

No. A10-0332

FEB 24 2012

FILED 7/22

---

**State of Minnesota  
In Court of Appeals**

---

Robert McCaughtry, et al.,

*Appellants,*

vs.

City of Red Wing,

*Respondent.*

---

**SUPPLEMENTAL BRIEF OF RESPONDENT CITY OF RED WING**

---

**INSTITUTE FOR JUSTICE  
MINNESOTA CHAPTER**

Anthony B. Sanders (Reg. No. 387307)  
Lee U. McGrath (Reg. No. 0341502)  
527 Marquette Avenue  
Suite 1600  
Minneapolis, Minnesota 55403-1330  
Telephone: (612) 435-3451

**INSTITUTE FOR JUSTICE**

Dana Berliner (D.C. No. 447686)  
(admitted *pro hac vice*)  
901 North Glebe Road  
Suite 900  
Arlington, Virginia 22203-185  
Telephone: (703) 682-9320

*Attorneys for Appellants*

**GREENE ESPEL PLLP**

John M. Baker (Reg. No. 174403)  
Kathryn M.N. Hibbard (Reg. No. 387155)  
200 South Sixth Street  
Suite 1200  
Minneapolis, Minnesota 55402  
Telephone: (612) 373-0830

*Attorneys for Respondent*

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

---

Jarod M. Bona (No. 0388860)  
DLA PIPER LLP (US)  
90 South Seventh Street  
Suite 5100  
Minneapolis, Minnesota 55402  
(612) 524-3000

*Attorney for Amicus Curiae St. Paul  
Association of Responsible Landlords*

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

*Attorney for Amicus Curiae League of  
Minnesota Cities*

Teresa Nelson (No. 269736)  
AMERICAN CIVIL LIBERTIES UNION  
OF MINNESOTA  
445 North Syndicate Street, Suite 325  
St. Paul, Minnesota 55104  
(612) 645-4097, Ext. 122

*Attorney for Amicus Curiae ACLU of  
Minnesota*

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF LEGAL ISSUES .....	1
INTRODUCTION.....	1
LEGAL ARGUMENT .....	2
I. PLAINTIFFS MISREPRESENT THE IMPLICATIONS OF THE SUPREME COURT’S DECISION.....	2
II. RECENT DEVELOPMENTS IN THE LAW CONFIRM THAT JUDGE KING PROPERLY DISMISSED PLAINTIFFS’ FACIAL CHALLENGE TO THE RDLC.....	5
A. The Minnesota Court of Appeals Continues to Emphasize its Limited Role in Changing the Interpretation of the Minnesota Constitution.....	6
B. Minnesota Courts Continue to Favor Uniformity in their Interpretations of Identical Provisions in the U.S. and Minnesota Constitutions.....	7
C. Where—as Here—the Plaintiffs are Bringing a Facial Attack, Their Burden Remains Especially High.....	10
D. Other Jurisdictions Have Applied <i>Camara</i> to Their Own State Constitutions.....	11
III. THE CASES ON WHICH PLAINTIFFS RELY DO NOT NECESSITATE A REVERSAL OF THE DISTRICT COURT’S DECISION.....	12
CONCLUSION .....	18
CERTIFICATE OF COMPLIANCE .....	19

## TABLE OF AUTHORITIES

	Page(s)
<b>FEDERAL CASES</b>	
<i>Camara v. Municipal Court</i> , 387 U.S. 523 (1967) .....	passim
<i>Frank v. Maryland</i> , 359 U.S. 360 (1959).....	14
<i>Katz v. United States</i> , 389 U.S. 347 (1967) .....	14, 16, 18
<i>Nix v. Williams</i> , 467 U.S. 431 (1984) .....	14
<i>TCF National Bank v. Bernanke</i> , 643 F.3d 1158 (8th Cir. 2011).....	10, 11
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968) .....	14
<i>United States v. Bena</i> , 664 F.3d 1180 (8th Cir. 2011) .....	11
<i>United States v. Jones</i> , __ U.S. __, 132 S. Ct. 945 (2012).....	14, 15, 16, 17
<i>United States v. Salerno</i> , 481 U.S. 739 (1987) .....	10, 11
<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442 (2008).....	11
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963) .....	14
<b>STATE CASES</b>	
<i>DeCook v. Rochester Int’l Airport Joint Zoning Bd.</i> , 796 N.W.2d 299 (Minn. 2011) .....	12, 13
<i>Gluba ex rel. Gluba v. Bitzan &amp; Ohren Masonry</i> , 735 N.W.2d 713 (Minn. 2007) .....	13
<i>In re City of Rochester</i> , 90 A.D.3d 1480, 2011 N.Y. Slip Op. 09367, __ N.Y.S.2d __ (N.Y. Sup. Ct. App. Div. Dec. 23, 2011) .....	11, 12
<i>In re Welfare of M.L.M.</i> , 781 N.W.2d 381 (Minn. App. 2010) .....	9
<i>In re Welfare of M.L.M.</i> , __ N.W.2d __, No. A09-0875, 2012 WL 204524 (Minn. Jan. 25, 2012).....	7, 9
<i>Interstate Cos. v. City of Bloomington</i> , 790 N.W.2d 409 (Minn. App. 2010).....	12, 13
<i>Kahn v. Griffin</i> , 701 N.W.2d 815 (Minn. 2005) .....	passim

<i>McCaughtry v. City of Red Wing</i> , __ N.W.2d __, No. A10-0332, 2011 WL 6783813 (Minn. Dec. 28, 2011) .....	1, 2, 3, 10
<i>Rickert v. State</i> , 795 N.W.2d 236 (Minn. 2011) .....	8
<i>Search Warrant of Columbia Heights v. Rozman</i> , 586 N.W.2d 273 (Minn. App. 1998), <i>review denied</i> (Minn. Jan. 21, 1999) .....	5, 7
<i>State v. Adams</i> , __ So. 3d __, CR-08-1728, 2010 WL 4380236 (Ala. Crim. App. Nov. 5, 2010) .....	10
<i>State v. Anderson</i> , 733 N.W.2d 128 (Minn. 2007) .....	8
<i>State v. Askerooth</i> , 681 N.W.2d 353 (Minn. 2004) .....	14
<i>State v. Bambrink</i> , No. A09-1322, 2010 WL 2899121 (Minn. App. July 27, 2010) .....	8
<i>State v. Carter</i> , 596 N.W.2d 654 (Minn. 1999) .....	9
<i>State v. Cox</i> , 798 N.W.2d 517 (Minn. 2011) .....	13
<i>State v. Diede</i> , 795 N.W.2d 836 (Minn. 2011) .....	14
<i>State v. Hamilton</i> , No. A11-115, 2012 WL 5747 (Minn. App. Jan. 3, 2012) .....	6
<i>State v. Johnson</i> , __ N.W.2d __, No. 09-0247, 2012 WL 204520 (Minn. Jan. 25, 2012) .....	8, 9
<i>State v. Larsen</i> , 650 N.W.2d 144 (Minn. 2002) .....	17
<i>State v. Licari</i> , 659 N.W.2d 243 (Minn. 2003) .....	14
<i>State v. Perez</i> , 779 N.W.2d 105 (Minn. App. 2010) .....	18
<i>State v. Richards</i> , 552 N.W.2d 197 (Minn. 1996) .....	14
<i>State v. Rodriguez</i> , 738 N.W.2d 422 (Minn. App. 2007), <i>aff'd</i> , 754 N.W.2d 672 (Minn. Aug. 21, 2008) .....	6
<i>State v. Thompson</i> , 788 N.W.2d 485 (Minn. 2010) .....	9
<b>STATE STATUTES</b>	
Minn. Stat. § 626.08 .....	5
Minn. Stat. § 609.117, subd. 1(2) .....	9

## CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV.....	Passim
U.S. Const. amend. V.....	13
U.S. Const. amend. XIV, § 1.....	13
Minn. Const. art. I, § 2 .....	13, 14
Minn. Const. art. I, § 10 .....	Passim
Minn. Const. art. I, § 13 .....	12, 13
N.Y. Const. art. I, § 12 .....	12

## OTHER AUTHORITIES

Paul H. Anderson & Julie A. Oseid, <i>A Decision Tree Takes Root in the Land of 10,000 Lakes</i> , 70 Alb. L. Rev. 865 (2007) .....	17
<i>Black's Law Dictionary</i> 261 (9th ed. 2009).....	2, 10
City of Red Wing's Rental Dwelling Licensing Code.....	Passim

## STATEMENT OF LEGAL ISSUES

The Minnesota Supreme Court remanded this case to the Minnesota Court of Appeals “to consider the merits of appellants’ challenge to the Red Wing rental inspection ordinance under the Minnesota Constitution.” *McCaughtry v. City of Red Wing*, \_\_ N.W.2d \_\_, \_\_, No. A10-0332, 2011 WL 6783813, at \*9 (Minn. Dec. 28, 2011) (“*McCaughtry*”). As the supreme court recognized, the question at issue in appellants’ challenge to the City of Red Wing (“the City”) rental inspection ordinance is “a purely legal question” that presents a “facial challenge” to the ordinance. *Id.* at \*8. Specifically, the question is whether the rental inspection ordinance is unconstitutional under Article I, Section 10, of the Minnesota Constitution, because it does not require a showing of particularized (or criminal-type) probable cause before a judge may issue a warrant to allow an administrative inspection.

## INTRODUCTION

The only question before the Minnesota Supreme Court on Plaintiffs’ appeal from this Court’s September 28, 2010 decision was whether Plaintiffs had standing to bring their challenge to the constitutionality of the City’s Rental Dwelling Licensing Code (“RDLC”). The supreme court did not consider the merits of Plaintiffs’ challenge, which Plaintiffs brought pursuant to Article I, Section 10, of the Minnesota Constitution. Instead, after concluding that Plaintiffs have standing to pursue their challenge to the RDLC, the supreme court remanded the case to this Court “to consider the merits of appellants’ challenge to the Red Wing rental inspection ordinance under the Minnesota Constitution.” *Id.* at \*9. In order to establish standing, Plaintiffs convinced the supreme

court to view this as “a purely legal question” that raises a “facial” challenge, defined by the supreme court as one that “asserts that a law ‘*always* operates unconstitutionally.’” *Id.* at \*8 (quoting *Black’s Law Dictionary* 261 (9th ed. 2009)) (emphasis in *McCaughtry*.) The supreme court characterized the issue as a request for “a judgment on the constitutionality of the administrative warrant provisions in the RDLC,” *id.*, and “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,” *id.* at \*9.

The parties previously briefed and argued Plaintiffs’ facial challenge to the RDLC to this Court. This Court has given the parties the opportunity to “serve and file supplemental briefs, addressing developments in the law since they filed their principal briefs.” Minn. App. Order at ¶ 2 (Jan. 4, 2012). Therefore, this brief identifies authorities issued since the parties’ initial briefs that support the City’s arguments and responds to Plaintiffs’ supplemental brief.

## LEGAL ARGUMENT

### I. PLAINTIFFS MISREPRESENT THE IMPLICATIONS OF THE SUPREME COURT’S DECISION.

As an initial matter, it is necessary to correct Plaintiffs’ mischaracterizations of the Minnesota Supreme Court’s decision in this matter. The liberties that Plaintiffs take in describing that decision reveal the falsity of their assertion that the supreme court’s decision is “the most relevant new case of all.” Pls.’ Supp. Br. at 2.

The sole issue before the supreme court was whether Plaintiffs have standing to bring their facial challenge to the RDLC. The supreme court explicitly stated that it *did not reach the merits* of that challenge. See *McCaughtry*, \_\_\_ N.W.2d at \_\_\_, 2011 WL 6783813, at \*9 (“Because the issue raised in this court is one of justiciability, we need not reach the merits of the underlying controversy at this time.” (Quotation omitted)). Nevertheless, Plaintiffs contend that the supreme court’s decision “*rejected*” three substantive propositions that relate to the merits of Plaintiffs’ claim: “(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.” Pls.’ Supp. Br. at 3 (emphasis added).

Plaintiffs contend that “statements of the [supreme] court . . . imply an open question” on whether *Camara* controls and whether the RDLC provides sufficient administrative standards. *Id.* But the only “statements of the [supreme] court” that Plaintiffs cite are the supreme court’s paraphrasing of *Plaintiffs’ own arguments*. See *id.* at 3-4. Plaintiffs describe this paraphrasing as “neutral language” that confirms that these questions remain open. *Id.* at 4. Presumably the supreme court would be surprised to learn that its effort to summarize Plaintiffs’ own arguments on a substantive issue that it “[*did*] not reach” constitutes a confirmation of anything about the merits of Plaintiffs’ arguments. *McCaughtry*, \_\_\_ N.W.2d at \_\_\_, 2011 WL 6783813, at \*9 (emphasis added).

Plaintiffs further their attempt to spin the supreme court’s analysis as a predetermination of the requisite result of Plaintiffs’ constitutional challenge when they

reference the supreme court's discussion of the role of a district judge in limiting the scope of a warrant. Pls.' Supp. Br. at 4-5. But that discussion did not address the effect that a judge's ability to limit the scope of a warrant has on the viability of Plaintiffs' facial challenge to the RDLC. Again, the supreme court did not reach the merits of that facial challenge. Instead, the supreme court's sole purpose in discussing a district judge's ability to limit the scope of a warrant was to determine whether that ability deprived Plaintiffs of standing. This Court should reject Plaintiffs' attempt to turn the supreme court's analysis of this standing issue into something other than what it was.

Finally, Plaintiffs contend that the supreme court's statement that "there is no probable cause or other standard set out in the [RDLC]" necessitates a decision in their favor in this appeal. Specifically, Plaintiffs argue that *Camara* "mandates '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." Pls.' Supp. Br. at 4. But that misstates what *Camara* held (and, for that matter, what the Minnesota Supreme Court "determined"). The U.S. Supreme Court in *Camara* stated that to issue a warrant, whether administrative or otherwise, probable cause (as distinguished from *individualized* probable cause) must exist. *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967). Of course, that statement is nothing more than a recitation of what the Fourth Amendment itself requires. *See* U.S. Const. Amend. IV ("[N]o Warrants shall issue, but upon probable cause . . ."). What *Camara* held is that probable cause exists if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."

*Camara*, 387 U.S. at 538. As this Court has previously recognized, *Camara* “did not require that the[se] ‘administrative standards’ be set by statute.” *Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273, 276 (Minn. App. 1998), review denied (Minn. Jan. 21, 1999). This Court has further held that, while housing code enforcement in Minnesota would be well served if the legislature were to enact a statute providing a general authorization for administrative search warrants, “*Camara* does not require such a statute.” *Id.* In short, just as Minnesota’s criminal search warrant statute (Minn. Stat. § 626.08) does not identify the applicable standard for the issuance of a criminal search warrant (i.e., *individualized* probable cause), the RDLC need not identify the applicable standard for the issuance of an administrative search warrant. Rather, the court reviewing a warrant application and the legal authority at issue in the application (in this case, the RDLC) must determine whether “reasonable legislative or administrative standards” exist. *Camara*, 387 U.S. at 538.

## **II. RECENT DEVELOPMENTS IN THE LAW CONFIRM THAT JUDGE KING PROPERLY DISMISSED PLAINTIFFS’ FACIAL CHALLENGE TO THE RDLC.**

If there have been any important developments in the law since the parties previously briefed Plaintiffs’ facial challenge to the RDLC under the Minnesota Constitution, it has been to reaffirm the relevant authority that existed at the time of that briefing. Most notably (1) this Court has reiterated its limited role in interpreting the Minnesota Constitution; (2) recent appellate decisions support the City’s arguments regarding the *Kahn v. Griffin* framework; (3) recent decisions confirm the difficult burden Plaintiffs face in proving that the RDLC is facially unconstitutional; and

(4) courts in other jurisdictions have continued to rely on *Camara* as the controlling interpretation of both the U.S. and various state Constitutions.

**A. The Minnesota Court of Appeals Continues to Emphasize its Limited Role in Changing the Interpretation of the Minnesota Constitution.**

In his December 2009 decision, Judge King acknowledged that the Plaintiffs, through their facial challenge to the RDLC, were seeking to have the district court “extend the protections guaranteed by Art. I, Sec. 10 of the Minnesota Constitution further than any Minnesota Court has done to date.” Pls.’ App. at A30. Judge King held that, “where the supreme court had not expanded the protections of the Minnesota Constitution to a particular type of case, lower courts have no authority to interpret it more broadly.” *Id.* (quotation omitted). Judge King therefore held that the district court

lacks the authority to conclude that Art. I, Sec. 10 of the Minnesota Constitution provides greater protection than the Fourth Amendment of the U.S. Constitution by forbidding the use of administrative warrants to enter rental dwellings without consent or that individualized probable cause is necessary to search occupied buildings pursuant to an administrative warrant.

*Id.*

Since the parties’ prior briefing in the spring of 2010, this Court has reaffirmed the very conclusion that Judge King reached about the limited role of courts other than the supreme court in interpreting the Minnesota Constitution. Specifically, this Court’s decision in *State v. Hamilton* repeated the long-standing principal that “it is not the role of *this* court to make a dramatic change in the interpretation of the Minnesota Constitution when the [Minnesota] supreme court has not done so.” *State v. Hamilton*, No. A11-115, 2012 WL 5747, at \*3 (Minn. App. Jan. 3, 2012) (quoting *State v.*

*Rodriguez*, 738 N.W.2d 422, 431–32 (Minn. App. 2007), *aff'd*, 754 N.W.2d 672 (Minn. Aug. 21, 2008)).

In its initial brief, the City discussed the applicability of *Camara* under established Minnesota precedent. Specifically, in *Rozman*, this Court treated *Camara* as governing law on the issue of administrative search warrants for housing licensing and inspection programs, holding that “[t]he basic authority for administrative search warrants is found in *Camara*.” 586 N.W.2d at 275-76.

Since the spring of 2010, neither this Court nor the Minnesota Supreme Court has interpreted Article I, Section 10, of the Minnesota Constitution in the context of administrative warrants. Thus, *Rozman*, and its reliance on *Camara*, remains the most recent applicable authority. In the absence of a dramatic change by the Minnesota Supreme Court in its interpretation of the law governing administrative warrants under Article I, Section 10, of the Minnesota Constitution, this Court should not deviate from its treatment of *Camara* as the governing authority.

**B. Minnesota Courts Continue to Favor Uniformity in their Interpretations of Identical Provisions in the U.S. and Minnesota Constitutions.**

The City’s initial brief analyzed the *Kahn v. Griffin* framework that the Minnesota supreme court uses to determine whether to deviate from federal interpretations of a provision in the U.S. Constitution that is identical or nearly identical to a provision in the Minnesota Constitution—i.e., the Fourth Amendment to the U.S. Constitution and Article I, Section 10, of the Minnesota Constitution. *See In re Welfare of M.L.M.*, \_\_\_ N.W.2d \_\_\_, \_\_\_, No. A09-0875, 2012 WL 204524, at \*3 (Minn. Jan. 25, 2012) (acknowledging that

the Fourth Amendment and Article I, Section 10, are “identical”); *State v. Johnson*, \_\_\_ N.W.2d \_\_\_, \_\_\_, No. 09-0247, 2012 WL 204520, at \*3 (Minn. Jan. 25, 2012) (same). This Court has since reiterated the *Kahn* principal that the Minnesota Supreme Court “looks to the state constitution as an independent basis for individual rights “with restraint and some delicacy,” especially when the right at stake is guaranteed by identical or substantially similar language in the federal constitution.” *State v. Bambrink*, No. A09-1322, 2010 WL 2899121, at \*4 (Minn. App. July 27, 2010) (quoting *State v. Anderson*, 733 N.W.2d 128 (Minn. 2007) (quoting *Kahn*, 701 N.W.2d at 828)); see also *Rickert v. State*, 795 N.W.2d 236, 247 (Minn. 2011) (Stras, J., concurring) (reiterating the *Kahn* “analytical framework for determining whether to follow the interpretation given to the U.S. Constitution in interpreting a parallel provision of the Minnesota Constitution,” and relying on *Kahn*’s holdings that (1) the Minnesota supreme court “favors uniformity with the [U.S.] Supreme Court’s interpretation of the U.S. Constitution because it results in ‘consistency of practice in state and federal courts’”; (2) the supreme court “will interpret a provision in the Minnesota Constitution differently from the [U.S.] Supreme Court’s interpretation of a similar provision of the United States Constitution in only limited instances”; (3) “[a] ‘principled basis’ must be identified for the differing interpretation, not simply a desire ‘to bring about a different result’”).

The case law issued since the spring of 2010 reflects Minnesota courts’ adherence to the general principal that Article I, Section 10, of the Minnesota Constitution and Fourth Amendment to the U.S. Constitution should be interpreted to have the same effect. In those cases, Minnesota courts have chosen to interpret those provisions coextensively.

In *M.L.M.*, this Court considered an argument that Minnesota Statute section 609.117, subdivision 1(2), authorized a warrantless, suspicionless taking of DNA in violation of the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution. The Court held as follows:

**Ordinarily, we analyze federal and state protections guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution as co-extensive. See *State v. Carter*, 596 N.W.2d 654, 657 (Minn. 1999) (interpreting protections under these provisions as co-extensive in the absence of “‘radical’ or ‘sharp’ departures” of the United States Supreme Court from its precedent); see also *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn.2005) (recognizing general principle favoring uniformity with the federal constitution). **There is not a basis for deviating from that general principle here.****

*In re Welfare of M.L.M.*, 781 N.W.2d 381, 384 (Minn. App. 2010) (emphasis added).

The supreme court recently affirmed this Court’s decision in *M.L.M.*, and held that DNA collection for identification purposes is not an unreasonable search under either the Fourth Amendment or Article I, Section 10. *M.L.M.*, \_\_\_ N.W.2d \_\_\_, 2012 WL 204524.

The supreme court reached a similar conclusion in *Johnson*, where it analyzed the Fourth Amendment and Article I, Section 10, coextensively and concluded that a different statute requiring certain offenders to submit a DNA sample for identification purposes did not violate federal or state search-and-seizure provisions. \_\_\_ N.W.2d \_\_\_, 2012 WL 204520.<sup>1</sup>

---

<sup>1</sup> The *State v. Thompson* concurrence on which Plaintiffs rely in their supplemental brief similarly analyzes the Fourth Amendment to the U.S. Constitution and Article I, Section 10, of the Minnesota Constitution coextensively, and relies on U.S. Supreme Court authority to analyze the protections provided under both provisions. 788 N.W.2d 485, 496-97 (Minn. 2010) (Page and Anderson, Paul H., JJ, concurring).

**C. Where—as Here—the Plaintiffs are Bringing a Facial Attack, Their Burden Remains Especially High.**

In their successful effort to convince the supreme court that they have standing, Plaintiffs presented their suit as a “facial challenge to the constitutionality of the ordinance.” *McCaughtry*, \_\_ N.W.2d at \_\_, 2011 WL 6783813, at \*8. In response, the supreme court recognized that “a facial challenge asserts that a law ‘always operates unconstitutionally.’” *Id.* (quoting *Black’s Law Dictionary* 261 (9th ed. 2009) (emphasis in *McCaughtry*)). That definition of a facial challenge is the legal equivalent of the principle articulated by the U.S. Supreme Court in *United States v. Salerno*, which held that, with certain narrow exceptions not present here, a party cannot facially invalidate a law unless the law is unconstitutional in all applications. 481 U.S. 739 (1987); see *State v. Adams*, \_\_ So. 3d \_\_, CR-08-1728, 2010 WL 4380236, at \*26 (Ala. Crim. App. Nov. 5, 2010) (quoting Black’s definition of “facial challenge,” with the same emphasis in the phrase “always operates unconstitutionally,” and quoting *Salerno*’s description of the plaintiff’s burden in a facial challenge).

Last year, the Eighth Circuit elaborated on the demanding standard for proving that a law is facially unconstitutional, and the reason why it is so demanding. In *TCF National Bank v. Bernanke*, the court explained:

“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that **no set of circumstances exists under which the Act would be valid.**” *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50, 128 S. Ct. 1184, 170 L.Ed.2d 151 (2008) (reaffirming the *Salerno* test outside the context of certain First Amendment challenges). This is because facial challenges “run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *Wash. State Grange*, 552 U.S. at 450, 128 S. Ct. 1184 (internal quotation marks omitted).

643 F.3d 1158, 1163 (8th Cir. 2011) (emphasis added). More recently, the Eighth Circuit recognized that, to succeed on a facial challenge, a claimant “‘must establish that no set of circumstances exists under which [the statute or ordinance] would be valid.’” *United States v. Bena*, 664 F.3d 1180, 1182 (8th Cir. 2011) (quoting *Salerno*, 481 U.S. at 745).

By concluding that Plaintiffs have standing, the supreme court did not relieve Plaintiffs of having to carry the extra burden that applies because they are attacking the RDLC on its face. Indeed, having used the facial nature of their challenge to secure standing, Plaintiffs cannot expect this Court to relieve them of the substantive burden created by that strategy.

#### **D. Other Jurisdictions Have Applied *Camara* to Their Own State Constitutions.**

Since the spring of 2010, at least one court in another jurisdiction has relied on *Camara* as governing law in the context of its own state constitution. In *In re City of Rochester*, the city applied for a warrant to inspect rental properties pursuant to a rental housing inspection program. 90 A.D.3d 1480, 2011 N.Y. Slip Op. 09367, at \*2, \_\_\_

N.Y.S.2d \_\_ (N.Y Sup. Ct. App. Div. Dec. 23, 2011). The plaintiffs filed a lawsuit challenging both the constitutionality of the local law that set forth the procedure for issuing judicial warrants in the absence of consent and the judicial warrants that were issued pursuant to that procedure. *Id.* at \*1: Citing *Camara*, the court held that the city did not violate “the Fourth Amendment with respect to either the procedures involved in issuing inspection warrants in general or the scope of the subject inspection warrants in particular.” *Id.* With respect to Article I, Section 12, of the New York Constitution, which is nearly identical to both the Fourth Amendment to the U.S. Constitution and Article I, Section 10, of the Minnesota Constitution, the court held that there was no violation of that provision because there was “no basis for imposing a higher standard with respect to the rights in question under the New York State Constitution.” *Id.*

### **III. THE CASES ON WHICH PLAINTIFFS RELY DO NOT NECESSITATE A REVERSAL OF THE DISTRICT COURT’S DECISION.**

Plaintiffs largely ignore the search-and-seizure case law that interprets the identical provisions in the Fourth Amendment to the U.S. Constitution and Article I, Section 10, of the Minnesota Constitution coextensively (*see* Sections II.B and D, *supra*). Instead, they rely on case law interpreting *other* constitutional provisions as support for their argument that this Court should disregard *Camara* and this Court’s prior reliance on it. In particular, Plaintiffs point this Court to recent supreme court decisions analyzing the Minnesota Constitution’s takings clause (Article I, Section 13). *See* Pls.’ Supp. Br at 7-8 (citing *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 305-07 (Minn. 2011), and *Interstate Cos. v. City of Bloomington*, 790 N.W.2d 409, 413-14

(Minn. App. 2010)). But unlike the Fourth Amendment and Article I, Section 10, the takings provisions in the U.S. Constitution (the Fifth Amendment) and the Minnesota Constitution (Article I, Section 13) are not identical. Rather, “[t]he language [of Article I, Section 13] of the Minnesota Constitution is broader than the Takings Clause of the Fifth Amendment to the U.S. Constitution.” *DeCook*, 796 N.W.2d at 305. Therefore, it follows logic that Minnesota courts would interpret a more broadly-worded constitutional provision differently in order to more broadly protect Minnesota citizens. *See Interstate Cos.*, 790 N.W.2d at 413; *see also Kahn*, 701 N.W.2d at 828 (holding that the determination of whether to depart from U.S. Supreme Court precedent begins with an inquiry into whether the language of the Minnesota Constitution is “identical or substantially similar” to the language in the U.S. Constitution).

Plaintiffs also cite to the supreme court’s decision in *State v. Cox*, 798 N.W.2d 517 (Minn. 2011), which addressed an equal protection claim under the Minnesota Constitution (Minn. Const. art. I, § 2). But again, Article I, Section 2, of the Minnesota Constitution is not identical to the Equal Protection Clause in the U.S. Constitution (U.S. Const. amend. XIV, § 1). Thus it is unsurprising that the Minnesota Supreme Court has sometimes interpreted the Equal Protection Clause in the Minnesota Constitution differently from how the U.S. Supreme Court has interpreted the Equal Protection Clause in the U.S. Constitution. *Cox*, 798 N.W.2d at 521 (observing that, “[w]hile we have not always followed federal law in interpreting our state Equal Protection Clause, we have relied on federal law to determine if two groups are similarly situated” (citations omitted); *see also Gluba ex rel. Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 721

(Minn. 2007) (observing that, when applying rational basis review under Article I, Section 2, of the Minnesota Constitution, “we have sometimes applied a ‘higher standard’”).

Plaintiffs do rely on one Minnesota case addressing Fourth Amendment to the U.S. Constitution and Article I, Section 10, of the Minnesota Constitution—*State v. Diede*, 795 N.W.2d 836 (Minn. 2011). But Plaintiffs’ contention that the supreme court in *Diede* “*acknowledge[d]* that Minnesota uses a different legal test” when analyzing those provisions is false. Pls.’ Supp. Br. at 12 (emphasis added). There, the supreme court applied these constitutional provisions coextensively, and relied on Minnesota cases that applied U.S. Supreme Court precedent—*see, e.g., State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)); *State v. Licari*, 659 N.W.2d 243 (Minn. 2003) (quoting *Katz v. United States*, 389 U.S. 347 (1967)); *Licari*, 659 N.W.2d at 254 (applying *Nix v. Williams*, 467 U.S. 431 (1984)); *State v. Richards*, 552 N.W.2d 197 (Minn. 1996) (applying *Wong Sun v. United States*, 371 U.S. 471 (1963)).

Plaintiffs’ reliance on the U.S. Supreme Court decision in *United States v. Jones*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 945 (2012), is similarly misplaced. Contrary to Plaintiffs’ contention, the U.S. Supreme Court in *Jones* did not “admit[] that the reasoning that it relied upon in *Camara* and *Frank [v. Maryland]*, 359 U.S. 360 (1959) was a ‘deviation’ from prior precedent.” Pls.’ Supp. Br. at 10. The question in *Jones* was a limited one—i.e., whether a search within the meaning of the Fourth Amendment had occurred. Specifically, the Supreme Court considered “whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual’s vehicle, and subsequent use

of that device to monitor the vehicle’s movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment,” and held that it did constitute a search. *Jones*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 948. The Supreme Court did not consider the questions of whether such a search requires a warrant and, if so, what level of suspicion is necessary (e.g., probable cause, reasonable suspicion, etc.). *Id.*; *see also id.* at \_\_\_, 132 S. Ct. at 954 (declining to decide government’s argument that the search via attachment of the GPS device “was reasonable—and thus lawful—under the Fourth Amendment because officers had reasonable suspicion, and indeed probable cause” on the ground that the government did not raise that argument below); *id.* at \_\_\_, 132 S. Ct. at 961, (Alito, J., concurring) (observing that the majority’s opinion only determined that attaching a GPS tracking device “*may* violate the Fourth Amendment” (emphasis added)).

Here, there is no dispute that an administrative search pursuant to the RDLC constitutes a search under the Fourth Amendment to the U.S. Constitution and Article I, Section 10, of the Minnesota Constitution. Nor is there any dispute that such a search requires a warrant in the absence of consent. The only question before this Court is whether the RDLC is facially unconstitutional pursuant to Article I, Section 10, of the Minnesota Constitution because it does not expressly impose a higher standard for the issuance of an administrative warrant than the Fourth Amendment to the U.S. Constitution requires. *Jones*’ holding, which was limited to the question of whether a search had occurred at all and which did not address the need for a warrant for any such search, sheds no light on this question.

There is a further flaw in Plaintiffs' contention that the U.S. Supreme Court "admitted [in *Jones*] that the reasoning that it relied upon in *Camara* and *Frank* was a 'deviation' from prior precedent." Pls.' Supp. Br. at 10. The only "deviation" the Supreme Court recognized in *Jones* was Justice Harlan's concurrence in the 1967 decision of *Katz v. United States*, 389 U.S. 347 (1967), and the cases that subsequently applied that concurrence. As an initial matter, *Katz* was decided six months *after Camara* and more than eight years *after Frank*. Given this timing, the *Katz* "deviation" could not be the "reasoning relied upon in *Camara* and *Frank*," as Plaintiffs contend.

Furthermore, the *Katz* "deviation" was one that was *in favor of* greater protections on the issue of whether a search had occurred (which, again, is an issue that is not present here). Specifically, the Supreme Court recognized that, until the latter half of the 20th Century, Fourth Amendment jurisprudence on the question of whether something constitutes a search "was tied to common-law trespass." *Jones*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 950. The later cases that "deviated from that exclusively property-based approach"—i.e., the cases applying Justice Harlan's concurrence in *Katz*—have held that the Fourth Amendment protects a person's "reasonable expectation of privacy." *Id.* (quoting *Katz*, 389 U.S. at 360 (1967)). But this reasonable-expectation-of-privacy test did not replace or repudiate the property-based trespass approach. Rather, the reasonable-expectation-of-privacy test was "*added to*, but not *substituted for*, the common-law trespassory test." *Id.* at \_\_\_, 132 S. Ct. at 952. In other words, post-*Katz*, the question of whether a search had occurred under the Fourth Amendment could be resolved by applying either the common-law trespass theory *or* the reasonable-expectation-of-privacy test.

Even if this case did involve the same question that was at issue in *Jones*, Plaintiffs are incorrect in their contention that *Jones* “demonstrate[s] that there was a sharp departure that occurred in federal law” such that federal law should not be applied in the Fourth Amendment context. Pls.’ Supp. Br. at 10. Because the post-*Katz* decisions added to the potential protections provided under the Fourth Amendment, those decisions cannot constitute a departure from prior precedent or a retrenchment on Bill of Rights issues that would justify the Minnesota Supreme Court’s departure from *Camara* under the *Kahn* analysis. See *Kahn*, 701 N.W.2d at 828 (holding that supreme court will depart from U.S. Supreme Court precedent involving an identical provision of the U.S. Constitution only if (1) “the United States Supreme Court has made a sharp or radical departure from its previous decisions or approach to the law and when [the Minnesota Supreme Court] discern[s] no persuasive reason to follow such a departure”; (2) “the Supreme Court has retrenched on Bill of Rights issues”; or (3) “federal precedent does not adequately protect our citizens’ basic rights and liberties”); see also Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes*, 70 Alb. L. Rev. 865, 924 (2007) (recognizing that the *Kahn* factors are intended to permit the Minnesota Supreme Court to restore rights formerly protected by Supreme Court’s prior precedent when the U.S. Supreme Court has made a sharp or radical departure from its own precedent that lessens those rights).<sup>2</sup>

---

<sup>2</sup> Plaintiffs again point this Court to the supreme court’s 2002 decision in *State v. Larsen*, 650 N.W.2d 144 (Minn. 2002). In *Larsen*, just as in *Katz* and its progeny, the supreme court applied the reasonable-expectation-of-privacy test to determine whether a search had occurred.

Finally, Plaintiffs reliance on *State v. Perez*, 779 N.W.2d 105 (Minn. App. 2010), also fails to support their theory. That case did not involve the questions of whether a search had occurred or whether a warrant was required. Rather, that case, which analyzed a criminal conviction for interference of privacy that arose as the result of a husband videotaping his wife, held that a spouse may have a reasonable expectation of privacy when alone in a shared bathroom. *Id.* at 107.

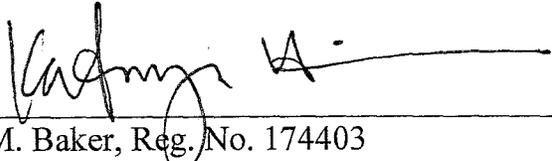
Here, the City does not dispute that there may be a reasonable expectations privacy in a bathroom. But that is not the question at issue here. The question is whether the RDLC, which requires an administrative warrant to search areas such as bathrooms in the absence of consent, is facially unconstitutional in every respect under Article I, Section 10, of the Minnesota Constitution. *Perez* did not address or resolve that question.

### CONCLUSION

For the reasons outlined here and in the City's prior brief, the City respectfully requests that the Court affirm the district court's entry of judgment in favor of the City on Plaintiffs' claims.

Dated: February 22, 2012

**GREENE ESPEL P.L.L.P.**

By 

John M. Baker, Reg. No. 174403

Kathryn N. Hibbard, Reg. No. 387155

200 S. Sixth Street, Suite 1200

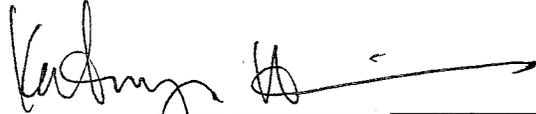
Minneapolis, MN 55402

(612) 373-0830

Attorneys for Respondent City of Red Wing

**CERTIFICATE OF COMPLIANCE**

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2007, which reports that the brief contains 5,010 words, exclusive of the cover, tables, and this certificate.



---

Kathryn N. Hibbard