

IN THE SUPREME COURT OF PENNSYLVANIA

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**IN RE: Y.W.-B.** : **1 EAP 2021**  
**Consolidated Appeals of: J.B.,** :  
**Mother** :

**IN RE: N.W.-B.,** : **2 EAP 2021**  
**Consolidated Appeals of: J.B.,** :  
**Mother** :

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BRIEF ON BEHALF OF PETITIONER, J.B.,  
MOTHER OF Y.W.-B. AND N.W.-B.

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Appeal By Allowance from the Order of the Superior Court of Pennsylvania entered October 8, 2020, for the cases at No. 1642 and 1643 EDA 2019, Affirming in part and Reversing in part the trial court's order of June 11, 2019, entered by the Honorable Joseph Fernandes, docketed at CP-51-DP-00002108-2013 and CP-51-DP-004204-2013.

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## **I. STATEMENT OF APPELLATE JURISDICTION**

Final orders of the Superior Court may be reviewed by the Supreme Court upon allowance of appeal by any two justices of the Supreme Court upon petition of any party to the matter. 42 Pa.C.S.A § 727(a). If the petition shall be granted, the Supreme Court shall have jurisdiction to review the order in the manner provided by section 5105(d)(1). The Superior Court of Pennsylvania filed a final order in the form of an Opinion on October 8, 2020. On November 7, 2020, J.B. filed a timely Petition for Allowance of Appeal to this Court. This Court granted the petition on January 5, 2021. Jurisdiction thus properly lies with this Court.

## **II. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW**

The issues presented are questions of law, therefore the standard of review is *de novo* and the scope of review is plenary. Glatfelter Pulpwood Co. v. Commonwealth, 61 A.3d 993, 998 (Pa. 2013). This Court granted review on two issues. These are whether the Superior Court created a rule of law creating a standard for a trial court's grant of a children and youth agency's Motion to Compel Cooperation with a General Protective Services investigation, which violates Article 1, Section 8 of the Pennsylvania Constitution, and whether the rule of law created by the Superior Court violates the Fourth Amendment of the United States Constitution. Although bound by the facts found by the trial court, this Court is not bound by the trial court's inferences, deductions, and conclusions therefrom. In re: E.P., 841 A.2d 128, 131 (Pa. Super. 2003).

### **III. STATEMENT OF THE QUESTIONS INVOLVED**

This Court granted review of two questions. These are:

1. Did the Superior Court err in creating a rule of law that violates Article 1, Section 8 of the Pennsylvania Constitution, when it ruled that where a Pennsylvania Child Protective Services agency receives a report that alleges that a child is in need of services, and that there is a fair probability that there is evidence that would substantiate that allegation in a private home, where the record does not display a link between the allegations in the report and anything in that private home, then that government agency shall have sweeping authority to enter and search a private home?

(suggested answer: yes.)

2. Did the Superior Court err in creating a rule of law that violates the Fourth Amendment of the United States Constitution, when it ruled that where a Pennsylvania Child Protective Services agency receives a report that alleges that a child is in need of services, and that there is a fair probability that there is evidence that would substantiate that allegation in a private home, where the record does not display a link between the allegations in the report and anything in that private home, and there was no showing of particularity, then that government agency shall have sweeping authority to enter and search a private home?

(suggested answer: yes.)

#### **IV. Pa.R.A.P. 2135(d) CERTIFICATION**

The undersigned certifies that this brief complies with the requirements of Pa.R.A.P. 2135, that where a principal brief exceeds thirty-five pages, it must contain a certification that it does not exceed 14,000 words. A word count conducted by Microsoft Word 2019, the application used to prepare this brief, determined that this brief contains 13,332 words, and is thus compliant with Pa.R.A.P. 2135(a)(1).

Respectfully Certified,

/S

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Michael Angelotti, Esquire

## **V. STATEMENT OF THE CASE**

### **(1) Statement of the Form of the Action and Brief Procedural History**

The instant matter was initiated by a Petition for Allowance of Appeal from a decision of the Superior Court of Pennsylvania dated October 8, 2020. The matter in the Superior Court arose from an order of the Philadelphia Court of Common Pleas, dated June 11, 2019, which the Superior Court Affirmed in part and Reversed in part.

The Superior Court formulated a rule of law to be applied where a Pennsylvania county children and youth agency petitions a court to compel cooperation with a General Protective Services investigation and orders, against the wishes of the family being investigated, that the county agency may enter and search the family's home.

### **(2) Prior Determinations**

The Superior Court of Pennsylvania issued an Opinion on October 8, 2020. The order of the Juvenile Court was entered on June 11, 2019.

### **(3) Judge Whose Determination is to be Reviewed**

The panel of the Superior Court consisted of Judge Carolyn H. Nichols, Judge Mary P. Murray, and Judge James G. Colins. The Opinion was authored by Judge Nichols. The Honorable Joseph Fernandes presided over the matter in the Philadelphia Court of Common Pleas, Juvenile Court Division.

**(4) Chronological Statement**

DHS receives an anonymous report.

Mother lives in Philadelphia, Pennsylvania with Father and their two children, Y.W.-B. and N.W.-B. N.T., 6/11/2019, p. 12.<sup>1</sup> She is politically active. Id. at 15, N.T., 6/18/19 at 16. She would protest outside of the Philadelphia Housing Authority (PHA) building. Id.

On May 22, 2019, the Philadelphia Department of Human Services (DHS) received an anonymous General Protective Services (GPS) report. N.T., 6/11/19 at 5. The allegations in the report from the anonymous reporter were that Mother, at some point, was asleep outside near PHA, that Mother was seen protesting outside of the PHA offices between the hours of 12:00 P.M. and 8:00 P.M. on a particular date, and it was “unknown” whether she fed one of the Children on that date. Id. at 8. Tamisha Richardson was assigned by DHS to investigate the report. Id. She reached out to the family that day. Id.

The anonymous reporter gave an address for the family to DHS. Id. at 9. Ms. Richardson went to that address, finding Father outside. Id. at 8. She sat down with Father and spoke to him. Id. at 6.

At that point, Father phoned Mother and told her to come home. Id. at 7. A short while later, Mother arrived with the Children. Id. Ms. Richardson did not find the

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<sup>1</sup> Hereafter, N.T. shall stand for the Notes of Testimony, followed by the relevant date.

family “aggressive.” Id. The family declined, however, to allow Ms. Richardson access to their home. Id.

The Motion to Compel Cooperation.

Unable to gain access to the home, Ms. Richardson filed a Motion to Compel Cooperation with the court. Id. at 9. The specific allegations set forward within the Motion to Compel, relevant to the incident in question, are:

J. On May 22, 2019, DHS received a GPS report alleging that three weeks earlier, the family had been observed sleeping outside of a Philadelphia Housing Authority (PHA) office located at 2103 Ridge Avenue; that on May 21, 2019, Ms. B. had been observed outside of the PHA office from 12:00 P.M. until 8:00 P.M. with one of the children in her care; that Project Home dispatched an outreach worker to assess the family; that Ms. B. stated that she was not homeless and that her previous residence had burned down; and that it was unknown if Ms. B. was feeding the children she stood outside of the PHA office for extended periods of time. This report is pending determination.

k. On May 22, 2019, DHS confirmed the family’s home address through a Department of Public Welfare (DPW) search.

l. On May 22, 2019, DHS visited the family’s home. When DHS arrived at the home, only Mr. W.-B.. was present, and he refused to allow DHS to enter the home. Mr. W.-B. contacted Ms. B. via telephone and allowed DHS to speak with her. Ms. B. stated that she was engaging in a protest outside of the PHA office; that she did not have the children with her while she was protesting; and that she would not permit DHS to enter the home. Ms. B. subsequently returned to the home with Y. and N. in her care. DHS observed that Y. and N. appeared to be upset before Ms. B. ushered them into the home. Ms. B. refused to allow DHS to enter the home or to assess Y. and N., and that stated that she would not comply with DHS absent a court order. Ms. B. further stated that the children had not been with her when she protested outside of the PHA offices; and that the children were fine and not in need of assessments or services. Ms. B. exhibited verbally aggressive behavior toward DHS and filmed the interaction outside of the

home with her telephone. DHS did not enter the home, but observed from the outside that one of the home's windows was boarded up.

m. On May 22, 2019, DHS returned to the family's home with officers from the Philadelphia Police Department (PPD). Ms. B. and Mr. W.-B. continued to exhibit aggressive behavior and refused to allow DHS to enter the home. The PPD officers suggested that DHS obtain a court order to assess the home.

p. To date, Ms. B. and Mr. W.-B. have failed to make the family's home available for evaluation and have failed to make Y. and N. available so that DHS can assess their safety. As a result, DHS is unable to complete its investigation of the May 22, 2019 GPS report.

*See* Motion to Compel Cooperation for Y.W.-B., filed 5/31/19, p. 4. A hearing was set for the Motion for June 11, 2019. Id. at p. 1.

The June 11, 2019 hearing.

Ms. Richardson testified at the hearing. N.T., 6/11/19, p. 1. She related the allegations of the report. Id. at 5 – 9. She said she received an address for the family from the reporter, and that the family was at that address when she arrived there. Id. at 9. Regarding whether entering the family's home would shed any light on whether Mother fed one of the children between the hours of 12:00 P.M. and 8:00 P.M. on May 22, 2019, Ms. Richardson stated that "I just need to walk through the home and complete an assessment to complete my investigation." Id. at 11.

Mother objected to allowing DHS into her home, stating that a search of her home would do nothing to prove or disprove the allegations in the GPS report. Id. at 15. When questioned by the court, Mother stated that she lived at the address that was given to



DHS by the anonymous reporter. Id. at 12. She stated that she had food in the home, and had a refrigerator and a stove. Id. at 13 – 14. She disagreed that DHS should be allowed to search her home. Id. at 15.

She said that this was the third time that “DHS is coming after me. Every time the reports were proven to be false. This is retaliation. I’m in the news. I’m engaging in an ongoing protest at the PHA headquarters. I’m being retaliated against.” Id.

The trial court acknowledged a prior Motion to Compel Cooperation filed against the family. Id. at 15 - 16. The court related how it granted the prior Motion. Id. It stated that after DHS searched the family’s home pursuant to the last Motion that it filed, the home was found to be appropriate. Id.

The trial court stated that it was going to grant the instant Motion to Compel, and that the probable cause requirement was met. Id. at 18. “If there’s a report, that’s their duty to investigate. You don’t cooperate then I have to force you to cooperate.” Id. at 16. The trial court stated that DHS’s search of the home must “see all the rooms in the house,” verify that there is food in the home, that the windows are appropriate, that there is heat or air conditioning, that there are doors, that the Children have beds. Id. at 24. The trial court stated that Mother may have a friend or person that she trusts be present during the search. Id. at 25. Mother filed a Notice of Appeal of the trial court’s order the same day.

The results of the search of the family's home.

DHS entered and searched the family's home on June 14, 2019. N.T., 6/18/19, p.

3. A family friend took the Children for a walk during the search. Id. at 4. The DHS social worker saw the Children's clothes and their beds. Id. at 6. The utilities were working. Id. There was sufficient food in the home. Id. One room had been damaged and was boarded up. Id.

**(5) Statement of Order Under Review**

Mother requests review of the Superior Court's Opinion. The Superior Court announced a rule of law, stating that "Accordingly, we affirm the trial court's conclusion that there was a fair probability that children could have been in need of services, and that evidence relating to the need for services could have been found in the home." *See In the Interest of Y.W.-B. and N.W.-B.*, 2020 PA Super. 245, p. 24.

The Superior Court also stated that "**social services agencies should be held accountable for presenting sufficient reasons to warrant a home visit, but those same agencies should not be hampered from performing their duties because they have not satisfied search and seizure jurisprudence developed in the context of purely criminal law.**" Id. at 14, *Citing In re: Petition to Compel Cooperation*, 875

A.2d 365, 380 (Pa. Super. 2005) (Beck, J., Concurring) (bold in the original). The rule of law sets a standard for meeting the probable cause requirement where a county children and youth agency wishes to enter and search a family's home, against the

family's consent, in investigating a GPS report.

**(6) Statement Of Place Of Raising Or Preservation Of Issues**

Mother has preserved this matter for this Court's review. Counsel for Mother argued Mother's position before the trial court. N.T., 6/11/19 at 11, 18, 21. Counsel argued that DHS did not have probable cause to conduct their search. Id. Counsel for Mother then timely filed a Notice of Appeal to the Superior Court. The Superior Court affirmed the trial court's order that DHS be allowed to enter and search the family's home. Counsel for Mother then filed a timely Petition for Allowance of Appeal.

## **VI. SUMMARY OF ARGUMENT**

This Court has never addressed the issue of whether and to what extent either the Fourth Amendment to the United States Constitution, or Article 1, Section 8 of the Pennsylvania Constitution apply to investigations by county children and youth agencies. The Court should determine that these provisions do apply to investigators from county agencies seeking court orders to enter and conduct searches of homes of Pennsylvania families. The Court should then fashion a rule for the provisions' application.

Both the Fourth Amendment and Article 1, Section 8 guarantee that a person's home be free of governmental intrusion absent probable cause. In Pennsylvania, the Constitutional notion of privacy runs deeper. This value has been respected and advanced by this Court. The standard articulated by the Superior Court, combined with the decisions of that court, undermine that value, and degrade the guarantees of the Pennsylvania Constitution.

In order to uphold Pennsylvania's Constitutional guarantees and preserve Pennsylvania's values, as well as those provided by the Fourth Amendment, this Court should hold that the Superior Court's rule of law was Constitutionally infirm, that probable cause is required before the government may enter and search a Pennsylvania home, and devise a standard by which probable cause should be determined.

## VII. ARGUMENT

### A. Introduction.

#### 1. To what extent may the government intrude upon our lives?

The Superior Court crafted a rule of law and has established a pattern of case law that is not compatible with this Court's interpretation of the protections guaranteed by Article 1, Section 8 of the Pennsylvania Constitution, as well as the Fourth Amendment to the United States Constitution. This case involves government intrusion into the homes of private citizens, and when and under what circumstances that intrusion is sanctioned. The context in which these issues are presented to the Court is that of trial court's grant of a Motion to Compel Cooperation with a GPS investigation by DHS.

An anonymous reporter made a set of allegations, saying that Mother was outside the Philadelphia Housing Authority (PHA) on a particular date, between the hours of 12:00 P.M. and 8:00 P.M., and that it was unknown whether she fed her child during that time. These allegations formed the basis of a GPS report. In investigating the report, the DHS investigator demanded to enter the family's home. The family said no. DHS returned with officers from the Philadelphia Police Department and their request was again declined. DHS then sought a court order to compel the family to cooperate with its investigation and allow the investigator into their home, which the court granted.<sup>2</sup> The questions now before this Court are

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<sup>2</sup> The court also granted DHS's request that it order that Mother be precluded from recording the government employees from DHS as they performed their duties of entering and searching her home. Mother appealed this order as well. The Superior Court found that this violated the First

whether that rule of law fashioned by the Superior Court falls short of the Constitutional guarantees of the Fourth Amendment and of Article 1, Section 8.

2. The statutory and regulatory framework governing reports to children and youth agencies in Pennsylvania.

A petition, or a motion, to compel cooperation is preceded by the filing of a report with a county children and youth agency. The report to DHS in the instant case was not a report of child abuse, or a CPS report, as was the report in In re: Petition to Compel Cooperation, 875 A.2d 365 (Pa. Super. 2005). Reports under the Child Protective Services Law (CPSL) are divided into two categories. *See Cumberland County Children and Youth Services v. Department of Public Welfare*, 611 A.2d 1338, 1342 (Pa. Commw, 1992), *Citing* 23 Pa.C.S.A. §6334. In one category are reports of suspected child abuse, or Child Protective Services (CPS) reports. *Id.* at 1343. The second category is for reports that inquire whether general protective services are needed, or General Protected Services (GPS) reports. *Id.* The report in question here is a GPS report. *See* N.T., 6/11/19, p. 5.

A GPS report is different from a CPS report. *See* 23 Pa.C.S.A. §6334. The purpose of a GPS report is to evaluate whether a family is in need of, and arrange for the provision of, general protective services. 55 Pa. Code 3490.235. In a GPS report, as opposed to a CPS report, there is no placement of an individual on the Childline registry. County agencies, such as DHS, are authorized to receive GPS

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Amendment of the United States Constitution, and vacated this order. No party has requested that this Court review that portion of the Superior Court's Opinion.

reports. *See* 55 Pa.Code 3490.232(a). The agency must then investigate the report within 60 days. 55 Pa.Code 3490.232(e). Like a CPS report, the regulations state that a county agency is to do a home visit and assessment as part of its investigation. 55 Pa.Code 3490.232(f). The regulations further state that, where appropriate, the county agency may initiate court proceedings. 55 Pa.Code 3490.232(j).

In its Opinion, the Superior Court stated that while the governing regulations allow for a children and youth agency to petition a court to compel cooperation in matters involving child abuse, there is no corresponding regulatory provision for GPS reports. *See Y.W.B., Supra.*, at 13, fn. 9. The Superior Court overlooked 55 Pa.Code 3490.232(j), which states that “the county agency shall initiate the appropriate court proceedings and assist the court during all stages of the court proceedings if the county agency determines that general protective services are in the best interest of a child and if an offer of an assessment, a home visit or services is refused by the parent.”

General Protective Services is a defined term, and the regulations list to whom they are available.<sup>3</sup> The Superior Court did not limit its holding to the regulatory

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<sup>3</sup> 55 Pa.Code 3490.223 states:

General protective services—Services to prevent the potential for harm to a child who meets one of the following conditions:

- (i) Is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals.
- (ii) Has been placed for care or adoption in violation of law.
- (iii) Has been abandoned by his parents, guardian or other custodian.
- (iv) Is without a parent, guardian or legal custodian.
- (v) Is habitually and without justification truant from school while subject to compulsory school attendance.

definition of General Protective Services, but rather applied its holding to a child “in need of services.”

The rule, as stated by the Superior Court, is that a court may compel cooperation with a GPS report, and allow the entry and search into a home, where “there was a fair probability that children could have been in need of services, and that evidence relating to the need for services could have been found in the home.”

Y.W.-B., 2020 PA Super. 245, p. 24. To underscore the expansive nature of the Superior Court’s holding, it further stated, in bold, that “**social services agencies should be held accountable for presenting sufficient reasons to warrant a home visit, but those same agencies should not be hampered from performing their duties because they have not satisfied search and seizure jurisprudence developed in the context of purely criminal law.**” Id., *Citing In re: Petition to Compel*, 875 A.2d at 380 (Beck, J., concurring).

The effect of a court’s grant of an agency’s petition to compel cooperation is broader still. In this case, for example, the trial court ordered that DHS’s search of the home must “see all the rooms in the house,” verify that there is food in the home,

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(vi) Has committed a specific act of habitual disobedience of the reasonable and lawful commands of his parent, guardian or other custodian and who is ungovernable and found to be in need of care, treatment or supervision.

(vii) Is under 10 years of age and has committed a delinquent act.

(viii) Has been formerly adjudicated dependent under section 6341 of the Juvenile Act (relating to adjudication), and is under the jurisdiction of the court, subject to its conditions or placements and who commits an act which is defined as ungovernable in subparagraph (vi).

(ix) Has been referred under section 6323 of the Juvenile Act (relating to informal adjustment), and who commits an act which is defined as ungovernable in subparagraph (vi).



that the windows are appropriate, that there is heat or air conditioning, that there are doors, that the Children have beds. *See* N.T., 6/11/19, p. 24. The scope of the intrusion into a family's home by the government is significant.

The scale of potential government intrusion into Pennsylvanians' homes is also significant. In 2019, the Pennsylvania Department of Human Services received a total of 178,124 GPS reports statewide. *See* Pennsylvania Department of Human Services 2019 Child Protective Services Annual Report, p. 25.<sup>4</sup> Of those, 95,671 were screened out, leaving county agencies to investigate 82,427 GPS reports. 41,937 of these were deemed valid, and 40,490 were unsubstantiated. This represents nearly 100,000 potential searches into Pennsylvania homes each year. This would represent a search of every home in a city almost twice the size of Allentown, which has 42,245 households.<sup>5</sup>

The number of reports investigated and deemed unsubstantiated, which represents a potential intrusion into a home in which services were ultimately not deemed warranted, is troubling. A similar issue exists with CPS reports, which are also subject to petitions to compel. Chief Justice Saylor noted the high rate of reversals when CPS reports are appealed to the Department of Public Welfare's (now the Pennsylvania Department of Human Services') Bureau of Hearings and Appeals, citing a 97 percent reversal rate in 2012, with five reports being upheld of 155

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<sup>4</sup> Located at: <https://www.dhs.pa.gov/docs/Publications/Documents/2019%20child%20prev.pdf>, last accessed February 14, 2021.

<sup>5</sup> *See* <https://www.census.gov/quickfacts/allentowncitypennsylvania>, last accessed February 25, 2021.

appeals on the merits. *See G.V. v. Department of Public Welfare*, 91 A.3d 667, 676 (Pa. 2014) (Saylor, (then) J. Concurring). This problem has not abated with the passage of time. The 2019 Child Protective Services Annual Report, on page 21, lists that of 293 appeals heard, 108 were overturned and just two upheld, with 149 cases still pending. This is less than two percent of the cases decided at the time that the Annual Report was compiled.

### 3. The impact of a children and youth investigation on a family.

An investigation can be terrifying for a family. The individual at your door, often (as was the case here) accompanied by law enforcement, represents the government's power to forever alter your family. We may think, and it is easy to think, that to allow unfettered discretion to a children and youth investigator is both the path of least resistance and the most risk-averse path to take.

However, a children and youth investigator probing the intimacy of a family's home can seem like a bull in a China shop. Certainly, most children and youth employees are well intentioned. However, a children and youth investigator can have differences of opinion with a family, he can have cultural differences, there can be differing interpretations and misunderstandings. Importantly, there is no balance of power here between the investigator and the family.

The power that an investigator can have to alter a family's life is clear in a case like this one, where DHS sought the court's authority to compel cooperation with its investigation. The trial judge in this case went so far as to tell the family

that they were breaking the law.<sup>6</sup> Of course, the family here committed no crime, but when a Judge insists on the record that you are, it is intimidating.<sup>7</sup>

That fear, that government employees can force their way into your home, and interpret something differently than you do, can also make one seem defensive. In her report, and in the motion submitted to the court, the DHS investigator described Mother as aggressive, a description that she retracted when she testified at the hearing. What is clear is that Mother had an aversion to the government intruding into her home.

Investigators are human beings, and human beings are fallible. The reaction to that potential fallibility of pure deference to the government regarding intrusion into a family's home, as does the standard endorsed by the Superior Court in this matter, is to eschew any sense of Constitutional balance. This Court should restore that balance.

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<sup>6</sup> N.T., 6/11/19, p. 35.

<sup>7</sup> See, e.g., Good v. Dauphin County, 891 F.2d 1087, 1090 (3<sup>rd</sup> Cir., 1989), relating a District Court's finding of fact that following a search by a children and youth investigator accompanied by a police officer, "both (the child) and her mother were left shocked and shaken, deeply upset and worried."

B. The Superior Court created a rule of law in its Opinion which runs afoul of Fourth Amendment to the United States Constitution when it ruled that where a Pennsylvania Child Protective Services agency receives a report that alleges that a child is in need of services, and that there is a fair probability that there is evidence that would substantiate that allegation in a private home, where the record does not display a link between the allegations in the report and anything in that private home, and there was no showing of particularity, then that government agency shall have sweeping authority to enter and search a private home.

This Court should hold that the rule of law created by the Superior Court to determine when a county agency has established probable cause to enter a home does not meet the minimum Constitutional standards. The Fourth Amendment to the Constitution prevents unreasonable searches and seizures, and requires a showing of probable cause. The Superior Court's standard is not compatible with Fourth Amendment jurisprudence, and does not meet the requirements of probable cause.

This is highlighted by the facts of this case, in which there was no nexus between the report to DHS and anything in Mother's home, there were no indicia of the reliability of the anonymous report to DHS, and there was no particularity to the allegations contained in the report. Additionally, none of the exceptions to the need for probable cause apply.

Additionally, the rule itself applies to "a child in need of services." This differs from the regulatory definition of General Protective Services. This loose, amorphous standard, combined with the language adopted by the Superior Court does exactly what a probable cause determination is supposed to protect against,

it leaves determinations to the discretion of the government agents requesting a search of a Pennsylvania home. As a result, this Court should reverse the Superior Court's order and establish a standard for determining probable cause consistent with the Constitution.

1. The Rule of Law Fashioned by the Superior Court.

The rule of law established by the Superior Court is “that there was a fair probability that children could have been in need of services, and that evidence relating to the need for services could have been found in the home.” See In the Interest of Y.W.-B. and N.W.-B., 2020 PA Super. 245, p. 24. The Superior Court also stated that **“social services agencies should be held accountable for presenting sufficient reasons to warrant a home visit, but those same agencies should not be hampered from performing their duties because they have not satisfied search and seizure jurisprudence developed in the context of purely criminal law.”** Id. at 14, Citing In re: Petition to Compel Cooperation, 875 A.2d 365, 380 (Pa. Super. 2005) (Beck, J., Concurring) (bold in the original).

2. The legal standard under the Fourth Amendment.

This Court has not addressed the application of the Fourth Amendment to investigations by county children and youth agencies. The Superior Court has held that, where a county children and youth agency files a petition to compel cooperation and requests to enter a family's home, the agency's petition must be supported by probable cause. In re: Petition to Compel, 875 A.2d at 374, In the

Interest of D.R., 216 A.3d 286 (Pa. Super. 2019). The Superior Court has stated that while an agency has a regulatory directive to conduct a home visit during its investigation, that home visit is a search for the purposes of the Fourth Amendment to the United States Constitution, as well as Article 1, Section 8 of the Pennsylvania Constitution. Id. The Fourth Amendment states that:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search and the persons of things to be seized.

U.S. Const. Amend. IV.

The Fourth Amendment protects people from unreasonable government intrusions into areas where they have legitimate expectations or privacy. Id. One's home, the subject of the search in this case, is afforded the highest degree of privacy. Id., *See Also* Commonwealth v. Romero, 183 A.3d 354 (Pa. 2018), *See Also* United States v. Griffith, 867 F.3d 1265, 1275 (D.C. Cir., 2017) (stating that, for Fourth Amendment purposes, "the home is first among equals").

Both the Fourth Amendment and Article 1, Section 8 require probable cause to authorize a search. Commonwealth v. Edmunds, 586 A.2d 887, 899 (Pa. 1991). The linchpin to determine when it is appropriate to authorize a search is the test for probable cause. Id. Probable cause exists when facts and circumstances within an affiant's knowledge and of which he or she has reasonably trustworthy information, are sufficient in themselves to warrant a

person of reasonable caution in the belief that a search should be conducted. Commonwealth v. Jones, 988 A.2d 649, 655 (Pa. 2010). A probable cause analysis examines the totality of the circumstances. Commonwealth v. Gray, 503 A.2d 921 (Pa. 1985), *Citing* Illinois v. Gates, 462 U.S. 213 (1983), Commonwealth v. Wallace, 42 A3d 1040, 1048 (Pa. 2012). The totality of the circumstances analysis includes an examination of the veracity of any affiant, as well as what basis of knowledge that affiant has of the statements provided. *Id.*, *See Also* Commonwealth v. Torres, 177 A.3d 263, 270 (Pa. Super. 2017).

It is important to note that the Superior Court omitted a crucial portion of cause analysis from its formulation of its rule. An individual tasked with finding probable cause must make a practical, common sense decision whether, given all of the circumstances, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Commonwealth v. Leeds, 142 A.3d 20, 27 (Pa. Super. 2017). The rule established by the Superior Court applicable to children and youth agencies does not include taking into account “the veracity and basis of knowledge of persons supplying hearsay information.” *See* Y.W.-B., at 24.

The conduct of a home visit by a children and youth investigator is a search for the purposes of both the Fourth Amendment and Article 1, Section 8. Where the government actively violates one’s reasonable expectation of privacy, the

government is conducting a search. Katz v. United States, 389 U.S. 347, 360 – 61 (1967) (Harlan, J., concurring). The question is whether there is a subjective expectation of privacy, and does society recognize that expectation as objectively reasonable. Id., *See Also* Commonwealth v. Williams, 764 A.2d 532, 542 (Pa. 2001). It is black letter law that a family has a reasonable expectation of privacy in their home. Payton v. New York, 445 U.S. 573, 585 (1980).

The next step in the analysis of whether either the Fourth Amendment or Article 1, Section 8 are applicable is determining whether the person or persons who are alleged to have conducted a search are subject to the relevant constitutional provisions. Although this Court has never been squarely presented with the issue, the Superior Court of Pennsylvania has held on several occasions that county children and youth social work investigators are subject to both constitutional provisions. *See* In re: Petition to Compel Cooperation with Child Abuse Investigation, 875 A.2d 365 (Pa. Super. 2005), In re: D.R., 216 A.3d 286 (Pa. Super. 2019), In re: Y.W.B. at 24.

Additionally, the United States Court of Appeals for the Third Circuit has held that Pennsylvania county children and youth social workers are subject to the Fourth Amendment. In Good v. Dauphin County, 891 F.2d 1097 (3d Cir. 1989), the Third Circuit considered whether a county children and youth agency violated a parent's Fourth Amendment rights when it entered a family's home and examined a seven year old child for bruises. In Good, the agency received



an anonymous report of possible child abuse. Id. at 1089. The next day, a social worker went to the family's home to investigate the report, asking a police officer to accompany her. Id. The two entered the home and observed the child, finding no signs of abuse. Id.

The child's mother sued, alleging that the social worker and officer entered the home in violation of her Fourth Amendment rights, and had only allowed them into her home because she felt compelled to. Id. The Third Circuit said that the Fourth Amendment was implicated by the social worker's entry into the home. Id. at 1092. Notably, neither the social worker or the police officer even argued that the search based on a single, anonymous report constituted probable cause. Id. at 1093, fn. 1. The court stated that a such a search unsupported by a warrant was per-se unreasonable absent exigent circumstances. Id. at 1092. Exigent circumstances, the court said, were not present here. Id. at 1093, fn. 1.

The majority of Circuit Courts have held that children and youth social workers are subject to the Fourth Amendment as well. *See* Tenenbaum v. Williams, 193 F.3d 581, 604 (2d Cir., 1999) (reversing a District Court's determination that the removal of a child was supported by probable cause, and holding that the case did not meet the special needs exception), Andrews v. Hickman County Tennessee, 700 F.3d 845, 859 (6<sup>th</sup> Cir., 2012) (noting a presumption that state actors are governed by the Fourth Amendment and the sanctity of the home under the Fourth Amendment, and holding that social

workers are governed by the Fourth Amendment warrant requirement), Gates v. Texas Dept. of Protective and Regulatory Services, 537 F.3d 404, 420 (5<sup>th</sup> Cir., 2008) (stating that it is well established in the Fifth Circuit that the Fourth Amendment regulates social workers and civil investigations), Calabretta v. Floyd, 189 F.3d 808, 813 – 14 (9<sup>th</sup> Cir., 1999) (holding that the Fourth Amendment applies to civil as well as criminal investigations), Brokaw v. Mercer County, 235 F.3d 1000, 1011 (7<sup>th</sup> Cir., 2000). In Doe v. Woodward, 912 F.3d 1278, 1293 (10<sup>th</sup> Cir., 2019), the defendants did not even contest the fact that an investigation by a children and youth agency was a search for Fourth Amendment purposes.

Because the Fourth Amendment applies to home searches by a children and youth investigator, and a family has a reasonable expectation of privacy in their home, those searches must be subject to the requirements of Fourth Amendment jurisprudence. The requirements within the totality of the circumstances test were developed to ensure an individual's interests have been protected. Considering these requirements, and analyzing them in the context of this case, it is clear that the standard created by the Superior Court is not Constitutionally sufficient.

- a. The Superior Court's rule fails to satisfy the particularity requirement.

Particularity is a constitutional requirement. The particularity requirement furthers the purposes of the Fourth Amendment because it limits the scope of a

search. *See* Terry v. Ohio, 392 U.S. 1, 17-19 (1968), Warden v. Hayden, 387 U.S. 294, 310 (1967) (Justice Fortas, concurring) (stating that the scope of a search must be strictly tied to and justified by the circumstances which rendered its initiation permissible). The particularity requirement also prevents searches and seizures of items and places other than those described in a warrant, and limits the discretion of the investigator conducting the search to go beyond the bounds of what probable cause allows. *See* Marron v. United States, 275 U.S. 192, 196 (1927). This serves the purpose of ensuring that the scope of every government intrusion is limited to only that for which there is probable cause. United States v. Heldt, 668 F.2d 1238 (D.C. Cir., 1981).

The particularity clause dates from the Revolutionary War Era in response to highly intrusive general searches. *See* Boyd v. United States, 116 U.S. 616, 624 – 27 (1886), Maryland v. Garrison, 275 U.S. 192, 195 – 96 (1927), Weeks v. United States, 232 U.S. 383, 390 (1914). It was enacted to guarantee that government agents could no longer rely on indiscriminate or vague warrants to engage in general, exploratory rummaging in a person's belongings. *See* Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). The point of the particularity requirement, then, is to limit the scope of government intrusion.

Here, DHS asked for a search of the family's home without limitation. The Motion to Compel Cooperation itself did not describe anything within the family's home that was relevant to its investigation with particularity. Ms.

Richardson told the court that she merely wanted to enter Mother's home to complete her investigation and did not relate anything within the home that she sought related to the allegations. The trial court, at the June 11, 2019 hearing, set no limitations on DHS's search – the court authorized DHS to enter into every room. This standard thus falls below the protections guaranteed by the Fourth Amendment, as it does not meet the particularity requirement of the Fourth Amendment, leaving investigators with wide discretion, and unbound from the confines of any report which they are investigating.

b. The Superior Court's rule fails to satisfy the reliability standard.

The Superior Court's formulation of a probable cause standard for petitions to compel cooperation omits an essential portion of probable cause analysis, failing to include a consideration of "the veracity and basis of knowledge of persons supplying hearsay information." *See Y.W.-B.*, at 24. In the instant case, for example, the allegations against the family were made by an anonymous informant, akin to a confidential informant. DHS offered no evidence regarding the reliability of the hearsay information obtained by the informant. As a result, the Superior Court's rule ignores the reliability standard of Fourth Amendment jurisprudence.

The Superior Court stated that "we note that there is no indication in this case that DHS received information from a mandated reporter. *See* 23 Pa.C.S. §§6311-6320. Therefore, the reliability of information from a mandated reporter

is not at issue in this case.” See Y.W.-B., at 14, fn. 10. This entirely misses the point of the jurisprudence concerning reliability. It is not whether or not a reporter is a *mandated reporter* that affects reliability. The issue is whether a reporter is *anonymous*. In this case, DHS based its report, its petition to compel cooperation, and its presentation to the court on the account of an anonymous reporter. There is no dispute over this, the record is clear. See N.T., 6/11/19, p. 10 – 11. There was no information presented to the court, in the report, or in the petition concerning the reliability of that anonymous reporter.

The Superior Court also did not address a significant difference between reporters of child abuse in CPS reports, and reporters, or information sources, in GPS reports. There is **no** statutory confidentiality provision for a reporter in a GPS report. The CPSL contains a provision stating that the identity of a reporter of **child abuse**. 23 Pa.C.S.A. §6340, release of information in confidential reports, subsection (c), protecting identity, states that “the release of data by the department, county, institution, school, facility or agency or designated agent of the person in charge that would identify the person who made a report of suspected child abuse or who cooperated in a subsequent investigation is prohibited.” There is no corresponding statutory provision regarding GPS reports, the reporter, or the source of information for a report that a family may be in need of general protective services.

This Court examined both the reliability factor of the totality of the circumstances in Commonwealth v. Clark, 28, A.3d 1284 (Pa. 2011). The Clark Court ultimately concluded that probable cause existed to search the defendant's home because the police conducted an investigation that independently corroborated much of the information provided by the confidential informant. Id. at 1289. Sufficient corroboration of a confidential informant's tip may constitute probable cause where the police independently verify the information, where an informant has provided accurate information in the past, where the informant has participated in the alleged criminal activity, or where the police corroborate significant details provided by the informant. Id. at 1288. Regarding the totality of the circumstances test, the Court stated that it "permits a balanced assessment of relative weights of all various indicia of reliability, or unreliability, of an informant's tip." Id.

The Superior Court has held that a search warrant is defective if the necessary information regarding indicia of reliability is not supplied. Commonwealth v. Good, 208 A.3d 497, 505 - 6 (Pa. Super. 2016), *See Also* Commonwealth v. Manuel, 194 A.3d 1076, 1805 - 86 (Pa. Super. 2018), (Holding that the trial court erred in finding probable cause existed based on an informant's tip where the informant's reliability is not adequately established, and where there was nothing in the record, the court held, to bolster the informant's reliability.). Uncorroborated hearsay of an informant may be accepted as a

credible basis for a finding of probable cause if the affidavit of probable cause avers circumstances that support a conclusion that the informant was credible. Id., *Citing Commonwealth v. Torres*, 764 A.2d 532, 537 – 38 (Pa. 2001). A confidential informant’s tip may constitute probable cause depending on the informant’s reliability, where police independently corroborate the information, where the informant has provided accurate information in the past, or where the informant has participated in the criminal activity. Commonwealth v. Gagliardi, 128 A.3d 790, 794 - 5 (Pa. Super. 2015), *Citing Commonwealth v. Sanchez*, 907 A.2d 477, 488 (Pa. 2006).

The totality of the circumstances test is supposed to lead to common sense conclusions. However, “common sense is not the same as guesswork.” Commonwealth v. Gagliardi, 128 A.3d 790, 805 (Pa. Super. 2015) (Wecht, J., Dissenting). In this case, to the extent that DHS independently investigated the allegations of the anonymous reporter, a common-sense analysis of DHS’s concern that the family was homeless looks at the fact that the reporter had the address of the family’s home, and DHS found the family’s address in its records, the DHS investigator saw the family go into the home and saw the family inside the home when Mother appeared at the window.

That common sense analysis can only conclude that the family lived there. Every piece of evidence points to the fact that the family lived at the address that was found for the family in records. There was no information concerning the

reporter's veracity. The homelessness allegation was unfounded; in no way was there a fair probability that the family lacked a home. As to the allegation that Mother attended a protest with one of her children a month before the hearing and it was unclear whether she fed the child on that date between the hours of 12 p.m. and 8 p.m., this allegation was stale. Common sense therefore dictates that there was *no* indicia of reliability established regarding the individual who supplied this hearsay allegation.

c. The Superior Court's rule fails to consider the nexus requirement.

The nexus requirement is also an essential element of probable cause. The Superior Court's rule fails to conform to the requirement that there be a nexus between an allegation in a GPS report and anything inside the home. Importantly, the Superior Court incorporates Judge Beck's standard from her concurrence in Petition to Compel, *Supra.*, that social services be held accountable simply for presenting sufficient reasons to warrant a home visit. However, the regulations require the agency to make a home visit in the case of every GPS report. *See* 55 Pa.Code 3490.232(f). The rule set by the Superior Court is broader still, as its language does not limit agency searches to GPS reports, but allegations in which there is "a child in need of services." This allows a search of a family's home regardless of any link between the allegations in the report and anything in the family's home. In this case, as there was no nexus provided between the GPS report which DHS wished to investigate and anything inside of Mother's home.



The Fourth Amendment unquestionably requires a nexus between the evidence searched for and an individual's home. *See* United States v. Grant, 682 F.3d 827 (9th Cir. 2012) (holding that as there was no nexus between a firearm and the defendant's home, the search was not supported by probable cause), United States v. Roach, 582 F.3d 1192 (10th Cir. 2009) (holding that probable cause was lacking where there was no nexus between a defendant's alleged gang activity and his paramour's home, where he was believed to be living), United States v. Higgins, 557 F.3d 381 (6th Cir. 2009) (holding that there was no probable cause to search a defendant's home where there was no nexus between an informant's statement that he sold drugs to the defendant and the defendant's home), United States v. Carpenter, 360 F.3d 591 (6th Cir. 2004) (holding that a search warrant was not supported by probable cause, as information that marijuana was growing near the defendant's home was an insufficient nexus to search in the defendant's home), United States v. Zimmerman, 277 F.3d 426 (3rd Cir. 2002) (holding that a search warrant was not supported by probable cause where it provided no link, between a defendant's alleged possession of child pornography and his home), United States v. Lalor, 996 F.2d 1578 (4th Cir. 1993) (holding that where informants provided information that the defendant was selling drugs on a street corner, this did not supply probable cause to search the defendant's home).

Pennsylvania state courts have held this as well. In Commonwealth v. Wallace, 42 A3d at 1048, this Court stated that nothing in the affidavit established

any nexus between the defendant's home and the sale or storage of drugs. Probable cause to believe that a defendant has committed a crime on the street is insufficient to support probable cause to search the defendant's home. Commonwealth v. Kline, 335 A.2d 361, 364 (Pa. Super. 1975), Commonwealth v. Heyward, 375 A.2d 191, 192 (Pa. Super. 1997). In fact, the lack of a nexus between street crime and a premises to be searched renders a search warrant facially invalid. Commonwealth v. Way, 492 A.2d 1151, 1154 (Pa. Super. 2015). Because the rule established by the Superior Court is not constrained by the nexus requirement, it fails to conform to Fourth Amendment jurisprudence.

d. This matter does not fall under any of the exceptions to the Fourth Amendment's probable cause requirement.

A search unsupported by probable cause may be constitutional "when special needs, beyond the normal need for law-enforcement, make the warrant and probable-cause requirement impracticable." Commonwealth v. Cass, 709 A.2d 350, 369 (Pa. 1998). Cass was a case about a search of school lockers. Id. This Court noted that the special needs doctrine originated in the public-school context. Id., *Citing* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). T.L.O. was a case in which a student was caught smoking in the restroom, and after the school personnel searched her purse, they found evidence of marijuana. The Court noted in T.L.O., the warrant requirement "would unduly interfere with the maintenance of swift and informal disciplinary procedures (that are) needed," and "strict adherence to the requirement that searches be based upon probable cause" would

undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." Id.

Here, the special needs exception does not apply to a county children and youth agency's search of a family's home. Initially, these cases involve *homes*, not school lockers or searches of a child's purse in school. A family has the utmost expectation of privacy in their home. *See Payton v. New York*, 445 U.S. 573, 585 (1980), Florida v. Jardines, 569 U.S. 1 (2013).

Additionally, an investigation by a children and youth agency is not beyond the normal needs for law enforcement. The search itself is to further the agency's statutory and regulatory mandates. *See* 55 Pa. Code 3490.2, 3490.222. There are also statutory and regulatory provisions mandating CYS to investigators to work with law enforcement. *See* 23 Pa.C.S.A. §6334(c). The governing regulations provide that CYS may request law enforcement assistance at any time during an investigation. 55 Pa.Code 3490.381. DHS summoned law enforcement in this case during its first visit to the family's home.

Likewise, the public servant exception/community caretaking doctrine is inapplicable here. In Commonwealth v. Livingstone, 174 A.3d 609, 625 (Pa. 2017), a police officer had pulled to the side of a road, where the defendant was stopped, to see if she needed assistance. Id. at 614. After noticing the defendant acting confused, the officer gave her a field sobriety test. Id. She was then arrested and convicted for driving under the influence.

This Court held that the seizure of the defendant was not justified by the community caretaking doctrine. *Id.* at 683. The exception was not applicable in that case, the Court held, as the encounter with the defendant was an investigatory detention; the defendant would not reasonably feel free to leave. *Id.*

Here, the search by DHS was not an attempt to render aid. It was an attempt to investigate a report. There was no evidence that an individual here needed aid. Mother made no request for aid, and actively refused the DHS investigator entry to her home.

Finally, there were no exigent circumstances here. Different levels of exigency exist, reflecting different levels of governmental interest, in the various possible situations confronting a children and youth agency. Investigating a GPS report is not the highest level. In a GPS report, the allegation is that a family may be in need of general protective services.

Cases in which the circumstances display a heightened exigency do exist. Should the report allege abuse, the report becomes a CPS report. Should the agency believe that the child is in danger in his home, the agency may apply to the court to take custody that child. *See* 23 Pa.C.S.A. §6315, 23 Pa.C.S.A. §6324.<sup>8</sup> Here, there were no allegations that the Children were at any risk of harm, and there was no immediate need to search for or seize them. Exigent

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<sup>8</sup> 23 Pa.C.S.A. §6324(a)(1) provides that a child may be taken into custody by court order, upon a showing that for the child to remain in the home is contrary to the welfare of the child's welfare.

circumstances, therefore, did not preclude the necessary finding of probable cause. *See e.g., Good, Supra.*, at 1090, fn. 1.

3. This Court should determine that a search by a county children and youth agency investigator requires probable cause under the Fourth Amendment.

This Court should find the reasoning of the Superior Court and the various Circuit Courts persuasive and determine that the Fourth Amendment covers searches of a family's home pursuant to a county children and youth agency's GPS investigation. As such, probable cause must exist to allow the investigator to enter and search the home. Further, this Court should find that the standard created by the Superior Court, especially in light of that court's endorsement of Judge Beck's standard from In re: Petition to Compel, does not meet the requirements of the Fourth Amendment.

The DHS social workers in this case were government agents engaging in an investigation. The investigators in this case, as well as many of the cases referenced *Supra*, demanded entry into a family's home, one of the main areas of concern of the Fourth Amendment. As a result, the protections afforded by these Constitutional provisions should apply here.

Should this Court adopt the Superior Court's standard, any allegation from any anonymous source would be sufficient to trigger a Pennsylvania Children and Youth Agency's ability to enter and search a family's home. The anonymous tip itself generates a report. And where there is a report, the agency has a

regulatory requirement to attempt a home visit and inspection. Under the Superior Court's standard, that alone would be sufficient to allow government intrusion into a home, as "agencies should not be hampered from performing their duties." An annulment of the protections of the Fourth Amendment such as this is not the law and this is not acceptable.

Every search and seizure analysis under the Fourth Amendment is a balance of competing interests. Commonwealth v. Romero, 183 A.3d 364, 396 (Pa. 2018). On one hand, the government has an interest in enforcing its laws. Id. The Fourth Amendment balances the degree of government intrusion upon an individual's privacy and the degree it is necessary to further a legitimate government interest. Riley v. California, 573 U.S. 373 (2014), *Citing* Wyoming v. Houghton, 526 U. S. 295, 300.

Government interest must be balanced against the interests of a family to be free of unwarranted government intrusion. The superior Court recognized this precept when it noted that "while crime is a grave concern for society, the right of police officers to thrust themselves into a home is also a grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. Commonwealth v. Berkheimer, 57 A.3d 171, 178 – 79 (Pa. Super. 2020), *Citing* Johnson v. United States, 333 U.S. 10, 14 (1948).

Indeed, cases involving reports of children in need involve a serious government interest. But so do cases involving murder and rape, in which there is no question that Fourth Amendment jurisprudence applies. Also, the government interest is not the same in all children and youth investigations. There is a difference in the government interests between investigating CPS reports, in which a child has been alleged to have been abused, and GPS reports, which address whether a family is in need of General Protective Services, and instances in which children need to be removed from a family to protect their safety. Additionally, the government interests vary among different GPS reports, depending on the fact pattern of each case. An allegation that a child resides in a home with no heat or utilities in a February blizzard and is in physical danger is different from an allegation that it is unknown whether, one month ago on a particular date, a child was fed during a particular eight-hour period.

The majority opinion in In re: Petition to Compel, despite the language in Judge Beck's concurrence, held that the county children and youth agency in question did not present probable cause to support the trial court's grant of the petition to compel cooperation. In re: Petition to Compel, 875 A.2d at 377. In that case, the agency received a Child Protective Services report. Id. at 378. The report alleged possible child abuse, involving medical neglect. Id.

In order to complete its investigation, the social worker from the agency requested to conduct a home visit, as required by the governing regulations. Id.

The family declined. Id. The agency petitioned the trial court in that case to compel the family to cooperate with its investigation; to order access to the family's home, which the court granted. Id.

The Superior Court vacated that order. holding that the agency "did not allege facts sufficient for a search warrant to issue." Id. at 378 - 79 There was no "specific link," the court stated, to the home's conditions. Id. The fact that the agency's governing regulations stated that it must conduct a home visit were not sufficient to justify the trial court's order. Id.

The agency in that case conducted its investigation to the point where it requested to enter the family's home, and discharged its duty where it conducted its investigation and petitioned the court. Id. at 379. However, the court stated that once the family declined the agency's request to enter the home, the agency "was obligated by the Constitution to depart, and to leave the family in peace until such time where it may have compiled additional, trustworthy facts in order to provide probable cause to enter the home." Id. *See Also Romero*, 183 A.3d at 397 (Stating that the check upon the power of law enforcement to enter and search a home by the probable cause standard is particularly significant where an investigation necessitates an intrusion into a home).

The Superior Court's standard has drifted since its holding in In re: Petition to Compel. The language used by the Superior Court in this case, "a child in need of services," is expansive. It is unclear how many children and families would



fall into such a broad category. Because of its vagueness, and because the language used by the Superior Court does not comport with the language of the CPSL, it is unclear how to even measure the precise government interest involved. The rule created by the Superior Court here creates a one-size fits all rule for government entry into a private home; a child welfare exception to the Fourth Amendment, a kind of lower standard applied more akin to reasonable suspicion. This child welfare exception swallows the rule of Fourth Amendment protection. This is especially so given the statutory allowances for law enforcement participation.

Because the rule of law established by the Superior Court falls short of the requirements of the Fourth Amendment, this Court should vacate its ruling. The Court should establish a rule of law regarding the search of a family's home pursuant to a children and youth agency investigation which meets those requirements. Mother respectfully proposes a rule which meets the requirements of both the Fourth Amendment, as well as Article 1, Section 8 of the Pennsylvania Constitution, below.

C. The Superior Court created a rule of law in its Opinion which rules afoul of Article 1, Section 8 of the Pennsylvania Constitution when it ruled that where a Pennsylvania Child Protective Services agency receives a report that alleges that a child is in need of services, and that there is a fair probability that there is evidence that would substantiate that allegation in a private home, where the record does not display a link between the allegations in the report and anything in that private home, then that government agency shall have sweeping authority to enter and search a private home.

In addition to holding that the rule created by the Superior Court violates the Fourth Amendment, this Court should hold that the rule violates Article 1, Section 8 of the Pennsylvania Constitution. The protections of Article 1, Section 8 are greater than those of the Fourth Amendment. Commonwealth v. Alexander, \_\_\_ A.3d \_\_\_, 30 EAP 2019, at p.2 (Pa. 2020), Commonwealth v. Schafter, 536 A.2d 354, 360 (Pa. Super. 1987) (*en banc*), Petition to Compel, *Supra*, at 374. The paramount interest protected by Article 1, Section 8 is the right to privacy. Alexander, at 8.

1. The Edmunds Analysis.

This Court has held that where a petitioner claims that the Pennsylvania Constitution affords greater protections than does the Constitution of the United States, she should conduct an analysis pursuant to the factors set forth in Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991). The Edmunds factors are: 1) the text of the Pennsylvania constitutional provision; 2) the history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of state and local

concern, and applicability within modern Pennsylvania jurisprudence. Edmunds, 586 A.2d at 895.

a. The Text of the Provision.

The first factor is to relate the text of the Constitutional provision. Article 1, Section 8 states:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause.

The text of the Fourth Amendment is similar. It states that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Despite the similarities between the language of the two provisions, the Alexander Court noted that even the slight differences were meant to afford a greater degree of privacy than the Fourth Amendment. Alexander, *Supra*, at 19. Related to the instant case, there is a slight difference in the text of the two provisions. Article 1, Section 8 states that “the people shall be secure in their... houses...from unreasonable searches and seizures...” The Fourth Amendment states that “the right of the people to be secure in their...houses... against

unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...” Article 1, Section 8, leads with the words “the people shall be secure,” The word Shall is generally interpreted as mandatory. *See In re: Columbia Borough*, 354 A.2d 277 (Pa. Cmmw. Ct. 1976). The Fourth Amendment, conversely, addresses *the right* of the people, which shall not be violated. This is more permissive language, as evidenced by the many exceptions to the Fourth Amendment, and its erosion over time.

The more positive, mandatory language of Article 1, Section 8 should be interpreted as reflecting this Court’s long held belief that the provision provides greater privacy protections than the Fourth Amendment. Indeed, the Federal Constitution, at best, defines only the minimum protections which must be afforded to fundamental rights. *Commonwealth v. Gray*, 503 A.2d 921, 928 (Pa. 1985) (Nix, J., Concurring), *Citing* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). Within our Federal system of government, state Constitutions must be viewed as independent, and indeed, primary sources of such protections. *Id.* The first Edmunds factor this leans towards interpreting the Pennsylvania Constitution as providing a greater degree of privacy in cases such as the instant one.

b. The History of Article 1, Section 8.

William Penn stated that privacy is the “greatest worldly contents men can enjoy.” Penn, William, *Some Fruits of Solitude*, 96 – 97 (8<sup>th</sup> ed., 1749). The

maxim that every man's home is his castle dates back at least over four hundred years and was cited in the English Common Law case Semayne's Case, 5 Coke Rep., 91 (1604). In the same spirit, and prior to the adoption of the United States Constitution, William Pitt wrote that "the poorest man in his cottage may bid defiance to all the forces of the crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England may not enter – all his force dares not cross the threshold of the ruined tenement." Pitt, William, Speech on the Excise Bill (1763), as quoted in Miller v. United States, 357 U.S. 301, 307 (1958).

These sentiments were reflected in the constitutional protection against unreasonable searches and seizures afforded by Article 1, Section 8 of the Pennsylvania Constitution, which was in existence for more than a decade before the adoption of the Federal Constitution, and fifteen years before the adoption of the Fourth Amendment. See Commonwealth v. Kohl, 615 A.2d 308, 314 (Pa. 1992), *Citing* Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983).

In interpreting Article 1, Section 8 as providing more protection than the Fourth Amendment, Pennsylvania Courts "have approached it as a fabric of protections for privacy encompassing the "inherent and infeasible rights" protected by Article 1, Section 1, the common law and the Fourth Amendment." Kreimer, Seth, The Right to Privacy Under the Pennsylvania Constitution, 3 Widener Journal of Public Law 77, 82 - 83 (1993). Pennsylvania's jurisprudence

seeks to acknowledge the constant “gravitational pull” of the ideal of privacy in a variety of areas.” Id. at 84. When balancing interests, Pennsylvania places a great deal of weight on strong notions of privacy. Id. at 86.

Thirty years ago, this Court declined to adopt the federal good faith exception to the exclusionary rule. Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991). The Edmunds Court based its decision on the privacy rights conferred by Article 1, Section 8. Id. The Court stated that “although the exclusionary rule may place a duty of thoroughness and care upon police officers and district justices in this Commonwealth, in order to safeguard the rights of citizens under Article 1, Section 8, that is a small price to pay, we believe, for democracy.” Id. at 906.

In recognizing a state Constitutional right to privacy, “Pennsylvania has long been at the constitutional forefront.” Commonwealth v. Gary, 91 A.3d 102, 139 (Pa. 2014) (Todd, J., Dissenting). Article 1, Section 8 has recognized protected privacy a natural and fundamental human right to privacy of our people since its exception in 1776. Id. at 143, Citing Commonwealth v. Sell, 470 A.2d 457, 467 – 68 (Pa. 1983).

This arose from experience of the colonial era, which included “myriad invasions of privacy as the result of widespread, capricious general search and seizure practices. Id. at 144. These included invasive searches by customs officers. Id. The survival of Article 1, Section 8’s language for over two hundred

years of profound change in other areas demonstrates the paramount concern for privacy continues to present. *Id.* at 148. A "steady line of case-law has evolved under the Pennsylvania Constitution, making clear that Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth." Commonwealth v. Alexander, *Supra*, at 6, *Citing Edmunds*, *Supra*, at 898.

In explaining the heightened degree of privacy provided by the Pennsylvania Constitution, this Court stated that the exclusionary rule under Article 1, Section 8 is not meant simply to deter police misconduct, but rather is rooted in the Pennsylvania Constitution's strong notion of privacy. *Id.* "Edmunds itself mandates that we cannot reflexively cede our citizens' constitutional rights to privacy to the needs of law enforcement." *Id.* This does not reflect an implicit hostility to law enforcement, but rather reflects "the rich history of our charter protecting privacy." *Id.*

This Court has also held that the language of Article 1, Section 8 requires more specificity than does the particularity requirement of the Fourth Amendment. Commonwealth v. Johnson, \_\_\_ A.3d \_\_\_ (Pa. 2019), 25 WAP 2019, *Citing Commonwealth v. Grossman*, 555 A.2d 896, 899 (Pa. 1989). This more stringent requirement stems from the language "as nearly as may be." *Id.* Because of the heightened requirements of the Pennsylvania Constitution, general or exploratory searches are not Constitutionally permissible. *Id.*, *Citing Commonwealth v. Matthews*, 285 A.2d 510, 514 (Pa. 1971).

Additionally, Pennsylvania has declined to follow the federal rule that probable cause is unnecessary in parole revocation hearings. Commonwealth v. Arter, 151 A.3d 149, 155 (Pa. 2016). This is so even though the federal rule is that the exclusionary rule would be inapplicable to such proceedings under the Fourth Amendment jurisprudence. Id. at 156.

Pennsylvania courts have held that the primary purpose of the right of privacy under Article 1, Section 8 is to keep citizens free from searches based on generalized suspicions. Commonwealth v. Torres, 177 A.3d 263, 274 (Pa. Super. 2017), *Citing* Commonwealth v. Edmunds, 586 A.2d 887, 897 (Pa. 1991). Because the purpose of the provision is to protect privacy, rather than deter misconduct, the motive of the individual conducting the search is not relevant. Commonwealth v. Arter, 151 A.3d 149, 167 (Pa. 2016). Edmunds itself held that Article 1, Section 8 provided more privacy protections than did the Fourth Amendment. Edmunds, *Supra.* at 897 – 98.

Article 1, Section 8 has also been applied in areas other than criminal law. *See* Lunderstadt v. Pennsylvania House of Representatives, 519 A.2d 408, 414 (Pa. 1986), Annenberg v. Roberts, 2 A.2d 612, 617 (Pa. 1938), Denoncourt v. Commonwealth State Ethics Commission, 470 A.2d 945 (Pa. 1983), Commonwealth Department of Environmental Resources v. Closenski Disposal Services, 566 A.2d 845 850 (Pa. 1989), Stenger v. Lehigh Valley Hospital Center, 609 A.2d 796, 800 (Pa. 1992).



The second Edmunds factor makes clear that Article 1, Section 8 should provide greater protection than the Fourth Amendment in cases of petitions to compel cooperation with county children and youth investigations. The rich history of Article 1, Section 8's protection of privacy, combined with Pennsylvania case law interpreting the provision strongly suggest that this provision is meant to protect Pennsylvanians from government intrusion absent a showing of probable cause.

c. State Law from Other States.

Research has not revealed a robust body of case law from other states applying the privacy provisions of their respective Constitutions to searches by children and youth investigators. There are federal cases holding that children and youth investigators are bound by probable cause, under the Fourth Amendment. In Walsh v. Erie County Dept. of Jobs and Family Services, 240 F.Supp 2d, 731, 745 (N.D. Ohio 2003), the District Court held that a search by a children and youth investigator was a search for Fourth Amendment purposes, and distinguished investigatory searches from limited, consensual home visits for the purpose of determining whether a family continued to be eligible for state benefits.

d. Public policy considerations.

The final Edmunds factor, public policy considerations, also runs in favor of a holding that the Superior Court's rule does not provide sufficient privacy

protections under Article 1, Section 8. For many years, there has been a steady erosion of the guarantees of the Fourth Amendment. These reduced protections can produce actual harm. The better policy, the policy embraced by this Court, is to maintain and protect Pennsylvanians' right to privacy from unreasonable government intrusion.

A reduced right to privacy results in actual harm. *See* Simmons, Kami, The Future of the 4<sup>th</sup> Amendment: The Problem With Privacy, Policy and Policing, 14 U. Md. L. J. Race, Religion, Gender, and Class, 240, 262 (2015). This reduced sense of privacy, and the resulting increased governmental intrusion into people's lives, often results in a lack of trust and a lack of cooperation with government. *Id.* It can also lead to a reduced sense of the legitimacy of government. *Id.* at 259. Because of this, instead of having the intended effect of reducing crime, an erosion of Fourth Amendment protections can have the overall effect of actually increasing crime. *Id.* at 263.

Similarly, Justice Marshall, in his dissent in the case of Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989) highlighted the pitfalls of the erosion of privacy rights. Conor Friedorsdorf, Thurgood Marshall's Prescient Warning: Don't Gut the 4th Amendment, The Atlantic, July 10, 2013 at 2.<sup>9</sup> Justice Marshall noted that "constitutional requirements like probable cause are

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<sup>9</sup> Located at <https://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/>, last accessed February 21, 2021.

not fair-weather friends, present when advantageous, conveniently absent when “special needs” make them not.” *Id.* at 4. We have a “shared belief that even beneficent governmental power – whether exercised to save money, save lives, or make the trains run on time – must yield to a resolute loyalty to constitutional safeguards. *Id.* at 9. Justice Marshall argued that the decision to embrace an exception to the probable cause requirement “will reduce the privacy all citizens may enjoy, for as Justice Holmes understood, the principles of law, once bent, do not snap back easily.” *Id.* at 11.

The erosion of our privacy rights under Article 1, Section 8 caused by the Superior Court’s Opinion, combined with its embrace of the guidelines set forth by Judge Beck’s concurrence in In re: Petition to Compel, as well as the trial court’s formulation of probable cause and the scope of the search given the facts of this case also create the unacceptable outcome of creating Constitutional Inequalities. It is inconsistent with our notions of liberty and democracy that a person’s economic status determines the extent of her constitutional rights.” *See Simmons*, 14 U. Md. L. J. Race, Religion, Gender, and Class at 263.

The impact of children and youth investigations disproportionately affects those who are lower on the socio-economic scale. *See Fong, Kelley, Child Welfare Involvement and Contexts of Poverty: The Role of Parental Adversities, Social Networks and Social Services, Children and Youth Services Review, Vol. 72, p. 5 – 13.* Children and youth agencies receive over six million reports each

year of abuse or neglect. These agencies then seek to either provide services or remove the children from the family home. Intervention is not, however, distributed evenly. Id. Children from poor families and communities are at increased risk of involvement with the child welfare system. Id. A parent’s economic situation may factor among parental adversities, and may constitute another mechanism through which poverty increases the risk of child welfare involvement. Studies have shown that economic factors are stronger of officially reported neglect, compared with parental reports of neglectful behavior. Id.

In addition to socioeconomic disparities, persons of color are disproportionately impacted by children and youth investigations. The Pennsylvania Department of Human Services has stated that “Nationally, the overrepresentation of Black children in the child welfare system has been well documented across numerous research studies.” Pennsylvania Department of Human Services Racial Equity Report, 2021, p. 12.<sup>10</sup> The report goes on to state that “In Pennsylvania there are significant racial disparities in the number of suspected child abuse and neglect reports that are received by the county children and youth agencies and ChildLine, Pennsylvania’s child abuse hotline. Notably, Black children make up 14 percent of the total child population in Pennsylvania but represent 21 percent of potential victims of abuse in child protective service reports.” Id. at 12 – 13.<sup>11</sup>

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<sup>10</sup> Located at:

<https://www.dhs.pa.gov/about/Documents/2021%20DHS%20Racial%20Equity%20Report%20final.pdf>, last accessed on February 15, 2021.

<sup>11</sup> See Also Justice Sotomayor’s dissent in Utah v. Strieff, 579 U.S. \_\_\_, 136 S. Ct. 2056, 2070

The increased likelihood of involvement with county children and youth agencies based on socio economic and racial factors creates the likelihood that these individuals will suffer the harm of increased government intrusion into their homes. Given the standard created by the Superior Court, its generous interpretation of when a children and youth agency may intrude into a home, and its weak interpretation of probable cause in these situations, it is assured that the likelihood of government intrusion into a families' homes will be drastically increased based on a Pennsylvania citizen's race or socio-economic status. This is a poor public policy outcome.

All of Pennsylvania's citizens have a right to enjoy the protections guaranteed by the Pennsylvania Constitution, regardless of socio-economic status or race. An ill-defined, ambiguous standard (such as "a child in need of services") allowing government intrusion into a family's home, which research shows is both disproportionately likely to affect minorities and the poor, while at the same time is also likely to be unfounded nearly half of the time, does not meet the minimum standards guaranteed by the Pennsylvania Constitution.

## 2. The application to the instant case.

As related in Section B, above, DHS's Motion to Compel Cooperation suffered from several flaws. There was no connection between the allegations of

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(2016), in which Justice Sotomayor states that "it is no secret that people of color are disproportionate victims of this type of scrutiny," highlighting the increased scrutiny, and the resulting higher number of searches and seizures to which persons of color are subjected to in the context of the criminal justice system.

the GPS report and anything to be found in Mother's home. There was no indicia of reliability supplied concerning the anonymous reporter who made the GPS report. The report, and the motion, did not allege anything relevant that it would search for with sufficient particularity. DHS simply wished to intrude upon Mother's home and search it in order to comply with its regulatory requirement and to complete its investigation. Regulatory obligations upon an agency, however, do not trump a citizen's Constitutional rights.

Because DHS did not have probable cause to support its Motion to Compel Cooperation, the trial court erred here. The Superior Court erred in constructing its rule of law, with an amorphous definition, deference to government intrusion in a family's home, and leaving a high degree of deference to the government. DHS's resulting search of Mother's home violated her rights under the Fourth Amendment to the Constitution, as well as her rights under Article 1, Section 8 of the Pennsylvania Constitution. As a result, this Court should vacate Superior Court's order. Further, this Court should adopt a test to determine when probable cause exists in cases such as this. Mother respectfully suggests a model for such a test below.

### VIII. CONCLUSION

This Court should vacate the rule established by the Superior Court. The rule falls short of the protections of both the Fourth Amendment and Article 1, Section 8 of the Pennsylvania Constitution. Applying the Superior Court's rule to the facts of the instant case highlights its inadequacy.

Mother urges this Court to adopt a test for when probable cause is present in cases where a county children and youth agency petitions a court to compel cooperation with a General Protective Services report. That test should consider 1) the government's interest or justification for the search, 2) the extent of the government intrusion being requested, 3) is the totality of the circumstances test satisfied, to include the particularity requirement, the nexus requirement, the reliability requirement, and 4) are there acceptable alternatives to a government intrusion that would address the government's interests. Mother believes that this test would restore the proper Constitutional balance of the interests in these matters.

Respectfully submitted,

/S

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Michael Angelotti  
Counsel for J.B., Mother

Dated: 2/25/21

2020 PA Super 245

IN THE INTEREST OF: Y.W.-B., A	:	IN THE SUPERIOR COURT OF
MINOR	:	PENNSYLVANIA
	:	
	:	
APPEAL OF: J.B., MOTHER & G.W.-	:	
B., FATHER	:	
	:	
	:	No. 1642 EDA 2019

Appeal from the Order Entered June 11, 2019  
 In the Court of Common Pleas of Philadelphia County Family Court at  
 No(s): CP-51-DP-0002108-2013,  
 FID# 51-FN-004204-2013

IN THE INTEREST OF: N.W.-B., A	:	IN THE SUPERIOR COURT OF
MINOR	:	PENNSYLVANIA
	:	
	:	
APPEAL OF: J.B., MOTHER & G.W.-	:	
B., FATHER	:	
	:	
	:	No. 1643 EDA 2019

Appeal from the Order Entered June 11, 2019  
 In the Court of Common Pleas of Philadelphia County Family Court at  
 No(s): CP-51-DP-0002387-2016,  
 FID# 51-FN-004204-2013

BEFORE: NICHOLS, J., MURRAY, J., and COLINS, J.\*

OPINION BY NICHOLS, J.: Filed: October 8, 2020

J.B. (Mother) and G.W. (Father) appeal from the orders granting the petitions to compel their cooperation with a home visit by the Philadelphia

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\* Retired Senior Judge assigned to the Superior Court.



Department of Human Services (DHS).<sup>1</sup> Mother claims that DHS failed to establish probable cause to compel her cooperation with a home visit. Mother also contends that the order violated her First Amendment free speech rights by prohibiting her from photographing or recording the DHS workers conducting the home visit. We affirm in part and reverse in part.

Mother and Father are the parents of Y.W.-B., born in June 2012, and N.W.-B., born in January 2015 (collectively, Children). On May 31, 2019, DHS filed the instant petitions to compel Mother's cooperation with a home visit.

In its petitions, DHS alleged, in part, that on May 22, 2019, it received a general protective services (GPS) report. *Pets. to Compel Cooperation with Child Protective Services Investigation of Abuse and/or Neglect, 5/31/19, ¶ j.* The GPS report indicated that three weeks earlier, the family slept outside a Philadelphia Housing Authority (PHA) office, and that on May 21, 2019, Mother was outside the PHA office from 12:00 p.m. to 8:00 p.m. with a child. ***Id.*** The petitions further stated that Mother told a Project Home outreach worker that she was not homeless, but that her previous residence was burned down. According to the petition, it was "unknown if [Mother] was feeding [Children

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<sup>1</sup> Counsel for Mother and Father filed separate notices of appeals from the separate orders filed at the trial court's separate docket numbers for each child. ***Cf. Commonwealth v. Walker***, 185 A.3d 969, 976-77 (Pa. 2018). However, while these appeals are captioned in this Court as appeals by Mother and Father, it appears that Mother was the only party named in the notices of appeal and the only party captioned in the appellate briefs. Therefore, we generally refer to Mother as the appellant throughout this opinion.

while] she stood outside of the PHA office for extended periods of time.”<sup>2</sup> Pets. to Compel Cooperation with Child Protective Services Investigation of Abuse and/or Neglect, 5/31/19, at ¶ j. According to the petitions to compel, DHS workers attempted to assess the family’s home on the same day it received the GPS report, but Mother and Father refused them entry to the home or access to Children. **Id.** at ¶ p.

On June 11, 2019, the trial court held a hearing on DHS’s petitions to compel. Mother and Father were represented by present counsel, and Children also appeared at the hearing. DHS presented testimony from Tamisha Richardson, the DHS investigator assigned to the May 22, 2019 GPS report. N.T., 6/11/19, at 4-7. During Mother’s cross-examination of Ms. Richardson, the trial court interjected and noted that it was familiar with Mother and Father.<sup>3</sup> **Id.** at 12. The trial court then questioned Mother regarding her address, whether she had utilities and income, and whether

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<sup>2</sup> The record does not contain a copy of the GPS report referenced in DHS petitions to compel. We note that DHS did not present further evidence clarifying whether it obtained the information attributed to the Project Home outreach worker directly or from the same source who originally indicated that Mother was outside the PHA office.

<sup>3</sup> As noted below, the family has had prior involvements with DHS from 2013 to 2015. Although not referred to by Mother, DHS, or the trial court, the record also indicates that in 2016, the trial court previously granted DHS’s petitions to compel Mother and Father’s cooperation with a home visit based on allegations that their home did not have water service. The record contains no indication that DHS commenced any dependency proceedings based on the results of the 2016 petition to compel. We add that the 2016 petitions to compel involved the same address of Mother’s residence as in the instant petition to compel.

Children were “up to date” with medical checkups. *Id.* at 12-15. After the trial court addressed Mother regarding the need for an assessment of her home, Mother and her counsel objected, and the trial court stated that it found “ample probable cause,” and that it was granting the petition. *Id.* at 18-19. The trial court then made arrangements for how the home assessment would be conducted. *Id.* at 19-32.

While arranging for the home visit, Mother noted that one of the DHS workers “became very angry and then there was a time over there that she was crying.” *Id.* at 32. DHS’s counsel subsequently asked the trial court to recall Ms. Richardson for further examination. *Id.* at 34. When the trial court asked about the purpose of the questioning, the following exchange occurred:

[DHS’s Counsel]: Well, Your Honor, there’s additional things; videos, photography taken, posted on social media.

THE COURT: They’re not -- they’re not -- oh.

[DHS’s Counsel]: -- that made her feel intimidated.

THE COURT: All right. So you cannot -- you see, you cannot take pictures and video people; that’s against the law, about video [sic] people.

[Mother]: I have video of public officials performing a public function --

THE COURT: No. No. No. No. No. No. See, the problem is, you don’t want to listen. You want to do what you want to do and that’s why you get yourself in trouble, okay. You got to start listening, because my patience only goes this far, okay.

When they go there, I want you to treat them with as much respect that you want them to treat you. It’s a two-way street. No pictures, no harassment, nothing on social media, because that could get you in trouble and arrested. Because just like you feel threatened, they feel threatened.

\* \* \*

[DHS's Counsel]: Your Honor, and for the videos that have --

[Mother]: Is this courtroom recording?

[DHS's Counsel]: -- and what they have of her on social media, may they be removed?

THE COURT: Remove the videos from social media.

***Id.*** at 34-36.

The trial court entered the orders granting DHS's petitions to compel cooperation and further directed that "Mother is NOT to record or video, nor post on social media" and "is to remove current videos regarding [DHS] from social media." Orders, 6/11/19. DHS conducted the home visit on June 14, 2019.<sup>4</sup>

Mother filed notices of appeals the same day as the hearing and submitted an amended statement of errors complained of on appeal the following day.<sup>5</sup> **See** Pa.R.A.P. 1925(a)(2)(i), (b). The trial court filed a responsive opinion asserting that (1) Mother's issues were moot; (2) there

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<sup>4</sup> During the June 14, 2019 home visit, Mother and Father allowed one DHS worker inside their home, and a family friend appeared to record the entire assessment. Additionally, Children were not at home during the assessment, and Parents did not permit DHS to access the basement or the living room that was "boarded up." N.T., 6/18/19, at 5. DHS asserted that it was not able to make a complete assessment and filed a second set of petitions to compel cooperation from Mother and Father. Following a hearing, the trial court denied DHS's second set of petitions on June 18, 2019. There are no indications that DHS took further actions in this matter.

<sup>5</sup> Mother also filed motions for a stay pending appeal in the trial court. The trial court denied the motions for a stay, and as noted above, DHS conducted the home visit on June 14, 2019.

was probable cause to compel Mother's cooperation with the home visit; and (3) its prohibition on Mother recording DHS workers during the home visit did not violate Mother's First Amendment rights. Trial Ct. Op., 9/9/19, at 5-8, 9-10.

Mother presents the following questions for review:

1. Should this Court review the merits of this matter where the trial court's order granted all of the relief requested by the [DHS], and where the trial court's order is capable of repetition yet may escape review?
2. Did the trial court err as a matter of law and abuse its discretion, violating the Fourth Amendment of the Constitution of the United States and Article 1, Section 8 of the Constitution of the Commonwealth of Pennsylvania where it determined that [DHS] presented the court with probable cause to search [Mother's] home in support of its [petitions] to Compel Cooperation?
3. Did the trial court err as a matter of law and abuse its discretion, violating the First Amendment of the Constitution of the United States where it ordered that [Mother] may not film, take pictures o[f], or record government employees acting in their official capacity as they searched her home?

Mother's Brief at 3.

### **Mootness of Mother's Appeal**

We briefly address Mother's first issue challenging the trial court's assertion that the issues in this appeal are moot.<sup>6</sup> In the lead case governing petitions to compel, *In re Petition to Compel Cooperation with Child Abuse Investigation*, 875 A.2d 365 (Pa. Super. 2005), this Court concluded that the fact that the parties complied with an order compelling cooperation

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<sup>6</sup> DHS agrees with Mother that the issues are not moot. DHS's Brief at 14.

did not render their constitutional challenges to the order moot. ***Pet. to Compel***, 875 A.2d at 369-71. The Court noted:

It is impermissible for courts to render purely advisory opinions. In other words, judgments or decrees to which no effect can be given will not, in most cases, be entered by this Court.

Generally, an actual claim or controversy must be present at all stages of the judicial process for the case to be actionable or reviewable. If events occur to eliminate the claim or controversy at any stage in the process, the case becomes moot. Even if a claim becomes moot, we may still reach its merits if the issues raised in the case are capable of repetition, yet likely to continually evade appellate review. Therefore, if the issues raised by an appeal are substantial questions or questions of public importance, and are capable of repetition, yet likely to evade appellate review, then we will reach the merits of the appeal despite its technical mootness.

***Id.*** at 369-70 (citations and quotation marks omitted).

The ***Petition to Compel*** Court continued that “parents . . . who are ordered by the court to open their home to an agency investigator within a specified time period will be denied appellate review.” ***Id.*** at 370-71. Moreover, the Court noted that the parents’ claims that an order violated their constitutional rights against unreasonable searches and seizures constituted “questions of great importance, implicating fundamental constitutional rights enjoyed by every citizen of this Commonwealth . . . .” ***Id.*** at 371.

Here, as in ***Petition to Compel***, Mother’s claim that the orders violated her constitutional rights to be free from an unreasonable search is not moot. ***See id.*** at 370-71. Further, Mother asserts that the orders violated her First Amendment right by prohibiting her from recording public officials performing

their duties. Similar to ***Petition to Compel***, Mother's First Amendment claim is capable of repetition, yet likely to evade appellate review, and also raises questions of public importance. ***See id.*** Therefore, Mother's constitutional claims are not moot, and we will address them on their merits.

### **Probable Cause to Compel Cooperation**

In her second issue, Mother argues that the trial court erred in finding probable cause to compel her cooperation with DHS. Mother's Brief at 19-34. Mother contends that the trial court applied a lower standard of probable cause than the standard applied in criminal cases involving anonymous tips. ***Id.*** at 24-25. Mother asserts that the allegations in the initial GPS report came from an anonymous report. ***Id.*** at 32. Mother contends that the trial court wrote "Fourth Amendment protections out of the law" for petitions to compel cooperation with home visits. ***Id.*** at 25. Specifically, Mother argues that "[s]hould this Court adopt the trial court's standard, any allegation from any anonymous source would be sufficient to trigger a [DHS] ability to enter and search a home." ***Id.***

Mother also refers in passing to the "four corners" rule for reviewing a criminal search warrant to argue that DHS's petitions to compel lacked any independent basis to confirm the reliability and veracity of the reporter's tip. ***Id.*** at 32. Specifically, Mother argues that nothing in the petitions to compel or the testimony at the hearing substantiated the allegations in the GPS report. ***Id.*** at 29, 33.

Additionally, Mother asserts that DHS's petitions to compel lacked sufficient particularity because "it did not describe anything within the family's home that was relevant to [DHS's] investigation." *Id.* at 33. Mother further contends that "[t]here were no facts, in either the testimony presented by DHS nor in the [petition] itself, that there was anything within Mother's home that would further DHS's investigation or lead it to a conclusion. There was no 'specific link' here connecting anything inside the home to DHS's investigation." *Id.* at 29.

Mother adds that the testimony at the hearing contradicted the allegations in DHS's petitions. Specifically, Mother notes that DHS's petitions alleged that when DHS workers attempted to conduct the home visit on May 22, 2019, Mother took Children inside the home and she became aggressive when she denied DHS access to the home. *Id.* at 32. Mother emphasizes that Ms. Richardson testified at the hearing that Children were outside with Mother when Mother was talking to the DHS workers, and that Mother was not aggressive. *Id.* Moreover, Mother asserts that the trial court erred in finding that the GPS report alleged homelessness. Mother maintains that there was evidence that both the anonymous reporter and DHS were aware that the family had an address to contact them. In sum, Mother contends that DHS failed to assert any reliable information to sustain the trial court's finding of probable cause to have DHS enter her home to conduct a GPS assessment.



DHS responds that the trial court properly found probable cause to enter Mother's home. DHS notes that the Child Protective Services Law (CPSL), 23 Pa.C.S. §§ 6301-6387, and the enabling regulations require it to conduct investigations of reports of suspected child abuse and visit a child's home during its investigation. DHS's Brief at 15. DHS further argues that, unlike the scope of review in a criminal case, a trial court may consider matters outside the four corners of a petition to compel. **Id.** at 19.

DHS claims that its May 31, 2019 petitions to compel were supported with probable cause and cites Ms. Richardson's descriptions of the GPS report and her own investigation of the report. **Id.** at 19-21. DHS further contends that there was sufficient particularity because Ms. Richardson testified that she needed to assess the home to ensure it was appropriate for Children, had working utilities, and contained adequate food for Children. **Id.** at 23. DHS argues in the alternative that the petitions to compel set forth adequate allegations to compel Mother's cooperation to an assessment of her home. **Id.** at 21-22.

At outset, we note that Mother's and DHS's arguments raise questions of fact and law. Our review of factual questions determined by the trial court is deferential. **Cf. Commonwealth v. Marshall**, 568 A.2d 590, 595 (Pa. 1989). This Court will not disturb a trial court's finding of fact or credibility if it is supported in the record. **Id.** However, an appellate court owes no deference to the trial court's legal conclusions. **Cf. In re L.J.**, 79 A.3d 1073, 1080 n.6 (Pa. 2013). Nevertheless, in the context of a search warrant, a court

does not conduct a *de novo* review of an issuing authority's probable cause determination, but ensures that the issuing authority had a substantial basis for concluding that probable cause existed. ***Commonwealth v. Batista***, 219 A.3d 1199, 1202 (Pa. Super. 2019).

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.<sup>7</sup> "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" ***Commonwealth v. Romero***, 183 A.3d 364, 397 (Pa. 2018) (plurality) (quoting ***Welsh v. Wisconsin***, 466 U.S. 740 (1984)).

In the context of criminal law, probable cause to search means "a fair probability that contraband or evidence of a crime will be found in a particular place." ***Commonwealth v. Jones***, 988 A.2d 649, 655 (Pa. 2010) (citation omitted). As our Supreme Court emphasized, "probable cause is based on

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<sup>7</sup> Article I, Section 8 of the Pennsylvania Constitution states:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. art. I, § 8.

probability, not a *prima facie* case of criminal activity . . . .” ***Commonwealth v. Housman***, 986 A.2d 822, 843 (Pa. 2009). “Probable cause is a practical, non-technical conception requiring a consideration of the totality of the circumstances[.]” ***Commonwealth v. Wallace***, 42 A.3d 1040, 1048 (Pa. 2012) (citation omitted and formatting altered). “The totality of the circumstances test `permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant’s tip[.]” ***Commonwealth v. Torres***, 764 A.2d 532, 537 (Pa. 2001) (citation omitted).

The CPSL defines “general protective services” as “[t]hose services and activities provided by each county agency for cases requiring protective services, as defined by the department in regulations.”<sup>8</sup> 23 Pa.C.S. § 6303(a). The CPSL requires that an agency assess and make a decision to accept a family for services within sixty days of receiving a report that a child is in need of protective services. 23 Pa.C.S. § 6375(c)(1). The Pennsylvania Department of Human Services’ regulations require a county agency to make at “least one home visit” during the assessment and make home visits “as often as necessary to complete the assessment and insure the safety of the child,” and permit an agency to make “unannounced home visits.” 55 Pa.

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<sup>8</sup> The Pennsylvania Department of Human Services’ regulations define “protective services” as “[s]ervices and activities provided by the Department and each county agency for children who are abused or in need of general protective services under this chapter.” 55 Pa. Code § 3490.4.

Code § 3490.232(f)-(g). Commonwealth regulations define “general protective services,” in part, as “[s]ervices to prevent the potential for harm to a child who . . . [i]s without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals.” 55 Pa. Code § 3490.223.

As stated in ***Petition to Compel***, the Fourth Amendment, and by necessary implication, Article I, Section 8, apply to the provision of the CPSL and regulations governing a county agency’s duty to investigate allegations of abuse or neglect inside a private home.<sup>9</sup> ***Pet. to Compel***, 875 A.2d at 377. Therefore, a county agency must demonstrate probable cause to enter a private residence to conduct an investigation. ***Id.*** at 377-78 (stating that “[a]s we interpret the statute and agency regulations, [an agency] must file a verified petition alleging facts amounting to probable cause to believe that an act of child abuse or neglect has occurred and evidence relating to such abuse will be found in the home”).

Additionally, all three members of this Court’s panel in ***Petition to Compel*** joined the majority opinion and a concurring opinion by Judge Phyllis Beck. The concurrence noted:

Future parties and courts faced with this issue to consider that the purposes and goals underlying the activities of child protective

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<sup>9</sup> We note that the regulations for investigating an assessing the need for general protective services do not contain a provision authorizing the filing of petitions to compel cooperation. **See** 55 Pa. Code. §§ 3490.221-3490.242. The regulation discussing petitions to compel cooperation is listed in governing investigations for “child abuse.” **See** 55 Pa. Code. § 3490.73.

agencies differ significantly from those of law enforcement generally. As a result, it would be unwise to apply the standard notion of probable cause in criminal law to cases such as these. While the Fourth Amendment certainly is applicable to these matters, we must not forget the very purpose for [CPSL]. Child Line and other services like it exist to encourage people to report incidents of potential danger to children. Likewise, we impose upon certain professionals an affirmative duty to report conduct they believe may be harmful to a child.<sup>[10]</sup> For these reasons, simply requiring an agency to show “probable cause” as it is defined in the criminal law is not enough. Instead, the nature and context of each scenario must be considered.

What an agency knows and how it acquired its knowledge should not be subject to the same restrictions facing police seeking to secure a search warrant. For instance, an agency’s awareness of previous conduct on the part of parents would be relevant, indeed vital, information to include in a request for a court-ordered home visit. What constitutes probable cause in the child protective arena is far different from what constitutes probable cause in the criminal law. **Social services agencies should be held accountable for presenting sufficient reasons to warrant a home visit, but those same agencies should not be hampered from performing their duties because they have not satisfied search and seizure jurisprudence developed in the context of purely criminal law.** I urge the courts deciding these issues to accord careful consideration to the unique circumstances they present.

***Pet. to Compel***, 875 A.2d at 380 (Beck, J., concurring) (emphasis added).

As noted in the concurrence in ***Petition to Compel***, there are differences between challenges to the issuance of a search warrant in a criminal case and the litigation of a petition to compel under the CPSL. ***See id.*** In criminal law, an affiant, often a police officer, obtains a search warrant

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<sup>10</sup> We note that there is no indication in this case that DHS received information from a mandated reporter. ***See*** 23 Pa.C.S. §§ 6311-6320. Therefore, the reliability of information from a mandated reporter is not at issue in this case.

by completing and submitting an application and an affidavit of probable cause to an issuing authority *ex parte*. **See generally *In re 2014 Allegheny Cty. Investigating Grand Jury***, 223 A.3d 214, 221 (Pa. 2019); **see also** Pa.R.Crim.P. 203. The target of the search warrant has no opportunity to challenge the application or affidavit unless the issuing authority grants the warrant and until after the search warrant is executed. Under these circumstances, neither the issuing authority nor a reviewing court may consider any evidence outside the affidavits of probable cause in support of a search warrant. **See *Commonwealth v. Milliken***, 300 A.2d 78, 80 (Pa. 1973) (explaining that the rule requiring that the information in support of a search be reduced to writing was founded, in part, on the “inherent difficulty of reviewing challenged unrecorded [oral] *ex parte* testimony”). Nevertheless, this rule, sometimes referred to as the “four corners” rule, is procedural and not constitutional in nature. **See** Pa.R.Crim.P. 203(B); ***Commonwealth v. Conner***, 305 A.2d 341, 342-43 (Pa. 1973); ***Commonwealth v. Morris***, 533 A.2d 1042, 1044 n.2 (Pa. Super. 1987).

By contrast, neither the CPSL nor any rule of civil or family procedure limits a trial court’s consideration of a petition to compel to the four corners of the petition. As was the case here, parents may appear before the trial court for a hearing **before** the court grants a petition to compel cooperation. Such a hearing may afford parents opportunities to cross-examine witnesses, challenge the veracity and reliability of the evidence in support of the petition, testify on their own behalf, and make legal arguments regarding probable

cause. Furthermore, as noted in ***Petition to Compel***, in child cases, a county agency and the trial court may have prior experiences with parents that bear relevance to a determination of probable cause. ***Pet. to Compel***, 875 A.2d at 380 (Beck, J., concurring). Therefore, we discern no basis to apply a criminal rule of procedure to restrict a court’s review of a petition to the four corners of the petition itself, where the trial court holds a hearing on an agency’s petition to compel.<sup>11</sup> ***See id.***

In sum, we reiterate the holding in ***Petition to Compel*** that an agency “must file a verified petition alleging facts amounting to probable cause to believe that an act of child abuse or neglect has occurred and evidence relating to such abuse will be found in the home.” ***Pet. to Compel***, 875 A.2d at 377-78. Similarly, where the petition to compel involves an entry into a parent’s home to investigate a GPS report, an agency must establish probable cause. ***See id.***; ***accord Romero***, 183 A.3d at 397. We further reiterate that the constitutional requirements of probable cause involve only “fair probabilities.” ***See Jones***, 988 A.2d at 655; ***Housman***, 986 A.2d at 843.

Accordingly, an agency may obtain a court order compelling a parent’s cooperation with a home visit upon a showing of a fair probability that a child

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<sup>11</sup> We note, however, that this Court indicated that parents do not have a due process right to notice and opportunity to be heard on a petition to compel. ***Pet. to Compel***, 875 A.2d at 379 (stating that “it would be unreasonable to direct the courts to give notice and schedule a hearing in every instance”). In such case, it is imperative that the agency reduce all allegations to writing. ***See id.*** at 380 (Beck, J., concurring).

is in need of services, and that evidence relating to that need will be found inside the home. **See *Pet. to Compel***, 875 A.2d at 377-78; **see also** 55 Pa. Code § 3490.223. In making a probable cause determination, however, the trial court may consider evidence presented at a hearing on the petition, as well as the court's and the agency's prior history to the extent it is relevant. **See *Pet. to Compel***, 875 A.2d at 380 (Beck, J., concurring). This Court will review the trial court's decision granting a petition to compel for a substantial basis for concluding that probable cause existed. ***Batista***, 219 A.3d at 1202.

In ***Petition to Compel***, an agency received a report alleging possible child abuse. ***Pet. to Compel***, 875 A.2d at 368. The agency's petition in that case generally stated those allegations, indicated that a caseworker had contacted the parents and several medical facilities that had treated the child, and that a referral for alleged medical neglect was made. ***Id.*** at 378. The petition essentially asserted that the regulations required it to make a home visit. ***Id.*** This Court vacated the trial court's order granting the petition, reasoning that the trial court lacked any factual foundation for finding probable cause that the abuse could have occurred inside the child's home or that evidence of the abuse could have been found inside the child's home. ***Id.***

In ***Interest of D.R.***, 216 A.3d 286 (Pa. Super. 2019), *aff'd*, \_\_\_ A.3d \_\_\_, 45 WAP 2019, 2020 WL 3240581 (Pa. filed June 16, 2020), an agency received three reports of a father being intoxicated, that on one of those occasions, the father was with one of his children, and that the father abused the mother but criminal charges were dismissed after the mother refused to



testify. **D.R.**, 216 A.3d at 289. The agency conducted an investigation, which included interviews of all of the children. Further, the agency sought records of the allegation regarding the abuse of the mother, but was not able to corroborate the allegations. **Id.** The agency thereafter filed a motion to compel the parents' compliance to a home inspection and the father's cooperation with a drug test. **Id.**

The **D.R.** Court vacated the order compelling the parents' cooperation with a home visit. This Court explained that:

While there were three separate reports regarding [the f]ather's alleged intoxication, none contained any specificity regarding the degree or type of impairment, nor alleged how such impairment caused any of the children to be abused or neglected. Only the first report alleged that a child was even present when [the f]ather appeared to be under the influence. And even then, [the agency] did not obtain potentially available security footage to see for themselves.

More importantly, none of the interviews with the children resulted in further suspicion of abuse or neglect. [The agency] did not allege any concerns with [the m]other, beyond the allegation that she was a victim of domestic violence—a charge that could not be substantiated by court records. And critically, [the agency] did not allege a link between the alleged abuse/neglect and the parents' home. Nor did [the agency] allege exigent circumstances; in fact, the allegations were months old.

It appears here that [the agency] merely sought compliance so that they could close the investigation. These facts do not constitute a sufficient foundation for a finding of probable child abuse or neglect under the CSPL. The court erred when it ordered the parents to submit to a home inspection.

**Id.** at 295 (footnotes and citation omitted).<sup>12</sup>

Mindful of the foregoing principles, we now consider DHS's petitions to compel Mother's cooperation with a home visit. Instantly, DHS filed the petition to compel alleging:

- b. On September 4, 2013, DHS received a [General Protective Services (GPS)] report alleging that [Mother], hit [Y.W.-B] on the arm; that it was unknown if [Y.W.-B] sustained an injuries, pain, or impairment; that [Mother] often hit [Y.W.-B]; that [Y.W.-B] was often heard yelling and screaming; that his basic needs were met, but the home was dirty and disordered; that [Mother] was unemployed; that she might have substance abuse issues; and that the home was heavily trafficked. This report was determined to be valid.
- c. On October 18, 2013, DHS received a GPS report alleging that the family's home was in deplorable condition; that there were holes in the walls; that the home was infested with fleas; that the home lacked numerous interior walls; that the interior structure of the home was exposed; that the home lacked hot water service and heat; and that the home appeared to be structurally unsound. The report further alleged that when [Y.W.-B] and his family's dog left the home, they were covered with fleas, and that [Father] was incarcerated. The report was determined to be valid.

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<sup>12</sup> The Pennsylvania Supreme Court granted allowance of appeal on an issue regarding drug testing and subsequently affirmed this Court's decision to reverse that portion of order that compelled the father's cooperation with drug testing. **Interest of D.R.**, \_\_\_ A.3d \_\_\_, 45 WAP 2019, 2020 WL 3240581, \*10 (Pa. filed June 16, 2020). Specifically, our Supreme Court concluded that the CPSL did not "expressly or implicitly authorize collecting samples of bodily fluids, without consent, for testing." **See id.** at \*10. Because our Supreme Court resolved the issue on statutory grounds, it did not reach the agency's constitutional arguments that a drug test could be compelled using a standard less than probable cause. **See id.** at \*9, \*10 n.14. We note that our Supreme Court expressly stated it did not endorse the position that the allegations in the report "properly triggered the [a]gency's statutory obligation to investigate" as it was beyond the scope of the issue accepted for review. **Id.** at \*9 n.13.

- d. On October 18, 2013, DHS obtained an Order of Protective Custody (OPC) for [Y.W.-B] and placed him in foster care.
- e. On October 29, 2013, [Y.W.-B] was adjudicated dependent and committed to DHS.
- f. [Y.W.-B] remained in foster care until July 20, 2015, when the [c]ourt transferred physical and legal custody of [Y.W.-B] to [Parents]. [Y.W.-B] remained under protective supervision of DHS.
- g. [Mother] gave birth to [N.W.-B in January 2015].
- h. The family received in-home services through Community Umbrella Agency (CUA)-NorthEast Treatment Centers (NET) from January 26, 2015 through November 10, 2015.
- i. On November 10, 2015, DHS supervision and [Y.W.-B's] dependent matter were discharged.
- j. On May 22, 2019, DHS received a GPS report alleging that three weeks earlier, the family had been observed sleeping outside of a Philadelphia Housing Authority (PHA) office located at 2103 Ridge Avenue; that on May 21, 2019, [Mother] had been observed outside of the PHA office from 12:00 P.M. until 8:00 P.M., with one of the children in her care; that Project Home dispatched an outreach worker to assess the family; that [Mother] stated that she was standing outside of the PHA office in protest; that she stated that she was not homeless and that her previous residence had burned down; and that it was unknown if [Mother] was feeding [Children] she stood outside of the PHA office for extended periods of time. This report is pending determination.
- k. On May 22, 2019, DHS confirmed the family's home address through a Department of Public Welfare (DPW) search.

- i. On May 22, 2019, DHS visited the family's home. When DHS arrived at the home, only [Father] was present, and he refused to allow DHS to enter the home. [Father] contacted [Mother] via telephone and allowed DHS to speak with her. [Mother] stated that she was engaging in a protest outside of the PHA office; that she did not have [Children] with her while she was protesting; and that she would not permit DHS to enter the home. [Mother] subsequently returned to the home with [Children] in her care. DHS observed that [Children] appeared to be upset before [Mother] ushered them into the home. [Mother] further stated that [Children] had not been with her when she protested outside of the PHA offices; and that [Children] were fine and were not in need of assessments or services. [Mother] exhibited verbally aggressive behavior toward DHS and filmed the interaction outside of the home with her telephone. DHS did not enter the home, but observed from the outside of the home that one of the home's windows was boarded up.
  
- m. On May 22, 2019, DHS returned to the family's home with officers from the Philadelphia Police Department (PPD). [Parents] continued to exhibit aggressive behavior and refused to allow DHS to enter the home. The PPD officers suggested that DHS obtain a court order to access the home.
  
- n. [Mother] has a criminal history that includes convictions for theft-related and trespassing offenses.
  
- o. [Father] has a criminal history that includes convictions for drug-related offenses in 1993. [Father] was also convicted of rape in 1994 and was sentenced to a minimum of 5.5 years to a maximum of 11 years of incarceration.
  
- p. To date, [Parents] have failed to make the family's home available for evaluation and have failed to make [Children] available to DHS so that DHS can assess their safety. As a result, DHS is unable to complete its investigation of the May 22, 2019 GPS report.

Pets. To Compel Cooperation, 5/31/19, at ¶¶ b-p.

At the hearing on the petition, Ms. Richardson, a DHS investigator, testified that DHS “received a GPS investigation” on May 22, 2019, alleging “homelessness and inadequate basic care.” N.T., 6/11/19, at 5. Ms. Richardson stated that she “made the initial outreach” that same day, but Mother and Father “made it clear to [her] that they [would] not allow [her] into the home . . . [a]nd they expressed to [her] to file a motion to compel and that’s what [she] did.” *Id.* at 5. The trial court questioned Ms. Richardson further about the purpose of the home visit and Ms. Richardson indicated that she needed to make sure Parents’ home was appropriate, that the utilities were working, and that there was food in the house. *Id.* at 6.

During cross-examination by Mother’s counsel, Ms. Richardson described Parents’ demeanor that day as “I don’t want to say aggressive, but just very clear that they did not want me to assess” the home. *Id.* at 7. Mother’s counsel questioned Ms. Richardson about the allegations in the GPS report and petition and raised discrepancies over whether Children remained outside or went inside the home when Mother returned home with them. *Id.* at 7-11.

Upon questioning by the trial court, Mother noted that she was “engaging in an ongoing protest at the PHA headquarters.” *Id.* at 15. Mother asserted that she was “being retaliated against.”

In its Rule 1925(a) opinion, the trial court noted that it reviewed DHS’s petitions to compel, the evidence presented at the hearing, as well as Mother’s demeanor at the hearing. The trial court concluded that there was probable

cause to compel Mother's cooperation with the home visit. **See** Trial Ct. Op. at 6-8. The trial court explained:

The [petitions to compel] and the hearing confirmed that one of the main factors of the DHS investigation is the matter of homelessness and if the alleged address of the family was suitable for Children. The home assessment by DHS would be able to determine if the claims for both homelessness and inadequate care of Children have merit. The trial court determined that the [petitions to compel] provided probable cause for DHS to complete an assessment of the family home. The allegations of the [petitions to compel] was, in part, that Mother was sleeping outside of PHA with Children. It was reasonable to ascertain whether [Mother and Father] had stable housing; therefore, [Mother and Father] needed to allow a home assessment. The testimony of the DHS witness was credible. Due to Mother's distrust of DHS, the trial court permitted Mother to bring witnesses to the home assessment.

**Id.** at 7-8.

Following our review, we find a substantial basis for the trial court's probable cause determination. **Cf. Batista**, 219 A.3d at 1202. The averments in DHS's petition, supported by evidence at the hearing, corroborated the initial report that Mother was outside the PHA office and the allegation that there was a fire at Mother's current residence. Although Mother asserted her previous residence was damaged by fire, the trial court was under no obligation to credit Mother's alleged explanation, particularly since DHS workers ultimately observed at least some damage to Mother's current residence, namely the boarded-up window, which was consistent with damage from a fire. **Cf. Commonwealth v. Torres**, 764 A.2d 532, 538 n.5, 539 & 540 n.8 (Pa. 2001) (corroboration of information freely available to the public

does not constitute sufficient indicia of reliability, but indications that a sources had some “special familiarity” with a defendant’s personal affairs may support a finding of reliability).

The trial court was also entitled to consider its prior experiences with the family, as well as Mother’s demeanor at the hearing. **See *Pet. to Compel***, 875 A.2d at 380 (Beck, J., concurring). Moreover, it was within the province of the trial court to resolve conflicts between the petition to compel and the testimony at the hearing when evaluating whether there was probable cause to compel Mother’s cooperation with the home visit. **Cf. *Marshall***, 568 A.2d at 595.

Therefore, under the circumstances of this case, we find no merit to Mother’s arguments that the trial court applied an improper probable cause standard, erred in ordering her compliance with the home visit based solely on an anonymous tip, or abused its discretion when weighing the totality of the circumstances. Unlike ***Petition to Compel***, DHS did not rely solely on its duty to complete an investigation into allegations. **See *Pet. to Compel***, 875 A.2d at 378. Moreover, there was a “link” between the allegations and DHS’s petition to enter the home. **See *D.R.***, 216 A.3d at 295. Accordingly, we affirm the trial court’s conclusion that that there was a fair probability that Children could have been in need of services, and that evidence relating to the need for services could have been found inside the home.

### **First Amendment Right to Record DHS Visit**

In her third claim, Mother argues that the trial court erred in prohibiting her from recording the DHS workers who conducted the home visit.<sup>13</sup> Mother relies on ***Fields v. City of Phila.***, 862 F.3d 353 (3d Cir. 2017), for the proposition that the First Amendment right to free speech necessarily incorporates the act of recording. Mother's Brief at 37-39. Mother asserts that under the rationale of ***Fields***, the trial court should have determined that she had a First Amendment right to record the DHS workers conducting their investigation inside her home. ***Id.*** at 45-46.

Moreover, Mother contends that the trial court erred in finding that its order prohibiting her from recording constituted a proper time, place, and manner restriction. ***Id.*** at 41-42. Specifically, Mother argues that there was no evidence that Mother or her recordings constituted a threat to the DHS workers. ***Id.*** at 42-45. Lastly, Mother contends that the trial court erred in concluding that there was a compelling interest in protecting the privacy of Children. ***Id.*** at 46-47.

DHS, in its brief, "agrees . . . that the trial court erred in prohibiting Mother from photographing or recording the home assessment." DHS's Brief at 14. DHS provides no further discussion of the claim.

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<sup>13</sup> Mother has not developed an argument that the trial court erred in ordering her to remove existing videos from her social media accounts.



The trial court, in its Rule 1925(a) opinion, addressed Mother's challenge as follows:

Regarding the First Amendment Right to Record, the United States Third Circuit Court of Appeals concluded, "In sum, under the First Amendment's right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas." [**Fields**, 862 F.3d at 360]. The United States Third Circuit Court of Appeals also indicated that all recording is either protected or desirable, and the right to record police is not absolute. Instead, it is subject to reasonable time, place, and manner restrictions. **Id.** Additionally, pursuant to the Juvenile Act, there is a compelling interest in protecting minor children's privacy rights, and the protection of such is a key aspect of the Juvenile Act. 42 Pa.C.S.[] § 6307(a).

Mother's Counsel argues that the finding of [**Fields**] is that preventing Mother from filming, photographing, or otherwise recording the DHS employees performing the home assessment is a violation of Mother's First Amendment rights under the Constitution of the United States. The finding in [**Fields**] specifically referred to police officers that were conducting official police activity in public areas. The facts in this matter involve significantly different circumstances around the attempted recording, including that the government agents involved were not police officers and did not attempt to act in such capacity; the official business that was conducted during the home investigation was not official police activity; and the home assessment did not take place in a public area, but instead a private home. During the hearing for the Motion to Compel, it was determined that Mother had previously taken videos and photographs of DHS and placed the recordings on social media. Furthermore, allowing Mother to create recordings of the DHS regarding the investigation pursuant to the [CPSL] would can [sic] interfere with protecting Children's privacy rights. The trial court did take into account Mother's distrust of DHS, and the trial court permitted Mother to bring witnesses to the home assessment in lieu of recording individuals of DHS.

Trial Ct. Op. at 9-10. The trial court concluded that it did not err when prohibiting Mother from filming, photographing, or otherwise recording DHS's performance of the home visit. **Id.** at 10.

"[I]n reviewing First Amendment cases, appellate courts must conduct a review of the entire record." **In re Condemnation by Urban Redevelopment Auth. of Pittsburgh**, 913 A.2d 178, 183 (Pa. 2006) (citation omitted); **accord S.B. v. S.S.**, 201 A.3d 774, 780 (Pa. Super. 2018), *appeal granted*, 217 A.3d 806 (Pa. 2019). Our standard of review of the trial court's legal conclusions is *de novo*. **Urban Redevelopment Auth. of Pittsburgh**, 913 A.2d at 183. "[T]o the extent that factual findings and credibility determinations are at issue," an appellate court will accept the trial court's conclusions insofar as they are supported by the record. **Id.**

Our research indicates that courts apply varying levels of scrutiny to government actions affecting First Amendment rights. First, as our Supreme Court noted, strict scrutiny applies

[w]hen the government restricts expression due to the content of the message being conveyed, such restrictions are allowable only if they pass the strict scrutiny test. That test is an onerous one, and demands that the government show that the restrictions are "(1) narrowly tailored to serve (2) a compelling state interest."

**Id.** (citation omitted).

Second, a court will apply an intermediate level of scrutiny when, for example, "the governmental regulation applies a content-neutral regulation to

expressive conduct.” **Id.** at 184 (citation omitted). Under that test, a regulation may be sustained when:

- 1) Promulgation of the regulation is within the constitutional power of the government;
- 2) The regulation furthers an important or substantial governmental interest;
- 3) The governmental interest is unrelated to the suppression of free expression; and
- 4) The incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest.

**Id.** (citation omitted). Similarly, “states may place content neutral time, place, and manner regulations on speech and assembly so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.” **Friends of Danny DeVito v. Wolf**, 227 A.3d 872, 902 (Pa. 2020) (citation and quotation marks omitted).

The third test “can fairly be denoted as the ‘no scrutiny’ test.” **Urban Redevelopment Auth. of Pittsburgh**, 913 A.2d at 184. That test applies where “the government enforces a regulation of general applicability, First Amendment scrutiny is not implicated even when the enforcement of such a regulation would have some effect on First Amendment-protected activities.” **Id.**

In **Commonwealth v. Bradley**, \_\_\_ A.3d \_\_\_, \_\_\_, 2020 PA Super 109, 2020 WL 2124419 (Pa. Super. filed May 5, 2020), this Court summarized **Fields** as follows:

Recently, the Third Circuit Court of Appeals explained:

The First Amendment protects the public's right of access to information about their officials' public activities. It goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, the highest rung of the hierarchy of the First Amendment values, and is entitled to special protection. That information is the wellspring of our debates; if the latter are to be uninhibited, robust, and wide-open, the more credible the information the more credible are the debates.

To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately. Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media. Accordingly, recording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public.

[**Fields**, 862 F.3d at 359] (citations and quotation marks omitted).<sup>[fn3]</sup> The Third Circuit, however, cautioned that all recording was not protected or desirable. **Id.** at 360. "The right to record police is not absolute. It is subject to reasonable time, place, and manner restrictions." **Id.** (quotation marks omitted). .

. .

<sup>[fn3]</sup> We treat decisions of the Third Circuit as persuasive authority on questions of federal constitutional law. **See Stone Crushed P'ship v. Kassab Archbold Jackson & O'Brien**, 589 Pa. 296, 908 A.2d 875, 883 n.10 (2006).

In **Fields**, the two plaintiffs brought Section 1983, 42 U.S.C. § 1983, claims against the City of Philadelphia and certain police officers, alleging, *inter alia*, that the officers illegally retaliated against them for exercising their First Amendment right to record public police activity. Plaintiff Amanda Geraci attended an anti-fracking protest at the Philadelphia Convention Center. Belonging to a police watchdog group, she carried her camera and wore a pink bandana that identified her as a legal observer. When the

police initiated the arrest of a protester, Geraci moved to record the arrest from a better vantage point. She did not interfere with the police. Yet, an officer abruptly pushed her and pinned her against a pillar for one to three minutes, preventing her from observing or recording the arrest. Geraci was not arrested or cited.

Plaintiff Fields, who was a sophomore at Temple University, was on a public sidewalk where he observed numerous police officers breaking up a house party across the street. The nearest officer was fifteen feet away from him. Using his iPhone, he photographed the scene. An officer noticed him taking pictures and inquired whether he liked taking pictures of grown men. The officer directed Fields to leave. He refused. The officer arrested Fields, seized his phone, and detained him. The officer ultimately released Fields and issued him a citation for obstructing highway and other public passage. Later the charges were withdrawn because the officer failed to appear at the court hearing.

Despite the defendants' decision not to argue against the existence of a First Amendment right, the district court *sua sponte* concluded that the plaintiffs' activities were not protected by the First Amendment because they presented no evidence that their conduct may be construed as expression of a belief or criticism of police activity. *Id.* at 356. On appeal, the Third Circuit disagreed, holding that "under the First Amendment's right of access to information the public has the commensurate right to record—photograph, film or audio record—police officers conducting official police activity in public areas." *Id.* at 360. The court, however, did not address the constitutional limits of this important First Amendment right because the defendants offered no justification for the action. *Id.* Accordingly, the court noted that no "countervailing concerns" existed to justify a departure from the general right to free speech under the First Amendment. *Id.*

**Bradley**, 2020 WL 2124419 at \*5-\*6 (some footnotes omitted).

In **Bradley**, this Court addressed such "countervailing concerns" in a case in which the defendant challenged his conviction for defiant trespass for recording in the lobby of a police station in which there was a "no-filming"

policy in place. **Id.** at \*6-\*7. The **Bradley** Court specifically concluded that the no-filming condition in the lobby passed constitutional muster, reasoning:

The Commonwealth presents several countervailing concerns to [the a]ppellant's argument that he had an absolute right under the First Amendment to videotape in the Lobby. Principally, the Commonwealth highlights Corporal McGee's testimony that the police department's no-filming condition in the Lobby was based on several reasons: (1) preventing the disclosure of confidential information relating to ongoing investigations discussed within secure areas of the police department; (2) safeguarding the identity of confidential informants and undercover officers; (3) ensuring their safety by preventing the risk of retaliation against them; and (4) ensuring and preserving the privacy of crime victims. Indeed, the trial court found "Corporal [ ] McGee testified with regard to numerous grounds upon which the no[-]filming policy was based, citing confidentiality and victim safety as fundamental components." Thus, the restriction or condition at issue is reasonable.

The no-filming condition applies to all members of the public who visit the Lobby. In other words, members of the public are granted a license to enter and remain in the Lobby, provided that they abide by the condition. Among other things, the no-filming condition ensures the integrity of police investigations and activity. The condition applies only to the Lobby and the interior of the police station, and not to areas outside of the police station, such as steps or entrances. Admittedly, it prohibits only the recording, taping, and photographing within the Lobby. The condition does not bar the use of parchment and quill in the Lobby. It, therefore, is a reasonable restriction under the First Amendment because it is narrowly tailored to serve a significant governmental interest, *i.e.*, to ensure the safety, security and privacy of officers, informants and victims. Moreover, it prevents interferences with police activity. Accordingly, under the circumstances of this case, the recording or filming in the Lobby by members of the public is not a protected activity under the First Amendment.

**Id.** at \*6-\*7, \*12.

Mother does not cite any cases discussing claims of First Amendment free speech protections for individuals that record official governmental activities inside the individuals' private residence. Our research has not revealed any cases dealing with First Amendment protections under these circumstances.<sup>14</sup> However, **Fields** recognized that "[a]ccess to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, the highest rung of the hierarchy of the First Amendment values, and is entitled to special protection." **Fields**, 862 F.3d at 359 (citations and quotation marks omitted). Although this case involves DHS officials rather than police, and official actions within Mother's home rather than in public, we conclude that First Amendment protections extend to

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<sup>14</sup> We note that in **Jean v. Mass. State Police**, 492 F.3d 25 (1st Cir. 2007), an individual, Paul Pechonis, recorded audio of police officers executing a warrantless search of his home. **Jean**, 492 F.3d at 25. Pechonis then disclosed the recording to Mary Jean, a political activist, who posted the recording on her website along with criticism of the District Attorney. **Id.** The **Jean** decision, however, focused on Jean's action in resolving a preliminary injunction of a police directive to Jean to remove the posting as a violation of Massachusetts' wiretapping statute, and not Pechonis' First Amendment right to record. **See id.** at 26.

In **Gaymon v. Borough of Collingdale**, 150 F. Supp. 3d 457 (E.D. Pa. 2015), a United States District Court considered a case involving the plaintiff recording officers intervening in a dispute between the plaintiff and a neighbor. **Gaymon**, 150 F. Supp. 3d at 460. The United States District Court did not squarely address the plaintiff's right to record in the plaintiff's civil action against the police officers for arresting the plaintiff based in part upon the act of recording. Instead, the court rejected the officers' claim of qualified immunity where even in the absence of a First Amendment right to record from the confines of one's home, the officers were not justified in entering the plaintiff's home without a warrant or consent. **See id.** at 468.

restrictions on “the stock of information from which members of the public may draw” when discussing public issues. **See id.** Therefore, we conclude that Mother’s claim that the trial court improperly curtailed her right to record the DHS officials conducting a home visit is subject to intermediate scrutiny.

In the instant case, there was no evidence of any countervailing interests to support DHS’s request for a no-recording provision. **See** N.T., 6/11/19, at 34-36 (indicating that the trial court denied DHS’s request to recall Ms. Richardson and granted DHS’s request for a no-recording provision based on DHS’s counsel’s assertion that there were “videos, photography taken, posted on social media . . . that made her feel intimidated”). **Compare Fields**, 862 F.3d at 360 (declining to address the limits of the right to record where the defendant police officers offered no justifications when the plaintiffs were recording official activities in public), **with Bradley**, 2020 WL 2124419 at \*6-\*7 (discussing evidence supporting the reasonableness of a policy limiting recording in the lobby of a police station). Moreover, we acknowledge the trial court’s concerns regarding the privacy interests of Children. However, our review is necessarily limited to the issue raised in this appeal, specifically, the right to record, under the First Amendment, DHS employees conducting an assessment of a home, and not Mother’s posting of such videos on social media.<sup>15</sup>

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<sup>15</sup> We add that there were no indications that Mother took videos containing images of Children or DHS employees interacting with the Children during her previous interactions with DHS.



Therefore, under the specific circumstances of this case, and in light of Mother's and DHS's arguments, we conclude that DHS failed to establish that its request for a no-recording provision was reasonable. We emphasize that our holding does not make the right to record absolute, consistent with established case law, it is subject to reasonable time, place, and manner restrictions. ***See Fields***, 862 F.3d at 359. Accordingly, we reverse the no-recording provision of the trial court's order.

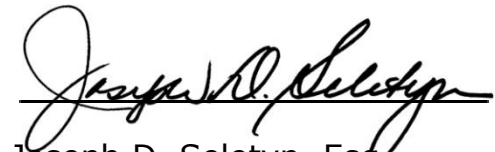
### **Conclusion**

In sum, we affirm the trial court's order that DHS presented the trial court with probable cause to search Mother's home in support of its petitions to compel cooperation and reverse the trial court's order that Mother may not film, take pictures of, or record government employees acting in their official capacity in their search of Mother's home. Further, we hold that that the trial court may establish reasonable time, place, and manner restrictions concerning Mother's request to film, take pictures of, or record government employees acting in their official capacity in her home, but that the record did not support the limitation imposed by the trial court in this case.

Order affirmed in part and reversed in part. Jurisdiction relinquished.

J-A01010-20

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath it.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 10/8/20

**IN THE COURT OF COMMON PLEAS  
FOR THE COUNTY OF PHILADELPHIA  
FAMILY COURT DIVISION**

In the Interest of Y.W.-B., a Minor	:	CP-51-DP-0002108-2013
	:	
In the Interest of N.W.-B., a Minor	:	CP-51-DP-0002387-2016
	:	
	:	FID: 51-FN-004204-2013
	:	
APPEAL OF: J.B., Mother	:	1642 EDA 2019
	:	1643 EDA 2019

2019 SEP -9 PM 2:00  
 PRO PRONY

**OPINION<sup>1</sup>**

**Fernandes, J.:**

Appellant J.B. (“Mother”) appeals from the trial court’s Order to Compel Cooperation, entered on June 11, 2019, ordering Mother to allow the Department of Human Services (“DHS”) to assess Mother’s home. Mother’s counsel, Michael Angelotti, Esquire, (“Mother’s Counsel”), filed a timely Notice of Appeal and Statement of Matters Complained of on Appeal pursuant to Rule 1925(b) (“Statement of Errors”) on June 11, 2019. On June 12, 2019, Mother’s Counsel filed an Amended Statement of Errors.

**Factual and Procedural Background:**

This family originally became involved with the DHS on September 4, 2013, when DHS received a General Protective Services (“GPS”) report alleging that Mother hit Y.W.-B. (“Child 1”) on the arm; it was unknown if Child 1 sustained any injuries, pain, or impairment; Mother often hit Child 1; Child 1 was often heard yelling and screaming; Child 1’s basic needs were being met, but the home was dirty and disordered; Mother was unemployed; Mother might have substance abuse issues; the home was heavily trafficked. This report was determined to be valid. On October 18, 2013, DHS received a GPS report alleging that the family home was in deplorable condition; there were holes in the walls of the home; the home was infested with fleas; the home lacked numerous

<sup>1</sup> The trial court requested the Notes of Testimony for June 11, 2019, on June 12, 2019, and for June 18, 2019, on July 15, 2019. A subsequent request for the June 11, 2019 Notes of Testimony was made on July 15, 2019. The trial court received the Notes of Testimony for June 11, 2019, and June 18, 2019, on August 7, 2019. The First Judicial District is still experiencing limited connectivity to the servers due to a virus.

interior walls; the internal structure of the home was exposed; the home lacked hot water service and heat; the home appeared to be structurally unsound; when Child 1 and the family dog left the home, they were covered in fleas; Father was incarcerated. This report was determined to be valid. On that same day, DHS obtained an Order of Protective Custody (“OPC”) for Child 1 and was subsequently placed in foster care.<sup>2</sup> On October 29, 2013, Child 1 was adjudicated dependent and fully committed to DHS. Child 1 remained in foster care until July 20, 2015, when the trial court transferred physical and legal custody of Child 1 to Mother and Father (collectively “Parents”). The family received in-home services through Community Umbrella Agency (“CUA”) Northeast Treatment Centers (“NET”) and Child 1 remained under the protective supervision of DHS until November 10, 2015, when the trial court discharged DHS supervision and Child 1’s dependency matter.

not  
textbook  
2013  
2015

On May 22, 2019, DHS received a GPS report alleging that three weeks earlier, the family had been observed sleeping outside of a Philadelphia Housing Authority (“PHA”) office; on May 21, 2019, Mother had been observed outside of the PHA office from 12:00 P.M. to 8:00 P.M., with one of the children in her care; Project Home dispatched an outreach worker to assess the family; Mother stated that she was standing outside of the PHA office in protest; Mother stated that she was not homeless and that her previous residence had burned down; it was unknown if Mother was feeding Children during the time she stood outside of the PHA office for extended periods of time. This report is pending determination. On that same day, DHS confirmed the family’s home address through a Department of Public Welfare search. DHS subsequently visited the family’s home. When DHS arrived, only Father was present and he refused to allow DHS to enter the home. Father contacted Mother via telephone and allowed DHS to speak with Mother. Mother stated that she was engaging in protest outside of the PHA office, she did not have Children with her while she was protesting, and she would not permit DHS to enter the home. Mother subsequently returned to the home with Children in her care. DHS observed that Children appeared to be upset before Mother ushered them into the home. Mother refused to allow DHS to enter the home or assess Children and stated that she would not comply with DHS absent a court order. Mother further stated that Children had not been with her when she protested outside of the PHA office

<sup>2</sup> N.W.-B. (“Child 2”) was not involved in the dependency matter in 2013 because Child 2 was not born until January 23, 2015.

and that Children were fine and were not in need of assessments or services. Mother exhibited verbally aggressive behavior toward DHS and filmed the interaction outside of the home with her telephone. DHS did not enter the home, but observed from the outside of the home that one of the home's windows was boarded up. Later that day, DHS returned to the family home with officers from the Philadelphia Police Department ("PPD"). Mother and Father continued to exhibit aggressive behavior and refused to allow DHS to enter the home. The PPD officers suggested that DHS obtain a court order to access the home.

On May 31, 2019, DHS filed a Motion to Compel Cooperation ("Motion to Compel") with the trial court. On June 11, 2019, a Motion to Compel hearing was held and the trial court granted the Motion to Compel. The trial court further ordered that Mother is to allow two DHS social workers to assess the home to verify that the home is safe and appropriate on June 14, 2019, at 5:00 P.M.; Mother is not to videotape or record the assessment; Mother is not permitted to post any recordings on social media; Mother is to remove any current videos regarding DHS from social media; Parents or third parties are not to intimidate, harass, or threaten any social workers. The trial court permitted Mother to have a family friend present for the assessment. (N.T. 06/11/19, pg. 32). On the same day, Mother's Counsel filed this appeal on behalf of Mother.

On June 12, 2019, Mother's Counsel filed a Motion for Stay Pending Appeal Pursuant to Pa.R.A.P. 1732 ("Motion for Stay") with the trial court and the Superior Court of Pennsylvania. On June 13, 2019, the trial court denied the Motion for Stay. On June 14, 2019, the Superior Court of Pennsylvania denied the Motion to Stay.<sup>3</sup> The home assessment took place on June 14, 2019. (N.T. 06/18/19, pg. 3). On June 18, 2019, after hearing testimony regarding the completed home assessment, the trial court dismissed the Motion to Compel. (N.T. 06/18/19, pg. 19).

### **Discussion:**

On appeal,<sup>4</sup> Mother (also known as Appellant) avers the following:

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<sup>3</sup> The Superior Court of Pennsylvania determined that Mother-Appellant did not successfully demonstrate the satisfaction of the requirement for the issuance of a stay: (1) likely to prevail on the merits of an appeal; (2) without the requested relief, will suffer irreparable injury; (3) the issuance of a stay will not substantially harm other interested parties; and (4) the issuance of a stay will not adversely affect the public interest. *Pa. Public Utility Cmm'n v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983).

<sup>4</sup> Mother's Counsel filed two Notices of Appeal, one for each child. However, the Statement of Errors included with each Notice of Appeal list the same errors.

1. The trial court erred as a matter of law and abused its discretion, violating the Fourth Amendment of the Constitution of the United States, where it determined that DHS presented the court with probable cause to search Appellant's home in support of its Motion to Compel Cooperation
2. The trial court erred as a matter of law and abused its discretion, violating Article 1, Section 8 of the Constitution of the Commonwealth of Pennsylvania, where it determined that DHS presented the court with probable cause to search Appellant's home in support of its Motion to Compel Cooperation
3. The trial court erred as a matter of law and abused its discretion in granting DHS's Motion to Compel Cooperation where the facts alleged in the Motion to Compel Cooperation did not, taken as a whole, require DHS to enter in to Appellant's home.
4. The trial court erred as a matter of law and abused its discretion in relying on facts not contained in the Motion to Compel Cooperation in rendering its Order.
5. The trial court erred as a matter of law and abused its discretion, violating the First Amendment of the Constitution of the United States, where it ordered that the Appellant may not film, take picture, or record government employees acting in their official capacity, in contravention of *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017).
6. Appellant respectfully requests to reserve the right to supplement this Statement of Errors pending receipt of the Notes of Testimony in this matter
7. The trial court erred as a matter of law and abused its discretion to grant Appellant's request to disclose the name of the anonymous reporter in this matter where the identity of the reported is rendered confidential pursuant to only a qualified privilege and where the trial court did not engage in the requisite test to determine whether the identity should be disclosed, where under the facts alleged in the Motion to Compel Cooperation, the GPS report was made contemporaneously at a time when Appellant was engaged in a political activity, which was protected by the First Amendment of the United States Constitution.
8. The trial court erred as a matter of law and abused its discretion by conducted a hearing and inquiry, which was broader in scope than that afforded by a narrow probable cause analysis.<sup>5</sup>

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<sup>5</sup> The errors listed are the errors included in the Amended Statement of Errors filed by Mother on June 12, 2019.

Mother's issues on appeal will be consolidated to read: Did the trial court err as a matter of law and abuse its discretion when it determined that DHS provided probable cause for the inspection of the family home; when it refused to allow the disclosure of the identity of the individual who made the initial GPS report involving Mother and Children on May 22, 2019; and when it ordered Mother not to film, photograph, or otherwise record DHS performing the home inspection, in contravention to the findings of Fields v. City of Philadelphia.

Before addressing Mother's issues on appeal, this court must address that the matter on appeal is moot. Generally, an actual claim or controversy must be present at all stages of the judicial process for the case to be actionable or reviewable. In re Petition to Compel Cooperation with Child Abuse Investigation, 875 A.2d 365, 374 (Pa. Super. 2005) (quoting Plowman v. Plowman, 597 A.2d 701, 705 (Pa. 1991)). If any events occur to eliminate the claim or controversy at any stage of the process, the case becomes moot. Id. Following the appeal filed by Mother on June 11, 2019, the home assessment occurred, as ordered, on June 14, 2019, following the denial of the Motion to Stay by both the trial court and the Superior Court of Pennsylvania. On June 18, 2019, the trial court heard testimony regarding the results of the home assessment, the trial court dismissed the Motion to Compel and the matter was completed. (N.T. 06/18/19, pg. 19). Since this matter was closed on June 18, 2019, there is no longer an actual claim or controversy to be addressed and this matter on appeal is moot.

Mother's first issue on appeal is whether the trial court erred as a matter of law and abused its discretion when it determined that DHS provided probable cause for the inspection of the family home, which violated Mother's constitutional rights. A Children and Youth Services ("DHS") inspection of a home is subject to the limitations of state and federal search and seizure jurisprudence. In re Petition to Compel, *supra* at 374 (Pa. Super. 2005). The Fourth Amendment to the Constitution of the United States protects people from unreasonable government intrusions into their legitimate expectations of privacy. Id. at 373 (citing Commonwealth v. Flewellen, 380 A.2d 1217, 1219-1220 (Pa. 1977)). The protection against unreasonable search and seizure afforded by the Pennsylvania Constitution is broader than that under the Fourth Amendment of the United States Constitution. In re Petition to Compel, *supra* at 374 (citing Commonwealth v. Jackson, 698 A.2d 571, 573 (Pa. 1997)). Although the Child Protective Services Law ("CPSL") mandates a

home visit at least once during the investigation period, pursuant to 55 Pa. Code §3490.55(i), that requirement is subject to the limits of federal and state search and seizure jurisprudence. *In re Petition to Compel*, supra at 374. A home inspection as part of a DHS investigation is constitutional if DHS has probable cause. *Id.* To conduct a home assessment if the parents do not consent, DHS must file a verified petition alleging facts that amount to probable cause to believe that an act of child abuse or neglect has occurred and evidence relating to such abuse will be found in the home. *In the Interest of D.R.*, 2019 PA Super. 230 (Pa. Super. 2019) (citing *In re Petition to Compel*, supra at 377). In criminal proceedings, probable cause is defined as a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary, prudent person in the same situation in believing that the party is guilty of the offense. *Kelley v. General Teamsters, Chauffeurs and Helpers, Local Union 249*, 544 A.2d 940 (Pa. 1988). In *In re Petition to Compel*, a concurring opinion was filed by The Honorable Phyllis W. Beck<sup>6</sup>, who opined that it would be unwise to apply the standard notion of probable cause in criminal cases to matters involving child protective services agency. The nature and context of each scenario must be considered. What an agency knows and how it acquired that information should not be subject to the same restrictions facing police seeking to secure a search warrant in a criminal matter. DHS should be held accountable for presenting sufficient reasons for a home visit, but those same agencies should not be hampered from performing their duties because they failed to satisfy search and seizure jurisprudence as defined by criminal law. *Supra* at 380.

DHS received a GPS report on May 22, 2019, which alleged homelessness and inadequate basic care with Children named as victims. DHS attempted to investigate the report by conducting a home assessment, but Mother and Father denied DHS permission into the family home. (N.T. 06/11/19, pg. 5). The address of the home that was provided to DHS came from the person that made the report to DHS. (N.T. 06/11/19, pgs. 10-11). When DHS visited the home, Mother instructed DHS to “file a motion to compel” and refused to allow DHS inside the home. (N.T. 06/11/19, pgs. 5-6). DHS subsequently filed the Motion to Compel on May 31, 2019. The allegations in the Motion to Compel include:

j. On May 22, 2019, DHS received a GPS report alleging that three weeks earlier,

<sup>6</sup> The Honorable Kate Ford Elliott and The Honorable Michael T. Joyce joined in the concurring opinion. *In re Petition to Compel*, supra at 379.



the family had been observed sleeping outside of a Philadelphia Housing Authority (PHA) office located at 2103 Ridge Avenue; that on May 21, 2019, [Mother] had been observed outside of the PHA office from 12:00 P.M. until 8:00 P.M. with one of the children in her care; that Project Home dispatched an outreach worker to assess the family; that [Mother] stated that she was standing outside of the PHA office in protest; that she stated that she was not homeless and that her previous residence had burned down; and that it was unknown if [Mother] was feeding the children she stood outside of the PHA office for extended periods of time. This report is pending determination.

k. On May 22, 2019, DHS confirmed the family's home address through a Department of Public Welfare (DPW) search.

i. On May 22, 2019, DHS visited the family's home. When DHS arrived at the home, only [Father] was present, and he refused to allow DHS to enter the home. [Father] contacted [Mother] via telephone and allowed DHS to speak with her. [Mother] stated that she was engaging in a protest outside of the PHA office; that she did not have the children with her while she was protesting; and that she would not permit DHS to enter the home. [Mother] subsequently returned to the home with [Children] in her care. DHS observed that [Children] appeared to be upset before [Mother] ushered them into the home. [Mother] refused to allow DHS to enter the home or to assess [Children], and that stated that she would not comply with DHS absent a court order. [Mother] further stated that the children had not been with her when she protested outside of the PHA offices; and that the children were fine and were not in need of assessments or services. [Mother] exhibited verbally aggressive behavior toward DHS and filmed the interaction outside of the home with her telephone. DHS did not enter the home, but observed from the outside of the home that one of the home's windows was boarded up.

m. On May 22, 2019, DHS returned to family's home with officers from the Philadelphia Police Department (PPD). [Mother] and [Father] continued to exhibit aggressive behavior and refused to allow DHS to enter the home. The PPD officers suggested that DHS obtain a court order to access the home.

(*See Motion to Compel*). During the hearing for the Motion to Compel, Mother attempted to refuse to answer the trial court's questions regarding Mother's ability to care for Children, including questions regarding Mother's income, Mother's employment status, Mother's ability to feed Children, and where Children received medical care. (N.T. 06/11/19, pgs. 12-13, 14). The Motion to Compel and the hearing confirmed that one of the main factors of the DHS investigation is the matter of homelessness and if the alleged address of the family was suitable for Children. The home assessment by DHS would be able to determine if the claims for both homelessness and inadequate care of Children have merit. The trial court determined that the Motion to Compel

provided probable cause for DHS to complete an assessment of the family home. (N.T. 06/11/19, pg. 18). The allegations of the Motion to Compel was, in part, that Mother was sleeping outside of PHA with Children. It was reasonable to ascertain whether the parents had stable housing; therefore, parents needed to allow a home assessment. The testimony of the DHS witness was credible. (N.T. 06/11/19, pgs. 5-8). Due to Mother's distrust of DHS, the trial court permitted Mother to bring witnesses to the home assessment. (N.T. 06/11/19, pgs. 17-18). DHS ultimately conducted the assessment of the family home on June 14, 2019. (N.T. 06/18/19, pg. 3). Based on DHS's findings of suitable housing, the trial court dismissed the Motion to Compel. (N.T. 06/18/19, pgs. 17-19). The trial court did not err or abuse its discretion in finding that DHS provided probable cause in the Motion to Compel to complete the home assessment of the family home and the home assessment did not violate Mother's federal or state constitutional rights.

Mother's next issue on appeal is whether the trial court erred as a matter of law and abused its discretion when the trial court refused to allow the disclosure of the identity of the individual who made the initial GPS report involving Mother and Children on May 22, 2019. The release of data by the department or county that would identify the person who made a report of suspected child abuse or cooperated in a subsequent investigation is prohibited. 23 Pa.C.S.A §6340(c). The only exceptions to the statute include reports made by law enforcement or in response to a law enforcement official investigating allegations of false reports pursuant to 18 Pa.C.S. §4906.1. This statute has been further interpreted to unequivocally prohibit the release of identifying information relating to the individual who made a report, as the statute was designed for law enforcement to protect the identity of individual who made the report. *In re A.G.C.*, 142 A.3d 102 (Pa. Super. 2016).

During the hearing for the Motion to Compel, Mother's Counsel attempted to question the DHS investigator regarding the identity of the individual that provided the home address of the family. The address of the home that was provided to DHS came from the person that made the report to DHS. (N.T. 06/11/19, pgs. 10-11). The trial court subsequently sustained the objection from DHS, indicating that the identity of the reporter is confidential information. (N.T. 06/11/19, pgs. 12-13). Pursuant to 23 Pa.C.S.A. §6340(c), the identity of the individual who made the report to DHS regarding Mother and Children cannot be released. Furthermore, the proceedings that took place

on June 11, 2019, were solely to address the Motion to Compel submitted by DHS. The hearing was not related to allegations of a false report. Therefore, the trial court did not err or abuse its discretion when it refused to allow the disclosure of the identity of the individual who made the initial GPS report on May 22, 2019.

Mother's final issue on appeal is whether the trial court erred as a matter of law and abused its discretion by ordering Mother not to film, photograph, or otherwise record DHS performing the home inspection, in contravention to the findings of *Fields v. City of Philadelphia*. Regarding the First Amendment Right to Record, the United States Third Circuit Court of Appeals concluded, "In sum, under the First Amendment's right of access to information the public has the commensurate right to record – photograph, film, or audio record – **police officers conducting official police activity in public areas.**" *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) (emphasis added). The United States Third Circuit Court of Appeals also indicated that all recording is either protected or desirable, and the right to record police is not absolute. Instead, it is subject to reasonable time, place, and manner restrictions. *Id* (citing *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010)). Additionally, pursuant to the Juvenile Act, there is a compelling interest in protecting minor children's privacy rights, and the protection of such is a key aspect of the Juvenile Act. 42 Pa.C.S.A. 6307(a).

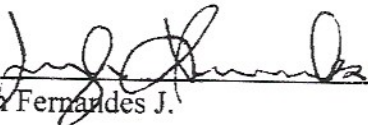
Mother's Counsel argues that the finding of *Fields v. City of Philadelphia* is that preventing Mother from filming, photographing, or otherwise recording the DHS employees performing the home assessment is a violation of Mother's First Amendment rights under the Constitution of the United States. The finding in *Fields v. City of Philadelphia* specifically referred to police officers that were conducting official police activity in public areas. The facts in this matter involve significantly different circumstances around the attempted recording, including that the government agents involved were not police officers and did not attempt to act in such capacity; the official business that was conducted during the home investigation was not official police activity; and the home assessment did not take place in a public area, but instead a private home. During the hearing for the Motion to Compel, it was determined that Mother had previously taken videos and photographs of DHS and placed the recordings on social media. Furthermore, allowing Mother to create recordings of the DHS regarding the investigation pursuant to the Child Protective

Services Law would can interfere with protecting Children's privacy rights. The trial court did take into account Mother's distrust of DHS, and the trial court permitted Mother to bring witnesses to the home assessment in lieu of recording individuals of DHS. (N.T. 06/11/19, pgs. 17-18).

**Conclusion:**

For the aforementioned reasons, the trial court did not err or abuse its discretion by determining that DHS provided probable cause for the inspection of the family home; when it refused to allow the disclosure of the identity of the individual who made the initial GPS report involving Mother and Children on May 22, 2019; and when it ordered Mother not to film, photograph, or otherwise record DHS performing the home inspection, in contravention to the findings of *Fields v. City of Philadelphia*. Furthermore, the matter on appeal is moot. Accordingly, the trial court's decision to grant the Motion to Compel on June 11, 2019, should be affirmed.

By the court,

  
\_\_\_\_\_  
Joseph Fernandes J.

**IN THE COURT OF COMMON PLEAS  
FOR THE COUNTY OF PHILADELPHIA  
FAMILY COURT DIVISION**

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In the Interest of Y.W.-B., a Minor	:	CP-51-DP-0002108-2013
	:	
In the Interest of N.W.-B., a Minor	:	CP-51-DP-0002387-2016
	:	
	:	FID: 51-FN-004204-2013
	:	
APPEAL OF: J.B., Mother	:	1642 EDA 2019
	:	1643 EDA 2019

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**CERTIFICATE OF SERVICE**


I hereby certify that this court is serving a copy of this duly executed Opinion upon all parties or their counsel on September 9, 2019. The names and addresses of all persons served are as follows:

Courtney McGinn, Esq.  
City of Philadelphia Law Department  
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Attorney for Mother and Father

Sharon K. Wallis, Esq.  
640 Rodman Street  
Philadelphia, Pennsylvania 19147  
Child Advocate

BY: \_\_\_\_\_

  
Ariel J. Bruce  
Law Clerk to the Hon. Joseph L. Fernandes  
First Judicial District of Pennsylvania  
Family Division  
1501 Arch St., Room 1431  
Philadelphia, Pa. 19102  
T: (215) 686-2660 | F: (215) 686-4224

Commonwealth of Pennsylvania

IN THE FAMILY COURT OF PHILADELPHIA COUNTY,  
PENNSYLVANIA

In the Interest Of:

JUVENILE DIVISION

Y [REDACTED] W [REDACTED]-B [REDACTED], A Minor

Date of Birth: [REDACTED]

DOCKET NO: CP-51-DP-0002108-2013  
FID: 51-FN-004204-2013

**MOTION TO COMPEL COOPERATION ORDER**

Persons appearing: ACS-C. McGinn, GAL-Sharon Wallis-P, Dhs Rep-Lisa Mullin, Dhssw-Tamisha Richardson, Mother-J [REDACTED] B [REDACTED], Father-G [REDACTED] W [REDACTED]-B [REDACTED], Child-Y [REDACTED] W [REDACTED]-B [REDACTED], Mother ATTY-Michael Angelotti-P.  
(ALL PERSONS APPEARING SERVED)  
DCR-SG, AML

AND NOW, this 11th day of June 2019, after conducting a Motion to Compel Cooperation Hearing the court enters the following order: Motion to Compel is Granted.

Further Findings: Child resides with mother and father.

Further Order: Mother is to allow two Dhs social workers in the home to assess the home to verify if mother's home is safe and appropriate on Friday June 14, 2019 at 5:00pm. Ms. Allison McDowell is to be present in mother's home as a witness to the home assessment. Mother is NOT to record or video, nor post on social media. Mother is to remove current videos regarding Dhs works from social media. Parents or third parties are NOT to intimidate, harass or threaten any social workers.

Next Court Date: Motion to Compel - 06/18/2019 - 10:30AM - 1501 Arch Street - Courtroom 5A - Judge Joseph Fernandes

BY THE COURT:

In the Interest of: Y [REDACTED] W [REDACTED]-B [REDACTED], a Minor

**MOTION TO COMPEL COOPERATION ORDER**

Docket No: CP-51-DP-0002108-2013

BY THE COURT:

A handwritten signature in black ink, appearing to read "Joseph Fernandez", written in a cursive style.

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Judge Joseph Fernandez

Commonwealth of Pennsylvania

In the Interest Of:

N [REDACTED] W [REDACTED]-B [REDACTED], A Minor  
Date of Birth: [REDACTED]

IN THE FAMILY COURT OF PHILADELPHIA COUNTY,  
PENNSYLVANIA

JUVENILE DIVISION

DOCKET NO: CP-51-DP-0002387-2016  
FID: 51-FN-004204-2013

**MOTION TO COMPEL COOPERATION ORDER**

Persons appearing: ACS-C. McGinn, GAL-Sharon Wallis-P, Dhs Rep-Lisa Mullin, Dhssw-Tamisha Richardson,  
Mother-J [REDACTED] B [REDACTED], Father-G [REDACTED] W [REDACTED]-B [REDACTED], Child-N [REDACTED] W [REDACTED]-B [REDACTED] Mother ATTY-Michael Angelotti-P.  
(ALL PERSONS APPEARING SERVED)  
DCR-SG, AML

AND NOW, this 11th day of June 2019, after conducting a Motion to Compel Cooperation Hearing the court enters the following order: Motion to Compel is Granted.

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Next Court Date: Motion to Compel - 06/18/2019 - 10:30AM - 1501 Arch Street - Courtroom 5A - Judge Joseph Fernandes

BY THE COURT:



In the Interest of: N [REDACTED] W [REDACTED]-B [REDACTED], a Minor

**MOTION TO COMPEL COOPERATION ORDER**

Docket No: CP-51-DP-0002387-2016

BY THE COURT:



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Judge Joseph Fernandez