UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KEVIN KELLER *et al.*,	:	**Case No. 1:14-CV-271**
	:	
Plaintiffs,	:	**Judge Dlott**
	:	
-vs-	:	
	:	
CITY OF MT. HEALTHY, OHIO,	:	
	:	
Defendants.	:	
	:	

MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION OF MT. HEALTHY RENTAL PERMIT PROGRAM AND MEMORANDUM IN SUPPORT THEREOF

Plaintiffs Kevin Keller and Bryan Keller, Vincent and Marilyn Evers, and K&T Homes LTD hereby move, pursuant to Federal Rule of Civil Procedure 65(b), for issuance of a temporary restraining order and preliminary injunction enjoining enforcement of the unconstitutional Mt. Healthy Rental Permit Program insofar as it (1) mandates warrantless home inspections without probable cause; (2) criminally and financially punishes homeowners who assert their Fourth Amendment rights to be free from such searches; and (3) fails to amount to a regulatory scheme sufficient to permit the attainment of a warrant. Both the warrantless search requirement and Defendant's threat to enforce it threaten to deprive Plaintiffs of their clearly-established constitutional rights to be free from warrantless criminal searches of their houses and to be free from punishment for assertion of their Fourth Amendment rights.

If Defendant’s enforcement of the prohibition is not immediately enjoined, at least some of the Plaintiffs will suffer irreparable harm for which there is no adequate remedy at law, including but not limited to criminal punishment solely as a result of refusing consent to an unlawful warrantless search. Pursuant to Local Rule 7.2(a)(1), this Motion is accompanied by a Memorandum in Support.

Plaintiffs request waiver of the requirement to give security pursuant to Rule 65(c).

	Respectfully submitted, */s/ Maurice A. Thompson* Maurice A. Thompson (0078548) 1851 Center for Constitutional Law 208 E. State Street Columbus, Ohio 43215 Tel: (614) 340-9817 Fax: (614) 365-9564 MThompson@)OhioConstitution.org *Counsel of Record for Plaintiffs* Justin C. Walker (0080001) Christopher Finney (0038998) Finney Law Firm, LLC 4270 Ivy Pointe Boulevard, Suite 225 Cincinnati, Ohio 45245 (513) 943-6660 phone (513) 943-6669 fax *Justin@Finneylawfirm.com* *Chris @Finneylawfirm.com* Curt Hartman (0064242) The Law Firm of Curt C. Hartman 3749 Fox Point Court Amelia, Ohio 45102 (513) 752-2878 *hartmanlawfirm@fuse.net*

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs initiated this civil rights action on April 1, 2014 by filing a Verified Complaint challenging, facially and as applied to them, the City of Mt. Healthy's search policies codified in the recently-enacted Ordinance 14-1693, The Rental Permit Program, and the enforcement of those policies by the City, whereby it threatens to unconstitutionally search houses owned and/or inhabited by Plaintiffs, or if Plaintiffs refuse, impose criminal sanctions and destroy Plaintiffs' property rights by restraining them from leasing these houses.

In determining whether to grant the present motion for issuance of a temporary restraining order and preliminary injunction, the Court is to consider four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether the issuance of a temporary restraining order or preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of a temporary restraining order or preliminary injunction. *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*). These factors are to be *balanced* against one another and should not be considered prerequisites to the granting of a temporary restraining order or preliminary injunction. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 347 (6th Cir. 1998). This balance of interests weighs strongly in favor of the Plaintiffs and the granting of the present motion.

First, Plaintiffs are highly likely to succeed on the merits because the newly-minted Rental Permit Program unambiguously coerces Plaintiffs into consenting to criminal searches of their houses, without a warrant, and irrespective of whether probable cause exist to conduct such a search. As such, the search itself violates the Fourth Amendment to the United States Constitution. Meanwhile, punishing Plaintiffs for withholding their consent to such a search violations the Fifth and Fourteenth Amendment's

"unconstitutional conditions doctrine," as interpreted and applied by the Supreme Courts of the United States and Ohio.

Secondly, Plaintiffs face irreparable harm insofar as the City maintains the power to criminally prosecute them for refusing their consent to this unconstitutional search, while fining them on a daily basis and destroying the entire value of their rental investments.

Thirdly, the requested injunctive relief would not result in any injury to Defendant or to third parties, as Plaintiffs merely request the right to engage in inherently harmless act of leasing their suitable hazard-free properties as they have done for years without incident in Mt. Healthy. For the same reasons, the public interest is clearly in favor of injunctive relief. Moreover, Plaintiffs believe that enjoining the Rental Permit Program will benefit the public by maximizing protection citizens' constitutional liberties - - it is always in the public interest to prevent the violation of constitutional rights.

II. BACKGROUND[1]

A. Mt. Healthy's Prohibition on Renting Homes Without Consenting to a Warrantless Search

On January 21, 2014, the City of Mt. Healthy's City Council enacted Ordinance 14-1693 (hereinafter "the Rental Permit Program" or "the Program"). The Rental Permit Program became effective on February 21, 2014. The Rental Permit Program applies only to "single family dwellings," which Mt. Healthy defines as individual homes;[2] and it does not apply to multi-family rental units or owner-occupied homes in Mt. Healthy. No reason was cited for the distinction, and Mt. Healthy cited no particular exigency catalyzing the passage of the ordinance.

Section 1 of the Program mandates that "owners of single family dwelling rental units will be required to obtain a permit * * * before [tenants] are permitted to occupy the dwelling units." Likewise,

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1 All factual assertions are taken from Plaintiffs' September 19, 2013 Verified Complaint.

2 Mt. Healthy Codified Ordinances Section 155.03 (Definitions): "*DWELLING, SINGLE FAMILY*. A dwelling consisting of a single dwelling unit only, separated from other dwelling units by open space."

Section 1(B) of the Program mandates that "Owners of single family rental units shall apply for a rental permit."

The permit simply allows Plaintiffs and other Mt. Healthy property owners the ability to exercise the same property rights that they have exercised for decades, if not centuries - - the rent habitable homes to others. However, acquiring the permit is no simple matter: Section 1(F) of the Program states "Permits will be issued only to properties that comply with the City of Mt. Healthy Property Maintenance Code." And to determine whether properties comply with the Mt. Healthy Property Maintenance Code, and are thus eligible to serve as rental properties, Sections 1(E) and (F) of the Program mandate inspections of residential rental homes.

This inspection is undeniably a "search," the evidence of which can be used to criminally prosecute the property's owner. *First*, pursuant to Section 1(F), violations of the Mt. Healthy Property Maintenance Code ("PMC") are "noted" during the inspection. *Second*, this Property Maintenance Code ("PMC") is voluminous - - the breadth of the Rental Permit Program search is confirmed by the "City of Mt. Healthy Rental Inspection Form," which denotes several pages of criminal offenses that the City searches for when inspecting. *See Exhibit B to Plaintiffs' Verified Complaint.* Indeed such a broad search for criminal offenses, by a government agent within an American home and without probable cause, is the classic "general warrant" that the Fourth Amendment was enacted to proscribe. Third, violations of the PMC, discovered during the broad search, result in criminal prosecution for offenses rising to the level of a first degree misdemeanors (180 days in jail) and an array of steep civil penalties in response to violations.[3] Likewise

[3] Section 153.15-106.2 of the PMC provides for penalties as follows: "**Prosecution of violation.** Any person failing to comply with a notice of violation or order served in accordance with § 153.16 **shall be deemed guilty of a misdemeanor, and the violation shall be deemed a strict liability offense**. If the notice of violation is not complied with, the Code Official shall institute the appropriate proceeding at law or in equity to restrain, correct or abate such violation, or to require the removal or termination of the unlawful occupancy of the structure in violation of the provisions of this code or of the order or direction made pursuant thereto. Any action taken by the authority having jurisdiction on such premises shall be charged against the real estate upon which the structure is located and shall be a lien upon such real estate." Section 153.15-106.4 of the PMC provides as follows: "**Violation penalties.** Any person, who shall violate a provision of this code, or fail to comply therewith, or with any of the requirements thereof,

pursuant to Section 3 of the Rental Permit Program, the City reserves the power to prosecute those who rent homes without a permit for an offense as high as First Degree Misdemeanor, as well as for significant civil penalties.

Thus, Plaintiffs and other Mt. Healthy property owners are left with a stark choice: (1) consent to the warrantless search, surrender their rights, and risk criminal penalties that may arise from the evidence therefrom; (2) refuse the search, and face criminal charges for violating the Rental Permit Program; or (3) lose the right to rent one's rental property altogether. This classic "your money or your life" choice is illustrated by the City of Mt. Healthy's clarification of the ordinance: on or about February 21, 2014, the City communicated to Plaintiffs and others "we have not received your application and payment, which puts you in violation of Ordinance 14-1693," and "whoever violations any provision of this ordinance . . . shall be prosecuted."[4] The Rental Permit Program Letter specifies that the only method of avoiding prosecution is to (1) submit to the Program, which includes a warrantless search of homes; or (2) discontinue rental of one's property.

After receiving this notice, Plaintiff Kevin Keller emailed the City's enforcement agent, inquiring as follows:

> I still have a few questions on the rental inspection program. I don't mind you sharing this with the City law director, either, if you think some of these are more legal in nature, but I hope you someone can help me soon, given that this thing becomes effective soon. Here are my questions:

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shall be prosecuted within the limits as provided herein. **Each day that a violation continues after due notice has been served shall be deemed a separate offense**. Whoever is convicted or pleads guilty to a Property Maintenance Code violation shall be charged with a minor misdemeanor. However: (a) Whoever is convicted or pleads guilty of a second offense not sooner than 20 days and not later than one year of the same section of the Property Maintenance Code shall be charged with a misdemeanor of the fourth degree. (b) Whoever is convicted or pleads guilty of the third offense not sooner than 20 days and not later than one year of the same section of the Property Maintenance Code shall be charged with misdemeanor of the third degree. (c) Whoever is convicted or pleads guilty of the fourth offense not sooner than 20 days and not later than one year of the same section of the Property Maintenance Code shall be charged with misdemeanor of the second degree. (d) Whoever is convicted or pleads guilty of the fifth offense not sooner than 20 days and not later than one year of the same section of the Property Maintenance Code shall be charged with **misdemeanor of the first degree**."

[4] *See Exhibit C,D, attached to Plaintiffs' Verified Complaint- Rental Permit Program Letters.*

1. I think I have one tenant moving out in the next month. Do I need to get an inspection before the next tenant moves in? (I haven't yet found one). Is it a crime to begin a new tenancy without an inspection?

2. It's still possible that this tenant may not move out. If he doesn't, do I still need an inspection to keep renting the property to him?

3. It looks like there is a two year rule in this ordinance - do I need an inspection every two years, even if the same tenant has been there?

4. The ordinance says that the fees go toward the inspection - - but if I don't need the inspection anytime soon, it seems like I shouldn't have to pay the fee, right?

5. When you all do these home inspections (is it you, or someone else?), what are you inspecting and looking for? For example, can I be cited for any code violation if you think you see something like that during the inspection? What if one of my tenants is doing something illegal in there that I don't know about?

I guess the most important thing I'm trying to figure out is whether I am looking at criminal charges if I don't get an inspection and pay the fee right away. I do have a buddy who is a lawyer, but he thought the new ordinance was "vague," and he thought it would just be best for me to ask you these questions directly. *See Exhibit E, attached to Plaintiffs' Verified Complaint.*

The Mt. Healthy's building department head simply responded as follows: "schedule the inspections for April or May, but they do have to be inspected. Without the inspection you can't get a rental license which would put you in violation." *See Exhibit E, attached to Plaintiffs' Verified Complaint.* Thus the City has made clear that one must submit the inspection, or face criminal charges and/or endure financial decimation.

Meanwhile, the Rental Permit Program contains no provision for the City to acquire a warrant to search Plaintiffs' properties. And the permitting fee associated with the program is exclusively allocated to pay for the cost of these inspections: Pursuant to Section 1(C) of the Program, the City imposes a $100 monetary charge on Plaintiffs and other owners of single family rental dwellings solely for the purpose of covering the costs of the warrantless home searches specified in Sections 1(E) and (F).

B. Plaintiffs' Status

The Plaintiffs are property owners and tenants. Plaintiff K&T HOMES, LTD. (hereinafter "K&T") is a domestic limited liability company duly organized and existing under the laws of the State of Ohio, and

is the sole owner of four single family homes in the City of Mt. Healthy, Ohio, in Hamilton County, each of which it leases to tenants. Plaintiff Kevin Keller is the sole member and owner of Plaintiff K & T HOMES, LTD., and his son, Bryan Keller is a tenant in one of the four K&T homes located in Mt. Healthy - - 7304 Park Avenue.

Plaintiffs Vincent and Marilyn Evers are the owners of a single family home located at 7329 Elizabeth Street in Mt. Healthy, Ohio, which they currently lease to tenants.

None of the Plaintiffs have consented to or intends to consent to the Rental Permit Program inspection. None of the Plaintiffs have submitted Rental Permit Program applications or "fees," because none of the Plaintiffs believe that the City of Mt. Healthy has the power to initiate warrantless general searches of their houses for code violations and/or other crimes. The Plaintiffs believe that their types of property are being unlawfully singled out, and that the Rental Permit Program search is pretextual.

As a consequence of their abstention, each Plaintiff is in imminent risk of facing criminal charges and/or loss of their property rights in response to this assertion his or her Fourth Amendment rights.

Importantly, Plaintiffs maintain no interior code violations within their rental properties located at 7329 Elizabeth Street, 1392 Compton Road, 7405 Elizabeth Street, 7416 Phoenix Avenue, or 7304 Park Avenue (all in Mt. Healthy, Ohio). No tenant or neighbor of any of the Plaintiffs has ever complained to the City of Mt. Healthy regarding code violations or other nuisances at any of these properties, or by any of the Plaintiffs at other properties.

Meanwhile, Plaintiffs maintain no conditions at the these properties that would give rise to the need for an emergency entry into those properties, or that would vest the City with probable cause to believe that any Plaintiff maintains an interior code violation or other nuisance at this time. None of the Plaintiffs have ever been prosecuted or fined by the City of Mt. Healthy for maintaining interior code violations or other nuisances. Each Landlord-Plaintiff is contractually and statutorily obligated to provide their tenants with a

fit and habitable property, free from any nuisances and/or other dangerous conditions, and understands and abides by these terms.[5] These Plaintiffs are, by all accounts, model property owners, landlords, and tenants.

Landlord-Plaintiffs maintain standing to bring this action because if they do not consent to a warrantless search of their property they are faced with (1) criminal charges and fines; and/or (2) loss of all rental income related to the Mt. Healthy properties. Tenant Plaintiff Bryan Keller maintains standing to bring this action because he maintains a property interest in his leasehold and a reasonable expectation of privacy in his personal residence.

III. LAW AND ARGUMENT

Plaintiffs satisfy the elements necessary for issuance of a temporary restraining order and/or preliminary injunction enjoining the enforcement of the Rental Permit Program. Within the context of efforts to obtain preliminary injunctive relief to prevent violations of constitutional rights, the "likelihood of success' factor is often determinative." *Connection Dist. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

A. Plaintiffs are highly likely to succeed on the merits.

Plaintiffs are highly likely to succeed on the merits because (1) Plaintiffs maintain the right to refuse warrantless criminal searches of their houses; (2) Plaintiffs maintain the right to *exercise the aforesaid right* without enduring state-imposed criminal or financial penalties in response; and (3) Defendant maintains no justification for searching these properties at this time under this regulatory scheme, without, *or even with*, a warrant.

i. Mt. Healthy's warrantless search requirement violates the fundamental purposes of the Fourth Amendment.

[5] Landlord-Plaintiffs are bound by R.C. 5321.04, which states, *inter alia*, as follows*:* "a landlord who is a party to a rental agreement shall do all of the following: (1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety; (2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition; (3) Keep all common areas of the premises in a safe and sanitary condition; (4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by the landlord * * *."

The Fourth Amendment to the Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment was adopted specifically in response to the Crown's practice of using general warrants and writs of assistance to search "suspected places" for evidence of smuggling, libel, or other crimes. *Boyd v. United States*, 116 U.S. 616, 625–626 (1886). Early patriots railed against these practices as "the worst instrument of arbitrary power" and John Adams later claimed that "the child Independence was born" from colonists' opposition to their use." *Id.*, at 625 (internal quotation marks omitted).

The Supreme Court of the United States has recognized that the Amendment reflects a number of foundational principles that require application in this case. *First*, the Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: when "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones*, 132 S.Ct. 945, 950–951 (2012). This understanding reflects the reality that, as the United States Supreme Court recently emphasized, *See Syllabus to U.S. v. Jones*, 132 S.Ct. 945 (2012), the Amendment expressly protects property and specifically includes "houses" as amongst such property. The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. Indeed, The Fourth Amendment "indicates with some precision the places and things encompassed by its protections: 'persons, houses, papers, and effects.'" *Oliver v. United States*, 466 U.S. 170, 176 (1984). A "search" occurs for Fourth Amendment purposes when the government physically intrudes upon one of these enumerated areas, or invades a protected privacy interest, for the purpose of obtaining information. *Jones*, supra, at 949–51, 181

L.Ed.2d 911 (2012); *Katz v. United States,* 389 U.S. 347, 360–61 (1967)(Harlan, J., concurring). Accordingly, "a warrant is generally required for a search of a home." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

And thus, contrary to some understandings, "Fourth Amendment rights do not rise or fall with the *Katz* formulation" (the "reasonable expectation of privacy" test). To this end, the Supreme Court explains "[w]e [do not] believe that *Katz,* by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home," *Alderman v. United States*, 394 U.S. 165, 176 (1969). And The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test." *Jones*, supra. (Syllabus)(*Katz* added to the baseline the "expectations" test where no intrusion on property takes place, *Katz* "does not subtract anything from the Amendment's protections 'when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.") "Houses" remain sacrosanct property, with respect to government searches.

Second, a fundamental purpose of the Amendment is "to protect against all general searches." *Go–Bart Importing Co. v. United States,* 282 U.S. 344, 357 (1931).

Third, "the suspicion-less search is one primary evil the Fourth Amendment was intended to stamp out." See *Boyd*, supra., at 625–630 (1886). While this individualized suspicion "is not an 'irreducible' component of reasonableness" under the Fourth Amendment, the requirement has been dispensed with only when programmatic searches were required to meet a "'special need' ... divorced from the State's general interest in law enforcement." *Ferguson v. Charleston,* 532 U.S. 67, 79 (2001); see also *Griffin,* 483 U.S., at 873 ("Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), ... we have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'").

Fourth, "a search without a warrant demands exceptional circumstances." *McDonald v. U.S.*, 335 U.S. 451, at 454-455 (1948).

Fifth, each of the aforesaid principles apply not just to owner-occupied residential homes, but even to business and commercial property, and even as to administrative and regulatory searches. In *New York v. Burger*, the Court held that "[a]n owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable. This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes." *New York v. Burger*, 482 U.S. 691, 699 (1987). And in *Marshall v. Barlow's Inc.*, the Court added "[i]f the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Marshall v. Barlow's Inc*., 436 U.S. 307, 312 (1978).

Mt. Healthy's Rental Permit Program search violates each of these principles. First, it is a search. Where the Government obtains information by physically intruding on a constitutionally protected area, such as a house, a search has undoubtedly occurred. And that is precisely the type of search mandated by the Program: Section 1(E) of the Program provides that "inspections . . . must be performed;" and Section 1(F) indicates that these inspections are to search for violations of the City's Property Maintenance Code.

Second, this is a search for violations which carry criminal penalties: any violation of the Property Maintenance Code carries serious criminal sanctions, and Section 3 of the Rental Permit Program carries its own serious criminal sanctions for "whoever violates any provision of this ordinance, or fails to comply therewith." Third, this is a general search that necessarily vests discretion in the government inspectors: Chapter 153 of the Mt. Healthy Code of Ordinance addresses, literally, every square inch of one's property.[6]

[6] This Chapter is available in its entirety at http://www.amlegal.com/nxt/gateway.dll/Ohio/mthealth/cityofmthealthyohiocodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:mthealthy_oh. Last Checked April 1, 2014.

As just a few examples, the inspector may search for any and all evidence in any "part of the dwelling unit, rooming unit, housekeeping unit or premises" as to whether the space is in a "clean, sanitary, and safe condition."[7] These same vague and open-ended standards apply to the entire exterior of any property.[8] Meanwhile, the government agent may literally open and shut every single door on the property.[9] And anything within the agent's plain view can serve as evidence in a non-PMC related criminal prosecution of the property owner and/or tenant.

Fourth, it is an absolutely suspicion-less search: The Rental Permit Program requires that every rental house in Mt. Healthy be searched, irrespective of its condition, and irrespective of whether tenant or neighbor complaints have been lodged against the property or its owner.

Fifth, it is a search of the exact type of property explicitly protected: "houses." These houses are tenants' *homes,* and as to property owners, they are, at minimum, commercial property entitled to heightened protection. *Dearmore v. City of Garland,* 519 F.3d 517 (5th Cir. 2008)(In *Dearmore v. City of Garland,* the Fifth Circuit affirmed a District Court's invalidation of a warrantless rental inspection ordinance akin to Mt. Healthy's program. There, the District Court concluded "a property owner's rental property is commercial property. Indeed, it would be fatuous to argue otherwise, as rental property is property which is put in the stream of commerce for economic purposes.")

Because the Fourth Amendment not only applies, but was ratified to guard against precisely the type of search Mt. Healthy is mandating through its Rental Permit Program, the only remaining question for the Court, on the merits, is whether subsequent precedent somehow exempts Mt. Healthy's rental permit search from the Fourth Amendment's strictures. Because it does not, the search and its attendant terms must be enjoined.

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[7] See Section 153.30-301.2.

[8] See Section 153.31-302.1. See also 153.33-304.1.

[9] See Section 153.34-305.6. ("very interior door shall fit reasonably well within its frame and shall be capable of being opened and closed by being properly and securely attached to jambs, headers or tracks as intended by the manufacturer of the attachment hardware.")

ii. Warrantless administrative searches of rental homes are generally unconstitutional.

Courts to have addressed the issue within the proper context have repeatedly concluded that searches of rental houses, even if "administrative" in nature, require a warrant. First and foremost, such searches must abide by the Supreme Court of the United States' 1967 decision in *Camara v. Municipal Court.* There, the Supreme Court held unconstitutional a San Francisco ordinance which permitted nonconsensual warrantless inspections of buildings or premises to ensure compliance with the city's housing code. *Camara v. Municipal Ct.*, 387 U.S. 523 (1967). The Court found applicable to that situation the governing principle that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 387 U.S. at pp. 528–529.

Further, since "the governmental purpose behind the search would not be frustrated by the burden of obtaining a warrant, and because administrative searches of the type there at issue involved significant intrusions upon the interests protected by the Fourth Amendment," the Court determined that such searches could not be made without the owner's consent unless a search warrant had first been obtained. *Id.* The Court added its rationale:

> "[w]e do not believe, however, that the requirement of a warrant for an administrative inspection is a hollow one. . . The minor and infrequent inconvenience which a warrant requirement may create cannot overshadow the substantial benefits which will result to the individual's dignity and liberty through the preservation of his right to privacy. . . it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures. . . The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. . . .In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual. . . " See *Camara, supra*, at 539 (concluding [a]ssuming the facts to be as the parties have alleged, we therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection.")

Later, the Court reinforced this ruling, holding in *See v. City of Seattle* that the warrant procedure and the prohibition against nonconsensual warrantless entry outlined in *Camara* would be applicable to private commercial premises. *See v. City of Seattle*, 387 U.S. 541 (1967).

Since *Camara,* Court's have authoritatively and persuasively struck down warrantless searches of rental property, such as the one Mt. Healthy proposes here. For instance, in *Wilson v. City of Cincinnati,* the Supreme Court of Ohio held that an ordinance requiring a seller of housing either to consent to warrantless search or face the possibility of criminal penalty was constitutionally unenforceable as coercing a waiver of Fourth Amendment rights. *Wilson v. Cincinnati* (1976), 46 Ohio St.2d 138. As here, the citizen in *Wilson* "faced * * * a serious dilemma; either consent to a warrantless search or face the possibility of a criminal penalty." *Wilson, supra.,* at 143. There, to sell his or her property, a seller had to consent to a warrantless search or face the possibility of a criminal penalty.

The court held "[w]here a municipal ordinance requires the owner of real property to tender a certificate of housing inspection to a prospective buyer, and such certificate may be obtained only by allowing a warrantless inspection of the property, the imposition of a criminal penalty upon the owner's failure to tender the certificate violates the owner's rights under the Fourth Amendment to the United States Constitution." *Wilson,* supra., at 138, at syllabus ("consent given in response to coercion does not meet Fourth Amendment requirements: [A] valid consent involves a waiver of constitutional rights and cannot be lightly inferred; hence, it must be 'voluntary and uncoerced, either physically or psychologically," and "therefore, the validity of such searches upon the basis of consent is not sustainable." The Court concluded the matter by observing that the matter was entirely governed by *Camara.*

Likewise, in the non-binding though highly persuasive case of *Sokolov v. Village of Freeport,* The Court of Appeals of New York (the State's Supreme Court) unanimously held that imposition of a penalty upon a landlord for renting his premises without first consenting to a warrantless search violates the property owner's Fourth Amendment rights. *Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 420 N.E.2d 55 (1981).

The Court's description of the municipal ordinance before it demonstrates that it was strikingly similar to Mt. Healthy's Rental Permit Program: (1) "Presented for our determination is the constitutionality of a municipal ordinance which provides, effectively, that a landlord is required to consent to a warrantless inspection of his property in order to obtain a rental permit;" (2) "The amended ordinance provides, in effect, that no one can let or relet a residence rental property within the Village of Freeport without first obtaining a permit from the village. No permit can issue without an inspection of the premises to determine that the property is 'safe, clean, sanitary, in good repair, and free from rodents and vermin'. Permits must be renewed every two years or each time a vacancy occurs, and an owner cannot rerent his property without submitting to an inspection and obtaining certification that the premises are free from all violations;" and (3) "The village may impose a penalty of $250 per day for each day in which a building is occupied without a rental permit. Thus, in substance, a landlord is subject to a fine of $250 per day for failure to consent to a warrantless administrative inspection." *Id.*, at 344-345 (Further explaining "[u]nder the Freeport ordinance a warrantless search is not directly authorized, but instead the ordinance provides that an individual will be subject to criminal penalty if he rents or rerents his premises without first obtaining a permit, which in turn can be obtained only if the property owner consents to an inspection.")

The Village there argued that failure to consent to a warrantless inspection was not punishable under the ordinance, but only the renting of the property without a permit. The Court responded "[w]e find this line of reasoning to be unpersuasive, for through an indirect method the property owner is being penalized for his failure to consent to a warrantless search. In this instance the property owner's consent is not voluntarily given, as it is clearly a product of coercion. A property owner cannot be regarded as having voluntarily given his consent to a search where the price he must pay to enjoy his rights under the Constitution is the effective deprivation of any economic benefit from his rental property." *Id.*

Importantly, the Court further reasoned as follows: "the village may not compel the owner's consent to a warrantless inspection upon the theory that these searches are a burden which a property owner must

bear in exchange for the right to open his property to the general public for rental. It is beyond the power of the State to condition an owner's ability to engage his property in the business of residential rental upon his forced consent to forego certain rights guaranteed to him under the Constitution." Thus the Court enforced *Camara* to invalidate a search identical to the required by Mt. Healthy's Rental Permit Program, and further explained how such a search violates the Fifth and Fourteenth Amendment's unconstitutional conditions doctrine (further analysis *infra*).

Finally, in *Dearmore v. City of Garland*, the Fifth Circuit Court of Appeals affirmed a District Court's application of *Camara* to invalidate warrantless rental inspections akin to those now sought by Mt. Healthy. *Dearmore v. City of Garland*, 519 F.3d 517 (2008). The District Court there issued a preliminary injunction upon considering an ordinance that it described as follows: "Under the terms of the Ordinance, in order to rent his property, an owner must obtain a permit. If a permit is not obtained, the owner cannot make commercial use of rental property without incurring a substantial penalty. When the owner applies for a permit, he must agree to abide by the Ordinance. The Ordinance requires that the owner consent to an annual inspection of his rental property . . . It is an offense if an owner rents his property without a permit. It is also an offense if an owner refuses to allow an inspection by the City. An owner, therefore, can be fined up to $2000 per day for renting his property without a permit. He may also be fined up to $2000 per day for refusing to allow an inspection of his rental property." *Dearmore v. City of Garland*, 400 Supp.2d 894 (N.D. Tex., 2005).

In response, the Court held "*Camara* makes no distinction between owner and tenant, but rather holds that an administrative search of a private residence, including a private residence owned by one person and rented by another, must include a warrant procedure. In this case the City ignores that the permitting process does not allow the owner to refuse consent when the property is unoccupied without being subject to criminal penalties, which can be quite substantial. *The court finds the City's reasoning unpersuasive because the property owner is being penalized for his failure to consent in advance to a warrantless search of*

unoccupied property. The property owner's consent thus is not voluntary at all. . . The alternatives presented to the property owner are to consent in advance to a warrantless inspection, or to face criminal penalties; thus consent is involuntary. On the other hand, if the owner does not consent to the warrantless search, he does not receive a permit. The whole purpose of receiving a permit is to rent the property for commercial purposes. Without a permit, the owner cannot engage in lawful commercial activity. The owner is thus faced with equally unavailing situations." *Id.*, at 903, citing *United States v. Santiago*, 410 F.3d 193, 198–99 (5th Cir.2005); *United States v. Olivier–Becerril*, 861 F.2d 424, 425 (5th Cir.1988).

Camara, Wilson, Sokolov, and *Dearmore* persuasively demonstrate that warrantless searches of rental property violate the Fourth Amendment. Further, the equally repugnant choices for Plaintiffs are: (1) the denial of a permit for refusing to consent to the inspection and thus loss of the ability to make commercial use of one's property for economic gain; (2) the withdrawal of consent, which will result in the imposition of substantial monetary fines for refusing to allow the inspection; or (3) consent in advance to the warrantless search or inspection, regardless of the necessity of such an inspection or search. And attempting to coerce a sacrifice of Fourth Amendment rights through an array of such choices violations Plaintiffs' Fifth and Fourteenth Amendment rights to due process and freedom from unconstitutional conditions. This precedent, striking down nearly identical search requirements, demonstrates that Plaintiffs are likely to prevail on the merits of their Fourth, Fifth, and Fourteenth Amendment claim. Accordingly, this Court should enjoin Mt. Healthy's Rental Permit Program search requirement.

iii. More general Sixth Circuit precedent affirms that Mt. Healthy's required search is unconstitutional.

Should the Court desire further support, beyond the rental inspection context, for the proposition that a warrantless administrative search such as this transgresses clear constitutional boundaries, it need look no further than binding Sixth Circuit precedent. As recently as 2010, the Sixth Circuit has confirmed that "[s]ince *Camara v. Mun. Court of City and County of San Francisco*, and *See v. City of Seattle*, statutes such

as Cleveland's Municipal Code [a warrantless fire inspection ordinance], have been held unconstitutional unless construed to require a search warrant supported by administrative probable cause." *Engineering & Mfg. Services, LLC v. Ashton*, 387 Fed.Appx. 575 (6th Cir. 2010). See also *Allinder v. State of Ohio*, 808 F.2d 1180 (6th Cir. 1987) ("a warrant is required before conducting an administrative search of commercial property or commercial products"). To be clear, "This prohibition exists not only with respect to traditional police searches conducted for the gathering of criminal evidence, but also with respect to administrative inspections designed to enforce regulatory statutes." *Term Auto Sales, Inc. v. City of Cleveland*, 54 F.3d 777 (6th Cir. 1995), citing *Barlow's, supra., at* 312-13 (1978); see also *See*, supra., at 546 (1967)(administrative search of commercial property generally must be supported by a warrant) ("the basic component of a reasonable search under the Fourth Amendment -- that it not be enforced without a suitable warrant procedure -- is applicable ... to business ... premises").

The Sixth Circuit recognizes only one finite exception to the warrant requirement for administrative searches that could even remotely be viewed as applicable: "as to searches conducted of 'closely regulated' industries, a legislative scheme may serve as a substitute for a warrant." *Id*., citing *Donovan v. Dewey*, 452 U.S. 594, 603 (1981). Because leasing of residential property is not a "closely regulated industry," no exception to the warrant requirement for administrative searches applies.

a. Residential rental property is not a "closely regulated industry."

In *Donovan,* the Supreme Court held that in certain limited situations, warrantless administrative searches of commercial property do not violate the fourth amendment. This Circuit has characterized these exceptions under the rationale of "the notion of implied consent." *Dow Chemical Co.,* 749 F.2d at 311 n. 1; *see also, Barlow's, Inc.*, 436 U.S. at 313. However, since this form of search is an exception to the warrant requirement, the burden of proof rests with the party asserting the exception. *See Barlow's, Inc.*, 436 U.S. at 324. However, "before this court will determine whether or not a warrantless inspection is constitutionally acceptable, the government must first overcome the presumption of unreasonableness by

showing that the owner has weakened or reduced privacy expectations that are significantly overshadowed by government interests in regulating the particular industry or industries." *McLaughlin v. Kings Island,* 849 F.2d 990 (6th Cir. 1988).

In 1995, the Sixth Circuit expressed that "[t]o date the Court has identified four such closely regulated industries: the liquor industry, the firearms industry, the mining industry, and the vehicle dismantling industry." *Id.* (Of note, in *McLaughlin v. Kings Island,* 849 F.2d 990 (6th Cir. 1988), the Sixth Circuit also included pharmacies). In 2003, the Circuit affirmed that even "sexually oriented businesses do not qualify as highly regulated industries." *Deja Vu of Cincinnati, L.L.C. v. Union Tp. Bd. of Trustees*, 326 F.3d 791 (6th Cir. 2003), citing 49 F.Supp.2d at 1040 (relying primarily on the fact that the Supreme Court has never reached such a conclusion, and citing *Burger,* 482 U.S. at 700–01). And in 1987, the Circuit concluded that the state had failed to meet its burden of demonstrating that bee apiaries were "closely regulated," explaining that "less than 100 percent of beekeepers in Ohio are registered, and only about 85 percent of those registered are inspected every year." *Allinder v. State of Ohio*, 808 F.2d 1180 (6th Cir. 1987). Meanwhile, in cases to have directly considered the issue, courts have observed that the business of residential rental is not closely regulated: "Nor may it be said that the business of residential rental is of such a nature that consent to a warrantless administrative search may be implied from the choice of the appellants to engage in this business." *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981), Footnote 1.

The rationale for the pervasively regulated industry exception to the warrant requirement stems from the fact that those "industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *Barlow's,* 436 U.S. at 313, (citation omitted). Since the owners or operators of such industries have "a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, have lessened application...." *Burger,* 107 S.Ct. at 2643 (citation omitted). However, as the Secretary concedes, *the pervasively regulated industry exception is limited*, and

indeed the exception, as industries affected by OSHA regulation are not by definition pervasively regulated. *Barlow's*, 436 U.S. at 315 ("The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents.").

This holding is of course correct. Thousands of Ohioans own residential rental property. And they do so without having to acquire and/or license or pass a test. Many simply rent a home that they have previously lived in, rather than selling it, and do so in their own names, rather than through an elaborate business enterprise. Moreover, concern over such a search is heightened because regulatory scheme seeks governmental access not just to commercial properties, but to a much more intimate location: peoples' homes. All the while, the Fourth Amendment expressly protects "houses."

Consequently, such a business cannot be said to be "closely regulated," so that any exception to the administrative warrant requirement applied. Thus, Plaintiffs are likely to prevail on the merits, and Mt. Healthy's search requirement must be enjoined.

b. Even if Residential leasing were closely regulated, Mt. Healthy's search requirement would fail scrutiny.

Even if this Court were to assume that small property owners renting a single home are pervasively regulated businesses, Mt. Healthy's Rental Permit Program would not satisfy the criteria for warrantless administrative searches.

Warrantless inspections of a pervasively regulated business violate the Fourth Amendment unless the following three requirements are met: "(1) there is a substantial government interest which informs the regulatory scheme pursuant to which the search is made; (2) the warrantless inspections are necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of certainty and regularity of its application, provides an adequate substitute for the warrant requirement." *Term Auto Sales, Inc. v. City of*

Cleveland, No. 94–3088, 1995 WL 308988 (6th Cir. May 18, 1995)(citing *Donovan v. Dewey,* 452 U.S. 594 (1981).

The Program fails each of these requirements; however it suffices to analyze just one the second prong: necessity. In *Hodgins v. U.S. Dept. of Agriculture*, the Sixth Circuit explained that to meet the second criterion-the necessity for warrantless inspections-the agency must show a need for "surprise." *Hodgins v. U.S. Dept. of Agriculture*, 238 F.3d 421 (6th Cir. 2000); *Cf. Marshall v. Barlow's, Inc.,* 436 U.S. 307, 316-17 (1978). "In *See v. City of Seattle,* the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short time. Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue." *Id.* In *Hodgins,* the Sixth Circuit explained "for warrantless searches to be justifiable under a regulatory scheme, the object of the search must be something that can be quickly hidden, moved, disguised, or altered beyond recognition, so that only a surprise inspection could be expected to catch the violations. On the other hand, if a regulation is similar to a building code (as in *See v. Seattle*), where violations will be harder to conceal, the need for surprise will be less pressing, and warrantless searches will more likely be unconstitutional." *Hodgins v. U.S. Dept. of Agriculture*, 238 F.3d 421 (6th Cir. 2000), citing *McLaughlin v. KingsIsland*, 849 F.2d 990 (6th Cir.1988).

Here, the warrantless search is for violations of the City's Property Maintenance Code, clearly tantamount to a building code. Further, the element of "surprise" is already lacking, since the City attempts to schedule these inspections well in advance of their actual date. See Plaintiffs' Complaint, Exhibits C, D, and E. Moreover, the only method for a property owner to "conceal" the conditions would be to remedy them, thus obviating the very need for the search.

Consequently, even if Plaintiffs' rental properties were to be considered part of a "closely regulated industry," the City's search requirement would fail to meet the requirements for a warrantless search. Accordingly, Plaintiffs are highly likely to prevail on the merits of their claim.

Plaintiffs would be remiss not to mention that the Sixth Circuit upheld a rental inspection ordinance as against constitutional challenge 2001 in *Harris v. Akron Dept. of Public Health*. However, that decision is highly distinguishable in several respects, and thus not controlling: (1) the ordinance there did not permit any type of punishment for failure to consent to the warrantless search; (2) the ordinance there required the city to obtain or attempt to obtain a warrant; and (3) the case was filed by *pro se* plaintiffs, who did not comply with the Court's procedures, apparently making entirely incomprehensive arguments (the Court characterized these arguments as "vague and conclusory"). 10 Fed.Appx. 316 (6th Cir. 2001). The Court explicitly concluded that "[t]he Ordinance does not violate the Fourth Amendment as it expressly provides that if entry is refused, an inspection may only be conducted as provided by law, and that the Ordinance shall not be construed to require an owner to consent to a warrantless inspection. *See* Code § 150.02(A)." *Id.*, citing *Camara, supra*, at 540. In addition the plaintiffs there apparently only lodged a facial challenge, causing the Court to acknowledge the *Salerno* principle that any one valid application of an ordinance may bar a facial challenge ("the plaintiffs have provided no evidence of any warrantless inspection carried out in the absence of both consent and emergency conditions."). *Id.*

iv. It is no defense that Mt. Healthy's search is indirectly rather than directly coercive.

At first glance, one may believe that Mt. Healthy's Rental Permit Program does not *force* a property owner to submit to a warrantless inspection, since the owner may cease the leasing of his property altogether. Such a view would misguidedly overlook the Supreme Court's "Unconstitutional Conditions" Doctrine arises from the Due Process guarantees articulated in the Fifth and Fourteenth Amendments to the United States Constitution.

The Supreme Court has confirmed in a variety of contexts that "government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983); see also, *e.g.*, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59–60 (2006); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990); *Perry v. Sindermann*, 408 U.S. 593 (1972). "Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v St. Johns River Water Management Dist.*, 133 S.Ct. 2586, at 2594 (2013). Pursuant to this Doctrine, "[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz*, supra. In 2013, the Supreme Court applied the Unconstitutional Conditions Doctrine within the context of land use permitting. Id. (explaining that "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take," citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *Dolan*, 512 U.S., at 385. In each of the rental inspection cases cited above - - *Wilson*, *Sokolov*, and *Dearborn*, the Courts abstained from nominally addressing the doctrine, yet clearly applied it: in each case, the property owner had the option of avoiding the warrantless inspection by *not* selling or renting his or her property; but in each case, the Court found this to be a false choice.

And nowhere is this more true than in Ohio, since "Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Norwood v. Horney* (2006), 110 Ohio St.3d 353, 361-62 (internal citations omitted). In Ohio, these "venerable rights associated with property" are not confined to the mere ownership of property.

Rather, the Supreme Court recently acknowledged that "[t]he rights related to property, i.e., to *acquire, use, enjoy,* and dispose of property, are among the most revered in our law and traditions." *Id.* And this is as it must be: merely protecting *ownership* of property becomes a hollow and illusory right when regulations of that same property are permitted to eat away at the owner's capacity to use and enjoy the property, while concomitantly diminishing its value. For this very reason, "the free use of property is guaranteed by Section 19, Article I of the Ohio Constitution," *State v. Cline,* 125 N.E.2d 222, and the Ohio Supreme Court has ruled "any substantial interference with the elemental rights growing out of ownership of private property is considered a taking." *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135, 142.

Thus, Mt. Healthy's message to Plaintiffs is this: you must choose between your constitutionally-protected freedom from warrantless searches and your constitutionally protected property rights; you cannot have both. Due Process forbids such a choice. At bottom, the City imminently threatens to force Plaintiffs into forfeiting their Fourth Amendment rights by, in response to the exercise of those rights, (1) withholding newly-required rental permits needed to rent homes in Mt. Healthy and/or (2) prosecuting Plaintiffs for criminal violations, should they rent their homes without newly-required rental permits. Such indirect coercion is forbidden. Consequently, Plaintiffs are highly likely to prevail on the merits of their claim, and the Rental Permit Program search requirement must be enjoined.

v. The Rental Permit Program is insufficient to support the issuance of a warrant.

Plaintiffs are further likely to succeed on the merits because the City of Mt. Healthy cannot, in the absence of specific complaints and targeted searches pursuant thereto, remedy its warrantless search requirement by simply seeking and obtaining a warrant to search Plaintiffs properties: (1) Mt. Healthy has no enacted no legislation, in the Property Maintenance Code, the Rental Permit Program or elsewhere, authorizing it to obtain a warrant to search Plaintiffs' homes - and there is no such state legislation; (2) even if such warrant authority were enacted, this regulatory scheme would be insufficient to form the administrative probable cause necessary to obtain a warrant (due to a lack of neutral principle and

unconstrained discretion of enforcement agents). Consequently, in the absence of a sufficiently specific complaint regarding Plaintiffs' houses, Mt. Healthy must be enjoined from attempting to seek and/or execute a warrant upon Plaintiffs' houses.

The doctrine of *ultra vires* is generally held applicable to municipal corporations. 39 Ohio Jurisprudence 2d 211, Municipal Corporations, Section 421. Thus any exercise of power by a municipal agent which is not conferred by the constitution, statute, or ordinance is an abuse of a municipality's corporate power. *Village of Warrensville Heights v. Cleveland Raceways*, 116 N.E.2d 837 (1954); *Marshall v. City of Columbus*, 1981 WL 3071 (Ohio App. 10 Dist.)("A public officer possesses only such power as by law is given to him."). Under the governing ordinances currently in effect - - the Mt. Healthy Property Maintenance Code and Rental Permit Program, no City officer has the authority to apply for and/or execute on a warrant simply to carry out an administrative search for PMC violations. On this basis alone, Mt. Healthy must be enjoined for seeking or executing upon a warrant to conduct a "wall-to-wall" search of Plaintiffs properties, pursuant to the PMC or Rental Permit Program.

Furthermore, the City could not cure this lack of authority by simply writing itself a warrant provision. In *Barlow's,* the Supreme Court held that probable cause justifying the issuance of a warrant for administrative purposes may be based either on "specific evidence of an existing violation" or "on a showing that 'reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular establishment.'" *Id.* at 320. Expounding on the second basis, the Court noted that a "warrant showing that a specific business has been *chosen* for [a] search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources ... would protect an employer's Fourth Amendment rights." *Id*. at 321 (emphasis added).

The Rental Permit Program is not "an administrative plan containing specific neutral criteria." *Barlow's*, 436 U.S. at 323. Within this context, the absence of "specific neutral criteria" for searches is manifest: the Rental Permit Program arbitrarily discriminates against certain property owners on its face.

The Rental Permit Program states in Section 1 that it applies only to "single family dwellings," which Mt. Healthy defines as individual homes;[10] and it does not apply to multi-family rental units or owner-occupied homes in Mt. Healthy. This is far from neutral administrative plan upon which to base a search. A home right next to Mr. Keller's house may not be subjected to an inspection simply because it is owner-occupied, even though it may be the same age or older, reside on the same street, or be in objectively worse shape. And apartment building on the other side of Mr. Keller's house is similarly exempt. Can Mt. Healthy honestly assert that the threat posed by one is greater than the other? Of course not. If anything, the closer confines of an apartment building may present its own *greater* set of health and safety concerns.

One wealthy enough to purchase his or her own home, or purchase an apartment complex in Mt. Healthy can and has essentially purchased back his Fourth Amendment rights from the City. Only the poor and middle class are left to suffer these degrading inspection, irrespective of whether their property is in objectively better or worse condition. Whatever the intentions behind the discriminatory treatment, at the end of the day the Rental Permit Program fails to establish the type of "neutral criteria" sufficient to form probable cause for a warrant to issue.

Notably, in *Camara,* the Supreme Court suggested that the administrative plan at issue there *may* have sufficed as a basis to obtain a warrant (this decision predates the *Barlows* requirement of neutrality). However, the distinction between that program and Mt. Healthy's Rental Permit Program is telling, and the Court found that distinction relevant to its analysis: the rental inspection program under review in *Camara contemplated "*city-wide compliance with minimum physical standards for private property" and code enforcement searches with respect to entire "areas." San Francisco's Ordinance did not and does not single out single family rental houses alone.

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[10] Mt. Healthy Codified Ordinances Section 155.03 (Definitions): "*DWELLING, SINGLE FAMILY.* A dwelling consisting of a single dwelling unit only, separated from other dwelling units by open space."

Meanwhile, the agents Mt. Healthy places in the field are unconstrained in the scope of their search. The PMC that they are to enforce is voluminous, and an agent could find reason to spend 30 minutes at one home, and three days at another. The City of Mt. Healthy Rental Inspection Form fails to cure this infirmity. The form contains wide-open and free-wheeling categories such as "sanitation," and then turns the inspector loose to act on his own personal predilections. *See Exhibit B to Plaintiffs' Verified Complaint*. Additional examples abound, but exceed the space available here. Such a lack of constraint opens the door to abuse, and further defeats the Supreme Court's mandate of neutrality.

Finally, these factors must be weighed in a heightened context: while the Supreme Court articulated them in the context of pure commercial property, such as warehouses, and machine shops, the regulatory scheme at issue here seeks governmental access not just to commercial properties, but to a much more intimate location: peoples' homes. All the while, the Fourth Amendment expressly protects "houses."

In light of these principles, the City cannot seek, obtain, or execute a warrant on Plaintiffs' properties. Consequently, Plaintiffs remain likely to prevail on the merits of their Fourth, Fifth, and Fourteenth Amendment claim, even if the City were to claim the power (as a litigation position) to seek a warrant. The Rental Permit Program's search must be enjoined.

B. Plaintiffs are confronted with irreparable injury.

Within this Circuit, a plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages. *Basicomputer Corp. v. Scott,* 973 F.2d 507, 511 (6th Cir.1992). Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights. *See, e.g., Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (recognizing that the loss of First Amendment rights, for even a minimal period of time, constitutes irreparable harm).

Further, the protection of Fourth Amendment rights warrants equitable relief: "given the fundamental right involved, namely, the right to be free from unreasonable searches—that Covino has

sufficiently demonstrated for preliminary injunction purposes that he may suffer irreparable harm arising from a possible deprivation of his constitutional rights." *See Mitchell v. Cuomo,* 748 F.2d 804, 806 (2d Cir.1984).

Moreover, even a temporary deprivation of constitutional rights is generally sufficient to prove irreparable harm. *National People's Action v. Village of Wilmette*, 914 F.2d 1008, 1012 (7th Cir. 1990). Thus, satisfaction of the first prong of the preliminary injunction standard – demonstrating a strong likelihood of success on the merits – also satisfies the irreparable injury standard. *See Elrod v. Burns*, 427 U.S. 347, 373 (1973) (holding that if a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (finding that "when a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor").

Plaintiffs have demonstrated a substantial likelihood of success on the merits. Thus, Plaintiffs will suffer irreparable injury if Defendant is not immediately enjoined from enforcing its unconstitutional policy.

Further, Plaintiffs here face (1) loss of their rights; or (2) criminal prosecution and sanction in response to the exercise of their fundamental constitutional rights. At minimum, they face unfathomable civil sanctions, the non-payment of which will then subject them to further criminal sanctions. Each harm is irreparable, and demands equitable relief.

C. No public interest is served by continued enforcement of the Rental Permit Program against Plaintiffs, nor would be private harm accrue.

Neither the City nor any private residents will suffer any harm should an injunction be issued. First, Mt. Healthy was founded in 1817 as the Village of Mt. Pleasant. For these nearly 200 years, leasing of residential homes has no doubt taken place in the Village-City. Yet The Village-City has operated without a Rental Permit Program for these two centuries. Thus, preservation of the *status quo* warrants continuing to forbid such inspections as this case is underway.

Further, the Plaintiffs' Verified Complaint demonstrate that their properties pose no threat to any private individual - - no complaint has ever been made against the Plaintiffs or their properties, and they have affirmed that they harbor no dangerous conditions at their properties.

IV. **CONCLUSION**

The City of Mt. Healthy's newly-minted Rental Permit Program, mandating warrantless searches of the properties of those owning in and living in rental homes within the City, unduly infringes upon Plaintiffs' Fourth, Fifth, and Fourteenth Amendment rights. And the Program's fee and license requirement are each dependent upon and intertwined with the unlawful inspection requirement. For the foregoing reasons, this Court must enjoin all enforcement of the aforesaid policies at once.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion and memorandum in support, as well as the verified complaint filed in this action, will be served upon Defendant on the date of its filing.

Respectfully submitted,

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