No. A10-332

State of Minnesota

# In Court of Appeals

Robert McCaughtry, et al.,

*Appellants,*

v.

City of Red Wing,

*Respondent.*

## REPLY BRIEF OF APPELLANTS


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**Minnesota Cases**

**Other State Cases**



**Federal Cases**

**Other Authority**

## INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal requires the Court to answer two fundamental questions of first impression in Minnesota. First, does Minnesota law permit a local government to subject its residents to an endless series of warrant applications without ever allowing those residents to obtain a declaratory judgment on whether the ordinance is constitutional? And second, do criminals have greater constitutional protection from unreasonable searches of their homes than law-abiding citizens? The answer to both questions must be "no." Therefore, this Court should rule in Plaintiffs' favor.

Plaintiffs have asked this Court to reverse the judgment of the district court concluding that they lacked standing to bring their constitutional challenges to the City of Red Wing's rental dwelling license code ("RDLC"). The City's response can be summed up as, "Judge Tunheim said so!" Plaintiffs respectfully disagree with Judge Tunheim's interpretation of Minnesota standing law. Plaintiffs have suffered actual injuries (barely addressed by the City in its response) and are in imminent danger of suffering further injuries, giving them standing under Minnesota law to litigate their claims.

Plaintiffs also ask this Court to decide the merits of their state constitutional challenge to the use of administrative warrants to conduct housing inspections. The City's response is that *Camara v. Municipal Court*, 387 U.S. 523 (1967), is "time tested" and "well established" and that this Court has already adopted it. The City is free to make the argument that Minnesota courts *should* adopt *Camara*, but it is not free to claim that Minnesota courts have already adopted *Camara*'s holding—they have not. And, as explained in Plaintiffs' opening brief, this brief, and the briefs by *amici curiae*,

Minnesota should reject *Camara*'s position that government may search homes without individualized probable cause.

In this reply brief, Plaintiffs will first seek to correct just some of the factual errors in the City's brief. They will then (1) describe why their claims are fit for judicial review (Part I); (2) underscore that, at minimum, Plaintiffs have standing to bring their state constitutional challenge to the use of administrative warrants for home inspections—an argument to which the City never specifically responded (Part II); and (3) explain why the City's arguments in defense of *Camara* fail (Part III).

## CLARIFICATION OF FACTS

The City makes many sweeping statements about how Plaintiffs have not been "fair" and "candid" in their discussion of the facts and how, supposedly, Plaintiffs have "overstated" or "ignore[d]" evidence in order to "prejudice" the Court. *See* R. Br. 7. Yet for all this rhetoric, the City fails to identify as false even *one* fact from the record evidence mentioned by Plaintiffs. Nor does it cite any specific material facts omitted by Plaintiffs (that were not actually discussed in Plaintiffs' brief).[1]

Plaintiffs included a detailed fact section to apprise this Court of the complex factual and procedural history of this case. This history matters for two reasons: First, the standard for justiciability in Minnesota is "the ripening seeds of a controversy." The

[1] To highlight just one, the City makes a number of assertions that, taken together, imply that Plaintiffs ignored evidence that the HMC and RDLC were enacted to maintain safe rental housing. R. Br. 9, 10, 12. For instance, the City claims that Plaintiffs' briefs make no reference to the housing study, the HMC's purpose statement, or "any minutes of any city council meeting." R. Br. 10. On the contrary, Plaintiffs discuss the housing study in detail, and highlight the City's own assertion in deposition that it was the City's sole factual basis for adopting the inspection program. Br. 7-8; A41.

history of this case amply demonstrates the sharply-opposed legal interests and the existence of a clearly-defined and important controversy.

Second, the facts show what is at stake and both parties' genuine need for resolution (however much the City may claim that it would like nothing better than to litigate the same issues every year without final resolution).[2] The real factual dispute between the parties is not about the underlying facts, but about their constitutional significance. In other words, the district court was presented with a fully developed record of largely uncontested facts to evaluate constitutional questions of statewide significance. Despite this well-defined controversy about the meaning and constitutionality of an existing ordinance that plainly applies to the Plaintiffs, the district court found that Plaintiffs lacked standing and refused to rule on their important constitutional claims. That decision was wrong, as discussed in the next section of this brief.

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[2] The City claims, incorrectly, that Plaintiffs have "exaggerat[ed]" the evidence about just how invasive these searches have been. R. Br. 15. As Plaintiff explained in their opening brief, Br. 11-12, the City has been "rummaging through the cabinets, closets, storage spaces, and bathroom vanities of almost every single rental home in the City." The City supposedly contradicts this evidence by citing the deposition of City inspector Eugene Durand that says he was not going through certain *other* spaces in homes (drawers and medicine cabinets) but does not disclaim the invasive searches cited by Plaintiffs. R. Br. 15. Indeed, Durand admits in the quoted testimony that he searches bathroom vanities. *Id.* Likewise, Durand admitted in deposition that he did go through cabinets, A45 ¶ 31; closets, A45 ¶¶ 30-31; and even refrigerators, A45 ¶ 31. Further, the City authorizes inspectors to search in all of the places cited by Plaintiffs in the statement above. A48 ¶ 40.

## ARGUMENT

### I. PLAINTIFFS HAVE STANDING.

It is important step back and look at the big picture in this case before jumping into a blow-by-blow rebuttal of the City's arguments. For four years, the City has been trying to enter Plaintiffs' homes and properties to conduct inspections and has sought three administrative warrants to do so, all of which have been denied. Yet the City seems bizarrely unable to understand why the Plaintiffs might want conclusive resolution of the constitutionality of the City's program or the warrants the City continually seeks against them. *See* R. Br. 31. Plaintiffs' motives are both obvious and understandable. They want to put an end to what appears to be a never-ending series of unconstitutional warrant applications, and they want to stop litigating the same case over and over and get on with their lives. The dispute here more than represents the "ripening seeds of a controversy," and thus satisfies Minnesota's standards for judicial review.

There is no Minnesota decision directly on point, so this Court must decide whether Plaintiffs have standing based on general Minnesota standing principles, analogous and persuasive case law, and consideration of the practical implications of its decision. Thus, Plaintiffs will next describe why (a) the City is wrong that Plaintiffs have not suffered actual injuries capable of being redressed by this Court; (b) the case presents the "ripening seeds of a controversy" sufficient for standing under Minnesota law; and (c) the City's argument that there is no difference being a *respondent* in a warrant proceeding and a *plaintiff* in a declaratory judgment action is grossly mistaken.

### *A. Plaintiffs have suffered actual injuries in fact.*

As they have repeatedly stated throughout this litigation, Plaintiffs have suffered actual injuries at the hands of the City, giving them standing to pursue their claims.[3] The actual injuries are of two types: (1) the actions they have had to take in *defending against unconstitutional searches* and (2) injury from the City *seeking and Plaintiffs having to defend against unconstitutional administrative warrant applications*.

#### 1. Plaintiffs have suffered actual injuries from defending against unconstitutional searches

The first type of injury is "defending themselves against the City's threatened unconstitutional searches." Br. 19; A51-53; RA 54 ¶¶ 67-68. These injuries provide standing on all of Plaintiffs' claims. Among other things, their opposition to the administrative warrants has caused Plaintiffs to:

- Spend numerous hours working with counsel (meetings, drafting affidavits, reviewing documents) to present effective oppositions to the three warrant applications, along with the associated personal costs in time and travel (A51 ¶¶ 51, 53; A52 ¶¶ 56-57);
- Sell or consider selling their rental properties due to the possibility they may have to open their doors to mandatory inspections (A53 ¶ 59);
- Suffer emotional stress and anxiety (A51 ¶¶ 51-52; A52 ¶ 58);
- Cope with alarmed tenants who have each been served with applications for warrants to search their homes, sending them letters and having personal conversations with them (A52 ¶ 56); and
- File, in the absence of defined procedures, declaratory judgment actions in order to preserve their constitutional challenges to the warrants and the inspection program as a whole (A44 ¶ 25).

[3] Relying on Judge Tunheim's opinion that Plaintiffs were not in danger of suffering an "imminent" injury, the district court failed to address whether Plaintiffs had already suffered actual injuries. A13-16.

The City has chosen not to address any of these actual injuries listed above; nor has it attempted to show that these injuries do not satisfy Minnesota's standing requirements. R. Br. 20-23.

### 2. Plaintiffs have suffered actual injuries from being served with and defending against per se unconstitutional warrant applications.

The second type of actual injury Plaintiffs have suffered is being served with and having to defend against administrative warrant applications that seek warrants that Plaintiffs argue are *per se* illegal under Minnesota law. This type of injury, along with the first type discussed above, confers standing only on Plaintiffs' claim that the Minnesota Constitution does not permit warrants without individualized probable cause to search homes and properties. RA58-61.

The City makes two related responses to this argument. The City first asserts, incorrectly, that Plaintiffs never pleaded an injury from the City "seeking administrative warrants." R. Br. 21-23. Second, it asserts that because Plaintiffs did not claim that seeking a warrant was illegal, it has not asked for relief against the City seeking warrants, so the injury is not redressable. *Id.*

Both the City's arguments fail. First, Plaintiffs did plead injury from the City seeking illegal administrative warrants. *See* RA 57-61, *but especially* RA 57 ¶ 83 (complaint); A51-53 ¶¶ 50-61, A66 ¶¶ 107-12 (motion for summary judgment).[4]

[4] The City responded to this argument on the merits below, never once mentioning its belief that the claim had not been pled. *See, e.g.*, A139 at § 4; *see also* City of Red Wing 5/13/09 Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment. Accordingly, even if Plaintiffs' had not pled this injury with specificity

Second, Plaintiffs have sought relief not against all warrant applications, but against further *administrative* warrant applications—applications for warrants that lack individualized probable cause. R. Br. 22. That injury certainly can be redressed by a ruling that the Minnesota Constitution forbids administrative warrants to search homes and properties. Further, the City notes that Plaintiffs can only claim an injury in fact under *Alliance for Metropolitan Stability* if the "challenged conduct" occurred in the past. R. Br. 23. But the "putatively illegal" conduct (being served with and having to defend against illegal administrative warrant applications, as well as unreasonable searches) has already occurred three times in the past and will, according to the City's own admission, occur in the future. Just like in *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905-913-14 (Minn. App. 2003), Plaintiffs in this case have had to divert and expend resources from normal activities to fight allegedly illegal government activity. Plaintiffs have shown actual injuries, and the district court had standing to consider all of Plaintiffs' declaratory judgment claims. Br. 20.

### *B. Plaintiffs' declaratory judgment lawsuits present the "ripening seeds of a controversy."*

As shown above, Plaintiffs have established that they have suffered actual injuries that confer standing. If this Court agrees, it need not even consider the question of whether Plaintiffs also are in danger of "imminent" injury. The Plaintiffs address it,

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(which they have), the City consented to its litigation below and cannot raise the issue now. *See* Minn. R. Civ. P. 15.02; *see also Shandorf v. Shandorf*, 401 N.W.2d 439, 442 (Minn. App. 1987) (consent to litigate presumed where party does not object to evidence or presents its own evidence on an issue).

however, because it was the basis of the decision below rejecting standing and is also the cornerstone of the City's standing argument.

As Plaintiffs explained in their opening brief to this Court, they are in imminent danger of suffering further injury in the form of unconstitutional searches. Br. 21-24. The City main response echoes the district court's conclusion that an unreasonable search is "hypothetical" because a "judicial officer stands between the City and its ability to search Plaintiffs' properties." R. Br. 20. Therefore, the district court concluded, there was no "imminent" injury and the case was not "ripe." A15. Specifically, the City argues that Minnesota follows federal standing law and that none of the Minnesota or foreign cases cited by Plaintiffs is exactly on point. R. Br. 19-30.

Below, Plaintiffs first explain that the City misconstrues Minnesota standing law, which confers standing when a plaintiff can show "the ripening seeds of a controversy." Next, Plaintiffs show that Minnesota does not adhere to the federal justiciability standard. Finally, Plaintiffs agree that this case presents an issue of first impression in Minnesota, and *all* cases both parties cite are analogous and persuasive precedent, rather than controlling precedent.

### 1. In Minnesota, Plaintiffs are in imminent danger of injury if the case presents, at minimum, "the ripening seeds" of a controversy.

As explained in Plaintiffs' opening brief, Br. 21-24, in the context of declaratory judgment actions, this Court has equated "imminent injury" with the "ripening seeds of a controversy" necessary for justiciability in Minnesota. *See Edina Cmty. Lutheran Church, et al. v. State* ("*ECLC*"), 673 N.W.2d 517, 521-22 (Minn. App. 2004) (equating

"imminent injury" with requirements for "justiciable controversy"); *Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.*, 549 N.W.2d 96, 99 (Minn. App. 1996) (stating justiciable actions are those that present "ripening seeds of a controversy"). The district court itself equated the two. A15.

The City disputes Plaintiffs' characterization of this Court's precedents, arguing, in essence, that the Minnesota courts' "ripening seeds" language does not mean what it says. R. Br. 23-24. It claims that both *ECLC* and *Rice Lake* require "injury-in-fact" and that "ripening seeds" are insufficient under Minnesota law. R. Br. at 23-25. Both those cases equate the two, as does *Minneapolis Federation of Men Teachers, Local 238 v. Board of Education*.

The City's reading of *ECLC* is woefully off-base. Indeed, the paragraph the City itself cites from *ECLC* explicitly confirms Plaintiffs' reading of the cases. *See* R. Br. 24. After explaining when a declaratory judgment action is a justiciable controversy, this Court says: "*In other words*, there must be a direct and imminent injury rather than a merely possible or hypothetical injury." *ECLC*, 673 N.W.2d at 521-22. This Court uses the phrase "in other words" to denote that an imminent injury is the functional *equivalent* of a justiciable controversy under the Declaratory Judgment Act. And in Minnesota, a controversy need not even be an actual controversy; it must simply present "the ripening seeds" of one. *Rice Lake*, 549 N.W.2d at 99.

Moreover, despite the City's attempt to distinguish *ECLC* as a free exercise case where access to the courts is easier so to not "chill" First Amendment freedoms (R. Br. 24), this Court characterized its decision quite differently. *ECLC*, 673 N.W.2d at 522

(stating "a justiciable controversy is presented by the issue of whether this act infringes on appellants' *property rights*"). And if the churches in *ECLC* had standing to litigate their claims without any concrete evidence that anyone would enter their properties with guns, Plaintiffs here surely have standing.

Similarly, in *Minneapolis Federation of Men Teachers, Local 238 v. Board of Education*, a few tenured Minneapolis teachers brought a declaratory judgment action to determine whether an annual form contract that the school board was *considering* having all Minneapolis teachers sign would affect their tenure status. 56 N.W.2d 203, 205 (Minn. 1952). The school board argued the teachers did not have standing and that any injury was purely "hypothetical" because it had not distributed the contract to teachers, the teachers had not yet refused to sign it, and there was no evidence that signing the document would cause any injury due to discharge or demotion. *Id.* at 206. The court, however, concluded that the teachers had standing anyway and stated that it was "preventing the ripening seeds of a controversy from becoming ripe." *Id.* Unlike in this case, the plaintiffs in *Men Teachers* had not alleged they suffered any actual injury, nor was their injury any more imminent than Plaintiffs' here. Indeed, they presented no evidence of *any* prospective injury. Under *Men Teachers*, Plaintiffs have satisfied Minnesota's justiciability standards.

Other Minnesota cases emphasize that the purpose of the Declaratory Judgment Act is to allow resolution of cases before they become fully ripe. *See, e.g., In re Petition for Improvement of County Ditch No. 86*, 625 N.W.2d 813, 821 (Minn. 2001); *Culligan Soft Water Serv. of Inglewood, Inc. v. Culligan Int'l Co.*, 288 N.W.2d 213, 215-16

(Minn.1979). That does not mean there is no injury requirement in declaratory judgment cases—there certainly is. But it does mean that the injury must be considered in light of the purpose of the Act, and shows why Minnesota courts have determined the presence of an imminent injury as long as the "ripening seeds of a controversy" are present. *See* Br. 9-17; 21-24.

### 2. Judge Tunheim was wrong to suggest (and the district court was wrong to conclude) that Minnesota follows federal justiciability standards.

The City (and the district court) relies extensively on Judge Tunheim's dicta—in an order in which he was compelled to correct his mistake of dismissing rather than remanding the case to state court—that "the standing requirements under Minnesota law track the constitutional requirements under Article III applied by this Court in dismissing Plaintiffs' claims," and that "claims under the Declaratory Judgment Act . . . are subject to similar standing requirements." RA38.

No Minnesota appellate decision explicitly addresses to what extent Minnesota and federal standing law differ, but there is ample evidence that Minnesota has a more lenient standard than federal courts. Most obviously, the language of the legal standards differs. Federal law requires that controversies be "ripe." *See, e.g., Reno v. Catholic Social Servs.*, 509 U.S. 43, 57 (1993). In contrast, Minnesota law requires only the "ripening seeds of a controversy" to litigate claims under the Declaratory Judgment Act. *See, e.g., Men Teachers*, 56 N.W.2d at 206 (finding standing where case was not "ripe" but presented "ripening seeds"). Further, the "ripening seeds" standard is consistent with

this State's explicit policy of allowing taxpayer standing,[5] as well as its more "liberal standard"[6] for organizational standing. In addition, many commentators have noted that state justiciability standards are generally different from federal requirements. *See, e.g.*, Shirley Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 Clev. St. L. Rev. 339, 350 (2004); John Reitz, *Standing to Raise Constitutional Issues*, 50 Am. J. Comp. L. 437, 460 (2002).

The City also argues that Minnesota courts cite to *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and thus have adopted federal law of standing. R. Br. 26. *Lujan*, however, requires only that injuries not be completely hypothetical—a standard that Plaintiffs easily meet. *Lujan* held that a controversy was "hypothetical" where a group of wildlife conservationists challenged federal regulations that they claimed would affect endangered species in a foreign nation but alleged only that they hoped to see the animals at some unidentified and unplanned point in the future. *Id.* at 564. Had they simply booked a plane ticket, they would have had standing. *Id.* at 579 (Kennedy, J., concurring). Here, of course, Plaintiffs are not alleging that perhaps, one day, they might wish to rent or own housing in Red Wing. They are actual tenants and actual landlords who have had to defend themselves against the City, thus satisfying *Lujan*'s standard. Judge Tunheim was incorrect that Minnesota applies the same standard as federal courts. It does not.

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[5] *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn.1977).
[6] *Alliance for Metro. Stability*, 671 N.W.2d at 913 (citing *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 166 (Minn. 1974)).

### 3. Courts do hear challenges to inspection programs outside of warrant proceedings.

Finally, the City presents a lengthy discussion showing that none of the out-of-state cases cited by Plaintiffs are exactly on point. R. Br. 27-30. Plaintiffs agree. They are all distinguishable, just as every case cited by the City is distinguishable. Indeed, there are no Minnesota state cases on point at all. The only recent on-point decision is Judge Tunheim's,[7] a federal case applying a different legal standard and with the further consideration of ongoing state proceedings. But what Plaintiffs' cases show is that courts hear and decide challenges to rental inspection ordinances in a variety of circumstances. *See, e.g., Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574, 576 (7th Cir. 1999); *Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 901 (N.D. Tex. 2005); *Black v. Village of Park Forest*, 20 F. Supp. 2d 1218, 1224 (N.D. Ill. 1998). Courts also decide challenges to government search authority even when there is no pending government action. *See Lankford v. Gelston*, 364 F.2d 197, 204 (4th Cir. 1966); *Hawaii Psychiatric Soc. v. Ariyoshi*, 481 F. Supp. 1028, 1037 (D. Hi.1979).

Defendants' discussion of *Ord v. District of Columbia* presents a good example. Plaintiffs never claimed that this case was directly on point, but explained that it was analogous, because the plaintiff had standing to challenge an ordinance even though there

[7] In fact, the City cites only two federal district court cases from Illinois to support its argument that Judge Tunheim's ruling should control this case. R. Br. 27 n.12. *Tobin v. City of Peoria*, 939 F. Supp. 628 (C.D. Ill. 1996), however, involved an ordinance that had never been enforced and under which no warrants had ever been sought. *Id.* at 631, 633. Moreover, *Tobin* emphasizes the prudential nature of the ripeness inquiry. *Id.* at 634.

was neither a pending warrant nor even an application for one. 587 F.3d 1136, 1143 (D.C. Cir. 2009); *see* Br. 26-27. The City believes Plaintiffs have mischaracterized *Ord* and it points to the facts that the District of Columbia had once sought to prosecute the *Ord* plaintiff, had conceded it would do so again, and had prosecuted Ord's employees under the challenged ordinance. R. Br. 20. Of course, that is no different than Plaintiffs' situation, where the City has sought warrants and concedes it will continue to do so. And just like in *Ord*, the fact that no warrant has been granted should not mean that Plaintiffs lack standing.

### *C. Plaintiffs also have standing because administrative warrant proceedings cannot provide the full range of relief offered by declaratory judgment actions.*

The bottom line on standing is that this Court must determine whether tenants and landlords like Plaintiffs can challenge rental housing inspection programs that directly apply to them prior to the issuance of an administrative warrant. There is no Minnesota case directly on point, so the Court will have to be guided by the legal principles and somewhat analogous caselaw discussed above. But this Court also should consider the practical consequences of its decision. *See Minn. Life and Health Ins. Guar. Ass'n v. Dep't of Commerce*, 400 N.W.2d 769, 773 (Minn. App. 1987) (stating that in cases of first impression the "consequences of a particular interpretation" of a statute should be considered by courts).

The City contends that there is no real difference between being a *respondent* in an administrative warrant proceeding and a *plaintiff* in a lawsuit. R. Br. 31. There are three major reasons why that assertion is plainly not true.

### 1. There are no established procedures for administrative warrant proceedings.

First of all, there is nothing in state law requiring any other city or local government unit to abide by the administrative warrant procedures used in this case—procedures that developed only in response to lawsuits filed by Plaintiffs against the City. Originally, the City sought an *ex parte* hearing for its original warrant application, and it also sought a protective order to prevent Plaintiffs from conducting discovery. A106 ¶ 12. The latter dispute was only resolved when the City consented to let its officials be deposed during the declaratory judgment lawsuit. If this Court rules that people may not bring declaratory judgment challenges to rental inspection programs, tenants and landlords in other cities will each have to confront these questions and try to convince a court that they are entitled to notice and discovery.

### 2. Parties likely cannot appeal from a warrant proceeding.

Second, despite the City's assertion that Plaintiffs can appeal a ruling on an administrative warrant application (R. Br. 31), most of the courts that have examined the issue have concluded that an order granting or denying an administrative warrant is not a final, appealable order.[8] Without waiving their right to seek such an appeal if necessary, Plaintiffs acknowledge that their ability to do so is far from certain. The lack of a definite

[8] *N.D. State Elec. Bd. v. Boren*, 756 N.W.2d 784, 789 (N.D. 2008); *Matter of Galvan Indus., Inc.*, 471 S.E.2d 132, 133 (N.C. Ct. App. 1996); *City of Evanston v. Paden*, 583 N.E.2d 47, 48 (Ill. Ct. App. 1991); *Ohio Envt'l Prot. Agency v. Ross Incineration Servs., Inc.*, 579 N.E.2d 758, 761 (Ohio Ct. App. 1989); *but see Fred W. Allnutt, Inc. v. Comm'r of Labor & Indus.*, 421 A.2d 1360,1362-63 (Md. 1980) (holding that court order denying a motion to quash an administrative search warrant was final appealable judgment).

right of appeal makes the availability of declaratory and injunctive relief all the more necessary.

### 3. Concluding plaintiffs have standing will mean giving the same amount of judicial review to rental inspection laws as other laws currently receive.

Third, if this Court concludes Plaintiffs and others like them do have standing, it will simply be treating rental inspection ordinances like other state and local laws. People affected by those laws will be able to bring declaratory judgment actions to determine if they are constitutionally valid. Courts will consider the evidence and the arguments, make decisions, and appellate courts will review them. Cities will face the prospect of attorneys' fees, which this Court has identified as a salutary incentive. *See Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. App. 1984) ("The purpose of [attorneys' fees] is to encourage lawyers to accept civil rights cases in which damages may be small, nominal, or non-existent."). But a ruling against Plaintiffs' standing will carve out and insulate this one type of ordinance from normal legal challenge, preventing the determination by courts of the basic constitutional issues and leaving all parties in a state of uncertainty, while these programs proliferate throughout the state.

## II. THIS COURT SHOULD CONSIDER AND DECIDE PLAINTIFFS' STATE CONSTITUTIONAL CHALLENGE TO THE USE OF ADMINISTRATIVE WARRANTS TO CONDUCT HOME INSPECTIONS.[9]

### *A. Plaintiffs have suffered actual injuries, conferring standing.*

In their opening brief, Plaintiffs described why their particular claim that the Minnesota Constitution does not permit administrative warrants for home inspections was unique from the others they raised and that, at the very minimum, they had standing on this claim. Br. 30-32. The City entirely failed to address Plaintiffs' argument that they had a unique standing argument for this one claim that differed from their standing argument for their other claims. It simply lumps all standing arguments together. R. Br. 18-35. As explained in Part I.A, *supra*, they have suffered an actual injury with regard to this claim by being served with and having to defend against an administrative warrant application when their legal challenge is that the Minnesota Constitution entirely forbids such administrative warrants.

### *B. Rule 103.04 allows this Court to hear the merits of this particular claim.*

Plaintiffs asked this Court to exercise its jurisdiction under Rule 103.04 and reach the merits of this particular claim not primarily because of any issues about standing, but because this Court might conclude that the lower court's ruling on this issue was dicta and thus choose not to reach it. Br. 33-35. Rule 103.04 gives it the authority to do so. The City did not address this point, apparently agreeing that if Plaintiffs have standing, the Court can reach the merits. Indeed, it is strange that the City would not want this

[9] Contrary to the City's assertion (R. Br. 18), this is the only claim on which Plaintiffs ask this Court to decide the merits. On their other claims, Plaintiffs seek a determination that they have standing and ask for remand.

Court to decide the issue because it could end the need for further litigation in the matter or limit Plaintiffs' claims in any future action.

The City is wrong, however, that Rule 103.04 does not grant this Court authority to hear the merits of this claim even if Plaintiffs' standing is questionable. In their opening brief (Br. 33), Plaintiffs cited two examples where this Court has invoked its Rule 103.04 authority to resolve disputed claims despite appellants' technical lack of standing to bring them: *State v. Fingal*, 666 N.W.2d 420, 425 (Minn. App. 2003) and *Schmidt v. Apple Valley Health Care Center*, 460 N.W.2d 349, 354-44 (Minn. App. 1990). The City tries, but fails, to distinguish these two on-point cases.

The City points out that this Court in *Fingal* found standing on two of the defendants' constitutional challenges. R. Br. 33. That is true, but this Court also concluded that the defendants did not have standing on their due process claims but still invoked Rule 103.04 to hear and decide them "in the interest of justice." *Fingal*, 666 N.W.2d at 425. The same principle warrants this Court's review of Plaintiffs' state constitutional claim.

As for *Schmidt*, the City argues this case merely shows that Rule 103.04 may be invoked to overcome a lack of standing when the claims-at-issue would otherwise be "insulated from review." *See* R. Br. at 33-34. According to the City, its actions are not "insulated from review" because "Plaintiffs have challenged—and presumably will continue to challenge—the City's enforcement of and the constitutionality of the RDLC *in the administrative warrant proceedings*." R. Br. 34. Yet *Schmidt* did not hold that Rule 103.04 applies only to standing when issues would otherwise be insulated from

review. *Schmidt*, 460 N.W.2d at 354-55. Indeed, *Fingal*, disproves that contention. Second, as discussed above in Part I.C., the warrant proceeding *does* effectively insulate Plaintiffs' claims—particularly this one, which is not based on any particular warrant application—from the full scope of judicial review. Nothing will be gained by forcing Plaintiffs to raise the same purely legal issue over and over again, hoping that one day a court will decide to rule on their broadest constitutional claim instead of their more narrow objections to a proposed warrant application.

Finally, the City claims that Plaintiffs' case citations merely show how this Court may ignore mere "procedural irregularities" to reach the merits of such claims. R. Br. 34 n.15. In fact, this Court often uses Rule 103.04 to review constitutional claims in cases where the appellant had erroneously raised such claims *for the first time on appeal.* Br. 33. That is a major deficiency, not a minor irregularity. *See e.g.*, *Thiele v. Stich,* 425 N.W.2d 580, 582 (Minn. 1988) (stating that Court "will not" hear matters raised for the first time on appeal). And, as Plaintiffs explained in their opening brief, this Court may apply Rule 103.04 to hear Plaintiffs' important constitutional challenge to the use of administrative warrants for home inspections. *See* Br. 33-34 (discussing *Rasmussen v. Glass*, 498 N.W.2d 508, 514-15 (Minn. App. 1993), a case whose similarity to this one (as explained in Plaintiffs' brief) is never refuted by the City).

## III. MINNESOTA COURTS HAVE NEVER EMBRACED THE USE OF ADMINISTRATIVE WARRANTS UNDER STATE LAW AND SHOULD NOT DO SO NOW.

The Court has been supplied with extensive briefing on this issue by the parties and *amici.* Plaintiffs therefore make only a few key points to refute the most glaring

errors in the City's brief. First, contrary to Red Wing's claim (R. Br. 35), this Court has not addressed whether *Camara*'s administrative-warrant doctrine is permissible under the Minnesota Constitution, nor treated it as governing in Minnesota.[10] The district court itself made that exact point, which is why the court considered the issue. A27-29. This is plainly an issue of first impression.

Second, the City argues that because *Camara* modified the Court's prior *Frank* opinion to require a warrant for home inspections, *Camara* was not a sharp departure from prior federal constitutional law, as required under one prong of the *Kahn v. Griffin* test for reviewing claims under the Minnesota Constitution.[11] R. Br. 38-40. As Plaintiffs thoroughly describe in their brief, *Frank* and *Camara* together represent the sharp departure from longstanding precedent. Br. 39. Although the City argues that the departure must be from a U.S. Supreme Court precedent, R. Br. 41, Plaintiffs believe they are on reasonable ground when they assert that the U.S. Constitution *itself* counts as precedent from which the High Court may "radically" depart under the *Kahn* framework.

The City's most surprising argument is that the Fourth Amendment was not meant to "stave off . . . building inspectors" (R. Br. 40). The City claims that until *Camara*, the U.S. Supreme Court had not explicitly recognized that the Fourth Amendment applied to

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[10] *Search Warrant of Columbia Heights v. Rozman* was about whether specific statutory authorization was required before a city could seek an administrative warrant. The court did not even address the question whether *Camara* governed under Minnesota law because there was individual probable cause for the re-inspection warrants at issue in the case. 586 N.W.2d 273, 276 (Minn. App. 1998).

[11] 701 N.W.2d 815, 828 (Minn. 2005). Contrary to the City's contention, R. Br. 41, under *Kahn*, courts can look to the Minnesota Constitution whenever the relevant federal case inadequately protects rights OR constitutes a sharp departure from precedent. *Id.*

housing inspections. R. Br. 40. Of course it had not. Housing inspections for building code violations did not even appear until the early 1900s, and nothing like the mandatory, universal inspections present in this case became common even in big cities until the 1950s. Note, "Municipal Housing Codes," 69 Harv. L. Rev. 1115, 1115 (1956). What Plaintiffs argue is that both the Fourth Amendment and Article I, Section 10 were originally meant to exclude *all* government entry into the home without a warrant based on individualized probable cause, including civil inspections. *See, e.g, Boyd v. United States*, 116 U.S. 616, 624-30 (1886); *see also Frank v. Maryland*, 359 U.S. 360, 378 (Douglas, J., dissenting); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 658-59 (1999).

The City then loosely cites *Boyd*, 116 U.S. at 634, and *Blackmer v. United States*, 284 U.S. 421, 441-442 (1932), for their supposed holding that Fourth Amendment protections were limited to criminal prosecutions. R. Br. 40. The cases say no such thing.[12]

*Boyd* involved a forfeiture proceeding against two business partners for fraudulently attempting to import glass without paying the duty.[13] 116 U.S. at 617. At

[12] The City also cites a lonely New Jersey district court Prohibition case from 1930, which held that the Fourth Amendment provides no protection from unreasonable searches when only civil penalties are involved, as well as a 1943 Wisconsin case involving a civil forfeiture proceeding. Neither constitutes dispositive authority relevant here.

[13] Instead of undermining Plaintiffs' argument, the history *Boyd* recites actually supports it. *Boyd* discussed the importance of search warrant rules in a non-criminal context, and described a number of prominent events in England and the Colonies that led to the adoption of the Fourth Amendment. 116 U.S. at 624-30; *see also State v. Pluth*, 195

trial, the government subpoenaed documents attesting to the value of the glass. *Id.* The partners claimed the seizure of the documents was unconstitutional, and the U.S. Supreme Court agreed, holding that the seizure violated both the Fourth and Fifth Amendments because compelling a man to turn over his papers to incriminate himself was an unreasonable seizure. *Id.* at 634-35.

Likewise, *Blackmer* involved whether it was permissible under the *Fifth* Amendment due process requirement to seize the property of an American citizen living in France for being in contempt of court. 284 U.S. at 436. Essentially, the Court held that the seizure did not violate due process. *See id.* at 441-42. There is nothing in either of these cases that explicitly limited the protections of the Fourth Amendment to criminal proceedings. As *Camara* ***itself*** notes: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior" and "[f]or this reason . . . *Frank* differed from the great bulk of Fourth Amendment cases." 387 U.S. at 530.

The City next claims incorrectly that Plaintiffs have only one federal court of appeals opinion to support their position. Plaintiffs cited *District of Columbia v. Little*, not because it is the only on-point case, but because it contains a discussion of the relevant Supreme Court cases, provides extensive historical analysis concerning the original meaning of the Fourth Amendment, and notes the "fantastic absurdity" at that time of anyone who claimed that it did not cover non-criminal entries of the home by

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N.W.2d 789, 790-91 (Minn. 1923) (citing with approval *Boyd*'s description of the history and background of the adoption of the Fourth Amendment).

government agents. 178 F.2d 13, 16-17 (1949). And it does all of that in an actual housing inspection case, something the City cannot provide except for *Camara* itself. *Little* was even cited by Justice Douglas in his *Frank v. Maryland* dissent when the U.S. Supreme Court jettisoned the Fourth Amendment. 359 U.S. 360, 378 (1959) (Douglas, J., dissenting). Thus, there is ample support for Plaintiffs' position in U.S. Supreme Court opinions, as well as in contemporary sources, and voluminous secondary literature.[14] The City is free to argue that the Constitution needs to "adapt" to modern needs (as it essentially does at page 48 of its brief), but it cannot change the original meaning of the document itself.

Additionally, the City claims that our supreme court's recent *Bartylla* and *Anderson* opinions refusing to provide greater protections under the Minnesota Constitution indicate that the Supreme Court is unlikely to do so here. R. Br. 36, 39. It essentially argues that because the Minnesota Supreme Court has not concluded that the U.S. Supreme Court got it wrong in *every* case, our high court will decline to do so here, regardless of the merits. But in both cases, the court concluded the defendants had lower

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[14] *See, e.g., Wilson v. Layne*, 526 U.S. 603, 609-10 (1999) (quoting 4 William Blackstone, *Commentaries on the Laws of England* 223 (1765-69): "[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity.... For this reason no doors can in general be broken open to execute any *civil* process; though, in criminal causes, the public safety supersedes the private.") (emphasis added); *Olmstead v. United States*, 277 U.S. 438, 463 (1928) (stating the Supreme Court has recognized that "[t]he well-known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will"); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 526-30 (1995).

expectations of privacy because they were both criminals. *State v. Bartylla*, 755 N.W.2d 8, 18 (Minn. 2008); *State v. Anderson*, 733 N.W.2d 128, 139 (Minn. 2007). By contrast, this case involves mandatory inspections of the homes of law-abiding citizens—where the highest expectation of privacy is involved and Minnesota courts are most scrupulous. Br. 40-41.

The City is right, however, about one thing: Plaintiffs are emphatically trying to make Minnesota "the most difficult place in the nation to enforce a rental housing and licensing program." R. Br. 35. Far from standing the "test of time" (R. Br. 46), *Camara*'s administrative-warrant doctrine is a bad rule that should be rejected. It should not be easier for the government to get into the homes of law-abiding citizens than suspected criminals.

It is only natural that the City would decry enforcing the Constitution as "the worst kind of judicial activism." R. Br. 49. Constitutions are horribly inconvenient when government wants to do something. The purpose of the Bill of Rights in Article I of the Minnesota Constitution, however, is to place limitations on government power. Therefore, for this Court to not enforce its limitations would be judicial *abdication*, not judicial restraint. *Camara* has never been adopted by Minnesota courts and, for the reasons discussed in Plaintiffs' briefs and those of *amici*, Minnesota courts should adhere to the original requirement that warrants to search people's homes be supported by individual probable cause.

## CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to reverse the district court and conclude they have standing to bring their claims. It should remand those claims to the district court for further review—except for their state constitutional challenge, which it should decide on the merits.

DATED: May 4, 2010

Respectfully submitted,

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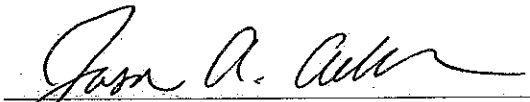
MINNESOTA CHAPTER



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STATE OF MINNESOTA

IN COURT OF APPEALS

Robert McCaughtry, et al.,

Appellants,

v.

City of Red Wing,

Respondent.

**CERTIFICATION OF BRIEF LENGTH**

**APPELLATE COURT CASE No. A10-332**

1. I hereby certify that this reply brief conforms to the requirements of Minn. R. Civ. App. 132.01, subds.1 and 3, for a brief produced with a proportional font.

2. The length of this brief is 6,996 words.

3. This brief was prepared using Microsoft Word 2003 in 13-point Times New Roman.

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