

**STATE OF MCGEE
IN COURT OF APPEALS
A22-0180-B**

In the Matter of the Child of H.B.G., Parent.

**Filed October 12, 2022
Affirmed in part and reversed in part
Bresnahan, J.**

McGee County District Court
File No. 22-CH-01-975

Considered and decided by Bresnahan, presiding Judge; Singhal, Judge; and Cantero,
Judge.

OPINION

H.G., mother of child T.G., appeals from the district court's order granting a petition filed by the McGee Department of Human Services (DHS) to compel her to allow DHS child-protection workers to enter and search her home. The district court's order also prohibits H.G. from broadcasting a live stream from inside the home to social media sites during the time child-protection workers are at or inside her home. Because the district court correctly concluded that probable cause to enter and search the home was established under the standard applicable to this child-protection case, we affirm the court's order compelling H.G. to allow DHS workers to enter and search her home. But because the portion of the order prohibiting H.G. from live streaming from inside her home during the workers' visit violates her rights under the First Amendment, we reverse that portion of the order.

I.

Appellant H.G. is the mother of one child, T.G., age 9. H.G. is single, sporadically employed, and is politically active and regularly participates in public protests in opposition to the current mayor of McGee and in support of extensive reform of the city's police department. In early 2022, appellant's protest activities included regular protests at city hall and at her local police precinct. Appellant is well-known on social media outlets for live streaming her protest activities and has over 1000 followers on two separate social media accounts where she broadcasts her live streams.

On April 22, 2022, McGee's Department of Human Services (respondent) received a child protective services report from an unidentified, anonymous source containing allegations of possible neglect of appellant's child. The source called by telephone and made three general allegations of neglect against appellant.

First, the source alleged that, on two occasions in the final week of March 2022, the source had seen appellant protesting with her child for between nine and 10 hours each day. On both occasions, the source saw that appellant did not have any food with her and did not see her feed her child on either occasion. On one of the occasions, the source reported that she heard the child repeatedly ask appellant for food and heard appellant tell the child, "No, this is not a time for you to eat. It's time for you to stop complaining about not eating." The source said these observations instilled a concern that appellant regularly did not provide her child with adequate food.

Second, the source alleged that, on the night of April 19, the source observed appellant in a bar near the mayor's office. Her child was not with her. The source alleged

that appellant was drinking heavily, appeared very intoxicated, and the source said that given appellant's intoxication it was "unclear" if she had used any controlled substances in addition to drinking alcohol. The source claimed to have heard appellant say near the end of the night that she "had to get home to my kid and make sure he hasn't gotten up to anything he shouldn't."

Third, the source expressed concern that appellant and her child were homeless or, at the very least, did not have a regular and safe place to sleep, because on the nights of April 18 and April 20 the source claimed to have seen appellant and her child sleeping overnight in sleeping bags outside city hall following protests both days. The source reported that sleeping outside did not appear to be connected to the protest activity because no other protesters or other people slept outside along with appellant and her child.

On April 25, in an attempt to investigate the source's allegations, a DHS child-protection worker went to an apartment rented by appellant's uncle, which is the address listed on appellant's driver's license. Appellant answered the door when the worker knocked, but refused to allow the worker to enter her home and refused to answer the worker's questions. Appellant live streamed most of this encounter on social media. After appellant refused to answer questions and refused to allow the worker to enter, the worker left the premises without incident.

On April 27, DHS filed in McGee County District Court a Petition to Compel appellant's cooperation with child-protection workers' entry into and search of her home. In the petition, DHS recounted the information the anonymous source had provided and asserted that entry into and search of the home was necessary to investigate possible

neglect. DHS claimed entry into the home would allow workers to investigate the possibilities that appellant was not providing adequate food to her child, that appellant may be keeping alcohol or controlled substances in the apartment in places the child could access, and that appellant and the child may not be residing at the address at all, and in fact may be homeless. DHS also requested an order that appellant be prohibited from live streaming the child-protection workers' entry into and search of the home.

The district court held a hearing on the Petition to Compel. The child-protection worker who attempted the visit at appellant's apartment testified to the allegations received in the CPS report and to appellant's refusal to allow entry into the apartment and refusal to answer questions. The worker did not testify to any further investigation or information DHS uncovered to corroborate the source's allegations. The worker testified that the source of the information was truly anonymous; that is, that DHS did not know the source's identity and did not know any information from which DHS could assess the source's credibility, apart from the source's claim to have learned the reported information through personal observation of appellant on the stated dates.

A McGee police officer who occasionally escorts child-protection workers on home visits when a worker fears the visit will become contentious testified in support of DHS' request for the live-streaming prohibition. The officer testified that prohibiting live streaming would serve safety interests of the workers by preventing people outside the home from having real-time knowledge of the workers' positions within the home. The officer testified this would help protect the workers from any potential "coordinated attack" by people who might learn via the live stream of the workers' activities in real time and

thereby learn what means the workers had to protect themselves, and what access they had to escape routes to flee any such attack. The officer testified that, while he had never personally experienced or heard of a specific example of such an attack on child-protection workers being facilitated by live streaming, such an attack was nonetheless possible and that information gleaned from a live stream would be helpful to any such attackers.

Appellant also testified at the hearing. She claimed that she feeds her child multiple times each day. She admitted she occasionally drinks alcohol at bars but testified that she does not use or keep alcohol at her home, and testified she does not use controlled substances. She also testified that the apartment is her regular home, where she and her child typically sleep. Appellant also testified that if child protection workers were to search her home, she would seek to live stream their entry and search on social media to express her displeasure with their conduct and the judicial process that resulted in their entering her home, and also to help ensure that the workers did not engage in any illegal activity inside her home. She denied that she had ever encouraged anyone to commit an act of violence against anyone else, either via her live stream or in any other way.

At the close of the hearing, the court concluded that probable cause to compel appellant to allow child-protection workers to enter and search the apartment had been established. The court stated that because DHS had received a report alleging neglect, “it’s their duty to investigate, and if you don’t let them do their job, then I have to force you to.” The court issued a written order granting the petition, reproduced here in full:

AND NOW, this 7th day of May 2022, after conducting a Petition to Compel Cooperation hearing the court enters the following order: Petition to Compel is Granted.

[H.G.] is ordered to allow two DHS child-protection workers in the home at 414 Pitkin Street, Apartment 2, on May 8, at 1:00 p.m., to assess and search the home to verify if mother is providing adequate care to the child and the child does not have access to dangerous substances.

It is further ordered that [H.G.] is hereby prohibited from broadcasting a live stream to any social media website from inside the home during the time when child-protection workers are at or inside the home. [H.G.] may record the visit and post the recording to social media or otherwise disseminate the recording after the home visit has concluded and workers have left the premises.

II.

Under McGee law, a child-protective services report is “a verbal or written statement to the Department of Human Services from someone alleging that a child is in need of services to prevent potential harm to the child due to lack of proper care or control, nutrition, education as required by law, or other care or control necessary for the child’s physical, mental, or emotional health.” McGee Statutes section 943.322(h) (2022).¹

When DHS receives a child protective services report, the agency must within thirty days conduct “an evaluation to determine whether or not the child is in need of child protective services.” McGee Statutes section 943.40, subd. 1 (2022). As part of this evaluation, statute requires DHS to contact the child’s caregiver at the home and “must seek an in-home visit.” *Id.* at subd. 2. DHS may initiate court proceedings and seek a

¹ A child-protective services report differs from a child-abuse services report, which is a statement made by a person alleging that a child has been abused. McGee Statutes section 943.322(g) (2022). This case involves only allegations of neglect, not abuse, and therefore involves only a child-protective services report, not a child-abuse services report.

motion to compel the caregiver's cooperation "if an in-home visit is refused by the caregiver." *Id.* at subd. 3.

The Fourth Amendment establishes the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched." *Id.* "[P]hysical entry of the home" by government agents "is the chief evil against which the . . . Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980).

The parties agree that the Fourth Amendment protection against unreasonable searches and seizures applies when DHS child protection workers seek to enter and search a home. The parties further agree that because the Fourth Amendment applies, an order compelling a person to allow child-protection workers into his or her home must be supported by probable cause. The parties, however, diverge on a crucial point: whether the same Fourth Amendment rules developed in the criminal-law context apply to determine whether probable cause for a home entry has been established in the child-protection context.

The parties' dispute on this point centers primarily on two probable-cause principles developed in criminal-law jurisprudence. First, appellant argues, to establish probable cause for child protection authorities to enter a home, the government must establish a sufficient nexus between the allegations of neglect and the home. *See, e.g., Zurcher v. Stanford Daily*, 436 U.S. 547, 555-56 (1978); *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Second, appellant argues that when, as here, the government learned the information from an anonymous source, whether the information is sufficiently reliable to establish probable cause must be evaluated according to the same rules applicable in criminal cases where police seek a warrant to search a home for evidence of a crime. *See Gates*, 462 U.S. 213 at 230.

To so argue, appellant points out that the search occurred at the place where the Fourth Amendment's protections are at their apex: her home. *See Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971). Given that context, appellant argues, the same requirements to establish probable cause should apply in this case as apply in the criminal-law context, as "it would be 'anomalous to say that the individual and [her] private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (quoting *Camara v. Mun. Court*, 387 U.S. 523, 530 (1967)). Appellant also cites foreign state and federal circuit cases that she asserts support her position. *See, e.g., In re Y.W.-B.*, 265 A.3d 602 (Pa. 2021); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1250 n.23 (10th Cir. 2003).

Appellant's argument, however, is ultimately unconvincing. After all, the fact that the entry into appellant's home triggers the protections of the Fourth Amendment probable-cause requirement does not in and of itself establish that all the same rules govern the analysis as in the criminal-law context. Granting the applicability of the Fourth Amendment "is only to begin the inquiry into the standards governing such searches." *T.L.O.*, 469 U.S. at 337; *Camara*, 387 U.S. at 536-37. As appellant herself recognizes, "Although the underlying command of the Fourth Amendment is always that searches and

seizures be reasonable, what is reasonable depends on the context within which a search takes place.” *T.L.O.*, 469 U.S. at 337.

In the situation presented here, it would not be reasonable to require the government to establish probable cause under the same rules as applied in the criminal-law context, because the unique context of child-protection proceedings in which child neglect is alleged makes application of those rules unreasonable and would leave the government without “effective methods to deal with breaches of public order.” *Id.*

This is because, as respondent argues, child protection authorities have few ways to investigate allegations of neglect like those made in this case without entering the home. Entering the home will allow workers to examine, for instance, whether there is any food in the cupboards, whether any alcohol has been left out and accessible to the child, and whether there are any beds in the home or other evidence the home is actually occupied by the child.

The unique context of child-protection proceedings and allegations of child neglect also advises against applying the same rules to evaluate the credibility of anonymous sources as apply in the criminal context. This is because anonymous sources who report child neglect are often family members or people close to the family, who have a special ability to observe how the caregivers treat the child. Sources with such close relationships with the child’s caregiver would be less likely to report neglect if they were not assured anonymity. This differentiates such sources in child-neglect cases from anonymous sources in criminal investigations, who are often involved in criminal activity themselves and may be providing information in hopes of obtaining a personal benefit.

Moreover, the U.S. Supreme Court has often held that government officials may enter and search a home without satisfying the criminal probable-cause standard, when those officials' purpose, as here, is not to seek evidence of a crime. Most apposite is *Camara v. San Francisco*, where the Supreme Court explained that "The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought," and "[w]here considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." 387 U.S. at 538. The *Camara* Court explained that when the government seeks a warrant to enter a home for a reason other than criminal investigation, the determination of "probable cause" is based simply on a reasonableness standard rather than strict applications of criminal-law requirements like establishment of a nexus between the allegations and the home. 387 U.S. at 537-39; *see also Michigan v. Tyler*, 436 U.S. 499, 510 (1978).

All in all, because of the differences between entries and searches by child-protection workers to investigate allegations of child neglect and entries and searches by law enforcement to seek evidence of a crime, probable-cause rules developed in criminal cases do not apply automatically to govern searches in the child-protection context like the search here. For the foregoing reasons, the criminal-law nexus and source-reliability rules appellant urges this court to apply are inapplicable here. DHS adduced sufficient information at the hearing on the petition to meet the probable cause reasonableness

standard applicable here, and the minimally intrusive search authorized by the district court complies with the Fourth Amendment.

III.

Appellant also challenges the portion of the district court's order prohibiting her from broadcasting a live video stream on social media sites from inside her home during the child-protection workers' entry into and search of her home. She argues this order violates her rights under the First Amendment.

Respondent first argues that appellant's desire to broadcast a live stream does not implicate the First Amendment at all, arguing that the order prohibits only the act of live streaming and does not prohibit appellant from saying or expressing anything. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60-66 (2006). But we disagree: appellant's live streaming of the activities of government workers at her home is protected First Amendment activity, for two reasons.

First, her act of livestreaming is "dissemination of information" protected by the First Amendment. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011). Second, in this case, the act of livestreaming itself constitutes "expressive conduct" protected by the First Amendment, as viewers of appellant's live stream could understand her choice to stream the encounter as a statement of distrust in the authorities and a condemnation of their actions. *See Texas v. Johnson*, 491 U.S. 397, 404-06 (1989). Because appellant's desired act of livestreaming is protected First Amendment activity, we must decide what level of scrutiny to apply to the court's order prohibiting that activity.

The level of scrutiny a prohibition on First Amendment activity merits depends on whether the regulation of speech is content-based or content-neutral. The parties disagree on which category the order here, which prohibits appellant from live streaming the interior of her home during the time child-protection workers enter and search it, falls into. Appellant argues that the order is content-based because, to determine whether any stream she broadcasts violates the order, one would have to examine the contents of the stream. However, the simple fact that one must examine the content of the stream to determine whether it is prohibited by the order is not dispositive of whether the prohibition is content-based. *City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022). Instead, the prohibition here is content-based because it is aimed at appellant's speech individually and directed at particular content: live streaming by H.G. from within her home at a particular time. *See Barr v. American Ass'n of Political Consultants, Inc.*, 140 S.Ct. 2335, 2347 (2020). Because the order regulating appellant's protected expression is content-based, strict scrutiny applies.

To survive strict scrutiny, the prohibition must further a compelling governmental interest and must be narrowly tailored to serve that interest, meaning that there must be no alternative less restrictive of speech that would serve the government's objective. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Respondent argues that the prohibition on appellant live streaming from inside her home while child-protection workers search serves the compelling interest of protecting the workers' safety, in that live streaming could potentially give wrongdoers outside the home real-time information about the positions of workers within the home by which those wrongdoers could stage a

“coordinated attack” on the workers.² There is no doubt that protecting the safety of the workers is an interest of utmost, compelling importance. But the government has reasonable alternatives to serve that interest – most prominently, sending police to station themselves outside the home during the search to protect the workers from any possible violence from outsiders. Because at least one reasonable alternative less restrictive of appellant’s protected First Amendment activity exists, the order fails strict scrutiny. We therefore reverse the district court’s order prohibiting appellant from livestreaming from inside her home during the time the child-protection workers are inside.

It is hereby ordered that the order of the district court is affirmed in part and reversed in part.

² At the hearing, the government presented no evidence and gave no genuine indication that it had any reason to believe that any such attack by people outside the home might occur in this case, with or without appellant livestreaming the encounter.