

PETITIONER/APPELLEE:
SUSQUEHANNA COUNTY SERVICES
FOR CHILDREN AND YOUTH

RESPONDENTS/APPELLANTS: ROBERT
AND SUSAN GAUTHIER

IN THE SUPREME COURT OF
PENNSYLVANIA

No. _____

MEMORANDUM IN SUPPORT OF
EMERGENCY MOTION FOR STAY
PENDING APPEAL TO THE
SUPERIOR COURT

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I. JURISDICTIONAL STATEMENT

This appeal to the Superior Court is from a final order of the Court of Common Pleas of Susquehanna County. A final order is defined in Pa. R.A.P. 341(b) as one that “disposes of all claims and of all parties.” According to this Court, “A pivotal consideration in determining whether an order is final and appealable is whether the plaintiff aggrieved by it has, for purposes of a particular action, been put ‘out of court’ ...” *Sweener v. First Baptist Church of Emporium, Pennsylvania*, 516 Pa. 534, 539, 533 A.2d 998, 1000 (Pa. 1987).

In this case, the court has ordered Mr. and Mrs. Gauthier to subject their home to a search by County agents by March 15, 2004, which was the only relief sought in the petition. The order is a final, appealable order.

Appellants moved the Superior Court for a stay pending appeal on March 11, 2004, which was denied on March 12, 2004. Review of the denial of the motion for stay pending appeal is proper in this Court under Rules 3315, 1702(c) and 1732, which allows this Court, or a single justice thereof, to issue a stay pending appeal.

II. STATEMENT OF SCOPE OF REVIEW AND STANDARD OF REVIEW

Under Rule 3315 this Court may review the Superior Court’s denial of Appellants’ Emergency Motion for Stay Pending Appeal, and under this Court’s King’s Bench powers enter an order to “cause right and justice to be done.” 42 Pa. C.S.A. § 726.

III. STATEMENT OF THE ISSUES

Issue One

The Court of Common Pleas for Susquehanna County has ordered Appellants to allow an investigative social worker into their home by March 15, 2004, to complete her investigation.

Is the social worker's entry into the Appellants' home to complete her investigation a "search" subject to the Warrant requirement of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution?

Issue Two

The Court of Common Pleas entered the home-visit order *ex parte*, without hearing, in response to a petition signed by counsel for Appellees, which lacks a supporting affidavit attesting to any factual basis for the home-visit order.

Is the order an invalid search warrant because it is not supported by Oath or affirmation, as required by the Fourth Amendment and Article I, Section 8?

Issue Three

The petition signed by counsel for Appellees seeking the home-visit order alleges only that the County received a referral for alleged medical neglect. It states no underlying facts that could possibly amount to probable cause to believe that the referral was true.

Is the order an invalid search warrant because it is not supported by probable cause required by the Fourth Amendment and Article I, Section 8?

IV. STATEMENT OF THE CASE

This emergency motion for stay pending appeal before the Superior Court of Pennsylvania, Middle District, arises out of an appeal from a March 4, 2004, final order of the Court of Common Pleas in Susquehanna County, by the Honorable Kenneth G. Seamans, President Judge. The order requires appellants, Susan and Robert Gauthier, to "cooperate with Susquehanna County Services for Children and Youth ("the County") through its designated caseworker for the scheduling and completion of a home visit of their residence . . . within ten (10) days of this Court's Order." March 15, 2004 will be ten days from the order's issuance. If

this Court does not act before 3:30 p.m. on Monday, March 15, 2004, Appellants will be forced to submit to an unconstitutional invasion of their home to avoid contempt proceedings.

The order was issued in response to an *ex parte* petition, without hearing, pursuant to Pennsylvania Code Title 55 § 3490.73(2), which provides:

The county agency shall petition the court if one of the following applies: . . . (2) A subject of the report of suspected child abuse refuses to cooperate with the county agency in an investigation, and the county agency is unable to determine whether the child is at risk.

The petition alleges that the County received a referral for alleged medical neglect of the Gauthier's infant daughter on February 17, 2004. Petition ¶¶ 1, 4. It further notes that the caseworker interviewed the parents and "several medical facilities which provided medical treatment to the minor." Petition ¶ 3. The petition further notes that "the child has returned to the home of her parents as of February 23, 2004." ¶ 5.

The petition is silent about the facts giving rise to the report of alleged medical neglect and it is silent about the results of the interviews with treatment providers. The petition does not seek placement of the child nor does it allege that the parents have in fact neglected their child. Instead, the petition merely seeks an order requiring the family to allow the caseworker into their home to "complete the investigation." It is apparent from the face of the petition that the social worker believes that she cannot complete her investigation without getting into Appellants' house, even if there is nothing in the house search that relates to the alleged medical neglect. "The investigation of a report of suspected child abuse requires that the caseworker complete a home visit at least once during the investigation period." Petition, ¶ 8. There is no allegation factually linking the need for a search of Appellants' home with the referral for alleged medical neglect.

The trial court signed the order on March 4, 2004, and the caseworker mailed it to appellants. Appellants moved the trial court for a temporary stay of the order on March 9, 2004, seeking an opportunity to be heard on the merits of the petition. The trial court denied the motion on March 9, 2004. The trial court made no factual finding regarding the need for the search of appellants' home but concluded that the search is mandatory under Pennsylvania Code Title 55 § 3490.55(i), which provides, in part: "When conducting its investigation, the county agency shall visit the child's home, at least once during the investigation period." Appellants filed a notice of appeal and served opposing counsel on March 10, 2004.

Appellants moved for an emergency stay pending appeal in the Superior Court on March 11, 2004. The Superior Court denied the motion without opinion on March 12, 2004.¹

V. SUMMARY OF THE ARGUMENT

After receiving a referral for possible medical neglect, social workers from Susquehanna County Services for Children and Youth ("the County") interviewed the Appellants in the hospital as well as medical personnel from several facilities where the child had been treated. After the child was released from the hospital the County sought to visit the home of appellants "to complete the investigation." The parents declined to consent, citing their rights under the Fourth Amendment. Eleven days after the child was released from the hospital, the County petitioned for and obtained an *ex parte* order compelling the parents to submit to the search of their home within ten days. The petition does not allege that medical neglect occurred, and, indeed, alleges no facts surrounding the nature of the initial referral. No petition for medical neglect has ever been filed. No allegation of medical neglect has ever been made by the County.

¹ Appellants did not move for a stay pending appeal in the trial court because the time constraints combined with the trial court's denial of their earlier motion for stay rendered such a motion impracticable. Rule 1732(b)

The entry of government social workers into a private home to conduct an investigation is a “search” and is subject to the Fourth Amendment and Article I, Section 8. In the absence of consent or some other exception to the warrant requirement, social workers must have a valid warrant supported by probable cause based on sworn testimony to enter a private home.

The order in this case is an invalid judicial search warrant. The order was issued without any sworn testimony or affidavit. Instead, it was issued in response to a petition signed by Appellees’ counsel. In addition to not having an affidavit to support it, the petition doesn’t allege any facts at all, much less facts that would amount to probable cause if true.

The County and the trial court have adopted an outrageously unconstitutional scheme, which completely abrogates the protections afforded by the Fourth Amendment and Article I, Section 8. Under this scheme, anyone who is the subject of a child welfare referral must consent to social workers searching their home, and if they don’t, the mere fact that they declined to consent is sufficient grounds for the Court of Common Pleas to order them to allow the social worker into their home. That is not the law, and this Court should grant Appellants’ emergency motion for stay pending appeal to prevent the violation of Appellants’ constitutional right to privacy in their home.

ARGUMENT

VI. APPELLANTS MEET THE STANDARD FOR GRANT OF STAY PENDING APPEAL

Appellants meet the standard set by Pennsylvania courts for a stay pending appeal. “That standard requires the movant to demonstrate: (1) a strong likelihood of success on the merits of her appeal; (2) that the denial of a stay will cause irreparable harm; (3) that the stay will not substantially harm other interested parties; and (4) that the stay will not substantially harm the public interest.” *Reading Anthracite Co. v. Rich*, 525 Pa. 118, 577 A.2d 881 (Pa.1990).

A. APPELLANTS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR APPEAL.

At the outset, it must be noted that the record before the trial court consisted of nothing more than the petition signed by Appellees' counsel. The Superior Court's and this Court's review should be confined to nothing more than the petition to determine whether Appellants have a strong likelihood of success on the merits of their appeal. In fact, even the petition is irrelevant because "[i]n analyzing whether a warrant was supported by probable cause, judicial review is confined to the four corners of the *affidavit*." *Commonwealth v. Coleman*, 830 A.2d 554, 560 (Pa. 2003) (emphasis added). In this case, no affidavit was attached to the petition—and no sworn testimony was received—so the judicial warrant has no factual support at all.

Furthermore, even if the averments in the petition are taken as true, they do not amount to probable cause that medical neglect occurred or that the child at issue is at any risk of harm. Instead, they simply allege that the County received a referral, it investigated the referral by speaking with the parents and the child's doctors, it sought consent to conduct a home visit, and the Appellants' declined to consent.²

² The petition consisted of 9 numbered paragraphs, which are set out here for this Court's convenience,

1. On or about February 17, 2004 the Agency received a Child Line referral of possible child abuse for Isis Gauthier, date of birth February 5, 2004.
2. The parents of the subject child are Robert and Susan Gauthier of RR 2 Box 172, Thompson, Susquehanna County, Pennsylvania 18465.
3. The caseworker assigned to this referral has followed up with an investigation including contact with the parents and several medical facilities which provided treatment to said minor child.
4. The referral was made for medical neglect.
5. The child has returned to the home of her parents as of February 23, 2004.
6. In order to complete the investigation, the assigned caseworker must make a home visit to the child's residence.
7. The caseworker has requested the opportunity to visit the home of the Gauthiers and they have refused.
8. The investigation of a report of suspected child abuse requires that the caseworker complete a home visit at least once during the investigation period. See: Pennsylvania Code Title 55 § 3490.55(i).
9. This petition to Compel is necessary as a result of the parents' failure and/or refusal to cooperate with the agency in connection with this matter.

It must be acknowledged that Appellants' trial level attorney, in her motion to the trial court for a temporary stay, Attachment 3, and Appellees' counsel, in her objections to Appellants' motion in the Superior Court, Attachment 9, strayed from the legitimate record before the trial court. But the contents of those papers help to provide this Court with some context, and, are before this court.

Because this case involves an infant, doctors, and a referral for possible medical neglect, the context beyond the petition is important because it makes it clear that the child is not at any risk of harm and that the home visit sought by the County has no logical connection to the baby's health. Indeed, the picture that emerges is one that should be most disturbing to liberty-loving people who have adopted the Fourth Amendment and Article I, Section 8 in their organic laws. The county's arguments to the lower courts reveal a child protective system that is potentially out of control and routinely violates the Fourth Amendment rights of Pennsylvania citizens.

Essentially, this case involves parents who took their sick baby to the hospital on February 14th and 17th, 2004, hardly an act of medical neglect. They questioned the doctors about the necessity of certain painful and invasive diagnostic and treatment procedures, which they eventually agreed to on February 17th. Social workers contacted Appellants at the hospital on February 17, 2004, and Appellants consented to allow them to speak with all of the baby's doctors regarding her medical condition.

What's more, Appellants would gladly consent to allow two doctors, including Dr. James Dellavalle, their family physician, to speak with the County regarding the baby's health. He saw her twice after her release, on February 24 and March 12, 2004. Dr. Marie Lena, a pediatrician, also saw Isis on February 27. Declaration of Susan Gauthier, Attachment 11. They are

mandatory reporters of medical neglect, and the mere fact that they have not contacted social services since the baby's release from the hospital speaks volumes.

The baby was released from the hospital and returned home on February 23, 2004. It was only when the requests by the social workers exceeded what was necessary to determine the baby's medical condition that Appellants objected. Asserting the Fourth Amendment right to decline consent to a government official requesting to enter one's home is not sufficient grounds for the official to then get a court order to compel the home visit.

Susquehanna County Services for Children and Youth filed its petition for an *ex parte* order, 16 days after it had begun the investigation, 11 days after the child returned home. And the petition by its own terms sought to compel the home visit within 10 days of the order, which was 26 days after the investigation began and 21 days after the baby returned home. This is hardly the behavior one would expect if the County truly believed that the home visit is necessary to protect an at-risk child.

Moreover, in its opposition papers in the Superior Court, the County acknowledged that based on the information in its possession after speaking to the baby's doctors no issues of medical neglect remain. Appellees' Opp. Memo at 6 ("Obviously, if this child is safe the home visit is a matter of form and the investigation is closed; . . ."). The petition did not allege that neglect had ever occurred; it simply seeks entry in the Appellants' home because it believes it is obligated to conduct at least one home visit before it may close the investigation. Petition at ¶¶ 6 and 8.

In its opposition memorandum before the Superior Court the County attempted to establish some link between the baby's illness and the home visit it seeks. "The condition which resulted in this ten (10) day old baby's five (5) day hospitalization presumably occurred at her

home given the proximity to her date of birth and the Appellee’s information that she was born at home.” Opp. Memo at 2. This statement borders on the absurd. Babies sometimes get sick, whether they are born in the hospital or at home. If the baby’s doctors had suspected that some environmental condition had caused the illness it beggars belief that they would have released her to return to the source of her illness. The County has never made an allegation that environment caused the illness and the fact that it waited more than two weeks to seek the order and allowed ten days for its execution clearly demonstrate that the house is not a legitimate concern as far as the baby’s illness.

This baby had a slight fever and difficulty breathing, suggesting either a viral or bacterial infection. Babies do not catch viruses from houses, they catch them from other people—parents, siblings, doctors, lawyers, judges—even social workers who make home visits. There exists no logical connection between the home visit sought and the child’s health much less a factual basis.

1. The home-visit order requires a “search” of Appellants’ home under the Fourth Amendment and the Pennsylvania constitution.

The test for establishing what constitutes a search for purposes of the Fourth Amendment and Article I, Section 8, requires the one asserting Fourth Amendment protections to demonstrate a subjective expectation of privacy in that which is searched and second, that this expectation is one our society recognizes to be reasonable. *Commonwealth v. Gindlesperger*, 743 A.2d 898, 900 (Pa. 1999). There is no clearer application of this principle than where a family’s home is concerned. “The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its validity” *Brush v. Pennsylvania State University Bd. Of Trustees of the Pennsylvania State University*, 375 A.2d 810, 814 (Pa.Super. 1977).

Investigative social workers are state actors subject to constitutional restraints on their activities. Where entry in a family’s home is concerned, then, they must not be allowed to

compel a search of a home without legal justification for doing so. The order in this case compels Appellants to allow a search of their home without their consent, and without a warrant based on sworn testimony amounting to probable cause.

2. Entry to a private home by social workers conducting investigations are subject to the Fourth Amendment and to Article I, Section 8 of the Pennsylvania Constitution.

As the Commonwealth Court has recognized “[t]he Fourth Amendment of the U.S. Constitution, insures the right ‘of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches,’ and provides that warrants may not be issued except ‘upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched.’” *Warrington Township v. Powell*, 796 A.2d 1061 (Pa.Cmwlth. 2002). The order in this case is not supported by probable cause; it is not supported by sworn testimony; and, it does not particularly describe the place to be searched. The order is thus thrice invalid and Appellants are substantially likely to succeed on the merits of their appeal.

Additionally, the order is breathtakingly broad. It compels Appellants to “cooperate” with the “completion of a home visit of their residence.” “Home visit” is not defined anywhere in the Pennsylvania Code. What exactly does “cooperate with the home visit of their residence” mean? May the social worker peer into Appellants’ underwear drawers? If Appellants object will they be subject to contempt proceedings? And just what is it that the County is looking for? Germs?

The Fourth Amendments’ purpose is to “safeguard the privacy and security of individuals against arbitrary invasions by governmental officials,” *id.*, and the U.S. Supreme Court has observed as its governing principle under this clause, that, “except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it

has been authorized by a valid search warrant.” *Id.* There is no proper consent in this case and no valid search warrant. The County’s attempted intrusion into the constitutionally protected privacy of Appellants’ home is therefore unconstitutional and the order should be stayed pending appeal.

3. The Order is a search warrant and must be supported by sworn testimony and probable cause; it must state with particularity the place to be searched.

The County no doubt would agree that it has no constitutional authority to simply force its way into the Appellants’ home in the absence of consent, emergency or valid court order. The dispute here is about whether the order it sought and obtained is in fact constitutionally valid. The County claims that its authority and the validity of the order may be found in statutes of the Commonwealth. Because the “home visit” is a search, either the statutes relied on by the County must be given a construction consistent with the state and federal constitutions or they must be declared unconstitutional if they allow a court order to search a home to issue without sworn testimony, probable cause, and particularity.

The order in this case cannot be fairly characterized as anything other than an extraordinarily broadly worded search warrant. The United States Supreme Court has said that if an order from a court must be sought before a search may commence it is a *judicial warrant* and requires probable cause:

While it is possible to say that the Fourth Amendment reasonableness demands probable cause without a judicial warrant, the reverse runs up against the constitutional provision that “no Warrants shall issue, but upon probable cause.” Amendment 4. The Constitution prescribes, in other words, that *where the matter is of such a nature as to require a judicial warrant*, it is also of such a nature as to require probable cause.

Griffin v. Wisconsin, 483 U.S. 868, 877 (1987) (emphasis added).

As the Supreme Court said in *Stump v. Sparkman*, 435 U.S. 349, 362 (1978), the factors that determine “whether an act by a judge is a ‘judicial’ one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.”

In other words, if all a state actor must do to acquire a search warrant is allege that a referral has been received and the subject of the referral has asserted her Fourth Amendment right to decline consent for the search, there is no need for the intervention of a neutral magistrate to weigh facts to make a probable cause finding. Courts are not supposed to simply rubberstamp a request by social workers—or police, for that matter—to search a home.

If that is truly what Pennsylvania statutes contemplate, then they are unconstitutional and Appellants have demonstrated substantial likelihood of success on the merits. On the other hand, it is likely that this Court would be able to construe the applicable statutes consistently with the constitution, requiring courts to abide by the Fourth Amendment/Article I, Section 8, and that no judicial search order be issued unless supported by sworn evidence and probable cause. “A statute must be construed in such manner, if possible, as to bring it in harmony with constitutional requirement[s].” *Commonwealth v. McCoy*, 405 Pa. 23, 30, 172 A.2d 795, 798 (Pa. 1961).

For example, this Court held in *Commonwealth v. Wright*, 560 Pa. 34, 742 A.2d 661 (Pa. 1999), that a statute that the Commonwealth argued authorized police to enter a home without consent, emergency, or warrant, had to be construed to be consistent with the Fourth Amendment. In that case, a statute required police to seize all weapons in certain domestic-violence cases. A shooting suspect was arrested outside his home and police learned that the gun he had used was inside. Relying on the domestic-violence statute, the police entered the man’s

home without first obtaining a warrant, found a loaded, cocked pistol, and seized it. This Court held that the search was unconstitutional and that the statute should be interpreted to authorize entry of the home to seize weapons only *when the intrusion is otherwise permissible* under the Fourth Amendment. This Court held:

Because we are obliged to construe the enactments of the General Assembly in harmony with constitutional requirements, the more tenable reading of Section 2711 is that the provision requires the police to seize a weapon *when the intrusion is otherwise permissible*. We hold, therefore, that the seizure of a weapon pursuant to Section 2711(b) is subject to the limits of existing Fourth Amendment jurisprudence.

Wright, 560 Pa. at 40 (emphasis added; citations omitted). Pennsylvania statutes governing social worker investigations should be similarly construed—or held to be unconstitutional. Again, this outcome demonstrates substantial likelihood of success on the merits, because the order in this case is clearly not compatible with either state or federal constitutions.

As this Court has held, probable cause must be determined based on the facts alleged in the affidavit, *Coleman*, 830 A.2d at 560, which in this case doesn't exist. Based on the facts attested to in the affidavit, the magistrate must be able to determine that there is a "fair probability that . . . evidence of a crime will be found in a particular place." *Id.*

Even if the petition and the extra-record statements of the County's counsel in its opposition memorandum are credited as true facts, they still do not amount to probable cause to support a search warrant. The petition in this case is totally devoid of *any* factual allegations supporting the medical neglect referral. The only ground alleged by the County in support of the search warrant is that it must enter the home to "complete the investigation." And, as previously pointed out, all that was before the trial court before it entered the order was the unsworn petition, which is all that is properly reviewable regarding the validity of the order.

The standard of review for this Court is “to ensure that the magistrate had a ‘substantial basis ... for conclud[ing] that probable cause existed.’ “ *Id.* Thus, because the petition in this case is not sworn testimony and alleges no facts at all, much less facts amounting to probable cause, the petition does not support the order issued by the trial court.

4. There is no social worker exception to the Fourth Amendment.

“There is no ‘social worker’ exception to the Fourth Amendment.” *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1205 (10th Cir. 2003). Court after court has held that social worker investigations are held to the same Fourth Amendment standard as criminal investigations by the police. *See, e.g., Roska v. Peterson*, 304 F.3d 982 (10th Cir. 2002) (holding that Fourth Amendment’s warrant requirement applies to non-emergency social worker investigation); *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) (social workers liable for damages for unlawful, warrantless entry to home); *Tenenbaum v. Williams*, 193 F.3d 581 (2nd Cir. 1999) (child welfare workers are subject to the Fourth Amendment because the law is “clearly established”).

The United States Court of Appeals for the Seventh Circuit recently held that *the strictures of the Fourth Amendment apply to child welfare workers*, as well as all other governmental employees:

Because the basic purpose of the Fourth Amendment “is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials,” *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), the amendment’s prohibition against unreasonable searches and seizures protects against warrantless intrusions during civil as well as criminal investigations by the government. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). Thus, *the strictures of the Fourth Amendment apply to child welfare workers*, as well as all other governmental employees. *Brokaw v. Mercer County*, 235 F.3d 1000, 1010 n. 4 (7th Cir.2000); *Darryl H. v. Coler*, 801 F.2d 893, 900 (7th Cir.1986).

Doe v. Heck, 327 F.3d 492, 509 (7th Cir. 2003) (emphasis added).

The United States Supreme Court has left no room for debate on this subject – the Fourth Amendment is applicable to the activities of civil as well as criminal authorities: “building inspectors, Occupational Safety and Health Act inspectors, and even firemen entering privately owned premises to battle a fire, are all subject to the restraints imposed by the Fourth Amendment.” *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (citations omitted).

Moreover, the United States Court of Appeals for the Third Circuit has held that *Pennsylvania* social worker investigations are subject to the Fourth Amendment. In *Good v. Dauphin County Social Services*, 891 F.2d 1087 (3d Cir. 1989) the Court specifically held that searches by social workers investigating abuse or neglect are subject to the strictures of the Fourth Amendment. “Physical entry into the home is the chief evil against which the Fourth Amendment is directed.” *Id.* at 1092 (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). The Third Circuit continued and ruled in the context of social worker investigations that “[a]t the very core [of the Fourth Amendment and the personal rights it secures] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961) (alterations in original)).

At least 22 states have statutory or administrative provisions requiring social services agencies to petition courts to issue noninterference orders if parents object to expanding the scope of the investigation.³ Many of those statutory provisions expressly require a showing by

³ See e.g., Ala. Code § 26-14-7(c); Ariz. Rev. Stat. § 8-803(C); Ark. Code Ann. § 12-12-510(b); Colo. Rev. Stat. § 19-3-308(3)(b); 16 Del. Code Ann. § 910(a) and (b); Fla. Stat. Ch. 39.301(10); 325 Ill. Comp. Stat. 5/7.5; Ind. Code § 31-33-8-7(c); Iowa Code § 232.71B.5; Ky. Rev. Stat. § 620.040(5)(a); La. Child. Code 613(A); Minn. Stat. § 626.556(10)(f); N.C. Gen. Stat. § 7B-303(a); Okla. Stat. tit. 10, § 7106(C)(2) (2001); Or. Admin. R. 413-020-0430(8)(b)(L) (2001); Or. Admin. R. 413-020-0430(8)(b)(L)(i) (2001); R.I. Gen. Laws § 40-11-7(c) (2000); S.C. Code Ann. § 20-7-650(D) (2001); S.C. Code Ann. § 20-7-490(14) (2001); Tenn. Code Ann. § 37-1-406(e) (2001); Tex. Fam. Code § 261.303(b) (2001); Utah Code Ann. § 62A-4a-409(8) (2001); Wis. Stat. § 48.981(3)(c)3 (2001); Wyo. Stat. Ann. § 14-3-204(a)(iii) (2001).

the social workers that probable cause,⁴ reasonable grounds,⁵ reasonable suspicion,⁶ good cause shown,⁷ or some other grounds⁸ exist to believe that abuse or neglect has occurred before a magistrate may issue a noninterference order. Each of these statutes reflect a legislative intent that is similar to that of the legislature in Pennsylvania: once parents object to particular aspects of a social worker’s investigation, it is the courts — not the social worker — that will determine whether there is a proper ground to expand the scope of the investigation.

For example, in *H.R. v. State Department of Human Resources*, 612 So.2d 477, 479 (1992), the court interpreted the statutory phrase “cause shown” in Alabama’s child-welfare noninterference statute to mean “reasonable or probable cause shown, i.e., reasonable or probable cause shown to believe that there has been an abuse of a child” The court

⁴ Iowa Code § 232.71B.5 (“If permission to enter the home to interview or observe the child is refused, the juvenile court or district court upon a showing of probable cause may authorize [home entry].”); Ky. Rev. Stat. § 620.040(5)(a) (“If, after receiving the report, the [officials] cannot gain admission to the location of the child, a search warrant . . . may be issued . . . upon probable cause that the child is dependent, neglected, or abused.”); S.C. Code Ann. § 20-7-650(D) (2001) (“The family court shall issue the warrant if the affidavit and petition establish probable cause to believe the child is an abused or neglected child”).

⁵ See e.g., Or. Admin. R. 413-020-0430(8)(b)(L) (2001) (“When there are reasonable grounds to suspect that the child may be a victim of abuse or neglect, and the caseworker is denied access to the child or his/her residence, the assessment will still proceed.”).

⁶ La. Child. Code 613(A) (An application for home entry “must demonstrate . . . [t]hat reasonable suspicion exists that the child has been abused or neglected.”).

⁷ Ala. Code § 26-14-7(c) (“If the admission to the home . . . cannot be obtained, then a court . . . upon cause shown, shall order the parents . . . to allow the interview, examinations and investigation.”); Colo. Rev. Stat. § 19-3-308(3)(b) (“If admission to the child’s place of residence cannot be obtained, the juvenile court or the district court . . . upon good cause shown, shall order the . . . interview, examination, and investigation.”); 16 Del. Code Ann. § 910 (“The Family Court shall issue such an order upon the showing . . . [t]hat a child is in danger of imminent physical injury”); Ind. Code § 31-33-8-7(c) (“If admission to the home . . . cannot be obtained, the juvenile court, upon good cause shown, [may order entry/examination.]”); Minn. Stat. § 626.556(10)(f) (“[T]he court shall issue an order to show cause, . . . specifying the basis for the requested interviews”); Okla. Stat. tit. 10, § 7106(C)(2) (2001) (“If admission to the home . . . cannot be obtained, then the district court . . . upon cause shown, shall order the parents . . . to allow entrance for the interview, the examination and the investigation or assessment.”); Tenn. Code Ann. § 37-1-406(e) (2001) (“If admission to the home . . . cannot be obtained, the juvenile court, upon cause shown, shall order the parents . . . to allow entrance for the interview, examination, and investigation.”); Tex. Fam. Code § 261.303(b) (2001) (“If admission to the home . . . cannot be obtained, then for good cause shown the court . . . shall order the parent . . . to allow entrance for the interview, examination, and investigation.”).

⁸ See e.g., R.I. Gen. Laws § 40-11-7(c) (2000) (“The department shall . . . petition the family court . . . where it is felt that a particular child has suffered abuse or neglect”).

reasoned that unsworn hearsay in a report to social services rose at best to mere suspicion and would not support a noninterference order. *Id.*

B. DENIAL OF THE STAY WILL CAUSE IRREPARABLE HARM TO APPELLANTS

If this Court denies the Appellants' request for an emergency stay, government officials will be able to invade the privacy of Appellants' home over their objection without having a constitutional justification for doing so. That is a serious and irreparable harm considering the important constitutional issues at stake.

In its opposition papers in the Superior Court, the County argued that an intrusion into the Appellants' home would cause no injury at all. Opp. Memo at 5. This is a shocking assertion to be made in this Commonwealth, which was at the epicenter of the formulation of the protections afforded by both state and federal constitutions. Indeed Article I, Section 8 was adopted a decade before the Fourth Amendment. The very purpose for the inclusion of these clauses in the organic laws of Commonwealth and Country was in response to a long history of governmental abuses generated by "general warrants" in the founding period. As this Court held in *Commonwealth v. Edmonds*, case the primary purpose of Article I, Section 8 was to abolish general warrants, which allowed sweeping searches of homes based on nothing more than generalized suspicions:

The requirement of probable cause in this Commonwealth thus traces its origin to its original Constitution of 1776, drafted by the first convention of delegates, chaired by Benjamin Franklin. The primary purpose of the warrant requirement was to abolish "general warrants," which had been used by the British to conduct sweeping searches of residences and businesses, based upon generalized suspicions. Therefore, at the time the Pennsylvania Constitution was drafted in 1776, the issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen.

Moreover, as this Court has stated repeatedly in interpreting Article I, Section 8, that provision is meant to embody a strong notion of privacy, carefully safeguarded in this Commonwealth for the past two centuries. As we stated in [*Commonwealth v.*] *Sell* [504 Pa. 46, 65, 470 A.2d 457, 467 (1989)]: "the survival of the language now employed in Article I, Section 8 through over 200 years of profound change in other areas

demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.”

Commonwealth v. Edmonds, 526 Pa. 374, 586 A.2d 887, 897 (Pa. 1991).

To suggest, as the County has, that a search of a private home without probable cause to do so causes no harm at all is an insult to both the Republic and the Commonwealth, which both fought a War of Independence to be free from just such systemic tyranny. The petition in this case can barely be said to express even “generalized suspicions” much less probable cause. No less than a two-hundred-year-old history of protecting the privacy of the people in their homes is at stake in this case. Unless this Court steps in, a grave injustice will be done. And worse, this case reveals a systemic problem that likely occurs in more than just this case.

C. GRANTING THE STAY WILL NOT SUBSTANTIALLY HARM APPELLEE

County is a state actor. It is not harmed by being required to abide by the constitution. Because Appellants have demonstrated a substantial likelihood of success on the merits, all that will be prevented is the County exceeding its constitutional authority. The County will experience no legally cognizable harm by this Court’s intervention.

Isis Gauthier is at home under the care of her family physician who saw her as recently as March 12, 2004, as part of her regular care and follow-up for her illness. Had the County asked, her physician could have allayed its concerns. Additionally, the agency has not acted as if it believed there were a continuing emergency at any time since February 17th. Therefore, granting a stay of the trial court’s order will not substantially harm Appellee.

D. UPHOLDING APPELLANTS’ FOURTH AMENDMENT RIGHTS TO BE FREE FROM AN UNCONSTITUTIONAL SEARCH OF THEIR HOME IS IN THE PUBLIC INTEREST

As the United States Court of Appeals for the Sixth Circuit has held, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc. v.*

Michigan Liquor Control Commission, 23 F.3d 1071, 1079 (6th Cir.1994)

The County is charged with investigation of child abuse and neglect, a vital function in this Commonwealth. But it is required to act in accordance with constitutional provisions in doing so. The Third Circuit held in *Dauphin* (a case in which the court held that a search by *Pennsylvania* social workers is required to abide by the Fourth Amendment) rejected the argument that the public interest would be better served by ignoring or diluting the Fourth Amendment's requirements in child-abuse investigations. The caseworkers in that case "suggest[ed] that they were entitled to assume that until told otherwise that child-abuse cases would not be controlled by the well-established legal principles developed in the context of residential intrusions motivated by less pressing concerns." *Dauphin*, 891 F.2d at 1094

The Third Circuit disagreed.

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."

Id. Under the Fourth Amendment, it is not the seriousness of the allegations, but the quantum and reliability of the evidence that justifies a search warrant. In other words, upholding the Fourth Amendment is always in the public interest—no less in the context of child-abuse investigations. Therefore, the public interest is served by preventing the violation of Appellants' Fourth Amendment rights.

List of Attachments

1. Petition to Compel Cooperation with Child Abuse Investigation, filed by Susquehanna County Services for Children and Youth March 4, 2004.
2. Order from Susquehanna County Court compelling Robert and Susan Gauthier to permit a home visit from Susquehanna County Services for Children and Youth, dated March 4, 2004.
3. Motion for Temporary Stay of Order Compelling Home Visit, filed in the Court of Common Pleas, Susquehanna County on March 9, 2004. No. 2004-4936-JUV.
4. Order from Susquehanna County Court of Common Pleas denying stay of March 4 order, dated March 9, 2004.
5. Docketing statement from Susquehanna County Court.
6. Notice of Appeal, filed March 10, 2004.
7. Appellants' Emergency Motion for Stay Pending Appeal in the Superior Court, Middle District of Pennsylvania, No. 398 MDA 2004, filed March 11, 2004.
8. Appellants' Memorandum in Support of Emergency Motion for Stay Pending Appeal in the Superior Court, filed March 11, 2004.
9. Appellees' Objection to Emergency Motion for Stay Pending Appeal in the Superior Court, filed March 12, 2004.
10. Order of Superior Court denying Emergency Motion for Stay Pending Appeal in the Superior Court, dated March 12, 2004.
11. Declaration of Susan Gauthier, dated March 14, 2004.