part, but not relevant. The rules for Housing Authority inspections are not at issue in this lawsuit, and the Borough’s third inspection of such properties is burdensome to tenants and landlords. Going through the motions of housing assistance inspection to prevent financial penalties and harassment does not mean landlords and tenants agree with the current inspection status quo.**

31. Camburn’s tenants are subject to leases, and he uses the same lease for all tenants in Pottstown. (Camburn Dep. Ex. S at pg. 63, ln. 1-16). The same lease as issued in Rivera is utilized for his tenants. *Id.* (See Rivera lease attached hereto and marked Exhibit “W”). As set forth in the Lease:

19. Right of Inspection. Lessor and his agents shall have the right at all reasonable times during the term of this lease and any renewal thereof to enter the demised premises for the purpose of inspecting the premises and all building and improvements thereon.

(Lease, Ex. W, ¶ 9). The Lease reserves the right for the landlord to inspect the property (Camburn Dep., Ex. T at pg. 46, ln. 12-25 pg. 47, ln. 1-2) The Lease fails to provide any notice prior to the landlord’s entry (See, Lease, Ex. W). **Mem. Supp. Mot. Summ. J. p. 8, § III(F)(i).**

**RESPONSE: Admitted in part, but not relevant. Mr. Camburn is not appearing at his tenants’ homes in the capacity of a government agent—he is approaching as a landlord, conducting repairs at his tenants’ request. Plaintiffs challenge inspections that are non-consensual and performed by the government. See First Am. Compl. ¶ 3 (“Plaintiffs . . . unite[] in this lawsuit to . . . vindicate their state constitutional rights to be free from unreasonable government searches.”). Nothing about Mr. Camburn’s consensual, contractually authorized entries into his tenants’ homes can tell**

this Court anything about whether the Borough's non-consensual government searches are lawful or not.

32. Additionally, the Lease provides that the "Lessee shall comply with all sanitary laws, ordinances, rules and orders of appropriate governmental authorities affecting the cleanliness, occupancy, and preservation of the demised premises, and the sidewalks connected thereto during the term of this lease." (Lease, Ex. W, ¶ 7). **Mem. Supp. Mot. Summ. J. p. 9, § III(F)(i).**

**RESPONSE: Admitted, but not material. See paragraph 31 above.**

33. The Riveras reside in a rental property owned by Mr. Camburn, at 326 Jefferson Avenue. (ACOM, r 4-5). The 326 Jefferson property is subject to Pottstown's rental inspection Ordinances. The Riveras executed a Lease with Camburn agreeing to comply with local ordinances (See, Lease, Ex. W. ¶7). **Mem. Supp. Mot. Summ. J. p. 9, § III(F)(ii).**

**RESPONSE: Admitted, but not material. The lease is not part of the dispute here.**

34. As named Plaintiffs, the Rivera premises has not been inspected during the course of this litigation. **Mem. Supp. Mot. Summ. J. p. 9, § III(F)(ii).**

**RESPONSE: Admitted in part. By way of further response, 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.**

35. Thomas O'Connor owned properties located at 462 and 466 Franklin Street (ACOM, ¶ 31; (N.T. Kathleen O'Connor, 4/3/23, pg. 19) attached hereto at Exhibit "X") Kathleen and Rosemarie O'Connor (daughters of Mr. O'Connor) resided in 466 N Franklin Street but maintained the unit was not a rental property as it was owned by their father; there was no lease; and they did not pay rent (K. O'Connor Dep., Ex. X at, pg. 75, ln. 1-6). Thomas O'Connor passed away in late 2022 and his Estate has been substituted (See, Doc. No. 194). **Mem. Supp. Mot. Summ. J. p. 9, §III(F)(iii) [The Borough mislabels this as section ii in its memo.]**

**RESPONSE: Admitted.**

36. Kathleen O'Connor was appointed Executrix of her father's estate (K. O'Connor Dep., Ex. W at pg. 20, ln. 1-2). The properties owned by Thomas O'Connor at 462 and 466 N Franklin Street were transferred to Kathleen and Rosemarie O'Connor on March 15, 2023 (See Deeds, attached hereto as Exhibit "Y"); ((N.T.

Rosemarie O'Connor, 4/3/23, pg. 15-21) attached hereto at Exhibit "Z"). Kathleen and Rosemarie O'Connor moved from the rental property located at 466 Franklin Street to 462 Franklin Street. They have no intention of renting the property located at 466 N Franklin (Ex. Z at pg. 7, ln. 17-20). **Mem. Supp. Mot. Summ. J. pp. 9–10, §III(F)(iii).**

**RESPONSE: This is a mischaracterization and falsification of the record. Rose O'Connor testified:**

**Q. Is it your intention to remove all the belongings from 466 Franklin Street and only reside at 462 Franklin Street?**

**A. We are not sure what we are doing.**

**Q. Have you had any discussions with your sister or any of your other siblings about selling 462 North Franklin Street?**

**A. It is still—we haven't figured out what we are doing. We are trying to get through probate.**

**Rose O'Connor Dep. Tr. Ex. 5 to Plfs.' Mot. Summ. J. at 7:17–8:1.**

**Kathy O'Connor testified:**

**Q. Do you have any intention of renting either the first or second floor of 466?**

**A. Don't know. Maybe. Maybe not.**

**Kathy O'Connor Dep. Tr. Ex. 4 to Plfs.' Mot. Summ. J. at 59:21–23.**

37. Despite the Plaintiffs anticipated argument (not pled) - to interpret the rental inspection program as a program seeking to aid law enforcement in making arrests, the record reveals otherwise. From the inception of the Ordinances in 2015, police have been involved in two limited instances wherein an Inspector feared for his or her safety. (See Police Incident Reports attached hereto as Exhibit "BB"). If something illegal (i.e., criminal) is observed during the inspection, the Inspectors disregard it and continue with the inspection as searching for contraband or otherwise criminal activity is not within the scope of their jobs (Weller Dep., Ex. P at pg. 35, ln. 19-22; Gonzalez Dep., Ex. N at pg. 24, ln. 23-23 pg. 25, ln. 1-18). The scope of the Inspectors' job is to inspect life safety items, not to engage in searches (Place (Corporate Designee) Dep., Ex. O at pg. 22, ln. 4-12). Inspectors are not trained on what to do is drugs are seen or smelled during inspections as that simply is not within the scope of their job duties (Gonzalez Dep. Ex. N at pg. 35, ln. 23-23 pg. 36, ln. 1-3). Inspectors only call the police if they fear for their safety (Drobins Dep., Ex. Q at pg. 81, ln. 6-13; Weller Dep., Ex. P at pg. 35, ln. 23-24 pg. 36, ln. 1-4). The Borough Police Department has confirmed that an inspector's safety is more important than making an arrest (September 26, 2018 Email (REL00305919) attached hereto as Exhibit

“CC”). **Mem. Supp. Mot. Summ. J. pp. 27–28, § VI(B)(2)(iv).**

**RESPONSE: Denied.** This paragraph is a mischaracterization and falsification of the record. 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 to Plfs.’ Mot. Summ. J. at 92:10–96:5, 103:20–104:2.* Inspector Gonzalez testified that when he called the police after seeing what he believed to be drug paraphernalia, he “d[id]n’t remember” how he felt about the situation. *Alex Gonzalez Dep. Tr. Ex. 12 to Plfs.’ Mot. Summ. J. at 31:19.* At no point did he suggest that he felt fear for his safety, and he testified that he would not call the police in a similar situation in the future. 32:7–8. The Pottstown inspectors have a policy of calling police on tenants, and tenants have been arrested pursuant to that policy. *See Plfs.’ Mot. Summ. J. ¶¶ 79–93.* The Pottstown Police Department has access to the tenant data collected through the inspection program. *K. Place Designee, II Ex. 11, 169:18–21.* 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. *See Docket No. 189.*

Finally, Plaintiffs did in fact plead this. *See First Am. Compl. ¶ 64 (“Nothing in the Ordinances prevents inspectors from bringing police into tenants’ homes or from sharing information with law enforcement or any other person.”).*

38. The evidence, taken in a light most favorable to Plaintiffs fails to support such an argument. For example, there is no police policy about interacting with the Licensing and Inspection Department (N.T. Chief M. Markovich, Ex. DD May 4, 2023, p. 21); he is unaware that any collaboration between inspections and police helped with any criminal investigations (p. 26); inspectors may contact police if they feel unsafe or in a dangerous situation (p.22). And historically, Chief Markovich was aware of an occasion where an inspector contacted the police indicating they stumbled upon a drug house, with cameras, multiple people in the rooms and drugs out in the open. Ex. DD at p. 40. **Mem. Supp. Mot. Summ. J. p. 28, §VI(B)(2)(iv).**

**RESPONSE: Denied. See paragraph 37 above.**

39. While Plaintiffs may attempt to paint a narrative of inspectors as an arm of the police department, not only is this denied, but Plaintiffs have presented no evidence of the same. The times inspectors called were due to safety concerns drugs were seen, but as Chief Markovich noted, anytime one observes drugs or a supplier of drugs, it could be a dangerous situation. Ex. DD at p. 25. This also is borne out by



Sgt. Kropp's email to Ms. Drobins that their safety is the utmost concern. See, Ex. EE. **Mem. Supp. Mot. Summ. J. p. 28, §VI(B)(2)(iv).**

**RESPONSE: Denied. See paragraph 37 above.**

40. Further, the inspection process itself does not violate personal privacy rights. Inspectors are not at rental units to scrutinize a tenant's way of life; rather, the Inspectors are there merely to ensure there is no safety code violation (Gonzalez Dep., Ex. N at pg. 42, ln. 4-7). When Inspectors complete their duties, they do not talk about what they see in other people's homes (Drobins Dep., Ex. Q at pg. 101, ln. 15-24 pg. 102, ln. 1-2). The only time Inspectors discuss what is seen in a tenant's home is with each other as it relates to a code violation (Id.). Inspectors do not search under tenant's beds or move items (other than a gas stove to ensure there is a shut-off valve) (Place (Corporate Designee) Dep., Ex H at pg. 91, ln. 1-4; Place (Individual Capacity), Ex. K at pg. 259, pg. 7-24 pg. 260, ln. 1-10). If there is a light in a closet (which requires permanent covers), the Inspector will open the closet only to ensure there is a permanent cover. (Place (Corporate Designee) Dep., Ex Hat pg. 124-125). Inspectors are not "searching" through tenant's personal items as Plaintiffs allege. Inspectors do not look in/under cabinets unless there is a life safety issue that needs to be inspected (i.e., plumbing). The primary function of the Ordinances is to determine if the unit is habitable and meets life safety criteria such as safety in electrical systems, fire extinguishers, smoke detectors, and deadbolt latch systems (Place (Individual Capacity) Dep., Ex. K at pg. 36, ln. 10-24 pg. 37, ln. 1-4). Inspections are not searching for criminal activity or paraphernalia as that is not within the scope of the inspections. **Mem. Supp. Mot. Summ. J. pp. 33-34, §VI(B)(iii).**

**RESPONSE: Denied. See paragraph 37 above.**

41. To the extent that tenants have items that they would not want an Inspector to see (i.e., religious items, lifestyle items, etc.), the landlords and tenants are provided with advance notice of the date and time of the inspection. Therefore, any argument that personal items viewed violate a tenant's right to privacy is undermined by the advance notice provided by the Ordinances. **Mem. Supp. Mot. Summ. J. p. 34, §VI(B)(iii).**

**RESPONSE: Denied. The Borough conducts inspections on people with severe disabilities who may not be physically able to move sensitive items. Alex Gonzalez Dep. Tr. Ex. 12 to Plfs.' Mot. Summ. J. 90:5-92:3. The Borough places the burden on citizens to anticipate every conceivable thing to hide things from the inspectors' prying eyes. It erroneously assumes that all tenants will have notice of an inspection. It is also based on a faulty presumption that every rental home will have enough storage space to hide such items. And nothing stops inspectors from opening storage spaces to**

look anyway. Because the Borough gives notice to landlord and not tenants, many tenants will not even know that they should be hiding things.

42. Mr. Camburn's testimony clearly demonstrates that neither he nor his tenants have an issue with granting access to the Inspectors after a Camara-type administrative warrant is obtained (Camburn Dep., Ex. T at pg. 93, ln. 15-25 pg. 94, ln. 1-4; pg. 109, ln 23-25; pg. 110, ln. 1). For the Camburn tenants who do not provide consent for entry without an administrative warrant, Mr. Camburn provides a template of how tenants may request an administrative warrant (Camburn Dep. Ex. T at pg. 92, ln. 11-25 pg. 93, ln. 1-9; see also, Administrative Warrants, Ex. R; Ex. U; Requests for Warrants). Of Mr. Camburn's 28 rental properties (approximately), there have been numerous instances wherein an administrative warrant was obtained, and the inspection occurred thereafter (Camburn Dep., Ex. T at pg. 10, ln. 5-16). Curiously, Camburn along with his tenants (and other Landlords) advised Pottstown that once an administrative warrant is obtained, they will coordinate with a date/time for the inspection to occur. Plaintiffs cannot have it both ways. They can't complain an administrative warrant based on less than individualized probable cause is insufficient, but then agree to the inspection based upon the reduced protections. **Mem. Supp. Mot. Summ. J. pp. 34–35, § VI(B)(iii).**

**RESPONSE:** Denied in part. Camburn and his tenants testified unequivocally that they do not want these inspections. See Dottie Rivera Dep. Tr. Ex. 2 to Plfs.' Mot. Summ. J. at 76:19–21; 78:16–17; 91:4–9; Eddy Omar Rivera Dep. Tr. Ex 3 to Plfs.' Mot. Summ. J. at 23:16–25; Camburn Ex. 1 to Plfs.' Mot. Summ. J. at 115:16–25; 128:24–129:2. They would have been risking arrest and possible violence to deny entry after a search warrant has been signed, which they are not required to do to vindicate their rights. The Commonwealth Court already held in this case that requiring tenants to submit to searches prior to challenging them would “render Tenants’ Article I, Section 8 privacy rights illusory.” *Rivera v. Borough of Pottstown*, No. 722 C.D. 2019, 2020 WL 57181, at \*4 (Pa. Commw. Ct. Jan. 6, 2020). So too would requiring the kind of confrontational brinkmanship—resisting arrest—the Borough cavalierly proposes. Also, if inspectors were not allowed in the rental, there is always the threat the Borough would tag the house and the tenants would need to move—thus risking loss of the roof over their head. See Code § 5-801(B) (revocation of rental license for refusal to comply with inspection).

By way of further response, the Pottstown Police Department's collaboration with Pottstown's Licensing and Inspection Department is not part of the ordinance. Administrative warrants are purposely being requested, and granted, without the entire probable cause, scope of search, and access by law enforcement being stated.

DATED: August 29, 2023

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

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

*Attorneys for Plaintiffs*

*\*Admitted Pro Hac Vice*

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' Response in Opposition to Defendants' Motion for Summary Judgment, Memorandum in Support*, 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:

Ms. Sheryl Brown, Esq.  
Ms. Connie Henderson, Esq.  
Siana, Bellwoar, & McAndrew  
941 Pottstown Pike, Suite 200  
Chester Springs, PA 19425  
slbrown@sianalaw.com  
cehenderson@sianalaw.com

DATED: August 29, 2023 By:

/s/ Michael F. Faherty  
**FAHERTY LAW FIRM**  
Michael F. Faherty (No. 55860)  
75 Cedar Avenue  
Hershey, PA 17033  
Email: mfaherty@fahertylawfirm.com  
Tel: (717) 256-3000  
Fax: (717) 256-3001

*Attorney for Plaintiffs*

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,  
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ROSEMARIE O'CONNOR, an  
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Plaintiffs,

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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

**[PROPOSED] ORDER**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2023, upon consideration of  
*Plaintiffs' and Defendants' Cross Motions for Summary Judgment and Responses*  
thereto, the Court hereby orders *that Plaintiffs' Motion for Summary Judgment* is  
**GRANTED** and *Defendants' Motion for Summary Judgment* is **DENIED**.

IT IS further **ORDERED, ADJUDGED AND DECREED** that:

1. 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. The Borough is permanently enjoined 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. Plaintiffs are awarded the costs and expenses of this action together with reasonable attorneys' fees in an amount to be determined.
4. The Court shall retain jurisdiction to enforce the terms of this Judgment.

Dated: \_\_\_\_ day of \_\_\_\_\_, 2023.

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*Hon. Richard P. Haaz*

**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  
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O'CONNOR, an Individual, and  
STEVEN CAMBURN, an Individual,

Plaintiffs,

v.

BOROUGH OF POTTSTOWN, and  
KEITH A. PLACE, in his official  
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Licensing and Inspections,

Defendants.

COURT OF COMMON PLEAS

CIVIL ACTION NO: 2017-04992

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR  
RESPONSE IN OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**



## TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. MATTERS BEFORE THE COURT.....	3
III. RE-STATEMENT OF QUESTIONS PRESENTED.....	3
IV. FACTS.....	4
V. ARGUMENT .....	6
A. Y. W.-B. Does Not Control This Case. ....	7
B. Kathy and Rose O'Connor Have Standing.....	10
C. Camburn and the Riveras Have Not Consented to Rental Inspections.....	13
D. The Ordinance Is Not “Facially Valid” and Neither Article I, Section I Nor the Landlord-Tenant Act Applies.....	16
E. The Claim Against Keith Place Is Valid and He Is Not Immune. ....	18
F. The Borough’s <i>Edmunds</i> Analysis Is Flawed. ....	21
VI. CONCLUSION.....	26
VII. RELIEF.....	26

TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Berwick Area Landlord Ass’n v. Borough of Berwick</i> , 48 A.3d 524 (Pa. Commw. Ct. 2012) .....	17
<i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968) .....	14
<i>Camara v. Mun. Ct.</i> , 387 U.S. 523 (1967) .....	1, 2, 8, 25
<i>Carroll v. Ringgold Educ. Ass’n</i> , 680 A.2d 1137 (Pa. 1996).....	13
<i>Commonwealth v. Am. States Ins. Co.</i> , 588 A.2d 1320 (Pa. Commw. Ct. 1990), <i>aff’d</i> , 526 Pa. 457 (1991).....	4
<i>Commonwealth v. Cuff</i> , No. 2160 MDA 2013, 2014 WL 10802678 (Pa. Super. Ct. Nov. 10, 2014).....	15
<i>Commonwealth v. Edmunds</i> , 586 A.2d 887 (Pa. 1991).....	3, 7, 21, 24
<i>Commonwealth v. Shaffer</i> , 209 A.3d 957 (Pa. 2019).....	16
<i>Emerson v. Cochran</i> , 4 A. 498 (Pa. 1886).....	22
<i>Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.</i> , 528 U.S. 167 (2000) .....	11
<i>Good v. Dauphin Cnty. Soc. Servs. for Children &amp; Youth</i> , 891 F.2d 1087 (3d Cir. 1989).....	8–9
<i>Greenacres Apartments, Inc. v. Bristol Twp.</i> , 482 A.2d 1356 (Pa. Commw. Ct. 1984) .....	17
<i>Heicklen v. Hoffman</i> , 761 A.2d 207 (Pa. Commw. Ct. 2000) .....	20

<i>In re \$300,000 in U.S. Currency,</i> 259 A.3d 1051 (Pa. Commw. Ct. 2021) .....	12
<i>In re Y.W.-B,</i> 265 A.3d 602 (Pa. 2021).....	2, 6–10
<i>Lange v. California,</i> 141 S. Ct. 2011 (2021) .....	10
<i>McSwain v. Commonwealth,</i> 520 A.2d 527 (Pa. Commw. Ct. 1987) .....	17
<i>Moser v. Bret Harte Union High Sch. Dist.,</i> 366 F. Supp. 2d 944 (E.D. Cal. 2005).....	4
<i>Nixon v. Commonwealth,</i> 839 A.2d 277 (Pa. 2003).....	17
<i>Ouachita Watch League v. Jacobs,</i> 463 F.3d 1163 (11th Cir. 2006) .....	11
<i>Payton v. New York,</i> 445 U.S. 573 (1980) .....	23
<i>Reichley ex rel. Wall v. N. Penn Sch. Dist.,</i> 626 A.2d 123 (Pa. 1993).....	12, 13
<i>Rivera v. Borough of Pottstown,</i> No. 722 C.D. 2019, 2020 WL 57181 (Pa. Commw. Ct. Jan. 6, 2020).....	12, 14, 19, 25
<i>Simpson v. City of New Castle,</i> 740 A.2d 287 (Pa. Commw. Ct. 1999) .....	17
<i>State v. Brown,</i> 840 N.E.2d 411 (Ind. Ct. App. 2006).....	23
<i>Town of McCandless v. McCandless Police Officers Ass’n,</i> 901 A.2d 991 (Pa. 2006).....	11
<i>Warren v. City of Philadelphia,</i> 115 A.2d 218 (Pa. 1955).....	18

<i>Watkins v. Pa. Dep't of Corr.</i> , 196 A.3d 272 (Pa. Commw. Ct. 2018) .....	19
--	----

## CONSTITUTIONAL PROVISIONS

Pa. Const. art. I, § 1 .....	2, 3, 16, 17
Pa. Const. art. I, § 8 .....	<i>passim</i>
U.S. Const. amend. IV .....	<i>passim</i>

## STATUTES, REGULATIONS, AND CODES

1 Standard Pa. Prac. 2d § 2:256 .....	16
8 Pa Cons. Stat. § 1006(4) .....	20
15 Standard Pa. Prac. 2d § 83:298 .....	12
42 Pa. Cons. Stat. §§ 8545; 8546; 8550 .....	20
Phila., Pa. Code § 9-804(2)(a)–(b) .....	24
Pottstown Code of Ordinances § 5-801(B) .....	15
Pottstown Code of Ordinances §§ 5-801–5-809; 11-201–11-206 .....	25, 26

## OTHER AUTHORITIES

Quinlan, <i>Landlords: Do Not Let the Bedbugs Bite</i> , Landlord Tenant Law Bulletin art. 7 (Feb. 2011) .....	5
Russell L. Weaver, <i>Administrative Searches, Technology and Personal Privacy</i> , 22 Wm. & Mary Bill Rts. J. 571 (2013) .....	23
Samuel R. Gilbert, <i>Don't Let Them Bite: Defining the Responsibilities of Landlords and Tenants in the Event of a Bedbug Infestation</i> , 80 Geo. Wash. L. Rev. 243 (2011) .....	5
<i>Search Warrant</i> , John Bouvier, <i>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</i> (1839) .....	21–22

Warrant, Richard Burn, <i>A New Law Dictionary: Intended for General Use, as well as for Gentlemen of the     Profession</i> (1792).....	21
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Pursuant to the Court’s Scheduling Order (Docket No. 193), Plaintiffs Dorothy and Eddy Omar Rivera, Steven Camburn, Kathleen O’Connor, Rosemarie O’Connor, and the Estate of Thomas O’Connor (the “Plaintiffs”) respectfully submit this memorandum of law in opposition to Defendant Borough of Pottstown and Keith Place’s (collectively the “Borough”; “Place” where identified separately) Motion for Summary Judgment and Memorandum in Support (Docket No. 205).

## I. INTRODUCTION

1. There is no factual battle to fight with the Borough’s Motion for Summary Judgment—the record unequivocally shows that the Borough conducts suspicionless, intrusive, non-consensual interior home inspections. Nothing in the Borough’s motion contradicts this. As Plaintiffs show in their separate response to the Borough’s factual averments, many of the Borough’s assertions to the contrary are not facts at all, let alone disputed or material. The Borough disclosed no expert reports contradicting Plaintiffs’ empirical analysis of the inspection program and the psychological importance of privacy. That leaves only the parties’ legal positions—specifically, the degree of probable cause required for administrative warrants—for this Court to resolve.

2. The Borough’s legal arguments are all at odds with the Pennsylvania Supreme Court’s Article 1, Section 8 jurisprudence. The Borough concedes, as it must, that this is a case of first impression.<sup>1</sup> So, the Borough turns away from what is at

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<sup>1</sup> See Borough Mot. Summ. J. ¶¶ 36–37 (“[I]n the over 50 years since *Camara* was issued, no Pennsylvania Court has provided greater protections pursuant to

stake in this case, and seizes on dicta in *In re Y.W.-B*, 265 A.3d 602 (Pa. 2021), to argue that searches of tenants' homes are subject to reduced Article I, Section 8 protections. But *Y.W.-B* held nothing of the sort. After emphasizing that “the home is first among equals” and that searches “inside a home without a warrant are presumptively unreasonable,” *id.* at 618 (citations omitted), the Court held that federal caselaw concerning administrative searches simply had “no application” to the search at issue in that case, which was targeted at a specific individual for specific reasons. *Id.* at 622. When a court distinguishes a precedent from the case at hand, the court is not approving of that precedent—it is explaining that the precedent is irrelevant.

3. Finding no support in Article I, Section 8, the Borough attempts to obtain summary judgment based on Article I, Section 1 and its “rational basis test,” which was not pleaded here and has nothing to do with this case. The Borough’s prolific arsenal of non-starter arguments also includes: seeking to rearrange the parties—dropping Kathy and Rose O’Connor and Defendant Keith Place; and arguing that Plaintiffs “consented” to searches by scheduling them in the face of a search warrant. But these arguments have no support in the law or the facts.

4. Because the undisputed facts establish that the Borough enters homes without consent or probable cause, and because the Borough is liable for that policy,

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Article I, Section 8. Conversely, Pennsylvania Courts have tacitly approved *Camara*. . . . Nor can Plaintiffs direct this Court to any Pennsylvania decision since the 1967 *Camara* decision which has expanded Article 1, Section 8 protections as it relates to administrative warrants for the inspections of rental properties.”).

Plaintiffs' motion for summary judgment should be granted, and the Borough's motion denied.

## II. MATTERS BEFORE THE COURT

5. Plaintiffs' and Defendants' Cross-Motions for Summary Judgment.  
Docket Nos. 205–206.

## III. RE-STATEMENT OF QUESTIONS PRESENTED

6. Is the Borough correct that “dragnet” searches of private homes are acceptable under Article I, Section 8 of the Pennsylvania Constitution? *Suggested Answer: No.*

7. Do Kathy and Rose O'Connor have standing to pursue their constitutional claim? *Suggested Answer: Yes.*

8. Did Plaintiffs consent to the challenged searches? *Suggested Answer: No.*

9. Is Article I, Section 1 of the Pennsylvania Constitution at issue? *Suggested Answer: No.*

10. Is Article I, Section 8 of the Pennsylvania Constitution less protective of privacy than the Fourth Amendment under *Edmunds*? *Suggested Answer: No.*

11. Is Keith Place immune from suit? *Suggested Answer: No.*



#### IV. FACTS

12. Plaintiffs incorporate herein by reference their Motion for Summary Judgment and Brief in Support thereof, which set forth the operative, undisputed facts.

13. The Borough presents a strained, cynical version of the facts, which, as demonstrated by the record, are often mischaracterized and certainly not “genuine.” *See Moser v. Bret Harte Union High Sch. Dist.*, 366 F. Supp. 2d 944, 987 (E.D. Cal. 2005) (sanctioning party for mischaracterizations of evidence on summary judgment).

14. Plaintiffs’ Response addresses the Borough’s various factual misstatements line-by-line. At bottom though, there is simply no dispute that the inspections are highly invasive, conducted against tenant consent and out of proportion to the de minimis government need.

15. “The mere existence of some *alleged* factual dispute between the parties need not preclude disposition by an otherwise properly supported motion for summary judgment. Summary judgment is appropriately entered when there are no ‘genuine’ issues of material fact.” *Commonwealth v. Am. States Ins. Co.*, 588 A.2d 1320, 1321 n.2 (Pa. Commw. Ct. 1990), *aff’d*, 526 Pa. 457 (1991) (cleaned up; emphasis added) (ruling on cross-motions for summary judgment).

16. The Borough also adds new facts for the first time in its memorandum, which show that the challenged inspections are even more invasive than Plaintiffs previously realized.

17. The Borough now reveals, for example, that inspectors search for bedbugs. Borough Mem. Supp. Summ. J. (“Mem.”) 25 (“[A]n external inspection cannot determine plumbing issues, electrical issues, smoke detector issues, fire hazards, mold, and bed bugs . . . Without periodic inspections, there are no reasonable means in which Pottstown could employ to ensure and promote safe living conditions.”).

18. Searching for bed bugs is one of the most invasive known searches—requiring examination of either a tenant’s bare skin or bedsheets. *See* 32 No. 2 Quinlan, *Landlords: Do Not Let the Bedbugs Bite*, Landlord Tenant Law Bulletin art. 7 (Feb. 2011). (“Unfortunately for landlords and tenants, bedbugs are ‘elusive’ and usually nocturnal. They can be detected by bites, as well as fecal spots and blood smears on sheets.”); Samuel R. Gilbert, *Don’t Let Them Bite: Defining the Responsibilities of Landlords and Tenants in the Event of a Bedbug Infestation*, 80 Geo. Wash. L. Rev. 243, 248 (2011) (“The inconsistency of human reactions to bites, coupled with the bugs’ small size and expertise at hiding, make confirming the origin, extent, or even existence of an infestation quite difficult[.]”).<sup>2</sup>

19. The Borough cannot dispute that inspectors look in closets, call the police on tenants, observe religious information, and marital aids such as sex toys. *See* Plfs.’ Mem. Supp. Summ. J. ¶¶ 70, 72, 73, 81–93.

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<sup>2</sup> “Bedbugs are ‘experts at hiding.’ They are as thin as a credit card and no longer than a pencil eraser. During the day, they conceal themselves in mattress seams, bed frames, cracks and crevices, clutter, wallpaper, or anywhere their small flat bodies can fit.” *Id.* at 247 (footnotes omitted).

20. The Borough's only response to these undisputed invasions of privacy is that "to the extent that tenants have items that they would not want an Inspector to see (i.e., religious items, lifestyle items, etc.), the landlords and tenants are provided with advance notice of the date and time of the inspection. Therefore, any argument that personal items viewed violate a tenant's right to privacy is undermined by the advance notice provided by the Ordinances." Mem. 34.

21. The Borough's flippant argument not only concedes that it invades privacy; it also places the burden on citizens to anticipate every conceivable thing to hide things from the inspectors' prying eyes. It is based on a faulty presumption that every rental home will have enough storage space to hide such items. And of course nothing stops inspectors from opening storage spaces to look anyway—where are tenants to hide their private items? In the closets that the inspectors open? Under the beds that the inspectors closely examine down to the sheets?

22. The Borough also ignores the fact that it conducts inspections on people with severe disabilities who may not be physically able to move sensitive items. Alex Gonzalez Dep. Tr. Ex. 12 to Plfs.' Mot. Summ. J. 90:5–92:3.

23. Now that the dust has settled following discovery, the parties do agree on one thing—this case is ready for a constitutional ruling from this Court.

## V. ARGUMENT

24. In Section A, Plaintiffs will show that the Borough's reliance on *In re Y.W.-B* is in the teeth of all Article I, Section 8 jurisprudence—and even the Court's decision in *Y.W.-B*. itself. The Borough also attempts to exploit the death of Mr.

O'Connor to say that Kathy and Rose O'Connor do not have standing to obtain constitutional redress for an attempted warrantless search of their home. In Section B, Plaintiffs will show that this is absolutely not the case. Pennsylvania courts uniformly hold that an ultimate constitutional question is not mooted by an issue capable of repetition yet evading review. In Section C, Plaintiffs will show that complying with a search warrant is a far cry from “consent” to a search. Plaintiffs in Section D will—for the second time in this case—show why the Borough’s “rational basis” arguments seem to be addressing another case altogether. In Section E, Plaintiffs will refute the Borough’s argument that Keith Place should be dismissed. Finally, in Section F, Plaintiffs will show that the Borough’s *Edmunds* analysis is wrong.

**A. Y.W.-B. Does Not Control This Case.**

25. The Borough asserts “that the Pennsylvania Supreme Court has already determined that ‘administrative searches’ inclusive of ‘dragnet searches’ (e.g., rental inspections) and those with a reduced expectation of privacy, are ‘entitled to reduced Fourth Amendment and Article I, Section 8 protections.’” Mem. 1–2 (emphasis omitted) (citing *In re Y.W.-B*, 265 A.3d 602 (Pa. 2021)). The Borough is mistaken. If anything, the case is helpful to Plaintiffs.

26. In *Y.W.-B.*, the Pennsylvania Supreme Court held that, under both the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution, the government needs a warrant supported by individualized probable cause before it can conduct a non-consensual child welfare home visit. The government, for its part,

agreed that individualized probable cause was necessary, but it argued that the standard should be significantly relaxed in comparison to the criminal standard. *Id.* at 619. The Pennsylvania Supreme Court rejected this argument, holding that “nothing short of probable cause, guided by the traditional principles that govern its federal and state constitutional limitations, will suffice when a trial court makes a determination as to whether or not to authorize a home visit.” *Id.* at 625. There are at least four reasons why *Y.W.-B.* does not support the Borough’s position.

27. First, *Y.W.-B.* did not address, even in dicta, the only legal question in this case: Whether Pennsylvania’s constitution should be interpreted as more protective of privacy than the Fourth Amendment in the context of residential housing inspections. To be sure, the court discussed the U.S. Supreme Court’s *Camara* decision, and dragnet searches more generally, but it did so merely to explain why those precedents did not apply to the facts of the case, where the government was trying to search a particular house for a particular reason. *Id.* at 622 (“*Camara* has no application with respect to home visits to investigate allegations of child neglect.”). The Court did not say that it agreed with *Camara* and its progeny; it simply explained that the facts of those cases were different and that those courts relied on justifications which, by their terms, did not apply in the context of child welfare home visits. This is unsurprising: Courts do not typically go out of their way to say whether they agree or disagree with cases that wouldn’t apply regardless of whether they’re good law.

28. Second, in reaching its decision, the Pennsylvania Supreme Court relied almost entirely on federal law, particularly the Third Circuit’s opinion in *Good*

*v. Dauphin County Social Services for Children & Youth*, 891 F.2d 1087 (3d Cir. 1989). Although the *Y.W.-B.* petitioner did advance a claim that Article I, Section 8 of the Pennsylvania Constitution was more protective than the Fourth Amendment, because she prevailed *even* under the Fourth Amendment, the majority “t[ook] no position, one way or the other” on the Pennsylvania Constitution. *Y.W.-B.*, 265 A.3d at 514 n.11. Justice Dougherty, however, would have treated the Pennsylvania claim as waived because it was insufficiently developed. *Id.* at 636 n.2 (Dougherty, J., concurring) (“[P]reservation of a claim seeking departure from federal constitutional law requires an appellant to assert and develop . . . why the state constitutional provision at issue should be interpreted more expansively than its federal counterpart. . . . As a result, to the extent necessary for resolution of this case, I view federal Fourth Amendment jurisprudence, and our cases interpreting Article I, Section 8 as coterminous with its federal counterpart, as appropriate binding precedent.”).

29. In the present case, of course, the Article I, Section 8 claim is squarely before this court, and Plaintiffs have offered a fully “assert[ed] and develop[ed]” argument about why the Pennsylvania Constitution is more protective than its federal counterpart. When such an argument is fully developed *and* where the Fourth Amendment would not apply, Pennsylvania courts take those arguments seriously. *See* Plfs.’ Mem. Supp. Summ. J. 49–56.

30. Third, to the extent that the Pennsylvania Supreme Court’s analysis bears on the constitutionality of Pottstown’s rental inspection program, it is actually helpful to the plaintiffs here.

31. The Court began its analysis with a series of citations to cases emphasizing the constitutional sanctity of the home:

When it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core, we have said, stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion. Or again: freedom in one's own dwelling is the archetype of the privacy protection secured by the Fourth Amendment; conversely, physical entry of the home is the chief evil against which it is directed. The Amendment thus draws a firm line at the entrance to the house.

*Y.W.-B.*, 265 A.3d at 617–18 (cleaned up) (quoting *Lange v. California*, 141 S. Ct. 2011, 2018 (2021), and collecting cases). The court also reaffirmed the “basic principle . . . that the requirement of probable cause to permit entry into a private home is not excused based upon any relative perceived societal importance.” *Id.* at 619. This makes sense—if probable cause is needed to search for murderers or kidnapping victims, surely it should also be needed to check the batteries on a smoke detector.

32. Finally, the court noted that the home visit at issue in the case “could result in criminal charges for child abuse.” *Id.* at 624. The record in the present case similarly demonstrates that rental inspections can and do lead to criminal charges. See Plfs.’ Mem. Supp. Summ. J. ¶ 130. While reading judicial tea leaves is always a hazardous endeavor, it is difficult to see how the court that wrote *Y.W.-B.* could also uphold the invasive and entirely unnecessary home inspection program at issue in this case.

#### **B. Kathy and Rose O’Connor Have Standing.**

33. The Borough argues, without citing any legal authority, that because Thomas O’Connor, the owner of both 462 and 466 N. Franklin Street at the time this

lawsuit commenced, passed away in late 2022, and because Kathy and Rose O'Connor are beneficiaries of his estate, with no current intention to rent 466 N Franklin Street, "they have no standing to seek relief as they are not subject to Pottstown's rental inspection program." Mem. 11–12. The Borough is flatly wrong. As Plaintiffs pointed out in their factual response, Kathy and Rose O'Connor testified that they were unsure whether they would rent in the future. *See* Factual Response ¶ 36. The Borough is also wrong a matter of law.

34. First, the Borough confuses mootness and standing. Although the concepts are "related," they are not the same. *Town of McCandless v. McCandless Police Officers Ass'n*, 901 A.2d 991, 1002 (Pa. 2006). A plaintiff must have standing to initiate litigation, but if the controversy ends during the course of litigation, it may *sometimes* become moot. Crucially, however, mootness is a far higher bar:

Standing doctrine functions to ensure, among other things, that the scarce resources of the . . . courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal.

*Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 191–92, (2000); *see also Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1175 (11th Cir. 2006) ("[T]he goes to the runner in the mootness inquiry[.]"). In other words, even if intervening events have modified the controversy, such that a plaintiff would no longer have standing to *initiate* a new suit, that is not sufficient to moot a suit that has already been litigated for years.



35. The “standing” issue in this case is settled. The Commonwealth Court already determined that the Borough has applied the Ordinance to the O’Connors, and that they had standing to challenge it: “Tenants received notice of inspections under the Borough’s inspection ordinance, and upon their refusal to allow the inspections voluntarily, the Borough sought and obtained administrative warrants<sup>[3]</sup> in an attempt to compel the inspections despite Tenants’ objections. The Borough is clearly applying its ordinance, and Tenants are clearly being affected individually by it.” *Rivera v. Borough of Pottstown*, No. 722 C.D. 2019, 2020 WL 57181, at \*4 (Pa. Commw. Ct. Jan. 6, 2020).

36. In addition, cases may not be dismissed as moot “where the conduct complained of is capable of repetition yet likely to evade review,” or “where the case involves issues important to the public interest.” *In re \$300,000 in U.S. Currency*, 259 A.3d 1051, 1056–57 (Pa. Commw. Ct. 2021); *see also Reichley ex rel. Wall v. N. Penn Sch. Dist.*, 626 A.2d 123, 126 (Pa. 1993). Both exceptions apply here. *See* 15 Standard Pennsylvania Practice 2d § 83:298 (“Where an injunction action involves restraining the government from enforcing a statute or rule that the plaintiffs, who otherwise enjoy standing to sue, contend is unconstitutional, the resolution of the immediate dispute between the parties does not deprive the plaintiffs of standing to obtain a court ruling on the ultimate constitutional[] question.”).

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<sup>3</sup> In fact, as explained in Plaintiffs’ opening brief, the O’Connors, unlike the Riveras, were actually subjected to an attempted *warrantless* search of their home. *See* Plfs.’ Mem. Supp. Summ. J. ¶ 44.

37. The *Reichley* court elaborated that “[g]iven the time involved in the hearing and deciding of cases, it is virtually certain that any teachers’ strike would either be resolved through negotiation or be enjoined on a finding of clear and present danger before full appellate review of the constitutional question could be had. We have previously decided that *mootness does not prevent the court from resolving such questions.*” *Reichley*, 626 A.2d at 126 (emphasis added.)

38. This case, like *Reichley*, involves an extensive litigation timeline (six years and counting) and the population involved—renters and other non-owner occupants—may have their claims mooted by a move before the end of the lengthy case timeline. *See also Carroll v. Ringgold Educ. Ass’n*, 680 A.2d 1137, 1140 (Pa. 1996) (“[W]hile this appeal presents a matter which is technically moot since the 1993–1994 school year has ended and the parties allegedly have entered a successor agreement, this appeal presents a question which is capable of repetition, but likely to evade review, which we should address on its merits.”).

39. The Borough cites no authority—because none exists—that supports its extreme suspension of Pennsylvania mootness jurisprudence, one that would freeze out legitimate constitutional claims.

40. Moreover, dismissing the O’Connors from this action would serve no purpose at this point because there is no question that the dispute remains live as to the other plaintiffs.

41. The O’Connors’ claim is thus validly before this Court.

**C. Camburn and the Riveras Have Not Consented to Rental Inspections.**

42. Notwithstanding that all the Plaintiffs in this case unambiguously testified that they do not want the Borough's inspectors entering their homes, the Borough asserts that they have "consented" to have their homes searched because they represented that they would only allow such a search once the Borough had obtained an administrative warrant. Mem. 35 ("Plaintiffs cannot have it both ways. They can't complain an administrative warrant based on less than individualized probable cause is insufficient, but then agree to the inspection based upon the reduced protections.").

43. But, of course, Plaintiffs were merely representing that they would submit to the Borough's authority, while continuing to do what they can to vindicate their rights. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) ("When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search . . . .Where there is coercion there cannot be consent."); *see also Rivera*, 2020 WL 57181, at \*4 ("Tenants received notice of inspections under the Borough's inspection ordinance, and upon their refusal to allow the inspections voluntarily, the Borough sought and obtained administrative warrants *in an attempt to compel the inspections despite Tenants' objections.*" (emphasis added)).

44. If Plaintiffs had attempted to deny entry to their homes, they would have been risking arrest and possible violence, which they are not required to do to vindicate their rights. The Commonwealth Court already held in this case that

requiring tenants to submit to searches prior to challenging them would “render Tenants’ Article I, Section 8 privacy rights illusory.” *Rivera*, 2020 WL 57181, at \*4. So too would requiring the kind of confrontational brinkmanship—resisting arrest—the Borough cavalierly proposes. Also, if inspectors were not allowed in the rental, there is always the threat the Borough would tag the house and the tenants would need to move—thus risking loss of the roof over their head. *See* Code § 5-801(B) (revocation of rental license for refusal to comply with inspection).

45. The Borough is dead wrong to suggest that the proper way to challenge the legality of government action is to physically resist before filing suit. *Cf. Commonwealth v. Cuff*, No. 2160 MDA 2013, 2014 WL 10802678, at \*4 n.2 (Pa. Super. Ct. Nov. 10, 2014) (“Under modern Pennsylvania law, one has no right to resist arrest, even if the arrest is unlawful.”).

46. The Borough makes a similarly absurd argument that Camburn’s “entry into a rental unit to inspect the premises, or the entry of a landlord-hired handyman, is no greater level of intrusion than a Borough Inspector entering a rental unit to ensure code compliance.” Mem. 34.

47. This issue has already been thoroughly briefed when the Borough attempted to obtain every one of Camburn’s leases. *See* Borough Mot. Compel, Docket No. 196, denied by, Order, Docket No. 201.

48. As Plaintiffs already explained, Mr. Camburn is not appearing at his tenants’ homes in the capacity of a government agent—he is approaching as a

landlord, conducting repairs at his tenants' request. *See* Resp. Mot. Compel, Docket No. 200.

49. Plaintiffs challenge inspections that are non-consensual and performed by the government. *See* First Am. Compl. ¶ 3 (“Plaintiffs . . . unite[] in this lawsuit to . . . vindicate their state constitutional rights to be free from unreasonable government searches.”). And the Pennsylvania Supreme Court has made clear that “[t]he proscriptions of the Fourth Amendment and Article I, § 8, do not apply to searches and seizures conducted by private individuals.” *Commonwealth v. Shaffer*, 209 A.3d 957, 971 (Pa. 2019) (cleaned up). Nothing about Camburn’s consensual, contractually authorized entries into his tenants’ homes can tell this Court anything about whether the Borough’s non-consensual government searches are lawful or not.

**D. The Ordinance Is Not “Facially Valid” and Neither Article I, Section 1 Nor the Landlord-Tenant Act Applies.**

50. The Borough parts ways with Article I, Section 8, and makes the following, circular argument under Article I, Section 1’s “rational basis” test: “Municipal ordinances are presumed constitutional; therefore, as a matter of law, the Borough’s Ordinances are facially valid.” Mem. 29, 30.

51. The Court already rejected this argument when the Borough asserted it in its Preliminary Objection for Demurrer—contending there that the Ordinance is a

constitutional and permitted use of the Borough's Police Power. *See* Defs.' Br. Supp. Prelim. Objs. (Docket No. 21) at 6–7; Order Overruling Prelim. Objs. (Docket No. 30).<sup>4</sup>

52. As Plaintiffs already explained (Plfs.' Br. Supp. Answer to Prelim. Objs., Docket No. 28 at 38–39) the Borough is attempting to misdirect the Court by invoking a constitutional provision not at issue in this case—Article I, Section 1—in the hopes of travelling under Pennsylvania's due process, rational-basis test. This argument is a non sequitur—Plaintiffs do not challenge the adoption of the rental-inspection ordinances as a violation of due process.

53. Just as it did during the demurrer phase, the Borough cites a smokescreen of rational basis cases that do not involve Article 1, Section 8 claims. *See Berwick Area Landlord Ass'n v. Borough of Berwick*, 48 A.3d 524, 527 (Pa. Commw. Ct. 2012) ("This case involves a challenge to the legality of the Landlord Registration Ordinance . . . because . . . the Ordinance violates substantive due process rights under Article I, Section 1, of the Pennsylvania Constitution.") (cited at Mem. 29); *Nixon v. Commonwealth*, 839 A.2d 277, 282 (Pa. 2003) (involving substantive due process guaranteed under Article I, section 1 of the Pennsylvania Constitution") (cited at Mem. 30); *McSwain v. Commonwealth*, 520 A.2d 527, 528 (Pa. Commw. Ct. 1987) (challenging vacant property ordinance on the ground it violates the Pennsylvania and

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<sup>4</sup> This Court's prior ruling on this same argument is the law of the case and forecloses the Borough's reliance on it here. *See* 1 Standard Pennsylvania Practice 2d § 2:256 ("The law of the case doctrine refers to a family of rules that embody the concept that a court involved in later phases of litigated matter should not reopen questions decided by another judge of the same court.").

United States Constitutions’ due-process provisions, finding Fourth Amendment claim was waived) (cited at Mem. 31).

54. These Article I, Section 1 cases are irrelevant.<sup>5</sup> Every one of those cases involved the basic legislative authority for a Pennsylvania borough to pass regulations. Not one of them remotely involved an analysis, let alone a holding, that those laws comported—or not—with independent Article I, Section 8 jurisprudence.

55. The Borough similarly argues, out of the blue, that “municipalities have the power to enact laws relating to landlord and tenant relations as long as the same do not conflict with the Pennsylvania Landlord Tenant Act.” Mem. 29. *See id.* (citing *Warren v. City of Philadelphia*, 115 A.2d 218, 221 (Pa. 1955) (party contended “that the ordinance is invalid because it conflicts with The Landlord and Tenant Act of 1951”)).

56. Nowhere in Plaintiffs’ pleadings or motions, or anywhere, do they argue that the Ordinance conflicts with the Pennsylvania Landlord Tenant Act. This sub-issue is demonstrably a non-starter.

57. Nor do Plaintiffs contend, as the Borough seems to imply, that the Ordinance is unconstitutional because the Borough applies it in a discriminatory manner—for example against a protected class. *See* Mem. 31 (“The rental inspection

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<sup>5</sup> In its rational basis section, the Borough also cites cases involving challenges to the constitutionality of rental-inspection ordinances under federal law, where the landlords have lost. *See* Mem. 31 (citing *Simpson v. City of New Castle*, 740 A.2d 287 (Pa. Commw. Ct. 1999); *Greenacres Apartments, Inc. v. Bristol Twp.*, 482 A.2d 1356 (Pa. Commw. Ct. 1984)). These obviously do not support the Borough’s Article I, Section 1 argument and, as previously explained, having nothing to say about the Article I, Section 8 issue to be decided here.

program is applied in neither an arbitrary nor a discriminatory manner. . . . Therefore, the application of the Ordinances is constitutional.”).

58. Although the Borough surely does discriminate—against Tenants, who are subject to invasive searches as opposed to owner-occupants, who are not—that distinction is not the gravamen of Plaintiffs’ constitutional challenge.

**E. The Claim Against Keith Place Is Valid and He Is Not Immune.**

59. Plaintiffs seek to enjoin Keith Place “from seeking warrants to conduct inspections”—in other words, for Place to stop doing what he is presently doing. (Am. Compl. Req. Relief ¶ B.) This is appropriate injunctive relief.

60. The Commonwealth Court summarized Plaintiffs’ reasoning for including Keith Place in this lawsuit as follows: “[T]hat as the officer responsible for overseeing the enforcement of the Borough’s ordinance provision concerning rental unit inspections, Place is an appropriate defendant in a legal action challenging the validity of those inspections and is not immune from a civil action, such as this one, which seeks only injunctive relief.” *Rivera*, 2020 WL 57181, at \*5.

61. Place now argues that because “Pottstown is a named Defendant, the claims against Defendant Place are redundant and thus moot.” Mem. 35. Place is wrong.

62. First, there is no mootness doctrine called “redundancy,” and no case holding as much. It is unclear what Place means by this, and neither Plaintiffs nor the Court should be forced to engage in guesswork. Moreover, by citing *Watkins v. Pennsylvania Department of Corrections*, 196 A.3d 272, 274 (Pa. Commw. Ct. 2018),



Place fails to grasp the difference between monetary relief (sought there) and injunctive relief (sought here). *Watkins* held that “[b]ecause the complaint asserted *only claims for money damages*, Plaintiffs’ claims against defendants . . . in their official capacity likewise cannot state a cause of action under Section 1983.” *Id.* at 275 (emphasis added). As the Borough concedes in its brief, there is no claim for non-nominal monetary damages here—and no attendant grounds for dismissing Place under *Watkins*. See Mem. 36 (“In addition to Plaintiffs’ request for declaratory judgment, they seek nominal damages of \$1.00.”)

63. Next, Place argues that because, unlike the Borough council, he cannot “enact or create ordinances,” therefore “claims asserted against Place fail as a matter of law.” Mem. 35 (citing 8 Pa Cons. Stat. § 1006(4), which spells out council powers). Again, Place misses the point. Plaintiffs are not seeking an injunction forcing Keith Place to change the law—they are seeking an injunction regarding his *enforcement* of the law. The Borough’s motion for summary judgment is silent on this point.

64. Finally, Place resurrects another previously rejected argument, that “he is entitled to official immunity pursuant to the Pennsylvania Political Subdivision Tort Claims Act.” Mem. 35–36 (citing 42 Pa. Cons. Stat. § 8546; *Heicklen v. Hoffman*, 761 A.2d 207, 209 (Pa. Cmwlth. Ct. 2000)).<sup>6</sup> This Court already rejected this argument in the Borough’s demurrer, see Order, Docket No. 30, making that ruling the law of

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<sup>6</sup> It is not clear what, if any, point Place makes by citing *Heicklen*, as that case involved “judicial immunity to cover the acts of a district justice performed in a judicial capacity.” *Heicklen*, 761 A.2d at 209.

case. In any event, the statute, by its own terms, applies only to claims “for damages,” not claims for declaratory and injunctive relief. 42 Pa. Cons. Stat. §§ 8545, 8546.

65. As Plaintiffs already explained (Plfs.’ Br. Supp. Answer to Prelim. Objs., Docket No. 28 at 41), Section 8545 simply provides for coterminous liability between a municipality and its employee. To prevail, the Borough’s argument for Mr. Place being immune from suit based on Section 8545 would have to rest on government immunity from this suit for the Borough itself. But the Borough makes no claim of immunity—so, again, Place cannot rely on Section 8545 to be dismissed from this action.

#### **F. The Borough’s *Edmunds* Analysis Is Flawed.**

66. Although the Borough purports to apply the correct framework for determining whether the Pennsylvania Constitution is more protective than the U.S. Constitution, its analysis is flawed. *See Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

67. With regard to the text of the Pennsylvania Constitution, the Borough rests its argument on the fact that Article 1, Section 8 and the Fourth Amendment contain similar language. But *Edmunds* itself makes clear that is not the inquiry. *Id.* at 895–96 (“Although the wording of the Pennsylvania Constitution is similar in language to the Fourth Amendment of the United States Constitution, we are not bound to interpret the two provisions as if they were mirror images, even where the text is similar or identical.” (footnote omitted)).

68. The real question, under the “text” prong of *Edmunds*, is what the terms of the Pennsylvania Constitution meant at the time it was adopted. 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.”).

69. Further, probable cause was also understood to require individualized suspicion of a violation of the law. *See Probable Cause*, Bouvier, *supra* (“When there are grounds for suspicion, that a person has committed a crime or misdemeanor, and public justice and the good of the community require that the matter should be examined, there is said to be a probable cause for making a charge against the accused . . . .”); *Emerson v. Cochran*, 4 A. 498, 501 (Pa. 1886) (“Probable cause is

defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty.”).

70. The plain text of Article I, Section 8 thus expressly requires warrants based on individualized probable cause to search a home and personal possessions.

71. As for the history of the Pennsylvania Constitution, the Borough is again confused. The Borough concedes that Article I, Section 8 was specifically intended to prohibit “general warrants,” which allowed for searches of the home without individualized probable cause. Nevertheless, the Borough argues that we should focus instead on the benign motives of its inspectors: Because Pottstown’s rental inspectors are searching homes for the good of the community, rather than searching for subversive or treasonous activity, Pennsylvania courts should bless these searches. Mem. 19–20.

72. The Borough is wrong as a historical matter. General warrants were about ensuring universal compliance with broad administrative requirements—just like Pottstown’s. *See Payton v. New York*, 445 U.S. 573, 608 (1980) (White, J., dissenting) (“[I]t was the abusive use of the warrant power . . . that precipitated the Fourth Amendment. That Amendment grew out of colonial opposition to the infamous general warrants known as writs of assistance, which empowered customs officers to search at will, and to break open receptacles or packages, wherever they suspected uncustomed goods to be.”); *State v. Brown*, 840 N.E.2d 411, 418 (Ind. Ct. App. 2006) (“General warrants were issued by the government typically to control the printing

industry and censor ‘seditious’ publications.” (internal citation omitted)); Russell L. Weaver, *Administrative Searches, Technology and Personal Privacy*, 22 Wm. & Mary Bill Rts. J. 571, 574 (2013) (“During the colonial period, general warrants and writs of assistance were frequently used in the administrative context, particularly in searches conducted by customs officials.”).

73. Moreover, when Pennsylvania adopted its constitution, there were no more agents of the crown to execute general warrants. Pennsylvania still outlawed them—not because such tools might be used by bad people, but because they are inherently wrong, no matter who wields them.

74. With regard to the “policy considerations” prong of *Edmunds*, the Borough has presented no evidence whatsoever that its program is actually necessary to address serious health and safety concerns. The Borough points out that some properties have failed inspections, but it does not claim that the inspections revealed serious life and safety issues requiring immediate attention. Mem. 25. As Plaintiffs’ expert has demonstrated, based on an analysis of over 14,500 rental inspection reports, “there are simply no exigent conditions to justify the intrusive inspections.” Phillips Report Ex. 16 ¶ 68.

75. The Borough points out that some tenants have complained about their landlords—but this is irrelevant in a case about searches being conducted without the consent of the tenant. Nothing about this case would ever stop tenants from consenting to an inspection or even requesting one, if they believe their landlord is not maintaining the property sufficiently.

76. As for the Borough's suggestion that tenants may fear that landlords will retaliate against them if they report code violations, there is also nothing stopping the Borough from making such retaliation illegal and providing remedies to affected tenants. *See, e.g.*, Phila., Pa. Code § 9-804(2)(a)–(b) (“It shall be unlawful for any . . . landlord . . . to terminate a lease with a tenant or make, alter, amend or modify any term or condition of any existing lease . . . in retaliation for: (a) any violation having been found against the premises; (b) the filing of a complaint alleging a violation[.]”).

77. Finally, the Borough's reliance on language in *Camara* about the “unanimous agreement among those most familiar with [the residential inspection] field” is misplaced. Mem. 25 (citing *Camara v. Mun. Ct.*, 387 U.S. 523, 535–36 (1967)). Setting aside whether the Supreme Court's statement was accurate even in 1967, it is not accurate today. Plaintiffs have retained experts who have reviewed voluminous evidence, from the last few years, about this very inspection program. After reviewing that evidence, they do not agree that mandatory rental inspections are necessary or wise. When the Commonwealth Court remanded this case so that the “trial court [c]ould have a full record on which to rule regarding both the facial and as-applied challenges to the Borough's rental inspection ordinance,” *Rivera*, 2020 WL 57181, at \*4, it clearly did not intend for this Court to base its ruling on bald factual assertions made in opinions from over half a century ago; it intended this Court to base its decision on the evidence in this case.

## VI. CONCLUSION

78. For these reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment and deny Defendants' motion for summary judgment.

## VII. 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: August 29, 2023

Respectfully submitted,

/s/ Michael F. Faherty

**FAHERTY LAW FIRM**

Michael F. Faherty (Attorney I.D. No. 55860)

75 Cedar Avenue

Hershey, PA 17033

Email: mfaherty@fahertylawfirm.com

Tel: (717) 256-3000

Fax: (717) 256-3001

**INSTITUTE FOR JUSTICE**

Robert Peccola\*

Jeffrey Redfern\*

Robert McNamara\*

901 North Glebe Road

Suite 900

Arlington, VA 22203

Email: rpeccola@ij.org; jredfern@ij.org;

rmcnamara@ij.org

Tel: (703) 682-9320

Fax: (703) 682-9321

*Attorneys for Plaintiffs*

*\*Admitted Pro Hac Vice*



**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 Their Response in Opposition to Defendants' Motion for 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:

Ms. Sheryl Brown, Esq.  
Ms. Connie Henderson, Esq.  
Siana, Bellwoar, & McAndrew  
941 Pottstown Pike, Suite 200  
Chester Springs, PA 19425  
slbrown@sianalaw.com  
cehenderson@sianalaw.com

DATED: August 29, 2023

By:

/s/ Michael F. Faherty

**FAHERTY LAW FIRM**

Michael F. Faherty (No. 55860)

75 Cedar Avenue

Hershey, PA 17033

Email: mfaherty@fahertylawfirm.com

Tel: (717) 256-3000

Fax: (717) 256-3001

*Attorney for Plaintiffs*