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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 1 EAP 2021
In the interest of Y.W.-B., a minor,
Appeal of: J.B., Mother.

BRIEF OF AMICUS CURIAE HOME SCHOOL LEGAL DEFENSE ASSOCIATION IN SUPPORT OF APPELLANT

Richard Winkler
Pa. Bar No. 23481
BUTCHER & WINKLER
123 N. Franklin Street
Titusville, PA 16354
Phone: (814) 827-9002
E-mail: rwinkler@zoominternet.net
Counsel for Amicus Curiae

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STATEMENT OF INTEREST OF AMICUS CURIAE

The 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 100,000 member families in fifty states, and more than 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. 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.

Another such case was *In re Petition to Compel Cooperation with Child Abuse Investigation*, 875 A.2d 365 (Pa. Super. Ct. 2005), where we represented the family. That case established that the Fourth Amendment and Article I, section 8 apply in full force to child-abuse investigations in Pennsylvania. In the years since, we have represented families in other states, pointing their courts to both *Calabretta* and *In re Petition to Compel* for guidance in how to properly balance the interest of the state and the rights of families in these complicated situations.

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

SUMMARY OF THE ARGUMENT

"[A]t 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." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). As the Supreme Court has long recognized, searches within the home raise heightened concerns about privacy that are important "not only to the individual but to a society which

chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

In re Petition to Compel strikes the correct constitutional balance in these circumstances, by recognizing that investigations within the home must be justified by probable cause.[1] While the state has a compelling interest in preventing child abuse and neglect, judges and scholars alike have long recognized that children can also be harmed by unnecessary, intrusive investigations. Cognizant of these dangers, courts in sister states have employed the same framework used by *In re Petition to Compel* to keep these harms in check.

ARGUMENT

I. *In re Petition to Compel* strikes the correct constitutional balance between the State's compelling interest in protecting children and the family's right to be free from unreasonable searches and seizures.

A. Court orders to enter homes must be predicated on probable cause.

There is no question that *In re Petition to Compel* is consistent with both state and federal law when it comes to the security and privacy of homes.

In *Commonwealth v. Flewellen*, the Supreme Court of Pennsylvania held that "[t]he Fourth Amendment to the Constitution of the United States protects people from unreasonable government intrusions into their legitimate expectations

[1] The undersigned attorney and Amicus Home School Legal Defense Association represented the family in *In re Petition to Compel*.

of privacy. Upon closing the door of one's home to the outside world, a person may legitimately expect the highest degree of privacy known to our society." 475 Pa. 442, 446 (1977). The Supreme Court of the United States reached the same conclusion three years later, in *Payton v. New York*, which stated unequivocally that "[g]overnment intrusion into one's home is presumptively unreasonable under the Fourth Amendment unless the officers have a warrant to enter that home." *Payton v. New York*, 445 U.S. 573, 586 (1980).

That warrant requirement is not mere surplusage. Rather, by limiting the authority to search to the specific areas and things for which there is probable cause to search, it ensures that "the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84-85 (1987). As the United States Supreme Court stated in *Griffin v. Wisconsin*:

> 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." 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).

This quote from *Griffin* is a straightforward textual application of the very words in the Fourth Amendment. If a magistrate is involved, *no* court order may

issue to enter a home unless it is supported by probable cause. And no state statute may abrogate that constitutional requirement.

B. The probable cause standard allows the State to protect children from harm, while also protecting children from unnecessary investigations.

It goes without saying that no child should suffer abuse, and that the government has an important interest in protecting children from abuse. But as the Ninth Circuit Court of Appeals recognized more than twenty years ago, "[t]he 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." *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999).[2]

In re Petition to Compel reached this same conclusion. "There can be no doubt that the state can and should protect the welfare of children who are at risk from acts of abuse and neglect," the Superior Court wrote, and "[t]here likewise can be no doubt that occasions arise calling for immediate response, even without prior judicial approval. But those instances are the exception. Otherwise child welfare workers would have a free pass into any home in which they have an anonymous report of poor housekeeping, overcrowding, and insufficient medical care and, thus, a perception that children may be at some risk." 875 A.2d at 378,

[2] Amicus Home School Legal Defense Association represented the Calabrettas.

quoting Walsh v. Erie County Dept. of Job & Family Servs., 240 F. Supp. 2d 731, 751-752 (N.D. Ohio 2003).

Anonymous reports pose special dangers. As the Third Circuit has previously recognized, it is critical in the child welfare context that investigators not "rely on the unknown credibility of an anonymous informant unless [they] could corroborate the information through other sources which would have reduced the chance that the informant was recklessly relating incorrect information or had purposely distorted information." *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1127 (3rd Cir. 1997).

The probable cause standard counteracts these dangers in several ways. First, it is rightly suspicious of anonymous tips, which "alone seldom demonstrate[] the informant's basis of knowledge or veracity" needed to justify a search or seizure. *Alabama v. White*, 496 U.S. 325, 329 (1990). Additionally, "[t]o find probable cause to search, there needs to be a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Burton,* 288 F.3d 91, 103 (3d Cir. 2002), *quoting Illinois v. Gates,* 462 U.S. 213, 238 (1983).

In re Petition to Compel properly adapts this standard to the child welfare context: to enter a home, the Department of Children and Youth "must file a verified petition alleging facts amounting to probable cause to believe that an act of

child abuse or neglect has occurred and evidence relating to such abuse *will be found in the home*." 875 A.2d at 377 (emphasis added). If the Department has probable cause to believe abuse or neglect is occurring in the home, it can petition the Court to enter the home. But if it lacks that probable cause—or if the allegations are unrelated to the conditions in the home—it lacks grounds to seek entry into a home. This is exactly what the Fourth Amendment requires.

C. Unnecessary investigations cause real harm to children.

Appellate oversight in this area is crucial, because as courts and legal scholarship have increasingly recognized, improvidently ordered investigations can dramatically harm families. Almost fifteen years ago, in her seminal article on the effect of child welfare investigations, Duke Law professor Doriane Coleman cautioned that "the majority of intrusions on family privacy do not directly benefit the children involved, and in many instances actually cause them demonstrable harm." Doriane L. Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 441 (2005).

In the fifteen years since, other researchers have found that while "children, of course, have a strong interest in being free from abuse . . . they also have a strong interest in being free from intrusive traumatic questioning by strangers." Jennifer Kwapisz, *Fourth Amendment Implications of Interviewing Suspected*

Victims of Abuse in School, 86 ST. JOHN'S L. REV. 963, 965 (2012). "[I]nvestigations, particularly those that are unnecessarily intrusive or that separate children from their caregivers, can be traumatic and psychologically harmful to the children as well as damaging to the family as a whole." Terri Dobbins Baxter, *Constitutional Limits on the Right of Government Investigators to Interview and Examine Alleged Victims of Child Abuse or Neglect*, 21 WM. & MARY BILL OF RTS. J. 125 (2012).

Appellate courts have reached the same conclusion. In *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, the Court of Appeals for the Fifth Circuit found that a six-year old child who was subject to an unlawful investigation "subsequently experienced frequent nightmares involving the incident, and exhibited anxiety responses, for which she underwent counseling. The symptoms persisted for about six months." 299 F.3d 395, 399 (5th Cir. 2002). Similarly, in *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, the court recognized that child welfare investigations can cause "trauma" to the child, especially if the child is subjected to multiple interviews or investigations. 537 F.3d 404, 413 (5th Cir. 2008).

No one disputes that the state has a compelling and laudable interest in the welfare of children, but that interest "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." *Calabretta*, 189 F.3d at 820. Respect for the Fourth Amendment is key to preserving that balance.

II. *In re Petition to Compel's* approach is typical of that used in sister states.

In re Petition to Compel's approach to access orders in the child welfare context is a sensible application of the Fourth Amendment. It should come as no surprise that it takes the same approach as other sister states in resolving these disputes in the child-welfare context. We highlight three such states, where we have represented families in cases similar to *In re Petition to Compel*, and those states' courts decided the case based on a close examination of the "cause" needed to enter a home.

A. Alabama.

In *H.R. v. State Department of Human Resources*, 612 So.2d 477 (Ala. 1992),[3] the question was almost identical to the one before this Court: did the investigator's affidavit provide the facts needed to justify an order of entry into a private home? Although the Alabama statute permitted such an order to issue for "cause shown," without specifying the level of "cause" required, the Alabama Court of Appeals held that "cause shown" *had* to mean "reasonable or probable

[3] Amicus Home School Legal Defense Association represented the family in *H.R.*

cause shown, *i.e.*, reasonable or probable cause shown to believe that there has been an abuse of a child . . . ." *Id.* at 479.

The reason was simple: "our legislature would not provide for the issuance of an order by a court for an investigative entry into a private home on any less 'cause shown' than that required for an ordinary search warrant." *Id.* The court reasoned that the Department's case—which was predicated on unsworn hearsay—amounted at best to mere suspicion, not probable cause. As such, it could not justify an order to enter a home. *Id.*

B. North Carolina.

In re Petition to Compel also closely tracks the North Carolina Supreme Court's 2003 decision in *In re Stumbo*, 582 S.E.2d 255, 289 (N.C. 2003).[4] A social service investigator went to the Stumbos' home to investigate an allegation that a two-year-old child who had been seen momentarily unattended outside her family's rural home. When the family refused entry, the investigator sought and obtained a court order to enter the home over the family's objection.

Although the North Carolina Court of Appeals initially sustained the order, the Supreme Court of North Carolina unanimously reversed. The majority opinion decided the case on the grounds that the report should never have triggered an investigation at all. "On this record, we have a report of a circumstance that

[4] Amicus Home School Legal Defense Association represented the Stumbos.

probably happens repeatedly across our state, where a toddler slips out of a house without the awareness of the parent or care giver—no matter how conscientious or diligent the parent or care giver might be. While no one wants that to happen, such a lapse does not in and of itself constitute 'neglect' under N.C.G.S. § 7B-101." *In re Stumbo*, 582 S.E.2d at 289.

Three of the seven justices on the North Carolina Supreme Court agreed, but would have gone further: not only did the allegations fail to amount to "abuse" or "neglect," but the order itself raised serious constitutional issues that were fraught with the potential for abuse. For them, "the central issue in this case is whether, when conducting a routine, non-emergency investigation, the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution allow a director to secure a noninterference order without particularized allegations of abuse or neglect supported by corroborative evidence." *In re Stumbo*, 582 S.E.2d at 292.

After an extensive analysis of the state and federal constitutional protections involved, the concurring justices wrote that "[e]ven when performing the important role of protecting children from abuse and neglect, government action must still comport with the Constitution." *Id.* at 299. As such, "[t]he trial court should have considered the allegations directed against the Stumbos as well as any evidence tending to show that such allegations were unfounded in determining whether the

government should be permitted to enter a private home over the objections of its owner, or to interview the children in private without the consent of their parents." *Id.* at 300.

C. Texas.

Finally, the Texas Court of Appeals decided a case late last year, which centered on the meaning of Texas's statute that allows social services investigators to petition for entry into a home. *In re Berryman*, 2020 Tex. App. LEXIS 8230, 2020 WL 6065982 (Tex. Ct. App. 12th Dist. 2020) (UNPUBLISHED).[5]

The Department of Family Protective Services investigated the Berrymans after an unknown person reported that they put their 8-month-old infant to sleep on the floor of a closet and that the baby had cried "excessively." *Id.* at *2. Mrs. Berryman talked to the investigator outside her home, explaining that her infant slept in a walk-in closet, which they had converted to a small nursery. She also allowed the investigator to see her baby, who was clothed only in a diaper, and the investigator noted that the baby "appeared to be clean and healthy." *Id.* The investigator then wanted to see inside the Berrymans' home. When Mrs. Berryman refused, the investigator sought and was granted an entry order. *Id.* at *2-3, *4.

[5] Amicus Home School Legal Defense Association represented the Berrymans. For the convenience of the Court, a copy of this decision is reproduced in the Appendix.

When the Berrymans sought a writ of mandamus, the Texas Court of Appeals held that the order should not have been granted. While the Department's petition had been supported by an affidavit, none of its allegations amounted to "abuse" or "neglect." "It is not uncommon for a parent to place a baby on the floor to play or nap," the Court noted, "[n]or is it uncommon for a parent to allow an infant to cry herself to sleep, which is a known method of sleep training. And it is certainly not beyond the realm of reasonableness that a parent might convert a closet into a nursery, albeit a small one." *Id.* at *13. "Without more, the conclusory assertions in [the] affidavit do not allege sufficient facts from which [the district court] could reasonably conclude that abuse or neglect had potentially occurred as contemplated by the Texas Family Code." *Id.*

The Court in *Berryman* was very attuned to the importance of protecting children from abuse and neglect. But it also recognized that while the state "may legitimately interfere with family autonomy to protect children from genuine abuse and neglect," its "responsibility to protect children from abusive parents does not authorize the State to oversee the internal affairs of every family." *Id.* at 16. The Court balanced these interests by applying the same sensible standard employed in *H.R.*, and *Stumbo*, and *In re Petition to Compel*:

> Absent a sufficient supporting affidavit, an order in aid of investigation of child abuse or neglect does not authorize a legitimate interference with family autonomy for purposes of protecting children from genuine abuse or neglect. To conclude otherwise would subject a parent's fundamental right

> to the care, custody, and control of her children to potential arbitrary governmental interference for any conduct or decision with which the government may disagree or of which it may disapprove.

Id. at *16-17.

CONCLUSION

This Court should take this opportunity to affirm the Pennsylvania Superior Court's decision in *In re Petition to Compel*.

Respectfully submitted this 25th day of February, 2021:

/s/ Richard Winkler
Richard Winkler
Pa. Bar No. 23481
BUTCHER & WINKLER
123 N. Franklin Street
Titusville, PA 16354
Phone: (814) 827-9002
E-mail: rwinkler@zoominternet.net
Counsel for Amicus Curiae

CERTIFICATION OF WORD COUNT

In accordance with Rules 531(b)(3) and 2135(b) of the Pennsylvania Rules of Appellate Procedure, I hereby certify that this Brief contains 3,182 words.

Dated: February 25, 2021

/s/ Richard Winkler
Richard Winkler

CERTIFICATE OF COMPLIANCE WITH Pa. R.A.P. 127

I certify 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: February 25, 2021

/s/ Richard Winkler
Richard Winkler

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Amicus Curiae Home School Legal Defense Association in Support of Appellant was served on the following attorneys of record via the Court's electronic case filing system (PACFile):

Michael Eugene Angelotti
7950 Henry Avenue 7A
Philadelphia, PA 19128

Courtney Lynn McGinn
Robert D. Aversa
Kathleen Bola Kim
City of Philadelphia
Law Department, Child Welfare Unit
1515 Arch Street, Floor 16
Philadelphia, PA 19102

Sharon K. Wallis
640 Rodman Street
Philadelphia, PA 19147

Dated: February 25, 2021

/s/ Richard Winkler
Richard Winkler

APPENDIX

NO. 12-20-00210-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE: MATTHEW BERRYMAN	§	
AND TABITHA BERRYMAN,	§	*ORIGINAL PROCEEDING*
RELATORS	§	

OPINION

Matthew and Tabitha Berryman filed this original proceeding to challenge Respondent's order in aid of investigation of child abuse or neglect.[1] We conditionally grant the writ.

BACKGROUND

The Berrymans are the parents of eight children, including an infant named E.B. In August 2020, the Texas Department of Family and Protective Services (the Department) filed a petition for order in aid of investigation of a report of child abuse or neglect, which alleged that the Department received a report of child abuse or neglect on August 17 and there is probable cause to expeditiously conduct an investigation to ensure the children's safety and welfare. According to the affidavit of the Department's representative, Jessica Tullberg, the Department received an intake alleging physical abuse of an infant. Specifically, E.B. was heard crying inside a closed closet in the Berrymans' home. The reporter alleged that Tabitha placed E.B. on the floor of the closet, instead of in a crib or infant seat, and E.B. "cried excessively" until falling asleep. The reporter stated that four or five siblings were in the home, as well as a grandmother or other adult caregiver, who observed E.B. in the closet but did not remove her from the closet. Tullberg spoke to the reporter, who confirmed the details of the intake.

[1] Respondent is the Honorable Tim Womack, Judge of the 307th District Court in Gregg County, Texas. The Texas Department of Family and Protective Services is the Real Party in Interest. The Texas Public Policy Foundation (the Foundation) filed an amicus brief in support of the Berrymans' petition for writ of mandamus.

On August 17, Tullberg went to the Berrymans' home. When she knocked on the door, a "young female" peered through the glass door and informed Tullberg that Tabitha was resting. Tullberg identified herself and requested that Tabitha be asked to come to the door. Approximately ten minutes later, Tullberg again knocked on the door. Tabitha, who was on the telephone with her attorney, came to the door. She told Tullberg that E.B. does not sleep in a "little closet" but sleeps in a walk-in-closet, which she called a "spare bedroom," and she denied the closet being inappropriate. Tullberg asked to see E.B. and the sleeping arrangements. Tabitha went inside to consult with her attorney and thereafter returned with E.B. She told Tullberg that E.B. has proper sleeping arrangements and is not being left in the closet. She allowed Tullberg to observe E.B., who wore only a diaper. Tullberg stated that E.B. appeared clean and healthy, with no visible physical injuries. Tullberg stated that she still needed to see the home environment and interview all the children, but Tabitha declined to allow Tullberg inside or agree to further interviews without speaking to Matthew. Tullberg advised Tabitha that she could not "ensure, nor appropriately assess, the children's safety as the home environment and interviews with the children are crucial pieces." Tabitha tentatively agreed to a time for Tullberg to return to the residence, but later cancelled so she could discuss with Matthew and agreed to contact Tullberg with a time to return to the residence.

On August 18, Tullberg called the Berrymans and left a message. That same day, she received a letter from the Berrymans' attorney, which requested that the Department close its case, as there was sufficient information to determine that the allegations are unfounded and no further contact with the family appeared necessary. The letter stated that E.B. was not left in a closet; rather, a large walk in closet had been converted into a nursery. The letter further stated that Tabitha voluntarily met with Tullberg, allowed Tullberg to inspect the baby, and the "mere allegation that a child is left in a closet is not necessarily a reasonable belief that a child is subject to abuse and neglect."

In her affidavit, Tullberg stated that she had been unable to conduct even basic investigatory tasks to ensure the children's safety. Based on the Barrymans' failure to cooperate with the investigation into allegations of abuse and neglect, Tullberg was concerned about the risk to their children's safety. Accordingly, the Department's petition alleged that it had been unable to conduct a thorough investigation because it had been unable to obtain consent, i.e., consent was denied, to enter the children's home, school, or other location for purposes of

interview, examination, or investigation. The Department sought an ex parte order (1) authorizing a Department representative to have immediate access to E.B. and the unknown children and to enter the children's home, school, or other location for an interview with the children, and observation of the premises and immediate surroundings where the children are located or where the alleged abuse or neglect occurred; and (2) authorizing a Department representative to transport the children for an interview relating to the investigation.

On August 21, Respondent signed an order finding that the Department has probable cause to conduct an investigation and there is good cause for the Department to have investigatory access to the children and to enter the home for an interview with the children, and observation of the premises and immediate surroundings where the children are located or where the alleged abuse or neglect occurred and to transport the children for an interview relating to the investigation.[2] In accordance with these findings, the order authorized the Department's representative to have investigatory access and to enter the children's home for an interview and observation, and to transport the children for an interview. The Berrymans were served with citation on August 27.

The Berrymans filed their mandamus petition with this Court on August 31. We granted their request for emergency relief, and stayed the August 21 order pending resolution of this proceeding.

PREREQUISITES TO MANDAMUS

Mandamus is an extraordinary remedy. ***In re Sw. Bell Tel. Co., L.P.***, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding). A writ of mandamus will issue only when the relator has no adequate remedy by appeal and the trial court committed a clear abuse of discretion. ***In re Cerberus Capital Mgmt., L.P.***, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding). The relator has the burden of establishing both of these prerequisites. ***In re Fitzgerald***, 429 S.W.3d 886, 891 (Tex. App.—Tyler 2014, orig. proceeding.). "Mandamus will not issue when the law provides

[2] The Department filed its petition on August 24, 2020, but Respondent signed the challenged order on August 21. The Berrymans and the Foundation take issue with this discrepancy. The Department explains that the petition and ex parte order were left with the court coordinator on August 21 because Respondent was on the bench, the court coordinator contacted the assigned attorney on August 24, and the clerk's office accepted the petition, affidavit, and order on August 26. An e-filing print out reflects that the documents were filed on August 24 and accepted on August 26. Apparently, Respondent signed the order and only then were all the documents filed and accepted. The Department states that this procedure is common practice as to ex parte orders. We have no reason to doubt the Department's representations regarding the filing date being three days after the order was signed.

another plain, adequate, and complete remedy." ***In re Tex. Dep't of Family & Protective Servs.***, 210 S.W.3d 609, 613 (Tex. 2006) (orig. proceeding).

An order in aid of investigation is a temporary order. *See* ***In re Tex. Dep't of Family & Protective Servs.***, 255 S.W.3d 613, 615 (Tex. 2008) (orig. proceeding). Mandamus is an appropriate remedy because the trial court's issuance of a temporary order is not subject to interlocutory appeal. *See* ***In re Derzapf***, 219 S.W.3d 327, 335 (Tex. 2007) (orig. proceeding); *see also* ***In re Salminen***, 492 S.W.3d 31, 38 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding); *see also* ***B.H. v. Tex. Dep't of Family & Protective Servs.***, No. 03-18-00101-CV, 2018 WL 1220897, at *1 (Tex. App.—Austin Mar. 9, 2018, no pet.) (mem. op.) (dismissing appeal from order in aid of investigation for want of jurisdiction); ***In re S.D.***, No. 09-11-00192-CV, 2011 WL 2581914, at *1 (Tex. App.—Beaumont June 30, 2011, no pet.) (mem. op.) (dismissing appeal from order in aid of investigation for want of jurisdiction); TEX. FAM. CODE ANN. § 105.001(e) (West 2019).

ABUSE OF DISCRETION

The Berrymans maintain that Respondent abused his discretion by granting the order in aid of investigation without any basis for the Department's belief that E.B. suffered abuse or neglect and without probable cause to enter the home and seize any of their children for interviews. The Texas Public Policy Foundation (the Foundation) filed an amicus brief in support of the Berrymans.[3] The Foundation argues that (1) Respondent abused his discretion by failing to apply the fit parent presumption; (2) Section 261.303 of the family code is unconstitutionally void for vagueness; (3) Respondent violated the Berrymans' due process rights by issuing the order without first affording them notice and a meaningful opportunity to respond; and (4) the order exceeds statutory authority by empowering the Department to transport the children to a different location for purposes of furthering the investigation.

Applicable Law

With assistance from the appropriate state or local law enforcement agency, the Department shall make a prompt and thorough investigation of a report of child abuse or neglect allegedly committed by a person responsible for a child's care, custody, or welfare. TEX. FAM.

[3] According to the amicus brief, the Foundation is a "non-profit, nonpartisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically sound research and outreach."

CODE ANN. § 261.301(a) (West 2020); ***In re E.C.R.***, 402 S.W.3d 239, 246 (Tex. 2013). If a parent or other person refuses to cooperate with the Department's investigation of the alleged abuse or neglect of a child and the refusal poses a risk to the child's safety, the Department shall seek assistance from the appropriate attorney with responsibility for representing the Department to obtain a court order pursuant to Section 261.303. TEX. FAM. CODE ANN. § 261.3031(a) (West 2020). Under Section 261.303, if admission to the home, school, or any place where the child may be cannot be obtained, then for good cause shown the court having family law jurisdiction shall order the parent, the person responsible for the care of the children, or the person in charge of any place where the child may be to allow entrance for the interview, examination, and investigation. ***Id.*** § 261.303(b). "Good cause" constitutes a "legally sufficient reason" and is "often the burden placed on a litigant...to show why a request should be granted or an action excused." BLACK'S LAW DICTIONARY 235 (8th ed. 2004); ***In re M.C.F.***, 121 S.W.3d 891, 896 (Tex. App.—Fort Worth 2003, no pet.). A trial court has discretion to determine good cause, and that determination can only be set aside if the trial court abused its discretion. ***M.C.F.***, 121 S.W.3d at 896.

A trial court abuses its discretion when it makes a decision that is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. ***In re M-I L.L.C.***, 505 S.W.3d 569, 574 (Tex. 2016) (orig. proceeding). We will not substitute our judgment for that of the trial court but must consider whether the trial court acted without reference to guiding rules and principles. ***Id.*** A trial court has no discretion in determining what the law is or applying the law to the facts. ***Id.*** A clear failure by the trial court to correctly analyze or apply the law constitutes an abuse of discretion. ***Id.***

Abuse or Neglect

We first address the Berrymans' contention that Tullberg's affidavit fails to allege facts that would amount to good cause that E.B. was a potential victim of abuse or neglect and, as a result, there was no basis for Respondent to grant the order. The Department responds, "It is reasonable to assume that the intake reported to the Department was true once the Department investigator was able to corroborate a critical portion of the initial intake report." According to the Department, "The cause for concern remains for the Department investigator to complete the necessary task to determine the safety of the children in the environment, and the Department presented the reasons for the trial court to consider the good cause in this matter." The

Department further maintains, "It is not unreasonable to assume that entrance to the home could lead to discovery of neglect stated in [the] intake report."

Chapter 261 of the Texas Family Code provides a broadly defined and nonexclusive list of acts or omissions that constitute "abuse" and "neglect" when investigating reports of child abuse or neglect. ***In re S.M.R.***, 434 S.W.3d 576, 583 (Tex. 2014); ***E.C.R.***, 402 S.W.3d at 246. "Both definitions give examples of abusive or neglectful conduct, and both definitions explicitly include risk[.]" ***E.C.R.***, 402 S.W.3d at 246. Pertinent to this case, "abuse" includes the following acts or omissions:

> (A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;
> (B) causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;
> (C) physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;
> (D) failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child[.]

TEX. FAM. CODE ANN. § 261.001(1)(A)-(D) (West 2020).[4] "Neglect" includes the following pertinent acts or omissions:

> (i) the leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm, without arranging for necessary care for the child, and the demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the child;
>
> ...
>
> (a) placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child;
>
> ...
>
> (c) the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services had been offered and refused[.]

[4] Section 261.001(1)(E)-(M) refers to child abuse involving sexual conduct, pornography, trafficking, use of a controlled substance, or forcing a child into marriage. *See* TEX. FAM. CODE ANN. § 261.001(1)(E)-(M) (West 2020).

Id. § 261.001(4)(A)(i), (ii)(a), (c).[5]

Here, the allegations that serve as the basis for Respondent's order are that on August 17, the Department received a report of physical abuse to an infant (E.B.), i.e., the "infant child had been heard crying inside a closet with the door shut in the residence." Rather than being placed in a crib or infant seat, E.B. was placed on the closet floor where she cried "excessively" until falling asleep. That same day, Tabitha told Tullberg that E.B. sleeps in a walk-in closet or "spare bedroom," had "proper sleeping arrangements," and was not being left in the closet. Although Tabitha did not allow Tullberg inside the home, she brought E.B. outside and Tullberg observed that E.B. had no visible physical injuries and appeared clean and healthy. In a subsequent letter to Tullberg, the Berrymans' attorney further explained that the master bedroom walk-in closet had been converted into a nursery and was equipped with baby monitors. Tullberg stated in her affidavit that she had been unable to "conduct even basic investigation tasks to ensure the safety of the children" and she had "concerns that there is a risk to the Berryman children's safety based upon the failure to cooperate with the investigations into the allegations of neglect and abuse[.]" Tullberg classified the report as a Priority One intake.

We first take issue with designation of the report as a Priority One. A Priority One report "concern[s] children who appear to face an immediate risk of abuse or neglect that could result in *death or serious harm.*" 40 TEX. ADMIN. CODE ANN. § 707.485(a)(1) (emphasis added); § 707.451(a)(17) ("Risk of child abuse or neglect--a reasonable likelihood that in the foreseeable future there will be an occurrence of child abuse or neglect as defined in Texas Family Code (TFC) §261.001"). Tullberg did not explain how Tabitha's alleged actions give rise to a conclusion that E.B. faced an immediate risk of abuse or neglect that *could result in death or serious harm.* And Tullberg's affidavit sets forth absolutely no facts regarding the Berrymans' other children, abusive, neglectful, or otherwise.

Nor do Tabitha's alleged actions, standing alone, meet the definitions of abuse or neglect. It is not uncommon for a parent to place a baby on the floor to play or nap.[6] Nor is it uncommon

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[5] The remainder of Section 261.001(4) refers to the failure to provide medical care, exposure to a substantial risk of sexual conduct, exposure to acts or omissions under Section 261.001(1)(E)-(H) and (K), failure to arrange for necessary care when the child has been absent from the home, and negligent acts or omissions by someone working under the auspices of a facility or program. *See id.* § 261.001(4)(A)(ii)(b), (d), (e), (iii), (iv).

[6] In "Safe Sleep for Babies: A Community Training," created by a committee composed of staff from the Texas Departments of State Health Services and Family and Protective Services, a note to the trainer states, "You

for a parent to allow an infant to cry herself to sleep, which is a known method of sleep training.[7] And it is certainly not beyond the realm of reasonableness that a parent might convert a closet into a nursery, albeit a small one. That the Department, or the trial court, may disapprove is insufficient to overcome a parent's fundamental right to make decisions regarding her children's care, custody, and control. *See* ***Troxel v. Granville***, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L.Ed.2d 49 (2000). There must be more to justify governmental intrusion into the family unit.

The conclusory allegations in Tullberg's affidavit fail to create such a justification. The facts set forth in Tullberg's affidavit do not allege any mental or emotional injury that may result in an observable and material impairment in E.B.'s growth, development, or psychological functioning, much less any act that caused or permitted E.B. to be in a situation in which she sustained such an injury that resulted in an observable and material impairment in her growth, development, or psychological functioning. *See* TEX. FAM. CODE ANN. § 261.001(1)(A)-(B). Nor did Tullberg allege facts suggesting physical injury that resulted in substantial harm to E.B., or the genuine threat of substantial harm from physical injury to E.B. *See* ***id.*** § 261.001(1)(D)-(C). Tullberg offered no explanation as to why E.B. would be exposed to a substantial risk of physical or mental harm, why a reasonable person would realize that the situation in which E.B. was placed results in bodily injury or a substantial risk of immediate harm to E.B., or how the alleged actions constituted a failure to provide E.B. with food, clothing, or shelter necessary to sustain E.B.'s life or health. ***Id.*** § 261.001(4)(A)(i), (ii)(a), (c). Again, Tullberg's affidavit was completely silent as to any allegations of abuse or neglect concerning the other children in the home. Tullberg expressly cited the Berrymans' "failure to cooperate" as the basis for her concern regarding a risk to the children's safety. But she offered no explanation as to why the alleged failure to cooperate posed a risk to the safety of any of the Berryman children. *See* TEX. FAM. CODE ANN. § 261.3031(a) (if parent or other person refuses to cooperate with investigation of alleged abuse or neglect *and the refusal poses a risk to the child's safety*, the Department shall seek assistance to obtain a court order pursuant to Section 261.303). Without more, the conclusory assertions in Tullberg's affidavit do not allege sufficient facts from which

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can let parents know that if there are no other options, the best place for their baby to sleep is on a thin mat or blanket on a clean and cleared off space on the floor." https://www.dshs.texas.gov/pdf/FINAL_Training_Guide.pdf.

[7] "Information for Parents of Newborns," created by the Department of State Health Services, includes the following advice: "If you are feeling frustrated by your baby's crying, put the baby in a safe place and leave the room. *Let your baby cry alone for 10 to 15 minutes.*"
https://www.dshs.state.tx.us/mch/pdf/Info_for_Parents_FINAL_English.pdf (emphasis added).

Respondent could reasonably conclude that abuse or neglect had potentially occurred as contemplated by the Texas Family Code.

And while we recognize that the definitions of abuse and neglect may encompass conduct in addition to that statutorily defined, we will not extend those definitions so broadly as to encourage governmental overreach. *See* ***City of Fort Worth v. Rylie***, 602 S.W.3d 459, 468 (Tex. 2020) ("Courts must construe statutes to avoid constitutional infirmities"). "[S]o long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." ***Troxel***, 530 U.S. at 68-69, 120 S. Ct. at 2061. Due process does not permit a State to infringe on a parent's fundamental right to make child rearing decisions simply because a state judge believes a "better" decision could be made. ***Id.***, 530 U.S. at 72-73, 120 S. Ct. at 2064. The "State may *legitimately interfere* with family autonomy to protect children from *genuine* abuse and neglect by parents who are unfit to discharge the 'high duty' of 'broad parental authority over minor children.'" ***Interest of A.M.***, No. 18-0905, 2019 WL 5275657, at *1 (Tex. Oct. 18, 2019) (Blacklock, J., concurring in denial of pet.) (quoting ***Parham v. J.R.***, 442 U.S. 584, 602, 99 S. Ct. 2493, 2504, 61 L. Ed. 2d 101 (1979)) (emphasis added). The State's responsibility to protect children from abusive parents does not authorize the State to oversee the internal affairs of every family. ***Id.*** "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." ***Id.*** (quoting ***Parham***, 442 U.S. at 603, 99 S. Ct. at 2504). Absent a sufficient supporting affidavit, an order in aid of investigation of child abuse or neglect does not authorize a legitimate interference with family autonomy for purposes of protecting children from genuine abuse or neglect. To conclude otherwise would subject a parent's fundamental right to the care, custody, and control of her children to potential arbitrary governmental interference for any conduct or decision with which the government may disagree or of which it may disapprove.

Accordingly, under the facts of this case, we conclude that Tullberg's affidavit is simply insufficient to support a conclusion of good cause to order that the Berrymans allow entrance for interviews, examination, and investigation.[8] Thus, Respondent abused his discretion by signing

[8] We do note that the order does not appear to track the statute, which allows a trial court to order the "*parent, the person responsible for the care of the children, or the person in charge of any place where the child*

an order in aid of investigation. Because we so hold, we need not address the Berrymans' remaining contentions or those raised by the Foundation. *See* TEX. R. APP. P. 47.1.

DISPOSITION

Having determined that Respondent abused his discretion by signing the order in aid of investigation, we ***conditionally grant*** the Berrymans' petition for writ of mandamus. We direct Respondent to vacate his August 21, 2020, order in aid of investigation. We trust Respondent will promptly comply with this opinion and order. The writ will issue only if the trial court fails to do so ***within ten days of the date of the opinion and order***. The trial court shall furnish this Court, within the time of compliance with this Court's opinion and order, a certified copy of the order evidencing such compliance. We ***lift*** our stay of September 2, 2020.

JAMES T. WORTHEN
Chief Justice

Opinion delivered October 14, 2020.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

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may be" to allow entrance for the interview, examination, and investigation. TEX. FAM. CODE ANN. § 261.303(b) (West 2020) (emphasis added). Respondent's order authorized the *Department's representative* to have investigatory access and to enter the children's home for an interview and observation. The order also authorized the Department representative to transport the children for an interview. Section 261.302(b)(3) does provide that the interview and examination of the child may include transporting the child for purposes relating to the interview or investigation. ***Id.*** § 261.302(b)(3) (West 2020). Before the Department may transport the child, the Department shall "attempt to notify the parent or other person having custody of the child of the transport." ***Id.*** § 261.302(b-1).

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Amicus Curiae Home School Legal Defense Association in Support of Appellant was served on the following attorneys of record via the Court's electronic case filing system (PACFile):

Michael Eugene Angelotti
7950 Henry Avenue 7A
Philadelphia, PA 19128

Courtney Lynn McGinn
Robert D. Aversa
Kathleen Bola Kim
City of Philadelphia
Law Department, Child Welfare Unit
1515 Arch Street, Floor 16
Philadelphia, PA 19102

Sharon K. Wallis
640 Rodman Street
Philadelphia, PA 19147

Dated: February 25, 2021

/s/ Richard Winkler
Richard Winkler