STATE OF MICHIGAN
IN THE SUPREME COURT

LONG LAKE TOWNSHIP,	Supreme Court No. 164948
Plaintiff-Appellee,	Court of Appeal No. 349230
-vs-	Grand Traverse CC No. 18-034553-CE
TODD MAXON AND HEATHER MAXON,	**ORAL ARGUMENT REQUESTED**
Defendant-Appellants.	

DEFENDANT-APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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Introduction

This case asks the Court to decide whether the government has unfettered discretion to use drones to spy on the homes of Michiganders and then use that information to punish them for alleged zoning violations. Over a dissent, the Court of Appeals held that it does, thereby empowering local government officials to use surveillance drones against anyone, whenever they wish.

Todd and Heather Maxon's story shows the shape of things to come if this Court does not reverse that determination. For years, Long Lake Township's code-enforcement officials have doggedly pursued the Maxons and their five-acre property for supposed aesthetic violations of the Township's zoning code. But those officials soon ran into a problem: The supposedly offending conditions on the Maxons' property were not visible from any ground-level public vantage point. The government's heavy-handed solution? Contract with a drone operator to fly a small, unmanned, remote-controlled aircraft at low altitudes all over Todd and Heather's property, and use its high-powered camera to record its surveillance forever in clear detail. Despite intruding three times over two years, Long Lake never once sought a warrant.

Earlier in this litigation, the Court of Appeals correctly held that the government's warrantless drone surveillance was an unreasonable search in violation of the Fourth Amendment. But after a remand from this Court, it rendered toothless its earlier decision: It held that even if repeated warrantless drone surveillance violated the Maxons' constitutional rights, Long Lake could nonetheless use that unconstitutionally

collected evidence to punish the Maxons in the Township's enforcement suit against them. In other words, the government could openly flout the Fourth Amendment. The Court of Appeals majority wrongly concluded that the exclusionary rule exists only to deter misconduct by *police* officers pursuing violations of *criminal* law. In the majority's view, exclusion serves "no function" when officials other than police deliberately violate your constitutional rights. But that view is unsupported by either precedent or policy. To the contrary, courts around the country emphasize that the exclusionary rule exists to deter Fourth Amendment violations, period—no matter the uniform worn by the offending investigator. If left standing, the Court of Appeals' decision will allow a vast array of government officials to intentionally trample on people's Fourth Amendment rights, consequence-free. It demands this Court's correction.

First, this Court should affirm the Court of Appeals' original conclusion that the government's warrantless drone surveillance is an unreasonable search. The government violated the Maxons' rights under any of the tests for whether a "search" has occurred—whether the physical intrusion test, or the expectation-of-privacy test, or the ordinary meaning of "search." This court must hold that the Township's drone surveillance amounts to a search to ensure that "police technology" does not "erode the privacy guaranteed by the Fourth Amendment." *Kyllo v United States*, 533 US 27, 34; 121 S Ct 2038; 150 L Ed 2d 94 (2001).

Second, this Court should hold that Long Lake's deliberate, warrantless surveillance demands exclusion. The exclusionary rule exists to "compel respect" for

Fourth Amendment rights in the "only effectively available way—by removing the incentive to disregard it." *Elkins v United States*, 364 US 206, 217; 80 S Ct 1437; 4 L Ed 2d 1669 (1960). Excluding the fruits of the Township's deliberate warrantless surveillance here would serve exactly that deterrent function. Constitutional protections are meaningless without remedies to enforce them. Saying that the government can benefit from the evidence it obtained in violation of the Fourth Amendment—even a deliberate violation of the Fourth Amendment—would take the *security* out of the "right of the people to be secure … against unreasonable searches and seizures." US Const, Am IV. But the Court of Appeals' decision sacrifices our security whenever the offending officer's daily outfit is something other than a police uniform. This Court should grant leave to appeal and remand for an order suppressing all evidence resulting from the government's warrantless drone search of the Maxons' property.

Statement Identifying Jurisdiction

In an order dated May 24, 2023, the Court directed the clerk to schedule oral argument on Defendant-Appellants' Todd and Heather Maxon's Application for Leave to Appeal. The order directed the parties to file supplemental briefing addressing: "(1) whether the appellee violated the appellants' Fourth Amendment rights by using an unmanned drone to take aerial photographs of the appellants' property for use in zoning and nuisance enforcement; and (2) whether the exclusionary rule applies to this dispute." App'x 0002. In an order dated June 14, 2023, the court extended the time for

Defendant-Appellants to file their supplemental brief until August 4, 2023. App'x 0001. This supplemental brief is timely filed under MCR 7.305(H)(1) and MCR 7.312(E).

Statement of Questions Presented

The government used a low-flying drone to surveil and take high-quality videos and photographs of Todd and Heather Maxon's home, which it could not have otherwise seen from any public vantage point. It did this repeatedly, over multiple years, to gather evidence of alleged municipal ordinance violations for use against the Maxons in a civil enforcement proceeding. It never obtained a warrant. The questions presented are:

1. Did Long Lake Township violate the Maxons' Fourth Amendment rights by using an unmanned drone to take aerial photographs of the Maxons' property for use in zoning and nuisance enforcement?

   The Court of Appeals answered, "Yes."[1]

   The Circuit Court answered, "No."

   Plaintiff-Appellee answers, "No."

   Defendant-Appellants answer, "Yes."

2. Does the exclusionary rule apply to this dispute?

   The Court of Appeals answered, "No."

[1] Without noting disagreement with the Court of Appeals' opinion on this question, this Court later vacated the Court of Appeals' opinion and instructed it to decide whether the exclusionary rule applies to this dispute. App'x 0021.

The Circuit Court did not decide.

Plaintiff-Appellee answers, "No."

Defendant-Appellants answer, "Yes."

Statement of Facts and Proceedings

This appeal arises from the denial of a motion to suppress evidence obtained from the government's use of an aerial drone to surveil Todd and Heather Maxon's property without a warrant. The issues here are fairly straightforward, but the road has been long and winding.

A. The Maxons' home sits on a five-acre property in Long Lake Township, just west of Traverse City. Mr. Maxon is a hobbyist: He fixes up and tinkers with automobiles for recreation. But for many years, Township officials have sought to use an overzealous reading of their zoning code to make it harder for him to do that.

It began fifteen years ago, when the government filed an enforcement action against Todd Maxon, alleging that the property was being used as an illegal junkyard. App'x 0024. That case settled in 2008—favorably for Todd. The settlement imposed no obligations on Todd. Under it, the Township both agreed to reimburse the Maxons more than $3,000 in attorneys' fees, and "not to bring further zoning enforcement action against Defendant Maxon based upon the same facts and circumstances which were revealed during the course of discovery … ." App'x 0040-0041.

B. Todd and Heather thought this favorable settlement was the end of the matter, but the government did not. A decade later, in August 2018, the government

brought a new zoning enforcement action, alleging that the Maxons had "significantly increased the scope" of items "being kept on their property" since the 2008 settlement. Claiming that the Maxons' use of their property constituted a "nuisance per se," the Township asked the Circuit Court to "order Defendants to abate the nuisance" and "award such other costs, fees and relief that the Court deems just." App'x 0042-0045.

But how did the government justify its allegations? After all, as the Court of Appeals recognized, "very little, if any" of the Maxons' property "is visible from the ground because the view is blocked by buildings and trees." App'x 0025 (2021 op. at 2); see also App'x 0059. It turned out that the government planned to rely on aerial photographs and video it obtained through its repeated, warrantless drone surveillance of the Maxons' home.

C. Long Lake's plan began in April 2017, when it hired a drone operator named Zero Gravity and paid it $1,200 for the express purpose of surveilling the Maxons' property—"to provide evidence for the purposes of code enforcement." App'x 0046-0048. Zero Gravity's drone was an unmanned, remote-controlled aircraft equipped with a high-powered camera. Drones are quiet and tiny compared to fixed-wing airplanes and helicopters; federal regulations require that they weigh less than 55 pounds, including attachments. 14 CFR 107.3 (2023). Because of their small size, they are much stealthier than larger aircraft and can navigate into much tighter and more secure spaces. And under federal law, drones must fly below 400 feet above the ground.

14 CFR 107.51(b) (2023). No one disputes that the Township's drone surveilled from below that threshold. App'x 0060.

Nor was Long Lake's surveillance a one-off occurrence. Zero Gravity surveilled the Maxons' home three times over two years: in April 2017, May 2017, and May 2018. App'x 0065. But despite that lengthy period and plenty of time for judicial approval, Long Lake never once tried to obtain a search warrant. The surveillance resulted in videos and photographs so detailed that the government introduced maps depicting exactly which items had moved places between its surveillance excursions and the precise location to which those items had been moved. App'x 0053-0057.

On May 5, 2018—the government's third surveillance flight around the Maxons' property—Mr. Maxon noticed the drone flying overhead. Startled as to why an unknown object was flying about his property, he followed the drone to a baseball field several hundred feet away, where he confronted the drone's operator. When Mr. Maxon asked to see the operator's license, the operator refused, citing a federal law requiring drone operators to produce a license only when asked for identification by law enforcement. App'x 0060-0061.

D. Long Lake introduced its video and photographic evidence against the Maxons in its new enforcement suit. The Maxons moved to suppress, arguing the drone photographs violated their Fourth Amendment rights. After briefing and a hearing, the Circuit Court denied the motion, finding that Long Lake's drone surveillance was not a "search" warranting constitutional scrutiny. App'x 0111-0120.

The Court of Appeals granted immediate leave to appeal on that issue alone. App'x 0039. And in a published decision, it reversed: A two-judge majority held that the government's drone surveillance was a "search" because it violated the Maxons' reasonable expectation of privacy, and Long Lake's failure to ever obtain a warrant rendered the government's actions unreasonable under the Fourth Amendment. App'x 0031-0033 (2021 op. at 8-10). The court accordingly remanded for entry of an order suppressing all photographs gained from Long Lake's drone surveillance. App'x 0033 (2021 op. at 10).

The Township then sought this Court's leave to appeal. And on March 16, 2022, this Court directed argument on that Application and ordered the parties to file supplemental briefing on whether the drone surveillance was a search under the Fourth Amendment. App'x 0023. But just two weeks later, the Court stayed its original briefing schedule and instead ordered the parties to brief a different issue: "whether the exclusionary rule applies to this zoning dispute, such that the Court of Appeals properly remanded for an order suppressing all photographs taken of defendants' property."[2] App'x 0022.

The parties and various amici submitted briefing to the Court addressing this issue. But the Court then vacated its earlier order scheduling oral argument on the

[2] The Court of Appeals' order suppressed only photographs taken of the Maxons' property "from a drone." App'x 0033 (2021 op. at 10). It expressed no opinion about any other photographs in the record or which the government may later introduce.

Application, vacated the Court of Appeals' earlier decision, and remanded the case to the Court of Appeals "to address the additional issue of whether the exclusionary rule applies to this dispute." App'x 0021.

In September 2022, the Court of Appeals ruled 2-1 that Long Lake's evidence is not subject to the exclusionary rule. Over a dissent, the two-judge majority held that even "assuming that a Fourth Amendment violation occurred" when Long Lake surveilled the Maxons' home, App'x 0005 (2022 op. at 3), the government could introduce that surveillance evidence in its enforcement proceeding against the Maxons. "[T]he exclusionary rule is intended to deter *police* misconduct," the panel concluded, "not that of lower-level bureaucrats who have little or no training in the Fourth Amendment." App'x 0008 (2022 op. at 6). The court also noted that the government's enforcement action is a civil code-enforcement proceeding, rather than "a criminal prosecution," and held that the *only* civil cases in which the exclusionary rule applies is "in forfeiture actions when the thing being forfeited as a result of a criminal prosecution is worth more than the criminal fine that might be assessed. That's it." *Id.* But see *Gilbert v Leach*, 62 Mich App 722, 725-726 & n 3; 233 NW2d 840 (1975) (collecting civil cases applying exclusionary rule more broadly). The dissent, recognizing that the zoning officials' surveillance of the Maxons' home was a "policing" function that could be deterred, would have applied the exclusionary rule. App'x 0013, 0020 (2022 dissenting op. at 3, 10).

The Maxons' timely Application for Leave to Appeal to this Court followed. This Court directed the Clerk to schedule oral argument on the application in an order dated May 24, 2023. App'x 0002. The Court also directed the parties to file supplemental briefing addressing whether the Township's drone surveillance violated the Maxons' Fourth Amendment rights and whether the exclusionary rule applies to this dispute. *Id.* The court extended the time for Defendant-Appellants to file their supplemental brief to and including August 4, 2023. App'x 0001.

Argument

This Court should grant the Maxons' application and hold that Long Lake's warrantless drone surveillance was an unreasonable search that requires suppression.

Below, the Maxons explain how the government's use of low-flying drones to take detailed photographs of a person's home, as it did here, is a search within the meaning of the Fourth Amendment. That is the case under any of the tests for whether a search occurred. It was a search under the physical intrusion test because the drone intruded on the Maxons' home—repeatedly—to acquire evidence. It was also a search under *Katz*'s expectation-of-privacy test because the drone surveillance impinged on the Maxons' "reasonable expectations of privacy"; as the Court of Appeals originally ruled, society would find it unreasonable for government to use highly sophisticated drones to snoop on private homes. And, lastly, Long Lake's actions were a search under the ordinary meaning of "search," because they amounted to a purposeful investigative act. Because the Township did all this without a warrant, it violated the Fourth Amendment.

And because Long Lake officials intentionally surveilled the Maxons' home so that they could use that evidence against the couple in court, suppression is warranted. Deterring law-enforcement officials from deliberately violating the Fourth Amendment is the core purpose of the exclusionary rule. Exclusion would serve that purpose here; indeed, only through exclusion of illegally obtained evidence can this Court effectively push local code-enforcement officials to conduct their investigative searches in accordance with Michiganders' constitutional rights. And none of the factors the U.S. Supreme Court has identified cautioning against the backstop of exclusion apply here. Allowing the Court of Appeals' contrary decision to stand would empower a vast array of government investigators to disregard our right to be free from unreasonable searches entirely.

I. Standard of review

This Court reviews application of Fourth Amendment principles de novo. *People v Hammerlund*, 504 Mich 442, 451; 939 NW2d 129 (2019).

II. The government's repeated, warrantless drone surveillance of the Maxons' property violated the Fourth Amendment.

The government's repeated use of a drone to surveil the Maxons' property for evidence of code violations was a search within the meaning of the Fourth Amendment. The government's drone surveilled the Maxons' home (Section A, below). Under any test, that surveillance required a warrant (or a warrant exception): First, the Township's drone was a search under the physical-intrusion test because it entered the Maxons'

property with the explicit purpose of gathering evidence (Section B). Second, it was a search under the privacy test because it invaded the Maxons' reasonable expectation of privacy (Section C). And third, under the ordinary meaning of "search," the government's drone surveillance was a search because it was a purposeful, investigative act (Section D). Because warrantless searches are presumptively unreasonable, and no exception applies here, this Court must hold the government's actions violated the Fourth Amendment (Section E).

A. The government's drone surveilled the Maxons' curtilage.

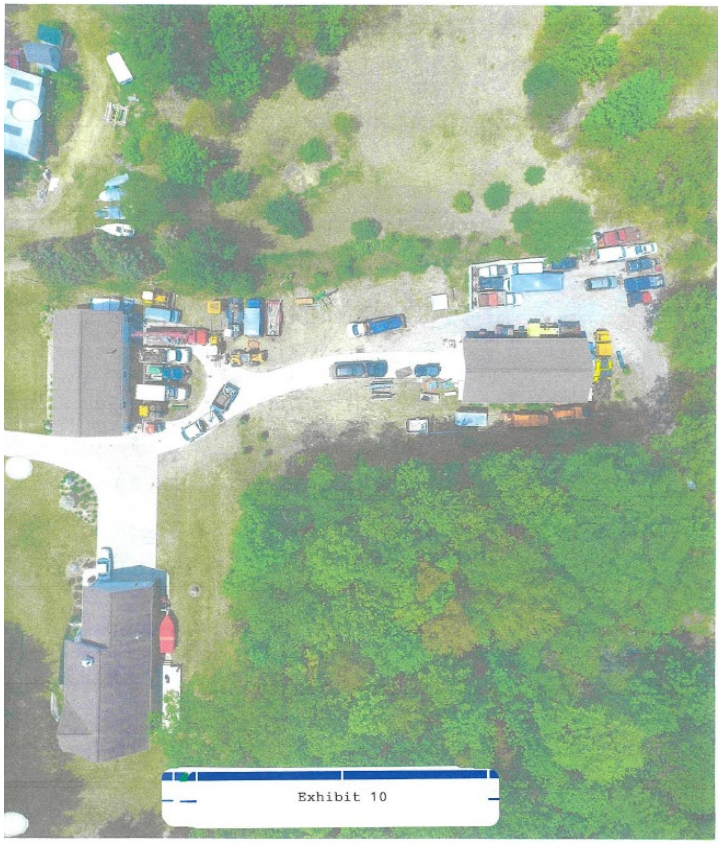
The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects." US Const, Am IV. Of these, the U.S. Supreme Court has held, "the home is first among equals." *Florida v Jardines*, 569 US 1, 6; 133 S Ct 1409; 185 L Ed 2d 495 (2013). And the "curtilage"—that "area 'immediately surrounding and associated with the home'"—is treated "as 'part of the home itself for Fourth Amendment purposes.'" *Id.* (citation omitted). This doctrine's "ancient and durable roots" flow from the need to protect the areas "'intimately linked to the home, both physically and psychologically' … where 'privacy expectations are most heightened.'" *Id.* at 6-7.

Because of their usual proximity to the home, backyards, driveways, and garages are classic examples of curtilage. See *State v Chute*, 908 NW2d 578, 585 (Minn, 2018) (collecting cases explaining that the "backyard and driveway of a home are often considered to be within the curtilage of a home"); *United States v Jenkins*, 124 F3d 768,

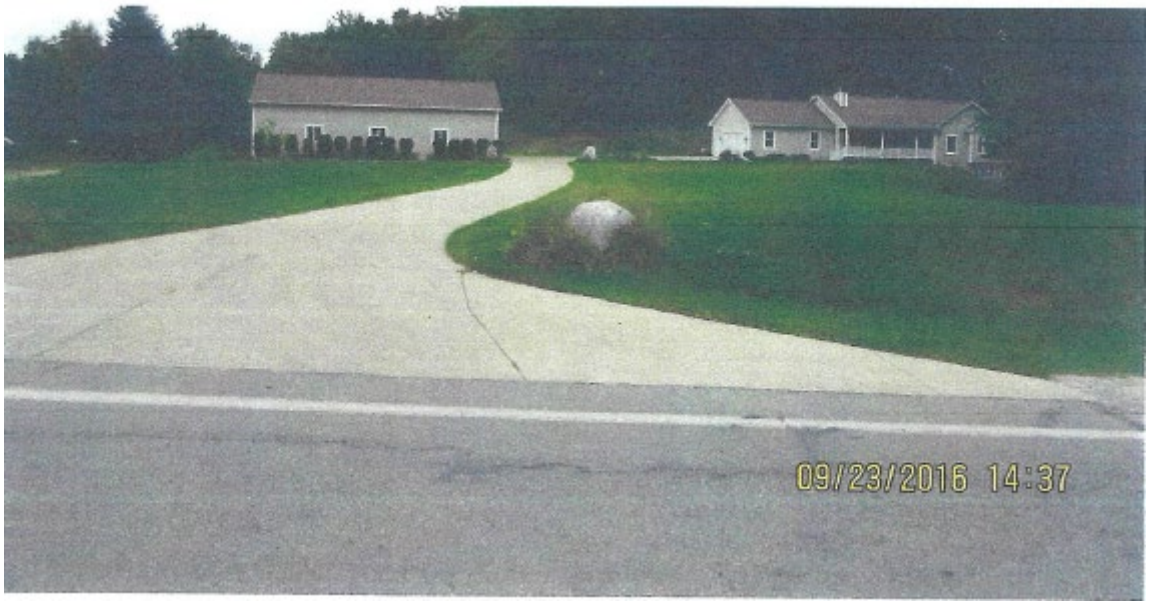
772 (CA 6, 1997) ("The backyard and area immediately surrounding the home are really extensions of the dwelling itself.") (citation omitted). And on "large parcel[s] of land" in "rural setting[s]," courts often find curtilage reaches "a larger area" than in more urban settings. *United States v Reilly*, 76 F3d 1271, 1277 (CA 2, 1996); see *State v Fisher*, 283 Kan 272, 288; 154 P3d 455 (2007) ("In the context of a rural setting, the area extending to outbuildings may be in the curtilage."), citing *State v O'Brien*, 223 Wis 2d 303, 310; 588 NW2d 8 (1999).

How visible the area is from public points is also a key factor; the less visible, the greater the link to the home. *People v Powell*, 477 Mich 860, 861; 721 NW 2d 180 (2006) (whether area is "unobstructed and open"); *People v Radant*, 499 Mich 988, 990-91; 882 NW2d 533 (2016) (MCCORMACK, J., joined by BERNSTEIN and LARSEN, JJ., dissenting from denial of leave to appeal) (noting precedent making whether area is "visible from the road" relevant to curtilage analysis). Courts around the country, too, hold that the public's "direct view" of the area being "blocked" counsels in favor of curtilage. *Fisher*, 283 Kan at 290; *Jenkins*, 124 F3d at 773 (backyard was curtilage because it was "a good distance from the road," "well shielded from the view of people passing by on the public thoroughfare," and protected from "undesired public viewing" by a "wooded field behind [the] house"). The government holds the burden of proving that the search was *not* of curtilage. *United States v Johnson*, 256 F3d 895, 901 (CA 9, 2001) (en banc); *State v Talkington*, 301 Kan 453, 461; 345 P3d 258 (2015); *State v Boyington*, 714 A2d 141, 143; 1998 ME 163 (1998).

Below, the Township did not even try to meet that burden; it did not "seriously dispute whether the area observed by [its] drone was within the curtilage." App'x 0027 (2021 op. at 4). Neither did the dissent in the Court of Appeals' first decision. And for good reason: The photographs the Township itself labeled as "Drone Photograph examples," Township Application App'x T.O.C., 041T-043T, squarely depict the Maxons' house. And the backyard immediately behind the house. And the driveway just beside the house. And the two garages (and the areas just around those garages), likewise, just adjacent to the house. These areas are classic curtilage. *Chute*, 908 NW2d at 585 (collecting cases). And given that the Maxons' home sits on a large lot in a non-urban area, it counsels in favor of even larger curtilage protections. *Reilly*, 76 F3d at 1277.



The fact that the areas the drone surveilled could not be well-viewed from the street denotes that it was curtilage, too. As the Court of Appeals explained, "very little, if any, of [the Maxons'] property is visible from the ground because the view is blocked by buildings and trees." App'x 0025 (2021 op. at 2); App'x 0004 (2022 op. at 2) (same). Both the home (and, necessarily, the backyard) and the garages to the left of the home are well-set back from the street. App'x 0059. Those areas are also "elevated above a lot of the surrounding area," as the Township conceded in the Circuit Court. App'x 0074. In short, the areas behind the home and beside the garages the Township wanted to view with its drone are not visible from a public vantage-point.



Courts regularly hold that areas like those the Township surveilled are curtilage. *United States v Wells*, 648 F3d 671, 678 (CA 8, 2011) (homeowner could "reasonably expect that members of the public would not traipse down the drive to the back corner of his home, from where they could freely observe his entire backyard").

The drone's surveillance of the Maxons' curtilage implicates the Fourth Amendment. As explained below, under any test, that surveillance was a search within the meaning of the Fourth Amendment.

B. The drone surveillance was a search under the physical intrusion test.

Long Lake's drone flights physically intruded onto the Maxons' property for the purpose of gathering evidence of suspected code violations. Under blackletter law, this physical invasion by the government's drone was a search under the Fourth Amendment.[3]

1. 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." *Jardines*, 569 US at 9 (quotation marks omitted). The U.S. Supreme Court has been clear that "gather[ing] … information" after "physically entering and occupying the area" when not "permitted" satisfies this test. *Id.* at 6.

[3] Nothing in the Fourth Amendment's text limits the type of government actors it restricts. The Amendment's "protection applies to governmental action" generally. *Burdeau v McDowell*, 256 US 465, 475; 41 S Ct 574; 65 L Ed 1048 (1921). Nor does a search's being conducted by a third party insulate it from Fourth Amendment scrutiny; the Fourth Amendment applies to non-government officials who act as government "agent[s]" or with a government official's "participation or knowledge." *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). "There is no dispute that the drone operator here was acting as an agent for Long Lake Township" nor that "Long Lake Township is a governmental entity." App'x 0026 (2021 op. at 3).

As this Court has recognized, "Fourth Amendment jurisprudence was originally tied to" this "physical intrusion[]" test. *Johnson v VanderKooi*, 509 Mich 524, 534; 983 NW2d 779 (2022). Beginning in the 1960s, though, the U.S. Supreme Court placed primacy on *Katz*'s "reasonable expectation of privacy" framework. See *id.* Yet the two now live side-by-side, with "the *Katz* reasonable-expectation-of-privacy test … *added to*, not *substituted for*, the common-law trespassory test." *Id.* (citation omitted).

Here, the government intruded on the Maxons' home (their curtilage) to obtain information. See Part II.A, above; *Collins v Virginia*, 138 S Ct 1663, 1670; 201 L Ed 2d 9 (2018) ("When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred."). Indeed, the Township remotely controlled the drone to not just intrude on the property, but to stealthily navigate to specific areas of the property it wished to investigate. It did this to obtain information—to learn what items were stored on the Maxons' property and where they were located. App'x 0046 (contract "to provide evidence for the purposes of code enforcement"). In short, the government "learned what [it] learned only by physically intruding on [the Maxons'] property to gather evidence." *Jardines*, 569 US at 11. That is "enough to establish that a search occurred." *Id.*

That the Township used technological equipment rather than a live human to intrude does not change the analysis. The U.S. Supreme Court has found searches under the intrusion test in those exact circumstances. In *United States v Jones*, for example, the government "physically occupied private property," not with boots on the ground, but

by installing a GPS tracker on a vehicle to monitor its movements. 565 US 400, 404; 132 S Ct 945; 181 L Ed 2d 911 (2012); see *Grady v North Carolina*, 575 US 306, 309; 135 S Ct 1368; 191 L Ed 2d 459 (2015) (State "conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements"). Just as in *Jones* and *Grady*, the government used electronic equipment to physically invade a protected area. That is a search.

2. Nor does it change the analysis that the government's drone flew *through* the Maxons' property, rather than physically touching the ground. The drone intruded on the property all the same.

a. Start with first principles. When the Fourth and Fourteenth Amendments were ratified (the latter incorporating the former against the states), the principle that an owner of land owned their plot "*ab inferis, usque ad coelum*"—"from hell to heaven"—was "perfectly distinguished in law." *Harlow v Lake Superior Iron Co*, 36 Mich 105, 108 (1877). Indeed, "[t]he *ad coelum* principle had been a feature of English common law since the reign of Edward I (1272-1307)." Khalil, *Aerial Trespass and the Fourth Amendment*, 121 Mich L Rev 1269, 1279 n 66 (2023).[4]

[4] See also, e.g., *Lyman v Hale*, 11 Conn 177, 185 (1836) ("[L]and comprehends every thing in a direct line above it … where a tree is planted so near the line of another's close that the branches overhang the land, the adjoining proprietor may remove them."); *Hoffman v Armstrong*, 48 NY 201, 203 (1872) ("The general rule unquestionably is, that land hath in its legal signification an indefinite extent upward," which "entitles the owner of the land to the right to it, and to the exclusive use and enjoyment of all the space above it.").

As this Court recently reaffirmed, it must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Johnson*, 509 Mich at 535, quoting *Jones*, 565 US at 406. So whatever might be said of *ad coelum* as a property-law principle today *generally* (more on that below), it does not change what makes an intrusion for *Fourth Amendment* purposes. Ratification-era principles control that inquiry. *Johnson*, 509 Mich at 535; see, e.g., *State v Dorff*, 171 Idaho 818; 526 P3d 988, 994-995 (2023) (relying on Blackstone's commentaries on trespass-to-chattel to ensure "the degree of protection [] afforded when the Fourth Amendment was adopted") (cleaned up). Under controlling ratification-era *ad coelum* principles, the Township's intentional surveillance over the Maxons' home would have been an intrusion on their property—and is therefore a search today.

b. But even if the ratification-era principles did not control, the Township's deliberate drone surveillance would still be a search under the intrusion test. As previewed above, modern "air commerce" has made "common law ownership of the land extend[ing] to the periphery of the universe" unworkable. *United States v Causby*, 328 US 256, 260; 66 S Ct 1062; 90 L Ed 1206 (1946). But ownership of the air above one's home has not been abrogated entirely.

In *Causby*, a farmer living near a military airport sued the federal government for flying aircraft across his land at sub-100-foot altitudes. *Id.* at 258-259. The noise and lights harmed his chicken-farming operation, which he contended was a taking that required just compensation under the Fifth Amendment. *Id.* The Court agreed. Again,

it noted that the *ad coelum* doctrine does not apply with full force today. But to have "full enjoyment of the land," the Court held, property owners "must have exclusive control of the immediate reaches of the enveloping atmosphere." *Id.* at 264. At "low altitude," even if the property owner "does not in any physical manner occupy that stratum of airspace," they have "a claim to it." *Id.* at 265. Low-altitude flights which pose "a direct and immediate interference with the enjoyment and use of the land," the Court concluded, are compensable takings—and the flights over Causby's land qualified. *Id.* at 266-267.

Again, what constitutes a taking today does not control whether a Fourth Amendment search occurred, because the Fourth Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted." *Jones*, 565 US at 411. But even under *Causby*'s reasoning, the Township's drone surveillance was an intrusion on the Maxons' home. By all accounts, the "altitude" at which drones operate is "low." See *Causby*, 328 US at 265. Federal law mandates that drones may not fly higher than 400 feet over the ground, 14 CFR 107.51(b) (2023), and no one disputes the drone surveilled from altitudes comfortably under that threshold. The drone operator's affidavit, too, reflects that the drone surveillance so disturbed Mr. Maxon that he followed the drone to confront the operator. See App'x 0060-0061; cf. *Causby*, 328 US at 264 ("direct and immediate interference with the enjoyment and use of the land").

And to be clear, the 400-foot restriction is a prohibition on drone flights above 400 feet—not a blessing on all drone flights below it. Courts have rejected claims that

the FAA's 400-foot safety rule means states cannot further restrict drone flights below that altitude "consistent with [their] traditional police powers, such as to protect privacy or prevent trespass or voyeurism." *Nat'l Press Photographers Ass'n v McGraw*, 504 F Supp 3d 568, 588-591 (WD Tex, 2020) (dismissing drone operators' claim that state-created no-fly zones are federally preempted); *Huerta v Haughwout*, No. 3:16-cv-358 (JAM), 2016 WL 3919799, at *4 (D Conn, July 18, 2016) ("it is far from clear that Congress intends—or could constitutionally intend—to regulate all that is airborne on one's own property"). As the Court of Appeals recognized, drones "fly below what is usually considered *public* or navigable airspace." App'x 0032 (2021 op. at 9) (emphasis added). And while the Circuit Court was wrong to conclude that no Fourth Amendment search had occurred, that court, too, was concerned that the government's surveillance may have violated the Maxons' property rights. App'x 0119 ("That is not to say that it's okay to fly a drone in low altitude over people's property, you know, in terms of trespass or other rights.").[5]

[5] See also *Gerhart v Energy Transfer Partners, LP*, No 1:17-cv-01726, 2020 WL 1503674, at *24 (MD Pa, March 30, 2020) (flying of drones at low altitudes for the "targeted purpose of surveillance" provided a basis for a state-law nuisance claim); Joe Beck, *Drone Dispute Reaches Courtroom*, The Northern Virginia Daily, <https://perma.cc/2R8L-Y5ZT> (posted October 25, 2015) (accessed August 3, 2023) (recounting a man found *criminally* guilty of "enter[ing] the land … of another for the purpose of … interfer[ing] with the rights of the owner … to use such property free from interference" after flying a drone 216 feet over a neighbor's property); Compl for Declaratory Judgment and Damages (ECF 1), *Boggs v Meredith*, No. 3:16-cv-6-DJH, 2016 WL 66951 (WD Ky January 4, 2016) (explaining that a state-court judge held a property owner who used "physical force" to remove a drone he perceived as "trespass[ing] upon his property" had "acted 'within his rights.'").

That is why courts around the country *are* recognizing that drone surveillance over one's home implicates the Fourth Amendment under the intrusion framework. A federal court in North Carolina found that drone surveillance of the curtilage could "infringe on the interests of the property owner because it involves a trespass coupled with an attempt to gain incriminating information." *In re Application of the United States*, No. 5:22-MJ-0205-RN, 2022 WL 16757941, at *8-9 (EDNC October 26, 2022) (government's drone-surveillance proposal "raise[d] some Fourth Amendment red flags" that would "be alleviated if the United States obtained a warrant."). The same with a Colorado state court, which granted a motion to suppress after police (without a warrant) flew a drone 390 feet over a criminal suspect's property for seven minutes to photograph alleged marijuana plants. Though "brief," the court observed, the drone flight "was not on public property," and was therefore an "unlawful entry" and violated the Fourth Amendment. Order Granting Mot Suppress Evidence, *People v Tuck*, 2020CR326 (Colo Dist Ct March 29, 2022) (attached at App'x 0123-131). The Township's repeated intrusion onto the Maxons' property to gather evidence of code violations warrants the same conclusion here.

3. This Court need not decide that all drone flights over all private property are necessarily tortious to conclude that Long Lake's physical intrusion with its surveillance drone was a search. *Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961) (holding in a pre-*Katz* case that courts "need not" find "a technical

trespass under the local property law" to find a Fourth Amendment violation).[6] It need not demarcate any specific altitude line below which a drone flight into private property turns actionable—if one even exists. Cf. *Causby*, 328 US at 266 ("Flights over private land are not a taking, unless they … interfere[] with the enjoyment and use of the land."). The Court need not intrude an inch on the public's fascination with drones for recreational purposes or local governments' use of them for non-evidence-gathering purposes. It need only hold that Long Lake's flying of its drone onto the Maxons' property for the purpose of "gather[ing] evidence" was a search. *Jardines*, 569 US at 11.

Jardines is instructive. There, without a warrant, the police approached the defendant's home with a drug-detection dog. 569 US at 3-4. The dog sniffed all around the front porch and gave a positive alert at the front door. *Id.* at 4. The government argued this was not a search: Because social norms allow anyone to merely walk up to the front door of a home, the police had not "intruded" on Jardines' property. The Court disagreed. True, there is an implied license for "visitor[s] to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8. But the police didn't do that. Rather, they "introduc[ed] a trained police dog to explore the area around the home in hopes of

[6] See also *Byrd v United States*, 138 S Ct 1518, 1526-1527; 200 L Ed 2d 805 (2018) (Fourth Amendment's reach can be assessed by *analogy* to property-law principles, including "the right to exclude others") (emphasis added); *Aerial Trespass and the Fourth Amendment*, 121 Mich L Rev at 1290 ("Even in *Jones*, analogy to trespass served as a proxy for ascertaining when the Fourth Amendment was triggered.").

discovering incriminating evidence." *Id.* at 9. And "[t]here is no customary invitation to do *that*." *Id.*

In other words, whether a "search" occurred depends on context and the visitor's motivation. *Jardines*, for example, does not hold that officers necessarily conduct a search whenever they approach your front door with a dog. Rather, it was a search because the officers brought a *drug-detection* dog to sniff all around the porch and "discover[] incriminating evidence." *Id.* at 9. By contrast, "[a]n officer approaching your home to return your lost dog" poses no such constitutional problem. *United States v Carloss*, 818 F3d 988, 1004 (CA 10, 2016) (Gorsuch, J., dissenting). See also *People v Frederick*, 500 Mich 228, 240 n 7; 895 NW2d 541 (2017) (recognizing a similar distinction). But the Township's drone here entered the Maxons' property (deliberately and repeatedly) to gather evidence.

"One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Johnson*, 509 Mich at 537, quoting *Jardines*, 569 US at 11. Under basic Fourth Amendment principles, the Township's use of a drone to physically enter the Maxons' property to gather evidence against them was a search.

C. The drone surveillance was a search under the reasonable expectation of privacy test.

Two years ago, the Court of Appeals held that the government's warrantless drone surveillance of the Maxons was a search because it violated their reasonable expectation of privacy. App'x 0031-0033 (2021 op. at 8-10). This Court later vacated

that decision (without expressing disagreement with it). App'x 0021. Because the Court of Appeals' original analysis was correct, this Court should adopt it as an alternative basis for finding a search.

1. Under the *Katz* framework, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 US at 33. As to the first prong, a person manifests their subjective expectation of privacy by "conceal[ing]" the area "from at least street-level views." *California v Ciraolo*, 476 US 207, 211; 106 S Ct 1809; 90 L Ed 2d 210 (1986). The Court of Appeals had no trouble finding that the Maxons met the first prong; "clearly," the court explained, "little, if any, of [their] property is visible from the ground because the view is blocked by buildings and trees." App'x 0025 (2021 op. at 2). See also App'x 0031 (2021 op. at 8) ("unrefuted photographic exhibits of defendants' property taken from the ground seem to establish a reasonable expectation of privacy against at least casual observation from a nonaerial vantage point"); App'x 0059. At base, the Maxons "took normal precautions to maintain [their] privacy" in the side- and backyard areas the drone surveilled, and that suffices to establish their subjective expectation of privacy. See *Ciraolo*, 476 US at 211 (citation omitted). Yet three times over two years, the government's drone surveillance upended their expectations.

The Court of Appeals was also correct in holding that the Maxons' expectation of privacy from low-flying drone surveillance was societally reasonable. App'x 0031-0033 (2021 op. at 8-10). Again, the government's repeated drone surveillance was of

the Maxons' home. See Part II.A, above. And, again, "when it comes to the Fourth Amendment, the home is first among equals." *Jardines*, 569 US at 6.

Here, the government's low-altitude drone flights repeatedly snooped all around the Maxons' five-acre property—including directly over their driveway, their home, and the areas immediately surrounding each. The drone's camera was trained directly on these areas, capturing photographs and videos as it passed in all the clear detail one would expect from modern high-definition cameras. As the Court of Appeals noted, it would not have been able to gather any of this information from any ground-level public vantage point. App'x 0025, 0031, 0059. In short, the government—without a warrant—repeatedly intruded on the area where the Maxons' "privacy expectations are most heightened" to surveil for evidence. See *Collins*, 138 S Ct at 1670, 1673 & n 3 (citations omitted). That is a search. *Kyllo*, 533 US at 34 (government's use of "enhancing technology" to obtain information "that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area'" was a search).

2. This conclusion is in no way undercut by two cases in which the U.S. Supreme Court held that aerial surveillance of a home's curtilage using far different technology at far greater altitudes—a fixed-wing airplane at 1,000 feet and a helicopter at 400 feet, respectively—was not a search. See *Ciraolo*, 476 US 207; *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989) (plurality opinion). As the Court of Appeals correctly held, *Ciraolo* and *Riley* do not control whether surveillance by more advanced drone technology at lower altitudes is a search. App'x 0031 (2021 op. at 8).

Indeed, the plurality in *Riley* expressly cautioned that it was "not" holding "that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law." *Riley*, 488 US at 451. Other state appellate courts have recognized this, holding helicopter surveillance at altitudes lower than in *Riley* can violate a reasonable expectation of privacy under the Fourth Amendment. *State v Davis*, 360 P3d 1161, 1171-1172; 2015-NMSC-034 (2015); *Commonwealth v Oglialoro*, 525 Pa 250, 260-263; 579 A2d 1288 (1990); *People v Pollock*, 796 P2d 63, 63-65 (Colo App, 1990). Moreover, material differences between drones and the older technologies discussed in *Ciraolo* and *Riley* underscore how Long Lake's surveillance violated the Maxons' reasonable expectation of privacy.

First, and as the Court of Appeals recognized, "drones are qualitatively different from airplanes and helicopters." App'x 0032 (2021 op. at 9). Because of their smaller size, drones can fly much closer to the ground than larger aircraft; indeed, federal law requires them to fly no higher than 400 feet above ground. 14 CFR 107.51(b) (2023). And, again, no one disputes the drone here surveilled comfortably below 400 feet. App'x 0060-0061. Drones' smaller size likewise allows them to take stealthier flight patterns and makes them much quieter while in operation.[7] Helicopters and airplanes

[7] Drones are "40 decibels more silent than traditional aircraft." Shawn Manaher, *Will A Drone Make Noise? How Much Noise Do Drones Make?,* Hobby Nation, <https://hobbynation.net/will-a-drone-make-noise/> (accessed August 3, 2023).

are, comparatively, large and loud. Should they scour all about your property's intimate spaces, it would be nearly impossible not to notice. Drones, on the other hand, can surveil an entire property—down to the ground level—virtually undetected. These fundamental differences between drone technology and more traditional aircraft show that *Ciraolo* and *Riley* are inapt and do not control this case.

Second, the advanced technological equipment drones are often equipped with (like the camera attached to the drone here) allow them to capture intimate details of private spaces far more efficiently and surreptitiously than the U.S. Supreme Court has approved. The police in both *Ciraolo* and *Riley* made their relevant observations of the defendant's curtilage with their own eyes. *Ciraolo*, 476 US at 209; *Riley*, 488 US at 448 (plurality opinion). Indeed, the *Ciraolo* court expressly declined to decide whether *photographs* taken from the aerial surveillance would be a search because "[i]t was the officer's observation, not the photograph, that supported the warrant." 476 US at 212 n 1; see also *Riley*, 488 US at 448-449 (warrant was obtained based on naked-eye observations).

Here, by contrast, the government was only able to observe the Maxons' property with help from the lightweight camera attached to the drone and the images it produced. Drones are necessarily unmanned, so no naked-eye observations are possible. In that respect, the drone technology used for surveillance here is far more like the thermal-imaging device used in *Kyllo* than the aircraft used in *Ciraolo* or *Riley*:

The government obtained information "that could not otherwise have been obtained" without "sense-enhancing technology." *Kyllo*, 533 US at 34.[8]

And rather than this Court needing to make its own "value judgment" as to whether the Maxons' expectation of privacy against drone surveillance was reasonable —see *United States v Johnson*, 584 F3d 995, 999-1000 (CA 10, 2009) (collecting criticisms of *Katz* framework)—the legislature has already indicated that in the affirmative. Although operating a drone is generally lawful, MCL 259.311, 259.313, the legislature made it illegal to "knowingly and intentionally operate an unmanned aircraft system … to otherwise capture *photographs, video, or audio recordings* of an individual in a manner that would invade the individual's reasonable expectation of privacy." MCL 259.322(3) (emphasis added). In other words, the legislature has stated in no uncertain terms that drone surveillance can infringe one's reasonable expectation of privacy. Indeed, one explicit argument in favor of the statute was the fear that "drones could be used to … conduct unauthorized surveillance."[9] By contrast, the naked-eye observations in *Ciraolo*

[8] In addition to "high-resolution cameras," drones can carry "infrared cameras, heat sensors, GPS, sensors that detect movement, and automated license plate readers." Electronic Privacy Information Center, *Drones and Aerial Surveillance*, <https://epic.org/issues/surveillance-oversight/aerial-surveillance/> (accessed August 3, 2023). Cameras affixed to drones may also "include facial recognition technology that would make it possible to remotely identify individuals from a distance without their knowledge." *Id.*

[9] Senate Fiscal Agency, *Bill Analysis, Public Act 436 of 2016*, at 5 <http://www.legislature.mi.gov/documents/2015-2016/billanalysis/Senate/pdf/2015-SFA-0992-N.pdf> (accessed August 3, 2023).

and *Riley* were taken from where Congress had given anyone "a right to be." *Ciraolo*, 476 US at 213; see also *Riley*, 488 US at 451 (plurality opinion) ("Any member of the public could legally have been flying over Riley's property … and could have observed Riley's greenhouse."). The Township's taking of photographs and video recordings in the face of a legislative guardrail against that technological snooping is further evidence for why *Ciraolo* and *Riley* are not on point here.

The Township's drone surveillance of the Maxons' home violated their reasonable expectation of privacy and was, therefore, a search.

D. The drone surveillance was a search under the ordinary meaning of "search."

Long Lake's repeated drone surveillance of the Maxons' property is a search under both the Fourth Amendment's intrusion-on-property and reasonable-expectation-of-privacy formulations. But there is an easier approach to the "search" question, one that simply asks if the government undertook "a purposeful, investigative act" with respect to the Maxons' home. *Morgan v Fairfield Co*, 903 F3d 553, 568 (CA 6, 2018) (Thapar, J., concurring). The Township's intentional drone surveillance of the Maxons' home "to provide evidence for the purposes of code enforcement" meets that definition. To ensure Fourth Amendment jurisprudence is grounded in the Fourth Amendment's text, this Court should adopt an ordinary-meaning test.

1. "Fourth Amendment jurisprudence is in flux." *Everett v State*, 186 A3d 1224, 1235 (Del, 2018). "After over two-hundred years," Judge Thapar wrote in *Morgan*,

"we are still not sure … what questions are relevant for determining whether a search occurred or if it was reasonable." 903 F3d at 567 (concurring opinion).

By its text, the Fourth Amendment protects against (1) "searches and seizures," (2) that "unreasonabl[y]" interfere with "[t]he right of the people to be secure" in (3) "their persons, houses, papers, and effects." US Const, Am IV. A major reason for confusion in modern Fourth Amendment doctrine is that a leading test—*Katz*'s reasonable expectation-of-privacy framework—"conflates the search inquiry with the reasonableness one." *Morgan*, 903 F3d at 570 (Thapar, J., concurring). Under the *Katz* framework, a "search" has occurred—meaning the Fourth Amendment is triggered — only when "a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, when the expectation is one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 US at 361 (Harlan, J., concurring).[10] The confusion is immediate: The *Katz* test "creates a separate reasonableness analysis at the first step of the Fourth Amendment framework"—in determining whether a "search" occurred—"prior to evaluating the reasonableness of the government's conduct at the second step." Baude & Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv L Rev 1821, 1871 (2016). The result is that courts are left to explain "when a search is not a search." *Kyllo*, 533 US at 32. Take *Ciraolo* and *Riley*, where the government chartered

[10] Even under the physical-intrusion test, a "search" occurs only if the government (1) "attempt[s] to find something or to obtain information" *and* (2) intrudes on a protected space. *Jones*, 565 US at 408 n 5.

aircraft to investigate whether someone was growing marijuana at their home. To say that the government was not "searching" for evidence is to strain the word "search" to its breaking point.[11]

Rather, "reasonableness" should determine "the legality of a search, not 'whether a search ... within the meaning of the Constitution has *occurred*'" at all. *Carpenter v United States*, 138 S Ct 2206, 2243; 201 L Ed 2d 507 (2018) (Thomas J., dissenting), quoting *Minnesota v Carter*, 525 US 83, 97; 119 S Ct 469; 142 L Ed 2d 373 (1998) (Scalia, J., concurring). This Court can ease the confusion in Fourth Amendment jurisprudence by adopting a test reflecting the ordinary meaning of "search" as "a purposeful, investigative act" directed toward a person or their property. *Morgan*, 903 F3d at 568 (Thapar, J., concurring).

This concept is not new. Justice Scalia suggested it in his opinion for the U.S. Supreme Court in *Kyllo*. There, in questioning the Court's precedents instructing that law enforcement's "visual observation" of a person's property "is no 'search' at all," he explained in passing: "When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.'"

[11] This Court, too, has noted the counterintuitive result that "information-gathering," such as "looking into the windows of a home," is not itself necessarily a "search." *Frederick*, 500 Mich at 237 n 4.

533 US at 32 & n 1, quoting Noah Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed 1989).

Justice Thomas and Judge Thapar brought the idea of an "ordinary-meaning test" forward again in 2018. Each explained that, unlike other constitutional phrases, "search" was not a term of art at the Founding, and there was no significant debate over its meaning. *Carpenter*, 138 S Ct at 2238 (Thomas, J., dissenting); *Morgan*, 903 F3d at 568 (Thapar, J., concurring). Each, therefore, advocated a test that looks to the ordinary meaning of "search" at the Founding. *Id.* And a look at those Founding-era dictionaries reveals a uniform definition: A search is a purposeful, investigative act. *Id.*

The full Iowa Supreme Court has adopted a similar test under its state search-and-seizure provision, which is nearly identical to the Fourth Amendment. *State v Wright*, 961 NW2d 396, 413 (Iowa 2021). When an officer opened garbage bags to obtain information, the court held he had "searched" regardless of "whether Wright had an expectation of privacy in the garbage bags or the contents." *Id.* at 413-414. A reasonable expectation of privacy was "relevant only to the question of whether a seizure or search was *unreasonable*," not whether one "has occurred." *Id.* (emphasis added).

And while not expressly calling it an ordinary-meaning test, the Seventh Circuit has repeatedly analyzed Fourth Amendment questions using something like it—deciding first whether something was a "search," then deciding whether it violated someone's reasonable expectation of privacy. *United States v Correa*, 908 F3d 208, 216-

221 (CA 7, 2018) (testing garage-door opener was "an obvious search," but "reasonable" because it did not seek "any meaningful private information"); *United States v Concepcion*, 942 F2d 1170, 1173 (CA 7, 1991) (inspecting a lock was a search, but "the privacy interest is so small that the officers do not need probable cause").

2. This Court should similarly adopt the ordinary meaning of "search" in determining whether a search has occurred, for two reasons.

First, doing so would be more faithful to both the United States and Michigan constitutional text and would provide more intuitive results. The word "search"—at the Founding as now—means "to look into or over carefully or thoroughly in an effort to find something." *Morgan*, 903 F3d at 568 (Thapar, J., concurring), quoting *Webster's Third New International Dictionary of the English Language* (2002). The term is easy for everyone to understand: people "search" for destinations, keys, and jobs; law enforcement searches for suspects, weapons, drugs—or, as here, cars. Once they have addressed the easier inquiry whether a search occurred, courts can move onto determining whether that search was reasonable, as the Fourth Amendment's text requires.

Second, under an ordinary-meaning test, more Fourth Amendment cases would turn on whether the government acted reasonably. Under the current frameworks, most cutting-edge surveillance cases reach appellate courts only on the first, threshold question: does the Fourth Amendment apply at all? *Carpenter*, for example, asked only whether accessing historical cell-site-location data is a *search*. 138 S Ct at 2211. *Kyllo*

asked only whether using a thermal imaging device on a home was a *search*. 533 US at 29. And as the Court of Appeals first decided this case, the only question was whether drone surveillance of a home was a *search*. Because these cases ask only whether new technologies *implicate* the Fourth Amendment, they provide little guidance for lower courts on how to decide when uses of that new technology in different factual circumstances are *reasonable* under the Fourth Amendment. See *Carpenter*, 138 S Ct at 2266 (Gorsuch, J., dissenting); *Morgan*, 903 F3d at 572 (Thapar, J., concurring) (providing similar critiques).

3. Here, Long Lake conducted a purposeful, investigative act when its agents deliberately and repeatedly flew a drone onto the Maxons' property to look for alleged violations of the Township's code. Under the ordinary-meaning test's threshold inquiry, the Township thus searched the Maxons' home.

The Township's surveillance was a search under any test. Having satisfied that inquiry, this Court can then determine whether the government's warrantless search was reasonable.

E. The Township's drone search was unreasonable.

The Township's search of the Maxons' home by drone surveillance was not reasonable. Under any test, warrantless searches are presumptively unconstitutional. *Johnson*, 509 Mich at 538. The government never obtained a warrant for any of its three drone excursions here. It did not have the Maxons' consent, nor can it point to exigent circumstances or any other exception to the warrant requirement. See *id.* Because no

exception to the warrant requirement applies, the government's drone surveillance was an unreasonable search under the Fourth Amendment.

Of course, none of that means the Township may never use drones. It may use drones at will for reasons other than gathering evidence. And it may use all kinds of gadgets, drones included, to search for evidence—it just needs a judicial officer's authorization to do so. Indeed, the Court of Appeals suggested the Township may have been able to secure a warrant here had it bothered to seek one. App'x 0033 (2021 op. at 10). But because it did not even try to do so before making its three drone surveillance trips over the Maxons' property, its surveillance was unconstitutional. To ensure such "anytime, anywhere" drone surveillance of people and their property does not become the norm, this Court should hold as such.

III. The government should not be permitted to benefit from the use of unconstitutionally seized evidence in this formal, punitive enforcement action.

The government's warrantless surveillance of the Maxons' property violated the Fourth Amendment. This Court should apply the exclusionary rule to suppress the evidence obtained from that illegal search. If the government can deliberately violate the Fourth Amendment and then use that evidence in court to punish the targets of its surveillance, it would open the door to "manifest neglect, if not [] open defiance" of the guarantee against unreasonable searches and seizures. *Weeks v United States*, 232 US 383, 394; 34 S Ct 341; 58 L Ed 652 (1914). It would devolve one of the American legal

system's most important constitutional protections into little more than "an empty promise." *Mapp v Ohio*, 367 US 643, 660; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).

In its opinion below, the Court of Appeals held that "the exclusionary rule has no place here," based on its view that the rule "is intended to deter police misconduct, not that of lower-level bureaucrats who have little or no training in the Fourth Amendment." App'x 0009 (2022 op. at 7). But neither the federal or state constitution distinguishes between types of government officials or their training; their "protection applies to governmental action" generally. *Burdeau v McDowell*, 256 US 465, 475; 41 S Ct 574; 65 L Ed 1048 (1921). As this case spotlights, investigatory officials can violate the Fourth Amendment no matter what hat they wear, and the exclusionary rule is a necessary bulwark to ensure that all such officials are deterred from violating Americans' constitutional protections with impunity. So this Court should hold that the government may not benefit from the use of evidence obtained from its deliberate violation of the Maxons' Fourth Amendment rights.

A. The exclusionary rule has deep roots in American jurisprudence and is a necessary mechanism for securing Fourth Amendment rights.

Since the Founding, the right to be secure against unreasonable searches and seizures has occupied a cardinal place in our system of ordered liberty. In fact, "the patriot James Otis's 1761 speech condemning writs of assistance was 'the first act of opposition to the arbitrary claims of Great Britain' and helped spark the Revolution

itself." *Carpenter*, 138 S Ct at 2213; *People v Marxhausen*, 204 Mich 559, 565-566; 171 NW 557 (1919).

But to mean anything, rights need remedies. *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 687; 983 NW2d 855 (2022) ("this Court retains the authority—indeed the duty—to vindicate the rights guaranteed by our Constitution"). If no mechanism deters officials from violating it, the right becomes "valueless." *Mapp*, 367 US at 655. This Court recognized that same principle over 40 years before *Mapp* in adopting the exclusionary rule under the Michigan Constitution. *Marxhausen*, 204 Mich at 571, quoting *Weeks v United States*, 232 US at 393, to explain that "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value." Without this guarantee, the Court wrote, protections against searches and seizures "might as well be stricken from the Constitution." *Id.*

Exclusion as a backstop to guarantee search-and-seizure protections was not a new concept. In fact, its origin dates before the Founding. See Roots, *The Originalist Case for the Exclusionary Rule*, 45 Gonz L Rev 1 (2010). In the 1765 case *Entick v Carrington*, regarded as one of the "most revered search and seizure cases known to the Framers of the American Constitution" and explicitly cited by this Court in *Marxhausen*, the King's representatives ransacked John Entick's property, searching for and seizing papers that were supposedly seditious. *Id.* at 38; *Entick*, 19 How St Tr 1029, 1074 (1765);

Marxhausen, 204 Mich at 564-565. Lord Camden (the Chief Justice of the Common Pleas) held that the warrant purportedly authorizing the search was invalid. He analogized the seizure to coercing a defendant into providing self-incriminating testimony: "It is very certain that the law obligeth no man to accuse himself," he observed, "and it should seem, that search for evidence is disallowed upon the same principle." *Entick*, 19 How St Tr at 1074. In the same way forced self-incriminating testimony could not be used against the accused, illegally seized physical evidence also had to be excluded and could not be used "to help forward the conviction[]." *Id.*

This principle influenced the Founders when adopting the Fourth Amendment. See *Originalist Case*, 45 Gonz L Rev at 38. And it strongly influenced the decisions of courts in the early days of our republic. See, e.g., *Frisbie v Butler*, 1 Kirby 213, 213-215 (Conn, 1787); *Grumon v Raymond*, 1 Conn 40, 40-41 (1814); *Jones v Commonwealth*, 40 Va 748, 750 (1842); *Miller v Grice*, 31 SCL 27, 27-28 (SC, 1845) (applying exclusionary remedies to evidence or suspects seized in violation of the Fourth Amendment, including under facially defective warrants).

B. The exclusionary rule has consistently been applied in punitive, quasi-criminal civil-enforcement cases like this one.

While often discussed in the criminal context, the U.S. Supreme Court has consistently applied the exclusionary rule in punitive civil-enforcement cases that, like this one, are "quasi-criminal in character." *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 700; 85 S Ct 1246; 14 L Ed 2d 170 (1965); see also *Boyd v United States*, 116 US

616; 6 S Ct 524; 29 L Ed 746 (1886); *United States v James Daniel Good Real Prop*, 510 US 43, 49; 114 S Ct 492; 126 L Ed 2d 490 (1993) (reaffirming that "the exclusionary rule applies to civil forfeiture"). In *Plymouth Sedan*, the Court clarified that whether a case is "quasi-criminal in character" depends on whether "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law." 380 US at 700. The Court analyzed *Boyd*—"[t]he leading case on the subject of search and seizure"—which "itself was not a criminal case but was a proceeding by the United States to forfeit 35 cases of plate glass which had allegedly been imported without payment of the customs duty." *Id.* at 696. Though "proceedings … may be civil in form," the Court continued, their characteristics can make "their nature criminal." *Id.* at 697, quoting *Boyd*, 116 US at 633.[12]

This Court has cited the approach in *Plymouth Sedan* with approval. Indeed, while the Court of Appeals referred to *Plymouth Sedan* as an "outlying case," App'x 0005 (2022 op. at 3), this Court has repeatedly applied the exclusionary rule in various civil proceedings. E.g., *In re Forfeiture of $176,598*, 443 Mich 261, 265; 505 NW2d 201 (1993) ("The exclusionary rule is applicable in forfeiture proceedings"); *Lebel v Swincicki*, 354 Mich 427, 440; 93 NW2d 281 (1958) (blood sample taken from unconscious motorist "constitute[d] a violation of his rights" under state constitution, so "testimony based

[12] See also *Camara v Municipal Court of City & Co of San Francisco*, 387 US 523, 531; 87 S Ct 1727; 18 L Ed 2d 930 (1967) (explaining how civil-enforcement processes can overlap with or lead to criminal-enforcement action).

on the analysis of such blood should not be admitted in evidence" in subsequent civil action against him); *McNitt v Citco Drilling Co*, 397 Mich 384, 388 n 2; 245 NW2d 18 (1976) (reaffirming *Lebel*); see also *Kivela v Dep't of Treasury*, 449 Mich 220, 231; 536 NW2d 498 (1995) ("[T]he scope of the Michigan exclusionary rule depends on the facts of each case.").

Much like the civil-forfeiture proceeding in *Plymouth Sedan*, the government's civil-enforcement action here is designed to penalize the Maxons. The government alleges that the Maxons violated the township's Zoning and Nuisance Ordinance. App'x 0042-0045. And as the language of the Ordinance makes clear, its explicit purpose is "to provide *penalties* for violations." Long Lake Township Nuisance Ordinance, Ordinance No 155 of 2016, at 1 <https://longlaketwpmi.documents-on-demand.com/document/d697aecb-c9a6-ec11-a36e-000c29a59557/Nuisance%20Ordinance%20/#_%20155.PDF> (emphasis added) (accessed August 3, 2023). The Ordinance further provides that "[a]ny person who violates any provision of this Ordinance … *shall* be subject" to a fine of up to $500 per day—with each day a violation exists a separate offense. *Id.* at 3, § 5 (emphasis added). "Its object," therefore, "like a criminal proceeding, is to penalize for the commission of an offense against the law." *Plymouth Sedan*, 380 US at 700.

The Ordinance's stated purpose, as well as its imposition of steep fines for violations, makes this case "quasi-criminal in character." *Id.* at 700; see also *People v Earl*, 495 Mich 33, 40; 845 NW2d 721 (2014) ("The Legislature is aware that a fine is generally

a criminal punishment."). To be sure, as the Court of Appeals noted, the government has not sought fines here—yet. It has requested a declaration that the Maxons are in violation of the Ordinance, an order to abate the alleged nuisance, and "such other costs, fees and relief that the Court deems just." App'x 0045. The government's prayer for relief intentionally leaves the door open for the court to impose fines up to $500 per day against the Maxons, and the Township's ordinances explicitly *command* such penalties. Ordinance No 155 of 2016, at 3 § 5.

Moreover, civil forfeiture—a context that is "quasi-criminal in character" and in which the U.S. Supreme Court has consistently affirmed the exclusionary rule's applicability—is closely intertwined with nuisance abatement. In both cases, the government alleges that otherwise-lawful private property is being used for unlawful ends, and it seeks a court order prohibiting the property's further use for that end.[13] Both actions seek to control a "man's property by reason of offenses committed by him," and "though they may be civil in form, are in their nature criminal." *Boyd*, 116 US at 634. In fact, according to the leading Fourth Amendment treatise, "there does not appear to be any doubt but that the *Plymouth Sedan* approach is called for when the government instead brings an action to abate a nuisance and would prove the illegal activity constituting the nuisance by the means of evidence come by through an

[13] In fact, civil forfeiture is considered an appropriate remedy under the state's nuisance-abatement statute. See *In re Forfeiture of $180,975*, 478 Mich 444, 455; 734 NW2d 489 (2007).

unconstitutional search." LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 1.7(a) & n 25 (6th ed 2022). That is true even when the nuisance action does not carry the potential for punitive, rapidly accumulating fines, as the Township's ordinances explicitly contemplate.

That conclusion is supported by caselaw from courts across the country. For example, in a civil suit against a bookstore to abate and enjoin an alleged obscenity nuisance, the Louisiana Supreme Court ordered five cartons of allegedly obscene materials the government had seized without a warrant excluded (along with two more seized under a defective warrant). *Jefferson Parish v Bayou Landing Ltd*, 350 So 2d 158, 161 (La, 1977). The Supreme Court of Georgia followed the same course in a civil-enforcement action seeking to enjoin an alleged gambling house where the only evidence supporting the government's case was obtained under an illegally issued warrant. *Carson v State ex rel Price*, 221 Ga 299, 304; 144 SE2d 384 (1965). And in a similar civil suit to enjoin an alleged nuisance, the Supreme Court of Alabama suppressed the testimony of officers who raided an alleged gambling house without a warrant. *Carlisle v State ex rel Trammell*, 276 Ala 436, 438; 163 So 2d 596 (1964). Just like in each of these cases, the Township's civil-enforcement action seeks to order the Maxons to remove an alleged nuisance from their property. And just as the various courts decided in each of those cases, ensuring the vitality of the Fourth Amendment requires excluding the evidence here that Long Lake obtained only through its Fourth Amendment violation.

C. None of the factors that the U.S. Supreme Court has identified in refusing to apply the exclusionary rule caution against its application here.

The U.S. Supreme Court has explained that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *United States v Calandra*, 414 US 338, 347; 94 S Ct 613; 38 L Ed 2d 561 (1974), quoting *Elkins v United States*, 364 US 206, 217; 80 S Ct 1437; 4 L Ed 2d 1669 (1960)). As a result, the Court has refused to apply the exclusionary remedy only in particular circumstances where its rationale would not, or could not practicably, be served.

The Court of Appeals misapplied the U.S. Supreme Court's recent approach. In the Court of Appeals' view, the exclusionary rule's purposes are served in exactly one type of civil case: "it only applies in forfeiture actions when the thing being forfeited as a result of a criminal prosecution is worth more than the criminal fine that might be assessed. That's it." App'x 0008 (2022 op. at 6). But that view is hard to square with what both the U.S. Supreme Court and this Court have actually said about the suppression remedy's applicability. As Judge Jansen noted below, the exclusionary "remedy [is] designed to safeguard Fourth Amendment rights generally through its deterrent effect," App'x 0012 (2022 dissenting op. at 2), quoting *Calandra*, 414 US at 348. Far from the rigid line the Court of Appeals drew, the U.S. Supreme Court has made clear that withholding the exclusionary rule requires a case-by-case assessment of whether the rule's deterrent purposes would—or practicably could be—served.

Likewise, this Court has held that the remedy's availability will "depend[] on the facts of each case." *Kivela*, 449 Mich at 231.

As part of that case-by-case assessment, the U.S. Supreme Court has identified particular factors that caution against applying a suppression remedy. Rather than drawing a bright line between criminal and civil proceedings, it has urged courts to inquire into the formality of the proceeding. Rather than drawing a bright line between civil forfeiture and any other civil proceeding, it has urged courts to ask whether the officer intended to use the unconstitutionally seized evidence in *this* proceeding or a different one. And rather than asking whether the government officials who committed the violation were police officers or "lower-level bureaucrats who have little or no training in the Fourth Amendment," App'x 0009 (2022 op. at 7), it has urged courts to examine how strong an effect applying the rule would have in the "deterrence of culpable *law enforcement* conduct." *Davis v United States*, 564 US 229, 246; 131 S Ct 2419; 180 L Ed 2d 285 (2011) (emphasis added).

The Court of Appeals did not analyze these concerns. And as demonstrated below, none of them caution against applying the suppression remedy here.

1. One factor that the U.S. Supreme Court considers in deciding whether to apply the exclusionary rule is the formality of the proceeding. In proceedings marked by a flexible, administrative nature, the Court has been more reluctant to require suppression. Because informal proceedings may not be "entirely adversarial" or governed by "traditional rules of evidence,"—or because the people who would rule on

the admissibility of evidence may "not be judicial officers or lawyers," determining in those proceedings whether officers violated the Fourth Amendment can be a difficult proposition. *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 363-366; 118 S Ct 2014; 141 L Ed 2d 344 (1998); see also *Calandra*, 414 US at 343 (rejecting suppression in grand-jury proceedings because they are "secret" and "unrestrained by [] technical procedural and evidentiary rules"). But those characteristics are not present here.

In *Calandra*, for example, the Court "emphasized" that grand jury proceedings "play a special role in the law enforcement process and that the traditionally flexible, nonadversarial nature of those proceedings would be jeopardized by application of the [exclusionary] rule." See *Pennsylvania Bd*, 524 US at 363. Similarly, in *Immigration & Naturalization Serv v Lopez-Mendoza*, when the Court found suppression unavailable in immigration deportation proceedings, it spotlighted the INS's "deliberately simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions." 468 US 1032, 1048; 104 S Ct 3479; 82 L Ed 2d 778 (1984). Finally, in *Pennsylvania Board*, the Court noted that parole revocation proceedings are a "nonadversarial[] administrative process[]" and that exclusion would be "incompatible with the traditionally flexible, administrative procedures of parole revocation." 524 US at 365-366.

But this case has none of those characteristics. The proceeding here is a markedly formal, punitive civil-enforcement suit. It was brought in a standard Circuit Court—a court which also hears criminal cases. It is explicitly "adversarial," governed by

"traditional rules of evidence," and not at all adjudicated under "flexible, administrative procedures." Cf. *id.* at 363-366. The circuit court reviewed formal legal briefing before holding a formal, live suppression hearing. This proceeding is as formal as any, and that supports the exclusionary rule's applicability.[14]

2. In keeping with the exclusionary rule's deterrence rationale, the U.S. Supreme Court has also been more reluctant to suppress evidence obtained from negligent, rather than deliberate, constitutional violations.

Start with *Herring v United States*. There, a police database showed that there was an active arrest warrant for a man who had just left a police station. Officers followed him out, pulled him over, and arrested him. 555 US 135, 137; 129 S Ct 695; 172 L Ed 2d 496 (2009). A search incident to that arrest revealed methamphetamine and an illegally possessed handgun. But as it turned out, the information in the database was wrong: The arrest warrant against Herring had actually been recalled five months earlier. *Id.* at 138. Because his arrest was unconstitutional, the officers' search of him incident to the arrest was also illegal. So, Herring argued, the guns and drugs therefore had to

[14] Similarly, *Pennsylvania Board* (parole) and *Lopez-Mendoza* (immigration) each arose in contexts in which the U.S. Supreme Court has repeatedly held Fourth Amendment scrutiny is more relaxed. See *Samson v California*, 547 US 843, 850; 126 S Ct 2193; 165 L Ed 2d 250 (2006) (suspicionless searches of parolees valid because parolees remain under "state-imposed punishment[]"); *United States v Ramsey*, 431 US 606, 616; 97 S Ct 1972; 52 L Ed 2d 617 (1977) (holding that "searches made at the border … are reasonable simply by virtue of the fact that they occur at the border"). Whatever the merits of those holdings, the Court has not similarly scaled back the Fourth Amendment's protections in the zoning context; the area the Township searched—the Maxons' home and curtilage—remains "first among equals." *Jardines*, 569 US at 6.

be suppressed. *Id.* The Court disagreed. It held that the failure to update the warrant database wasn't "sufficiently deliberate" to justify exclusion; suppression, the Court explained, was unlikely to deter this "isolated negligence" in the future. *Id.* at 137, 144.

But here, far from being "isolated" or "negligent," the government's drone searches over the Maxons' property were deliberate and repeated over fourteen months. Rather than stemming from miscommunication or incorrect information, the government intentionally surveilled the Maxons.

Or take *United States v Leon*, where the court held that suppressing evidence investigators obtained "in objectively reasonable reliance" on a later-invalidated search warrant would not meaningfully deter future Fourth Amendment violations by those investigators. 468 US 897, 922; 104 S Ct 3405; 82 L Ed 2d 677 (1984). In *Leon*, the investigating officers submitted an "extensive" search warrant application in accordance with usual procedures, and a detached magistrate issued the requested warrant. *Id.* at 902. But the court later determined that the warrant should not have issued because the application's substance was not sufficient to establish probable cause. *Id.* at 903-905. Rather than contest that conclusion on appeal to the U.S. Supreme Court, the government argued that the officers' "good-faith reliance on a search warrant" counseled against suppressing evidence obtained in executing that warrant. *Id.* at 905. The Court agreed, highlighting that it is a "magistrate's responsibility to determine whether the officer's allegations establish probable cause." *Id.* at 921. An officer who otherwise followed proper procedures in applying for a warrant, the Court held,

"cannot be expected to question" that determination. *Id.* In the Court's view, it would not make sense to "[p]enaliz[e] the officer" by excluding evidence for "the magistrate's error." *Id.*

In that way, *Leon* directly encourages officers to seek a warrant before they conduct a search. As outlined above, that is what the Township should have done here. It cannot claim to have reasonably relied on an invalid warrant when it never sought one for any of its three separate drone surveillance trips. Contrary to the Court of Appeals' conclusion that exclusion will likely deter Township officers "from ever again resorting to a drone to gather evidence of a zoning violation," App'x 0009-0010 (2022 op. at 7-8), *Leon* directly encourages them to just seek a warrant for any future drone surveillance. If they had probable cause, they could have easily obtained one.

Another cautionary factor both the U.S. Supreme Court and this Court have identified is "whe[ther] the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit" that "falls outside the offending officer's zone of primary interest." *United States v Janis*, 428 US 433, 458; 96 S Ct 3021; 49 L Ed 2d 1046 (1976), quoted in part in *Kivela*, 449 Mich at 235. In other words, the exclusionary rule may not serve its goal of deterrence when the governmental entity seeking to use the evidence is not the governmental entity that committed the constitutional violation. Because a state criminal law-enforcement officer is already "punished" for their Fourth Amendment violation "by the exclusion of the evidence in the state criminal trial," the Court in *Janis* reasoned, exclusion from

a different kind of case, outside the officer's "zone of primary interest" and involving a "different sovereign," is "unlikely to provide significant … additional deterrence." *Id.* at 448, 458.[15]

But that is not what happened here. The Township obtained the drone photographs solely for the Township's use in an action to enforce the Township's ordinances. It is squarely within the investigating officers' "zone of primary interest." If exclusion would not serve the purpose of deterrence here, it is hard to imagine a situation in which it would. As Judge Jansen noted in dissent below, the agency in *Kivela* seeking admission of the unconstitutionally obtained evidence "was wholly distinct from the one responsible for the Fourth Amendment violation, … an institutional separation to which our Supreme Court attached great significance." App'x 0015 (2022 dissenting op. at 5). By contrast, "[t]here is no dispute that the drone operator here was acting as an agent for Long Lake Township, that Long Lake Township is a governmental entity, and that Long Lake Township seeks admission of its own allegedly illegally obtained evidence." App'x 0026 (2021 op. at 3).

3. The Court of Appeals found it important that the search was performed by a "lower-level bureaucrat[]." App'x 0009 (2022 op. at 7). In its view, the suppression remedy exists exclusively to deter "*police* misconduct." *Id.* (emphasis added). But neither

[15] Exclusion is fully appropriate, however, when there is evidence of "collusion between the agency that performed the illegal search and the agency seeking to admit the incriminating evidence." *Kivela*, 449 Mich at 226-227 (collecting cases).

the U.S. Supreme Court nor this Court have ever endorsed such a restrictive view. And rightfully so. The Fourth Amendment does not limit the types of government officials it constrains. Rather, "its protection applies to governmental action" generally. *Burdeau*, 256 US at 475. Constitutional violations are just as concerning no matter the hat worn by the offending government official. E.g., *Safford Unified Sch Dist No 1 v Redding*, 557 US 364, 374-375; 129 S Ct 2633; 174 L Ed 2d 354 (2009) ("embarrassing, frightening, and humiliating" strip search of middle school student by non-police school officials violated Fourth Amendment); *Zadeh v Robinson*, 928 F3d 457, 474 (CA 5, 2019) (Willett, J., concurring) (State Medical Board investigators violated Fourth Amendment when they, "without notice and without a warrant, entered a doctor's office and demanded to rifle through the medical records of 16 patients.").[16] See also LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 1.8(e) (6th ed 2022) (for "nonpolice" like "building inspectors" and "OSHA inspectors," nothing in the Supreme Court's cases "casts serious doubt upon the applicability of both the Fourth Amendment and its exclusionary rule to their investigative activities.")

In keeping with that rationale, federal appellate courts across the country have made clear that the deterrent purpose of the exclusionary rule applies with full force to the Fourth Amendment violations of non-police law-enforcement officials pursuing

[16] *Safford* and *Zadeh* do not involve a dispute over the exclusionary rule's applicability; rather, they are illustrative of the types of egregious Fourth Amendment violations the Court of Appeals' reasoning would leave unattended.

noncriminal enforcement.[17] So have federal district courts.[18] And likewise for state high courts.[19] The question is one of deterring constitutional violations, not of the label printed on the agent's uniform or the civil or criminal title given to the legal proceeding.

[17] *Grimes v Comm'r*, 82 F3d 286, 289-290 (CA 9, 1996) ("[W]hether a proceeding results in a 'punishment' for double jeopardy purposes does not determine what is likely to deter officers in the field from violating the Fourth Amendment."); *Tirado v Comm'r*, 689 F2d 307, 313-314 (CA 2, 1982) ("A test for the exclusionary rule that turns on the civil or criminal character of the proceeding does not comport with an objective of achieving substantial deterrence."); *Savina Home Indus v Secretary of Labor*, 594 F2d 1358, 1362-1363 (CA 10, 1979) (finding the deterrent purpose is served by suppressing unconstitutionally seized evidence by an OSHA inspector in an OSHA administrative proceeding); *Pizzarello v United States*, 408 F2d 579, 586 (CA 2, 1969) ("Absent an exclusionary rule, the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences … . [I]t seems clear, even under a view of the law most favorable to the Government, that evidence so obtained would be excluded."); see also *Camara*, 387 US at 530 ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.").

[18] *Pike v Gallagher*, 829 F Supp 1254, 1263-66 (DNM, 1993) (excluding evidence from a warrantless drug test of a municipal employee in an employment disciplinary proceeding); *Jones v Latexo Indep Sch Dist*, 499 F Supp 223, 239 (ED Tex 1980) ("failure to apply a corollary of the exclusionary rule in this context would leave school officials free to trench upon the constitutional rights of students in their charge without meaningful restraint or fear of adverse consequences").

[19] *State v Lussier*, 171 Vt 19, 30-34; 757 A2d 1017 (2000) (excluding evidence from administrative license revocation hearing); *Pooler v Motor Vehicle Div*, 306 Or 47, 52-53; 755 P2d 701 (1988) (same); *Goldin v Pub Utilities Comm*, 23 Cal 3d 638, 669 & n 19; 592 P2d 289 (1979) (holding exclusionary rule applicable to public utilities commission proceedings); *Finn's Liquor Shop, Inc v State Liquor Auth*, 24 NY2d 647, 653-659; 249 NE2d 400 (1969) (excluding evidence seized by state liquor authority agents; "[i]n the absence of any other means of enforcement … a restricted application of the rule would … place the agency beyond the reach of the Constitution and there would be no way to protect licensees from abuse and harassment at the hands of its employees or agents").

By contrast, when the evidence was obtained by lower-level bureaucrats in a way "unconnected with law enforcement purposes," courts sometimes find exclusion inappropriate. See *Roberts v State*, 443 So 2d 1082, 1082-1083 (Fla App, 1984) (exclusion of evidence obtained from a co-worker's desk drawer by a nosy membership clerk at a university's alumni office was unwarranted because the clerk's actions were unconnected with law enforcement). But that rationale doesn't apply here given that the Township's officers were actively looking for "evidence for the purposes of code enforcement." App'x 0046.

At base, none of the factors cautioning against applying the exclusionary rule are present here. Nor can the Court of Appeals' warning of the "cost" of excluding evidence save its erroneous decision. App'x 0010 (2022 op. at 8). While that court concluded that exclusion might lead to an alleged zoning violation "potentially remain[ing] unabated," *id.*, the government can ask a magistrate for a warrant if it has strong enough reason to believe the Maxons are in violation. Indeed, were the "cost" of suppressing unconstitutionally obtained evidence sufficient to foreclose the exclusionary rule, it would never apply even in *criminal* cases, where it may result in "dangerous defendants go[ing] free." *Herring*, 555 US at 141. But that is obviously not the rule (nor is that concern at issue here; the Maxons are accused merely of an aesthetic code violation).

And on the other side of the coin, the costs of not affording a suppression remedy in nearly all civil or nonpolice cases are huge. Contrary to the Court of Appeals'

view that the suppression remedy would "serve[] no valuable function" in such cases, App'x 0010 (2022 op. at 8), failure to afford a suppression remedy would impose a major societal cost: It would effectively bless even blatant Fourth Amendment violations by a huge subset of government officials. Whether snooping for evidence of medical history or financial data or recreational vehicles (as here), or anything in between—see p. 51 & n 16, above—the Court of Appeals' rule would leave little incentive for officials to respect the Fourth Amendment rights of their civil-investigation targets. The consequences for the people's security would be devastating. The Township (or any other government entity) will know it can deploy drone surveillance on people's homes at will to fish for whatever code-violation evidence it pleases, without probable cause or a warrant. When it finds a violation, it could freely use intrusive drone photographs and video to fine or otherwise punish its targets. There would be no incentive to seek a warrant or refrain from arbitrary searches of people's homes—and there will be every incentive to proceed as if the Fourth Amendment provides no constraint at all.

As explained below, suppression is the *only* remedy available that would provide a meaningful deterrent against that reality.

D. No remedy other than exclusion would meaningfully deter the government's unconstitutional drone surveillance.

Both the Court of Appeals majority and dissent agreed that the exclusionary rule's purpose is to deter constitutional encroachments. Here, suppression is the only

remedy that would meaningfully deter the government from conducting similar warrantless drone surveillance again.

First, the government conducted its drone surveillance to support a punitive civil action against the Maxons. It has not (and cannot) bring criminal charges to enforce the ordinances at issue. So unlike in other civil contexts, there is no "state" or "federal criminal trial" in which the Maxons may vindicate their rights. Cf. *Janis*, 428 US at 448.

Second, the possibility of a separate civil suit by the Maxons against the offending government officials is also unlikely to meaningfully deter the misconduct here. The Court of Appeals, for example, suggested the Maxons pursue "a civil lawsuit sounding in constitutional tort." App'x 0010 (2022 op. at 8), citing *Bauserman*, 509 Mich 673. But in *Bauserman*, this Court decided only that the *state* may be liable for its own violations of the state constitution; it did not address whether such claims are available against municipal entities or individual government actors. *Id.* at 708 n 13. So it is unclear whether *Bauserman* would permit claims against the local officials who organized the warrantless surveillance of the Maxons' home.

And whether the action sounds in constitutional or ordinary tort, the possibility of those officials being liable for any meaningful damages is slim to none, making any such suit not worth the effort. Compensatory damages in a trespass action are "general[ly] measure[d]" by "the diminution in value" caused by the trespass, or, if the injury was "temporary," "the cost of restoration of the property to its original condition." *Kratze v Indep Order of Oddfellows, Garden City Lodge No. 11*, 442 Mich 136,

149; 500 NW2d 115 (1993). But here, while the government's surveillance deeply disturbed the Maxons' security in their property, it is unlikely to have affected the property's market value or its physical condition. As a result, any official who conducted this warrantless surveillance against the Maxons (or someone else in their shoes) would unlikely be subject to substantial damages if found liable in a separate civil action. Even if there were a greater financial risk on the line for an official who violates the Fourth Amendment in this way, the U.S. Supreme Court's "qualified immunity decisions have nevertheless made it increasingly difficult for plaintiffs to show that defendants have violated clearly established law," and therefore to recover under Section 1983 at all. Schwartz, *The Case Against Qualified Immunity*, 93 ND L Rev 1797, 1814 (2018).

In practice, the exclusionary rule is the only reliable incentive officials have to respect the Fourth Amendment rights of people in the Maxons' shoes. Without consequences for arbitrary invasions into their rights, no one can be secure in their person, house, papers, or effects. To preserve that security, the exclusionary rule must continue to apply in cases like this one.

Instead, the Court of Appeals created a bright-line rule foreclosing the suppression remedy's applicability in nearly all civil-enforcement cases, even for egregious constitutional violations. Under that rule, the government will reap the benefit of using whatever illegally seized evidence it wants to punish people, no matter how blatant the constitutional violation—so long as the proceeding is civil and the investigating officers were not police. In cases like this—where the exclusionary rule's

deterrence rationale would (and practicably can) be served, see Part III.C, above—the people's security in their constitutional rights requires more.

Relief Sought

Todd and Heather Maxon request that this Court grant their application for leave to appeal and remand to the Circuit Court for entry of an order suppressing all evidence obtained from the government's drone surveillance of their property.

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I certify that this document complies with the formatting rules in MCR 7.212. I certify that this document contains 14,784 countable words, according to the word count function in Microsoft Word. The document is set in 14-point Garamond font, with lines double spaced.

I certify that on August 4, 2023, I electronically filed this Supplemental Brief in Support of Application for Leave to Appeal, causing all parties of record to be served through the MiFILE system of the Michigan Supreme Court.

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