

NO. A10-0332

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State of Minnesota  
 In Supreme Court

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Robert McCaughtry, *et al.*,  
 Appellants,  
 v.  
 City of Red Wing,  
 Respondent.

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BRIEF AND APPENDIX OF *AMICUS CURIAE*  
 WIEBESICK RENTAL

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## Introduction<sup>1</sup>

“That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Ordinary, law-abiding citizens all over the state of Minnesota still believe the Declaration of Independence, the U.S. Constitution, and the Minnesota State Constitution serve to protect them from unwarranted government intrusion into their lives and property. These hardworking citizens believe their government needs to have justification before barging into their most private space: their homes. The rights of property owners and renters at stake in this case are not limited to those in the City of Red Wing, as many cities across the state are implementing similar licensing and inspection regimes based solely on generalized requirements to inspect all rental property within their jurisdiction. *See generally* Survey of Top Minnesota Cities for Rental Housing Licensing and Inspection Programs (Appellants’ App. 124). These supposedly purely administrative regimes are anything but benign when paired with the might of law enforcement, fines and threat of criminal sanctions for noncompliance. This modus operandi of city officials forcing their way into private residences when the tenants and landlords resist the intrusion is a far cry from the ideal that city government

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<sup>1</sup> Nicole L. Concordia, counsel for *amicus curiae* Wiebesick Rental, certifies counsel authored this brief in whole, with no monetary contributions whatsoever.

should be working for the benefit of its citizens by protecting their rights. *Amicus curiae* Wiebesick Rental (Wiebesick) believes the city of Golden Valley (City) should spend its resources on remedying actual problem properties and leave alone the properties with zero tenant complaints and no obvious violations of the Golden Valley Residential Property Maintenance Code (RPMC). Therefore, Wiebesick urges this Court to remind cities to treat their citizens with dignity and respect by interpreting Article I Section 10 of the Minnesota Constitution to require individualized probable cause for administrative warrants authorizing inspections of rental property.

#### **Statement of the Case and Facts**

Wiebesick concurs with Appellants' Statement of the Case and Facts and adopts and incorporates the facts set forth in the Brief of Appellants and the Appendix to Brief of Appellants.

Additionally, by Order of September 10, 2012, the Minnesota Supreme Court allowed Wiebesick Rental to participate as *amicus curiae* in this case to describe its experience objecting to an inspection of its property upon non-individualized probable cause under Golden Valley's rental licensing inspection regime.

#### **Statement of *Amicus Curiae* Facts**

Jason Wiebesick, principal of Wiebesick Rental, purchased a duplex in Golden Valley in 1986. After completing moderate renovations, the unit

located at 510 Jersey Avenue North has seen a steady string of tenants renting the property. Jason performs regular maintenance of the property and personally completes renovations to ensure the work is done with quality materials and meticulous attention to detail and compliance with housing standards. Many of Wiebesick's tenants only leave the property when they are ready to purchase a home of their own. For 25 years, Wiebesick maintained a quality rental unit with zero complaints from its tenants.

In 2007, Golden Valley adopted a licensing and inspection system in its Residential Property Maintenance Code (RPMC) requiring all rental units in the City to be licensed and submit to an intrusive inspection of the rental property whenever the City Manager feels like it. Golden Valley Residential Property Maintenance Code § 4.60 subd. 9 (2007) (APP1-18). The stated purpose of the inspections is to “determine whether the property is in compliance with the City Code, the standards contained in this Section and the laws of the State of Minnesota.” *Id.* Such a broad inspection necessarily touches every space within a rental unit, since, for example, inspectors would need to verify that a unit provides one electrical outlet for every sixty square feet of floor area. *Id.* at § 4.60 subd. 8(D)(2) (APP10).

Wiebesick became aware the City intended to apply this new rental licensing requirement to its property when it received a letter from the City, dated June 29, 2011. APP19. This one page letter purported to be a Second

Notice, referenced the existence but not the content of the earlier letter from June 8, 2011, and simply stated Wiebesick must submit a rental application and fee by July 15, 2011, or face fines. *Id.* The letter did not even reference the City Code provision authorizing the rental license. *Id.*

Perplexed by this new licensing requirement, Wiebesick sent a response letter to Mr. Kunde (Kunde), the author of the City's letter and Fire/Property Maintenance Specialist, on July 1, 2011, requesting an explanation of the City's authority to require a rental license for private property being rented to a private individual. APP20-21. Wiebesick did not receive any response from Kunde or the City to its inquiry. Instead, Wiebesick received a citation, signed by Kunde, for "Failure to License Rental Property," which carried a \$100 fine and a notice that possible criminal prosecution could ensue. APP22-24. This citation, along with the envelope it was mailed in, erroneously listed the mailing address as "PO Box 27681," instead of "PO Box 27618" as listed in Wiebesick's July 1 letter. *Compare id.* with APP20.

Wiebesick then wrote a complaint letter to the City Manager, Mr. Burt, criticizing Kunde's unresponsiveness and detailing the impact of that lack of communication; namely, the \$100 fine, the potential \$25 fee to appeal the fine and potential for criminal prosecution. APP25-26. In the Complaint Wiebesick again requested help understanding this new licensing

requirement. *Id.* And again Wiebesick's request was met with silence from the City.

On September 26, 2011, having received no response, Wiebesick submitted a letter to the City refusing the citation, requesting the citation be put on hold until someone finally responds and also requesting a meeting. APP27. Having no legal training, the format for this letter was inspired by information Jason Wiebesick found online. Frustrated at this point, but still believing in local government's role to support its citizens, Wiebesick remained hopeful that it could work out these issues without involving lawyers. With that in mind, Wiebesick went to City Hall on September 26, 2011, and met with Chief Mark Kuhnly, Kunde's supervisor. Wiebesick explained the situation and again requested the citation be placed on hold while they worked out the details. Wiebesick understood Chief Kuhnly to agree to place the citation on hold while he investigated further. Instead, the very next day, September 27, 2011, Wiebesick was issued a second citation for an additional \$250. APP28-29. Wiebesick again went back to City Hall to talk with Chief Kuhnly, but this time was told a formal appeal would need to be filed for \$25.

After this second citation, Wiebesick finally received a cursory response to its many inquiries about where the City derived its authority to implement its rental licensing program in a September 30, 2011 letter from attorney

Allen Barnard. APP30-31. The less than two-page letter cited a Colorado Supreme Court decision about the tenth amendment to the U.S. Constitution, and a brief example of a U.S. Eighth Circuit Court of Appeals decision, neither of which provided a clear delineation for a layperson to understand the link between federal and state constitutions and the City's ability to tell private persons what can and cannot be done on their own property. *Id.*

Wiebesick filed an Appeal on October 6, 2011, which detailed three main complaints about the rental licensing requirement: 1) the inspection without individualized probable cause would be an invasion of privacy for both tenants and owners residing at the property; 2) there are no standards for how the inspection is to be performed; and 3) there are no safeguards in place to ensure information the inspector obtains will be kept confidential, especially from law enforcement. APP32-34. At the appeal hearing on November 1, 2011, Wiebesick read the appeal document to the City Council and was met with what appeared to be hostility when the first question asked was 'where were you when the City was contemplating the rental license code?' Wiebesick finally received a response to the inquiry on the authority of the City to require the rental license when the City told him it didn't believe the requirement to be unconstitutional and it was too costly to do the complete judicial review that Wiebesick had been requesting. Wiebesick

pleaded inability to pay the fines, and as a result the City reduced the total amount owed from \$350 to \$200.

Not satisfied that the City was justified in requiring a rental license and subsequent inspection, with the threat of criminal prosecution looming Wiebesick nevertheless complied with the request to submit a rental application on November 9, 2011, along with the \$100 application fee and a letter stating owners and renters objected to the inspection requirement and would not allow an inspection without a warrant. APP35-38. The City issued Wiebesick a rental license on November 14, 2011, and mailed said license with a letter stating an inspection must be scheduled within 30 days. APP39-43. Having objected to the inspection at the time the rental application was submitted, Wiebesick expected the City to seek a warrant for the inspection. Instead, Wiebesick was given another citation on December 27, 2011, and fined \$100 for failure to schedule the inspection of rental property under "City Code 4.60, Subdivision 9." APP44-47. But there is no language in the city code requiring the property owner to schedule the inspection. *See* RPMC § 4.60 subd. 9(A) (APP10).

Wiebesick appealed this third citation on January 4, 2012, on the grounds that 1) Wiebesick invoked its right to have a warrant issued prior to inspection on November 1, 2011, and this citation is equivalent to retaliation for invoking constitutional rights, 2) the city code referenced does not require

the property owner to schedule the inspection, nor does it allow the remedy of a fine for failure to schedule an inspection but rather to obtain a warrant, and 3) the pending case of *McCaughtry v. City of Red Wing* may render this issue moot. APP48-52. Another \$25 check accompanied this second appeal. *Id.*

Wiebesick expected notification of another appeal hearing, but instead received a call from the new Mayor, Shep Harris, on Saturday, February 4, 2012. Mayor Harris informed Wiebesick that he wished to understand the background of the appeal before the hearing scheduled for Monday, February 6, 2012. On Monday, February 6, 2012, Wiebesick called Mr. Burt at the City offices, and followed the phone call with an email, requesting the hearing be rescheduled, and also pointing out that under the City Code Wiebesick was entitled to five business days' notice of the hearing, and moreover, the hearing should have been scheduled within thirty days of the appeal. APP53; *see* RPMC § 4.6, subd. 12(B) (APP17). Since no notice of the hearing was given, the five day notice requirement was not met, and would mean that the hearing could not be scheduled within the thirty day window. For these reasons the City dismissed the citation. APP54. On February 15, 2012, Wiebesick requested a refund of the appeal fee. APP55. A refund check was later issued.

In yet another example of the City being unable to follow its own code, Wiebesick received a notice from March 20, 2012, stating the 2011 license would expire on May 1, 2012, and a renewal application was due by April 13, 2012. APP56. The RPMC specifies that rental licenses “shall be issued annually and shall expire on the last day of February of the following year.” RPMC § 4.6 subd. 9(A) (APP10).

Wiebesick submitted the renewal application on April 12, 2012, along with the \$125 license fee. APP57-59. Wiebesick’s next communication from the City came on April 24, 2012, when served with the Hennepin County District Court Order Authorizing Inspection, a “courtesy” copy of the Petition submitted to obtain the Order and a date for the ordered inspection of April 26, 2012. APP60-64. Having no notice of the warrant petition, Wiebesick was prevented from speaking on its own behalf to the neutral magistrate making the decision about whether a warrant was justified.

The letter delivered with the Order, identified the date of inspection as just two days later on April 26, 2012. *Id.* Then, on April 26, 2012, instead of an inspection, Wiebesick received another hand-delivered letter stating the inspection would be on April 30, 2012, at 5 p.m. APP65. While the letters were presented within the twenty-four hour notice requirement of the Order for a scheduled inspection, the relatively short notice and last-minute change presented a hardship for Jason Wiebesick to leave early from his full-time job

and to find a baby-sitter for his two children so that his wife, Jacki, could also attend the inspection. Only one of the tenants, whose privacy was at stake, was able to leave their job early to attend the inspection.

At 5 p.m. on April 30, 2012, Jason and Jacki Wiebesick, and Jamal Riley (Tenant) were awaiting the arrival of the City inspector, Kunde. At 6 p.m., an hour after the inspection was scheduled to begin, Kunde approached the property with two armed Golden Valley police officers (Officer #1 and Officer #2). Two more officers remained in their marked vehicles parked on the street. The presence of the armed officers added even more stress to an already tense situation. As Kunde moved through the house he asked Tenant questions about the condition of the property and specific items he was checking. Both Jason and Officer #1 followed Kunde and Tenant through the property, while Jacki and Officer #2 remained in the living room near the front door. Jason asked Officer #2 if it was normal for police officers to attend these inspections. Officer #2 replied that it was normal when a warrant was required. The inspection lasted approximately ten minutes, after which Kunde issued a Correction Notice with “no violations” noted. APP66.

### **Argument**

- I. This Court should interpret Article I Section 10 of the Minnesota Constitution to afford Minnesotans greater protection than the U.S. Supreme Court’s decision in Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967), by rejecting the use of**

**administrative warrants based solely on generalized probable cause to search the private homes of law-abiding citizens.**

**A. Other cities' rental property management codes offer even fewer protections to law-abiding citizens than Red Wing's Rental Dwelling Licensing Code and Housing Maintenance Code.**

The focus in the case before this Court is on Red Wing's Rental Dwelling Licensing Code (RDLC) and Housing Maintenance Code (HMC). However, the decision of this Court will have a far-reaching impact on similar codes in other Minnesota cities, some of which infringe even further on fundamental liberties than those at issue in Red Wing.

Red Wing's HMC specifically limits what information inspectors gather that may be shared with law enforcement to disclosures required by law, evidence of methamphetamine labs, and mistreatment of minors, vulnerable adults or animals. RDLC § 4.31 subd. 1(3)(q) (Appellants App. 100). Golden Valley's RPMC contains no such limitations on sharing information with police. *See generally* RPMC § 4.60 (APP1-18). For inspections where the police are not present, then, inspectors in Golden Valley are free to share any information they obtain with law enforcement.

Similarly, Red Wing's HMC minimally limits the areas to be searched by specifying that inspectors are "not authorized to open containers, drawers or medicine cabinets," and only allowed to open cabinets or closets when "reasonably necessary" to inspect for the conditions violative of the HMC.

RDLC §§ 4.31 subd. 1(3)(m)-(n) (Appellants App. 99). While these guidelines provide a very narrow set of protections for Red Wing’s citizens, Golden Valley identifies no limitations to the scope of its inspections. *See generally* RPMC § 4.60 (APP1-18).

Finally, when a citizen invokes his right to require a warrant before allowing an intrusive inspection, Golden Valley reserves the right to charge the property owner with the costs of obtaining that warrant. RPMC § 4.60 subd. 9(F) (APP12). There is no corresponding provision in Red Wing’s HMC. *See generally* RDLC § 4.31 (Appellants App. 96-104).

**B. Public policy interests favor setting minimum guidelines for cities enacting rental property licensing and inspection codes to preserve the public’s confidence in local government.**

As illustrated by Wiebesick’s long, harrowing road to protecting its tenants’ privacy rights, ordinary citizens are being subjected to onerous requirements under cities’ misguided attempts to protect tenants from meticulously maintained rental property. The tactics employed by city officials in the Wiebesick story only serve to undermine the public’s confidence in the role and integrity of city officials – from the repeated unresponsiveness to requests for help understanding the new licensing requirements and authority for such, to being unable to follow the terms set forth in its own city code, to filing warrant applications without notice, and creating an environment of general waste of limited government and private

resources. By setting individual probable cause standards for all types of warrants, law-abiding citizens can remain confident their government respects and protects the liberties articulated in Article I Section 10 of the Minnesota Constitution.

### Conclusion

For the foregoing reasons, amicus curiae Wiebesick Rental respectfully requests this Court reverse the decision by the Court of Appeals to dismiss Appellants' claims and find that Article I Section 10 of the Minnesota Constitution requires individualized probable cause to be articulated prior to a grant of administrative warrants for rental inspections.

Respectfully submitted,

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Dated: 9/26/12

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**CERTIFICATE OF COMPLIANCE WITH RULE 132.01**

I, Nicole L. Concordia, certify that the Brief of *Amicus Curiae* Wiebesick Rental complies with the length limitation and font size requirements of Rule 132.01, subs. 1 and 3 of the Minnesota Rules of Civil Appellate Procedure. I further certify that, in preparation of this brief, I used Microsoft Word Version 2003, and this word processing program has been applied specifically to include all text, including headings, footnotes and quotations in the following word count, excluding only the caption, signature text and certificates of counsel. I further certify that the above-referenced brief contains 2,884 words.

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