STATE OF MICHIGAN
IN THE SUPREME COURT

LONG LAKE TOWNSHIP,

Plaintiff-Appellee,

v.

TODD MAXON and HEATHER MAXON,

Defendants-Appellants.

**Supreme Court No. 164948**

**Court of Appeals No. 349230**

Grand Traverse Circuit No.: 18-034553-CE

Hon. Thomas G. Power

# LONG LAKE TOWNSHIP'S SUPPLEMENTAL BRIEF

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## COUNTER STATEMENT OF JURISDICTION AND ORDER APPEALED

Long Lake Township agrees that the Maxons have identified the relevant underlying Order of this Court directing MOAA on the issues of "(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." Maxon App'x 0002.[1]

[1] If the document has been included, the Township's brief will reference the Maxons' appendix except where documents contain highlighting or other marks not in the original or are illegible in part. The Township's exhibits are alphabetically numbered to avoid confusion. This brief will further refer to the Maxons' supplemental brief as "Supplement."

## COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

The Township used a drone flying above the tree canopy to observe an unfenced, partially wooded, five-acre tract of land that was being used as an unlicensed junk and salvage yard in a residential area. The drone's vantage point was no different than any helicopter, plane, or other drone flying in publicly navigable airspace. In fact, the images of the Maxons' junk and salvage yard are similar in detail to those currently available to any member of the public on Google Earth. The flights in question lasted for no more than 120 minutes total from set up to tear down, two of which took place during a time period when Todd Maxon had consented to inspection of his property. The questions presented are as follows:

**I. Whether Long Lake Township violated 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 Township answers: No.

The Trial Court answered: No.

The Maxons answered: Yes.

The Court of Appeals did not address this question on remand after its prior opinion was vacated.

**II. Whether the exclusionary rule applies to this civil dispute?**

The Township answers: No.

The Circuit Court found no Fourth Amendment violation and did not address the exclusionary rule.

The Maxons answered: Yes.

The Court of Appeals Answered No.

## INTRODUCTION

Application of well-established constitutional law leads to the conclusions that (1) there was no Fourth Amendment violation under the facts of this case and (2) that the exclusionary rule does not otherwise apply. The Maxons, however, ask this Court to rely on out-of-date law, inapplicable constitutional frameworks, and to apply legal tests that appear nowhere in the cases cited to reach the opposite conclusions. They also ask this Court to make a decision not based on the totality of the circumstances of this case, but on fears and uncertainty of what might possibly happen in the future. The fact of the matter is this: the Maxons are asking this Court to fundamentally alter decades of jurisprudence to help them get away with running a salvage yard in their wooded, unfenced, residentially zoned property to the detriment of their neighbors and in violation of reasonable Township regulation. Junk in and around an open backyard and the woods viewed from high in the air is not a search and has no Fourth Amendment implications. Further, the Court of Appeals correctly held that the exclusionary rule does not apply to this civil case.

This case involves a civil lawsuit brought by Plaintiff Long Lake Township (the "Township") based on Defendants Todd Maxon and Heather Maxon's (the "Maxons") expanded use of their unfenced, partially wooded, five-acre tract of land—located in an area zoned for low density residential homes—as an unlicensed junk/salvage yard. Before commencing the civil action, the Township hired a company to perform three drone flyovers to observe, from publicly available airspace, the extent of the accumulating scrap and junk

materials on the Maxon property. The combined total time for all these flights—including set up and tear down of equipment—was no more than 120 minutes. There is no evidence that the drone was flown in violation of applicable regulations or other law, "nor that it contained equipment or was itself technology not readily available or generally used by the public." *Long Lake Twp v Maxon (Long Lake I)*, 336 Mich App 521, 549; 970 NW2d 893 (2021) (Fort Hood, J., dissenting), vacated and remanded 973 NW2d 615 (2022).

Where, as here, there is no physical trespass onto a person, house, paper, or effect, courts generally apply a two-part inquiry regarding whether a Fourth Amendment violation has occurred. *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). The first question is whether the individual has "exhibited an actual (subjective) expectation of privacy." *Id.* at 361. In other words, whether the individual has shown that "he seeks to preserve [something] as private." *Id.* at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" *Id.* at 361.

Under this test, the United States Supreme Court has held that aerial observations do not implicate the Fourth Amendment—i.e., they do not involve either subjective or objective expectations of privacy.[2] Based on the record, the Maxons did not have any subjective or objective expectation of privacy from

[2] See *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989); *California v Ciraolo*, 476 U S 207, 211-214; 106 S Ct 1809; 90 L Ed 2d 210 (1986).

aerial observation—be the aircraft manned or unmanned—here, either. The five-acre property is not covered or fenced, is partially visible from neighboring properties, and is otherwise more appropriately characterized as "open fields" or business property, given the uses to which it is put. The imagery was taken from publicly navigable airspace above the tree canopy, in compliance with FAA regulations, and with the use of technology readily available to any member of the public. Similar images of the Maxons' property can already be viewed, for free, right now, on Google Earth. In sum, the drone use did not constitute a Fourth Amendment violation based on the totality of the circumstances in this case, and this Court properly vacated the prior Court of Appeals decision holding otherwise.

Further, on remand, the Court of Appeals appropriately concluded that the exclusionary rule does not apply to this civil zoning action. *Long Lake Twp v Maxon*, ___Mich App___; ___NW2d___, 2022 WL 4281509 (September 15, 2022) (*Long Lake II*). The exclusionary rule is a harsh remedy designed to deter future *police* misconduct where it has resulted in a violation of constitutional rights; it's "not designed to act as a personal constitutional right of the aggrieved party." *People v Frazier*, 478 Mich 231, 248; 733 NW2d 713 (2007). And, accordingly, the exclusionary rule does not apply to civil cases—even when that civil action involves fees, deportation, arrest, revocation of parole status, or other consequences traditionally reserved for the criminal law. Nothing about the facts of this case compels a different result.

The Township is not holding the torch for any governmental entity that wants to use drones to peer into the private spaces of a home or pervasively track the movements of an individual or group. But limited and reasonable aerial observations of land are a critical tool in all sorts of civil governmental functions—from land use to environmental and natural resource regulation. And, based on decades of caselaw, they are also a permissible tool under the Fourth Amendment. The use of common, publicly available technology to make these observations should not change the analysis. And, more to the point, it does not change the analysis under the facts presented here.

This Court should deny the application. In the alternative, should this Court grant leave, it should affirm the opinion in *Long Lake II* and further conclude that no Fourth Amendment violation occurred.

## COUNTER-STATEMENT OF FACTS

This case involves the Maxons' use of five acres of residentially zoned land, located at 9160 North Long Lake Road, as an unlicensed junk and salvage yard.[3] (Exhibit C, Complaint, App'x 0013T-0042T). The Maxons' property is also not rural. Compare Supplement, 13. It's located in the middle of several residential neighborhoods, and its use for salvage and junk purposes is in clear violation of local zoning ordinances (see Exhibit C & Google Earth image, below).


A prior enforcement action against the Maxons based on the use of the same property as a junk yard was resolved in 2008 when the Township and the

[3] Todd Maxon very well may be a "hobbyist" who likes to "tinker"; but that's not what this case is about. Supplement, 5.

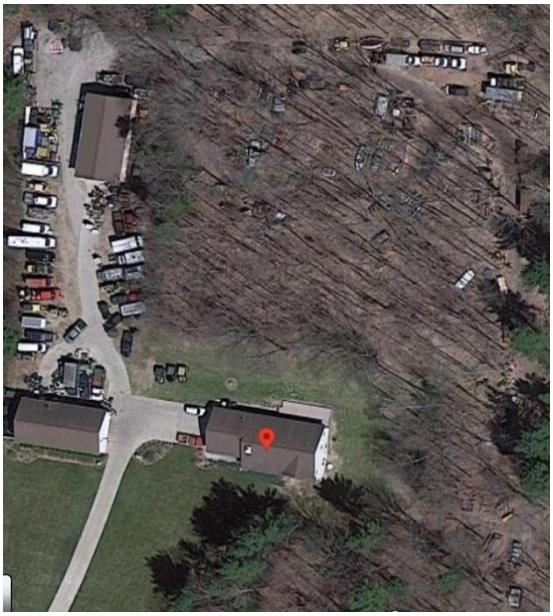
Maxons entered into a settlement agreement. The Township agreed, in pertinent part, not to pursue any further enforcement action against the Maxons so long as the junk yard/salvage activities remained status quo. (Exhibit 11). In other words, the Maxons' use of the property was essentially grandfathered in under the then-existing Township ordinances—but only so long as their use did not expand, and only so long as the Township zoning regulations remained unchanged. (Exhibit 11).

The expanded volume of junk and salvage activity was brought to the Township's attention in part by unrelated site inspection photographs from 2016, as well as verbal and written complaints from neighboring property owners around that same time. (Exhibit D, 2016 Photographs, Township App'x 0043T-0074T; Exhibit E, Neighbor Complaint, Township's App'x 0076T). In other words, despite the 2008 agreement, the Maxons' land use did not remain status quo. And, contrary to the frequent claim in the Maxons' brief, the property's general use and condition *was* clearly visible from several ground level vantage points, neighboring properties, and even the roadway.[4] (App'x 0043T-0074T and Exhibit F, Google Images, App'x 0086T-0095T).

Subsequently, the Township engaged Zero Gravity Aerial, and Dennis Wiand, in turn, performed drone flights three times over the course of a year: on April 24, 2017, May 26, 2017, and May 5, 2018. The total time involved in all

[4] The Maxons cite at least five times to a quote from the vacated Court of Appeals majority decision finding that the condition of their property was not publicly visible from ground level. That conclusion was incorrect.

three of these aerial flights—including set up and tear down—was limited to approximately 120 minutes (two hours total). (Affidavit of Dennis Wiand, Exhibit G, App'x 0096T-0098T; May 2, 2019, Motion Hearing Transcript, p 39). Google Earth historical satellite photographs likewise show how the activities on the property have changed and expanded over the years. (Exhibit F, Google Earth Images, App'x 0077T-0095T). A side-by-side comparison of the drone images and those available on Google Earth illustrates how remarkably similar the drone images look to those currently available to any member of the public:[5]



[5] It's also clear from the image on the Left (Google Earth) that the Maxons have continued to expand the junk yard on their property while this action has been pending. See also Google Maps, available at <https://www.google.com/maps/place/9160+N+Long+Lake+Rd,+Traverse+City,+MI+49685/@44.7484159,-85.7594262,17z/data=!3m1!4b1!4m6!3m5!1s0x881e3071f8f03c13:0xa2d5d7b59996b133!8m2!3d44.7484159!4d-85.7568513!16s%2Fg%2F11gfn_c1_m?entry=ttu>.

The Maxons' Statement of Facts claims that drones can be "stealthy" and navigate into "much tighter" spaces than manned aircraft. Supplement, 6. First, the Maxons are not experts in drones or the capability of manned aircraft, nor has any expert on these topics offered an opinion in this case. But more importantly, even assuming they're right, a "stealthy" drone navigating into "tight[] spaces" is not what this case is about. In fact, Todd Maxon observed the drone while it was over his operation and contemporaneously (and aggressively) confronted the drone operator while the flight was in progress on May 5, 2018. (Exhibit G, App'x 0096T-0098T). The Maxons' neighbor also heard the drone on that date and heard other drones on prior occasions, as well. (Exhibit M, Defendants' Response to prior Township Application, p 21, App'x 0148T).

Additionally, the Township had permission to inspect the Maxons' property during at least two of the flyovers. Specifically, in September of 2016, Todd Maxon applied for a permit to build an 800-foot long, 6-foot-high perimeter privacy fence on the otherwise unfenced parcel. (Exhibit H, Permit Application; App'x 0099T-0101T). The permit was issued on September 23, 2016, and remained valid for a full year. (Exhibit I, Permit; App'x 0103T). As a necessary condition of the permit application, Mr. Maxon consented to "on-site inspections by Long Lake Township Zoning, Planning, or Assessing officials that may be necessary to ascertain compliance, completion and value of the content of the land use permit." (Exhibit H).

Apparently, the Maxons decided not to build the fence, but project progress (or lack thereof) was not communicated to the Township. During a site visit of the perimeter where the fence was supposed to be constructed in late September 2017, a Township inspector observed, in plain view, the condition of the property, and also took photographs. The Maxons were subsequently notified that the permit was revoked because the fence had not been constructed within the one-year period as evidenced by the inspection. (Exhibit J, Photographs from 2017 site inspection, App'x 0104T-0115T; Exhibit K, October 4, 2017 Letter, App'x 0117T; Exhibit L, Affidavit of Loyd A. Morris regarding 2017 inspection, App'x 0119T). Both the April 24, 2017, and May 26, 2017, drone flyovers took place while the permit—and the associated consent to inspection—was in effect.

Ultimately, based on ground, aerial, and satellite (Google Earth) images, the Township filed the present civil suit seeking abatement of a nuisance per se (zoning violation) on August 21, 2018, asserting that the Maxons were operating an expanded junk/salvage yard on their property.[6] As outlined in the Complaint, it is the Township's position that this use violates both the 2008 agreement and current, reasonable zoning regulations for a low-density residential district. (Exhibit C, App'x 0014T-0017T).

[6] On April 17, 2019, the Township again took ground level photographs, with permission, from locations surrounding the Maxons' property. (Exhibit 4, January 16, 2020, Township Court of Appeals Brief, Docket Event Number 19).

Following a period of discovery, the Maxons moved to suppress all aerial imaging taken by the drone and the photos taken by the official during the ground level site inspection in September 2017.[7] After hearing argument from the parties, the trial court denied the motion to suppress the drone photographs, finding that the aerial imaging was not a search under Supreme Court precedent. (M Tr, 50-59; see also Exhibit A). The trial court also denied Defendants' motion to suppress the ground level photographs based on the permissive entry of the Long Lake official pursuant to the terms of the permit application—specifically finding that the Township had the right to inspect the property and that the photographs were of objects in plain view. (M Tr, 47-50).

The Maxons filed an application for leave to appeal on June 5, 2019, and the Court of Appeals granted leave on the sole issue of whether the drone images violated the Fourth Amendment. (Exhibit 10). In a published opinion dated March 18, 2021, a 2-to-1 panel of the Court of Appeals reversed the trial court decision on the motion to suppress. (Exhibit 8 & 9). Instead of applying clear precedents regarding aerial observation, the majority found that cases involving infrared surveillance of the inside of a home and eavesdropping were controlling, and that drone use would be a violation of privacy "whether the drone flew as high as a football-field length or flew directly up to an open bathroom window." *Long Lake I*, slip op at 9.

[7] Contrary to the Maxons' Statement of Facts, no drone video was ever introduced in the trial court. Compare Maxon Supplement, 6, 7.

Judge Fort Hood dissented from the opinion, concluding:

> The majority contends that drone observation is, by nature, similar to the intrusive surveillance that occurred in *Kyllo*. However, *Kyllo* involved infrared thermal imaging of the defendant's home. Our Supreme Court concluded with respect to that surveillance:
>
> > Where, as here, the Government uses a device that *is not in general public use*, to explore details of the home that *would previously have been unknowable without physical intrusion*, the surveillance is a 'search' and is presumptively unreasonable without a warrant. [*Kyllo*, 533 US at 40 (emphasis added).]
>
> In my opinion, the fundamental import of *Ciraolo*, *Riley*, and *Kyllo*, is that if the drone that was used to view defendants' property in this case was a technology commonly used by the public that observed only what was visible to the naked eye and that was flown in an area in which any member of the public would have a right to fly their drone—and the record suggests that all of these things are true—then precedent provides that a Fourth-Amendment violation has not occurred. See *Ciraolo*, 476 US at 215; *Riley*, 488 US at 450; *Kyllo*, 533 US at 40. [*Long Lake I*, Judge Fort Hood dissenting, slip op at 3.]

On March 16, 2022, this Court granted MOAA and ordered supplemental briefing on whether the Township "violated the appellees' Fourth Amendment rights by using an unmanned drone to take aerial photographs of the appellees' property for use in zoning and nuisance enforcement." (Exhibit 7). Subsequently, on April 1, 2022, this Court entered an order directing supplemental briefing on "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. See *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364 (1998) (declining to extend the operation of the exclusionary rule beyond the criminal trial context)." (Exhibit 6).

After supplemental briefing, this Court entered an Order vacating the prior Court of Appeals opinion and remanding the case to the Court of Appeals to address the "issue of whether the exclusionary rule applies to this dispute. See, e.g., *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364 (1998) (declining to extend the operation of the exclusionary rule beyond the criminal trial context); *Kivela v Dep't of Treasury*, 449 Mich 220 (1995) (declining to extend the exclusionary rule to a civil tax proceeding)."[8] Pursuant to that Order, the Court of Appeals issued an opinion on September 15, 2022, agreeing with the overwhelming weight of authority that the exclusionary rule is limited almost exclusively to criminal matters and hence did not apply here. (Exhibit 3 and 4). This application and order of MOAA followed. (Exhibit 2).

## LEGAL STANDARD

This Court reviews application of Fourth Amendment principles de novo. *People v Vanderpool*, 505 Mich 391, 397; 952 NW2d 414 (2020).

## ARGUMENT

### I. The Township did not violate the Maxons' Fourth Amendment rights by taking aerial photos of their five-acre property from an unmanned aircraft.

The Township's use of a drone to take aerial photographs was not a search under *Katz*, which is the applicable test where the alleged search is one

[8] While it's true the prior order did not expressly give a reason why *Long Lake I* was vacated, it is also clear that, if this Court agreed with the reasoning and conclusion in *Long Lake I*, there was no reason to vacate the opinion to simply remand for consideration regarding the exclusionary rule.

involving observation of property. Moreover, even under the "trespass" test, the above-the-tree-canopy observations were not trespassory. Neither Michigan nor federal law supports the Maxons' proposed plain language test. And, finally, the Maxons consented to Township inspection of their property during the first two drone flights. This Court should either deny leave or find no Fourth Amendment violation occurred.

The Fourth Amendment provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [U.S. Const., Am. IV.]

The Michigan Constitution, Const. 1963, art. 1, § 11, likewise "provides coextensive protection to that of its federal counterpart." *People v Hammerlund*, 504 Mich 442, 451; 939 NW2d 129 (2019).

An overarching consideration in any Fourth Amendment inquiry involves determining whether the alleged search occurred in an area or involved an object that is protected by the Fourth Amendment at all. *See Florida v Jardines*, 569 US 1, 6; 133 S Ct 1409, 1414; 185 L Ed 2d 495 (2013) (discussing open fields); *United States v Dunn*, 480 US 294, 301; 107 S Ct 1134, 1139; 94 L Ed 2d 326 (1987) (discussing curtilage). Here, the area observed by the drone was akin to open fields and was not within the curtilage of the residence.

Beyond that initial inquiry, when considering whether observations constitute a search within the meaning of the Fourth Amendment, courts have

reliably utilized the two-part test from *Katz*, 389 US at 360 (Harlan, J., concurring). The first part is whether the individual, by his or her conduct, has "exhibited an actual (subjective) expectation of privacy." *Katz,* 389 US at 360 (Harlan, J., concurring). In other words, whether the individual has shown that "he seeks to preserve [something] as private." *Id*., at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" *Id*., at 361. In other words, the *Katz* test is dependent on the facts of a particular case. And application of *Katz* to the specific facts of this case results in the conclusion that the Maxons never exhibited a subjective expectation of privacy from aerial observation of their property, and, even if they had, it was not one society has recognized as reasonable.

### A. The Fourth Amendment does not apply to the Township's aerial observations because they were not focused on the home or its curtilage.

The Fourth Amendment does not "prevent all investigations conducted on private property; for example, an officer may (subject to *Katz*) gather information in what we have called 'open fields'—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text." *Jardines*, 569 US at 6. An "open field," however "need be neither 'open' nor a 'field' as those terms are used in common speech." *Oliver v United States*, 466 US 170, 180 n 11; 104 S Ct 1735 (1984). For example, and applicable here, "a thickly wooded area nonetheless may be an open field as that term is used in

construing the Fourth Amendment." *Id.* See also *People v Frederick*, 500 Mich 228, 236 n 3; 895 NW2d 541 (2017).

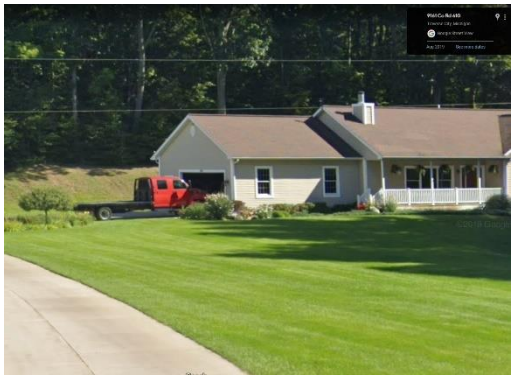
There are four factors to consider in deciding whether an area is within the "curtilage" for purposes of the Fourth Amendment: "[1]the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *See Dunn*, 480 US at 301. Common locations falling within the curtilage include the front porch, a side garden, and the area outside the front window or an arms-length from the house. See *Jardines*, 569 US at 6. *Collins v Virginia*, 138 S Ct 1663, 1670-1671; 201 L Ed 2d 9 (2018) (top portion of the driveway sitting behind the front perimeter of the house and enclosed on two sides by a brick wall about the height of a car and on a third side by the house, was also found to be within the curtilage). In contrast, a barn located 60 feet away from a home (and outside of a fence circling the home), was not within the curtilage. *Dunn*, 480 US at 297 (and, accordingly, officers could peer into the barn and even illuminate its contents with a flashlight without implicating the Fourth Amendment at all); *People v Powell*, 477 Mich 860, 861; 721 NW2d 180 (2006) (area of back yard that was not enclosed and was in plain view of defendant's neighbors was not curtilage).

Simply put, this case is not about the Maxons' curtilage or "home." Instead, the underlying civil case and the drone imaging were focused on the

junk and salvage yard far beyond the "home" and its garage, mostly in unfenced wooded areas and along the property's perimeter. The images—which are focused on the "open fields" portion of the property—are not of an area subject to Fourth Amendment protection. Put another way, a partially wooded, unfenced junk yard does not fall within "an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Ciraolo*, 476 US at 212–213. See also *Jardines*, 569 US at 7 (quoting *Oliver*, 466 US at 182 n 12). Application of each of the *Dunn* factors leads to the same conclusion. Specifically, the imaging—and counting of materials as depicted in the Maxons' exhibits—was focused on (1) a vast junkyard (2) away from the home, and (3) that was unfenced and uncovered. The mere hope that the Township, neighbors, or any other plane or drone overhead not see the full scope of the open property or its use does not make that space private or constitutionally protected. Neither does filling up "open fields" with scrap materials.

The fact that the house is visible in some of the images does not convert the observations to a search or change the Township's focus in its use of the drone (which has never been in serious dispute). See Supplement, 12-13. The single still image provided by the Maxons is not illustrative of what a person can see driving by, from any neighboring property, or from any plane, helicopter, or private drone flying overhead. In fact, the home, driveway, and garage are equally as visible from the Road and from Google Earth as they are from the

drone pictures (compare Google Earth satellite and street images below with Maxon Exhibit 14):[9]



[9] See also Exhibit F.


Cases suggesting that lack of visibility from the road or other properties weigh in favor of finding an area to be curtilage, therefore, don't help the Maxons' case. Neither do cases suggesting curtilage is somehow expanded in rural areas; that is because the Maxons' do not live in a "rural" area.

Further, even assuming some portions of the property at issue have characteristics of both open fields and curtilage, photography of this sort of 'quasi-curtilage' from aerial views does not constitute a search. *Dow Chem Co v United States*, 476 US 227, 236–237; 106 S Ct 1819; 90 L Ed 2d 226 (1986). This also has already been considered and decided. See *id*. As first described by the Sixth Circuit, the surveillance of the Dow property in Midland, Michigan involved at least six flyovers and was done with detailed imaging equipment:

> [O]n February 6, 1978, EPA contracted with Abrams Aerial Survey Corporation, a private company located in Lansing, Michigan, to take aerial photographs of the Dow plant. EPA's stated purposes for the aerial surveillance were to create visual documentation of smokestack emissions and to obtain perspectives on the layout of the plant and its relationship to the surrounding geographic area. EPA directed Abrams to take the pictures at particular altitudes and angles; EPA informed Abrams that emissions would be more visible in early morning or late afternoon, but left the actual time of the flight to Abrams' discretion.
>
> Abrams performed the overflight in the afternoon on February 7, 1978. The aircraft made *at least* six passes over the plant at altitudes of 12,000, 3,000, and 1,200 feet. **Abrams used a Wild RC–10 aerial mapping camera to take approximately 75 color photographs of various parts of the Dow plant. Because of Abrams' sophisticated photographic equipment, the photographs contain vivid detail and resolution; some of the photographs can be enlarged to a scale of 1 inch equals 20 feet or greater, without significant loss of detail or resolution. The District Court found that when enlarged in this manner and viewed under magnification, the photographs show equipment, pipes and power lines as small as ½ inch in diameter**. [*Dow Chem Co v US By & Through Burford*, 749 F2d 307, 310 (CA 6, 1984), aff'd sub nom. *Dow Chem Co v United States*, 476 US 227; 106 S Ct 1819; 90 L Ed 2d 226 (1986).] [emphasis supplied].

Nevertheless, as affirmed by the US Supreme Court, the aerial observations and imaging did not violate a privacy right recognized by the Fourth Amendment. *Dow*, 476 US at 238.

The Maxons' junk and salvage yard area (even if unlicensed) is much more akin to a business than a home. A "businessman" has a constitutional right to be free from official entries (ground level physical intrusions) upon his commercial property. But the Court found that no such protections existed regarding aerial photography of the exterior of the business. This was true even when significant measures to safeguard the property from ground level

observation were taken. As such, like in *Dow*, the Fourth Amendment is not implicated in this case.

### B. Defendants did not have a constitutionally protected subjective or objective expectation of privacy.

Even regarding curtilage, however, Fourth Amendment protections only apply to government observations where there is an actual subjective expectation of privacy, *and* that subjective expectation is one that society recognizes as objectively reasonable. *Bond v United States*, 529 US 334, 338; 120 S Ct 1462; 146 L Ed 2d 365 (2000); *People v Perlos*, 436 Mich 305, 317; 462 N W 2d 310 (1990). Whether the expectation exists, both subjectively and objectively, depends on the totality of the circumstances surrounding the alleged intrusion. *Id*. at 317–318. Respectfully, this was the foundational flaw in the majority opinion in *Long Lake I*, which was vacated by this Court. As noted by Judge Fort Hood, the majority was concerned about what drones might do in the future, not with the circumstances of the present case. *Long Lake I*, 336 Mich App at 548–549 (Fort Hood, J., dissenting).

Regarding the latter, it's well established that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz,* 389 US at 351 (emphasis added). To that end, individuals do not have a subjective or objective expectation of privacy from aerial observations, even where—unlike this case—significant efforts are undertaken to shield items from street level observations. *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989); *California v Ciraolo*, 476 US 207,

211-214; 106 S Ct 1809; 90 L Ed 2d 210 (1986). The facts here, including that the aircraft was unmanned, do not warrant a different conclusion.

**1. The aerial observations did not violate any actual, subjective expectation of privacy.**

To determine whether a subjective expectation of privacy existed, courts consider whether an individual "took normal precautions to maintain his privacy—that is, precautions normally taken by those seeking privacy." *People v Smith*, 420 Mich 1, 27–28; 360 N W 2d 841 (1984). Apart from keeping the bulk of their salvage materials out of the front yard, the Maxons have not pointed to any acts they took to seek privacy. Compare Supplement, 25. The Maxons' property was not fenced in, covered, or enclosed. The vehicles, boats, scrap, trucks, tires, and other salvage materials are spread about the wooded area and all along the boundaries of the property. Some of the scrap is visible from neighboring properties as evidenced from ground-level images taken in 2016 and 2017. Exhibits D & J. In fact, the visible state of the property caused neighbors and other individuals in the area to complain to the Township long before any drone images were taken. Exhibit E. Any plane, helicopter, satellite, or drone could easily and lawfully view the contents of the junk yard from above. As such, the general state of the property is not private, and the Maxons have not acted in a way that would suggest it was subjectively intended to be kept private.

The fact that the Maxons' property would be visible from any plane or aircraft—manned or unmanned—flying from publicly navigable airspace

obviates any subjective privacy expectation. This is true even where a party takes some steps meant to create privacy. In *Ciraolo*, the Court found no objective expectation of privacy existed from observations of officers that took place within navigable airspace, even though the yard was intentionally concealed from street-level view by a 10-foot fence. *Id*. at 213–214. Furthermore, the Court was unconcerned with the fact that aircraft was focused on the property (i.e., it was not a random flyover) or that the officers were specially trained to recognize marijuana. Id. The Court concluded instead that "[a]ny member of the public flying in this airspace who glanced down could have seen" what the officers observed. *Id*.

In *Riley* the Court likewise concluded that the defendant "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter" flying at a legal altitude—400 feet—despite having erected fences around the property. The Court further noted that the defendant "no doubt *intended* and *expected* that his greenhouse would not be open" to ground level inspection. *Id*. at 450 (emphasis added). However, because the sides and roof were left partially open, the contents were subject to viewing from the air without Fourth Amendment implications. *Id*. "Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was." *Riley*, 488 US at 449–450. In other words, even the attempt

to enclose the greenhouse from ground observation did not give rise to a subjective expectation of privacy from the air. Moreover, "private and commercial flight [by helicopter] in the public airways is routine" and there was no indication that such flights were unheard of in the area at issue. *Id.* at 450-451. And, here, too, the Maxons' property is less than nine miles from the Cherry Capitol Airport.

Moreover, although the Maxons applied for a permit to build a privacy fence in 2016, it was never actually built. In other words, unlike *Riley*, there were not even any precautions taken against "ground-level observation" in this case. Again, the Township disagrees with the Court of Appeals prior conclusion in *Long Lake I*, repeated at least four times by the Maxons, that "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 non-aerial vantage point." See Supplement, 25-26. The Township itself took (with permission) and submitted as evidence several photographs depicting the state of the property from neighboring land. As these images show, the general use of the property as a junkyard was not hidden. But the question here is not whether the *full* scope of the property could be observed from a neighboring property or road. It is axiomatic that the very center of a five-acre wooded lot would not likely be visible from the perimeter. But wooded property does not mean that the owners have manifested an actual expectation of privacy

from aerial observation—or even from casual observation from neighbors. The Maxons had no such expectation.

What's more, the Maxons *consented* to Township searches or observations of their property in their permit application. Exhibits H and I, App'x 0099T-0103T. As the trial court concluded, the zoning inspector had permission to observe the Maxon property from ground level where the fence was supposed to be. Both the April 24, 2017, May 26, 2017, drone flyovers took place while the permit—and the associated consent to in-person, ground level inspection—was in effect. As the zoning official already had permission to physically enter onto the property during those times for an inspection—which would have also permitted him to observe the zoning violations in plain view—it is simply unreasonable to conclude that the Maxons had any subjective expectation of privacy regarding the condition of their property (i.e., its extensive use as a junk/salvage yard) from the air. It is well-established that a physical presence is much more intrusive than observations from the air or other public vantage point. See, e.g., *Katz*, 389 US at 351.

It is also reasonable to conclude that the Maxons were effectively on notice that their property would likely garner some level of heightened scrutiny based on the prior 2008 consent agreement. See *Maryland v King*, 569 US 435, 447; 133 S Ct 1958, 1969; 186 L Ed 2d 1 (2013) (in certain situations "an individual is already on notice" that some reasonable monitoring is to be expected). As outlined in the Complaint in this case, the consent agreement

only permitted the Maxons to continue with the nonconforming use of their property if it remained status quo. (App'x 0015T). The use did not remain status quo, and Township oversight could have reasonably, and subjectively, been expected.

Based on the totality of the circumstances in this case, it cannot be said that the Defendants demonstrated *any* subjective expectation of privacy from aerial surveillance—either from manned or unmanned aircraft.

**2. The search was objectively reasonable, too, and the technology used is widely available and socially accepted under the facts at issue in this case.**

Even where significant effort has been made to shield property from ground level observation (something that has not been done here), the Court has found that society would not recognize such a subjective expectation of privacy where property was otherwise visible from the air. As was summarized by Judge Fort Hood:

> the fundamental import of *Ciraolo*, *Riley*, and *Kyllo*, is that if the drone that was used to view defendants' property in this case was a technology commonly used by the public that observed only what was visible to the naked eye and that was flown in an area in which any member of the public would have a right to fly their drone—and the record suggests that all of these things are true—then precedent provides that a Fourth-Amendment violation has not occurred. See *Ciraolo*, 476 US at 215; *Riley*, 488 US at 450; *Kyllo*, 533 US at 40. [*Long Lake I*, 336 Mich App at 546 (Fort Hood, J., dissenting).]

The Maxons assert that drones can be small, relatively inexpensive, less noisy, and more readily available than manned aircraft and that this should make their use prohibited or objectively unreasonable under the Fourth Amendment.

But the inexpensive and wide-spread availability of drones actually cuts against finding a Fourth Amendment violation.[10] See *Kyllo*, 533 US at 34-40. Put another way, the Township cannot reasonably be expected to avert its eyes from activity that could have been observed by any member of the public. See *California v Greenwood*, 486 US 35, 39–41; 108 S Ct 1625; 100 L Ed 2d 30 (1988).

And the noise level of an average drone (or, more importantly, the drone used here) is immaterial to the question of whether an expectation of privacy is real or reasonable. Whether or not an individual is aware that their property is being observed is also not relevant to whether a trespass occurred or whether any reasonable expectation of privacy exists.[11] Additionally, to be clear, the Township's imaging in this case did *not* occur within the Maxons' home. The Township did not take any images of the inside of the Maxons' residence, nor did it capture any "intimate spaces" of the Maxon's home. Supplement, 28. It was also not "undetected." Supplement, 28.

There is no evidence that the Township or Ground Zero violated any statute or regulations, either. MCL 259.322(3) provides that "[a] person shall not knowingly and intentionally operate an unmanned aircraft system to violate section 539j of the Michigan penal code, 1931 PA 328, MCL 750.539j, or to

[10] *Kyllo v United States*, 533 US 27, 37; 121 S Ct 2038, 2045; 150 L Ed 2d 94 (2001), involved thermal scanning technology "not in general public use" to "explore details of the home" that would have been unknowable without physical intrusion into the home.

[11] The Maxons simultaneously argue that drones might go unnoticed and that they noticed and were bothered by the Zero Gravity drone. Either way, the noise of the drone does not establish a constitutional issue in this case.

otherwise capture photographs, video, or audio recordings of an individual in a manner that would invade the individual's reasonable expectation of privacy." But this statute only prohibits recording of an "individual." MCL 259.322(3).[12] It does not apply to images taken of property. Nor did the Township look at anything within the Maxons' residence or at the Maxons themselves. And, at any rate, the above-the-tree-canopy images of the Maxon property do not violate any statute or *reasonable* expectation of privacy.

At base, a Fourth Amendment analysis doesn't hinge on whether a particular technology is divisive, unpopular, or universally beloved. For example, it can hardly be said that hovering a helicopter a mere 100 feet above someone's house while agents peer over to inspect contents through a crack in the roof is polite or socially welcomed behavior. See *People v Smola*, 174 Mich App 220, 224; 435 NW2d 8 (1988); *People v Grubb*, unpublished opinion of the Court of Appeals, issued April 21, 2000 (Docket No. 213121), 2000 WL 33427611, p 1 n 4 (helicopter hovering 200 to 300 feet above property not a Fourth Amendment violation) (Exhibit O); *United States v Eight Firearms*, 881 F Supp 1074, 1078 (SDW Va, 1995) ("It is equally clear from the case law that a helicopter conducting aerial surveillance of marihuana growing in the claimant's backyard at an altitude as low as 100 feet is not violative of his Fourth

[12] The last antecedent rule of statutory construction would not reasonably apply here because the latter part of the sentence in MCL 259.322(3) also refers to the "individual's" expectation of privacy. See *Dye by Siporin & Assoc, Inc v Esurance Prop & Cas Ins Co*, 504 Mich 167, 192; 934 NW2d 674 (2019). The word "individual" modifies each item in the list.

Amendment rights."); *Giancola v State of WVa Dept of Pub Safety*, 830 F2d 547, 548 (4th Cir, 1987) (multiple helicopter flights at 100 feet or less did not violate Fourth Amendment). But it's not a Fourth Amendment violation.[13] *Id.* That's because "visual observation is no 'search' at all." *Kyllo v United States*, 533 US 27, 32; 121 S Ct 2038, 2042; 150 L Ed 2d 94 (2001), citing *Dow*, 476 US at 234–235.

The thing is, the Maxons would prefer this Court not consider the actual subjective and objective expectations based on the facts of this case. Instead, they ask this Court to render judgment on what a different drone with different capabilities might do in a different case. But this case is not about whether a drone *could* violate the Fourth Amendment. Even assuming for argument's sake that the Maxons sincerely hoped that the contents of salvage yard would not become known to the Township or other members of the public, an expectation of privacy does not give rise to Fourth Amendment protection "unless society is prepared to accept that expectation as objectively reasonable." *Greenwood*, 486 US at 39–41. Whether by plane, helicopter, or Google Earth, substantially similar aerial views and images are available to any member of the public. It cannot, therefore, be concluded that the Maxons have an objectively reasonable expectation of privacy with regard to aerial views of their

[13] It may be, in fact, that a helicopter hovering 400 feet above a mostly enclosed property while officers lean over to get a good look through the cracks would objectively feel *much* more intrusive than a drone. See *Riley*, 488 US at 449–450. But it's not a search. *Id.*

unfenced junk yard—regardless of whether those images are from a satellite, a helicopter, or a drone.

There was no Fourth Amendment violation under the facts of this case.

### C. The "trespass" test is not applicable, and, even if it were, drone use was not a Fourth Amendment violation under the "trespass" test.

It's important to keep in mind that the two-part test in *Katz* was developed specifically for cases—like this one—that involve observation, not physical touch. "[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates." *United States v Jones*, 565 US 400, 406; 132 S Ct 945; 181 L Ed 2d 911 (2012). See also *Florida v Jardines*, 569 US 1, 11; 133 S Ct 1409; 185 L Ed 2d 495 (2013); *Grady v North Carolina*, 575 US 306, 307; 135 S Ct 1368; 191 L Ed 2d 459 (2015); *Johnson v VanderKooi*, 509 Mich 524; 983 NW2d 779 (2022). And the pre-*Katz* "common-law trespassory test" is still applicable alongside *Katz* where there is an actual physical trespass onto a person, house, paper, or effect. *Johnson*, 509 Mich at 536-538. For example, this Court recently applied the physical trespass test to conclude that fingerprinting constituted a search for purposes of the Fourth Amendment. *Id.*

But, unlike *Jones* (physical trespass onto vehicle), *Grady* (physical trespass onto person), or *Vanderkooi* (physical trespass onto person), however, this case does not involve any physical trespass onto any person, house, paper,

or effect.[14] Moreover, unlike *Jones* and its progeny,[15] this case does not involve the surveillance or tracking of any individual. When it comes to isolated or infrequent far overhead views of property out in the open, *Ciraolo*, *Riley*, and *Dow* control. The *Katz* test is the appropriate application of the law.

The Maxons have not cited to any law applying the trespass test to aerial observation. And, in fact, the Maxons have not pointed to any law finding that limited drone flights and observations of property like those at issue here constituted a search under either test.[16] Recall again that there was no

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[14] In *In re Application of the United States*, 637 F Supp 3d 343, 355, 2022 WL 16757941 (EDNC October 26, 2022), the district court considered whether 30 days of drone surveillance, with no limitations on height, and with a focus on homes and their entryways *might* possibly implicate the Fourth Amendment. Of course, those are not the facts before this court. In fact, the court further noted that, in other cases, overhead surveillance's infrequency (twice in a year), height (100 feet) and short duration "contributed to its constitutionality." *Id.* Another case cited by the Maxons, *Collins v Virginia*, ___US ___, ___; 201 L Ed 2d 9; 138 S Ct 1663 (2018), likewise involved an officer's physical presence inside a partially enclosed portion of the defendant's driveway that abuts the house. It does not support a finding of a common-law trespass here, either.

[15] See also *Carpenter v United States*, 138 S Ct 2206, 2209; 201 L Ed 2d 507 (2018).

[16] The Colorado District Court Order attached Exhibit 18 to the Maxons' brief is based on unique Colorado statutory law not at issue in this case. It was, instead, the fact that repeated and frequent flights far beyond anything that occurred in this case rendered the respondents' property uninhabitable and constituted a taking in that case. *Id.* The Pennsylvania case involved allegations that a private security company repeatedly engaged in the flying of helicopters and drones at a low altitude, shining high-beams onto the property at issue at night from unmarked vehicles parked near the property, *and* sending employees or agents onto neighboring properties for the purpose of surveillance. *Gerhart v Energy Transfer Partners, LP*, No. 1:17-CV-01726, 2020 WL 1503674, at *7 (MD Pa, March 30, 2020). And the criminal allegation in Virginia involved a man who was alleged to have flown his drone over the neighboring property "*daily*." Joe Beck, *Drone Dispute Reaches Courtroom*, The Northern Virginia Daily,

"physical intrusion" into the home, nor was the drone focused on collecting any biometric data or on tracking an individual. The images in evidence clearly show that the drone was above the trees and focused on the general condition of the property; property that was out in the open for any overhead observer to view. This is not a "trespass" under the common law or Michigan statute.[17]

The common law concept of ownership up to the heavens has "no place in the modern world:"

> The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim. [*United States v Causby*, 328 US 256, 260–261; 66 S Ct 1062; 90 L Ed 1206 (1946)][18]

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<https://perma.cc/2R8L-Y5ZT> (posted October 25, 2015) (accessed November 23, 2022) ("We're not talking five or six times. . . .We're talking somewhere between 50 to 100 times."). Finally, the facts presented in the Kentucky case cited by the Maxons—involving whether it was lawful for a private citizen to shoot down a drone—are not remotely similar to those here. See *Boggs v Merideth*, No. 3:16-CV-00006-TBR, 2017 WL 1088093, at *8 (WD Ky, March 21, 2017).

[17] Finding drone use like the use at issue here to be a common law trespass would, undoubtedly, have implications far beyond this case. Particularly in the civil context, drones are used for several legitimate and important governmental purposes, from land use restrictions (like this case) to GIS mapping, to ensuring environmental and natural resource protections and compliance. None of these have anything to do with the dystopian concerns raised by the Maxons. And, in nearly all these examples, the government is doing no more than any ordinary citizen may also presently do. Each would also become a "trespass" under the analysis offered by the Maxons here. As would any private drone use over non-public property.

[18] Even if this Court were to apply *Causby* as suggested by the Maxons (which was not a trespass case at any rate), even under that case a landowner only

Put another way, navigable airspace is akin to land held in the public trust, like Lake Michigan shoreline. See *Glass v Goeckel*, 473 Mich 667, 673; 703 NW2d 58 (2005).

Even assuming for the sake of argument only that, at some point, a drone could fly either at a level so low or fly overhead so often that it would be a trespass, there is no evidence of record suggesting that this happened here.[19] See *In re Application of the United States*, 637 F Supp 3d 343, 355, 2022 WL 16757941 (EDNC October 26, 2022). Space above the trees is not land that was occupied or used by the Maxons. Nor is there any evidence that the Maxons could occupy that space. Considering the actual drone use here—its limited duration, the fact that it was high above the property (i.e., not interfering with any of the Maxons actual use or enjoyment of the property), the fact that it was focused on physical property otherwise out in open fields and not on any person—leads to the conclusion that the brief occupation of the airspace above the Maxon property was not a trespass.[20] And accordingly, even if the "trespass"

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owns the land above the ground that they "can occupy or use in connection with the land." *Id*. at 264.

[19] Moreover, the Maxons' argument on this point is unpreserved. They never created any record in the trial court regarding the height of the drone flight or any other factor that might reasonably warrant consideration in determining whether there was a physical trespass.

[20] In contrast, in *Causby*, 328 US at 261, the United States "conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment." And *Causby* was about an avigation easement, i.e., regular, constant air travel over the property; not whether an isolated flight would constitute common law trespass.

test were applicable, the limited far-overhead flights performed in this case were not trespassory.

Application of common law "trespass" to the airspace where Zero Gravity traveled would also create a conflict with the federal law. The FAA has exclusive authority to determine the airspace in which a person may operate a drone. 14 CFR part 107, the small UAS rule, allows operations of drones or unmanned aircraft system under 55 pounds at or below 400 feet above ground level for visual line-of-sight operations. And Michigan law similarly provides:

> A person that is authorized by the Federal Aviation Administration to operate unmanned aircraft systems for commercial purposes may operate an unmanned aircraft system in this state if the unmanned aircraft system is operated in a manner consistent with federal law. [MCL 259.311]

The Zero Gravity operator here was so licensed. (Exhibit G, App'x 0096T-0098T). "[T]here is no evidence that the drone in this case was flown in violation of the law or applicable regulations, nor that it contained equipment or was itself technology not readily available or generally used by the public." *Long Lake I*, 336 Mich App at 549 (Fort Hood, J., dissenting). See also *Michigan Coal of Drone Operators, Inc v Ottawa Cnty*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2022 (Docket No. 359831) (finding local ordinance conflicted with FAA sovereignty and the UASA) (Exhibit P), p 3.

Regardless, there was no physical trespass under current Michigan or federal law. While there is certainly value to keeping "easy cases easy," *Johnson,* 509 Mich at 537, quoting *Jardines*, 569 US at 11, that concept has never meant disregarding the specific facts of the case in favor of blunt

application for the sake of ease—particularly in cases involving observations (not physical touch or trespass). Compare Supplement, 24. Instead, Fourth Amendment considerations and analyses are based on the totality of the circumstances in the particular case before the Court. And, under the facts here, there was no Fourth Amendment violation under either *Katz* or the "trespass" test.

### D. The Maxons' proposed plain language test has never been applied in any Fourth Amendment holding. And, even if the Court were to apply it here, the conclusion would be that no violation occurred.

This case is about whether the Township's drone use violated the Fourth Amendment. No court interpreting the Fourth Amendment or Michigan's constitution has ever held that the so-called plain language test set forth by Plaintiff is applicable in this context. Dissenting opinions of a single Justice or appellate judge are not the law. This Court has further concluded that the Michigan Constitution, Const. 1963, art. 1, § 11, "provides coextensive protection to that of its federal counterpart." See *Hammerlund*, 504 Mich at 451.

The Iowa Supreme Court followed the Gorsuch and Thomas dissents by concluding that the Iowa state constitution was no longer coexistent with the federal one. *State v Wright*, 961 NW2d 396, 411–412 (Iowa, 2021). In *Wright*, the Iowa court ultimately held "a warrantless search of a citizen's trash left out for collection is unlawful" because this was "a physical trespass on [the defendant's] papers and effects." *Id.* at 417, 419. No physical trespass is implicated in this case. See Section I.C. And, further, the Maxons have not

made any argument based on our own State Constitution or history as to why Michigan should depart from the federal counterpart. And application of the Maxons' proposed definition of "search" would lead to the conclusion that any observation, if looking for evidence, would be a search.

The Maxons further erroneously suppose that a "plain," "fair," or "ordinary" meaning test would lead to clarity in, and more uniform application of, the law. There is no reason to believe that's true. What is "plain" to one private citizen, Township official, or member of law enforcement is impossibly opaque to another. A prime example can be found in the voluminous amount of ink spilt over the "plain" meaning of statues. What's "plain" or "fair" is not always an obvious inquiry.

Federal precedent, discussed at length in the sections above, controls the Fourth Amendment analysis. Further, there is no reason to change Michigan law regarding Const. 1963, art. 1, § 11, particularly in the context of this unique civil case. Finally, even if this Court were so inclined, it should adopt a "plain meaning" test that continues to hold—consistent with reasonable public expectations—that observing uncovered, unfenced, outdoor objects like scrap and salvage materials that are otherwise in plain view from public vantage points is not a "search."

### E. Alternatively, the Township's drone observations did not violate the Maxons' Fourth Amendment rights because the Maxons consented to the 'search' by virtue of the 2008 Settlement Agreement and 2016 Permit.

As outlined above, the aerial images taken in this case do not constitute a "search" under any test. So, there's no Fourth Amendment violation. But even assuming for the sake of argument a "search" occurred, the Township still did not violate the Maxons' Fourth Amendment rights. It is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v Bustamonte*, 412 US 218, 219; 93 S Ct 2041, 2043–44; 36 L Ed 2d 854 (1973). Whether consent is freely and voluntarily given is a question of fact based on an assessment of the totality of the circumstances. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

First, there was implicit consent to oversight of the overall condition of the property by virtue of the 2008 Settlement Agreement. (Exhibit 11). Courts have already clearly recognized the concept of implicit consent, for example, in the context of motor vehicle statutes. See *id*. See also *Birchfield v North Dakota*, 136 S Ct 2160; 195 L Ed 2d 560 (2016). The 2008 Settlement Agreement at issue here permitted the Maxons to continue with their commercial use of the five-acre property so long as it remained status quo. (Exhibit 11; Exhibit C, App'x 0015T). In other words, the Maxons' use of the property was essentially grandfathered in under the then-existing Township ordinances—but only so long as their use did not expand. It is inherent in that compromise, therefore,

that the Township would have the ability to ensure that the use was not expanded. In other words, the necessary and reasonable implicit permission to observe the uses to which the Maxons put their property is a fundamental underpinning of the agreement. And again, considering the totality of the circumstances, the aerial drone observations here were a completely reasonable method of ascertaining whether the terms of the agreement were violated.

Second, Todd Maxon *expressly* consented to both 2017 aerial observations in conjunction with his application for an 800-foot-long perimeter fence. The permit was issued on September 23, 2016, and remained valid until September 23, 2017. (App'x 0103T). As a necessary condition of the permit application, Mr. Maxon consented to "on-site inspections by Long Lake Township Zoning, Planning, or Assessing officials that may be necessary to ascertain compliance, completion and value of the content of the land use permit." This language does not limit the manner of inspection in any way. Whether by drone, on foot, or otherwise, inspection of the property was permissible. And, in fact, the trial court already held that the inspector had a right to be physically on the Maxons' property for an inspection even a few days after the permit expired (and this ruling is not at issue in this appeal). (M Tr, 47-50). Both the April 24, 2017, and May 26, 2017 drone flyovers took place while the permit—and the associated consent to inspection—was in effect.

It's further irrelevant that the permission was for the purpose of fence inspection. Permission to enter for one purpose does not imply that the

inspector or officer should turn a blind eye to the other conditions of the property that were in plain view. Neither the law nor our jurisprudence carries and such restriction on searches pursuant to consent. At the very least, the April 24, 2017, and May 26, 2017, drone flyovers were done with consent to inspect the property. As such, in the alternative, this Court should find that the Township did not violate the Fourth Amendment because its aerial images were taken pursuant to consent. *Schneckloth*, 412 US at 219.

## II. The exclusionary rule does not apply to this civil zoning enforcement action.

The exclusionary rule is designed to deter police misconduct where it has resulted in a Fourth Amendment violation. It is not a constitutional right, nor is it intended to vindicate a party's constitutional rights. Rather, when deciding whether the exclusionary rule should be applied, courts balance the deterrent effect on criminal law enforcement officers, if any, against the recognized high societal cost of excluding probative evidence.

Under this balancing test, the exclusionary rule has been consistently limited to criminal trials, only. Citing both the high costs of exclusion of evidence and the minimal deterrent impact of application of the rule in the civil context, Courts have concluded that the exclusionary rule does not apply even when the underlying civil action involves fees, deportation, arrest, revocation of parole status, or other consequences traditionally reserved for the criminal law. Here, the Maxons are not facing any "punishment," they're not accused of committing an "offense," and this case is *not* about a *public* nuisance (which

requires evidence of criminal conduct). Compare Supplement, 38-43. Instead, this case is about nuisance per se: a civil zoning matter. The Court of Appeals majority reached the right result with respect to the application of the exclusionary rule, and this Court should either deny leave or affirm.[21]

**A. This is a civil case.**

The Township filed a civil complaint for abatement of nuisance per se: it "seeks only an injunction—a remedy to enforce its ordinance against current and future violations." *Twp of Fraser v Haney*, 509 Mich 18, 25 n 14; 983 NW2d 309 (2022). This action is not punitive. No fine, imprisonment, probation or any other "punishment" for past conduct is sought in this case. Rather, the Township seeks a return to the status quo: use of the property for salvage activities no greater than were present in 2008.[22]

A zoning enforcement action *may* be pursued by a township as a "municipal civil infraction." MCL 125.3407. And, as mandated by statute, the Township's ordinance designates violations as a "municipal civil infraction" and provides for a maximum $500 per day fine for each occurrence. See, e.g., Long Lake Nuisance Ordinance, Section 8, App'x 0038T-0042T. But, to be clear, even a "municipal civil infraction" is not a criminal matter; it's something that is

[21] Of course, "application of the exclusionary rule is inappropriate in the absence of governmental misconduct." *Frazier*, 478 Mich at 250.

[22] The perfunctory language at the end of the Complaint is nearly identical to that used in nearly every civil matter (i.e., requesting any "other costs, fees and relief that the Court deems just") (See Exhibit C, App'x 0017T). Throughout the present action, the Township has requested and pursued injunctive relief, only.

"prohibited by an ordinance . . . *.and is not a crime* under that ordinance, and for which civil sanctions may be ordered." MCL 600.113 (emphasis added). As such, even if the Township were seeking the maximum fine permitted under the law, this would not transform this matter into a criminal trial or criminal prosecution. Matters involving ordinance violations "are not criminal cases within the meaning of the statutes and rules for review by this Court." *Huron Tp v City Disposal Sys, Inc*, 448 Mich 362, 365; 531 NW2d 153 (1995).[23] Likewise, any fines imposed in matters involving ordinance violations "are not equivalent to a criminal prosecution under Michigan law." *Gora v City of Ferndale*, 456 Mich 704, 718; 576 NW2d 141 (1998); *City Disposal Sys, Inc*, 448 Mich at 365.

In fact, the Maxons' neighbors, i.e., private citizens, could have filed nearly an identical action requesting identical relief for nuisance per se based on the same zoning violations. See *Kallman v Sunseekers Prop Owners Ass'n*,

[23] Of further import, the line of cases finding that ordinance "prosecutions" have some criminal characteristics involved some punishment (arrest, probation, or jail sentence) imposed by the local authority that is traditionally reserved for criminal proceedings. See *City of Ann Arbor v Riksen*, 284 Mich 284, 288; 279 NW 513 (1938) (individual was arrested and ordered to pay a fine); *Delta Co v City of Gladstone*, 305 Mich 50, 53; 8 NW2d 908 (1943) (considering fines collected for violations of local ordinances prohibiting acts that were also punishable by statute); *People v Goldman*, 221 Mich 646, 650; 192 NW 546 (1923)(individual placed on probation following conviction for drunk driving); *City of Detroit v Dingeman*, 233 Mich 356, 357; 206 NW 582 (1925) (individual "convicted" of reckless driving "and sentenced to serve 30 days in the Detroit House of Correction"). No punishment is sought in this case. And the application of the exclusionary rule is nevertheless appropriately limited to criminal trials – not quasi-criminal matters.

LLC, 480 Mich 1099; 745 NW2d 122 (2008) (standing in action for nuisance per se brought by private persons may be proven by showing that the "defendant's activities directly affected the plaintiff[s'] recreational, aesthetic, or economic interests."). See also *Cook v Bandeen*, 356 Mich 328, 330–334; 96 NW2d 743 (1959) ("residents in the immediate vicinity" had the right to obtain injunctive relief from land use inconsistent with zoning ordinance); *Jones v De Vries*, 326 Mich 126, 128; 40 NW2d 317, 318 (1949) ("property owners in the area affected" had a right to seek equitable relief from use in violation of local zoning); *Baura v Thomasma*, 321 Mich 139, 142–143, 146; 32 NW2d 369 (1948).

The Maxons argue that this action is "quasi-criminal" by citation to a handful of considerably older cases from outside jurisdictions involving public nuisance. First, a public nuisance case is still a civil case under Michigan law. See Michigan's public nuisance statutes MCL 600.3801, et seq. But, even assuming for the sake of argument only that there may be some aspects of the public nuisance cases cited by the Maxons that could be more "quasi-criminal" in nature, this is *not* a *public* nuisance case. In fact, very much unlike this case, each of those cited by the Maxons regarding a "public nuisance" primarily involved a *criminal* investigation (much more analogous to civil forfeiture matters). See, e.g., *Jefferson Par v Bayou Landing Ltd, Inc*, 350 So 2d 158, 160 (La, 1977)("Jefferson Parish Sheriff's Office were conducting an investigation into possible criminal violations concerning the sale of obscene materials at the premises); *Carson v State ex rel Price*, 221 Ga 299, 304; 144 SE2d 384 (1965)

(criminal investigation into illegal gambling); *Carlisle v State ex rel Trammell*, 276 Ala 436, 438; 163 So 2d 596 (1964) (involving officers who participated in a raid or investigation).[24] Both of the Maxons' citations to *LaFave*, Search & Seizure: A Treatise on the Fourth Amendment § 1.7(a) & n 25; and § 1.8(e)(6th ed 2022), are also, in proper context, discussing criminal prosecutions or the public nuisance cases cited above, i.e., cases where underlying criminal activity results in forfeiture of property. See also MCL 600.3825(3)(a)-(d); MCL 600.3835. This case, however, does not involve any criminal investigation, criminal allegations, the state or federal penal code, any claim of public nuisance, or any civil forfeiture.

Under the clear, in-state precedent, a case seeking prospective injunctive relief for a nuisance per se is not a criminal or quasi-criminal case. Instead, as correctly determined by the Court of Appeals majority, this is a civil matter. And, based on this fact and the totality of the circumstances, the exclusionary rule does not apply.

[24] The Maxons repeated reliance on cases from the 1960s and 1970s is misleading for another reason: law on the exclusionary rule has been *significantly* clarified since that time. For example, *Carlisle* and *Carson* each reached their conclusions based on *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 700; 85 S Ct 1246; 14 L Ed 2d 170 (1965), but, as explained in detail below, the Supreme Court has repeatedly restricted and clarified the limited and appropriate use of the exclusionary rule since 1965.

### B. Courts have repeatedly concluded the exclusionary rule's application is limited to criminal trials.

"The exclusionary rule is a judicially created remedy that originated as a means to protect the Fourth Amendment right of citizens to be free from unreasonable searches and seizures." *People v Hawkins*, 468 Mich 488, 498; 668 NW2d 602 (2003), citing *Weeks v United States*, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1914), overruled on other grounds by *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). Generally, where the exclusionary rule is applied, "evidence obtained in violation of the Fourth Amendment cannot be used in a *criminal* proceeding against the victim of the illegal search and seizure." *United States v Calandra*, 414 US 338, 347; 94 S Ct 613; 38 L Ed 2d 561 (1974) (emphasis added). The Supreme Court has "held the exclusionary rule to apply only in criminal trials," and moreover has "significantly limited its application even in that context." *Pennsylvania Bd of Prob & Parole v Scott*, ("Scott") 524 US 357, 364 n 4; 118 S Ct 2014; 141 L Ed 2d 344 (1998). This was, in fact, the very point noted by this Court in its order remanding this case for consideration of the exclusionary rule's applicability here. See May 20, 2022 Order (citing *Scott* as "declining to extend the operation of the exclusionary rule beyond the criminal trial context" and *Kivela* as "declining to extend the exclusionary rule to a civil tax proceeding").

The exclusionary rule is designed to sanction and deter *police* misconduct. *People v Anstey*, 476 Mich 436, 447–448; 719 NW2d 579 (2006) (quotation omitted). See also *Calandra*, 414 US at 347 ("[T]he rule's prime

purpose is to deter future unlawful police conduct . . ..”). To that end, the Court has balanced two factors: “the prime purpose of the rule, if not the sole one”—i.e., the deterrence of unlawful *police* conduct—against “the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.” *INS v Lopez-Mendoza*, 468 US 1032, 1041; 104 S Ct 3479; 82 L Ed 2d 778 (1984). “Real deterrent value is a ‘necessary condition for exclusion,’ but it is not ‘a sufficient’ one.” *Davis*, 564 US at 237, quoting *Hudson v Michigan*, 547 US 586, 596; 126 S Ct 2159; 165 L Ed 2d 56 (2006). The analysis must also account for the “substantial social costs” generated by the rule. *Id.* See also *People v Frazier*, 478 Mich 231, 248; 733 NW2d 713 (2007), quoting *People v Goldston*, 470 Mich 523, 539; 682 NW2d 479 (2004) (the “proper focus is on the deterrent effect on law enforcement officers, if any.”).

Further, “[t]he judicially created rule is not designed to act as a personal constitutional right of the aggrieved party.” *Id.* Nor is its purpose to “redress the injury to the privacy of the search victim.” *Calandra*, 414 US at 347. Put another way, the exclusionary rule is simply not intended to safeguard Fourth Amendment rights “generally” as argued by the Maxons. Compare *Calandra*, 414 US at 348.[25] Rather, the exclusionary rule has been narrowly applied: it

[25] Although this line of thought originates from *Calandra*, its meaning is changed dramatically by consideration of the context in which it was used in that case:

has "never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Stone v Powell*, 428 US 465, 486; 96 S Ct 3037; 49 L Ed 2d 1067 (1976). Instead, "because the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its 'substantial social costs.'" *Scott*, 524 US at 363, quoting *United States v Leon*, 468 US 897, 907; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

In fact, the Supreme Court has had several opportunities to consider whether "the operation of the exclusionary rule [should be extended] beyond the criminal trial context." *Scott*, 524 US at 364 (1998). Nevertheless, "[i]n the complex and turbulent history of the rule, the Court never has applied it to

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> In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.
>
> Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. [Calandra, 414 US at 348 (emphasis added).]

Context is also important to this Court's consideration of two other cases cited by the Maxons: *Safford Unified Sch Dist No 1 v Redding*, 557 US 364, 374-375; 129 S Ct 2633; 174 L Ed 2d 354 (2009), and *Zadeh v Robinson*, 928 F3d 457, 474 (5th Cir, 2019). First, as the Maxons' now concede, neither involved the exclusionary rule at all. Compare Application p 39. And, more importantly, they're clearly not examples of "egregious" Fourth Amendment violations left "unattended" without the exclusionary rule. In fact, it's completely unclear how the exclusionary rule would have had any impact in either of these cases. Supplement, 51.

exclude evidence from a civil proceeding, federal or state." *United States v Janis*, 428 US 433, 447 (1976). In fact, the Court has held that the exclusionary rule does not apply to civil tax proceedings, deportation hearings, parole revocation hearings, habeas corpus review, or grand jury proceedings. *Scott*, 524 US at 363 (exclusionary rule does not apply to probation proceedings); *Lopez-Mendoza*, 468 US at 1035 (exclusionary rule does not apply to deportation proceedings); *Janis*, 428 US at 454 (exclusionary rule does not apply to civil tax matters); *Calandra*, 414 US at 347 (exclusionary rule does not apply to grand jury proceedings). See also *Stone*, 428 US at 495 (exclusionary rule not applicable in habeas corpus review). In other words, even where the "civil" matter at hand involves some "penalty," the Supreme Court has nevertheless found the exclusionary rule to be inapplicable.

To that end, the Court of Appeals was correct to describe *One 1958 Plymouth Sedan*, as an "outlying case." Specifically, the Court of Appeals majority concluded that

> [t]he Court's analysis [in *One 1958 Plymouth Sedan*] linked the underlying Pennsylvania civil forfeiture proceeding to a criminal trial. George McGonigle, the car's owner "was arrested and charged with a criminal offense against the Pennsylvania liquor laws." *Id.* The "object" of the forfeiture action, "like a criminal proceeding," was "to penalize" McGonigle for the criminal offense. *Id.* Conviction would have subjected McGonigle "to a minimum penalty of a $100 fine and a maximum penalty of a $500 fine *Id.* at 701, 85 S Ct 1246. Yet in the forfeiture proceeding McGonigle stood to lose his sedan, valued at approximately $1,000—double the maximum fine in the criminal case. *Id.* The Court reasoned: "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, *requiring the determination that the criminal*

> *law has been violated*, the same evidence would be admissible." *Id.* (emphasis added).
>
> The legality of McGonigle's possession of the sedan underpinned the Supreme Court's rationale for applying the exclusionary rule. The Court distinguished between the return of McGonigle's car and a hypothetical return of seized "contraband," such as narcotics or "unregistered alcohol." *Id.* at 698-699, 85 S Ct 1246. Application of the exclusionary rule in the latter circumstances, the Court reasoned, "would clearly have frustrated the express public policy against the possession of such objects." *Id.* at 699, 85 S Ct 1246. In other words, had the forfeiture action involved an item that McGonigle could not have legally possessed, the outcome may well have been different.[26]

The several cases that followed *One 1958 Plymouth Sedan* reaffirmed its limited scope. In *United States v Calandra*, the Court considered whether a witness could be questioned by a grand jury based on evidence obtained outside the scope of a search warrant. Even though the underlying purpose of the grand jury was to "include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions," the Court decided the exclusionary rule did not apply. *Id.* at 343. In weighing the deterrent impact on police misconduct against the high societal cost, the Court concluded:

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police

[26] In the same way, cases involving public nuisance like those cited by the Maxons also require a violation of the penal code. See section II.A above. This case—a nuisance per se—doesn't.

> misconduct at the expense of substantially impeding the role of the grand jury. [*Calandra*, 414 US at 351–352.]

The Court also noted that, although they involve investigations into crimes, a grand jury proceeding is not a criminal trial and does not adjudicate criminal guilt or innocence. *Id.* at 349. Therefore, the rationale for exclusion of evidence during a criminal trial did not apply to a grand jury proceeding (even though the purpose of that proceeding was to investigate crime and issue indictments that might result in convictions). See *Id.*, at 344.

Two years later in *United States v Janis*, 428 US at 447, the Supreme Court held "that the exclusionary rule did not bar the introduction of unconstitutionally obtained evidence in a civil tax proceeding because the costs of excluding relevant and reliable evidence would outweigh the marginal deterrence benefits, which, we noted, would be minimal because the use of the exclusionary rule in criminal trials already deterred illegal searches." *Scott*, 524 US at 363-364.[27]

Less than a decade later, the Court concluded that the exclusionary rule did not apply a civil case regardless of whether the Fourth Amendment violation and subsequent action were pursued by the same authority. In *INS v Lopez-Mendoza*, the Supreme Court declined to apply the exclusionary rule to deportation proceedings after the respondent was illegally arrested by an INS

[27] Notably, *Janis* involved an inter-sovereign situation: the information was discovered by state authorities and later used in the federal tax matter. The Court expressly noted that it was not making a decision on intra-sovereign matters because that question was not before the Court.

agent at his place of employment. The Court concluded that "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime . . .. Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing." *Id*. at 1038. The Court also stated that it was not dealing with "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id*. at 1050–1051. Accordingly, the Court concluded the exclusionary rule did not apply, citing the minimal deterrent impact and high societal cost of permitting an ongoing violation and the civil nature of the underlying proceeding. *Id*. at 1050.

Finally, in *Pennsylvania Bd of Prob & Parole v Scott*, 524 US at 362-364, the Supreme Court again declined to apply the exclusionary rule to matters outside of criminal trials, finding that "the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights." The Court concluded that "application of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings." *Id*. at 364. And, "[t]he rule would provide only minimal deterrence benefits in this context, because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional

searches." *Id.* The Court also noted that, not only has it "generally held the exclusionary rule to apply only in criminal trials," it has, "moreover, significantly limited its application even in that context." *Scott*, 524 US at 364 n 4.

In sum, "United States Supreme Court precedent regarding the exclusionary rule's use in civil cases can be succinctly summarized as follows: 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." *Long Lake II*, ___Mich App at ___, 2022 WL 4281509, at *5.

### C. The exclusionary rule under Michigan's constitution is equally constrained.

And, as the Court of Appeals concluded, Michigan's own constitution tracks the same restrained approach as does its federal counterpart. *Long Lake II*, ___Mich App at ___, 2022 WL 4281509, at *5. In fact, if anything, the participants at our 1961 constitutional convention were "attempting to allow for the possibility of a less stringent application of the exclusionary rule if allowed by federal law, rather than attempting to strengthen Michigan search and seizure protection." *People v Nash*, 418 Mich 196, 212-213; 341 NW2d 439 (1983). Specifically, this Court has remarked that

> [a]ttempts to unite Michigan and United States search and seizure law by adopting the exact language of the Fourth Amendment in the proposed Michigan Constitution were defeated. Instead, the *anti-exclusionary-rule* proviso of Const. 1908, art. 2, § 10 was amended back into the proposed constitution. [*Id.* (emphasis added).]

"There is no indication that in readopting the language of Const 1908, art 2, § 10 in Const 1963, art 1, § 11 the people of this state wished to place restrictions on law enforcement activities greater than those required by the federal constitution. In fact, the contrary intent is expressed." *Id*. See also *People v Goldston*, 470 Mich 523, 536–537; 682 NW2d 479 (2004).[28] As plurality of this Court explained in *People v Nash*, 418 Mich 196, 214; 341 NW2d 439 (1983) (opinion by BRICKLEY, J.): "The history of Const. 1963, art. 1, § 11, and its plain import, however, suggest that its further expansion, with the concomitant expansion of the exclusionary rule to enforce it, should occur only when there is a compelling reason to do so." See *Long Lake II*, 2022 WL 4281509, at *5. See also *Kivela v Dept of Treasury*, 449 Mich 220, 233; 536 NW2d 498 (1995); *Sitz v Dept of State Police*, 443 Mich 744, 752–753; 506 NW2d 209 (1993); *People v Collins*, 438 Mich 8, 28; 475 NW2d 684 (1991).

In fact, citing prior Supreme Court precedents, this Court has also declined to apply the exclusionary rule in civil cases. In *Kivela*, this Court considered whether Michigan would apply the exclusionary rule in a civil tax proceeding. Applying the balancing test outlined by *Janis*, it concluded that the deterrent effect would not be furthered by excluding evidence illegally sized during a prior criminal investigation from subsequent civil tax proceedings.

[28] As such, the exclusionary rule in Michigan is "*not* based on the text of our constitutional search and seizure provision, Const. 1963, art. 1, § 11." *Goldston*, 470 Mich at 526.

Other federal jurisdictions have reached the same conclusion.[29] So have other state courts.[30]

*Kivela* also distinguished prior Michigan case law applying the exclusionary rule in the civil context:

> *Lebel v Swincicki*, 354 Mich 427, 435–440; 93 NW2d 281 (1958) and *McNitt v Citco Drilling Co*, 397 Mich 384; 245 NW2d 18 (1976), do not support the defendant's arguments. Although these cases state that "Michigan's exclusionary rule [has in certain cases been applied] in civil proceedings," *Lebel* and *McNitt* involved removal of blood from a living person, a degree of intrusiveness not present when police armed with a warrant search one's home. We find

[29] *United States v Phillips*, 914 F3d 557, 558–559 (7th Cir., 2019) ("In other non-criminal-trial procedural contexts that have adversarial qualities and carry significant risks for defendants, the Court has found that the exclusionary rule is not worth the "substantial social costs" that would accompany it."); *Johnson & Johnson v Advanced Inventory Mgt, Inc*, No. 20-CV-3471, at *2 (ND Ill, October 2, 2020) ("The overwhelming weight of authority strongly suggests that the exclusionary rule does not apply in any civil actions."). In fact, one of the Maxons own purportedly supporting citations is an excellent example of a civil case where another federal circuit found exclusionary rule does *not* apply. Compare *Grimes v CIR*, 82 F3d 286, 287–88 (9th Cir, 1996)(the exclusionary rule does not prohibit the IRS from using information from documents seized by FBI agents during an allegedly illegal search in a criminal investigation), with Supplement, 52 n 17. Same for *Tirado v CIR*, 689 F2d 307, 308 (2nd Cir, 1982), which again found the exclusionary rule to be inapplicable. Supplement, 52 n 17.

[30] *Francen v Colorado Dept of Revenue, Div of Motor Vehicles*, 328 P3d 111 (Colo, 2014) (exclusionary rule not applicable in license revocation hearings); *59th & State St Corp v Emanuel*, 70 NE3d 225, 232–234 (Ill App Ct, 2016). Contrary to the Maxons' argument, state courts have not held that the exclusionary rule applies in a civil matter like this one. *State v Lussier*, 171 Vt 19, 23; 757 A2d 1017 (2000), involved a criminal DUI matter with an officer stop and arrest; *Goldin v Pub Utilities Comm*, 23 Cal 3d 638, 669 n 19; 592 P2d 289 (1979), considered a warrant obtained by virtue of affidavits that were the product of illegal entrapment (and never analyzed the Fourth Amendment exclusionary rule at all); and *Finn's Liquor Shop, Inc v State Liquor Auth*, 24 NY2d 647; 249 NE2d 440 (1969), involved agents raiding shops and homes—and was also issued decades before the relevant Supreme Court precedent discussed above.

> these cases inapplicable to the instant case. [*Kivela* 449 Mich at 236.]

Moreover, *Lebel* and *McNitt* did not have the benefit of the development of law on this issue in *Scott* or *Lopez-Mendoza* or this Court's own subsequent analysis on the scope of Michigan's exclusionary rule in relation to its federal counterpart. As recently noted by the Supreme Court, "[a]dmittedly, there was a time when our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine." *Davis v United States*, 564 US 229, 237; 131 S Ct 2419; 180 L Ed 2d 285 (2011). However, courts–including this Court—have since "abandoned the old, 'reflexive' application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits." *Id.* at 238.

### D. The Court of Appeals correctly found that the exclusionary rule does not apply here.

#### 1. The deterrent impact is speculative at best in civil matters and the societal cost in instances of continuing wrongs is unacceptably high. Thus, balancing of the factors does not support application of the exclusionary rule.

Application of the balancing test "establishes that the exclusionary rule has no place here." *Long Lake II*, 2022 WL 4281509, at *6. The Court of Appeals was correct in concluding that

> [t]here is no likelihood that exclusion of the drone evidence in this zoning infraction matter will discourage the police from engaging in future misconduct, since the police were never involved in the first place. Rather, exclusion of the drone evidence likely will deter a township employee who works in the zoning arena from ever again resorting to a drone to gather evidence of a zoning violation. This is not the purpose of the exclusionary rule. [*Id.*]

There was no collusion or unethical agreement with any law enforcement agency, whether inter- or intra-sovereign. And the Township is not pursuing any penalty whatsoever in this case; the Maxons face no "punishment" or other criminal sanction for the past *years* of violations. The proceedings are not punitive. "The exclusionary rule was not intended to operate in this arena, and serves no valuable function." *Id*. at *7.

On the other hand, the societal costs of exclusion are significant. In asking for exclusion of probative and reliable evidence detailing the Maxons' increasingly hazardous use of their low-density residential property, Defendants are essentially asking the Court to turn a blind eye to an ongoing public nuisance. The Supreme Court has already rejected the exclusionary rule in such a circumstance:

> The first cost is one that is **unique to continuing violations of the law. Applying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law. This Court has never before accepted costs of this character in applying the exclusionary rule**. [*Lopez-Mendoza*, 468 US at 1046 (emphasis added).]

The *Lopez-Mendoza* Court went on to conclude that "*no one* would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized." *Id*. (emphasis added). But that's precisely what's happening here. The Maxons

are suggesting that this Court exclude reliable evidence and permit them to continue use of their property as a nuisance per se.[31] The Supreme Court has expressly rejected use of the exclusionary rule in a civil matter in the face of such a cost.

The Supreme Court has left open the *possibility* that the exclusionary rule could be applicable in civil matters where there are "egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Lopez-Mendoza*, 468 US at 1050-1051 (1984). But that is not what happened in this case. Aerial images or observations are not Fourth Amendment violations in other contexts (they are "no search at all"); their capture here by a drone can hardly be called "egregious." And, to that point, it would have been (and still is) reasonable to rely on binding precedent regarding aerial observations. The Maxons' assertion that there was some nefarious or intentional Fourth amendment violation, and that this weighs in favor of exclusion is also wrong. Compare Supplement, 47-50. Thus, there is neither "police" conduct nor culpability in this case and, likewise, there is no basis for application of the exclusionary rule.

[31] Further, like the Defendant in *Lopez-Mendoza*, the Maxons would still be subject to civil proceedings for *ongoing* violation of the law. And as the Court of Appeals correctly noted, the fact that the inner portions of the property are only visible from the air would make future enforcement challenging despite the fact that the condition of the property is not in dispute, i.e., the drone images are accurate.

It is completely unclear, therefore, what criminal law enforcement deterrent benefit would be derived from application of the exclusionary rule, and it is equally clear that the cost to society would be significant if the evidence were excluded. And, on the other hand, there is nothing about the facts or outcome of this case that would make a reasonable police officer believe that any of the extreme, dystopian concerns put forth by the Maxons would be lawful or permissible from a Fourth Amendment standpoint.

The Maxons urge this Court to adopt a three-factor test in deciding whether the exclusionary rule applies. Supplement, 44-54. First, this test is not found in any case law, nor has it been applied in any Supreme Court case. The Supreme Court has clearly said what it meant: the only test is to consider the impact exclusion will have on deterring *police* misconduct against the social cost of excluding reliable evidence. And in its application of this test, the exclusionary rule has "never" applied to any civil case, even where cases have serious criminal-like penalties. In other words, "United States Supreme Court precedent regarding the exclusionary rule's use in civil cases can be succinctly summarized as follows: 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." *Long Lake II*, ___Mich App at ___, 2022 WL 4281509, at *5.

But even if this Court were to apply the factors suggested by the Maxons, the Township would nevertheless prevail. First, the civil proceeding here is not

analogous to the formality of a criminal trial. See Supplement 45-47. Michigan civil rules promote open, cooperative discovery and facilitation and mediation—practices that are not present in a criminal trial. See MCR 2.302; MCR 2.401, et seq. Moreover, civil tax proceedings, deportation proceedings, grand jury proceedings, and revocation of parole are all regulated, structured, and adversarial proceedings; but the exclusionary rule applies to none of them. Next, even assuming for the sake of argument only that there was a Fourth Amendment violation, it was hardly intentional. See Supplement, 47-50. For example, there was no reason for any Long Lake official to believe that the Township was prohibited from lawfully doing what any private citizen may still lawfully do: fly a drone high above wooded property. And, third, the so-called "uniform" of the alleged violator *does* matter. The exclusionary rule is designed to sanction and deter *police* misconduct. *Anstey*, 476 Mich at 447–448. No police were involved in this case; no crime or punishment is involved, either. Therefore, even under the Maxons' proposed test, the exclusionary rule would not apply.

The Court of Appeals reached the correct result in *Long Lake II* and the present application should be denied. Alternatively, this Court should grant leave and affirm.

**2. There is no "compelling reason" for this Court reach a different result under Michigan law.**

There is no "compelling reason" for this Court reach a different result under Michigan law. *Kivela*, 449 Mich at 233. To start, Michigan applies the

same balancing test analyzed above. And, assuming for the sake of argument only that some unmanned aerial observations could be a Fourth Amendment violation, the fact that a claimant could possibly pursue other civil remedies against a municipality would be deterrent enough. See *Bauserman v Unemployment Ins Agency*, 509 Mich 673; 983 NW2d 855 (2022). And, even if *Bauserman* would not apply as the Maxons argue, there are nevertheless other civil remedies for violations of the federal constitution. For example, parties may also seek injunctive or declaratory relief. See *INS v Lopez-Mendoza*, 468 US at 1045. Civil suits and declaratory or injunctive relief are—unlike the exclusionary rule—specifically designed as redress for a constitutional violation.

The Maxons (repeatedly) express a fear that drones might be used in a manner not at all advocated by the Township or, quite frankly, at issue in this case. But there is absolutely no evidence that exclusion of non-curtilage drone photos taken from high above the tree canopy in this zoning action would have any deterrent effect whatsoever on a law enforcement agency that wanted to use a warrantless search by an unmanned aircraft to peek into a home or to surveil a person, as the Maxons claim. Nor does the *Long Lake II* opinion provide them with any justification to do so.[32]

[32] Further, none of the exaggerated hypotheticals previously raised by the Maxons warrant a different outcome here. A "search" of medical records, financial records, or other "data" is not at issue. Michigan already has statutes to protect these "papers," as does the federal law. See, e.g., MCL 600.2157. And a physical trespass onto "papers" would be fundamentally different than taking a look at open property from the air.

Recall again that "[e]xclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Davis,* 564 US at 236 (quotation omitted) The rule is "unsupportable as reparation or compensatory dispensation" to an injured party. *Id.* quoting *Janis*, 428 US at 454 n 29. "The rule's *sole* purpose, we have repeatedly held, is to deter future Fourth Amendment violations." *Id.* at 236–237 (emphasis added). Considering each of these factors, the Court of Appeals majority reached the correct result: the exclusionary rule does not apply to this civil zoning enforcement matter under either federal or Michigan law.

## RELIEF REQUESTED

WHEREFORE, Long Lake Township respectfully requests that this Court DENY the Maxons' application for leave to appeal. In the alternative, the Township requests that this Court GRANT leave and find that no Fourth Amendment violation occurred and that the exclusionary rule does not apply in this context. The Township respectfully requests any additional relief deemed necessary, including costs and fees in connection with this appeal.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212. I certify that this document contains 15,925 countable words as calculated by the word process program used in its creation. The document is set in Century Schoolbook, and the text is in 12-point double spaced type.

Respectfully submitted,

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