

**IN THE SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT**

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No. 45 WAP 2019  
In the Interest of: D.R., a minor,  
Appeal of: Fayette County Children and Youth Services.

No. 46 WAP 2019  
In the Interest of: A.R., a minor,  
Appeal of: Fayette County Children and Youth Services.

No. 47 WAP 2019  
In the Interest of: G.R., a minor,  
Appeal of: Fayette County Children and Youth Services.

No. 48 WAP 2019  
In the Interest of: R.R., a minor,  
Appeal of: Fayette County Children and Youth Services.

No. 49 WAP 2019  
In the Interest of: C.R., a minor,  
Appeal of: Fayette County Children and Youth Services.

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**BRIEF OF AMICI CURIAE  
THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA  
AND HOME SCHOOL LEGAL DEFENSE ASSOCIATION  
IN SUPPORT OF APPELLEES**

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## **STATEMENT OF INTEREST OF AMICI CURIAE**

### **American Civil Liberties Union of Pennsylvania**

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization of over 1.75 million members. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty and equality embodied in the Pennsylvania Constitution, the United States Constitution and civil rights laws. The ACLU of Pennsylvania is one of its state affiliates.

The ACLU and ACLU of Pennsylvania have appeared many times as amicus curiae in federal and state courts at all levels, including both civil and criminal proceedings, in cases involving the rights of people to be free from unreasonable searches, including drug tests. The proper resolution of this case is thus a matter of substantial importance to the ACLU and its members.

### **Home School Legal Defense Association**

Home School Legal Defense Association is a national nonprofit organization whose mission is to protect the fundamental constitutional right of parents to direct the education and upbringing of their children.

With over 80,000 member families in fifty states, and almost 3,000 member families in Pennsylvania, HSLDA is the world's largest homeschool advocacy organization.

In the early days of the modern homeschooling movement, we discovered that child-welfare investigators routinely avoid interacting with parents at the beginning of an investigation by going to the child's school or pre-school, as was done in this case. But because homeschooled children are at home when they are at school, child-welfare investigators could not routinely avoid parents. This led to many distressing encounters at the home's front door, often simply because the family homeschooled at a time when it was not as accepted as it is today.

In one of our early cases, *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), the Ninth Circuit held that the nonconsensual entry into the home and subsequent strip search of the children violated the constitutional rights of that homeschooling family. "The government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the

privacy and dignity of their homes and in the lawfully exercised authority of their parents.” *Id.* at 820.

From its founding in 1983, HSLDA has assisted thousands of families in protecting these interests during child-welfare investigations, often commenced in response to anonymous or malicious hotline tips that later prove to be unfounded. HSLDA represented the family in *In re Petition to Compel Cooperation with Child Abuse Investigation*, 875 A.2d 365 (Pa. Super. Ct. 2005), which established that the Fourth Amendment and Article I, section 8 apply in full force to child-abuse investigations in Pennsylvania.

In accordance with Pa. R.A.P. 531(b)(2)(i)(ii), no person or entity other than amici or counsel for amici paid in whole or in part for the preparation of this amici curiae brief or authored in whole or in part the amici curiae brief.

## SUMMARY OF THE ARGUMENT

This case involves the government’s power to compel a parent to undergo drug testing as part of an investigation into suspected child abuse or neglect. The Superior Court correctly held that there is no statutory authority for a county child welfare agency to petition for a drug test prior to a dependency adjudication. But even if such statutory authority existed, compelling a parent to submit to a drug test would constitute an unreasonable search in violation of the Fourth Amendment to the United States Constitution and Article I, § 8 of the Pennsylvania Constitution, unless probable cause existed to believe that the drug test would provide evidence of child abuse or neglect.

In this case, the only allegation involving children was that the father (“Father”) of D.R., A.R., G.R, R.R., and C.R. appeared to be under the influence of some unknown substance in a county office building in the presence of one of his five children, who were between the ages of five and fifteen.<sup>1</sup> That allegation fails to establish probable cause sufficient to compel Father to undergo a drug test. To establish

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<sup>1</sup> The allegation was made through a report to ChildLine and did not specify which child was with Father or the age of the child. Two other reports to CYS regarding Father did not include allegations regarding any children.

probable cause, appellant Fayette County Children and Youth Services (“CYS”) must show that Father’s children were at risk of abuse or neglect; that Father’s alleged drug use put them at risk of abuse or neglect; and that drug-testing Father would provide information helpful to CYC in its investigation. None of those showings were made in this case. Accordingly, even if CYC had statutory authority to require parents to undergo drug tests during child abuse and neglect investigations, which it does not, this Court should affirm the decision of the Superior Court vacating and remanding the trial court’s order requiring Father to provide a urine sample for drug testing as part of a child welfare investigation.

## ARGUMENT

“Except in limited circumstances, a search or seizure is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.” *Commonwealth v. Kohl*, 532 Pa. 152, 161 (1992) (citing *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 619 (1989)). Reasonableness of a search “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” *Skinner*, 489 U.S. at 619 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)); *see also Theodore v. Del. Valley Sch. Dist.*, 575 Pa. 321, 341-42 (1992) (applying balancing test to analysis of Pennsylvania Constitution, Article I, § 8).

A drug test is a search subject to the reasonableness requirements of the Fourth Amendment to the United States Constitution and Article I, § 8 of the Pennsylvania Constitution. *E.g.*, *Skinner*, 489 U.S. at 617; *Theodore*, 575 Pa. at 344-45. That the search at issue—a urine drug test—was related to a child welfare investigation is of no moment: The Superior Court has previously held that the Fourth Amendment and Article I, § 8 apply to the Child Protective Services Law (“CPSL”) and the regulations written to implement it. *In re Petition to Compel*

*Cooperation with Child Abuse Investigation*, 875 A.2d 365, 374-77 (Pa. Super. Ct. 2005). Accordingly, even if the CPSL authorized parental drug-testing as part of an investigation into child abuse or neglect, which it does not, the Fourth Amendment and Article I, § 8 require probable cause to believe that a child is at risk of abuse or neglect based on a parent's alleged drug use *and* that drug test results will aid CY5 in its investigation before a court can order a parent to undergo a drug test.

I. **Drug Testing Parents Intrudes on Strong Privacy Interests Regarding Private Medical Facts and Observation of Excretory Functions.**

Blood, breath, or urine drug tests are searches that intrude upon privacy in at least two ways—in collection of the sample and in disclosure of the results. *Theodore*, 575 Pa. at 338; *Skinner*, 489 U.S. at 616-17. Chemical analysis of urine can reveal private medical facts, including whether someone is epileptic, pregnant, or diabetic. *Skinner*, 489 U.S. at 617. The process of collecting a urine sample also implicates privacy interests, as it may include visual or aural monitoring of the act of urination. *Id.* The United States Supreme Court has explained:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms, if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law, as well as social custom.

*Id.* at 617 (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).

In this case, CYS sought an “observable” urine screen, which requires the administrator of the drug test to watch the urine exit the penis to ensure the integrity of the sample. *See In re D.R.*, 216 A.3d 286, 289 n.3 (Pa. Super. Ct. 2019). An observable urine screen is particularly intrusive on privacy. *See Theodore*, 575 Pa. at 345 (finding privacy intrusion of urine collection ameliorated by collection by trained medical personnel in a manner that balances privacy and confidentiality with the accuracy of the tests); *Skinner*, 489 U.S. at 626 (noting reduced privacy concern for collecting urine sample where sample did not need to be furnished “under the direct observation of a monitor”).

Reports alleging that a parent was under the influence of an unknown substance do not create a reduced expectation of privacy for

the parent. Courts have recognized a reduced expectation of privacy with respect to a urine drug test in certain contexts, such as for railroad employees, who participate “in an industry that is regulated pervasively to ensure safety,” *Skinner*, 489 U.S. at 627-28, federal employees directly involved in drug interdiction, *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989), federal employees required to carry firearms, *id.*, and public school students while in school, *e.g.*, *Theodore*, 575 Pa. at 345. No similar circumstances exist when a government agency, based on allegations from third parties, investigates private citizens. *See Nat’l Treasury Emps. Union*, 489 U.S. at 672 (explaining that “[u]nlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity”).

A private citizen parent’s strong privacy interests with respect to drug testing do not evaporate simply because a third party alleges to CYS that the parent is using drugs. A urine drug test as part of an investigation of alleged child abuse or neglect plainly intrudes on strong

privacy interests regarding both private medical facts and observation of excretory functions.<sup>2</sup>

**II. A Compelled Drug Test Requires Probable Cause to Believe a Parent Used Drugs, Resulting in Child Abuse or Neglect, and That the Drug Test Will Provide Evidence of Child Abuse or Neglect.**

**A. Child Welfare Investigations Must Comport with the Fourth Amendment and Article I, § 8.**

Child welfare investigations must comport with the probable cause requirements of the Fourth Amendment and Article I, § 8. *See, e.g., Good v. Dauphin Cnty. Social Servs. for Children & Youth*, 891 F.2d 1087, 1092-95 (3d Cir. 1989) (applying Fourth Amendment to home visit and strip search as part of child abuse investigation); *In re Petition to Compel*, 875 A.2d at 374-77. In *In re Petition to Compel*, the Superior Court vacated a trial court order compelling parents to allow a home

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<sup>2</sup> “The cases decided under Article I, [Section] 8, have recognized a ‘strong notion of privacy, which is greater than that of the Fourth Amendment.’” *Theodore*, 575 Pa. at 341 (quoting *Commonwealth v. Glass*, 562 Pa. 187 (2000)) (alteration in original); *see also Commonwealth v. Melilli*, 521 Pa. 405, 412 (1989). “[A]t 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.” *Commonwealth v. Edmunds*, 526 Pa. 374, 394 (1991). Thus, the privacy interests implicated by a compelled drug test are entitled to greater protection under Article I, § 8 than under the Fourth Amendment.

visit by Susquehanna County Services for Children and Youth (“C & Y”) as part of an investigation into a ChildLine report of alleged medical neglect. *Id.* at 368. The Superior Court held that in order to comport with the Fourth Amendment and Article I, § 8, a compelled home visit requires “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.” *Id.* at 377. The only relevant fact in that case was a ChildLine referral to C & Y for possible medical neglect, which was insufficient to establish probable cause to justify a home visit. *Id.* at 378.

Similarly here, to obtain an order compelling a parent to undergo a drug test as part of a child welfare investigation, CYS must establish probable cause to believe not only that an act of child abuse or neglect has occurred, but also that evidence relating to such abuse will be found through a drug test of the parent. *See id.* at 377.

Although CYS contends that this Court’s decision in *Luminella v. Marcocci*, 814 A.2d 711 (Pa. Super. Ct. 2002), supports its argument that parents can be compelled to undergo drug testing during child welfare investigations, *Luminella* involved a private custody dispute, not a child welfare investigation. When private parties petition a court

to resolve a dispute, they are subjecting themselves to the court’s jurisdiction. As the Superior Court explained in *Luminella*, “[t]he civil litigant generally, and the custody dispute litigant in particular, has a drastically reduced expectation of privacy.” *Id.* at 722. A child custody litigant can “reasonably expect that the very core of her privacy interests—her home life and child rearing practices—would be the central focus of the hearing.” *Id.* at 723. By contrast, a parent at the center of a child welfare investigation has not sought the assistance of the court in resolving a child custody dispute, but has instead been involuntarily made the target of a government investigation. *See In re D.R.*, 216 A.3d at 296 (“[A] contested custody action between parents (or statutorily authorized family members) does not involve the same type of governmental intrusion as a CYS Agency’s investigation of child abuse or neglect, either in degree or in kind.”). Accordingly, parents do not have a reduced expectation of privacy simply because they are the subjects of a child welfare investigation.<sup>3</sup>

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<sup>3</sup> In citing *Luminella*, CYS appears to be arguing for a “special needs” exception to the Fourth Amendment for parents accused of child abuse or neglect. *See* CYS Br. at 18-20. Although “a search unsupported by probable cause may be permissible . . . where ‘special needs’ beyond those associated with law enforcement make this

**B. Drug Testing Will Rarely, If Ever, Provide Evidence of Child Abuse or Neglect.**

It is unlikely that an agency would ever be able to establish probable cause that evidence relating to child abuse or neglect will be found through a drug test of a parent because drug test results will rarely constitute evidence of child abuse or neglect. The United States Department of Health and Human Services has explained:

A drug test alone cannot determine the existence or absence of a substance use disorder. In addition, drug tests do not provide sufficient information for substantiating allegations of child abuse or neglect or for making decisions about the disposition of a case (including decisions regarding child removal, family reunification, or termination of parental rights).

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requirement impractical,” *Theodore*, 575 Pa. at 335; *see also Skinner*, 489 U.S. at 619, there is no basis for applying this exception to parents accused of child abuse or neglect. Determining whether special needs excuse the requirement for a warrant supported by probable cause requires balancing the intrusion on the individual’s privacy interest against the promotion of a legitimate government interest. *See Theodore*, 575 Pa. at 341-42; *Skinner*, 489 U.S. at 619. Here, a urine drug test intrudes upon strong privacy interests regarding private medical facts and observation of excretory functions. *See supra*, Part I. A urine drug test also would be ineffective in providing CYS with evidence helpful for its child abuse or neglect investigation. *See infra*, Part II.B. Because strong privacy interests outweigh limited governmental interests here, special needs do not justify a urine drug test without probable cause.

Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., *Drug Testing in Child Welfare: Practice and Policy Considerations* 1 (2010), <https://ncsacw.samhsa.gov/files/DrugTestinginChildWelfare.pdf>.

A drug test also would not provide evidence of whether a parent was under the influence of a drug during a previously reported incident. “Drug test results indicate only that the drug or its metabolite is present at or above the established concentration cutoff level in the test specimen.” *Id.* Nor would a drug test reveal whether a parent abuses or neglects his children. Simply using an illicit substance, without more, does not constitute child abuse or neglect. Indeed, there is “no definitive research-driven or evidence-based method exists to determine whether drug use [] contribut[es] to child maltreatment.” *Id.* at 19. Accordingly, compelling a parent to submit to a drug test following an allegation that he was under the influence of an unknown substance would not advance CYS’s interest of determining whether there is substantial evidence that the parent has abused or neglected his child.

This case highlights the unreasonableness of a urine drug test as part of a child abuse investigation. Here, none of the reports to CYS

alleged that any of Father's children had been abused or neglected. Nor did the reports allege any actual knowledge of illegal drug use by Father, much less illegal drug use that was causing harm to his children. (R. 78a-79a). Instead, one report stated Father "appeared to be impaired/under the influence of an unknown substance," (R. 79a), one report stated that Father "may be taking something he shouldn't," (R. 63a), and one report stated Father appeared "completely out of it," (R. 46a-R. 47a, R. 60a-R. 61a). Only the first report involved any of Father's children and it did not specify a particular child or the child's age. *See* CYS Br. at 14. CYS interviewed all five of Father's children and found no evidence of child abuse or neglect. (R. 68a-R. 69a). The result of a drug test of Father's urine, especially coming many months after the initial allegations, would not alter CYS's apparent conclusion that there was no evidence of child abuse or neglect.

Despite its reliance on *Luminella*, CYS concedes that a compelled urine test requires "probable cause." CYS Br. at 22. Although CYS contends that probable cause existed in this case, that argument fails for at least two reasons. First, a report alleging that a parent appeared to be under the influence of an unknown substance is insufficient to

establish probable cause that the parent was under the influence of an unknown substance, much less that the parent has abused or neglected his children. *See In re Petition to Compel*, 875 A.2d at 377-78 (finding ChildLine referral for alleged medical neglect insufficient to establish “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”). Second, CYS applies the wrong standard for what probable cause is required for compelling a drug test in a child welfare investigation. CYS seems to argue that probable cause to believe a parent was under the influence of an unknown substance at a prior time is sufficient. *See* CYS Br. at 22. But as explained above, a compelled drug test must be supported by probable cause to believe the parent was under the influence of a drug, resulting in child abuse or neglect, *and* that the drug test would provide evidence of that child abuse or neglect. *See, e.g., Schmerber v. California*, 384 U.S. 757, 769-70 (1966) (“The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions [beyond the body’s surface] on the mere chance that desired evidence might be obtained.”); *In re Petition to Compel*, 875 A.2d at 377. Such

circumstances do not arise from reports that a parent allegedly appeared to be under the influence of an unknown substance at a prior time, especially when the parent's children were interviewed and there is no evidence that the children had been abused or neglected.

### CONCLUSION

For the aforementioned reasons, amici curiae respectfully urge this Court to affirm the decision of the Superior Court vacating and remanding the trial court's order requiring Father-Appellee to provide a urine sample for drug testing as part of a child welfare investigation.

Respectfully Submitted,

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Dated: December 23, 2019

## CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 3,347 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this brief.

Dated: December 23, 2019

/s/ Richard T. Ting  
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**CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127**

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: December 23, 2019

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## CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of the foregoing Brief of Amici Curiae to be served upon the persons indicated below by PACFile and First Class Mail, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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