NO. A10-332

State of Minnesota
In Supreme Court

Robert McCaughtry, et al.,

Appellants,

v.

City of Red Wing,

Respondent.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

I. **Minnesota courts have concluded that a person may bring a declaratory-judgment action whenever the ripening seeds of a justiciable controversy are present. The City of Red Wing has (a) enacted a rental-housing-inspection ordinance allowing the City to seek administrative warrants to enter homes, (b) sought three warrants to enter Plaintiffs' homes and properties, and (c) unequivocally admitted it will continue to seek warrants and attempt to conduct inspections. Is a justiciable controversy—or at least the "ripening seeds" of one—present when a municipality enacts and begins enforcing a rental-housing-inspection ordinance against tenants and landlords?**

The district court concluded that neither the ripe nor the ripening seeds of a controversy were present because no administrative search warrant had been granted. As a result, the court found there was no imminent injury and, therefore, concluded Plaintiffs lacked standing. The court of appeals affirmed, and held that a party must have suffered or be in imminent danger of suffering an injury for a case to be justiciable, but did not analyze the relationship between the standing requirement of "injury" and the justiciability requirement of "ripening seeds of a controversy."

Apposite Authority:
Minn. Stat. ch. 555
Onvoy, Inc. v. ALLETE, Inc., 736 N.W.2d 611 (Minn. 2007)
Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996)
Cnty. Bd. of Educ. v. Borgen, 192 Minn. 512, 257 N.W. 92 (1934)

II. **According to the U.S. Supreme Court, once the government begins to enforce a regulatory scheme that directly applies to a party, or someone is credibly threatened by the enforcement of a criminal statute, their injuries are "imminent" and they have standing to bring constitutional challenges against a statute. Do Plaintiffs have standing to challenge the City of Red Wing's rental-housing-inspection ordinance after the City has begun enforcing the law against them, but before a search warrant has been granted?**

The district court concluded that the possibility a judicial officer may limit the scope of an administrative search warrant rendered Plaintiffs' injuries' "hypothetical." The court of appeals held that Plaintiffs had not suffered actual injuries either (a) defending themselves in court from the City's warrant applications or (b) from dealing with the effects of the new ordinance, such as concerned tenants, stress and anxiety, and lost resources. The court did not,

however, state when the threat of an unreasonable search would be imminent enough to make Plaintiffs' claims challenging the constitutionality of the City of Red Wing's Rental Dwelling License Code justiciable.

Apposite Authority:
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)
Pennell v. City of San Jose, 485 U.S. 1 (1988)
Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979)

STATEMENT OF THE CASE AND FACTS

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 probable cause. It comes to this Court on the question of jurisdiction: "When can citizens raise constitutional challenges to laws that directly affect them?" The answer to that question is plain: When the government enacts an ordinance or statute and begins enforcing it, you may, at minimum, seek a declaratory judgment concerning its constitutional validity. Alternatively, when the government sues you—especially if it does so repeatedly and it is undisputed it will continue to do so—you have standing to challenge the underlying ordinance or statute that the government is trying to enforce against you. The courts below, however, dismissed Plaintiff-Appellants' claims on justiciability grounds, despite the fact that (1) an ordinance authorizing administrative warrants and home inspections 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.[1]

[1] The parties' cross-motions for summary judgment were heard in Goodhue County District Court in front of Hon. Robert R. King. A panel of the court of appeals

The case in a nutshell

In 2005, Respondent City of Red Wing ("City" or "Red Wing") enacted a "Rental Dwelling License Code" ("RDLC") that requires every rental-housing unit to be licensed by the City. Plaintiff-Appellants' Appendix ("A") at A23; A511, ¶ 1.[2] But in order to obtain a license, tenants and landlords must submit to a mandatory inspection. A512, ¶ 3. Thus, for almost five years, the City has been rummaging through the cabinets, closets, storage spaces, and bathroom vanities of rental homes throughout the City, and seeking administrative warrants to enter the dwellings of those who do not consent. Put simply, Red Wing has a law on the books authorizing unconstitutional searches of people's homes.

Plaintiff-Appellants ("Plaintiffs") are two tenants and nine landlords who have repeatedly objected to Red Wing's requests to search their rental homes and properties. A246-48, ¶¶ 1-7. When the City first sought an administrative warrant, Plaintiffs brought their own lawsuit, seeking a declaration that the warrant application and proposed searches violated both the U.S. and Minnesota constitutions. A23; A456-78. Their claims sought relief from the RDLC under Article I, Section 10 of the Minnesota Constitution, as well as the Fourth Amendment to the U.S. Constitution. Plaintiffs

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(Halbrooks, Bjorkman, ***Collins***, JJ.) affirmed Judge King's dismissal of Plaintiffs' claims in an unpublished opinion. A22-29; 2010 WL 3744638 (Minn. App. Sept. 28, 2010).

[2] In some instances, Plaintiffs have not cited multiple pieces of evidence in the voluminous record; rather, for ease of reference, they cite to pleadings, court orders and briefing found in their Appendix, which in turn cite and discuss the relevant evidence.

question the City's ability to seek warrants and conduct inspections based on less than individualized probable cause and, in the alternative, challenge the legislative and administrative standards that govern the conduct of rental-housing inspections.

After almost five years of litigation, Plaintiffs have been unable to secure the *opportunity* to obtain declaratory and injunctive relief against this blatantly unconstitutional program. Although they have defeated all three warrant applications, the rulings have not protected them against future warrant applications because the district court has never ruled on the merits of Plaintiffs' civil-rights lawsuits. Thus, there has been no declaration that these warrant applications or 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 an ongoing series of administrative warrants against the City in order to protect their rights—without any recourse to declaratory or injunctive relief. A223.

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 and court of appeals expect 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 Minnesota Declaratory Judgment Act ("MDJA") provides for direct judicial review.

Plaintiffs have presented a justiciable controversy; the City is actively seeking to enter the homes and properties of *these* Plaintiffs, and they want to keep the City and its agents out because they believe the administrative warrants and the searches authorized by the RDLC are unconstitutional. Citizens, like Plaintiffs, may seek declaratory relief concerning a municipal ordinance from the moment the state acts to enforce it against them.

The courts below improperly grafted an injury-in-fact requirement into the declaratory judgment justiciability inquiry. Even if injury is a necessary element of a justiciable controversy, they overlooked the presence of both actual and imminent injuries in concluding Plaintiffs lacked standing. This Court should determine that Plaintiffs' claims are justiciable, and it should remand them to the district court for consideration of the merits.[3]

Plaintiffs have included below a detailed background section to help the Court understand the extensive factual and procedural history of this case.[4] The history matters for two reasons: First, the standard for justiciability is "the ripening seeds of a controversy." The history of this case amply demonstrates the sharply opposed interests

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[3] As explained in more detail below, one of Plaintiffs' state constitutional claims already has been briefed and argued in the court of appeals. This Court can remand that claim for appellate decision. *See* A74-90; A134-148.

[4] Both lower court opinions included little in the way of facts, likely because they dismissed on justiciability grounds. Plaintiffs' statement of the facts is based on the "exhibits" and "papers filed in the trial court." Minn. R. Civ. App. P. 110.01.

between the parties and the evidence of a clearly defined and important controversy. Second, the facts show both parties' genuine need for resolution and why a declaratory judgment is an appropriate remedy to end the dispute between the parties.

Origin and adoption of the RDLC

Members of the Red Wing City Council began discussions about modifying the City's housing code in 2003. A248, ¶ 10. A study from a private consulting firm had indicated that although much of the City's rental-housing stock was in good condition, 46 percent of the dwelling units were constructed prior to 1960. A108. In 2004, the City formed the Housing Code Committee to look at the idea of adopting a rental inspection and licensing program based on a recommendation of the study. A212, ¶ 5.

When the City presented a draft of the code to the public for the first time at an open house on August 30, 2004, ensuring safe rental housing was just one of many reasons for adopting the code. City officials distributed talking points that emphasized the need to address excessive police calls, "problem properties," and "disorderly" tenants; assist the police department; and mandate participation in the Crime-Free Multi-Housing Program. A250, ¶ 18.

In 2005, Red Wing adopted the new rental-inspection and licensing ordinance as part of its Housing Maintenance Code ("HMC") and Rental Dwelling Licensing Code ("RDLC").[5] Red Wing City Code §§ 4.30, 4.31; A497-519.[6] The ordinance requires all

[5] 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

rental-property owners to obtain an operating license for each housing unit they rent. *Id.* § 4.31, subd. 1(1); A511. But under the RDLC, no operating license can be issued to any owner unless the City first inspects the dwelling unit for compliance with the terms of the HMC. *Id.* § 4.31, subd. 1(3); A512. Under the current version of the ordinance, the City must first seek owner and tenant consent for such inspections. *Id.* § 4.31, subd. 1(3)(a); A513. If consent is not obtained, the RDLC authorizes the City to seek an "administrative warrant" from a "judicial officer." *Id.* § 4.31, subd. 1(3)(i); A514.

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

In 2006, the City sought to inspect rental properties that the landlord Plaintiffs own, including the apartments in which the tenant Plaintiffs live. A251, ¶ 22. Plaintiffs objected to this request, stating that the City would have to obtain a warrant before inspecting their properties. A213, ¶ 11. Then, in October 2006, the City filed in state district court its first application for an administrative warrant. *Id.* at ¶12. In response, Plaintiffs filed a civil-rights lawsuit for declaratory and injunctive relief in November

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safety were again featured prominently in PowerPoint presentations about the inspection program, as well as by advocates of the program at public forums. A559-60.

[6] The Red Wing City Code was recently recodified, but there were no substantive or structural changes to the RDLC. A511-19. The parties have agreed to use the prior numeration, and Plaintiffs have included in their appendix the version with the old numbering for ease of reference and consistency with the proceedings below.

2006 in the same court, challenging the constitutionality of the City's mandatory inspection program.[7] *Id.*; A456-78.

Shortly thereafter, the City removed Plaintiffs' declaratory-judgment action to federal district court. A213, ¶ 12. The Goodhue County District Court meanwhile rejected the City's first warrant application in August 2007, concluding that the RDLC failed to authorize mandatory inspections of Plaintiffs' homes and properties, and that there was no evidence that code violations existed inside. *Id.* at ¶ 13; A553-54. 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). A214, ¶ 15. Then, in March 2008, the City applied for a second round of administrative warrants against Plaintiffs. *Id.* at ¶ 16. Again, Plaintiffs filed a separate civil-rights lawsuit in state court for declaratory and injunctive relief, and simultaneously opposed the warrant application. A214, ¶ 18; A404-34.

In early May 2008, while the City's second warrant application was pending in state district court, the federal district court dismissed Plaintiffs' declaratory-judgment action on standing grounds, but after reconsideration, remanded the case to state court. A214, ¶¶ 17, 21. A short time later, the state district court consolidated the City's second warrant application with Plaintiffs' second declaratory-judgment action, and then denied the warrant application because the court did not agree with the City that "the degree of

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

intrusion of the searches is reasonably balanced with the need for the searches."[8] *Id.* at ¶ 19; A549.

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 therefore the warrants based upon the RDLC violated the U.S. Constitution. A550. The court also concluded that the merits of Plaintiffs' second declaratory-judgment action should be heard in the context of a subsequent warrant application. A541, ¶ 3. 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. A215, ¶ 22.

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

After its second warrant application was denied, the City revised the RDLC again. A215, ¶ 23. There were only a few relevant changes. 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)(m); A514.

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[8] To give this Court some idea of the invasiveness of the City's searches, the City's chief inspector admitted to inspecting the interior of kitchen cabinets, bedroom closets, bathroom vanities, and opened and stuck his hand in refrigerators. A253, ¶ 31. 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.*

It is undisputed that inspectors can and do look in bedrooms, bathrooms, living rooms, hallways, 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); A514. 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 RDLC also has maintained an explicit link to crime control. When Red Wing amended its ordinance in October 2008, it added a provision specifically authorizing inspectors to report to police and social services evidence of methamphetamine labs, as well as mistreatment of minors, vulnerable adults, and animals. RDLC § 4.31, subd. 1(3)(q); A188.

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. A218, ¶ 25. 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. A246-403.

In their motion for summary judgment, Plaintiffs first argued that Article I, Section 10 of the Minnesota Constitution provides greater protection from unreasonable searches than the U.S. Constitution, and forbids the use of administrative warrants—that is, warrants based on less than individualized probable cause—to conduct home inspections.[9] A218, ¶ 26; A286-95. Second, Plaintiffs moved for summary judgment on their parallel federal claim, seeking the U.S. Supreme Court's reversal of *Camara v. Municipal Court*, 387 U.S. 523 (1967), and its "administrative-warrant doctrine" because the Fourth Amendment, as originally understood, does not permit government entry into homes without individualized probable cause. A280 n.1. Third, Plaintiffs argued that the program runs afoul of the Minnesota Constitution's yet-to-be developed administrative-warrant doctrine because it authorizes searches of occupied dwellings. A305-07. Fourth, Plaintiffs argued that even under *Camara*, the RDLC violates the Fourth Amendment because it authorizes unreasonable searches of homes and lacks reasonable "legislative

[9] This claim was analyzed by the district court, which concluded that only *this* Court had the authority to provide greater protection from unreasonable searches than provided by the Fourth Amendment. A225-39. Plaintiffs raised the issue on appeal because a ruling in their favor could resolve the litigation entirely. It was fully briefed and argued by both parties in the court of appeals, but the court did not discuss it. A74-90; A134-45; A177-82. Plaintiffs did not raise the claim as an issue to be considered in their petition for review, but this Court could ask the parties for additional briefing if it is inclined to conclude, based on the briefing, that Plaintiffs' claims are justiciable. The claim is one of major statewide importance on a state constitutional issue, and will likely reach this Court again at some point in the future. If the Court chooses to reverse and remand, it may remand this one claim separately to the court of appeals, rather than the district court, for review.

and administrative standards"[10] governing the conduct of inspections. A218, ¶ 27; A295-301.

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 inspections under the state and federal constitutions is that the government have a legitimate interest in conducting inspections generally, and that the inspection program be enacted by statute and contain a warrant provision. A340-44. 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. A219. 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." A222-23. 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." A223. At that point Plaintiffs, the court seemed to assume, could seek a temporary injunction and file their various claims for relief.

[10] *Camara*, 387 U.S. at 538.

The district court then denied the third warrant application. A239-43. It concluded that the RDLC placed inadequate limits on the inspector's discretion in conducting searches—particularly going into closets and cabinets—and allowed potential disclosure of data collected during searches to former City law-enforcement and non-law-enforcement personnel. A243. As a result, it violated even *Camara*'s standards for inspections. *Id.* Plaintiffs appealed the dismissal of their claims, but the ruling on the warrant application is not at issue on appeal.

In a brief, unpublished opinion, the court of appeals affirmed the district court's dismissal of Plaintiffs' claims. A22-29. It held that Plaintiffs had not suffered any injuries at the City's hands, either by being dragged into court to defend themselves against the warrant application, A26, or spending time and resources dealing with the new inspection regime—such as responding to the concerns of tenants who had each been served both with documents from the City seeking entry into their homes and court documents related to the individual warrant applications. *Id.* The court of appeals did not say when the case would be justiciable, only that it did not present similar facts to those declaratory-judgment cases cited by Plaintiffs in which the court had previously concluded the "ripening seeds of a controversy" were present. A27.

Plaintiffs petitioned this Court for review, arguing that the Court's declaratory-judgment precedents had sown confusion among the lower courts about what constitutes a justiciable controversy, namely, whether "injury in fact" was a prerequisite. A1-7. That confusion, Plaintiffs argued, resulted in decisions like those below, dismissing a

case where a justiciable controversy is plainly present. A5-6. Review was granted on December 22, 2010.

There is no question that the City will continue to seek administrative warrants to enter Plaintiffs' homes and properties.[11] The City has stated this repeatedly, and indeed the RDLC itself mandates that the City continue to seek warrants. The district court, too, acknowledged that the warrant applications will continue. A223. Unless this Court rules that Plaintiffs are entitled to a ruling whether the underlying law is constitutional, they will remain in legal limbo, fighting off individual warrant applications yet never getting a ruling whether the inspection law is constitutional in the first place. Other Minnesotans, subjected to similar rental inspection laws throughout the State, A539-40, will be limited to opposing warrant applications with no means of challenging the constitutionality of the laws to which they are subject. Instead, this Court should rule that people, including Plaintiffs, may challenge laws that are being enforced against them.

STANDARD OF REVIEW

A court's jurisdiction to hear a claim is a question of law that this Court reviews *de novo*. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 710 (Minn. 2007).

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[11] The City explicitly admitted this point at oral argument, below, and has never refuted it in briefing or otherwise. *See also* ¶ 35 (A440) of the City's Amended Answer to ¶ 33 (A410) of Plaintiffs' Amended *McCaughtry* Complaint (admitting that "Defendant intends to continue to seek warrants to enter property owned or rented by Plaintiffs"); 11/17/08 Deposition of Jay Owens at 172:2-9 (A598) (same).

ARGUMENT

Citizens have standing to challenge laws that are being enforced against them. This right is basic and fundamentally important. They need not wait until they are actually "injured" to bring suit. At minimum, they may seek a declaration that an ordinance or statute is invalid when it is likely to be applied to their disadvantage. And it is especially obvious that a declaratory-judgment action challenging a municipal ordinance is justiciable when the government has sued the declaratory-judgment plaintiffs three times to enforce the law, as is the case here.

The lower courts erred by concluding Plaintiffs (1) had not brought a justiciable controversy under the MDJA; and (2) had not suffered actual injuries and were not in imminent danger of suffering injury sufficient to give them standing to raise their constitutional objections to the ordinance. Both errors, corresponding to the questions presented in this case, will be discussed in the two sections that follow.

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE UNDER THE MINNESOTA DECLARATORY JUDGMENT ACT.

The MDJA allows litigants to seek declarations concerning the validity of statutes or municipal ordinances whenever the "ripening seeds" of a justiciable controversy are present. Yet the courts below completely ignored this long-standing test in concluding Plaintiffs' claims were not justiciable. Instead, they imposed the typical standing requirement of injury in fact and then refused to rule on the merits of Plaintiffs' claims,

even though this controversy satisfies both the declaratory-judgment test for justiciability and the injury-in-fact test for standing.

This section proceeds in two parts. Plaintiffs will (A) discuss the purpose of declaratory judgments, and why they are intended resolve controversies at their inception *before* anyone is actually injured; and (B) apply this Court's "ripening seeds" test to show Plaintiffs' claims should be heard.

A. Declaratory judgments are meant to resolve cases at their inception.

The Minnesota Declaratory Judgment Act ("MDJA") is a statutory remedy that gives courts the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Minn. Stat. § 555.01; *see also* Minn. R. Civ. P. 57. Its purpose is to eliminate "uncertaint[ies] and insecurit[ies] with respect to rights," Minn. Stat. § 555.12, and resolve controversies "at their inception," *State Farm Mut. Auto. Ins. Co. v. Skluzacek*, 208 Minn. 443, 447, 294 N.W. 413, 415 (1940), by allowing litigants to turn the light on "*before*—rather than after—one steps in a hole." *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273-74 (Minn. App. 2001) (emphasis added); *see also Montgomery v. Minneapolis Fire Dept. Relief Ass'n*, 218 Minn. 27, 31, 15 N.W.2d 122, 124 (1944) ("The act provides the machinery for the removal of legal clouds which create peril, insecurity, fears, and doubts.") (citation omitted).

1. The MDJA was enacted to prevent injury.

When interpreting and applying statutes like the MDJA, this Court has the responsibility to "ascertain and effectuate the intention of the legislature." Minn. Stat.

§ 645.16. There is no extant legislative history providing specific evidence why the Legislature enacted the MDJA.[12] But we do have extensive and contemporaneous writings on the subject by the UDJA's author, Edwin Borchard. Indeed, this Court has often turned to Borchard for guidance concerning declaratory judgments,[13] and much of what the Court has said about the MDJA, including the "ripening seeds" of a controversy language, comes directly from his work. *See Lee v. Delmont*, 228 Minn. 101, 110, 36 N.W.2d 530, 537 (Minn. 1949) (citing Edwin Borchard, *Declaratory Judgments* 56 (2d ed. 1941)). The history of the statute underscores what is plain in its text, namely, that it was created to eliminate the requirement that one had to actually be wronged or injured before the judicial arm of the state could be invoked. Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 Yale L.J. 1, 2 (1918).

According to Borchard, declaratory judgments are "instrument[s] of preventive justice" that act as a "stabilizer of legal relations and an authoritative warning against untoward and misguided conduct." Edwin M. Borchard, *The Uniform Declaratory*

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[12] Apart from one small amendment in 1943 to Minn. Stat. § 555.09 concerning when and how issues of fact may be tried in a declaratory-judgment proceeding, the Legislature has not modified the MDJA since its enactment in 1933. A search in the Minnesota Historical Society library revealed no significant legislative history other than vote totals for the passage of the act in 1933. H.F. No. 271 was passed by a 77-1 vote in the House of Representatives, and a vote of 36-5 in the Senate. The law was enacted as L.1933, c. 286.

[13] Borchard has been cited and discussed by this Court as an authority on declaratory judgments in numerous cases. *See, e.g.*, *Ditzler v. Spee*, 288 Minn. 314, 318, 180 N.W.2d 178, 181 (1970); *Connor v. Twp. of Chanhassen*, 249 Minn. 205, 209, 81 N.W.2d 789, 793-94 (1957); *Harrington v. Fairchild*, 235 Minn. 437, 442-43, 51 N.W.2d 71, 74 (1952); *Montgomery*, 218 Minn. at 30-31, 15 N.W.2d at 124; *Skluzacek*, 208 Minn. at 446, 294 N.W. 413 at 415.

Judgments Act, 18 Minn. L. Rev. 239, 256 (1934). Legislatures came to the conclusion that "modern social and industrial conditions emphasize[] the conviction that the social equilibrium is disturbed not only by a violation of private rights, privileges, powers and immunities but by the placing of these individual advantages in grave doubt and uncertainty." Borchard, 28 Yale L.J. at 2. The limited scope of traditional preventive relief, such as injunctions, "against insecurity and the disturbance of the status quo" made it necessary to consider the alternative remedy of declaratory judgments. *Id.* at 4.

Unlike an "executory" judgment, that is, one "called into operation by some past or immediately threatened violation of a right," which is followed by "further relief in the form of a judgment for the payment of damages or a decree for an injunction," the distinctive characteristic of a declaratory judgment is that

> it carries with it no coercive decree or order commanding the defendant or the sheriff to do anything, an inherent element of all executory judgments. Its purpose is to afford security and relief against uncertainty and doubt. It does not necessarily presuppose culpable conduct on the part of the defendant, but it enables any party whose rights, privileges, powers or immunities . . . have been disputed, endangered, threatened or placed in uncertainty by another person to invoke the aid of a court to obtain an authoritative determination or declaration of his rights or other legal relations.[14]

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[14] That is not to say an action for a declaratory judgment may not be accompanied by a request for injunctive relief, as it is here. According to Borchard:

> The request for a declaration is very frequently accompanied in a separate prayer by a demand for coercive relief in the form of injunction or other decree, the advantage being that even though the injunction may be refused, the declaration of the legal relations of the parties may still be made and the parties will govern themselves accordingly. This usually serves the

Id. In other words, a declaratory judgment "assures a construction or interpretation of the law *before* rather than after breach or violence." Edwin Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 Yale L.J. 445, 445 (1943) (emphasis in original).

This Court's decisions reflect Borchard's understanding of the remedy: "[I]n any proceeding where declaratory relief is sought, in which judgment or decree will terminate the controversy or remove an uncertainty, the court's authority comes into play. Thus rights are settled and determined before disputes become serious or well-nigh irremediable." *Montgomery*, 218 Minn. at 31, 15 N.W.2d at 124 (citing Borchard, 18 Minn. L. Rev. at 246); *see also Harrington*, 235 Minn. at 442-42, 51 N.W.2d at 74; *Skluzacek*, 208 Minn. at 445-56, 294 N.W. at 414-15. Other states that have adopted the Uniform Declaratory Judgment Act ("UDJA") share the understanding that declaratory judgments are meant to resolve controversies at their inception. *See, e.g., Ryder Truck Rental, Inc. v. Rollins*, 518 N.W.2d 124, 128 (Neb. 1994); *Allen v. City of Minot*, 363 N.W.2d 553, 554 n.1 (N.D. 1985); *Sapp v. ABC Credit & Inv. Co.*, 253 S.E.2d 82, 87 (Ga. 1979); *Salt Lake Cnty. v. Salt Lake City*, 570 P.2d 119, 120-21 (Utah 1977).

Here, the tenants and landlords want to know if the City's underlying inspection ordinance is constitutional before City officials apply for another warrant, show up at

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> plaintiff's purpose and renders further assistance from the courts unnecessary.

Borchard, 28 Yale L.J. at 7; *see also* Borchard, *Declaratory Judgments* at 135, 435, 968.

their door with a warrant, or search their homes. This is just the type of situation in which the Legislature intended the MDJA to serve as a remedy.

2. Minnesota courts regularly hear declaratory-judgment actions concerning the constitutional validity of statutes and ordinances.

One of the primary purposes of declaratory judgments is to review the validity of statutes and municipal ordinances. Indeed, the MDJA specifically mentions that it authorizes challenges to the validity of statutes and ordinances, as long as the law "affect[s]" a person. *See* Minn. Stat. § 555.02. Borchard, too, has explained the usefulness of declaratory-judgment actions in challenging laws:

> With the ever greater interference by government in the affairs of private individuals, it often becomes important to the individual to test the validity of the interference, present or proposed, *before* it is applied or invoked against him. . . . As a rule, *the mere enactment* of a statute or ordinance imposing restraints on an individual and implying enforcement by prosecuting officials threatens and hampers the plaintiff's freedom, peace of mind or pecuniary interests, and creates that justiciability of the issue which sustains a proceeding for an injunction and, *a fortiori*, for a declaratory judgment.

Borchard, *Declaratory Judgments* at 966 (emphasis added); *see also* Borchard, 52 Yale L.J. at 445 ("[T]he very fact that such disputes turn mainly on questions of law, involving the line marking the boundary between private liberty and public restraint . . . makes this field of controversy peculiarly susceptible to the expeditious and pacifying ministrations of the declaratory judgment."). Thus, "[s]ocial legislation or legislation promoting the public welfare has been put to the test by actions for a declaration." Borchard, *Declaratory Judgments* at 783.

This Court frequently hears declaratory-judgment actions concerning the validity of statutes and municipal ordinances. *See, e.g.*, *Barron v. City of Minneapolis*, 212 Minn. 566, 569, 4 N.W.2d 622, 624 (1942) (stating it can be plainly seen that a declaratory-judgment suit challenging the validity of a municipal licensing scheme "affords a good reason for making use of the [MDJA]"); *see also Connor*, 249 Minn. at 209, 81 N.W.2d at 794 (holding justiciable a declaratory-judgment action to challenge zoning ordinance); *Arens v. Vill. of Rogers*, 240 Minn. 386, 392-93, 61 N.W.2d 508, 514 (Minn. 1953) (holding justiciable a declaratory-judgment action to challenge constitutional validity of municipal liquor stores).[15] Therefore, this case presents a textbook example of when declaratory judgments should be available.

B. Claims are justiciable under the MDJA whenever the "ripening seeds" of a justiciable controversy are present; Plaintiffs easily meet that standard.

Declaratory-judgment actions are meant to resolve disputes at their inception, although they must still present a justiciable controversy. *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617 (Minn. 2007). According to this Court, a claim raised under the MDJA presents a justiciable controversy when it "(1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific

[15] For examples of recent cases, *see Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 685 (Minn. 2009); *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 177 (Minn. 2006); *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005).

resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Id.* at 617-18. The claim need not even present a full-blown controversy, as is present here, just the "ripening seeds" of one. *Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn. 1996) (quoting *State ex rel. Smith v. Haveland*, 223 Minn. 89, 92-93, 25 N.W.2d 474, 477 (1946)); *Holiday Acres No. 3 v. Midwest Fed. Savings & Loan Ass'n*, 271 N.W.2d 445, 447 (Minn. 1978) (stating plaintiffs may raise claims prior to "full-blown" development of a controversy). The district court and court of appeals ignored this longstanding test[16] and instead improperly relied on an "injury" requirement to avoid reaching the merits of Plaintiffs' claims. Plaintiffs' claims, however, easily satisfy all three elements of Minnesota's "ripening seeds" test for justiciability.

1. The City has placed Plaintiffs' rights in jeopardy.

Plaintiffs' claims obviously involve "concrete assertions of right that emanate from a legal source." *Onvoy*, 736 N.W.2d at 617. This prong requires Plaintiffs show "possession of a legal interest or right which is capable of and in need of protection from the claims, demands, or objections emanating from a source competent legally to place such legal interest or right in jeopardy." *Kennedy*, 544 N.W.2d at 6 (quoting *Haveland*, 223 Minn. at 92, 25 N.W.2d at 477); *see also Harrington*, 235 Minn. at 443, 51 N.W.2d at 74 (stating a plaintiff seeking a declaratory judgment need merely show that some legal interest or right of his has been "placed in jeopardy") (quoting Borchard, *Declaratory*

[16] The test can be found in one of this Court's earliest cases following enactment of the MDJA. *See Borgen*, 192 Minn. at 517, 257 N.W. at 94 (laying out justiciability inquiry and explicitly rejecting injury-in-fact requirement).

Judgments at 27). Plaintiffs have been able to meet this requirement since 2006, when the City first sent them letters seeking to enter their homes and properties.

Plaintiffs have raised civil-rights claims under Article I, Section 10 of the Minnesota Constitution and the Fourth Amendment to the U.S. Constitution (as guaranteed by 42 U.S.C. § 1983), claiming that the RDLC threatens their privacy and security in their "persons, houses, papers, and effects" guaranteed by each constitution's prohibition on unreasonable searches. The City is legally competent to invade those rights; the RDLC explicitly authorizes City officials to seek administrative warrants whenever a tenant or landlord refuses consent to an inspection. *See* Red Wing City Code § 4.31, subd. 1(3)(i); A514. The City has applied for such warrants to enter Plaintiffs' homes and properties on three separate occasions, and will continue to do so. Plainly, a declaration will "serve[] as a warning to the defendant and reassure[] the plaintiff in the enjoyment of his rights." Borchard, *Declaratory Judgments* at 1009.

2. The City is actively in conflict with Plaintiff tenants and landlords.

A declaratory-judgment action is justiciable if it "involves a genuine conflict in tangible interests between parties with adverse interests." *Onvoy*, 736 N.W.2d at 617. Here, the Plaintiffs want to keep the City and its agents out of their homes and properties, and the City wants to come in to conduct inspections. Plaintiffs believe the RDLC violates their rights, and the City does not. Plaintiffs want to be able to stop defending against warrant applications, and the City will continue to bring them. And this

controversy—involving numerous parties, multiple legal proceedings, thousands of dollars, and countless hours—has been raging for nearly *five years*. It is a direct and tangible conflict.

Apparently, the lower courts concluded that for the parties to be in conflict—that is, for a justiciable controversy to be present—Plaintiffs needed to have suffered, or be in imminent danger of suffering, some "injury." But, as *Onvoy* and numerous other cases from this Court hold,[17] that is not the test; "physical injury need not necessarily be alleged." *Borgen*, 192 Minn. at 517, 257 N.W. at 94; *see also Minneapolis Fed'n of Men Teachers, Local 238 v. Bd. of Educ. of City of Minneapolis*, 238 Minn. 154, 156-57, 56 N.W.2d 203, 205 (Minn. 1952) (stating "defendants advance the erroneous theory that in order to have a justiciable controversy the complaint must necessarily state a Legal [sic] cause of action in the same sense as that term is ordinarily used in actions falling outside the [MDJA]"); *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007) ("In the absence of a redressable injury, Minnesota courts will exercise judicial power

[17] The following cases all omit an injury requirement from the elements of a justiciable declaratory-judgment action: *Culligan Soft Water Serv. Co. v. Culligan Int'l Co.*, 288 N.W. 2d 213, 216 (Minn. 1979); *Holiday Acres*, 271 N.W.2d at 447-48; *Minn. Ass'n of Pub. Schools v. Hanson*, 287 Minn. 415, 418-19, 178 N.W.2d 846, 850 (1970); *Connor*, 249 Minn. at 209, 81 N.W.2d at 793-94; *Arens*, 240 Minn. at 390-91, 61 N.W. 2d at 513; *Men Teachers*, 238 Minn. at 157, 56 N.W.2d at 205-06; *Harrington*, 235 Minn. at 443-44, 51 N.W.2d at 74-75; *Hassler v. Engberg*, 233 Minn. 487, 495, 48 N.W. 2d 343, 350-51 (1951); *Montgomery*, 218 Minn. at 30, 15 N.W. 2d at 124; *Barron*, 212 Minn. at 569-70, 4 N.W. 2d at 624; *Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 281-82, 290 N.W. 802, 804 (1940); *Borgen*, 192 Minn. at 516-18, 257 N.W. at 94.

only in narrowly-defined circumstances. First, to prevent injury and conserve judicial resources, we will issue declaratory judgments.").

a. The "direct and imminent injury" language found in a few of this Court's precedents simply means that a person cannot come to the court asserting only generalized grievances.

It is true that this Court has occasionally held that "[t]o establish a justiciable controversy, [a plaintiff] must show a direct and imminent injury which results from the alleged unconstitutional provision." *Kennedy*, 544 N.W.2d at 6. But the "direct and imminent injury" language found in a few of this Court's declaratory-judgment precedents is simply an alternative way of explaining that there must be a genuine conflict between parties with adverse interests. A litigant must possess a bona fide legal interest that, "with respect to the *ripening seeds of a controversy* is about to be[] affected in a prejudicial manner." *Id.* (emphasis added). Both statements appear in *Kennedy*, indicating that, in the context of declaratory-judgment actions, the "ripening seeds" of a controversy is the functional equivalent of a "direct and imminent injury."

The key distinction made by requiring "injury" is that the MDJA may not be used by members of the general public to challenge laws that they dislike but which do not uniquely affect them. As this Court has stated, "[t]he inquiry . . . focus[es] upon whether plaintiffs have asserted legally cognizable interests which will, *in some way distinguished from the general public*, be interfered with or destroyed." *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn. 1977) (emphasis added); *see also*

Hanson, 287 Minn. at 418-19, 178 N.W.2d at 850 ("A party challenging the constitutionality of a statute must show that it affects his rights in an unconstitutional manner and not merely the rights of others."); Borchard, *Declaratory Judgments* at 50-51 ("When the attack is upon a statute, the plaintiff must show not only the existence of the statute, but the fact that he is personally affected by it to an extent warranting judicial relief.").

For example, in *Marzitelli*, this Court applied the "direct injury" language in concluding a collection of taxpayers did not have standing to challenge a state statute halting the construction of I-35E along the "Pleasant Avenue Corridor" in St. Paul. 258 N.W.2d at 588 n.1. The taxpayer plaintiffs claimed that the law was preempted by the "Federal interstate highway program" and that their harmed interests included: 1) the loss of benefit of using the highway; 2) loss of "millions of dollars" in building costs in reliance on construction of the highway; 3) a waste of the gasoline and license taxes they paid that would be refunded to the federal government; and 4) their general interest in seeing the project completed. *Id.* at 588. This Court, however, declined to find a justiciable controversy because the law "in no way affects the plaintiffs more severely than all other persons traveling in or through the Minneapolis-St. Paul area," and the "thoroughfare system" had "been constructed to benefit the plaintiffs and the public generally." *Id.* at 589. Thus, the plaintiffs' interests were not those that "in some way [could be] distinguished from the general public." *Id.* at 588.

Here, however, Plaintiffs are not simply random Red Wing residents challenging a City law they do not agree with. Rather, they are *tenants and landlords* challenging the City's *rental-housing-inspection* ordinance that the City adopted in 2005 and has been actively enforcing *against Plaintiffs* since 2006. Unlike the plaintiffs in *Marzitelli*, they are *directly* (and repeatedly) affected by the RDLC, and thus may seek a declaration whether the law is valid.

b. The "direct and imminent injury" language is a source of mischief and confusion; it should be clarified.

The "direct and imminent injury" language was applied by this Court in taxpayer-standing cases to ensure that citizens did not file declaratory-judgment actions based on generalized grievances as taxpayers. It later found its way into other declaratory-judgment actions and, as this case demonstrates, has been misconstrued to prevent plaintiffs from seeking declaratory judgments even when appropriate. A brief history is in order.

In *State ex rel. Smith v. Haveland*, a case involving a taxpayer challenge to tax-assessment policies by the City of St. Paul, this Court stated—in a discussion of the elements of a justiciable declaratory-judgment action—that a party must "show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." 25 N.W. 2d 474, 478 (Minn. 1946) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). The

statement is actually a quote from a 1923 U.S. Supreme Court opinion decided when the Court believed actions for declaratory relief were essentially advisory opinions outside the scope of the federal judicial power to decide "cases and controversies."[18] The U.S. Supreme Court later reversed course and heard cases filed under state UDJAs, as well as upheld the federal Declaratory Judgment Act, which was enacted in 1934. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (discussing U.S. Supreme Court's historical treatment of declaratory judgments).

This Court went on to apply the "injury" language in a few other declaratory-judgment cases, particularly those involving taxpayer challenges. *See, e.g., McKee v. Likins*, 261 N.W.2d 566, 570 (Minn. 1977); *Marzitelli*, 258 N.W.2d at 588 n.1. But, as noted above, this language has not been a regular feature of this Court's declaratory-judgment cases. It makes sense that a court would find such language appropriate in cases involving taxpayer challenges. The effect of the use of the phrase, however, has been to sow confusion among Minnesota courts concerning the relevant test for justiciable declaratory-judgment actions.[19] This is not surprising given that courts have

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[18] The language of the MDJA itself seeks to thwart this inherent skepticism concerning the nature of the remedy: "No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." Minn. Stat. § 555.01.

[19] Some court of appeals cases require the presence of "injury" for a justiciable declaratory-judgment action. *See, e.g., Anderson v. Cnty. of Lyon*, 784 N.W.2d 77, 83-84 (Minn. App. 2010); *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. App. 2004); *Edina Cmty. Lutheran Church v. State*, 673 N.W.2d 517, 522 (Minn. App. 2004); *Alliance for Metro. Stability v. Met. Council*, 671 N.W.2d 905, 913 (Minn. App. 2003); *Rocco Altobelli v. State, Dep't of Commerce*, 524 N.W.2d 30, 34 (Minn. App. 1994); *Byrd v. Indep. Sch. Dist. 194*, 495 N.W.2d 226, 230-231 (Minn. App. 1993). Others do

regularly gotten confused about how declaratory relief operates. *See* William Breese, *Atrocities of Declaratory Judgment Law*, 31 Minn. L. Rev. 575, 591 (1947) ("The courts of the various states still reveal their inability to distinguish a justiciable controversy from one which is not justiciable on many possible grounds."). And as this case demonstrates, sometimes courts will omit altogether the correct justiciability test and instead resort to the use of an injury-in-fact requirement, even when a declaratory judgment is appropriate.

As described above, the "direct injury" language need not necessarily be read inconsistently with the majority of this Court's precedents concerning the elements of a justiciable declaratory-judgment action, inasmuch as the language seeks to prevent people with generalized grievances from filing taxpayer suits. But it should not be read to keep people out of court and preclude the very type of challenges the MDJA was intended to allow. This Court should either reject the injury language as a standard for MDJA cases or clarify that it is meant only to prevent generalized grievances, as discussed in cases such as *Haveland* and *Marzitelli.*

Similarly, the dicta in a footnote of *McKee v. Likins*, 261 N.W.2d at 570 n.1, relied upon by the City and the court of appeals (A12, A27), that "the declaratory judgment statute itself . . . does not provide a separate test for standing," was not supported by authority, and is both wrong as a matter of law and an outlier among this Court's

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not. *See, e.g.*, *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321-22 (Minn. App. 2007); *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273-74 (Minn. App. 2001); *Rupp v. Mayasich*, 561 N.W.2d 555, 557-58 (Minn. App. 1997); *Graham v. Crow Wing Cnty Bd. of Comm'rs*, 515 N.W.2d 81, 84 (Minn. App. 1994).

declaratory-judgment precedents. To make the standing requirement of injury in fact a requirement for justiciable declaratory-judgment actions is not only contrary to this Court's precedents, but also thwarts the intent of the Legislature when it enacted the law in 1933. *See* Minn. Stat. § 555.12 (stating the MDJA is "remedial," and is to be "*liberally* construed and administered" (emphasis added)). *McKee*'s dicta should be expressly abandoned by this Court.[20]

This Court must clarify the justiciability requirements for declaratory-judgment actions so citizens in rental-inspection and other types of cases[21] know when exactly they can challenge allegedly unconstitutional government activity. The Court should provide a definitive clarification concerning what relationship the "direct and imminent injury" has in the context of analyzing whether a declaratory-judgment action presents the "ripening seeds" of a controversy.

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[20] The court of appeals has stated that "Minnesota courts have limited *McKee* closely to its facts." *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 175 (Minn. App. 2009) (citing cases).

[21] The MDJA envisions many contexts for declaratory-judgment actions. *See* Minn. Stat. § 555.02 (listing uses). In addition to testing the validity of statutes, one of the main ways in which declaratory judgments are used effectively is in the area of contracts. *See, e.g.*, *Men Teachers*, 56 N.W.2d at 205. A declaratory judgment may settle uncertainty concerning the parties' rights and obligations under the contract. But if this Court requires injury in fact, that is, breach of contract, before an action for declaratory judgment may be brought, the unique remedy will be rendered ineffectual.

3. There is nothing hypothetical about the dispute between the parties such that a declaratory judgment would constitute an "advisory opinion."

A justiciable declaratory-judgment action must be "capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Onvoy*, 736 N.W.2d at 617-18. Plaintiffs' claims present questions of law that a court can adjudicate: Can the City constitutionally obtain administrative warrants to enter Plaintiffs' homes and properties? If so, do the standards and rules for conducting inspections laid down in the RDLC satisfy state and federal constitutional requirements for housing inspections?

There is nothing hypothetical about this dispute. The City has been and will continue to seek entry into Plaintffs' homes and properties. Plaintiffs are not seeking an opinion about whether the RDLC (or a similar law being considered by a city council) is constitutional in the event it actually gets applied to and enforced against them one day. Instead, the City is actively enforcing the RDLC against Plaintiffs, repeatedly attempting to search their homes and properties. Plaintiffs have been refusing consent and defending themselves against repeated warrant applications to keep out the City and its agents since 2006. *See Haveland*, 223 Minn. at 94, 25 N.W.2d at 478 (stating "a litigant who questions the constitutionality of a statute, must . . . be able to show that the statute is, or is about to be, applied to his disadvantage"). Therefore, Plaintiffs' claims are justiciable.

In comparison to the many declaratory-judgment cases in which this Court has heard and resolved challenges to municipal ordinances, Plaintiffs have been able to find

only one case that was not justiciable because it was brought too early. And in that case, the person wanted to challenge a law that had not been passed. In *Beatty v. Winona Housing Redevelopment Authority*, a lawyer who owned land in Winona sued the city's HRA to thwart the city's consideration of plans to engage in "urban renewal" and redevelop downtown Winona. 277 Minn. 76, 77, 151 N.W.2d 584, 585 (1967). This Court concluded his claims were not justiciable because the HRA had only entered into contracts with two planning firms to prepare a redevelopment plan and a marketability study of the area. *Id.* at 77-78, 151 N.W.2d at 585-86. A plan had not even been submitted to either the HRA or the city council for approval or adoption. Unlike this case, the lawyer's claims were tantamount to asking the court for an advisory opinion about the legitimacy of a redevelopment plan that did not yet even exist. The controversy in *Beatty* was hypothetical because the redevelopment plan might never be passed, or it might not encompass Beatty's property. Here, the RDLC has been passed, the City enforces it, and it directly affects Plaintiffs. Thus, *Beatty* illustrates that a declaratory-judgment action testing the validity of a municipal ordinance fails to be justiciable only when it is brought before the ordinance is actually passed.

The district court in this case, however, concluded that Plaintiffs' claims were "fatally hypothetical" and their "injury" would be imminent only after a judge granted an administrative warrant. A223. The court reasoned that "an Application for Administrative Warrants might possibly be approved in such a manner that the controversy might not be so ripe as to be practically falling off the vine," namely, the

scope of the searches could be limited or the warrant could be denied outright. *Id.* This line of reasoning fails for two main reasons.

First, Plaintiffs' claims include two that challenge the City's ability to even seek administrative warrants in the first place. The denial of a single warrant application, or even three, cannot resolve the question whether the City may legally apply for these warrants. Only a lawsuit challenging the RDLC—which explicitly authorizes the City to seek the warrants—will resolve whether that provision of the ordinance passes constitutional muster. Without the ability to challenge the authority to seek the warrants, the City will continue to seek them, which, in turn, forces Plaintiffs to repeatedly defend themselves in court.

Second, the district court's reasoning misapprehended the nature of declaratory relief. It seemed to believe that if at least some of Plaintiffs' legal questions could be answered in the warrant proceeding, then a declaratory judgment was unnecessary. But a declaratory judgment is an *alternative* remedy. Minn. R. Civ. P. 57; *Connor*, 249 Minn. at 209, 81 N.W.2d at 793. The MDJA gives courts the "power to declare rights, status, and other legal relations *whether or not further relief is or could be claimed.*" Minn. Stat. § 555.01 (emphasis added).

This Court has stated that in a suit to test the validity of a municipal ordinance, the rule is that "[t]he existence of another adequate remedy does not preclude judgment for declaratory relief in cases where it is appropriate." *Connor*, 81 N.W.2d at 793-94 (quoting *Barron*, 212 Minn. at 569, 4 N.W.2d at 624); *see also Almquist v. City of*

Biwabik, 224 Minn. 503, 505, 28 N.W.2d 744, 745 (1947) (holding that in action for determining validity of home-rule charter provision, the fact that another proceeding could have been brought to challenge tenure of office by elected officers if provision was found to be invalid did not prevent resort to declaratory judgment). Similarly, "a controversy does not lose its justiciable character because the court in the exercise of a sound discretion issues a restraining order to preserve the status quo until the rights of the parties have been declared. It is no defense that the court by appropriate action has prevented the ripening seeds of a controversy from becoming ripe." *Men Teachers*, 238 Minn. at 158, 56 N.W.2d at 206. The presence of some other proceeding, such as an administrative-warrant application that *may* provide some form of relief to Plaintiffs is, therefore, not controlling.

In sum, this case easily meets the standard for a justiciable controversy. "All that the plaintiff should be required to show . . . is that the enactment of the statute creates a threat, jeopardy, prejudice or burden which impairs the plaintiff's business." Borchard, *Declaratory Judgments* at 786. Plaintiffs are challenging an ordinance that explicitly authorizes the City to seek what Plaintiffs claim are illegal administrative warrants, and have had to show up in court three times to defend themselves against these warrants and the illegal searches they authorize. The City has put Plaintiffs' rights in jeopardy and will continue to do so. The court of appeals, however, ignored both the relevant legal test and the clear presence of a very live controversy. This Court should conclude Plaintiffs' declaratory-judgment claims are justiciable.

II. PLAINTIFFS HAVE "STANDING" TO CHALLENGE THE RDLC.

As discussed above, Plaintiffs have presented the "ripening seeds of a controversy" sufficient to bring a declaratory-judgment action. But even if this Court follows *McKee*, 261 N.W.2d at 570 n.1 (a taxpayer challenge), and concludes that injury in fact is a prerequisite to raising a justiciable declaratory-judgment action, the courts below still erred in concluding that Plaintiffs had not and were not in imminent danger of suffering injury and, as a result, did not have standing to challenge the RDLC and the warrants and searches authorized by it.

"Standing is a legal requirement that a party have a sufficient stake in a justiciable controversy to seek relief from a court." *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007). In *Lorix*, this Court adopted the United States Supreme Court's *Lujan* test for injury in fact. 736 N.W.2d at 624. "An injury-in-fact is a concrete and particularized invasion of a legally protected interest." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). That invasion must be "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotations and citations omitted).

Lujan requires only that injuries not be completely hypothetical—a standard that Plaintiffs easily meet. *Lujan* held that a controversy was "hypothetical" where a group of wildlife conservationists challenged federal regulations that they claimed would affect endangered species in a foreign nation, but alleged only that they hoped to see the animals at some unidentified and unplanned point in the future. *Id.* at 564. Had they

simply booked a plane ticket, they would have had standing. *Id.* at 579 (Kennedy, J., concurring).

As *Laidlaw v. Friends of the Earth* showed a few years later, the *Lujan* test does not represent a departure from a lenient injury threshold. 528 U.S. 167, 180-81 (2000). In that case, the U.S. Supreme Court concluded an organization had satisfied the injury-in-fact requirement to sue on behalf of its members when those members alleged that the defendant's mercury discharges potentially affected an area they liked to visit and, therefore, they stopped visiting or had curtailed activities in the area. *Id.* at 182-83. The Court ruled that the threat to one's appreciation of "aesthetic and recreational values of [an] area" gave people standing to sue. *Id.* at 183; *see also United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973) (noting the general principle from numerous cases is that "an identifiable trifle is enough for standing to fight out a question of principle," and that injuries as minor as "a fraction of a vote," a five-dollar fine, or a dollar-and-fifty-cents poll tax have been sufficient to confer standing). Mere "concern" that the water had become polluted, and simple "belief" that mercury discharges had reduced the value of their homes, was enough. *Laidlaw*, 520 U.S. at 198 (Scalia, J., dissenting).

Plaintiffs easily satisfy the *Lujan* injury-in-fact standard; their injuries are more than "trifles." *SCRAP*, 412 U.S. at 689 n.14. They have (A) suffered actual injuries defending themselves in court against each warrant application, as well as numerous other injuries responding to the enactment of the RDLC and the threatened searches of their homes and properties. And (B) they are in imminent danger of suffering further

injury due to the City's intent to seek further warrants and conduct unreasonable searches. Each form of injury will be discussed in turn.

A. Plaintiffs have already suffered injuries at the hands of the City.

Plaintiffs' actual injuries are of two types. First, they have been repeatedly injured by the City dragging them into court and having to defend themselves from the City's three administrative-warrant applications. Second, they have been injured by having to adapt and respond to the City's creation of an inspection program and then having it enforced against them.

1. Getting dragged into court is an actual injury.

Plaintiffs have spent tremendous amounts of time and resources going to court to protect themselves from not one, but *three attempts* by the City to enter their homes and properties. The City has filed three applications for administrative warrants with the district court, each time listing Plaintiffs, among others, as *defendants*.[22] Plaintiffs defeated those warrant applications with not a little effort.

Plaintiffs argued below that being dragged into court and the expenses incurred defending oneself in a civil action—in this case, a warrant proceeding—were sufficient to give them standing to challenge the underlying ordinance authorizing the City to seek the administrative warrants in the first place. A58-59; A163-65. The court of appeals rejected this argument, instead stating that "the contention that litigation costs constitute

[22] The applications were filed as civil actions that were litigated like a typical motion, with briefing, exhibits, and a full hearing.

injury for purposes of a standing determination is counterintuitive; otherwise, the standing requirement could easily be met in virtually any court proceeding." A26. But the court of appeals failed to distinguish between litigation costs incurred by a plaintiff in bringing suit and those incurred by a defendant in trying to prevent an action from being taken against her. "Obviously," a plaintiff cannot get standing from his own costs. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). But just as obviously, it is undoubtedly an injury when a citizen is forced to defend herself against an action brought by the government that threatens to violate her rights. It gives the defendant standing to challenge the law that authorized the government to take action against her.

There are a number of analogous cases in which a litigant had standing when the government took some legal action against her. For example, the fact of repeated enforcement actions against a party gives her standing to sue. *See Kolender v. Lawson*, 461 U.S. 352, 355 n.3 (1983) (noting that 15 prior stops for vagrancy law violation in a two-year period were sufficient to give standing to challenge a vagrancy statute even though there was no pending action); *see also Ord v. Dist. of Columbia*, 587 F.3d 1136, 1143 (D.C. Cir. 2009) (holding plaintiff had standing to challenge gun law even though there was no pending warrant for his arrest; future threat of prosecution and the fact a previous warrant had been issued for his arrest was enough); *Anderson v. Nemetz*, 474 F.2d 814, 818 (9th Cir. 1973) (holding plaintiff who had been arrested four times for violating vagrancy statute could challenge statute even though he was not even under arrest); *People v. Mayberry*, 345 N.E. 2d 97, 101 (Ill. 1976) (holding that defendants who

had been indicted but not convicted had suffered injury sufficient for standing to challenge the statute under which they were indicted). Here, Plaintiffs have been subject to repeated warrant proceedings, and it is undisputed that the City intends to subject Plaintiffs to another. That is sufficient for standing.

Furthermore, having been subject to allegedly unconstitutional acts, a plaintiff has standing to challenge regulations on the grounds that they merely "permit recurrence of comparable violations," *Henderson v. United States*, 339 U.S. 816, 823 (1950), and involve a "practice that was expected to continue," *Mitchell v. United States*, 313 U.S. 80, 96 (1941). For example, those who had been previously subject to incarceration in segregated jails were not required to wait until they were charged with another crime to gain standing to challenge the segregation of jails on constitutional grounds. *See Washington v. Lee*, 263 F. Supp. 327, 330 (M.D. Ala. 1966). Plaintiffs here have been subjected to three unconstitutional warrant applications, and seek to stop another proceeding. The failed warrant applications present in this case are the functional equivalent to the arrests and indictments in other cases that gave the parties standing to challenge the underlying ordinance.

2. Plaintiffs have suffered injuries from the impact of the RDLC.

A party has standing when he or she must make changes to his or her conduct to obey a challenged regulation. *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997). Plaintiffs have suffered numerous injuries due to the enactment and enforcement of the RDLC. In particular, Plaintiffs have had to:

- Obtain temporary permits required by the RDLC to continue renting their properties (A213, ¶ 14; A417, ¶¶ 70-71; A459, ¶¶ 12-13);
- Spend numerous hours and resources working with counsel (meetings, drafting affidavits, reviewing documents) to present effective oppositions to the three warrant applications, along with the associated personal costs in time and travel (A259-60, ¶¶ 51, 53, 56-57);
- Sell or consider selling their rental properties due to the possibility they may have to open their doors to mandatory inspections (A261 ¶ 59);
- Suffer emotional stress and anxiety (A259-60, ¶¶ 51-52, 58); and
- Cope with alarmed tenants who have each been served with applications for warrants to search their homes, sending them letters and having personal conversations with them (A260, ¶ 56).

These injuries are sufficient for standing.

Generally, economic loss incurred by a party as a result of a government policy to which they are subject (in a manner distinguishable from the general public) is a sufficient injury to raise claims challenging the underlying ordinance. For example, in *New West L.P. v. City of Joliet*, the Seventh Circuit found that a landlord's financial losses from the city's efforts to delay the award of a federal Section 8 housing subsidy were an injury sufficient to give the landlord standing to sue under the Fair Housing Act. 491 F.3d 717, 720-21 (7th Cir. 2007).

Additionally, injury in fact may include non-economic as well as economic injuries. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (aesthetics). For example, psychological effects of continuing apprehension about consequences that may be uncertain have been held to constitute a present injury in fact. *See Laidlaw*, 520 U.S. at 198 (Scalia, J., dissenting) (stating the Court's majority had concluded plaintiffs had standing simply because they expressed "concern" that the water

became polluted); *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 73-74 (1978) (holding that uncertainty about the effects of possible radiation releases alone constituted injury in fact notwithstanding the absence of any evidence of existing physical harm).

Therefore, Plaintiffs' myriad injuries, comprising regulatory compliance, lost time and resources, as well as psychological injury, satisfy the injury-in-fact requirement. *SCRAP*, 412 U.S. at 689 n.14 (noting even small injuries, "trifles," create standing). These injuries are amply sufficient for standing purposes and entitle Plaintiffs to at least nominal damages. *Cf. Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (stating mental and emotional distress caused by deprivation of civil rights justifies award of at least nominal damages); *Sime v. Jensen*, 213 Minn. 476, 481, 7 N.W.2d 325, 328 (Minn. 1942) (stating nominal damages may be obtained for trespass upon land). And as discussed below, they need not even have suffered injuries to have standing to sue; injury need only be imminent. *Lujan*, 504 U.S. at 560.

B. Plaintiffs are in imminent danger of suffering further injury.

In addition to suffering actual injuries, Plaintiffs are in imminent danger of suffering further injury by having to defend themselves from more warrant applications, as well as the possibility of unreasonable and unconstitutional searches of their homes and properties. Once the government begins to enforce a regulatory scheme that directly applies to a party, or someone is credibly threatened by the enforcement of a criminal statute, their injuries are "imminent" and they have standing to bring pre-enforcement

challenges against a statute. *See Terrace v. Thompson*, 263 U.S. 197, 214 (1923) ("[J]urisdiction will be exercised to enjoin the threatened enforcement of a state law . . . wherever it is essential . . . to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who . . . is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action. . . ."). Both lines of cases are relevant here.

1. When the government begins enforcing a regulatory scheme that applies to a plaintiff, as Red Wing has done here, then injury is imminent.

A party has standing to challenge a regulatory scheme when it is clear the regulation applies to the party and the particular party is subject to the ordinance. For example, in *Pennell v. City of San Jose*, an individual landlord and an association of rental-property owners sought a declaration in California state court that the city of San Jose's rent-control ordinance, which allowed an officer to consider "hardship to a tenant" when determining whether the rent could be raised, was unconstitutional. 485 U.S. 1, 4 (1988). The complaint stated that the property owners were "subject to the terms" of the ordinance, and that many had "hardship tenants." *Id.* at 6. The city argued that any injury a property owner might suffer was only "speculative" because an actual hardship case had not presented itself, and the statute had not yet been enforced. *Id.* at 6-7. But the U.S. Supreme Court concluded that it was not "unadorned speculation" that "the Ordinance will be enforced" against the plaintiffs. *Id.* at 8. Rather, "[t]he likelihood of enforcement . . . is a sufficient threat of actual injury to satisfy Art. III's requirement that

'a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Id.* (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)).

Similarly, in *Gray v. City of Valley Park*, a rental-property owner challenged city ordinances that penalized businesses for hiring illegal aliens, and conditioned the receipt of a business license on an affidavit that the businesses did not knowingly hire illegal aliens. 567 F.3d 976, 980 (8th Cir. 2009). The court concluded that because the ordinance clearly applied to the plaintiff as a business entity, the "injury [was] not speculative," even though the property owner had not obtained a business license. *Id.* at 985. The court reasoned that "where the enforcement of a regulatory statute would cause plaintiff to sustain a direct injury, the action may properly be maintained, whether or not the public officer has threatened suit; *the presence of the statute is threat enough.*" *Id.* at 985-86 (quotation and citations omitted) (emphasis added); *see also United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988) ("This court has also entertained constitutional challenges where the statute clearly applies to the plaintiff, and the plaintiff has stated a desire not to comply with its mandate.").

Pennell and *Gray* stand for the rule that a plaintiff has standing to bring a pre-enforcement challenge to a regulatory ordinance whenever the party is "subject to the terms" of the law itself. *Pennell*, 485 U.S. at 7. Many other cases conclude that plaintiffs have standing to challenge laws as long as there is a strong likelihood they will be subject to them. *See, e.g., DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1038 (9th

Cir. 2006) (holding tenants had standing to challenge the loss of the procedural protections in their lease—even though they had not actually suffered any deprivation of their rights—when federally subsidized low-income housing units in which they lived moved from one federal program to another); *Aid for Women v. Foulston*, 441 F.3d 1101, 1110 (10th Cir. 2006) (holding professionals satisfied injury-in-fact requirement for standing even though state reporting law had not been or even threatened to be enforced against them); *Am. Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas Cnty.*, 221 F.3d 1211, 1214 (11th Cir. 2000) (holding plaintiff established "credible threat of injury" sufficient for standing when correspondence between plaintiff and county established that charity consultants plaintiff represented had to register before performing any services in the county); *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 445 (Iowa 1983) (stating "[o]nly a likelihood or possibility of injury need be shown" to support standing).

Here, Plaintiffs are not even making a *pre*-enforcement challenge to the RDLC. The law is actively being enforced against them and many others. The City has sent them letters asking them to open their homes and properties to inspections, A213, ¶ 11, as well as sought three warrants to enter their homes and properties. Under the reasoning of *Pennell* and *Gray*, they had standing to sue years ago when the statute hit the books and began to be enforced.

2. An injury is imminent when the opposing party is taking active steps to injure the plaintiff.

Parties may seek pre-enforcement review of a criminal statute when they face "a credible threat of prosecution." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010) (quoting *Babbitt*, 442 U.S. at 298) (holding plaintiffs, who wished to provide various forms of aid to suspected terrorist groups, had standing to seek a pre-enforcement challenge of federal law that forbade Americans from providing material and other assistance to such organizations). "When contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *Babbitt*, 442 U.S. at 298 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)) (alterations in original); *Russell v. Burris*, 146 F.3d 563, 566-67 (8th Cir. 1998). Only "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Babbitt*, 442 U.S. at 298 (citation omitted). The cases above show that an ordinance like the RDLC—which carries with it the possibility of criminal prosecution—may be challenged whenever a city has given some indication it will be enforced against the plaintiff.

The City has consistently cited *State v. Colsch*, 284 N.W.2d 839, 842 (Minn. 1979), for the rule that any potential injury arising from a Fourth Amendment violation is speculative until a search has actually been conducted. A13; A349-50. But *Colsch* does not stand for this rule and is a unique case limited to its facts. In *Colsch*, a criminal

defendant appealed a term of his post-conviction sentence of probation, namely, that he must submit to warrantless searches of his person at any time for illegal drugs. *Id.* at 840-41. The defendant argued that the warrantless search provision in the term of probation was overbroad and would lead to harrassing searches by law enforcement officers. *Id.* at 842. The court summarily concluded that no searches had taken place, and no evidence had been seized and, therefore, addressing the defendant's argument would essentially be an advisory opinion. *Id.*

Colsch is an inapposite for two reasons. First, it was not a declaratory-judgment action and did not involve a challenge to an actual statute; it concerned one convict whose real argument related to the potential for harassment, not warrantless searches to which he was plainly subject. Second, although many Fourth Amendment claims related to unreasonable searches cannot feasibly be brought prior to a warrant or an actual search because the search authority is based on a warrant and the particular facts of each case,[23] this case involves civil-inspection authority calling for the search of *all* rental dwellings; the inspection standards are laid out in an ordinance that a court can review ahead of time to determine whether they pass constitutional muster.[24] Likewise, waiting on the

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[23] *See Babbitt*, 442 U.S. at 300 ("Even though a challenged statute is sure to work the injury alleged, however, adjudication might be postponed until a better factual record might be available.") (internal quotations omitted); *see also Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 n. 22 (1982) ("In a pre-enforcement challenge it is difficult to determine whether Fourth Amendment rights are seriously threatened.").

[24] Courts do hear and decide constitutional challenges to rental-inspection ordinances. *See, e.g.*, *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791,

contingencies of an administrative-warrant proceeding will not make this case more ripe. Plaintiffs argue here that *any* search of their homes and properties under this ordinance conducted without individualized probable cause would be unconstitutional.

In fact, a federal district court—in a very similar case to *Colsch* but with more analogous facts to this one in that it was a declaratory-judgment challenge to an actual ordinance—concluded registered sex offenders could challenge the constitutionality of a state statute that required them to register their consent to warrantless searches even though their sentence had ended and they were not on probation. In *Doe v. Prosecutor*, the government moved for dismissal on the ground that no searches had occurred and the statute authorizing them had not even been implemented and therefore, the plaintiffs had not suffered injury. 566 F. Supp. 2d 862, 869 (S.D. Ind. 2008). The court, however, concluded that "the legal issue does not depend on further factual development" and that the plaintiffs faced a credible threat of injury from the statute sufficient to give them standing to challenge the law. *Id.* at 876. Moreover, the court noted that a challenge to the constitutionality of a state statute may be ripe even absent an imminent threat of prosecution under the challenged statute, especially when the defendant has acted to forestall injury, as is the case here. *Id.* at 871 (citing *MedImmune*, 549 U.S. at 128). *Doe* is much closer to the facts in this case than *Colsch*, and its reasoning should allow this Court to distinguish the latter.

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797 (9th Cir. 2001); *Platteville Area Apartment Ass'n v. City of Platteville*, 179 F.3d 574, 576 (7th Cir. 1999); *Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 901 (N.D. Tex. 2005); *Black v. Vill. of Park Forest*, 20 F. Supp. 2d 1218, 1224 (N.D. Ill. 1998).

Similarly, the City will likely hang its hat on the fact that the state and federal district courts that reviewed this case concluded that Plaintiffs injuries were not "imminent" because the RDLC required the City to obtain an administrative warrant to enter Plaintiffs' homes and properties, and no warrant had yet been obtained to search. A221-23; *Stewart v. City of Red Wing*, 554 F. Supp. 2d 924, 929 (D. Minn. 2008). That reasoning, however, directly conflicts with the U.S. Supreme Court precedent discussed above, about the availability of pre-enforcement challenges to regulatory and criminal laws, and would mean regulatory-inspection statutes are a unique class of statute that is completely insulated from pre-enforcement challenges, as long as they contain a warrant provision. But as this case shows, such a rule makes no practical or legal sense.

If the reasoning in the lower court decisions is allowed to stand, citizens who want to protect themselves against unreasonable searches 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 will still 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. At some point, tenants and landlords will simply give up and let the inspectors in. Indeed, despite the increasing

prevalence of rental-housing-inspection ordinances (A539-40), 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 temporary-injunction 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 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. *Skluzacek*, 208 Minn. at 447, 294 N.W. at 413. 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.

Therefore, if this Court concludes Plaintiffs and others like them do have standing, it will simply be treating rental-inspection ordinances like other state and local laws. People affected by those laws will be able to bring declaratory-judgment actions to determine if they are constitutionally valid. Courts will consider the evidence and the arguments and make decisions. And appellate courts will review them. But a ruling against Plaintiffs' standing will carve out and insulate this one type of ordinance from normal legal challenge, preventing the determination by courts of the basic constitutional issues and leaving all parties in a state of uncertainty, while these programs proliferate throughout the state.

CONCLUSION

Constitutional safeguards against unreasonable searches and seizures are "indispensable to the full enjoyment of personal security, personal liberty and private property" and "are to be regarded as of the very essence of constitutional liberty." *Gouled v. United States*, 255 U.S. 298, 303-304 (1921). Plaintiffs ask this Court to ensure that Minnesotans can call upon the courts to protect these vital liberties, and hold that their constitutional challenges to the Red Wing RDLC present a justiciable controversy, or, in the alternative, satisfy the injury-in-fact test for standing. If this Court concludes Plaintiffs' claims are justiciable, the Court should remand Plaintiffs' claims to the district court for further consideration on the merits—except for their state-constitutional claim, which seeks a ruling that the Minnesota Constitution prohibits administrative warrants used for searches of homes. That claim should be submitted to

the court of appeals or, in the alternative, scheduled for briefing and argument in this Court, given its status as an important constitutional question asking for greater protection for Minnesotans from unreasonable searches and seizures than currently provided under the U.S. Constitution.

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Respectfully submitted,

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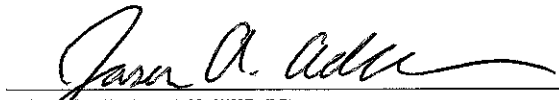
MINNESOTA CHAPTER



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IN SUPREME COURT

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.

2. The length of this brief is 13,895 words, excluding the cover, table of contents, table of authorities, signature block and this certificate.

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