

**THE SUPREME COURT OF PENNSYLVANIA**

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No. 1 EAP 2021

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IN RE: Y.W.-B., A MINOR

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J.B., Mother,

Appellant,

v.

DEPARTMENT OF HUMAN SERVICES,

Appellee.

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**BRIEF OF *AMICUS CURIAE* SUPPORT CENTER FOR CHILD  
ADVOCATES**

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Appeal Pursuant to this Court's January 5, 2021 Order Granting the Petition for Allowance of Appeal (Children's FT)

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## **INTEREST OF AMICUS CURIAE**

For more than forty years, the Support Center for Child Advocates (“*Child Advocates*”) has served as Philadelphia’s volunteer lawyer program for abused and neglected children. For all the children committed to *Child Advocates*’ care—typically more than a thousand children per year—the agency’s volunteer and staff lawyers and staff social workers strive to ensure safety, health, education, family permanency, and access to justice. Respected for diligent and effective advocacy, *Child Advocates* moves public systems to deliver entitled services and private systems to open their doors to needy children and their families. Given the organization’s history, mission, and expertise, *Child Advocates* has a strong interest in the legal rules and procedures in child welfare proceedings and a particular interest in sharing its child-focused perspective with the Court in this potentially significant constitutional case.

## **ARGUMENT**

Home visits and inspections are a vital component of the Pennsylvania child welfare system. This case poses important questions about how to balance the Commonwealth’s interest in investigating reports of suspected child abuse or neglect—including through home visits mandated by state law—and parents’ constitutional right to be free from unreasonable searches and seizures. The process and probable cause standard endorsed by the Superior Court in this case

strike the correct balance between those interests and comport with longstanding principles of federal and state constitutional law. For these reasons, the Court should affirm.

*Child Advocates'* interest in this case extends to several core, recurring issues in child welfare proceedings. First, what process should county agencies (and trial courts) typically follow when a caregiver refuses to consent to a home visit in connection with an open child welfare matter? Second, what is the proper articulation of the probable cause standard in that context? Third, to what extent is it appropriate—and constitutional—for trial courts to consider (i) anonymously reported information and (ii) prior family history (of abuse, neglect, criminality, etc.) as part of the totality-of-the-circumstances probable cause calculus?

The Superior Court addressed these questions correctly as a matter of law. As to the process for securing parental cooperation in a child welfare matter, the panel followed longstanding Pennsylvania authority and held that, absent emergency circumstances, consent, or case-specific reasons to proceed with an *ex parte* probable cause determination, county agencies typically should petition the court for an order to compel cooperation. *In re Y.W.-B.*, 241 A.3d 375, 384-86 (Pa. Super. 2020) (following *In re Petition to Compel Cooperation with Child Abuse Investigation*, 875 A.2d 365 (Pa. Super. 2005) (“*In re Petition to Compel*



*Cooperation*’’)). Parents, in turn, typically should receive notice and an opportunity to participate in the probable cause hearing. *Id.*

In assessing whether probable cause exists, the trial court must be free to consider **all** potentially relevant information. *See Florida v. Harris*, 568 U.S. 237, 244 (2013) (emphasizing the “flexible, all-things-considered approach” required for probable cause determinations). This includes information contained in the petition itself, additional information adduced during the hearing, the reliability of evidence, the credibility of witnesses, and any other potentially relevant information including anonymous reports of abuse or neglect and past family history (for example, history of child abuse, neglect, or criminal conduct). Ultimately, the trial court must weigh all the facts holistically to determine whether the agency has demonstrated a fair probability that a home visit is justified to investigate, assess, or monitor a case of child abuse or neglect. *Id.* (explaining flexible “fair probability” standard for probable cause); *Commonwealth v. Jones*, 605 Pa. 188, 199 (2010) (same). The trial court followed this basic protocol, and its decision was endorsed by the Superior Court.

While probable cause is necessarily a fact-bound determination, this Court’s articulation of the legal rules that apply to probable cause determinations in the child welfare context will have far-reaching consequences. Rigid rules such as those advocated by Appellant simply do not comport with the flexible totality-of-

the-circumstances probable cause analysis prescribed by state and federal constitutional law. And Appellant’s arguments are particularly problematic in the civil child welfare context, given the requirements of the regulatory scheme and the realities of abuse and neglect cases. Instead, this Court should affirm the longstanding “flexible, *all-things-considered*” probable cause standard and affirm the judgment of the Superior Court.

**I. THIS COURT SHOULD ENDORSE THE *IN RE PETITION TO COMPEL COOPERATION* PROCESS FOR PETITIONS TO COMPEL PARENT COOPERATION.**

The Pennsylvania Child Protective Services Law (“CPSL”), 23 Pa. Cons. Stat. §§ 6301-86, aims to protect children from abuse and neglect by, *inter alia*, establishing county-level agencies charged with “receiving and investigating all reports of child abuse.” 23 Pa. Cons. Stat. § 6362(a). The county agencies’ core mission, in short, is to investigate child welfare cases; provide “protective services to prevent further” harm to the child and other children in the home; “provide or arrange for and monitor the provision of those services necessary to safeguard and ensure the well-being and development of the child”; and “preserve and stabilize family life wherever appropriate.” *Id.*

When potential child abuse and/or neglect is reported in the Commonwealth, state law requires county agencies to initiate specific investigatory measures. *See, e.g.*, 23 Pa. Cons. Stat. §§ 6365(b)-(c), 6368; 55 Pa. Code §§ 3490.55, 349.232. In

the vast run of cases, that process necessarily requires a home visit to ensure child safety and well-being. The regulatory framework recognizes as much by mandating interviews and home visits during the investigation and assessment process. *See* 55 Pa. Code §§ 3490.55(d), 349.55(i), and 349.232 (f)-(h).

Parents often consent to these procedures, but sometimes they do not. In that situation, absent exigent circumstances, the established practice in Pennsylvania is for county agencies to follow the process outlined in *In re Petition to Compel Cooperation*, 875 A.2d 365 (Pa. Super. 2005)—a foundational case in which the Superior Court addressed CPSL home visit requirements through the lens of constitutional search and seizure doctrine. As described below, *In re Petition to Compel Cooperation* carefully squares the CPSL framework with constitutional requirements and allows trial courts to consider all potentially relevant information in an appropriately flexible and case-specific way. Because that framework comports with the text and purposes of the CPSL, and with all relevant constitutional provisions, this Court should embrace it going forward.

#### **A. Background on Investigations and Home Visits**

Child welfare investigations typically start with a report of a child at risk. Most reports come from so-called mandatory reporters such as health care professionals, teachers, and others in regular contact with children. *See, e.g.*, Pa. Dep't Hum. Servs., *Child Protective Services 2019 Annual Report* (“*Annual*

*Report*”), at 6.<sup>1</sup> Other investigations are initiated—often anonymously—by so-called “permissive” reporters such as friends, neighbors, extended family, and the like. *Id.*; *see also* 23 Pa. Cons. Stat. § 6312.

Upon receiving a report, county agencies must take prompt investigative action under a comprehensive regulatory regime. *See, e.g.*, 23 Pa. Cons. Stat. §§ 6365(b)-(c), 6368; 55 Pa. Code §§ 3490.55, 349.232. The CPSL’s implementing regulations ultimately distinguish between two types of child welfare cases: so-called Child Protective Services (“CPS”) matters involving potential child abuse, *see* 55 Pa. Code § 3490.55, and so-called General Protective Services (“GPS”) (“reports alleging a need for general protective services”) for matters that do not qualify as child abuse under the CPSL but may involve neglect or other vulnerabilities or concerns, *see* 55 Pa. Code § 3490.232. At the outset of an investigation, however, it is often unclear precisely what types of issues are involved and how serious and immediate the risk is to the child. That is why prompt investigation and assessment is imperative in responding to both CPS and GPS reports. *See generally Bennett ex rel. Irvine v. City of Philadelphia*, 499 F.3d 281, 284-85 (3d Cir. 2007) (describing tragic case of child abuse initially reported through the hotline as a GPS matter involving neglect). It goes without saying that

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<sup>1</sup>Available at <https://www.dhs.pa.gov/docs/Publications/Documents/2019%20child%20prev.pdf>.

both types of cases implicate profoundly important child welfare interests, as the CPSL framework reflects.<sup>2</sup>

Home visits and family interviews are an essential part of the process. The necessity of a home visit is reflected in both the CPSL itself and its implementing regulations; in fact, the latter explicitly *require* county agencies to conduct a home visit.<sup>3</sup> And, as *Child Advocates* can attest based on more than forty years of experience representing thousands of abused and neglected children in Philadelphia County, the CPSL’s emphasis on home visits and family interviews is both necessary and appropriate. In the vast majority of cases—especially the most

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<sup>2</sup> GPS cases, no less than CPS cases, can involve serious and potentially life-threatening issues such as abandonment, homelessness, malnourishment, unmet medical needs, caregiver substance abuse, and more. *See generally Annual Report*, at 26.

<sup>3</sup> *See* 23 Pa. Cons. Stat. § 6368(a)-(d) (explaining that a county agency must “immediately commence an investigation”; must see the child immediately and assess the safety risk to the child and any other children in the home if protective custody may be necessary or “if it cannot be determined from the report whether emergency protective custody is needed”; and must take all “action[s] necessary to provide for the safety of the child or any other child in the child’s household” including but not limited to investigatory “interviews with all subjects of the report”); 55 Pa. Code § 3490.55(i) (“When conducting its investigation, the county agency shall visit the child’s home at least once during the investigation period. The home visits shall occur as often as necessary to complete the investigation and to assure the safety of the child.”); 55 Pa. Code § 349.232(f) (“The county agency shall see the child and visit the child’s home during the assessment period. The home visits shall occur as often as necessary to complete the assessment and ensure the safety of the child. There shall be a least one home visit.”); 55 Pa. Code § 349.232(g) (“The county agency shall interview the child, if age appropriate, and the parents or the primary person who is responsible for the care of the child. The county agency shall also conduct interviews with those persons who are known to have or may reasonably be expected to have information that would be helpful to the county agency in determining whether or not the child is in need of general protective services.”); 55 Pa. Code § 349.232 (h) (“The county agency may make unannounced home visits.”).

serious ones—there is simply no way to ensure child safety and well-being without a home visit and family contact.

**B. The Process to Compel Cooperation, as Set Forth in *In re Petition to Compel Cooperation***

At the same time, parents have a constitutional right to be free from unreasonable searches and seizures. U.S. Const. am. IV; Pa. Const. art. I § 8. Accordingly, absent consent, emergency circumstances, a warrant, or some other functionally equivalent court order, the home is generally off limits to state officials, including social workers. *See, e.g., Good v. Dauphin Cty. Social Services for Children & Youth*, 891 F.2d 1087, 1093 (3d Cir. 1989). What then is the constitutionally appropriate process to allow a county agency to proceed with a home visit—a critical step in investigating a report of child abuse or neglect—absent consent or exigent circumstances? Reasonableness, as always, is the touchstone in this context. *See generally Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (“The ultimate touchstone of the Fourth Amendment . . . is reasonableness.”) (citation omitted).

*In re Petition to Compel Cooperation* was the first Pennsylvania appellate case to consider child welfare home visits through the lens of constitutional search and seizure doctrine. 875 A.2d 365. In *In re Petition to Compel Cooperation*, the county agency received a report of possible medical neglect of a newborn child. *Id.* at 368. But the parents refused to consent to a home visit, so the county sought

an *ex parte* order to compel cooperation. The county did not allege any exigent circumstances. *Id.* at 378. In fact, the “only relevant facts alleged were that [the agency] had received a ChildLine referral for possible medical neglect.” *Id.* Nonetheless, and “[w]ithout a hearing,” the trial court granted the agency’s petition. *Id.* at 368.

The Superior Court vacated the trial court’s order on constitutional grounds, holding that, absent consent or emergency circumstances, county agencies should petition the court for an order compelling cooperation based on a showing of probable cause. *Id.* at 377.<sup>4</sup> In addition, while the court was careful to emphasize that *ex parte* proceedings—functionally akin to a warrant application—may be appropriate in certain cases, it encouraged agencies and courts to conduct a contested probable cause hearing when time and case-specific circumstances permit. *Id.* at 379; *see also id.* at 380 (emphasizing the need for a flexible, holistic probable cause analysis in the child welfare context) (Beck, J., concurring, joined by all members of the panel).

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<sup>4</sup> The CPSL’s implementing regulations authorize petitions to compel parent cooperation for investigations of potential child abuse and for general protective services cases. *See* 55 Pa. Code § 3490.72(2) (“The county agency shall petition the court if . . . a subject of the report of suspected child abuse refuses to cooperate with the county agency in an investigation, and the county agency is unable to determine whether the child is at risk.”); 55 Pa. Code § 3490.232(j) (“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.”)

**C. This Court Should Uphold the Constitutionally Sound Process Laid Out in *In re Petition to Compel Cooperation*.**

That process is now standard practice for petitions to compel cooperation in Philadelphia County and across the Commonwealth. Upon receiving a report of potential abuse or neglect, county agencies are required to investigate the matter promptly, including by visiting the home, seeing the child, and interviewing family members to ensure safety. Ideally, adult caregivers consent to a home visit. In emergency situations, agencies can proceed under exigency or emergency aid doctrine. But absent consent or emergency circumstances, the agency petitions a court to compel cooperation, and the court grants the petition only upon a finding of probable cause to believe the order is justified to investigate, assess, or monitor a case of abuse or neglect—typically following a contested hearing duly noticed to all parties, unless case-specific factors necessitate an *ex parte* probable cause determination or emergency custody. See 42 Pa. Cons. Stat. § 6324 and Pa.R.J.C.P. 1210 (“Order for Protective Custody”).

So too here. The Philadelphia County Department of Human Services (“DHS”) received a report of potential neglect on May 22, 2019. DHS visited the home that day, but the parents refused to consent to a home inspection. DHS continued its investigation through other channels and filed a petition to compel cooperation on May 31, 2019. The parents received notice and an opportunity to participate in a contested probable cause hearing, and the court held that hearing on



June 11, 2019, allowing all interested parties (including Appellant’s counsel) to introduce potentially relevant information.

The process is constitutionally sound. It strikes the correct balance between the Commonwealth’s interest in investigating reports of child abuse or neglect (including by conducting a home visit as required by the regulatory framework) and parents’ privacy interests, providing an avenue for agencies to obtain access to a home but only upon a showing of probable cause, typically at a contested hearing in which the parents and their counsel may participate. *See Riley v. California*, 573 U.S. 373, 386 (2014) (recognizing the need to “strike[] the appropriate balance” between government and privacy interests under the Fourth Amendment); *Commonwealth v. Romero*, 183 A.3d 364, 396 (Pa. 2018) (same).

It also allows the court to rest its probable cause determination on a holistic consideration of *all* potentially relevant information adduced in the contested hearing. *See Harris*, 568 U.S. at 244 (emphasizing the “flexible, all-things-considered approach” required for probable cause determinations). This includes, but is not limited to, information contained in the petition itself, testimony and additional information adduced in open court, the credibility of witnesses, the past history of the family (including but not limited to involvement in prior child welfare matters and criminal records of household members), and anything else the trial court elects in its discretion to consider as potentially relevant. The point, as

Judge Beck correctly recognized long ago, is that “the nature and context of each scenario must be considered” holistically in this context to protect the safety and well-being of children in a manner consistent with constitutional requirements. *In re Petition to Compel Cooperation*, 875 A.2d at 380. The process laid out by the Superior Court in *In re Petition to Compel Cooperation* and followed by the court here allows courts to do just that, and, as such, should be upheld by this Court.

## **II. SUBSTANTIVE PROBABLE CAUSE STANDARDS**

This case also raises important questions about the contours of the probable cause analysis a court must conduct within the framework described above. First, what is the proper articulation of the probable cause standard in this particular context? Second, to what extent is it appropriate for trial courts to consider anonymous reports of abuse or neglect in their probable cause analysis? Third, to what extent is it appropriate for trial courts to consider past family history (of child abuse, neglect, criminal records of household members, etc.) as part of their probable cause calculus?

What matters, from *Child Advocates'* perspective, is the law in this area going forward. In short, this Court should reaffirm the long-settled constitutional principle that probable cause demands a flexible, case-specific, totality-of-the-circumstances inquiry. *See, e.g., Harris*, 568 U.S. at 244; *Jones*, 605 Pa. at 199. This principle recognizes that, in many contexts, the probable cause inquiry turns

on complex and factually challenging questions—and the child welfare context is no exception. Trial courts therefore need flexibility to account for all potentially relevant information—including anonymous reports of abuse and neglect and past family history—to evaluate whether the case-specific circumstances establish a “fair probability” that a home visit is justified to investigate, assess, or monitor a case of child abuse or neglect. This Court should decline Appellant’s invitation to impose “rigid rules, bright-line tests, and mechanistic inquiries” and instead affirm longstanding state and federal constitutional principles upholding a flexible, case-specific, totality-of-the-circumstances probable cause inquiry. *Harris*, 568 U.S. at 244.

**A. Probable Cause Standard**

The first question is the proper general articulation of the probable cause standard in the context of a petition to compel cooperation in connection with a child welfare investigation. Contrary to Appellant’s argument, there is no disconnect between the probable cause standard applied by the Superior Court and constitutional law.

The test for probable cause is not reducible to “precise definition or quantification.” *Harris*, 568 U.S. at 243. Instead, courts must take a “flexible, all-things-considered” approach. *Id.* Such flexibility is necessary, as “probable cause is a fluid concept—turning on the assessment of probabilities in particular factual

contexts—not readily, or even usefully, reduced to a neat set of legal rules.”

*Illinois v. Gates*, 462 U.S. 213, 232 (1983). It is a “practical and common-sensical” standard that takes into account the “totality of the circumstances.”

*Harris*, 568 U.S. at 244. Although the inquiry is flexible, the ultimate question is whether the totality of the circumstances “warrant a person of reasonable caution in the belief” that the home contains relevant evidence of criminality in the criminal context, *Harris*, 568 U.S. at 243, or that a search is reasonably justified to advance an important health and safety interest in the civil context, *see Camara v. Municipal Court of City & Cty. of San Francisco*, 387 U.S. 523, 535 (1967).

This standard “take[s] into account the nature of the search that is being sought,” *id.*, and amounts to “the kind of fair probability on which reasonable and prudent people, not legal technicians, act.” *Harris*, 568 U.S. at 244 (citation omitted); *see also Commonwealth v. Johnson*, 615 Pa. 354, 379-80 (2012) (explaining that probable cause exists when the totality of facts and circumstances “are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted”) (citations omitted).

The same test applies when a court is presented with a petition to compel cooperation with a home visit in connection with a child welfare investigation: the court must consider all the potentially relevant information before it and decide whether, ***based on the totality of the circumstances, the agency has demonstrated***

*a fair probability that a child is in need of services for abuse or neglect and that evidence relating to that need will be found in the home.* See *In re Y.W.-B.*, 241 A.3d at 386. This standard—articulated by the Superior Court in the case at hand—comports with the longstanding constitutional principles set forth by the United States Supreme Court and this Court.

Appellant asks this Court to impose different and more rigid probable cause standards, including a strict “particularity” requirement. Setting aside the inherent conflict between Appellant’s argument and the constitutional principles described above, Appellant’s position is particularly problematic in the child welfare context. As a practical matter, many reports of child abuse or neglect come from sources—including doctors, teachers, clergy, coaches, and the like—with no visibility into a child’s home. In many instances, the reporter only sees outward signs of abuse or neglect, for example demonstrable signs of physical or emotional trauma. A county agency, having received information from a reporter in such a position, cannot possibly be expected to identify with specificity the particular evidence that a home visit might reveal or describe with particularity where such evidence might be found. Forced to meet an impossible particularity requirement in this exceedingly common circumstance, an agency would be unable to conduct the home visit required under the CPSL to investigate what will turn out to be, in many instances, valid concerns of child abuse or neglect. See generally *Commonwealth*

*v. Johnson*, 240 A.3d 575, 585 (Pa. 2020) (explaining that probable cause determinations are flexible and must account for the reality that, in certain types of cases, it is “virtually impossible” for authorities to describe the information sought in a search or the particular location of relevant information with specificity); *Camara*, 387 U.S. at 539 (explaining that “reasonableness is still the ultimate standard” and when “a valid public interest justifies the intrusion contemplated, then there is probable cause to issue” an appropriate inspection order to advance important health and safety objectives in the civil context).

The flexible probable cause standard applied by the Superior Court in this case allows a court to account for these realities as part of its holistic analysis of whether there is a “fair probability” that a home visit is justified to investigate, assess or monitor a case of abuse or neglect without hamstringing the agency’s ability to carry out the purposes and goals of the CPSL. *See Harris*, 568 U.S. at 244 (noting that probable cause is a “practical and common-sensical” standard); *In re Petition to Compel Cooperation*, 875 A.2d at 380 (Beck, J., concurring) (urging consideration of the “purposes and goals underlying the activities of child protective agencies” and the “nature and context of each scenario”). Put simply, the standard applied by the Superior Court reflects the longstanding flexible totality-of-the-circumstances probable cause inquiry, and this Court should reject

Appellant's invitation to constrain courts' ability to apply that standard in the child welfare context.

**B. Courts Should Be Able to Consider Anonymous Reports of Abuse or Neglect as Part of the Holistic Probable Cause Analysis.**

The majority of child abuse reports come from mandated reporters such as school employees, social service agency employees, or health care providers. *See Annual Report*, at 6. However, reports of information from anonymous "permissive" reporters also play an important role in alerting county agencies to potential abuse or neglect. *See id.* Permissive reporters can include friends, neighbors, extended family members, and others who may wish to remain anonymous given their close relationship to the parents. But that same relationship makes them a vital source of firsthand information.

To that end, the CPSL expressly embraces the value of confidential reporting by prohibiting agencies and other institutions from releasing reporter identities. 23 Pa. Cons. Stat. § 6340 (shielding both mandatory and permissive reporters from disclosure). Of course, and contrary to Appellant's assertion, this does not mean that "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." Appellant's Br. at 37. Information from a permissive reporter is simply *one* of the pieces of evidence a court may consider as part of its totality-of-the-circumstances probable cause analysis.

Appellant's request to impose a strict "reliability requirement" lacks constitutional support. In fact, the Supreme Court rejected this precise type of requirement in the criminal context in *Gates*, explaining that "'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of [an informant's] report" but that these elements should not be understood as "entirely separate and independent requirements to be rigidly exacted in every case." 462 U.S. at 230. Instead, reliability is simply one of many issues "that may usefully illuminate the commonsense, practical question whether there is 'probable cause.'" *Id.* See also *Commonwealth v. Lyons*, 79 A.3d 1053, 1065 (Pa. 2013) ("[W]hile witness credibility and reliability are certainly appropriate considerations in determining probable cause, such technical pleading requirements are inconsistent with the practical, common sense determination" of probable cause.)

If no such requirement exists in the criminal context, it is certainly inappropriate in the child welfare context. Whereas probable cause determinations in the criminal context often include information obtained from confidential police informants, permissive reporters of child abuse or neglect are often ordinary citizens. See *Lyons*, 79 A.3d at 1065 ("This Court has repeatedly rejected the argument that an officer relying on statements from an ordinary citizen, in contrast to a police informant, must establish the citizen's credibility and reliability."). Moreover, probable cause determinations in the criminal context are typically



made *ex parte*, without an opportunity for the person whose property will be searched to challenge the proffered evidence. In contrast, under the framework set forth in *In re Petition to Compel Cooperation*, probable cause determinations in the child welfare context are generally made following a contested probable cause hearing, where the interested parties and their counsel have an opportunity to challenge the reliability of evidence and the credibility of witnesses and to present additional relevant information. In short, a strict “reliability requirement” conflicts with the well-established totality-of-the-circumstances inquiry and would be particularly problematic where, as here, the statutory and regulatory scheme rely in part on information from anonymous sources.

**C. Courts Should Be Able to Consider Relevant Past Family History as Part of the Holistic Probable Cause Analysis.**

Once again, courts must be free to consider all potentially relevant information when determining whether probable cause exists, and there is no reason to deviate from that approach in the child welfare context. In this case, DHS represented to the trial court that DHS had received and validated two prior GPS reports involving Appellant, that Y.W.-B. was adjudicated dependent and placed in DHS’s care as a result of one of those reports, that Y.W.-B.’s father had a criminal history that included convictions for rape and drug-related offenses, and that Y.W.-B.’s mother had a criminal record including convictions for theft-related and trespassing offenses.

Courts should be free to consider evidence of past family history, including household members' past involvement in child welfare matters and criminal records. Again, the regulatory framework expressly recognizes as much. *See, e.g.*, 55 Pa. Code §§ 3490.62 (addressing cases of “repeated child abuse”), 3490.321 (making clear that agencies must consider “the characteristics of the environment” including “the history of prior abuse and neglect” in risk assessment process); Pa. Dep’t Hum. Servs., *OCYF Bulletin No. 3490-20-08, Statewide General Protective Services (GPS) Referrals* (2020), at 4 (noting that “[p]rior [agency] referral history, previous indicated reports of abuse or neglect, and prior services provided to the family offer important context to inform decision making.”).<sup>5</sup> And caselaw confirms the often-critical importance of this type of information in the child welfare context. *See, e.g., Bennett*, 499 F.3d at 282-85.<sup>6</sup>

Allowing courts to do so is constitutional, and courts—including this Court—have held that such information is relevant to the probable cause analysis. *See Commonwealth v. Gullett*, 459 Pa. 431, 441 (Pa. 1974) (explaining that an

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<sup>5</sup> Available at [https://www.dhs.pa.gov/docs/Publications/Documents/FORMS%20AND%20PUBS%20OCYF/OCYF%20Bulletin%203490-19%20Statewide%20General%20Protective%20Services%20GP%20Referrals\\_12202019.pdf](https://www.dhs.pa.gov/docs/Publications/Documents/FORMS%20AND%20PUBS%20OCYF/OCYF%20Bulletin%203490-19%20Statewide%20General%20Protective%20Services%20GP%20Referrals_12202019.pdf).

<sup>6</sup> Given its importance, criminal history is regularly considered in other child welfare contexts. For example, the CPSL conditions approval to be a foster parent, adoptive parent, or an employee or volunteer who has contact with children on the results of an individual’s state and federal criminal history reports. See 23 Pa. Code § 6344 (addressing employees, prospective foster parents, and prospective adoptive parents), § 6344.2 (addressing volunteers).

individual’s past criminal history “clearly can be considered as one of the factors leading to th[e probable cause] determination”); *Collins v. Jones*, No. 2:13-cv-07613, 2015 WL 790055, at \*5 (E.D. Pa. Feb. 24, 2015) (finding criminal history relevant to probable cause); *United States v. Majeed*, No. 08-cr-186, 2009 WL 2393439, at \*7 (E.D. Pa. Aug. 4, 2009) (“criminal records are relevant to a determination of probable cause”). This does *not* necessarily mean that a parent’s past involvement in a child welfare matter or a criminal record, standing alone, warrants a finding of probable cause. It is simply one piece of evidence that a court should be free to consider as part of the totality of the circumstances probable cause inquiry long required by state and federal constitutional law.

### **CONCLUSION**

*Child Advocates* respectfully requests that this Court uphold longstanding state and federal constitutional law and affirm the judgment of the Superior Court.

Dated: April 5, 2021

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Date: April 5, 2021

/s/ Emily C. Reineberg

**WORD COUNT CERTIFICATION**

In accordance with Pennsylvania Rule of Appellate Procedure 531(b)(3), I certify that the attached brief contains 4,997 words as calculated by the word-count feature of Microsoft Word.

Date: April 5, 2021

/s/ Emily C. Reineberg

**CERTIFICATE OF SERVICE**

I certify that, on April 5, 2021, I caused a copy of the foregoing to be served on the following via PACFile, which satisfies Pennsylvania Rule of Appellate Procedure 121.

/s/ Emily C. Reineberg