No. A10-332

State of Minnesota

In Court of Appeals

Robert McCaughtry, et al.,

Appellants,

v.

City of Red Wing,

Respondent.

APPELLANTS' REPLY BRIEF TO BRIEF OF AMICUS CURIAE LEAGUE OF MINNESOTA CITIES

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INTRODUCTION

Pursuant to this Court's order filed with the Office of Appellate Courts on January 24, 2012, Plaintiff-Appellants herein respond to the brief of *amicus curiae* League of Minnesota Cities ("League"), filed with this Court on February 23, 2012.

ARGUMENT

This case is about the right of particular tenants and landlords to be free from unwanted searches of their private homes and properties performed without probable cause. None of the various arguments presented by the League can explain why this right, which coexists perfectly well with enforcement of the State of Minnesota's criminal laws, should be taken away in the name of the City of Red Wing's housing code. For that reason, and for the reasons stated in Plaintiff-Appellants' previous briefs in this matter, this Court should hold Red Wing's rental-inspection law unconstitutional.

In the following, Plaintiff-Appellants respond to a number of the League's arguments. First, the League is mistaken in its attempts to characterize this dispute as an abstract question about the relative power of landlords and tenants. In fact, this case is very much concrete: Plaintiffs are real people who do not want government officials to search their homes without probable cause.

Second, the League fails to provide any evidentiary support for its radical assertion that the protections afforded to Minnesotans by Article 1, Section 10 of the Minnesota Constitution should be set aside within the context of housing inspections. Just like many other laws that the city enforces regarding Minnesotans' property, the housing code can be enforced while respecting the constitutional rights of Red Wing's

citizens. Indeed, as the evidence in this case makes clear, Red Wing's inspection program is not essential to the protection of public health and safety, but rather a program in search of a problem.

Third, the League recapitulates Red Wing's argument that the law here is saved by the possibility that a hypothetical future judge might decide to require probable cause for a hypothetical future warrant application. This argument has been squarely rejected by the Minnesota Supreme Court. Red Wing's statute authorizes searches without cause, and Plaintiff-Appellants are entitled to a ruling on the constitutionality of those authorized searches.

Fourth, a ruling against the city would not necessitate the invalidation of various Minnesota statutes. And, finally, the League's suggestion that enforcing Article I, Section 10 of the Minnesota Constitution would somehow threaten the "separation of powers" is simply wrong: Courts can (and do) enforce constitutional requirements against the other branches of government.

I. REQUIRING INDIVIDUALIZED PROBABLE CAUSE PROTECTS THE RIGHTS OF TENANTS.

The League stresses the importance of mandatory-inspection programs like Red Wing's for protecting tenants from problems they might have with their landlords. Brief of League at 6-8. But this argument completely ignores the real people in this case and discounts the other party that tenants need protection from: the government. Requiring individualized probable cause for a rental inspection conducted without a tenant's consent protects the rights of tenants. The League apparently thinks that tenants are so

helpless in their dealings with their landlords that the tenants' constitutional rights must be overridden for their own good—no matter what the tenants say. This position cannot be squared with the robust individual-rights protections of the Minnesota Constitution.

To see why administrative warrants do not protect tenants, consider tenant Plaintiff-Appellants John Monroe and Jesse Stewart. *See* Combined App. to Certain Tenants' & Landlords' Opp'n to Red Wing's Appl. for Admin. Search Warrant & Pls.' Mem. in Supp. of Summ. J. & Opp'n to Def.'s Mot. for Summ. J., *filed* May 26, 2009 ("Pls. Mem in Supp. of Summ. J."), Ex. 21 (Monroe aff.), Ex. 22 (Stewart aff.)[1]. As Minnesotans, they have rights, and the Minnesota Constitution protects their rights through, among other provisions, Article I, Section 10, which forbids the government from entering their homes without their permission unless it has a warrant issued upon probable cause. Significantly, Article I, Section 10 (like the other individual-rights provisions of the Minnesota Constitution) does not say it protects this right "unless the government knows better." It just protects the right, and leaves it to citizens to decide whether they want to waive it.

When Messrs. Monroe and Stewart tell the government that they do not want strangers inspecting their residences and invading their privacy they mean it. *Id.* Both find the prospect of a stranger walking through every room of their house and viewing their most cherished possessions, without permission, to be frightening and a deep

[1] Pursuant the Stipulated Protective Order entered by the district court on Nov. 7, 2008 and Minn. R. App. P. 112.01, portions of these affidavits by Monroe and Stewart contain confidential information that is restricted to this Court, attorneys, experts and their authorized agents.

violation of their privacy. *Id.* Thus, if the City of Red Wing is able to force them to submit to a rental inspection, without probable cause to believe their homes have anything wrong with them, it will cause them serious harm. Article I, Section 10, is meant to protect citizens from exactly this harm—and that protection should not be cast aside simply on the government's say-so.

This Court must reject the League's paternalistic view of tenants as a class of citizens who cannot be trusted with their own individual rights. If tenants want to allow inspections of their living quarters without individualized probable cause—as many tenants in Red Wing have done—then they are perfectly free to make that choice. But if tenants want to forbid government agents—strangers who lack any evidence anything is wrong with the tenants' homes—from looking through their most personal spaces and possessions, the Minnesota Constitution requires the government to respect that choice as well.

II. HOUSING CODES DO NOT REQUIRE MANDATORY INSPECTIONS ANY MORE THAN OTHER IMPORTANT LAWS DO, AS THE FACTS OF THIS CASE DEMONSTRATE.

Unlike the enforcement of countless other laws that seek to protect the public, the League asserts that the plain words of Article I, Section 10 must be set aside when it comes to housing codes. Apparently these laws are so different that it will "seriously impair" their enforcement if traditional standards of probable cause are not set aside.

The League offers no evidence in support of this proposition. It merely cites *Camara v. Municipal Court*, 387 U.S. 523 (1967), the very case Plaintiff-Appellants and their *amici* have extensively argued should not be adopted in interpreting Article I,

Section 10.[2] On the other hand, the actual evidence presented to the district court in this very case demonstrates that Red Wing's own housing code would hardly be impaired if non-consensual inspections required warrants based upon probable cause. Instead of being necessary to solve problems, Red Wing's mandatory inspection regime is a program in search of a problem.

A. The League Presents No Evidence Demonstrating that the Normal Rules of Searches of Private Homes Should Be Suspended When It Comes to Housing Codes.

The relief Plaintiff-Appellants seek in this case is modest but essential. The burden on the government is light: Many tenants will consent to searches (as indeed many have), and Red Wing will still be able to search buildings if it has actual evidence of a problem requiring a search. The benefit to Plaintiff-Appellants is enormous: A ruling in their favor will preserve their ability to maintain control over who enters their most intimate living spaces. But the League nonetheless contends that forcing cities to bear even this light burden would somehow stymie local efforts at code enforcement. This contention cannot withstand serious scrutiny.

There are many, many laws that cities enforce—often arguably much more important laws than housing codes—that do not justify inspections without individualized probable cause. These include controlled-substance laws, laws against burglary, laws forbidding cruelty to household pets, and laws against spousal abuse. In these areas the United States and Minnesota constitutions have been properly interpreted to require a

[2] Brief of Appellants at 35-49; Brief of ACLU at 3-15; Brief of St. Paul Assoc. of Responsible Landlords at 8-13.

warrant based upon individualized probable cause.[3] *See, e.g.*, *In re Welfare of BRK*, 658 N.W.2d 565, 578 (Minn. 2003) (warrant based upon probable cause necessary for a home search, absent exigent circumstance, under the Fourth Amendment and Article I, Section 10); *Steagald v. United States*, 451 U.S. 204, 211 (1981) ("[W]e have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant.").

Despite this, the League asserts that housing codes are a special case in which the ordinary rules must be suspended. Offering neither statistics nor evidence, the League's brief simply states that if mandatory inspections are outlawed "it will seriously impair the effectiveness of rental-housing standards throughout our state." Brief of League at 5. It should go without saying that actual evidence is incumbent upon someone asking that basic constitutional liberties be set aside. *Ascher v. Comm's of Public Safety*, 519 N.W.2d 183, 184-86 (Minn. 1994) (burden placed on the government to put forward evidence justifying departure from traditional probable cause requirement). Mere argument based on speculation—which is all that the League offers—is not enough.

Indeed, the government will *always* be able to argue that it could at least conceivably prevent more crime if only it were free to disregard citizens' privacy rights. That is not enough. The proper balance between the government's interest in law enforcement and an individual's interest in being free from unreasonable searches is the one *already set* by the framers of the Minnesota and United States constitutions—a balance struck via the concept of probable cause. *See, e.g.*, *Fisher v. United States*, 425

[3] The one exception being, of course, exigent circumstances. Brief of Appellants at 47.

U.S. 391, 400 (1976) ("The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great [i.e. reaches the level of individualized probable cause], the invasion of privacy becomes justified and a warrant to search and seize will issue."). The Minnesota Constitution makes clear that the ends of law enforcement do not justify the means of suspicionless searches: Just as we can catch criminals without sacrificing constitutional rights to privacy, so too can we enforce housing codes without sacrificing constitutional rights to privacy.

Moreover, it is irrelevant that tenants being inspected would not be at risk of prosecution. Like the Fourth Amendment, Article I, Section 10 primarily exists to protect the property and privacy rights of *innocent* people. *See, e.g.*, *State v. Wiegand*, 645 N.W.2d 125, 130 n.5 (Minn. 2002); *Dunaway v. New York*, 442 U.S. 200, 214-15 (1979) (Fourth Amendment protects innocent persons from the government harassing them in looking for criminal suspects). The invasion of a home by a stranger violates the resident's rights whether or not the resident is a tenant or an owner and whether or not they may later be charged with a crime.

Similarly, the League offers no evidence for its assertion that a ruling in Plaintiff-Appellants' favor "will negatively affect thousands of rental-housing tenants throughout our state." Brief of League at 6. A ruling for Plaintiff-Appellants in this case will protect the rights of those tenants to refuse inspections if they want, and it will not take away the tenants' option of *voluntarily* allowing inspections. Many tenants will agree to

inspections. Some—including Plaintiff-Appellants Monroe and Stewart—will not. That is their right protected by the Minnesota Constitution.

Finally, the League's other assertions should similarly be given little weight. For example, the League asserts that code enforcement is "more important today" because Minnesota's housing stock has aged an additional 45 years since *Camara* was decided in 1967. Brief of League at 7. It only takes a moment's thought to realize that the state's housing stock cannot have aged 45 years in the 45 years since *Camara*—housing has, obviously, also been *constructed* in that period, and some has presumably been torn down. The League also overstates its case when it asserts that "cities throughout Minnesota have a public interest either in preserving the constitutionality of their current housing ordinances or in preserving their authority to adopt this type of ordinance in the future." Brief of League at 5. But Minnesota's cities have no public interest in violating their citizens' rights. *See Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest."). The public interest demands a ruling that these laws are unconstitutional that will halt their enforcement and prevent their adoption in any further cities.

B. Red Wing's System of Mandatory Inspections Is "a Program in Search of a Problem."

This case has nothing to do with a city's power to adopt or enforce housing codes, or even to license rental property. It concerns one sliver of how property is regulated—inspections conducted without consent or individualized probable cause. While, as demonstrated above, these inspections are of great significance to the objecting parties,

they make no difference to the government's ability to enforce its housing codes. As the evidence in this case itself has demonstrated, it concerns a tool of the government's that, in fact, is not necessary in protecting the public's health and safety.[4]

As was briefly summarized in Plaintiff-Appellants' opening brief, the city conducted over 800 inspections between December 2005 and May 2009. Brief of Plaintiff-Appellants at 13; Appendix of Plaintiff-Appellants ("A") at 60. During that time it did not order a single property vacated. *Id.* Inspectors only found 42 potentially serious code violations overall, only seven of which were in the actual living spaces of tenants. Brief of Plaintiff-Appellants at 14; A60. Further, as was presented to the district court, 10 of these 42 properties had "significant exterior issues" which would be sufficient to justify an inspection, i.e. would constitute individualized probable cause that there was also an interior violation. Pls. Mem in Supp. of Summ. J., Ex. 23 (Phillips aff., May 21, 2009) ("Phillips aff."), ¶¶ 34-36, 40. In addition, for many larger buildings the city's practice is to only inspect a small number of the total number of units, sometimes as low as 15% per building. *Id.* ¶¶ 10-11; Brief of Plaintiff-Appellants at 13. Overall, despite seeking administrative warrants against Plaintiff-Appellants three different times in the name of protecting the public's health and safety, the city did not even require an inspection of over 40% of all rental properties. Phillips aff. ¶ 13; Brief of Plaintiff-

[4] The League's brief also expends a great deal of energy on its argument that this is a "facial" rather than an "as-applied" challenge. But that distinction speaks only to the scope of the remedy this Court should issue; it has no effect on how this Court should consider the merits. *See, e.g. Citizens United v. FEC*, 130 S. Ct. 876, 893 (2010).

Appellants at 13. And, the city's housing code itself contains this glaring disclaimer summing up the city's confidence in its own inspections:

> 8. No Warranty by City. By enacting and undertaking to enforce the HMC neither the city nor its Council, agents or employees warrant or guarantee the safety, fitness or suitability of any dwelling in the city. Owners or occupants should take whatever steps they deem appropriate to protect their interests, health, safety and welfare. A warning in substantially the foregoing language shall be printed on the face of the license.

A191.

Thus, the city (1) did not find a single violation serious enough to justify vacating a premises; (2) found potentially serious code violations in only five percent—42 out of over 800—of all inspected units, and only seven of these were in actual living spaces; (3) nevertheless would have had actual individualized probable cause to inspect many out of that five percent of units if their tenants or landlords had actually objected to inspections; (4) did not think its inspections were important enough to the public's health and safety to even bother inspecting more than 40% of all rental properties; and (5) disclaims any warranty that its inspections actually protect the public.

This does not constitute a program that is necessary to protect the public's health and safety. Instead, as Plaintiff-Appellants' expert testified, this is "a program in search of a problem." Phillips aff. ¶ 41.

III. WHETHER OR NOT A JUDGE WOULD APPLY INDIVIDUALIZED PROBABLE CAUSE TO A HYPOTHETICAL WARRANT APPLICATION IS IRRELEVANT.

Echoing Red Wing's arguments, the League suggests that the law here is saved by the possibility that a future judge may require individualized probable cause before

issuing a warrant—even though the law requires no such thing. However, the Minnesota Supreme Court has already rejected this argument. Before remanding it said, "The possibility that a judge might in the future limit the City's administrative warrant application to ensure that the warrant comports with the Minnesota Constitution does not make the challenge here premature." *McCaughtry v. City of Red Wing*, 2011 Minn. LEXIS 768, at *26 (Minn., Dec. 28, 2011) (citing *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U .S. 102, 142 (1974)). This statement means more than simply that Plaintiff-Appellants' claims are justiciable.

The HMC empowers a district court to issue "administrative warrants." A187 (RDLC § 4.31, subd 1(3)(i)) ("If the City is unsuccessful in securing consent for an inspection pursuant to this section, the City shall seek permission, from a judicial officer through an *administrative warrant*.") (Emphasis added)). Administrative warrants, by definition, require a showing of less than individualized probable cause. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) ("Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation."). If it were fatal to Plaintiff-Appellants claims that, notwithstanding the foregoing, a judge might at some time in the future apply a different standard, the Minnesota Supreme Court would have said so. Instead, it held that the possibility of future judicial intervention could not be a bar to judicial intervention *now*. The question before this Court is whether the HMC, as written, comports with the Minnesota

Constitution, not whether some future judicial officer might disregard its text in applying it.

IV. A RULING IN FAVOR OF PLAINTIFF-APPELLANTS WOULD NOT INVALIDATE THE STATE STATUTES THE LEAGUE INVOKES.

The League also contends that a ruling in Plaintiff-Appellants' favor would invalidate a number of state statutes. This is incorrect. A decision in Plaintiff-Appellants' favor would only mean that administrative warrants for residential property are impermissible in Minnesota or, in the alternative, that under Minnesota's administrative warrants doctrine the government may not use administrative warrants to inspect occupied buildings. This would only directly affect rental-housing inspections.

The actual statutes the League invokes are very different from Red Wing's challenged ordinance. For example, Minn. Stat. § 299F.08, which is among the statutes granting powers to the State Fire Marshall, is an entirely different form of regulation than a mandatory rental inspection ordinance. That statute grants the Fire Marshall the power to require an inspection of premises that recently have suffered a fire or are adjacent to a building that did. Although the warrants governing these follow-up inspections are termed "administrative warrants," by definition they require specific cause: That is, a building has to have actually been damaged in a fire. That is a far cry from a mandatory inspection of any rental property no matter its history or condition.

Another statute the League claims would be imperiled is Minn. Stat. § 504B.211(3)(4). The League states that "[t]his statute recognizes that one of the many business purposes that authorizes a landlord to enter a tenant's rental property is for

'allowing inspections by state, county, or city officials charged in the enforcement of health, housing, building, fire prevention, or housing maintenance code.'" Brief of League at 15 (quoting Minn. Stat. § 504B.211(3)(4)). It then claims "this entire statute—like the Code at issue in this case—would be constitutionally deficient under Appellants' reasoning because it doesn't contain any reference to a warrant procedure or to probable-cause standards." *Id.* But the law will not be invalidated by a decision in favor of the tenants in this case any more than it was invalidated by *Camara*'s holding that inspections must be preceded by a warrant. Just as *Camara* did not result in an invalidation of that law, but rather a limitation on the manner in which it was enforced, the same would be true here.

V. JUST LIKE IN OTHER CASES INTERPRETING ARTICLE I, SECTION 10, THIS CASE DOES NOT THREATEN THE SEPARATION OF POWERS.

The League ends its argument by asserting that Plaintiff-Appellants are merely asking this Court to set legislative policy, and that this imperils the separation of powers. It states that just because there is a less burdensome method of accomplishing the city's goals does not mean that administrative warrants are unconstitutional, and that courts do not engage in such analysis when considering constitutional challenges.

This is simply not true: Courts regularly intervene to protect citizens from unconstitutional searches like these. Further, as part of their analysis they consider the burdens of the government's available methods. In *State v. Larsen*, the ice house case, the court ruled that a warrantless search for fish in an ice house was unconstitutional even though the government had argued that such searches "are *necessary* to further

Minnesota's regulatory scheme because the possibility of being randomly checked by a conservation officer is *essential* for deterring violations and protecting Minnesota wildlife." 650 N.W.2d 144, 151 (Minn. 2002) (emphasis added). The court ruled that this was not in fact the case, and that the rights enshrined in Article I, Section 10 were more important than the government's asserted "necessary" and "essential" powers.

Further, in *Ascher*, which considered the constitutionality of temporary sobriety checkpoints, the court stated "we have engaged in a judicial determination of the reasonableness of the use of a temporary roadblock to stop large numbers of drivers in the hope of discovering evidence of alcohol-impaired driving by some of them and have concluded that it violates Minn. Const. art. I, § 10." *Ascher.* 519 N.W.2d at 187. The court framed the issue as precisely the following:

> [T]he issue is whether the state has met its burden of articulating a persuasive reason for departure from the general requirement of individualized suspicion—as by showing, for example, (a) that it is *impractical* to require the police to develop individualized suspicion and that a departure from the individualized suspicion requirement *will significantly help* police achieve a higher arrest rate than they can achieve using more conventional means of apprehending alcohol-impaired drivers and (b) that this outweighs the interests of ordinary citizens in not having their privacy or their freedom of movement interfered with by police investigators who do not have any reason to suspect them of wrongdoing.

Id. at 186 (emphasis added).[5]

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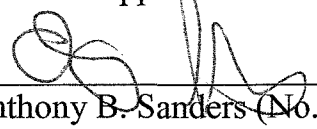
[5] The League also argues that a ruling for Plaintiff-Appellants is foreclosed because this Court does not have the power to interpret the Minnesota Constitution more expansively than the analogous provision in the United States Constitution has been interpreted—here, the Fourth Amendment—when the Minnesota Supreme Court has not yet addressed the issue. Brief of League at 12-14. However, as Plaintiff-Appellants have argued previously, although the *exact* issues of this case have not been addressed by the Minnesota Supreme Court—and thus are "open questions"—precedent requiring higher

In both *Larsen* and *Ascher* the Minnesota Supreme Court rejected the asserted needs of the government and ruled in favor of protecting property and privacy rights guaranteed by Article I, Section 10. Such rulings have nothing to do with "separation of powers," and everything to do with interpreting this state's own constitution and whether the government has violated the rights it enshrines. Legislatures, including city councils, cannot simply pursue their own policy goals without regard to constitutional liberties. When legislatures do so it is the job of the courts to engage in their own independent analysis and declare the legislature's judgment to exceed the bounds of the constitution.

CONCLUSION

For the foregoing reasons, the arguments in the brief *amicus curiae* of the League of Minnesota Cities should be rejected and this case should be remanded with instructions to enter judgment in favor of Plaintiff-Appellants.

DATED: March 1, 2012



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levels of protection under Article I, Section 10 is in abundance, including, but not limited to, *Larsen* and *Ascher*. Brief of Plaintiff-Appellants at 37-38; Brief of ACLU at 6-8; Supplemental Brief of Plaintiff-Appellants at 12-13.

STATE OF MINNESOTA

IN COURT OF APPEALS

Robert McCaughtry, et al.,

Appellants,

CERTIFICATION OF BRIEF LENGTH

v.

CASE No. A10-332

City of Red Wing,

Respondent.

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 4,100 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.

DATED: March 1, 2012

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