

CASE NO. A10-0332

**STATE OF MINNESOTA
IN SUPREME COURT**

Robert McCaughtry, et al.,

Appellants,

vs.

City of Red Wing,

Respondent.

**BRIEF OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES**

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STATEMENT OF LEGAL ISSUE

An ordinance is facially unconstitutional only if there is no set of circumstances under which it could be constitutionally applied. Is an ordinance that establishes a neutral process for routine rental-housing inspections and authorizes city employees to seek an administrative warrant from a judge if consent to an inspection is refused facially unconstitutional under Article I, Section 10, of the Minnesota Constitution because it does not specify the type of probable cause required for a warrant?

STATEMENT OF IDENTITY OF *AMICUS CURIAE*

The League of Minnesota Cities (League) has a voluntary membership of 830 out of 853 Minnesota cities including the city of Red Wing (City).¹ The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management, and advocacy services. The League's mission is to promote excellence in local government through effective advocacy, expert analysis, and trusted guidance for all Minnesota cities.

The League has a public interest in this appeal because it will directly impact cities' ability to protect the health, safety, and welfare of thousands of rental-housing tenants throughout Minnesota. The League also has a public interest in ensuring that the difficult test that a challenger must meet to invalidate a city ordinance under a facial constitutional challenge is properly enforced.

STATEMENT OF CASE AND FACTS

The League concurs with the City's statement of the case and facts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants claim—in the context of rental-housing inspections—that Article I, Section 10, of the Minnesota Constitution provides more protection for privacy rights

¹ The League certifies that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the League made a monetary contribution to its preparation or submission.

than does the “identical” language of the Fourth Amendment to the U.S. Constitution.²

Appellants also claim that the Minnesota Constitution prohibits what the U.S.

Constitution authorizes—the issuance of administrative warrants to conduct routine rental-housing inspections if “reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.”³

Appellants seek to overturn the City’s Rental Dwelling Licensing Code (Code) through a facial constitutional challenge and urge this Court to hold that the Minnesota Constitution can only be interpreted to authorize the issuance of criminal-type search warrants supported by individualized probable cause to believe a violation of law exists—a holding that would result in a blanket prohibition on the use of administrative warrants in Minnesota.

The City’s brief demonstrates why its Code is facially constitutional. The League concurs with the City’s legal arguments and will not repeat them here. Instead, this brief evaluates from a broader municipal point of view four issues that this appeal raises and the public policies at stake. First, it addresses the important governmental interests served by conducting routine rental-housing inspections. Second, it demonstrates that a combination of three factors makes the constitutional analysis of rental-housing inspections unique. Third, it shows that the alternative inspection methods Appellants propose would not achieve the governmental goal of ensuring universal compliance of

² *State v. Harris*, 590 N.W.2d 90, 97 (Minn. 1999) (characterizing as “identical” the language of the two constitutional provisions).

³ *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 535-36 (1967); *Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273, 276-277 (Minn. Ct. App. 1998), *rev. denied* (Minn. Jan. 21, 1999) (treating *Camara* as governing law).

the rental housing selected for inspection. And finally, this brief demonstrates that if the City's Code is facially unconstitutional for failing to specify a probable cause standard, a number of other government regulations will also be vulnerable to facial attacks.

LEGAL ARGUMENT

I. THE USE OF ADMINISTRATIVE WARRANTS TO CONDUCT ROUTINE RENTAL-HOUSING INSPECTIONS PROTECTS PUBLIC HEALTH, SAFETY, AND WELFARE.

This Court has already recognized that Minnesota cities adopt rental-housing standards to protect public health, safety, and welfare.⁴ Likewise, health experts have concluded that there is a significant connection between housing conditions and public health.

Housing conditions can significantly affect public health. Nationwide there are more than 6 million substandard housing units. Residents of these units are at increased risk for childhood lead poisoning, asthma, fire and electrical injuries, falls, rodent bites, exposure to indoor toxicants, and other illnesses and injuries.⁵

Effective enforcement of rental-housing standards protects the public. The enforcement of electrical standards, for example, prevents fires, and the enforcement of a requirement for working smoke detectors saves lives.⁶ In addition, the Legislative Auditor has

⁴ *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 550, 554 (Minn. 1996) (holding that a city's revocation of a rental license for violations of its housing-maintenance code was not an unconstitutional taking and noting that the code was designed "to serve a legitimate public interest" by imposing "minimum standards for the buildings and their operation, in order to protect public health, safety, and welfare").

⁵ Centers for Disease Control and Prevention, Fact Sheet, *Healthy Homes Initiative* (Nov. 2006), <http://www.cdc.gov/nceh/publications/factsheets/HealthyHomesInitiative.pdf> (visited Oct. 26, 2012).

⁶ In April of 2011, a tragic fire in Minneapolis killed six tenants who lived in apartments above a commercial building. Two tenants told the Star Tribune that they never heard the smoke alarms go off the morning of the fire. The apartments were scheduled for city

concluded—after conducting a best-practices audit—that the enforcement of housing codes preserves existing housing which in turn protects neighborhood stability and economic vitality.⁷ And our state Legislature has consistently recognized that local housing codes serve an important governmental purpose.⁸

Despite the importance of the governmental interests at stake, Appellants claim that this Court should interpret the Minnesota Constitution to prohibit cities from seeking administrative warrants to conduct routine rental-housing inspections. Instead, Appellants claim that the Minnesota Constitution can only be interpreted to authorize the issuance of criminal-type search warrants supported by individualized probable cause to believe a violation of law exists regardless of whether a search occurs in a criminal or an administrative context. Appellants and their supporting *amici* rely heavily on this Court’s decisions in *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183 (Minn. 1994) (considering the constitutionality of sobriety checkpoints) and *State v. Larsen*, 650 N.W.2d 144 (Minn. 2002) (considering the constitutionality of a conservation officer’s

inspection in July. Randy Fust and James Eli Shiffer, *Investigating a Deadly Fire*, Star Tribune (updated April 25, 2011), <http://www.startribune.com/investigators/90055707.html?refer=y> (visited Oct. 26, 2012).

⁷ Minnesota Office of the Legislative Auditor, *Preserving Housing: A Best Practices Review*, Report #03-05, p. 45 (April 2003), <http://www.auditor.leg.state.mn.us/ped/pedrep/0305all.pdf> (visited Oct. 26, 2012).

⁸ See, e.g., Minn. Stat. § 504B.001, subd. 14 (imposing a duty on landlords to comply with any applicable “city health, safety, housing, building, fire prevention, or housing-maintenance code”); Minn. Stat. § 504B.161 (codification of a landlord’s covenant of habitability including the covenant to “maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government where the premises are located”); Minn. Stat. § 504B.285, subd. 2 (providing tenants with protection from eviction for reporting a landlord’s “violation of a health, safety, housing, or building code or ordinance”).

warrantless search of an ice-fishing house) to support their call for a dramatic change in Minnesota law. But this reliance is misplaced for two reasons. First, *Ascher* and *Larsen* are not binding precedent because both cases involved significantly different facts in significantly different contexts.⁹ Second, the outcome of this appeal should be different from that in *Ascher* and *Larsen* because a combination of three factors makes the constitutional analysis of rental-housing inspections unique.

II. A combination of three factors makes the constitutional analysis of rental-housing inspections unique.

A. There is no effective way to obtain individualized probable cause to believe that the interior conditions of rental housing violate housing standards without conducting interior inspections.

The constitutional analysis of rental-housing inspections is unique because (absent cooperation from tenants knowledgeable about the intricacies of housing codes) there is no way to obtain individualized probable cause to believe that the interior conditions of rental housing violate housing standards without conducting interior inspections. The U.S. Supreme Court recognized this dilemma in *Camara*.

[T]he public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself.¹⁰

⁹ *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 692-693 (Minn. 2009) (this Court concluded that its prior decision in a case involving a similar issue of a facial challenge to a city ordinance that authorized the ranking of multiple candidates was not binding precedent because it involved significantly different facts).

¹⁰ *Camara*, 387 U.S. at 537.

In contrast to the Catch-22 that occurs in the rental-housing context, consider the different options available to the government in other contexts. For example, even if officers cannot conduct sobriety checkpoints, they can still obtain individualized probable cause of alcohol-impaired driving by observing whether drivers violate traffic laws or engage in erratic driving behavior. Likewise, even if conservation officers cannot conduct warrantless searches of ice-fishing houses, they can still obtain individualized probable cause of violations of fishing regulations by conducting license checks of anglers when they are outside of their ice-fishing houses.

But if this Court holds that the Minnesota Constitution requires administrative warrants to be supported by individualized probable cause, cities will no longer be able to effectively implement programs for routine rental-housing inspections that are designed to achieve universal compliance of the housing selected for inspection. In fact, this appeal demonstrates that there are landlords and tenants that will choose to opt out of routine-inspection programs if they are not mandatory. As a result, these programs will be ineffective because universal compliance cannot be achieved and fewer violations of rental-housing standards will be discovered and remedied.¹¹

B. The operation of rental housing is a business subject to government regulation because of its impact on public health, safety, and welfare.

The constitutional analysis of rental-housing inspections is also unique because the operation of rental housing is a business subject to government regulation and licensing

¹¹ *Id.* at 535-536 (concluding that “[t]here is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures”).

because of its impact on public health, safety, and welfare.¹² The fact that rental housing is a regulated business does not mean that tenants have a diminished right to privacy. It does, however, provide a compelling reason for placing great weight on the governmental interests in conducting routine housing inspections when a balancing test is performed to determine whether such an inspection is a reasonable search under the Minnesota Constitution.¹³

In fact, when the Legislature balanced tenants' privacy rights against landlords' business needs to access rental housing, it concluded that tenants do not have an absolute right to privacy in their rental housing. Instead, the Legislature authorized landlords to access their tenants' rental housing for a number of business reasons including to show a rental unit to a prospective buyer or to an insurance agent and to perform maintenance work.¹⁴ And although it is true that there is a significant difference between a city inspector and a landlord entering a tenant's property, it is also true that city inspectors seek access for a compelling public purpose while landlords seek access to promote their private business interests.

The St. Paul Association of Responsible Landlords argues that routine rental-housing inspections no longer serve a legitimate governmental purpose because current tenants have more resources and rights since *Camara* was decided and because being a

¹² See, e.g., Minn. Stat. ch. 504B; *City of St. Paul v. Dalsin*, 245 Minn. 325, 329-30, 71 N.W.2d 855, 858-59 (1955) (noting that cities have broad authority to license businesses that affect the public health, morals, safety, or comfort); Minn. Stat. § 412.221, subd. 32.

¹³ See Respondent's Brief at 30-31 (discussing this Court's precedent requiring a balancing of public interests with the degree of intrusion on individual rights).

¹⁴ Minn. Stat. § 504B.211.

landlord today is a “noble profession.”¹⁵ But even if these assertions are true, it does not change the fact that there is still a vital need for routine rental-housing inspections. In fact, there are several reasons why routine inspections are even more important today.

First, our state’s aging housing stock makes it vitally important to preserve our existing housing.¹⁶ According to survey data from 2011, just over 60 percent of Minnesota’s housing units are at least 30 years old, an age by which many major building systems need to have been replaced.¹⁷ Second, as our state population continues to grow so too will the number of rental-housing tenants.¹⁸ Third, the growing diversity of our state likely means that there are more tenants who do not speak English as a first language and who would face additional hurdles in identifying and reporting housing-code violations and in accessing tenant resources.¹⁹ Fourth, the historically low rental-vacancy rates may leave many tenants in a take-it-or-leave-it position regarding deficient

¹⁵ St. Paul Association of Responsible Landlords’ brief at 5-8. An individual landlord (Wiebesick Rental) also filed a brief of *amicus curiae*. The Wiebesick brief addresses facts outside the record that are not properly before this Court. In addition, it only presents one perspective regarding the city of Golden Valley’s enforcement of its housing code—a perspective that is not relevant in a facial challenge to the city of Red Wing’s Code.

¹⁶ Minnesota Office of the Legislative Auditor, *supra* note 7 at 4-6 (noting that the need to preserve housing is reflected in several trends: first, Minnesota continues to experience growth in its number of households; second, increases in the number of housing units lag behind increases in the number of households; and third, Minnesota’s housing units are aging and require reinvestments).

¹⁷ U.S. Census Bureau, 2011 American Community Survey, Selected Housing Characteristics, Minnesota, DP04, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_DP04&prodType=table (visited Oct. 26, 2012).

¹⁸ Minnesota’s population increased by approximately 384,446 from 2000 to 2010 according to federal census data.

¹⁹ State Demographic Center, State Population by Race, Minnesota (2010) <http://www.demography.state.mn.us/Census2010/> (visited Oct. 26, 2012).

housing conditions.²⁰ Fifth, our sluggish economy has increased both the number of tenants and the number of first-time landlords who are attempting to raise revenue in hard economic times.²¹ It is likely that these first-time landlords are not familiar with housing codes and are ill prepared to deal with what the landlords' association characterizes as the "complexity of owning and managing rental property."²² And sixth, it is still true today that most tenants simply do not have the time or knowledge to effectively enforce rental-housing standards on their own.²³

It isn't realistic, for example, to expect that an 18-year-old college student who is renting his first apartment will take the time or have the ability to recognize when the mechanical or ventilation systems in his apartment violate a city's housing code. Likewise, it isn't realistic to expect that a tenant whose immigration status is questionable will be willing to report housing-code violations such as rodent infestation or lack of adequate heat without fear for repercussions (whether real or imagined) from her landlord. Indeed, courts have recognized that there are a variety of reasons why tenants

²⁰ Ronald A. Wirtz, *Rental housing market: musical chairs, with fewer chairs*, fedgazette (July 10, 2012) (noting that the overall vacancy rate for the Twin Cities dipped below 3 percent last year), http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4916 (visited Oct. 26, 2012).

²¹ Kim Palmer, *Forced to become landlords*, Star Tribune (Sept. 15, 2011), <http://www.startribune.com/lifestyle/homegarden/129746343.html?refer=y> (visited Oct. 26, 2012).

²² St. Paul Association of Responsible Landlords' brief at p. 1.

²³ In addition, there are also certain groups of tenants that may be particularly vulnerable including tenants with physical or learning disabilities and those with mental-health issues.

do not have the leverage needed to require landlords to address problems with habitability standards on their own.

Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock.²⁴

Our state Legislature has also recognized the inequality of bargaining power between landlords and tenants and has responded by adopting a whole chapter of state statutes that includes many legal protections for tenants and recognizes the vital public purposes served by local housing codes.²⁵

There are undoubtedly good landlords in Minnesota. But there are also undoubtedly landlords (both good and bad) that will quickly understand that there is no such thing as mandatory rental-housing inspections without administrative warrants. Many of these landlords will logically decide that it is not in their financial interest to cooperate with housing inspections because they will have to pay to correct any

²⁴ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970) (citations omitted) (landmark case establishing an implied warranty of habitability in residential leases measured by the standard set out in the Housing Regulations for the District of Columbia); *Fritz v. Warthen*, 298 Minn. 54, 59, 213 N.W.2d 339, 342 (Minn. 1973) (recognizing that “[t]he legislative objective in enacting the implied covenants of habitability is clearly to assure adequate and tenantable housing within the state”).

²⁵ See, e.g., Minn. Stat. § 504B.001, subd. 14 (imposing a duty on landlords to comply with any applicable “city health, safety, housing, building, fire prevention, or housing-maintenance code”); Minn. Stat. § 504B.161 (codification of a landlord’s covenant of habitability including the covenant to “maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government where the premises are located”); Minn. Stat. § 504B.285, subd. 2 (providing tenants with protection from eviction for reporting a landlord’s “violation of a health, safety, housing, or building code or ordinance”).

violations that are discovered. This is especially a concern given the many absentee landlords in our state who already have less of an incentive to ensure that their property is in compliance with housing standards because they do not live on the premises and may not even live in the same city or state where their rental property is located.²⁶ In fact, survey data for the metropolitan area has demonstrated that tenants of rental units that were not owner-occupied reported more housing deficiencies than did tenants of rental units that were owner-occupied.²⁷ And here, the City adopted its Code after performing a housing study that found significant problems with absentee landlords.²⁸

C. Rental-housing inspections are administrative searches that serve a regulatory purpose.

The constitutional analysis of rental-housing inspections is also unique because rental-housing inspections are administrative searches that serve a regulatory purpose and are not targeted searches to uncover evidence of crimes.²⁹ This fact alone makes the constitutional analysis of the many criminal cases that Appellants and its *amici* rely on distinguishable.³⁰

The fact that the *Camara* Court concluded that criminal-type probable cause is not needed for the issuance of a warrant for a rental-housing inspection does not mean that

²⁶ See, e.g., *Dome Realty, Inc. v. City of Paterson*, 416 A.2d 334, 351-352 (N.J. 1980) (noting that landlords who live in their buildings have a greater incentive to maintain them in accord with minimum standards of habitability).

²⁷ Minnesota Office of the Legislative Auditor, *supra* note 7 at p. 9.

²⁸ Appellants' Appendix at APP167

²⁹ *Camara*, 387 U.S. at 537 (noting that rental-housing inspections "are neither personal in nature nor aimed at the discovery of evidence of crime").

³⁰ See Respondent's brief at 34-35 (distinguishing the criminal cases on which Appellants rely).

the *Camara* Court concluded that criminals have more rights than tenants.³¹ Instead, it means that when the *Camara* Court conducted a balancing of interests, it logically recognized that the possibility of incarceration in the criminal context carries greater constitutional implications than does the loss of privacy while a housing-inspection is conducted in an administrative context. In fact, Minnesota law already holds the government to different burdens of proof depending on whether it brings a criminal or civil case against an individual. Likewise, this Court should confirm that Minnesota law holds the government to different standards of probable cause depending on whether it seeks a warrant for a search that will take place for a criminal or for a regulatory purpose.

The ACLU-MN attempts to distract this Court from the regulatory purpose of rental-housing inspections by claiming that the City adopted its Code as a “subterfuge” and that the real municipal objective behind routine rental-housing inspections is to uncover evidence of criminal activity in order to prosecute tenants.³² But this argument is unpersuasive because there is no credible evidence that Minnesota cities conduct routine rental-housing inspections as a subterfuge for discovering criminal activity by tenants.

Minnesota cities do not adopt programs for routine rental-housing inspection cavalierly. These programs require a significant amount of time and resources to implement (as this case demonstrates). For example, cities with routine-inspection programs need to hire qualified inspectors to conduct inspections. In addition, these

³¹ See Respondent’s brief at 33-34.

³² ACLU-MN’s brief at 8-13.

programs address real problems like missing fire extinguishers, faulty electrical wiring, and exposed lead paint—problems that have significant impacts on the health, safety, and welfare of Minnesotans. Furthermore, inspections under these programs are often triggered by the neutral criterion of the passage of time. Here, for example, the City’s Code requires inspections upon issuance of a rental license and upon each license renewal after a five-year period.³³ An inspection that occurs once every five years with advance notice to tenants when a rental license is renewed cannot credibly be characterized as a targeted search to find evidence of criminal activity by a particular tenant.

Appellants also claim that city inspectors have not found enough serious Code violations to demonstrate that there is a legitimate governmental need for routine inspections.³⁴ But the record rebuts this claim and demonstrates that past inspections have discovered numerous, significant safety violations.³⁵ Furthermore, Appellants have not been elected by the citizens of Red Wing to make legislative determinations about what Code violations should be considered serious or how many Code violations are necessary to demonstrate a need for a rental-housing inspection program. In addition, even if a city’s routine inspections had only discovered a small number of violations, the members of a city council could still reasonably conclude that this fact demonstrates that

³³ Appellants’ Appendix at APP96-APP97.

³⁴ Appellants’ brief at 11.

³⁵ See Respondent’s brief at 7; Respondent’s Appendix at RA45-47, RA 51-52; *See also*, Minnesota Office of the Legislative Auditor, *supra* note 7 at 20 (according to a survey conducted by the Legislative Auditor, sixty-five percent of the cities that had rental inspection programs and that answered the survey question indicated that inspectors had issued correction orders for half or more of the units that they had inspected in 2001).

routine inspections are effective. Indeed, if landlords have advance notice that their rental-housing will be inspected, it provides a strong incentive for them to bring their properties into compliance before the inspections occur.

III. The alternative inspection methods Appellants propose would not achieve the governmental goal of ensuring universal compliance of the rental-housing selected for inspection.

Appellants propose several alternative inspection methods including voluntary inspections, inspections upon complaint, and inspection of properties with exterior deterioration.³⁶ But none of these inspection methods would achieve the governmental goal of ensuring universal compliance of the housing selected for inspection because they would not result in mandatory inspections. Again, this appeal demonstrates that there are landlords and tenants that will opt out of routine inspection programs if administrative warrants are not available. Therefore, the different inspection methods Appellants propose can only be characterized as effective alternatives if Appellants are allowed to substitute a legitimate governmental goal of universal compliance with a lesser governmental goal, such as a goal of compliance of a smaller subset of rental housing where landlords and tenants have consented to inspections or where rental housing exhibits exterior deterioration (assuming a judge would determine that exterior deterioration provides individualized probable cause to believe interior violations also exist).

But under current Minnesota law, Appellants are not authorized to substitute a legitimate governmental goal with a lesser government goal or to require a city to use the

³⁶ Appellants' brief at 3.

least burdensome method to accomplish a legitimate government goal.³⁷ Instead, local elected officials have authority to make legislative determinations regarding what government goals are appropriate for their communities and regarding what the best method is to accomplish those goals. In fact, this Court has consistently held that the fact that a less burdensome method might have been chosen to accomplish a governmental objective does not render an ordinance unconstitutional.³⁸ Likewise, this Court has also cautioned that even if a court thinks that the arguments against the policy, expediency, wisdom, and propriety of an ordinance outweigh those in its favor, it must sustain the ordinance's constitutionality if there is any reasonable basis for it.³⁹

IV. If the City's Code is facially unconstitutional for failing to specify a probable cause standard, a number of other government regulations will also be vulnerable to facial attacks.

In order to succeed in a facial challenge, Appellants must establish that there is no set of circumstances under which the challenged ordinance could be constitutionally applied—a challenge that courts have characterized as the “most difficult” to mount successfully.⁴⁰ Appellants cannot meet this difficult test because as Respondent demonstrates there is nothing on the face of its Code that would prevent a judge from requiring individualized probable cause before issuing an administrative warrant—an

³⁷ Because the alternative inspection methods Appellants propose would not achieve universal compliance, they cannot credibly be characterized as less burdensome methods of achieving the governmental goal.

³⁸ *State v. Clarke Plumbing & Heating, Inc.*, 238 Minn. 192, 200, 56 N.W.2d 667, 672-673 (Minn. 1952); *Sverkerson v. City of Minneapolis*, 204 Minn. 388, 391-392, 283 N.W. 555, 557 (Minn. 1939).

³⁹ *Anderson v. City of St. Paul*, 226 Minn. 186, 204, 32 N.W.2d 538, 548 (Minn. 1948).

⁴⁰ *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 688 (Minn. 2009).

application that would satisfy Appellants' proposed interpretation of the Minnesota Constitution.⁴¹

Appellants have attempted in the past to respond to this flaw in their facial challenge by claiming that the Code is facially unconstitutional for failing to recite a probable cause standard that a judge must follow when determining whether to issue a warrant.⁴² But Minnesota law does not require government regulations to specify probable cause standards. And if this Court changes Minnesota law to impose such a requirement, there are many other government regulations that will be vulnerable to facial attacks.

A review of the state criminal code, for example, confirms that criminal statutes do not contain probable cause standards.⁴³ In fact, the criminal search warrant statute itself does not specify a probable cause standard.⁴⁴ In addition, there are a number of other statutes authorizing inspections that do not contain probable cause standards including statutes authorizing fire inspections, inspections under the State Building Code, inspections of nursing homes, and inspections by agents of a board of health.⁴⁵ In addition, a variety of city ordinances authorize inspections without specifying probable cause standards including ordinances authorizing inspections to verify that homes do not contain sump pumps illegally connected to a city's sanitary sewer system, requiring time-

⁴¹ Respondent's brief at 14.

⁴² Appellants' Supplemental Brief at the Court of Appeals at p. 4.

⁴³ Minn. Stat. ch. 609.

⁴⁴ Minn. Stat. § 626.07.

⁴⁵ Minn. Stat. § 299F.08; Minn. R. 1300.0110 Subp. 7; Minn. Stat. § 144A.10; Minn. Stat. § 145A.04.

of-sale inspections of homes, and requiring inspections to verify that remodeling work satisfies housing and building code requirements.

Statutes and ordinances do not specify probable cause standards because probable cause determinations are an independent function of the judge deciding whether to issue a warrant.⁴⁶ The purpose of the warrant requirement is to provide an independent judicial officer with discretion to conduct an independent assessment of the evidence in order to protect citizens from unreasonable searches.⁴⁷ In short, it would be inconsistent with this Court's precedent and it would be bad public policy to require ordinances that authorize administrative warrants to conduct routine rental-housing inspections to contain standards regulating a judge's probable cause determination when deciding whether to issue a warrant.⁴⁸

CONCLUSION

Minnesota cities have a public interest in preserving their ability to protect the health, safety, and welfare of their tenant citizens by conducting mandatory routine rental-housing inspections. Minnesota cities also have a public interest in ensuring that the difficult test a challenger must meet to invalidate a city ordinance under a facial constitutional challenge is properly enforced.

⁴⁶ *State v. Kahn*, 555 N.W.2d 15, 17 (Minn. Ct. App. 1996).

⁴⁷ *State v. Nolting*, 312 Minn. 449, 452, 254 N.W.2d 340, 343 (Minn. 1977).

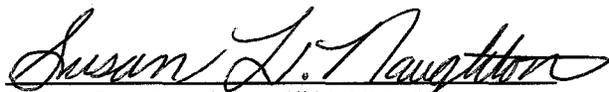
⁴⁸ If this Court chooses to change Minnesota law and require statutes and ordinances to contain standards governing probable cause and the issuance of warrants, the League respectfully requests this Court to provide guidance regarding what specific standards are required in the context of rental-housing inspections.

A combination of three factors makes the constitutional analysis of rental-housing inspections unique: first, there is no effective way to obtain individualized probable cause to believe the interior conditions of rental housing violate housing standards without conducting interior inspections; second, the operation of rental housing is a business subject to government regulation because of its impact on public health, safety, and welfare; and third, rental-housing inspections are administrative searches that serve a regulatory purpose. The alternative inspection methods Appellants propose would not achieve the governmental goal of ensuring universal compliance of the housing selected for inspection because none of them would result in mandatory inspections. And finally, if the City's Code is facially unconstitutional for failing to specify a probable cause standard, a number of other government regulations will be vulnerable to facial attacks.

For all of these reasons, the League respectfully requests that this Court hold that the City's Code is constitutional on its face under the Minnesota Constitution and confirm that the Minnesota Constitution authorizes the issuance of administrative warrants if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.

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