

No. A10-0332

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**STATE OF MINNESOTA**  
**IN SUPREME COURT**

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Robert McCaughtry, *et al.*,

Appellants,

v.

City of Red Wing,

Respondent.

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**REPLY BRIEF and APPENDIX of APPELLANTS**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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The question before this Court is the same question that the U.S. Supreme Court faced in *Camara*: Does the public need for housing inspections justify a wholesale exception to ordinary constitutional protections against suspicionless searches? *Camara* said it did. This Court, however, shows great respect for the privacy of the home, and, unlike the U.S. Supreme Court, it requires the government to bear the burden of justifying a departure from ordinary constitutional protections. Red Wing largely ignores this Court's precedents, and it does not carry its burden. This Court should independently interpret Article I, Section 10 of the Minnesota Constitution and reject the holding of *Camara*.

Below, in Part I, Plaintiffs explain that they have brought a facial challenge to Red Wing's ordinance. In Part II, Plaintiffs discuss Red Wing's failure to address any of this Court's relevant precedents and show that, under Minnesota constitutional law, the ordinance does not adequately protect the rights of Minnesotans. Part III discusses the history of the Fourth Amendment and how *Frank* and *Camara* constituted a sharp departure from that history.

#### **I. Plaintiffs Are Making a Facial Challenge to Red Wing's Ordinance.**

In its opposition brief, Red Wing reprises its previously rejected argument that the law here is saved by the possibility that a future judge may require individualized probable cause before issuing a warrant—even

though the ordinance itself requires no such thing. Br. of Respondent (“RSB”) 13-14. As this Court explained, “The possibility that a judge might in the future limit the City’s administrative warrant application to ensure that the warrant comports with the Minnesota Constitution does not make the challenge here premature.” *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 341 (Minn. 2011) (citation omitted).

This Court found that Plaintiffs’ facial challenge was not premature because the text of the ordinance itself plainly authorizes “administrative warrants” instead of warrants requiring traditional probable cause. *Id.* at 339-41; *see* Red Wing Rental Dwelling Licensing Code (“RDLC”) § 4.31, subd. 1(3)(i) (APP99).<sup>1</sup> And this Court thus held that Plaintiffs had the right to a judicial determination of “the appropriate constitutional standard” for warrants to enter homes to conduct rental inspections. *Id.* at 341.

This Court’s previous ruling is dispositive. Red Wing’s ordinance does not become facially constitutional simply because a judge might disregard the ordinance’s text and impose requirements beyond those actually in the law.

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<sup>1</sup> The League of Cities’ *amicus* suggests that if the City’s ordinance is facially unconstitutional because it does not specify that it requires probable cause, so is the statute authorizing criminal searches. League Br. 17-18. The League is incorrect. Criminal search warrants will not be undermined because the statutes do require probable cause for those searches—the requirement appears in the next code section after the one the League cited. *Compare* Minn. Stat. § 626.08 *with* Minn. Stat. § 626.07 (cited at League Br. 17 n.44).

## II. *Camara* Does Not Adequately Protect the Rights of Minnesotans.

In their opening brief to this Court, Plaintiff-tenants and -landlords showed that the rule of *Camara v. Municipal Court*, 387 U.S. 523 (1967), cannot be squared with Minnesota's legal traditions of respect for the sanctity of the home and protection of privacy, as reflected in this Court's jurisprudence in many areas, including Article I, Section 10. Plaintiffs also demonstrated this Court's deep skepticism of programs of suspicionless searching of ordinary citizens. *See Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005) (holding Minnesota will interpret state constitution to "independently safeguard" the rights of Minnesotans). This is the core of Plaintiffs' argument, yet Red Wing fails to discuss or analyze this Court's precedents.

Instead, Red Wing claims that none of this Court's decisions are relevant because they involved searches for evidence of crime. Red Wing then asks this Court to accept the U.S. Supreme Court's assessment in *Camara* that the government's need for area-wide inspections outweighs the "relatively limited invasion of privacy" of having one's home searched. It also argues that the limited decisions of the district courts in this case show that *Camara* offers sufficient protection. Finally, Red Wing claims that the history of inspection laws in Minnesota shows that (contrary to this Court's

precedents), Minnesota accepts suspicionless home searches. Plaintiffs address each point below.

**A. Minnesota Legal Traditions Provide More Protection of Rights than *Camara*.**

*Camara* does not adequately protect the rights of Minnesotans. See Brief of Appellants (“APB”) 13-37. This Court’s cases have repeatedly emphasized great respect for the sanctity of the home and privacy. APB 15-20. This Court has always found invasions of homes without both a warrant and probable cause to be unconstitutional. APB 20-24. Indeed, this Court has repeatedly and specifically relied on the importance of preserving the privacy of the home when interpreting Article I, Section 10. *Id.*

Because of this powerful concern for the day-to-day privacy of law-abiding citizens, this Court shows deep skepticism of suspicionless search and seizure programs. Indeed, it has never upheld one against ordinary citizens. APB 25-29; see, e.g., *State v. Bryant*, 287 Minn. 205, 211, 177 N.W.2d 800, 804 (1970) (“the rights of the innocent may not be sacrificed to apprehend the guilty”). The purpose of constitutional privacy protections is to protect the privacy of the innocent, not just to make criminal investigations more difficult. APB 26.

Red Wing’s brief fails to explain how its ordinance can be squared with this jurisprudence. Instead, it ignores Plaintiffs’ discussion of cases about

respect for the home and privacy and then treats all of this Court's search cases as irrelevant because they involved searches for evidence of crime. RSB 34-35. There are three problems with this approach: First, suspicionless searches of homes are enormously invasive, whether they involve searches for evidence of crimes or not. Second, this Court already has held unconstitutional a suspicionless search program under what the Court characterized as a "regulatory scheme" in *State v. Larsen*, 650 N.W.2d 144 (Minn. 2002). Third, Red Wing's ordinance does in fact authorize reporting evidence of crimes observed during an inspection.

1. **Suspicionless searches of homes are invasive, whether the government searches for evidence of crimes or regulatory violations.**

Red Wing provides no reason *why* suspicionless searches to enforce regulatory programs would be constitutional but suspicionless searches for criminal activity would be unconstitutional. For the law-abiding citizen, the experience—and the violation of privacy—are the same. She wants to maintain the privacy of her religious beliefs, family life, sexual orientation, personality, health, wealth, aesthetic tastes, and hobbies within her own home. APB 8-10, 18-19. Red Wing violates that privacy whether the search is for criminal activity or housing code violations. Red Wing's interpretation of Article I, Section 10 turns the purpose of the constitutional protection on

its head, making it into a provision that protects the privacy of criminals but not ordinary, law-abiding citizens.

**2. This Court rejected suspicionless searching to enforce a regulatory scheme in *Larsen*.**

In *Larsen*, this Court rejected a policy of suspicionless entry into ice-fishing houses in order to enforce Minnesota's fishing regulations and license requirements. 650 N.W.2d at 153-54. Red Wing attempts to distinguish *Larsen* as an ordinary case holding that police need a warrant in order to search a home for evidence of a crime. RSB 34-35. But *Larsen* was a case about enforcement of a "regulatory scheme," a phrase used seven times in the opinion. 650 N.W.2d at 150-53. Noting that fish and game penalties are exclusively misdemeanors, *Larsen* likened the fishing regulatory scheme to the regulation of traffic. *Id.* at 153. Indeed, although classified as a misdemeanor, the penalty for angling with one extra fishing line (as *Larsen* did) is \$50, plus \$85 in surcharges. No court appearance is required.<sup>2</sup> Fishing without a license receives the same fine.<sup>3</sup>

The fishing regulatory scheme is not far different from Red Wing's inspection program. Renting without a license is a criminal misdemeanor, Red Wing City Code § 4.99 (APP123), just as fishing without a permit is a

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<sup>2</sup> [http://www.mncourts.gov/Documents/10/Public/Court\\_Administration/2012.01.01\\_DNR\\_Payable\\_List.pdf](http://www.mncourts.gov/Documents/10/Public/Court_Administration/2012.01.01_DNR_Payable_List.pdf) at 1, 28.

<sup>3</sup> *Id.* at 31.

criminal misdemeanor.. Punishment includes up to 90 days in jail or a fine of up to \$700. *id.* § 1.05(13) (Reply APP50). Violations of the housing code must be corrected and failing to do so is itself a misdemeanor. RDLC § 4.31, subds. 2(4), 4 (not responding to correction notice within 90 days a misdemeanor) (APP101, 104).

**3. Red Wing's ordinance, on its face, authorizes searches for evidence of crimes.**

Even if Red Wing were correct that this Court primarily protects privacy from criminal investigation, Red Wing's ordinance plainly authorizes reporting evidence of four felonies. APB 36-37. Red Wing responds that the ordinance prohibits reporting most crimes and merely allows but does not *require* reporting the four listed felonies.<sup>4</sup> RSB 38. Plaintiffs fail to see the point of this distinction. An ordinance that allows the government to search all homes and then gives the government the discretion to report or withhold evidence of four specific felonies is no more constitutional than one that requires reporting the felonies. Both authorize searches for evidence of crimes without individual probable cause. Red Wing's ordinance violates Article I, Section 10.

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<sup>4</sup> Red Wing claims that these four felonies are situations "in which the general prohibition would be absurd or would conflict with statutory responsibilities." RSB 38. Plaintiffs fail to see why it is more "absurd" not to report pet abuse than not to report evidence of murder, robbery, or any number of other serious crimes.

**B. The Individual's Interest in Privacy in One's Own Home Outweighs Red Wing's Interest in Its Mandatory Inspection Program.**

Having tried to sidestep all of the relevant Minnesota caselaw, Red Wing focuses its argument on the balancing test that this Court uses in evaluating the constitutionality of searches. RSB 30. Red Wing argues that the government's interest here is "weighty" and that Plaintiffs have given it short shrift. RSB 30-31.

There are several problems with Red Wing's argument. First, Red Wing refuses to acknowledge that, under *Ascher v. Commissioner of Public Safety*, 519 N.W.2d 183 (Minn. 1994), Red Wing bears a heavy burden in demonstrating that its rental inspection program is significantly more effective than any other alternative and that its interest is so strong that it outweighs the privacy interests of the individuals subject to the searches. Second, however weighty the government interest may be in housing code enforcement, it cannot possibly be weightier than its interest in enforcing the criminal laws and preventing drunk driving, neither of which justify suspicionless searches. Third, Red Wing's evidence of the need for the program shows, at best, that some code violations are found through its search program. These violations were neither as numerous nor as serious as Red Wing claims, but even if they were, the mere fact that suspicionless searching finds some violations is not sufficient under this Court's

jurisprudence to uphold such a program. Finally, Red Wing has not even attempted to show that the many alternatives proposed by Plaintiffs and *amici* would be ineffective.

**1. Red Wing bears the burden.**

This Court places a heavy burden on the government when it seeks to deviate from ordinary constitutional protections. *See* APB 29-33. This rule applies to all deviations, not just ones involving criminal law. *See, e.g., State v. Hershberger*, 462 N.W.2d 393, 399 (Minn. 1990) (placing burden on government to show that there was no alternative means to protect vehicle public safety that did not violate religious liberty of Amish). Here, Red Wing argues for an exception to the constitutional rule of individualized probable cause for warrants and of individual suspicion for all searches. Accordingly, it bears the burden of showing that its suspicionless search program is truly necessary. *See Larsen*, 650 N.W.2d at 151; *Ascher*, 519 N.W.2d at 186. Moreover, this burden is particularly heavy given that the searches are nonconsensual searches of occupied homes. APB 20-24.

Red Wing seeks to reverse this burden by complaining that Plaintiffs have not demonstrated that another enforcement program will achieve universal compliance and catch all code violations in buildings that do not show signs of poor maintenance from the outside. RSB 35-36. Not only do Plaintiffs not bear this burden, but Red Wing plainly does not think that even

its own program will catch all such safety violations, as it disclaims any assurance of safety or habitability from its inspections. APP103.

**2. “Universal compliance” does not justify dispensing with constitutional protections.**

However “weighty” the government interest may be in housing code inspections, it is surely not as weighty as the interest in detecting and preventing crime or the interest in preventing drunk driving. Yet this Court has found that neither of these interests justifies suspicionless searches. APB 25-29. Minnesota does not dispense with the protections of Article I, Section 10 to achieve “universal compliance” with the criminal law, and Red Wing has offered no reason that the state should dispense with those protections to achieve compliance with housing codes. The City quotes *Camara* as saying that the interest is very important, but *Camara* gives no reason for housing codes being more important than preventing or prosecuting crimes. RSB 31-32; *Camara*, 387 U.S. at 535-39. And it is clear that *Camara* discounts the individual interest in being free from the searches, which it calls “a relatively limited invasion of the urban citizen’s privacy.” 387 U.S. at 537. As demonstrated by *Ascher*, however, this Court does not simply accept unsupported assertions of government interest justifying suspicionless searching; nor does it discount invasions of day-to-day privacy, even if the U.S. Supreme Court is ready to do so. 519 N.W.2d at 185-

87. This Court in *Ascher* rejected each justification the U.S. Supreme Court accepted in *Camara*. APB 30-31.

**3. Red Wing has shown, at best, that its program finds some violations.**

Red Wing attempts to show that its program is effective in detecting important safety problems in rental dwellings. RSB 7, 32. Both *Larsen* and *Ascher* make clear that just because a program is effective at finding violations (and in *Larsen*, the Court acknowledged that it would be virtually impossible to find violations without suspicionless searching), it still may be unconstitutional. *Larsen*, 650 N.W.2d at 150 n.5; *Ascher*, 519 N.W.2d at 186-87.

Red Wing points to the “numerous” “dangerous” code violations that its inspector has found. RSB 32. Red Wing is correct that some potentially serious code violations were found.<sup>5</sup> As explained in Plaintiffs’ brief, however, of the more than 800 inspections conducted, inspectors found only

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<sup>5</sup> At least two of the cited conditions, insufficient working smoke alarms and inadequate locks (*see* RSB 32), do not belong on the list at all. Red Wing does not treat smoke detectors as a serious code violation. It does not consider them sufficiently important to require putting the same number of smoke detectors in its own public housing (about 25% of units) as it requires in private housing. APP190. Moreover, Red Wing also inspects only a small proportion of the units in large buildings (sometimes as low as 15%), showing it is not necessary to check that all supposedly required smoke detectors either exist or are functional. APP189; *see also* Reply APP23-25 (further discussing smoke detectors). Windows and doors lacking locks, also noted by Red Wing, are not even code violations. APP193; Pls.’ M.S.J. & Opp. To D.’s M.S.J. (filed May 26, 2009), Ex. 27E (Durand Dep.74, 79).

42 potentially serious code violations, only *seven* of which were found in living spaces. APB 11; APP195. Indeed, only one violation was sufficiently serious for the inspector to require action “very soon,” without a fixed date; the others were not even that serious. Reply APP18-19.

This evidence is, at best, similar to that in *Ascher*, showing that the program is mildly effective in locating code violations. But, as this Court held in *Ascher*, the mere fact that a suspicionless search program yields some results is not sufficient to uphold it. Instead, Red Wing must show that its program is “significantly” more effective than any alternative. *Ascher*, 519 N.W.2d at 186.

**4. Red Wing has not shown that its program is “significantly” more effective than alternative approaches.**

Plaintiffs and *amici* have listed many different alternative enforcement programs that would not involve suspicionless searches of private homes.

These include:

- Voluntary inspections. APB 33
- Inspections of properties with deteriorated conditions outside. APB 33.
- Inspections of units where another voluntarily-inspected unit in the building had a type of violation likely to exist in other units. APB 33.
- Inspection upon complaint. Cato Br. 26-27.

- Self-inspection with owners required to give sworn statements of compliance with particular safety requirements and inspections if owners do not provide these statements or appropriate documentation. APB 33; SPARL Br. 10-12; Cato Br. 24. Indeed, for certain items like furnaces and electrical panels, photographs could be required.
- City “seal of approval” for units that have been inspected. APB 33; SPARL Br. 10.
- Inspection in between tenants, while unit is unoccupied. Cato Br. 25, 27.
- Tenant education to support voluntary inspection program, coupled with penalties for retaliation against tenants. SPARL Br. 9; ACLU-MN Br. 16.<sup>6</sup>

These other approaches, used by other cities across the country, provide alternatives that do not violate privacy rights and yet would still enforce compliance with housing codes. Red Wing addresses only the first two possibilities listed and ignores all the rest. *See also* League of Cities Br. 15 (addressing three possibilities and ignoring the others). Red Wing has not met its burden.

**C. The District Court Decisions under *Camara* Provide Inadequate Protection for Minnesotans.**

In their opening brief, Plaintiffs explained that administrative warrants lack the protections of traditional warrants. A judge does not consider whether there is sufficient evidence to show a “probable” violation;

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<sup>6</sup> *See also* SPARL Br. 6-8 (post-1967 tenant protections).

nor does she ensure that the evidence is linked to the place to be searched. APB 34-36. Administrative warrants thus violate the constitutional requirement that warrants may be issued only upon “probable cause.” *See* Minn. Const., Art. I, sec. 10.

In response, Red Wing points out that the judges in this case actually have denied two warrant applications on the grounds that the proposed warrant did not comport with *Camara*. RSB 37. But those rulings do not show that *Camara* provides adequate protections for the rights of Minnesotans. To the contrary, those decisions highlight the fact that *Camara* requires courts to ignore the explicit textual requirement of “probable cause.” In keeping with *Camara*, the trial courts reviewing the warrant applications never suggested any requirement of actual probable cause. APP73-77; RA0092-95. They never required any connection between the properties to be searched and the likelihood of violation; nor did they require a probability of violations being found. *See id.*

Instead, the trial courts sought to reduce, at the margins, the invasiveness of the searches. APP75-77; RA0093-95. They held that the ordinance gave too much discretion to search closets and cabinets and found that inspectors had too much ability to share information with current and former law enforcement. *See id.* Even enforcing the trial courts’ limits, however, the inspectors will still enter every room, including bedrooms and

bathrooms, engaging in broad-ranging searches with only minor limits. And although the trial court limited the reporting of *other* information to police, it did not hold unconstitutional the ordinance's provision allowing reporting of evidence of the four felonies. *See* APP76. In other words, in the eyes of the trial court, reporting evidence of some felonies to the police after a rental inspection does not violate *Camara*. That rule does not adequately protect Minnesotans.

**D. Legislative and Ordinance History Do Not Demonstrate that Suspicionless Home Inspections Are Accepted in Minnesota.**

Red Wing argues that the history of inspection laws in Minnesota shows that they are part of Minnesota's legal traditions and should be accepted by this Court. RSB 41-46. Red Wing's reliance on these statutes and ordinances is misplaced. First, and most important, this Court's precedents upholding the sanctity of the home and rejecting suspicionless search and seizure programs are more relevant for constitutional interpretation. Second, the historical record is too mixed to support Red Wing's position.

Although the existence of a statute or ordinance is some evidence of historical practice, it cannot outweigh the multitude of cases from this Court upholding the sanctity of the home. *See* APB 15-18 & 20-24. And indeed, although Red Wing cites cases where historical statutes are used as evidence,

see RSB 40, those cases rely far more on analysis of prior cases and constitutional language than on the existence of historical statutes. See *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 830-33 (Minn. 1991) (devoting pages to relevant cases and one paragraph to historical statute); *Clark v. Pawlenty*, 755 N.W.2d 293, 304-07 (Minn. 2008) (devoting more space to relevant caselaw and statutory construction than to historical statutes); *Women of the State of Minn. v. Gomez*, 542 N.W.2d 17, 26-31 & n.14 (Minn. 1995) (devoting pages to discussion of relevant caselaw and one footnote to discussion of historical statutes). In short, discussion of historical statutes sometimes supplements, but does not supplant, this Court’s analysis of prior precedent.

Moreover, the statutes and ordinances cited by Red Wing do not clearly point one way or the other. The Minnesota territorial statutes and statutes at the time of the adoption of the Minnesota Constitution require both a warrant and individualized reason for search.<sup>7</sup> Later Minnesota statutes

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<sup>7</sup> These statutes required both a warrant and a reason to search the particular property. To obtain a warrant, “any member of the board may make complaint under oath to a justice of the peace...*stating the facts in the case* so far as he has knowledge thereof.” Minn. Terr. Stat. ch. 18, § 7 (1851) (RA0124) (emphasis added). Then, the persons executing the warrant were authorized “to repair to *the place where such nuisance, source of filth or cause of sickness complained of* may be.” *Id.* at § 8 (emphasis added); see also Minn. Stat. ch. 16, § 8 (1858) (RA0129) (identical language). Although not termed “reasonable cause” or “probable cause,” these statutes offered the same protection as regular warrants—specific evidence showing a likelihood

abandoned the warrant requirement but continued to require individualized justification for searches.<sup>8</sup> Early city ordinances required a warrant; Minneapolis required individualized probable cause for sanitary inspections, while St. Paul and Duluth did not. *See* RA0152, 0156, 0166-167. And then, although the large cities adopted housing inspections in the 1950s, in practice, inspectors simply did not search if people objected. *See* Comment, *State Health Inspections and “Unreasonable Search”: The Frank Exclusion of Civil Searches*, 44 Minn. L. Rev. 513, 530 n.60 (1960) (according to the head of the health departments of Minneapolis and St. Paul in 1959, they just “ignor[ed] an occasional refusal of entry”). This mixed bag of statutes and ordinances gives no clear indication of constitutional intent. If anything, the fact that the state-level statutes required a warrant and individualized reason to search at the time of constitutional adoption cuts in Plaintiffs’ favor, not the City’s. *Cf. Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“An

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of violation, tied to a specific location. *See* APB 34-35 (describing protections of traditional warrants). Because information about a specific problem at a specific location was required, Red Wing is incorrect in its claim that warrants could be obtained simply to “prevent” problems that might occur, with no evidence that such problems were likely to occur at a specific location. RSB 40-41.

<sup>8</sup> Although the warrant requirement for sanitary inspections was removed, the 1905 and current law plainly limit entry to places where a problem “exists or is reasonably suspected.” 1905 Minn. Laws ch. 29, § 2136 (RA0134); Minn. Stat. § 145A.04(7) (2011) (RA0141). The 1909 statutes that authorized annual inspections of hotels and boarding houses, *see* RSB 42, only gave the power to search halls, not sleeping quarters, without a warrant or individual cause. *See* 1909 Minn. Laws ch. 36, § 2374(7) (RA0146).

Act passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, ... is contemporaneous and weighty evidence of its true meaning.”) (internal citations omitted).

### III. *Frank* and *Camara* both Represented a Sharp Departure from the Traditional Understanding of the Fourth Amendment.

As Plaintiffs have explained, 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”<sup>9</sup> and there is no persuasive reason to follow the departure. APB 37; *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005). In their brief, Plaintiffs made several detailed arguments, rooted in state and federal caselaw, American history, and historical understandings of the Fourth Amendment and Article I, Section 10, demonstrating that the U.S. Supreme Court’s decisions in *Frank v. Maryland*, 359 U.S. 360 (1959) and *Camara* represent a sharp departure under *Kahn*. APB 37-57.

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<sup>9</sup> The City thinks it is significant that Plaintiffs accidentally included the word “general” within quotation marks in their opening brief. RSB 17. However, this was a typographical error, not an error in meaning. The point remains that this Court will find a sharp departure when the U.S. Supreme Court departs from its previous “approach to the law,” even if, as in the case of rental inspections, there was no previous case exactly on point. *See Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005).

In response, the City focuses almost entirely on one case, *Boyd v. United States*, 116 U.S. 616 (1886), misunderstanding the case's relevance. The City also provides an inaccurate portrayal of colonial history and a misreading of a recent case, *United States v. Jones*, 132 S. Ct. 945 (2012). Plaintiffs below show how *Boyd* demonstrates *Frank* and *Camara* constituted a sharp departure under *Kahn*, correct the City's reading of colonial history, explain how *Jones* supports a finding of sharp departure, and close with how there is no persuasive reason to follow the departure.

**A. *Boyd v. United States* Did Not Limit the Fourth Amendment to Criminal Proceedings and Civil Forfeiture.**

*Boyd*, and the colonial era sources it relied upon, demonstrate that prior to *Frank*, and during the period in which the Minnesota Constitution was adopted, it was understood that the Fourth Amendment (1) applied to civil proceedings and (2) required individualized probable cause for the issuance of a warrant. The City counters that *Boyd's exact* holding does not directly address the *precise* issue of this case. But, that is undisputed; the Supreme Court did not do so, of course, until 1959 with *Frank*. *Boyd's* reasoning, however, inescapably demonstrates these conclusions. Further, the cases the City cites do not say otherwise, and to the extent they distinguish *Boyd*, they do so on issues completely irrelevant to this case.

*Boyd* applied the Fourth Amendment to civil forfeiture, but it never stated or implied that this was the only civil context in which the Fourth Amendment applied. Although civil forfeiture is sometimes considered “quasi-criminal,” RSB 20, civil forfeiture defendants receive nothing like the rights accorded the accused in a criminal prosecution. For example, civil forfeiture does not require proof beyond a reasonable doubt and innocence is not a defense. *See Bennis v. Michigan*, 516 U.S. 442, 446 (1996) (no innocent owner defense); *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011) (requiring only preponderance of the evidence).

Nowhere in *Boyd* did the Court state that civil forfeiture was the only civil proceeding covered by the Fourth Amendment. The City makes much out of later cases citing *Boyd* for the proposition that the Fourth Amendment applies to criminal prosecutions and civil forfeiture proceedings. RSB 20-23. But in none of those pre-*Frank* cases did the courts state that the Fourth Amendment *only* applied to those actions. Two of the cases distinguished *Boyd* because they involved corporations, something entirely beside the point here. *See Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 204-08 (1946); *Hale v. Henkel*, 201 U.S. 43, 71-73 (1906); *see also Minn. State Bar Ass’n v. Divorce Assistance Ass’n, Inc.*, 311 Minn. 276, 248 N.W.2d 733 (1976) (distinguishing *Boyd* based upon *Fisher v. United States*, 425 U.S. 391, 407-

08 (1976), which stated *Boyd* had been superseded in three areas, none having to do with the Fourth Amendment's application to civil proceedings).

The cases from this Court cite *Boyd* for its holding regarding the right against self-incrimination and do not address *Boyd's* application to civil searches. See *State v. Sauer*, 217 Minn. 591, 593-94, 15 N.W.2d 17, 20 (1944) (*Boyd* did not apply because papers hotel owner turned over to police were turned over voluntarily and were themselves “the means of perpetrating” a crime); *State v. Drew*, 110 Minn. 247, 251, 124 N.W. 1091, 1093 (1910) (*Boyd* cited for right against self-incrimination with no comment whatsoever on its application to non-forfeiture civil proceedings); *State v. Strait*, 94 Minn. 384, 388-89, 102 N.W. 913, 913-14 (1905) (in fraud prosecution, *Boyd* held inapplicable because defendants voluntarily turned over financial papers in question).

Further, *State v. Pluth* also did not state that *Boyd* was limited to the criminal context. 157 Minn. 145, 195 N.W. 789 (1923). There, this Court stated that *Boyd* was relevant to the criminal prosecution before it. *Id.* at 149-50. However, as Plaintiffs stated in their brief, APB 43-44, *Pluth* also explained that *Boyd* was not limited to the right against self-incrimination, and that one of the reasons for the adoption of the Fourth Amendment was to prevent searches for the purpose of enforcing imposts and taxes, and that Article I, Section 10 embodies the same purposes. See *Pluth*, 157 Minn. at

149-50. *Pluth* thus recognized that protecting against civil searches as well as criminal ones was fundamental to Article I, Section 10's genesis and scope.

**B. Colonial History Demonstrates Administrative Warrants for Home Inspections Are Akin to General Warrants and Writs of Assistance.**

The understanding of the Fourth Amendment at the time the Minnesota Constitution was adopted was that it was meant to apply to civil proceedings as well as criminal ones. *Boyd's* embrace of colonial era decisions on general warrants and writs of assistance demonstrates this understanding. *See Boyd*, 116 U.S. 624-29. The City boldly asserts "Appellants offer no basis for their assumption that the Crown employed only a non-criminal, regulatory response to smugglers or tax-evaders, once caught." RSB 25. Appellants do not make an "assumption." Rather, Appellants have put forth evidence that general warrants and writs of assistance often were issued to enforce regulatory legislation, such as customs laws. *See APB* at 40-43. The penalty for violations of these laws could be criminal but often was merely a monetary penalty, as an article that Defendant itself relies upon states:

Compared to the notoriously severe criminal penalties of the seventeenth and eighteenth centuries, which emphasized corporal punishment, the provisions for forfeiture of goods, vessels, and sums of money up to one hundred pounds were "civil" penalties. ... And those penalties were not different in substance than the penalties which could have been invoked by

authority of the statute in *Frank* for non-compliance with orders demanding remedy of health nuisances.

Comment, 44 Minn. L. Rev. at 521 n.29 (citing various civil customs penalties); *see also id.* at 520-23.

A regulatory customs search was exactly what was at issue in the famous *Paxton's Case*. APB 41. The request for a previous writ of assistance, by Mr. Paxton himself, simply stated, in relevant part: "Humbly shews Charles Paxton Esq. That he is lawfully authorized to Execute the Office of Surveyor of all Rates Duties and Impositions arising and growing due to his Majesty at Boston...." Josiah Quincy, *Reports of Cases Argued & Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 & 1772* 402 (1865) (Reply APP36) (antiquated typography corrected). Paxton requested authority to collect "rates[,] duties and impositions," not to imprison or corporally punish evaders of customs laws.

Thus, the regulatory searches allowed via general warrants and writs of assistance were often part of civil proceedings. The consequences for the searched parties were often merely fines, whereas the possible consequences for violation of Red Wing's ordinance can be fines or a short stint in jail. *See supra* 6-7. The approach to the law at the time of Minnesota's founding was

that the Fourth Amendment protected against both criminal and civil searches of the home without a warrant.

**C. Before *Camara*, Individualized Probable Cause Was Constitutionally Required for *Any* Warrant.**

One of the purposes of the Fourth Amendment was to require probable cause for the issuance of a warrant, and, until *Camara*, “probable cause” was always an individualized inquiry. *See* APB 40-43, 54-55. *Boyd*’s references to colonial era cases condemning general warrants and writs of assistance demonstrate this general understanding.

First, these devices, *by definition*, allowed warrants that lacked probable cause. *See, e.g., Cassady v. Tackett*, 938 F.2d 693, 699 (6th Cir. 1991) (“General warrants did not require probable cause.”).

Second, until *Camara*, “probable cause” did not mean anything other than “individualized probable cause.” The idea of “probable cause” that didn’t involve a “probable” violation by the person to be searched made its first conceptual appearance in the *Frank* dissent.<sup>10</sup> *Frank*, 359 U.S. at 383. It did not become law until the *Frank* dissent became the majority opinion in *Camara*. *Camara*, 387 U.S. at 538-39; *see also* APB 54-55 (citing legal

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<sup>10</sup> The *Frank* majority actually rejected this novel understanding of “probable cause” because it felt it would cheapen the Fourth Amendment in other areas. *Frank*, 359 U.S. at 372-73.

scholars agreeing that area-wide “probable cause” had not been used by courts before *Camara*).

When *Boyd* recognized that the Fourth Amendment was adopted in order to reject general warrants, *Boyd*, 116 U.S. at 624-27, it thus recognized that the Fourth Amendment was adopted to reject warrants that allowed for regulatory searches without individualized probable cause.

**D. Other Pre-1959 Sources Demonstrate that *Frank's* and *Camara's* Treatment of the Fourth Amendment Were Sharp Departures from Traditional Understandings of the Fourth Amendment.**

The City largely ignores Plaintiffs’ evidence that the understanding of the Fourth Amendment prior to 1959 was that it applied to regulatory inspections of homes. Pre-1959 history and legal sources demonstrate that although the issue was rarely tested in court, the traditional understanding was that the Fourth Amendment protected against unconsented regulatory searches of homes.

First, there is the *Little* case, the most significant ruling on the issue of regulatory inspections of homes before *Frank*. See *District of Columbia v. Little*, 178 F.2d 13, 16-17 (D.C. Cir. 1949); APB 45-47.

Then, there are legal authorities writing on the issue long before *Frank*. See APB 45-46 (quoting Professor Ernst Freund stating in 1904 that warrants were required for regulatory searches of homes) (Reply APP37-39). Early discussions of regulatory searches to enforce sanitary regulations

agree. In 1897, Professor Henry Campbell Black, in his *Handbook of American Law*, stated, in a section entitled “Search Warrants in Aid of Sanitary Regulations,” that a search warrant would be necessary “if an entry into a private house could not be obtained, for such purposes, without the employment of force.” Henry Campbell Black, *Handbook of American Law* 507 (2d ed. 1897) (Reply APP40-41). Similarly, an 1892 “how to” guide for public health officials repeatedly advises to obtain warrants for regulatory inspections. See Parker & Worthington, *The Law of Public Health and Safety and the Powers and Duties of Boards of Health* (1892) (Reply APP42-48). Specifically, it explains how a health board should apply for a warrant before a justice of the peace when “there is reasonable ground for believing a nuisance to exist.” *Id.* at Reply APP44; see also *id.* at Reply APP43, 45-46, 48.

Obviously, if the general understanding in 1892 was that warrants were not required for regulatory inspections of private homes, there would be no need for public health officials conducting these inspections to worry about warrants. But they did. And that is because the general understanding of the Fourth Amendment at the time—the “approach to the law”—was that it *did* require warrants for all home inspections—until *Frank’s* sharp departure changed that. (*Camara*, of course, required a warrant but created a new kind of “probable cause” that had never existed before.)

**E. *United States v. Jones.***

As with its treatment of *Boyd*, the City misunderstands Plaintiffs' use of another case, *United States v. Jones*, 132 S. Ct. 945 (2012). *See* RSB 29-30. Plaintiffs do not argue that *Jones* addresses the precise issue in this case. Instead, they explain that it shows the U.S. Supreme Court's own admission that it adopted a new general "approach" to Fourth Amendment law—the same approach it used in *Frank* and *Camara*—that diminished the protections for "houses, papers and effects" embodied in the previous property-based approach to the Fourth Amendment. *Kahn*, 701 N.W.2d at 828; *see discussion* APB 55-57.

**F. *There Is No Persuasive Reason to Follow Camara.***

This Court may also look at additional factors in evaluating if there is a "persuasive reason" to follow the U.S. Supreme Court, *see Kahn*, 701 N.W.2d at 828; *see also State v. Askerooth*, 681 N.W.2d 353, 362 n.5 (Minn. 2004) (stating that Court evaluates "the better rule of law"). Red Wing asserts that the rulings of other state high courts and the lack of any body of Minnesota law show that *Camara* is the better rule or that there is no persuasive reason to depart from it. RSB 46-49. Red Wing is wrong on both counts. Moreover, as shown by *amici*, the rule of *Camara* invites abuse.

**1. Decisions of other state courts have little persuasive value.**

Red Wing points out that the intermediate appellate courts of three other states—New York, Kentucky, and Pennsylvania—have followed *Camara* in interpreting their own state constitutions. RSB 48. Yet none of these three cases contain any analysis at all of the state constitutional issue. *See In re City of Rochester*, 90 A.D.3d 1480, 1482 (N.Y. App. Div. 2011); *Louisville Bd. of Realtors v. City of Louisville*, 634 S.W.2d 163, 166 (Ky. Ct. App. 1982); *Simpson v. City of New Castle*, 740 A.2d 287, 291 (Pa. Commw. Ct. 1999). *See also* Cato Br. 9-11 (discussing lack of state constitutional precedent and analysis). Few courts have considered in any way the constitutionality of *Camara* under their state constitutions as applied to home searches, and the few who have considered it have failed to engage in any analysis. This Court's decision will be the first to do so.

**2. There is a large body of Minnesota caselaw suggesting administrative warrants to search homes violate the Minnesota Constitution.**

Red Wing suggests that, without a body of Minnesota caselaw supporting its decision, a ruling from this Court rejecting *Camara* will be seen as a purely political decision with little credibility. RSB 48-49. This suggestion by Red Wing is possible only because it wholly ignores the large body of Minnesota caselaw discussed by Plaintiffs regarding the home, privacy, suspicionless searches, and Article I, Section 10. *See* APB 14-33.

**3. Administrative warrants have a significant potential for abuse.**

Red Wing complains that *amici* present what Red Wing considers to be hypotheticals and conjectures about the potential for abuse. Red Wing treats these discussions as irrelevant because they are not solely directed toward Red Wing's ordinance. RSB 38. But the concerns of *amici* definitely go to the broader question of whether there is a persuasive reason to follow *Camara*. A decision by this Court holding that Article I, Section 10 should be interpreted just like the Fourth Amendment in *Camara* will be understood by all Minnesota municipalities as upholding their inspection ordinances as well.

It is thus important for this Court to think about issues like potential for use of evidence gleaned in criminal investigations. If this Court approves an ordinance authorizing reporting four felonies to the police, there is no reason that another ordinance could not authorize reporting a different set of four, or more, crimes. As shown by the experience of *Amicus* Wiebesick, in at least one other Minnesota city, police actually accompany inspectors in their searches pursuant to administrative warrants, and that city includes even fewer protections than Red Wing's ordinance. Wiebesick Br. 9-12. *Amicus* ACLU-MN points out that reporting the presence of marijuana in an apartment would not violate the language of Red Wing's ordinance, because the ordinance prohibits only the reporting of conditions of "the unit" or "the

occupant,” and drugs in an apartment would not be a condition of either. ACLU-MN at 11-12.<sup>11</sup> *Amici* Cato *et al.* discuss the problems with keeping information obtained through housing inspections private in the electronic age. Cato Br. 20-22. And Plaintiffs’ *amici* demonstrate that there are other ways to protect tenants from substandard housing that do not involve violating those same tenants’ rights. *Id.* 23-27; ACLU-MN Br. 16-17; SPARL Br. 8-14. The *amici* show that there is no persuasive reason to follow *Camara* and many reasons to depart from it.

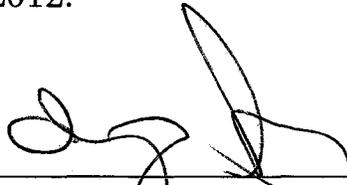
### Conclusion

This Court should reject *Camara* and hold that administrative warrants to search homes violate Article I, Section 10.

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<sup>11</sup> Red Wing complains that the ACLU-MN cites only to proposed findings of fact, instead of to the underlying record evidence. RSB 39. The proposed findings of fact contain all of the record citations and, in any event, the contents of the cited city documents and city depositions cannot possibly be in dispute. *See* Proposed Findings of Fact at ¶¶ 16-19 (filed Aug. 7, 2009) (citing numerous summary judgment exhibits, including city documents, 27Z, 27AA, 27BB, 27CC, and depositions of city officials, 27H, 27I, 27W, 27Y). Red Wing disagrees with the *conclusion* to be reached from its own statements about the link between the origins of the program and crime prevention, but the documents say what they say.

DATED this 13<sup>th</sup> day of November, 2012.



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STATE OF MINNESOTA  
IN SUPREME COURT

Robert McCaughtry, et al.,

Appellants,

**CERTIFICATION OF BRIEF LENGTH**

v.

**No. A10-0332**

City of Red Wing,

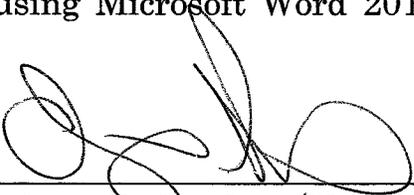
Respondent.

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