IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

METROPOLITAN OMAHA PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff,

vs.

THE CITY OF OMAHA,

Defendant.

Case No.: 8:19-cv-00431-BCB-MDN

BRIEF IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION

Metropolitan Omaha Property Owners Association, Inc. ("MOPOA") moves this Court for an Order temporarily enjoining and restraining the City of Omaha ("the City") from implementing or enforcing the Rental Property Registration and Inspection Ordinance ("the RPRIO"), which is set to become effective on January 1, 2020. The RPRIO requires all property owners to register with the City, pay fees to have their properties inspected, and submit to arbitrary inspections as a condition to renting or leasing.

The RPRIO is unconstitutional on its face, and as applied to MOPOA, because it flagrantly violates rights guaranteed by the Fourth Amendment. The RPRIO: (1) authorizes unlimited, warrantless searches without any precompliance review, probable cause, or exigent circumstances; (2) imposes unlimited and arbitrary penalties upon property owners who refuse to consent to warrantless searches; (3) forces property owners to register for the ability to rent their

properties; and (4) coerces property owners to forfeit their fundamental right to be free of unreasonable searches just to be able to rent their properties.[1]

The RPRIO was designed to and will unlawfully eliminate the safeguards and limitations that were specifically bargained for by MOPOA, agreed to by the City, and implemented within a Consent Decree entered by this Court.

The City will suffer absolutely no harm if the RPRIO is preliminarily enjoined because it currently has procedures and laws in place to inspect and remedy code violations, including ***the ones it agreed to, were codified in its ordinances, and implemented by a Consent Decree entered by this Court.***

This Court should preliminarily enjoin the RPRIO and preserve the status quo during the pendency of this case.

STATEMENT OF FACTS

In 2013, MOPOA brought a class action lawsuit before this Court against the City and some of its property code inspectors in *Metropolitan Omaha Property Owners Association, Inc. v. City of Omaha*, Case No. 8:13-cv-00230-LSC-FGS ("the Class Action Suit"). (Ex. 1). MOPOA sought damages, injunctive, and declaratory relief to redress the City's pattern and custom of property maintenance code enforcement abuses and unlawful searches and trespasses.

After approximately six months of negotiations between MOPOA and the City, the involvement of a mediator, and the exchange of numerous ideas, proposals, draft ordinances, policies, and procedures, the Parties entered into a settlement agreement and release on or about January 28, 2015 ("the Settlement Agreement"). (Ex. 2, ¶¶ 5-6; Ex. 3). As part of the

[1] The RPRIO is also unconstitutional and should be enjoined for the additional reasons described in MOPOA's Complaint. (Doc. 1).

Settlement Agreement, the City agreed to amend various provisions of the Omaha Municipal Code, create a Property Maintenance Appeals Board for appealing and contesting alleged property code violations, and to dismiss 233 minor violation cases. (Ex. 3).

As part of the Settlement Agreement, the City agreed to adopt and implement Standard Operating Procedures for property maintenance cases. (Ex. 3, Pg. 2-3). The Standard Operating Procedures were negotiated and agreed upon by representatives "of the Parties, designated as 'Task Force III.'" (Ex. 3, Pg. 2-3).

MOPOA also specifically sought, bargained for, and obtained specific safeguards to protect property owners and landlords from unreasonable searches and arbitrary and abusive code enforcement practices. (Ex. 3). MOPOA sought, and the City agreed, that: (1) the City could act only in response to a valid complaint meeting certain specified criteria before inspecting a property for code violations (Ex. 3, Pg. 20); (2) the City inspectors were stripped of their unfettered power to impose unlimited penalties based upon arbitrary and unidentified standards (Ex. 3, Pg. 2-3, 9-10, 17-25); (3) the City could not inspect a property without consent of the owner or probable cause (Ex. 3, Pg. 10-11); and (4) the City could no longer charge a separate criminal offense for each day a code violation existed. (Ex. 3, Pg. 11-12).

The City expressly agreed that property inspections were "subject to constitutional restrictions on unreasonable searches and seizures." (Ex. 3, Pg. 11). The City agreed that it could only require inspections to be conducted at "reasonable times" and if "consent is obtained from the owner or occupant." (Ex. 3, Pg. 11). The City agreed that, without consent, the City could only conduct an inspection if "there is an emergency involving imminent risk to life or safety, or a search warrant, inspection warrant, or other authorizing court order is obtained."

(Ex. 3, Pg. 11). This Court entered a Consent Decree on March 4, 2015, implementing the terms and conditions of the Settlement Agreement. (Ex. 4).

The RPRIO undermines and eliminates the safeguards, protections, and due process provisions of the Consent Decree, particularly the safeguards related to the need for probable cause and an actionable complaint to conduct an inspection. The City has acknowledged that the Consent Decree prohibits it from adopting or implementing a rental registration ordinance or conducting mandatory inspections. (Ex. 2, ¶¶ 14-15). The City adopted the RPRIO anyway in an admitted attempt to "work around" the Consent Decree. (Ex. 5, ¶ 5).

The RPRIO was adopted as Ordinance No. 41767 and will be codified in the Omaha Municipal Code[2] at §§ 48-201 to 48-209. (Ex. 6). The RPRIO is set to take effect on January 1, 2020 and will require all rental property owners within the City or its three mile extraterritorial jurisdiction to register their properties. (Ex. 6, Pg. 2-5; §§ 48-202 – 205). Properties that do not register via the RPRIO or fail to remedy outstanding code violations will be forced to go through annual inspections. (Ex. 6, Pg. 5; § 48-206(a)). Properties that do register and which have no outstanding code violations are still "subject to periodic inspection under this article" at least once every ten years. (Ex. 6, Pg. 6; § 48-206(b)).

When read thoroughly, the RPRIO actually empowers code officials to conduct an unlimited number of inspections in their sole discretion and without any discernible standard. The scope, length, duration, and breadth of these inspections are undefined and unrestricted. Section 48-206(e) states, in pertinent part:

> The code official shall be authorized to take such actions as the code official deems necessary or appropriate to implement, administer and carry out the inspection requirements of this article, including, but not limited to, scheduling inspections for the efficient use of city resources.

[2] The Omaha Municipal Code will be abbreviated as "OMC" for citation purposes.

Section 48-206(i) also provides, in pertinent part:

> Inspections may also be conducted at other times as the code official determines necessary, including inspections initiated because of a complaint or other means outside of the inspection program of this article.

(Ex. 6, Pg. 6-7; § 48-206(e) & (i)).

Property owners are charged a fee of $125 for each inspection forced upon them without consent or probable cause. (Ex. 6, Pg. 7; § 48-206(e)). City officials are vested with unlimited power, authority, and discretion to impose severe, unlimited, and unidentified penalties, sanctions, and criminal prosecutions for anything they deem to constitute a violation of the RPRIO and other unknown laws, rules, and regulations, including ones that are not yet in existence. (Ex. 6, Pg. 4; § 48-204(c)).

The RPRIO should be enjoined because it eliminates protections and rights guaranteed by the Fourth Amendment and the safeguards and limitations that were specifically bargained for by MOPOA, agreed to by the City, and implemented within the Consent Decree.

STANDARD

"The purpose of a preliminary injunction is to protect and preserve the rights of all the litigants with the least injury to each until the controversies between them can be tried and finally decided." *Denver & R.G.R. Co. v. United States*, 124 F. 156, 157 (8th Cir. 1903) (Court Syllabus). When determining whether to issue a preliminary injunction, courts weigh "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1036 (D. Neb. 2010), *quoting Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc).

"No single factor in itself is dispositive; rather, each factor must be considered to determine whether the balance of equities weighs toward granting the injunction." *United Indus. Corp. v. Clorox Co.,* 140 F.3d 1175, 1179 (8th Cir. 1998). A court should intervene to maintain the status quo where the plaintiff "has raised questions so serious and difficult as to call for more deliberate investigation." *Lynch Corp. v. Omaha Nat. Bank*, 666 F.2d 1208, 1212 (8th Cir. 1981).

ARGUMENT

I. MOPOA WILL SUFFER IRREPARABLE HARM BECAUSE THE RPRIO IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO MOPOA.

The RPRIO is facially unconstitutional because it will deprive MOPOA of its fundamental right to be free of unreasonable searches. The Fourth Amendment reads:

> 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.

U.S. Const., Amend. IV. (emphasis added).

Other courts have consistently struck down similar rental registration ordinances for undermining constitutional rights and safeguards. In *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), the Supreme Court of the United States reviewed an ordinance that, like the RPRIO, authorized warrantless inspections under the guise of property maintenance and imposed penalties upon a property owner for refusing to consent. The Supreme Court struck down the ordinance and found the warrantless searches violated the Fourth Amendment:

> Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the full limits of the inspector's

> power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. ... The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.... We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.

Camara, 387 U.S. at 532–33, 87 S. Ct. at 1732–33.

Dearmore v. City of Garland, 400 F. Supp. 2d 894 (N.D. Tex. 2005), involved a city ordinance that also required rental property owners to register and obtain a permit. Like the RPRIO, the Garland ordinance required that as "a condition of the permit, the City will inspect the property at least once a year." *Id*, at 897. Like the RPRIO, the Garland ordinance subjected property owners to being fined, or even arrested, for a violation of the ordinance. The Court preliminarily enjoined the ordinance finding:

> Dearmore has also demonstrated a substantial threat of immediate and irreparable harm, for which he has no adequate remedy at law, because in order to receive a permit he must agree to abide by all the provisions of the Ordinance, which includes agreeing in advance to a warrantless inspection. Dearmore also is subject to being fined, or even arrested, for a misdemeanor violation.

Id, at 905.

In *Pund v. City of Bedford, Ohio*, 339 F. Supp. 3d 701, 712–13 (N.D. Ohio 2018), the Court held that a rental inspection ordinance requiring landlords to schedule a warrantless inspection of their rental units every two years to be unconstitutional both, on its face, and as applied to the landlords. The Court focused on the lack of an administrative warrant requirement, the penalties imposed, and the dilemma faced by the landlords who are required to give forced consent. The Court discussed:

> In this case, according to Plaintiffs' uncontested allegations, Bedford's Point of Sale Inspection Ordinance (as it existed on May 4, 2016) featured no administrative warrant requirement. The Ordinance required a homeowner to obtain a Certificate in order to sell a home, which in turn allowed a building inspector to enter and search the property without a warrant at any reasonable time after being notified that the property was for sale. Failure to comply was punishable as "a misdemeanor of the first degree." Attendant penalties included fines between $50 and $500 for the first offense and $100 to $1,000 for the second. A second offense was also punishable by up to six months' imprisonment. Each day that a homeowner refused to comply with the inspection constituted a separate offense, for which potential punishments multiplied.
>
> As in *Patel*, Bedford homeowners had no real choice but to comply with the City's warrantless inspection under the Point of Sale Ordinance. Under the terms of the Ordinance, even two days of noncompliance warranted imprisonment up to six months. Homeowners "cannot reasonably be put to this kind of choice."

Id, at 712–13 (citations omitted).

The RPRIO contains the same constitutionally offensive requirements as the ordinance struck down in *Pund*. The Supreme Court has mandated that to satisfy the Fourth Amendment there needs to be, among other things, an avenue for precompliance review by a court of competent jurisdiction before warrantless searches can be conducted. *See City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2452, 192 L. Ed. 2d 435 (2015) ("the Court has repeatedly held that searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable."). "The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311, 98 S. Ct. 1816, 1819, 56 L. Ed. 2d 305 (1978).

The United States District Court for the Eastern District of Michigan assessed the constitutionality of Detroit's ordinance that is substantially similar to the RPRIO in *MS Rentals, LLC v. City of Detroit*, 362 F. Supp. 3d 404 (E.D. Mich. 2019). Detroit's ordinance required "property owners to register their property, comply with habitability standards, and submit to inspections." *Id*, at 407. Detroit charged "fees for occupancy certificates and inspections," and

imposed "fines when inspections are refused." *Id*. The Court determined that the Detroit ordinance was unconstitutional on its face because it "did not provide for any precompliance review and that inspections were never performed under a warrant." *Id*, at 417.

The RPRIO is similarly unconstitutional on its face because it does not provide for any precompliance review by a court and mandates inspections without a warrant. The RPRIO also runs afoul of the unconstitutional conditions doctrine because it coerces landlords into giving up their right to be free from unlawful or warrantless searches in exchange for being able to conduct the lawful business of renting. The unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 133 S. Ct. 2586, 2594, 186 L. Ed. 2d 697 (2013).

In *Thompson v. City of Oakwood, Ohio*, 307 F. Supp. 3d 761 (S.D. Ohio 2018) *modified*, 2018 WL 9944970 (S.D. Ohio Apr. 4, 2018), the Court struck down a municipal ordinance making it unlawful to transfer ownership in real estate or change a tenant without obtaining an inspection. The Court determined that the ordinance violated the plaintiffs' "Fourth Amendment rights by subjecting them to a warrantless search without valid consent." *Id*, at 776. The Court further discussed that the City violated the unconstitutional conditions doctrine when it "presented Plaintiffs the choice between agreeing to an inspection and being denied a certificate of occupancy." *Id*, at 778. "Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *United States v. Chicago, M., St. P. & P.R. Co.*, 282 U.S. 311, 328–29, 51 S. Ct. 159, 164, 75 L. Ed. 359 (1931). "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." *Sokolov v. Vill. of Freeport*, 52 N.Y.2d 341, 346–47, 420 N.E.2d 55, 57 (1981). The RPRIO imposes such a constitutionally impermissible condition.

The RPRIO also unlawfully dispenses with the Fourth Amendment requirement that entry into a person's home or private property be based upon probable cause. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The RPRIO does not require ***any*** search warrant, let alone one clearly setting forth facts upon which the warrant is based and describing with particularity the premises to be searched. Under the RPRIO, the City may, in its absolute and unfettered discretion, conduct searches "as the code official determines necessary" without any restriction whatsoever as to number, scope, and duration. (Ex. 6, Pg. 7; § 48-206(i)).

The RPRIO places no constitutional restrictions upon the City's ability to search rental properties and undermines the fundamental purpose of the Fourth Amendment, which is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2213, 201 L. Ed. 2d 507 (2018) (internal quotations omitted). If the RPRIO is not enjoined, MOPOA will suffer at least the same irreparable harm identified by several other Courts when striking down similar ordinances, including deprivation of its Fourth Amendment rights. "[W]hen an alleged deprivation of constitutional rights is involved, no further showing of irreparable injury is necessary." *Saint v. Nebraska Sch. Activities Ass'n*, 684 F. Supp. 626, 628 (D. Neb. 1988), *citing Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977) (finding that the threat of irreparable injury was present in granting temporary restraining order since the plaintiff had alleged a violation of her constitutional rights).

Under the RPRIO, MOPOA's members (and all landlords in the City of Omaha and three miles beyond) will be subjected to mandatory inspections of their properties without probable cause or any precompliance review by a court. As determined by the Supreme Court, "Absent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass." *Patel*, 135 S. Ct. at 2452–53.

Moreover, the RPRIO will force MOPOA's members to waive their constitutional right to be free of warrantless searches simply to conduct lawful business operations and earn rental income. Section 48-204 provides, in pertinent part:

> (a) *Registration required*. It shall be unlawful for any person to offer for lease, lease, or continue to lease a rental dwelling to any other person unless the rental property containing the rental dwelling has been registered as such under this article with the permits and inspections division.
>
> (b) *Ongoing compliance required*. To maintain a registration in effect requires ongoing compliance with applicable requirements of this article and other laws, rules and regulations during the duration of the registration, including ongoing compliance with the IPMC and other requirements that are the subject of periodic inspections hereunder or under other applicable laws, rules, or regulations.

(Ex. 6, Pg. 4; § 48-204(a) & (c)).

The RPRIO's forced consent of inspections is not a voluntary act by any means, but an unconstitutional, coerced condition. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). The Northern District of Texas discussed the impermissible dilemma created from a substantially similar unconstitutional ordinance:

> Here the equally repugnant choices, or the "between a rock and a hard place" dilemma, for the owner of rental property 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.

Dearmore, 400 F. Supp. 2d at 903–04.

The United States District Court for the Northern District of Ohio reached a similar conclusion when it recently struck down a similar inspection ordinance because, like the RPRIO, it dispensed with the search warrant requirement and coerced property owners into compliance:

> Because landlords, absent tenant intervention, have a constitutional right to privacy in both their occupied and unoccupied rental units, the Bedford **landlords had a constitutional right to refuse inspection and demand a warrant**. **Faced with the threat of criminal penalty**, property owners in Bedford had no opportunity to exercise that right. Bedford's Rental Inspection Ordinance, as it existed on May 4, 2016, was **unconstitutional** on its face and, consequently, also as applied to Plaintiffs because **any consent given by a landlord could not have been voluntary**.

Pund, 339 F. Supp. 3d at 716 (emphases added).

The RPRIO is far more constitutionally intrusive than any of the similar ordinances discussed above because it imposes much harsher punishment, the extent of which cannot even be determined from its face. Under the RPRIO, City officials are vested with unlimited power, authority, and discretion to impose severe, unlimited, and unidentified penalties, sanctions, and prosecutions for any "deficiency" or "failure to comply" not only with the RPRIO, ***but also the International Property Maintenance Code, the entire Omaha Municipal Code, and other unknown, unidentified, and even non-existent "laws, rules or regulations."*** Section 48-204(c) provides, in pertinent part:

> Any deficiency or failure to comply shall be subject to such actions, orders, rights and remedies of the code official as set forth in ***this article, the IPMC or other applicable laws, rules or regulations as enacted or amended from time to time***, up to and including issuance of notices or orders under chapter 48 or other applicable chapters of this Code, charges, and issuance or assessment of citations, fines, penalties and/or criminal prosecutions, all of which shall be carried out in accordance with applicable law.

(Ex. 6, Pg. 4; § 48-204(c)) (emphasis added).

These penalties could include unlimited fines, criminal prosecution, and imprisonment, all upon the subjective whim of a City official without any uniform or discernible standard. It is difficult to fathom a more overly broad, vague, and constitutionally offensive law.

MOPOA will unquestionably be subjected to irreparable harm if its members are forced to: (1) register their rental properties and pay fees for the privilege of having them inspected against their will; (2) forfeit their constitutional right to be free of warrantless searches as a condition to lawful rental operations; (3) be subjected to unlimited, mandatory inspections without probable cause; and (4) be subjected to unlimited penalties and imprisonment if a City official arbitrarily determines that they failed to comply with any portion of the RPRIO, the International Property Maintenance Code, the entire Omaha Municipal Code, or some other unknown and unidentified laws, rules, or regulations that may not even exist yet.

II. MOPOA WILL SUFFER ADDITIONAL IRREPARABLE HARM FROM THE RPRIO BECAUSE IT WILL LOSE THE PROTECTIONS OF THE CONSENT DECREE AND THE BENEFIT OF ITS BARGAIN.

MOPOA will further suffer unique irreparable harm because the RPRIO eliminates the safeguards and limitations that were specifically bargained for by MOPOA and agreed to by the City. For example, the Consent Decree required the City to adopt and employ Standard Operating Procedures for purposes of code enforcement that were negotiated and agreed to by the Parties with the assistance of a mediator. (Ex. 3, Pg. 2-3). The RPRIO nullifies those standard operating procedures and permits the code inspectors to once again conduct housing enforcement based upon unknown and arbitrary standards. The City intends to fully revert back to the very system that fostered gross abuses and the arbitrary and discriminatory enforcement of the property code that gave rise to the Class Action Suit.

The Consent Decree also mandates that the City have consent, probable cause, or emergency circumstances to inspect a rental property. (Ex. 3, Pg. 10-11; OMC § 48-34). The Consent Decree further requires a valid complaint meeting certain specified criteria before the City can conduct an inspection of a rental property. (Ex. 3, Pg. 20).

These safeguards were unquestionably agreed upon by the City and implemented as reasonable limitations upon the City's ability to encroach upon constitutional rights. The City has admitted publicly, in proceedings before this Court, and under oath that its ability to conduct inspections or act on a property code complaint is held in check by the Consent Decree. As the City has stated in pleadings before this Court:

> The City of Omaha utilizes a complaint based system for identifying potential violations of the code. The City Planning or Permits and Inspections Department must receive a citizen complaint before it can investigate a purported code violation.

(8:18-cv-00287 at Doc. 5, Pg. 2, ¶ 6; Ex. 7, Pg. 2, ¶6).

City officials, including its Chief Housing Inspector, Scott Lane ("Lane"), have made public statements confirming that because of the Consent Decree the City has no authority to act on anything other than a valid property code complaint. (Ex. 8). The City stated to the press on or about September 26, 2018:

> The City is required by a federal court order to include the name and contact information (phone number) of the person making a report of a housing code violation. Without this information, we cannot submit the report.

(Ex. 9).

Lane again confirmed the limitations imposed by the Consent Decree in a recent deposition:

> Q. What do you mean by "a proper complaint to proceed"?

> A. The way I understand our process to work is that we receive a formal complaint with a name and a phone number, and it has to be a specific complaint on a specific item and a specific location. I did not have that information to proceed with an investigation at that time.

(Ex. 10, Pg. 9:3 – 10:5).

The City's Mayor, Jean Stothert, even once agreed that the City "could not legally adopt or implement a rental registration/inspection program because of the Consent Decree with MOPOA." (Ex. 2, ¶¶ 14-15). Despite agreeing to and knowing them, the City intentionally sought out to thwart and "work around" the protections of the Consent Decree through the RPRIO. (Ex. 5, ¶¶ 4-5). Mayor Stothert acknowledged the City and its legal department's efforts to undermine the Consent Decree in a meeting where representatives of MOPOA were raising concerns about the adoption of the RPRIO. (Ex. 5, ¶¶ 4-5).

The RPRIO undoubtedly undermines and nullifies the provisions of the Consent Decree, including the express requirements for probable cause and an actionable complaint to inspect a rental property. The RPRIO purports to permit the City to require all landlords to submit to (and pay for) unlimited mandatory inspections without any complaint, warrant, or probable cause "as the code official determines necessary." (Ex. 6, Pg. 7; § 48-206(i)).

MOPOA specifically sought, bargained for, and obtained these constitutional safeguards because, among other things, the City had a pattern and practice of violating the rights of landlords through unwarranted searches and searches premised upon the submittal or fabrication of illegitimate complaints by third parties, non-paying tenants, and/or the City itself. (Ex. 1; Ex. 2, ¶ 10). These safeguards were absolutely crucial to MOPOA, who exchanged valuable consideration and made numerous concessions to obtain them, including the dismissal of the Class Action Suit and claims for significant damages. (Ex. 2, ¶¶ 8, 10). Had the City not agreed to these safeguards or indicated that it would try to conduct mandatory inspections of rental

properties and/or force owners of rental properties to register them, pay inspection fees, and/or consent to mandatory inspections as a condition to renting, MOPOA would not have entered into the Settlement Agreement or dismissed the Class Action Suit. (Ex. 2, ¶¶ 11-13).

The RPRIO is contrary to the terms, protections, and safeguards of the Consent Decree and, if implemented, would deprive MOPOA of the benefit of its bargain and agreement with the City. Consequently, the City should be preliminarily enjoined from enforcing the RPRIO pending final disposition of this case.

III. THE BALANCE OF HARDSHIPS FAVORS MOPOA.

The irreparable harm MOPOA faces outweighs any potential "injury" the City faces from a preliminary injunction. This Court examines "the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant." *Planned Parenthood supra*, 724 F. Supp. 2d at 1036. As recently explained in *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467 (2019), the balance of hardships weighs in favor of granting injunctive relief where a plaintiff's privacy interests under the Fourth Amendment will be infringed:

> [D]enial of a preliminary injunction likely would result in the continuous violation of plaintiffs' Fourth Amendment rights. Plaintiffs' privacy interests in the information covered by the Ordinance would be irretrievably lost…
>
> The City, in contrast, faces only slight hardships if enforcement of the Ordinance is preliminarily enjoined while this case is adjudicated to completion. Were the City to prevail on the merits, a preliminary injunction would only temporarily delay enforcement of the Ordinance.

Id, at 499-500.

The City will face absolutely no hardship if enforcement of the RPRIO is preliminarily enjoined. The City currently has the procedures, tools, policies, and laws in place to inspect and remedy code violations, including under Omaha Municipal Code Chapters 37 (Trees and Vegetation), 43 (Building), 48 (Property Maintenance), and 54 (Swimming Pools).

Under the Omaha Municipal Code, including under provisions adopted and/or amended pursuant to the Consent Decree, the City has the ability to conduct inspections of rental properties. (Ex. 3, Pg. 10-11; OMC §§ 48-33 & 48-34). City officials are currently "authorized to enter the exterior areas of any property in the city or its extraterritorial jurisdiction at reasonable times for purposes of inspection." (Ex. 3, Pg. 11; OMC § 48-34(a)). City officials are currently authorized to "enter the interior common area of a multi-unit structure for purposes of knocking on or otherwise accessing the exterior of the door of a unit contained therein." (Ex. 3, Pg. 11; OMC § 48-34(b)). City officials are expressly authorized to inspect the interior of a rental structure as follows:

> The code official may enter the interior of a structure or unit thereof for purposes of inspection under this chapter at any reasonable time, provided, that consent is obtained from the owner or occupant, or there is an emergency involving imminent risk to life or safety, or a search warrant, inspection warrant, or other authorizing court order is obtained. If the owner has registered pursuant to section 48-33(b), the code official shall comply with that section prior to inspection. If entry is refused or not obtained, the code official is authorized to pursue recourse as provided by law.

(Ex. 3, Pg. 11; OMC § 48-34(c)).

Current Nebraska state law specifically authorizes the City to obtain an inspection warrant to inspect a rental property, subject only to the reasonable requirements of sufficient probable cause and the refusal of consent. Neb. Rev. Stat. § 29-833 provides, "An inspection warrant shall be issued only by a judge of a court of record upon reasonable cause, supported by affidavit describing the place and purpose of inspection." This statute is consistent with the constitutional protections imposed by the Fourth Amendment. Neb. Rev. Stat. § 29-832 provides, "Inspection warrants shall be issued only upon showing that consent to entry for inspection purposes has been refused." Current Nebraska state law further establishes that the City does not need consent or a warrant to conduct a rental property in emergency situations.

See Neb. Rev. Stat. § 29-832 ("In emergency situations neither consent nor a warrant shall be required.").

Thus, the RPRIO is unnecessary and no harm could be suffered by the City if the status quo is maintained. The City currently possesses the authority to conduct lawful inspections of rental properties subject only to reasonable limitations and constitutional protections. The Court considered the availability of an avenue to obtain an inspection warrant in striking down a similar ordinance that also required forced consent:

> The ease with which the City could acquire an administrative search warrant makes unnecessary the need for the City to require property owners to forego in advance their rights guaranteed by the Fourth Amendment. The court fully understands that the City has a valid and important governmental interest in protecting the public, however, the court sees no reason why this should be done at the expense of infringing on rights guaranteed by the Fourth Amendment to the United States Constitution.

Dearmore, 400 F. Supp. 2d at 903–04 (N.D. Tex. 2005).

Because the City can acquire an administrative search warrant pursuant to an authorizing state statute or inspect rental properties with consent or in emergency circumstances, the City will suffer no harm or prejudice if the RPRIO is delayed pending the outcome of this case. "Where there is 'a conflict between the state's … administrative concerns on the one hand, and the risk of substantial constitutional harm to plaintiffs on the other ... the balance of hardships tips decidedly in plaintiff's favor.'" *Airbnb*, 373 F. Supp. 3d at 500, *citing Mitchell v. Cuomo*, 748 F.2d 804, 808 (2d Cir. 1984).

IV. MOPOA IS LIKELY TO SUCCEED ON THE MERITS.

"To show a likelihood of success on the merits, the movant need not show that it will ultimately win, or even that the movant is more likely than not to prevail." *Kuper Indus., LLC v. Reid*, 89 F. Supp. 3d 1005, 1010 (D. Neb. 2015). "Indeed, in any case '[t]he threshold inquiry is

whether the movant has shown the threat of irreparable injury.'" *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991).

As demonstrated by other Courts striking down similar, but less constitutionally offensive, ordinances, MOPOA will succeed on the merits. The RPRIO is unconstitutional on its face, and as applied to MOPOA, because, among other things, it: (1) authorizes warrantless inspections of private property; (2) imposes unknown and unlimited penalties upon property owners who refuse to consent; (3) does not require precompliance review by a court; and (4) forces owners to surrender constitutional rights as a condition to being able to rent their properties. MOPOA will also succeed on the merits because the RPRIO constitutes a breach of the agreement reached between the City and MOPOA and violates the Consent Decree entered by this Court.

V. THE PUBLIC INTEREST WILL BE PROTECTED BY AN INJUNCTION.

The public interest weighs in favor of preliminarily enjoining the RPRIO. It "is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007), *modified on reh'g,* 545 F.3d 685 (8th Cir. 2008). In *Saint*, this Court issued a temporary restraining order to protect the constitutional rights of a female high school student who was prevented from joining the boys wrestling team, holding:

> In this matter, **the public interest will be served** by the granting of the restraining order **as the plaintiff is seeking to prevent violations of her constitutional rights**. As such, restraining the defendants from refusing to permit her to wrestle on the team serves the public interest to the extent that the plaintiff's constitutional rights will be determined on the merits because irreparable injury occurs. In addition, **no public interest will be injured** by the issuance of this order.

Saint, 684 F. Supp. at 629-30. (emphasis added).

MOPOA seeks to preserve and protect the Fourth Amendment and other constitutional rights of not only themselves, but property owners, landlords, and tenants *across the entire City* and its extraterritorial jurisdiction. MOPOA seeks to prevent the City from: (1) imposing unlimited and arbitrary penalties upon property owners who refuse to consent to warrantless searches; (2) forcing property owners to register and pay inspection fees simply to rent their properties; and (3) coercing property owners to forfeit their fundamental right to be free of unreasonable searches as a condition to be able to rent their properties.

MOPOA further seeks to prevent the City from forcing warrantless searches of private property without probable cause. The need for protection has likely never been greater because the City has recently escalated its efforts to undermine the Fourth Amendment to search private properties and harm and harass landlords through abusive, arbitrary, and weaponized code enforcement.

As one of the more egregious examples, on November 18, 2019, the Douglas County Court invalidated an inspection warrant obtained by the City and suppressed all resulting evidence obtained. (Ex. 11). The City obtained and utilized the invalid warrant to raid and effectively seize an entire Omaha apartment complex comprised of 100 apartments (without notice or any attempted compliance with the Consent Decree) and forcefully displace approximately 500 refugee tenants. (Case No. 8:19-cv-00102, Doc. 1; Ex. 12). The City then utilized the invalid warrant to file ***100*** criminal counts of violating the property maintenance code against a person that was not the owner of the apartment complex while the actual property owner's appeal to the Property Maintenance Appeals Board was pending and has had success. (Case No. 8:19-cv-00102, Doc. 1; Ex. 12).

The Douglas County Court invalidated the inspection warrant because the City did not comply with the requirements of Neb. Rev. Stat. § 29-832, which authorizes inspection warrants specifically for code enforcement purposes. (Ex. 11, Pg. 2-3). The Court also expressly determined that the City's Chief Housing Inspector made a false statement to obtain the warrant, along with "additional misstatements." (Ex. 11, Pg. 2-4).

The RPRIO is just another step in the City's reversion back to the abusive, unlawful, and discriminatory code enforcement practices that were supposed to be eliminated by the Consent Decree. Thus, a preliminary injunction of the RPRIO is necessary to protect a large amount of residents and property owners from further erosion of the Fourth Amendment by the City.

Public policy would also be served by forcing the City to honor its agreement with MOPOA. "The obligation of a contract is the law which binds the parties to perform their agreement." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129, 111 S. Ct. 1156, 1164, 113 L. Ed. 2d 95 (1991). A contract "is an agreement, obligation, or legal tie whereby a party binds itself, or becomes bound, expressly or impliedly, to pay a sum of money or to perform or omit to do some certain act or thing." *Kosmicki v. State*, 264 Neb. 887, 897, 652 N.W.2d 883, 892 (2002).

MOPOA specifically sought, bargained for, and obtained reasonable safeguards to the City's ability to inspect rental properties. (Ex. 2, ¶¶ 8-10). After extensive negotiations and concessions by MOPOA, the City agreed to implement and abide by standard operating procedures and specific safeguards that were codified in the Omaha Municipal Code. The RPRIO eviscerates those safeguards, nullifies the standard operating procedures, and completely deprives MOPOA of the benefits of its bargain. Public policy commands that the City be held to its promises and agreement.

Public policy would also be served through the enforcement of the Consent Decree. "A consent decree is no more than a settlement that contains an injunction." *In re Masters Mates & Pilots Pension Plan & IRAP Litig*., 957 F.2d 1020, 1024 (2d Cir. 1992). "Consent Decree, as a written reflection of the parties' bargain resolving their case, should be interpreted as a contract. *Pigford v. Vilsack*, 777 F.3d 509, 513 (D.C. Cir. 2015).

A federal court has inherent power to enforce its judgments. *Peacock v. Thomas*, 516 U.S. 349, 356, 116 S. Ct. 862, 868, 133 L. Ed. 2d 817 (1996). "A federal court may assert ancillary jurisdiction 'to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.'" *Sampson v. Kofoed*, No. 8:07CV155, 2016 WL 6998607, at *3 (D. Neb. Nov. 30, 2016) *citing Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994). The RPRIO will render the Consent Decree meaningless and dissuade litigants from resolving their claims through settlement. The City should be compelled to abide by the Orders of this Court to deter it from seeking to undermine, "work around," or violate lawful orders in the future and to respect and preserve the integrity of the judicial process.

CONCLUSION

This Court should preliminarily enjoin the RPRIO and preserve the status quo during the pendency of this case. MOPOA has demonstrated that all relevant considerations weigh heavily in its favor and that MOPOA, property owners, landlords, and tenants will face irreparable harm and violations of their fundamental Fourth Amendment rights if the RPRIO is implemented. The RPRIO will unlawfully empower the City to: (1) impose mandatory searches of private property without probable cause; (2) impose unlimited and arbitrary penalties upon property owners who refuse to consent to warrantless searches; (3) force property owners to register and pay for forced

inspections simply to rent their properties; and (4) coerce property owners to forfeit their fundamental right to be free of unreasonable searches just to be able to rent their properties.

MOPOA will further suffer unique irreparable harm because the RPRIO will eliminate the safeguards and limitations that were specifically bargained for by MOPOA, agreed to by the City, and implemented within the Consent Decree entered by this Court.

The City will suffer absolutely no harm if the RPRIO is preliminarily enjoined. The City currently has procedures and laws in place to inspect and remedy code violations, including those it agreed to, were codified in its ordinances, and implemented by the Consent Decree.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notifications to all parties of record.

/s/ Jason M. Bruno