Advocacy for Families Impacted by DHS

PRESENTED BY REGINE CHARLES-ASAR, KELLY CAMPBELL, TIFFANY COBB, SYDNEY GROLL, YALONDA HOUSTON, SARAH KATZ, AND MICHAEL VIOLA WITH SPECIAL GUESTS HON. DEBORAH CANTY AND APRIL LEE

Imagine: The Knock…

Your client: Jessie

Jessie, a mom of 2 young children, calls your law office. She says a Department of Human Services (DHS) worker is outside her home. The worker has informed her that she is there to investigate the following General Protective Services (GPS) report:

3 weeks earlier the family was observed sleeping outside the Philadelphia Housing Authority (PHA) Office at 2103 Ridge Avenue. Yesterday Jessie and one of the children were observed outside the PHA office from 12-8pm; the caller is unsure if the child was fed during that time; and outreach worker was dispatched to speak with Jessie but denied the family was unhoused, but indicated the family's previous residence had burned down.

Jessie informs you that she has not let the worker inside her home and has not yet spoken to the worker other than to receive the information about the report being investigated. She told the DHS worker she wanted to speak with a lawyer first.

Does Jessie have to let DHS in her home?

DOES SHE HAVE TO SPEAK WITH DHS?

DOES SHE HAVE TO LET DHS SPEAK WITH HER CHILDREN?

What legally limits what DHS can do during an investigation?

- The 4th Amendment!
- Pennsylvania Constitution Article I, Section 8

U.S. Constitution, 4th Amendment

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.**

Pa. Constitution, Article I, Section 8

- 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.

In the Interest of *Y.W.-B.*, 265 A.3d 602 (Pa. 2021)

THERE IS NO SOCIAL WORKER EXCEPTION TO THE FOURTH AMENDMENT OR

ARTICLE I, SECTION 8 OF THE

PENNSYLVANIA CONSTITUTION:

"We **expressly hold** that there is **no "social worker exception"** to compliance with constitutional limitations on an entry into a home without consent or exigent circumstances." *Int. of Y.W.-B.*, 265 A.3d 602, 627 (Pa. 2021).

Y.W.-B Holdings

- DHS entry into Mother's home without consent not a "minimally intrusive spot check"
- Probable cause analysis for child abuse and neglect investigation governed by principles of federal and state constitutional search and seizure principles
- Finding of probable cause at motions hearing based on testimony by caseworker on issues not alleged in the petition (beyond the scope of petition) **violated due process**
- Probable cause based in part on Mother's prior DHS history was fundamental error
- DHS failed to show **nexus** between allegations in the petition and place to be searched (home) to support finding of probable cause
- DHS's failure to present evidence to **establish credibility and reliability of unidentified reporter** who made GPS report precluded finding of probable cause

So under Y.W.-B. what is probable cause?

Probable cause for the purpose of dependency proceedings requires analysis of the same basic principles of criminal search and seizure case law, including:

- **Veracity and basis of knowledge** of anonymous or confidential sources of evidence
- **Nexus**
- **Particularity**
- **Staleness**
- **Due process**

So how do you advise Jessie?

SYSTEM NAVIGATION V. FAMILY DEFENSE

WHAT DO FAMILIES NEED IN THIS MOMENT?

Procedure for Challenging Search & Seizure: Dependency Motions to Compel

- DHS/CYS files a motion to compel cooperation
- The court holds a hearing to determine if probable cause exists to compel cooperation, where it considers both testimony and the allegations within the motion
- Due process applies (notice + opportunity to be heard)
- Court appoints attorneys for indigent parties
- The court either discharges the petition or makes an order granting various forms of relief
- Issuing court must determine the parameters or scope of the search/seizure, in accordance with the motion and the evidence

Dependency Motions to Compel

- A VIEW FROM THE BENCH
- A VIEW FROM A CHILD ADVOCATE

Your client: Jessie

A few months later, Jessie calls your law office again. DHS is again on her doorstep, this time investigating a CPS report. The allegation is that one of the children broke their arm, and according to the reporter, Jessie delayed going to the emergency room for 2 days, giving the child ice and ibuprofen. Jessie has already told the DHS worker that she will not speak with them without a lawyer present. The worker has asked Jessie to sign a safety plan to send the children to MGM while the investigation is pending. Jessie wants to know if she has to agree to the safety plan.

What is a "Safety Plan?"

- An agreement between Department of Human Services (DHS) and/or Community Umbrella Agency (CUA) and the family intended to alleviate an identified present or impending safety risk
- Implemented in writing
- Signed by an identified "safety provider," usually a family member or kin

Categories of Safety Plans

In-home safety plan

- Ex: Parent agrees to take child to all scheduled medical appointments, maternal grandmother agrees to ensure that Parent does so and will notify the agency if appointments are missed
- Ex: Maternal aunt agrees to monitor interactions between Parent and Child and ensure Child's safety in the home

Out-of-home safety plan

- Ex: Child will reside in godmother's home. Godmother will monitor all contact between Parent and Child
- Ex: Stepfather will leave the home. Mother will monitor all contact between Stepfather and Child, or Mother will not allow any contact between Stepfather and Child

Safety Plan Guidelines

- Must be "voluntary"
- Must be "time-limited"
  - Per PA guidance, should not exceed 60 days in most cases, but can be renewed
- Cannot alter legal/physical custody, regardless of if there is a pre-existing custody order
- Cannot name a relative/kin as an educational or medical decisionmaker for a child
- Cannot suspend contact between a parent and child
- Must be revocable at any time

Are Safety Plans Legal?

- Yes, but subject to Constitutional protections under the 14th Amendment
- Substantive due process right to the care, custody, and control of children
- No procedural due process required *prior* to implementation of safety plan
- Post-deprivation procedural due process requirements:
  - Notice
  - Informed consent
  - Timely and meaningful opportunity to challenge

So how do you advise Jessie?

- BENEFITS
- RISKS

Safety Plans: View from the Bench

Caution
As of: August 23, 2024 5:35 PM Z

In re Y.W.-B.

Supreme Court of Pennsylvania

May 19, 2021, Argued; December 23, 2021, Decided

No. 1 EAP 2021, No. 2 EAP 2021

Reporter
265 A.3d 602 *; 2021 Pa. LEXIS 4353 **; 2021 WL 6071747

IN THE INTEREST OF: Y.W.-B., A MINOR, APPEAL OF: J.B., MOTHER IN THE INTEREST OF: N.W.-B., A MINOR, APPEAL OF: J.B., MOTHER

Prior History: [1]** Appeal from the Order of Superior Court entered on October 8, 2020 at No. 1642 EDA 2019 affirming and reversing the Order entered on June 11, 2019 in the Court of Common Pleas, Philadelphia County, Family Division at No. CP-51-DP-0002108-2013.

Appeal from the Order of Superior Court entered on October 8, 2020 at No. 1643 EDA 2019 affirming and reversing the Order entered on June 11, 2019 in the Court of Common Pleas, Philadelphia County, Family Division at No. CP-51-DP-0002387-2016.

Core Terms

probable cause, trial court, petition to compel, allegations, home visit, homelessness, cooperation, neglect, protective services, inspection, home inspection, cases, investigations, searches, child abuse, caseworker, circumstances, child protection, reliability, anonymous, majority opinion, administrative search, protesting, assess, principles, evidentiary hearing, anonymous source, criminal law, confidential, privacy

Case Summary

Overview
HOLDINGS: [1]-In a child neglect case, a mother had no reduced expectation of privacy in the sanctity of her home based upon suspicion of potential wrongdoing, and while home visits were conducted by civil government officials rather than members of law enforcement, they did not fit within the two categories of "administrative searches" entitled to reduced Fourth Amendment protections; [2]-Entry into the mother's home was not a "minimally intrusive" spot check because the order placed no limitations on the scope of the search, leaving it entirely in the social worker's discretion as to the thoroughness of the search, including a general rummaging of the family's belongings; [3]-U.S. Const. amend. IV and Pa. Const. art. I, § 8 applied to searches conducted in civil child neglect proceedings, which had the same potential for unreasonable government intrusion into the sanctity of the home.

Outcome
The judgment was reversed.

LexisNexis® Headnotes

Family Law > Delinquency & Dependency > Dependency Proceedings

***HN1*[] Delinquency & Dependency, Dependency Proceedings**

In the context of child dependency, to compel cooperation with a home inspection, an agency must establish probable cause before it will be permitted to enter a private residence to conduct an investigation.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Family Law > Delinquency & Dependency > Dependency Proceedings

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

***HN2*[] Standards of Review, De Novo Review**

Constitutional challenges present questions of law over which review is plenary. With respect to findings of fact and credibility determinations of the trial court, the standard of review in dependency cases requires an appellate court to accept them if they are supported by the record, but does not require the appellate court to accept the lower court's inferences or conclusions of law.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN3 **Children, Abuse, Endangerment & Neglect**

Probable cause requires a nexus between the allegations of child neglect and the individual's home.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN4 **Search & Seizure, Scope of Protection**

The Fourth Amendment, U.S. Const. amend. IV, establishes the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, and that no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV. Physical entry of the home is the chief evil against which the Fourth Amendment is directed. At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. When it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion. Freedom in one's own dwelling is the archetype of the privacy protection secured by the Fourth Amendment; conversely, physical entry of the home is the chief evil against which it is directed.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN5 **Search & Seizure, Probable Cause**

Pa. Const. art. I, § 8 protects all citizens in this Commonwealth against unreasonable searches by requiring a high level of particularity, i.e., that warrants describe as nearly as may be the place to be searched and the items to be seized with specificity. Pa. Const. art. I, § 8 also requires that a warrant be supported by probable cause to believe that the items sought will provide evidence of a crime.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN6 **Search & Seizure, Probable Cause**

It is well established that probable cause exists where the facts and circumstances within the affiant's knowledge and of which he or she has reasonably trustworthy information are sufficient in and of themselves to warrant a person of reasonable caution in the belief that a search should be conducted. To assess whether probable cause has been established, the issuing authority makes a practical, common-sense decision based on the totality of the circumstances and the information in the affidavit, whether, given the relative veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that relevant evidence will be found in a particular place.

Family Law > Family Protection & Welfare > Children > Proceedings

HN7 **Children, Proceedings**

The government cannot condition a parent's right to raise her children on periodic home inspection unsupported by probable cause.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN8 **Search & Seizure, Probable Cause**

Dragnet searches are not predicated on individualized showings of probable cause, nor indeed on any kind of individualized suspicion.

Constitutional Law > ... > Fundamental Rights > Search

& Seizure > Scope of Protection

HN9[] **Search & Seizure, Scope of Protection**

Dragnet searches are justified if they satisfy a balance of interests and are necessary because a regime of individualized suspicion could not effectively serve the government's interest.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN10[] **Children, Abuse, Endangerment & Neglect**

Home visits by child protective services are in no sense routine and periodic, but rather must be based upon credible allegations of evidence of neglect occurring in the specified home.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

HN11[] **Search & Seizure, Scope of Protection**

While home visits in the child neglect context are conducted by civil government officials rather than members of law enforcement, they do not fit within the two categories of administrative searches entitled to reduced Fourth Amendment, U.S. Const. amend. IV and Pa. Const. art. I, § 8 protections.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

Constitutional Law > Substantive Due Process > Scope

HN12[] **Privacy, Personal Decisions**

The United States Supreme Court has held that natural parents have a fundamental liberty interest in the care, custody, and management of their children and that a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is a liberty interest far more precious than any property right. While state agencies have an interest in investigating credible allegations of child neglect, nothing short of probable cause, guided by the traditional principles that govern its federal and state constitutional limitations, will suffice when a trial court makes a determination as to whether or not to authorize a home visit.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN13[] **Search & Seizure, Probable Cause**

The evidence necessary to establish probable cause in child neglect settings must be evaluated pursuant to certain basic principles developed primarily in search and seizure jurisprudence -including the existence of a nexus between the areas to be searched and the suspected wrongdoing at issue, an assessment of the veracity and reliability of anonymous sources of evidence, and consideration of the age of the facts in relation to the facts presented to establish probable cause. These fundamental principles are critical to ensure that a court's finding of probable cause is firmly rooted in facts that that support a constitutional intrusion into a private home.

Civil Rights Law > ... > Section 1983 Actions > Scope > Family Relations

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exigent Circumstances

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN14[] **Scope, Family Relations**

There is no social worker exception to compliance with constitutional limitations on an entry into a home without consent or exigent circumstances. While most often applied with respect to the police, the United States Supreme Court has ruled that the basic purpose of the Fourth Amendment,

U.S. Const. amend. IV, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. As a result, the Fourth Amendment applies equally whether the government official is a police officer conducting a criminal investigation or a caseworker conducting a civil child welfare investigation.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > Family Protection & Welfare > Children > Proceedings

HN15 **Search & Seizure, Scope of Protection**

U.S. Const. amend. IV and Pa. Const. art. I, § 8 apply to searches conducted in civil child neglect proceedings, which have the same potential for unreasonable government intrusion into the sanctity of the home.

Administrative Law > ... > Hearings > Right to Hearing > Due Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN16 **Right to Hearing, Due Process**

Parents, in order to protect the sanctity of their homes, are entitled, at a minimum, to the basic tenets of due process, which include, fundamentally, the key principles underpinning due process — notice and an opportunity to be heard.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN17 **Search & Seizure, Probable Cause**

Stale evidence may not be used to establish the probable cause to issue a search warrant; instead, the conclusion that probable cause exists must be based on facts which are closely related in time to the date the warrant is issued. If too old, the information is stale, and probable cause may no longer exist.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN18 **Search & Seizure, Probable Cause**

Where probable cause is almost entirely based on information gleaned from anonymous sources and there is no attempt made to establish either the basis of knowledge of the anonymous sources or their general veracity, a strong showing of the reliability of the information that they have relayed is required to support a finding of probable cause.

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Family Law > Family Protection & Welfare > Child Abuse Prevention & Treatment Act

HN19 **Children, Abuse, Endangerment & Neglect**

There is a distinction between an individual who makes an anonymous report of child abuse as opposed to one of child neglect — the state must guard the confidentiality of an individual making allegations of child abuse, but has no similar obligations in cases involving reports alleging child neglect.

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For G.W.-B., Father, Appellee: Michael Eugene Angelotti, Philadelphia, PA.

For Department of Human Services, Appellee: Courtney Lynn McGinn, City of Philadelphia, Phila Law Dept Child Welfare, Philadelphia, PA.

For N.W.-B., a Minor, **[**2]** Appellee: Sharon K. Wallis,

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Judges: BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ. Chief Justice Baer and Justices Saylor and Wecht join the opinion. Justice Dougherty files a **[**3]** concurring and dissenting opinion in which Justice Todd joins. Justice Mundy files a dissenting opinion.

Opinion by: DONOHUE

Opinion

[*609] JUSTICE DONOHUE

A report from an unidentified source provided the sole basis for an allegation that Mother (J.B.) was homeless and had failed to feed one of her children during a single eight-hour period and led to the issuance of an order compelling her to allow the Philadelphia Department of Human Services ("DHS") to enter and inspect the family residence. Before the Court is the question of whether DHS established sufficient probable cause for the trial court to issue the order permitting entry into the home without consent. We conclude that DHS did not establish probable cause and thus reverse the order of the Superior Court.

I. Factual and Procedural History

Mother, who is politically active, lives with her two young children ("Y.W.-B" and "N.W.-B") and the children's father ("Father") in Philadelphia. On May 22, 2019, DHS allegedly received a general protective services report ("GPS report") from an unidentified source alleging possible neglect by Mother. Although DHS referenced this GPS report several times at the evidentiary hearing and used it to refresh its sole witness's **[**4]** recollection, it inexplicably never introduced it into evidence. The only information of record regarding the contents of the GPS report are set forth in the "Petitions to Compel Cooperation" (the "Petitions to Compel") subsequently filed by DHS. In paragraph "J" of the Petitions to Compel, DHS summarized the relevant allegations in the GPS report against Mother as follows:

> 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 not homeless and that her previous residence had burned down; and that it **[*610]** was unknown if [Mother] was feeding the children [sic] she stood outside of the PHA office for extended periods of time.[1] This report is pending determination.

Petitions to Compel, 5/31/2019, ¶ J.

In summary, and as set forth in paragraph "J," two allegations were made in the report: first, around **[**5]** three weeks prior to May 21, 2019 (or on approximately May 1, 2019), the unidentified reporter claimed to have observed Mother's family sleeping outside of the Philadelphia Housing Authority. Project Home pursued this allegation with Mother, who denied the family was homeless. Second, on May 21, 2019, the unidentified source apparently indicated that he or she had also observed Mother, with one of her children,

[1] It is not entirely clear whether this allegation relates to the family sleeping outside of the Philadelphia Housing Authority three weeks earlier or on May 21st while Mother was protesting for eight hours. Because this allegation regarding a failure to feed the children as she "**stood** outside of the PHA office" (rather than sleeping outside of the PHA office), herein we will assume that this allegation refers to Mother's protesting activities on May 21st . The trial court made no finding of fact on the issue and the Superior Court did not reference it in its opinion. In any event, this assumption has no effect on our disposition of the appeal before us.

protesting outside of the office of the Philadelphia Housing Authority from noon until eight in the evening, and that it was "unknown" if Mother had fed the child during that eight-hour time period. Mother does not challenge that these were the claims of possible neglect in the GPS report, and we thus rely on the allegations in paragraph J in our analysis and disposition.

The same source provided DHS with the address of the family home. Project Home, a Philadelphia organization that attempts to alleviate homelessness, dispatched a worker on May 22, 2019 to approach Mother.[2] In response to the Project Home worker's questions, Mother stated that she was at the Philadelphia Housing Authority to protest and that she was not homeless, although she indicated that a previous home had **[**6]** been involved in a fire.

Later that same day, Tamisha Richardson, a DHS caseworker, verified the address of the family's home via a search of the Department of Welfare's records. When she arrived at this address later in the day after the Project Home worker's visit, she encountered Father, who denied Richardson entry into the residence and called Mother, who then spoke with her over the phone. Trial Court Opinion, 9/9/2019, at 6-7. Mother reiterated that she was protesting at the Philadelphia Housing Authority on May 21st and denied that she had either of the children with her on that date. Shortly thereafter, Mother arrived at the family home with the children and ushered them into the house. Mother informed Richardson that she would not allow her into the home absent a court order. *Id.* Richardson left but returned later the same day accompanied by police officers, again seeking entry into the home. Mother and Father continued to refuse entry. *Id.*

On May 31, 2019, without conducting any additional investigation or making any effort to corroborate the allegations of the unidentified author of the GPS report, DHS filed two Petitions to Compel the parents' cooperation with an in-home **[**7]** visit, one for each of the children. In the Petitions **[*611]** to Compel, DHS set forth the events of May 22, 2019 and detailed the family's prior involvement with DHS, which consisted of a dependency matter that began in 2013 when DHS received a GPS report indicating that the family 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." Petitions to Compel, 5/31/2019, ¶ C. On October 29, 2013, Y.W.-B was adjudicated dependent and committed to DHS[3] until July 20, 2015, at which time DHS transferred legal and physical custody back to Mother and Father. *Id.* ¶¶ E-F. The family received in-home services through local community agencies and treatment centers through November 10, 2015, at which time DHS ceased its protective supervision of Y.W.-B and discharged the dependency matter.[4] *Id.* ¶¶ H-I.

On June 11, 2019, the trial court held a hearing on the Petitions to Compel, at which Mother and Father appeared with counsel. DHS called Richardson **[**8]** as its single witness. Richardson testified to the events of May 22nd and explained that because of the allegations in the GPS report, she was required to assess the inside of the home to complete her investigation. N.T., 6/11/2019, at 11. She did not state or offer any evidence to support any belief that the conditions inside the home were deficient in any respect (as had been the case in 2013). The trial court then questioned Mother from the bench as to the status of her housing, the operability of her utilities, her employment status and whether the children were up-to-date with their medical and dental exams. Mother responded by verifying her address and affirming that the utilities were functioning in her home, that she was employed, and that the children were current with their medical and dental exams. *Id.* at 12-14. During this inquiry, Mother asked the presiding judge why he was asking these questions of her and voiced her opinion that his inquiries did not relate to the allegations in the GPS report. *See id.* at 13, 19.

Mother also stated her view that the GPS report was made in retaliation for her protests of the Philadelphia Housing Authority. *Id.* at 15. She insisted that **[**9]** this was the third time[5] that DHS had "com[e] after me. Every time the reports

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[2] The Project Home representative did not testify at the evidentiary hearing and offered no evidence regarding whether or not the family was homeless. The record merely indicates that the representative asked Mother if her family was homeless and Mother responded that they were not. Petitions to Compel, 5/31/2019, ¶ J.

[3] N.W.-B was born in January 2015. Petitions to Compel, 5/31/19, ¶ G.

[4] The Petitions to Compel also noted Father's two criminal convictions in 1993 and 1994, the first for drug offenses and the second for rape. Petitions to Compel, 5/31/2019, ¶ O. The Petitions to Compel indicated that Mother's criminal history included convictions for theft and trespassing, but provided no timeframes. *Id.* ¶ N.

[5] A review of the lower court record reveals one such encounter. While not referenced in the trial court's opinion or in the briefs of Mother or DHS, the record reflects that in 2016, the trial court granted a DHS petition to compel Mother and Father to cooperate with a home visit based on numerous allegations of neglect, including that the family home did not have water service, that Mother and Father had a history of domestic violence and drug use,

were proven to be false. This is retaliation. I'm in the news. I'm engaging in an ongoing protest at the [Philadelphia Housing Authority] **[*612]** headquarters and I'm being retaliated against." *Id.*

After the close of testimony, the trial court stated that the probable cause requirement had been met and that it was going to grant the Petitions to Compel. *Id.* at 18. In this regard, the trial court stated that "[i]f 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 order stated in full:

> 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 **[**10]** videos regarding DHS works from social media. Parents or third parties are NOT to intimidate, harass or threaten any social workers.

Petitions to Compel Cooperation Order, 6/11/2019.[6] In its order, the trial court continued the evidentiary hearing until June 18, 2019.

Mother immediately filed a motion to stay the home inspection pending the resolution of her appeal. The trial court denied Mother's motion for a stay and the inspection occurred on June 14, 2019. When the hearing reconvened on June 18, 2019, one of the DHS caseworkers who performed the inspection testified that although Mother and Father did not permit the caseworkers to have access to the basement or the living room (which was under renovation), the rest of the home, which they did inspect, was safe and suitable for the children. N.T., 6/18/2019, at 12-13, 18. The trial court then dismissed the motion to compel. *Id.* at 20.

Mother filed a timely notice of appeal of the trial court's June 11th order.[7] [8] In her statement of matters complained **[*613]** of on appeal pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure, Mother argued, inter alia, that the trial court's determination that DHS had established probable cause to allow the home inspection violated her **[**11]** rights under the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution. In its written opinion pursuant to Rule 1925(a), the trial court recognized that a home inspection is subject to "the limitations of state and federal search and seizure jurisprudence[,]" Trial Court Opinion, 9/9/2019, at 6, and that to compel cooperation with a home inspection, DHS must establish probable cause that an act of child abuse or neglect has occurred and that evidence relating to the abuse or neglect will be found in the home. *Id.* at 5-8. The trial court relied on the concurrence in *In re Petition to Compel Cooperation with Child Abuse Investigation*, 2005 PA Super 188, 875 A.2d 365 (Pa. Super. 2005)[9] (Beck, J.,

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and that the neighbors were providing food and clothing to the children. Motion to Compel Cooperation, 10/27/2016, ¶ B. The trial court's order stated: "View to Discharge at the next listing if parents are compliant." Cooperation Order, 11/23/2016. After DHS conducted its home visit on November 30, 2016, the trial court dismissed DHS's motion to compel the next day (December 1, 2016). We were unable to locate any further records involving this encounter.

[6] Before the Superior Court, Mother challenged the trial court's prohibition of filming the DHS social workers during the home visit on the ground that it violated her First Amendment right to freedom of speech, which necessarily incorporates the act of recording. The Superior Court agreed and reversed this portion of the trial court's order, indicating that "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." *In Interest of Y.W.-B*, 2020 PA Super 245, 241 A.3d 375, 395 (Pa. Super. 2020), *appeal granted*, 243 A.3d 969 (Pa. 2021).

[7] An order compelling cooperation with the scheduling and completion of an in-home inspection by a government agency is a final order for purposes of appeal. *In re Petition to Compel Cooperation with Child Abuse Investigation*, 2005 PA Super 188, 875 A.2d 365, 369 (Pa. Super. 2005).

[8] We agree with the Superior Court's determination that Mother's constitutional claims are not moot. *In Interest of Y.W.-B*, 241 A.3d at 381. In general, the mootness doctrine requires that an actual case or controversy must be extant at all stages of review. **[**12]** *See, e.g., Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 652 Pa. 224, 207 A.3d 886, 897 (Pa. 2019). This Court has recognized that issues "capable of repetition yet evading review" fall within a limited exception to the mootness doctrine. *Reuther v. Delaware Cty. Bureau of Elections*, 651 Pa. 406, 205 A.3d 302, 306 n.6 (Pa. 2019) (citing *Nutter v. Dougherty*, 595 Pa. 340, 938 A.2d 401, 405 n.8 (Pa. 2007)). We have likewise recognized an exception for issues that are of great and immediate public importance. *Chester Water Auth. v. Pa. Dep't of Cmty. & Econ. Dev.*, 249 A.3d 1106, 1115 (Pa. 2021) (citing *Com., Dep't of Envtl. Prot. v. Cromwell Twp., Huntingdon Cty.*, 613 Pa. 1, 32 A.3d 639, 652 (Pa. 2011)). In our view, both exceptions apply here.

[9] Given the prominence of this opinion and, in particular, the concurring opinion, the opinions are later addressed in detail at pages 30-34.

concurring) (hereinafter the "Beck Concurrence"), for the proposition that "the standard notion of probable cause in criminal cases" does not apply to matters involving child protective services agencies and that "[w]hat 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." Trial Court Opinion, 9/9/2019, at 6 (quoting *Petition to Compel Cooperation*, 875 A.2d at 380) (Beck, J., concurring)).

Operating under this principle, the trial court explained that it considered not only the allegations contained in the Petitions to Compel,[10] but also the testimony presented by DHS at the hearing and the consternation Mother expressed when questioned by the trial court regarding her ability to care for the children, her source of income, and her employment status. *Id.* at 7. The trial court explained that "one of the main factors of the DHS investigation [was] the matter of homelessness and if the alleged address of the family was suitable" for the children, and that the home inspection would determine if the claims of homelessness and inadequate care had merit. *Id.* Because of DHS's allegations of homelessness and inadequate care, the trial court found that "it was reasonable to ascertain whether the parents had stable housing; therefore, parents needed to allow a home assessment." *Id.*

The Superior Court affirmed. **[**13]** *In Interest of Y.W.-B*, 2020 PA Super 245, 241 A.3d 375 (Pa. Super. 2020), *appeal granted*, 243 A.3d 969 (Pa. 2021). Relying on its prior decision in *Petition to Compel Cooperation*, it first found that both the Fourth Amendment and Article I, Section 8[11] apply to regulations **[*614]** promulgated pursuant to Pennsylvania's Child Protective Services Law ("CPSL"), 23 Pa.C.S. §§ 6301-6386, that govern an agency's duty to investigate allegations of abuse or neglect within a home. ***HN1***[] As such, to compel cooperation with a home inspection, an agency must establish probable cause before it will be permitted to enter a private residence to conduct an investigation. *In Interest of Y.W.-B*, 241 A.3d at 384 (citing *Petition to Compel Cooperation*, 875 A.2d at 377-78). Drawing on the Beck Concurrence, the Superior Court considered the different purposes of child protective laws and criminal laws as reflected in the procedural differences for obtaining a warrant in a criminal case and a motion to compel in a child welfare case. For instance, in criminal law, the procedure to obtain a search warrant is entirely ex parte such that the target of the search has no opportunity to challenge the allegations contained in the warrant application or affidavit before the warrant issues. *Id.* at 385 (citing *Commonwealth v. Milliken*, 450 Pa. 310, 300 A.2d 78, 80 (Pa. 1973); Pa.R.Crim.P. 203(B)). In contrast, under the CPSL, trial courts may conduct an evidentiary hearing before the issuance of an order granting a search of the home, at which time the parents may cross-examine witnesses, **[**14]** testify on their own behalf, and otherwise challenge the evidence put forth in support of the motion to compel. *Id.* Moreover, the Superior Court noted, there are no statutory provisions or procedural rules that cabin a trial court's consideration of a motion to compel to the contents within the four corners of that motion, and so trial courts are free to consider additional evidence relevant to its inquiry, including any prior experiences they have had with the parents that would be relevant to a probable cause determination. *Id.* at 385-86. The court ultimately held that

> 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 is in need of services, and that evidence relating to that need will be found inside the home. 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.

Id. at 386 (internal citations omitted).

Applying this standard, the Superior Court pointed to the testimony of the DHS caseworker, who corroborated that DHS received a GPS report on May 22, 2019 alleging **[**15]** "homelessness and inadequate basic care," and that the home visit was intended to make sure the home was appropriate, the utilities were working, and that there was food in the house. Thus, the Superior Court found no error in the trial court's probable cause determination, as the averments in DHS's petition, supported by evidence at the hearing, corroborated the initial report and established a "link" between the initial allegations of homelessness and inadequate care and DHS's

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[10] As discussed, this included averments regarding Mother's previous involvement with DHS in 2013, which involved allegations of physical abuse against the older child, Mother's employment status, whether the child's basic needs were being met, and inadequate housing. Trial Court Opinion, 9/9/2019, at 1-2. In connection with those allegations, the child was adjudicated dependent for a period of time. In November 2015, the trial court discharged the dependency. *Id.* at 2.

[11] In the "Counter-Statement of the Issues Involved"' in its brief filed with this Court, DHS contends that Mother failed to preserve a claim under Article I, Section 8 of the Pennsylvania Constitution in either the trial court or the Superior Court. Because Mother asserted violations of Article I, Section 8 before the trial court, the Superior Court and now in this Court, we conclude that Mother has preserved this constitutional claim. For present purposes, we take no position, one way or the other, with respect to Mother's contention that Article I, Section 8 provides greater constitutional protections than does the Fourth Amendment. Appellant's Brief at 42.

motion seeking to enter the home. *Id.* at 390.

This Court granted Mother's petition seeking allowance of appeal to consider the following issues:

> (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 **[*615]** and anything in that private home, then that government agency shall have sweeping authority to enter and search a private home?
>
> (2) Did the Superior Court err in creating **[**16]** 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?

In Interest of Y.W.-B, 243 A.3d 969 (Pa. 2021) (per curiam). ***HN2***[] The constitutional challenges before us present questions of law over which our review is plenary. *See, e.g., Washington v. Dep't of Pub. Welfare*, 647 Pa. 220, 188 A.3d 1135, 1149 (Pa. 2018). With respect to findings of fact and credibility determinations of the trial court, the standard of review in dependency cases requires an appellate court to accept them "if they are supported by the record, but does not require the appellate court to accept the lower court's inferences or conclusions of law." *In re L.Z.*, 631 Pa. 343, 111 A.3d 1164, 1174 (Pa. 2015) (quoting *In re R.J.T.*, 608 Pa. 9, 9 A.3d 1179, 1190 (Pa. 2010)).

II. The Parties' Arguments

Mother argues that the Superior Court's decision created an unconstitutionally diluted version of the probable cause standard to be applied when a government agency is seeking to **[**17]** compel cooperation with a home inspection based on allegations of child neglect. In her view, the Superior Court's adoption of the sentiment, derived from the Beck *C*oncurrence, that child welfare agencies should not be held to the same restrictions as police in criminal investigations in the acquisition of information to develop probable cause vitiates the protections against unreasonable searches guaranteed by the Fourth Amendment and Article 1, Section 8.

Mother believes that the Superior Court eliminated three aspects of constitutional protection. The first is the requirement that the order indicate with particularity the area and items targeted by the search. Mother claims that the trial court's order granting entry into her home completely failed to set forth the parameters of the search to be conducted. Mother's Brief at 26-27.[12] Second, she maintains that the Superior Court's ruling eliminates the need for an assessment of the reliability of the source of the information upon which probable cause is based. Noting that this Court has upheld this "reliability factor" as a critical part of a probable cause determination, she argues that the standard established by the Superior Court fails to incorporate an assessment **[**18]** of the reliability of the reporting source. *Id.* at 28-30 (citing *Commonwealth v. Clark*, 611 Pa. 601, 28 A.3d 1284 (Pa. 2011)). ***HN3***[] Third, probable cause requires a nexus between the allegations of neglect and the individual's home. Mother argues that the Superior Court eliminated this requirement by permitting a home assessment upon no more than the vague allegation that a child is in need of **[*616]** services. *Id.* at 32-33.[13] This case, Mother asserts, exhibits a complete lack of nexus between the allegations in the GPS report and anything that could be found within the home, and this lack of nexus by itself renders the search unconstitutional. *Id.* at 32-34.

Mother argues that before cooperation with a home inspection may be compelled, the trial court's probable cause determination should require consideration of not only the particularity, reliability and nexus requirements, but also the government's interest or justification for the search; the extent of the government intrusion being requested; and whether

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[12] Given our conclusion that DHS failed to offer sufficient evidence to establish probable cause to enter and search Mother's home, we do not reach Mother's contention that the trial court's order lacked sufficient particularity.

[13] Highlighting the impact of the greatly relaxed probable cause standard, Mother argues that DHS's regulations require child protective agencies to make a home visit in the case of every GPS report. Mother's Brief at 32 (citing 55 Pa. Code § 3490.232(f)). In her brief filed with this Court, Mother cites to the Pennsylvania Department of Human Services 2019 annual report, which reflects that in that year it received 178,124 GPS reports statewide. Of those, 95,671 were screened out, leaving county agencies to investigate 82,427 GPS reports — with 41,937 deemed valid and 40,490 unsubstantiated. Thus, according to Mother, this reflects that there are "nearly 100,000 potential searches into Pennsylvania homes each year." *Id.* at 17.

there are acceptable alternatives to a government intrusion that would address the government's interests. *Id.* at 55.

DHS agrees that probable cause must be established before a family may be compelled to cooperate with a home inspection, but it rejects **[**19]** the notion that the considerations identified by Mother must be strictly enforced. DHS's Brief at 16-17. DHS echoes the sentiment expressed in the Beck Concurrence that probable cause "in the child protective arena is far different from what constitutes probable cause in the criminal law." *Id.* at 19 (quoting *Petition to Compel Cooperation*, 875 A.2d at 380 (Beck, J., concurring)).

With these considerations in mind, DHS argues that there is no need for a particularity requirement in the context of probable cause for a home inspection for neglect because there is no particular "thing" that is the subject of such a search, suggesting that neglect is a permeating condition found throughout the home. *Id.* at 24 ("[W]here the allegation in a GPS report is a lack of care in the home, an order to inspect the general conditions of the home **is** sufficiently particular.") (emphasis in original). In a similar manner, DHS contends that "there is almost **always** a nexus between the home and potential allegations of neglect" and that "[w]ithout searching the home, DHS has no way to ensure" that adequate care is being provided. *Id.* (emphasis in original). In this instance, in DHS's view, when assessing probable cause, it would have been more salient **[**20]** for the trial court to focus on the need for the search, the minimal intrusiveness of the requested search, Mother's prior involvement with DHS, and her evasive demeanor at the hearing. *Id.* at 20.[14] DHS also rejects Mother's contention that the Superior Court's standard is too vague, arguing that "two layers of protection" **[*617]** prevent this standard from being applied improperly — specifically, the counties' screening processes to weed out unfounded reports and the due process protections provided by the hearing on a motion to compel. *Id.* at 43-44. DHS argues that United States Supreme Court precedent supports less stringent probable cause requirements for the home inspections it performs, a contention we address in our analysis.

[14] DHS characterizes the assessment here as minimally intrusive and not designed to uncover criminal activity. DHS's Brief at 25-31. Because the search here was not for evidence of a crime and did not involve the police, DHS contends that "Mother had less privacy interests at stake." *Id.* at 29-30. Also weighing in favor of allowing the search, according to DHS, is the fact that the trial court found Mother evasive when it questioned her and that Mother had a history of involvement with DHS related to the conditions of her home. *Id.* at 32-35. Regarding the role of anonymous reports, DHS emphasizes that anonymous reports are crucial for child protective investigations, as anonymity often provides cover that allows reporters to feel comfortable making a report. *Id.* at 35-36.

III. Analysis

A. Constitutional Limitations on Home Entry

Pennsylvania's CPSL defines two types of reports received by county agencies. A general protective service report (a GPS report) is "[a] verbal or written statement to the county agency from someone alleging that a child is in need of general protective services[,]" which are in turn defined as, inter alia, services to prevent the potential for harm to a child who "[i]s without proper parental care or **[**21]** 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(i). In contrast, a child protective report ("CPS") is made by someone who has "reasonable cause to suspect that a child has been abused." 55 Pa. Code § 3490.11(a).

When a county agency receives a GPS report indicating that a child is not receiving proper care, the agency must within sixty days conduct an "assessment," which is defined as "[a]n evaluation ... to determine whether or not a child is in need of general protective services." 23 Pa.C.S. § 6375(c)(1); 55 Pa. Code § 3490.232(e). As part of its assessment, the CPSL and its regulations provide that the county agency must perform "at least one home visit[.]" 55 Pa. Code § 3490.232(f); 23 Pa.C.S. § 6375(g) ("The county agency shall ... conduct in-home visits."). The CPSL and its regulations further state that the county agency may initiate court proceedings if "a home visit ... is refused by the parent." 55 Pa. Code § 3490.232(j); *see also* 23 Pa.C.S. § 6375(j). On the two prior occasions in which the Superior Court has addressed the issue, it has held that trial courts may grant an order requiring parents to cooperate with a home visit **only** when it is entered in accordance with the requirement of probable cause pursuant to the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. *In Interest of D.R.*, 2019 PA Super 230, 216 A.3d 286, 294 (Pa. Super. 2019) ("[A] CYS **[**22]** inspection of a home is subject to the limitations of state and federal search and seizure jurisprudence."); *Petition to Compel Cooperation*, 875 A.2d at 374. The parties to the present appeal both agree that an order permitting a home visit must comport with federal and state constitutional limitations. Mother's Brief at 13; DHS's Brief at 14.

HN4[↑] The Fourth Amendment establishes the "right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures," and that "no [w]arrants 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. "[P]hysical entry of the home is the chief evil against which the ... Fourth Amendment is directed[.]" *United States v. United States Dist. Court*, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961); *see also Payton v. **[*618]** New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."). As the Supreme Court recently reiterated:

> When it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core, we have said, stands the right of a man to retreat into his own **[**23]** home and there be free from unreasonable government intrusion. Or again: [f]reedom in one's own dwelling is the archetype of the privacy protection secured by the Fourth Amendment; conversely, physical entry of the home is the chief evil against which it is directed. The Amendment thus draws a firm line at the entrance to the house.

Lange v. California, __ U.S.__; 141 S. Ct. 2011, 2018, 210 L. Ed. 2d 486 (2021) (internal citations and quotations omitted).

Article I, Section 8 of the Pennsylvania Constitution provides:

> **§ 8. Security from searches and seizures**
>
> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any 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. ***HN5***[] Article I, Section 8 of the Pennsylvania Constitution protects all citizens in this Commonwealth against unreasonable searches by requiring a high level of particularity, i.e., that warrants (or here, an order to compel) describe "as nearly as may be" the place to be searched and the items to be seized with specificity. Article I, Section 8 also requires that a warrant be supported by probable cause to believe that the items sought will provide evidence of a crime. *Commonwealth v. Waltson*, 555 Pa. 223, 724 A.2d 289, 292 (Pa. 1998).

HN6[] It is well established that "[p]robable cause exists where **[**24]** the facts and circumstances within the affiant's knowledge and of which he [or she] has reasonably trustworthy information are sufficient in and of themselves to warrant a person of reasonable caution in the belief that a search should be conducted." *Commonwealth v. Jacoby*, 642 Pa. 623, 170 A.3d 1065, 1081-82 (Pa. 2017). To assess whether probable cause has been established, the issuing authority makes a "practical, common-sense decision" based on the totality of the circumstances and the information in the affidavit (or here, the Petitions to Compel), whether, given the relative veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that relevant evidence will be found in a particular place. *Id.* at 1082.

B. Standards for Assessing the Existence of Probable Cause with Respect to a Petition to Compel Entry into a Home in a Case Initiated by the Filing of a GPS Report

While the parties to the present appeal agree that an order permitting a home visit must be supported by probable cause, they do not agree on what constitutes probable cause in a civil proceeding initiated by the filing of a GPS report. DHS disagrees that probable cause with respect to home visits by social workers should be assessed based upon the fundamental **[**25]** principles developed primarily in the criminal law context, including that there be a nexus between the areas to be searched and the suspected crime committed, an assessment **[*619]** of the veracity and reliability of anonymous sources of evidence, and facts that are closely related in time to the date of issuance of the warrant. DHS's Brief at 19. DHS contends that social service 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.* Relying upon *Wyman v. James*, 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971) and *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), DHS contends that the protection of children is an essential societal value and thus the interests it serves through home visits are more worthy of the public's concern than are Mother's interests in the protection of the sanctity of her home. DHS's Brief at 21. Finally, DHS further insists that unlike an entry into a home to search for evidence of a crime, a child protective home assessment is nothing more than a "minimally invasive spot-check" for evidence of neglect (e.g., like confirmation that the home had basic utilities, food and beds). *Id.* at 25-26.

We disagree with DHS's position. The evidentiary principles used **[**26]** to guide an analysis of whether sufficient evidence exists to establish probable cause has developed

over many years in a wide variety of contexts. In this regard, while we are not bound by the decisions of federal circuit courts, we find persuasive the opinion of the Third Circuit in *Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087 (3d Cir. 1989). In *Good*, members of the Harrisburg Police and two social workers entered and searched a home without a warrant or other legal justification (e.g., consent or exigency). The social workers argued that they were entitled to sovereign immunity because the law had not been developed to make clear that because this was a child abuse case, their actions would not be governed "by the well-established legal principles developed in the context of residential intrusions motivated by less pressing concerns." *Id.* at 1094. The Third Circuit disagreed, ruling that the controlling standards for determining whether probable cause exists in cases involving possible harm to children are the same as those developed in criminal cases and that no perceived increase in the societal interest involved alters these standards.

> It evidences no lack of concern for the victims of child abuse or lack of respect for the problems associated with **[**27]** its prevention to observe that child abuse is not sui generis in this context. The Fourth Amendment caselaw has been developed in a myriad of situations involving very serious threats to individuals and society, and we find no suggestion there that the governing principles should vary depending on the court's assessment of the gravity of the societal risk involved. We find no indication that the principles developed in the emergency situation cases we have heretofore discussed will be ill suited for addressing cases like the one before us.

Id. (footnotes omitted)

This basic principle, namely that the requirement of probable cause to permit entry into a private home is not excused based upon any relative perceived societal importance, was further articulated by the United States Supreme Court in *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). In *Mincey*, the police argued that the extreme importance of the immediate investigation of murders justified a warrantless search of a murder scene. The Supreme Court emphatically disagreed:

> [T]he State points to the vital public interest in the prompt investigation of **[*620]** the extremely serious crime of murder. No one can doubt the importance of this goal. But the public interest in the investigation of other serious **[**28]** crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? 'No consideration relevant to the Fourth Amendment suggests any point of rational limitation' of such a doctrine.

Id. at 393 (quoting *Chimel v. California*, 395 U.S. 752, 766, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)).

The *Wyman* and *Camara* cases relied on by DHS do not support its position. At issue in *Wyman* was a New York regulation that was part of a program to provide aid to dependent children (i.e., children in families who qualified for welfare). The regulation required social workers to make an initial home visit and subsequent periodic visits for public financial aid to begin and thereafter to continue. The Supreme Court concluded that the home visits in this circumstance did not violate the Fourth Amendment. In so ruling, the Court focused on the public interest in insuring that state tax monies are spent on their proper objects and encouraging welfare recipients to return to self-sufficiency; the limited scope of the entry and its consensual nature; the fact that the recipients were entitled to advance notice; and the fact that all welfare recipients were subjected to the entries, which thus were not based on individualized suspicion of wrongdoing. *Wyman*, 400 U.S. at 318-23; **[**29]** *see also Walsh v. Erie Cty. Dep't of Job and Family Servs.*, 240 F. Supp. 2d 731, 745 (N.D. Ohio 2003).

The circumstances of the recipients of financial aid in *Wyman* differ significantly and substantially from those of Mother in this case. In *Wyman*, the persons at issue affirmatively sought financial benefits to which they were not automatically entitled to receive. The Court ruled that a state can lawfully condition the receipt of benefits on various conditions, including comprehensive disclosure of the applicant's financial status. In addition, the state can lawfully take steps, such as periodic inspections of recipients' homes, to ensure that fraud is not occurring and that the recipients remain entitled to continued benefits. Under *Wyman*, the diminishment of privacy of the recipients of the benefits was a quid pro quo for receiving the welfare payments. The recipients consented to the inspections in exchange for the receipt of benefits. In the present case, by contrast, Mother sought nothing from DHS other than her basic right to be left alone. ***HN7***[⬆] The government cannot condition a parent's right to raise her children on periodic home inspection unsupported by probable cause.

In *Camara*, the Supreme Court addressed a circumstance where a San Francisco tenant challenged a city code provision that **[**30]** allowed health and safety inspectors to conduct warrantless searches of apartments to check for possible code violations. The Court began by emphasizing that an administrative inspection for possible violations of a city's

housing code was a "significant intrusion upon the interests protected by the Fourth Amendment[.]" *Camara*, 387 U.S. at 534. The Court then rejected any contention that the Fourth Amendment only protects citizens from searches to obtain evidence of a crime, but does not apply to civil administrative searches.

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting **[*621]** the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.

Id. at 530-31 (footnote omitted); *see also Michigan v. Tyler*, 436 U.S. 499, 506, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) ("Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment.").[15]

The Court also recognized, however, that an administrative inspection for possible violations of a city's housing code posed a unique **[**33]** situation, since unlike searches of a specific residence for a particular purpose (i.e., to find evidence of a crime), the investigation programs at issue were "aimed at securing city-wide compliance with minimum physical standards for private property[,]" and that even a single unintentional violation could result in serious hazards to public health and safety, e.g., a fire or an epidemic that could ravage **[*622]** a large urban area. *Camara*, 387 U.S. at 535. Accordingly, given this distinctive circumstance, the Court concluded that probable cause to issue a warrant to inspect exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.* at 538

Camara has no application with respect to home visits to investigate allegations of child neglect. Unlike in *Camara*, which involved an agency's decision to conduct an area inspection based upon its appraisal of the conditions in the **area as a whole** to protect the public, probable cause to conduct a home visit depends upon whether probable cause exists to justify the entry into a **particular** home based upon credible evidence that child neglect may be occurring in that particular home. Moreover, and importantly, **[**34]** the scope of the search in the present case was in no respect limited to ensuring compliance with certain identified housing code violations. The search here allowed DHS investigators to search the home, including every room, closet and drawer in

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[15] The Concurring and Dissenting Opinion identifies several cases we cite which presumably "rely" upon *Camara*. While certain of **[**31]** these cases cite to *Camara*, that fact is coincidental to the reasons for which we cite them. Concurring and Dissenting Opinion (Dougherty, J.) at 24-25 n.16. In connection with *Tyler*, for instance, we note only that administrative searches are governed by the Fourth Amendment. *Tyler* has no specific connection to searches in the child protective context; as it instead deals with firefighters entering private property to fight a fire, *Tyler*, 436 U.S. at 511, and it cites to *Camara* for the unremarkable proposition that once the firefighters leave, "additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches[,]" as set forth in *Camara*. *Id. New Jersey v. T.L.O*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) reaffirms that the Fourth Amendment safeguards privacy against invasion by government officials generally (not just the police). It involved searches of school students by school officials." *Camara* was cited solely for the proposition that the Fourth Amendment applies outside the criminal context. *Id.* at 335 ("Because the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards" it would be anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.") (citations omitted). The Tenth Circuit in *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003) rejected the existence of a social **[**32]** worker exception to the Fourth Amendment. The court cited to *Camara* for the limited purpose of comparing *Camara*'s warrant requirement in the administrative context to a case in which the "special needs" doctrine permitted a warrantless search of someone's home. *Id.* at 1248 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987)). Finally, in *Walsh v. Erie County*, 240 F. Supp. 2d 731 (N.D. Ohio 2003), the federal district court declined to recognize a social worker exception to the Fourth Amendment and cited to *Camara* as an example of Fourth Amendment protections extending beyond the criminal context. *Id.* at 744-45.

DHS does not contend that "special needs, beyond the normal need for law enforcement," *Commonwealth v. Hicks*, 652 Pa. 353, 208 A.3d 916, 938 (Pa. 2019), dispense with the requirement of probable cause in child neglect investigations. To the contrary, as indicated above, DHS agrees that probable cause must be established before a court may order a home visit. DHS's Brief at 14. *See, e.g., Gates v. Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 424 (5th Cir. 2008) ("The purpose of TDPRS's entry into the Gateses' home — the investigation of possible child abuse — was closely tied with law enforcement ... [and because] the need to enter the Gateses' home was not divorced from the state's general interest in law enforcement, there was no special need that justified the entry.").

In sum, these cases do not contradict the conclusion that no social worker exception to the Fourth Amendment exists or that traditional probable cause requirements apply in the context of home visits in connection with child neglect circumstances.

the home, based entirely upon their own discretion. In short, while the search here was not conducted by law enforcement, its scope bore little or no relation to a traditional administrative search. As such, the contention that *Camara*'s holding that administrative searches on an area basis are permitted where "reasonable legislative and administrative standards are satisfied"[16] is insufficient to allow the exhaustive search of the entirety of family's home without a clear showing, based upon competent and, as necessary, corroborated, evidence establishing individualized suspicion exists allowing entry into a private home.

The Concurring and Dissenting Opinion nevertheless urges application of *Camara* with respect to child protection home visits. We decline to do so. Decided in 1967, *Camara* was the Supreme Court's first blessing of what has come to be known as a "dragnet search," namely one in which the government searches every person, place, or thing in a specific location or involved in a specific activity. *See generally* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 Colum. L. Rev. 254, 263 (2011). ***HN8***[⬆] Dragnet searches are not predicated on individualized showings of probable cause, nor indeed on **any** kind of individualized suspicion. *See City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 161 (Minn. 2017) ("Administrative search warrants must be supported by probable cause; not individualized suspicion but 'reasonable legislative or administrative standards for conducting an area **[*623]** inspection.'") (quoting *Camara*, 387 U.S. at 538); Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 Ohio St. J. Crim. L. 603, 611 (2007) (noting the individualized **[**36]** suspicion requirement cannot be honored when large groups of people are subjected to searches or seizures). On the contrary, the hallmark of a dragnet search is its generality, as it reaches everyone in a category rather than only a chosen few. In addition to the safety-related inspection of every home in a given area in *Camara*, other dragnets include checkpoints where government officials stop, for example, every car or every third car driving on a particular roadway, *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 550, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976) (upholding checkpoint stops for illegal aliens near the border); and drug testing programs that require every person involved in a given activity to submit to urinalysis. *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822, 837, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002) (permitting random drug testing of students involved in extracurricular activities).

HN9[⬆] Dragnet searches are justified if they satisfy a balance of interests and are necessary because a regime of individualized suspicion could not effectively serve the government's interest. In *Camara*, the Court suggested that if the legislative standards were reasonable, probable cause existed because "the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures." **[**37]** *Camara*, 387 U.S. at 535-36, 538. Based on this rationale, there could not reasonably be an individual suspicion because the inspections are **routine and periodic**. The Court has subsequently found that the traditional probable cause standard "may be unhelpful in analyzing the reasonableness of **routine administrative functions**." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (emphasis added) (constitutionality of drug-testing program analyzing urine specimens of employees who applied for promotion to positions involving interdiction of illegal drugs). In *Von Raab*, a case involving a routine search that set out to prevent hazardous conditions from developing, the Court found that such searches can be conducted "without any measure of individualized suspicion." *Id.*

In the 1980s, the Court recognized a separate category of administrative searches for groups of people shown to possess **reduced expectations of privacy**, including students, *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985), government employees, *O'Connor v. Ortega*, 480 U.S. 709, 725, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987), probationers, *Griffin v. Wisconsin*, 483 U.S. 868, 879, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987), and parolees, *Samson v. California*, 547 U.S. 843, 847, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006). These types of searches typically carry stigmatic burdens imposed by suggestions of wrongdoing, as they target those who are generally more likely to be likely to engage in wrongdoing, e.g., probationers and paroles, than other

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[16] In *Camara*, the Supreme Court held that given the unique and limited nature of the administrative searches at issue there, compliance with "reasonable legislative and administrative standards," in and of itself, satisfied the probable cause requirement. *Camara*, 387 U.S. at 535. No similar result may maintain for child protection home visits. The legislative and **[**35]** administrative standards in the CPSL and the regulations promulgated thereunder provide that at least one home visit must be conducted in every case in which a GPS report, 55 Pa. Code. § 3490.232(f), or a CPS report, 55 Pa. Code § 3490.55(i), is received, without a requirement that any constitutional requirements be satisfied. In *Petition to Compel*, the Superior Court held that despite the mandatory nature of the need for a home visit in every instance, home visits are permitted only where the agency files "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." *Petition to Compel*, 875 A.2d at 377. DHS in this case does not contest that Pennsylvania law requires that home visits, despite the mandatory nature of Sections 3490.232(f) or 3490.55(i), must be supported by a separate showing of the existence of probable cause. DHS's Brief at 8.

individuals. Eve Brensike Primus, *Disentangling Administrative* ***[**38]*** *Searches*, 111 Colum. L. Rev.at 272. While these cases did not require the same level of individualized suspicion typically required to authorize a Fourth Amendment search because of the person's reduced expectation of privacy, the requirement of individualized suspicion was not entirely eliminated. In *Griffin*, for instance, the probationer had a reduced expectation of privacy because a refusal to permit a home visit to search for weapons was a violation of the terms **[*624]** of his or her probation, and because possession of a weapon without permission was a violation of law. *Griffin*, 483 U.S. at 871. Even given the reduced expectation of privacy, however, a relatively high degree of individualized suspicion was required, as the probation officer, before entering the home, had to consider "the reliability and specificity of [the informant's] information, the reliability of the informant (including whether the informant has any incentive to supply inaccurate information), the officer's own experience with the probationer, and the need to verify compliance with rules of supervision and state and federal law." *Id.* (internal quotations omitted).

A child protection home inspection order like the one at issue here is neither a dragnet search nor a search of an individual **[**39]** with a reduced expectation of privacy. It is not a dragnet-type search because it does not involve home visits of all homes in an area for a limited purpose as in *Camara* to inspect wiring. ***HN10***[⬆] Home visits by DHS are in no sense "routine and periodic," but rather must be based upon credible allegations of evidence of neglect occurring in the specified home. Mother likewise has no reduced expectation of privacy in the sanctity of her home based upon any suspicion of potential wrongdoing (like with, e.g., probationers and paroles), and DHS does not rely on the *Griffin* or *Samson* line of cases. ***HN11***[⬆] As a result, while home visits in the child neglect context are conducted by civil government officials rather than members of law enforcement, they do not fit within the two categories of "administrative searches" entitled to reduced Fourth Amendment and Article 1, Section 8 protections.

Moreover, DHS's entry into Mother's home cannot remotely be characterized as a "minimally intrusive" spot check. DHS argued in its brief filed with this Court that the trial court informed Mother that DHS would only check for working utilities, windows, a stove, food and beds. DHS's Brief at 26. Although it is hard to fathom how the operability of windows could be determined **[**40]** without entering every room to determine the existence of a window, in its order granting DHS permission to enter Mother's home, the trial court imposed **no** limitations and provided only that the search would "assess the home to verify if mother's home is safe and appropriate." Petitions to Compel Cooperation Order, 6/11/2019. The order thus placed no limitations on the scope of the search, leaving it entirely in DHS's discretion as to the thoroughness of the search, including, if it so chose, a general rummaging of all of the home's rooms and the family's belongings.

In *Wyman*, a refusal to allow a home inspection would have the limited consequence of termination of the conditional governmental financial assistance. In the case of any court ordered entry by a child protective service agent, depending upon the findings in the home, the inspection could result in criminal charges for child abuse[17] or for any criminal activity discovered during the search. More significantly, the home visit could result in the parents' loss of their children, either temporarily or permanently. ***HN12***[⬆] The United States Supreme Court has held that natural **[*625]** parents have a fundamental liberty interest in the "care, custody, **[**41]** and management" of their children and that a natural parent's "desire for and right to the companionship, care, custody, and management of his or her children is a [liberty] interest far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (citations omitted). Likewise, this Court has affirmed that the right to make decisions concerning the care, custody, and control of one's children is one of the oldest fundamental liberty interests protected by due process. *Hiller v. Fausey*, 588 Pa. 342, 904 A.2d 875, 885 (Pa. 2006) (citing *Troxel v. Granville*, 530 U.S. 57, 67, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *see also Lassiter v. Dep't of Soc. Servs. of Durham Cty, N.C.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (observing that "a parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection"). Accordingly, while state agencies have an interest in investigating credible allegations of child neglect, nothing short of probable cause, guided by the traditional principles that govern its federal and state constitutional limitations, will suffice when a trial court makes a determination as to whether or not to authorize a home visit.

The trial court and Superior Court here both cited the Beck Concurrence for the proposition that "[w]hat constitutes

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[17] Child neglect could in some cases result in criminal charges. The CPSL defines "child abuse" to include intentionally, knowingly or recklessly "[c]ausing serious physical neglect of a child." 23 Pa.C.S. § 6303. In turn, "serious physical neglect" can include the "failure to provide a child with adequate essentials of life, including food, shelter or medical care." *Id.* If CPS makes a finding of abuse, they can initiate the proceedings to take a child into protective custody. 23 Pa.C.S. § 6315(a)(4).

probable cause in the **[**42]** child protective arena is far different from what constitutes probable cause in the criminal law[,]" *Petition to Compel Cooperation*, 875 A.2d at 380 (Beck, J., concurring), and that as a result a distinct or lesser standard of probable cause is sufficient for a home inspection in a child neglect investigation. In *Petition to Compel*, the Susquehanna County Services for Children and Youth ("C & Y") filed a petition to compel cooperation to permit a caseworker to make a home visit of the family residence as part of a child abuse investigation. In its petition, C & Y averred that it had received a referral of possible child abuse at the residence and that the parents had refused to allow the visit. The trial court, without conducting a hearing, signed an order directing the parents to comply with a home visit, and subsequently denied their motion for a temporary stay — stating in his order that 55 Pa. Code § 3490.55(i) provides that a home visit is mandatory.

Parents filed a notice of appeal, arguing that, inter alia, the order was unsupported by probable cause and therefore violated their state and federal constitutional rights against unreasonable searches and seizures. The majority opinion, authored by then-Judge Kate Ford Elliott, unanimously held first that 55 Pa. Code § 3490.55(i), despite its **[**43]** mandatory requirement of a home visit, was subject to the limits of Fourth Amendment and Article I, Section 8 jurisprudence. In so holding, the majority decision rejected C & Y's contention that Section 3490.55(i) may be enforced without regard to constitutional limitations on entry into a private residence. *Petition to Compel Cooperation*, 875 A.2d at 374. To the contrary, the court, relying in substantial part on the Third Circuit's decision in *Good* discussed earlier, held that a request for a home visit could be enforced only upon a showing of probable cause or an exception thereto (e.g., exigency). The court likewise rejected C & Y's contention, based upon the Supreme Court's decision in *Wyman*, that because social workers played an important role in protecting children, constitutional protections did not apply to them.

> To accept the defendants' claims about the reach of *Wyman* would give the **[*626]** state unfettered and absolute authority to enter private homes and disrupt the tranquility of family life on nothing more than an anonymous rumor that something might be amiss.
>
> Despite the defendants' exaggerated view of their powers, the Fourth Amendment applies to them, as it does to all other officers and agents of the state whose requests to enter, however benign or well-intentioned, are met by a closed **[**44]** door. There is, the defendants' understanding and assertions to the contrary notwithstanding, no social worker exception to the strictures of the Fourth Amendment.

Id. at 376 (quoting *Walsh*, 240 F. Supp. 2d 731, 746-47 (citations omitted)).

Having rejected C & Y's contention that no showing of probable cause was required before the trial court could order a home visit, the panel in *Petition to Compel Cooperation* easily concluded that in its petition C & Y had not presented sufficient facts to establish probable cause in its petition. The petition was based solely on C & Y's belief that a home inspection was statutorily mandated. The petition cited only to a Childline referral for possible "medical neglect," with no explanation or description of the alleged neglect. It did not contend that an emergency situation existed or that the child's life was in imminent danger. *Id.* at 378. There were no allegations supporting a nexus between the family home and the factual allegations of child abuse (i.e., "medical neglect"). *Id.* In the absence of probable cause, the court reversed the trial court's order permitting entry into the family home.

The Beck Concurrence was joined by the two other members of the panel. Despite unanimous acceptance, the Beck Concurrence was dicta, as its discussion of **[**45]** the probable cause standard was entirely irrelevant to the disposition of the case where there were no allegations to support probable cause because the agency did not believe that any were necessary given the statutory mandate. Moreover, aside from saying the standard is different when a child protective services home inspection is at issue rather than a criminal investigation, it does not explain how that is so. The Beck Concurrence instead more generally provides that "[s]ocial services agencies should be held accountable for presenting sufficient reasons to warrant a home visit." *Petition to Compel Cooperation*, 875 A.2d at 380 (Beck, J., concurring).

Contrary to DHS and the lower courts here, we do not read the Beck Concurrence to advocate for a lesser standard of proof, or a lesser quantum of evidence, to establish probable cause in the child neglect context. After all, the court in *Petition to Compel Cooperation* (including Judge Beck) reversed the trial court's grant of authority to enter the family home based upon a lack of evidence to demonstrate probable cause and criticized C & Y for its "exaggerated view" of its powers to do so without first satisfying constitutional requirements. In context, the Beck Concurrence merely recognizes that because the **[**46]** context of a child service home inspection is different from a criminal investigation, the facts supporting probable cause to enter the home will likewise be different.

We agree that the evidence necessary to establish probable cause in the child neglect context will sometimes be "different" than is typically presented in a criminal case. For

example, a disinterested magistrate in an application for a criminal search warrant cannot consider prior knowledge of the subject of the search. In contrast, as discussed later at page 45 note 21, in a child protective service petition to compel a home visit, the judge presented with the petition oftentimes, by design, **[*627]** may have been assigned continuing oversight over matters involving the family whose home is the subject of the inspection. The judge's prior knowledge of the family circumstances will be part of the probable cause analysis. ***HN13***[] But what is not "different" is that the evidence necessary to establish probable cause in both settings must be evaluated pursuant to certain basic principles developed primarily in search and seizure jurisprudence (given the abundance of caselaw in this area) - including the existence of a nexus between the **[**47]** areas to be searched and the suspected wrongdoing at issue, an assessment of the veracity and reliability of anonymous sources of evidence, and consideration of the age of the facts in relation to the facts presented to establish probable cause. These fundamental principles are critical to ensure that a court's finding of probable cause is firmly rooted in facts that that support a constitutional intrusion into a private home.

HN14[] We expressly hold that there is no "social worker exception" to compliance with constitutional limitations on an entry into a home without consent or exigent circumstances.[18]

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[18] Our holding **[**48]** is in agreement with the binding panel decision in *Petition to Compel Cooperation*, 875 A.2d at 375-76.

The Concurring and Dissenting Opinion insists that it does not favor implementation of a "social workers exception" to permit DHS caseworkers to obtain home visit orders without a showing of probable cause. Concurring and Dissenting Op. (Dougherty, J.) at 6. Other than to describe the type of evidence that is **not** required to establish probable cause in the child welfare context (i.e., the type or quantum of evidence necessary in the criminal context), the Concurring and Dissenting Opinion does not identify what type or quantum of evidence is required to establish probable case in the child welfare milieu. The Concurring and Dissenting Opinion references the "individualized and fact-sensitive civil administration" of the CPSL, *id.* at 7. but offers no indication of any evidence of individualized suspicion or fact-sensitive information" actually discovered or developed by DHS in this case. Likewise, the Concurring and Dissenting Opinion indicates that in accordance with its "risk assessment model," DHS must have "some discretion in translating the information supplied by a reporter, along with any other information revealed through its own screening and assessment processes, into risk assessment categories such as 'homelessness' and 'inadequate basic care.'" *Id.*at 13. As presented in this case, such "discretion," however, is not really discretion at all, but rather a license to translate simple allegations of an unidentified reporter (without any corroboration whatsoever) into serious contentions that might threaten the removal of the children from the home. At the evidentiary hearing, caseworker Richardson translated a contention that the family slept outside of the Philadelphia Housing Authority as part of Mother's protesting activities into a claim that the family was homeless. Likewise, an apparent observation by the unidentified reporter that he or she had not seen Mother feed one of the children during an eight-hour period mushroomed into a serious contention of neglect, not just on the night in question (again, during Mother's protesting activities) but also in the family home necessitating a DHS home visit. This bald translation of the information provided by the reporter in the guise of evidence presented at the hearing cannot, under any type or quantum of evidence, establish probable cause.

While most often applied with respect to the police, the United States Supreme Court has ruled that "[t]he basic purpose of [the Fourth] Amendment ... is to safeguard the privacy and security of individuals against arbitrary invasions **by governmental officials**." *New Jersey v. T.L.O.*, 469 U.S. 325, 335, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (emphasis added). As a result, the Fourth Amendment applies equally whether the government official is a police officer conducting a criminal investigation or a caseworker conducting a civil child welfare investigation. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1205 (10th Cir. 2003) ("[T]he defendants' contention that the Fourth Amendment does not apply in the 'noncriminal' and 'noninvestigatory' context is without foundation.").

[*628] ***HN15***[] We thus join the vast majority of other federal and state courts in explicitly recognizing that the Fourth Amendment (and our own Article I, Section 8) applies to searches conducted in civil child neglect proceedings, which have the same potential for unreasonable government intrusion into the sanctity of the home. *See, e.g.Andrews v. Hickman Cty., Tenn.*, 700 F.3d 845, 863-64 (6th Cir. 2012) ("Fourth Amendment standards are the same, whether the state actor is a law enforcement officer or a social worker."); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1250 n. 23 (10th Cir. 2003) ("[A]bsent probable cause and a warrant or exigent circumstances, social workers may not enter an individual's home for the purpose of taking a child into protective custody."); *Walsh*, 240 F. Supp. 2d at 746-47 ("[A]ssertions to the contrary notwithstanding, [there is] no social worker exception to the strictures of the Fourth Amendment."); *People v. Dyer*, 457 P.3d 783, 789, 2019 COA 161 (Colo. App. 2019); *State in Interests of A.R.*, 937 P.2d 1037, 1040 (Utah Ct. App. 1997), *aff'd sub nom., State ex rel. A.R. v. C.R.*, 1999 UT 43, 982 P.2d 73 (Utah 1999); *In re Diane P.*, 110 A.D.2d 354, 494 N.Y.S.2d 881, 883-85 (1985); *In re Robert P.*, 61 Cal. App. 3d 310, 132 Cal. Rptr. 5, 11-12 (Cal. Dist. Ct. App. 1976) (stating that the Fourth Amendment applies in civil child protective proceeding).

C. The Absence of Probable Cause in the Present Case

In criminal matters, when presented with an application for a search warrant, the issuing authority **[**49]** considers only the information contained in the "four corners" of the application and the supporting affidavit. *Commonwealth v. Housman*, 604 Pa. 596, 986 A.2d 822, 843 (Pa. 2009); Pa.R.Crim.P. 203(B). In contrast, here both the trial court and the Superior Court also took into consideration the testimony presented at the evidentiary hearing on the Petitions to Compel. We take no issue with this approach in connection with efforts to establish probable cause to compel a home visit as long as the testimony is cabined by the allegations in the petition. We note that the CPSL contains no provision requiring the trial court to conduct an evidentiary hearing in connection with the filing of a petition to compel cooperation with a home visit in a proceeding initiated by the filing of a GPS report. At its discretion, the trial court may either hold an evidentiary hearing or issue a ruling on the averments of fact set forth in the petition to compel. In either case, a probable cause finding must be supported by the allegations in the petition and supporting testimony, if any.

In this regard, we note that the two dissenting opinions both disagree that the evidence at the hearing must be limited to the averments set forth in the Petitions to Compel, and even take no issue with **[**50]** DHS's decision to amend the content of the Petitions to Compel by presenting testimony in direct contradiction to the allegations that it had set forth in those Petitions to Compel. Concurring and Dissenting Opinion (Dougherty, J.) at 12-13; Dissenting Opinion (Mundy, J.) at 4. ***HN16***[⬆] We disagree, as parents, in order to protect the sanctity of their homes, are entitled, at a minimum, to the basic tenets of due process, which include, fundamentally, the key principles underpinning due process — notice and an opportunity to be heard. *Pa. Bankers Ass'n v. Pa. Dep't of Banking*, 598 Pa. 313, 956 A.2d 956, 965 (Pa. 2008). DHS may not, consistent with the fundamental principles of due process, set forth its allegations of alleged wrongdoing in a verified petition to compel a home visit, but then at the evidentiary hearing on the petition present entirely contrary evidence. The Petitions to Compel in this case were verified by a representative of **[*629]** DHS, but as both of the dissenting opinions acknowledge, DHS's sole witness (caseworker Richardson) took the stand and disavowed key evidence in the Petitions to Compel regarding the family's alleged homelessness (namely that she saw Mother and her children enter the home). Concurring and Dissenting Opinion (Dougherty, J.) at 12-13; Dissenting **[**51]** Opinion (Mundy, J.) at .4 What had not been an issue even mentioned in the Petitions to Compel (homelessness) suddenly became a significant issue, at least in the eyes of the trial court. The Petitions to Compel thus not only failed to provide Mother with notice of an important issue, but also misled her with regard to the evidence that DHS intended to introduce at the evidentiary hearing. If Mother had been on notice of a need to prove that her family lived in the home, she could have introduced any of numerous forms of proof (e.g., recent bills, rental or mortgage documents, etc.) The trial court ordered the home visit, at least in part, to determine whether DHS's allegation of homelessness "had merit." Trial Court Opinion, 9/9/2019, at 7 Adequate notice for due process purposes includes the "right to notice of the issues and an opportunity to offer evidence in furtherance of such issues." *Id.* at 965. When the allegations of wrongdoing and the evidence to support them may be changed during the course of the hearing itself, parents have little or no opportunity either to prepare or respond to any contentions of alleged neglect directed against them.

As recounted above, DHS's involvement in this **[**52]** case began with an anonymous GPS report. At the hearing, caseworker Richardson testified that the GPS report contained allegations of "homelessness and inadequate basic care" of Mother's children. N.T., 6/11/2019, at 5. The Petitions to Compel do not state that Mother was homeless, but rather only that on one occasion three weeks prior to the filing of the GPS report Mother and her family had been seen sleeping outside of the Philadelphia Housing Authority and on a more recent occasion Mother had been observed protesting outside of the Philadelphia Housing Authority from noon until eight in the evening. *See* Petitions to Compel, 5/31/2019, ¶ J. The Petitions to Compel likewise do not describe any generalized "inadequate basic care," but rather allege only that during the eight hours she was protesting at the Philadelphia Housing Authority on May 21, 2019, it was "unknown" whether she had fed her children. *Id.*

To the extent that the contention that the family slept outside of the Philadelphia Housing Authority on one occasion could be construed as evidence of homelessness (rather than just part of her protesting activities), DHS disproved this contention during its limited investigation. **[**53]** First, the anonymous source of the GPS report provided DHS with the family's address, and DHS then promptly sent a representative of Project Home to approach Mother. Mother informed the representative of her protesting activities at the Philadelphia Housing Authority but denied that she or her family was homeless. Caseworker Richardson then verified Mother's address in DHS's files and proceeded to the residence, where she confronted Father and later observed the arrival of Mother and the children. *Id.* ¶ L. Caseworker Richardson left but returned later in the day, when she again found Mother and Father at the home. Having located the family's home and repeatedly finding Mother and Father there, any allegation of homelessness was rendered moot. If all of this was not

sufficient evidence of a lack of homelessness, by the end of the evidentiary hearing DHS unmistakably confirmed that it no longer considered the family to be homeless, as it requested an order to conduct **[*630]** a home visit at the very house where caseworker Richardson had visited twice on the day in question.

At that juncture, the only remaining allegation in the Petitions to Compel was that the anonymous reporter had not observed **[**54]** Mother feed one of the children on a single day for approximately eight hours. The DHS caseworker's characterization of this allegation as "inadequate basic care" was hyperbole. At the hearing, DHS did not offer any evidence to corroborate this specific allegation or of any other instance of current neglect of the children of any kind that it discovered in its investigation prior to filing the Petitions to Compel.

Without reference to the claims in the Petitions to Compel, or recognition of the lack of evidence to support them, the trial court questioned Mother regarding the status of the utility service to the home, the presence of food in the home, whether there was adequate bedding and clothing, whether the children had treating physicians and dentist, and whether Mother was employed. *See* N.T., 6/11/2019, at 12-14. Although Mother answered these questions appropriately by denying any general neglect of her children (and without any allegation or evidence to the contrary), the trial court nevertheless concluded that the evidence presented formed the basis for a finding of probable cause to grant DHS a home visit:

> The Motion to Compel and the hearing confirmed that one of the main factors **[**55]** 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 the claims for both homelessness and inadequate care of Children have merit. The trial court determined that the Motion to Compel provided probable cause to complete the assessment of the family home.

Trial Court Opinion 9/9/2019, at 7-8.

This analysis reveals a decision and fact-finding untethered to the allegations or evidence before the trial court. Richardson's testimony confirmed that the family was not homeless,[19] and there were no allegations in the Petitions to Compel, and no evidence presented at the hearing, to substantiate any issues with the children's health or that the home was lacking in any respect. We reiterate: the only potentially viable allegation of any current or ongoing neglect before the trial court at the hearing on the Petitions to Compel was an anonymous report of a possible failure to feed one of the children for a portion of one day. DHS offered no evidence to corroborate this allegation or to support the more general contention that the children were malnourished or otherwise not regularly **[**56]** being fed. Without any evidence to substantiate the allegations of neglect of the children, no probable cause existed to order DHS to conduct a home visit.

To the extent that the trial court was suspicious that the home conditions of prior years could possibly have returned despite the lack of evidence to even support a suspicion, this was a fundamental error. Respectfully, reasoning of this sort appears to rest on an unsupportable presumption that once neglectful parents will always be deficient in the care of their children. Mother and Father had resolved the home-related issues in prior years, resulting **[*631]** in DHS lifting Y.W.-B.'s protective supervision in 2015. At the time of the events at issue here, there was no evidence of any reoccurrence of those prior shortfalls. While it was not inappropriate for the trial judge to view any current allegations through the prism of prior experiences with the family, it was entirely inappropriate to order a home visit based solely on prior events without any evidence of a reoccurrence.

As a reviewing court, the Superior Court's inquiry was limited to determining whether there was a substantial basis in the record for the trial court to find probable **[**57]** cause. *Jacoby*, 170 A.3d at 1082. As we outlined in connection with the trial court's ruling, the paucity of evidence offered in this proceeding does not provide a substantial basis for a finding of probable cause. The Superior Court erred in reaching a contrary conclusion.

> The averments in DHS's petition, supported by evidence at the hearing, corroborated the initial report that Mother was outside the [Philadelphia Housing Authority] 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*, 564 Pa. 86, [] 764 A.2d 532, 538 n.5, 539 &

[19] The Dissenting Opinion contends that as "the allegations of homelessness remained an issue, along with the allegations of inadequate basic care, there was a clear connection between the allegations in the petition and the requested investigative home visit." Dissenting Opinion (Mundy, J.) at 6. For all of the reasons set forth here, we respectfully disagree that the record supports such a contention.

> 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. **[**58]** *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.
> * * *
>
> 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.

In Interest of Y.W.-B, 241 A.3d at 390.

The Superior Court's probable cause analysis fails in several respects. First, while the court indicated that there was a "link" between the allegations and DHS's petition to enter the home, it did not explain what that link was between the home inspection and the allegation that Mother may have failed to feed one of the children for eight hours. To establish probable cause, there must be a specific "nexus between the items to be [searched] and the suspected crime committed[.]" *Commonwealth v. Johnson*, 240 A.3d 575, 587 (Pa. 2020) (plurality) (quoting *Commonwealth v. Butler*, 448 Pa. 128, 291 A.2d 89, 90 (Pa. 1972)); *see also Commonwealth. v. Kline*, 234 Pa. Super. 12, 335 A.2d 361, 364 (Pa. Super. 1975) ("Probable cause to believe that a man has committed a crime on the street **[**59]** does not necessarily give rise to probable cause to search his home."). In the case that the Superior Court cited to support the necessity **[*632]** of a nexus, *In Interest of D.R.*, 2019 PA Super 230, 216 A.3d 286 (Pa. Super 2019), *affirmed*, 232 A.3d 547 (Pa. 2020),[20] the Fayette County child protective services agency filed a motion seeking to compel cooperation with a home inspection, alleging that it had received three reports of incidents in which a father was observed to be under the influence of an unspecified substance, and that during one of those instances, he was in the company of one of his five children. The Superior Court reversed the trial court's grant of the motion, concluding, inter alia, that the agency had wholly failed to allege a connection between the alleged misconduct and the family's home. *Id.* at 294-95 ("[C]ritically, Fayette CYS did not allege a link between the alleged abuse/neglect and the parents' home.").

Based upon our review of the record, no nexus existed between the **[**60]** allegations in the Petitions to Compel and Mother's home. The Petitions to Compel state that during an eight-hour period, while protesting before the Philadelphia Housing Authority, it was "unknown" whether Mother fed her child who was with her. This allegation has no connection whatsoever to the family's home. Even assuming a lack of food in the home on the day of the inspection, that would not be evidence to support the contention that Mother failed to feed one of her children during her eight-hour protest on May 21, 2019 in front of the Philadelphia Housing Authority. We reiterate that there was no evidence, or even an allegation, that the children exhibited signs of malnourishment or even that DHS uncovered other days in which the children appeared to go without food.

Second, the Superior Court also erred in considering Mother's prior experiences with DHS in its probable cause analysis because the trial court placed no express reliance on it. Y.W.-B's dependency ended in 2015 when DHS ceased its protective supervision and discharged the dependency matter. The GPS report contained no allegations that any of the prior deficiencies in the home (e.g., flea infestation, lack of interior **[**61]** walls) had reoccurred or was currently occurring. The current child protective services investigation is not a continuation of the prior proceeding, but rather is wholly unrelated to the prior proceeding that DHS itself terminated in 2015 after concluding that the then-existing issues with the family home had been satisfactorily rectified. The fact that Mother earned the discharge of the dependency petition four years prior to this proceeding, with no proof of any intervening episodes, made the prior experience totally irrelevant.[21]

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[20] This Court's review was limited to addressing the agency's authority to compel a parent to submit to an observed urine sample for analysis as part of its investigation. *In Interest of D.R.*, 232 A.3d at 558. We affirmed the Superior Court's ruling that under the unambiguous provisions of the CPSL, the agency lacked any such authority. *Id.* at 559. We did not grant allocatur to consider the issues raised in the current appeal.

[21] Although not discussed in the proceedings in this case, we recognize that the trial judge who issued the order in question presided over the 2013 dependency matter for one year prior to its termination. As such, he was aware of the discharge of that petition and the fact that the conditions giving rise to those proceedings has

[*633] Moreover, according to the Petitions to Compel, the current allegations against Mother were related solely to her presence near the Philadelphia Housing Authority and not to any conditions existing inside her current residence. Again, Mother's prior experiences with DHS that ended in 2015 were four years old and there was no evidence of any reoccurrence of prior problems. They were therefore **stale** and provided no evidentiary basis to establish probable cause to enter the home. ***HN17***[⬆] Stale evidence may not be used to establish the probable cause to issue a search warrant; instead, the conclusion that probable cause exists must be "based on facts which are closely **[**62]** related in time to the date the warrant is issued." *Commonwealth v. Jones*, 506 Pa. 262, 484 A.2d 1383, 1389 (Pa. 1984) (Zappala, J., dissenting). "If too old, the information is stale, and probable cause may no longer exist." *Commonwealth v. Leed*, 646 Pa. 602, 186 A.3d 405, 413 (Pa. 2018); *In re Smith Children*, 26 Misc. 3d 826, 891 N.Y.S.2d 628, 635 (N.Y. Fam. Ct. 2009) ("[W]hile the statute requires the court to consider the child protective or criminal history of a family, such history cannot be proffered as the sole basis for seeking a pre-petition order to gain entry into their home in connection with a new investigation commenced by an anonymous report ... three years later."); *see also Commonwealth v. Tolbert*, 492 Pa. 576, 424 A.2d 1342, 1344 (Pa. 1981) ("If the issuing officer is presented with evidence of criminal activity at some prior time, this will not support a finding of probable cause as of the date the warrant issues, unless it is also shown that the criminal activity continued up to or about that time".).

Next, the Superior Court failed to address the reliability of the information contained in the Petitions to Compel, which was provided exclusively by the unidentified source that filed the GPS report. DHS offered no evidence at the evidentiary hearing to establish the credibility and reliability of the source or to corroborate any of the information provided by the source. ***HN18***[⬆] This Court has ruled that where probable cause is "almost entirely **[**63]** based on information gleaned from anonymous sources ... [and] there is no attempt made to establish either the basis of knowledge of the anonymous sources or their general veracity, a strong showing of the reliability of the information that they have relayed" is required to support a finding of probable cause. *Commonwealth v. Torres*, 564 Pa. 86, 764 A.2d 532, 540 (Pa. 2001); s*ee also Florida v. J.L.*, 529 U.S. 266, 270, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) (holding that anonymous tip that juvenile was carrying a weapon did not justify a stop and frisk because "[i]n the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller."); *Commonwealth v. Cramutola*, 450 Pa. Super. 345, 676 A.2d 1214, 1216 (Pa. Super. 1996) ("[I]nformation provided to the police by an anonymous source can establish probable cause **if it is corroborated**.") (emphasis added); *Croft v. Westmoreland Cty. Children and Youth Servs.*, 103 F.3d 1123, 1127 (3d Cir. 1997) (holding that in connection with searches in the child protective services context, "[the investigator] was not ... entitled to rely on the unknown credibility of an anonymous informant unless she could corroborate the information through other sources which **[*634]** would have reduced the chance that the informant was recklessly relating incorrect information or had purposely distorted information."); *In re Smith Children*, 891 N.Y.S.2d. at 634 ("In the absence of other reliable **[**64]** information, this Court finds that an anonymous SCR report alone is insufficient to establish 'probable cause' for the issuance of an order of entry in a child protective investigation[.]").

In the present case, the identity of the individual who provided the allegations of neglect summarized in the Petitions to Compel was never identified and did not testify at the evidentiary hearing. The failure to testify was significant in at least four respects. First, there was no evidence to corroborate the anonymous report. In fact, the conjecture as to homelessness was specifically rebutted by Mother to the Project Home representative and by DHS's own investigation and its request for an order to enter the same home that Caseworker Richardson twice visited. Second, the trial court lacked any opportunity to observe the individual's testimony to assess his or her credibility. Third, Mother had no opportunity to provide support for her contention that the GPS report had been filed in retaliation for her protests of the policies of the Philadelphia Housing Authority, which she could have done if, for example, the source of the GPS report had any affiliation with that governmental body. Fourth, **[**65]** the lack of testimony left unclear the foundation for the statement in the Petitions to Compel that it was "unknown" whether Mother fed her children during the time she was protesting. Did the source observe Mother

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been ameliorated well in advance of the current matter. In addition, the same trial judge granted a petition to compel an inspection of Mother's home in 2016 and the petition was discharged the day after the inspection. *See* supra note 5. This interaction between Mother and the agency was not contained in the current petitions to compel or referenced in the proceedings in this case.

In many counties, repeat incidents involving child welfare are assigned to the same judge for purposes of continuity with the family. When a petition to compel compliance with a home inspection is presented to a judge with prior case involvement with the parents, the judge will be making a probable cause determination with knowledge of the previous proceedings and dispositions. To the extent relevant, the judge may take into account these prior encounters. Here, in issuing the order, the trial judge did not invoke reliance of Mother's history in his courtroom.

continually throughout the eight hours of protest on May 21st without seeing Mother provide food to the child?[22] Or, conversely, did the source of this allegation observe Mother with child only sporadically during the eight hour period, such that Mother could have fed the child on many (unobserved) occasions throughout that time period?

Finally, and significantly, DHS had no obligation to keep the identity of the source of the GPS report confidential or to shield him or her from testifying at the evidentiary hearing. The trial court mistakenly believed that DHS was legally required to keep the name of the anonymous source confidential and, accordingly, citing 23 Pa.C.S. § 6340(c), sustained DHS's objections when Mother's counsel asked Richardson to identify the anonymous source of the GPS report. Trial Court Opinion, 9/9/2019, at 8. Section 6340(c) of the CPSL, however, only requires DHS to keep confidential the name of an anonymous reporter of a **CPS** report, i.e., a report alleging child abuse. 23 Pa.C.S. § 6340(c). No similar provision in **[**66]** the CPSL protects the source of a **GPS** report, i.e., a report of, inter alia, child neglect.[23]

[*635] ***HN19***[] Our General Assembly has drawn a clear distinction between an individual who makes an anonymous report of child abuse as opposed to one of child neglect — DHS must guard the confidentiality of an individual making allegations of child abuse in a CPS report, but has no similar obligations in cases involving GPS reports alleging child neglect. While DHS could have called the source of the GPS report in this case to provide testimony to corroborate the claims against Mother, it chose not to do so and, accordingly, the allegations set forth in the Petitions to Compel, based solely on this single uncorroborated anonymous source, were insufficient to establish probable cause to justify entry into Mother's home. *See, e.g., Torres*, 764 A.2d at 540.

In its probable cause analysis, the Superior Court placed heavy weight on Mother's perceived demeanor at the evidentiary hearing. While her demeanor may well have had some effect on the trial court's evaluation of her credibility, we are aware of no legal authority to support the proposition that the demeanor of a witness, without more, constitutes a basis for a finding of probable **[**67]** cause to permit entry into that individual's home. In this regard, and without condoning disrespect for the court or the proceeding, we note that Mother's demeanor may well have been, in whole or in part, a reflection of her frustration based on her view that the entire episode was in retaliation for her protesting activities.

The Superior Court's reference to fire damage in Mother's current home in its probable cause analysis is dehors the record in this case. The trial court made no finding of fact that Mother's current home had suffered any fire damage. While the Petitions to Compel did indicate that Mother had advised the Project Home worker that a fire had destroyed a **prior** residence, the trial court did not, based upon a boarded window or otherwise, conclude that the present home had suffered fire damage.[24] Fire damage in the current home was not even mentioned at the evidentiary hearing or in the trial court's subsequent Rule 1925(a) written opinion. In short, the trial court did not, as did the Superior Court, take the leap from the existence of a boarded window to fire damage inside the home in the absence of any evidence in support.

For these reasons, Mother's constitutional rights were violated. The order compelling her cooperation with a governmental intrusion into her home was deficient for want of probable cause. Accordingly, we reverse the order of the Superior Court.

Order reversed.

Chief Justice Baer and Justices Saylor and Wecht join the opinion.

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[22] Mother has consistently denied that she had either of her children with her during her protests on May 21st, a contention contradicted only by the anonymous source of the GPS report.

[23] The Concurring and Dissenting Opinion disagrees with this statutory analysis on the grounds that there is some overlap in the definitions of "child abuse" and "child neglect." Concurring and Dissenting Opinion (Dougherty, J.), at 10. While there is some overlap, it is minimal and clearly not implicated in this case. The definition of "child abuse" includes, inter alia, "[s]erious physical neglect by a perpetrator constituting prolonged or repeated lack of supervision or the failure to provide the essentials of life, including adequate medical care, which endangers a child's life or development or impairs the child's functioning. " 55 Pa. Code § 3490.4. The alleged child neglect in this case, involving an uncorroborated allegation of a single instance of potentially failing to feed one of the children for one eight hour period is not the type of serious prolonged and repeated physical neglect necessary to constitute child abuse under the definition of that term in 55 Pa. Code § 3490.4. In the overlap case hypothesized by the Concurring and Dissenting Opinion, the trial court judge would make the call on the appropriate categorization and treat the identity of the reporter accordingly. Here however, we apply the CPSL to the case before us.

[24] It is not clear how the trial court could have made such **[**68]** a finding of fact. The Superior Court rightly notes that the trial court had no obligation to find Mother's testimony regarding a fire at a previous home to be credible. *In Interest of Y.W.-B.*, 241 A.3d at 390. The result, however, would merely be to disbelieve that the previous home had been destroyed by fire. Absent any evidence that a fire had damaged Mother's current home, her testimony regarding her prior home could not be "transferred" to her current home.

Justice Dougherty files a concurring and dissenting opinion in which Justice Todd joins.

Justice Mundy files a dissenting opinion.

Concur by: DOUGHERTY

Dissent by: MUNDY; DOUGHERTY

Dissent

[*636] CONCURRING AND DISSENTING OPINION

JUSTICE DOUGHERTY

I concur in the result. Specifically, I agree with the majority's conclusion the juvenile court's order directing appellant to comply with a child welfare home safety assessment lacked a sufficient basis, and the Superior Court therefore erred **[**69]** in concluding the record supports a finding of probable cause. I appreciate the majority's scrupulous attempt to pronounce clear parameters of probable cause around the domain of child protection, where bright-line standards are scarce, and I underscore my thorough agreement with the majority's conclusion the facts of this record do not establish probable cause under any type or quantum of evidence. However, I view substantial elements of the majority's reasoning as incongruous, and potentially deleterious to the development of more context-specific, and arguably more appropriate, jurisprudence. But, upon this record of insufficient facts, the majority makes significant pronouncements of child welfare law and practice regarding issues neither properly before this Court nor, in my view, necessary for resolution of this case; these statements may hamper county agencies' ability to effectively assess and serve vulnerable families. I therefore dissent from the majority's analysis.

There is no dispute here regarding whether the Child Protective Services Law (CPSL) and the related regulations governing the Department of Human Services and county children and youth agencies must be enforced **[**70]** within the constitutional limits imposed by the Fourth Amendment to the United States Constitution. The parties, the lower courts, over a decade of jurisprudence governed by the Superior Court's decision in *In re Petition to Compel Cooperation*, 2005 PA Super 188, 875 A.2d 365 (Pa. Super. 2005), and each of the federal circuit courts confronting constitutional claims related to child protection investigations,[1] all agree the Fourth Amendment's protection against unreasonable searches requires a showing of reasonable government need to compel inspection of a home by an agency acting under a child protection statute. We ostensibly granted discretionary review to consider whether the Superior Court below granted the Philadelphia Department of Human Services (DHS) "sweeping authority to enter and search a private home" in violation of state and federal constitutional protections, allegedly without a link between the General Protective Services (GPS) report and anything particular inside the home. *Interest of Y.W.-B.*, 243 A.3d 969, 969-70 (Pa. 2021) (*per curiam*). But, the question of what measure of probable cause applies to an administrative search sought by an agency performing a child protection investigation is an issue of first impression for this Court, and the arguments advanced by the parties actually focus on whether the record before the trial court provided a basis to meet any standard **[**71]** of probable cause at all.[2]

[*637] I. The Superior Court's decision in *Petition to*

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[1] *See, e.g.Wojcik v. Town of N. Smithfield*, 76 F.3d 1 (1st Cir. 1996); *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999); *Good v. Dauphin Cty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1093 (3d Cir. 1989); *Wildauer v. Frederick Cty.*, 993 F.2d 369, 372 (4th Cir. 1993); *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407-08 (5th Cir. 2002); *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003); *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1240-42 (10th Cir. 2003).

[2] Preliminarily, the question of whether appellant preserved her state law claim under Article I, Section 8 of the Pennsylvania Constitution circumscribes the scope of my analysis. Although, as the majority indicates, appellant claimed a violation of both federal and state provisions in the trial court and Superior Court, *see* Majority Opinion at 9-10 n.10, appellant's contention in this Court is that the Pennsylvania Constitutional provision affords greater protection than the Fourth Amendment does, and consequently certain probable cause exceptions developed under the federal law do not apply. *See* Appellant's Brief at 42-54, *citing*, *inter aliaCommonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 888, 897-98 (Pa. 1991) (declining to adopt federal good-faith exception to the exclusionary rule). However, DHS argues appellant's expansion-of-protection argument is waived under *Commonwealth v. Bishop*, 655 Pa. 270, 217 A.3d 833, 840-42 (Pa. 2019), in which we held preservation of a claim seeking departure from federal constitutional law requires an appellant to assert and develop — to the trial court and on intermediate appeal — why the state constitutional provision at issue should be interpreted more expansively than its federal counterpart. Here, appellant did not do so, and, consistent with *Bishop*, I therefore view her departure claim as waived, and regard her state law **[**72]** claim as coterminous with a claim under the Fourth Amendment. *Id.* at 838, 841. As a result, to the extent necessary for resolution of this case, I view federal Fourth Amendment jurisprudence, and our cases interpreting Article I, Section 8 as coterminous with its federal counterpart, as appropriate binding precedent.

Compel

The thorny issue we confront here was previously considered by the Superior Court in *Petition to Compel*. The question before that court was broad: whether constitutional protections against unreasonable searches applied at all to home inspections sought by a children and youth agency pursuant to the CPSL. *See Petition to Compel*, 875 A.2d at 374. Noting the absence of Pennsylvania law on the subject, the panel in *Petition to Compel*, like the majority in the present case, drew significant guidance from *Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087 (3rd Cir. 1989), and *Walsh v. Erie County Department of Job & Family Services*, 240 F. Supp. 2d 731 (N.D. Ohio 2003), both federal cases, respectively reversing and denying summary judgment on Section 1983 civil rights claims regarding child protection searches performed without a warrant.[3] *Id.* at 375-79. *Good* and *Walsh* each held the Fourth Amendment applied to the searches performed under child protection statutes, although neither addressed the merits of a claim probable cause was lacking, nor did they consider situations where a warrant had issued or a pre-deprivation hearing had been held. Observing, based upon *Good* and *Walsh*, that Fourth Amendment and Article I, Section 8 principles applied to child protection investigations, as well as the primacy of the privacy interest in one's home, and the agency had provided only a single allegation of medical neglect unconnected **[**73]** to the child's home environment, the *Petition to Compel* panel vacated the lower court's *ex parte* order granting the home inspection. The panel pronounced as the law of the Commonwealth that constitutional protections against unreasonable searches require a children and youth agency to "**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 [*638] be found in the home**." *Petition to Compel*, 875 A.2d at 377 (emphasis added). The panel's rationale and holding are endorsed by the majority and both parties in the present appeal. *See* Majority Opinion at 30-32, Appellant's Brief at 39-40, Appellee's Brief at 16, 22 n.3.

I make these observations regarding *Petition to Compel* in response to appellant's central claim the rule of law articulated by the Superior Court's decision below allows for a sweeping, unlimited search of a private home "not compatible with Fourth Amendment jurisprudence" because the court failed to confine its holding to the particular definition of "general protective services" provided in the CPSL regulations. Appellant's Brief at 15-16, 20-21, 32, 40-41, 53. The "rule of law" to which appellant refers is a nearly word-for-word reiteration of the accepted "rule of law" from *Petition to Compel*: "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 is in need of services, and that evidence relating to that need will be found inside the home**." *Id.* at 16-17; *Interest of Y.W.-B.*, 2020 PA Super 245, 241 A.3d 375, 386 (Pa. Super. 2020) (emphasis added), *citing Petition to Compel*, 875 A.2d at 377-78. In adapting this minimally-nuanced version of the holding from *Petition to Compel* regarding a child abuse investigation under the CPSL, to the type of "general protective services" assessment involved in this case, the panel below explicitly **[**75]** incorporated this Court's definition of "probable cause," as well as the CPSL's definition of "general protective services" and relevant regulations. *See id.* at 383-84, *quoting*, *inter aliaCommonwealth v. Jones*, 605 Pa. 188, 988 A.2d 649, 655 (Pa. 2010) (defining "probable cause" as a common-sense determination of "fair probability" evidence would be found in a particular place); *id.* at 384, *quoting* 23 Pa.C.S. §6303(a) (defining "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'") and 55 Pa. Code §3490.223 (further defining "general protective services"); *id.* at 384 n.8, *quoting* 55 Pa. Code §3490.4 (defining "protective services" to include child abuse and general protective services). It therefore appears appellant's entire argument takes the Superior Court's reference to a child "in need of services" fully out of context, and appellant would be satisfied if the panel instead had merely referred more explicitly to a child "in need of **protective** services." Consequently, I view appellant's challenge to the Superior Court's "rule of law", which comprises the issues upon which we granted allocatur, as without merit.

I further observe that neither DHS nor its *amicus* argues in favor of implementing the "social worker **[**76]** exception to the Fourth Amendment" the majority rejects. Relatedly, I cannot agree with the majority's casting of Judge Beck's famous concurring opinion in *Petition to Compel* — joined, notably and unusually, by both panel members in the majority — as generally irrelevant, aside from its recognition the facts

[3] *See* 42 U.S.C. §1983. Though effective for answering the broad question then before the panel in *Petition to Compel*, the utility of these federal cases accedes to some important limits discussed *infra*, *i.e.*, they assume the truth of the plaintiffs' allegations of objectively egregious conduct (an assault by police to compel an investigation of poor housekeeping in *Walsh*, and a strip search based upon an anonymous report of bruises in *Good*), and determine the agents were not entitled to qualified immunity, because a factfinder could conclude the government actors **[**74]** performing the searches could not reasonably believe they had authority to search plaintiffs' homes without a warrant or on the basis of exigency. *See Good*, 891 F.2d at 1095-96; *Walsh*, 240 F. Supp. 2d at 744, 749-50, 758-60.

supporting probable cause for a home inspection will likely be different from those in a criminal investigation. Majority Opinion at 32-33. In my view, the Beck Concurrence potently declared "simply requiring an agency to show 'probable cause' as it is defined in the criminal law **is not enough**[,]" and encouraged close consideration of the nature and context of each scenario, along with the fullest of all possible disclosures of relevant information by children and youth agencies requesting to compel a home inspection, in light of the significantly different purposes and goals of child protection versus those of law enforcement. *Petition to Compel*, 875 A.2d **[*639]** at 380 (Beck, J., concurring) (emphasis added).

Thus, I would not minimize the significance of the Beck Concurrence. Judge Beck's astute warning to avoid applying "the standard notion of probable cause in criminal law" to child protection cases is not without authoritative support, and indeed, **[**77]** it reflects important, diverging federal court probable cause jurisprudence involving non-criminal investigations. *See, e.g.Griffin v. Wisconsin*, 483 U.S. 868, 873, 875-76, 877-78 & nn.4 & 6, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) (administrative search requires reasonableness only, rather than quantum of concrete evidence to support probable cause; warrantless search of probationer's home was reasonable where state's Department of Health and Social Services regulatory scheme provided "special needs" for the supervision of a special population "beyond the normal need for law enforcement[which] make the warrant and probable-cause requirement impracticable"), *quoting New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (Blackmun, J., concurring); *Ferguson v. City of Charleston*, 532 U.S. 67, 68, 79-80, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (warrantless, suspicionless search fits "special needs" exception only when "divorced from the State's general interest in law enforcement"); *Darryl H. v. Coler*, 801 F.2d 893, 901 (7th Cir. 1986) (because discretion of caseworker was circumscribed by regulatory standards and child could refuse to cooperate, child abuse investigation including inspection of child's body could be conducted without meeting the strictures of probable cause or warrant requirement); *Tenenbaum v. Williams*, 193 F.3d 581, 604 (2d Cir. 1999) (noting possibility of "special needs" circumstances where warrant and probable cause would not effectively protect child); *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993) ("critical distinction[]" between social work and law enforcement **[**78]** "justifies a more liberal view of the amount of probable cause that would support an administrative search").

Similarly, I view the distinct features of the individualized and intimately fact-sensitive civil administration of the CPSL, as compared to the strictly-prescribed principles of criminal law and procedure utilized to enforce the Crimes Code, as important considerations — not for the purpose of excusing a proper showing of reasonable or probable cause — but to competently balance risks of harm to the vulnerable child and the sacrosanctity of the family home.[4] After all, despite well-established Fourth Amendment standards developed through criminal law, we nevertheless continue to pronounce often fine-grained distinctions between assessments of probable cause necessary to support an arrest (where the conclusion concerns the guilt of the arrestee), and probable cause to search (where the conclusions concern the present location of items sought and their connection with a crime), as well as the not-quite probable cause (*i.e.*, a reasonably articulable suspicion) required to perform an investigatory stop and subsequent search. *See Terry v. Ohio*, 392 U.S. 1; 20-27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (reasonable suspicion affords "due weight" to "specific reasonable **[**79]** inferences which [an officer] is entitled to draw from the facts in light of his experience"; however, "good faith" and "inarticulate hunches" are insufficient **[*640]** support); *see also, e.g.Commonwealth v. Hicks*, 652 Pa. 353, 208 A.3d 916, 925, 940, 946 (2019) (applying *Terry*, investigative stop based on officer's "inchoate and unparticularized suspicion or hunch" did not satisfy reasonable suspicion standard) (internal quotations omitted).

I further note the contours of an appropriate Fourth Amendment analysis are, to some extent, shaped by the General Assembly's intentional enactments of specialized laws, with their particularly-defined purposes and elements, which must be considered when determining whether an adequate quantum of evidence supports the requested invasion of privacy. *See Hicks*, 208 A.3d at 954 (Dougherty, J., concurring), *quoting Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) (where legislature exercises its exclusive power to pronounce which acts are crimes and define them, "it is the elements of those crimes that officers must consider when determining whether there is 'reasonable, articulable suspicion that criminal activity is afoot'"). The Beck Concurrence did not further expound upon the parameters of probable cause in cases arising under the CPSL, perhaps due to the panel's unanimous agreement regarding the dispositively **[**80]** insufficient record before it. But, in my respectful view, Judge Beck foresaw the pernicious allure of applying our existing, well-developed criminal law rubric within the context of a child welfare

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[4] The majority criticizes my analysis here as failing to indicate what evidence might be required to establish probable cause in the child welfare context. *See* Majority Op. at 34-35 n.18. I reiterate that I do not dispute there was insufficient evidence presented in this case, and also note that I describe several examples to this effect *infra*, in Section IV of this opinion.

investigation — exemplified by several problematic assumptions and conclusions relied upon throughout the majority's analysis in this case — which risks arriving at incorrect, plausibly dangerous results.

II. Criminal law and child protection distinctions

The criminal law standards relied upon by the majority, *see* Majority Opinion at 17-19, address the constitutional probable cause requirements for obtaining an ***ex parte*** **warrant** to search for **specific evidence** of **criminal activity** to be **seized for use in proving a crime**. Analogy to the customized procedural and substantive requirements developed in response to these particular features of criminal search warrants may be all that exists in the Commonwealth's jurisprudence to aid our analysis here, but, in my view, it is at best an approximate, awkward fit.

A.

First, and foremost, the CPSL is not a criminal statute. It is a civil law statute administered by the Pennsylvania Department of Human Services (the Department) to implement and regulate **[**81]** a program of child protection with the stated purpose of, *inter alia*, "providing rehabilitative services for children and parents involved so as to ensure the child's well-being and to preserve, stabilize and protect the integrity of family life wherever appropriate[.]" 23 Pa.C.S. §6302(b). "It is the goal of children and youth social services to ensure for each child in this Commonwealth a permanent, legally assured family which protects the child from abuse and neglect." 55 Pa. Code §3130.11. "The primary purpose of general protective services is to protect the rights and welfare of children so that they have an opportunity for healthy growth and development." 23 Pa.C.S. §6374(a). "Implicit in the county agency's protection of children is assistance to parents in recognizing and remedying conditions harmful to their children and in fulfilling their parental duties more adequately." *Id.* §6374(b). To that end, each county is responsible for administering a program of children and youth social services that provides, *inter alia*, "[s]ervices designed to keep children in their own homes; prevent abuse, neglect and exploitation; and help overcome problems **[*641]** that result in dependency and delinquency[;]" and "[s]ervices designed to reunite children and their **[**82]** families" if circumstances require the child's removal. 55 Pa. Code §§3130.12(c), 3490.231; 23 Pa.C.S. §6373. Of course, referrals to law enforcement may at times arise in such situations, but, fundamentally, an investigating caseworker is not law enforcement. As well, although there might naturally be some resistance to a protective services investigation, the caseworker's purpose and duty is to render the services necessary to keep children safe in their own homes. *See id.*

Unlike our expansive crimes code and detailed Rules of Criminal Procedure, which together define every possible offense requiring law enforcement with strictly-construed precision and delineate their consequences and warrant procedures, the CPSL defines only two circumstances authorizing an agency's unwanted involvement in family privacy: when the child is in need of either "child protective services" as a result of child abuse, or "general protective services" to address additional needs related to potential for harm, such as neglect. Each of these is broadly defined, and their concepts and protocols overlap. For example, beyond solely intentional injuries, child abuse calling for "child protective services" may include omissions in care which create a likelihood **[**83]** of injury, cause physical neglect (including failure to provide age-appropriate supervision), or contribute to a child's mental illness. *See* 23 Pa.C.S. §6303. "General protective services" are those provided by each county agency "**for cases requiring protective services**, as defined by the [D]epartment in regulations[,]" *id.* (emphasis added); the corresponding regulations' definition of "protective services" encompasses services **both** to "children who are abused" **and** those "in need of general protective services[,]" 55 Pa. Code §3490.4.[5]

The term "general protective services" includes, most broadly, "[s]ervices to prevent the potential for harm to a child who [*inter alia*] [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[,]" *id.* §3490.223. Consequently, a child may be **both** the subject of a child protective services report, **and also** in need of general protective services. A report of suspected child abuse received by Childline may, after its initial screening, be assigned to the county agency for assessment as a GPS report, and a family may also be accepted for general protective services **[**84]** following an unfounded "CPS" (*i.e.*, child protective services) investigation; conversely, a report screened-in as meeting GPS criteria may, after assessment, be transitioned to a CPS case for a child abuse investigation. *See* 23 Pa.C.S. §6334(f); 55 Pa. Code §§3490.32(g), 3490.59(a), 3490.235(a) ("The county agency shall provide, arrange or otherwise make available the same services for children in need of general protective services as for abused children[.]"); PA. DEP'T OF HUM. SERVS., OCYF Bull. No. 3490-20-08, STATEWIDE

[5] *See also* 23 Pa.C.S. §6303 (defining "protective services" as [t]hose services and activities provided by the department and each county agency for children who are abused **or** are alleged to be in need of protection under [the CPSL]") (emphasis added).

GEN. PROTECTIVE SERVS. (GPS) REFERRALS, at 2 (Sept. 11, 2020) (referencing guidelines for transitioning reports originally assigned as GPS reports to CPS reports). Furthermore, a report of possible neglect based on, for example, a reporter's observation a child is unbathed, hungry, and unsupervised, may fit either category or none at all, depending not only upon the veracity of the particular **[*642]** details provided by the reporter (or lack thereof), but also the agency's ability to understand the circumstances — *e.g.*, the child's age and ability, whether the incident is isolated, or if there is evidence of further or different maltreatment[6] — and assess for safety threats and level of risk. *See* 23 Pa.C.S. §§6362(e), 6375(c)(2) (requiring use of Department-approved **[**85]** risk assessment process to evaluate both CPS and GPS cases); 55 Pa. Code §3490.321 (providing standards for Department-approved risk assessment processes).[7]

Recognizing the Court must render its decision in this case without the contextual aid of any record development regarding the foundations of the agency's administrative or investigatory protocols and risk assessment calculus, I note responsibility for the particulars of how these screening and assessment practices are employed has been delegated to the Department by the General Assembly. *See id*; 23 Pa.C.S. §6303 (defining "[r]isk assessment" as "[a] Commonwealth-approved systematic process that assesses a child's need for protection or services based on the risk of harm to the child"); 55 Pa. Code §3490.321(b) ("The Department and counties will review the implementation of the risk assessment process on an ongoing basis to ensure that the standards established are consistent with good practice and the results of research."); *id.* §3490.321(c) ("The county agency shall implement the State-approved risk assessment **[**86]** model developed by the Department in consultation with the Risk Assessment Task Force."). In this vein, the agency **[*643]** must have some discretion in translating the information supplied by a reporter, along with any other information revealed through its own screening and assessment processes, into risk assessment categories such as "homelessness" and "inadequate basic care."[8]

Here, I am troubled by the majority's parsing of the information supplied by the reporter and the categories of risk identified by DHS without regard for the Department's evidence-based process. *See id.* §3490.321(b), *supra*. Specifically, I disagree with the majority's conclusion the DHS caseworker's testimony — that she located the family's address and observed the arrival of appellant and the children — "confirmed" the family was not homeless, and thus any risk of homelessness was "rendered moot." Majority Opinion

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[6] Research compiled by the United States Department of Health and Human Services indicates children experiencing one form of maltreatment may experience others simultaneously and are likely to experience recurring neglect. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019 20-22 (2019), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf.

[7] The majority dilutes my disagreement with its statutory analysis by imprecisely characterizing it as merely based upon "overlap in the definitions of 'child abuse' and 'child neglect.'" Majority Op. at 48 n.23. But my dissent in this regard stems not only from the particular definitions of these (unquestionably important) terms, but from the malleable, transferable, **context-specific** concepts relating to the **type of protective services** (*i.e.*, CPS or GPS) employed at a given time in a given case as a result of an agency's screening, assessment, or investigatory process — which, by statute and by regulation, is neither static nor dependent upon the information supplied by the reporter.

Of course, this statutory and regulatory scheme is significantly more complex than the summary review I provide herein. Its adaptability to an agency's improved understanding of the child's and family's needs is a critical feature which, in my respectful view, is dangerously oversimplified by the majority's use of regulatory provisions divorced from context to define the services an agency must provide based on how the report is made. *See id.; see also id.* at 16. Even a report as seemingly anodyne as potentially failing to feed a child for eight hours while outside could prove dire in the case of a very young infant or other especially vulnerable child; such a report is just as readily an allegation the child is without care necessary for his physical health — *i.e.*, GPS report criteria, *see id.* at 16, quoting 55 Pa. Code §3490.223 — as it is reasonable cause to suspect the child's development is endangered by his caregiver's failure to provide the essentials of life — *i.e.*, CPS report criteria, *see id., quoting* 55 Pa. Code §3490.11(a); *id.* at 48 n.23, *citing* 55 Pa. Code §3490.4 (defining child abuse as including "serious physical neglect"). Additionally, I note the statutory definition of "serious physical neglect," differs from the regulatory definition described by the majority, and includes, as forms of child abuse, the failure to supervise a child in a manner appropriate for the child's development and abilities, as well as failure to provide a child with adequate essentials of life — "including food, shelter or medical care," without regard for whether such deprivation is "prolonged or repeated" as the majority insists. 23 Pa.C.S. §6303(b.1).

[8] Guidance from the Pennsylvania Department of Human Services' Office of Children, Youth and Families provides subcategories of need to be used for the dual purposes of identifying the primary concerns to address and allowing for consistent tracking of data. *See* PA. DEP'T OF HUM. SERVS., OCYF Bull. No. 3490-20-08, STATEWIDE GEN. PROTECTIVE SERVS. (GPS) REFERRALS, at 8 (Sept. 11, 2020). The subcategories, which include "homelessness" and "inadequate basic needs" related to clothing/food/hygiene, education, health care, nurturing/affection, and shelter/housing, are not exhaustive or rigidly applied, but "nuanced" examples are "provided solely to give direction to staff[.]" *Id.* at 8, 10-11.

at 39. First, I note that, while the Petition to Compel Cooperation (Petition) indicates appellant ushered the children into the home while DHS was there, the caseworker herself specifically refuted making that observation, as **[**87]** follows:

> [Appellant's counsel] Q. You testified that the allegations were homelessness and inadequate care. You said you went out to the home; is that correct?
>
> [DHS] A. I went out to the home; yes, I did.
>
> Q. You saw the family go into a home?
>
> A. No, I did not. We were standing outside the entire time.
>
> * * *
>
> Q. The facts alleged in the petition are that the father was at the home, and that the mother arrived at the home shortly after that and ushered the children into the home; is that correct?
>
> A. I do not recall that, no.
>
> Q. All right. I think your counsel can show you a copy of the petition? Were you there?
>
> A. That's fine, but I -- I filed the petition, and I recall being with the family, and that's not what occurred. So, something could be in the petition, but that's not what I stated.
>
> Q. The petition might be false?
>
> A. That could be. It could be a mistake, but that's not what occurred.
>
> Q. All right. You have an address that you went out to; is that correct?
>
> A. Yes, I did.
>
> Q. Was the family living at that address?
>
> A. I have no idea if they were living at the address because I was not allowed access into the home.

N.T. 6/11/2019 at 8-10; *see also* Petition to Compel Cooperation, 5/31/2019, at ¶ 3(l). **[**88]** Second, other nonconflicting evidence indicates the address was the same residence known to DHS and the trial court from appellant's prior dependency matter, which was confirmed by the caseworker through a public welfare records search. *See* N.T. 6/11/2019 at 9-12; Petition at ¶ 3(k). But there is nothing in the record to confirm that any person did or could occupy or enter the address prior to DHS's completion of its court-ordered home assessment. In my view, just as the Court cannot affirm a finding of probable cause on these scant facts, the Court **[*644]** should not conclusively terminate, as a matter of law, a fact-intensive DHS investigation where more information may be available, but the evidence presented in the midst of an investigation is insufficient to warrant home entry. An individual's presence at the address on file for public welfare purposes, without more, is not proof the address is habitable or that she lives there. Likewise, I disagree with the majority's dismissal of DHS's identified concern for "inadequate basic care" as "hyperbole," and its determination that the "only potentially viable allegation" remaining (after ruling out homelessness) was an anonymous report one **[**89]** child may not have been fed over a period of several hours during a protest event which had no connection to conditions of the home. Majority Opinion at 38-41. Regardless of whether appellant did or did not feed the child that day, safe and habitable shelter remains an essential aspect of providing "basic care" to a child. *See supra* n.7.

B.

Although reports provided by mandated reporters must include the reporter's identity and a presumption of good faith, *see* 23 Pa.C.S. §§6313(b)(8), 6318(c), the CPSL also encourages "[a]ny person" to make a report "if that person has reasonable cause to suspect that a child is a victim of child abuse[,]" *id.* §6312; *see also id.* §6302 (one purpose of CPSL is "to encourage more complete reporting of suspected child abuse"). The agency must accept and screen all reports "regardless of whether the person identifies himself." 55 Pa. Code §3490.11; *see also id.* at §3490.54 (agency "shall investigate and make independent determinations on reports of **suspected** child abuse" "regardless of whether or not the person making the report identified himself") (emphasis added). As a result, even anonymous or nonspecific reports are where an agency's investigation must begin. Unlike law enforcement, caseworkers do not police **[**90]** and patrol; their investigations do not typically start with knowledge of any objective facts, as law enforcement does when a crime occurs. *See, e.g.E.Z. v. Coler*, 603 F. Supp. 1546, 1559-60 (N.D. Ill.1985) ("When police are investigating a crime, investigation is generally after the fact and no immediate threat to the life of a dependent child is present. . . . [R]equiring child abuse investigators to meet a probable cause standard or obtain a warrant ignores the difficulty of collecting any evidence other than anonymous tips and unverified reports in child abuse investigations."), *aff'd sub nom.Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986). Similarly, the respective roles of confidential informants in police investigations and anonymous reporters of child maltreatment are not equivalent. A confidential informant receives some benefit based on the level of detail and reliability of information provided in cooperation with the police. A reporter's reliability does not stem from his relationship with the investigator, however, but from his relationship to the child and family — requiring careful balancing to preserve that relationship, for the sake of the child and family as well as the investigation — and, as a result, may trigger greater reluctance to provide details, including his **[**91]** identity.

For these reasons and others, I disagree with the majority's

determination DHS has no basis to maintain the confidentiality of a reporter whose unsolicited information at the starting point of an investigation is categorized by the agency as fitting GPS criteria as opposed to CPS criteria, a distinction with plausibly no difference in some cases. *See* 23 Pa.C.S. §6332 ("The department shall establish a single Statewide toll-free telephone number that all persons, whether mandated by law or not, may use to report cases of suspected child **[*645]** abuse or children allegedly in need of general protective services."); *but see* Majority Opinion at 46-47. Nor do I agree the General Assembly "has drawn a clear distinction between an individual who makes an anonymous report of child abuse as opposed to one of child neglect." *Id.* at 47. As explained *supra*, the CPSL's definition of child abuse **includes** types of neglect, and the decision to assign a report as GPS or CPS belongs to the Department or agency staff performing the intake screening, not the lay reporter. *See supra* n.7; *see also* 23 Pa.C.S. §§6334, 6362; 55 Pa. Code §3130.31. It thus seems quite plausible that the CPS and GPS distinctions are not clear enough to require the confidentiality **[**92]** of one reporter but not the other, and the contrary conclusion appears antithetical to the CPSL's express purpose of encouraging more complete reporting of any and all child abuse. *See* 23 Pa.C.S. §6302. More importantly, however, the majority's sweeping judgment in this regard is a departure from the Department's stated practice,[9] and will have consequences for incident reporting across the Commonwealth. And, even more problematic, the issue is not one squarely before us for review. To the extent the parties do argue the issue, the majority accepts appellant's position, but does not address the reasonable counter-argument of DHS. DHS observes CPSL subsection 6375(o) mandates "[i]nformation related to reports of a child in need of general protective services shall be available to individuals and entities to the extent they are authorized to receive information under [S]ection 6340[,]" and Section 6340(c) protects the identity of the person making a report "of **suspected** child abuse." Appellee's Brief at 38-39, *citing* 23 Pa.C.S. §§6340, 6375(o) (emphasis added). Although the reporter's testimony may well have shed some light, it may simply be that the reporter was anonymous, in which case DHS would not have known the reporter's identity, let alone called upon him or her to testify. **[**93]** In any event, the majority's rule eradicating a reporter's confidentiality appears neither appropriate nor necessary in the context of this case.[10]

C.

One of the few objective tools available to agencies performing an initial assessment or investigation is to obtain the family's prior history of agency involvement, which the regulations require. *See* 55 Pa. Code §3490.321(e)(1) ("[F]actors which shall be assessed by the county agency include . . . the history of prior abuse and neglect."). "Simply put, as the frequency of known prior abuse/neglect increases, so does the risk of harm to the child." PA. CHILD WELFARE RES. CTR., UNIV. OF PITTSBURGH, **[*646]** A REFERENCE MANUAL FOR THE PENNSYLVANIA MODEL OF RISK ASSESSMENT 22 (2015).[11] However, the mere existence of a previous report is not dispositive of a high degree of risk; other important factors include, *inter alia*, the quantity and quality of the previous incidents, the abilities of the child and parent, and whether the severity of risk has increased over time. *Id.* at 22-23. In its updated guidance to county agencies regarding the initial assessment of GPS reports, the Office **[**94]** of Children, Youth and Families instructs "[i]t is critical that county agencies seek information regarding the child and family's prior history of child welfare involvement . . . . Prior referral history, previous indicated reports of abuse or neglect, and prior services provided to the family offer important context to inform decision making. . . . It often entails going beyond the [reported] maltreatment and the underlying motivations of an individual making a report." OCYF Bull. No. 3490-20-08 at 4.

For these reasons, I cannot agree with the majority's determination appellant's prior experience with the agency from 2013 to 2015 — which includes the removal of one child for over a year due to the structurally unsound and deplorable conditions in the home, including lack of heat and hot water — is "totally irrelevant." Majority Opinion at 43. The agency's requirement to assess it makes it relevant; the

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[9] *See* PA. DEP'T OF HUM. SERVS., PERMISSIVE REPORTERS: FREQUENTLY ASKED QUESTIONS, https://www.dhs.pa.gov/KeepKidsSafe/Clearances/Documents/FAQ_Permissive%20Reporter.pdf (last visited December 17, 2021).

[10] The majority misconstrues my disagreement with its analysis of a reporter's confidentiality as a disagreement with its statutory analysis of CPSL Subsection 6340(c). *See* Majority Op. at 48 n.23. Though I have highlighted here several textual and practical reasons one might disagree with the substance of the majority's review of this point, *see also supra* n.7, I underscore my view that the majority's decision to declare GPS reporters' identities subject to disclosure conclusively addresses a discrete issue not encompassed in our allocatur grant, despite the likelihood of significant negative impacts as well as the majority's recognition that potentially dispositive factors are "clearly not implicated in this case." *Id.* As described *supra*, the agency, not the trial court judge, categorizes a report, and whether the trial court judge can or should override this agency function is not before us; further, conditioning a reporter's confidentiality on this after-the-fact determination appears to me an absurd, if not harmful, conclusion.

[11] http://www.pacwrc.pitt.edu/Curriculum/1300_PA%20Rsk%20Asssmnt_BsterSht/Handouts/HO%203%20ARfrncMnlFrThPAMdlOfRskAssssmnt_CPSLRevision2015%20(2).pdf

particular circumstances, including the passage of time and any subsequent history, afford it due weight. I note the majority's conclusion appellant's DHS history was "stale" relies, in part, on the assertion there was no recurrence of the prior problems, despite its recognition a subsequent **[**95]** petition to compel cooperation was granted in 2016, and the trial judge, who had presided over both the prior dependency petition and the 2016 petition to compel, "may take into account these prior encounters." *Id.* at 6 n.5, 45 n.21. In the 2016 petition, DHS averred the family's home lacked water service, which was confirmed by the utility company. Motion to Compel Cooperation, 10/27/2016, ¶ 3(d). The majority further rests its legal conclusion of staleness on indefinite or nonbinding jurisprudential statements which, as a result of today's decision, are now the law of the Commonwealth despite the fact the issue was not squarely before the Court — and not preserved or developed through the litigation in the lower tribunals.[12]

D.

Lastly, as the Superior Court aptly explained in its analysis below, the standards applicable to *ex parte* criminal warrants are ill-suited in cases such as this one where an evidentiary hearing is held and the parties may present and cross-examine witnesses. *See Interest of Y.W.-B.*, 241 A.3d at 385-86. Where an *ex parte* warrant issues without notice to the target of the search, the four corners of the affidavits supporting the warrant must speak for **[*647]** themselves with sufficient particularity, **[**96]** reliability, and connection between the search and the need, such that a surprise invasion would be justified. For law enforcement seeking evidence to prove a suspect committed a crime, such a showing is a fair requirement; criminal activity will usually leave a "trail of discernible facts" available whereby probable cause may be established. LaFave, 5 *Search & Seizure* §10.3(a) (6th ed.). This is not the case where a safety threat exists behind closed doors, especially if the victim is not old enough to attend school, cannot communicate clearly, or is harmed in a way that does not leave clearly visible injuries. *See id.* In such circumstances, the "four-corners" requirements of personal knowledge or reasonably trustworthy information from others to show a specific link to the home would require an agency to make a probable cause showing of a thing they do not know exists in a place accessible only to those who would hide its existence.[13] In this sense, even the term "allegations" is something of a misnomer, having different meanings whether in connection with the original reporter, the GPS assessment report, or the petition to compel; further, the petition is not "affied to" by an individual **[**97]** with personal knowledge, but verified by a legal representative on behalf of the agency. Moreover, the agency cannot truthfully allege in a verified petition that a home contains safety hazards when seeking an order to investigate whether the home contains safety hazards.[14] And, as a result, we are left with the quagmire we must now resolve.

Nevertheless, where the target of the search in such cases has an opportunity to challenge the search — before it occurs, through the adversarial process, in a court of law subject to appellate review, where a judge assesses credibility and has the authority to direct the bounds and circumstances of the search — I see little reason for typical warrant constraints to apply. I am therefore unpersuaded by the majority's pronouncement the evidence at a hearing on a petition to compel cooperation must be cabined by the allegations in the petition. *See* Majority Opinion at 43-44. Unrelated risk factors may be identified in the course of an investigation; preventing the consideration of additional, relevant evidence beyond the allegations in the petition would appear only to further delay resolution of the matter to the detriment of all involved. **[**98]** Our Rules of Juvenile Court Procedure allow for the liberal amendment of pleadings, oral motions, the forgiveness of certain defects in the interest of expeditiously stabilizing the child's circumstances, the

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[12] Moreover, the majority's conclusion in this regard is in tension with other aspects of dependency law, involving a significantly stricter clear-and-convincing burden of proof, in which prognostic evidence is routinely admitted to support an adjudication. *See In re R.W.J.*, 2003 PA Super 208, 826 A.2d 10, 14 (Pa. Super. 2003); *see also, e.g., N.J. Div. of Youth & Family Servs. v. Wunnenburg*, 167 N.J. Super. 578, 408 A.2d 1345, 1348-49 (N.J. Super. Ct. App. Div. 1979) (holding an adjudication of "unfitness" in relation to three older siblings twenty-two months prior to the requested investigation regarding parents' newborn child was a sufficient basis to authorize home entry, "[p]arental unfitness is a personal characteristic which, ordinarily, does not vanish overnight, or even within weeks or months.").

[13] I note, as described *supra*, the reporter in such a case will likely be someone close to the child whose confidentiality should be maintained for the child's safety, whether the report is coded as a CPS or GPS.

[14] The majority observes, though DHS testified the GPS report contained allegations of homelessness and inadequate basic care, "the Petitions to Compel d[id] not state that [appellant] was homeless" or "describe any generalized [allegations of] 'inadequate basic care[.]'" Majority Opinion at 37. I counter that DHS could not aver appellant was homeless or provided inadequate basic care because it was unable to obtain appellant's cooperation to rule in or out whether these concerns were true; if such facts were available, an order to compel cooperation would be unnecessary. However, as discussed further *infra*, I see no reason why DHS could not aver in its petition what categories of concern it sought to assess.

possibility of continuances in the interests of fairness, and assurance of due process safeguards, such as adequate notice. *See* Pa.R.J.C.P. 1122, 1126, 1334, 1344. We need not depart from these principles where an evidentiary proceeding commences from a petition to compel cooperation.

[*648] Thus, in my view, several of the judgments foundational to the majority's analysis, made here within the specific confines of establishing probable cause as opposed to definitive proof, unduly restrict as a matter of law the discretion and scope of an agency's child protection investigation. These judgments also hamper rather than encourage the more complete assessment of fact-bound risk factors better suited to the discretionary functions of the agency, and the factfinding function of the trial court, than to the review function of an appellate court. Nonetheless, I still agree with the majority's result, for reasons that follow.

III. Probable cause and administrative searches

As we have explained many times in our criminal law **[**99]** jurisprudence, the United States Supreme Court dictates the requisite probable cause to warrant a search by law enforcement in terms of reasonableness and fair probabilities based upon a totality of the circumstances; that is: based upon a "balanced assessment of the relative weights of all the various indicia of reliability (and unreliability)" of all the circumstances in a warrant affidavit, the magistrate should make a commonsense, non-technical decision of whether there is a fair probability of discovering evidence of criminal activity. *Illinois v. Gates*, 462 U.S. 213, 232, 234-38, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) ("[P]robable 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."); *see also, e.g.Commonwealth v. Clark*, 611 Pa. 601, 28 A.3d 1284, 1287-88 (Pa. 2011) (applying *Gates*, the reliability of hearsay information in an anonymous tip need not depend on the veracity and basis of knowledge of the informant if corroborated by other information).

However, the High Court has also explained this **traditional** "**probable-cause standard is peculiarly related to criminal investigations**" and is "unhelpful in analyzing the reasonableness of routine administrative functions, especially where the [g]overnment seeks to prevent **[**100]** the development of hazardous conditions[.]" *National Treasury Employees v. Von Raab*, 489 U.S. 656, 667-68, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (internal quotation marks and citations omitted; emphasis added), *citing, inter aliaCamara v. Municipal Court of San Francisco*, 387 U.S. 523, 535, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). Though searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment, "[p]robable cause in the criminal law sense is not required[,]" *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978), and "**may vary with the object and intrusiveness of the search**," *Michigan v. Tyler*, 436 U.S. 499, 506, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) (emphasis added), *citing Camara*, 387 U.S. at 538. *See also O'Connor v. Ortega*, 480 U.S. 709, 723, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987) ("[T]he appropriate standard for administrative searches is not probable cause in its traditional meaning."); *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) ("Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."),[15] **[*649]** *citing, inter aliaTerry*, 392 U.S. at 1, *and Camara*, 387 U.S. at 534-539; *Griffin*, 483 U.S. at 873 ("[I]n certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements[.]").

Under the principles developed through the High Court's jurisprudence, the requisite demonstration of cause to justify an administrative search turns on a more generalized notion of reasonableness than traditional probable cause, ranging from a reasonable suspicion of some existing code violation, *see Marshall*, 436 U.S. at 320, to a showing that reasonable legislative or administrative standards for conducting an inspection would be satisfied, *see Camara*, 387 U.S. at 536-38, or where "special needs, beyond the normal need for law enforcement" would make the traditional probable-cause requirement impracticable, *Griffin*, 483 U.S. at 873. *See also O'Connor*, 480 U.S. at 723.

I would not, as the majority does, reject the relevance of *Camara* with respect to child protection home inspections. *See* Majority Opinion at 24-25. Nor do I urge the wholesale **[**102]** application of *Camara* in these types of

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[15] The majority cites *T.L.O.* to support its pronouncement the Fourth Amendment "applies equally" to criminal and noncriminal investigations. Majority Opinion at 33-34, *quoting T.L.O.*, 469 U.S. at 335. I do not disagree that the Fourth Amendment applies to both. However, in my observation, *T.L.O.* does not support **[**101]** the proposition the provision applies in equal measure in both situations; rather, it dispensed with traditional probable cause requirements and held searches of school students required neither a warrant nor "strict (continued...) adherence to the requirement that searches be based on probable cause" in favor of a justification based "simply on the reasonableness" of a search which best serves the public interest. *T.L.O.*, 469 U.S. at 340-41; *but see* Majority Opinion at 23-24 n.15.

cases. However, principles from *Camara* remain foundational to administrative search jurisprudence among the federal courts, and are omnipresent throughout the cases and scholarship regarding the constitutionality of child protection investigations — including most of the cases cited by the majority, underscoring its importance to the matter at hand.[16]

[*650] In addition to confirming the Fourth Amendment applies even to routine home inspections by non-law enforcement government officials, *Camara* articulated a basis to "vary the probable cause test from the standard applied in criminal cases" in administrative searches, by degree of reasonableness in light of the government's particular need to search balanced against the invasion the search entails. *Camara*, 387 U.S. at 537-39. For example, where a criminal investigation requires a level of specificity that certain contraband will be found in a particular location to justify the search of a dwelling, the health and safety inspection program in *Camara*, the goal of which was to prevent the development of hazardous conditions in private homes, required universal compliance with periodic inspections to achieve acceptable results, as "[m]any such conditions—faulty wiring **[**103]** is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself." *Id.* at 535-37.

On the "government need" side of the reasonableness equation, *Camara* determined the need is met "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling"; however, the Court also considered whether any less invasive method would achieve acceptable results. *Id.* at 537-40. *Camara* identified factors including the routineness of the search, its lack of personal nature or law enforcement aim, and the notice and time of day it would be conducted (*i.e.*, during normal business hours) to conclude the intrusion was limited, and enforced the requirement of a warrant procedure as a necessary protection of the occupant from unlimited arbitrary discretion, *i.e.*, "rummaging," by the official in the field. **[**106]** *Id.* at 532, 537, 539; *but see* Majority Opinion at 28 (trial court's order granting appellant's home inspection left search "entirely in DHS's discretion" including, "if it so chose, a general rummaging of all of the home's rooms and the family's belongings").

Now echoed in harmony with the eminent criminal-law probable cause standard pronounced in *Gates*, 462 U.S. at 232, 234-38, the importance of *Camara*'s proportional

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[16] *See, e.g.Tyler*, 436 U.S. at 509; *T.L.O.*, 469 U.S. at 337, 340; *Roska*, 328 F.3d at 1248; *Walsh*, *supra* n.3. The majority indicates these cases do not particularly rely on *Camara* nor contradict its conclusions that no social worker exception to the Fourth Amendment exists and that "traditional probable cause requirements" apply in the context of a child protection home assessment, *see* Majority Opinion at 23-24 n.15; but I respectfully disagree.

Addressing the government's entry and inspection of a private property for the purpose of determining the cause of a fire, *Tyler* explicitly relied upon the *Camara* principle that the probable cause showing required to authorize an administrative search warrant is distinct from the "traditional showing of probable cause applicable to searches for evidence of crime," which would apply if arson was suspected, but otherwise "may vary with object and intrusiveness of search" and satisfied by compliance with relevant regulatory standards for conducting the search. *See Tyler*, 436 U.S. at 506 & n.5., 511-12.

Contrary to the majority's review of *T.L.O.*, respectfully, that decision **did** rely on *Camara*'s balancing principle, significantly weighing the prohibitive burden of obtaining a warrant in **[**104]** favor of maintaining safety and order on school grounds, to curtail the privacy rights of students. *T.L.O.*, 469 U.S. at 337 ("[T]he standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'"), *quoting Camara*, 387 U.S. at 536-537; *id.* at 340-41; *see also supra* n.15.

Though declining to excuse child protection social workers from warrant protocols for the home entry and removal of a child not believed to be in imminent danger, the Tenth Circuit in *Roska* recognized "the Fourth Amendment's strictures might apply differently to social workers" whose principal focus is the welfare of the child, "justif[ying] a more liberal view of the amount of probable cause that would support an administrative search" and assenting to "something approaching probable cause." *See Roska*, 328 F.3d at 1249-50.

Additionally, I note other cases cited by the majority do not lend support for the proposition that the same notion of criminal-law probable cause applies in an administrative child protection proceeding. *See* Majority Opinion at 34, *citing, e.g., In re Robert P.*, 61 Cal. App. 3d 310, 132 Cal. Rptr. 5,11-12 (Cal. Dist. Ct. App. 1976) (indicating the **Fourteenth Amendment** is implicated in such proceedings, but explicitly declining to extend the Fourth Amendment's exclusionary principles). *See also id.* at 26, *citing Von Raab*, 489 U.S. at 668. Upholding the routine warrantless drug testing of customs agents who sought promotions to positions involving access to firearms and illicit substances, the *Von Raab* Court relied not only upon the routineness of administrative employment decision-making, but upon "the longstanding principle that neither a warrant nor probable **[**105]** cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. . . . [O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests" to determine the level of individualized suspicion in the particular context. *Von Raab*, 489 U.S. at 665-66.

balancing test is not overstated:

> [In *Camara*] the Court has taken the view that the evidentiary requirement of **[*651]** the Fourth Amendment is not a rigid standard, requiring precisely the same quantum of evidence in all cases, but instead is a flexible standard, permitting consideration of the public and individual interests as they are reflected in the facts of a particular case. This is an extremely important and meaningful concept, which has proved useful in defining the Fourth Amendment limits upon certain other special enforcement procedures unlike the usual arrest and search.

LaFave, 5 *Search & Seizure* §10.1(b) (quotations omitted). The majority's view of the limited types of administrative searches enabled by *Camara* — dragnet searches, and searches involving special subpopulations with reduced expectations of privacy — is certainly useful (to a degree) in identifying the **[**107]** relevant factors underpinning each line of cases. Justification for dragnet searches intended to achieve universal compliance without the need for individualized suspicion is predicated not only on the seriousness of the government's interest at stake, but also on the limitation of discretion by officials, either through a warrant-type procedure or a statutory or regulatory regime setting the terms of the search; for subpopulations whose expectation of privacy is already diminished, a showing of at least some individualized suspicion of wrongdoing is required in the absence of a warrant. *See* Majority Opinion at 26-27; Eve Brensike Primus, Disentangling Administrative Searches, 111 Colum. L. Rev. 254, 263 (2011). But, as the majority aptly observes, a child protection home inspection fits neither of these two categories. *Id.* at 27-28. And as the foregoing explication describes, the principles of criminal law are not wholly suitable either.

The High Court has articulated other factors to consider in assessing the invasiveness of — and requirements for allowing — an administrative search. Where the purpose of the search is law enforcement, the invasion is greater, and traditional warrant and probable cause requirements **[**108]** apply. *See Ferguson*, 532 U.S. at 79-80; *Tyler*, 436 U.S. at 508. However, "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect." *New York v. Burger*, 482 U.S. 691, 716, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987). A supervisory relationship "that is not, or at least not entirely, adversarial" between the government-searcher and the object of the search, *e.g.*, school and student, employer and employee, probation officer and probationer, may demonstrate a special need of the agency "to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene[.]" *Griffin*, at 879; *see also O'Connor*, 480 U.S. 709, 725-26; *T.L.O.*, 469 U.S. at 339-40. In all cases, determining the reasonableness of any search involves a determination of whether the search was justified at its inception and reasonably related in scope to the circumstances that warranted the interference in the first place. *T.L.O.* 469 U.S. at 341, *citing Terry*, 392 U.S. at 20.

Though the United States Supreme Court has not directly addressed the constitutionality of administrative searches and seizures performed under state child protection statutes, federal district and circuit courts reaching the issue provide consistent guidance to the extent they uniformly, although generally, establish the Fourth Amendment's protections do unequivocally **[**109]** apply to child protection investigations and child removals; the cases are significantly less consistent, however, with **[*652]** regard to the degree of protection to apply. *See supra* at 2 n.1. Given the gravity of interests at stake, the bounds of these cases are important to consider: they arise in the posture of summary judgment in Section 1983 civil rights actions and on the distinctive fact of a **warrantless** search by an agency, which is presumptively unreasonable. *See*, *e.g.Darryl H.*, 801 F.2d 893 at 901; *Tenenbaum*, 193 F.3d 581 at 605; *Franz*, 997 F.2d 784 at 791; *Good*, 891 F.2d 1087 at 1095-96; *Roska*, 328 F.3d 1230 at 1240-42; *Walsh*, 240 F.Supp.2d 731 at 758-60. In this limited context, the courts' resolution turns on whether a basis exists to reasonably support an exigency or other exception to the warrant requirement, or otherwise afford the investigator with a qualified immunity defense, *see*, *e.g.Tenenbaum*, 193 F.3d at 605, but does not reach the merits of whether a warrant should issue on any set of facts. As a result, such cases define characteristics of objectively unreasonable searches only, and provide little guidance for the magistrate or investigating caseworker to assess what quality and quantity of information available to describe potentially harmful circumstances will establish sufficient cause to justify an invasion of privacy when evidence of danger is suspected to exist, but has not **[**110]** been clearly established.

For these reasons, I view the majority's reliance on *Good* and *Walsh*, which considered only whether exigent circumstances excused a warrantless search, to support its conclusion principles of probable cause in child protection investigations must always adhere to those in criminal investigations, to be somewhat misplaced. The majority quotes *Good* as follows: "'Fourth Amendment caselaw has been developed in a myriad of situations involving very serious threats to individuals and society, and we find no suggestion there that the governing principles should vary **depending on the court's assessment** of the gravity of the societal risk involved.'" Majority Opinion at 20, *quoting Good*, 891 F.2d at 1094 (emphasis added).

However, this portion of the opinion refers not to any judicial approval of a warrant or similar request to compel an inspection, but to the district court's erroneous assessment that certain immunity provisions of the CPSL absolved the investigating social workers who performed a strip search of a child, without a warrant or court order, and in the absence of any evidence of imminent danger of serious bodily injury that might excuse their lack of process.[17] *See Good*, 891 F.2d at 1093-96.

In contrast, the present case involves no such lack of process. Beyond the protection afforded by any warrant issued and exercised without advance notice to the object of the search, DHS filed a petition to compel appellant's cooperation with its investigation, and appellant **[**112]** received an evidentiary, adversarial hearing to contest **[*653]** the petition before a court of common pleas where the judge found probable cause existed to order a compelled home safety assessment. On the merits, then, we are left with the question of whether the Fourth Amendment requires compelled child protection investigations be supported by the traditional standard of probable cause applicable to criminal investigations as the majority advances. Majority Opinion at 20-21, 23-24 n.14, 33-34. For the foregoing reasons, I suggest it does not, and I would not foreclose the possibility of future development of more clearly-tailored tenets. Presently, however, as described *supra*, there appears to be no real dispute over the Superior Court's expression of probable cause in terms of "fair probabilities" so long as the "fair probability" measured relates to a need for protective services as they are defined by the CPSL.

Accordingly, I now review whether, in light of the totality of the circumstances of DHS's need to search and the concomitant invasion of appellant's privacy, the record contains a substantial basis of fair probability that the home assessment ordered by the trial court would uncover evidence showing **[**113]** one or both of appellant's children were in need of protective services under the CPSL.

IV. Application

Applying the principles we articulated in *Clark*, *supra*, to this context, proper dispatch of the totality of the circumstances approach should not "'judg[e] bits and pieces of information in isolation against [ ] artificial standards[,]'" but rather should consider the information appropriately available to the trial court "'in its entirety, giving significance to each relevant piece of information and balancing the relative weights of all the various indicia of reliability (and unreliability)[.]'" 28 A.3d at 1289, *quoting Massachusetts v. Upton*, 466 U.S. 727, 732, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984) (applying *Gates*, 462 U.S. at 234).

In its opinion, the trial court described the two substantiated GPS reports underlying DHS's initial involvement in September 2013, and Y.W.-B.'s removal from appellant's care and placement in foster care later in October of 2013, as set forth by DHS in the Petition: the first report stated Y.W.-B., then aged fifteen months, was often heard yelling and screaming, appellant hit him on the arm, and although his basic needs were met, the home was dirty and disordered; the second report stated the family's home was structurally unsound, flea-infested, lacked internal walls and heat **[**114]** and hot water, and was in deplorable condition. Trial Court Opinion, 9/9/2019, at 1-2. Y.W.-B. remained in foster care until July of 2015, and under protective supervision until the trial court discharged DHS's supervision and dependency petition in November 2015. *Id.* The court also set forth the additional allegations in the current Petition, *i.e.*: the family had been sleeping outside the Philadelphia Housing Authority; appellant was outside the Authority from noon until 8 P.M. three weeks later and possibly did not feed the child who was with her during that time; appellant was there to protest, and stated she was not homeless and that her previous residence had burned down; DHS confirmed appellant's address through a public welfare records search; DHS located the home and the children's father was present but would not allow the caseworker inside the residence; DHS observed appellant arrive with the children and usher them into the home; appellant refused to allow DHS to assess the home or children; DHS did not enter the home but observed from outside "that one of the home's windows was boarded up"; and, DHS returned accompanied by police, **[*654]** but appellant still refused entry. *Id.* **[**115]** at 6-7, *quoting* Petition at ¶¶ 3(j)-(m).

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[17] Similarly, I view the majority's use of **[**111]** *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), *see* Majority Opinion at 21, as even farther afield, as the case dealt with a warrantless multi-day search by law enforcement of a murder suspect's home, during which time the suspect was incapacitated and all of the other household members were safely relocated. 437 U.S. at 389, 393. The High Court determined the state court's decision deeming the murder crime scene *per se* exigent was unconstitutional because it excused the police from obtaining a warrant where there was no imminent danger to "life or limb." *Id.* at 393-95. Furthermore, while I do not endorse a view that a child protection investigation or assessment should be *per se* exigent, I do view the government's interest in halting and preventing harm to children, who are in no position themselves to escape harm inflicted by those intended to protect them, as significantly different, and in certain situations possibly more urgent, than solving a completed crime that can no longer be prevented.

Regarding the hearing on the Petition, the court described appellant's testimony, in which she attempted to refuse to answer his questions about her income and ability to feed the children and obtain their medical care, and the court stated its finding the DHS caseworker's testimony was credible. *Id.* at 7-8. The court noted, because the Petition included an allegation the family slept outside the Housing Authority, it was reasonable to ascertain if their housing was stable, and the Petition thereby established probable cause. *Id.* at 8. The court entered an order directing appellant to allow DHS into the home to assess and "verify if [appellant's] home is safe and appropriate," and further set a date and time for the assessment, and provisions for appellant to have a witness present. Trial Court Order, 6/18/2019.

I agree with the majority that the trial court's analysis raises more questions than provides answers about the basis of the court's concern. We can guess about the significance of the prior dependency matter, but without definitive resolution; sleeping outside might mean hovering under a tree at night or napping on a bench in broad daylight **[**116]** — or a myriad of other circumstances not necessarily indicative of safety level; and a single boarded up window might be cause for concern depending on the location and size of the space covered by the board, and what lies behind it. The Petition itself is not much more illuminating,[18] though it provides the additional detail that N.W.-B. was born in January of 2015 while Y.W.-B was still in foster care, and she remained in appellant's care during that time. Petition at ¶3(g). The hearing transcript demonstrates the trial judge remembered the family from prior proceedings, and that the family's home address was the same. N.T. 6/11/2016 at 12. However, as explained previously, the DHS caseworker's testimony, deemed credible by the judge, indicated the Petition may have contained mistakes. Indeed, the caseworker directly refuted the Petition allegation she saw the children enter the home — an allegation the trial court nevertheless relied on in its opinion. And while DHS urges us to consider the trial court's determination appellant was "evasive," the court made no such finding — the court observed appellant attempted to refuse to answer its questions, but in the end, she did answer them. **[**117]** *See id.* at 12-14.

Turning to appellant's prior dependency matters, I note the trial court record for the underlying Petition includes the entire dependency court record, presided over since its midpoint by the same trial judge as this Petition. The twenty-five-month-long matter, including Y.W.-B.'s placement in foster care for twenty months due to hazardous housing conditions, is relevant; but all other circumstances incident to the case are relevant, too. Here, the court's record reveals: each case plan and permanency review order noted the parents' full cooperation with the agency and court's orders; the condition of the house, which parents own, was the only problem; parents **[*655]** consistently worked on repairs, they took classes in home repair, and both enrolled in college; and, except for a brief period before the first permanency review, parents were awarded liberal, day-long visits with Y.W.-B. so long as they didn't go to the house. *See* Juvenile Court Docket, entries dated 10/21/2013 - 11/24/2015; DHS Family Service Plan Review, 9/18/2014. Finally, although a subsequent Motion to Compel Cooperation was filed in 2016 averring the water department confirmed the home's service had **[**118]** been shut off, service had been restored and parents applied for payment assistance prior to the hearing. *See* Motion to Compel Cooperation, 10/27/2016, at ¶3(d); Trial Court Order, 11/23/2016. Thus, the prior dependency court record demonstrates **at least** as much capacity to care for and protect the children as it does concern for risk of harm relating to the conditions existing inside the home at the onset of DHS's involvement in 2013.

Given the aforementioned missing details and other inconsistencies in the record, I cannot conclude it established a fair probability that appellant's children need protective services sufficient to warrant the government's intrusion into appellant's home. Though the trial court, in good practice, included protective parameters in its order to reduce the intrusion of the home assessment, the search nevertheless remains an invasion upon appellant's greatest expectation of privacy, and this record does not demonstrate a substantial basis for DHS's need to invade.

If this result begs the question what would have sufficed, I suggest that, in this case, it would have required only a modicum more, particularly in light of the fact appellant admitted after the **[**119]** home assessment that the home's front room had been damaged by a fire. N.T. 6/18/2019 at 18-19. A photo of the home's exterior, a sworn statement of observed or believed fire damage, certainly, more detail from the anonymous reports would have been useful, as well as the GPS report document if possible. Given the Petition's evidentiary import, accuracy in the pleading is a must; but

[18] The second-to-last page of the Petition contains two paragraphs which provide the movant with the option of checking a box to include them as statements in the verified petition. The box relating to the first paragraph, which requests the court to order appellant to "cooperate with the investigation," is checked. Notably, the box relating to the second paragraph, which states, "the allegations set forth above constitute probable cause to believe [the children are] the victim(s) of child abuse and/or neglect, and probable cause to believe that evidence relating to such abuse will be found in the home[,]" is **not** checked. Petition at 5 (unnumbered). In other words, DHS did not aver in its petition a belief or allegation that probable cause existed.

even an oral motion to amend errors may have rehabilitated its weakened reliability. In addition, reference to agency regulations or policies addressing the scope of the search and its confidentiality would be demonstrative of necessary limitations on the discretion of the caseworker in the field.[19] But more importantly, some explanation **[*656]** of the agency's risk assessment was crucial, notwithstanding the trial judge's past experience with these individuals, in order to establish in the record some basis for why these pieces of information raised the agency's concern and how the search satisfied administrative standards. And, while a home assessment may be the most powerful tool for obtaining reliable information, there are other tools available to further an investigation, for example: school visits for children **[**120]** who are old enough, discreet questions to neighbors when appropriate, or as DHS did in 2016, a confirmation of utility services (or lack thereof) to the home. Where other efforts are unavailable, or attempted and thwarted, an explanation of those efforts is a considerable factor. Although, as Judge Beck observed, "the frustration agency officials experience in carrying out their tasks must be immense," it is nonetheless "critically important that we [e]nsure agencies act within the bounds of the Constitution." *Petition to Compel*, 875 A.2d at 380 (Beck, J., concurring). It is, after all, a government investigation.

The trial court's function is to resolve conflicts in evidence, and appellate courts generally should afford great deference in dependency matters to the judge who has observed the parties over multiple hearings. *See Interest of S.K.L.R.*, 256 A.3d 1108, 1127 (Pa. 2021). As the majority relates, these observations are certainly relevant; however, to obtain the benefit of them upon a challenge, they must be invoked in some manner. *See* Majority Opinion at 45 n.21. In this instance, in my view, the trial court's resolution only further obfuscated any indicia of reliability attending the information provided by DHS. To justify a deprivation **[**121]** of constitutional magnitude where the court does not otherwise have dependency jurisdiction over the child, the court relying on its prior experience, like the agency, must articulate in the record the basis for its belief; "it cannot simply assert the belief without explanation." *Petition to Compel*, 875 A.2d at 380.

Justice Todd joins this concurring and dissenting opinion.

DISSENTING OPINION

JUSTICE MUNDY

The issue in this case is whether the trial court's decision to grant the Philadelphia Department of Human Services' (DHS) Petitions to Compel Cooperation (Petitions to Compel) was supported by probable cause. As I conclude DHS established sufficient probable cause to support the trial court's grant of the Petitions to Compel, I respectfully dissent.

An order directing cooperation with an investigative home visit in the child protective arena must satisfy the strictures of the Fourth Amendment, including the requirement that the order must be supported by probable cause. However, as Judge Beck observed in her concurrence in *In re Petition to Compel Cooperation with Child Abuse Investigation*, 2005 PA Super 188, 875 A.2d 365 (Pa. Super. 2005), "it would be unwise to apply the standard notion of probable cause in criminal law to cases such as these." *In re Petition to Compel*, 875 A.2d at 380 (Beck, J. concurring). This is because "the purposes and goals underlying the activities of child protective **[**122]** agencies differ significantly from those of law enforcement generally." *Id.* For example, in the criminal arena, 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*, 605 Pa. 188, 988 A.2d 649, 655 (Pa. 2010) (citation omitted). The purpose of an investigative home visit in the child protective arena, however, is not to discover contraband or evidence of a crime, but, rather, to investigate reports of incidents **[*657]** or circumstances of potential danger to children. The ultimate goal of child protection agencies is the protection of children

[19] The majority declines to address the particularity of the search order directly, but, as I noted above, it does criticize the order's lack of limitation as authorizing "general rummaging of all of the home's rooms and the family's belongings." Majority Opinion at 28; *see also id.* at 13 n.12; *supra* at 26. This concern may be somewhat overstated in this case: appellant did not complain of any rummaging from her prior experiences with DHS, and acknowledged the caseworker performing the assessment in this instance "had a good attitude," N.T. 6/18/2019 at 15; the trial court generally described the walk-through safety inspection several times, *see* N.T. 6/11/2019 at 17-18, 24-25, 32; and the caseworker testified DHS has a standard walk-through procedure for assessments, *see* N.T. 6/18/2019, at 10-12, that would clearly be violated by "general rummaging." Nevertheless, the prevention of such unreasonably intrusive searches is a valid constitutional concern, and a petition to compel a home assessment may be an individual's first contact with the child protection and dependent court systems. All practical efforts should be made to assure parties of the expectations and limitations of the search, such as providing reasonably detailed orders, or directing access to relevant agency policies and procedural safeguards. *See* 55 Pa. Code §3130.23 ("County agency rules and policies describing the services offered by the county agency, service policies and procedures, eligibility for services, financial liability of clients and the rights of clients to receive or refuse services shall be available to the public for review or study in every county agency office on regular workdays during regular office hours.").

and not the prosecution of criminal activity. Therefore, the probable cause needed to grant a request to order cooperation with an investigative home visit should be that there is a fair probability that a child has suffered from abuse or neglect and that evidence relating to those allegations may be found in the residence. This standard protects a parent's Fourth Amendment rights while also permitting a child protective agency to protect the health and safety of the children involved.

Further, a probable cause determination is based on the totality of the circumstances and the issuing authority should make a practical, common-sense decision **[**123]** whether probable cause exists, given all the circumstances. Commonwealth *v. Torres*, 564 Pa. 86, 764 A.2d 532, 537 (Pa. 2001) (citation omitted). In addition, while there is a rule-based requirement in the criminal arena that an issuing authority may only consider the contents of the sworn written affidavits presented by the affiant in making his or her probable cause determination, that requirement is not constitutionally mandated. Pa.R.Crim.P. 203(B); *Commonwealth v. Conner*, 452 Pa. 333, 305 A.2d 341, 342 (Pa. 1973). There is no corresponding rule-based requirement in the child protective services arena. Therefore, there is neither a constitutional requirement nor a rule-based requirement that a trial court considering a child protective agency's petition to compel an investigative home visit rely solely on the contents of the petition. As such and given the differences between the child protective and criminal contexts, I disagree with the Majority's holding that the trial court can only consider testimony at an evidentiary hearing on such a petition to establish probable cause "as long as the testimony is cabined by the allegations in the petition." Majority Opinion at 35. The trial court should be permitted to consider all the information before it in coming to its probable cause determination, including the contents of the **[**124]** petition, the evidence produced at any hearing on the petition, and the trial court's knowledge of the family's prior involvement with child protective services.

In this case, DHS filed the two Petitions to Compel (one for each child) at issue on May 31, 2019. In its petitions, DHS asserted, *inter alia*, that on May 22, 2019 it received a General Protective Services (GPS) report regarding the family. It summarized the contents of that report as follows:

> 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 not homeless and that her previous residence had burned down; and that it was unknown if [Mother] was feeding the children [sic] she stood outside of the PHA office for extended periods of time. The report is pending determination.

Petitions to Compel, 5/31/2019 ¶ j. According to the petitions, **[**125]** that same day DHS located the family's home address through a Department of Public Welfare search and went to the residence:

> l. 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 **[*658]** 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 [Y.W.-D.] and [N.W.-B.] in her care; DHS observed [Y.W.-B.] and [N.W.-B] appeared to be upset before [Mother] ushered them into the home. [Mother] refused to allow DHS to enter the home or to assess [Y.W.-B.] and [N.W.-B.]. and that [sic] 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 **[**126]** 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.

Id. at ¶¶ l-m. At the hearing on the petitions, DHS investigator Tamisha Richardson testified that she was the DHS worker that went out to the family's home that day and contradicted the assertion in the petition that she observed Mother usher the children into the home, testifying that she did **not** observe Mother and the children enter the home. N.T., 6/11/19 at 8-9 (emphasis added).

The petitions also set out the family's past involvement with DHS, which included GPS reports from September and October 2013 alleging, *inter alia*, deplorable home conditions,

including holes in the walls, a flea infestation, lack of interior walls, internal structure of the home being exposed, a lack of water and heat service, and that the home appeared to be structurally unsound. **[**127]** Petitions to Compel at ¶ c. These reports were determined to be valid and led to the older child, Y.W.-B., being adjudicated dependent and placed in DHS custody. *Id.* at ¶¶ c, e. Y.W.-B. remained in foster care until July 20, 2015 when custody was returned to Mother and Father. *Id.* at ¶ f. The family continued to receive services through DHS until November 10, 2015 when DHS's supervision ended and Y.W.-B.'s dependency case was discharged. *Id.* at ¶ h-i. N.W.-B. was not born until January 23, 2015. *Id.* at ¶ g. In addition to the family's prior involvement with DHS referenced in the Petitions to Compel, at the hearing on the petitions the trial court noted it had prior involvement with the family.

At the hearing on DHS's petitions on June 11, 2019, Richardson was the sole witness. She testified that DHS received a GPS report on May 22, 2019 alleging homelessness and inadequate basic care, naming the children as the victims and the parents as the alleged perpetrators. N.T. 6/11/19, 5. She further testified that she went to parents' house and the parents made it clear to her that she would not be permitted inside the home. *Id.* In response to questioning from the court, Richardson testified **[**128]** that she needed to view the inside of the home to make sure the home was appropriate, the utilities were working, there was food in the home, beds for the children, and so forth. *Id.* at 6.

Based on the information before it, the trial court determined that probable cause **[*659]** existed to order parents to cooperate with an assessment of the home. In support of its determination, the trial court stated:

> 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.

Trial Court Opinion, 9/9/19 at 7. In determining that probable cause existed the trial court also found Richardson's testimony credible. *Id.* at 8.

I disagree with the Majority's contention that since DHS located the family's home the allegations of homelessness were moot and needed no further investigation. Majority Opinion at 37-38. Even though Richardson received an address where the family purportedly resided and talked to the family outside that residence, that does **[**129]** not mean the family resided there or that the residence was suitable for children. As Richardson testified, she needed to observe the inside of the house to determine if the home was appropriate for the children. N.T. at 6. The allegations of homelessness were also not moot by the unsupported assertion in the petitions that DHS observed Mother usher the children into the home. First, Richardson testified that she was the DHS worker who went to the residence and she did not observe Mother and the children enter the residence. N.T. at 8-9. The conflict between the petitions and Richardson's testimony was a factual question for the trial court to answer. Further, even if Richardson did observe Mother usher the children into the residence, merely entering a home is not proof that one resides there. I also disagree with the Majority's assertion that Richardson's testimony confirmed that the family was not homeless. Majority Opinion at 38. This assertion is directly contradicted by Richardson's own testimony that she had "no idea" if the family was living at the address because she was not permitted access into the home. N.T. at 10.

As the allegations of homelessness remained an issue, along **[**130]** with the allegations of inadequate basic care, there was a clear connection between the allegations in the petition and the requested investigative home visit. Only by observing the inside of the residence could DHS determine if the family resided there and if it was an appropriate place for the children to live.

In addition, I also disagree with the Majority's determination that the information regarding the family's prior involvement with DHS was stale because the family's prior experiences with DHS ended in 2015, four years prior to the Petitions to Compel, and there was no evidence of any reoccurrence of the prior issues. Majority Opinion at 43. The age of information is a factor in determining probable cause. *Commonwealth v. Leed*, 646 Pa. 602, 186 A.3d 405, 413 (Pa. 2018). "However, staleness is not determined by age alone, as this would be inconsistent with a totality of the circumstances analysis." *Id.* (citing *Commonwealth v. Hoppert*, 2012 PA Super 21, 39 A.3d 358, 363 (Pa. Super. 2012)). The remoteness of information can affect the weight a court chooses it give the information. Courts must also consider the nature of the allegations and the type of evidence. *Hoppert*, 39 A.3d at 363. The Petitions to Compel indicated that in 2013 DHS received GPS reports regarding the family, asserting, *inter alia*, deplorable home conditions, including **[**131]** holes in the walls, flea infestation, lack of interior walls, internal structure of the home being exposed, a lack of water and heat services, and that the home appeared structurally unsound. Petitions to Compel at ¶ c. Those reports were determined **[*660]** to be valid. *Id.* In addition, at the hearing on the current Petitions to Compel the trial judge referenced his prior involvement with the family. N.T. at 12, 18. Richardson testified that DHS received a GPS report alleging homelessness and inadequate

basic care on May 22, 2019. *Id.* at 5. The family's prior involvement with DHS involved issues regarding the adequacy of the family's housing. The housing related allegations at issue in the Petitions to Compel were similar to the housing related problems at issue in the family's prior involvement with DHS. Those previous reports were determined to be valid and led to a dependency case. Therefore, the family's prior involvement with DHS was relevant to the allegations in the Petitions to Compel and not stale, as the allegations were of a similar nature. The fact that DHS received the previous GPS reports over five years prior to receiving the current one, and Y.W.-B.'s dependency case was closed **[**132]** approximately four years prior, goes to the weight the trial court should give the information. The trial court, however, should not have been required to ignore the family's prior involvement in considering the totality of the circumstances of the case. Rather, the trial court should have been permitted to consider the family's prior history as part of the totality of the circumstances in coming to its probable cause determination.

Further, due to the nature and purpose of child protective investigations, as discussed *supra*, "[w]hat 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." *In re Motion to Compel*, 875 A.2d at 380 (Beck, J. concurring). This is especially true in regards to anonymous sources. Anonymous sources in the child protective arena differ significantly from confidential informants in the criminal arena. Anonymous sources in child protective investigations are often family members or those close to the family who are in the best position to observe a child's circumstances and whether the child is in need of services. Due to the relationship with the care giver, these sources would be less likely to report abuse **[**133]** or neglect if they were not given anonymity. Confidential informants in criminal cases, on the other hand, are often involved in criminal activity themselves and provide information to law enforcement authorities in an attempt to extricate themselves from legal trouble. Information given in self-interest should be looked upon more cautiously than information given by an individual concerned about the health and safety of a child. Therefore, in the child protective arena courts should be able to consider anonymous reports as part of the totality of circumstances analysis in coming to a probable cause determination without the same corroboration requirements that are applicable to criminal informants.

The Majority also criticizes DHS's failure to call the anonymous source to testify at the hearing on the Petitions to Compel based, at least in part, on its incorrect determination that

> DHS had no obligation to keep the identity of the source of the GPS report confidential or to shield him or her from testifying at the evidentiary hearing. The trial court mistakenly believed that DHS was legally required to keep the name of the anonymous source confidential and, accordingly, citing 23 Pa.C.S. § 6340(c), sustained **[**134]** DHS's objection when Mother's counsel asked Richardson to identify the anonymous source of the GPS report. Section 6340(c) of the CPSL, however, only requires DHS to keep confidential the name of an anonymous reporter of a **CPS** report, I,e,, a report alleging child abuse. No similar provision in the CPSL protects the **[*661]** source of a **GPS** report, i.e., a report of, *inter alia*, child neglect,

Majority Opinion at 46-47 (emphasis in original) (internal citations omitted). Section 6340(c), entitled "Protecting identity," provides that, except under specific limited circumstances not at issue here, the release of information by a child protective services agency "that would identify the person who made a report of suspected child abuse or who cooperated in a subsequent investigation is prohibited." 23 Pa.C.S. § 6340(c). The CPSL also prohibits the release of the same information as to an individual who makes a GPS report. Section 6375(o) of the CPSL, entitled "Availability of information," states "[i]nformation related to reports of a child in need of general protective services shall be available to individuals and entities **to the extent they are authorized to receive information under section 6340 (relating to release of information in confidential reports)**." 23 Pa.C.S. § 6375(o) (emphasis added). Since Section 6340(c) prohibits **[**135]** the disclosure of information that would identify a person who made a report of child abuse, Section 6375(o) likewise prohibits the disclosure of information that would identify an individual who made a GPS report, like the anonymous source at issue here. The trial court, therefore, correctly sustained DHS's objection to Mother's counsel's question asking Richardson to identify the anonymous source.

Even if DHS was not statutorily required to keep the anonymous source's identity confidential, which it was, it was under no obligation to call the source to testify at the hearing on the petitions and provide Mother an opportunity to cross-examine him or her, as the Majority implies. Majority Opinion at 47. There is no legal requirement, constitutional, statutory, or rule-based, that the subject of a request for an order to compel cooperation with an investigative home visit must be permitted to cross examine a source prior to a trial court making a probable cause determination. There is no requirement that the court hold a hearing on the petition at all.

When reviewing a trial court's probable cause finding, it is a reviewing court's duty to ensure there was "a substantial basis

for concluding probable **[**136]** cause existed. In so doing, the reviewing court must accord deference to the issuing authority's probable cause determination, and must view the information offered to establish probable cause in a common-sense, non-technical manner." *Jones*, 988 A.2d at 655 (quoting *Commonwealth v. Torres*, 564 Pa. 86, 764 A.2d 532, 537-540 (Pa. 2001)). In so doing, "a reviewing court [is] not to conduct a *de novo* review of the issuing authority's probable cause determination, but [is] simply to determine whether or not there is substantial evidence in the record supporting" the finding of probable cause. *Id.* (quoting *Torres*, 764 A.2d at 537-38, 540). In order to have met the probable cause standard in this case, there had to be a fair probability that the children had suffered from abuse or neglect and that evidence relating to those allegations may be found in the residence. The allegations set forth in the Petitions to Compel combined with Richardson's testimony and the trial court's knowledge of the family's prior involvement with DHS support the trial court's determination that DHS satisfied that standard here. Therefore, I respectfully dissent as I would affirm the Superior Court's holding.

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ORIGINAL ARTICLE

Lies my child welfare system has told me: The critical importance of centering families' voices in family policing legal advocacy

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Abstract

The web of law, regulation and policy which forms the modern day "child welfare" system is organized around one central unifying principle: the notion that these laws, regulations and policies are *necessary* to protect and save children. Yet an ever-growing and overwhelming chorus of "lived experts" – individuals who have been impacted as a parent and/or child by what is more aptly called the family policing system – as well as by advocates and scholars, are drawing attention to the degree of harm the system causes to the families it purports to help. Even though the harms the family policing system causes are well known, the family policing system continues to justify these harms as warranted in the name of protecting children. More concerning, even well-meaning advocates and scholars who acknowledge the harms, implicitly and explicitly continue to perpetuate the big lie that the family policing system's intention is benevolent and caring. The impetus for any law is a story; law identifies a problem and seeks to resolve it. But what happens when the story is false? The stories we tell about the need for family policing perpetuate harm and replicate systemic racism. Most importantly, the impact of these false narratives can be felt through generations of families leaving devastated communities. The stories, perspectives and opinions of those most impacted by the system historically

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have been, and continue to be, intentionally left out of the making of law and policy, and even in the teaching of the law. Unless the actual perspectives of families are present to challenge the stories that are woven into the law, these narratives will continue to create significant obstacles to critical thought about the law, prevent meaningful legal change, and ultimately cause continued harm to families and communities. In this essay, in the tradition of participatory law scholarship (Note: Rachel Lopez, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795 (2023) ["Participatory Law Scholarship or (PLS)… is an emerging genre of legal scholarship written in collaboration with authors… who have no formal training in the law but rather expertise in its function and dysfunction through lived experience."]), the authors, a parent and professional advocate, and a clinical law professor and attorney, seek to unpack the myths which are built into the laws of family policing. In reckoning with these myths, the paper seeks to propose a critical framework to both acknowledge the intentional trauma and harm caused by the family policing system, and to disrupt and dismantle the fictions that are the underpinnings of the laws and regulations that continue to perpetuate these harms. Ultimately, this paper argues that by centering the lived expertise of families' voices and perspectives in legal advocacy, we can form a cogent vision for true safety for families and communities.

KEYWORDS
child welfare, false narratives, family policing, lived expertise, lived experts, true narratives

Key points for the family court community

- False Narratives Embedded into Child Welfare Law.
- Debunking False Narratives.
- Centering Lived Expertise.
- Child Welfare, Family Policing, Lived Experts, Lived Expertise, False Narratives, True Narratives.

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INTRODUCTION

The web of law, regulation and policy which forms the modern day "child welfare" system is organized around one central unifying principle: the notion that these laws, regulations and policies are *necessary* to protect and save children. Yet an ever-growing and overwhelming chorus of "lived experts" – individuals who have been impacted as a parent and/or child by what is more aptly called the family policing system[1] – as well as by advocates and scholars, are drawing attention to the degree of harm the system causes to the families it purports to help. Even though the harms the family policing system causes are well known, such as the horrific life outcomes for children who spend time in foster care, and the many layers of trauma it wreaks on families, the family policing system continues to justify these harms as warranted in the name of protecting children. More concerning, even well-meaning advocates and scholars who acknowledge the harms, continue to implicitly and explicitly perpetuate the big lie that the family policing system's intention is benevolent and caring by both intentional and unintentional reinforcement of the system's ungirding narratives. The only way to counteract this phenomenon is to ensure that the perspectives of families most impacted are meaningfully included in the making of law, policy, practice, advocacy and education surrounding the family policing system.

The catalyst for any law is a story; law identifies a problem and seeks to resolve it. But what happens when the story is false? The stories we tell about the need for family policing, and how the system operates, perpetuate harm and replicate systemic racism. Most importantly, the impact of these false narratives can be felt through generations of families leaving devastated communities. Even as the "child welfare profession" has begun to embrace the notion of having the "lived expertise" of parents and youth (or former youth) at the table, too often the stories, experiences and most importantly the opinions of those most impacted by the family policing system are left out of the making of law and policy, legal advocacy, and the teaching of law. If we are serious about counteracting the many harms the family policing system perpetrates, and want to move toward truly helping families, we can no longer continue to ignore the experiences and perspectives of the most impacted families. Too often, the lived expertise of parents, youth and former youth are tokenized, reduced to storytelling rather than collaboration, in service of a narrative that upholds the existing system. Unless the stories that are woven into the law are actively challenged, these narratives will continue to create significant obstacles to critical thought about the law, meaningful legal change, and ultimately cause continued harm to families and communities. In short, adherence to the false narratives result in seeking solutions to the wrong problems.

We write this essay as two human beings who care deeply about the devastation the family policing system has wrought on Black and brown communities. April is a professional and parent who has navigated the family policing system and its traumas herself, who now helps others do the same, while advocating for repeal of laws and policies which are harming communities across the nation. Sarah is a lawyer and clinical law professor who has represented parents and caregivers enmeshed with the family policing system in various family law matters for two decades. We collaborated to write this piece after both attending the American Bar Association Commission on At-Risk Youth Convening at Hofstra Law School. The meeting was attended by family court judges, lawyers and other professionals, some of whom still subscribe to the false narratives of the family policing system. Although professionals with lived expertise who are parents and former youth were intentionally invited to the meeting, there was not uniform willingness to engage, accept and receive their voices. This experience is not uncommon in established "child welfare professional" spaces.

This essay will proceed in three sections. First, the essay will discuss the role of narrative in furthering and justifying the family policing system, and the role the perspectives of impacted families play in disrupting that narrative. The second section will begin to unpack some of the lies, big and small, which are woven into the laws of family

[1]More commonly called the "child welfare system," the authors have made a conscious choice to use the term "family policing system" throughout this essay as it more accurately reflects the degree of surveillance and harm families experience as a result of "child welfare" intervention.

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policing. The third section will set out a vision for how the lived expertise of families should be meaningfully incorporated into legal advocacy about and within the family policing system.

FAMILY POLICING LAW AND NARRATIVE

The stories told to justify the laws of the family policing system are omnipresent, not just within the legal system or "child welfare profession" writ large, but in our larger society. Movies, television shows, books, and media stories, are rife with narratives of horrifically abused and neglected children, who are saved by the caring benevolence of child protection workers and/or foster/adoptive parents. These stories rarely focus on the actual experiences, circumstances or perspective of the parent, nor on the actual experiences or perspective of the child, that resulted in or from child protection intervention. Despite a growing body of scholarship regarding the harms to children,[2] and parents,[3] resulting from the intervention of the family policing system, the popular narrative continues to reinforce the notion that child protection saves and protects children.

In recognition of the lack of nuance in these popular narratives regarding the realities of the family policing system, there has been a concentrated effort to improve the reporting and storytelling in popular culture regarding the family policing system. Parents and youth have driven these efforts, collaborating to ensure that their true narratives are heard. Parents and children impacted by the family policing system, and their allies, have worked to create and publish media such as news articles, opinion pieces, podcasts, and films which center their lived experience.[4] Efforts by the National Coalition for Child Protection Reform, led by Richard Wexler, and other news reporters such as Steve Volk, Eli Hager, and Shoshana Walter, have moved the needle significantly in improving the depth of reporting to focus on the true narratives of families impacted by the system.[5] A number of family defense attorneys and legal organizations, for example, Center for Family Representation in New York City, Community Legal Services in Philadelphia, Washington State Office of Public Defense Parent Representation Program, and Colorado Office of Respondent Parents' Counsel, have added peer advocate parents as part of the legal representation team.[6] Child advocate offices such as the Children's Law Center in Los Angeles, and recently the Child Advocate Unit at the Defender Association of Philadelphia, have added youth peer advocates to their representation teams.[7] A number of youth advocacy organizations have various models of youth advocates engaged with their work, for example the Juvenile Law Center, or Children's Defense Fund-New York.[8] Even child protection agencies, foster care agencies, foundations

[2]Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families–and How Abolition Can Build a Safer World (2023); Shanta Trivedi, *The Harm of Child Removal*, 43 NYU Rev. of Law & Social Change 523 (2019). *See also*, Peter J. Pecora et al., *Assessing the Effects of Foster Care: Findings from the Casey National Alumni Study* (2023), *found at* https://www.casey.org/media/AlumniStudy_US_Report_Full.pdf.

[3]*See*, Sarah Lorr, *Disabling Families*, 76 Stanford L. Rev. (forthcoming 2024); Robyn Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 Yale J. of L. & Feminism 37 (2022); S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. Rev. 1523 (2023).

[4]*See*, Audio Nuggets – Mining for Gold Podcast (https://safecampaudio.org/show/audio-nuggets/); Savannah Leaf, *Earth Mama* film (2023); Ms. Magazine Torn Apart Podcast (https://msmagazine.com/series/torn-apart/); Rise Magazine (https://www.risemagazine.org/rise-magazine/); Upend Podcast (https://upendmovement.org/podcast/).

[5]*See generally*, Richard Wexler, National Coalition for Child Protection Reform, *found at* https://nccpr.org/. *See also* Eli Hager, *When Foster Parents Don't Want to Give Back the Baby*, ProPublica (Oct. 16, 2023), *found at* https://www.propublica.org/article/foster-care-intervention-adoption-colorado; Steve Volk & Julie Christie, *Philly still keeps the benefits of foster care youths despite a 2022 law banning the practice*, Phila. Inquirer (Dec. 26, 2023), *found at* https://www.inquirer.com/news/foster-parenting-philadelphia-social-security-payments-20231226.html#loaded; Shoshana Walter, *They Followed Doctors' Orders. The State Took Their Babies*., Reveal (Jul. 1, 2023), *found at* https://revealnews.org/podcast/they-followed-doctors-orders-the-state-took-their-babies/.

[6]*See* Center for Family Representation (https://cfrny.org/family-defense-teams/); Colorado Office of Respondent Parent Counsel (https://coloradoorpc.org/); Community Legal Services Family Advocacy Unit (https://clsphila.org/services/family/); Washington State Office of Public Defense (https://opd.wa.gov/find-legal-help-and-information/parents-representation-program). For more about the effectiveness of interdisciplinary models of representation for parent defense, *see* Lucas Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 Child & Youth Servs. Rev. 42 (2019).

[7]*See* Children's Law Center of California (https://www.clccal.org/our-work/multidisciplinary-advocacy/peer-advocates/); Defender Association of Philadelphia Child Advocate Unit (https://phillydefenders.org/child-advocacy/).

[8]*See* Children's Defense Fund-NY (https://cdfny.org/policy/policy-priorities/youth-justice/); Juvenile Law Center (https://jlc.org/youth-advocacy).

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and other institutions, have begun to incorporate impacted parents and/or former youth as consultants or peer advocates into their work.

At the American Bar Association's Convening for the Commission on At-Risk Youth, which was the impetus for this essay, one quarter of the attendees were "lived experts." Such inclusion demonstrates an increasing recognition that the perspectives of impacted parents and former youth provide important depth and nuance to conversations. Yet, even with this increased understanding of the nuanced issues within families, there is not a universal understanding or even appreciation of the role or purpose of lived expertise of families in shaping the law and policy of family policing. We must move away from the need to create false power dynamics in the way we gather and collaborate. Reducing impacted parents and youth down to the stories of their experiences is an injustice which cannot continue. The recognition of parents and youth as professionals and leaders adds new life and dimension to ongoing legal advocacy to end the harms of the family policing system and meaningfully value, support, and achieve justice for families.

The story the law tells

1. The web of law, regulation and policy which make up the family policing system is undergirded by a purportedly race-neutral narrative about "bad" parents and children who need to be "saved." Indeed, the historical narrative arc which is typically used to describe the roots of the modern child protection system, takes us from one mistreated child in 1874, Mary Ellen, who was saved from her vicious foster parents in an effort led by the Society for the Prevention of Cruelty to Animals, since there was no public child protection agency to save her.[9] That legend tells us that this sparked an entire movement of Progressive Child Savers, which spawned private and ultimately public child protection efforts throughout the United States, from Orphan Trains to Houses of Refuge to Juvenile Courts.[10] This legend conveniently leaves out the underlying xenophobia and nativism which drove most of these efforts, not to mention fails to focus on the fact that Mary Ellen experienced abuse in foster care, not by her parent, who lacked the financial means to care for her.[11] Although Black children were excluded almost entirely from formal child protection efforts until the 1970s, through the influence of Dr. C. Henry Kempe and the medicalization of child abuse, the framework for our modern child protection system was born.[12]
2. This narrative framing of the history of modern child protection leaves out the outsized role which family separation and white supremacy have played from the early beginnings of this country's history, both as instruments of societal power and control, cultural genocide, and their direct throughline to the modern family policing system. As detailed by Dorothy Roberts in her seminal book Torn Apart: How the Child Welfare System Destroys Black Families–and How Abolition Can Build a Safer World, the framework of modern child protection is best understood by grounding ourselves in history. Starting with the history of enslavement with the devaluation and destruction of Black families, then considering the legacy of destruction of indigenous families through the Indian Boarding School movement, and later through formal foster care, we can understand the cultural hegemony which animates modern child protection laws. With the advent of the Indian Child Welfare Act to stem the tide of destruction of indigenous families wrought by the family policing system, and the devastating and ongoing dismantling of Black families wrought by the combined impact of the Child Abuse Prevention and Treatment Act enacted in 1974, the Adoption Assistance and Child Welfare Act of 1980, and the Adoption and Safe Families Act of 1997, we begin to understand the ways in which cultural erasure and white supremacy underscore modern child protection law.

[9]Lela Costin, *Unraveling the Myth of Mary Ellen Legend: Origins of the "Cruelty" Movement*, 65 Soc. Serv. Rev. 203 (1991).
[10]Jane Spinak, *The End of Family Court: How Abolishing the Court Brings Justice To Children and Families*, (NYU Press 2023), at 17–32.
[11]*Costin*, *supra* note 10.
[12]Mical Raz, *Abusive Policies: How the American Child Welfare System Lost It's Way* (UNC Press 2020), at 55–72.

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Yet the story the law tells us is that in order to root out the serious problem of child abuse and neglect, any suspicion of harm to a child must be reported to the state, which is then charged with investigating and uncovering the "truth."[13] If a child has indeed been harmed, the law empowers the state to seek to remove the child from the family, and/or compel the parent to submit to extensive surveillance, in order to prove their family should remain intact or reunify.[14] Should the parent fail to comply with the conditions of surveillance, the state is obligated, absent certain exceptions, seek to legally sever the parent–child relationship, and identify a "new" family for the child.[15]

The story the law tells us is that the check against unfettered state intervention into the family is the 14th Amendment of the United States Constitution.[16] A long line of United States Supreme Court cases tells us that there is a fundamental right to family integrity, and the state cannot intervene in the family absent a finding of unfitness.[17] Even once a parent is deemed unfit, state intervention in the family is meant to be reined in by Constitutional protections, for example 4th Amendment protection against unreasonable searches and seizures,[18] or 14th Amendment due process protections.[19] The story the law tells us is that parents and children have rights that are meaningfully protected throughout any state intervention in the family.

The story the law tells us is that these intrusive state interventions are justified and necessary to serve the state's overarching goal and obligation to protect children, and that any "disproportionate racial impact" is at best unintentional, or at worst necessary.[20] The story the law tells us is that any trauma or harm caused to children or their parents by family separation, foster care, termination of parental rights, and adoption, is an unfortunate yet necessary antidote to the harms caused by these children's bad parents.[21] The story the law tells is that any flaws or limitations of the existing family policing system are unintentional outcomes of well-intentioned and benevolent people and policies.

Why impacted voices matter

The collective voices of families impacted by family policing system, such as April's, tell a very different story. While impacted voices are by no means a monolith, critical connection and engagement with the families most impacted force confrontation with the deep systemic and racialized harm caused by the family policing system. As a recent report by human rights experts to the United Nations Committee to End All Forms of Racial Discrimination (CERD) recently concluded, "The child welfare system has had a devastating and disparate impact on Black families."[22] This stark racialized impact of the "child protection" system on Black and brown families has been clear for decades. As Dorothy Roberts wrote in her book *Shattered Bonds* over 20 years ago, Black and brown children are more likely to be reported to child protection, less likely to receive services to remain safely in their homes, more likely to be separated from their families and for longer periods of time, and more likely to have their ties to their families of origin

[13]Child Abuse Prevention and Treatment Act, 42 USC 5101 et seq; 42 USC 5116 et seq. (1974). For more on the harms of CAPTA and mandatory reporting, *see* Charlotte Baughman, Tehra Coles, Jennifer Feinberg, Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 Colum. J. Race & L. 501 (2021); Talia Gruber, *Beyond Mandated Reporting: Debunking Assumptions to Support Children and Families*, 1 Abolitionist Perspectives in Social Work 1 (2023).

[14]Adoption and Safe Families Act of 1997 (ASFA), Public Law 105–89 (1997). For more on the harms of the Adoption and Safe Families Act (ASFA) *see* for example, Ashley Albert and Amy Mulzer, *Adoption Cannot be Reformed*, 12 Colum. J. Race & L. 1 (2022); Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 Colum J. Race & L. 711 (2021).

[15]ASFA, *supra* note 15.

[16]U.S. Const. Amend. IV.

[17]*See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel v. Granville*, 530 U.S. 57 (2000).

[18]U.S. Const. Amend. IV. Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 Wash. U. L. Rev. 1057 (2023); Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 Calif. L. Rev. 1485 (2023).

[19]U.S. Const. Amend. XIV; *Lassiter v. Dept of Social Servs*., 452 U.S. 18 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982). Cf, Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. R. L. & Social Change 523 (2019).

[20]*See*, Brett Drake et al., *Racial/Ethnic Differences in Child Protective Services Reporting, Substantiation and Placement, With Comparison to Non-CPS Risks and Outcomes: 2005–2019*, 28 Child Maltreatment 683 (2023).

[21]*See* Elizabeth Bartholet, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (Beacon Press 1999).

[22]Columbia Law School Human Rights Institute & Children's Rights, *Racial (In)Justice in the U.S. Child Welfare System* (July 2022).

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legally severed.[23] Despite two decades of reform efforts, as Professor Roberts wrote in *Torn Apart*, the family policing system has the same racialized impact today.[24] As Roberts writes, "The United States extinguishes the legal rights of more parents than any other nation on Earth. As with every aspect of the child welfare system, Black and Native children suffer the most—they are more than twice as likely as white children to experience the termination of both parents' rights."[25] Indeed, nationally, over 50% of Black children will experience a child welfare investigation by their eighteenth birthday (nearly double the rate of white children).[26] Nearly 10% of Black children will be removed from their parents and placed in foster care (double the rate of white children).[27] One in 41 Black children will have their parents' rights legally terminated.[28]

The only way we get to the "real" story of the family policing system is by lifting back the veil, hearing from families brutalized by this system daily. For too long, voices and perspectives of family have been left out of the conversations that controlled their lives and are often overlooked or ignored by a system that thinks it knows best. The family policing system has built adversaries in what has always been a unit and a fundamental right to have a family. children are pitted against their parents, parents against parents, and family against family. April frequently says, "*Our children think we gave up on them; when it was the system that gave up on family*." If we want to protect children, we must protect the sanctity of the family.

If we listen to the voices of families, we understand there is nothing more terrifying than a knock on the door from child protective services. A stranger gains access into your life, while using a magnifying glass to search for any imperfection or defect your family might have. Investigators are written a blank check, often without due process, to build a narrative against the family. The invasiveness of the investigation causes ongoing harm and trauma to each member of the family, even if the report is unfounded, or no intervention is found to be warranted. During an investigation, children are separated from their parents, and at times strip searched, photographed, and interrogated, without another adult, let alone a *trusted* adult or attorney, being present. Parents are asked intimate details about themselves and their family, pressured to sign releases for confidential information, and under threat of court-ordered removal of their children, coerced into agreeing to "voluntary" safety plans and family services.

The voices of families will tell us that family separation is one of the most violent things the state can do, and that it takes very little for a child to be ripped out of a parent's arms. Contrary to what is often assumed, most children are removed because of allegations of neglect, not abuse. Separation can occur due to housing insecurity, food insecurity, lack of access to utilities, medical care, transportation, childcare, mental health or substance abuse treatment, all of which are caused by or exacerbated by poverty. Nuances of family life are not taken into account when it comes to separation, and separation remains the primary "intervention" the family policing system has to offer families, rather than actual help. Family separation has a lasting effect which is often felt for generations, even if the family is reunified.

> April writes: "I deal with the ramifications of family separation every day in my home. I can tell you of all the struggles of healing your family after it is destroyed. If you asked, 'what does your family need,' I can tell you almost no one will say separation.

[23]Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (Civitas Books 2002).
[24]Dorothy Roberts, *Torn Apart*, *supra* note 3.
[25]*Id*.
[26]Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 Am. J. Public Health 203 (2017). *See also* Frank Edwards et al., *Contact with Child Protective Services is Pervasive but Unequally Distributed by Race and Ethnicity in Large US Counties*, 118 Proceedings Nat'l Acad. SCIS. 1 (2021).
[27]Elisa Minoff & Alexandra Citrin, *Systemically Neglected: How Racism Structures Public Systems to Produce Child Neglect*, Ctr. For the Study of Soc. Pol'y (Mar. 22), *found at* https://cssp.org/resource/systemically-neglected/.
[28]Shereen White & Stephanie Persson, *Racial Discrimination in Child Welfare Is a Human Rights Violation—Let's Talk About It That Way*, (Am. Bar Ass'n Oct. 2022), *found at*, https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2022/fall2022-racial-discrimination-in-child-welfare-is-a-human-rights-violation/#:~:text=Nearly%2010%20percent%20of%20Black,rate%20of%20the%20general%20population).

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Stories like mine are all too common; a mother struggling with mental health after being sexually assaulted. The only "help" I was offered was to remove my children until I learned not to feel the gravity of my pain. While my children were away, my mental health declined farther. I was too afraid to kill myself, and too hopeless to continue to live so, I drowned myself in drugs. My children were my identity and the reason for me to live and fight. There is an echoing silence in your home when you no longer hear little feet running around. A knife in the heart when you see another child that is not yours. It's like dying while still living when your children are a few blocks away but too far to touch them.

My daughter went to school around the corner from my house. I would walk past the gate and watch her. I could not walk up to her, for I knew the pain it would cause, and I would not be able to take her with me to soothe her tears. Every day I would watch from a distance just to see her grow. My other children I could not watch at all, I would just pray that they were well as my heart broke to see other children. My children were separated from me then separated from each other. When I got them back (over a course of five years) I had to reintroduce them to each other and their family. At one point I was deemed fit to have two of my children back as I continued to fight for the last one. I did supervised visits with my middle child. I had to get their siblings put on the court order to ensure they were able to attend the visits. I visited for almost two years even though my other children were home, and I never abused my children.

Visits bring on a new level of terror. I was put into this expansive room with other families. I walked through the metal detectors with armed guards on the other side. Your every move would be watched, the way you speak, interact, feed, and care for your children. One day my sons who were 12 and 8 at the time started to wrestle, I remember being panicked and my anxiety increased very quickly as I explained to them that they could not do that. Although that was a brotherly act that would happen in many homes, it was looked at as a lack of control and I was pulled aside and warned for this. As I began to work in this field, I realized that I was not unique in this type of trauma and this type of harsh dehumanizing treatment of my family.

As a result of my work helping and advocating for families brutalized by the family policing system, I can continue to tell you countless stories of the harm that has come to families under the guise of help. Children being taken because a parent can't afford childcare, or for a lack of food. While navigating my own family's situation, I did not understand that I had rights; I didn't learn my rights until I began working at a legal services organization which aims to help families like mine. During that time, I have seen just how widespread lies have become. It is parents such as I that are leading the way to spread the true narrative of the family policing system. I have sat in rooms as policies were created. I have sat in case meetings and heard firsthand about what everyone thinks is needed without asking a person, 'what do you need.'

Would a surgeon operate on you, cut you open, without making sure you needed surgery in the first place? This is why we need more impacted individuals to ensure that the surgery is necessary. We cannot continue to say we value children without valuing their families. We must elevate and engage impacted individuals to teach and lead the field into a new humane way to genuinely care for family."

THE LIES, BIG AND SMALL, AND WHY THEY ARE WRONG

Although many of the family policing system's flaws are known and obvious to the judges and lawyers who work within the system, no one experiences those harms and flaws as acutely as the families the system ensnares. Lawyers for parents

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and children are meant to serve as a check against the family policing system's unfettered power to intervene in families, yet their legal advocacy is also limited by the tools provided within the existing legal framework. Legal education has traditionally not included critical perspectives on the family policing system, so lawyers may be limited in their capacity to critically reflect on the practice, and further limited by the myths embedded in the laws themselves. As a result, lawyers may also inadvertently or intentionally reinforce the lies. While lawyers' proximity to the harms inflicted by the system may give them a heightened understanding and responsibility to repair the harms,[29] this proximity is simply not the same as the lived reality of impacted families, and may be hampered by their own biases and lack of conditioning to interrupt systemic racism. As a result, lawyers may not always be best-situated to critically question the prevailing narrative underpinning the law, nor to determine the solutions, unless they are doing so in collaboration with those most directly impacted by the law – the families. To do so requires not just listening to stories, but engaging meaningfully with impacted families' expertise to determine a path forward. This section will detail some of the false narratives embedded in the existing legal framework, and unpack how the lived experiences of families illuminate the lies.

The child protection system saves children

The big lie which illuminates the modern-day family policing system is that these laws, policies, and interventions, keep children safe. At the same time, we lack statistical evidence that this is actually true; while rates of child abuse have decreased slightly over the last couple decades, child fatalities due to abuse have actually increased.[30] Further, children are harmed in foster care at alarming rates.[31] The vast majority of children enter foster care because of allegations of neglect, not abuse, and neglect is frequently conflated with poverty.[32] Despite the promise of the Families First Prevention Services Act[33] to redirect resources to keep families together, in order to access those resources, a family has to be labeled at high risk of separation, and family separation and foster care remains the primary intervention the family policing system offers families.

When we center impacted voices, we learn the true devastation and terror the family policing system causes families. As Dorothy Roberts, Alan Detlaff, and other scholars have demonstrated, the true roots of the family policing system are rooted in the legacy of slavery and the central role family separation played in exerting power over Black and indigenous families.[34] In more modern history, when laws like the Child Abuse Prevention and Treatment Act (CAPTA) and the Adoption and Safe Families Act (ASFA) went into effect, the data already showed that there would be a disproportionate outcome for families of color.[35] Thus, the notion that these laws are race-neutral is false, and undermines shining a light on the racialized harms of the family policing system.

Mandatory reporting keeps children safe

Under CAPTA, mandatory reporting is meant to be the primary way we keep children safe. The theory behind these laws is that professionals such as doctors, nurses, and teachers are best situated to identify children at risk. But we

[29]Joshua Michtom, *A Call to Action for Parents' Lawyers in the Family Regulation System: Bearing Witness as Praxis and Practice in the Face of Structural Injustice*, 31 J. L. & Pol'y 90 (2023).

[30]Administration for Children and Families, Child Maltreatment 2021 (Children's Bureau 2021), at 20–21, 52–53, *found at* https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2021.pdf.

[31]Richard Wexler, *Abuse in Foster Care: Research* vs. *the Child Welfare System's Alternative Facts*, Youth Today (Sept. 20, 2017), *found at* https://youthtoday.org/2017/09/abuse-in-foster-care-research-vs-the-child-welfare-systems-alternative-facts/.

[32]Human Rights Watch/ACLU, "If I Wasn't Poor, I wouldn't Be Unfit": The Family Separation Crisis in the US Child Welfare System (2022), *found at* https://www.aclu.org/publications/if-i-wasnt-poor-i-wouldnt-be-unfit-family-separation-crisis-us-child-welfare-system.

[33]Public Law (P.L.) 115–123 (2018).

[34]Alan Detlaff, Confronting the Racist Legacy of the American Child Welfare System: The Case for Abolition (Oxford University Press 2023); Roberts, *supra* note 3.

[35]Guggenheim, *supra* note 15.

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have no data to suggest that this is actually true. Mandated reporting has cultivated a culture of "better safe than sorry" and "just cover your own behind," way of thinking, where professionals believe that they have actually helped a family by making a report. This undermines professionals owning their responsibility to help (it's off my plate because I reported) and removes critical thinking about how to best support families from professions such as social work, medicine, and education. This form of thinking also leaves an abundance of room for racial bias, services which surveil rather than help, and leaves the most vulnerable populations fearful of seeking help. By centering impacted voices, we know entire communities, especially Black and brown families, live with a constant fear of the possibility of being reported, which is indeed statistically more likely.

At the same time, the system is overburdened with unsubstantiated or outright false reports, causing actual child abuse to go undetected.[36] Reports are made for issues such as: a child not having clean clothes, a family being unhoused, bug infestation, food insecurities, children not having beds, lack of access to medical care, truancy, lack of childcare, and even transportation issues. None of these are child abuse, and yet the family policing system subjects families to invasive investigations and is not equipped to actually help with these issues. This is why parent advocate Joyce McMillan has called for "mandatory support," decreasing the need of reporting, while bolstering actual support.[37] If a family needs food, give it to them, if the family needs transportation or childcare, give it to them. If support, rather than reporting, was mandated, the family policing system could focus on reports of actual child abuse, which would mean better help for families, and a chance of more meaningful child abuse prevention.

Investigations are harmless and determine the truth

Although it is widely known that most reports are unsubstantiated, the narrative the law tells us is that investigations are brief, necessary, and legal. This does not take into account the harm and terror an investigation causes for a family. Further, many assume that the 4th and 5th Amendments are not relevant to child protection investigations, so child protection investigators routinely enter homes, question parents and children, access confidential medical treatment and educational information – all without advising families of their rights. Texas is the only state in the nation that has passed a legal requirement, called Family Miranda, that families be advised of their rights at the start of an investigation. Because families are not aware of their rights, they often also do not have access to counsel who can counsel them on how to navigate the investigation. As a result, investigations frequently become fishing expeditions, where even if the initial allegations are untrue, the family's entire existence is excavated and analyzed, with potential horrific consequences for the family if the investigator does not like what they see. This process leaves open extraordinary room for bias, as parents are held accountable to a White, middle class, heteronormative standard, which isn't realistic or culturally appropriate for the Black and brown families who are most frequently subject to investigation. Even when the investigation is unsubstantiated, it still remains a part of the family's record; sometimes the sheer number of reports and prior investigations creates a presumption of guilt.

Foster care is necessary

A common refrain within the child welfare profession is that foster care is and will always be necessary. This refrain tacitly reinforces the notion that children's safety is in conflict with family integrity, and obscures the reality that 60% of children are removed due to neglect not abuse.[38] Because neglect is too easily conflated with poverty, this means that the vast majority of children in care are there for reasons such as inadequate housing or lack of access to necessities like child care, medical care or other supports which families need to thrive. Although the law tells us that

[36]*See* for example, Olivia Hampton, "*Deluged*" *child welfare system struggle to protect kids amid calls for reform*, NPR News (Nov. 30, 2023), *found at* https://www.npr.org/transcripts/1211781955; Mical Raz, *supra* note 13, at 55–72.
[37]Joyce McMillan, *What is Mandatory Support?*, JMacforFamilies (Aug. 24, 2023), *found at* https://www.youtube.com/watch?v=r7wgSolEC24.
[38]Child Maltreatment, *supra* note 31.

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foster care should only be used in situations of "imminent danger" where other efforts to keep the family together have been exhausted, the reality is that children are removed far too easily and with minimal effort to preserve the family – because the things that families really need like housing and childcare are not funded by the child welfare system. The notion that foster care is necessary also obscures the significant harm that removal to foster care causes children, and their parents. As Professor Shanta Trivedi has written:

> Study after study demonstrates that children also suffer complex and long-lasting harms when they are removed from their parents and placed into foster care. Yet, in most states, courts consider only whether a child is at risk of harm if she remains in her parents' care, without factoring in the harm that results from the alternative—removing that child from her home and her family.[39]

As Trivedi notes, very few states require a court to consider the harm to the child that will result from removal. As a result, in the name of child safety, the story the law tells us justifies deep and lasting traumatic harm to children.

Foster care is safe

The narrative that foster care is necessary might make more sense if foster care were in fact a source of safety for children as the law would have us believe. But the reality is that by any measure, foster care harms children. As foster care survivor Kayla McMillan has written, "No child deserves to face the educational, mental, physical and emotional abuse and neglect that is the daily experience of so many [foster] kids."[40] Studies show that the rates of physical and sexual abuse, sex trafficking, and death are much higher for children in foster care than in the general population.[41] While certain high profile cases of abuse or death in foster care get public attention,[42] the reality is that such abuse or death is far too common. Further, by literally any measure, the outcomes for children who spend time in foster care are horrific; children who spend time in care are less likely to finish high school or college, more likely to experience being unhoused, and criminal justice involvement. The lived expertise of youth who have spent time in care, and their parents tell a devastating story.

Adoption is good

Woven into the current web of law of family policing is the notion that adoption is a good and desirable outcome for children if they cannot reunify with their parents within a "reasonable" period of time. To address concerns of "foster care drift," that is, children remaining in foster care indefinitely, under the Adoption and Safe Families Act (ASFA), adoption is prioritized as a permanency outcome, second only to reunification. ASFA commands that states move to terminate parental rights, absent certain exceptions, in most situations once a child has been in care for 15 of the last

[39]Trivedi, *Harm of Removal*, *supra*, note 3 at 526.

[40]Kayla McMillan, *I survived the foster care system. Dismantling it altogether is the only path forward*, U.S.A. Today (Sept. 24, 2023), *found at* https://www.usatoday.com/story/opinion/voices/2023/09/24/foster-care-group-home-lasting-harm-kids-academics-mental-health/70863779007/.

[41]*See* Larissa MacFarquhar, *When Should a Child Be Taken From His Parents*, New Yorker. (Aug. 7, 2017) https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents; National Coalition for Child Protection Reform, Foster Care vs. Family Preservation: The Track Record on Safety and Well Being 1, https://drive.google.com/file/d/0B291mw _hLAJsV1NUVGRVUmdyb28/view [https://perma.cc/YDK9-QX48] (citing Mary I. Benedict & Susan Zuravin, Factors Associated with Child maltreatment by Family Foster Care Providers 28–30 (1992)). (citing J. William Spencer & Dean D. Knudsen, Out-of-Home Maltreatment: An Analysis of Risk in Various Settings for Children, 14 Child & Youth Servs. Rev. 485 (1992)).

[42]*See* for example, Children's Rights, *Toddler Murdered by Foster Parents 12 year old son, say police* (July 9, 2012), *found at* https://www.childrensrights.org/news-voices/toddler-murdered-by-foster-parents-12-year-old-son-say-police; Roxanna Asgarian, We Were Once A Family (2023); Ximena Conde, *Philly Removes Children from Devereux facilties after sex abuse revelations*, WHYY (Sept. 24, 2020), *found at*, https://whyy.org/articles/philly-removes-children-from-devereux-facilities-after-sex-abuse-revelations/.

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22 months. ASFA also permits states to petition to bypass reunification efforts when "aggravated circumstances" are present. The story ASFA tells is that adoption is a happy ending.

The voices of impacted families tell a different story, one that encompasses the trauma and violence that is inherent in any termination of parental rights and adoption. Termination of parental rights has been likened to the civil death penalty for children and their parents, and the finality of an adoption does not repair that harm. As former foster youth and transracial adoptee Angela Tucker writes in her book *"You Should Be Grateful" Stories of Race, Identity, and Transracial Adoption*:

> What sometimes gets forgotten or glossed over is the essential detail that I had to say goodbye to my biological family before even being given the opportunity to say hello. It meant that my birth culture was wiped away and my roots were effectively severed. But as strangers often reminded me, I should be grateful for being adopted![43]

Tucker, and many adoptees, seek recognition of the loss and trauma caused by adoption, even if they were raised in loving adoptive families.

Yet lived expertise also tells us that not all adoptions from foster care result in happy endings. As detailed in Roxanna Asgarian's important investigative book *We Were Once A Family*, there is evidence that children are abused or even murdered in foster to adoptive families. Although it is difficult to track numbers, we know anecdotally that a number of these adoptions dissolve, with children re-entering foster care, or ending up with other caregivers, including sometimes returning to the families from whom they were severed.

Further, children still remain in foster care, group homes, and congregate care long after their rights to family were terminated. Each year thousands of older youth age out of foster care as legal orphans; their legal connection to their families having been severed without an adoption ever having been accomplished. It is hard to reconcile how ending these young people's connection to any family at all sets them up for success. In short, ASFA's narrow notion of permanency is flawed at best, but ultimately legal permanency is too often a myth not a reality.

The child protection system helps families

Even acknowledging the many flaws of the family policing system, a pervasive lie continues to be that the system helps at least some families. Yet the many harms the system causes linger long after case closure. Even after a "successful reunification," as April acknowledges, her family lives with these harms every day, the impact of the trauma caused by family separation and maltreatment in care is a daily reality, not just a distant memory. So many of the losses and traumas the system causes remain unacknowledged and unaddressed, because the system celebrates legal permanency rather than relational permanency, or legal outcomes over well-being. For so many parents and children impacted by the family policing system, this results in disenfranchised grief and ambiguous loss that lasts a lifetime, no matter how many "happy endings" the system purports to celebrate.

CENTERING THE LIVED EXPERTISE OF FAMILIES IN LEGAL ADVOCACY

Meaningfully addressing the many harms caused by the family policing system requires meaningfully centering lived expertise in legal advocacy about and within the family policing system. While there is greater acknowledgement that parents and youth need to be at the table, inclusion means more than relying on impacted people to tell their stories. It requires engagement at every stage – agenda setting, strategy, and implementation. During the convening

[43]Angela Tucker, "You Should Be Grateful!" Stories of Race, Identity and Transracial Adoption (2023), at 9.

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at Hofstra, there was a clear distinction in the language used to describe the "professionals" and the individuals with "lived expertise" as two separate siloed groups. Child welfare professionals, and legal advocates in particular, must move away from reinforcing such false power dynamics in the way we gather and collaborate with families.

Answering the call to have more impacted families at the table and within organizations, requires being intentional in asking ourselves what kind of space we are asking parents, youth, and former youth to enter, and whether we are cultivating a space for them to lead and grow. As parent advocate Corey Best, one of the leaders in the movement to overcome the false narratives surrounding family policing, frequently asks: "*what kind of world do we want to live in?*" To get the answer to that question, we must ask ourselves a few more questions: *How will we avoid tokenizing parents and youth? What type of development will go into having lived experts as staff or collaborators?* And most importantly, *how are you willing to relinquish power?* Before you can be amazed by the wealth of knowledge, empathy, and vision an impacted parent or youth could bring to your advocacy efforts, there are some steps we suggest you take.

Cultivating safe space

First, cultivating a space is the foundation of achieving the true inclusion of impacted families in advocacy work. In order to collaborate effectively with parents, youth, or former youth, they will need to feel safe and that you have their backs at each stage of collaboration or work. This means setting in place intentional language and practices to ensure lived experts are not tokenized but rather treated as equals. It also means setting expectations and ground rules with staff or other participants to ensure buy-in to the ongoing work of cultivating safe space.

As you contemplate how to cultivate safe space, ask yourself:

- What are your motives bringing lived experts to the table?
- What steps are you willing take to create a safe space for all participants?
- How will you ensure lived experts have autonomy over their own narrative and their voice is heard?
- How are you being intentional about leading and facilitating the space?
- How will you create ground rules and set expectations to ensure everyone's voice is heard?

Collaborating with parents, youth, and former youth with lived expertise needs to be intentional and thoughtful in order to be generative. Otherwise, there is a risk of tokenizing. Cultivating space for such collaboration requires careful consideration of your motivation for the collaboration. The role you envision for lived experts must move beyond simple storytelling, which can be re-traumatizing, and lay the foundation for shared work together. Lived experts are more than their stories; they have important knowledge to offer. That said, lived experts must have autonomy over their own narrative, rather than be asked to work in service of a narrative not their own.

While of course one cannot control all aspects of the environment lived experts will walk into, one can set expectations and ground rules to ensure meaningful collaboration. Not only should all participants have a common understanding of what lived experts can offer, but there should be structures in place to support, and at times defend, the role and contributions of the lived experts.

Cultivating space also should include room for professional development. This is one of the cornerstones of creating a space to help amplify lived experts' knowledge and experience, while supporting them as they move through their own past trauma to have the fortitude to be able to help and lead others. Ensure the lived expert has access to and support from other lived experts in their field, even if that support needs to come from outside your organization, advocacy coalition, or meeting. At the same time, be mindful of creating a power differential, and ensure the lived expert has access to the same resources, supports, and information as other participants or employees. The lived expert should feel like an equal member of the team and not othered in any way.

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Authentically sharing power

Frequently the language of sharing power is used, while in fact dominance and control is practiced. These two things cannot co-exist at the same time. If collaboration is going to be meaningful, lived experts must be seen as equals.

As you contemplate how to authentically share power, ask yourself:

- How will you share power? What are you willing to give up?
- How will you acknowledge privilege and hold accountable individual bias?
- Who sets the agenda?
- How will decisions be made about priorities and strategy?

Being open to new ideas and new ways of doing things is essential to sharing power. Individuals with lived expertise can see things from a different perspective, and often produce common sense and effective solutions that may have been overlooked. Lawyers in particular are frequently taught to be emotionally detached from their clients, which may result in disconnecting from and othering the community. Child welfare professionals are accustomed to having power and control over the community. Recognizing these dynamics is the start to removing ego and pushing someone else up front to lead.

Putting aside ego and privilege is not an easy task, yet it is doable with intentional practice. Sharing power must start with active listening; in other words, listening to learn. Partnering with a person with lived expertise on a particular task or project may be a good place to start. Partnership will look different depending on the organization or project's mission. Partnership is relational and helps put both parties on equal footing. In the ecosystem of partnership, everyone has a place and every place is important to help the common goal. For example, in writing this essay together, the authors, a lawyer, and lived expert, have been able to advance a shared goal of illuminating the false narratives embedded into the family policing system which are decimating communities, and promoting the value of collaborative advocacy with lived experts to address these harms. In doing so, we have each learned a lot from each other, and have forged trust which will carry into other shared advocacy projects.

Creating a unified vision

To bring together "cultivating space" and "sharing power," the next step is to create a unified vision. Creating a shared mission, vision, or goal requires intentional strategic planning. Strategic planning should go beyond a simple strength/weaknesses/opportunities/threats (SWOT) analysis and should include brainstorming and collective planning surrounding advocacy, policies, system connections, and professional development.

As you contemplate how to create a unified vision, ask yourself:

- Is your vision or mission truly collaborative?
- How will you ensure all participants weigh in not just on vision but strategy?
- To the extent your legal advocacy is on behalf of a client, how will you balance your professional responsibilities with this collaborative model?
- To the extent you are engaged in systemic advocacy, how do you ensure lived experts' voices are leading at each stage of the work?

Setting forth a clear unified vision or mission is critical to meaningful collaboration on legal advocacy. This helps remove misunderstandings due to power dynamics or personality differences. Everyone who will be needed to carry

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out the mission or goal should be included in the planning process, whether this means staff within an organization, or members of a coalition or committee. Many of the false narratives which pervade the law and policy of the family policing system persist because families and communities have not been consulted, let alone had the autonomy to determine the solutions. It is important not to recreate the same harms by excluding lived experts from strategic planning. Collaborating with lived experts in setting a unified vision or mission helps ensure the goals and action steps you develop do not create unintended harms.

Leading the way forward

Opportunities to collaborate between lawyers and lived experts should not start once lawyers are already in practice. Nor should collaborations between other child welfare professionals and lived experts wait until their education is complete. The two of us coming together to produce a piece of legal scholarship is part of the way forward. We also must change the way we educate professionals, especially lawyers, to understand not just the intended impact of the law but its actual impact. This can be done by asking students to sit with the lived expertise as they learn their profession, not only so they will learn to think critically about law and policy, but so they will see lived experts – the very families meant to be "helped" – as important partners in leading the way forward. This should be the model for all lawyers and other child welfare professionals.

As you contemplate how to lead the way forward, ask yourself:

- Am I using my privilege to create platforms for and with those with lived expertise?
- How will I continue to collaborate when differences arise on vision, goals and strategies?
- How will I continue to engage with and evolve anti-racist practices within my advocacy work?

The recognition of lived experts as professionals and leaders is the way forward to meaningfully valuing families and creating radical change within the family policing system. We must create action steps to ensure communication, development, and intentional placement of people with lived expertise in positions of leadership in any and all advocacy efforts concerning the family policing system. It is essential for legal advocates to acknowledge that anti-racism is an action word, meant to counter systemic racism and oppression. Alleviating the oppression and systemic racism endemic to the family policing system requires radical change, and that radical change will come from those who understand the harms of the system firsthand – the families themselves. By policing or siloing lived expertise, we are doubling down and holding up the very system we are meant to change. As Desmond Tutu wrote, "If you are neutral in situations of injustice, you have chosen the side of the oppressor."

CONCLUSION

Centering families' voices and perspectives is the only path forward for radical change for families. If we are serious about reversing the devastating harms of the family policing system, and actually helping families, we must be serious about meaningful collaboration with the most impacted families in every aspect of advocacy, from individual representation to systemic change. Through such collaboration, we can resist explicit and implicit attachment to false narratives, and not only form a cogent vision for true safety for families and communities, but to realize this vision.

ACKNOWLEDGMENTS

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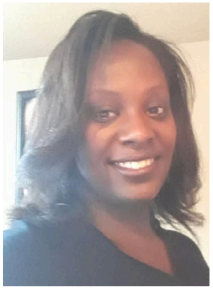

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Croft v. Westmoreland County Children & Youth Servs.

United States Court of Appeals for the Third Circuit

June 28, 1996, Argued ; January 6, 1997, Filed

No. 95-3528

Reporter
103 F.3d 1123 *; 1997 U.S. App. LEXIS 113 **

HENRY L. CROFT, JR.; CAROL CROFT, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF CHYNNA CROFT, A MINOR, Appellants v. WESTMORELAND COUNTY CHILDREN AND YOUTH SERVICES; WESTMORELAND COUNTY; CARLA DANOVSKY, Appellees

Prior History: [1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. (D.C. Civ. No. 93-00995).

Disposition: Reversed and remanded.

Core Terms

sexual abuse, anonymous tip, daughter, liberty interest, interviews, reasonable suspicion, summary judgment, naked, reasonable ground, family unit, informant, removing, slept

Case Summary

Procedural Posture
Plaintiffs, mother and father, sought review of an order by the United States District Court for the Western District of Pennsylvania which granted summary judgment to defendants, county youth services and an investigator, relative to plaintiffs' cause of action alleging that defendants had impermissibly interfered with their U.S. Const. amend. XIV liberty interest in the companionship of their daughter.

Overview
Defendants, county youth services and an investigator, received an anonymous phone call regarding the possible sexual abuse of a child by plaintiffs, mother and father. Plaintiff father was ordered out of the home based on this anonymous tip. Plaintiffs filed a complaint alleging that defendants had impermissibly interfered with their U.S. Const. amend. XIV liberty interest in the companionship of their daughter. The court reversed the district court's entry of summary judgment because defendant investigator abused her government power in ordering plaintiff father from the house based on her lack of an opinion regarding whether sexual abuse had actually occurred. The court found that defendant investigator lacked objectively reasonable grounds to believe that the child had been sexually abused. The court found that plaintiffs confirmed that an incident bearing only the barest resemblance to the anonymous tip had happened and plaintiffs' statements raised serious questions about the veracity of the informant. Furthermore, defendant investigator testified that she did not have enough information to make a determination and further investigation was required.

Outcome
District court's entry of summary judgment in favor of defendants, county youth services and an investigator, was reversed because the court found that defendant investigator's conduct was an arbitrary abuse of government power when she ordered plaintiff father removed from the house with objectively reasonable grounds to support this decision.

LexisNexis® Headnotes

Family Law > Family Protection & Welfare > Children > General Overview

HN1[] **Family Protection & Welfare, Children**

Liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children particularly where the children need to be protected from their own parents.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due Process > General Overview

Constitutional Law > Substantive Due Process > Scope

HN2[] **Fundamental Rights, Procedural Due Process**

The Due Process Clause of the U.S. Const. amend. XIV prohibits the government from interfering in familial relationships unless the government adheres to the requirements of procedural and substantive due process.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Criminal Law & Procedure > ... > Children & Minors > Child Abuse > Elements

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > Substantive Due Process > Scope

HN3[] **Privacy, Personal Decisions**

The court must balance the fundamental liberty interests of the family unit with the compelling interests of the state in protecting children from abuse.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Criminal Law & Procedure > ... > Children & Minors > Child Abuse > Elements

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

Constitutional Law > Substantive Due Process > Privacy > General Overview

Family Law > Family Protection & Welfare > General Overview

Family Law > Family Protection & Welfare > Children > General Overview

HN4[] **Privacy, Personal Decisions**

A state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.

Criminal Law & Procedure > ... > Warrantless Searches > Stop & Frisk > General Overview

Family Law > Family Protection & Welfare > Children > General Overview

HN5[] **Warrantless Searches, Stop & Frisk**

An anonymous tip may justify investigation but will not provide reasonable grounds for removal of a family member absent independent, articulable criteria of reliability; and certainly not when all evidence is to the contrary.

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Family Law > Family Protection & Welfare > Children > General Overview

Criminal Law & Procedure > ... > Sex Crimes > Sexual Assault > General Overview

HN6[] **Sexual Assault, Abuse of Children**

Minor inconsistencies, which provide no affirmative evidence of sexual abuse, cannot alone establish the objectively reasonable grounds necessary to remove a family member from the family unit.

Counsel: Alexander H. Lindsay, Jr., Lindsay, Lutz, Jackson, Pawk & McKay, 408 North Main Street, Butler, Pa. 16001. Susan S. Jackson (Argued), Lindsay, Lutz, Jackson, Pawk & McKay, 408 North Main Street, Butler, Pa. 16001, Counsel for Appellants.

Sherry L. Halfhill (Argued), Burns, White & Hickton, 120 Fifth Avenue, Suite 2400, Pittsburgh, Pa. 15222, Counsel for Appellee Westmoreland County Children and Youth Services and Appellee Carla Danovsky.

David J. Singley (Argued), Israel, Wood & Puntil, 310 Grant Street, Suite 501, Pittsburgh, Pa. 15219, Counsel for Appellee County of Westmoreland.

Judges: Before: BECKER, NYGAARD AND LEWIS, Circuit Judges.

Opinion by: NYGAARD

Opinion

[*1124] OPINION OF THE COURT

NYGAARD, Circuit Judge.

Plaintiffs-Appellants, Dr. Henry L. Croft, Jr., and Carol Croft, individually and as parents and natural guardians of Chynna Croft, appeal an order of the district court granting summary judgment for defendants-appellees, Carla Danovsky, Westmoreland County Children and Youth Services, and Westmoreland County. We will reverse **[**2]** and remand.

I.

On February 1, 1993, Gerald Sopko, Assistant Director of the Westmoreland County Children's Bureau received a call from Childline, informing him that Dr. Croft was sexually abusing his daughter, Chynna. Sopko was further told that the child slept with her parents and that she had recently been out of the house naked, walked to a neighbor's house, knocked on the door, and told the neighbors that she was "sleeping with mommy and daddy."

Barbara Jollie, Program Director for the Assessment Department of the Westmoreland County Children's Bureau, assigned the matter to Carla Danovsky for investigation. Danovsky, accompanied by State Police Trooper Griffin, went to the Croft home that night. Danovsky told Dr. Croft she was investigating him for possible sexual abuse of his daughter based on the Childline report. Dr. Croft consented to be interviewed.

Dr. Croft explained that Chynna had indeed, in April of 1992, left her bed without waking her parents, gone downstairs and outside, and locked herself out of the house. She then went to the house of her babysitter/nanny, a short distance from the Croft home, wearing her pajama top and holding her pajama bottoms with a soiled **[**3]** diaper inside. He further provided Danovsky with the telephone number of the nanny who could verify his version of events.

Dr. Croft agreed that his daughter had seen him naked and that, in fact, the family vacationed in the French West Indies where nude beaches are routine. Dr. Croft stated that his wife sunbathed nude around Chynna. He explained that Chynna suffered from seizures and, although she regularly slept in her parents' bed so they could be nearby if necessary, she slept naked only rarely. Henry and Carol Croft slept clothed. Dr. Croft told Danovsky that he had applied medicinal creams to her vaginal area when she had a rash. He denied sexually abusing Chynna.

Danovsky gave Dr. Croft an ultimatum: unless he left his home and separated himself from his daughter until the investigation was complete, she would take Chynna physically from the home that night and place her in foster care. Dr. Croft then left the room and Danovsky interviewed Carol Croft while Chynna sat in her lap. Carol Croft confirmed Dr. Croft's version of the April 1992 incident when Chynna locked herself out of the house. Finally, Danovsky questioned Chynna, who also confirmed Dr. Croft's version of the **[**4]** lock-out incident. Chynna provided no indication that she had ever been sexually abused. Danovsky then reiterated her ultimatum, that unless Dr. Croft immediately **[*1125]** left his home and had no contact with his daughter, Danovsky would remove Chynna from the home that very night and place her in foster care. Faced with this dilemma, Dr. Croft complied with her ultimatum, and left his home, wife and daughter. [1]

Danovsky testified to some inconsistencies between the statements of the Croft parents. She testified that Carol Croft said that Chynna never saw Henry Croft swimming naked, and that she sunbathed topless but not totally nude. One of the parents informed Danovsky that Chynna **[**5]** never slept naked in their bed, while the other said she was not clothed all the time. In sum, however, the differences were insignificant and reasonable under the circumstances. Danovsky also testified that, pursuant to County policy, a parent accused of sexual abuse must prove beyond any certainty that there was no sexual abuse before she would be permitted to leave a child with his or her parents. She further testified that if a County caseworker does not know whether or not the allegation is true, the child will be separated from the alleged perpetrator. Danovsky also testified that at the conclusion of her interview with the Crofts, she was uncertain whether any sexual abuse had occurred.

The Crofts filed a complaint in the federal district court against Westmoreland County Children and Youth Services (WCCYS), Carla Danovsky and Westmoreland County. They alleged that the defendants had impermissibly interfered with their Fourteenth Amendment liberty interest in the companionship of their daughter.

Defendants filed motions to dismiss the complaint, which, since discovery had been completed, were considered as motions for summary judgment. They argued that defendant Danovsky **[**6]** was entitled to qualified immunity for her actions and that the county and WCCYS enjoyed municipal immunity from the charges. The court entered summary judgment against the Crofts on

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[1] Defendants repeatedly have characterized Dr. Croft's decision to leave as "voluntary." This notion we explicitly reject. The threat that unless Dr. Croft left his home, the state would take his four-year-old daughter and place her in foster care was blatantly coercive. The attempt to color his decision in this light is not well taken.

all three counts, asserting that the Crofts would impermissibly have the court elevate their right to freedom of intimate association above Defendants' obligation to protect children. The Crofts timely appealed. [2]

II.

We recognize the constitutionally protected liberty interests that parents have in the custody, care and management of their children. See Lehr v. Robertson, 463 U.S. 248, 258, 103 S. Ct. 2985, 2991-92, 77 L. Ed. 2d 614 (1983); Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir. 1987). We also recognize that this interest is not absolute. Martinez v. Mafchir, 35 F.3d 1486, **[**7]** 1490 (10th Cir. 1994); Myers, 810 F.2d at 1462. Indeed, this ***HN1***[] liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children __ particularly where the children need to be protected from their own parents. See Myers, 810 F.2d at 1462. The right to familial integrity, in other words, does not include a right to remain free from child abuse investigations. Watterson v. Page, 987 F.2d 1, 8 (1st Cir. 1993).

HN2[] The Due Process Clause of the Fourteenth Amendment prohibits the government from interfering in familial relationships unless the government adheres to the requirements of procedural and substantive due process. [3] In determining whether the Crofts' constitutionally protected interests were violated, ***HN3***[] we must balance the fundamental liberty interests of the family unit with the compelling interests of the state in protecting children from abuse. Whatever disruption or disintegration of family life the Croft's may have suffered as a result of the county's child abuse investigation does not, in **[*1126]** and of itself, constitute a constitutional deprivation. Watterson, 987 F.2d at 8; see also Frazier v. Bailey, **[**8]** 957 F.2d 920, 931 (1st Cir. 1992).

We realize there may be cases in which a child services bureau may be justified in removing either a child or parent from the home, even where later investigation proves no abuse occurred. However, ***HN4***[] a state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse. See Lehr, 103 S. Ct. at 2990 (declaring liberty interests in preserving the family unit "are sufficiently vital to merit constitutional protection in appropriate cases") (emphasis added); accord Myers, 810 F.2d at 1462-63 (noting parental liberty interest in maintaining integrity of family unit is not a clearly established right where there **[**9]** is a "reasonable suspicion" abuse may have occurred).

Our focus here is whether the information available to the defendants at the time would have created an objectively reasonable suspicion of abuse justifying the degree of interference with the Crofts' rights as Chynna's parents. [4] Absent such reasonable grounds, governmental intrusions of this type are arbitrary abuses of power. See Gottlieb v. County of Orange, 84 F.3d 511, 517 (2d Cir. 1996) (finding no due process violation for removing child where child welfare workers possess objectively reasonable basis for believing parental custody represents a threat to child's health or safety); Thomason v. SCAN Volunteer Services, Inc., 85 F.3d 1365, 1371 (8th Cir. 1996) (holding child care worker entitled to qualified immunity in § 1983 action where he or she removes child on reasonable suspicion of child abuse); cf. 42 Pa. Cons. Stat. § 6324 and 23 Pa. Cons. Stat. § 6315 (providing for removing child from home only where there are reasonable grounds to believe the child suffers from injury, or is in imminent danger of injury from her surroundings); Myers, 810 F.2d at 1462-63 (noting parental liberty interest in **[**10]** maintaining integrity of family unit is not a clearly established right where there is a "reasonable suspicion" that abuse may have occurred).

Before the interviews, Danovsky possessed a six-fold hearsay report by an anonymous informant stating that the mother had told a friend that Dr. Croft had abused Chynna and that Chynna had recently been put out of the house naked, walked several miles, was found by a neighbor, and said she was sleeping with her parents. [5]

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[2] We note that the Crofts are appealing the district court's order with respect only to the County and the WCCYS, not as to Carla Danovsky. Furthermore, the Crofts are only appealing the district court's determination of their substantive due process issues.

[3] We note here only that the policy of removing the suspected parent from the family home during the pendency of child abuse investigations absent any procedural safeguards raises a procedural due process issue.

[4] This proposition is most often raised against government action that threatens to remove a child from his or her home. Nonetheless, we can discern no rational distinction which would entitle governments to order parents from their homes and arbitrarily separate parents from their children; or to deprive children of their liberty interests in continued companionship with their parents.

[11]** Dr. Croft confirmed that an incident bearing only the barest resemblance to the anonymous tip had happened. Far from corroborating the anonymous tip, the Crofts' statements raised serious questions about the veracity of the informant. ***HN5***[] An anonymous tip may justify investigation but will not provide reasonable grounds for removal of a family member absent independent, articulable criteria of reliability; and certainly not when all evidence is to the contrary. Cf. Alabama v. White, 496 U.S. 325, 328, 110 S. Ct. 2412, 2415, 110 L. Ed. 2d 301 (1990) (anonymous tip, absent sufficient indicia of reliability, will not support reasonable suspicion necessary to justify stop-and-frisk); United States v. Roberson, 90 F.3d 75, 78 (3d Cir. 1996) (anonymous tip that only contains information readily observable at the time the tip is made does not supply reasonable suspicion to stop).

[*1127] Danovsky was entitled to view the statements of an alleged perpetrator skeptically. She was not, however, entitled to rely on the unknown credibility of an anonymous informant unless she could corroborate the information through other sources which would have reduced the chance that the informant was recklessly relating incorrect **[**12]** information or had purposely distorted information. See Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 2331, 76 L. Ed. 2d 527 (1983) (anonymous tip, without other indicia of reliability, does not establish probable cause for search warrant).

Danovsky, in her deposition testimony, pointed to what she called "red flags" -- statements given during the interviews which raised questions in her mind about whether the tip was true -- as further justification for forcing Henry Croft from his home. The red flags cited by Defendants are incapable of providing the necessary reasonable grounds. For example, at one point during the interview, Dr. Croft told Danovsky that he had applied vaginal creams to Chynna when she had a rash, which Danovsky interpreted to mean that he regularly gave his daughter vaginal exams. Likewise, Danovsky's reliance on supposed inconsistencies between the statements of Carol and Dr. Croft is without foundation. None of the cited inconsistencies is evidence of child sexual abuse, nor did any of the statements in any way confirm the allegations of the anonymous tip. Even considered together, ***HN6***[] minor inconsistencies which provide no affirmative evidence of sexual abuse cannot alone **[**13]** establish the objectively reasonable grounds necessary to remove a family member from the family unit.

Most damaging to Defendants is Danovsky's deposition testimony that, after the interviews, she had no opinion one way or the other whether sexual abuse had occurred. Alternatively, Danovsky testified that she did not have enough information to make a determination and that further investigation was required. Under either statement, Danovsky did not have reasonable grounds, to any degree of certainty, that Chynna was sexually abused or was in imminent danger of abuse. She possessed no evidence of abuse beyond an anonymous tip. Danovsky had no physical evidence of sexual abuse with which to base an opinion. She was merely presented with an anonymous tip relating an incident which was reasonably explained by the accused parents. Record evidence establishes that Danovsky lacked any objective evidence of sexual abuse, and, indeed, that she had no belief that such abuse had occurred.

Considered in light of the circumstances surrounding the ultimatum, Danovsky's conduct was an arbitrary abuse of government power. Based on her lack of an opinion regarding whether sexual abuse had occurred, **[**14]** we hold that she lacked objectively reasonable grounds to believe the child had been sexually abused or was in imminent danger of sexual abuse. Combined with the total absence of objective evidence which would support a belief that sexual abuse had occurred, we hold that Danovsky's conduct will certainly not support the grant of summary judgment in the Defendants' favor. Because the Crofts did not cross-file for summary judgment, we, sitting as a court of review, must remand the cause to the district court for further proceedings. [6]

III.

We will reverse the district court's entry of summary judgment. [7]

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[5] The anonymous tip reported that "The mother told a friend. . ." of sexual abuse. Subsequently, the information went from the informant, to Childline, to Gerald Sopko, to Barbara Jollie, to Danovsky. We recognize that child abuse will often be reported anonymously. We additionally realize that such hearsay may often be the only available evidence to alert the child abuse investigators. Anonymous informants, such as those who report suspected abuse on the Childline, are undoubtedly important in policing "invisible crimes" like child sexual abuse.

[6] While Judge Becker joins in the preceding portions of the opinion, he is not prepared at this juncture to hold that Danovsky's conduct violated the Crofts' constitutional rights, or that, on remand, the Crofts are entitled to an automatic summary judgment on their claims, as the majority opinion seems to suggest.

[15]** Costs will be taxed against the Appellee.

End of Document

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[7] The Crofts have also raised questions of fact, *inter alia*, whether an unconstitutional custom or policy existed; whether the relevant final policy makers for WCCYS and the County consciously or deliberately enacted, or acquiesced in, the custom or policy at issue; and, whether the custom or policy caused the violation of the Crofts' constitutional rights.

Caution
As of: December 2, 2024 3:00 PM Z

Isbell v. Bellino

United States District Court for the Middle District of Pennsylvania

August 27, 2013, Decided

No. 4:12-CV-0043

Reporter
962 F. Supp. 2d 738 *; 2013 U.S. Dist. LEXIS 121868 **; 2013 WL 4516475

AMIR A. ISBELL, BERGINA BRICKHOUSE ISBELL, M.D., J.B., and A.I., Plaintiffs, v. PAUL J. BELLINO, M.D., THOMAS W. WILSON, M.D., GEISINGER MEDICAL CENTER, CRAIG PATTERSON, RACHEL WADE, JULIE SPENCER, and MONTOUR COUNTY, Defendants.

Prior History: Isbell v. Bellino, 983 F. Supp. 2d 492, 2012 U.S. Dist. LEXIS 189134 (M.D. Pa., 2012)

Core Terms

safety plan, Plaintiffs', summary judgment, rights, Defendants', procedural due process, family services, damages, notice, procedural safeguards, procedural protections, implemented, train, deprivation, custody, constitutional right, family home, municipality, individual defendant, parental rights, employees, qualified immunity, letters, summary judgment motion, unsupervised contact, failure to train, notice of rights, procedural due process claim, suspected child abuse, punitive damages

Case Summary

Overview
ISSUE: Whether procedural protections under the Fourteenth Amendment were due parents when defendants implemented a voluntary safety plan that removed the father from his family home for an extended period of time following a report of suspected child abuse, and, if so, whether the requisite due process was provided. HOLDINGS: [1]-Once a safety plan was implemented, a parent was entitled to some level of procedural protection in order to challenge the alteration of parental rights, and such opportunities had to be provided in a meaningful and timely manner after the deprivation; [2]-Defendants failed to offer any pre- or post-deprivation protections to the parents in connection with the safety plan; [3]-County was liable for an unconstitutional policy and practice of failing to provide procedural due process notices, and for failing to train employees with regard to voluntary safety plans.

Outcome
Motions granted in part and denied in part.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if the record establishes that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. The movant meets this burden by pointing to an absence of evidence supporting an essential element as to which the non-moving party will bear the burden of proof at trial. Once the moving party meets its burden, the burden then shifts to the non-moving party to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e)(2). An issue is "genuine" only if there is a sufficient evidentiary basis for a reasonable jury to find for the non-moving party, and a factual dispute is "material" only if it might affect the outcome of the action under the governing law.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN2[] **Summary Judgment, Evidentiary Considerations**

In opposing summary judgment, the non-moving party may not rely merely on allegations of denials in its own pleadings; rather, its response must set out specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56(e)(2). The non-moving party cannot rely on unsupported allegations, but must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial. Arguments made in briefs are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion. However, the facts and all reasonable inferences drawn therefrom must be viewed in the light most favorable to the non- moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences that a fact finder could draw therefrom. Still, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; there must be a genuine issue of material fact to preclude summary judgment.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Family Law > Parental Duties & Rights > General Overview

Family Law > Family Protection & Welfare > Children > Proceedings

Family Law > ... > Termination of Rights > Involuntary Termination > Procedure

HN4[] **Procedural Due Process, Scope of Protection**

Procedural due process requires rigorous adherence to procedural safeguards anytime the state seeks to alter, terminate, or suspend a parent's right to the care, custody, and management of his or her children. The policy of removing the suspected parent from the home during the pendency of child abuse investigations absent any procedural safeguards raises a procedural due process issue.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Family Law > Parental Duties & Rights > General Overview

Family Law > Family Protection & Welfare > Children > Proceedings

HN5[] **Procedural Due Process, Scope of Protection**

The Fourteenth Amendment requires county agencies to establish procedural safeguards when ordering the removal of a parent from the family home.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

HN6[] **Local Officials, Individual Capacity**

The doctrine of qualified immunity shields officials acting and sued in their individual capacities. A state actor sued in his individual capacity enjoys qualified immunity if his conduct does not violate clearly established or constitutional rights of which a reasonable person would have known.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Family Law > Parental Duties & Rights > General Overview

Family Law > ... > Termination of Rights > Involuntary Termination > Procedure

HN7[] **Local Officials, Individual Capacity**

"Clearly established rights" are those with contours sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is, there must be sufficient precedent at the time of the action to put the defendant on notice that his or her conduct is constitutionally prohibited. It has long been established that the procedural component of procedural due process requires rigorous adherence to procedural safeguards anytime the state seeks to alter, terminate, or suspend a parent's right to the care, custody and management of his children. However, the Supreme Court has often emphasized that the inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

Family Law > Parental Duties & Rights > General Overview

Family Law > Family Protection & Welfare > Children > Proceedings

HN8[] **Local Officials, Individual Capacity**

For purposes of qualified immunity, the right to procedural due process protections when a county agency seeks to remove a parent from the family home is clearly established in the Third Circuit.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Family Law > Parental Duties & Rights > General Overview

Family Law > Family Protection & Welfare > Children > Proceedings

HN9[] **Local Officials, Individual Capacity**

For purposes of qualified immunity, the right to due process when a parent is removed from the family home is a clearly established right protected by the Fourteenth Amendment.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Family Law > Parental Duties & Rights > General Overview

HN10[] **Fundamental Rights, Procedural Due Process**

An otherwise viable procedural due process claim does not fail merely by lack of actual damages. If nothing else, the violation of a parent's right to procedural due process would be a basis for awarding nominal damages. The denial of procedural due process should be actionable for nominal damages without proof of actual injury. Thus, a procedural due process violation, once established, entitles a plaintiff to, at minimum, nominal damages in recognition of the violation of his or her constitutional right.

Civil Rights Law > Protection of Rights > Immunity From Liability > Respondeat Superior Distinguished

HN11[] **Immunity From Liability, Respondeat Superior Distinguished**

In order for a plaintiff to succeed on a 42 U.S.C.S. § 1983 claim against an individual defendant, the evidence must establish that the defendant was personally involved in the constitutional violation. Indeed, liability cannot be predicated on a theory of respondeat superior and the plaintiff must establish that the defendant participated in violating the plaintiff's rights, directed others to violate them, or, in the case of a person in charge, had knowledge of and acquiesced in his subordinates' violations. Thus, in order for a defendant to be subject to § 1983 liability, the plaintiff must establish that he or she participated in or encouraged the constitutional violation at issue. Any defendant in a § 1983 civil rights action must have personal involvement in the alleged wrongs.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

HN12[] **Local Officials, Customs & Policies**

In Monell, the Supreme Court established the standard for a 42 U.S.C.S. § 1983 claim for municipal liability and outlined stringent pleading requirements which must be met before a municipality can be held liable for the conduct of those in its employ. The Court held that local governing bodies can be subject to § 1983 liability when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy,

inflicts the constitutional injury. Municipal liability can also be premised on a failure to train theory, where an established and pervasive failure to train employees is the cause of the plaintiff's constitutional deprivation.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Deliberate Indifference

HN13[] **Local Officials, Deliberate Indifference**

A plaintiff must demonstrate deliberate indifference on the part of the municipality or its officer in order to establish failure to train liability. Such deliberate indifference requires a showing that (1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice; and (3) the wrong choice by an employee will frequently cause a deprivation of constitutional rights. Typically, in the context of a failure to train claim, Monell and its progeny require some showing by the plaintiff that a specific, alternative training exists which would have reduced the risk of a constitutional violation.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

HN14[] **Local Officials, Customs & Policies**

In order to succeed on a claim against a municipality for an unconstitutional custom or policy, a plaintiff must establish that the widespread execution of the government's policy, either formally or informally, caused the plaintiff's constitutional injury. In other words, a plaintiff must establish that the county or municipality is responsible for either enacting, implementing or widespreadly engaging in a practice which constitutes or causes a constitutional violation. There must be sufficient evidence from which a jury could conclude that the municipality was the "moving force" behind the injury suffered by the plaintiff.

Civil Procedure > Remedies > Damages > Punitive Damages

HN15[] **Damages, Punitive Damages**

The purpose of punitive damages is to punish a defendant for his willful or malicious conduct and to deter others from similar behavior; for that reason, such damages are available only on a showing of the requisite intent. Indeed, punitive damages will only be awarded where a plaintiff has established to the satisfaction of a jury that the defendant's conduct was either motivated by evil motive or intent or involved reckless or callous indifference to the federally protected rights of others.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Family Law > Parental Duties & Rights > General Overview

Family Law > Family Protection & Welfare > Children > Proceedings

HN16[] **Procedural Due Process, Scope of Protection**

Once a safety plan is implemented, a parent is entitled to some level of procedural protection in order to challenge the alteration of their parental rights, and such opportunities must be provided in a meaningful and timely manner after the deprivation.

Counsel: [1]** For Amir A Isbell, J.B., A Minor, A.I., A Minor, Bergina Brickhouse Isbell, M.D., Plaintiffs: Mark D. Freeman, Mark D. Freeman, Esq., Media, PA.

For Craig Patterson, Rachel Wade, Julie Spencer, Montour County, Defendants: David L. Schwalm, Thomas, Thomas & Hafer, LLP, Harrisburg, PA.

Judges: Hon. John E. Jones III, United States District Judge.

Opinion by: John E. Jones III

Opinion

[*740] MEMORANDUM & ORDER

Presently pending before the Court are the motion for summary judgment of **[*741]** Plaintiffs Amir A. Isbell, Bergina Brickhouse Isbell, and their minor children J.B. and A.I. (doc. 53) and the motion for summary judgment of Defendants Craig Patterson, Rachel Wade, Julie Spencer, and Montour County (doc. 58), each of which has been fully briefed. After considered review of the submissions, we will grant in part and deny in part the said motions, as more fully set forth below.

I. FACTUAL & PROCEDURAL BACKGROUND

Plaintiffs Amir Isbell ("Mr. Isbell") and Plaintiff Bergina Brickhouse-Isbell, M.D. ("Mrs. Isbell") are husband and wife and are the natural parents of minor Plaintiff A.I. ("A.I."), born in 2009. Mrs. Isbell is also the natural parent of minor Plaintiff J.B. ("J.B."), born in 2002. (Doc. 55, ¶ 1). At all times relevant to **[**2]** this case, Defendants Rachel Wade and Julie Spencer were employed as caseworkers with Montour County Children & Youth Services ("CYS"), an agency of Defendant Montour County (the "County") and Defendant Craig Patterson was employed as the Executive Director for CYS. (*Id.* ¶¶ 5, 7-8).

On January 7, 2010, Mrs. Isbell brought A.I. to Geisinger Medical Center for what she perceived as increasing somnolence and dehydration. (*Id.* ¶ 9). After an examination, the doctors diagnosed A.I. with several rib fractures and head trauma; concerned that the trauma was non-accidental, medical center staff filed a report of suspected child abuse with CYS in the early morning hours of January 8, 2010. (Doc. 55, ¶ 12; doc. 59, ¶¶ 6-7). The report noted that "the child is in serious & critical condition due to concern for non-accidental trauma." (Doc. 59, ¶ 7). Defendant Rachel Wade, a caseworker then employed by CYS, was on call and received the report from Childline. (*Id.* ¶ 8-10; doc. 55, ¶ 12).

At approximately 5:30 a.m. on January 8, Defendant Wade met with Mr. and Mrs. Isbell and A.I. at the medical center but did not at that time discuss the possibility of altered custody arrangements, safety plans, or **[**3]** family plans. (Doc. 55, ¶ 14). Later, at approximately 3:00 p.m., Defendant Wade returned to the medical center and told the Isbells that "safety plans are standard procedure" when CYS receives a report of suspected child abuse; Defendant Wade then had Mr. and Mrs. Isbell and A.I.'s maternal grandmother sign a safety plan which prohibited either of the Isbells from having unsupervised contact with either A.I. or J.B. (*Id.* ¶¶ 22, 25-26). Consistent with CYS policy, if the Isbells did not agree to the terms of the safety plan modifying their custodial rights, CYS would file a petition with the juvenile court for emergency protective custody of A.I. (*Id.* ¶ 26). This safety plan remained in effect until A.I. was released from the hospital.

Also on January 8, 2010, CYS issued letters to Mr. and Mrs. Isbell which advised them of their rights with regard to the Childline report. The letters, which the Defendants contend satisfy the constitutional requirements of procedural due process, contained identical language, in pertinent part as follows:

> The Child Protective Services Law, (Acts 124, 136, 42, 33, 80, 151 and 10) and Department of Public Welfare Regulations require the County Children **[**4]** and Youth Agency to notify all subjects in a report of suspected child abuse about the existence of the report, their legal rights, the possible impact of a confirmed report on future employment and the social services available to protect children.

A report of suspected child abuse concerning the above named child has been made to our agency and the Pennsylvania **[*742]** Department of Public Welfare. Under the law, our agency must conduct an investigation to determine whether or not the child was abused. Also, we are required by law to report certain types of suspected abuse to the police.
According to the report (list the type of suspected abuse and the nature and extent of the allegations): It is alleged that [A.I.] was physically abused.

You are named as alleged perpetrator.

You are not named as alleged perpetrator. (X)

The agency is required to complete the investigation within 60 days after the report is received and determine if the report is "unfounded," "indicated," or "founded." An unfounded report is any report in which there is no evidence of child abuse as defined by the law. An indicated report is a report in which the County agency determines that the child was abused. A founded report **[**5]** is a report in which a court determines that the child was abused. You will be notified in writing of the results of the investigation.
As a subject of the report, you may receive a copy of the report by writing to this agency or the ChildLine and Abuse Registry. . . The name of the person who made the report or any person who cooperated in the investigation may not be released except by the Secretary of Public Welfare upon written request. . . .
If the report is determined to be unfounded, the report will be expunged in one year and 120 days from the date the report was received by the Department. However, if the investigation reveals that the child and family need social services provided by or arranged by our agency, records will be retained and indicate that the report of suspected child abuse was unfounded.

If the report is determined to be indicated, the information will be kept on file until the child reaches his/her 23rd birthday. The person responsible for the abuse may request that the report be amended or expunged if he or she feels the report is not accurate. Such requests must be made to the Secretary of Public Welfare within 45 days after being notified that the report is **[**6]** indicated.
If the case goes to Juvenile Court, you have the right to have an attorney, introduce evidence and cross-examine witnesses.
A person responsible for abuse in a founded report may not be employed in any child care service, public or private school or be a foster or adoptive parent within five (5) years of when the abuse was committed.
A person convicted of any of the crimes listed in Section 6344 of the CPSL may never be employed in any child care service, public or private school or be a foster or adoptive parent.
The goal of our agency is to protect children from harm and keep them in their own homes. To help parents and other care givers to keep children in their own homes, our agency provides or arranges for social services for the child and family.
(Doc. 58-3, Ex. 8-9).

On January 22, 2010, in anticipation of A.I.'s release from the hospital, a new safety plan, prepared by Defendant Patterson, was presented to Mr. and Mrs. Isbell by Defendant Wade; the new plan provided that Mr. Isbell must move out of the residence, prohibited any unsupervised contact between the Isbells and their children, and required that all of Mr. Isbell's contact with A.I. be supervised by CYS. (Doc. **[**7]** 55, ¶ 37). That safety plan again warned that noncompliance with CYS directives **[*743]** would result in CYS petitioning the court for custody of the children. (*Id.*). Prior to the Isbells signing the January 22 safety plan, it was discussed with and reviewed by their counsel. (Doc. 59, ¶ 19). Also on January 22, 2010, felony and misdemeanor criminal charges arising from this incident were filed against Mr. Isbell, who was arraigned on January 27, 2010. His bail was conditioned on total compliance with CYS guidelines and directives. (Doc. 55, ¶ 40).

On February 12, 2010, an indicated report of abuse was made with respect to Mr. Isbell. The indicated report was signed by Defendant Wade. (Doc. 58-3, Ex. 15; Doc. 55, ¶ 45). At some point thereafter, although the record is unclear as to the specific date, Defendant Spencer assumed responsibility for the Isbell case, inheriting it from Defendant Wade. (Doc. 59, ¶ 30). On February 16, 2010, the Isbells signed a new safety plan which permitted Mrs. Isbell to have unsupervised contact with her children but further restricted Mr. Isbell's contact, permitting only supervised visits which occurred at the CYS agency office. (*Id.* ¶ 47). On February 17, 2010, **[**8]** Defendant Spencer issued a letter to Mr. and Mrs. Isbell which indicated that she believed that the family would benefit from "ongoing General Protective Services (GPS)" in the area of "Parenting Needs;" the letter further indicated that "the decision to provide ongoing services . . . may be appealed by the custodial parent or the

primary person responsible for the care of your children" and that Defendant Spencer would reach out to the family to discuss implementation of the family service plan; the letter makes no reference to the safety plan. (Doc. 58-3, Ex. 18).

In early March of 2010, Defendant Spencer performed a home inspection and observed Mr. Isbell leaving the house to barbecue when Mrs. Isbell arrived home with the children. Mr. Isbell believed that because he was not "in" the home with the children, he was not in violation of the plan; as a result, on March 12, 2010, a new safety plan was prepared as a "clarification and an amendment" to the most recent plan, prohibiting Mr. Isbell from being within 100 yards of his son. (Doc. 55, ¶¶ 50-51). It is unclear from the record whether or not the Plaintiffs' attorney participated in drafting or reviewing the amendment.

On April **[**9]** 30, 2010, Defendants Spencer and Patterson met with Plaintiffs and their counsel, who wanted to discuss the progression of the case. (Doc. 55, ¶ 53; doc. 59, ¶¶ 34-35). At that meeting, Defendant Patterson approved a revised safety plan which the Plaintiffs signed, along with a "family service plan," at the direction of their counsel. (Doc. 55, ¶¶ 54-56; doc. 59, ¶ 36). Plaintiffs' counsel believed that the family had no choice but to agree to the safety plan and family service plan because Mr. Isbell's bail would be revoked if they did not comply with CYS. (Doc. 55, ¶ 56; doc. 59, ¶ 36). The family service plan, which the Defendants do not dispute is a separate document from the safety plan, was triggered by the referral regarding A.I.'s head injury and mandated a minimum of six (6) months of "family services." (Doc. 58-3, Ex. 19). The family service plan provides that: "Parents, guardians, custodians and children have the right to participate in the development of this plan; however, if you disagree with this plan, you are not required to sign and have the right to appeal." (*Id.* p. 1). The family service plan also contains a specific Notice of Right to Appeal, as follows:

> As a parent **[**10]** of a child receiving services from the Montour County Children and Youth
> You have the right to appeal:
>
> **[*744]** *any determination made which results in a denial, reduction, discontinuance, suspension, termination of service; or
> * the County Agency's failure to act upon a request for service with reasonable promptness.
> A) If the Juvenile Court is involved with your case, you may ask the Court to schedule a hearing regarding you and your child(ren).
> B) You have the right to appeal Children & Youth Services' determination to the State's Department of Public Welfare (DPW) [address omitted].
> Parents have the right to be represented by an attorney or a spokesperson of his/her choice, during the appeal process or any Court proceeding regarding your child(ren).

(*Id.* p. 11). The notice further provides a contact number in the event the parents wish to be represented by a lawyer but cannot afford one, describes the process for filing a written appeal, and notes that "[d]uring the appeal process, the service plan, as signed by the Children & Youth caseworker, remains in effect." (*Id.*). The family service plan and the notice of rights do not contain any reference to the safety plan. (*Id.*).

On May 27, 2010, Defendant **[**11]** Patterson filed a dependency petition which alleged that Plaintiff A.I. was a child without parents able to care for him. (Doc. 55, ¶ 65; doc. 59, ¶ 41). A hearing was held on June 30, 2010, before Judge James of the Court of Common Pleas of Montour County, during which proceeding the Plaintiffs stipulated to an in-home dependency without prejudice or any admission of abuse conduct and at which time the Plaintiffs signed a revised voluntary safety plan. (Doc. 55, ¶ 66, 67; doc. 59, ¶ 43-45). This was the first court proceeding at which the Plaintiffs had the opportunity to challenge the safety plan. (Doc. 55, ¶ 67). When the Plaintiffs and their children later moved to Lycoming County, Montour County CYS made a referral to Lycoming County CYS, and the Plaintiffs agreed to Lycoming County's visitation plan, which required compliance with the safety plan created by Montour County CYS. (Doc. 59, ¶ 50). On May 4, 2011, the Court of Common Pleas of Lycoming County dismissed the dependency petition after a dependency trial, concluding that Mrs. Isbell was a "ready, willing, and able" parental provider. (Doc. 55-34, p. 10). At that time and to the present, the criminal charges against Mr. **[**12]** Isbell remain pending in Montour County.

Plaintiffs commenced this Section 1983 action by filing an eight-count complaint (doc. 1) on January 6, 2012, alleging various due process violations arising out of the child abuse investigation and voluntary safety plan implemented by Defendants

Patterson, Wade, and Spencer and a claim for municipal liability against the Defendant County. [1] The matter was verbally referred to Magistrate Judge J. Andrew Smyser on January 11, 2012. Thereafter, the Defendants moved to dismiss all claims against them. (Doc. 16). The motion was fully briefed, and on July 6, 2012, Judge Smyser issued a report and recommendation ("R&R") (doc. 30) which recommended that we grant the Defendants' motion to the extent it sought dismissal of Plaintiffs' substantive due process and intentional infliction of emotional distress claims but deny the motion to the extent it sought dismissal of the Plaintiffs' procedural **[*745]** due process claims, including the claim for municipal liability against the Defendant County. (*Id.*).

On September 25, 2012, we issued a memorandum and order (doc. 40) which adopted the R&R in its entirety. Therein, we agreed with Judge Smyser that the Plaintiffs' complaint failed to state facts to support either their substantive due process claims or their intentional infliction of emotional distress claim and we thus dismissed those counts against all Defendants with prejudice on a finding that the Defendants were entitled to qualified immunity. (*Id.*). As to the procedural due process claims, however, we reached a different result, concluding that the Third Circuit's decision in *Croft v. Westmoreland County Children and Youth Services*, 103 F.3d 1123 (3d Cir. 1997) put child services agencies on notice that a "policy of removing the suspected parent from the family home during the pendency of child abuse investigations absent any procedural safeguards raises a procedural due process issue." (Doc. 40, p. 16 (quoting *Croft*, 103 F.3d at 1126 n.3). In doing so, we also relied **[**14]** on our own recent decision in *Starkey v. York County*, No. 1:11-cv-00981, Doc. 28, 2011 U.S. Dist. LEXIS 157646 (M.D. Pa. Sept. 21, 2011), which involved substantially similar facts to those presented by the case *sub judice*. The matter thus proceeded to discovery on the remaining claims.

With discovery now closed, on May 8, 2013, the Plaintiffs filed a motion for summary judgment (doc. 53) contemporaneously with a supporting brief (doc. 54) and statement of undisputed facts (doc. 55). On May 17, 2013, the Defendants also moved for summary judgment (doc. 58) as to the remaining claims and the same day filed their supporting brief (doc. 60) and statement of undisputed facts (doc. 59). The cross motions have now been fully briefed (docs. 54, 60, 66, 67, 69, 71) and are ripe for this Court's disposition.

II. STANDARD OF REVIEW

HN1[] Summary judgment is appropriate if the record establishes "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The movant meets this burden by pointing **[**15]** to an absence of evidence supporting an essential element as to which the non-moving party will bear the burden of proof at trial. *Id.* at 325. Once the moving party meets its burden, the burden then shifts to the non-moving party to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e)(2). An issue is "genuine" only if there is a sufficient evidentiary basis for a reasonable jury to find for the non-moving party, and a factual dispute is "material" only if it might affect the outcome of the action under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

HN2[] In opposing summary judgment, the non-moving party "may not rely merely on allegations of denials in its own pleadings; rather, its response must . . . set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). The non-moving party "cannot rely on unsupported allegations, but must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial." *Jones v. United Parcel Serv.*, 214 F.3d 402, 407 (3d Cir. 2000). Arguments made in briefs "are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary **[**16]** **[*746]** judgment motion." *Jersey Cent. Power & Light Co. v. Twp. of Lacey*, 772 F.2d 1103, 1109-10 (3d Cir. 1985). However, the facts and all reasonable inferences drawn therefrom must be viewed in the light most favorable to the non-moving party. *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 852 (3d Cir. 2006).

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[1] The complaint initially asserted claims against Defendants Paul J. Bellino, Thomas W. Wilson, and Geisinger Medical Center. Those Defendants have been dismissed **[**13]** from this action and the claims against them are irrelevant to our resolution of the instantly pending motions. "Defendants" herein refers only to Defendants Wade, Patterson, and Spencer and the Defendant County.

HN3[] Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences that a fact finder could draw therefrom. *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 84 (3d Cir. 1982). Still, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; there must be a *genuine* issue of *material* fact to preclude summary judgment." *Anderson*, 477 U.S. at 247-48.

IV. DISCUSSION

The remaining issue before this Court is a narrow but complex one: we are tasked to consider whether procedural protections were due to the Plaintiffs when the Defendants implemented a voluntary safety plan that removed Mr. Isbell from his family home for an extended period of time following a report of suspected child abuse, and, if the answer is in the affirmative, whether the requisite due **[**17]** process was provided. The individual Defendants move for summary judgment, asserting that they are entitled to qualified and/or absolute immunity and that such plans, because of their "voluntary" nature, do not require procedural protections in the first instance. They alternatively contend that even if safeguards were required, the Plaintiffs were provided ample opportunities to challenge the safety plan. In the same vein, the Defendant County asserts that the Plaintiffs' claim against it for municipal liability fails because procedural protections are not necessary when a "voluntary" plan is offered to the parents, precluding a finding that it is liable for failing to provide such safeguards.

The Plaintiffs also move for summary judgment, asserting that the record before the Court amply demonstrates that the Defendants failed to offer any pre- or post-deprivation notice of their rights in any of their dealings with the Plaintiffs, in complete violation of the Fourteenth Amendment. In doing so, the Plaintiffs rely almost exclusively on our decision in *Starkey v. York County*, No. 11-cv-981, Doc. 65, 2012 U.S. Dist. LEXIS 189055 (M.D. Pa. Dec. 20, 2012) (Jones, J.). The Defendants, in response, assert and emphasize **[**18]** a number of ancillary facts which they contend distinguish this matter from *Starkey* and warrant a different result. The most appropriate starting point for our analysis, then, is a discussion of our decision in *Starkey*, which we ultimately determine is virtually indistinguishable from this matter.

A. *Starkey v. York County*

The facts before this Court in *Starkey* bear striking resemblance to the facts of record *sub judice*: parents took their minor child to the hospital where the father reported that the child had bumped his head; when medical examinations revealed injuries which could be consistent with child abuse, the hospital made reports of suspected child abuse to Childline, and the county family services agency became involved. An initial safety plan was implemented by the agency, which prohibited unsupervised contact with the children; thereafter, another plan was implemented which again barred unsupervised contact but also provided that the parents may not reside in the family home with their children. The parents were advised that the agency would seek emergency custody of the children if they did not agree to the terms of the plan. *See Starkey*, No. 11-cv-981, Doc. 65, pp. 5-7. **[**19]** Neither safety **[*747]** plan advised the parents of their rights or contained a notice of any opportunity to appeal the terms or imposition of the plan. *Id.* at p. 8. Approximately two months after the minor plaintiff was taken to the hospital, the assigned social worker filed an "indicated" report of child abuse and also filed dependency petitions for both of the Starkey children. At subsequent hearings, the court ultimately terminated the safety plan and the indicated reports of abuse were expunged. *Id.* at 9-11.

The parties filed cross-motions for summary judgment, and the agency and social workers alleged, as the Defendants do here, that the Fourteenth Amendment does not require procedural protections when the county implements a safety plan because the plan is "voluntary" and thus not a deprivation imposed under color of state law. The defendants also argued that even if procedural due process concerns were implicated when safety plans are established, the parents were provided with ample notice of their rights throughout their dealings with the agency. The parents asserted that because safety plans by their nature alter and interfere with parents' rights to custody, care, and management **[**20]** of their children, procedural safeguards are required. Because there were no facts in dispute, the question before the Court was purely one of law: whether parents have a right to notice and an opportunity to be heard when a safety plan is implemented.

In concluding that due process concerns are triggered by safety plans, we emphasized the Third Circuit's admonition that ***HN4***[] procedural due process "requires rigorous adherence to procedural safeguards anytime the state seeks to *alter*, terminate, or

suspend a parent's right" to the care, custody, and management of his or her children. *Id.* at 22 (quoting *McCurdy v. Dodd*, 352 F.3d 820, 827 (3d Cir. 2003)). We noted further that the Circuit, in a case involving similar facts in the context of a substantive due process claim, expressly noted that "the policy of removing the suspected parent from the home during the pendency of child abuse investigations absent any procedural safeguards raises a procedural due process issue." *Id.* at 23 (quoting *Croft v. Westmoreland Cnty. Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997)). The defendants in *Starkey* urged this court to instead adopt *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006), a Seventh **[**21]** Circuit case which held that safety plans by their nature are voluntary and require no procedural safeguards. We noted, however, that the *Croft* panel expressly rejected that characterization, observing that "the threat that unless [the father] left his home, the state would take his [child] and place her in foster care was blatantly coercive." *Starkey*, No. 11-cv-981, Doc. 65, at 26 (quoting *Croft*, 103 F.3d at 1125 n.1). Thus, with reliance on *Croft* and *McDurdy*, we rejected with the agency's contention that such plans are voluntary and held that ***HN5***[] the Fourteenth Amendment requires county agencies to establish procedural safeguards when ordering the removal of a parent from the family home. *Id.*

After finding that procedural protections were required, we reviewed the record to determine whether such protections had in fact been offered, ultimately rejecting the agency's argument that it had provided ample notice to the parents of their rights in connection with the plan. Without deciding what level of protection, specifically, is required by the Fourteenth Amendment, we noted that the record contained a dearth of evidence of *any* procedural safeguards. We found no merit in the agency's argument **[**22]** that letters related to the Childline report, which contained notices of the right to appeal the report and to counsel in the event of an appeal, were sufficient to establish due process, observing **[*748]** that those letters made no mention of the safety plan itself or the parents' rights in connection therewith and were limited to a discussion of the parents' rights in connection with the report of abuse. *Id.* at 27-29. Further, we observed that the safety plan itself was facially devoid of any notice of rights whatsoever. We thus found that the defendants were not entitled to qualified immunity and, indeed, the parents entitled to summary judgment because the defendants had entirely failed to offer *any* pre- or post-deprivation opportunities for the parents to challenge the alteration of their parental rights. *Id.* at 65.

In *Starkey*, we also concluded that the parents were entitled to summary judgment on their municipal liability claim pursuant to *Monell v. N.Y.C. Dep't of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). While we acknowledged that municipal liability claims are often difficult to prove and cannot be premised on a theory of vicarious liability, we noted that the county steadfastly maintained **[**23]** that it does not train its employees with regard to procedural safeguards because such protections were not required in conjunction with safety plans. On that basis, we concluded that no reasonable jury could find that the county had appropriately trained its employees with regard to those requisite safeguards. We thus granted summary judgment to the parents as to the *Monell* claim, in addition to the individual liability claims, and placed the case on a trial term on the sole issue of damages, which had not been addressed by the parties in their summary judgment papers. *Starkey*, No. 11-cv-981, Doc. 65, at 27-29.

B. The Case *Sub Judice*

The Defendants' arguments in their motion for summary judgment here largely mirror the arguments made by the county defendants in *Starkey*: they assert that they are entitled to qualified immunity because, first, there is no constitutional right to procedural protections in conjunction with safety plans; second, that even if such a right did exist, it was not violated because procedural protections were offered to the Isbells; and third, that the right to procedural protections was not clearly established to the individual Defendants. The Plaintiffs in their **[**24]** motion assert that *Starkey* supports a finding of liability against the individual and the municipal Defendants. We first consider whether, based on the law of this Circuit and the facts before the Court, the individual Defendants are entitled to qualified immunity as to the Plaintiffs' procedural due process claim.

1. Qualified Immunity

Earlier in this litigation, based on the well-pled allegations of the Plaintiffs' complaint, we held that the doctrine of qualified immunity cannot protect the individual Defendants if they failed to offer any procedural protections to the Isbells either before or after depriving them of their constitutional right to the care, custody, and management of their children. (Doc. 40, pp. 11, 16-17). Reasserting many arguments already rejected by this Court, the Defendants again contend that the record supports a

finding of qualified immunity, and judgment in their favor, on the Plaintiffs' remaining claim. The Plaintiffs, citing our prior decision in this case and quoting at length from our analysis in *Starkey*, assert that the facts of the two cases are indistinguishable and compel like results. On the undisputed facts before the Court, we cannot but agree **[**25]** with the Plaintiffs.

HN6[] The doctrine of qualified immunity shields officials acting and sued in their individual capacities. *See Brandon v. Holt*, 469 U.S. 464, 471-73, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985). A state actor **[*749]** "sued in his individual capacity enjoys qualified immunity if his conduct does not violate clearly established or constitutional rights of which a reasonable person would have known." *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 254 (3d Cir. 1999) (*superseded on other grounds in P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 730 (3d. Cir. 2009)). We will first address the Defendants' argument that the right to procedural protections for safety plans is not a "clearly established right" before considering whether there exist genuine issues of fact as to whether that right was violated.

a. Clearly Established Right

At the motion to dismiss stage of this matter, the Defendants argued that there is no constitutional right to due process protections in conjunction with a safety plan and that a nonexistent right could thus not be clearly established for purposes of a qualified immunity analysis. Relying on *Croft*, we emphasized that more than a decade ago, the Third Circuit put the Defendants on **[**26]** notice that coercing parents to sign a safety plan under threat that the county will otherwise take emergency custody of their children raises procedural due process concerns. (Doc. 40, p. 16-17 (citing *Croft*, 103 F.3d at 1125 n.3). In doing so, we also relied on our decision in *Starkey*, which, citing *Croft*, rejected the county's assertion that "no judicial determination existed [at the time the defendants acted] that the use of voluntary safety plans was a violation of constitutional rights under the circumstances of this case." *Starkey*, No. 1:11-cv-981, No. 65, at p. 22. Given the similarities between *Starkey* and the matter *sub judice*, our analysis there is instructive:

> "***HN7***[] 'Clearly established rights' are those with contours sufficiently clear that a reasonable official would understand that what he is doing violates that right." *McLaughlin v. Watson*, 271 F.3d 566, 571 (3d Cir. 2001). That is, there must be "sufficient precedent at the time of the action . . . to put [the] defendant on notice that his or her conduct is constitutionally prohibited." *Id.* at 572. It has long been established that the "procedural component of procedural due process . . . requires rigorous adherence to procedural **[**27]** safeguards anytime the state seeks to *alter*, terminate, or suspend a parent's right" to the care, custody and management of his children. *McCurdy v. Dodd*, 352 F.3d 820, 827 (3d Cir. 2003) (emphasis added). However, the Supreme Court has often emphasized that our inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004). We thus must query not whether the particular facts of this case can be melded into some established general principle of due process precedent, but instead whether the particular action taken in this case has previously been declared unconstitutional. We conclude that it has.
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> As previously noted, more than ten years before the conduct at issue here occurred the Third Circuit decided *Croft v. Westmoreland Cnty. Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997), a substantive due process case involving strikingly similar facts to those before the Court today. While *Croft* addressed the substantive due process concerns raised when implementing a safety plan and removing a child or parent from a home without an objective and reasonable basis to do so, the Circuit also **[**28]** noted that "the policy of removing the suspected parent from the family home during the pendency of child abuse investigations absent any procedural safeguards raises a *procedural* due **[*750]** process issue." *Id.* at 1125 n.3. The Circuit chastised the defendants' characterization of a similar safety plan as a "voluntary" agreement where, in fact, the parents only "agree" to the terms of the plan under threat that they will otherwise lose custody of their child. *Id.* at 1125 n.1. The Defendants offer no compelling argument with regard to *Croft* and instead simply ignore its existence, contending that "there are no cases which are on-point to the circumstances alleged in Plaintiffs' Complaint, and, quite frankly, none which are clearly analogous and support Plaintiff's [sic] claims." (Doc. 51, p. 21).

Id. at pp. 22-23. Further, it has long been established, and the Defendants do not deny, that the Fourteenth Amendment "requires rigorous adherence to procedural safeguards anytime the state seeks to *alter*, terminate, or suspend a parent's right" to the care, custody and management of his children. *McCurdy*, 352 F.3d at 827 (emphasis added); *also B.S. v. Somerset Cnty.*, 704 F.3d 250, 271 (3d Cir. 2013) **[**29]** (emphasizing that "at least *some* process is required" when state alters familial rights).

With the exception of their reliance on *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006), the rationale of which we have already rejected both here and in *Starkey*, the Defendants offer no compelling reason for us to reject our earlier decisions, and we cannot independently conceive of any basis for doing so. [2] We thus conclude, as we have previously, that ***HN8***[⬆] the right to procedural due process protections when a county agency seeks to remove a parent from the family home is clearly established in this Circuit.

b. Violation of Constitutional Right

Having reaffirmed that ***HN9***[⬆] the right to due process when a parent is removed from the family home is **[**30]** a clearly established right protected by the Fourteenth Amendment, we must determine next whether the Plaintiffs have established—or, in the context of the Defendants' motion, failed to establish—a violation of that constitutional right. It is clear, from the record, that the Isbells' right to the care, custody, and management of their children was altered substantially for several months, and that fact is not contested by the parties. [3] Our inquiry, then, is whether any procedure for challenging that deprivation was offered by the Defendants, and if so, whether that the procedure satisfies the requirements of procedural due process. *See Parratt v. Taylor*, 451 U.S. 527, 537, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

In attempt to distinguish this matter from *Starkey*, the Defendants emphasize several facts which they believe constitute sufficient due process to satisfy *Croft*. Specifically, the Defendants assert that: (1) Plaintiffs "were **[**31]** advised of their rights during the investigation;" (2) that "the bail bond requirements for Plaintiff Amir Isbell required compliance with the safety plans," (3) that the "family service plan and safety plan signed on April 30, 2010 contained a Notice of Rights," and (4) that "Plaintiffs stipulated to the safety plan before the Court of Common Pleas after **[*751]** the dependency petition was filed." (Doc. 60, p. 5). [4] The Plaintiffs contend that these alleged distinctions are mere red herrings. We will address each of these points *seriatim.*

The Defendants first assert that the Plaintiffs were advised of their rights to counsel and to a hearing "as early as January 8, 2010, when [CYS] issued letters to them regarding the investigation under the Child Protective Services law." (Doc. 60, p. 9). Critically, however, the letters issued on January 8, 2010, pertained only to the parents' rights with respect to the Childline report **[**32]** of suspected child abuse and made no mention whatsoever of the safety plan which the parents were asked to sign on that date. Specifically, the letters advised only that the parents have the right to receive a copy of the report of child abuse, that the parents have the right to request that the report be expunged or amended if they believe the report is not correct, and that "[i]f the case goes to Juvenile Court, [the parents] have the right to have an attorney, introduce evidence and cross-examine witnesses." (Doc. 58-3, Ex. 8-9). The letters are devoid of any reference to the safety plan or the rights of the parents in connection therewith, and we thus reject the blanket contention that these letters provided the Plaintiffs' with ample notice of their rights in connection with the safety plan.

The Defendants also assert that on April 30, 2010, "Plaintiffs signed a Family Service Plan and Safety Plan that contained a Notice of Rights." (Doc. 60, p. 12). Importantly, as we have noted above, the safety plan and the family service plan are two different documents; the parties apparently do not dispute, however, that it was the safety plan, and not the family service plan, which required **[**33]** Mr. Isbell to remove himself from the family home throughout the pendency of the investigation. Critically, none of the Plaintiffs' claims stem from the terms of the family service plan or the circumstances surrounding the signing of said plan. For this reason, as we have concluded *supra* with respect to the Childline letters, we cannot agree with the

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[2] As the defendants did in *Starkey*, the Defendants here quote at length from the Seventh Circuit's decision in *Dupuy* as support for their contention that safety plans are voluntary and not entitled to procedural due process protections. We again reject *Dupuy* and its holding as it is directly inconsistent with the Third Circuit's admonition in *Croft* that removing a parent from the family home without any opportunity to be heard raises procedural due process concerns.

[3] While the Defendants contend that this alteration was voluntarily accepted by the Plaintiffs rather than imposed by the Defendants, they nonetheless apparently concede that there was in fact an alteration of the Plaintiffs' familial rights.

[4] The Defendants also contend that this case is different from *Starkey* because the "safety plans were agreed to by Plaintiffs and their counsel." Because we have rejected *supra* the Defendants' contention that safety plans are voluntary, we need not again address this argument.

Defendants that the family service plan provided any level of notice of procedural protections to the Plaintiffs with respect to the safety plan itself. *See, e.g., Billups v. Penn State*, No. 1:11-cv-1784, 2012 U.S. Dist. LEXIS 56414, Doc. 58, p. 36 (M.D. Pa. Apr. 23, 2012) (at motion to dismiss stage, rejecting contention that notice of rights contained in family service plan is dispositive of plaintiffs' due process claims where none of the plaintiffs' claims were derived from the terms of the family service plan but instead were based on separate safety plan).

Critically, it cannot be disputed that each of the several versions of safety plan signed by the Plaintiffs are facially and entirely devoid of any notice of the right to an attorney or to a hearing or of any other means by which the Plaintiffs' could challenge the deprivation of their parental rights, and **[**34]** the Defendants have not identified *any* procedure which was in fact in place to protect those rights. For those reasons, we find that there are no genuine factual disputes from which a reasonable juror could find that either the safety plan itself or any other document or correspondence provided by the Defendants adequately satisfied even the most relaxed procedural due process requirements.

The Defendants also contend that Plaintiff Amir Isbell had the opportunity to **[*752]** challenge the safety plan through Pennsylvania Rule of Criminal Procedure 529, which permits criminal defendants to request modification of bail provisions by formal motion to the judge of the Court of Common Pleas presiding over the case. (Doc. 60, p. 12 (citing PA. R. CRIM. P. 529)). The Defendants contend that because the Plaintiffs' attorney chose not to move for modification of the Plaintiff's bail in the state criminal proceedings, the Plaintiffs in effect were provided due process protections but elected to waive them. (*Id.*). The Defendants cite no authority in support of their proposition that the state court presiding over Mr. Isbell's criminal proceeding had jurisdiction to overturn or modify the safety plan imposed **[**35]** by CYS or to conduct a hearing in order to determine whether the plan was appropriate and justified. Our independent research has revealed no authority to support this claim and, there being no indication in the law nor in logic that a court with criminal jurisdiction had the authority to override the CYS safety plan or conduct a hearing on its merits, we are compelled to reject this argument as well.

Finally, the Defendants assert that the Plaintiffs effectively waived their procedural due process claim at the dependency petition hearing ultimately held on June 30, 2010, where the Plaintiffs stipulated to a safety plan that was, for all practical purposes, identical to the plan initially imposed by the Defendants. They argue that if one fact distinguishes this matter from *Starkey* in a material way, it is this one, which they believe demonstrates that the Plaintiffs suffered no harm from any deprivation and failure of process. By contrast, in *Starkey*, the plaintiff parents benefitted substantially from their ultimate opportunity to be heard, when the presiding judge terminated the safety plan and dismissed the dependency petition. Here, rather than proceed with the dependency hearing, **[**36]** the Plaintiff parents, with the assistance of their attorney, chose to stipulate to an in-home dependency and a revised safety plan. The Defendants thus assert that because the Plaintiffs agreed to a safety plan even after they had an opportunity to be heard, no harm flowed from whatever procedural due process violation may have occurred in the interim five months. Specifically, they contend that "even if there were alleged due process violations on the part of Defendants, which Defendants deny, Plaintiffs' voluntary agreement to a substantially identical safety plan after their hearing before the Court evidences that an earlier hearing would not have produced a different result. In other words, the alleged due process violations did not cause any damage to the Plaintiffs." (Doc. 67, pp. 13-14).

The Third Circuit, however, has recently rejected this argument. In *B.S. v. Somerset County*, 704 F.3d 250 (3d Cir. 2013), the court rejected the defendants' contention that a due process claim fails unless the plaintiff can demonstrate that additional due process protections "would have borne a different result." *Id.* at 273. The court in *B.S.* held that ***HN10***[↑] an otherwise viable procedural due process **[**37]** claim does not fail merely by lack of actual damages, noting that "[i]f nothing else, the violation of [a parent's] right to procedural due process would be a basis for awarding nominal damages." *Id.* (quoting *Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 ("We believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.")). Thus, a procedural due process violation, once established, entitles a plaintiff to, at minimum, nominal damages in recognition of the violation of his or her constitutional right, and we reject the Defendants' contention that the Plaintiffs' procedural due **[*753]** process claim necessarily fails for lack of actual damages.

There is no question on the record before the Court that the Plaintiffs were mired in a legal limbo, obliged to follow the terms of the safety plan imposed by the Defendants without any means of recourse for nearly five months. There is further no dispute that the Plaintiffs were given no instruction as to how they might challenge the safety plan as a whole or any of its individual terms; indeed, regardless of the question of how, the Plaintiffs were not even told whether they had such a right. The record **[**38]** establishes unequivocally that the Plaintiffs were not offered a means by which to challenge the safety plan at all until

the Defendants, at their sole election and within their sole discretion, elected to pursue dependency proceedings, triggering the hearing which finally offered the Plaintiffs a forum to address the safety plan before a court. Thus, even construing all of the evidence in the Defendants' favor, we are compelled to conclude that the Defendants entirely failed to provide any level of procedural due process protections to the Plaintiffs in any meaningful manner either pre- or post-deprivation.

As we have observed, the critical question is whether the county agency afforded any wit of process to the Plaintiffs before or after implementing the voluntary safety plan. Stripping away the multitude of ancillary facts emphasized by the Defendants, the simple answer is no. Indeed, once the record is boiled down to only those facts relevant to our due process analysis, it is pellucidly evident that there was utterly no process established by the agency for challenging either the implementation or the terms of a voluntary safety plan, rendering this case entirely indistinguishable **[**39]** from *Starkey* and directing us to a like result. Accordingly, given the undisputed record facts, and consistent with our decision in *Starkey* and the Circuit's admonition in *Croft*, we are obligated to deny the Defendants' request for summary judgment and indeed to grant the Plaintiffs' motion, finding that the record establishes a violation of the Plaintiffs' rights to procedural due process.

2. Defendant Wade

The Defendants assert that, regardless of our determinations above, in any event Defendant Wade cannot be subject to liability because her involvement in the proceedings terminated before the Plaintiffs suffered any deprivation of their parental rights. Specifically, while the Defendants concede that Defendant Wade participated in drafting and signed the initial safety plan on January 8, 2010, and further concede that Defendant Wade presented the January 22, 2010 safety plan to the Plaintiffs, securing their signatures and affixing her own, they assert that she "was not involved in preparing" the safety plans which removed Mr. Isbell from the family home and prohibited his unsupervised contact with the children and that she is thus too far removed from the constitutional transgression **[**40]** to be subject to Section 1983 liability. (Doc. 60, pp. 27-28). This argument, however, is entirely belied by the undisputed facts of record.

It is true, as the Defendants assert, that ***HN11***[] in order for a plaintiff to succeed on a Section 1983 claim against an individual defendant, the evidence must establish that the defendant was personally involved in the constitutional violation. *See Santiago v. Warminster Twp.*, 629 F.3d 121, 129 (3d Cir. 2010). Indeed, liability cannot be predicated on a theory of *respondeat superior* and the plaintiff must establish that the defendant "participated in violating the plaintiff's rights, directed others to violate them, or, [in the case of a] person in charge, had knowledge of and acquiesced in his subordinates' violations." **[*754]** *Id.* Thus, in order for a defendant to be subject to Section 1983 liability, the plaintiff must establish that he or she participated in or encouraged the constitutional violation at issue. *Id.; see also Kretchmar v. Bachtle*, 2005 U.S. Dist. LEXIS 11136, * 6-7 (E.D. Pa. June 6, 2005) ("Any defendant in a 42 U.S.C. § 1983 civil rights action must have personal involvement in the alleged wrongs.").

Turning to the record before the Court, **[**41]** it is undisputed that Defendant Wade participated in drafting and signed the initial safety plan of January 8, 2010, which mandated an open door policy with the Plaintiffs while minor Plaintiff A.I. was in the hospital and prohibited either parent from unsupervised contact with their child. (Doc. 59, ¶¶ 9-10). Defendant Wade also testified that while she did not draft the January 22, 2010 safety plan herself, she remained actively involved in the case until it was reassigned to Defendant Spencer; specifically, she indicated that she presented the January 22 plan to the Plaintiffs, secured their signatures, and signed the plan herself. (Id. ¶ 16-18; Doc. 65, ¶ 16). Indeed, far from being disputed, Defendant Wade concedes these facts in her deposition. (Doc. 55-37, at 20:15- 23:4). The Defendants are correct, however, that the record reveals no further involvement by Defendant Wade after approximately January 25, 2010.

Regardless of Defendant Wade's truncated participation in this panoply, her argument here is without merit. The undisputed—and indeed, admitted—record facts establish that Defendant Wade participated in the proceedings against the Plaintiffs for nearly an entire month and **[**42]** was personally involved in both drafting the initial safety plan, which curtailed the Plaintiffs' parental rights by prohibiting unsupervised contact with their children, and securing the Plaintiffs' signatures on the second safety plan, which removed Mr. Isbell from the family home and again prohibited any and all unsupervised contact. The Defendants' argument is in essence that Defendant Wade was not *as* involved as the other Defendants in altering the Plaintiffs' parental rights because she was not involved for the full duration of the deprivation; however, Defendants point to no case law, and our educated guess is that none exists, supporting the proposition that a Section 1983 defendant is immunized from liability simply because his or her involvement in the constitutional violation was of an established but lesser degree than other

defendants. Accordingly, on the record before us, we cannot but conclude that the Plaintiffs have established, and the Defendants have failed to offer evidence to counter, that Defendant Wade "participated in violating the plaintiff's rights." *Santiago*, 629 F.3d at 129. We will thus deny the Defendants' motion to the extent it seeks judgment in favor **[**43]** of Defendant Wade for lack of personal involvement, as there can be no genuine dispute that Defendant Wade's involvement, however temporary by comparison to other individual Defendants, played a crucial role in initiating the constitutional violation at issue.

3. *Monell* Claim

Finally, in Count V of their complaint, Plaintiffs assert a claim pursuant to *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) against the Defendant County for an unconstitutional policy and practice of failing to provide procedural due process notices, and for failing to train employees with regard to voluntary safety plans. Plaintiffs contend that because there is no evidence that the Defendants ever considered or implemented procedural protections in conjunction with voluntary safety plans, and because we granted summary judgment on the parents' *Monell* **[*755]** claim under similar circumstances in *Starkey*, they are entitled to summary judgment as to Count V. The Defendants assert that they are entitled to summary judgment as to the Plaintiffs' failure-to-train claim against the Defendant County because they did train their employees with respect to the use of voluntary safety plans. (Doc. 60, p. 14). **[**44]** We again are compelled to agree with the Plaintiffs.

HN12[↑] In *Monell*, the Supreme Court established the standard for a Section 1983 claim for municipal liability and outlined stringent pleading requirements which must be met before a municipality can be held liable for the conduct of those in its employ. *See id.* at 691. The Court held that local governing bodies can be subject to Section 1983 liability "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [constitutional] injury." *Id.* at 694-95. Municipal liability can also be premised on a failure to train theory, where an established and pervasive failure to train employees is the cause of the plaintiff's constitutional deprivation. *See Carter v. City of Phila.*, 181 F.3d 339, 357 (3d Cir. 1999). In Count V, the Plaintiffs assert both municipal failure to train claims and unconstitutional custom or policy claims against the Defendants. We will address these claims *seriatim.*

The Plaintiffs first claim that the Defendants have failed to train their employees with respect to application of procedural safeguards when drafting **[**45]** and implementing voluntary safety plans and that but for this failure to train, Plaintiffs would not have suffered a constitutional deprivation. In *Starkey*, we articulated the applicable failure to train standard as follows:

> . . . It is well established that ***HN13***[↑] a plaintiff must demonstrate deliberate indifference on the part of the municipality or its officer in order to establish failure to train liability. Such deliberate indifference requires a showing that "(1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice . . . ; and (3) the wrong choice by an employee will frequently cause a deprivation of constitutional rights." Typically, in the context of a failure to train claim, *Monell* and its progeny require some showing by the plaintiff that a specific, alternative training exists which would have reduced the risk of a constitutional violation.

Starkey, No. 1:11-cv-00981, Doc. 65, at 32-33 (quoting *Carter*, 181 F.3d at 357 (3d Cir. 1999); *Robert S. v. City of Phila.*, 2000 U.S. Dist. LEXIS 4020, *14-15 (E.D. Pa. Mar. 30, 2000)). There, we noted that the county had failed to implement any training whatsoever with regard **[**46]** to the necessity of procedural protections in the context of voluntary safety plans. *Id.* Given that *Croft* had put the municipal defendants on notice more than a decade previously that removing a parent from the home without procedural protections raises procedural due process concerns, we concluded that "the municipality's total failure to address *Croft*'s concerns and train employees regarding requisite procedural safeguards constitutes a deliberate indifference to the due process rights of parents like the plaintiffs" and granted summary judgment in favor of the Defendants on the *Monell* failure to train claim. *Id.* at 34.

Once again, the Defendants have failed to meaningfully distinguish this matter from *Starkey*. While the Defendants have directed the Court to substantial record evidence which details the various trainings offered to and completed by each of the individual Defendants in this case, including evidence that the agency **[*756]** trained its employees with respect to the *use* of safety plans, there is a dearth of record evidence that any of the individual Defendants were trained with regard to the procedural due process concerns and protections triggered by those plans. The indisputable **[**47]** fact remains that there is no

record evidence which establishes that CYS employees received any training regarding the due process considerations raised where a parent is removed from the home by way of a voluntary safety plan. This is logically true, because as we have already found, there were no procedural safeguards in place. Because the record reveals an absence of training designed to protect this constitutional right, "the reasonable inference is that *any* training with respect to the constitutional rights at issue, specifically the necessity of including procedural safeguards when implementing safety plans, would have alleviated or reduced to nothing the likelihood of a constitutional deprivation." *Id.* at 33-34. Accordingly, on the facts before us, we must but conclude that the Defendant County exhibited deliberate indifferent to the rights of the Plaintiffs, and indeed all parents, by failing to train its employees as to the procedural safeguards necessary when removing a parent from the family home. For that reason, we are compelled to grant the Plaintiffs' motion for summary judgment as to the *Monell* failure to train claim.

Likewise, the Plaintiffs have established, and the **[**48]** Defendants have offered no evidence which reasonably disputes, that the Defendant County has maintained a custom of failing to implement procedural due process protections in voluntary safety plan cases. As we noted in *Starkey*, ***HN14***[] in order to succeed on a claim against a municipality for an unconstitutional custom or policy, a plaintiff must establish that the widespread execution of the government's policy, either formally or informally, caused the plaintiff's constitutional injury. *Id.* at 34 (quoting *Robert S.*, 2000 U.S. Dist. LEXIS 4020 at *16). In other words, a plaintiff must establish that the county or municipality is "responsible for either enacting, implementing or widespreadly engaging in a practice which constitutes or causes a constitutional violation." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)). As the Third Circuit has explained, there must be sufficient evidence from which a jury could conclude that the municipality was the "moving force" behind the injury suffered by the plaintiff. *Thompson v. Wynnewood of Lower Merion Twp.*, 2012 U.S. Dist. LEXIS 130742, *26-27 (E.D. Pa. Sept. 13, 2012) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388-89, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)).

The **[**49]** record before the Court contains the initial safety plan and each revised safety plan issued to the Plaintiffs in this case, and it cannot be disputed that not one of those plans contains any notice of a right to an attorney or an opportunity to be heard with respect to the safety plan's imposition or its terms. The record also contains standard issued correspondence to the Plaintiffs regarding the Childline report, but that letter is likewise devoid of any notice of rights in conjunction with the safety plan. Further, and in our view most critically, it is and has been the Defendants' position throughout this litigation that such notices are not contained in nor provided in conjunction with voluntary safety plans because those plans are "voluntary" and thus do not trigger Fourteenth Amendment concerns, in essence conceding that due process protections were not—and as a rule, are not—provided when safety plans are implemented. We rejected this argument in *Starkey*, and we reject it again today.

[*757] Where, as here, the record establishes that the County routinely fails to provide notice and an opportunity to be heard when removing a parent from the family home and depriving that parent of **[**50]** his or her parental rights, and indeed contends that such notices are not required, there can be no question that the County is thus "responsible for either enacting, implementing or widespreadly engaging in a practice which constitutes or causes a constitutional violation." *Phillips*, 515 F.3d at 233. For this reason, we will grant the Plaintiffs' motion for summary judgment, and deny the Defendants' motion, as to both *Monell* claims.

4. Damages

Lastly, we will address the issue of damages. The Defendants argue that a punitive damages award is not available against the County or Defendants Wade, Spencer, and Patterson to the extent they are sued in their official capacities and that the Plaintiffs have failed to produce evidence supporting such an award to the extent the Defendants are sued in their individual capacities. The Plaintiffs, in their responsive papers, concede that punitive damages cannot be recovered from municipal defendants in their official capacities or from the municipality itself. *See Newport v. Fact Concerts*, 453 U.S. 247, 271, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). Accordingly, we will grant the Defendants' motion to the extent they seek dismissal of the Plaintiffs' punitive damages claims against **[**51]** the Defendant County and the individual Defendants in their official capacities.

The Defendants also assert that the record does not support a finding that the individual Defendants' actions were so malicious and wanton as to support an award for punitive damages against them personally. [5] The Supreme Court has observed that "***HN15***[] the purpose of punitive damages is to punish a defendant for his willful or malicious conduct and to deter others from similar behavior;" for that reason, "such damages are available only on a showing of the requisite intent." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 n.9, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986). Indeed, punitive damages will only be awarded where a plaintiff has established to the satisfaction of a jury that the defendant's conduct was either "motivated by evil motive or intent" or involved "reckless or callous indifference to the federally protected rights of others." *Feldman v. Phila. Housing Auth.*, 43 F.3d 823, 833 (3d Cir. 1994) (quoting *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)). Our review of the record reveals that it is devoid of any document, testimony, or other evidence which evinces the requisite malicious intent on the Defendants' part to support an award **[**52]** of punitive damages, and the Plaintiffs have failed to direct the Court to any evidence which might support their claim. For this reason, we will grant summary judgment to the Defendants as to the punitive damages issue.

With punitive damages unavailable and judgment as to liability having been determined *supra*, the only question remaining at this juncture is whether an award of compensatory damages is supported by the record. However, while both parties have moved for summary judgment *in toto*, neither party has put either evidence or argument before the Court on the issue of actual damages. Accordingly, there is insufficient evidence before the Court on the issue of damages at this juncture from which we could make an appropriate determination **[*758]** as to whether and what amount of compensatory damages should be awarded. We shall thus follow the same course previously charted in *Starkey* and set this matter for trial on the issue of damages alone.

V. CONCLUSION

This Court is not unsympathetic **[**53]** to the myriad challenges facing the nation's social workers daily, and we are in full agreement with the Defendants' contention that they are frequently required to make instant, difficult decisions, often under tense and stressful circumstances. We are likewise cognizant of the Hobson's choice forced on social workers in these situations, where the safety of a child or children must be balanced against the constitutional rights of parents. Our decision today does not, as Defendants apparently fear, tip the scales in favor of the parents over the safety of the child. Indeed, to be clear, we do not hold that any level of due process is required *prior* to the deprivation attendant to a safety plan; our holding, as it was in *Starkey*, is simply that ***HN16***[] once a safety plan is implemented, a parent is entitled to some level of procedural protection in order to challenge the alteration of their parental rights, and that such opportunities must be provided in a meaningful and timely manner after the deprivation. Because the undisputed facts before the Court establish that the Defendants entirely failed to offer *any* pre- or post-deprivation protections to the Plaintiffs in connection with the safety **[**54]** plan, it is appropriate to enter summary judgment in the Plaintiffs' favor on the procedural due process claims.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Defendants' Motion for Summary Judgment (doc. 58) is **GRANTED** to the limited extent that it seeks a determination that punitive damages are unavailable against the individual Defendants in both their personal and their official capacities and further that such damages are unavailable against the Defendant County. The Motion is **DENIED** in all other respects.

2. The Plaintiffs' Motion for Summary Judgment (doc. 53) is **GRANTED** as to liability on the remaining procedural due process claims against the individual Defendants in both their personal and official capacities and the Defendant County, and judgment is **ENTERED** in favor of the Plaintiffs and against each Defendant named in Counts V and VI.

3. With judgment as to liability having been entered on all remaining Counts, this matter shall proceed to trial on the limited issue of damages. A telephonic conference call **IS SCHEDULED** for October 29, 2013 at 10:15 a.m. for the purpose of discussing whether damages discovery is necessary and to chart a course for pretrial proceedings. Counsel

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[5] The Plaintiffs have not responded to this argument in their opposition papers. Rather than deeming the issued to be waived, in the interest of caution, we briefly address the merits of the punitive damages claim.

[55]** for the Plaintiffs **SHALL** initiate the said call to Chambers at (717) 221-3986. At the time the call is placed, all counsel shall be on the line and prepared to proceed.

/s/ John E. Jones III

John E. Jones III

United States District Judge

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