

Trial Court Case No. 25-cv-08-1104 (Consolidated)
Appellate Court Case No. A10-0332

**State of Minnesota
In Supreme Court**

Robert McCaughtry, et al.,

Petitioners,

vs.

City of Red Wing,

Respondent.

BRIEF OF RESPONDENT CITY OF RED WING

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Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. Crim. L. & Criminology 933 (2010)..... 28

STATEMENT OF LEGAL ISSUE

Is the City of Red Wing’s rental-housing inspection ordinance facially unconstitutional under Article I, Section 10, of the Minnesota Constitution because its terms do not require a showing of particularized (or criminal-type) probable cause before a judge may issue a warrant to allow an administrative inspection?

In a published opinion, the Minnesota Court of Appeals held that the City of Red Wing’s ordinance is not facially unconstitutional under the Minnesota Constitution.

Apposite Authority:

U.S. Const. amend. IV.

Minn. Const. art. I, § 10.

Camara v. Municipal Court, 387 U.S. 523 (1967).

Kahn v. Griffin, 701 N.W.2d 815 (Minn. 2005).

STATEMENT OF THE CASE

Appellants are several landlords and two tenants who brought a challenge to the Rental Dwelling Licensing Code (“RDLC”) of respondent City of Red Wing (“the City”). The RDLC requires either consent or a warrant to conduct an administrative inspection. A98–99¹ (RDLC § 4.31, subds. 1(3)(h)–(i)). Appellants asked the district court to declare that the constitutional prohibition of unreasonable searches and seizures in Article I, Section 10, of the Minnesota Constitution requires criminal-type individualized probable cause before a court-authorized administrative rental-housing inspection may occur.

The district court granted the City’s summary-judgment motion, holding that Appellants lacked standing. The district court analyzed (but did not decide) the merits of

¹ When used as citations in this brief, “A” refers to Appellants’ appendix, “APB” refers to Appellants’ brief, and “RA” refers to the City’s appendix.

Appellants' claim, which it observed sought to "have this Court extend the protections guaranteed by Art. I, Sec. 10 of the Minnesota Constitution *further than any Minnesota Court has done to date.*" A72 (emphasis added). Noting the conflict between Appellants' position and the United States Supreme Court's holding in *Camara v. Municipal Court*, 387 U.S. 523 (1967), the district court declined to hold that Article I, Section 10, of the Minnesota Constitution provides greater protections than its identical counterpart in the United States Constitution (i.e., the Fourth Amendment). A59, A72. Because the Minnesota Court of Appeals affirmed the district court's standing determination, it did not consider the merits of Appellants' challenge. A41–42.

On appeal to this Court, Appellants argued that they had standing. A25. This Court agreed, holding that "appellants are presenting a facial challenge to the constitutionality of the ordinance," which "presents a purely legal question" that could be resolved immediately. A31. This Court reversed and remanded the case to the court of appeals to consider the merits of Appellants' facial challenge. A34.

On remand, the court of appeals again affirmed the district court's entry of summary judgment. It held that Appellants "have not established that the RDLC is unconstitutional on its face under the Minnesota Constitution on the ground that it permits the issuance of administrative search warrants by a judicial officer, without an individualized showing of suspicion that particular code violations exist in the rental dwelling to be inspected." A14.

STATEMENT OF THE FACTS

I. THE RENTAL DWELLING LICENSE CODE

The Rental Dwelling Licensing Code (“RDLC”) requires landlords to obtain operating licenses. A96 (subd. 1(1)). To do so, their rental units first must be inspected by the City for compliance with the Housing Maintenance Code (“HMC”). A97–100 (subd. 1(3)).² The City must seek owner and tenant consent for such inspections. A98 (subd. 1(3)(h)). If the City cannot secure consent, it must seek and obtain an administrative warrant from a court. A99 (subd. 1(3)(i)). A warrant is required before the City may inspect a non-consenting tenant’s unit or the common areas of a non-consenting landlord’s property. *Id.*

The RDLC imposes significant limitations on the scope of inspections. A97–100 (subd. 1(3)). The RDLC specifically limits the scope of any inspection to what is necessary to determine compliance with the HMC. A99 (subd. 1(3)(j)). It limits the hours when an inspection can occur and gives the occupant rights regarding scheduling, including the option to be present when the inspection occurs. A99 (subd. 1(3)(k)). The RDLC further limits the City’s authority when conducting inspections by:

² Although Appellants have successfully prevented the City from inspecting their units, that has not forced them to stop renting those units. Soon after the adoption of the RDLC, landlords subject to it obtained temporary permits that were available without the need for an inspection. A96. An amendment to the RDLC extended the duration of the temporary permits. Moreover, in July 2009, after the City’s first two warrant applications denied and its third application was pending, the parties stipulated that, “[i]f Defendant is unable to obtain a warrant to search the properties of Landlord-plaintiffs before the expiration of the temporary permits, Defendant will not impose sanctions upon the Landlord-plaintiffs or require them to stop renting their properties.” RA196-98. Because the Tenant-Appellants have leased from Landlord-Appellants, the stipulation benefits them, as well.

- Prohibiting the use of photographs and video recordings inside the building, absent court permission or consent of the tenant (inside the unit) or landlord (common areas and unoccupied units);
- Prohibiting inspectors from opening containers, drawers, or medicine cabinets, absent consent of the tenant (inside the unit) or the landlord (common areas and unoccupied units); and
- Authorizing inspectors to open cabinets (other than medicine cabinets) or closets only when doing so is reasonably necessary to inspect for the existence of one or more conditions that violates the HMC, or with consent of the tenant (inside the unit) or the landlord (common areas and unoccupied units).

A99–100 (subd. 1(3)(l, m, and n)).

The RDLC also places important restrictions on what the City can do with information it gathers during inspections by:

- Limiting the information that is recorded and retained by the City;
- Prohibiting the City from uploading to a GIS system any data regarding the results of inspections; and
- Prohibiting the City from sharing with law enforcement officials or agencies information observed during inspections regarding the condition of the units or its occupants (or enabling its discovery), subject to exceptions that permit—*but do not require*—the City to so report if disclosure is (1) required by law; (2) necessary to abate a methamphetamine lab or the mistreatment of minors, vulnerable adults, or animals; or (3) made to enable a law-enforcement officer to accompany the inspector where the property owner has made a threat of bodily harm, causing the inspector to be concerned for his or her welfare.³

³ The argument of Amicus Curiae American Civil Liberties Union of Minnesota (“ACLU”) that this provision does not preclude inspectors from reporting unspecified tenant behaviors because such activities may not be a “condition of the unit” or a “condition of the occupant” rests on a misreading of the ordinance. *See* ACLU Br. 11. The ordinance precludes the City from sharing information regarding (1) the condition of the unit, or (2) its occupants. A100 (subd. 1(3)(q)). The ACLU’s example—i.e., the presence of marijuana—would fall within these categories, as it is information regarding the occupant’s possession of marijuana within his or her unit.

A99-100 (subd. 1(3)(o, p, and q)).

In addition to the limitations set forth in the RDLC, the RDLC also expressly permits a court to condition any warrant it authorizes on any additional limitations the court chooses to write into the warrant. A99 (subd. 1(3)(i)).

The City and the district court treat the warrant-application process as an adversarial civil proceeding. The City serves notices of the dates and times of court hearings on such requests far enough in advance to give abundant opportunities to be heard, including at least the same amount of time to respond as is allowed for summary-judgment motions. *See Stewart*, 554 F. Supp. 2d at 927; A47–48, A52; *see also* RA24. Each time, the City obtained a hearing date from the district court, notified the tenant or landlord or their counsel, and served them with the applications at least 28 days in advance of the hearing date. RA27, RA30, RA32, RA37, RA39.

II. STEPS LEADING TO THE ENACTMENT OF THE RENTAL DWELLING LICENSING CODE AND HOUSING MAINTENANCE CODE

The City of Red Wing, founded over 150 years ago, is one of Minnesota’s oldest cities.⁴ In 2003, the City received an update to the study of housing needs and conditions it had commissioned in 1997. A45; RA1. The update determined that much of the City’s rental housing was aging and deteriorating. A45–46. It noted that 30% of all occupied rental housing units had been built before 1940, and 46% had been built before 1960. A166. This finding was also consistent with City officials’ experiences. RA2–4

⁴ *See, e.g.*, David A. Lanegran, *Minnesota on the Map* 84–85 (2008) (discussing the history of Red Wing and characterizing it as “probably the oldest continuously inhabited place in Minnesota”). *See generally* Jean Dodsall & Jo Erickson, *Red Wing, Minnesota, 1857-2007: 150 Years* (2006).

(testifying that the City gathered information regarding code violations from inspections in other contexts, such as fire-marshall inspections and inspections by Red Wing Housing & Redevelopment, which requires inspections prior to participation in a rental-assistance program). Because the City had never had an administrative inspection program before, many of these aging properties had never been inspected. RA7.

Based on these findings, the updated study recommended that the City establish a rental-housing inspection program to ensure that all rental units are in compliance with a revised HMC. A167 (“The need for a Rental Inspection Program in Red Wing has been identified for a variety of reasons including health and safety issues, age of the housing stock, older converted buildings, lack of maintenance of rental properties, neighborhood stabilization, absentee landlords, violations of codes and the success other cities have had implementing other rental inspection programs.”).

The City adopted the recommendation and appointed a committee to draft a proposed ordinance. RA11–12. But before it enacted the ordinance, the City received and considered feedback from landlords. *Id.*; RA16; *see also Stewart v. City of Red Wing*, 554 F. Supp. 2d 924, 926 (D. Minn. 2008). After implementing some of this feedback, the City adopted the RDLC and revised the HMC on February 28, 2005. A46. The revised HMC sets forth the RDLC’s purpose as follows:

[T]o protect, preserve, and promote the public health, safety, and the general welfare of the people of the City, to prevent housing conditions that adversely affect or are likely to adversely affect the life, safety, general welfare, and health, including the physical, mental, and social well-being of persons occupying dwellings within the City, to provide minimum standards for basic equipment and facilities for light, ventilation, and thermal conditions, for safety from fire, for the use and location and amount of space for human occupancy, and for an adequate level of maintenance; to preserve the value of land and buildings throughout the City; and to provide for the administration and enforcement thereof.

RA19–20; *see also* A82.

III. EARLY BENEFITS OF THE INSPECTION PROCESS

Unlike Appellants, many owners and tenants have consented to the City's inspections. RA44. During these inspections, the City has found numerous significant safety violations of the HMC, such as water heaters and furnaces venting carbon monoxide into basements (RA45–46, RA50); fire-safety hazards, including the lack or insufficiency of operable fire alarms (RA45); electrical hazards, including the placement of an electrical service panel within reach of a bathtub and toilet stool (RA47, RA51); and security hazards, such as external doors or windows without working locks (RA47, RA52). These issues were uncovered as part of the routine inspection program, not as a result of tenant complaints. RA48. Many of these violations are kinds that could not have been observed from the exterior of the rental unit. *Id.*

IV. THE CITY'S FIRST WARRANT APPLICATION

On February 28, 2006, the City sent letters to several rental property owners, including Appellants, requesting to schedule inspections. RA27. One Appellant initially scheduled an inspection (and later cancelled it), but no other Appellant responded to the

letter. RA53–54. In response to two follow-up letters, four Appellants responded with objections, and advised the City that it would need to obtain a warrant. RA27.

On November 1, 2006, the City filed in state district court (and later amended) an application for warrants to inspect several rental properties, including Appellants' properties.⁵ A47. The Landlord-Appellants were served with the application and challenged it. RA56. The district court denied the application on non-constitutional grounds, finding that the RDLC was written so as to authorize inspections only when a license application was submitted or when the City has reason to believe that a code violation exists. RA62–65. The Court concluded that neither circumstance existed here. *Id.*

V. THE CITY'S FIRST AMENDMENTS TO THE RDLC

On October 8, 2007, the City Council adopted amendments to the RDLC and the HMC. Those amendments addressed the issue raised by the district court when denying the first warrant application, and modified or removed controversial language in the ordinance in an attempt to resolve issues raised in the present litigation. RA66–85. The City's amendments to the RDLC further limited the City's authority when conducting inspections. *Id.* For example, these amendments made it clear that the purpose and scope of the inspections were limited to determining whether the units conformed to the HMC. *Id.*; see also A97–99 (subds. 1(3)(a)–(b), (e), (j)).

⁵ The City also sought consent from the *tenants* of those properties. RA28.

VI. THE CITY'S SECOND WARRANT APPLICATION, ITS 2008 AMENDMENTS TO THE RDLC, AND ITS APPLICATION OF THE AMENDED RDLC

Following these amendments, the City again attempted to schedule inspections with owners of uninspected rental properties. RA7. When these attempts failed, the City filed a second application for an administrative search warrant. RA7–8. The City provided Appellants with notice of this application and an opportunity to challenge it, which Appellants did. RA32, RA37. The district court denied the second application based entirely on reasons related to protecting “the privacy of citizens subject to inspection.” RA93–95.

In response to the reasons stated for the district court’s denial of the second warrant application and the privacy concerns expressed by landlords and tenants, the City Council again amended the RDLC. It adopted additional standards to limit the scope of inspections and restrict the collection, use, and dissemination of private information. RA22, RA29; A99–100.⁶

VII. THE CITY'S THIRD WARRANT APPLICATION

On March 25, 2009, the City once again wrote to the owners of uninspected rental properties requesting consent and advising them that failure to respond would be interpreted as non-consent. RA9, RA96–97. No Appellants consented. RA29, RA98–104. The City thus filed a third administrative-warrant application. A52. Once again, the City

⁶ In response to a supreme court decision regarding state building code preemption (*City of Morris v. Sax Investments*, 749 N.W.2d. 1 (Minn. 2008)), the City also modified any HMC standards that could be construed to conflict with the building code. RA22–23.

provided those named in the application with notice more than six weeks before the hearing, and an opportunity to oppose the application. RA39–41.

The district court denied the third warrant application, concluding that its concerns regarding privacy and the discretion of inspectors were not adequately addressed by the amended RCLC. A75-77. Specifically, the Court denied the application because the amended RDLC (1) does not prohibit the City from sharing information with former members of the Red Wing Police Department, any law-enforcement agency of another jurisdiction, or non-law-enforcement agencies; and (2) “grants inspectors too much discretion in deciding whether or not to search cabinets and closets.” A75–77. The district court made it clear that it was applying *Camara* when denying the warrant application. A77 (“Thus, *Camara*-type probable cause has not been established.”)

LEGAL ARGUMENT

The only issue that is properly before this Court is whether the RDLC is facially unconstitutional under Article I, Section 10, of the Minnesota Constitution. Appellants contend that the RDLC is unconstitutional because it does not require a showing of particularized (or criminal-type) probable cause before a judge may issue a warrant to allow an inspection. Their contention, if adopted by this Court, would put Minnesota at odds with United States Supreme Court precedent interpreting the identical federal counterpart to Article I, Section 10, of the Minnesota Constitution—i.e., the Fourth Amendment to the United States Constitution. Minnesota would then become the only state in the country to require criminal-type probable cause for routine housing licensing inspections.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the United States Supreme Court carefully balanced the weighty public and private interests implicated by administrative inspections, and adopted a rule of constitutional law that has stood the test of time. Overruling its earlier holding in *Frank v. Maryland*, 359 U.S. 360 (1959) permitting warrantless administrative searches, the Supreme Court held that a municipality must obtain a warrant from a court to inspect a dwelling for housing-code violations, but may obtain the warrant without making a showing of individualized suspicion of such a violation. 387 U.S. at 528. The Supreme Court held that the probable-cause requirement of the Fourth Amendment is satisfied if the municipality has “reasonable legislative or administrative standards for conducting an area inspection.” *Id.* at 538. It further held that such standards, “which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e.g.*, a multifamily apartment house), or the condition of the entire area, but *they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.*” *Id.* (emphasis added).

The *Camara* Court cited several factors to support its conclusion that area-wide code-enforcement inspections are reasonable under the Fourth Amendment, including that (1) such inspection programs have a “long history of judicial and public acceptance”; (2) “the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results”; and (3) inspections, “which are neither personal in nature nor aimed at the discovery of a crime,” are a relatively limited invasion of an individual’s privacy. *Id.* at 537.

Now, forty-five years later, Appellants ask this Court to reject *Camara*, and to instead interpret the Minnesota Constitution to require housing licensing ordinances to recite a requirement that judges demand a showing of individualized probable cause before permitting any inspections. But *Camara* did not retrench on Bill of Rights issues, and its decision adequately protects the rights and liberties of Minnesota citizens. Appellants' request that this Court disregard *Camara* and adopt a standard that requires individualized criminal-type probable cause would render it extremely difficult—if not impossible—to effectively regulate the conditions of rental housing. For these reasons, there is no principled basis for this Court to construe Article I, Section 10, of the Minnesota Constitution differently than its federal counterpart.

I. APPELLANTS' FACIAL ATTACK FAILS BECAUSE APPELLANTS HAVE NOT SHOWN THAT THE ORDINANCE IS INCAPABLE OF BEING ENFORCED IN A CONSTITUTIONAL FASHION.

As this Court has previously acknowledged, Appellants present a facial challenge to the constitutionality of the RDLC. See *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 339 (Minn. 2011). As such, the only question properly before this Court is whether the ordinance is unconstitutional on its face because it does not recite an individualized probable-cause requirement for administrative-inspection warrants.

A city ordinance is presumed constitutional, and Appellants have the burden to prove otherwise. See *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 688 (Minn. 2009). This is a heavy burden. In its prior decision, this Court recognized that “a facial challenge asserts that a law ‘always operates unconstitutionally.’” *McCaughtry*, 808 N.W.2d at 339 (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 United States Supreme Court in *United States v. Salerno*—i.e., 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, 745 (1987); *see also* *Minn. Voters Alliance*, 766 N.W.2d at 688 (citing *Salerno* and other case law for the proposition that a successful facial challenge to a municipal law requires a showing that the law is unconstitutional in all of its applications); *Soofoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) (stating that a facial challenge to the constitutionality of a statute requires a showing that no set of circumstances exists under which the statute would be valid).

Last year, the Eighth Circuit explained why the standard for proving that a law is facially unconstitutional is so demanding:

“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).

TCF Nat’l Bank v. Bernanke, 643 F.3d 1158, 1163 (8th Cir. 2011) (emphasis added).

Appellants, in their brief to this Court, entirely ignore their burden to establish that the RDLC is incapable of being enforced in a constitutional manner. Indeed, Appellants cannot meet this high burden because the RDLC does not preclude a judge’s ability to

apply even the heightened standard Appellants seek. Specifically, the RDLC does not define what type of probable cause a court must require, or otherwise tie the judge's hands in determining whether to grant the application:

If the City is unsuccessful in securing consent for an inspection pursuant to this section, the City shall seek permission, from a judicial officer through an administrative warrant, for its enforcement officer or his or her agents to conduct an inspection. *Nothing in this Code shall limit or constrain the authority of the judicial officer to condition or limit the scope of the administrative warrant.*

A99 (subd. 1(3)(i)) (emphasis added).

Indeed, a determination of whether probable cause exists is an independent, fact-specific assessment that is not readily or usefully captured in the text of an ordinance or statute. *See Illinois v. Gates*, 462 U.S. 213, 232 (1983) (recognizing that “probable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules”); *State v. Bagley*, 286 Minn. 180, 191, 175 N.W.2d 448, 455 (1970) (“There are no set rules or established formulae for determining probable cause Each case must be determined upon its own facts.”); *see also State v. Nolting*, 312 Minn. 449, 452, 254 N.W.2d 340, 343 (1977) (stating that a judicial determination of probable cause “require[s] an independent assessment of the inferences to be drawn from the available evidence”). It is unnecessary—and likely impossible—for an ordinance to recite a standard for probable cause that will be correct in every possible situation that warrant applications may present.

Rather than showing that the ordinance is incapable of being applied in a constitutional way, Appellants and their amici are, in effect, asking this Court to define

how the ordinance *might* be applied in an unconstitutional fashion. *See, e.g.*, APB 36–37 (arguing that RDLC provision authorizing the reporting of certain crimes “amounts to a rule permitting plain-view searches of thousands of homes for evidence of criminal activity”); Amicus Curie St. Paul Ass’n of Responsible Landlords (“SPARL”) Br. 17 (hypothesizing that “a tenant or landlord will overestimate the authority of the inspector and feel obligated to consent to searches of otherwise non-searchable areas” or that “inspectors will over-reach and attempt to exert more authority than they possess”). Their approach would require this Court to turn the test of a facial challenge on its head. Such efforts ignore not just the standard for a facial challenge, but also the reasoning behind it. They would require the Court to “anticipate a question of constitutional law in advance of the necessity of deciding it,” and to “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

The facial nature of Appellants’ remaining claim was their ticket to standing. A31. But that ticket does not authorize them to bypass the appropriately demanding test that this Court, like the United States Supreme Court and the Eighth Circuit, uses to decide the merits of facial challenges. The outcome of that test, when applied in this case, was correctly stated by the court of appeals below: because the RDLC is capable of being applied in a constitutional fashion, Appellants’ challenge must fail. A5, A14.

II. IN THE CONTEXT OF ADMINISTRATIVE INSPECTIONS OF RENTAL HOUSING, THE MINNESOTA CONSTITUTION PROVIDES PROTECTIONS IDENTICAL TO THOSE PROVIDED BY THE UNITED STATES CONSTITUTION.

This Court adheres to the general principle of favoring uniformity with the federal constitution when construing the Minnesota Constitution. *Kahn v. Griffin*, 701 N.W.2d 815, 824 (Minn. 2005). The framework that this Court has adopted for considering requests to interpret the Minnesota Constitution more broadly than its federal counterpart is intended to ensure that this Court will decline such requests where it does not have a “clear and strong conviction” that there is a “principled basis” to do so. *Id.* at 828; *see also State v. Carter*, 697 N.W.2d 199, 210 (Minn. 2005) (stating that this Court will not cavalierly construe the Minnesota Constitution more expansively than the federal constitution); *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004) (same); *State v. Wiegand*, 645 N.W.2d 125, 132 (Minn. 2002) (same); *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) (same); *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (same); *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987) (same); *State v. Fuller*, 374 N.W.2d 722, 726–27 (Minn. 1985) (same).

This Court takes an especially restrained approach in determining whether to diverge from uniform interpretation where, as here, the constitutional provisions at issue are identical or substantially similar.⁷ *Kahn*, 701 N.W.2d at 828. This Court will not depart from federal precedent unless it concludes (1) that the United States Supreme

⁷ Although there are typographical differences between Article I, Section 10, and the Fourth Amendment, this Court has concluded that these provisions are “textually identical.” *Wiegand*, 645 N.W.2d at 132.

Court has made a “sharp or radical departure” from its previous decisions or approach to the law *or* federal precedent does not adequately protect the basic rights and liberties of Minnesota citizens; *and* (2) there is no persuasive reason to follow the United States Supreme Court. *Id.*; *see also* Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota’s Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 Alb. L. Rev. 865, 868, 912–16 (2007) (explaining the *Kahn* framework).

A. *Camara* Does Not Represent a Sharp or Radical Departure from United States Supreme Court Precedent Because It Provided Greater Protections for Individual Rights.

This Court may consider departing from federal precedent if the United States Supreme Court “has made a sharp or radical departure from its previous decisions or approach to the law.” *Kahn*, 701 N.W.2d at 828.⁸ As Appellants acknowledge (APB 39), this exception to the rule of uniform interpretation provides Minnesota courts with a way to avoid becoming bound by a new United States Supreme Court decision that provides *less* protection than the Supreme Court’s earlier decisions. *See Askerooth*, 681 N.W.2d at 362 (concluding that United States Supreme Court’s “apparent removal of any consideration of a balancing of individual interests with governmental interests” was a

⁸ Appellants misquote *Kahn* for the proposition that “Minnesota courts look to the state constitution to protect individual liberty when the governing U.S. Supreme Court authority represents a ‘radical’ or ‘sharp’ departure from precedent or a ‘*general approach to the law*’” APB 37 (emphasis added). The quoted phrase “general approach to the law” does not appear anywhere in *Kahn*. To the contrary, *Kahn* refers exclusively to the previous decisions of the United States Supreme Court. 701 N.W.2d at 828. Thus, Appellants’ reliance on a 1949 opinion of two of the three judges in a single U.S. Court of Appeals, *District of Columbia v. Little*, 178 F.2d 13, 16-17 (D.C. Cir. 1940), *aff’d on other grounds*, 339 U.S. 1 (1950), is misplaced.

sharp departure from its precedent that justified independent interpretation of the Minnesota Constitution); *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 185–86 (Minn. 1994) (concluding that Supreme Court’s decision not to adhere to the traditional requirement of individualized suspicion in context of traffic stops was a radical departure); *E.D.J.*, 502 N.W.2d at 783 (concluding that Supreme Court’s alteration of its traditional test for determining when a seizure occurs was a departure from precedent warranting independent constitutional interpretation); *see also* *Anderson & Oseid, supra*, at 921 (stating that the question of whether the United States Supreme Court has made a sharp and radical departure from its precedent on individual rights “suggests that the Minnesota Supreme Court is not willing to develop completely new state law in the individual rights area, but instead will look *only to see if the Supreme Court has retrenched on previously recognized rights*” (emphasis added)).

There is no “sharp departure” is at issue here, as *Camara* does not constitute a retrenchment on individual rights. Eight years before the *Camara* decision, the Supreme Court in *Frank v. Maryland* considered the constitutionality of administrative inspections and held that no warrants were necessary. 359 U.S. 360, 371–73 (1959). There, the Supreme Court emphasized this country’s “long history” of warrantless inspections of dwellings and the “indispensable importance” of this practice to the maintenance of community health. *Id.* The Court concluded that no warrant was necessary for a city to conduct an administrative inspection. *Id.*

Eight years later, the Supreme Court’s decision in *Camara* overruled *Frank* to the extent that the latter sanctioned *warrantless* administrative inspections. *Camara*, 387 U.S.

at 528. The Supreme Court held that the Fourth Amendment requires greater protections, in the form of either consent or an administrative warrant, to conduct a code-enforcement inspection. *Id.* at 538–39. Thus, to the extent that *Camara* was a departure from Supreme Court precedent, it was a departure *in favor* of broader protections of individual rights.

1. Appellants’ historical arguments rest on a distorted and misleading use of an early search-and-seizure ruling.

In an attempt to obscure the nature of the enhanced protections provided by *Camara*, Appellants argue that *Frank* was a departure from even earlier Supreme Court precedent, and that *Camara* partially corrected *Frank* but fell short of these earlier protections. APB 47–53. This argument rests on a distorted and misleading use of one of the U.S. Supreme Court’s early search-and-seizure rulings (and of its progeny).

a. The Supreme Court’s decision in *Boyd v. United States* addressed seizures “to establish a criminal charge,” not administrative inspections.

In 1886, the Supreme Court decided *Boyd v. United States*, a civil seizure-and-forfeiture action involving imported merchandise for which the owners had not paid the required duty. 116 U.S. 616 (1886), *abrogation on other grounds recognized by Fisher v. United States*, 425 U.S. 391, 407–08 (1976). The Supreme Court held that the statute requiring the owners to produce the invoice for the merchandise violated the Fourth and Fifth Amendments. *Id.* at 617–18, 638.

According to Appellants, *Boyd* illustrates that the Fourth Amendment categorically prohibited warrantless regulatory searches before and until the Court radically departed from this rule in *Frank*. APB 49. But this argument completely ignores

that the *Boyd* Court limited the scope of its holding to seizures in the context of criminal or forfeiture cases. *See, e.g., Boyd*, 116 U.S. at 622–23 (discussing recency of government authorization for “the search and seizure of a man’s private papers, or the compulsory production of them, *for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property*” (emphasis added)); *id.* at 630 (“[A]ny forcible and compulsory extortion of a man’s own testimony or of his private papers *to be used as evidence to convict him of crime or to forfeit his goods*, is within the condemnation of that judgment.” (emphasis added)); *id.* at 631–32 (“And any compulsory discovery by extorting the party’s oath, or compelling the production of his private books and papers, *to convict him of crime, or to forfeit his property*, is contrary to the principles of a free government.” (emphasis added)).

Appellants’ argument also ignores the *Boyd* Court’s repeated emphasis of the quasi-criminal nature of the forfeiture action. The Court explained its use of the Fourth (and Fifth) Amendments in that forfeiture proceeding by explaining that “proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offenses committed by him, though they may be civil in form, *are in their nature criminal.*” *Id.* at 634 (emphasis added). Noting that the “ground of forfeiture” consisted of certain acts of fraud that were “made criminal by the statute,” the *Boyd* Court concluded that “[t]he information, though technically a civil proceeding, is in substance and effect a criminal one.” *Id.*

In later decisions, the Supreme Court has described the holding of *Boyd* as one “limited, in view of the facts, to criminal proceedings and proceedings for forfeiture of

property.” *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 206 n.36 (1946) (observing, in addition, that in *Boyd*, “[t]he vitiating element lay in the incriminating character of the unusual provision for enforcement” and that “[t]he statute provided that failure to produce might be taken as a confession of whatever might be alleged in the motion for production”); accord *Hale v. Henkel*, 201 U.S. 43, 71 (1906) (“We held [in *Boyd*] ‘that a compulsory production of a man’s private papers *to establish a criminal charge against him, or to forfeit his property*, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be,’ and that the order in question was an unreasonable search and seizure within that Amendment.” (emphasis added) (quoting *Boyd*, 116 U.S. at 622)).

This Court has also recognized that the holding in *Boyd* “‘was that the compulsory production of a man’s private papers *to establish a criminal charge against him, or to forfeit his property*, was in effect an unreasonable search and seizure and compelling him to be a witness against himself.’” *State v. Sauer*, 217 Minn. 591, 593, 15 N.W.2d 17, 19 (1944) (emphasis added) (quoting *State v. Stoffels*, 89 Minn. 205, 210, 94 N.W. 675, 677 (1903)); see also *State v. Drew*, 110 Minn. 247, 251, 124 N.W. 1091, 1093 (1910) (stating that the *Boyd* Court “took the position that . . . the compulsory production of account books and papers *for the purpose of being used against a person in a criminal case* is equivalent to compelling him to be a witness against himself, within the prohibition of the Constitution” (emphasis added)); *State v. Strait*, 94 Minn. 384, 388, 102 N.W. 913, 913–14 (1905) (“It may be well to state that the court say in their opinion in this case [*Boyd*] that by the proceeding under consideration the court was attempting to

extort from the party his private papers and books, *and to make him liable for a penalty or forfeiture of his property.*” (emphasis added)).

Appellants attempt to obscure this distinction by emphasizing that *Boyd* was a civil forfeiture proceeding. But this Court has also recognized, and embraced, the *Boyd* Court’s acknowledgment “that a proceeding to enforce a penalty or forfeiture because of the violation of a statute is a criminal action in the constitutional sense.” *Hawley v. Wallace*, 137 Minn. 183, 189, 163 N.W. 127, 130 (1917).

Disregarding these decisions, Appellants rely heavily upon *State v. Pluth*, 157 Minn. 145, 195 N.W. 789 (1923). In *Pluth*, this Court simply decided that the state was permitted to keep liquor taken from a criminal defendant and to use it as evidence against him. 157 Minn. at 156, 195 N.W.2d at 793–94 (“The state having obtained possession of it had the right to retain it as property forfeited to the state, and could lawfully use it as evidence.”). Relying solely upon dicta, Appellants cite *Pluth* in support of their overly broad reading of *Boyd*. APB 41, 43–44. But in *Pluth*, this Court recognized that *Boyd* and its progeny were limited to the criminal context. *Pluth*, 157 Minn. at 150, 195 N.W.2d at 791 (“The Supreme Court of the United States has decided repeatedly that the Fourth Amendment to the federal Constitution forbids the officers or agents of the United States from searching the premises, papers, or effects of *an accused person* without a warrant, and that this amendment, taken in connection with the Fifth, forbids the use, in the courts of the United States, against a person accused of crime, of evidence obtained by such officers or agents in an unlawful search of his premises, papers, or property.” (emphasis added)).

Moreover, this Court has also observed that “the sweeping pronouncements of *Boyd v. United States*” have been curtailed by later rulings, including at least one constituting a “significant departure” from those pronouncements. *Minn. State Bar Ass’n v. Divorce Assistance Ass’n, Inc.*, 311 Minn. 276, 282 n.2, 248 N.W.2d 733, 739 n.2 (1976). Appellants selectively use several such “sweeping pronouncements” of *Boyd*. Making matters worse, they have disregarded the limitations on those pronouncements that arise from the facts of *Boyd*, even though those limitations have been repeatedly recognized by the Supreme Court and this Court.

2. Appellants’ historical arguments also rest on a faulty analogy between the administrative warrants authorized by *Camara* and 18th century “general warrants.”

Appellants also equate a warrant issued under *Camara* with the kind of “general warrants” (also called writs of assistance) used by the British in the mid-18th century. APB 50–51. That analogy rests on a fundamental misunderstanding of the nature of the general warrants and the features that caused them to be reviled.

As Justice Stewart explained for the Court in *Stanford v. Texas*, “[t]he hated writs of assistance had given customs officials *blanket authority to search where they pleased* for goods imported *in violation of the British tax laws.*” 379 U.S. 476, 481 (1965) (emphases added). These writs were considered arbitrary and destructive of liberty and law “because they placed the liberty of every man in the hands of every petty officer.” *Id.*; see also *Pluth*, 157 Minn. at 149–50, 195 N.W. at 791 (stating that “searches under general warrants, under which the officers and agents of the English government assumed *the power to search any person and any place they pleased, for the purpose of*

discovering violations of the laws, and also for the purpose of enforcing and collecting the obnoxious imposts and taxes which the English government had laid on the Colonies, was one of the inciting causes which led to the Revolution, and that the purpose of these provisions was to effectually prohibit such practices” (emphasis added)).

Entick v. Carrington, 95 Eng. Rep. 807 (1765), the pre-revolutionary English case upon which Appellants mistakenly rely, recognized that general warrants authorized the seizure of any and all of a specified person’s “books and papers.” APB 42; *see also Stanford*, 379 U.S. at 483 (describing *Entick*). As Justice Brennan later explained, *Entick* held general warrants unlawful for two principal reasons: (1) “because of their uncertainty,” and (2) “searches for evidence are unlawful because they infringe the privilege against self-incrimination.” *Lopez v. United States*, 373 U.S. 427, 454 (1963) (Brennan, J., dissenting). Because general warrants authorized the seizure of books and papers, the history of disputes over their legality “is largely a history of conflict between the Crown and the press.” *Stanford*, 379 U.S. at 482 (noting that “officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent, both Catholic and Puritan”).

Moreover, the reviled general warrants were not issued by an independent judicial officer but by the Crown’s secretary of state. *See State v. Frink*, 296 Minn. 57, 59–60, 206 N.W.2d 664, 665–66 (1973) (recognizing that “Chief Justice of England, Lord Camden, struck down as unlawful general warrants issued by Lord Halifax, *one of the principal secretaries of state*, in *Entick v. Carrington*” (emphasis added)); *see also United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. 297, 327 (1972) (Douglas, J.,

concurring) (“[In *Entick*, t]he Secretary of State had issued general executive warrants to his messengers authorizing them to roam about and to seize libelous material and libellants of the sovereign.”)

Although Appellants cite both *Boyd* and *Pluth* for the notion that the Fourth Amendment was intended to prevent non-criminal, regulatory searches of homes without individualized probable cause (APB 43), those cases say or imply nothing about individualized probable cause and refute Appellants’ claim that general warrants were used for non-criminal, regulatory searches. In *Boyd*, for example, the Supreme Court described general warrants as having been used “to search suspected places for smuggled goods.” 116 U.S. at 625. And in *Pluth*, this Court referred to general warrants as having been used “for the purpose of discovering violations of the laws, and also for the purpose of enforcing and collecting the obnoxious imposts and taxes which the English government had laid on the Colonies.” 157 Minn. at 149–50, 195 N.W. at 791.⁹ Appellants offer no basis for their assumption that the Crown employed only a non-criminal, regulatory response to smugglers or tax-evaders, once caught. *See U.S. Dist. Ct.*

⁹ A modern housing inspector’s economic motives are very different than those of a colonial-era “exciseman.” *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 659 (1999) (“Customs was a peculiar arena in several ways. First, customs enforcement was more aggressive than law enforcement generally. Customs officers had a unique motive for initiating searches and seizures that constables and other peace officers did not share: customs officers were entitled to keep a significant portion of the value of any uncustomed goods they seized. Second, legislatures had a particular reason to allow unusually aggressive enforcement in customs collections: customs (‘imposts’) were to be a primary source of revenues, initially for the new state governments, and then for the new national government.” (emphasis added) (footnote omitted)). By contrast, a housing inspector receives no “share” of the property that he or she inspects. Nor does the City’s revenue increase upon the discovery of a violation.

for *E. Dist. of Mich.*, 407 U.S. at 328 (Douglas, J., concurring) (referring to *Huckle v. Money*, 95 Eng. Rep. 768, 769 (1763), in which the judge who would later preside in *Entick* stated that “[o] enter a man’s house by virtue of a nameless warrant, *in order to procure evidence*, is worse than the Spanish Inquisition” (emphasis added)).

3. Even if this Court accepts Appellants’ revisionist history, that revisionism cannot justify requiring criminal-type individualized probable cause for routine housing inspections.

Appellants’ highly selective reading of *Boyd*, and their reliance upon the most sweeping of dictum as a substitute for attention to its holding, are designed to create the false impression that the *Camara* decision curtailed Minnesotans’ constitutional rights. But until *Camara*, the United States Supreme Court had never held that a housing inspector who was refused consent for an inspection was required to obtain any kind of warrant. *Camara* enhanced the Fourth Amendment rights of property owners and tenants by requiring inspectors to obtain either consent or an administrative warrant.

But even if this Court chooses to read *Boyd* more broadly than either its own prior decisions or those decisions of the United States Supreme Court, it does not follow that an ordinance must, on its face, require individualized probable cause to avoid running afoul of Article I, Section 10, of the Minnesota Constitution. Examination of the dissent in *Frank* demonstrates the gulf that exists between (1) a broad reading of *Boyd* and of the mischief embodied in general warrants, and (2) an individualized probable-cause requirement.

In *Frank*, the Supreme Court’s greatest advocate for broad Fourth Amendment protections of privacy, Justice William O. Douglas, dissented from the majority’s

conclusion that health and building inspectors were not required to obtain warrants to conduct their inspections. His opinion, joined by Chief Justice Warren and Justices Black and Brennan, rested on an interpretation of *Boyd*, and of the Crown's use of general warrants, that was *not* limited to criminal and forfeiture proceedings. *Frank*, 359 U.S. at 376–77 (Douglas, J., dissenting) (“The Court misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions. . . . The Fourth Amendment thus has a much wider frame of reference than mere criminal prosecutions.”). But the dissenters made it clear that the warrant they believed was required in the context of administrative housing inspections would *not* require a showing of criminal-type probable cause:

This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of “probable cause” to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of “probable cause” required by the Fourth Amendment can take into account the nature of the search that is being sought. This is not to sanction synthetic search warrants but to recognize that the showing of probable cause in a health case may have quite different requirements than the one required in graver situations.

Id. at 383 (Douglas, J., dissenting) (emphases added).

In many well-known decisions, the Warren Court read the Fourth Amendment to provide broader protections than any United States Supreme Court has before or since.¹⁰ During that era, the Supreme Court's decisions were repeatedly rooted in references to the Crown's use of general warrants and the mischief at which the Fourth Amendment was directed. *See, e.g., Stanford*, 379 U.S. at 481. Decisions that stopped short of fully protecting Fourth Amendment rights were accompanied by separate opinions faulting the Court's restraint. *See, e.g., Lopez*, 373 U.S. at 454 (Brennan, J., dissenting). Yet on the question of whether individualized probable cause should be required before a judge could issue a warrant for a housing inspection, not a single member of the Warren Court embraced Appellants' position on either of the occasions when the subject was before them—i.e., *Frank* and *Camara*.

Appellants have failed to provide a defensible historical foundation for the conclusion that, before the *Camara* decision, the Supreme Court interpreted the Fourth Amendment to require any warrant at all for an administrative inspection, much less a warrant based on individualized, criminal-type probable cause. To the contrary, the Court itself has indicated that warrantless regulatory inspections were a longstanding American practice. *See Frank*, 359 U.S. at 367–73.

To the extent that *Camara* was a departure from Supreme Court precedent, it was a departure *in favor* of broader protection of individual rights. Appellants have not and

¹⁰ *See* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. Crim. L. & Criminology 933, 938 (2010).

cannot show that *Camara* is a Supreme Court decision that provides *less* protection than the Court's earlier decisions.

4. The Supreme Court in *Jones* did not acknowledge a “deviat[ion]” on the only question at issue here.

As the court of appeals correctly recognized below (A13-14), Appellants' reliance on the U.S. Supreme Court decision in *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012) (*see* APB 55-57), is misplaced. *Jones* addressed the limited question of whether a search within the meaning of the Fourth Amendment had occurred when police placed a GPS device on a vehicle and monitored its movements on public streets, as part of a criminal investigation. *Jones*, ___ U.S. at ___, 132 S. Ct. at 948. The Supreme Court did not consider the questions of whether the search at issue required a warrant and, if so, what showing is necessary. *Id.*; *see also id.* at ___, 132 S. Ct. at 954 (declining to consider whether the activity “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). Thus, the decision sheds no light on the only question before this Court: 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 a warrant than the Fourth Amendment to the U.S. Constitution requires.

Furthermore, the only “deviation” the *Jones* Court recognized was Justice Harlan's concurrence in the 1967 decision of *Katz v. United States*, 389 U.S. 347

(1967)—a case decided six months after *Camara*—and cases subsequently applying it. But like *Camara*, the *Katz* “deviation” was one that was in favor of greater protections.

B. *Camara* Adequately Protects Minnesota Citizens’ Individual Rights.

Where the Supreme Court does not sharply or radically depart from its prior decisions, this Court will decline to follow federal precedent if it does not adequately protect the basic rights and liberties of Minnesota citizens. *Kahn*, 701 N.W.2d at 828. Appellants are unable to show that *Camara* inadequately protects the individual rights of Minnesotans.

1. *Camara* was the product of a careful balancing of public interests and individual rights.

Whether applying the Fourth Amendment or interpreting Article I, Section 10, of the Minnesota Constitution, this Court requires a balancing of public interests with the degree of intrusion upon individual rights. *See State v. Anderson*, 733 N.W.2d 128, 138 (Minn. 2007) (adopting the totality-of-the-circumstances test articulated in *United States v. Knights*, 534 U.S. 112, 114 (2001), and stating that the reasonableness of a search is determined “by assessing, on the one hand, the degree to which [the search] intrudes upon an individual’s privacy and, on the other, the degree to which [the search] is needed for the promotion of legitimate governmental interests”); *Wiegand*, 645 N.W.2d at 132–33 (following the United States Supreme Court’s Fourth Amendment analysis where it reflected “a weighing of the government’s interest and the degree of intrusion on the individual that is consonant with [the Minnesota Supreme Court]’s approach to search and seizure under the state constitution”); *see also Askerooth*, 681 N.W.2d at 362

(emphasizing the importance of balancing individual and governmental interests in applying the Fourth Amendment). The *Camara* Court carefully balanced the public interests and individual rights implicated by administrative housing inspections, and reached a conclusion that “adequately protect[s]” the “basic rights and liberties” of Minnesota citizens. *Kahn*, 701 N.W.2d at 828.

a. Appellants fail to adequately recognize the weighty public interests served by rental inspections.

In *Askerooth*, this Court criticized the United States Supreme Court’s decision in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), for its “apparent removal of any consideration of a balancing of individual interests with governmental interests.” *Askerooth*, 681 N.W.2d at 362. Appellants’ search-and-seizure analysis is likewise marred by a failure to engage in meaningful balancing. Although Appellants have a great deal to say about individual interests, they give short shrift to discussing the public interests on the other side of the scale, except to concede that the enforcement of housing codes is a “significant” interest and to argue that there is “no need” for the City’s inspection program. APB 5, 10–11, 29.

In sharp contrast to Appellants’ approach, the *Camara* Court recognized the important public interests implicated by housing inspections:

The primary governmental interest at stake is *to prevent even the unintentional development of conditions which are hazardous to public health and safety*. Because fires and epidemics may ravage large urban areas, [and] because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures.

387 U.S. at 535 (emphasis added). The *Camara* Court also stressed that inspections are crucial to this interest: “There 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.” *Id.* at 535–36 (emphasis added); *see also id.* at 537 (“[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.”). As the *Camara* Court observed: “Time and experience have forcefully taught us that the power to inspect dwelling places . . . is of *indispensable importance to the maintenance of community health* The need for preventative action is great, and city after city has seen this need” *Id.* at 537 (emphasis added) (quoting *Frank*, 359 U.S. at 372)).

Appellants’ claim that there is “no need” for the City’s inspection program is undercut by the dangerous code violations uncovered during the inspections that have occurred pursuant to the RDLC. For example, more than half of the properties inspected by compliance official Gene Durand had an insufficient number of working smoke alarms. RA45. Durand also found numerous instances of inadequately vented water heaters and furnaces, which might have resulted in the venting of carbon monoxide into the basement of the premises; exposed live electrical wiring, which could result in electrical shock; doors and ground-floor windows with inadequate locks; stairways without hand railings; bedrooms without adequate egress in case of a fire; and crumbling foundations that do not adequately support the building. RA44–52.

b. Appellants mischaracterize the nature of the intrusion into the private interests at stake.

Appellants are correct that administrative inspections sometimes implicate significant individual privacy interests—interests that the Supreme Court balanced in *Camara*. See 387 U.S. at 530–31 (rejecting the *Frank* Court’s characterization of the Fourth Amendment interests at stake in inspection cases as “merely peripheral” and recognizing that a citizen “has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority” (quotation omitted)). The *Camara* Court’s balancing led it to conclude that administrative housing inspections are a lesser intrusion upon those privacy interests than a criminal investigation. *Id.* at 530 (“[A] routine inspection of the physical condition of private property is *a less hostile intrusion* than the typical policeman’s search for the fruits and instrumentalities of crime.”) (emphasis added); *id.* at 537 (“[B]ecause the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve *a relatively limited invasion* of the urban citizen’s privacy.” (emphasis added)).

Appellants’ inflammatory contention that *Camara* “gives criminals greater protections than innocent people” (APB 57) reveals their misunderstanding of the Supreme Court’s careful balancing of public and private interests in the unique context of housing inspections. The *Camara* Court assumed in its analysis that the tenants were “law-abiding” citizens and criticized the *Frank* decision for minimizing the interests of those law-abiding citizens by permitting warrantless inspections. *Id.* at 530–31. The *Camara* Court’s Fourth Amendment analysis hinged on the nature of the intrusion, and

the Court concluded that a court-authorized administrative housing inspection is a fundamentally different kind of intrusion than a court-authorized criminal investigation.

Although Appellants are also correct that this Court has, on occasion, interpreted Article I, Section 10, of the Minnesota Constitution to require greater protections than the Fourth Amendment, they fail to acknowledge that this Court has only done so *in the context of criminal investigations*. See, e.g., *Carter*, 697 N.W.2d at 210–11 (addressing police’s use of drug-detection dog outside a bank of storage units); *Ascher*, 519 N.W.2d at 187 (addressing police’s use of temporary roadblocks to investigate whether drivers are impaired by alcohol).

Appellants admit that all but one of the cases they cite regarding this Court’s protection of privacy interests related to searches of the home “involved suspicionless searches for criminal activity.” APB 27. Appellants assert that the exception is *State v. Larsen*—a case that they describe as the “most significant case applying the importance of the home and privacy to search law.” APB 20. In error, Appellants characterize *Larsen* as involving an administrative search similar to a housing inspection. APB 22, 27–28. *Larsen* involved the constitutionality of a licensed peace officer’s warrantless entry into a fish house to conduct a “routine license check.” 650 N.W.2d at 144, 145 (Minn. 2002). But unlike an area-wide housing inspection, a peace officer’s “routine license check” is not performed to find out whether the fish-house owner has satisfied the preconditions to the future issuance or renewal of a license, but to catch anyone fishing without a license. The consequences of fishing without a license included arrest, misdemeanor prosecution, and seizure of property. Minn. Stat. §§ 97A.205, .221, .255, .301, .405, subd. 1, 97C.301

(2000). Thus, the search at issue in *Larsen* was one for criminal activity, unlike an administrative inspection to determine qualifications for licensure under a health-and-safety code.

c. Appellants do not provide solutions for the crucial problems foreseen by the *Camara* Court.

Appellants and several amici suggest that the City can enforce the RDLC without inspecting the interior of all rental units for which the landlord or occupant does not give consent—for example, by conducting only voluntary inspections or inspections upon complaint. APB 33; ACLU Br. 16; Cato Br. 23–27; SPARL Br. 8–14. These suggested alternatives are inferior to routine, compulsory inspections for many reasons. As Judge Posner has recognized:

It is difficult to enforce such a [housing] code without occasional inspections; the tenants cannot be counted upon to report violations, because they may be getting a rental discount to overlook the violations, or, as we noted earlier, may be afraid of retaliation by the landlord or unaware of what conditions violate the code. And it is impossible to rely on a system of inspections to enforce the code without making them compulsory, since violators will refuse to consent to being inspected.

Platteville Area Apartment Ass'n v. City of Platville, 179 F.3d 574, 578 (7th Cir. 1999).

Furthermore, none of the proposed alternatives provides a solution to a crucial problem articulated by the *Camara* Court: the difficulty of abating a dangerous interior condition that is not easily detected and cured by the average occupant. *See* 387 U.S. at 537. As the *Camara* Court recognized:

[T]he public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique [other than routine periodic inspections of all structures] 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.*

Id. (emphasis added).

2. A judicial officer’s review of an application for an administrative warrant adequately protects the rights of Minnesotans.

Appellants argue that administrative warrants do not adequately protect the rights of Minnesotans because they are warrants “in name only.” APB 34–36. But both *Camara* itself and the record here contradict Appellants’ claim that administrative warrants must require particularized probable cause to effectively protect individual rights.

First, the *Camara* Court specifically rejected Appellants’ argument:

It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a “synthetic search warrant” and thereby to lessen the overall protections of the Fourth Amendment. But we do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. *If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy.*

387 U.S. at 538–39 (emphasis added) (citations omitted). The *Camara* Court’s reference to a “suitably restricted search warrant” confirms that the judicial officer reviewing a warrant application has a meaningful role in evaluating whether an intrusion is justified.

See id. at 539; *see also State v. Paulick*, 277 Minn. 140, 148, 151 N.W.2d 591, 596 (1967) (noting the *Camara* Court’s emphasis on the need for individualized review by a neutral magistrate to avoid the issuance of “rubber stamp” warrants).

More fundamentally, Appellants’ argument presumes that this Court will never read the reasoning of the district court opinions analyzing the City’s warrant applications. Such opinions embody an evaluation, performed within the parameters of *Camara*, of whether the degree of an intrusion upon privacy is justified. On each of the three occasions that the City sought a warrant to inspect Appellants’ properties, the district court carefully considered and ultimately *denied* the application, twice because of the privacy interests of citizens subject to the inspections. RA62, RA93–95; A75–77. The judges protected those privacy interests as part of their application of the *Camara* standard. RA93–95; A75–77. In denying the third application, the district court also stated that it “has no intention of ever ‘rubber-stamping’ any warrant application, administrative or otherwise. This Court always carefully reviews any warrant applications before it and only signs those that are supported by probable cause.” A57.

In short, the words of *Camara*, and the district court decisions on the City’s warrant applications, debunk the notion that a *Camara*-based approach is a rubber stamp that ignores citizens’ privacy interests.

3. Inspections under the ordinance are not a pretext for the detection of criminal activity.

Appellants and amici assert that particularized, criminal-type probable cause should be required for rental-housing inspections because the inspections amount to

searches for criminal activity. APB 36–37; ACLU Br. 8–12; Cato Br. 19–20. These arguments against the RDLC are unfounded.

First, at least two of the amici make broad assertions about the inspection programs *of other cities*, including cities in other states. ACLU Br. 8–9; Cato Br. 11-18. The practices of other cities are irrelevant to the only issue that is before this Court—i.e., whether the City’s RDLC is facially unconstitutional.

Second, the theory that the RDLC was fashioned in order to detect criminal activity is based on an amalgam of misconstruction of the ordinance, accusatory statements about activities the City has not engaged in, and speculation about what possibly could happen in the future. What it is not based on is anything the City has done, is presently doing, or is considering doing in the near future.

These arguments twist beyond recognition the limitations in the RDLC regarding the disclosure of information obtained in inspections. As the language of those changes plainly shows, the City does not *require* disclosure of any information to law enforcement officers; rather, it adopted a general *prohibition* on such disclosures while identifying a small number of extraordinary circumstances—not yet encountered in more than one thousand inspections—in which the general prohibition would be absurd or would conflict with statutory responsibilities. Under the RDLC, the enforcement officer is authorized only to inspect for violations of the HMC. A99 (subd. 1(3)(j)).

One amicus asserts that the RDLC was created “as a subterfuge for identifying and rooting out criminal activity in the city.” ACLU Br. 9. This assertion is undermined by Appellants’ own brief, which states that “[t]he basis for adopting the inspection program

was Red Wing’s housing study” APB 10. Moreover, the amicus brief relies only on a set of Appellants’ *proposed* findings of fact and conclusions of law, not any factual cites to the actual record. ACLU Br. 9–10. In any case, it is undisputed that the City has never used or attempted to use any evidence seized during a rental-housing inspection in a criminal proceeding. If the RDLC’s true purpose were to root out criminal activity, the Court should expect to see evidence in the record that the City actually tried to exploit the ordinance to fulfill that purpose following enactment.

4. The City may lawfully inspect rental housing but not owner-occupied housing.

Appellants and amici argue that the City has improperly singled out persons who lease, rather than own, their residences. APB 20; ACLU Br. 14, 17; Cato Br. 4–8; SPARL Br. 13. These contentions overlook the important differences between rental and owner-occupied properties. *See Platteville Area Apartment Ass’n*, 179 F.3d at 578; *see also* Minn. Stat. § 504B.211 (2010) (allowing landlord to enter premises rented by a residential tenant); *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 7 (Minn. 2012) (noting that rental-insurance premiums can “reflect increased risks presented by changing tenant use” (emphasis added) (quoting *United Fire & Casualty Co. v. Bruggeman*, 505 N.W.2d 87, 89 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993))); *Cardinal Estates, Inc. v. City of Morris*, No. CX-02-1505, 2003 WL 1875487, at *3 (Minn. App. Apr. 15, 2003) (rejecting argument that ordinance providing for periodic inspection of rental housing violates the Equal Protection Clause because tenants and homeowners are not similarly situated).

5. Minnesota and its municipalities have traditionally authorized government entry into private buildings—including dwellings—for the detection and prevention of conditions hazardous to public health and safety.

As a general rule, this Court “does not independently apply our state constitution absent language, concerns, and traditions unique to Minnesota.” *Kahn*, 701 N.W.2d at 825 (citing *Harris*, 590 N.W.2d at 97–98); *see also* *Anderson & Oseid*, *supra*, at 916 (stating that the Minnesota Supreme Court “often considers the state’s traditions in deciding whether Minnesota citizens’ rights are adequately protected”). To determine what the “traditions” of Minnesota are, this Court has looked to historical legislation. *See Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 831–32 (Minn. 1991) (citing a Minnesota Statute from 1877 as evidence of the state’s “long tradition” of assuring the right to counsel); *see also Clark v. Pawlenty*, 755 N.W.2d 293, 306 (Minn. 2008) (stating that this Court, in construing a provision of the state constitution, can review how the provision has been implemented by the legislature); *Women of State of Minn. v. Gomez*, 542 N.W.2d 17, 30 (Minn. 1995) (noting that legislative action is evidence of Minnesota’s traditions).

In arguing that *Camara* inadequately protects the rights of Minnesotans, Appellants attempt to portray the administrative inspection of dwellings as a recent development—that is, a practice inconsistent with Minnesota history. APB 47; A124–25.¹¹ To the contrary, the historical statutes of this state and the historical charters and

¹¹ To their brief appellants have appended a table—of unknown provenance—that purports to show the “effective year” of the rental-housing inspection and licensing programs for several Minnesota cities. A124–25. The table omits citations to adopting

ordinances of its largest cities reveal a long tradition of permitting government entry into private buildings—including dwellings—for the prevention of fire and disease, the prevention and abatement of nuisances, and compliance with housing codes.

a. Historical state statutes provided health boards with a right of entry.

The territorial statutes and the earliest Minnesota state statutes included identical provisions authorizing local boards of health to enter “*any building . . . for the purpose of examining into and destroying, removing or preventing any nuisance, source of filth, or cause of sickness.*” Rev. Stat. Terr. Minn. ch. 18, § 7 (1851) (emphases added); Minn. Stat. ch. 16, § 7 (1858) (emphases added). If a board of health were refused entry, the statutes permitted the board to obtain a warrant from a county justice of the peace. Rev. Stat. Terr. Minn. ch. 18, §§ 7–8 (1851); Minn. Stat. ch. 16, §§ 7–8 (1858). The statutory language describing the public-health warrants did not include the particularized “reasonable cause” requirement found in the contemporaneous provisions governing criminal search warrants. *Compare* Rev. Stat. Terr. Minn. ch. 18, §§ 7–8 (1851), *with id.* ch. 110, § 1 (1851); *compare* Minn. Stat. ch. 16, §§ 7–8 (1858), *with id.* ch. 99, § 1 (1858). In 1905, the legislature removed the warrant provision from the public-health statutes, and Minnesota boards of health continue to have a warrantless, statutory right of entry to this day. *See* Rev. Laws Minn. ch. 29, § 2136 (1905); Minn. Stat. § 145A.04,

resolutions or ordinances. In fact, the information conveyed by the table is unreliable. For example, the table gives the “effective year” of St. Paul’s inspection and licensing programs as 2007. But the City of St. Paul authorized the inspection of dwellings for compliance with its housing ordinance *nearly ninety years earlier*, in 1918. *See* St. Paul, Minn., Ordinance 4028 § 101 (Mar. 28, 1918). But whatever the cause for its shortcomings, the table paints an extremely inaccurate picture of Minnesota history.

subd. 7 (2010) (“To enforce public health laws, ordinances or rules, a member or agent of a board of health may enter a building, conveyance, or place where contagion, infection, filth, or other source or cause of preventable disease exists or is reasonably suspected.”).

b. Historical state statutes provided a right of entry for fire inspections.

In 1905, the legislature enacted fire-safety requirements for several types of buildings, including hotels, tenements, and boarding houses. Rev. Laws Minn. ch. 36 (1905). Four years later, the legislature authorized the appointment of an inspector to enforce those requirements:

For the purpose of carrying into effect the provisions of this act, the governor shall appoint an inspector . . . whose duty it shall be *to visit and inspect annually*, so far as possible, *every building* or structure kept, used or maintained as, or advertised as, or held out to the public to be an inn, a hotel, public lodging house or place where sleeping accommodations are furnished to the public, whether with or without meals.

Revised Laws of Minn., ch. 36, § 2374(4) (Supp. 1909) (emphases added). The inspector had “police power to enter all hotels, inns, boarding or lodging houses in this state, at reasonable hours to inspect the sanitary condition thereof, and the fire escapes and their condition.” *Id.*

c. Historical municipal legislation on fire prevention and sanitation provided rights of entry for government officials.

In the 19th century, the cities of Duluth, Minneapolis, and St. Paul authorized government officials to enter any building—including a private home—to enforce sanitation laws and to prevent and abate nuisances. *See, e.g.*, St. Paul, Minn., Ordinance XVII § 6 (June 29, 1858) (“It shall be the duty of the Health Officer, whenever he may

deem it necessary in order to secure the public health, *to enter in the day time upon the premises and into the house of any person or persons*, within the limits of said city, to ascertain every nuisance which may exist, and examine into the condition and number of persons inhabiting such house, and inspect the vaults, cellars, privies, cess pools and drains of such premises” (emphasis added)); Minneapolis, Minn., Ordinance 5 § 5 (May 26, 1873) (authorizing chief of police, upon “reasonable cause” to believe nuisance ordinance has been violated, “to enter into any building . . . and make *reasonable search and examination* as to the existence or presence” of a nuisance (emphasis added)); Minneapolis, Minn., Ordinance 7 § 16 (May 21, 1873) (tracking the language of Minn. Stat. ch. XII, §§ 57–58 (Supp. 1873), on entry by board of health); Duluth, Minn., Ordinance XXXIV §§ 9, 11 (Feb. 27, 1885) (permitting health officer and assistant health inspectors, for purposes of enforcing state and local laws relating to sanitation and nuisances, “*to enter into any house, store, stable or other building*” during daylight hours and, if necessary, “to cause the floors to be raised . . . in order to make a thorough examination of cellars, vaults, sinks or drains, and to cause all dead animals and other nauseous or unwholesome things or substances to be buried or removed, or disposed of” (emphasis added)).

Nineteenth-century Minnesota municipal ordinances also allowed entry into private homes for the purposes of electrical or fire-prevention inspections. *See, e.g.*, Minneapolis, Minn., City Charter ch. VII, § 7 (1883) (providing for the appointment of a fire marshal, “who shall have power and be fully authorized *to enter any dwelling house* or other building at all hours between seven o’clock in the morning and six o’clock in the

evening, and examine all chimneys, stoves, furnaces, pipes and other parts of such buildings, and see that the ordinances of the city respecting the same are enforced” (emphasis added)); Duluth, Minn., Ordinance XVII § 14 (1887) (providing for the appointment of an “Inspector of Chimneys” and making it unlawful “for any person, whether owner or occupant, to refuse to admit such Inspector *into his house*, or permit him to make a full examination of all chimneys on his premises” (emphasis added)); St. Paul, Minn., Ordinance 1917 §§ 331–32 (Apr. 7, 1897) (authorizing electrical inspector “to regulate and determine the placing of telephone, telegraph, and other signal wires, and electric light and power wire *in and on all buildings, streets, alleys and public or private places* in said city in such a way as to prevent fires, accidents or injury to persons or property” and giving inspector “*the right at any time to enter any building, manhole or subway* in the discharge of his official duties” and “prompt access to all buildings, *public and private*” (emphases added)).

d. Historical municipal housing ordinances provided for code enforcement through inspections.

In 1913, the City of Duluth enacted a comprehensive housing code and directed its health commissioner to “cause periodic inspection to [b]e made of all tenement and dwelling houses to ascertain whether any violations of [the housing code] are being committed as to lighting, ventilation, overcrowding and sanitation.” Duluth, Minn., Housing Code § 94 (Jan. 29, 1913).

In 1918, the City of St. Paul enacted a comprehensive housing ordinance (separate from its building code). It included regulations on the size and ventilation of basement

sleeping rooms, required water-closets and sinks to be maintained “in good order and repair,” and prohibited overcrowding. St. Paul, Minn., Ordinance 4028 §§ 80, 82, 94 (Mar. 28, 1918). The ordinance also provided for enforcement through mandatory inspections of dwellings:

The Health Officer or his duly authorized assistants or subordinates shall cause a periodic inspection to be made of every two family and multiple dwelling at least once a year. Such inspection shall include *thorough examination of all parts of such dwellings* and the premises connected therewith. The Health Officer is also hereby empowered to make similar inspection of all dwellings and the premises surrounding or adjacent thereto, as frequently as may be necessary and for this purpose shall have *the right to enter in and upon all premises and dwellings at such time or times as he may see fit.*

Id. § 101 (emphases added).

In 1950, Minneapolis enacted a housing code (separate from its building code) and directed the city health commissioner to conduct inspections:

The Commissioner of Health shall cause *a periodic inspection to be made of every multiple dwelling at least once a year. . . .* The Commissioner of Health, the Inspector of Buildings, and all inspectors, officers and employees of the Health Department and the Building Department, and such other persons as may be authorized by the Commissioner of Health or the Inspector of Buildings, may, in the performance of their duties, without fee or hindrance, *enter, examine, and survey all premises, grounds, erections, structures, apartments, dwellings, buildings, and every part thereof* of in the city.

Minneapolis, Minn., Housing Code § 612 (Apr. 4, 1950) (emphases added).

Thus, by the time the United States Supreme Court first addressed the constitutionality of housing inspections in *Frank*, Minnesota’s most populous cities were already conducting warrantless housing inspections to enforce municipal housing ordinances. *See also* Comment, *State Health Inspections and “Unreasonable Search”*:

The Frank Exclusion of Civil Searches, 44 Minn. L. Rev. 513, 531 n.66 (1960) (citing interviews with St. Paul and Minneapolis inspectors about possible impact of hypothetical warrant requirement).

In short, legislation since this state’s inception has authorized entry onto private property for purposes of investigating and neutralizing threats to public health and safety. Many city ordinances in Minnesota have provided comparable authority, including some adopted over a century ago. By requesting that Article I, Section 10, be construed to require criminal-type probable cause for warrants in the context of administrative housing inspections, Appellants ask this Court to create a new right that would frustrate powers that are as old as Minnesota—not to enforce a right that is rooted in this state’s history.¹²

C. Several Additional Persuasive Reasons Exist for this Court to Follow United States Supreme Court Precedent.

In *Kahn*, this Court stated that it will depart from federal precedent only if it concludes (1) that the United States Supreme Court has made a “sharp or radical departure” from its previous decisions or approach to the law *or* federal precedent does not adequately protect the basic rights and liberties of Minnesota citizens; *and* (2) there is no persuasive reason to follow the United States Supreme Court. *Id.*; *see also* Anderson & Oseid, *supra*, at 868, 912–16. As explained above, *Camara* is not a sharp or radical

¹² *Camara*’s consonance with Minnesota tradition is further evidenced by decisions of this state’s appellate courts that recognize *Camara* as controlling authority. *See In re Rozman*, 586 N.W.2d 273, 275–26 (Minn. App. 1998) (citing *Camara* as “[t]he basic authority for administrative search warrants”), *review denied* (Minn. Jan. 21, 1999); *see also Cardinal Estates*, 2003 WL 1875487, at *3 (agreeing with *Camara*’s conclusion that “routine, periodic inspections are the best reasonable mechanism for finding and addressing building code violations”).

departure from United States Supreme Court precedent because it provides greater protections for individuals in the context of administrative inspections. Nor does *Camara* inadequately protect the rights of Minnesotans. Although it is not necessary for the Court to reach the final prong of the *Kahn* analysis, there are several additional persuasive reasons to follow *Camara*.

First, the *Camara* Court approved a special solution to accommodate both the weighty home-related privacy rights of individuals and the substantial safety-related interests of the public. In doing so, the Court expressed concern about the difficulty of abating a dangerous interior condition that is not easily detected by the average occupant. 387 U.S. at 537. Although Appellants and several amici suggest that the City can somehow enforce the RDLC without inspecting the interior of all rental units, none of their proposed alternatives to mandatory inspections of all units solve the potentially fatal concern raised by the *Camara* Court forty-five years ago.

Second, Appellants fail to identify a single state with a constitution that requires particularized, criminal-type probable cause in the context of routine licensing inspections of housing. In the forty-five years since the Supreme Court decided *Camara*, that decision has achieved general acceptance by other state courts that could have replaced it with a state constitutional interpretation that is more demanding.¹³ Those

¹³ Only a few state constitutions contain provisions that *require* interpretation in conformity with the federal constitution. *See, e.g.*, Fla. Const. art. I, § 12 (requiring search-and-seizure provision to be “construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court). Thirty-three states have constitutional search-and-seizure provisions “that copy the

states have constitutional provisions similar to the Fourth Amendment, and have chosen to follow *Camara* in interpreting the search-and-seizure provisions of their own constitutions. See *In re City of Rochester*, 90 A.D.3d 1480, 1482 (N.Y. App. Div. 2011) (“[W]e see no basis for imposing a higher standard with respect to the rights in question under the New York State Constitution.” (citation omitted)); see also *Louisville Bd. of Realtors v. City of Louisville*, 634 S.W.2d 163, 166 (Ky. Ct. App. 1982) (citing *Camara* and holding that inspection law did not violate the federal or state constitution); *Simpson v. City of New Castle*, 740 A.2d 287, 291 (Pa. Commw. Ct. 1999) (upholding inspection law under both the Fourth Amendment to the United States Constitution and Article I, Section 8, of the Pennsylvania Constitution). Minnesota would be the first state to adopt the radical position urged by Appellants.

Third, Appellants have failed to show a distinct, principled, and credible body of state constitutional doctrine in support of their position. Without such a solid foundation, a conclusion inconsistent with federal precedent may be seen as a political one:

A state court decision on individual rights will inevitably be contrasted with the United States Supreme Court’s treatment of the same question, and the decisional process, again inevitably, will be seen in political rather than jurisprudential terms unless the process insists on a distinctive, principled and credible body of state constitutional doctrine.

John E. Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 Wm. Mitchell L. Rev. 227, 244 (1994); see also *Kahn*, 701 N.W.2d at 824 (“We will not reject

Fourth Amendment in all significant respects with no major deletions or additions.” Barry Latzer, *State Constitutions and Criminal Justice*, App’x A (1991).

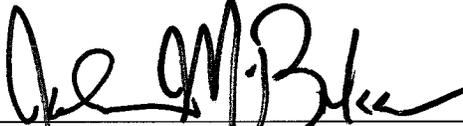
a Supreme Court interpretation of a provision of the U.S. Constitution merely because we want to bring about a different result.”).

CONCLUSION

Because Appellants have not shown that the RDLC is incapable of being enforced in a constitutional fashion, and because no principled basis exists for this Court to depart from construing the search-and-seizure provision of the Minnesota Constitution in uniformity with the Fourth Amendment to the United States Constitution, the City asks this Court to affirm the decision of the court of appeals.

Dated: 10/22/2012

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STATE OF MINNESOTA
IN SUPREME COURT

Robert McCaughtry, et al.,

Petitioners,

CERTIFICATION OF BRIEF LENGTH

v.

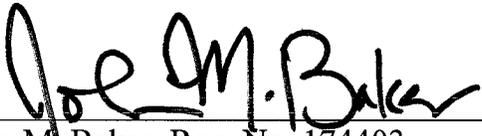
City of Red Wing,

Respondent.

1. I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. 132.01, subs. 1 and 3(a), for a brief produced with a proportional font.
2. The length of this brief is 13,861 words, excluding the cover, table of contents, table of authorities, and this certificate.
3. This brief was prepared using Microsoft Word 2007 in 13-point Times New Roman.

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