No. A10-332

State of Minnesota
In Court of Appeals

Robert McCaughtry, et al.,

Appellants,

v.

City of Red Wing,

Respondent.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Minnesota Statutes

Minnesota Cases

Other State Cases

Federal Cases

Other Authority

STATEMENT OF ISSUES

I. **The tenant and landlord Plaintiffs have successfully fought off three unconstitutional attempts by the City of Red Wing to force its way into their homes and properties using administrative warrants. The City acknowledges it will continue to seek further administrative warrants. Are Plaintiffs' claims for declaratory and injunctive relief justiciable under Minnesota law now, or are they justiciable only at the moment when injury is so imminent that a temporary restraining order would be required to prevent it?**

The district court dismissed Plaintiffs' claims because it concluded they did not have standing to raise them. According to the court, Plaintiffs' injury from an unconstitutional search of their homes and properties was not "imminent."

Apposite Authority:
Minn. Stat. ch. 555
Edina Cmty. Lutheran Church, et al. v. State, 673 N.W.2d 517 (Minn. App. 2004)
Alliance for Metro. Stability v. Metro. Council, 671 N.W.2d 905 (Minn. App. 2003)
Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc., 549 N.W.2d 96 (Minn. App. 1996)

II. **The Minnesota Constitution safeguards citizens' freedom from unreasonable searches, as well as protects home privacy and the right to be secure in one's "papers and effects." The City of Red Wing, and a growing number of other Minnesota cities, however, authorize city officials to conduct intrusive, mandatory home inspections using administrative warrants—warrants that are justified only by a generalized "probable cause" to believe that an inspection program might be a good idea. Does government entry into the home without individualized probable cause violate Article I, Section 10 of the Minnesota Constitution?**

The district court concluded no existing Minnesota appellate case held that the Minnesota Constitution prohibited (or allowed) "administrative warrants" for home searches. As a result, the court believed it did not have the authority to expand the protections of the Minnesota Constitution to rule in Plaintiffs' favor, although it recognized that the Minnesota Supreme Court may eventually embrace Plaintiffs' arguments.

Apposite Authority:
Minn. Const. art. I, § 10
Kahn v. Griffin, 701 N.W.2d 815 (Minn. 2005)
State v. Larsen, 650 N.W.2d 144 (Minn. 2002)
Ascher v. Comm'r of Pub. Safety, 519 N.W.2d 183 (Minn. 1994)

STATEMENT OF THE CASE

This is a case about the right of Minnesota residents and property owners to be free from unreasonable searches conducted without their consent and without a warrant based on individualized probable cause. In 2005, Respondent City of Red Wing ("City" or "Red Wing") enacted a "rental dwelling license code" that requires every single rental housing unit to be licensed by the City. But in order to obtain a license, tenants and landlords must submit to a mandatory city inspection. Thus, for over four years, the City has been rummaging through the cabinets, closets, storage spaces, and bathroom vanities of almost every single rental home in the City, and seeking administrative warrants to enter the rest. Put simply, Red Wing has a law on the books authorizing unconstitutional searches of people's homes.

The reason for this intrusion has been a moving target, shifting from "limiting police calls at rental properties" to ensuring the quality of an aging housing stock and searching for meth labs and child abuse. What has remained the same throughout the history of the City's rental inspection program is that it is unconstitutional. The program's illegality has been clear from the beginning, yet Red Wing residents who object to unconstitutional searches of their rental homes and properties have been stuck in a never-ending legal limbo.

After four years of litigation and fighting off three administrative warrant applications to enter their homes and properties, a group of persistent tenants and landlords ("Plaintiffs") has been unable to secure the *opportunity* to obtain declaratory and injunctive relief against this blatantly unconstitutional program. Under almost any

other circumstance (that is, without free legal representation), such a battle would have been impossible. But enduring an open-ended series of warrant applications until one is actually granted is just what the district court expects of citizens before they even have the chance to bring their constitutional challenges. Minnesotans should not be subjected to a process that creates tremendous disincentives for people to stand up for their rights, particularly when the Declaratory Judgments Act provides for direct judicial review. And here, standing is an easy case where (1) a statute authorizing administrative warrants and unconstitutional searches has been on the books for four years; (2) the City has repeatedly tried to enforce it against Plaintiffs; and (3) intends to continue to do so.

The tenant and landlord Plaintiffs bring four principal claims against Red Wing's program. First, they contend that Article I, Section 10 of the Minnesota Constitution does not allow government searches of homes absent probable cause to believe a code violation is present inside. With this claim, Plaintiffs seek to end Red Wing's pursuit of so-called "administrative" warrants—warrants based on less than individualized probable cause—to enter homes and properties.

The claim asks Minnesota courts to reject, on state constitutional grounds, the U.S. Supreme Court's decision in *Camara v. Municipal Court*, 387 U.S. 523 (1967), which allowed housing code inspections based on less than individualized cause. By contrast, Article 1, Section 10 of the Minnesota Constitution provides more robust protection of home privacy and the right of Minnesotans to be free from unreasonable government searches of their "persons, houses, papers, and effects." Therefore, Plaintiffs argue the Minnesota Constitution forbids government inspection of homes without some evidence

to believe a code violation exists inside. As the district court concluded, this is an important question of first impression for Minnesota appellate courts. Plaintiffs have also raised a parallel federal claim arguing that *Camara* should either be (a) reversed or (b) clarified and/or narrowed to forbid inspections of occupied dwellings without probable cause.

Next, Plaintiffs claim in the alternative that, even if some form of housing inspections conducted without consent or individualized probable cause are permissible, Red Wing's program still violates the Fourth Amendment. This claim seeks to challenge the breadth of the City's search authority under *Camara*. In particular, Plaintiffs argue that, under *Camara*, the need for the inspections must outweigh the invasion of privacy the search entails. As a result, the City must present evidence demonstrating a need for the inspection, as well as ensure that the inspections are conducted according to "reasonable legislative and administrative standards." Only then can Red Wing enter homes without consent. And thus far, Red Wing has failed that test, as demonstrated by three failed warrant applications. By contrast, the City has claimed it has "area-wide" probable cause to enter everyone's home as long as it identifies in statute a particular reason to conduct inspections—even without having any significant evidence of a problem.

Finally, Plaintiffs raise a parallel state constitutional challenge arguing that even if Red Wing could develop a program that satisfies the Fourth Amendment requirements laid down in *Camara*, it would still violate the Minnesota Constitution because

Minnesota has a different (and yet-to-be-defined) administrative-warrant doctrine that contains more stringent standards for "reasonableness" and "probable cause."

The court below dismissed these claims, concluding Plaintiffs lacked standing, but reviewed the first of the four claims—the state constitutional challenge to the use of administrative warrants for home inspections—in the interest of "judicial economy." Thus, only one of Plaintiffs' claims has ever been considered and decided on the merits in the course of this litigation.

Therefore, this appeal concerns two issues: (1) whether Minnesotans who do not want local government officials unconstitutionally entering their homes and property must wait until the moment between when a city obtains an administrative warrant and when it actually executes the warrant before bringing constitutional challenges to a housing inspection program; and (2) whether the Minnesota Constitution even allows cities or other government agencies to obtain administrative warrants—that is, warrants based on something less than the typical warrant requirement of individualized probable cause—in the first place.

If this Court concludes that Plaintiffs' claims are justiciable, it should remand them to the district court for further consideration. If, however, it also concludes that the Minnesota Constitution forbids housing inspections conducted without consent or individualized probable cause, Plaintiffs' remaining claims are rendered moot because that decision effectively resolves the questions present in this litigation.

FACTUAL BACKGROUND

Plaintiffs are two tenants and nine landlords who objected to Red Wing's requests to search their rental housing. Plaintiff-Appellants' Appendix ("A") at A38-40. Their objections led the City to seek administrative warrants—warrants the district court has denied on three separate occasions, including, most recently, in December 2009. A5.

When the City first sought an administrative warrant, Plaintiffs brought their own lawsuit, seeking a determination that the warrant application and proposed searches violated both the U.S. and Minnesota constitutions. *Id.* Although Plaintiffs have defeated each individual warrant, the rulings have not protected them against future warrant applications, because the district court has never ruled on the merits of Plaintiffs' civil-rights lawsuit. Thus, there has been no declaration that these proposed searches are unconstitutional and no injunction against further warrant applications. Each time the City has simply revised its rental-inspection law and tried again.

Now, as the district court candidly acknowledged, Plaintiffs face the prospect of litigating a never-ending series of administrative warrants against the City in order to protect their rights—without any recourse to declaratory or injunctive relief—even though, as the district court also acknowledged, such warrants may be illegal under Minnesota law. A15. This problem is not confined just to Red Wing. Cities all over Minnesota have rental inspection programs, many containing even less protection for tenants and landlords than the program in Red Wing.[1]

[1] Plaintiffs have reviewed the ordinances of many major Minnesota cities. Of the 50 largest cities outside the seven-county Twin Cities metropolitan area, as measured by the

The district court's decision—and the parties' proposed findings of fact, conclusions of law, and memoranda—may be found in the appendix to this brief. A1-167. The district court made very few findings of fact, perhaps because it dismissed on standing. Thus, the factual background below is developed from the parties' proposed findings of fact, which are not substantially in dispute.[2]

Origin and Adoption of the City's Rental Housing Inspection Program

Members of the Red Wing City Council began discussions about modifying the City's housing code in 2003. A3. In 2004, the City formed the Housing Code Committee to look at the idea of adopting a rental inspection and licensing program. A4. The committee considered no tenant testimony, kept no formal minutes, and made no formal findings before drafting a proposed ordinance. A40.

Red Wing had no significant evidence of health or safety problems when it enacted its inspection program.

Red Wing's only housing study was conducted in 2003 and found that the City's housing stock was generally in good condition. A40-41. The 2003 study, which discusses housing in Red Wing generally, recommends a rental inspection program (as its 20th recommendation), but contains no supporting data about housing conditions other than census data about the age of some buildings. It contains no data about deterioration,

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League of Minnesota Cities, 31 have mandatory inspection programs for rental housing. Of the 50 largest cities inside the metro area, 33 have mandatory rental inspection programs. Many of the programs were enacted in the last five years—including Minneapolis and St. Paul—illustrating the growing trend among cities to adopt these programs and conduct mandatory inspections. *See* A212-13.

[2] For ease of reference, this brief will cite the parties' proposed findings found in the appendix, which in turn cite the specific supporting evidence in the record.

maintenance, health and safety issues, problems with Red Wing rental housing, or complaints about housing conditions. A41. According to the City, these few lines of recommendations in the 2003 study were the sole factual basis for the City's finding before the adoption of the inspection program that there was deterioration of housing. *Id.*

City officials handled approximately only one dozen complaints from tenants regarding rental properties in the thirteen years between 1994 and 2007. *Id.* Indeed, the relevant employee admitted that he encountered one "or less" complaints annually during a seven-year period between 1994 and 2001, during which he was primarily responsible for fielding such calls. *Id.* He also admitted at an August 30, 2004, open house that fewer than five percent of Red Wing's rental housing units were in disrepair. *Id.*

In contrast to the limited evidence about housing problems, there is significant evidence that crime reduction and nuisance control was meant to be a major purpose of the rental inspection program in the months leading up to its adoption.

Red Wing's inspection program was designed to address crime problems.

Red Wing's rental inspection program was originally enacted with the goal of minimizing police service calls, reducing "bad" tenant behavior, and mandating participation by landlords in the Crime-Free Multi-Housing program, which encourages surveillance of tenants for criminal activity. A42. The consensus reached by the Housing Code Committee during April 2004, was to have law-enforcement or fire calls trigger inspections, along with tenant complaints. *Id.*

When the City presented a draft of the code to the public for the first time at an open house on August 30, 2004, City officials distributed talking points that emphasized

the need to address excessive police calls, "problem properties," "disorderly" tenants, assist the police department, and mandate participation in the Crime-Free Multi-Housing Program. A42.

In 2005, Red Wing adopted a rental inspection and licensing ordinance as part of its Housing Maintenance Code ("HMC") and Rental Dwelling Licensing Code ("RDLC"). Red Wing City Code §§ 4.30, 4.31; A168-211 (current version). The ordinance requires all rental property owners to obtain an operating license for each housing unit they rent. *Id.* § 4.31, subd. 1(1); A184. But under the RDLC, no operating license could be issued to any owner unless the City first inspected the dwelling unit for compliance with the terms of the HMC. *Id.* § 4.31, subd. 1(3); A5, A185.

After the RDLC and HMC became effective in August 2005, the purposes of reducing crime, addressing excessive police calls, and helping the police promote public safety were again featured prominently in PowerPoint presentations about the inspection program, as well as by advocates of the program at public forums. A43.

Red Wing seeks successive administrative warrants against Plaintiffs and is denied.

In 2006, the City sought to inspect rental properties that the landlord Plaintiffs owned, including the apartments in which the tenant Plaintiffs live. A5. Plaintiffs objected to this request, stating that the City would have to obtain a warrant before inspecting their properties. *Id.* The City then filed its first application for an administrative warrant in state district court. *Id.* In response, Plaintiffs filed a civil-rights lawsuit for declaratory and injunctive relief in November 2006 in the same court, challenging the constitutionality of the City's mandatory inspection program. A5.

Plaintiffs filed their lawsuit because there was no procedure outlined in local ordinances or state statute for challenging the merits of an application for an administrative warrant and because they wanted to enjoin further warrant applications.[3] A44.

Shortly thereafter, the City removed Plaintiffs' declaratory judgment action to federal district court. The Goodhue County District Court meanwhile rejected the City's warrant applications in August 2007, concluding that the RDLC failed to authorize mandatory inspections of Plaintiffs' homes and properties, and that there was no reason to believe code violations existed inside. A5. After this ruling, the City amended its RDLC to permit "zone-based inspections" of rental properties (i.e., area-wide inspections that did not require any suspicion of code violations on a particular property). A6. Then, in March 2008, the City applied for a second round of administrative warrants against Plaintiffs. *Id.* Again, Plaintiffs filed a separate civil-rights lawsuit in state court for declaratory and injunctive relief to ensure that their constitutional objections to the warrant application were heard, while simultaneously opposing the warrant application. A46.

In early May 2008, the federal district court dismissed Plaintiffs' declaratory judgment action on standing grounds, but after reconsideration, remanded the case to state court. A6. A short time later, the state district court consolidated the City's second warrant application with Plaintiffs' new action, and then denied the warrant application

[3] Plaintiffs also opposed each of the City's three warrant applications individually, in addition to their independent civil-rights lawsuits for declaratory and injunctive relief.

because the court did not agree with the City that "the degree of intrusion of the searches is reasonably balanced with the need for the searches." A6, A47.

To give this Court some idea of the invasiveness of the City's searches, the versions of the RDLC in place until October 2008 authorized searches inside storage areas, bedroom closets, kitchen drawers, bathroom vanities and cabinets, in addition to bedrooms, living rooms, hallways, bathrooms, kitchens, attics, utility rooms and basements. A45. The City's chief inspector also admitted to inspecting the interior of kitchen cabinets, bedroom closets, bathroom vanities, and opened and stuck his hand in refrigerators. *Id.* The inspector admitted that he inspected for "general housekeeping" and even demanded correction of "excessive dust on window sill," unacceptable "general living maintenance," missing bathroom door locks, and a dirty stovetop. *Id.*

Reviewing the second warrant application, the district court concluded that the inspection program did not "contain reasonable standards controlling the use and dissemination of data collected during RDLC inspections to adequately protect the privacy of the citizens subject to inspection," and thus violated the Constitution. A47. The court also concluded that the merits of Plaintiffs' second declaratory judgment action should be heard in the context of a subsequent warrant application. Eventually, the district court consolidated Plaintiffs' original lawsuit, which had been remanded from federal court, with Plaintiffs' subsequent lawsuit filed in response to the second warrant application. A7. Thus, both of Plaintiffs' declaratory judgment actions and the City's third warrant application would be heard together.

The current version of the ordinance still authorizes unconstitutional searches of homes.

After its second warrant application was denied, the City revised the RDLC again. A48. The changes were only cosmetic. The current version of the RDLC still authorizes City inspectors to search almost every part of a rental property or home, with only three limited exceptions—containers, drawers, and medicine cabinets. RDLC § 4.31, subd. 1(3); A185.

It is undisputed that inspectors look in bedrooms, living rooms, hallways, bathrooms, kitchens, attics, utility rooms and basements for code violations. And, at the inspector's discretion, the RDLC and HMC further authorize searches inside storage areas, bedroom closets, kitchen cabinets, bathroom vanities and other cabinets (other than medicine cabinets). RDLC § 4.31, subd. 1(3)(n); A187, A48. In other words, a resident should expect an inspector to enter every room of her home, and potentially to look in closets, cabinets, or other private storage spaces.

The HMC's scope is broad. In addition to specific regulations concerning plumbing, heating, and electrical components, it contains potential violations for, among other things, putting too much stuff in a storage area, having too many people living in a home, and further undefined "unsafe" conditions. *See* HMC § 4.30, subd. 4(A)(dd)(ii) (A173) (prohibiting overcrowding of a portion of a dwelling with "long-term storage so as to prevent upkeep, maintenance or regular housekeeping"); HMC § 4.30, subd. 9(J) (A184) (setting maximum occupancy standards, so that too many occupants would violate the HMC); HMC § 4.30, subd. 4(A)(qq) & (vv) (A175-76) (mandating that all

properties be kept in "Safe" condition, defining "Safe" as "*including but not limited to*" the specific "Unsafe" conditions listed in the HMC (emphasis added)).

The RDLC also has maintained an explicit link to crime control. When Red Wing amended its ordinance in October 2008, it added a provision specifically requiring inspectors to report to police and social services evidence of meth labs, as well as mistreatment of minors, vulnerable adults, and animals.[4] RDLC § 4.31, subd. 1(3)(q); A188.

In their summary judgment and warrant opposition briefs, Plaintiffs presented evidence that the City's enforcement of its ordinance was inconsistent at best, and arbitrary at worst. A61-62. In particular, 40 percent of the units the City licensed were never inspected by anyone. Further, in many larger, multi-unit buildings, City inspectors exercised their discretion to inspect only a few units—usually unoccupied ones. And even some that they did inspect were not required to meet HMC standards.

Likewise, the results of the City's inspections confirm what it knew when it instituted the program—that there are no significant or widespread problems with the City's rental housing stock. A60. Despite conducting over 800 inspections between December 2005 and May 2009, not a single property was ordered vacated. *Id.* Inspectors

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[4] The potential criminal penalties for these crimes are very high. *See* Minn. Stat. § 152.021 subds. 2a, 3 (penalty for manufacturing any amount of methamphetamine is up to 40 years in prison and/or a $1,000,000 criminal fine); Minn. Stat. § 609.377, subd. 6 (penalty for malicious punishment of a child is up to 10 years in prison and/or $20,000 criminal fine); Minn. Stat. § 609.2325, subd. 3 (penalty for mistreatment of vulnerable adult is up to 15 years in prison and/or $30,000 criminal fine); Minn. Stat. § 343.21, subd. 9 (penalty for animal abuse is up to 4 years in prison and/or $10,000 criminal fine).

only found 42 potentially serious code violations overall, only seven of which were in the actual living spaces of tenants. *Id.*

The Parties' Cross-Motions for Summary Judgment

In the spring of 2009, the parties filed cross-motions for summary judgment on the consolidated declaratory judgment actions, and the City submitted its third application for an administrative warrant to enter the homes and properties of Plaintiffs and many other persons who refused consent. A10. The district court heard oral arguments on the motions as well as the warrant application on June 26, 2009. *Id.* Following the argument, the parties submitted proposed findings of fact, conclusions of law, and memoranda of law.

In their motion for summary judgment, Plaintiffs first moved that Article I, Section 10 of the Minnesota Constitution forbids the use of administrative warrants to conduct home inspections. Second, Plaintiffs moved for summary judgment on their parallel federal claim, arguing that the Fourth Amendment does not permit government entry into homes without individualized probable cause.[5] Third, they argued that the RDLC authorizes unreasonable searches of homes in violation of the Fourth Amendment to the U.S. Constitution. Fourth, Plaintiffs argued that the program runs afoul of the Minnesota Constitution's yet-to-be defined administrative-warrant doctrine because it authorizes searches of occupied dwellings. Plaintiffs also argued that the failure to provide notice in RDLC § 4.31, subd. 1(3)(i), concerning how citizens may challenge an

[5] Plaintiffs did not brief their parallel federal claim, but instead raised it and preserved the issue for appeal.

administrative-warrant application before it is granted violated their right to procedural due process.[6] A10-11.

The City moved to dismiss Plaintiffs' claims on standing grounds, and argued in the alternative that it was entitled to summary judgment because all that was required for administrative warrants under the state and federal constitutions is that the government have a legitimate interest in conducting inspections, and that the inspection program was enacted in statute. A11. Once these minimum requirements were satisfied, the City argued, the government gets to come in.

The district court dismissed without prejudice Plaintiffs' civil-rights lawsuit, holding that Plaintiffs lacked standing to bring any of their claims. The court concluded that because a judicial officer must approve an administrative warrant allowing the search of Plaintiffs' homes and properties, Plaintiffs were not threatened with an "imminent injury." A14. As a result, the court ruled that Plaintiffs' claims were not justiciable until a court actually granted the warrant. According to the court, "the 'seeds' of this controversy would be so ripe as to be practically falling off the vine at a time after an Application for Administrative Warrants had been granted, but prior to the execution of the warrant." A15. At that point, Plaintiffs, the court assumed, could seek a temporary injunction and file their various claims for relief.

Because the district court recognized the importance of Plaintiffs' state constitutional challenge to the use of administrative warrants, it decided "in the interest of

[6] The district court concluded that any future warrant applications would have to be conducted under the same procedures used in the third warrant application. Therefore, Plaintiffs have abandoned this claim.

judicial economy" to analyze and rule on the merits of Plaintiffs' claim. A17-31. The court concluded that it lacked authority to hold that the Minnesota Constitution provided more protection from invasive housing inspections than the Fourth Amendment, because the U.S. Supreme Court created "administrative" warrants specifically for housing inspections in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 537-39 (1967). A30. At the same time, the court expressed its belief that (1) *Camara* was "wrongly decided"; (2) it is "entirely possible" to read the Minnesota Constitution as providing greater privacy protection than the Fourth Amendment; and (3) consideration of Plaintiffs' claims by the Minnesota Supreme Court was to be "fully expect[ed]" during the course of this litigation. A30-31. The district court then denied the third warrant application. A33. It concluded the RDLC placed inadequate limits on the inspector's discretion in conducting searches, particularly going into closets and cabinets, and allowed potential disclosures of data collected during searches to former City law-enforcement and non-law-enforcement personnel. A35. As a result, it violated even *Camara*'s standards for inspections. The ruling on the warrant application is not at issue in this appeal. Notice of appeal was filed February 19, 2010.[7]

The City has remained firm in its position that "no operating license may be issued" for any rental dwelling unit unless an inspection is first conducted for compliance

[7] Again, Plaintiffs are not asking this Court to decide the merits of their constitutional claims (except the state constitutional challenge to administrative warrants and the administrative-warrant doctrine) because the district court dismissed them for lack of standing. If this Court concludes Plaintiffs have standing to bring their claims but declines to reach Plaintiffs' state constitutional challenge to administrative warrants, then it should remand the entire case to the district court so it may be decided on the merits.

with the HMC. RDLC § 4.31, subd. 1(3); A185. The district court fully expected that the City would amend its ordinance again and seek another administrative warrant in the near future. A16. And the City has continuously stated its intent to continue to seek an administrative warrant until one is finally granted.[8] Unless this Court rules for Plaintiffs, no end to this litigation is in sight.

STANDARD OF REVIEW

A party's standing to bring a legal claim is a question of law that this Court reviews *de novo*. *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. App. 2004). Likewise, "this court reviews *de novo* a district court's conclusions as to the application of a provision of the Minnesota Constitution." *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003).

ARGUMENT

Plaintiffs' argument proceeds in three parts. First, Plaintiffs argue that they have standing on all of their constitutional claims. Next, they argue in the alternative that even if they do not have standing to bring *all* of their claims at this time, they have—at the very minimum—standing to bring their state constitutional claim challenging the use of administrative warrants for home inspections, which is not based on the particular features of any inspection program or warrant application. This Court should reach and decide this important state constitutional question of first impression. Finally, Plaintiffs argue the merits of their state constitutional claim, namely, that Article I, Section 10 of

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[8] *See* Paragraph 35 of Def's Amended Answer to paragraph 33 of Plf's Amended *McCaughtry* Complaint; 11/17/08 Deposition of Jay Owens at 172:2-9.

the Minnesota Constitution requires individualized probable cause to believe a housing code violation is present in a particular dwelling before the government may enter.

I. CITIZENS SUBJECT TO MANDATORY HOME INSPECTIONS DO NOT NEED TO WAIT UNTIL AN INSPECTOR IS KNOCKING AT THEIR DOOR BEFORE THEY CAN SEEK DECLARATORY AND INJUNCTIVE RELIEF AGAINST AN UNCONSTITUTIONAL INSPECTION PROGRAM LIKE RED WING'S.

Plaintiffs argue they and other Minnesotans subject to rental inspection programs have standing to bring their constitutional claims once the government acts in some way to enter their homes and properties without consent. The district court, however, concluded Plaintiffs lacked standing because they had not been injured by the successive warrant applications, and were not faced with an "imminent injury" to their right to be free from unreasonable searches. According to the court, because it "carefully reviews" all warrant applications to ensure they are supported by probable cause, and can "limit the scope of the warrant as appropriate," Plaintiffs' injury is only "hypothetical." The "seeds" of this controversy, it reasoned, would be "ripe" only once a warrant was actually granted. A15.

The district court erred by (a) wrongly concluding that Plaintiffs have not *already* suffered actual injury from having to defend themselves against three unconstitutional warrant applications; (b) concluding that Plaintiffs were not in danger of suffering an "imminent" injury to their rights because their claims were not "ripe"; and (c) ignoring the practical implications of requiring that an administrative warrant actually be granted before citizens can challenge an inspection program. The nature of a declaratory judgment action is to "permit determination of a controversy *before* obligations are

repudiated and rights are violated, essentially allowing one who walks in the dark to turn on the light before—rather than after—one steps in the hole." *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273-74 (Minn. App. 2001) (internal quotations omitted) (emphasis added).

To say that Plaintiffs do not have standing until they need a TRO to defend themselves is to defeat the purpose of declaratory judgment actions altogether. In Minnesota, an injury is "imminent" for standing in a declaratory judgment action once it presents the "ripening seeds of a controversy." *See Edina Cmty. Lutheran Church, et al. v. State*, 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"). Here, there's been a law on the books for five years authorizing unconstitutional searches, which the City has been actively enforcing against Plaintiffs, and which it plans to continue attempting to enforce until it finally gets into their homes and properties. There is plainly a "live controversy" here.

A. Plaintiffs have suffered actual injuries in the form of defending themselves against the city's threatened unconstitutional searches.

No one disputes that to bring a viable lawsuit, plaintiffs must have standing, meaning they must show that the claimed harm is personal, actual, or imminent; traceable to the defendant's challenged actions; and redressable by the court. *State v. Riehm*, 745 N.W.2d 869, 873 (Minn. App. 2008). The causation and redressability components of

standing are easily satisfied, and the district court itself passed over them. The district court erred, however, by concluding that Plaintiffs had not satisfied the requirement of personal, actual, or imminent injury. A14.

Plaintiffs already have suffered actual injuries from having to defend themselves against three warrant applications; each has spent many hours and significant personal and financial resources defending themselves over the last three years. *See Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913-14 (Minn. App. 2003) (finding standing when plaintiffs had to divert and expend resources from normal activities to fight allegedly illegal government activity). The landlords have also spent time talking to anxious tenants about the warrants that have been served on them. A52. All of the Plaintiffs have experienced significant stress each time they must go through the process of opposing the warrants; some have had increased health problems. *Id.* As a result, they have been unable to devote significant time to their businesses and families, all in the name of fighting for constitutional principle—a fight that has been partially vindicated three times by the district court but that they are effectively unable to bring to an end. These injuries are amply sufficient for standing purposes and entitle Plaintiffs to nominal damages. *Cf. Carey v. Piphus*, 435 U.S. 247, 266-67 (1977) (mental and emotional distress caused by deprivation of civil rights justifies award of at least nominal damages); *Sime v. Jensen*, 7 N.W.2d 325, 328 (Minn. 1942) (nominal damages may be obtained for trespass upon land).

B. In Minnesota, an "imminent injury" is present when the case presents the "ripening seeds of a controversy." Here, an actual controversy has been going on for years.

For a declaratory judgment action to be justiciable in Minnesota, it need only present "the ripening seeds of a controversy." *Rice Lake Contracting Corp.*, 549 N.W.2d at 99. This Court has equated the "imminent injury" requirement for standing with the requirement that justiciable cases present the "ripening seeds" of a controversy. *Edina Cmty. Lutheran Church*, 673 N.W.2d at 521-22.

The district court concluded that because Plaintiffs' injury at the hands of a city inspector conducting an unconstitutional search was not "imminent," the "seeds" of this controversy were not so "ripe as to be practically falling off the vine." A15. As explained above, the case is ripe, but Minnesota law does not even require ripeness. The standard is whether the controversy is *ripening*. Especially in the declaratory judgment context—the whole purpose of which is an adjudication of a dispute *before* rights or obligations are in danger—courts look at whether the "*ripening seeds* of a controversy" are present to determine if the injury is sufficiently "imminent" for standing. *See Rice Lake Contracting Corp.*, 549 N.W.2d at 99 (noting "a 'ripening seeds' inquiry replaces the usual 'present controversy' justiciability inquiry in declaratory judgment situations").

1. This case presents, at minimum, the "ripening seeds of a controversy."

The Uniform Declaratory Judgments Act provides that "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute" may obtain a declaration as to those rights, status, or legal relations and as to any question of construction or validity

of the statute. Minn. Stat. § 555.02. A declaratory judgment action is justiciable if it "(a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Franck*, 621 N.W.2d at 273 (internal citations omitted). The purpose of the statute is to settle uncertainty and it is to be "*liberally*" construed and administered. Minn. Stat. § 555.12.

When the three factors above are satisfied, the "ripening seeds of a controversy"—and thus an imminent injury—are present. *See Alliance for Metro. Stability*, 671 N.W.2d at 915 (stating that under Minn. Stat. § 555.05, "[a] party may seek a declaration as to rights, status or legal relations whenever the declaration will terminate a controversy or remove an uncertainty"). The controversy here easily satisfies this standard. In fact, it is difficult to imagine a more live, direct controversy between parties.

Neither party disputes that the City wants to search Plaintiffs' homes and properties without their consent, nor that it has an ordinance requiring these searches. In response, Plaintiffs assert their state and federal rights to be free from unreasonable searches via administrative warrant, and to be secure in their "houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Those are tangible and concrete adverse interests.

Furthermore, the controversy is capable of specific resolution. The procedures and standards for the conduct of inspections are sufficiently laid out in both the RDLC and the extensive evidentiary record. There is no chance of an advisory opinion because

there is nothing hypothetical about this case: The City has a law that requires it to search Plaintiffs' homes and properties; Plaintiffs have repeatedly refused the City entry; and the City has repeatedly sought search warrants to enter without Plaintiffs' consent. Additionally, there continues to be uncertainty about whether the City's program and its administrative warrants are constitutional—questions a declaratory judgment could answer. *See* Minn. Stat. § 555.02.

For example, Plaintiffs argue that the need for mandatory, city-wide inspections does not outweigh the invasion of privacy. There is extensive evidence in the record about the purpose of the program, the need for the program, the conduct of the searches, and the degree of privacy violation entailed. No further factual development is needed. And in this case, three successive district court rulings have not required *any* evidence concerning the conduct of the program because the statute plainly ran afoul of basic constitutional requirements. Courts are very capable of addressing these claims. *See Franck*, 671 N.W.2d at 273 (stating declaratory relief is a unique statutory remedy that serves an important social function of deciding controversies at their *inception*); *see also Minneapolis Fed'n of Men Teachers v. Bd. of Educ.*, 56 N.W.2d 203, 205 (Minn. 1952) ("Jurisdiction exists to declare the rights . . . of the parties if the complainant is possessed of a judicially protect[a]ble right or status which is placed in jeopardy by the ripe or ripening seeds of an actual controversy with an adversary party . . . .").

One recent case illustrates how liberal the standing requirement is for declaratory judgment actions. In *Edina Community Lutheran Church v. State*, a church had standing—that is, a "direct and imminent injury"—to challenge Minnesota's concealed-

carry gun law when there was no evidence any person had attempted or even desired to set foot on the church property with a gun. 673 N.W.2d at 522. All the church wanted to do was to make sure it could protect its "property rights" by prohibiting guns on its premises. *Id.* The controversy was not truly ripe until someone actually showed intent to enter the property or actually came on the property with a concealed weapon. Yet this Court in *Edina* held that the church's fear that its property rights could *potentially* be violated was sufficient to constitute an "imminent injury." *Id.* Here, in contrast, Red Wing has taken active steps to enter Plaintiffs' homes and properties, and Plaintiffs have had to take active steps to prevent Red Wing's access. This case is not even a close call under Minnesota law.

2. Courts routinely hear challenges to housing inspection programs prior to the issuance of a warrant.

The district court did not cite any case in which a court denied similarly situated plaintiffs the opportunity to bring their claims. Nor did it analogize this case with any other case in which the plaintiffs lacked standing. It merely cited a few cases discussing basic standing principles with which all parties agree, and simply relied on the mistaken reasoning of the *federal* district court to conclude that Plaintiffs lacked standing. But, as has been discussed, Minnesota has its own justiciability standards for declaratory judgment actions, requiring merely the "ripening seeds of a controversy."

The strongest indicator of error on the part of the district court is that it ignored the many cases—state and federal—in which courts have heard the merits of a declaratory judgment action challenging an inspection program. A review of these cases removes all

doubt as to Plaintiffs' standing, yet the district court did not even address them. *See, e.g., Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574, 576 (7th Cir. 1999) (assuming standing to challenge housing inspection ordinance where city had applied for administrative search warrant); *Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 901 (N.D. Tex. 2005) (finding standing for landlord to challenge ordinance requiring him to consent to an inspection in order to receive a permit or be cited for an offense); *Black v. Village of Park Forest*, 20 F. Supp. 2d 1218, 1224 (N.D. Ill. 1998) (finding standing for declaratory judgment action against future searches "based on the words of the Housing Code, the Village's own evidence as to how the program operates, and the plaintiffs' experience with the ordinance" and rejecting the assertion that future injuries were speculative); *City of Vincennes v. Emmons*, 841 N.E. 2d 155, 157-58 (Ind. 2006) (finding standing to challenge constitutionality of rental housing code where legal action had been taken by city against landlords for refusing to register properties and submit to inspection); *see also Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 797 (9th Cir. 2001) (finding standing to challenge housing inspection ordinance where city had already sued one plaintiff and notified another that "that it intends to enforce the . . . Ordinance against them").

More generally, courts find plaintiffs have standing to challenge search programs or warrants whenever there is a credible threat of enforcement against them. *See, e.g., New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 17 (1st Cir. 1996) (plaintiffs had standing to challenge state law that was not moribund, that state continued to assert was constitutional, and that could credibly be enforced against them);

Lankford v. Gelston, 364 F.2d 197, 204 (4th Cir. 1966) (en banc) (finding standing to challenge search policy even though searches of plaintiffs had ceased because city had not renounced its policy "and the danger of repetition has not been removed"); *Noble v. Tooley*, 125 F. Supp. 2d 481, 484 (M.D. Fla. 2000) (finding standing to assert a Fourth Amendment claim, even when no search had occurred, because defendants continued to assert they had the right to search plaintiffs' homes on mere suspicion of criminal activity); *Hawaii Psychiatric Soc. v. Ariyoshi*, 481 F. Supp. 1028, 1037 (D. Hi.1979) (finding standing in preliminary injunction action by Hawaii Psychiatric Society to enjoin enforcement of state statute that authorized issuance of administrative inspection warrants to search records of Medicaid providers).

A recent federal declaratory judgment action in which the plaintiff was found to have standing serves as a useful analogy. In *Ord v. District of Columbia*, the plaintiff brought suit against the District of Columbia, arguing it lacked probable cause to issue an arrest warrant against him for allegedly violating D.C.'s gun laws. 587 F.3d 1136, 1138 (D.C. Cir. 2009). The District had previously sought an arrest warrant because Ord entered the District with firearms. After he contacted the city attorney and contested the legitimacy of the warrant, there was a back-and-forth dispute in which the District continued to vacillate whether it would execute the warrant. Eventually, the city attorney declared it would not prosecute and the warrant was quashed. *Id.* at 1138-39. Fearing future prosecution, Ord filed the lawsuit to challenge the District's probable cause. *Id.* at 1139. The district court dismissed the pre-enforcement challenge because the earlier warrant was quashed and the plaintiff was never arrested. *Id.* The D.C. Circuit reversed,

concluding that because there was a credible threat that D.C. would seek another warrant in the future, Ord faced an "imminent injury" permitting a declaratory judgment action. *Id.* at 1143.

Likewise, in this case, Plaintiffs filed declaratory judgment actions in response to the City's warrant applications in order to assert their constitutional objections to the program and defend themselves from further attack. Even though the applications have all been denied, the City still seeks to enter Plaintiffs' homes and properties. And despite already inspecting almost all of the City's rental housing units, Red Wing continues to make entering Plaintiffs' dwellings a priority. Indeed, it must continue to seek warrants because city law requires Red Wing to inspect all rental homes, and Plaintiffs will not consent to these searches. RDLC § 4.31, subd. 1(3); A185. Thus, Plaintiffs, just as in *Ord*, have an "imminent injury" allowing them to challenge the city's purported "probable cause" to conduct inspections on their property.

3. Plaintiffs have standing because the case raises issues of "unusual public importance."

"The primary goal of the standing requirement is to ensure that the factual and legal issues before the courts will be vigorously and adequately presented." *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007). As discussed above, and as can be seen in the parties' exhaustive summary judgment briefing, the standing threshold has long since been crossed. But lest there remain any doubt about Plaintiffs' standing, the Minnesota Supreme Court has concluded that a plaintiff may challenge the constitutionality of statutes by declaratory judgment actions even when "the question [of

standing] is a close one" insofar as: (1) the plaintiff's challenge raises issues that are of "unusual public concern"; (2) these issues have been "exhaustively and vigorously litigated in an adversary manner by competent counsel"; and (3) "it would be a great disservice to the public to decline jurisdiction because the plaintiffs' standing is somewhat doubtful." *Village of Burnsville v. Onischuk*, 222 N.W.2d 523, 527 (Minn. 1974) (finding standing on the part of a municipal official who sought to challenge the constitutionality of a state taxation redistribution scheme by seeking a declaratory order, even though other remedies were available to him).

Whether and under what circumstances the government may enter your home or property is the quintessential question of "unusual public concern." The procedural history of this case also demonstrates that the issues can and indeed have been adequately litigated prior to the grant of a warrant. Finally, because these issues appear so infrequently at an appellate court, it would be a great disservice to the public to decline jurisdiction. This Court should conclude Plaintiffs have standing so that the merits of their claims can be heard.

C. The district court's decision makes no practical sense.

The district court concluded that this controversy would be "so ripe as to be practically falling off the vine at a time after an Application for Administrative Warrants had been granted, but prior to the execution of the warrant." A15. But requiring that a warrant be granted before filing suit puts tremendous barriers in the way of potential litigants.

Under the district court's decision, if citizens want to protect themselves against unreasonable searches, they must have the financial resources to battle a potentially endless series of warrant applications. In this case, for example, Plaintiffs have successfully defeated three warrant applications, yet still will be subject to more. Despite the fact that many people value their privacy, not many people have the energy and determination to litigate essentially the same case every single year. Furthermore, the vast majority of tenants—and indeed many landlords—do not have the money to litigate these issues even if they wanted to. By way of comparison, the City has generated over $500,000 in legal bills litigating this case.[9] At some point, tenants and landlords will simply give up and let the inspectors in. Indeed, despite the increasing prevalence of housing inspection ordinances, few cases make their way to the appellate courts, no doubt because the cost of such challenges is prohibitive.

Making a bad situation even worse, the district court's ruling requires those hardy souls who want to put an end to the warrant applications to put together both a complaint and TRO application in the short space of time between the granting of the warrant and its execution. The need for such rapid action places yet another hurdle in front of those who wish to oppose unconstitutional searches. And by making it so difficult to challenge inspection programs, the district court's ruling actually gives cities an incentive to create as sweeping an inspection program as possible—if someone sues, the law can always be

[9] This figure is taken from the meeting minutes of the January 11, 2010 Red Wing City Council Meeting, *available at* http://156.99.117.8/weblink7/DocView.aspx?id=45542.

narrowed, and in all likelihood, the law will go unchallenged anyway, giving the city broad search powers.

The remedy for all of this is allowing citizens to bring their claims at the controversy's inception—the whole point of a declaratory judgment action. *Franck*, 671 N.W.2d at 273. Once a city enacts an inspection ordinance and begins regularly enforcing it, then citizens should be able to challenge the law. Concluding citizens have standing at this point—or even once a warrant application is filed—will do three things. First, it will alleviate any uncertainty as to the constitutionality of the program. Second, it will prevent citizens from being stranded in a legal purgatory of defending themselves against potentially endless warrant applications. And third, if local governments face the possibility of a lawsuit challenging these programs, they will be more likely to craft ordinances that pass constitutional muster.

II. ONCE A CITIZEN HAS BEEN SERVED WITH NOTICE THAT THE GOVERNMENT SEEKS TO ENTER HER HOME OR PROPERTY THROUGH AN ADMINISTRATIVE WARRANT, SHE HAS STANDING TO CHALLENGE WHETHER ADMINISTRATIVE WARRANTS ARE CONSTITUTIONALLY PERMISSIBLE.

As discussed at length in Part I, *supra*, Plaintiffs have standing on all of their claims. But their standing argument is even more obvious on their state constitutional challenge to the use of administrative warrants to search homes in Minnesota, a challenge that, if successful, would moot the remainder of Plaintiffs' claims. The district court erred in two ways by concluding that Plaintiffs lacked standing to bring their state constitutional claim. First, Plaintiffs are challenging whether administrative warrants may *ever* be used in Minnesota—a claim which is completely independent of any

particular warrant application and how a judge may handle it. Second, Plaintiffs have in fact *already* been injured by the three preceding administrative warrant applications. But even if this Court were to conclude Plaintiffs lack standing to bring this claim, it should still review it "in the interest of justice" under Minnesota Rule of Civil Appellate Procedure 103.04.

A. Plaintiffs' claim is not tied to any particular inspection program or warrant application because the claim is that there can be no warrant application at all.

The district court did not provide any separate justiciability analysis related to this claim, but instead concluded that Plaintiffs lacked standing generally because (to paraphrase the court) a judge reviewing a warrant application could prevent cities from conducting unconstitutional searches and, therefore, there was no "imminent" injury. A15-16. But it does not make sense to say that a court stands between the warrant application and an inspection, because Plaintiffs' argument here is that there can be no administrative warrant application in the first place.

B. Plaintiffs have suffered actual injuries at the hands of the City.

Plaintiffs have standing because they have already been injured by the City. The threat of an imminent injury in the form of an unconstitutional search is not the only injury from which Plaintiffs are trying to protect themselves. It is also the administrative warrant applications (especially successive ones) authorized in RDLC § 4.31, subd. 1(3)(i), that Plaintiffs are trying to avoid because they have been burdensome, costly and unconstitutional. A51-52. And, as here, Plaintiffs have been vindicated only to have to defend themselves from yet more applications for these unconstitutional warrants. Thus,

the district court's concern that the injury is not imminent is misplaced. If Plaintiffs' legal theories are correct, then they have already been injured by the City's unconstitutional actions.

C. If this Court concludes that Plaintiffs lack standing, it should exercise its discretion under Rule 103.04 to consider the merits of Plaintiffs' state constitutional challenge to the use of administrative warrants.

Even if this Court were to conclude that Plaintiffs lack standing to challenge Red Wing's use of administrative warrants, this Court still should exercise its discretion under Rule 103.04 to review "any order involving the merits or affecting the judgment" and decide the claim in "the interest of justice." Minn. R. Civ. App. P. 103.04. It should do so for three reasons. First, this Court has not previously hesitated to use Rule 103.04 to overcome standing-related issues in key cases and decide the important legal issues involved. Second, this Court has generally relied on Rule 103.04 in cases involving the vindication of fundamental constitutional rights. Third, this Court has routinely applied Rule 103.04 for purposes of judicial economy. The state constitutional claim is a pure question of law that was fully briefed below and decided by the district court "in the interest of judicial economy." A17. Because it is an important question of state constitutional law that will eventually be reviewed by this Court anyway, and a decision in Plaintiffs' favor could effectively end this litigation, this Court should decide it now.

1. This Court has not previously hesitated to use Rule 103.04 to overcome standing-related issues in key cases and decide the important legal issues involved.

This Court has concluded on multiple occasions that although an appellant may not have standing to raise certain legal claims, the merits of these claims still should be

addressed in "the interest of justice." *See, e.g., State v. Fingal*, 666 N.W.2d 420, 425 (Minn. App. 2003) (considering due process challenge to criminal statute "in the interest of justice" even though appellants did not have standing); *Schmidt v. Apple Valley Health Care Center*, 460 N.W.2d 349, 354-55 (Minn. App. 1990) (using "discretionary review powers" under Rule 103.04 to review the validity of attorneys' fees award even though appellant lacked standing).

2. This Court has relied on Rule 103.04 to hear claims concerning the vindication of important constitutional rights.

This Court's prior decisions also make clear that Rule 103.04 allows this Court to review an appeal's legal claims in "the interest of justice" when these claims concern the vindication of fundamental constitutional rights. *Whitten v. State*, 690 N.W.2d 561, 564 (Minn. App. 2005).[10] This Court's decision in *Rasmussen v. Glass* provides the clearest comparison for why this Court should reach the claim, regardless of any standing issues involved. 498 N.W.2d 508, 514-15 (Minn. App. 1993).

In *Rasmussen*, the Court protected appellant-restaurant owner's free association and "conscience" rights under the Minnesota Constitution against enforcement of a city anti-discrimination ordinance that penalized appellant for his conscience-motivated refusal to deliver food to an abortion clinic. *Id.* at 514. While observing that these claims

[10] Other cases in this vein include: *Reed v. Albaaj*, 723 N.W.2d 50, 55 (Minn. App. 2006) (invoking Rule 103.04 to decide appellant's equal protection claim despite his failure to raise it at trial); *In re Civil Commitment of Martin*, 661 N.W.2d 632, 640 n.3 (Minn. App. 2003) (invoking Rule 103.04 to decide appellant's due process, equal protection, and double jeopardy claims despite his failure to raise them at trial); *State v. Mellett*, 642 N.W.2d 779, 783-84 (Minn. App. 2002) (invoking Rule 103.04 to decide appellant's state right-to-privacy and search-and-seizure claims despite clear invalidity of his general due process claim under state supreme court precedent).

were "not previously raised by the parties in an explicit manner," this Court still invoked its jurisdiction under Rule 103.04 because: "The issue of conscience is too important not to be considered in this case . . . ." *Id.* at 515. Similarly, in the present case, Plaintiffs seek to vindicate their essential privacy rights under Article I, Section 10 of the Minnesota Constitution to be free from unreasonable inspections of their rental homes. Thus, because these rights are just as susceptible to "greater protection" under the Minnesota Constitution as those at issue in *Rasmussen* (as the district court concedes), they also are "too important not to be considered in this case."

3. This Court has routinely applied Rule 103.04 for purposes of judicial economy.

Finally, this Court should consider how Rule 103.04 may be applied in "the interest of justice" to advance judicial economy and bring closure to legal claims. Indeed, as the Minnesota Supreme Court has held, when an appeal involves (1) legal questions upon which a trial court "may again be called to rule," and (2) legal questions where "much of the law . . . . is unclear," then appellate review of these questions is proper under Rule 103.04 "on the supposition that by [such review] another appeal might be avoided." *Wild v. Rarig*, 234 N.W.2d 775, 786 (Minn. 1975). Plaintiffs' state constitutional claim fits this bill.

Here, a decision in Plaintiffs' favor on their state constitutional claim would effectively end this litigation because the City would no longer be able to seek administrative warrants. The district court decided to consider the merits of the claim for just this reason of "judicial economy." A17. Thus, even if this Court should conclude

that Plaintiffs lack standing on their claims, it still should exercise its discretion under Rule 103.04 and decide this particular state constitutional challenge "in the interest of bringing closure to this matter." *Agra Res. Coop v. Freeborn County Bd. of Comm'rs*, 682 N.W.2d 681, 684 (Minn. App. 2004); *see also Onischuk*, 222 N.W.2d at 527 (ruling courts should decide important constitutional claims even when standing is doubtful).

III. UNDER THE MINNESOTA CONSTITUTION, GOVERNMENT AGENTS CANNOT ENTER YOUR HOME WITHOUT INDIVIDUALIZED PROBABLE CAUSE TO BELIEVE A CODE VIOLATION IS PRESENT.

Article I, Section 10 of the Minnesota Constitution forbids Red Wing's attempted use of administrative warrants to enter rental dwellings without consent for the purpose of conducting housing inspections. Minnesota strongly protects the right of privacy and the right to be free from unreasonable searches in one's home. *See State v. Larsen*, 650 N.W.2d 144, 147 (Minn. 2002); *Thiede v. Town of Scandia Valley*, 14 N.W.2d 400, 406 (Minn. 1944) (describing the robust protections afforded to the sanctity of the home as "fundamental law" recognized by the Minnesota Constitution).

Although the U.S. Supreme Court permitted the use of administrative warrants for home inspections under the Fourth Amendment in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 537-39 (1967), no Minnesota appellate court has ever adopted *Camara*'s ruling, nor interpreted the Minnesota Constitution to allow administrative warrants based on generalized or area-wide probable cause to search the homes of law-abiding citizens. Minnesota has a stronger rule because it provides special constitutional protection to the home and because Minnesota recognizes a robust right to privacy. *See State v. Jordan*, 742 N.W.2d 149, 159 (Minn. 2007) (Meyer, J., concurring) ("[The

Minnesota Supreme Court has] frequently recognized that privacy rights are more broadly defined under the Minnesota Constitution than under the United States Constitution."). Government officials still need individualized probable cause before they may enter a home. *See Larsen*, 650 N.W.2d at 150 (requiring that DNR inspector have consent or probable cause before entering an ice house to conduct regulatory inspection).

Plaintiffs are asking this Court to apply the Minnesota Constitution's unique guarantee of home privacy to protect the rights and liberty of Minnesotans above and beyond the minimal protection the U.S. Constitution provides. Again, no precedent prevents this Court from undertaking the analysis of state constitutional claims that the Minnesota Supreme Court prescribed in *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005).[11] And indeed, nowhere have courts held more frequently that the Minnesota Constitution provides greater protection than the U.S. Constitution than in the area of protection against unreasonable searches. *Kahn*, 701 N.W.2d at 827 n.6; *see, e.g.*, *State v. Carter*, 697 N.W.2d 199, 210-11 (Minn. 2005) (holding that random and suspicionless dog sniffs of storage units are an "unreasonable search" under state constitution); *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994) (holding that suspicionless

[11] The district court correctly concluded that two cases from this Court were not on point and did not foreclose further review of the issue. According to the district court, *Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273 (Minn. App. 1998), and *Cardinal Estates, Inc. v. The City of Morris*, No. CX-02-1505, 2003 WL 1875487 (Minn. App. Apr. 15, 2003), did not consider or rule on the legal standards for housing inspection regimes under the Minnesota Constitution. A27-30. Neither case even mentioned the Minnesota Constitution, let alone analyzed whether Minnesota's administrative-warrant requirements are identical to those announced in *Camara*.

sobriety checkpoints, permissible under the Fourth Amendment, constitute an unreasonable search and seizure under the Minnesota Constitution).

A. The district court wrongly concluded it did not have the authority to rule in Plaintiffs' favor.

Despite dismissing Plaintiffs' claims, the district court decided to address the merits of Plaintiffs' state constitutional claim for reasons of "judicial economy." A17. The district court concluded that "*Camara* was wrongly decided" and that it was "entirely possible" the Minnesota Supreme Court may agree with Plaintiffs' argument, which was a matter of first impression for Minnesota's appellate courts. A31. Indeed, the district court "fully expect[ed] that the Minnesota Supreme Court will have at least been presented with the opportunity to consider the issue" by the conclusion of this litigation. A30-31. The court, however, declined to rule in Plaintiffs' favor, reasoning that in order to do so, it would have to expand the protections of the Minnesota Constitution, which it believed it had no authority to do because there was no existing case *directly* on point.

The district court was entirely correct that it has no power to expand the protections of the Minnesota Constitution. *State v. Rodriguez*, 738 N.W.2d 422, 432 (Minn. App. 2007). But the district court wrongly concluded it did not have the authority to rule in Plaintiffs' favor and hold that Article I, Section 10 of the Minnesota Constitution does not permit the issuance of warrants to enter people's homes on less than individualized probable cause. Minnesota's robust search-and-seizure jurisprudence, exemplified in cases like *State v. Larsen*—the famous ice house case—*already* provides more protection for home privacy and the right to be free from

unreasonable searches of one's person, papers, home, and effects than the U.S. Constitution. *Kahn*, 701 N.W.2d at 827 n.6. A holding in Plaintiffs' favor would have followed naturally from the prior cases offering greater protection. And this Court has in the past applied these expanded state constitutional protections to novel factual contexts.[12] The district court, however, was unwilling to apply prior precedent to a new factual context, and left it to the appellate courts to resolve. A30.

B. Minnesota courts should look to the Minnesota Constitution whenever federal precedent inadequately protects the rights of Minnesotans, or constitutes a "sharp departure" from longstanding precedent.

The crux of the dispute over this claim is whether or not *Camara*'s administrative-warrant doctrine, which departs from literally centuries of precedent dating to at least the Colonial era, is justified and adequately protects the rights of Minnesotans. The Minnesota Supreme Court has explained that courts should look to the Minnesota Constitution as an independent source of liberty whenever the federal rule (1) inadequately protects the rights of Minnesotans *or* (2) constitutes a sharp and unjustified departure from longstanding precedent. *Kahn*, 701 N.W.2d at 828; *see also* Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights under Both the United States and*

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[12] *See, e.g., Ascher v. Comm'r of Pub. Safety*, 505 N.W.2d 362, 366-69 (Minn. App. 1993) (examining the propriety of sobriety checkpoint under the Minnesota Constitution "as an adequate and independent state ground for decision"), *aff'd*, 519 N.W.2d 183 (Minn. 1994); *Rasmussen*, 498 N.W.2d at 514-15 (applying state constitution to protect right of conscience); *In re Welfare of E.D.J.*, 492 N.W.2d 829, 831 (Minn. App. 1992) (stating that court could reject with good reason federal interpretations of federal constitutional provisions almost identical in language to state-constitutional provisions), *rev'd on other grounds*, 502 N.W.2d 779 (Minn. 1993).

Minnesota Constitutions, 70 Alb. L. Rev. 865, 912–13 (2007) (Justice Anderson explains the *Kahn* methodology). Here, *Camara* fails both prongs of this test.

1. *Camara* inadequately protects the rights of Minnesotans.

Minnesota courts have developed robust protections for privacy under Article I, Section 10 of the Minnesota Constitution because the U.S. Constitution does not adequately protect the rights of Minnesotans. *State v. Davidson*, 481 N.W.2d 51, 58 (Minn. 1992); *see also Kahn*, 701 N.W.2d at 825 (stating that courts will consider independently applying the state constitution when there are "concerns" and "traditions" unique to Minnesota). *Camara*'s assault on home privacy and the home security the Minnesota Constitution so zealously guards is one such instance in which the federal rule should be rejected.

In Red Wing's view of *Camara*, the government must obtain a warrant for an administrative search when consent is refused, but these are mere rubberstamp warrants.[13] Courts, the City claims, are not to scrutinize the conduct of inspections or the need justifying any particular inspection program. The City has contended these rubberstamp warrants provide the minimal protection for people's rights the *Camara* Court envisioned; an administrative warrant allows citizens to know that the government official is entering for a legitimate purpose, and the inspection is being carried out in accord with some regulatory scheme.

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[13] Eight years prior to *Camara*, the U.S. Supreme Court held in *Frank v. Maryland*, 359 U.S. 360 (1959) that warrants were not required at all for administrative searches. *Camara* thus represents a slight retrenchment on *Frank*'s warrantless inspection rule, but, according to Red Wing, the courts otherwise impose only very limited restrictions on the government's wide power to conduct searches, including searches of homes.

Similarly, the City has argued that Minnesota courts have looked to Article I, Section 10 of the Minnesota Constitution as an independent source of protection for individual rights only in cases that do not involve a warrant. And because in this case a "warrant" is present, the City has claimed that Minnesota courts should refuse to apply the state constitution. But these arguments miss the mark.

First of all, most of the cases in which Minnesota courts have held that the state constitution provides greater protection against unreasonable searches than the Fourth Amendment focus on the fact that the government conducts a suspicionless search in a place with a high degree of personal privacy. *See, e.g.*, *Carter*, 697 N.W.2d at 212 (holding that random and suspicionless dog sniffs of storage units are an "unreasonable search" under state constitution); *Ascher*, 519 N.W.2d at 187 (holding that suspicionless sobriety checkpoints, permissible under the Fourth Amendment, constitute an unreasonable search and seizure under the Minnesota Constitution); *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979) (holding that a warrant may not authorize searching a lawyer's office for evidence against a client when the lawyer is not suspected of criminal wrongdoing and there is no threat that evidence will be destroyed if sought by subpoena).

Other cases explicitly give greater protection to the privacy of the home. *See, e.g.*, *In re B.R.K.*, 658 N.W.2d 565, 578 (Minn. 2003) (holding short-term social guests in a home have a reasonable expectation of privacy under Article I, Section 10); *Larsen*, 650 N.W.2d at 149 (concluding ice house is a dwelling in which inhabitants have an expectation of privacy). The common thread binding these cases is Minnesota courts'

emphasis on protecting personal privacy with respect to intimate spaces. And as the *O'Connor* case shows, the presence or absence of a warrant is not dispositive.

Second, administrative warrants are *sui generis*; they are a unique exception to the normal standard for searches based on individualized probable cause. Thus, the presence of a *civil* administrative warrant here does not distinguish this case from others involving the absence of *criminal* search warrants. The Minnesota Supreme Court would likely reject a "warrant" that would allow for suspicionless searches of the home—the place where persons have the highest expectation of privacy.

The *Larsen* case is particularly instructive. *Larsen* involved a warrantless search of a dwelling—the same issue present in *Camara*. Like *Camara*, *Larsen* ruled that a warrantless entry of a dwelling was unconstitutional. 650 N.W.2d at 154. But whereas *Camara* proceeded to craft the administrative-warrant doctrine to give future guidance to lower courts concerning the constitutional permissibility of regulatory searches of homes, *Larsen* did no such thing. It did not even mention *Camara* or the administrative-warrant doctrine, despite it being the ideal factual situation in which to adopt such a test: regulatory enforcement activities conducted in dwellings.

Instead, *Larsen* highlighted the importance of preserving the integrity and sanctity of the home, calling it a "fundamental right" to be free from unreasonable intrusions into one's abode. *Id.* at 147-48. Even a "ruined tenement," the court stated, cannot be invaded without probable cause. *Id.* It required DNR inspections of ice fishing houses to be conducted under the same constitutional standards that govern law-enforcement officials. *Id.* at 154.

But was the *Camara* issue even raised in *Larsen*? This Court's opinion in that case—which the Supreme Court affirmed—provides some helpful context. There, this Court addressed in detail the question whether "conservation officers are under the same constitutional constraints as other law enforcement officers." *State v. Larsen*, 637 N.W.2d 315, 322 (Minn. App. 2001). The Court concluded they were, and ruled that a conservation officer may not enter an ice house absent consent or "objective individualized articulable suspicion of criminal wrongdoing before" entry. *Id.* at 323. In its discussion, this Court explicitly quoted from *Camara* to show that the DNR's warrantless searches of even these temporary dwellings were impermissible. *Id.* at 320.

This Court likened suspicionless searches of ice houses to the random, suspicionless traffic stops struck down on state constitutional grounds in *Ascher*. *Larsen*, 637 N.W.2d at 322. This Court noted that in *Ascher*, there was a far more compelling state interest justifying the search—getting drunk drivers off the road—yet the Minnesota Supreme Court still required some "objective individualized articulable suspicion" before a driver could be stopped and searched. *Id.* at 323. This Court concluded in *Larsen* that, if the Minnesota Supreme Court rejected the federal rule allowing for suspicionless sobriety checks despite the strong government interest in keeping drunks off the road, the need to protect home privacy under the Minnesota Constitution should be upheld when the government interest was much lower.

Confronted in *Larsen* with a claim that the government had an important need to conduct regulatory searches without probable cause, the Minnesota Supreme Court could have crafted an administrative-warrant doctrine, just like the U.S. Supreme Court did

when confronted with a similar claim in *Camara*. But the court rejected that path and instead held simply that the proposed searches violated the Minnesota Constitution. The result in *Larsen* is attributable to the value that Minnesota courts and the Minnesota Constitution give to the privacy and sanctity of the home. Particularly striking is the fact that the Minnesota Supreme Court vindicated these rights in ice houses—shacks in which people might stay for a day or two while they fished—simply because they *resembled* homes. *Larsen*, 650 N.W.2d at 149; *see also Carter*, 697 N.W.2d at 210-11 (holding that a person's expectation of privacy in a self-storage unit is greater for the purpose of the Minnesota Constitution than under the Fourth Amendment because "the dominant purpose for such a unit is to store personal effects in a fixed location"). Here, of course, Red Wing seeks to search actual homes—homes in which the tenant Plaintiffs have lived for years. If an ice house cannot be searched without individual probable cause and a storage unit cannot be searched without individual suspicion, then surely a search of a person's permanent home requires at least as much.

Over 40 years have passed since *Camara* and no Minnesota appellate court has adopted it. That is because Minnesota's unique tradition of protecting privacy beyond that of the U.S. Constitution forbids the use of administrative warrants to conduct housing inspections. *See Kahn*, 701 N.W.2d at 825 (stating that the court will consider independently applying the state constitution when there are "concerns" and "traditions" unique to Minnesota).

2. *Camara* is an unjustified departure from longstanding precedent.

Minnesota courts also look to the state constitution to protect individual liberty when the governing U.S. Supreme Court authority represents a "radical" or "sharp" departure from precedent or a "general approach to the law." *Kahn*, 701 N.W.2d at 828; *see also State v. Wiegand*, 645 N.W.2d 125, 132–33 (Minn. 2002). The Minnesota Supreme Court has relied upon the presence of a sharp or radical departure in four cases involving searches or seizures. *See State v. Flowers*, 734 N.W.2d 239, 258 (Minn. 2007) (rejecting federal rule and holding that a second weapons sweep of a vehicle stopped for a license plate violation is unreasonable where the police had no grounds for the second weapons sweep in addition to those they found for the initial weapons sweep); *State v. Askerooth*, 681 N.W.2d 353, 361–63 (Minn. 2004) (holding that confining a driver in a squad car's back seat and requesting consent to search the driver's vehicle unjustifiably expands the scope of a stop-sign-violation stop); *Ascher*, 519 N.W.2d at 186 (holding that suspicionless sobriety checkpoints, permissible under the Fourth Amendment, constitute an unreasonable search and seizure under the Minnesota Constitution); *In re E.D.J.*, 502 N.W.2d 779, 780 (Minn. 1993) (holding that a person is seized who has been subjected to, but has not yet submitted to, police officer's assertion of authority).

Generally, Minnesota courts will find a "sharp" departure when a U.S. Supreme Court case interpreting the Fourth Amendment departs from longstanding precedent and provides less protection for individual rights than the previous rule. That is exactly the situation here, where *Camara*'s test for the constitutionality of administrative searches

bears almost no resemblance to the principles embodied in the Fourth Amendment's text or historical context.[14] *See* Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't this Exactly What the Framers Were Trying to Avoid?*, 5 Regent U. L. Rev. 215 (1995).

Camara was a sharp departure from longstanding precedent in two ways. First, along with *Frank v. Maryland*, *Camara* departed from the requirement that all searches of homes (absent some exigency) be based on warrants supported by individual probable cause. *See Dist. of Columbia v. Little*, 178 F.2d 13, 16-17 (D.C. Cir. 1949) (stating it was "settled" law since the time of the Framers that *all* government intrusions into the home required a warrant based on traditional probable cause, and to conclude otherwise was a "fantastic absurdity"). Second, *Camara*'s administrative-warrant doctrine was a sharp departure because it created a new form of warrants based on something less than individualized probable cause, namely, a balancing test for the overall "reasonableness" of a search. "To say that the probable cause required by the Fourth Amendment is not a fixed test, but instead involves a sort of calculus incorporating all the surrounding circumstances of the intended search, constitutes *a major departure* from existing constitutional doctrine. And it could well be a departure with a multitude of

[14] Plaintiffs recognize that although *Camara* is not a recent departure like in *Ascher* or *E.D.J.*, its administrative-warrant doctrine was a "sharp" departure from precedent, and Minnesota courts have never adopted it as the correct rule of state constitutional analysis for home searches under Article I, Section 10 The Minnesota Supreme Court has never confined its "sharp departure" analysis to recent departures by the U.S. Supreme Court. Limiting the analysis to chronologically recent departures in Fourth Amendment cases would make little sense where, as here, the issues raised are less likely to appear before a court as frequently as a criminal search and seizure issue.

consequences." Wayne R. LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 Sup. Ct. Rev. 1, 12–13 (emphasis added).

Minnesota courts should "strive to ascertain and give effect to the intent of the constitution as indicated by the framers and the people who ratified it" when interpreting the Minnesota Constitution. *Kahn*, 701 N.W.2d at 825 (citing *Reed v. Bjornson*, 253 N.W. 102, 104 (Minn. 1934)). On those occasions, the court will "look to the history and circumstances of the times and the state of things existing when the constitutional provisions were framed and ratified in order to ascertain the mischief addressed and the remedy sought by the particular provision." *Id.* Minnesota courts have not hesitated to review the history of the ratification of the Fourth Amendment and cite to it as authority and support for their decisions. *See, e.g., State v. Jackson*, 742 N.W.2d 163, 169–70 (Minn. 2007).

The Fourth Amendment was ratified to prevent invasions of the home by government officials who lacked individualized probable cause, such as the entries authorized by general warrants and writs of assistance during the Colonial era. *Boyd v. United States*, 116 U.S. 616, 624-30 (1886); *State v. Pluth*, 195 N.W. 789, 790-91 (Minn. 1923) (citing *Boyd* with approval); *see also Virginia v. Moore*, 128 S.Ct. 1598, 1603 (2008). *See generally* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 642-48 (1999).

The key provision of the Fourth Amendment was the warrant requirement based on individualized probable cause. *Boyd*, 116 U.S. at 626, 630; *Pluth*, 195 N.W. at 791. Without this warrant, searches of the home were *per se* unreasonable. *Davies*, 98 Mich.

L. Rev. at 551. The Fourth Amendment did not distinguish between "criminal" and "administrative" or "regulatory" searches of the home. *Frank*, 359 U.S. at 376 (Douglas, J., dissenting); *see also Payton v. New York*, 445 U.S. 573, 585 (1980) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."). All intrusions of the home (except those involving exigent circumstances) were impermissible without a warrant. *Boyd*, 116 U.S. at 630; *Little*, 178 F.2d at 16-17; *see also Frank*, 359 U.S. at 376 (Douglas, J., dissenting).

Minnesota adopted the language and prevailing meaning of the Fourth Amendment when it ratified Article I, section 10 in 1857.[15] *Pluth*, 195 N.W. at 790-91; *see also Olson v. Tvete*, 48 N.W. 914, 914 (Minn. 1891) (stating that the common law principle that "no warrant shall issue but upon probable cause, supported by oath or affirmation, and *particularly* describing the place to be searched," was embodied in Article I, Section 10 of the Minnesota Constitution) (emphasis added). The robust protections afforded to the sovereignty and security of the home are "fundamental law" recognized by the Minnesota Constitution. *Thiede*, 14 N.W.2d at 406.

Housing inspections—when conducted without the consent of the landlord and tenant, or without a warrant based on individualized probable cause—cut to the heart of

[15] Early Minnesota case law supports the conclusion that the warrant requirement was the central feature of Article I, Section 10, just like the Fourth Amendment. *See, e.g., State v. Stoffels*, 94 N.W. 675, 676-77 (Minn. 1903) (holding that statute authorizing searches for illegal liquor vendors did not authorize an "unreasonable" search because it required a warrant based on probable cause); *State ex rel. Schulman v. Phillips, Sheriff*, 75 N.W. 1029, 1030 (Minn. 1898) (commenting that a statute authorizing government agents to enter "any dwelling house" to search for children truant from a reforming school without a warrant was "in conflict with section 10 of article I of the constitution, prohibiting the unreasonable search of a person's house").

our most important legal tradition of respect for the sanctity and security of a person's home, whether it is a small apartment or a large estate. The ancient common-law maxim, "A man's home is his castle," served as the principal foundation of Article I, Section 10, and still commands great respect in Minnesota.[16]

Adopting *Camara*'s radical departure is unjustified because there are alternative means of enforcing the housing code. *See, e.g.*, *Ascher*, 519 N.W.2d at 187 (refusing to follow federal rule allowing suspicionless sobriety checkpoints when state had not demonstrated (1) it was impractical to require individualized suspicion; (2) the need for the checkpoints outweighed the invasion of privacy; and (3) higher arrests rates would be achieved).

The dispute between the parties concerning whether *Camara*'s departure is justifiable is rooted in a difference of opinion about the "appropriate constitutional limitations" on the City's police power. The City argues that the rubberstamp administrative warrant it believes *Camara* allows is sufficient to protect rights and gives the government the power it needs to institute a system of comprehensive, universal inspections. Plaintiffs, on the other hand, argue that this Court should affirm the longstanding rule barring government entry of homes without individualized probable cause because a departure from this rule would unnecessarily endanger the liberty and security of people in their homes.

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[16] Two recent cases have cited the famous maxim. *See, e.g.*, *State v. Carothers*, 594 N.W.2d 897, 901 (Minn. 1999) (upholding right of person to use deadly force to prevent commission of a felony in home); *State v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 888 (Minn. 1992) (describing intrusiveness of unsolicited calls in the home).

Plaintiffs are not arguing that the government can never enter a rental dwelling. Likewise, Plaintiffs are not arguing that Red Wing cannot maintain standards for rental housing—it certainly can adopt something like its current housing maintenance code, and it is undisputed that municipal corporations have the power to enact laws to protect public health and safety. Minn. Stat. § 412.221, subd. 32; *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 6 (Minn. 2008). This power includes the ability to regulate the conditions of rental housing and order compliance with codes. *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 550 (Minn. 1996). Plaintiffs are also not arguing that Red Wing cannot conduct inspections. But there are a number of less-intrusive alternatives the City can use to conduct inspections and enforce the housing maintenance code than a system of mandatory, suspicionless searches. The City has not demonstrated why any of these alternatives would be impractical, jeopardize public safety, or significantly hinder code enforcement. Thus, the departure from the traditional warrant requirement is simply not justified, and this Court should rule that the constitutional safeguard the Minnesota Constitution affords to the privacy and sanctity of the home—a warrant based on individualized probable cause—should be upheld. *See Askerooth*, 681 N.W.2d at 362 n.5 (stating that Minnesota courts should interpret the state constitution to provide greater protection for individual rights whenever it would result in the "better rule of law").

CONCLUSION

In a dissent that revolutionized search-and-seizure law, Justice Louis Brandeis stated: "The makers of our Constitution ... conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by

civilized men.... Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting). When the U.S. Supreme Court ignored Justice Brandeis's word of caution and created administrative warrants 40 years later, it opened the door—literally—to the government seeking access to the homes of every resident. As this case demonstrates, cities can use "administrative" inspections for frontline police work, as well as poking around in every nook and cranny of a home. Furthermore, administrative warrants allow the type of search that should be given (and was intended to receive) the most scrutiny under both the U.S. and Minnesota constitutions: general, non-consensual searches of the homes of law-abiding citizens without any suspicion of illegal activity.

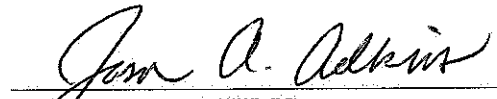
Bending the U.S. Constitution to allow governments to search homes without probable cause has deeply undermined one of the most important constitutional rights in our country. Thankfully—as it has done many times in the past—Minnesota can ignore what the federal courts are doing. Minnesota gives particular respect to the sanctity of the home, and Red Wing's use of administrative warrants to conduct housing sweeps without even a hint of suspicion of a code violation is unconstitutional under Article I, Section 10.

Even if this Court does not adopt Plaintiffs' interpretation of the Minnesota Constitution, it should still conclude they have standing to pursue their other constitutional challenges and remand those claims for further consideration by the district court.

DATED: March 22, 2010

Respectfully submitted,

INSTITUTE FOR JUSTICE
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 brief conforms to the requirements of Minn. R. Civ. App. 132.01, subds.1 and 3(a), for a brief produced with a proportional font.

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