No. A15-1795

STATE OF MINNESOTA
IN SUPREME COURT

JASON WIEBESICK, JACKI WIEBESICK, AND JESSIE TRESELER,

Appellants,

v.

CITY OF GOLDEN VALLEY,

Respondent.

BRIEF OF AMICI CURIAE CENTER OF THE AMERICAN EXPERIMENT, CATO INSTITUTE, AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are nonprofit institutions that seek to vindicate the public interest in safeguarding the liberty and property interests of Americans in the privacy of their homes against routine and unwarranted government searches, whether those homes are owned, rented, or occupied on another basis. All three institutions participated as amici curiae before this Court in *McCaughtry v. City of Red Wing*, 831 N.W.2d 518 (Minn. 2013), which concerned the unlawfulness under the Minnesota Constitution of warrantless rental inspections pursuant to Red Wing's ordinance.

Center of the American Experiment (CAE) is a nonpartisan educational organization dedicated to the principles of individual sovereignty, private property, and the rule of law. It advocates for policies that limit government intrusion in individual affairs, uphold the protection of private property rights, and promote competition and consumer choice in a free market environment. CAE is a nonprofit, tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual

[1] No counsel for any party authored this brief in whole or in part, and no person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs in cases in which individual liberties are at issue.

The Electronic Frontier Foundation (EFF) is a nonprofit, member-supported civil liberties organization, based in San Francisco, California, working to protect privacy rights in a world of sophisticated technology. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy, and has served as counsel or amicus curiae in cases addressing privacy rights, as well as the Fourth Amendment's application to new technologies.

INTRODUCTION

Amici curiae respectfully submit that rental-home inspection programs like the City of Golden Valley's Licensing of Rental Housing (LRH) ordinance, Golden Valley City Code § 6.29, constitute one of the most broadly applicable, pervasive, and unjustified intrusions into the private lives of thousands and, nationally, millions of Americans. To live in a rental home, one must subject oneself to a government agent's mandatory "inspection"—for constitutional purposes, a search—of one's residence. This occurs even if the tenant and

landlord *both* do not want an inspection or believe one is necessary. If they deny consent, the city may proceed on an administrative warrant without offering any evidence of an individualized, specific housing-code violation or other problem with the home. There is nowhere for residents to hide; the most private trappings of their lives are on display to government inspectors who are subject to no apparent restrictions—in Golden Valley's case, not even the toothless restrictions provided by Red Wing's ordinance in *McCaughtry*. The only theoretical avenue of escape is for owners and renters to pack up all their belongings and hide them elsewhere until the government agents have gone away—until the next inspection.

That is not how government agencies in this country are supposed to act. Yet they are increasingly doing so at the lowest level of government. Counties and municipalities across the country are undertaking a wide variety of rental-inspection programs for vaguely stated reasons that lack empirical justification, and with inadequate protections for privacy interests. *Camara v. Municipal Court*, 387 U.S. 523 (1967), may have prevented the Fourth and Fourteenth Amendments to the U.S. Constitution from providing effective protection, but that curious ruling does not prevent state constitutions from filling the void. State constitutions are closer to the people, and the local governments subject to state protections against unreasonable

searches are creatures of those constitutions. This is a perfect opportunity for the Minnesota Constitution to provide "the first line of defense for individual liberties within the federalist system." *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005).

ARGUMENT

I. Homes Are Entitled to Protection Against Broad Administrative Searches Without Regard to the Homes' Underlying Economic Arrangements.

A person's home is entitled to protection against unreasonable government searches regardless of whether it is owned outright. "The right to be free from unauthorized entry into one's abode is ancient and venerable." *State v. Larsen*, 650 N.W.2d 144, 147 (Minn. 2002). Indeed, "'the house has a peculiar immunity in that it is sacred for the protection of a person's family.'" *State v. Carothers*, 594 N.W.2d 897, 900 (Minn. 1999) (quoting *State v. Touri*, 101 Minn. 370, 374, 112 N.W. 422, 424 (1907)) (brackets omitted). The "very essence of constitutional liberty and security" involves constraining "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). "It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some

public offense ...." *Id.* Reflecting these fundamental principles, Minnesota has acknowledged a constitutionally protected expectation of privacy in one's home and its curtilage. *See Garza v. State*, 632 N.W.2d 633, 639 (Minn. 2001); *State v. Perkins*, 582 N.W.2d 876, 878 (Minn. 1998).

The Minnesota Constitution expressly recognizes the sanctity of the home by guaranteeing "[t]he right of the people to be secure in their persons, *houses*, papers, and *effects*," and requiring that "no warrant shall issue but upon probable cause." Minn. Const. art. I, § 10 (emphasis added). What is at issue here is not the sanctity of one's home in a figurative sense, as is used in cases involving state regulation of private conduct that typically occurs at home, such as sexual relationships, use of contraception, or teaching one's children. Rather, rental-home inspections strike at the physical integrity of the house, threatening the privacy of *all* that occurs within. Golden Valley's LRH ordinance authorizes the search of the "Rental Dwelling" and "all common areas, utility and mechanical rooms, [and] garages." Golden Valley City Code § 6.29, subd. 4(E). "Rental Dwelling" is defined as the "Dwelling Unit" and "accessory structures such as garages and storage buildings ... which are on the premises on which a Rental Dwelling is located"; "Dwelling Unit" includes the "dwelling space providing independent living facilities for ... sleeping, eating, cooking, and sanitation." *Id.*, subd. 3(E) & (M).

Golden Valley's ordinance authorizes the search of every nook and cranny: its "Inspection Checklist" for "Rental Housing: Interior" requires inspection for "[c]racks or chipping" in any walls, "[a]ll outlets/switches," and the "[c]lean and sanitary condition" of dishwashers, washers, driers, refrigerators, ovens, kitchen cabinets, and bathroom fixtures.[2] Indeed, the checklist announces that it merely "includes the major items covered in an inspection but may not be totally inclusive of all items." *Id.* Unlike Red Wing's ordinance in *McCaughtry*, Golden Valley provides no exceptions for containers, drawers, and medicine cabinets—even if they are closed and their contents are not in plain sight. *Cf.* Red Wing Code § 4.31, subd. 1(3)(m).

Inspections like those conducted under Golden Valley's ordinance expose—in plain sight—innumerable aspects of the occupants' lives:

- Politics and political activities, as displayed by posters, books, and pamphlets
- Reading habits, including books, newspapers, and magazines
- Movie-viewing habits, whether political, literary, or sexual[3]

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[2] http://www.goldenvalleymn.gov/homeyard/rent/pdf/rental-housing-checklist-interior.pdf (last visited Sept. 28, 2016).

[3] Federal protections against the disclosure of video rentals and sales were adopted after reporters obtained Judge Robert Bork's rental history during his Supreme Court confirmation battle. *See* Video Privacy Protection Act of 1988, 18 U.S.C. § 2710. Inspections threaten the privacy of all *possessed* materials, without any need for cooperation from third-party vendors.

- Protected-class information, including race, national origin, creed, or sexual preference

- Religious (or nonreligious) beliefs, affiliations, and practices, which may be unpopular or discriminated against in the locality, e.g., minority Christian denominations, Santeria, Jews, Moslems, Scientologists, Wiccans, and atheists

- Family and other intimate and nonintimate relationships, as well as the sex and identity of other occupants, as revealed in photographs and personal effects

- Group associations, e.g., membership in Alcoholics Anonymous

- Personal habits, such as slovenliness

- Personal belongings, including jewelry, artwork, and furnishings, and the location of safes (which sometimes are located behind dummy outlets that inspectors may check)

- Hobbies and interests, from the ordinary to what some may find disturbing

- Sports fandoms, which may be uncomfortable for a Green Bay Packers fan in Vikings territory

- Gambling or even the state lottery, which may be proscribed by the person's religious community, to the point of precluding church contributions from any winnings

- Intimate preferences, practices, and characteristics, whether lawful or unlawful, which may conflict with the occupants' avowed religious faith or otherwise open them to ridicule in their community, e.g., contraceptive devices in the bedrooms of Catholics, or cross-gender clothing in closets

- Private, and possibly embarrassing, dietary practices, e.g., pork in the home of a rabbi or vegan enthusiast, alcohol in the home of a Southern Baptist or Latter-Day Saint, or high-sugar foods in a home with children or obese residents

- Lawfully or unlawfully possessed weapons

- Smoking and drug-related paraphernalia
- Medical devices and prescriptions
- Financial documents and records.

Some of these may appear trivial or (like sports fandom) even humorous, but disclosures of seemingly benign private information may be devastating to some people, particularly in combination. That Golden Valley's searches are nondiscriminatory among rental homes—*everyone* has to suffer the indignity and violation—is no consolation.

The sanctity of one's home and its contents does not and should not turn on the economic arrangements through which the individual or family occupies the premises. In *McCaughtry*, the court of appeals recognized that, under federal and Minnesota law, "landlords and tenants have a reasonable expectation of privacy in rental property," and "inspections of rental property constitute a search." *McCaughtry v. City of Red Wing*, 816 N.W.2d 636, 642 (Minn. Ct. App. 2012). If portable ice-fishing houses receive constitutional protection under Minnesota law against enforcement of a regulatory code, *State v. Larsen*, 650 N.W.2d 144, 149 (Minn. 2002), and self-storage units receive protection because "the dominant purpose for such a unit is to store personal effects in a fixed location," *State v. Carter*, 697 N.W.2d 199, 210-11 (Minn. 2005), so much more so should an actual year-round rental home or apartment where personal effects are stored and *used*.

Individuals may choose a particular economic housing arrangement for financial or other personal reasons that have nothing to do with the nature, quality, condition, or safety of the home. Some may choose to purchase a detached home or condominium for investment, philosophical, or emotional reasons. Some may opt to grant mortgages or deeds of trust in order to gain necessary financing or secure tax benefits. Some may enter into sale/lease-back agreements for purposes that have everything to do with liquidity. Others may choose to rent for financial reasons (such as lack of funds for a down payment, or a belief that properties will not appreciate) or nonfinancial reasons (such as not being tied down to a particular place, manner, or time of residence). Rentals may be short-term or long-term, depending on the desires and interests of the owners and occupants, as reflected in freely negotiated, mutually satisfactory agreements. Treating owned and leased homes differently, and granting lesser privacy protections for those who lease instead of own, distort the market for homes and unfairly skew arrangements in favor of ownership over other property interests.[4] No Minnesotans—no

[4] Commentators have pointed to government policies favoring home ownership over renting as a cause of the recent financial crisis. *See* Kirsten David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. Rev. 573, 575 (2009) (arguing that, "because Americans value homeownership so much—in fact, more than we should—we have placed ourselves in an untenable position as a country and now find ourselves in the midst of a well-documented housing crisis" (footnotes

Americans—should be subjected to a broad invasion of privacy based merely on their having rented when there has been no individualized showing of a problem with their home.

II. The Recent Growth of Rental-Home Inspection Ordinances Poses a Great Threat to the Sanctity of Homes Against Searches.

A. This Court may be the first to address the applicability of state constitutional protections to rental-home inspections.

Minnesota courts, first in *McCaughtry* and now here, appear to be the first to focus on whether their state's constitution provides greater protections against warrantless inspections of homes than the Fourth Amendment as construed in *Camara*. This Court recognized in *McCaughtry* that "whether the Minnesota Constitution prohibits the issuance of an administrative warrant" to conduct a housing inspection is an "unsettled question." 831 N.W.2d at 525. As a consequence, the decision in this case may be a watershed ruling here and nationally.

Other states have declined to follow Fourth Amendment case law as to administrative searches and recognized broader protection under state constitutions, but those cases did not involve residential properties; instead,

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omitted)); Peter J. Wallison, *Government Housing Policy and the Financial Crisis*, 30 Cato J. 397 (Spring/Summer 2010).

they involved OSHA-type inspections[5] or public-school searches.[6] On the other hand, while several state courts have followed Fourth Amendment case law on administrative searches under their state constitutions, almost none did so in the context of homes; some followed *Camara* and *See v. City of Seattle*, 387 U.S. 541 (1967), *Camara*'s companion decision in the commercial context, as to administrative searches of business premises,[7] trees in the curtilage,[8] or farm property.[9] And those courts did not engage in any detailed

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[5] *Woods & Rohde, Inc. v. Dep't of Labor*, 565 P.2d 138 (Alaska 1977) (invalidating warrantless OSHA inspection); *Salwasser Mfg. Co., Inc. v. Municipal Court*, 156 Cal. Rptr. 292 (Ct. App. 1979) (invalidating OSHA statute's authorization of routine inspections under federal and state constitutions, holding that because statute carries "far-reaching penal consequences," probable cause akin to criminal search warrant was required).

[6] *Commonwealth v. Smith*, 889 N.E.2d 439 (Mass. App. Ct. 2008) (administrative searches in public school system that produced gun in student's pocket).

[7] *City of Overland Park v. Niewald*, 893 P.2d 848 (Kan. Ct. App. 1995) (administrative search of business premises for compliance with fire code under *Camara* and *See*); *Yocom v. Burnette Tractor Co. Inc.*, 566 S.W.2d 755 (Ky. 1978) (requiring state OSHA inspectors to obtain warrant for nonconsensual workplace search under "the teaching of *Camara* and *See*"); *State ex rel. Accident Prev. Div. of Workmen's Comp. Bd. v. Foster*, 570 P.2d 398 (Or. Ct. App. 1977) (under *Camara* analysis, legislature needed to adopt administrative standards for routine inspections of manufacturing facilities under Oregon Safe Employment Act).

[8] *Fla. Dep't of Agric. & Consumer Servs. v. Haire*, 836 So. 2d 1040 (Fla. Ct. App. 2003) (applying *Camara* under state constitution in striking down city search program permitting warrantless inspection of citrus trees for signs of disease).

analysis of state law. While Texas and Vermont courts have provided a more detailed analysis of state constitutional protections from administrative searches, those cases were in nonresidential contexts—courthouse metal detectors[10] and DUI checkpoints.[11]

While one New York intermediate appellate court did address administrative searches of residential rental properties, even that case carries little weight.[12] The ordinance authorized the city to obtain *judicial* inspection warrants, and the court upheld the procedure as consistent with *Camara* on Fourth Amendment grounds without any real analysis. The petitioners apparently did not challenge the searches under the state constitution, and the court merely noted in dicta that it "saw no basis" for imposing a higher standard under New York law.[13] In fact, the New York Court of Appeals has, in other Fourth Amendment contexts, "not hesitated to interpret [the state provision] independently of its Federal counterpart when

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[9] *State v. Stip*, 246 N.W.2d 897 (S.D. 1976) (applying *Camara* analysis and upholding ordinance permitting inspectors to "spot check" property to determine whether all of property was included on individual's tax assessment statement).

[10] *Gibson v. State*, 921 S.W.2d 747 (Tex. Ct. App. 1996).

[11] *State v. Record*, 548 A.2d 422 (Vt. 1988).

[12] *In re City of Rochester*, 935 N.Y.S.2d 748 (App. Div. 2011).

[13] *Id.* at 750.

the analysis adopted by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free from unreasonable government intrusions."[14] Minnesota courts are therefore in uncharted territory when it comes to state constitutional protections against rental-home inspections that are not grounded in individualized showings of probable cause.

B. Ordinances authorizing administrative searches without a basis in individual suspicion have been adopted for sundry and vague purposes.

One of the fundamental problems with rental-home inspection ordinances is that they are adopted not by one state legislature, but by potentially hundreds of counties, cities, and towns in a single state, sometimes on a neighborhood-by-neighborhood basis. The justifications for such inspection programs are as varied as they are vague and grand, and most of them apply with equal strength to owner-occupied dwellings:

- to "properly protect the health and safety of persons residing in rental properties,"[15] to "promote safety and adequate maintenance of residential structures,"[16] or to prevent conditions that "are likely to affect adversely the public health

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[14] *People v. Dunn*, 564 N.E.2d 1054, 1057 (N.Y. 1990) (declining to follow *United States v. Place*, 462 U.S. 696 (1983), regarding dog sniff of airport luggage).

[15] Joliet Ordinance 1. For ease of reading, full citations to the city and county materials are set forth in the Table of Authorities.

[16] North Richland Hills Ordinance 1; *see* Oakley Code § 4.30.104 (ordinance "is necessary to preserve the health, safety, and general welfare of the community").

(including the physical, mental and social well-being of persons and families), safety and general welfare"[17]

- to "preserve and enhance the quality of life for residents of the City living in those residential rental dwelling units,"[18] or "the quality of life of neighborhoods"[19]

- to "avoid life-threatening problems such as a lack of functioning smoke detectors, faulty mechanical equipment and inadequate or unsafe electrical equipment"[20]

- to "proactively identify blighted and deteriorated rental housing stock,"[21] or "prevent[] conditions of deterioration and blight that could adversely affect economic conditions and the quality of life in the City."[22]

The marked expansion since 2008 of the number of local jurisdictions adopting rental-home inspection programs has been driven in great part by the home foreclosure crisis. Thus, Sacramento County, California, noted as a justification for its ordinance that "the foreclosure crisis has resulted in an influx of vacant properties which are often vandalized and contribute to

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[17] West Lafayette City Ordinance § 117.01(c).

[18] Richmond Code § 6.40.010.

[19] Joliet Ordinance 1; *see* Oakley Code § 4.30.102 (ordinance "protect[s] the public health, safety and welfare through the identification, prevent, and correction of substandard housing conditions that adversely affect the quality of life for residents living in and around rental dwelling units").

[20] Trappe Ordinance 1, § B(4).

[21] Richmond Code § 6.40.010.

[22] Pinole Ordinance § 8.30.020.

neighborhood blight."[23] One wonders why a foreclosure crisis associated with unaffordable home mortgages would drive the need for a *rental*-inspection program; if anything, home foreclosures should enhance the market for, and sustainability of, rental properties.

The answer may be that governments are looking for any way, however dubious, to boost local property values, as opposed to home safety. In Rochester, Michigan, for example, the city council adopted (by a 4-3 vote) a rental-inspection ordinance in 2011 because, "[a]fter the crash of the housing market in 2008 and the resulting rise in foreclosures, [the] council appointed a task force to find ways to protect property values," and "[t]he task force is credited with the idea of the inspection ordinance."[24] One council member noted that "the Southeast Michigan Council of Governments has urged local governments to enact such ordinances in the wake of the foreclosure crisis gripping the state," which caused lower property values.[25]

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[23] Sacramento Information (explaining why prior complaint-based inspection process "has not effectively dealt with the increase of deteriorating properties").

[24] Annette Kingsbury, *Rental Inspection Ordinance Approved in Rochester* (May 25, 2011), www.rochestermedia.com/rental-inspection-ordinance-okd-in-rochester (last visited Sept. 28, 2016).

[25] *Id.*

Golden Valley has not articulated any specific justification for its inspection program; the LRH ordinance contains no findings supporting such inspections. It is not alone: beyond Golden Valley, ordinances requiring routine inspections of *all* rental homes are being adopted without any concrete showing of need. Usually the local government's "findings" consist of unspecified, anecdotal references to problems with rentals that could easily justify inspections based on individualized showings of probable cause. One California city explained, "It has been noted over the years that some of these residential rental buildings and dwelling units are substandard, over-crowded and/or unsanitary …."[26] Another California city stated, "For years the City responded to complaints from tenants, other nearby rental property owners, and residents about the lack of property maintenance on many rental properties."[27] One ordinance recites that the "City Council hereby finds that … [r]ental housing *sometimes* experiences a lack of adequate maintenance, or is allowed to create public nuisances, due to the fact that owners *may* not inspect the property often, *may* not make repairs or abate nuisances as necessary, or because tenants are not concerned with property conditions

[26] Santa Cruz Questions 1.

[27] Azusa Information 1.

that may adversely affect *property values*."[28] Another ordinance states that "[t]here is a *growing concern* in the community with the appearance and physical condition of many Residential Rental Units," and "a *perception and appearance* of greater incidence of problems with the maintenance and upkeep of residential properties which are not Owner-occupied as compared to those that are Owner-occupied."[29]

Again, some complaints appear to be driven by concerns that property values are being driven down by *obvious* deterioration. As one city stated, other property owners complained that "their property values were being adversely affected," and "other rental property owners … believed that their ability to rent, and even their ability to increase rents, was being adversely affected by other errant rental property owners in their neighborhoods."[30] The same could be said of deteriorating owner-occupied or unoccupied homes, but inspecting them would require taking on a different constituency.

The logic behind inspecting *only* rental units is rarely stated. One ordinance that attempted to justify the restriction argued that "[r]enter-occupied units are more likely to be attached units than are Owner-occupied

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[28] Oakley Code § 4.30.104 (emphasis added).

[29] Trappe Ordinance 1, § B(2) (emphasis added).

[30] Azusa Information 1.

units. As a result, code violations in renter-occupied units are more likely to directly endanger neighboring residents."[31] But that would suggest the need to inspect all attached units, regardless of ownership, rather than all rental units, regardless of whether they are attached. Insisting that rental homes uniquely demand government inspection is, in fact, part of a pattern of government policy that unfairly stigmatizes renters while elevating homeownership.[32]

No effort is made by the municipalities to document with empirical evidence the need to inspect all rental homes without any individualized showing of probable cause. Rather, they typically note—if they say anything at all—that it is simply easier to search everything, e.g., that "routine periodic inspections of all premises" are "the most effective way to obtain compliance."[33] Thus, one city's ordinance merely recites that the regulations

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[31] Trappe Ordinance 2, § B(5).

[32] *See* Adams, 60 S.C. L. Rev. at 595-96 ("[t]he other side of this phenomenon [associating homeownership with other positive virtues] is that Americans have stigmatized renting and renters," even though "stigmatizing renters and over-privileging homeowners is unfounded"); Anthony Randazzo, *Renters Are Fiscally Responsible Too: Three Reasons Renting Should Be a Part of the American Dream*, http://reason.org/news/show/ renters-fiscally-responsible-too (June 14, 2011) (last visited Sept. 26, 2016); Morris A. Davis, *Questioning Homeownership as a Public Policy Goal*, Cato Institute Policy Analysis No. 696 (May 15, 2012).

[33] Kalamazoo Code § 17-12(A).

"appear to the city council to be well designed to promote safety and adequate maintenance of residential structures within the city."[34] And another broadly declares that residential dwelling units may become "unsafe, a public nuisance, and unfit for human habitation" when not subject to initial or periodic inspections.[35]

But these vague invocations of need are used to justify universal or near-universal *repeated* inspection and re-inspection on a routine basis, such as no more than once a year,[36] annually,[37] at least once every two years,[38] once every three years,[39] not less than once every four years,[40] at least once every five years,[41] or on an "area basis, such that all the regulated premises in a predetermined geographical area will be inspected simultaneously or

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[34] North Richland Hills Ordinance 1.

[35] Roanoke Code § 7-34(a).

[36] North Richland Hills Ordinance § R110.2.2.

[37] Santa Cruz Questions 1; Azusa Information 1.

[38] Joliet Code § 8-152(e).

[39] Pinole Ordinance § 8.30.080-090 (but allowing officials to inspect "in response to a citizen complaint alleging code violations or other violations of law at such an apartment, house, or hotel").

[40] Stockton Code § 8.32.050(A).

[41] Stockton Code § 8.32.120(A).

within a short period of time."[42] These routine inspections may be in addition to inspection for specific cause.[43]

The ordinances' exceptions to the inspection requirement show how thin the rationales are. For example, the ordinances almost always do not require inspection of owner-occupied homes or units,[44] unoccupied homes or units, or other homes or units not available for rental.[45] Many ordinances provide other exceptions that are not grounded in any empirical showing:

- Manager-occupied units[46]
- Any owner with two or fewer rental dwelling units in the city[47]
- Housing of one to six units, one of which is occupied by the owner[48]

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[42] Kalamazoo Code § 17-12(E)(1).

[43] *E.g.*, Kalamazoo Code § 17-12(E)(1)-(3) (inspections may be authorized on an "area basis," on a "complaint basis," or on a "recurrent violation basis").

[44] Joliet Code § 8-152(b) (exempting owner-occupied single-family dwellings and non-owner occupied single-family dwellings that have not experienced police service, fire service, or code violations or been declared a public nuisance); Pinole Ordinance § 8.30.040(A); Richmond Code § 6.40.020 (definition of "Residential rental dwelling unit"); Roanoke Code § 7-35; Seattle Code § 22.214.030(B)(3).

[45] Oakley Code § 4.30.206(c); Seattle Code § 22.214.030(A)(3).

[46] Pinole Ordinance § 8.30.040(A).

[47] Richmond Code § 6.40.020.

[48] Boston Code § 9-1.3.

- Units provided to members of the building owner's family[49]
- The "initial tenant" of a unit that entered the rental market "in an effort to prevent foreclosure or similar economic hardship."[50]

Such ordinances do not point to any evidence that the purported concerns justifying otherwise-universal inspections are not raised simply because the owner, the owner's family, or the owner's employee lives in the complex. That appears to be a political concession as to the scope of politically driven inspection programs.

Public pressure for an empirical basis for broad inspection programs is undermined by the fact that the inspection programs are frequently extolled as "self-funded" operations: the owner generally has to pay a fee for the privilege of being inspected and thereupon licensed to offer the rental.[51] Thus, the local government need not make much effort to explain to taxpayers and voters (particularly those who live in uninspected nonrental homes) why the program is justified.

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[49] North Richland Hills Ordinance § R110.2.2(1).

[50] North Richland Hills Ordinance § R110.2.2(2).

[51] *E.g.*, Garland Information (rental-inspection programs "remained completely self-funded"); Pittsburg Program (same); San Bernardino Program (program "is self-funded and the ordinance requires a one hundred dollar ($100.00) annual inspection fee … to pay for the program").

C. Rental-inspection ordinances generally lack any safeguards for privacy interests.

Nearly all of the ordinances provide for mandatory inspections. The invasion of privacy is not lessened simply because the ordinance initially requires the government to politely request consent, if the denial of consent leads to routine issuance of an administrative warrant that is not based on probable cause. Similarly, requiring or allowing the owner's or occupant's presence during the inspection, or providing for advance notice (which may be as little as two days or an indeterminate period), does not mitigate the invasion of privacy. Such "protections" merely allow victims to bear witness or to try to pack up and move what they can. That may address concerns about theft, but not invasion of privacy.

The mandatory inspection's invasion of privacy is compounded by the failure of the rental-home inspection ordinances to prevent the further informal or formal disclosure of information revealed during the search. Most ordinances provide no restrictions on disclosing information about the inspected home, its contents, or the facts of the owners' or occupants' lives. The Golden Valley ordinance is illustrative: unlike the Red Wing ordinance in *McCaughtry*, there are no restrictions on the dissemination of information. *Cf.* Red Wing Code § 4.31, subd. 1(3)(q) (providing that the city will not

intentionally disclose information to "any current member" of a "law-enforcement agency").

Moreover, the channels of disclosure of information gleaned from inspections are both formal and informal. As to formal disclosure, Golden Valley's inspection reports are public information. *See* Minn. Stat. Ann. § 13.44, subd. 2 ("Code violation records … kept by any … city agency … with the responsibility for enforcing a … housing maintenance code are public data."). Beyond public-records requests, the LRH ordinance does not prohibit—and as a practical matter could not effectively prevent—inspectors from disclosing information to law enforcement officers; co-workers; the occupant's current, past, or prospective employers; acquaintances, friends, or family members of the inspector, the landlord, or the tenant; media outlets; or anyone at a local pub. Indeed, Golden Valley allows police to accompany the rental inspectors; not only did that occur in the inspection conducted in this case, but the evidence indicates it is *routine* whenever the city obtains an administrative warrant. The police did not remain at the front door; at least one of them followed the inspector throughout the home. Appellants' Br. 6-7.

The presence of police officers and even rental inspectors themselves in private residences threatens to become even more intrusive as the use of body-worn cameras (BWCs) becomes more common. More and more police

forces routinely equip police officers with such cameras, often on the demand of the public for better recording of encounters in the public square. No provision of law requires police officers to turn the cameras off when they accompany rental inspectors into a private residence, even if the tenant or landlord asks them to do so. Indeed, Minneapolis has explained that "allowing members of the public to have exclusive control over whether officers are allowed to activate a BWC does not serve the BWC program's goals of transparency and accountability."[52] The concern is not limited to police officers, as rental inspectors themselves have begun to use body-worn cameras. For example, a city inspector in Colorado who, pursuant to a municipal ordinance, has conducted mandatory inspections of over 2,000 rental homes and apartments since 2013, told the media that "*she wears a body camera for all rental inspections and records everything she sees*."[53] When the U.S. Supreme Court decided *Camara* in 1967, it could hardly have foreseen an age when warrantless inspections of private homes would be

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[52] City of Minneapolis, *Minneapolis Police Department Body Worn-Camera Policy: Response to Community Concerns*, http://www.minneapolismn.gov/www/groups/public/@mayor/documents/webcontent/wcmsp-183274.pdf (May 17, 2016) (last visited Sept. 28, 2016).

[53] Brian Maass, *Mandatory Rental Inspections Under Fire, Renters & Landlords Push Back*, CBS Denver (May 17, 2016) (emphasis added), http://denver.cbslocal.com/2016/05/17/mandatory-rental-inspections-federal-heights/ (last visited Sept. 28, 2016).

routinely filmed in high definition, with the footage available for public consumption under state FOIA statutes.

Particularly when captured with such modern technology, inspections do not require the government to prosecute, fine, or jail in order to wreak havoc in someone's life. Intentionally or inadvertently affixing a "badge of infamy" through disclosure can be enough. *See Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971) (Douglas, J.) ("Yet certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play." (quotation omitted)).

Moreover, whatever disclosure restrictions might be added one day are ultimately toothless in the face of technological changes that leave the denial of government access altogether as the only effective safeguard for privacy. At the front end, government inspectors, like many or soon most Americans, carry smartphones or even less-sophisticated cell phones that double as cameras or video recorders. There is little to signal owners, tenants, or other observers that homes or their contents are being recorded, and images being immediately e-mailed or otherwise transmitted elsewhere. *See* Jacqueline D. Lipton, *"We, the Paparazzi": Developing a Privacy Paradigm for Digital Video*, 95 Iowa L. Rev. 919, 921 (2010) (noting "a number of recent episodes illustrating how a person's privacy can be destroyed at the push of a button,

using the simplest and most ubiquitous combination of digital technologies—the cell-phone camera and the Internet"). This situation becomes worse, not better, when, like the Colorado city inspector mentioned above, rental inspectors routinely use body-worn cameras for all inspections. *See supra* pp. 24-25.

This does not assume that inspectors come to work with a preexisting desire to tattle: "individuals can instantly snap a photograph without even thinking to carry a camera, and can then disseminate that image instantaneously and globally …." Lipton, 95 Iowa L. Rev. at 927. And all of this may be accomplished without leaving any public trace. In an age when members of the British royal family are surveilled from hundreds of yards away, up-close-and-personal still photographs and videos from inside the home are a far greater threat.

Beyond intentional disclosures, there is simply never enough effective security available for government repositories of personal data. That is particularly true when the government records are stored electronically. There is increasing pressure to put all public records online: "Making government data public should always include putting it online, where it is more available and useful to citizens than in any other medium." David G. Robinson et al., *Enabling Innovation for Civic Engagement* 83, 84, in *Open*

Government: Collaboration, Transparency, and Participation in Practice (Daniel Lathrop & Laurel Ruma eds. 2010). It is not clear whether any municipality could except itself from a statewide movement toward online public access. In any event, despite the number of laws on the books protecting the integrity of government paper files or computer systems, unauthorized access by hacking or other means is an ever-present threat.

Revelations of personal information, whether disclosed legally or illegally, adds to the public knowledge about a person. Even tidbits about one's life or habits that do not seem particularly valuable by themselves fill in the mosaic of information available from other sources. The facts of the U.S. Supreme Court's decision in *United States v. Jones*, 132 S. Ct. 945 (2012), which concerned the constitutionality of warrantless searches via a GPS tracking device placed on a vehicle, demonstrate that, when it comes to privacy, the whole is far greater than the sum of its parts. *See Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").[54] As in *Jones*, "making available … such a substantial quantum of intimate information about any person whom the Government, in

[54] *See United States v. Maynard*, 615 F.3d 544, 560-62 & n.* (D.C. Cir. 2010) (addressing "mosaic theory" in context of GPS tracking data).

its unfettered discretion, chooses to [inspect]—may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.* at 956 (quotation omitted). In this light, this Court should not allow unfettered inspections just because a home is rented.

III. Alternatives Are Available to the Unconstitutional Searches Authorized by Golden Valley's Ordinance.

Golden Valley's invasion of privacy interests through suspicionless searches of all rental homes is unnecessary because less intrusive means exist to protect public health and safety. Some communities have adopted alternatives to full-bore mandatory government inspections of all properties that still violate privacy rights; these are included to give the Court a full picture of the variety of home-inspection ordinances around the country.

First, local governments may inspect rental homes with the consent of the owner or tenant. Governments may encourage consent by educating tenants and owners about the benefits of inspections, and providing owners with certifications of compliance that are valuable in attracting tenants.

Second, some local governments provide for self-inspection by owners or their agents, coupled with audits of the self-inspection documentation. For example, Sacramento County requires the owner's manager or agent to conduct a self-inspection of each rental unit at the commencement of any

tenancy but before occupancy, and then annually.[55] If the units are inspected by someone other than the owner, the inspector must have attended a county-approved program of instruction.[56] Units are subject to county inspection only if the owner fails a compliance audit of the owner-inspection reports (which must be provided to the county and the tenants), or if the home is a "problem property" subject to a notice and order more than once in any calendar year and corrections were not made.[57] As that county notes, "[t]his new ordinance differs from other ordinances because it allows owners and/or agents of rental properties to become certified to self-inspect their properties. It concentrates on owner/tenant education and provides mandated inspections that will assure quality housing for all rental tenants."[58] Self-inspections are accompanied with a requirement that the property owner or manager provide tenants with information concerning their rights and responsibilities.[59]

In contrast, beginning in January 2014, Boston has required inspections of nonexempt rental units every five years; previously, it had

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[55] Sacramento Code § 16.20.906(A)-(B).

[56] Sacramento Code § 16.20.909.

[57] Sacramento Code §§ 16.20.906(C)-(D), 16.20.907 (Problem Properties).

[58] Sacramento Information; Sacramento Code § 16.20.906(A)-(B).

[59] Sacramento Code § 16.20.909.5.

required inspection only upon turnover of the unit, i.e., a new occupancy.[60] The "Authorized Inspector" may be either a city inspector or a "certified home inspector" or "registered sanitarian" who has completed a certificate program.[61] But requiring a private party to admit a government-certified stranger into one's home does not cure the unconstitutionality of mandatory inspections; it simply replaces the government employee with a privately employed surrogate.

Other cities have at least somewhat curtailed the number of tenants subject to search by combining self-inspection with only limited city inspection; this amounts to a half-a-loaf approach to the privacy concerns, rather than true protection against unwarranted searches. For example, Santa Cruz, California, offers the choice of registering for city inspections or self-certifying rental property by self-inspecting rental units; but acceptance in the self-certification program still requires the city to inspect 20 percent of the units every five years.[62] The Stockton, California, rental-inspection ordinance similarly allows for a self-certification of qualified properties, but

[60] Boston Code § 9-1.3(C).

[61] Boston Code § 9-1.3(A)(2).

[62] Santa Cruz Questions 1.

the city "shall cause an inspection of approximately 10 percent of the residential rental units that self-certify to verify compliance."[63]

Third, some municipalities do not try to skirt probable-cause requirements at all. For example, the Richmond, California, ordinance provides that if an owner or tenant refuses to allow access to conduct the inspection, "the City Attorney may use all legal remedies permitted by law …, including issuance of a warrant to cause an inspection to take place, *provided reasonable cause* exists to believe that a violation of the Municipal Code or State law exists on the subject property."[64] Similarly, Yuma, Arizona, provides that the inspection may be conducted "with the consent of the tenant or the consent of the owner in the case of an unoccupied unit, or pursuant to a lawfully issued warrant."[65]

Fourth, some cities do not find any need to conduct routine interior inspections. For example, Oakley, California, provides that all rental units "shall be subject to periodic inspection to determine whether any substandard condition exists" or "whether there is a violation of this code or the

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[63] Stockton Code § 8.32.060(A) (allowing qualification for self-certification of "[w]ell-maintained residential rental units with no existing violations").

[64] Richmond Code § 6.40.060(e) (emphasis added).

[65] Yuma Code § 138-06(A).

checklist."[66] The ordinance specifies that the inspections "shall be *exterior inspections only*, unless an interior inspection is *authorized by the owner or tenant*."[67] The ordinance then permits inspectors to obtain administrative warrants to search interior spaces. But if the exterior inspection provides no probable cause to suspect that there is an interior violation, it may be difficult to justify such a warrant.

Fifth, nonconsensual inspections may be based on complaints about specific properties that provide probable cause to believe that violations exist. For example, Joliet, Illinois,[68] allows inspections only if there has been some kind of complaint or reason to believe that a dangerous condition exists (e.g., a fire). Whether the information comes from an actual complaint by a tenant or neighbor, or a consensual inspection of a nearby unit that suggests a systemic problem, such ordinances would at least require some type of individualized showing.

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[66] Oakley Code § 4.30.402(a) (emphasis added); *see also* Brentwood Code § 8.44.040 ("The enforcement officer shall cause the exterior of each rental property to be inspected at least once every two years to ensure compliance with all applicable laws.").

[67] Oakley Code § 4.30.402(d) (emphasis added). The ordinance does not prevent the city from obtaining an inspection warrant for a nonconsensual inspection or from "conducting an emergency inspection under exigent circumstances."

[68] Joliet Code § 8-152(d).

Finally, local governments can avoid invading the sanctity of a home by limiting inspections to periods when the property is vacant. For example, Boston requires that property owners have newly rented apartments inspected before or within 45 days of a rental.[69] Similarly, Rochester, Michigan, provides that, after the initial self-inspection, subsequent self-inspections must be completed when there is a change of occupant.[70] Such provisions, while not ideal, provide somewhat greater protection for homes and privacy than Golden Valley's LRH ordinance, which forces owners and tenants to lay bare their most intimate, fully occupied space.

CONCLUSION

This Court should invalidate using administrative warrants to conduct involuntary rental-home inspections without probable cause.

[69] Boston Code § 9-1.3.

[70] Kingsbury, *supra* p. 15 note 24.

DATED this 29th day of September, 2016.

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CERTIFICATE OF BRIEF LENGTH

1. I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. 132.01, subds. 1 and 3(C)(1), for a brief produced with a proportional font.

2. The length of this brief is 6,991 words, excluding the cover, table of contents, table of authorities, signature block, and this certificate.

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DATED this 29th day of September, 2016.

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