No. A10-0332

STATE OF MINNESOTA
IN SUPREME COURT

ROBERT MCCAUGHTRY, ET AL.,

Plaintiffs-Appellants,

V.

CITY OF RED WING,

Defendant-Respondent.

BRIEF OF AMICI CURIAE CATO INSTITUTE, REASON FOUNDATION, MINNESOTA FREE MARKET INSTITUTE AT THE CENTER OF THE AMERICAN EXPERIMENT, ELECTRONIC FRONTIER FOUNDATION, AND LIBERTARIAN LAW COUNCIL IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutions, Statutes, Ordinances, and Municipal Materials

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici curiae are nonprofit, nonpartisan organizations dedicated to the protection of civil rights and individual liberties.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files amicus briefs in cases in which individual liberties are at issue.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason has a specific interest in advancing, promoting, and protecting individual rights under the Fourth Amendment to the U.S. Constitution and its state counterparts. Reason advances its mission by publishing *Reason* magazine and commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports. To further

[1] No counsel for any party authored this brief in whole or in part, and no person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

The Minnesota Free Market Institute at the Center of the American Experiment (MFMI) is a nonpartisan educational organization dedicated to the principles of individual sovereignty, private property, and the rule of law. It advocates for policies that limit government intrusion in individual affairs, uphold the protection of private property rights, and promote competition and consumer choice in a free-market environment. MFMI is a nonprofit, tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code.

The Electronic Frontier Foundation (EFF) is a nonprofit, member-supported civil liberties organization, based in San Francisco, California, working to protect privacy rights in a world of sophisticated technology. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy, and has served as counsel or amicus curiae in cases addressing privacy rights, as well as the Fourth Amendment's application to new technologies.

The Libertarian Law Council (LLC) is a Los Angeles-based organization of lawyers and others interested in the principles underlying a free society, such as the right to liberty and property, including the right to be free from unreasonable searches and seizures. Founded in 1974, the LLC files briefs amicus curiae in cases involving serious threats to liberty.

INTRODUCTION

Amici curiae respectfully submit that rental-home inspection programs like the City of Red Wing's Rental Dwelling Licensing Code ("RDLC") constitute one of the most broadly applicable, pervasive, and unjustified intrusions into the private lives of thousands and, nationally, millions of Americans. To live in a rental home, one must subject oneself to a government agent's mandatory "inspection"—for constitutional purposes, a search—of one's residence. This occurs even if the tenant and the landlord *both* do not want an inspection or believe one is necessary. If they deny consent, the city may proceed on an administrative warrant without offering any evidence of an individual, specific housing-code violation or other problem with the home. There is nowhere for residents to hide; the most private trappings of their lives are on display to government inspectors who are subject to few, toothless restrictions. The only theoretical avenue of escape is for owners and renters to pack up all their belongings and hide them elsewhere until the government agents have gone away—until the next inspection.

That is not how government agencies in this country are supposed to act. Yet they are increasingly doing so at the lowest level of government. Counties and municipalities across the country have increasingly undertaken a wide variety of rental-inspection programs for vaguely stated reasons that lack empirical justification, and with inadequate protections for privacy interests. *Camara v. Municipal Court*, 387 U.S. 523 (1967), may have prevented the Fourth and Fourteenth Amendments to the United States Constitution from providing effective protection, but that curious ruling does not prevent state constitutions from filling the void. State constitutions are closer to the people, and the

local governments subject to state protections against unreasonable searches are the creatures of those very constitutions. This is a perfect opportunity for the Minnesota Constitution to provide "the first line of defense for individual liberties within the federalist system." *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005).

ARGUMENT

I. Homes Are Entitled to Protection Against Broad Administrative Searches Without Regard to the Homes' Underlying Economic Arrangements.

A person's home is entitled to protection against unreasonable government searches regardless of whether it is owned outright. As this Court has recognized, "[t]he right to be free from unauthorized entry into one's abode is ancient and venerable." *State v. Larsen*, 650 N.W.2d 144, 147 (Minn. 2002). Indeed, "'the house has a peculiar immunity in that it is sacred for the protection of a person's family.'" *State v. Carothers*, 594 N.W.2d 897, 900 (Minn. 1999) (quoting *State v. Touri*, 101 Minn. 370, 374, 112 N.W. 422, 424 (1907)) (brackets omitted). The "very essence of constitutional liberty and security" involves constraining "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). "It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense …." *Id.* Reflecting these fundamental principles, Minnesota has acknowledged a constitutionally protected

expectation of privacy in one's home and its curtilage. *See Garza v. State*, 632 N.W.2d 633, 639 (Minn. 2001); *State v. Perkins*, 582 N.W.2d 876, 878 (Minn. 1998).

The Minnesota Constitution expressly recognizes the sanctity of the home by guaranteeing "[t]he right of the people to be secure in their persons, *houses*, papers, and *effects*," and by requiring that "no warrant shall issue but upon probable cause." Minn. Const. art. I, § 10 (emphasis added). What is at issue here is not the sanctity of one's home in a figurative sense, as is used in cases involving state regulation of private conduct that typically occurs at home, such as sexual relationships, use of contraception, or teaching one's children. Rather, rental-home inspections strike at the physical integrity of the house, threatening the privacy of *all* that occurs within. The RDLC authorizes the search of every nook and cranny of the home, as the housing code it seeks to effectuate reaches "[a]ll buildings and structures and all parts thereof," and all "electrical service, lines, switches, outlets, fixtures, and fixture coverings in every building or structure." City of Red Wing Housing Maintenance Code § 4.30, subd. 8(D), (E)(1); *see* Opening Br. 6-7. The only exceptions are containers, drawers, and medicine cabinets—assuming they are closed and their contents are not in plain sight. RDLC § 4.31, subd. 1(3)(m).

The sanctity of one's home and its contents does not turn on the nature of the property interest by which the individual occupies the home. The Court of Appeals recognized that privacy protections extend to rental homes as much as owned dwellings. *McCaughtry v. City of Red Wing*, 816 N.W.2d 636, 642 (Minn. Ct. App. 2012) (noting that "it is undisputed that inspections of rental property constitute a search, even under federal law"). "It is also undisputed that landlords and tenants have a reasonable

expectation of privacy in rental property, under federal law." *Id*. If portable ice-fishing houses receive constitutional protection under Minnesota law against enforcement of a regulatory code, *State v. Larsen*, 650 N.W.2d 144, 149 (Minn. 2002), and self-storage units receive protection because "the dominant purpose for such a unit is to store personal effects in a fixed location," *State v. Carter*, 697 N.W.2d 199, 210-11 (Minn. 205), so much more so should an actual year-round rental home or apartment where personal effects are stored and *used.*

By whatever means individuals or families arrange for their abodes, the privacy of the home and its contents is fundamental to their liberty. Inspections like those conducted under the RDLC expose—in plain sight—innumerable aspects of the occupants' lives:

- Politics and political activities, as displayed in posters, books, pamphlets, and other materials;
- Reading habits, including books, newspapers, and magazine subscriptions;
- Movie-viewing habits, whether political, literary, or sexual;[2]
- Protected-class information, including race, national origin, creed, or sexual preference;
- Religious (or nonreligious) beliefs, affiliations, and practices, which may be unpopular or a subject of discrimination in the locality, e.g., minority Christian denominations, Santeria, Jews, Moslems, Scientologists, Wiccans, and atheists;

[2] Federal protections against the disclosure of video rentals and sales were adopted after reporters obtained Judge Robert Bork's rental history during his Supreme Court confirmation battle. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710. Inspections threaten the privacy of all *possessed* materials, without any need for the cooperation of third-party vendors.

- Family and other intimate and non-intimate relationships, as well as the sex and identity of other occupants, as revealed in photographs and other personal effects;
- Group associations, e.g., membership in Alcoholics Anonymous;
- Personal habits, such as slovenliness;
- Personal belongings, including jewelry, artwork, and furnishings, and the location of safes (which sometimes are located behind dummy outlets that inspectors may check);
- Hobbies and interests, from the ordinary to what some may find disturbing;
- Sports fandoms, which may be uncomfortable for a Vikings fan in Green Bay Packer territory;
- Intimate preferences, practices, and characteristics, whether lawful or unlawful, which may conflict with the occupants' avowed religious faith or otherwise open them to ridicule in their community, e.g., contraceptive devices in the bedrooms of Catholics, or cross-gender clothing in closets;
- Private, and possibly embarrassing, dietary practices, e.g., pork in the home of a rabbi or vegan enthusiast, alcohol in the home of a Southern Baptist or Latter-Day Saint, or high-sugar foods in a home with children or obese residents;
- Lawfully or unlawfully possessed weapons;
- Smoking and drug-related paraphernalia;
- Medical devices and prescriptions; and
- Financial documents and records.

That Red Wing's searches are non-discriminatory among rental homes—that *everyone* has to suffer the indignity and violation of the search—is no consolation.

These privacy interests in one's home are independent of the economic arrangements one makes for occupying it. Individuals may choose to own in fee simple,

own legal title under a mortgage or deed of trust, rent, or occupy their habitations by other arrangements, all for financial or other personal reasons that have nothing to do with the quality or safety of the home. Some may choose to purchase homes for investment, philosophical, or emotional reasons. Some may opt to grant mortgages or deeds of trust in order to gain necessary financing or secure valuable tax benefits. Some may enter into sale/lease-back agreements that have nothing to do with the nature or condition of the property, and everything to do with underlying financial considerations. Others may choose to rent for financial reasons (such as lack of funds for a down payment, or a belief that properties will not appreciate) or non-financial purposes (such as not being tied down to a particular place, manner, or time of residence). Rentals may be short-term or long-term, depending on the desires and interests of the owners and occupants, as reflected in freely negotiated, mutually satisfactory agreements. Treating owned and leased homes differently, and granting lesser privacy protections for those who lease instead of own, distort the market for homes and unfairly skew arrangements in favor of ownership over other property interests.[3] No Minnesotans—no Americans—should be subjected to a broad invasion of privacy based merely on their having rented when there has been no individualized showing of a problem with their home.

[3] Commentators have pointed to government policies favoring home ownership over renting as a cause of the recent financial crisis. *See* Kirsten David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L Rev. 573, 575 (2009) (arguing that, "because Americans value homeownership so much—in fact, more than we should—we have placed ourselves in an untenable position as a country and now find ourselves in the midst of a well-documented housing crisis" (footnotes omitted)); Peter J. Wallison, *Government Housing Policy and the Financial Crisis*, 30 Cato J. 397 (Spring/Summer 2010).

II. The Recent Growth of Local Rental-Home Inspection Ordinances Poses a Great Threat to the Sanctity of Homes Against Searches.

A. This Court may be the first to address the applicability of state constitutional protections to rental-home inspections.

This Court appears to be the first to focus on whether its state's constitution provides greater protections against warrantless inspections of homes than the Fourth Amendment as construed in *Camara*. As a consequence, its decision may be a watershed ruling nationally.

Other states have declined to follow Fourth Amendment case law as to administrative searches and recognized broader protection under state constitutions, but those cases did not involve residential properties; instead, they involved OSHA-type inspections[4] or public-school searches.[5] On the other hand, while several state courts have followed Fourth Amendment case law on administrative searches under their state constitutions, almost none of those cases did so in the context of homes: Some followed *Camara* and *See v. City of Seattle*, 387 U.S. 541 (1967), *Camara*'s companion decision in the commercial context, as to administrative searches of business premises,[6] trees in the

[4] *Woods & Rohde, Inc. v. Dep't of Labor*, 565 P.2d 138 (Alaska 1977) (invalidating warrantless OSHA inspection); *Salwasser Mfg. Co., Inc. v. Municipal Court*, 156 Cal. Rptr. 292 (Ct. App. 1979) (invalidating OSHA statute's authorization of routine inspections under federal and state constitutions, holding that because statute carries "far-reaching penal consequences," probable cause akin to criminal search warrant was required).

[5] *Commonwealth v. Smith*, 889 N.E.2d 439 (Mass. App. Ct. 2008) (administrative searches in public school system that produced gun in student's pocket).

[6] *City of Overland Park v. Niewald*, 893 P.2d 848 (Kan. Ct. App. 1995) (administrative search of business premises for compliance with fire code under *Camara* and *See*); *Yocom v. Burnette Tractor Co. Inc.*, 566 S.W.2d 755 (Ky. 1978) (requiring

curtilage,[7] or farm property.[8] And those courts did not engage in any detailed analysis of state law. While Texas and Vermont courts have provided a more detailed analysis of state constitutional protections from administrative searches, those cases were in non-residential contexts: courthouse metal detectors[9] and DUI checkpoints.[10]

While one New York intermediate appellate court did address administrative searches of residential rental properties, even that case carries little weight. The ordinance authorized the city to obtain *judicial* inspection warrants, and the court upheld the procedure as consistent with *Camara* on Fourth Amendment grounds without any real analysis; it does not appear that the petitioners in that case challenged the searches under the state constitution, and the court merely noted in dicta that it "saw no basis" for imposing a higher standard under New York law.[11] In fact, the New York Court of Appeals has in other Fourth Amendment contexts "not hesitated to interpret [the state

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state OSHA inspectors to obtain warrant for nonconsensual workplace search under "the teaching of *Camara* and *See*"); *State ex rel. Accident Prev. Div. of Workmen's Comp. Bd. v. Foster*, 570 P.2d 398 (Or. Ct. App. 1977) (under *Camara* analysis, legislature needed to adopt administrative standards for routine inspections of manufacturing facilities under Oregon Safe Employment Act).

[7] *Fla. Dep't of Agric. & Consumer Servs. v. Haire*, 836 So. 2d 1040 (Fla. Ct. App. 2003) (applying *Camara* under state constitution in striking down city search program permitting warrantless inspection of citrus trees for signs of disease).

[8] *State v. Stip*, 246 N.W.2d 897 (S.D. 1976) (applying *Camara* analysis and upholding ordinance permitting inspectors to "spot check" property to determine whether all of property was included on individual's tax assessment statement).

[9] *Gibson v. State*, 921 S.W.2d 747 (Tex. Ct. App. 1996).

[10] *State v. Record*, 548 A.2d 422 (Vt. 1988).

[11] *In re City of Rochester*, 935 N.Y.S.2d 748, 750 (App. Div. 2011).

provision] independently of its Federal counterpart when the analysis adopted by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free from unreasonable government intrusions."[12] This Court is therefore truly in uncharted territory when it comes to state constitutional protections against rental-home inspections that are not grounded in individualized showings of probable cause.

B. Ordinances authorizing administrative searches without a basis in individual suspicion have been adopted for sundry and vague purposes.

One of the fundamental problems with rental-home inspection ordinances is that they are not adopted by one state legislature, but by potentially hundreds of counties, cities, and towns in a single state, sometimes on a neighborhood-by-neighborhood basis. The justifications for such inspection programs are as varied as they are vague and grand, and most of them apply with equal strength to owner-occupied dwellings:

- to protect "the health and safety of persons residing in rental properties,"[13] to "promote safety and adequate maintenance of residential structures,"[14] or to prevent conditions that "affect adversely the public health (including the physical, mental and social well-being of persons and families), safety and general welfare";[15]

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[12] *People v. Dunn*, 564 N.E.2d 1054, 1057 (N.Y. 1990) (declining to follow *United States v. Place*, 462 U.S. 696 (1983), regarding dog sniff of airport luggage).

[13] Joliet Ordinance at 1. For ease of reading, the full citations to the city and county materials are set forth in the Table of Authorities.

[14] North Richland Hills Ordinance at 1; *see also* Oakley Ordinance § 4.30.104 (ordinance "is necessary to preserve the health, safety, and general welfare of the community").

[15] West Lafayette City Ordinance § 117.01(c).

- to "preserve and enhance the quality of life for residents of the City living in those residential rental dwelling units,"[16] or "the quality of life of neighborhoods";[17]

- to "avoid life-threatening problems such as a lack of functioning smoke detectors, faulty mechanical equipment and inadequate or unsafe electrical equipment";[18] or

- to "proactively identify blighted and deteriorated housing stock,"[19] or "prevent[] conditions of deterioration and blight that could adversely affect economic conditions and the quality of life in the City."[20]

The marked expansion of the number of local jurisdictions adopting rental-home inspection programs in the last four years has been driven in great part by the home foreclosure crisis. Thus, Sacramento County in California noted as a justification for its ordinance that "the foreclosure crisis caused more properties to become vacant and vandalized, adding to neighborhood blight."[21] One wonders why a foreclosure crisis associated with unaffordable home mortgages would drive the need for a *rental*-inspection program; if anything, home foreclosures should enhance the market for, and sustainability of, rental properties. The answer may be that governments are looking for

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[16] Richmond Ordinance § 6.40.010.

[17] Joliet Ordinance at 1; *see also* Oakley Ordinance § 4.30.102 (ordinance "preserves and enhances the quality of life for residents of the City living in and around rental dwelling units"); Sacramento Information ("The success of the program will be evaluated on the quality of life for tenants ….").

[18] Trappe Ordinance at 1, § B(4).

[19] Oakley Ordinance § 4.30.102; Richmond Ordinance § 6.40.010.

[20] Pinole Ordinance § 8.30.020.

[21] Sacramento Information (explaining why prior complaint-based inspections "did not adequately deal with the increasing number of deteriorating properties").

any way, however dubious, to boost local property values, as opposed to home safety. In Rochester, Michigan, for example, the city council adopted (by a 4-3 vote) a rental-inspection ordinance in 2011 because, "[a]fter the crash of the housing market in 2008 and the resulting rise in foreclosures, [the] council appointed a task force to find ways to protect property values," and "[t]he task force is credited with the idea of the inspection ordinance …."[22] One council member noted that "the Southeast Michigan Council of Governments has urged local governments to enact such ordinances in the wake of the foreclosure crisis gripping the state," which caused lower property values.[23]

Appellants have described the lack of any basis of, or need of the City of Red Wing for, its inspection program. Opening Br. 10-11. As is true in Red Wing, ordinances requiring routine inspections of *all* rental homes are being adopted without any concrete showing of need. Usually the local government's "findings" consist of unspecified, anecdotal references to problems with rentals that could easily justify inspections based on individualized showings of probable cause. One California city explained, "It has been noted over the years that some of these residential rental buildings and dwelling units are substandard, over-crowded and/or unsanitary …."[24] Another California city stated, "For years the City responded to complaints from tenants, other nearby rental property owners,

[22] Annette Kingsbury, *Rental Inspection Ordinance Approved in Rochester* (May 25, 2011), http://www.rochestermedia.com/rental-inspection-ordinance-okd-in-rochester (last visited Sept. 26, 2012).

[23] *Id.*

[24] Santa Cruz Questions at 1.

and residents about the lack of property maintenance on many rental properties."[25] Milwaukee, which otherwise requires a complaint before inspecting, mandates inspections without complaints in two "target areas" comprised of mostly student renters because "students have been known to invite others to move in together to save rent, hence they may be unwilling to file a complaint."[26] Another ordinance recites that the "City Council hereby finds that … "[r]ental housing *sometimes* experiences a lack of adequate maintenance, or is allowed to create public nuisances, due to the fact that owners *may* not inspect the property often, *may* not make repairs or abate nuisances as necessary, or because tenants are not concerned with property conditions that may adversely affect *property values*."[27] And yet another states that "[t]here is a *growing concern* in the community with the appearance and physical condition of many Residential Rental Units," and "a *perception and appearance* of greater incidence of problems with the maintenance and upkeep of residential properties which are not Owner-occupied as compared to those that are Owner-occupied."[28]

Again, some of the complaints appear to be driven by concerns that property values are being driven down by *obvious* deterioration. As one city stated, other property owners complained that "their property values were being adversely affected," and "other rental property owners … believed that their ability to rent, and even their ability to

[25] Azusa Information at 1.

[26] Milwaukee Program.

[27] Oakley Ordinance § 4.30.104 (emphasis added).

[28] Trappe Ordinance at 1, § B(2) (emphasis added).

increase rents, was being adversely affected by other errant rental property owners in their neighborhoods."[29] The same could be said of deteriorating owner-occupied or unoccupied homes, but inspecting them would require taking on a different constituency.

The logic for inspecting only rental units is rarely stated. One ordinance that attempted to justify the restriction suggested that "[r]enter-occupied units are more likely to be attached units than are Owner-occupied units. As a result, code violations in renter-occupied units are more likely to directly endanger neighboring residents."[30] But that would suggest the need to inspect all attached units, regardless of ownership, rather than all rental units, regardless of whether they are attached. Insisting that rental homes uniquely demand government inspection is, in fact, part of a pattern of government policy that unfairly stigmatizes renters while elevating homeownership.[31]

No effort is made by the municipalities to document with empirical evidence the need to inspect all rental homes without any individualized showing of probable cause. Rather, they typically note—if they say anything at all—that it is simply easier to search everything, e.g., that "routine periodic inspections of all premises" are "the most effective

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[29] Azusa Information at 1.

[30] Trappe Ordinance at 2, § B(5).

[31] *See* Adams, *supra* note 3, 60 S.C. L Rev. at 595-96 ("[t]he other side of this phenomenon [associating homeownership with other positive virtues] is that Americans have stigmatized renting and renters," even though "stigmatizing renters and over-privileging homeowners is unfounded"); *see also* Anthony Randazzo, *Renters Are Fiscally Responsible Too: Three Reasons Renting Should Be a Part of the American Dream*, http://www.reason.org (June 14, 2011) (last visited Sept. 25, 2012); Morris A. Davis, *Questioning Homeownership as a Public Policy Goal*, Cato Institute Policy Analysis No. 696 (May 15, 2012).

way to obtain compliance."[32] Thus, one city's ordinance merely recites that the regulations "appear to the city council to be well designed to promote safety and adequate maintenance of residential structures within the city."[33] And another broadly declares that residential dwelling units may become "unsafe, a public nuisance, and unfit for human habitation" when not subject to initial or periodic inspections.[34]

But these vague invocations of need are used to justify universal or near-universal *repeated* inspection and re-inspection on a routine basis, such as no more than once a year,[35] annually,[36] at least once every two years,[37] once every three years,[38] not less than once every four years,[39] at least once every five years,[40] or on an "area basis, such that all the regulated premises in a predetermined geographical area will be inspected

[32] Kalamazoo Code § 17-12A.

[33] North Richland Hills Ordinance at 1.

[34] Roanoke Code § 7-34(a).

[35] North Richland Hills Ordinance § R110.2.2.

[36] Santa Cruz Questions at 1; Azusa Information at 1.

[37] Joliet Ordinance § 8-152(e).

[38] Pinole Ordinance § 8.30.080-090 (but allowing officials to inspect "in response to a citizen complaint alleging code violations or other violations of law at such an apartment, house, or hotel").

[39] Stockton Code § 8.32.050(A).

[40] Stockton Code § 8.32.120(A).

simultaneously or within a short period of time."[41] These routine inspections may be in addition to inspection for specific cause.[42]

The ordinances' exceptions to the inspection requirement show how thin the rationales are. For example, the ordinances almost always do not require inspection of owner-occupied homes or units,[43] unoccupied homes or units, or other homes or units not available for rental.[44] Many ordinances provide other exceptions that are not grounded in any empirical showing:

- Manager-occupied units;[45]
- Any owner with two or fewer rental dwelling units in the city;[46]
- Housing of one to six units, one of which is occupied by the owner;[47]
- Units provided to members of the building owner's family;[48]or

[41] Kalamazoo Code § 17-12E(1).

[42] *E.g.*, Kalamazoo Code § 17-12E(1)-(3) (inspections may be authorized on an area basis, on a "complaint basis," or on a "recurrent violation basis").

[43] Joliet Ordinance § 8-152(b) (exempting owner-occupied single-family dwellings and non-owner occupied single-family dwellings that have not experienced police service, fire service, or code violations or been declared a public nuisance); Pinole Ordinance § 8.30.040(A); Richmond Ordinance § 6.40.010; Roanoke Code § 7-35; Seattle Ordinance § 6.440.030(A).

[44] Oakley Ordinance § 4.30.206(c); Seattle Ordinance § 6.440.030(B).

[45] Pinole Ordinance § 8.30.040(A).

[46] Richmond Ordinance § 6.40.020.

[47] Boston Ordinance § 9-1.3.

[48] North Richland Hills Ordinance § R110.2.2(1).

- The "initial tenant" of a unit that entered the rental market "in an effort to prevent foreclosure or similar economic hardship."[49]

Such ordinances do not point to any evidence that the purported concerns justifying otherwise universal inspections are not raised simply because the owner, the owner's family, or the owner's employee lives in the complex. That appears to be a political concession as to the scope of politically driven inspection programs.

The need for an empirical basis for broad inspection programs is undermined by the fact that the inspection programs are frequently extolled as "self-funded" operations: The owner generally has to pay a fee for the privilege of being inspected and thereupon licensed to offer the rental.[50] Thus, the local government need not make much effort to explain to taxpayers and voters (particularly those who live in uninspected non-rental homes) why the program is justified.

C. Rental-inspection ordinances generally lack any safeguards for privacy interests.

Nearly all of the ordinances provide for mandatory inspections. The invasion of privacy is not lessened if the ordinance initially requires the government to politely request consent if the denial of consent simply leads to routine issuance of an administrative warrant that is not based on probable cause. Similarly, requiring or

[49] North Richland Hills Ordinance § R110.2.2(2).

[50] *E.g.*, Garland Information (rental-inspection programs were "self-funded"); Pittsburg Program (same); Reading Report (rental-inspection program "is completely self-funded" and "[i]n 2012 we will increase the number of rental inspectors so we can ensure all rental properties are inspected over the next four years"); San Bernardino Program (program "is self-funded and the ordinance requires a one hundred dollar ($100.00) annual inspection fee to be paid after the annual inspection to pay for the program").

allowing the owner's or occupant's presence during the inspection, or providing for advance notice (which may be as little as two days or an indeterminate period), does not mitigate the invasion of privacy: Such "protections" merely allow victims to bear witness or to try to pack up and move what they can. That may address concerns about theft, but not invasion of privacy.

The mandatory inspection's invasion of privacy is compounded by the failure of the rental-home inspection ordinances to prevent the further informal or formal disclosure of information revealed during the search. Most ordinances provide no restrictions on disclosing information about the inspected home, its contents, or the facts of the owners' or occupants' lives.

Even though the RDLC contains some restrictions, they are largely meaningless with respect to the privacy of *law-abiding* residents. The RDLC states that, as a general rule, "[t]he City will not share information regarding the condition of the unit or its occupants obtained through inspections conducted pursuant to this Section *with any current member of the Red Wing Police Department or any law-enforcement agency of another jurisdiction, or enable their discovery by such person or agency* …." RDLC § 4.31, subd. 1(3)(q) (emphasis added). Even that provision is subject to exceptions related to four felonies: an active or inactive methamphetamine lab and the statutorily defined mistreatment of a minor, vulnerable adult, or animal. *Id.* Allowing local governments to pick and choose what they deem reportable offenses is an invitation to caprice and flavor-of-the-day exceptions to privacy. Why allow disclosure of evidence of mistreatment of an animal but not human rape or burglary? And the additional provision

allowing disclosure whenever "such disclosure is required by law" makes the delimiting of offenses less comforting than it might otherwise seem, as nothing prevents the government from creating a duty to report other conduct.[51]

Moreover, assuring owners and tenants that the city will not intentionally disclose information to "any current member" of a "law-enforcement agency" hardly limits the audience for all kinds of salacious gossip. And the channels of disclosure of information gleaned from inspections are both formal and informal. As to formal disclosure, the City of Red Wing's inspection reports are public information. *See* Minn. Stat. Ann. § 13.44, subd. 2 ("Code violation records … kept by any … city agency … with the responsibility for enforcing a … housing maintenance code are public data.").

Beyond public-records requests, the ordinance does not prohibit—and as a practical matter could not effectively prevent—inspectors from disclosing information to *former* law enforcement officers; co-workers; the occupant's current, past, or prospective employers; acquaintances, friends, or family members of the inspector, the landlord, or the tenant; media outlets; or anyone at a local pub. The government does not need to prosecute, fine, or jail in order to wreak havoc in someone's life; sometimes intentionally or inadvertently affixing a "badge of infamy" through disclosure is enough.[52]

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[51] *E.g.*, Minn. Stat. Ann. § 390.11, subd. 7 (imposing duty to report 24 categories of deaths on various persons, including a "law enforcement officer" or "anyone who discovers a deceased person").

[52] *See Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971) (Douglas, J.) ("Yet certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play." (quotation omitted)).

Whatever disclosure restrictions do exist are ultimately toothless in the face of technological changes that leave the denial of government access altogether as the only effective safeguard for privacy. At the front end, government inspectors, like many or soon most Americans, carry smartphones or even less sophisticated cell phones that double as cameras or video recorders. There is little to signal owners, tenants, or other observers that homes or their contents are being recorded, and images being immediately e-mailed or otherwise transmitted elsewhere. *See* Jacqueline D. Lipton, *"We, the Paparazzi": Developing a Privacy Paradigm for Digital Video,* 95 Iowa L. Rev. 919, 921 (2010) (noting "a number of recent episodes illustrating how a person's privacy can be destroyed at the push of a button, using the simplest and most ubiquitous combination of digital technologies—the cell-phone camera and the Internet"). This does not assume that inspectors come to work with a preexisting desire to tattle: "individuals can instantly snap a photograph without even thinking to carry a camera, and can then disseminate that image instantaneously and globally …." *Id.* at 927. And all of this may be accomplished without leaving any public trace. In an age when members of the British royal family are surveilled from hundreds of yards away, up-close-and-personal still photographs and videos from inside the home are a far greater threat.

Beyond intentional disclosures, there is simply never enough effective security available for government repositories of personal data. That is particularly true when the government records are stored electronically. Red Wing's initial rental-inspection ordinance did not restrict the storage or availability of information collected through inspections. The current ordinance includes only a very narrow limitation: "The City may

not upload to a GIS system any data regarding the results of inspections conducted pursuant to this Section." RDLC § 4.31, subd. 1(3)(p). But a GIS—a geographical information system—is a specific type of system that does not encompass most forms of electronic storage.[53] Moreover, there is increasing pressure to put all public records online: "Making government data public should always include putting it online, where it is more available and useful to citizens than in any other medium." David G. Robinson et al., *Enabling Innovation for Civic Engagement* 83, 84, in *Open Government: Collaboration, Transparency, and Participation in Practice* (Daniel Lathrop & Laurel Ruma eds. 2010). It is not clear whether any municipality could except itself from a state-wide movement toward online public access. In any event, despite the number of laws on the books protecting the integrity of government paper files or computer systems, authorized access by hacking or other means is an ever-present threat.

Revelations of personal information, whether disclosed legally or illegally, simply adds to the public knowledge about a person. Even tidbits about one's life or habits that do not seem particularly valuable by themselves add to the mosaic of information available from other sources. The facts of the United States Supreme Court's recent decision in *United States v. Jones*, 132 S. Ct. 945 (2012), which concerned the constitutionality of warrantless searches via a GPS tracking device placed on a vehicle,

[53] "Geographic information system (GIS) is a system designed to capture, store, manipulate, analyze, manage, and present all types of geographical data." Wikipedia, *Geographic Information System*, http://en.wikipedia.org/wiki/Geographic_information_system (last visited Sept. 25, 2012).

demonstrate that, when it comes to privacy, the whole is far greater than the sum of its parts. *See Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").[54] As in *Jones*, "making available … such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to [inspect]—may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.* at 956 (quotation omitted). This Court should not allow unfettered inspections just because a home is rented.

III. Alternatives Are Available to the Unconstitutional Searches Authorized by Red Wing's Ordinance.

Red Wing's invasion of privacy interests through suspicionless searches of all rental homes is unnecessary because less intrusive means exist to protect public health and safety. Opening Br. 32-33. Some communities have adopted alternatives to full-bore mandatory government inspections of all properties that still violate privacy rights; these are included to give the Court a full picture of the variety of home-inspection ordinances around the country.

First, local governments may inspect rental homes with the consent of the owner or tenant. Governments may encourage consent by educating tenants and owners about

[54] *See United States v. Maynard*, 615 F.3d 544, 560-62 & n.* (D.C. Cir. 2010) (addressing "mosaic theory" in context of GPS tracking data).

the benefits of inspections, and by providing owners with certifications of compliance that are valuable in attracting tenants.

Second, some local governments provide for self-inspection by owners or their agents, coupled with audits of the self-inspection documentation. For example, Sacramento County requires the owner's manager or agent to conduct a self-inspection of each rental unit at the commencement of any tenancy but before occupancy, and then annually.[55] If the units are inspected by someone other than the owner, the inspector must have attended a County-approved program of instruction.[56] Units are subject to county inspection only if the owner fails a compliance audit of the owner-inspection reports (which must be provided to the county and the tenants), or if the home is a "problem property" subject to a notice and order more than once in any calendar year and corrections were not made.[57] As that county notes, "[t]his new ordinance differs from other ordinances because it allows owners and/or agents of rental properties to become certified to self-inspect their properties. It concentrates on owner/tenant education and provides mandated inspections that will assure quality housing for all rental tenants."[58] Self-inspections are accompanied with a requirement that the property owner or manager provide tenants with information concerning their rights and responsibilities.[59]

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[55] Sacramento Code § 16.20.906(A)-(B).

[56] Sacramento Code § 16.20.909.

[57] Sacramento Code §§ 16.20.906(C)-(D), 16.20.907 (Problem Properties).

[58] Sacramento Information; Sacramento Code § 16.20.906(A)-(B).

[59] Sacramento Code § 16.20.909.5.

In contrast, Boston requires inspections of rental units upon turnover of the unit, i.e., a new occupancy. The "Authorized Inspector" may be either a city inspector or a "certified home inspector" or "registered sanitarian" who has completed a certificate program.[60] But requiring a private party to admit a government-certified stranger into one's home does not cure the unconstitutionality of mandatory inspections; it simply replaces the government employee with a privately employed surrogate.

Other cities have at least somewhat curtailed the number of tenants subject to search by combining self-inspection with only limited city inspection; this amounts to a half-a-loaf approach to the privacy concerns, rather than true protection against unwarranted searches. For example, Santa Cruz, California, offers the choice of registering for city inspections or self-certifying rental property by self-inspecting rental units; but acceptance in the self-certification program still requires the city to inspect 20 percent of the units every five years.[61] The Stockton, California, rental-inspection ordinance similarly allows for a self-certification of qualified properties, but the city "shall cause an inspection of approximately 10 percent of the residential rental units that self-certify to verify compliance."[62]

Third, some municipalities do not try to skirt probable cause requirements at all. For example, the Richmond, California, ordinance provides that if an owner or tenant

[60] Boston Ordinance § 9-1.3.

[61] Santa Cruz Questions at 1.

[62] Stockton Code § 8.32.060(A) (allowing qualification for self-certification of "[w]ell-maintained residential rental units with no existing violations").

refuses to allow access to conduct the inspection, "the City Attorney may use all legal remedies permitted by law to cause an inspection to take place, *provided reasonable cause* exists to believe that a violation of the Municipal Code or State law exists on the subject property."[63]

Fourth, some cities do not find any need to conduct routine interior inspections. For example, Oakley, California, provides that all rental units "shall be subject to an annual *exterior* inspection … to determine whether any substandard condition exists" or "whether there is a violation of this Chapter or of this Code."[64] The ordinance specifies that the inspections "shall be *exterior inspections only*, unless an interior inspection is *authorized by the owner or tenant*."[65] The ordinance then permits inspectors to obtain administrative warrants to search interior spaces. But if the exterior inspection provides no probable cause to suspect that there is an interior violation, it may be difficult to justify such a warrant.

Fifth, nonconsensual inspections may be based on complaints about specific properties that provide probable cause to believe that violations exist. For example, Joliet, Illinois,[66] allows inspections only if there has been some kind of complaint or reason to

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[63] Richmond Ordinance § 6.40.060(e) (emphasis added).

[64] Oakley Ordinance § 4.30.402(a) (emphasis added); *see also* Brentwood Code § 8.44.040 ("The enforcement officer shall cause the exterior of each rental property to be inspected at least once every two years to ensure compliance with all applicable laws.").

[65] Oakley Ordinance § 4.30.402(d) (emphasis added). The ordinance does not prevent the city from obtaining an inspection warrant for a nonconsensual inspection or from "conducting an emergency inspection under exigent circumstances."

[66] Joliet Ordinance § 8-152(d).

believe that a dangerous condition exists (e.g., a fire). Whether the information comes from an actual complaint by a tenant or neighbor, or a consensual inspection of a nearby unit that suggests a systemic problem, such ordinances would at least require some type of individualized showing.

Finally, local governments can avoid invading the sanctity of a home by limiting inspections to periods when the property is vacant. For example, Boston, Massachusetts, requires that property owners have newly rented apartments inspected before or within 45 days of a rental.[67] Similarly, Rochester, Michigan, provides that, after the initial self-inspection, subsequent self-inspections must be completed when there is a change of occupant. *See* Kingsbury, *supra* note 22. Such provisions, while not ideal, provide somewhat greater protection for homes and privacy than the RDLC, which forces owners and tenants to lay bare their most intimate, fully occupied space.

CONCLUSION

This Court should invalidate using administrative warrants to conduct involuntary rental-home inspections without probable cause.

[67] Boston Ordinance § 9-1.3.

DATED this 27th day of September, 2012.

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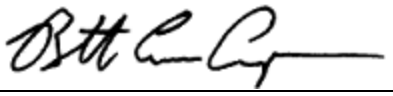
By 

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CERTIFICATE OF BRIEF LENGTH

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

2. The length of this brief is 6,997 words, excluding the cover, table of contents, table of authorities, signature block, and this certificate.

3. This brief was prepared using Microsoft Word 2010 in 13-point Times New Roman.

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