STATE OF MICHIGAN
IN THE SUPREME COURT

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

DEFENDANT-APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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Introduction

Long Lake Township deliberately used a drone to repeatedly scour the Maxons' home for evidence against them in civil law-enforcement proceedings. The opening brief shows why the Township's actions violated the Fourth Amendment: both because it intruded on the Maxons' curtilage and invaded their reasonable privacy expectations. And to deter the Township from conducting this unreasonable, warrantless surveillance again, the Court should order that evidence excluded. If this Court doesn't hold as much, government agents across Michigan will have carte blanche to deploy creepy drone surveillance on whomever they want, whenever they want, for whatever reason they want.

The Township makes arguments predicted—and refuted—in the Maxons' opening brief. It relies heavily on the incorrect assumption that the Fourth Amendment's intrusion test has some jigsaw carveout for intrusions-by-drone (**Part I.A**). Its privacy argument extends prior aerial-surveillance cases past their breaking point (**I.B**). And its claims that it didn't search the Maxons' curtilage (**I.C**) and that the Maxons somehow consented to this surveillance (**I.D**) are factually and doctrinally unsound.

The same holds for the Township's exclusionary-rule arguments. Its conception of what makes a case quasi-criminal is unduly narrow (**II.A**). It ignores the opening brief's analysis of the factors that weigh against exclusion and explanation of how those factors are not present here (**II.B**). And it fails to seriously contest the deterrent value

of excluding the unconstitutional drone evidence—while inflating the minimal costs of doing so (**II.C**). To ensure regular, warrantless drone surveillance doesn't pervade this state, the Court should reverse.

Argument

I. The drone surveillance was an unreasonable search.

A. The drone surveillance was a search under the intrusion test.

1. The government "searches" when it physically intrudes on a protected area to gather information. *Florida v Jardines*, 569 US 1, 6 (2013). Yet the Township claims (at 43) the intrusion test is "inappropriate" for drones; in its view, only the *Katz* framework applies.

That makes no sense. The Township concedes (at 42) the intrusion test applies "alongside" *Katz*. Although the Township is right (at 43) that the U.S. Supreme Court hasn't yet applied the intrusion test to "aerial observation," that's because it hasn't yet had the opportunity. After all, *United States v Jones* rejuvenated the intrusion test only in 2012, decades after the *Katz*-focused flyover cases the Township relies on. And as the Maxons explained, lower courts *are* holding that drone surveillance implicates the intrusion test. Opening Br. 22 (collecting cases). The Township doesn't meaningfully distinguish those cases. It cites no authority *foreclosing* the intrusion framework for drones. And its implication (at 43) that the intrusion test applies only to searches of "an[] individual" is just incorrect. See *Jardines*, 569 US at 8-9 (applying it to real property).

2. As the opening brief demonstrates (at 16-24), the drone's intrusion onto the Maxons' property to investigate alleged zoning violations violates the intrusion test.

First, the *ad coelum* doctrine—whatever its applicability to private torts today—fully applied at the Founding. Under that doctrine, homeowners owned their plot upward indefinitely. *Harlow v Lake Superior Iron Co*, 36 Mich 105, 108 (1877). The Township's intrusion onto the airspace over the Maxons' home to gather evidence would therefore easily be a search at the Founding. Because the Fourth Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted," *United States v Jones*, 565 US 400, 411 (2012), that intrusion *must* be a search today. Opening Br. 18-19. The Township gives zero response to this.

Second, the drone surveillance is an intrusion even without the *ad coelum* principle. Even today, property owners maintain "exclusive control" over their "low altitude" airspace; an aerial intrusion may not make "a direct and immediate interference with the enjoyment and use of the land." *United States v Causby*, 328 US 256, 264-266 (1946). Drones, which must fly below 400 feet, fit that bill. The Township's drone was both comfortably under that altitude and so disturbed Mr. Maxon that he followed it and confronted its operator. Opening Br. 19-22.

3. The Township raises a smattering of objections in response. It claims (at 45-46) that its drone was allowed to intrude on the Maxons' property because it stayed below 400 feet, its operator was licensed, and the drone stayed "above the trees." None of that makes a difference. True, drones may not fly *higher* than 400 feet. 14 CFR

107.51(b). But that doesn't mean the FAA has blessed all drone flights *below* that altitude. Nor have federal courts. E.g., *Nat'l Press Photographers Ass'n v McCraw*, 504 F Supp 3d 568, 588-591 (WD Tex, 2020) (dismissing claim that state-created drone no-fly zones for "protect[ing] privacy or prevent[ing] trespass or voyeurism" are federally preempted). As for licensing, while state statute (MCL 259.311) authorizes licensed people to "operate" drones, *who* may fly drones says nothing about *where* they may fly. And the Township cites no authority for its claim that being "above the trees" transforms private property into "public" land. As the Court of Appeals explained, drones "fly below what is usually considered public or navigable airspace." Maxon App'x 0032.

Other Township objections are irrelevant, too. It says (at 43) it cared only about getting "overhead views" of the Maxons' home. But "observ[ing]" curtilage from a lawful place is far different from "enter[ing]" it to gather evidence. *Collins v Virginia*, 138 S Ct 1663, 1675 (2018). The drone did the latter, which is a search. *Id.* Finally, the Township presents (at 44 n 17) a laundry list of hypothetical drone uses—like GIS mapping and private, recreational drone flights—it says will be inhibited if *this* drone surveillance is a search. But those uses aren't implicated here. As the Maxons already explained, the intrusion test applies only when government is gathering *evidence*. *Collins*,

138 S Ct at 1670; Opening Br. 22-24. And even when the government wants to gather evidence, it can always apply for a warrant.[1]

B. The drone surveillance was a search under the privacy test.

Once holding the drone surveillance violated the intrusion test, the Court doesn't need to reach further on the search question. *Jardines*, 569 US at 11 (intrusion test "keeps easy cases easy").

But if the Court reaches further, the drone surveillance was also a search under the expectation-of-privacy test. That test contains both a subjective and objective component. *California v Ciraolo*, 476 US 207, 211 (1986). The Maxons held a subjective privacy expectation because they "conceal[ed]" the parts of their property the Township searched "from at least street-level views." *Id.* And that expectation was objectively reasonable because the Township needed to use "enhancing technology" to obtain information "that could not otherwise have been obtained without physical 'intrusion

[1] The Township (at 44 n 17) raises concerns about "environmental … protections." Indeed, it later (at 67) compares the Maxons' home to a "hazardous waste dump." But its circuit-court complaint alleges nothing more than an aesthetic zoning violation. Maxon App'x 0042-0045. For true "hazards," the exigent-circumstances exception excuses the warrant requirement—but the Township has never argued that exception applies. Likewise, the Court's analysis shouldn't be colored by the Township's apparent taking for granted that it will ultimately prevail in *proving* the complaint's legal allegations. Compare, e.g., Township Supplement 41 (referring to the property as a "salvage yard"), 42 ("junk yard"), 67 ("*years* of violations"), 68 ("nuisance per se"), with Maxon App'x 0108 (circuit court "carefully not referring to these as derelict vehicles" because whether the property is in violation is "disputed").

into a constitutionally protected area.'" *Kyllo v United States*, 533 US 27, 34 (2001); Opening Br. 24-26.

The Township misconstrues U.S. Supreme Court precedent in arguing otherwise. It argues (at 33) that aerial surveillance is *never* a Fourth Amendment search, even when street-level views are blocked.[2] But this is just wrong. The U.S. Supreme Court has expressly rejected "that an inspection of the curtilage … from an aircraft will always pass muster." *Florida v Riley*, 488 US 445, 451-452 (1989) (plurality); *Ciraolo*, 476 US at 215 (police did not need a warrant "at this altitude" [1,000 feet]). Drones surveil from altitudes below which the U.S. Supreme Court has ever allowed, Maxon App'x 0060, and they rely on remote "enhancing technology" for their observations, *Kyllo*, 533 US at 34, unlike the naked-eye aerial observations blessed in *Ciraolo* and *Riley*. Using that technology to (repeatedly) surveil the Maxons invaded their reasonable privacy expectations. Opening Br. 26-30; Maxon App'x 0031-0032.

The Township also says (at 36, 41) that the Maxons lacked a reasonable privacy expectation from drone surveillance because it could have obtained similar information

[2] The Township claims (at 41) *Kyllo* holds that "visual observation is no 'search' at all," period. Far from it. Justice Scalia's majority opinion was describing cases holding that "examining the portion of a house that is in *plain public view*," unlike the Maxons' backyard, is not a "search" for Fourth Amendment purposes. 533 US at 32 (emphasis added). In so doing, he critiqued those cases' counterintuitive result that "a search [was] not a *search*" *Id.* (emphasis added). This laid foundation for the test, later adopted by Justice Thomas and Judge Thapar and the full Iowa Supreme Court, focusing on the ordinary meaning of "search": purposeful, investigative acts. See Opening Br. 30-35. The drone surveillance easily satisfies that test. *Id.*

via photographs from neighboring properties or Google Earth. But *Kyllo* expressly holds that "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." 533 US at 35 n 2. And in fact, the Court of Appeals correctly recognized that "most" of the area the drone searched "is not visible from the ground." Maxon App'x 0032; cf. Township Supplement 68 n 31 (conceding the "inner portions of the property" are visible only "from the air"). After all, if the Township already had all the evidence it needed from other means, why use a drone? The only reason is to view areas *inaccessible* from public or neighboring land—that is, areas the Maxons kept private. The use of enhancing technology to surveil those private areas was a search.

C. The drone surveillance was a search of the curtilage.

The Township's drone searched throughout the Maxons' curtilage, making it all the more unreasonable. The Township searched the areas instantly near the Maxons' home, including their immediate backyard, their driveway, and just outside their two garages. These areas are classic curtilage. *State v Chute*, 908 NW2d 578, 585 (Minn, 2018) (collecting cases); Opening Br. 14-15.

As the opening brief explains (at 13), the government bears the burden of proving its search was not of curtilage. Below, the Township did not even try to meet that burden. *Id.* For the first time now, the Township argues that its drone searched "open fields," not curtilage. Even if those arguments aren't waived, they are meritless.

The Township focuses its argument (at 29-30) on the idea that it did not search curtilage because the areas its drone searched were not hidden—either because the Maxons' backyard lacked a fence or because it was visible from the street. But in reality, the area behind and to the left of the Maxons' home is well-hidden from the street. Opening Br. 15. Trying to resist that fact, the Township (at 29-30) includes screenshots purportedly from Google's "street-view" function, claiming these are "equal[]" to "the drone pictures."

But a cursory glance at the drone photographs (e.g., Maxon App'x 0058) demonstrates that the street-view photographs show nothing close to the drone pictures.

Only the drone would allow "members of the public" to "freely observe [the Maxons'] entire backyard." *United States v Wells*, 648 F3d 671, 678 (CA 8, 2011). Given that, the Township's point about the lack of a fence is immaterial. It is well established that "requiring a person to expend resources and sacrifice aesthetics by building a fence … to obtain protection from unreasonable searches is not required." *United States v Diehl*, 276 F3d 32, 40 (CA 1, 2002) (collecting cases).

The Township's curtilage argument is so strained that it relies heavily (at 31-33) on *Dow Chem Co v United States*, 476 US 227, 229 (1986)—a case involving a search, not of a home, but an industrial chemical plant. Cases involving corporate manufacturing facilities are irrelevant here; the Fourth Amendment treats "the home [a]s first among

equals." *Jardines*, 569 US at 6. The Township searched the property on which the Maxons' home sits. It searched an area of the home Mr. Maxon uses, not as a "businessman" (contra Township Supplement 32), but, as the Township concedes (at 18 n 3), for hobbies. See *United States v Reilly*, 76 F3d 1271, 1279 (CA 2, 1996) (use of property for "recreation" cuts toward curtilage finding). The Township's search was unreasonable because it searched the Maxons' curtilage.

D. The Maxons did not consent to drone surveillance.

Nor was the drone surveillance "reasonable" because of consent. The Township says (at 49-51) the Maxons consented to warrantless drone surveillance—either because the parties' 2008 settlement agreement grants "implicit permission" to do so, or because the Maxons' application to build a perimeter fence required an inspection of any fence built.

Both arguments stretch consent doctrine past its breaking point. Consent to search must be "specific" and "unequivocal," and government bears the burden of proving it. *Andrews v Hickman Co*, 700 F3d 845, 854 (CA 6, 2012) (citations omitted). The settlement agreement is silent (far from unequivocal) on future searches, much less about any "specific" means for conducting them. Maxon App'x 0040-0041; see *id.* at 0033 (Court of Appeals reaching same conclusion). As for the Maxons' consent to a fence inspection: The scope of consent is defined by the search's "expressed object," *Florida v Jimeno*, 500 US 248, 251 (1991), and the government cannot "exceed[] the scope of … valid consent," *People v Mead*, 503 Mich 205, 216 (2019). Even assuming the

Maxons consented to an inspection of a *perimeter* fence, the drone here was not used to inspect a fence; it toured the *interior* of the property for the express purpose of "provid[ing] evidence for … code enforcement." Maxon App'x 0046. The Maxons didn't consent to *that*.[3]

II. The exclusionary rule applies.

Because the drone surveillance violated the Fourth Amendment, evidence from that surveillance must be excluded. The opening brief explains why the exclusionary rule applies to this enforcement action: It is quasi-criminal; none of the discrete considerations cautioning against exclusion apply here; and the substantial deterrence benefits outweigh the minimal costs. Opening Br. 39-57. The Township's contrary arguments lack merit.

A. The Township starts by arguing (at 52-55) that this case isn't quasi-criminal because it doesn't involve "criminal allegations." But whether the Township could have "alternatively sought to enforce a parallel criminal statute" is just one of several factors informing, for federal-law purposes, whether "a civil enforcement proceeding is quasi-criminal in nature." *TitleMax of Delaware, Inc v Weissman*, 24 F4th 230, 236 (CA 3, 2022). Courts also ask whether the proceeding is brought by the government as sovereign; whether there are "other similarities" to criminal cases, like

[3] It's questionable even whether the Maxons consented to a fence inspection, because consent isn't necessarily satisfied where the government "*requires* the affected population to 'consent'" to access a benefit. *Lebron v Secretary, Florida Dep't of Children & Families*, 710 F3d 1202, 1215 (CA 11, 2013).

an investigation leading to the charges; and whether it seeks to sanction the target for alleged wrongful acts. *Id.* All three of those factors exist here. The Township's sovereign investigation led it to believe the Maxons are violating the Township's nuisance and zoning laws; if the Township wins, the Maxons will face fines as punishment.[4]

B. The Township (at 55 n 24) chides the Maxons' arguments as "misleading," claiming they omit recent U.S. Supreme Court cases "clarif[ying]" when the exclusionary rule is "appropriate." To the contrary, the opening brief rigorously analyzes those cases by name—and, when those cases explain what considerations counsel *against* exclusion in that case, the opening brief (at 44-50) takes them at their word.

The U.S. Supreme Court has found exclusion unworkable, for example, when the proceeding is insufficiently adversarial or not governed by ordinary procedural and evidentiary rules. Opening Br. 45-47 (analyzing *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 363-366 (1998), *Immigration & Naturalization Serv v Lopez -Mendoza*, 468 US 1032, 1048 (1984), and *United States v Calandra*, 414 US 338, 343 (1974)).[5] Other times, it has found exclusion wouldn't serve its deterrence function because the

[4] As the Township concedes (at 52), if the Maxons lose, they "shall" be "subject to a fine" of up to $500 per day "[i]n addition" to abatement. Township App'x 0040T.

[5] *Scott* does not support a categorical ban on exclusion in civil cases. Contra Township Supplement 56. The Court declined the exclusionary rule in that non-criminal-trial context, to be sure. But that was because the parole-revocation proceeding was too informal—unlike here, *Scott* involved no "trial" at all. 524 US at 366-367.

constitutional violation wasn't the fault of either the searching officer or the entity prosecuting that case. Opening Br. 47-50 (analyzing *Herring v United States*, 555 US 135, 137 (2009), *United States v Leon*, 468 US 897, 920-921 (1984), and *United States v Janis*, 428 US 443, 458 (1976)). But none of those considerations are present here. Opening Br. 44-50.

Nor do those recent cases limit exclusion to only the misdeeds of *police* officers. Contra Township Supplement 56-57. Some cases involve misdeeds by police, so, naturally, the opinion refers to what "the police" did. But exclusion deters the misdeeds of government investigators, period. Other cases use more precise language to reflect that elementary point. *Davis v United States*, 564 US 229, 246 (2011) (focus is on deterring "culpable law enforcement conduct"); *People v Goldston*, 470 Mich 523, 539 (2004) (quoted at Township Supplement 57) ("deterrent effect on law enforcement officers").

C. The Township (at 66) correctly identifies that, in analyzing whether exclusion is appropriate, courts balance exclusion's deterrent effect against its costs. But in arguing that the "deterrent impact is speculative" here (*id.*), the Township simply repeats its mistaken belief that exclusion exists only to deter *police* officers. *Id.* at 69. Again, that is wrong; exclusion exists to deter zoning law-enforcement officers just like criminal law-enforcement officers. The Township has no other argument on deterrence. With that off the table, it does not seriously dispute that exclusion would deter it from playing fast-and-loose with the Maxons' (or other residents') Fourth

Amendment rights again. Exclusion would incentivize it to get a warrant for future drone surveillance.

Speaking of warrants: The fact that the Township's concerns with the Maxon home are ongoing minimizes any cost of exclusion. Cf. Township Supplement 67-68. As the Court of Appeals pointed out, the Township can seek a warrant and try again. Maxon App'x 0033.[6]

Relief Sought

The Court should grant the Application and order all evidence obtained from the drone surveillance excluded.

[6] The Township could also proceed with the constitutionally obtained evidence it claims is "equal[]" to "the drone pictures." See p 8, above.

Dated: September 8, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023, I electronically filed the foregoing Supplemental Reply Brief on behalf of Defendant-Appellants, causing all parties of record to be served through the MiFILE system of the Michigan Supreme Court.

/s/ Michael Greenberg
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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212 and 7.305(E). I certify that this document contains 3,176 countable words and is set in 14-point, double-spaced Garamond type.

Dated: September 8, 2023.

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