

No. A10-332

State of Minnesota
In Court of Appeals

Robert McCaughtry, et al.,

Appellants,

v.

City of Red Wing,

Respondent.

SUPPLEMENTAL BRIEF OF APPELLANTS

Anthony B. Sanders (No. 387307)
Lee U. McGrath (No. 341502)
INSTITUTE FOR JUSTICE
527 Marquette Avenue, Suite 1600
Minneapolis, Minnesota 55402-1330
(612) 435-3451

John M. Baker (No. 174403)
Kathryn M.N. Hibbard (No. 387155)
GREENE ESPEL, P.L.L.P.
200 South Sixth Street, Suite 1200
Minneapolis, Minnesota 55402
(612) 373-0830

Dana Berliner (D.C. No. 447686)
(admitted *pro hac vice*)
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington Virginia 22203-1854
(703) 682-9320

Attorneys for Respondent

Attorneys for Appellants

(Counsel for amici are listed on the following page.)

Jarod M. Bona (No. 0388860)
DLA PIPER LLP (US)
80 South Eighth Street
Suite 2800
Minneapolis, Minnesota 55402-3903
(612) 524-3000
Attorney for Amicus Curiae
St. Paul Association of Responsible
Landlords

Charles R. Shreffler (No. 183295)
SHREFFLER LAW, PLLC
410 11th Avenue South
Hopkins, Minnesota 55343
(612) 782-8000
Attorney for Amicus Curiae
Minnesota Family Institute

David F. Herr (No. 44441)
MASLON EDELMAN
BORMAN & BRAND, LLP
90 South Seventh Street, Suite 3300
Minneapolis, Minnesota 55402
(612) 672-8350
Attorneys for Amici, Dean Eric Janus,
Prof. Roger S. Haydock, Prof. Michael
Stokes Paulsen, Prof. Gregory Sisk

Donald Gallick*
Michelle Finelli*
190 North Union Street
Suite 201
Akron, Ohio 44304
(330) 631-6892

Teresa Nelson (No. 269736)
AMERICAN CIVIL LIBERTIES
UNION OF MINNESOTA
2300 Myrtle Avenue
Suite 180
Saint Paul, Minnesota 55114
(612) 645-4097, Ext. 122
Amicus Curiae

Erick G. Kaardal (No. 229647)
MOHRMAN & KAARDAL, P.A.
33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
(612) 341-1074
Attorneys for Amici
Ryan W. Scott and Samuel L. Bray

Stuart R. Nostdahl (No. 388427)
NOSTDAHL LAW FIRM, LLC
P. O. Box 19278
Minneapolis, Minnesota 55419
(612) 554-5275
Attorney for Amici, Cato Institute,
Reason Foundation, Minnesota Free
Market Institute

Susan L. Naughton (No. 259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
Saint Paul, Minnesota 55103
(651) 281-1232

*Admitted *pro hac vice*.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. THE MINNESOTA SUPREME COURT OPINION REJECTED CERTAIN ARGUMENTS MADE BY RED WING TO THIS COURT	2
III. NO ADMINISTRATIVE WARRANTS ARE PERMITTED UNDER THE MINNESOTA CONSTITUTION	5
A. Minnesota Has Continued Its Tradition of Interpreting Its Constitution to Protect Individual Rights at a Higher Level than the U.S. Constitution	6
B. <i>United States v. Jones</i> Demonstrates that <i>Camara</i> and <i>Frank</i> Represented a “Sharp or Radical Departure” from the U.S Supreme Court’s Previous Decisions and Approach to the Law.....	8
IV. MINNESOTA GIVES GREATER WEIGHT TO PRIVACY CONSIDERATIONS, PARTICULARLY OF LAW-ABIDING PERSONS IN THEIR OWN HOMES.....	11
CONCLUSION	16

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Minnesota Cases</u>	
<i>Ascher v. Comm’r of Pub. Safety</i> , 519 N.W.2d 183 (Minn. 1994)	13
<i>DeCook v. Rochester Int’l Airport Joint Zoning Bd.</i> , 796 N.W.2d 299 (Minn. 2011).....	7, 12
<i>In re B.R.K.</i> , 658 N.W.2d 565 (Minn. 2003).....	13
<i>Interstate Cos. v. City of Bloomington</i> , 790 N.W.2d 409 (Minn. Ct. App. 2010).....	8, 12
<i>In re MLM</i> , 781 N.W.2d 381 (Minn. App. 2010)	13
<i>Kahn v. Griffin</i> , 701 N.W.2d 815 (Minn. 2005)	<i>passim</i>
<i>O’Connor v. Johnson</i> , 287 N.W.2d 400 (Minn. 1979)	13
<i>Rickert v. State</i> , 795 N.W.2d 236 (Minn. 2011)	6, 7
<i>State v. Bartylla</i> , 755 N.W.2d 8 (Minn. 2008).....	13
<i>State v. Bryant</i> , 287 Minn. 205, 177 N.W.2d 800 (1970)	14
<i>State v. Carter</i> , 697 N.W.2d 199 (Minn. 2005)	13
<i>State v. Cox</i> , 798 N.W.2d 517 (Minn. 2011).....	8, 12
<i>State v. Diede</i> , 795 N.W.2d 836 (Minn. 2011)	7, 12
<i>State v. Johnson</i> , 777 N.W.2d 767 (Minn. App. 2010).....	14
<i>State v. Larsen</i> , 650 N.W.2d 144 (Minn. 2002).....	11, 13
<i>State v. Lessley</i> , 779 N.W.2d 825 (Minn. 2010)	6
<i>State v. Perez</i> , 779 N.W.2d 105 (Minn. 2010).....	14
<i>State v. Thompson</i> , 788 N.W.2d 485 (Minn. 2010)	14

Federal Cases

Camara v. Mun. Court of San Francisco, 387 U.S. 523 (1967)*passim*

Frank v. Maryland, 369 U.S. 360 (1959)..... 5, 8, 10

Katz v. United States, 389 U.S. 347 (1967) 9

McCaughtry v. City of Red Wing, No. A10-0332, slip op.
(Minn. Dec. 28, 2011) 1, 3, 4, 5

Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978) 12

United States v. Jones, No. 10-1259, 2012 U.S. LEXIS 1063
(U.S. Jan. 23, 2012)..... 8, 9, 10, 11, 12

Other Authority

U.S. Const 2, 4, 6, 8, 12

Minn. Const. *passim*

Catherine Chiantella Stern, *Note: Don't Tell Mom the Babysitter's Dead: Arguments for a Federal Parent-Child Privilege and a Proposal to Amend Article V*, 99 Geo. L.J. 605 (2011) 15

Jeffrey A. Parness, *American State Constitutional Equalities*, 45 Gonz. L. Rev. 773 (2010)..... 6

I. INTRODUCTION

The Minnesota Supreme Court remanded this matter for consideration of Plaintiff-Appellants' claims under the Minnesota Constitution. These claims are that (a) "the Minnesota Constitution forbids housing inspections without some evidence to believe that a code violation exists—that is an administrative warrant application requires individualized probable cause"; and (b) "the City's inspection program 'runs afoul of the Minnesota Constitution's yet-to-be developed administrative-warrant doctrine because it authorizes searches of occupied buildings.'" *McCaughtry v. City of Red Wing*, No. A10-0332, 2011 Minn. LEXIS 768, at *20-21 (Minn. Dec. 28, 2011) (quoting Plaintiff-Appellants). These are the claims that the Court ruled are ripe for review. *Id.* at *27; Order, Jan. 4, 2012.

This Court has ordered Plaintiff-Appellants to provide supplemental briefing on the Minnesota constitutional issues, focusing on legal developments since the prior round of briefing. Order, Jan. 4, 2012. This brief accordingly focuses on new cases but also notes where the new cases support arguments made in the prior briefing (without reiterating all of those arguments).

As Plaintiff-Appellants' prior briefing demonstrated, and as this brief will show has only continued, the Minnesota courts continue to interpret the Minnesota Constitution as providing more protection from rights violations than the federal Constitution in a variety of contexts, including searches, property rights, and privacy. These precedents continue to indicate that the Minnesota Constitution does not allow for administrative

warrants. Further, the Minnesota Constitution certainly would not allow administrative warrants to search occupied homes of ordinary, law-abiding citizens.

In the following, Plaintiff-Appellants begin with the most relevant new case of all, the Minnesota Supreme Court's ruling on this matter, and discuss how certain statements of the court impact the merits of this case. Next, Plaintiff-Appellants turn to their claim that the Minnesota Constitution forbids the use of administrative warrants and rejects federal law on the subject. They discuss several recent rulings in which Minnesota courts have only continued Minnesota's long tradition of interpreting the Minnesota Constitution to protect individual rights at a higher level than the U.S. Constitution. Plaintiff-Appellants then explain the U.S. Supreme Court's recent admission that its approach to searches represented a "deviation" from prior caselaw and original meaning, thus satisfying the Minnesota test for a "sharp departure" from prior precedent. Finally, Plaintiff-Appellants discuss their claim that Minnesota's yet-to-be-developed administrative warrant doctrine forbids searches of occupied residences. They note several recent cases on privacy rights and explain that because Minnesota courts continue to protect privacy at a higher level than federal courts do, Minnesota courts would weigh the privacy interests of law abiding citizens heavily against the government, tipping the scales against allowing administrative warrants of occupied residences.

II. THE MINNESOTA SUPREME COURT OPINION REJECTED CERTAIN ARGUMENTS MADE BY RED WING TO THIS COURT.

The Minnesota Supreme Court obviously did not rule on the merits of this case; instead, it remanded to this Court "to consider the merits of appellants' challenge to the

Red Wing rental inspection ordinance under the Minnesota Constitution.” *McCaughtry* 2011 Minn. LEXIS 768, at *27. Nonetheless, certain comments of the Minnesota Supreme Court do have implications for the ultimate outcome of the case on the merits. In previous briefing to this Court, Red Wing has argued (1) that *Camara* controls, (2) that Red Wing’s ordinance provides sufficient administrative standards to survive constitutional scrutiny, and (3) that this Court’s review should turn on the fact that a judge could “write in” constitutional standards not provided in the text of the ordinance. The Minnesota Supreme Court rejected each of these propositions in its decision in this case.

First, Red Wing argued to this Court that the issue of whether the Minnesota Constitution permitted administrative warrants and followed *Camara v. Municipal Court*, 387 U.S. 523 (1967), was already resolved. Brief of Respondents at 35. Yet the Minnesota Supreme Court’s descriptions of Plaintiff-Appellants’ claim heavily imply that this is an open question. For example, the court said, “Moreover, the district court has acknowledged that the appropriate standard under the Minnesota Constitution is not clear. In fact, the appropriate constitutional standard is the precise legal issue the landlords and tenants are seeking to resolve in this declaratory judgment action.” *McCaughtry* 2011 Minn. LEXIS 768, at *18. The Supreme Court’s description of the district court’s ruling as an “acknowledge[ment]” means that it agrees the issue is unresolved. Other statements of the court also imply an open question. *See, e.g., id.* at *21 (“appellants argue that the City’s inspection program ‘runs afoul of the Minnesota Constitution’s yet-to-be developed administrative-warrant doctrine because it authorizes searches of

occupied buildings”); *id.* at *23 (“appellants are seeking specific declaratory relief—a judgment on the constitutionality of the administrative warrant provisions in the RDLC”); *id.* at *26-27 (“[appellants] are making a broader challenge to the constitutionality of the entire administrative warrant scheme based on the lack of a requirement for individualized probable cause to conduct housing inspections.”). This neutral language certainly does not suggest the ultimate outcome, but neither does it suggest that the Minnesota constitutional standard is anything but an open question.

Second, Red Wing argued that its ordinance followed federal law. Plaintiff-Appellants’ Appendix, at A130. Federal law requires “reasonable legislative or administrative standards” for determining when an administrative warrant may be issued. *Camara* 387 U.S. at 538. However, the Minnesota Supreme Court noted that “there is no probable cause *or other standard* set out in the [rental inspection] ordinance.” *McCaughtry*, 2011 Minn. LEXIS 768, at *25 (emphasis added). Thus, even if this Court holds that Minnesota’s constitutional requirements are identical to those under the U.S. Constitution, those requirements mandate “reasonable legislative or administrative standards” in an inspection ordinance, and the Minnesota Supreme Court has determined that those standards cannot be found in Red Wing’s ordinance.

Finally and relatedly, Red Wing suggested to this Court that its ordinance is constitutional because it allows the district court to impose the appropriate constitutional limitations. Respondent argued *Camara* held this by “expressly recogniz[ing] a district court’s authority to further accommodate privacy interests by ‘suitably restrict[ing]’ the scope of the search warrant. Brief of Respondent at 47 (second alteration in original); *see*

also id. at 14-15 n.9 (emphasizing that a judge’s crafting of the scope of a permissible search in a warrant is what saves the ordinance’s constitutionality). In rejecting Red Wing’s argument on standing, the Minnesota Supreme Court spoke disparagingly of this theory: “the City essentially is arguing that appellants must wait and hope that a judge will ‘write in’ the correct constitutional limitations on the warrant power.” *McCaughtry* 2011 Minn. LEXIS 768, at *25-26. Again, this comment is not determinative of how the Minnesota Supreme Court would decide the actual merits, but it does suggest that it would not find Red Wing’s ordinance to be constitutional simply because a judge might “write in” a constitutional standard that does not exist in the ordinance itself.

III. NO ADMINISTRATIVE WARRANTS ARE PERMITTED UNDER THE MINNESOTA CONSTITUTION.

When last before this Court, Plaintiff-Appellants argued that the Minnesota Constitution forbids the use of administrative warrants. Brief of Appellants at 35. They explained that this Court should apply the test of *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005). Part of what the court looks at in applying the *Kahn* test is the history of the constitutional clause at issue, and that the Minnesota Constitution has strong and independent protections for Minnesotans. Brief of Appellants at 38-48. These arguments have been reaffirmed by recent caselaw. And, in a decision issued on January 23, 2012, the U.S. Supreme Court itself acknowledged that its prior precedent had “deviated” from the original meaning under the Fourth Amendment in its use of the “reasonable expectation of privacy” test—the same form of test applied in *Camara*, 387 U.S. at 537 and *Frank v. Maryland*, 369 U.S. 360, 367 (1959), which Plaintiff-Appellants argued to

this Court represented a “sharp departure” under *Kahn*. Brief of Plaintiff-Appellants at 44-49.

A. Minnesota Has Continued Its Tradition of Interpreting Its Constitution to Protect Individual Rights at a Higher Level than the U.S. Constitution.

First, the test set forth in *Kahn*, 701 N.W.2d at 828, continues to be the method used to determine whether to interpret the Minnesota Constitution differently than the United States Constitution. See *Rickert v. State*, 795 N.W.2d 236, 247 (Minn. 2011) (Stras, J., concurring); Jeffrey A. Parness, *American State Constitutional Equalities*, 45 Gonz. L. Rev. 773, 777 (2010). The Minnesota Constitution, particularly its Bill of Rights, is recognized by the Minnesota Supreme Court as a critical vehicle for the protection of rights of Minnesotans, just as Plaintiff-Appellants argued in their prior briefing. See *State v. Lessley*, 779 N.W.2d 825, 838 (Minn. 2010); Brief of Plaintiff-Appellants at 36, 40, 43, 47, 49. Moreover, the Minnesota Supreme Court strives “to ascertain and give effect to the intent of the constitution as indicated by the framers and the people who ratified it.” *Id.* at 834 (quoting *Kahn*). Plaintiff-Appellants, of course, argue that the intent of Article I, Section 10 was to provide protection against involuntary searches and to require warrants for them, whether the warrants were issued to search for evidence of crimes or for civil purposes. Brief of Plaintiff-Appellants at 46-48 (discussing history of Article I, § 10). Further, the recent opinion in *Lessley* confirms the vital role of looking at history in interpreting the Minnesota Constitution. *Lessley*, 779 N.W.2d at 834.

In addition, Justice Stras' concurrence in *Rickert v. State* indicates that when using the *Kahn* framework, Minnesota courts should look to whether prior cases have treated the state and federal provisions that are at issue differently. *Rickert*, 795 N.W.2d at 248. Minnesota courts certainly do not always interpret the Fourth Amendment differently (or "independently") from Article I, Section 10, but the Minnesota Supreme Court has numerous times rejected federal caselaw as insufficiently protective and imposed higher standards under Article I, Section 10. See Brief of Plaintiff-Appellants at 40-43; Brief of Amicus Curiae American Civil Liberties Union of Minnesota ("ACLU"), at 6-9. The reliance on past practice in the *Rickert* concurrence buttresses Plaintiffs' argument that the Court here should provide greater protections in the search and seizure context.

With *Kahn* often, although not always, as a backdrop, Minnesota courts continue to interpret the State's own Constitution to give significant protection for rights, often beyond that provided under the federal Constitution, both in the context of search and property rights, as well as general equal protection principles. Several recent cases illustrate this continuing independence. Minnesota continues to provide vigorous enforcement of the right to be free from unreasonable searches and seizures under the Minnesota Constitution. See *State v. Diede*, 795 N.W.2d 836 (Minn. 2011) (police lacked reasonable articulable suspicion to search car passenger's cigarette package). In addition, recent cases from this Court and the Minnesota Supreme Court make clear that Minnesota's test for evaluating inverse takings claims under the Minnesota Constitution differs from the federal test, providing more recourse for individuals challenging takings than the U.S. Constitution provides. See *DeCook v. Rochester Int'l Airport Joint Zoning*

Bd., 796 N.W.2d 299, 305-07 (Minn. 2011); *Interstate Cos. v. City of Bloomington*, 790 N.W.2d 409, 413-14 (Minn. Ct. App. 2010). Further, in *State v. Cox*, although the Minnesota Supreme Court did not resolve the issue or what the test should be, all Justices recognized that Minnesota’s test for violations of the Minnesota Constitution’s Equal Protection Clause varies in some ways from the federal test, and typically provides more scrutiny. *See* 798 N.W.2d 517, 521 (Minn. 2011); *see also id.* at 526 (Anderson, Paul, J., dissenting).

B. *United States v. Jones* Demonstrates that *Camara* and *Frank* Represented a “Sharp or Radical Departure” from the U.S. Supreme Court’s Previous Decisions and Approach to the Law.

A very recent decision of the U.S. Supreme Court supports Plaintiff-Appellants’ argument that this Court should interpret Article I, Section 10 of the Minnesota Constitution differently from the U.S. Constitution on the issue of administrative warrants to search homes. As explained in earlier briefing, *Kahn* stated that Minnesota may reject the U.S. Supreme Court’s jurisprudence and interpret Minnesota’s own constitution as more protective of individual rights when, among other reasons, the U.S. Supreme Court’s jurisprudence constitutes “a sharp or radical departure from its previous decisions or approach to the law.” *Kahn*, 701 N.W.2d at 828; Brief of Plaintiff-Appellants at 44-49. Similarly, *Kahn* counsels for a differing interpretation when “federal precedent does not adequately protect [Minnesota] citizens’ basic rights and liberties.” *Kahn*, 701 N.W.2d at 828. In *United States v. Jones*, No. 10-1259, 2012 U.S. LEXIS 1063 (U.S. Jan. 23, 2012), the Court admitted that its Fourth Amendment jurisprudence has departed from the Amendment’s original meaning and also revealed

how such departures impact individual rights protections. *Jones* did not deal with administrative warrants or searches of homes, but it does show that the U.S. Supreme Court may be just at the beginning of correcting its course and bringing itself more in line with the holdings of the Minnesota Supreme Court.

Jones involved the placement of a GPS device on a person's car to track his movements. *Id.* at *4-6. The U.S. Supreme Court explained that until the 1960s, the Court's jurisprudence in the area of the Fourth Amendment had been "property-based." *Id.* at *9. It had focused on the question of whether the invasion was one that would have constituted a trespass upon land or chattels. *Id.* at *10-11. Moreover, this property focus meant that "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *Id.* With *Katz v. United States*, 389 U.S. 347, 351 (1967), and other cases, the Court "deviated" from that approach and instead focused on the "reasonable expectation of privacy" and the use of various factors to determine what kind of expectation was "reasonable." *Id.* at *9-10. *Camara* looked at what it considered to be the expectations of privacy impacted by the housing inspections and found that the privacy invasion of area-wide inspection programs was not serious; because "the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." *Camara*, 387 U.S. at 537. *Frank*, which, together with *Camara*, represented the "sharp departure" from prior precedent, *see* Brief of Plaintiff-Appellants at 39 n.13, uses similar reasoning. *See Frank*, 369 U.S. at 367 ("Thus, not only does the inspection touch at most upon the

periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion, but it is hedged about with safeguards designed to make the least possible demand on the individual occupant, and to cause only the slightest restriction on his claims of privacy.”).

Thus, in *Jones*, the U.S. Supreme Court admitted that the reasoning that it relied upon in *Camara* and *Frank* was a “deviation” from prior precedent. Both *Camara* and *Frank* involved invasions of “houses,” as well as searches of “effects.” The Court has just made a course-correction, holding that where common-law trespass is used to find information, or where there are invasions of the specific areas listed in the Fourth Amendment (including “houses, papers, and effects”), the Court will henceforth not need to proceed to use the “reasonable expectation of privacy” test. *Jones*, at *20. In other situations, the Court will continue to use the reasonable expectation of privacy test. *Id.* Obviously, the Court has not begun to apply this case or its reasoning to home inspections, administrative warrants, or *Camara*. But it has admitted, just as Plaintiff-Appellants argued to this Court, that its jurisprudence represented a deviation from the original meaning of the Fourth Amendment until the mid-20th Century. That of course satisfies one of the tests of *Kahn*.¹

Not only does *Jones* demonstrate that there was a sharp departure that occurred in federal law, but contrasting it to Minnesota case law demonstrates that Minnesota has

¹ The concurrence of Justice Sotomayor also indicates that the Court's jurisprudence perhaps has not sufficiently taken into account the level of privacy violation inherent in GPS monitoring. She points to the personal information that can be obtained about a person by such surveillance, including “a wealth of detail about her familial, political, professional, religious, and sexual associations.” *Jones*, at *26 (Sotomayor, J., concurring). The same of course is true of an inspection of someone's home, where, as in *Red Wing*, inspectors look in every room of the house and will inevitably observe all kinds of personal information.

placed a higher “privacy” value on constitutional enumerated areas (*i.e.*, “homes, papers, and effects”), effectively incorporating the older emphasis on the value of protection of real and personal property. For example, in *State v. Larsen*, 650 N.W.2d 144, 151 (Minn. 2002), the Minnesota Supreme Court partly relied on the fact that an ice house is a non-commercial dwelling, putting it at the core of both the Fourth Amendment and Article I, Section 10. It is possible that the *Jones* decision is the first in a line of cases that will return the U.S. Supreme Court to an interpretation of the Fourth Amendment more consistent with Minnesota Supreme Court’s interpretation of the Minnesota Constitution. Even if the U.S. Supreme Court does not fully correct its departure from prior precedent, Minnesota should reject that departure and instead adhere to the meaning adopted by Article I, Section 10. Brief of Plaintiff-Appellants at 47-48; *Kahn*, 701 N.W.2d at 829-31.

IV. MINNESOTA GIVES GREATER WEIGHT TO PRIVACY CONSIDERATIONS, PARTICULARLY OF LAW-ABIDING PERSONS IN THEIR OWN HOMES.

Plaintiff-Appellants’ second claim under the Minnesota Constitution—that the Minnesota Supreme Court has also ordered now be addressed—is that Article I, Section 10 forbids the use of administrative warrants for occupied residences. As we argued in our previous briefing, Minnesota requires a higher level of constitutional protection for occupied residences than in other contexts. *See, e.g.*, Brief of Plaintiff-Appellants at 39-41; Reply Brief of Plaintiff-Appellants at 23-24. Since then, Minnesota courts have

continued to give great respect for privacy rights and implied that privacy rights are at their strongest in homes and for law-abiding citizens.²

Rulings that the Minnesota Constitution provides a higher level of protection are sometimes made in a nuanced fashion. In several of the above cases, including *Diede* and *Cox*, the Minnesota Supreme Court purports to be interpreting both the state and U.S. constitutions. Yet the court relies almost entirely on Minnesota state caselaw and acknowledges that Minnesota uses a different legal test, even for federal claims. This is often true in privacy contexts, as well as in protecting property rights.

This approach of applying a stricter standard than a federal court would is particularly apparent in this Court's decision in *Interstate Companies*. That case involved regulatory takings, but the method is equally applicable to privacy issues. In *Interstate Companies*, which concerned the Minnesota Constitution's Takings Clause, this Court applied the federal test for determining whether there was a regulatory taking, but explicitly applied the test differently than a federal court would in order to provide greater protection to property rights.³ 790 N.W.2d at 413. (This approach was explicitly validated a few months later by the Minnesota Supreme Court. *See DeCook*, 796 N.W.2d at 307.)

Similarly, here, even if the Court accepts that the Minnesota Constitution might sometimes allow administrative warrants, its application of the expectation of privacy

² As discussed above, the recent U.S. Supreme Court decision in *United States v. Jones*, 2012 U.S. LEXIS 1063, raises interesting issues about whether a search of a person's home should even be discussed in terms of "privacy" or in terms of "trespass" or property interests. As also explained above, Minnesota has used the language of "privacy" from U.S. Supreme Court cases while simultaneously giving great weight to the interests of ordinary, law-abiding persons in protecting their "houses, papers, and effects" from government intrusion or trespass. *See supra*.

³ Specifically, this Court used the federal test of *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), but stated that more restrictive Minnesota precedent "informs" the use of *Penn Central* in Minnesota.

test, as articulated in *State v. Bartylla*, gives greater weight to privacy considerations, particularly of law-abiding persons and particularly in homes, than federal courts do. See 755 N.W.2d 8, 17-18 (Minn. 2008); see also Reply Brief of Plaintiff-Appellants at 23-24. Minnesota's greater concern for privacy calls for its courts to heavily weight the rights of law-abiding individuals to security and privacy of their "papers and effects" within their own "houses". Minn. Const. art I, sec 10. In Minnesota, the public interest necessary to overcome this interest must be particularly strong. This is illustrated in other cases Plaintiff-Appellants have cited involving privacy. Brief of Plaintiff-Appellants at 40-41; Brief of ACLU at 5-9; *State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005); *In re B.R.K.*, 658 N.W.2d 565, 578 (Minn. 2003); *Larsen*, 650 N.W.2d at 149; *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994); *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979). These cases would inform this Court's articulation of Minnesota's administrative warrant doctrine and make it more protective of privacy than the federal equivalent.

Two recent cases from this Court relied heavily on *Bartylla*, which Plaintiff-Appellants also relied upon, Reply Brief of Plaintiff-Appellants at 24, to talk about the appropriate balancing of the state's interests against the intrusion into an individual's personal security. See also Brief of Amicus Curiae St. Paul Association of Responsible Landlords at 9, 16-17 (discussing the balancing of private and public interests under Article I, § 10 and Minnesota Supreme Court precedent). Both cases (now accepted for review by the Minnesota Supreme Court) rely on the diminished expectations of privacy to which criminals and probationers are entitled. See *In re MLM*, 781 NW.2d 381, 389

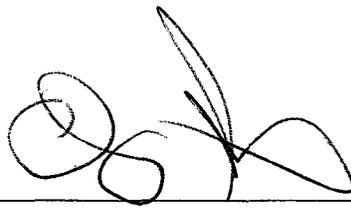
(Minn. Ct. App. 2010) and *State v. Johnson*, 777 N.W.2d 767, 770-71 (Minn. Ct. App. 2010). But, as Plaintiffs-Appellants demonstrated in their prior briefing to this Court, it is one thing to hold that someone who has committed a crime has a diminished expectation of privacy and quite another to invade the privacy of people who have not violated the law. Reply Brief of Plaintiff-Appellants at 24. Minnesota courts have never held that non-criminals have any kind of diminished privacy interest, particularly in their own homes, under the Minnesota Constitution.

Minnesota's rejection of federal precedent as insufficient in protecting privacy rights, particularly of law-abiding persons within their own homes, continues to be part of Minnesota case law. For example, in *State v. Perez*, 779 N.W.2d 105 (Minn. Ct. App. 2010), this Court held that married individuals had some reasonable expectation of privacy from videotaping by their spouses even within their own homes. The case involved a bathroom, but the Court favorably cited cases from other jurisdictions involving time that spouses simply spent alone in bedrooms, and the Minnesota Supreme Court's ruling in *State v. Bryant*, 287 Minn. 205, 177 N.W.2d 800 (1970), which involved the constitutional right to privacy in a public restroom. See *Perez*, 779 N.W.2d at 108. The ordinance at issue in this case allows the City of Red Wing to search both bedrooms and bathrooms. In addition, two justices noted in a concurrence in *State v. Thompson*, that the recording of a conversation between a child and his mother violated the right to privacy and unreasonable searches and seizures under Article I, section 10 (as well as the Fourth Amendment). 788 N.W.2d 485, 496-97 (Minn. 2010) (Page & Anderson, Paul, JJ., concurring). This approach stands in stark contrast to the approach

of federal courts, which overwhelmingly reject a parent-child privilege, thus again illustrating the divergence between Minnesota and federal courts on privacy protections. Catherine Chiantella Stern, *Note: Don't Tell Mom the Babysitter's Dead: Arguments for a Federal Parent-Child Privilege and a Proposal to Amend Article V*, 99 Geo. L.J. 605, 612 (2011) ("The vast majority of federal courts align with the Third Circuit in rejecting the parent-child privilege.").

CONCLUSION

To the extent Minnesota courts have issued relevant decisions in the past two years, those decisions serve only to bolster Plaintiff-Appellants' claims. This is particularly true in the case of the privacy of innocent people in their homes. The U.S. Supreme Court has admitted that it deviated from prior precedent, thus satisfying the standard for independent interpretation of Minnesota's Constitution. For these reasons, this Court should rule that the Minnesota Constitution requires the government to demonstrate individualized probable cause before it obtains a warrant to conduct a housing inspection, or, alternatively, to do so when requesting a warrant to search an occupied residence.



DATED: January 25, 2012

Anthony B. Sanders (No. 387307)
Lee U. McGrath (No. 341502)
INSTITUTE FOR JUSTICE
527 Marquette Avenue, Suite 1600
Minneapolis, Minnesota 55402-1330
(612) 435-3451

Dana Berliner (D.C. No. 447686)
(admitted *pro hac vice*)
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington Virginia 22203-1854
(703) 682-9320

Attorneys for Appellants

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, subs.1 and 3(a), for a brief produced with a proportional font, to the extent that those requirements apply to a supplemental brief.

2. The length of this brief is 4,128, 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: January 25, 2012



Anthony B. Sanders (No. 387307)
Lee U. McGrath (No. 341502)
INSTITUTE FOR JUSTICE
527 Marquette Avenue, Suite 1600
Minneapolis, Minnesota 55402-1330
(612) 435-3451

Dana Berliner (admitted *pro hac vice*)
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203-1854
Telephone: (703) 682-9320

Attorneys for Appellants