No. _____

In The Supreme Court of the United States

MICHAEL MARCAVAGE,
Petitioner,

v.

BOROUGH OF LANSDOWNE, PENNSYLVANIA
AND
MICHAEL J. JOZWIAK, BOROUGH CODE OFFICER,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Michael Marcavage is a landlord and resident of the Borough of Lansdowne, Pennsylvania. By local ordinance, the Borough requires landlords such as Marcavage, who reside within a structure that includes rental property, to submit to a warrantless home inspection as a condition of receiving a rental license. Since the enactment of this ordinance, Marcavage has repeatedly voiced his objections to this scheme on Fourth Amendment grounds, but has not received any definitive response from Borough officials. On September 30, 2009, Borough officials posted a notice on the front door of Marcavage's residence, forbidding him to use, occupy, or collect rent from his property because he had not submitted to a warrantless administrative search. The questions presented by this petition are:

I. May a municipality require that landlords waive their Fourth Amendment rights to be free from warrantless searches of their homes as a condition of exercising fundamental property rights?

II. Does a municipality's posting of a notice stating that it is unlawful for the owner to use or occupy his home constitute a seizure of the property for purposes of the Fourth Amendment where the citizen leaves his home to avoid prosecution?

PARTIES TO THE PROCEEDING

The Petitioner is Michael Marcavage, an individual who resides in the Borough of Lansdowne, Pennsylvania.

The Respondents are the Borough of Lansdowne, a self-governing municipality organized under the laws of Pennsylvania, and Borough Code Officer Michael J. Jozwiak, in his individual and official capacities.

RULE 29.6 NOTATION

No party to this proceeding is a non-governmental corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Marcavage respectfully petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS AND ORDERS BELOW

The Third Circuit's opinion below is not reported, but may be cited as *Marcavage v. Borough of Lansdowne*, 2012 WL 3218520 (3d Cir. Aug. 9, 2012) and is set forth in the Appendix beginning at 1a. The Third Circuit's judgment is set forth beginning at 52a. The district court's opinion is reported at 826 F. Supp.2d 732 (E.D. Pa. 2011), and is set forth in the Appendix beginning at 19a. The district court's order granting summary judgment to Respondents is reproduced at 54a.

JURISDICTION

The final judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Eastern District of Pennsylvania was entered on August 9, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution provides, in relevant part: "[N]o state shall . . . deprive any person of life, liberty, or property, without due process of law."

Lansdowne Code § 265–4 (2003) ("Ordinance 1188") provided:

Upon completed registration of the rental unit, the owner or agent shall immediately arrange with the Code Department for a rental license inspection. The Code Officer shall fully inspect each registered rental unit. It shall be unlawful for the owner of any premises or any agent acting for such an owner to operate, rent or lease any premises or any part thereof, whether granted or rented for profit or nonprofit, or to represent to the general public that a premises or any part thereof is for rent, lease or occupancy without first acquiring one of the below-approved licenses issued by the Code Department in

the name of the owner, local agent or operator and for the specific rental unit. Fees for rental licenses shall be set by periodic resolution of Borough Council.

***

D. Owner occupying portions of rental properties. The owner occupied portion of a rental property shall be inspected in addition to the rental unit. However, there shall be no fee for this inspection.

Lansdowne Code § 265-4.

In 2010, the Borough amended its Code by adding new subsections, § 265-4(D) and § 265–10(E). These new provisions ("Ordinance 1251") state, respectively:

Written certification from a Pennsylvania-licensed architect or licensed engineer that states that the owner-occupied portion of a rental property complies with all of the provisions of applicable laws, regulations and codes shall be provided to the Borough. In lieu of a certification by a Pennsylvania-registered and -licensed architect or engineer, an inspection may be conducted, at the request of the owner, by the Borough Code Enforcement Officer to ascertain compliance with this chapter and all applicable laws, regulations and codes, in accordance with the applicable fee schedule of the owner-occupied portion of any rental property.

Lansdowne Code § 265-4(D).

> The owner, occupant, tenant or person in charge of any property or rental unit possesses the right to deny entry to any unit or property by a Code Enforcement Officer for purposes of compliance with this chapter. However, nothing in this chapter shall prohibit a Code Enforcement Officer from asking permission from a owner, occupant, tenant or person in charge of property for permission to inspect such property or rental unit for compliance with this chapter and all other applicable laws, regulations and codes, to seek a search warrant based on probable cause or to enter such property or rental unit in the case of emergency circumstances requiring expeditious action.
>
> Lansdowne Code § 265-10(E).

STATEMENT OF THE CASE

A. Factual History

Marcavage resides and owns real estate in Lansdowne, Pennsylvania. One of these properties contains two rental units. In the other, Marcavage resides in the downstairs unit and rents the upstairs unit to a tenant. App. 2a-3a. Each unit has a separate entrance, and there are no internal common areas. App. 22a.

Under Lansdowne Ordinance 1188, which was in effect at the time when the events described herein occurred, Marcavage was required to have both the rental units *and* his private residence inspected by a Borough Code Enforcement Officer as a condition of receiving a license to rent his real

property to tenants. App. 3a. The Ordinance made it unlawful to rent property without the proper license. *Id.*

Since the initial enactment of Ordinance 1188, Lansdowne has issued Marcavage annual notices urging him to obtain the mandated inspections. App. 4a. Marcavage has not, to date, obtained such an inspection; instead, he has informed Code Enforcement officials on multiple occasions that he considered the mandatory inspection scheme to violate his rights (and those of his tenants) under the Fourth Amendment.[1] *Id.*; App. 23a.

On September 30, 2009, Code Enforcement Officer Jozwiak posted notices on Marcavage's two residential properties which read:

NOTICE
This Structure has been Declared an
Unlawful Rental Property
For failure to obtain the required rental license.
It is unlawful for Landlord to collect any Rent, Use,
or
Occupy This Building After 9/30/09 or until a rental license has been
Obtained from the Borough of Lansdowne.
Any Unauthorized Person Removing This Sign
WILL BE PROSECUTED.

---

[1] Marcavage has complied with the Ordinance in all other regards, and has sought to have one of his rental units inspected during a time of vacancy. For reasons unknown to Marcavage, the inspection was not performed at this time, despite the fact that Marcavage actually paid for the inspection service.

App. 4a. As Marcavage read this notice (one of which was posted on the door of his own residence), it forbade him to "use" or "occupy" the building. *Id.*; App. 23a. Rather than risk prosecution, Marcavage spent the nights of October 1st and 2nd, 2009 in a hotel and spent the following two nights at acquaintances' homes. App. 4a-5a.

B. Proceedings Below

On October 5, 2009, Marcavage filed suit in the United States District Court for the Eastern District of Pennsylvania to enjoin Lansdowne from enforcing the notices. Marcavage invoked the federal district court's jurisdiction under 28 U.S.C. § 1331. Upon Lansdowne's agreement to take no further action until the resolution of the case, Marcavage returned to his home.

On April 21, 2010, Lansdowne amended Ordinance 1188 by enacting Ordinance 1251. The new provisions enabled the landlord to forgo the inspection by Borough officials upon obtaining written certification from a Pennsylvania-licensed architect or engineer that the owner-occupied portion of a rental property complies with all applicable laws. App. 3a.

Marcavage then filed an Amended Complaint seeking a declaratory judgment that the Ordinance was unconstitutional in both its original and amended form, a permanent injunction against its enforcement, and damages against the Borough for an unconstitutional seizure of his residence. App. 6a.

The district court reviewed Marcavage's constitutional claims with regard to Ordinance 1188, concluding that there was no material distinction between it and the amended version which would alter the constitutional analysis. App. 6a, fn2.[2]

The district court granted summary judgment in favor of Respondents, and Marcavage timely appealed to the United States Court of Appeals for the Third Circuit. *Id.*

The circuit court affirmed the summary judgment, rejecting Marcavage's facial and as-applied constitutional challenges. The court distinguished the Lansdowne inspection requirement from the warrantless administrative searches struck down in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), based primarily on the fact that in Lansdowne, "It is the property owner that decides if he wishes to use the property as rental units." App. 10a-11a. In other words, because criminal penalties do not result from the property owner's refusal to allow the government inspection unless the owner continues to rent his property, the court considered the Lansdowne scheme to pose no

---

[2] Marcavage agrees with this finding, because the Fourth Amendment concerns remain where citizens are required to submit to warrantless administrative searches at the government's behest, even where those searches are undertaken by a government surrogate employed to detect Code violations. *See Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 614 (1989) (Fourth Amendment protects against intrusions by private parties "if the private party acted as an instrument or agent of the Government.").

threat to citizens' Fourth Amendment rights. App. 11a-13a. The circuit court thus harmonized the inspection scheme with *Wyman v. James*, 400 U.S. 309 (1971), characterizing the ability to receive rents from real estate as a "benefit," the receipt of which can properly be conditioned upon a "limited search by a city official." App. 12a.

The circuit court also rejected Marcavage's claim that Code officials' posting of the notice that forbade him to occupy his home or to collect rents from his tenants constituted an unconstitutional seizure of his property under the Fourth Amendment and denial of his due process rights under the Fourteenth Amendment. App. 15a. The court found that Marcavage's interpretation of the notice as an eviction was erroneous because the posting did not state that Marcavage would be removed from his home, nor did it order him to vacate the premises. *Id.* The court made these findings without further explanation, despite the undisputed fact that the notice, itself, actually stated, "It is unlawful for Landlord to ... *Use, or Occupy* This Building After 9/30/09..." App., 4a (emphasis added).

REASONS FOR GRANTING THE PETITION

I. The court of appeals has decided an important constitutional question that has not been, but should be, decided by this Court: whether a municipality may require a citizen to waive his Fourth Amendment right to be free from warrantless administrative searches as a condition of his ability to collect rents.

It is imperative for this Court to grant this petition in order to reinforce its doctrine of unconstitutional conditions. The Court has summarized this doctrine as meaning that "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *United States v. Chicago, M. St. P. & P. R. Co.*, 282 U.S. 311, 328-29 (1931). *See also Barron v. Burnside*, 121 U.S. 186 (1887) (state cannot impose, as condition of doing business, requirements that are repugnant to federal Constitution).

While the doctrine's proper scope and jurisprudential underpinnings have been the subject of scholarly inquiry and debate (*See, e.g.*, Richard A. Epstein, *Foreward: Unconstitutional Conditions, State Power, and the Limits of Consent, The Supreme Court Term 1987*, 102 Harv.L.Rev. 5, 7 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv.L.Rev. 1415, 1428-42 (1989)), this Court should clarify that the doctrine means at least this:

that government officials may not "condition" the exercise of one fundamental civil liberty upon the forfeiture of another.

The question is directly and succinctly presented by this case, because in upholding the Lansdowne licensing scheme, the Third Circuit explicitly relied upon the fact that the only consequence of the property owner's refusal to submit to a warrantless home search is his loss of the ability to collect rents from his real property. App. 11a. The court reasoned that this, and the fact that the property owner remained in control of details such as the time and date of inspection, distinguished the Lansdowne Ordinance from the laws invalidated in *Camara*, *supra*. The courts below have thereby allowed the Borough to achieve indirectly what it concedes the Borough could not achieve directly: a warrantless search of a citizen's home.

Where this Court's unconstitutional conditions doctrine applies, government officials are precluded from conditioning a benefit upon the waiver of a constitutional right even if the government could legitimately withhold the benefit altogether. *See* Epstein, *supra*, at *6-7. However, the Court has found the doctrine to be inapplicable in a variety of contexts, leaving room for lower courts to speculate as to which "benefits" might properly be withheld from citizens who refuse to compromise their civil liberties. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138 (1983) (limitations on free speech rights of government employee are constitutionally permissible) *Califano v. Aznavorian*, 439 U.S. 170,

177 (1978) (accepting "incidental effect" of denial of social security benefits on right to travel); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding ban on political campaigning by federal employees).

Whatever the theoretical justification for the unconstitutional conditions doctrine may be, and wherever its outer boundaries may lie, the doctrine should be invoked in a case such as this one, where officials have required the complete waiver of a core, textual Fourth Amendment right as a condition of the enjoyment of property rights which are also a primary concern of the Bill of Rights. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (criminal defendant may not be forced to waive Fifth Amendment right against self-incrimination to assert Fourth Amendment claim for improper search/seizure). In short, it is intolerable for a citizen to be compelled to surrender one civil right in order to assert another. *Id.* The Court should grant this petition to provide this needed clarification to the beleaguered—but essential—doctrine.

II. The decision below undermines this Court's rulings in *Camara* and *See v. City of Seattle* and dramatically extends this Court's holding in *Wyman v. James* in a way that erodes Fourth Amendment protections for the sanctity of citizens' homes.

The unconstitutional conditions issue arises in this case as a result of the gray area left between this Court's decisions in *Camara*, *supra*, and *Wyman*, *supra*. The Court's guidance is needed to

ensure that lower courts do not—as the Third Circuit has done here—apply *Wyman* in a manner that improperly erodes core Fourth Amendment rights recognized by this Court.

Camara clearly prohibits government officials from applying criminal penalties to citizens who do not consent to warrantless administrative searches of their homes. *Id.*, 387 U.S. at 534. *Wyman*, however, permits the government to condition the receipt of public financial assistance upon warrantless home "inspections" by social workers. In this case, the courts below have treated the *Wyman* holding as a loophole which allows municipalities to perform warrantless administrative searches so long as they can tie them to a "benefit" citizens seek. This interpretation of *Wyman* both minimizes the significance of the search in question (by analogizing it to the home visits in *Wyman*) and all but eviscerates a fundamental property right (by characterizing the right to collect rent from private property as nothing more than a government "benefit").

The Court distinguished *Wyman* from *Camara* and *See v. City of Seattle*, 387 U.S. 541 (1967), by concluding that the visits by social workers in *Wyman* were not "searches" within the meaning of the Fourth Amendment, and that the "investigative" aspect of the visits had been overemphasized. *Wyman*, 400 U.S. at 317, 325. The Court explained that in both *Camara* and *See*, the intrusion into the home and business, respectively, "concerned a true search for violations." *Id.*, at 325. Furthermore, while the denial of consent for the searches in those

cases resulted in criminal prosecution, the only consequence of Mrs. James' refusal to submit to the home visit was the cessation of welfare benefits. *Id.*

By analogizing this case to *Wyman* rather than to *Camara* and *See*, the Third Circuit has marginalized the important central holdings of the latter two cases: that municipalities may not require citizens to submit to warrantless administrative inspections of private homes and businesses performed to monitor local code compliance. *Camara*, *supra*; *See*, *supra*. Under the circuit court's interpretation, *Camara* and *See* dictate Fourth Amendment protection for homeowners only where criminal prosecution is the *direct* result of the citizen's refusal to consent to the search. The court's holding denies Fourth Amendment protection where the refusal to consent leads to prosecution only if joined with the exercise of other property rights.

In so holding, the Third Circuit has also dramatically extended *Wyman*, because the decision below permits municipalities to deny not a government-provided entitlement, but *a citizen's liberty to exercise property rights*, if he does not allow the warrantless search. This Court explained in *Wyman* that Mrs. James' choice to refuse the home visit was similar to a taxpayer's prerogative to refuse to substantiate a claimed tax exemption. 400 U.S. at 324. "The taxpayer is fully within his 'rights' in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making." *Id.* Mrs. James faced a similar choice, the Court reasoned, "and nothing of constitutional magnitude

is involved." *Id.*

The same cannot be said of Marcavage and other property owners in Lansdowne. The right to rent real property is more than a mere "benefit" bestowed by the state. Indeed, it has long been recognized that among the valuable rights of owning property are the rights to unrestricted use and enjoyment of it and the right to receive rents. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54 (1993). Laws that purport to interfere with one's enjoyment of these property interests constitute deprivations of property that trigger the requirements of due process. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 12 (1991).

The Third Circuit's decision must not stand, because it unconscionably blurs the critical line between a citizen's *right* that is only subject to limited, reasonable, regulatory oversight, and a government-provided *benefit*. While the financial assistance benefit involved in *Wyman* was a matter of state beneficence, the license which Lansdowne holds here as the inducement for consent to the searches is the very means of the citizen's pursuit of his fundamental civil right to enjoy private property. Marcavage seeks no "benefit" from the government, except that of being left alone to enjoy his civil liberties.

Marcavage is not aware of any court decision, to date, upholding rental licensing schemes that require landlords to consent to a warrantless search of their own homes. *Cf. Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574, 576-77, 582 (7th Cir. 1999) (discussing city rental inspection

scheme that required inspectors to obtain warrant if consent denied). In fact, at least three courts have struck down similar ordinances on Fourth Amendment grounds. *See Sokolov v. Village of Freeport*, 420 N.E.2d 55, 57 (N.Y. 1981); *Wilson v. City of Cincinnati*; 346 N.E.2d 666, 671 (Ohio 1976); *Currier v. City of Pasadena*, 48 Cal. App.3d 810, 815 (Cal. Ct. App. 1975) (holding ordinance unconstitutional *except* if construed to incorporate statutory warrant provisions). However, if the decision below is left standing, other municipalities will likely find Lansdowne's system an attractive means of monitoring residential structures for Code compliance without enduring the hassle of obtaining warrants.

III. The court below has decided an important constitutional question that has not been, but should be decided by this Court: whether the posting of a notice forbidding a homeowner from occupying his property constitutes a Fourth Amendment "seizure."

For purposes of Fourth Amendment analysis, a "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook County, Illinois*, 506 U.S. 56, 63 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). "[A]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home." *Id.* (*quoting Silverman v. United States*, 365 U.S. 505, 511 (1961)).

Upon first reading the notice forbidding use or occupancy of his own home or continued rental to tenants, Marcavage immediately contacted Jozwiak by phone to inquire as to whether the notice was, in fact, meant to forbid him to occupy his own home. Jozwiak confirmed that Marcavage was required to comply with the directives stated in the posted notice. Marcavage then sought alternative shelter in an effort to avoid prosecution. Nevertheless, the circuit court found that the notice and its mandatory directives did not constitute a Fourth Amendment seizure.

The decisions of this Court establish that government officials' actions—although non-physical in nature—effect a seizure for Fourth Amendment purposes if they (1) convey to a reasonable person that he is not at liberty to go about his business and ignore governmental instructions, and (2) induce the citizen's submission to a show of authority. *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

However, it remains unsettled whether the government's posting of a notice forbidding further occupancy constitutes a seizure under the Fourth Amendment. *See*, e.g., *Thomas v. Cohen*, 304 F.3d 563, 583 (6th Cir. 2002) (Gilman, J., *dissenting*) (law not clearly established on whether officers' participation in unlawful eviction constituted seizure); *Sellhorst v. Stine*, 2010 WL 2572045, *3 (E.D. Tenn. June 18, 2010) (noting Fourth Amendment law unsettled as to whether officers' involvement in unlawful eviction without taking physical control constituted seizure); *Woll v. County*

of Lake, 582 F.Supp.2d 1225, 1230 (N.D. Cal. 2008) (pointing to lack of authority for plaintiff's claim that recording of "Notice of Nuisance" constituted meaningful interference with possessory interests in real estate); *Brooks v. Sauceda*, 85 F.Supp.2d 1115, 1127 (D. Kan. 2000), (finding no Fourth Amendment seizure because no occupants actually vacated the property based on posted notices) *aff'd*, 242 F.3d 387 (10th Cir. 2000).

In *Soldal*, the interference with the citizens' possessory interests was undeniable; law enforcement officers had physically removed the plaintiffs' mobile home from its foundation. But the interference with Marcavage's possessory interests in this case was just as meaningful in effect, for the notice informed Marcavage in no uncertain terms that he would be violating the law if he continued to use or occupy his home. App., 4a. This definite interference, though less dramatic, should be no less cognizable under the Fourth Amendment. *See U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 47 (1993) (Fourth Amendment "seizure" occurred when government directed tenants to pay future rents to United States Marshal as part of a drug forfeiture proceeding); *Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006) (Fourth Amendment "seizure" occurred when government officials published map erroneously showing part of plaintiffs' real estate as comprising a public trail). In the words of the Fourth Circuit, a government-occasioned interference with property that is "disruptive, stressful, and invasive" constitutes a Fourth Amendment seizure. *Presley*, 464 F.3d at 487.

This Court's guidance is needed to resolve the issue of whether a Fourth Amendment seizure occurs when officials post notices forbidding citizens from occupying their homes.

CONCLUSION

Under the Borough's rental licensing scheme upheld below, citizens like Marcavage are precluded from renting real property to tenants unless they submit to a warrantless search of their own homes by government officials or surrogates. The Third Circuit's ruling thus completely upsets this Court's unconstitutional conditions doctrine, allowing Lansdowne to force citizens to choose between two precious fundamental civil rights. It is difficult to imagine any more compelling need for the doctrine's application than where the "benefit" used to induce the waiver of constitutional rights is itself a thing of great constitutional import. The Court's guidance is also needed to reaffirm the sanctity of the home as recognized in Camara and to determine whether a Fourth Amendment seizure is effected when government officials forbid citizens to continue occupancy of their homes.

Marcavage prays that this Court will intervene to vindicate his fundamental civil rights.

Respectfully submitted,

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APPENDIX

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-4175

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Appellant

v.

BOROUGH OF LANSDOWNE, PENNSYLVANIA;
MICHAEL J. JOZWIAK, BOROUGH CODE
OFFICER, IN HIS OFFICIAL AND INDIVIDUAL
CAPACITIES

APPEAL FROM THE UNITED STATES DISTRICT
COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
(D.C. Civ. No. 2–09–cv–04569)
District Judge: Honorable Anita B. Brody

Submitted Under Third Circuit LAR 34.1(a)
June 7, 2012

Before: SCIRICA, GREENAWAY, JR. and COWEN,

Circuit Judges.

(Opinion Filed: August 9, 2012)

OPINION

GREENAWAY, JR., *Circuit Judge.*

This case arises from the United States District Court for the Eastern District of Pennsylvania's grant of summary judgment as to Appellant Michael Marcavage's ("Marcavage") civil rights action under 42 U.S.C. § 1983. Marcavage brought suit alleging that Lansdowne Ordinance 1188 (hereinafter, "Ordinance 1188") and its successor, Lansdowne Ordinance 1251 (hereinafter, "Ordinance 1251") are unconstitutional both on their face and as-applied to him. The District Court granted summary judgment in favor of Appellees Borough of Lansdowne and Michael Jozwiak (collectively, "Lansdowne"). For the reasons stated herein, we will affirm the District Court's order.

I. BACKGROUND

Because we write primarily for the benefit of the parties, we recount only the essential facts.

Marcavage owns two rental properties in

Lansdowne, Pennsylvania – one located at 62 East Stewart Avenue and another at 34 East Stratford Avenue. He rents three of the four units at these two properties. He resides in one unit on the first floor of the Stewart Avenue property. Because the property is divided into rental units, Lansdowne required Marcavage to obtain a rental license pursuant to Ordinance 1188. Lansdowne, Pa., Code § 265–4 ("It shall be unlawful for the owner of any premises . . . to operate, rent or lease any premises or any part thereof . . . without first acquiring one of the below-approved licenses issued by the Code Department . . . ."). To obtain a rental license, the owner of the property must have the property inspected by a Code Enforcement Officer. *Id.* Alternatively, the owner may obtain, "written certification from a Pennsylvania licensed architect or licensed engineer that states that the owner-occupied portion of a rental property complies with all of the provisions of applicable laws." *Id.* at § 265–4(D).[1] To initiate the inspection proceedings, the applicant is responsible for "contact[ing] the Code Department [to] schedule all inspections." *Id.* at § 265–7(A) and (B).

If an individual fails to comply with Ordinance 1188, Lansdowne may issue a notice of violation absent inspection. *Id.* at § 265–5. Despite owning the properties since the adoption of Ordinance 1188, Marcavage neither requested an inspection nor had a licensed engineer or architect approve the property.

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[1] This provision was added in Ordinance 1251, which amended Ordinance 1188.

As a result, Marcavage received annual notices from the Code Department urging him to comply with Ordinance 1188 and obtain an inspection. Marcavage refused on the grounds that the inspection constituted an unreasonable search and seizure in violation of the Fourth Amendment. He continued renting the units in violation of Ordinance 1188. Because Marcavage continued renting the units, Lansdowne could, "in addition to other remedies, institute . . . any appropriate action or proceedings to prevent, restrain, correct or abate such building, or to prevent . . . any act, conduct, business or use constituting such violation." *Id.* at § 265–10(C).

On September 30, 2009, Code Enforcement Officer Jozwiak posted notices on Marcavage's two properties which read:

NOTICE
This Structure has been Declared an
Unlawful Rental Property
For failure to obtain the required rental license.
It is unlawful for Landlord to collect any Rent, Use,
or
Occupy This Building After 9/30/09 or until a rental license has been
Obtained from the Borough of Lansdowne.
Any Unauthorized Person Removing This Sign
WILL BE PROSECUTED.

(App. at 50). Marcavage inferred from these notices that he was required to cease occupying the building or face prosecution. He spent the nights of October 1

and 2, 2009 in a hotel and the following two nights at acquaintances' homes. Although he expressed concerns about the inspection requirement on several occasions, he did not appeal the decision. *Id.* at § 265–12 ("The owner, applicant, or agent thereof, may appeal a decision of the Code Enforcement Officer or request a modification of the strict letter of this chapter in accordance to [Lansdowne Code].").

On October 5, 2009, Marcavage filed suit in the United States District Court for the Eastern District of Pennsylvania to enjoin Lansdowne from enforcing the notices. After Lansdowne agreed to take no further action until the resolution of the case, Marcavage returned to his home. On April 21, 2010, Lansdowne amended Ordinance 1188 with Ordinace 1251. The amendment clarified rights and obligations that owners and others occupying the units have with regard to the rental inspection requirement. *Id.* at § 265–10(E).

Ordinance 1251 provided that:

> The owner, occupant, tenant or person in charge of any property or rental unit possesses the right to deny entry to any unit or property by a Code Enforcement Officer for purposes of compliance with this chapter. However, nothing in this chapter shall prohibit a Code Enforcement Officer from asking permission from a owner, occupant, tenant or person in charge of property for permission to inspect such property or rental unit for compliance with this chapter and all other

> applicable laws, regulations and codes, to seek a search warrant based on probable cause or to enter such property or rental unit in the case of emergency circumstances requiring expeditious action.

Id.

Marcavage then filed an Amended Complaint seeking: (1) to declare both Ordinances 1188 and 1251 unconstitutional; (2) a permanent injunction under 42 U.S.C. § 1983 prohibiting Lansdowne's enforcement of Ordinance 1251; and (3) damages against the Lansdowne under § 1983 for allegedly seizing Marcavage's residence.[2] Marcavage filed a motion for partial summary judgment arguing that the Ordinances were unconstitutional. Lansdowne cross-moved for summary judgment on the ground that the Ordinances did not infringe upon Marcavage's constitutional rights. The District Court granted summary judgment in favor of the Appellees.[3] Marcavage timely appealed.

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[2] The District Court reviewed Marcavage's constitutional claims regarding to Ordinance 1188. It concluded that there was no material distinction between ordinances 1188 and 1251 that would alter the constitutional analysis. Because Ordinance 1251 serves as a amendment to Ordinance 1188, we refer to them collectively as "the Ordinance" for the remainder of this analysis.

[3] Because Marcavage sued Jozwiak based on his capacity as a Code Enforcement Officer, we refer to Appellees collectively as "Lansdowne."

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291.

We review the District Court's order granting summary judgment de novo. *Azur v. Chase Bank, USA, Nat'l Ass'n,* 601 F.3d 212, 216 (3d Cir. 2010). "To that end, we are required to apply the same test the District Court should have utilized initially." *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.,* 587 F.3d 176, 181 (3d Cir. 2009) (internal quotation marks and citation omitted).

Summary judgment is appropriate "where the pleadings, depositions, answer to interrogatories, admissions, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Nicini v. Morra,* 212 F.3d 798, 805–06 (3d Cir. 2000) (en banc) (citing Fed. R. Civ. P. 56(c)).[4] "Once the moving party points to evidence demonstrating no issue of material fact exists, the nonmoving party has the duty to set

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[4] FED. R. CIV. P. 56 was revised in 2010. The standard previously set forth in subsection (c) is now codified as subsection (a). The language of this subsection is unchanged, except for "one word—genuine 'issue' bec [ame] genuine 'dispute.'" Fed. R. Civ. P. 56 advisory committee's note, 2010 amend.

forth specific facts showing that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor." *Azur,* 601 F.3d at 216 (quoting *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 252 (3d Cir. 1999)). In determining whether summary judgment is warranted "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Further, [w]e may affirm the District Court on any grounds supported by the record." *Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009) (internal quotation marks and citation omitted).

III. ANALYSIS

Marcavage presents four arguments on appeal. First, he asserts that the Ordinance is unconstitutional on its face because it requires citizens to consent to a warrantless search of their residences in violation of the Fourth Amendment. Second, he posits that the Ordinance, on its face, violates the Fourteenth Amendment, because it allows city officials to interfere with a landlord's property interests if that landlord does not consent to a search of the property for the purpose of attaining the required rental license. Third, Marcavage makes an as-applied Fourth Amendment challenge to the Ordinance, arguing that Lansdowne seized his property based on his refusal to consent to the search of his residence. Finally, Marcavage asserts that Lansdowne officials violated his procedural and substantive due process rights by allegedly evicting

him from his residence and prohibiting him from renting his property. We will address each issue in turn.[5]

A.) Facial Constitutional Challenges

We characterize Marcavage's first two arguments as facial attacks because they challenge the Ordinance's constitutionality based solely on its text. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 n.11 (1988). In order for Marcavage to prevail on these two claims, he "must establish that no set of circumstances exists under which the [Ordinance] would be valid [under the Constitution]." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, facial attacks are especially difficult to mount. *Id.*

Here, Marcavage posits that the Ordinance's requirement that a city official inspect a rental property before it issues a rental license constitutes an unreasonable search and seizure under the Fourth Amendment. According to Marcavage, the search requirement constitutes a warrantless administrative search similar to that prohibited in *Camara v. Mun. Court of San Francisco,* 387 U.S. 523 (1967). In *Camara,* the Supreme Court

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[5] Because Marcavage waived his argument regarding any property interest in his tenants' residences, we consider only whether the Ordinance infringed upon his privacy interest in his own residence. *Bagot v. Ashcroft*, 398 F.3d 252, 256 (3d Cir. 2005).

considered a Fourth Amendment challenge to two sections of San Francisco's housing code by a property owner that was prosecuted for refusing to allow a city inspector to enter his property. One ordinance allowed authorized employees of the city to enter any building for the purpose of conducting inspections or performing any duty imposed upon him by the municipal code (absent any cause or stated reason for the inspection).

The other ordinance established criminal penalties for any owner who refused to allow a city inspector to enter his property in accordance with San Francisco's municipal code. The Supreme Court held that the ordinances violated the Fourth Amendment because they provided the inspectors with unfettered discretion to intrude on a property owner's rights, unless the owner challenged the warrantless inspection at the risk of criminal sanction. *See Camara,* 387 U.S. at 532–33.

As the District Court properly noted, the Lansdowne ordinance poses no such threats to an owner's property rights.[6] To begin with, the Ordinance carries no criminal penalties based on an owner's refusal to allow an inspection. It also does

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[6] Because Marcavage waived his ability to assert a privacy interest in his tenants' residences (by not briefing the issue before the District Court), our analysis pertains solely to his privacy interest in the residence that he occupies. *Bagot v. Ashcroft,* 398 F.3d 252, 256 (3d Cir. 2005).

not provide the city employee with unfettered discretion in deciding if and when to conduct an inspection. Contrary to Marcavage's characterization, the property owner holds the power in the process. It is the property owner that decides if he wishes to use the property as rental units. If so, the property owner initiates the scheduling of the inspection in order to obtain a rental license. At all times, the property owner may refuse to consent to a search, at which point, no criminal sanctions attach and no search will take place.[7]

Additionally, if the property owner does not wish to consent to an inspection by a city official, the Ordinance provides him with an opportunity to select a licensed architect or engineer of his choice to conduct the inspection and submit a report to the City. Unlike the San Francisco ordinances, the Ordinance here authorizes an inspection for the specific purpose of obtaining a rental license and requires at least forty-eight hours notice. This is a stark contrast from the language of the San Francisco ordinances, which authorize searches at any reasonable time for any purpose under the local municipal code.

Marcavage has failed to provide evidence indicating that there is no set of circumstances under which the Ordinance does not offend the Fourth

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[7] The only time a penalty attaches to the refusal to consent to a search is if the property owner continues leasing the property after failing to obtain a license. *See* Lansdowne, Pa., Code § 265–14.

Amendment. Additionally, our review of Supreme Court precedent indicates that the Ordinance would pass constitutional muster based on the fact that it requires a limited search by a city official for the specific purpose of receiving a benefit under the law. *See, e.g.*, *Wyman v. James,* 400 U.S. 309, 317 (1971). For these reasons, his facial challenge under the Fourth Amendment fails.

Marcavage has similarly failed to show that a genuine dispute of material fact exists regarding his Fourteenth Amendment facial challenge. The Fourteenth Amendment prohibits state actors from depriving persons of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Here, Marcavage essentially reargues his Fourth Amendment claim and suggests that the Ordinance interferes with his property rights by conditioning the unrestricted use and enjoyment of the property upon the waiver of his Fourth Amendment rights. He grounds this argument in the recognized notion that a state cannot condition a privilege on a person's waiver of constitutional rights. *United States v. Chicago, M., St. P. & P.R. Co.*, 282 U.S. 311, 328–29 (1931) ("[T]he right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition

prescribed by the state which is hostile to the provisions of the federal Constitution.").

Because we find that the Ordinance, on its face, poses no threat to Marcavage's Fourth Amendment rights, we similarly find no intrusion upon his Fourteenth Amendment rights. Marcavage's ability to reside on the property as the owner is unaffected by the Ordinance. Furthermore, his freedom to use the property as rental units is affected only by a reasonable inspection requirement, not an unconstitutional search under the Fourth Amendment.[8]

B.) As-applied Constitutional Challenges

Marcavage's final two arguments challenge the Ordinance's constitutionality based on its application to him. Thus, we consider whether the specific facts of this case indicate that Lansdowne infringed upon Marcavage's Fourth and Fourteenth Amendment rights.

Marcavage argues that Lansdowne evicted him and his tenants from their homes based on his

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[8] Marcavage's brief also includes a facial procedural due process challenge under the Fourteenth Amendment. Because the text of the statute explicitly provides for an appeals process, this argument must fail as a facial challenge. We will, however, address his procedural due process argument in detail during our later discussion of his as-applied Fourteenth Amendment claim.

refusal to consent to a warrantless search when it posted the Notice on his properties. The District Court articulated the proper standard for such alleged violations as follows:

> Under the Fourth Amendment, a "seizure" of property "occurs when there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook Cnty.*, 506 U.S. 61 (1992) (citation and internal quotation marks omitted). "[S]eizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." *Id.* at 68. This Fourth Amendment right against unreasonable seizure is "transgressed if the seizure of [a person's] house was undertaken to . . . verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all." *Id.* at 69.

Marcavage v. Borough of Lansdowne, Pa., 826 F. Supp. 2d 732, 745 (E.D. Pa. 2011). On September 30, 2009, Lansdowne posted a Notice on Marcavage's residence stating that the structure had been declared an unlawful rental property and indicating that it would be unlawful for Marcavage to collect rent or allow use or occupancy of the building until he obtained a rental license. According to Marcavage this notice constituted an unreasonable seizure under the Fourth Amendment because "it interfered with his possessory interests in occupying his own home and purported to forbid him from receiving rents

from his other properties." (Appellant Br. at 19–20). This argument is unpersuasive.

The notice served as an official statement of Marcavage's failure to comply with the Ordinance as a landlord. At no point did the notice state that Marcavage would be removed from his home, nor did it order him to vacate the premises. Similarly, it made no mention of any judicial order of eviction and did not cite any local code sections referencing eviction. Marcavage states that he interpreted the notice as an eviction and did not immediately return to the property. This erroneous interpretation is insufficient as evidence of an alleged unconstitutional seizure of property.

Finally, Marcavage argues that Lansdowne violated his Fourteenth Amendment rights to procedural and substantive due process by abruptly evicting him from his home and precluding him from collecting rent.[9] As we previously noted, the Fourteenth Amendment requires that all individuals

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[9] In his statement of issues, Marcavage presents a substantive due process challenge under the Fourteenth Amendment. We do not consider this argument in our analysis for two reasons. First, the District Court did not substantively consider the argument because it found it to be waived as not properly presented before the Court. Second, Marcavage similarly stated the issue in his brief to this Court but failed to allege facts to support his claim or otherwise pursue the argument. Accordingly, this argument is waived. *See Kost v. Kozakiewicz,* 1 F.3d 176, 182 (3d Cir. 1993).

be afforded due process – that is "the opportunity to be heard at a meaningful time and in a meaningful manner" – before the denial of life, liberty or property under the law. *Mathews,* 424 U.S. at 333. When an individual brings suit under 42 U.S.C. § 1983 for a state actor's alleged failure to provide procedural due process, we consider "(1) whether the asserted individual interests are encompassed within the fourteenth amendment's protection of life, liberty, or property; and (2) whether the procedures available provided the plaintiff with due process of law." *Alvin v. Suzuki,* 227 F.3d 107, 116 (3d Cir. 2000) (internal quotation marks and citation omitted).

Because we hold that Lansdowne did not seize Marcavage's property when it posted the notice, Marcavage was never denied a right as a property owner seeking to inhabit his property. Therefore, we find no deprivation of his property interests as an owner residing on his property. The only arguable issue is whether procedures were available to provide Marcavage with due process regarding Lansdowne's restriction of the use of the property as rental units. We hold that there were.

The text of the Ordinance explicitly provides for an appeal of the decision or the ability to request a modification of the strict letter.[10] Lansdowne, PA.,

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[10] "Strict letter" is a term of art identified in Ordinance 1251. As it applies here, modification of the strict letter refers to a request that the rules be modified (or less strictly enforced) in a particular circumstance as a means of avoiding a finding of non-compliance.

Code § 265–12 (2003). Marcavage concedes this point but nonetheless argues that this appeals process offends due process because it is only available after the resistant owner has been deprived of his property rights. This assertion is inaccurate. Lansdowne sent Marcavage yearly notices regarding his non-compliance, so Marcavage was well aware of the applicability of the Ordinance and its consequences. Additionally, Marcavage's property rights were only affected because he chose not to avail himself of the formal appeals process, not because the process was lacking. This fact, alone, is dispositive of the procedural due process issue. We have previously stated that,

> In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate. [A] state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them. A due process violation is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants.

Alvin, 227 F.3d at 116 (internal quotation marks and citations omitted).

Marcavage's failure to avail himself of the appeals process precludes him from stating a claim under the Fourteenth Amendment. Consequently, his Fourteenth Amendment as-applied challenge also must fail. *See id.*

IV. CONCLUSION

For the reasons stated above, we will affirm the District Court's order.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL MARCAVAGE, Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 09-CV-4569
BOROUGH OF LANSDOWNE, PENNSYLVANIA, MICHAEL J. JOZWIAK, Defendants.	:	

October 19 __, 2011 **Anita B. Brody, J.**

MEMORANDUM

Plaintiff Michael Marcavage owns several rental properties in the Borough of Lansdowne ("Lansdowne" or the "Borough"). Defendant Lansdowne Code Enforcement Officer Michael J. Jozwiak posted notices on Marcavage's properties informing Marcavage that he was not in compliance with a Lansdowne ordinance that required Marcavage to obtain rental licenses for his properties. Marcavage has brought suit against Defendants Borough of Lansdowne and Jozwiak claiming that Lansdowne's original rental ordinance and amended rental ordinance are unconstitutional, and seeking relief under 42 U.S.C. § 1983. The

parties have filed cross-motions for summary judgment. Defendants move for summary judgment against Marcavage's Amended Complaint on the basis that the rental ordinances are not unconstitutional, and that Jozwiak is entitled to qualified immunity. Marcavage moves for partial summary judgment in favor of his Amended Complaint on the basis that the rental ordinance is facially unconstitutional. For the reasons that follow, I will grant Defendants' motion for summary judgment, and will deny Marcavage's cross-motion for partial summary judgment.

I. BACKGROUND[11]

The facts of this case are essentially undisputed. On May 7, 2003, Lansdowne adopted Ordinance 1188, which required anyone owning rental

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[11] For purposes of summary judgment, "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in [that party's] favor." Hunt v. Cromartie, 526 U.S. 541, 552, (1999) (internal quotations omitted). "[W]here, as was the case here, the District Court considers cross-motions for summary judgment 'the court construes facts and draws inferences in favor of the party against whom the motion under consideration is made.'" J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.,-- F.3d--, 2011 WL 2305973, at *6 (3d Cir. 2011) (en banc) (quoting Pichler v. UNITE, 542 F.3d 380, 385 (3d Cir. 2008)) (internal quotation marks omitted). Because of my conclusion that Defendants' motion for summary judgment should be granted, all facts will be construed in favor of Marcavage.

properties in Lansdowne to obtain an annual rental license. Specifically, Section 265-4 provided that:

> It shall be unlawful for the owner of any premises or any agent acting for such an owner to operate, rent or lease any premises or any part thereof, whether granted or rented for profit or nonprofit, or to represent to the general public that a premises or any part thereof is for rent, lease or occupancy without first acquiring [a rental license] issued by the Code Department in the name of the owner, local agent or operator and for the specific rental unit.

Lansdowne Code § 265-4 (2003). In order to obtain a license, a property owner had to, *inter alia,* arrange for a rental license inspection by Lansdowne's Code Enforcement Division. Id. The scope of the inspection included the exterior and interior areas of the rental unit. Id. § 265-7(D). Furthermore, in making such an inspection, a Lansdowne Code Enforcement Officer was to inspect any owner-occupied portion of a rental property (i.e., landlord-occupied unit within a larger apartment building of tenant-occupied units), including its interior. Id. §§ 265-4(D), 265-7(E).

An applicant for a rental license was responsible for "contact[ing] the Code Department [to] schedule all inspections" and making such inspection requests "no less than 48 hours prior to the time of inspection." Id. § 265-7(A)-(B). If, during an inspection, a Code Enforcement Officer found a code violation, Lansdowne would issue a notice of

violation. Id. § 265-5. Any rental unit found to have code violations was to "be brought into compliance . . . within a time frame to be determined at the discretion of the Code Officer." Id. Additionally, "[i]f any building . . . [was] proposed to be . . . maintained or used in violation [of the Ordinance], the Code Enforcement Officer [could], in addition to other remedies, institute in the name of the Borough any appropriate action or proceedings to prevent, restrain, correct or abate such building . . . or to prevent . . . any act, conduct, business or use constituting such violation." Id. § 265-10(C). Upon receiving a notice of violation or decision of the Code Enforcement Officer, a property owner could appeal the decision or petition Lansdowne for a variance from the "strict letter" of the Lansdowne Code. Id. § 265-12. Anyone who violated or failed to comply with Ordinance 1188 would be subject to a fine or imprisonment, or both. Id. § 265-14.

Marcavage owns a two-unit apartment house at 62 East Stewart Avenue ("Stewart Avenue Property") in Lansdowne. Marcavage maintains his principal residence in one unit of the Stewart Avenue Property, and the other unit is leased to a tenant. The Stewart Avenue Property is a two-story building with the leased unit on the second floor above Marcavage's residence. Each unit has a separate entrance, and there are no interior common areas. Marcavage owns another two-unit apartment house at 34 East Stratford Avenue ("Stratford Avenue Property") in Lansdowne. Each unit at the Stratford Avenue Property is leased to a tenant. The units of

the Stratford Avenue Property have separate entrances, but share a common exterior door.

Marcavage has owned these properties since the enactment of Ordinance 1188. Marcavage received yearly notices from the Borough that his properties needed a rental license inspection. Defs.' Mot. Summ. J. Ex. D, Marcavage Dep. 50:23-52:24. Over this time period, however, Marcavage never requested an inspection. Instead, he contacted the Borough on multiple occasions, by phone and by email, to express his objections with the rental inspection process--particularly the lack of a warrant requirement for the inspection. Id. at 50:3-52:18, 60:11-61:4. In one particular email, on August 15, 2008, Marcavage "urge[d]" Jozwiak "to cease and desist from pursuing legal action against landlords at this point for non-compliance to [Ordinance 1188] that is clearly unconstitutional." Am. Compl. Ex. D.

On September 30, 2009, identical notices (the "Notices") were posted at both the Stewart and Stratford Avenue Properties. One was posted on the common exterior door for the Stratford Avenue Property, and one was posted on the door of Marcavage's residence at the Stewart Avenue Property. Each notice stated the following:

NOTICE

This Structure has been Declared an
Unlawful Rental Property
for failure to obtain the required rental license.

It is Unlawful for Landlord to collect any Rent, Use,
or
Occupy This Building After 9/30/09 or until a rental
license has been
obtained from the Borough of Lansdowne.
Any Unauthorized Person Removing This Sign
WILL BE PROSECUTED.

Pl.'s Counter-Statement of Undisputed Facts ¶ 16. The Notices included Jozwiak's name and title. Id. The Notices did not inform Marcavage of how he might appeal or contest the Borough's decision.

Marcavage alleges that as a result of the Notice on the Stewart Avenue Property, he was forced from his home and spent the nights of October 1, 2009 and October 2, 2009 in a hotel, and the nights of October 3, 2009 and October 4, 2009 in the homes of acquaintances. Pl.'s Mot. TRO & Prelim. Inj., Marcavage Decl. ¶¶ 22, 23.

On October 5, 2009, Marcavage filed the instant suit, along with a motion for a temporary restraining order seeking to enjoin the Defendants from enforcing the Notices or commencing any process against him for residing at his home. ECF Nos. 1, 3. In a hearing on October 5, 2009, the Defendants agreed to refrain from taking any further action against Marcavage until the resolution of this case. ECF No. 5. As a result, Marcavage returned to his house on October 5, 2009. Defs.' Mot. Summ. J. Ex. D, Marcavage Dep. 87:10-13.

On April 21, 2010, Lansdowne passed Ordinance 1251 that amended Ordinance 1188.[12] Ordinance 1251 added a subsection clarifying certain rights and remedies of owners and occupants of property subject to the rental inspection requirement. Id. § 265-10(E). Specifically, subsection 10(E) provided for the following:

> The owner, occupant, tenant or person in charge of any property or rental unit possesses the right to deny entry to any unit or property by a Code Enforcement Officer for purposes of compliance with this chapter. However, nothing in this chapter shall prohibit a Code Enforcement Officer from asking permission from a owner, occupant, tenant or person in charge of property for permission to inspect such property or rental unit for compliance with this chapter and all other applicable laws, regulations and codes, to seek a search warrant based on probable cause or to enter such property or rental unit in the case of

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[12] In his briefs, Marcavage refers to the new ordinance as "Ordinance 2151," while Defendants refer to the ordinance as "Ordinance 1251." Both parties provide copies of the amended Chapter 265 of the Borough Code, with one stating the ordinance is "Ordinance 1251," and the other stating the ordinance is "Ordinance 2151." See Defs.' Mot. Summ. J. Ex. D; Pl.'s Mot. Partial Summ. J. Ex. A. The difference is trivial. I will refer to the amended ordinance as "Ordinance 1251."

> emergency circumstances requiring expeditious action.

Id. After Ordinance 1251 was passed, Marcavage filed an Amended Complaint, seeking the following relief: (1) declaratory relief, declaring Ordinance 1251 unconstitutional, both facially and as applied; (2) injunctive relief under 42 U.S.C. § 1983 in the form of a permanent injunction against the Defendants from enforcing Ordinance 1251; and (3) damages under § 1983 against the Defendants resulting from their allegedly dispossessing Marcavage from his residence.[13]

II. LEGAL STANDARD

Summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is a "genuine" issue of material fact if the evidence would permit a reasonable jury to find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

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[13] Although in his Amended Complaint Marcavage attacks the application of Ordinance 1251 as a violation of his Fourth and Fourteenth Amendment rights, the only application to him was of Ordinance 1188, not Ordinance 1251. Therefore, in assessing the merits of Marcavage's as-applied claims, I will look to Ordinance 1188. The distinction ends up being irrelevant, however, as no material differences exist between the two Ordinances that would alter the constitutional analysis.

248 (1986). The "mere existence of a scintilla of evidence" is insufficient. Id. at 252.

The moving party must make an initial showing that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The nonmoving party must then "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Fed. R. Civ. P. 56(c)(1). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In determining whether the nonmoving party has established each element of its case, the court must draw all reasonable inferences in the nonmoving party's favor. Id. at 587.

III. DISCUSSION

Marcavage seeks a declaratory judgment that Ordinance 1251 is unconstitutional facially, and that Ordinance 1188 was unconstitutional as-applied to Marcavage, under the following constitutional provisions: (1) Fourth Amendment right to be protected from unreasonable searches and seizures, (2) Fourteenth Amendment right to procedural due process, and (3) the Fourteenth Amendment right to equal protection. He also requests a permanent injunction to prohibit the Defendants from enforcing the sections of Ordinance 1251 that require an inspection of his properties prior to his obtaining a

rental license. Lastly, he seeks damages, under § 1983, from Defendants for their actions that allegedly evicted Marcavage from his home in violation of the Fourth and Fourteenth Amendments. Defendants deny that Ordinance 1251 violates any of these constitutional rights, and also argue that Jozwiak is protected by qualified immunity from liability for Marcavage's § 1983 claim.

A. Constitutional Claims

Before addressing the merits of a particular constitutional attack, a court must first address the nature of the constitutional claim—whether facial or as-applied. "A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case." United States v. Marcavage, 609 F.3d 264, 273 (3d Cir. 2010). A party making a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Therefore, to establish a facial attack, Marcavage must demonstrate that the "[Ordinance] is unconstitutional in all its applications." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) (citation omitted). Considering this burden, facial attacks are the "most difficult to mount successfully." Salerno, 481 U.S. at 745. On the other hand, an as-applied challenge "does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a

constitutional right." Marcavage, 609 F.3d at 273. Marcavage brings a facial attack to Ordinance 1251 and an as-applied attack to Ordinance 1188 for violations of the Fourth Amendment right to be protected from unreasonable searches and seizures, Fourteenth Amendment right to procedural due process, and Fourteenth Amendment right to equal protection. I will first address Marcavage's facial challenges to Ordinance 1251, then turn to his as-applied challenges to Ordinance 1188.

1. Facial Challenges

i. Unreasonable Search and Seizure

Marcavage argues that Ordinance 1251, the amended ordinance, violates the Fourth Amendment because it requires a search of a landowner's private property—both a landlord's own residence (if attached to a rental unit) and other leased units—without a warrant based on probable cause.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, states that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV. "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" Calif. v. Ciraolo, 476 U.S. 207, 211 (1986). A party can challenge the

search by a third party only if that party has a reasonable expectation of privacy in the area searched. Minnesota v. Olson, 495 U.S. 91, 95 (1990).

It is undisputed that the Fourth Amendment protects a person's privacy in her home. Silverman v. United States, 365 U.S. 505, 683 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."). Courts have also held, however, that a landlord does not have a reasonable expectation of privacy with respect to individual apartments leased to third parties, simply on the basis that the landlord owns the apartments. See Rozman v. City of Columbia Heights, 268 F.3d 588 (8th Cir. 2001) (holding that landowner lacked standing to assert his tenants' rights in seeking to challenge the searches of tenants' apartments, without their permission, pursuant to city ordinance requiring annual rental inspection); Miller v. Hassinger, 173 Fed. Appx. 948, 952 (3d Cir. 2006) (non-precedential) (finding that landlord had no privacy interest in the apartment searched, where it had been leased to third parties, and landlord did not have access to the apartment, did not have personal items in the apartment, and did not allege any access to the apartment); Mangino v. Incorporated Village of Patchogue, 739 F. Supp. 2d 205, 234 (E.D.N.Y. 2010) ("A landlord generally does not have a reasonable expectation of privacy with respect to property that he has rented to a tenant and that is occupied by that tenant"); Reedy v. Borough of Collingswood, No. 04-cv-4079, 2005 WL

1490478, at *5 (D.N.J. June 22, 2005) ("[T]here is a diminished nature of the landlord's privacy interest in an apartment which he is making available for rent.").

This distinction is blurred here, where of the four units in question, three have been made available for rent and one is being used by the landlord as a primary place of residence. In his motion for partial summary judgment, Marcavage asserts that Ordinance 1251 violates the Fourth Amendment because it compels a landlord to authorize entry by the Borough, without a warrant, into tenant-occupied residences. In response, Defendants argue that Marcavage has no standing to "assert[] causes of action on behalf of his tenants by stating that he cannot be compelled to authorize entry into his tenant-occupied residences." Defs.' Resp. 5. While Marcavage does correctly note that he has a privacy interest in his own residence, he fails to brief the issue of the appropriate expectation of privacy for his rental units. Marcavage has failed to offer any particular facts or circumstances to establish that he has a reasonable expectation of privacy in his rented units. Thus no genuine issue of material fact exists as to whether Marcavage has standing to bring causes of action based on Fourth Amendment violations with respect to his rental units or on behalf of his tenants.[14]

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[14] To the extent Marcavage, in his Amended Complaint, further attacks the constitutionality of the Ordinances on behalf of his tenants or with regard to his tenant-occupied residences, he fails to brief the issue of his standing to

Even though Marcavage has a privacy interest in his own residence, he still must show that the law violated that interest. Marcavage bases his argument completely on the Supreme Court's ruling in Camara v. Municipal Court of City & County of S.F., 387 U.S. 523 (1967). At issue in Camara was the constitutionality of two San Francisco ordinances. The first ordinance permitted city inspectors to enter any building for purposes of inspection. Specifically, it provided that:

> Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

Camara, 387 U.S. at 526. A separate San Francisco ordinance set out criminal penalties for property owners who refused to permit city inspectors to enter a building to perform an inspection.[15] Plaintiff

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bring such claims or the merits of such claims. Therefore, those arguments are deemed to have been waived. See, e.g., Hackett v. Cmty. Behavioral Health, No. 03-6254, 2005 WL 1084621, at *6 (E.D. Pa. May 6, 2005) (failure to address claims waives opportunity to contest summary judgment on that ground).

[15] That Ordinance provided that: "[a]ny person, the owner or his authorized agent who violates, disobeys, omits,

Camara was a San Francisco property owner who was prosecuted for failure to allow an inspector to enter his property, and who challenged the constitutionality of the ordinances on Fourth Amendment grounds. The Supreme Court struck down Camara's prosecution, holding that the San Francisco ordinances authorized warrantless searches in violation of the Fourth Amendment. Marcavage argues that for the same reason, Ordinance 1251 is facially unconstitutional under the Fourth Amendment. This is simply not so.

The San Francisco ordinances at issue in Camara empowered government employees to enter premises in the name of an inspection, subject to no limitations. Under the ordinances, an inspector was given the "right to enter, at reasonable times, any building . . . to perform any duty imposed upon them by the Municipal Code." Camara, 387 U.S. at 526. There was no limitation on the number of inspections that could be made, nor any justification or cause that needed to be offered. An inspector could simply

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neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code . . . shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue." Camara, 387 U.S. at 526.

demand entrance into any city unit. Indeed, the second ordinance at issue prevented unit owners from excluding inspectors from entering by criminalizing the act of resisting entrance by an inspector. Under these ordinances, the city had unfettered discretion to enter any unit, and unit owners were powerless to stop them. In holding these ordinances unconstitutional, the Supreme Court emphasized that this discretion was problematic:

> [O]nly by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. . . . The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.

Id. at 532-33.

The Supreme Court also carefully noted that the San Francisco ordinances permitted searches without a property owner's consent, and that refusal to consent was actually criminalized. Specifically, the Court noted that "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant" and that "most citizens allow inspections of their property without a warrant." Id. at 528-29, 539. Indeed, in Wyman v. James, 400 U.S. 309 (1971), decided just five years after Camara, the Court upheld an

ordinance that required a home inspection in order to investigate safety conditions for children on welfare because "the visitation in itself [wa]s not forced or compelled" and the only consequence of refusing to consent to an inspection was the loss of welfare funding. Id. at 317. Wyman is controlling.

Ordinance 1251 has neither of the defining features in Camara—Ordinance 1251 does not afford the Borough unfettered discretion in entering a unit, and there are no criminal penalties attached to a property owner's refusal to consent to a search. Section 265-10(E) of the Ordinance provides that a property owner has "the right to deny entry to any unit or property by a Code Enforcement Officer." Landsdowne Code § 265-10(E). Furthermore, it states that a Code Enforcement Officer may ask permission from a property owner to inspect such property, "seek a search warrant based on probable cause or [] enter such property . . . in the case of emergency circumstances requiring expeditious action." Id. As such, a property owner like Marcavage can easily refuse to consent to a search.[16] Like the ordinance in Wyman, Ordinance 1251 does not force or compel an inspection, as the only consequence of failing to consent to a search is the denial of a rental license.[17]

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[16] Indeed, Marcavage did just that, and his property was never ultimately searched.

[17] Marcavage very briefly appears to argue that conditioning a property owner's ability to rent his property on obtaining a rental license and having a rental inspection, is a violation of the Takings Clause. Even if

Fines and criminal prosecution are only possible under Ordinance 1251 if a property owner, after having failed to obtain a rental license, leases his property to a third party or represents to the public that his property is for rent, use, or occupancy.

Additionally, the inspections provided for in Ordinance 1251 are more limited in scope and number than those found in the San Francisco ordinances. Under the San Francisco ordinances, an inspector was given the "right to enter, at reasonable times, any building . . . to perform any duty imposed upon them by the Municipal Code." Camara, 387 U.S. at 526. Ordinance 1251, on the other hand, provides for periodic inspections of rental properties, or owner-occupied portions of rental properties. Those inspections are scheduled by a rental license applicant, not a Code Enforcement Officer, and require at least forty-eight hours notice. Lansdowne Code § 265-7(A)-(B). Furthermore, the purpose and justification behind the inspections (condition to receiving a rental license) are more narrow and specific than those supporting the inspections under the San Francisco ordinances.

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the Takings Clause were implicated in this case, the Supreme Court has made clear that in order to raise a Takings Clause argument, a Plaintiff must first exhaust all state court remedies available. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). Here, Marcavage appears neither to have filed a case in state court nor to have administratively challenged his alleged eviction notice.

Marcavage has not offered any reason why, despite lacking these two defining features, Ordinance 1251 violates the Fourth Amendment.[18] He does not explain why other courts that have considered comparable provisions have upheld them. See, e.g., Platteville Area Apartment Ass'n v. City of Platteville, 179 F.3d 574, 576-77, 582 (7th Cir. 1999) (upholding city ordinance authorizing periodic searches of rental properties to assess compliance with city's housing code); Rozman, 268 F.3d at 590-91 (finding city's decision to revoke a landlord's rental license "because he refused to notify his tenants of [an] upcoming inspection" in accordance with city ordinance to be constitutionally permissible). Marcavage has neither acknowledged nor

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[18] Marcavage repeatedly argues that the Borough's inspection program is unconstitutional under Camara because it is based upon "appraisal of conditions in an area as a whole" and not on "knowledge of conditions in each particular building." Marcavage misunderstands and misquotes Camara in making this assertion. In Camara, the Court actually declared "area codeenforcement inspections" to be reasonable because of "a number of persuasive factors": their "long history of judicial and public acceptance," the public interest in preventing latent, dangerous conditions, and their "relatively limited invasion of the urban citizen's privacy." Camara, 387 U.S. at 537. Of course, probable cause to make such an administrative inspection is still necessary, but the Court noted such cause may exist "if based upon the passage of time, the nature of the building . . ., or the condition of the entire area, [and] will not necessarily depend upon specific knowledge of the particular dwelling." Id. at 538.

distinguished Wyman, which upheld an ordinance that appears to be more similar to Ordinance 1251 than the ordinances in Camara. In short, Marcavage has failed to demonstrate that Ordinance 1251 is facially unconstitutional under the Fourth Amendment.

ii. Procedural Due Process

Marcavage next attacks Ordinance 1251 on the ground that it is facially unconstitutional for violating "his right to freedom from denial of right to property without due process of law under the [*744] Fourteenth Amendment." Am. Compl. ¶ 45. "The fundamental requirement of [procedural] due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citations and internal quotation marks omitted). The text of Ordinance 1251 provides that "[t]he owner, applicant, or agent [of the property] may appeal a decision of the Code Enforcement Officer or request a modification of the strict letter of this chapter in accordance to the Borough Code." Lansdowne Code § 265-12. Defendants argue that this process is sufficient on its face to allow property owners to challenge or seek modifications of Borough decisions. In response, Marcavage essentially reargues his Fourth Amendment challenge to Ordinance 1251, relying on general statements of law that fail to advance his procedural due process claim. He fails to explain how Section 265-12 is "incapable of any valid application," and therefore facially unconstitutional for violating

the Fourteenth Amendment's right to procedural due process. Steffel v. Thompson, 415 U.S. 452, 474 (1974). In fact, he even concedes that Ordinance 1251 provides for appeals of decisions by Code Enforcement Officers. Pl.'s Resp. 7. Therefore, Marcavage's facial challenge to Ordinance 1251 based on a "denial of right to property without due process" fails.

iii. Equal Protection

Finally, Marcavage asserts that Ordinance 1251 is facially unconstitutional on equal protection grounds, because it requires an inspection of owner-occupied residences in buildings also containing rental units, whereas owners of residences unattached to any rental property are not required to submit to an inspection.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "'requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'" Engquist v. Oregon Dep't of Agric., 553

U.S. 591, 602 (2008) (quoting Hayes v. Missouri, 120 U.S. 68, 71-72 (1887)).[19]

Under rational basis review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Lawrence v. Texas, 539 U.S. 558, 579 (2003) (quoting Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985)). "Under rational-basis review, where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (quoting Cleburne, 473 U.S. at 441) (citation and internal quotation marks omitted).

"A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Heller v. Doe, 509 U.S. 312 (1993) (citations and internal quotation marks omitted). "[T]he burden is upon the challenging party to negative 'any

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[19] Marcavage concedes that the law should be considered under rational basis review. ECF No. 43 at 19.

reasonably conceivable state of facts that could provide a rational basis for the classification.'" Garrett, 531 U.S. at 367 (quoting Heller, 509 U.S. at 320).

The Borough Council identified the legislative purpose for Ordinance 1251 in Section 265-1. It states that "[t]he purpose of this chapter . . . shall be to protect and promote the public health, safety and welfare of its citizens . . . and to encourage owners and occupants to maintain and improve the quality of rental units within the community." Lansdowne Code § 265-1. Marcavage does not explain why this offered basis is not rational; he simply states that it is not. This is not enough. Lansdowne's offered basis is conceivably rational; there may be code violations in a property owner's unit—for example, faulty electrical wiring or fire hazards—that could present health and safety concerns to the neighboring renter. Marcavage has not met his burden in showing that this basis is insufficient to survive rational basis review. Thus, Marcavage's facial attack to Ordinance 1251 on equal protection grounds fails.

2. As-Applied Challenges

i. Unreasonable Seizure

Although Marcavage does not clearly spell out his as-applied challenge under the Fourth Amendment, his briefings suggest that he believes the Defendants' application of Ordinance 1188, the original ordinance, violated his Fourth Amendment right

against unreasonable seizures. Marcavage claims that although his property was never searched by Defendants, it was seized, as a result of his being dispossessed from his home by Jozwiak's posting of the Notice on the door of his residence.

Under the Fourth Amendment, a "seizure" of property "occurs when there is some meaningful interference with an individual's possessory interests in that property." Soldal v. Cook Cnty., 506 U.S. 56, 61 (1992) (citation and internal quotation marks omitted). "[S]eizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." Id. at 68. This Fourth Amendment right against unreasonable seizure is "transgressed if the seizure of [a person's] house was undertaken to . . . verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all." Id. at 69.

Marcavage claims that he was "seized' under the Fourth Amendment because the Defendants' application of Ordinance 1188—Jozwiak's posting the Notice on his door—constituted a summary eviction and dispossessed him from his home. The Notice that was posted on Marcavage's residence at the Stewart Avenue Property, on September 30, 2009, stated:

NOTICE

This Structure has been Declared an
Unlawful Rental Property

for failure to obtain the required rental license.
It is Unlawful for Landlord to collect any Rent,
Use, or Occupy This Building After 9/30/09 or
until a rental license has been
obtained from the Borough of Lansdowne.
Any Unauthorized Person Removing This Sign
WILL BE PROSECUTED.

Pl.'s Counter-Statement of Undisputed Facts ¶ 16. Defendants argue that Marcavage's property was not seized as a result of this Notice because Marcavage was not forced off his property, but instead left voluntarily. Marcavage asserts that because the Notice states that "[i]t is Unlawful for Landlord to . . . Occupy This Building After 9/30/09," he was dispossessed from his home and forced to go to a hotel and then the house of some acquaintances over the course of five days.

A review of Marcavage's history with Ordinance 1188 will demonstrate that the true effect of this Notice was to formally notify Marcavage that, after many years of non-compliance, he was violating Ordinance 1188. It was not to evict him from or seize his property. Ordinance 1188, enacted in 2003, required owners of rental property to register and obtain a rental license for their properties through the Code Department. Lansdowne Code § 265-3, -4. A property owner's receipt of a rental license for a property was predicated on a Code Enforcement Officer's having inspected the owner's rental property. Id. § 265-4. The Ordinance defined "Rental Property" to include owner-occupied portions of

rental property, like Marcavage's residence at the Stewart Avenue Property. See id. § 265-2 ("Owner Occupied Portions Rental Properties [sic] - Areas or portions of a rental property that are used or occupied primarily by the property owner."); id. ("Rental Property - A premises, property or portion thereof, that is under a rental agreement and/or contains one or more rental units."). As such, the Ordinance conditioned receipt of a rental license not only on the inspection of rental units, but also on the inspection of owner-occupied portions of rental properties. Id. § 265-4(D). Without first obtaining a rental license from the Code Department, it was "unlawful for the owner of any premises . . . to operate, rent or lease any premises or any part thereof, whether granted or rented for profit or nonprofit, or to represent to the general public that a premises or any part thereof is for rent, lease or occupancy . . . ." Lansdowne Code § 265-4.

Marcavage has owned his properties since the enactment of Ordinance 1188, and admitted that he received yearly notices from the Borough that his properties needed inspection to comply with the Ordinance. Defs.' Mot. Summ. J. Ex. D, Marcavage Dep. 50:23-52:24. Over this time period, however, Marcavage did not request an inspection, and, in turn, did not receive a rental license. Instead, Marcavage contacted the Borough on multiple occasions, by phone and by email, to express his objections with the rental inspection process. Id. at 50:3-52:18, 60:11 61:4. In one particular email, on August 15, 2008, Marcavage "urge[d]" Jozwiak "to

cease and desist from pursuing legal action against landlords at this point for non-compliance to [Ordinance 1188] that is clearly unconstitutional." Am. Compl. Ex. D. Marcavage, therefore, was openly non-compliant with Ordinance 1188 from 2003 until he received the Notice on September 30, 2009.

Given that Marcavage was maintaining his properties in violation of the Ordinance, Jozwiak could, "in addition to other remedies, institute in the name of the Borough any appropriate action or proceedings to prevent, restrain, correct or abate [any Building violating the Code] or to prevent . . . any act, conduct, business or use constituting such violation." Lansdowne Code § 265-10(C). Jozwiak did act, in accordance with Sections 265-4 and 26510(C), by posting Notices on both of Marcavage's properties, informing Marcavage that it would be "unlawful for [him] to collect any rent, use, or occupy" his properties after September 30, 2009 "or until a rental license has been obtained from the Borough of Lansdowne." Pl's Counter-Statement of Undisputed Facts ¶ 16. This Notice conforms with the language of Section 265-4 of the Code that declares it "unlawful for the owner of any premises . . . to operate, rent or lease any premises or any part thereof . . . or to represent to the general public that a premises or any part thereof is for rent, lease, or occupancy without first acquiring" a rental license for each rental unit. Lansdowne Code § 265-4.

Considering Marcavage's history of non-compliance with Ordinance 1188 and the language of

the Ordinance, the Borough's action was modest and appropriate. Marcavage fails to explain how such an action constitutes a "seizure" under Fourth Amendment case law. In fact, courts have found similar actions not to constitute a seizure. See Nikolas v. City of Omaha, 605 F.3d 539, 544-47 (8th Cir. 2010) (placarding of landowner's garage as unfit for human occupancy, after city code inspector saw that garage was going to be used in violation of city's zoning ordinance, is not a seizure under Fourth Amendment); United States v. TWP 17 R 4, 970 F.2d 984, 989 (1st Cir. 1992) (posting warrant of arrest in rem on parcel of real estate did not constitute seizure of real estate). The Notice did not state that Marcavage would be removed from his home if he remained on the property. It did not order him to vacate the premises, nor did it cite or refer to any judicial order of eviction. Furthermore, Marcavage was not forced off his property by Code Enforcement Officers or in the presence of Code Enforcement Officers, but instead left voluntarily. In order for a person to be forced off his property, the action must be much more significant. See, e.g., Soldal, 506 U.S. at 58-61 (holding that seizure occurred under Fourth Amendment when, in presence of deputy sheriffs lacking an eviction order, plaintiffs' mobile home was physically removed from the ground and moved to another location); Thomas v. Cohen, 304 F.3d 563, 572 (6th Cir. 2002) ("Escorting tenants from their residences in the course of effectuating an eviction . . . satisfies the requirement of 'meaningful interference' with their leasehold interest so as to amount to a seizure of their property.").

It is, therefore, an overstatement for Marcavage to claim this action to be a summary eviction order or seizure of his property. The Notice formally informed Marcavage that his properties were unlawful rental properties, and emphasized that he would be acting in violation of the Ordinance if he continued to occupy his residence and collect rent from his other units, without first obtaining a rental license for his properties. Thus Marcavage's as-applied challenge to Ordinance 1188 based on a violation of his Fourth Amendment rights fails.

ii. Procedural Due Process

The Fourteenth Amendment prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV. "In analyzing a procedural due process claim, the first step is to determine whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." Shoats v. Horn, 213 F.3d 140, 143 (3d Cir. 2000) (citing Fuentes v. Shevin, 407 U.S. 67 (1972)). "Once we determine that the interest asserted is protected by the Due Process Clause, the question becomes what process is due to protect to it. Id. (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). "The essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." Mathews, 424 U.S. at 349-50 (citation and internal quotation marks omitted).

Marcavage's right to due process protection is predicated upon the existence of a deprivation of property. To establish that such a deprivation occurred, Marcavage relies exclusively on the same argument he made as to how his property was seized in violation of the Fourth Amendment--that Jozwiak's posting of the Notice on his residence dispossessed him from his home. For the same reasons already noted with regard to Marcavage's "seizure" argument, Marcavage fails to show how he was deprived of being able to remain in his home. Therefore, Marcavage's as-applied challenge to the Ordinances under the Fourteenth Amendment fails.[20]

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[20] Marcavage also fails to explain how the Defendants' application of the Ordinance denied him adequate due process, i.e. "the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews, 424 U.S. at 333 (citations and internal quotation marks omitted). Marcavage concedes that Ordinance 1188 provided for appeals of "decisions" by Code Enforcement Officers. See Lansdowne Code § 265-12 ("The owner, applicant or agent thereof may appeal a decision of the Code Enforcement Officer or request a modification of the strict letter of this chapter in accordance with the Borough Code."). He argues, however, that the Notice posted by Jozwiak was not a "decision" within the meaning of Ordinance 1188, but rather an ultra vires act outside the bounds of authority established by the Ordinance. Pl.'s Resp. 7. Marcavage complains that Ordinance 1188 did not allow him to appeal an action that the Ordinance did not permit. Id. at 7-8. The Supreme Court, though, has held that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the

iii. Equal Protection

Marcavage fails to offer any explanation as to how his facial and as-applied challenges on equal protection grounds are different. Marcavage has already failed to demonstrate that Ordinance 1251 is facially unconstitutional on equal protection grounds, as discussed in Section A.1., supra. Therefore, as Ordinances 1251 and 1188 have no material differences, Marcavage has failed to establish that Ordinance 1188 violated his rights under the Equal Protection Clause.

Marcavage has failed to raise a genuine issue of material fact with respect to the constitutional invalidity of Ordinance 1251 or Ordinance 1188 under the Fourth or Fourteenth Amendments. Therefore, Defendants' motion for summary judgment as to Marcavage's facial and as-applied challenges to the Ordinances, seeking declaratory relief and a permanent injunction, is granted.

B. § 1983 Liability

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procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984). Marcavage fails to explain how the procedures provided for in Section 265-12 are an inadequate post-deprivation remedy for any alleged property loss he may have suffered from Jozwiak's actions.

Marcavage brings a § 1983 action against the Borough and Jozwiak for violations of the Fourth and Fourteenth Amendments, arising from the posted Notice on Marcavage's residence that allegedly dispossessed him from his home and failed to provide him any process by which he could challenge the action.

Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." Baker v. McCollan, 443 U.S. 137, 145 n.3 (1979). "To establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate a violation of a right protected by the Constitution or laws of the United States that was committed by a person acting under the color of state law." Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000) (en banc). Neither party disputes that Jozwiak was acting under the color of state law. Therefore, the only question is whether the Defendants' actions violated Marcavage's constitutional rights under the Fourth and Fourteenth Amendments.[21]

Because Marcavage has failed to demonstrate that any violation of his constitutional rights occurred, there can be no liability for the Defendants

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[21] Marcavage only alleges constitutional violations and does not claim that the Ordinances violated a right protected by federal statute.

under Section 1983. Therefore, Defendants' motion for summary judgement as to Marcavage's § 1983 claim against the Defendants is granted.

V. CONCLUSION

For the foregoing reasons, I will grant Defendants' motion for summary judgment, and I will deny Marcavage's cross-motion for summary judgment.

/s/ Anita B. Brody

ANITA B. BRODY, J.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-4175

MICHAEL MARCAVAGE,
Appellant

v.

BOROUGH OF LANSDOWNE, PENNSYLVANIA;
MICHAEL J. JOZWIAK, BOROUGH CODE
OFFICER, IN HIS OFFICIAL AND INDIVIDUAL
CAPACITIES

APPEAL FROM THE UNITED STATES DISTRICT
COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
(D.C. Civ. No. 2–09–cv–04569)
District Judge: Honorable Anita B. Brody

Submitted Under Third Circuit LAR 34.1(a)
June 7, 2012

Before: SCIRICA, GREENAWAY, JR. and COWEN,
Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on June 7, 2012. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the Order entered by the District Court on October 19, 2011, be, and the same is, AFFIRMED. Parties to bear their own costs. All of the above in accordance with the Opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron

Clerk

Dated: 9 August 2012

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL MARCAVAGE, Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 09-CV-4569
BOROUGH OF LANSDOWNE, PENNSYLVANIA, MICHAEL J. JOZWIAK, Defendants.	:	

ORDER

AND NOW, this __ 19th __ day of October 2011, it is **ORDERED** that:

- Defendants' Motion for Summary Judgment (ECF No. 39) is **GRANTED**, and
- Plaintiff's Motion for Partial Summary Judgment (ECF No. 40) is **DENIED**.

s/ Anita B. Brody

ANITA B. BRODY, J.

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL MARCAVAGE	:	
	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 09-4569
BOROUGH OF LANSDOWNE, PENNSYLVANIA, MICHAEL J. JOZWIAK	:	

CIVIL JUDGMENT

Before the Honorable Anita B. Brody

AND NOW, this 21st day of October, in accordance with the Court's Memorandum and Order (Docs. #45 and #46),

It is ORDERED that Judgment be the same is hereby entered in favor of Defendants and against Plaintiff.

BY THE COURT

ATTEST:

s/Marie O'Donnell

Marie O'Donnell, Civil Deputy/Secretary
to the Honorable Anita B. Brody