



INSTITUTE FOR JUSTICE

March 9, 2026

Members of Borough Council
Borough of Pottstown
100 E High Street
Pottstown, PA 19464

cc: Matthew Hovey, Esq.
Sheryl Brown, Esq.

Dear Members of Borough Council:

We are attorneys at the Institute for Justice. The Institute for Justice is a nationwide public interest law firm that litigates to protect constitutional rights in the area of property rights. As you know, we are lead counsel in *Rivera v. Borough of Pottstown*, which held that “the Borough’s Code provisions authorizing administrative warrants for biennial rental inspections on less than individualized probable cause are facially unconstitutional under article I, section 8 of the Pennsylvania Constitution.” 349 A.3d 486, 501 (Pa. Commw. Ct. 2025) (footnotes omitted).

We understand from the Borough’s March 4 Committee of the Whole meeting and [reporting in the Pottstown Mercury](#) that the Borough is considering an amendment to its rental inspection ordinance that would require landlords, when a tenant refuses entry to Borough inspectors, to retain a certified third-party inspector to conduct the inspection and report the results to the Borough as a condition of obtaining or renewing a rental license. Although you have stated to the press that the provision is, ostensibly, meant to cover situations “when a tenant feels compelled or coerced,” Pottstown has other tools available to address such situations. In particular, Pottstown could enact anti-retaliation measures to protect tenants. Other Pennsylvania municipalities have done so—Pottstown has not. *See, e.g.*, Phila., Pa. Code § 9-804(2)(a)-(b).

Because this proposal appears to have been advanced in response to the Commonwealth Court’s decision in *Rivera*, we write to flag a significant constitutional concern before the Borough proceeds further.

As you know, the Commonwealth Court unanimously held that Article I, Section 8 of the Pennsylvania Constitution does not permit the Borough to obtain administrative search warrants authorizing entry into occupied rental homes absent individualized probable cause. The court’s reasoning rested on a straightforward premise: the home—whether rented or owned—receives the highest protection against governmental intrusion.

The proposed ordinance is designed to replace a Borough inspection with one conducted by a private inspector. But constitutional doctrine does not turn on the job title of the individual who crosses the threshold of the home. Where “the government actually requires that private parties conduct searches under certain specified circumstances . . . and a search is undertaken pursuant to those government regulations rather than for some private purpose, it is . . . correct to characterize the search as being governmental in character.” Wayne A. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 1.8(c) (5th ed. 2019) (footnotes omitted); *see also* 79 C.J.S. Searches § 57 (“[I]f a statute or regulation so strongly encourages a private party to conduct a search that the search is not primarily the result of private initiative, then the Fourth Amendment applies.”).

Pennsylvania “precedents treat the state test for private searches as coextensive with the federal test.” *Commonwealth v. Baex*, 270 A.3d 1114 (Pa. Super. Ct. 2021) (rejecting private search where “police convinced a third party to do what the officers could not”). Under that test, the government is responsible for private actions when it “has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Where, as here, inspections are mandated by law, that law serves as the “coercive power” or “significant encouragement” necessary to involve government conduct. *See also* 16A West’s Pa. Prac., Criminal Practice § 19:42 (search and seizure protection apply “to administrative searches conducted by housing, health, fire, safety inspectors and the like”).

The proposal described at the Committee meeting fits squarely within this framework. Under the ordinance as described:

- the Borough would require the inspection as a condition of rental licensing;
- the Borough would define the qualifications of the inspector;
- the inspection would be conducted according to Borough code standards; and
- the results would be reported directly to the Borough for enforcement purposes.

An inspection performed under those circumstances would not be a private search undertaken for a private purpose. It would be a search conducted pursuant to a government regulatory mandate for the benefit of the Borough’s enforcement program. In that situation, the inspector functions as an instrument of the government, and the constitutional protections governing governmental searches—including those articulated by the Commonwealth Court in *Rivera*—apply with full force.

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Put simply, if the Borough may not enter an occupied home without a constitutionally valid warrant, it may not accomplish the same result by requiring a private inspector to enter the home on the Borough's behalf.

We recognize that the Borough has petitioned for allowance of appeal in the Pennsylvania Supreme Court and that further proceedings are ongoing. Our purpose in writing is not to relitigate those issues here, but simply to ensure that the Borough is aware that the proposed ordinance raises substantial constitutional concerns and would likely invite further litigation if adopted. It could also expose Borough officials to suits for damages in their private capacities. The Borough has already expended more than \$600,000 in outside legal fees defending this program—resources that could instead be directed toward programs that directly benefit tenants.

The constitutional principle at issue is not complicated. If the government may not enter a home itself, it may not accomplish the same result by compelling a private party to enter the home on its behalf.

We would, of course, welcome the opportunity to discuss these issues further if that would be helpful.

Respectfully submitted,

/s/ Robert Peccola

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