STATE OF MICHIGAN
IN THE SUPREME COURT

LONG LAKE TOWNSHIP,

Plaintiff-Appellee,

-vs-

TODD MAXON AND HEATHER MAXON,

Defendants-Appellants.

Supreme Court No.

Court of Appeal No. 349230

Grand Traverse CC No. 18-034553-CE

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DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL
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Introduction and Statement of Grounds for Application

This appeal asks this Court to decide whether the government has unfettered discretion to use drones to spy on your home and then use that information to punish you in court for alleged zoning violations. Over a dissent, the Court of Appeals held that it does, thereby empowering local government officials to use technologically advanced drones to surveil people's private homes whenever they wish. Left undisturbed, the lower court's decision will have devastating consequences for all Michiganders' Fourth Amendment right to be secure in their persons and property.

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

Earlier in this litigation, the Court of Appeals correctly held that the government's warrantless drone surveillance was an unreasonable search in violation of the Fourth Amendment. But upon remand from this Court, the Court of Appeals rendered toothless its earlier decision. It held that even if repeated warrantless drone surveillance violated the Maxons' constitutional rights, Long Lake could nonetheless use evidence collected from that constitutional violation to punish the Maxons in this civil enforcement lawsuit. The Court of Appeals majority wrongly concluded that the exclusionary rule exists only to deter misconduct by police officers pursuing violations of criminal law. Contrary to

Judge Jansen's dissenting view that the suppression remedy is designed to safeguard Fourth Amendment rights *generally* through its deterrent effect, no matter the uniform worn by the offending officer, the majority held that exclusion serves "no function" when officials other than the police violate your constitutional rights.

If left to stand, the court's decision will allow a vast array of government officials to trample the people's Fourth Amendment rights consequence-free. It demands this Court's correction.

First, this Court should affirm the Court of Appeals' original conclusion that the government's warrantless drone surveillance was an unreasonable search. The government violated the Maxons' rights under any of the tests for whether a "search" has occurred. But clarifying which of the several tests used by federal and state courts controls is of "major significance to the state's jurisprudence." MCR 7.305(B)(3). And as advanced drone technology proliferates throughout government agencies across the state—making it ever easier, cheaper, and more efficient for law enforcement to surveil the people's most intimate spaces—this Court must step in to ensure that "police technology" does not "erode the privacy guaranteed by the Fourth Amendment." *Kyllo v United States*, 533 US 27, 34; 121 S Ct 2038; 150 L Ed 2d 94 (2001). The extent to which government may use this cutting-edge technology to surveil its citizens without judicial oversight is of "significant public interest," MCR 7.305(B)(2). This Court should grant leave to appeal and hold that the Fourth Amendment protects the people of Michigan from such warrantless intrusions.

But constitutional protections are meaningless without remedies to enforce them. And here, the Court of Appeals' majority opinion would let government officials conduct warrantless drone surveillance with impunity—even though that surveillance violates the Fourth Amendment. Worse, its decision creates a bright line rule: the exclusionary rule simply does not apply when the offending officers violate your Fourth Amendment rights in the course of looking for civil rather than criminal

violations. That line in the sand is unsupported by caselaw and, in effect, would leave little incentive for a vast array of government officials from committing even blatant constitutional violations.

Judge Jansen's view in dissent comes closer to the mark. As she recognized, the suppression remedy is designed to safeguard Fourth Amendment rights *generally* through its deterrent effect, no matter the uniform worn by the offending officer. The remedial structure in place to ensure the people's freedom from arbitrary searches remains meaningful carries significant public interest and is of major significance to the state's jurisprudence. MCR 7.305(B)(2), (3). This Court should grant leave to appeal and remand for an order suppressing all evidence resulting from the government's warrantless drone search of the Maxons' property.

Statement Identifying Judgment

Defendants-Appellants Todd and Heather Maxon seek leave to appeal the Court of Appeals' September 15, 2022 opinion in *Long Lake Twp v Maxon*, Court of Appeals Docket No. 349230, ___ NW2d ___; 2022 WL 4281509. (App. 0001-0008.) The Court of Appeals' decision came following this Court's order of May 20, 2022 (reported at 973 NW2d 615 and attached at App. 0019), remanding to the Court of Appeals "to address the additional issue of whether the exclusionary rule applies to this dispute." The Court of Appeals held that the exclusionary rule does not apply to this dispute and remanded the case for further proceedings. Judge Kathleen Jansen entered her dissenting opinion on September 15, 2022, the same date as the Court of Appeals' decision. (App. 0009-0018.)

Statement of Questions Presented

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

1. Did the government's warrantless drone surveillance of the Maxons' home constitute an unreasonable search, in violation of the Fourth Amendment?

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

   The Circuit Court answered, "No."

   Plaintiff-Appellee answers, "No."

   Defendants-Appellants answer, "Yes."

2. May the government use evidence gathered from its unconstitutional search of a property owner's home to further its case in a punitive civil enforcement action against that property owner?

   The Court of Appeals answered, "Yes."

   The Circuit Court did not decide.

   Plaintiff-Appellee answers, "Yes."

   Defendants-Appellants answer, "No."

Statement of Facts and Proceedings

This is an appeal from the denial of a motion to suppress evidence obtained from the government's warrantless use of an aerial drone to surveil Defendants Todd and Heather Maxon's property. The issues here are fairly straightforward, but the road has been long and winding.

A. The Maxons live on a five-acre property in Long Lake Township, just west of Traverse City. Mr. Maxon is a hobbyist: He fixes up and tinkers with automobiles for recreation. And for many

[1] As explained below, the Court of Appeals' decision on this question was later vacated on other grounds by this Court.

years, Long Lake Township's officials have sought to use an overzealous reading of the Township's code to make it harder for him to do that.

It began fifteen years ago, when the government filed an enforcement action against Todd Maxon, alleging that the property was being used as an illegal junkyard. (App. 0022.) That case settled in 2008—favorably for Todd. The Township agreed to reimburse him for more than $3,000 in attorneys' fees. And it agreed "not to bring further zoning enforcement action against Defendant Maxon based upon the same facts and circumstances which were revealed during the course of discovery … ." The settlement imposed no obligations on him. (App. 0037-0038.)

B. Todd and Heather thought that favorable settlement was the end of the matter, but the government did not. A decade later, in August 2018, the government brought a new zoning enforcement action against them. It alleged that the Maxons had "significantly increased the scope" of items "being kept on their property" since the 2008 settlement. It alleged that the Maxons' use of their property constituted a "nuisance per se." And it requested the Circuit Court "order Defendants to abate the nuisance" and "award such other costs, fees and relief that the Court deems just." (App. 0039-0042.)

How did the government justify its allegations? After all, as the Court of Appeals recognized, "very little, if any" of the Maxons' property "is visible from the ground because the view is blocked by buildings and trees." *Long Lake Twp v Maxon*, 336 Mich App 521, 526; 970 NW2d 893 (2021), vacated on other grounds, 973 NW2d 615 (Mich May 20, 2022); see also App. 0055. So the government relied on aerial photographs and video it obtained through its repeated, warrantless drone surveillance of the Maxons' home.

C. Long Lake's plan began in April 2017, when it hired a drone operator named Zero Gravity and paid it $1,200 for the express purpose of surveilling the Maxons—"to provide evidence for the purposes of code enforcement." (App. 0043-0045). Zero Gravity's drone was an unmanned,

remote-controlled aircraft equipped with a high-powered camera. Drones are quiet and tiny compared to fixed-wing airplanes and helicopters; federal regulations require that they weigh less than 55 pounds, including attachments. 14 CFR 107.3 (2022). Because of that small size, they are much stealthier than larger aircraft. And under federal law, drones must fly below 400 feet above ground level. 14 CFR 107.51(b) (2022). Here, the videos and photographs show that Zero Gravity's drone surveilled the Maxons' property at altitudes well below *200 feet*. One video, for instance, showed the drone flying at the same height as the treetops on the Maxons' property, and the tallest tree *ever* recorded in Michigan was 155 feet tall. See Emily Bingham, *A remote Upper Peninsula white pine has been crowned Michigan's tallest tree*, MLive <https://www.mlive.com/news/2021/10/a-remote-upper-peninsula-white-pine-has-been-crowned-michigans-tallest-tree.html> (posted October 29, 2021) (accessed October 26, 2022).

Nor was Long Lake's surveillance a one-off occurrence. Zero Gravity surveilled the Maxons' home on three separate occasions over two years: in April 2017; in May 2017; and in May 2018. (App. 0061.) But despite that lengthy period, Long Lake never even tried to obtain a search warrant. The resulting surveillance videos and photographs were so detailed that the government managed to introduce maps detailing exactly which items had moved places between visits to the property and the exact location to which those items had been moved. (App. 0050-0054.)

On May 5, 2018—the government's third surveillance flight on the Maxons' property—Mr. Maxon noticed the drone flying overhead. Startled as to why an unknown object was flying about his property, he followed the drone to a baseball field several hundred feet away, where he confronted the drone's operator. When Mr. Maxon asked to see the operator's license, the operator refused, citing a federal law requiring drone operators to produce a license only when asked for identification by law enforcement. (App. 0056-0057.)

D. Long Lake introduced its video and photographic evidence against the Maxons in its new enforcement suit. The Maxons moved to suppress, arguing the drone photographs violated their

Fourth Amendment rights. After briefing and a hearing, the Circuit Court denied the motion, finding that Long Lake's drone surveillance was not a "search" warranting constitutional scrutiny. (App. 0107-0116.)

The Court of Appeals granted immediate leave to appeal on that issue alone. (App. 0119.) And in a published decision, it reversed: A two-judge majority held that the photographs obtained from the government's drone surveillance was a "search" because it violated the Maxons' reasonable expectation of privacy, and Long Lake's failure to ever obtain a warrant rendered the government's actions unreasonable under the Fourth Amendment. *Maxon*, 336 Mich App at 538-542. The court accordingly remanded for entry of an order suppressing all evidence gained from Long Lake's drone surveillance. *Id.* at 542.

The government then sought leave to appeal to this Court. And on March 16, 2022, this Court ordered the parties to provide supplemental briefing on whether the drone surveillance was a search under the Fourth Amendment. *Long Lake Twp v Maxon*, 970 NW2d 664 (Mich. March 16, 2022) (citing MCR 7.305(H)); App. 0021. But just two weeks later, this Court stayed the existing briefing schedule and instead ordered the parties to brief a different issue: "whether the exclusionary rule applies to this zoning dispute, such that the Court of Appeals properly remanded for an order suppressing all photographs taken of defendants' property."[2] (App. 0020.)

The parties and various amici submitted briefing to the Court addressing that issue. But then the Court vacated its earlier order scheduling oral argument on the application, vacated the Court of Appeals' earlier decision, and remanded the case to the Court of Appeals "to address the additional issue of whether the exclusionary rule applies to this dispute." *Long Lake Twp v Maxon*, 973 NW2d 615 (Mich May 20, 2022); App. 0019.

[2] The Court of Appeals ordered suppressed only photographs taken of the Maxons' property "from a drone." 336 Mich App at 542. Its opinion said nothing about any other photographs in the record or which the government may later introduce.

In September 2022, the Court of Appeals ruled 2-1 that Long Lake's evidence should not be excluded. Over a dissent, the two-judge majority held that even "assuming that a Fourth Amendment violation occurred" when Long Lake surveilled the Maxons' home, *Long Lake Twp v Maxon*, ___ Mich App ___; ___ NW2d ___; 2022 WL 4281509, at *2 (September 15, 2022), the government could introduce that surveillance evidence in its enforcement proceeding against the Maxons. "[T]he exclusionary rule is intended to deter police misconduct," the panel surmised, "not that of lower-level bureaucrats who have little or no training in the Fourth Amendment." *Id.* at *6. The court further noted that the government's enforcement action is a civil code-enforcement proceeding, rather than "a criminal prosecution," and held that distinction "removes it" from the exclusionary rule's applicability. *Id.* This Application for Leave to Appeal followed.

Argument

As more fully discussed below, this case presents issues that have "significant public interest" and are of "major significance to the state's jurisprudence." MCR 7.305(B)(2), (3). The Court of Appeals' decision blows a large hole in Michiganders' search and seizure protections. Its ruling that zoning enforcement officials can violate the Fourth Amendment and still use the evidence it gathered from that violation in court strips a major incentive to respect the people's right to be "secure in their persons, houses, papers, and effects." US Const, Am IV. Moreover, the Court of Appeals' decision leaves unanswered the significant question of whether government officials have unfettered discretion to use advanced drone technology to surveil the homes of anyone they wish, at any time.

This Court should grant the Maxons' application and hold that Long Lake's warrantless drone surveillance was an unreasonable search that requires suppression. Below, the Maxons explain how the government's use of low-flying drones to take detailed photographs of a person's home, as it did here, is a search within the meaning of the Fourth Amendment. It impinges on the Maxons' "reasonable expectations of privacy," as the Court of Appeals originally ruled, because society would

find it unreasonable for government to use highly sophisticated drones to snoop on their homes. It constitutes an invasion of the Maxons' property in order to acquire evidence. And lastly, Long Lake's actions amount to a purposeful investigative act. Because Long Lake did all this without a warrant or an exception to the warrant requirement, it violated the Constitution. And because Long Lake intentionally surveilled the Maxons' home so that it could use that evidence against the Maxons in court, suppression is warranted: only through exclusion of illegally obtained evidence can this Court incentivize local code enforcement officials to comply with the Fourth Amendment. Allowing the Court of Appeals' decision to the contrary to stand would leave a vast portion of government officials free to disregard Michiganders' right to be free from unreasonable searches entirely.

I. This case presents issues that have "significant public interest" and are of "major significance to the state's jurisprudence."

The issues in this case are of profound importance not just to the Maxons, but Michiganders and the nation as a whole. After all, the extent to which the government may surveil its citizens without judicial oversight is always of "significant public interest." MCR 7.305(B)(2). That is especially true when it comes to new, "remarkably easy, cheap, and efficient" technological tools that can open "intimate window[s] into a person's life." *Carpenter v United States*, 585 US ___, ___; 138 S Ct 2206, 2217-2218; 201 L Ed 2d 507 (2018). Simply, the courts must ensure that "police technology" does not "erode the privacy guaranteed by the Fourth Amendment." *Kyllo v United States*, 533 US 27, 34; 121 S Ct 2038; 150 L Ed 2d 94 (2001). As this Court explained just this past summer, it "must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Johnson v VanderKooi*, ___ Mich ___, ___; ___ NW2d ___; 2022 WL 2903868, at *6 (July 22, 2022) (quoting *United States v Jones*, 565 US 400, 406; 132 S Ct 945; 181 L Ed 2d 911 (2012)).

Drones are just that kind of new technology courts must scrutinize. As this case demonstrates, drones make surveillance of people's most intimate spaces "remarkably easy" and "efficient."

Carpenter, 138 S Ct at 2217. Indeed, their stealthy nature allows officials to surveil surreptitiously, without the target knowing. Justice Brennan—writing for two other members of the U.S. Supreme Court—warned of exactly this possibility more than thirty years ago:

> Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all—and, for good measure, without posing any threat of injury. Suppose the police employed this miraculous tool to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were.

Florida v Riley, 488 US 445, 462; 109 S Ct 693; 102 L Ed 2d 835 (1989) (dissenting opinion). "Three decades ago," Justice Brennan may have called such technology "miraculous." *McKelvey v State*, 474 P3d 16, 30 (Alas App 2020). But that miracle is now reality. See *id.* Today's drones are equipped with cameras making the kind of surveillance Justice Brennan described not just possible, but documentable in crystal clarity. And because drones *must* fly at exceedingly low altitudes, they can surreptitiously snoop on people's most intimate spaces.

Without this Court's intervention, drone surveillance will be considered outside the bounds of the Fourth Amendment altogether. That means Long Lake and other government entities will be free to use the technology to surveil *anyone* they wish and capture the most intimate details of those people's lives. This would be true no matter how powerful or important you are, or what steps you took to protect your privacy by keeping your property from being viewed at any ground-level public vantage point. Suspicionless, warrantless drone monitoring would become the norm and, as the technology becomes "eas[ier], cheap[er], and [more] efficient," Michiganders' privacy and security would suffer. To protect the people's "indefeasible right of personal security," *Boyd v United States*, 116 US 616, 630; 6 S Ct 524; 29 L Ed 746 (1886), this Court should grant leave to appeal and hold that the government's use of a high-powered drone to surveil someone's home is a "search" for Fourth Amendment purposes.

Moreover, divining the proper test for deciding when drone surveillance amounts to a "search" is of "major significance to the state's jurisprudence." MCR 7.305(B)(3). The Court of Appeals originally held that the government's drone surveillance of the Maxons' property was a search. *Maxon*, 336 Mich App at 538-542. That decision (before this Court vacated it on other grounds) rested on the "reasonable expectation of privacy" test. *Id.* at 540-541 ("To establish a violation of the Fourth Amendment, a person is required to establish that they had a legitimate expectation of privacy and to establish that society is prepared to recognize that expectation as reasonable." (citing *People v Mead*, 503 Mich 205, 212-213; 931 NW2d 557 (2019))). This framework traces to Justice Harlan's oft-cited concurrence in *Katz v United States*, 389 US 347, 360-362; 88 S Ct 507; 19 L Ed 2d 576 (1967). The Court of Appeals' conclusion that drone surveillance was a "search" under that framework was correct, and the Maxons urge this Court to adopt it. See pp. 19-23, below.

But while the "reasonable expectation of privacy" framework is one way to determine whether a search has occurred, it has "been criticized as circular, and hence subjective and unreasonable." *Kyllo*, 533 US at 34.[3] That is why the U.S. Supreme Court, courts around the country, and individual federal jurists (including U.S. Supreme Court justices and judges of the Sixth Circuit) often use other frameworks for determining whether the government's conduct was a search. For instance, the U.S. Supreme Court has held that a search occurs when the "government physically occupie[s] private property for the purpose of obtaining information." *Jones*, 565 US at 404. And many other courts and jurists have suggested that courts simply apply the "ordinary meaning" of the term "search," under which any purposeful investigative act by government officials constitutes a search subject to Fourth

[3] See also *Carpenter*, 138 S Ct at 2244 & n 10 (Thomas, J., dissenting) (collecting academic criticisms); *United States v White*, 401 US 745, 786; 91 S Ct 1122; 28 L Ed 2d 453 (1971) (Harlan, J., dissenting) (test encourages "the substitution of words for analysis"); *United States v Johnson*, 584 F3d 995, 999-1000 (CA 10, 2009) (recounting position of "definitive treatise" that test requires courts to make "value judgment[s]") (internal citations and quotation marks omitted); *Everett v State*, 186 A3d 1224, 1235 (Del, 2018) ("Fourth Amendment jurisprudence is in flux.").

Amendment scrutiny. Identifying the proper framework to analyze warrantless drone surveillance is not just important to lower courts in Michigan, but will clarify this cutting-edge issue to courts around the nation.

The Court of Appeals' decision that government officials may use drone surveillance evidence in civil code-enforcement proceedings likewise demands this Court's review. Saying that the government can violate the Constitution and benefit from the evidence it obtained would take the *security* out of the "right of the people to be secure … against unreasonable searches and seizures." US Const, Am IV. As Judge Jansen noted in dissent, the exclusionary rule is a "remedy designed to safeguard Fourth Amendment rights *generally*." *Maxon*, 2022 WL 4281509, at *7 (emphasis added) (quoting *United States v Calandra*, 414 US 338, 348; 94 S Ct 613; 38 L Ed 2d 561 (1974)). She also noted that "[t]he drone operator was an agent of [the government] looking for zoning violations against which plaintiff might take action, with municipality and drone operator both thus carrying out actions decidedly more policing than supervisory." *Id.* And she recognized that the agency that conducted the surveillance was the same one that wished to use the evidence to punish the Maxons. *Id.*

Yet the Court of Appeals' decision leaves those agencies with little incentive to respect Fourth Amendment rights in their duties, or even to gain "training" in what the Fourth Amendment prohibits. Cf. *id.* at 6 (majority opinion). Indeed, under the majority's view, officials could conduct warrantless drone surveillance with impunity. And beyond drone surveillance, the majority's rule would let non-police investigators commit blatant Fourth Amendment violations—like breaking down doors and, without a warrant, snooping through homes—yet still use that evidence against their target in court, so long as they were snooping for civil, rather than criminal lawbreaking. That rule would apply to a vast array of government officials beyond mere zoning; it would allow officials pursuing evidence as

sensitive as medical data,[4] financial records,[5] or residential occupancy practices,[6] and everything in between—to violate the Fourth Amendment consequence-free. Simply, Michiganders' security from arbitrary searches should not be left to the whim of "lower-level bureaucrats who have little or no training in the Fourth Amendment." *Id.*

The people's Fourth Amendment rights deserve better. Ensuring that those protections do not devolve merely to "a form of words" or an "empty promise," *Mapp v Ohio*, 367 US 643, 655, 660; 81 S Ct 1684; 6 L Ed 2d 1081 (1961), is an issue of "significant public interest." MCR 7.305(B)(2). And with no binding precedent from the U.S. Supreme Court or this Court supporting the decision below, it is an issue of "major significance to the state's jurisprudence." MCR 7.305(B)(3). This Court should grant leave to appeal, hold that the government's warrantless drone surveillance was a search, and remand for an order suppressing all evidence resulting from that search.

II. Standard of review

This Court reviews application of Fourth Amendment principles de novo. *People v Hammerlund*, 504 Mich 442, 451; 939 NW2d 129 (2019). It reviews findings of fact for clear error. *Id.* at 450.

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

For three reasons, the government's repeated use of a drone to surveil the Maxons' property for evidence of code violations was a search within the meaning of the Fourth Amendment. First, the government physically intruded on the Maxons' home for the purpose of gathering evidence (Section A, below). Second, it invaded the Maxons' reasonable expectation of privacy in an area the

[4] E.g., *Zadeh v Robinson*, 928 F3d 457 (CA 5, 2019).
[5] E.g., *Silverthorne Lumber Co v United States*, 251 US 385; 40 S Ct 182; 64 L Ed 319 (1920).
[6] E.g., *Camara v Municipal Court of City & Co of San Francisco*, 387 US 523; 87 S Ct 1727; 18 L Ed 2d 930 (1967).

Maxons sought to keep hidden from snooping (Section B). And third, under the ordinary meaning of "search," the government's drone surveillance of the Maxons was a search because it was a purposeful, investigative act (Section C).

Indeed, the government's search of the Maxons' property happened numerous times for over fourteen months. (App. 0061.) Yet at no point did the government even seek, let alone obtain a warrant. Because warrantless searches are presumptively unreasonable, and no exception to that general rule applies here, this Court should declare the government's actions to be unreasonable.

A. The government's warrantless drone surveillance violated the Fourth Amendment because it was a physical intrusion to gather evidence.

Long Lake's drone flights physically intruded onto the Maxons' property repeatedly for the purpose of gathering evidence of suspected municipal code violations. Under black letter law, this physical invasion by the government's drone constitutes a search under the Fourth Amendment.[7] And because Long Lake did this repeatedly over the course of months without ever securing a warrant, that search is constitutionally unreasonable.

1. When the government "obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Florida v Jardines*, 569 US 1, 9; 133 S Ct 1409; 185 L Ed 2d 495 (2013) (internal quotation marks omitted). While a government official's "[t]respass alone does not qualify" as a search, *Jones*, 565 US at 408 n 5, the U.S. Supreme Court has been clear that "gather[ing] … information" after "physically entering and occupying the area" when not "permitted" by the owner does. *Jardines*, 567 US at 6. The intrusion need not be through boots on ground: In *Jones*, for example, the government

[7] Nothing in the Fourth Amendment's text limits the type of government actors it restricts. The Amendment's "protection applies to governmental action" generally. *Burdeau v McDowell*, 256 US 465, 475; 41 S Ct 574; 65 L Ed 1048 (1921).

"physically occupied private property" not by busting through any doors, but by installing a GPS tracker on a suspect's vehicle to monitor the vehicle's movements. 565 US at 404.[8]

As this Court has recognized, "Fourth Amendment jurisprudence was originally tied to" this "physical intrusion[]" test. *VanderKooi*, 2022 WL 2903868, at *6. Beginning in the 1960s, though, the U.S. Supreme Court placed primacy on *Katz*'s "reasonable expectation of privacy" framework. See *id.* Yet the two now live side-by-side, with the U.S. Supreme Court holding that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* (quoting *Jones*, 565 US at 409).

Here, the government intruded on the Maxons' home to obtain information. See *Jardines*, 569 US at 6 ("the curtilage of the house," the area that "immediately surround[s]" the house, "enjoys protection as part of the home itself."); see also *Collins v Virginia*, 584 US ___, ___; 138 S Ct 1663, 1670; 201 L Ed 2d 9 (2018) ("When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred."). Just as in *Jones*, the government used electronic equipment to physically invade a protected area (here, the government remotely controlled the drone to not just intrude on the property, but to navigate to specific areas of the Maxons' property it wished to investigate). It did this to obtain information—to learn what items were stored on the Maxons' property and where they were located. In short, the government "learned what [it] learned only by physically intruding on [the Maxons'] property to gather evidence." *Jardines*, 569 US at 11. That is "enough to establish that a search occurred." *Id.*

[8] Nor does a search's being conducted by a third party insulate it from Fourth Amendment scrutiny; the Fourth Amendment applies to non-government officials who act as government "agent[s]" or with a government official's "participation or knowledge." *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). Here, "[t]here is no dispute that the drone operator here was acting as an agent for Long Lake Township" nor that "Long Lake Township is a governmental entity." *Maxon*, 336 Mich App at 529.

2. Nor does it change the analysis that the government's drone flew through the air on the Maxon's property, rather than physically touching the ground. The drone invaded the property all the same. As this Court has held:

> Real property consists of something more than mere surface rights; its meaning and the rights appertaining thereto are found in the ancient maxim: *'Cujus est solum, ejus est usque ad coelum et ad inferos.*' The surface of the land is a guide but not the full measure, for, within reasonable limitations, land includes not only the surface but also the space above and the part beneath.

Grand Rapids Gravel Co v William J. Breen Gravel Co, 262 Mich 365, 373; 247 NW 902 (1933). The U.S. Supreme Court has echoed that view. It has made clear that, for property owners to have "full enjoyment of the land," they "must have exclusive control of the immediate reaches of the enveloping atmosphere." *United States v Causby*, 328 US 256, 264; 66 S Ct 1062; 90 L Ed 1206 (1947). At "low altitude," even if the property owner "does not in any physical manner occupy that stratum of airspace," they have "a claim to it." *Id.* at 265. "[I]nvasions of it are in the same category as invasions of the surface." *Id.*

And by all accounts, the altitude at which drones operate is "low." Federal law mandates that drones fly lower than 400 feet above ground level. 14 CFR 107.51(b) (2022). And here, the videos captured by the drone show that, at times, it surveilled the Maxons from less than 200 feet above their home. Indeed, the Court of Appeals itself recognized that drones "fly below what is usually considered public or navigable airspace." *Maxon*, 336 Mich App at 540. And despite denying the Maxons' motion to suppress, the Circuit Court was also concerned that the government's surveillance may have violated the Maxons' property rights. See App. 0115 ("That is not to say that it's okay to fly a drone in low altitude over people's property, you know, in terms of trespass or other rights.").

Courts around the country are in accord. In Colorado, police officers flew a drone over a criminal suspect's property at 390 feet above ground for seven minutes and took photographs of alleged marijuana plants—all without a warrant. Though "brief," the court observed, the drone flight

"was not on public property," and was therefore an "unlawful entry." Order Granting Mot Suppress Evidence, *People v Tuck*, 2020CR326 (Colo Dist Ct March 29, 2022) (attached at App. 0120-128). It was therefore a search within the meaning of the Fourth Amendment, and the court ordered the photographs suppressed. *Id.* In Pennsylvania, a federal court found that a defendant's flying of drones at low altitudes for the "targeted purpose of surveillance" stated a state-law nuisance claim. *Gerhart v Energy Transfer Partners, LP*, No 1:17-cv-01726, 2020 WL 1503674, at *24 (MD Pa, March 30, 2020). In Virginia, a man was found *criminally* guilty of "enter[ing] the land … of another for the purpose of … interfer[ing] with the rights of the owner … to use such property free from interference" after flying a drone 216 feet over a neighbor's property for six seconds. Joe Beck, *Drone Dispute Reaches Courtroom*, The Northern Virginia Daily, <https://perma.cc/2R8L-Y5ZT> (posted October 25, 2015) (accessed October 26, 2022). And in Kentucky, a court dismissed criminal charges against a property owner who fired a shotgun at a neighbor's drone for flying 200 feet above the property; the court held the property owner had a legal right to shoot down the drone. Compl, *Boggs v Meredith*, No 3:16-CV-00006-TBR, 2017 WL 1088093 (WD Ky, March 21, 2017), ECF No 1. Again, the video shows that the drone here reached altitudes *below* 200 feet over the Maxons' home.

3. Of course, this Court need not decide that all drone flights over all private property are necessarily tortious to conclude that Long Lake's drone surveillance was a search. It need not demarcate any specific altitude line below which a drone flight turns actionable—if one even exists. Cf. *Causby*, 328 US at 266 ("Flights over private land are not a taking, unless they … interfere[] with the enjoyment and use of the land."). The Court need not intrude an inch on the public's fascination with drones for recreational purposes. See Ct App Oral Arg 10:00-10:12, <https://tinyurl.com/3r9c5e88> (accessed October 26, 2022) ("anybody that has grandchildren with a Christmas wish list probably has … a drone that one of the kids wants for Christmas."). It need only hold that Long Lake's intrusion into the Maxons' property for the purpose of "gather[ing] evidence"

was a search. *Jardines*, 569 US at 9. See also *Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961) (holding in a pre-*Katz* case—when the "physical intrusion" test alone controlled—that courts "need not" find "a technical trespass under the local property law" to find a Fourth Amendment violation).

Jardines and cases applying it are instructive. There, without a warrant, the police approached the defendant's home with a drug-detecting dog. 569 US at 3-4. The dog sniffed all around the front porch and signified a positive alert at the front door. *Id.* at 4. The government, naturally, argued this was not a search: Because social norms allow anyone to merely walk up to the front door of a home, the police had not "intruded" on Jardines' property. The Court disagreed. True enough, there is an implied license for "visitor[s] to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8. But that is not what the police did. Rather, they "introduc[ed] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." *Id.* at 9. And "[t]here is no customary invitation to do *that*." *Id.* (emphasis in original).

In other words—as "the Nation's Girl Scouts and trick-or-treaters" understand, see *id.* at 8—whether the government has "intruded" on property for search purposes depends on context and the visitor's motivation. *Jardines*, for example, does not hold that officers necessarily conduct a search whenever they approach your front door with a dog. Rather, it was a search because the officers approached the home with a *drug-detection* dog, "in hopes of discovering incriminating evidence." *Id.* at 9. By contrast, "[a]n officer approaching your home to return your lost dog" likely poses no such constitutional problem. *United States v Carloss*, 818 F3d 988, 1004 (CA 10, 2016) (Gorsuch, J., dissenting). See also *People v Frederick*, 500 Mich 228, 240 n 7; 895 NW2d 541 (2017) (while homeowners grant newspaper deliverers a limited license to approach the house, most "would be

surprised—and likely indignant—if their newspaper delivery person rang the bell and knocked for several minutes at 5:00 a.m. rather than simply leaving the paper.").

The same distinction applies with drones. The average homeowner is unlikely to quibble with a neighbor's drone incidentally passing through their property during a recreational flight. But the neighbor who flies their drone onto the homeowner's property to take high-quality photographs and videos of the homeowner's property—to snoop for intimate details of the homeowner's life—is far more objectionable. Indeed, the legislature has made it illegal to use a drone to "capture photographs, video, or audio recordings of an individual in a manner that would invade the individual's reasonable expectation of privacy." MCL 259.322(3). So no neighbor could legally do what Long Lake did here.[9] And because the government may intrude "no more than any private citizen might do," *Kentucky v King*, 563 US 452, 469; 131 S Ct 1849; 179 L Ed 2d 865 (2011), its use of a drone to enter the Maxons' property in order to gather evidence against them was a search under basic Fourth Amendment property principles.

B. The government's warrantless drone surveillance violated the Fourth Amendment by infringing the Maxons' reasonable expectation of privacy.

Last year, the Court of Appeals held that the government's warrantless drone surveillance of the Maxons was a search because it violated the Maxons' reasonable expectation of privacy. *Maxon*, 336 Mich App at 538-542. This Court later vacated that decision on other grounds (App. 0019), but the Court of Appeals' analysis was correct. This Court should adopt that analysis here.

1. Under the *Katz* framework, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 US at 33. As to the first prong, a person manifests their subjective expectation of privacy by "conceal[ing]" the area "from at least street-level views." *California v Ciraolo*, 476 US 207, 211; 106 S

[9] While not necessary to finding a search here, Mr. Maxon was startled by, and voiced his displeasure with, one of the drone surveillance flights to the drone's operator. (App. 0056-0057.)

Ct 1809; 90 L Ed 2d 210 (1986). The Court of Appeals had no trouble finding that the Maxons met the first prong; "clearly," the court explained, "little, if any, of [their] property is visible from the ground because the view is blocked by buildings and trees." *Maxon*, 336 Mich App at 526; see also *id.* at 538 ("unrefuted photographic exhibits of defendants' property taken from the ground seem to establish a reasonable expectation of privacy against at least casual observation from a nonaerial vantage point."); App. 0055. At base, the Maxons "took normal precautions to maintain [their] privacy," and that suffices to demonstrate their subjective expectation of privacy in their backyard. See *Ciraolo*, 476 US at 211 (quoting *Rawlings v Kentucky*, 448 US 98, 105; 100 S Ct 2556; 65 L Ed 2d 633 (1980)). Three times over two years, the government's drone surveillance upended their expectations.

The Court of Appeals was also correct in holding that the Maxons' expectation of privacy from low-flying drone surveillance was societally reasonable. *Maxon*, 336 Mich App at 541. Simply, the government's repeated drone surveillance was of the Maxons' home. And "when it comes to the Fourth Amendment, the home is first among equals." *Jardines*, 569 US at 6. The Amendment's "very core" protects "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman*, 365 US at 511.

Although there is no evidence the government's drone penetrated the walls of the home itself, it is "black letter law" that the home's curtilage—"the area immediately surrounding and associated with the home—[is] part of the home itself for Fourth Amendment purposes." *Collins*, 138 S Ct at 1670 (internal marks and citations omitted) (finding government's intrusion into side driveway was a search). Here, the government's low-altitude drone flights repeatedly snooped all around the Maxons' five-acre property—including directly over their driveway, their home, and the areas immediately surrounding each. The drone's camera was trained directly on these areas as it passed, capturing photographs and videos as it passed through these areas—in all the clear detail one would expect from high-definition modern cameras. It would not have been able to gather any of this information from

any ground-level public vantage point. *Maxon*, 336 Mich App at 526, 538. In short, the government—without a warrant—repeatedly intruded on the area where the Maxons' "privacy expectations are most heightened" to surveil for evidence of wrongdoing. See *Collins*, 138 S Ct at 1670 (citation omitted). That is a search. See *Kyllo*, 533 US at 34 (finding the government's use of "enhancing technology" to obtain information "that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area'" was a search).

2. This conclusion is in no way undercut by two cases in which the U.S. Supreme Court held that aerial surveillance of a home's curtilage using far different technology—a fixed-wing airplane at 1,000 feet and a helicopter at 400 feet, respectively—was not a search. See *Ciraolo*, 467 US 207; *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989). As the Court of Appeals correctly held, these cases do not control whether surveillance by more advanced drone technology is a search. And there are material differences between the two technologies that underscore how Long Lake's surveillance violated the Maxons' reasonable expectation of privacy.

First, and as the Court of Appeals recognized, "drones are qualitatively different from airplanes and helicopters." *Maxon*, 336 Mich App at 539. Because of their smaller size, drones can fly much closer to the ground than larger aircraft; indeed, federal law requires them to fly no higher than 400 feet above ground. 14 CFR 107.51(b) (2022). (The helicopter surveillance in *Riley* was conducted at 400 feet. 488 US at 448. As explained above, the drone here reached altitudes lower than 200 feet above the Maxons' ground.) The smaller size likewise allows drones to take stealthier flight patterns and makes them much quieter while in operation. See Shawn Manaher, *Will A Drone Make Noise? How Much Noise Do Drones Make?,* Hobby Nation, <https://hobbynation.net/will-a-drone-make-noise/> (accessed October 26, 2022) (drones are "40 decibels more silent than traditional civil aircraft"). Larger aircraft are, comparatively, large and loud, and fly much higher and faster. Should they scour all about your property's intimate spaces, it would be nearly impossible to not notice. Drones, on the other

hand, can surveil an entire property—down to the ground level—virtually undetected. These fundamental differences between drone technology and more traditional aircraft make *Ciraolo* and *Riley* ill-suited to control this case.

And *second*, drones (like the one used here) are often equipped with cutting-edge cameras. The police in both *Ciraolo* and *Riley* made their relevant observations of the defendant's curtilage with their own eyes. *Ciraolo*, 407 US at 209; *Riley*, 488 US at 448 (plurality opinion). Indeed, the *Ciraolo* court expressly declined to decide whether *photographs* taken from the aerial surveillance would be a search because "[i]t was the officer's observation, not the photograph, that supported the warrant." 407 US at 212 n 1; see also *Riley*, 488 US at 448-449 (warrant was obtained based on naked eye observations).

Here, by contrast, the government was only able to observe the Maxons' property with help from the lightweight camera attached to the drone and the crystal-clear footage it produced. Drones are necessarily unmanned, and therefore, no naked eye observation was possible. In that respect, the drone technology used for surveillance here is far more like the thermal-imaging device used in *Kyllo* than the aircraft used in *Ciraolo* or *Riley*: The government obtained information "that could not otherwise have been obtained" without "sense-enhancing technology." *Kyllo*, 533 US at 34.

As mentioned above, that distinction between drones and other aircraft concerned the legislature, too, and it has enacted a guardrail to protect Michiganders from just this kind of snooping. Although operating a drone is generally lawful, MCL 259.311, 259.313, the Unmanned Aircraft Systems Act makes it illegal for any "*person*" to "knowingly and intentionally operate an unmanned aircraft system … to otherwise capture *photographs, video, or audio recordings* of an individual in a manner that would invade the individual's reasonable expectation of privacy." MCL 259.322(3) (emphases added). That same Act defines a person as "an individual, partnership, corporation, association, *governmental entity*, or other legal entity." MCL 259.303(C) (emphasis added). So under Michigan law flying a drone about is not prohibited, but using a drone to capture private, intimate details of one's

home is. Indeed, fears that "drones could be used to … conduct unauthorized surveillance" was an explicit argument in favor of the Act. See Senate Fiscal Agency, *Bill Analysis, Public Act 436 of 2016*, at 5 <http://www.legislature.mi.gov/documents/2015-2016/billanalysis/Senate/pdf/2015-SFA-0992-N.pdf> (accessed October 26, 2022).

Both the *Ciraolo* majority and *Riley* plurality stressed that the surveilling officers made visual observations from where they "ha[d] a right to be." *Ciraolo*, 476 US at 213; see also *Riley*, 488 US at 451 (plurality opinion) ("Any member of the public could legally have been flying over Riley's property … and could have observed Riley's greenhouse."). But the Unmanned Aircraft Systems Act casts great doubt on the idea that the government—or anyone—could legally fly a drone over the Maxons' home "to capture photographs, video or audio recordings … ." MCL 259.322(3).[10] At base, rather than this Court needing to act alone in making a "value judgment"—see *United States v Johnson*, 584 F3d at 999-1000; n 3, above—as to whether the Maxons' expectation of privacy against drone surveillance was reasonable, a majority of the legislature has already answered that question in the affirmative. The government's violation of that reasonable expectation of privacy in surveilling the Maxons' home was a search.

C. This Court should adopt the ordinary meaning test for determining whether the government conducted a search.

Long Lake's repeated drone surveillance of the Maxons' property is a search under both the Fourth Amendment's intrusion-on-property and reasonable-expectation-of-privacy formulations. But there is an easier approach to the "search" question, one based on an ordinary application of the word, that simply asks if the government undertook "a purposeful, investigative act" with respect to the Maxons' home. *Morgan v Fairfield Co*, 903 F3d 553, 568 (CA 6, 2018) (Thapar, J., concurring).

[10] Even if the government were to suggest that it could have obtained this evidence through less advanced technology—and there is no evidence that it could have—"[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." *Kyllo*, 533 US at 35 n 2.

1. As noted earlier, "Fourth Amendment jurisprudence is in flux." *Everett v State*, 186 A3d 1224, 1235 (Del, 2018). "After over two-hundred years," Judge Thapar wrote in *Morgan*, "we are still not sure … what questions are relevant for determining whether a search occurred or if it was reasonable." 903 F3d at 567 (concurring opinion).

By its text, the Fourth Amendment protects against (1) "searches and seizures," (2) that "unreasonabl[y]" interfere with "[t]he right of the people to be secure" in (3) "their persons, houses, papers, and effects." US Const, Am IV. A major reason for confusion in modern Fourth Amendment doctrine is that the leading test—*Katz*'s reasonable expectation-of-privacy framework—"conflates the search inquiry with the reasonableness one." *Morgan*, 903 F3d at 570 (Thapar, J., concurring). Under the *Katz* framework, a "search" has occurred—meaning the Fourth Amendment is triggered —only when "a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 US at 361 (Harlan, J., concurring).[11] The confusion is immediate: The *Katz* test "creates a separate reasonableness analysis at the first step of the Fourth Amendment framework"—in determining whether a "search" occurred—"prior to evaluating the reasonableness of the government's conduct at the second step." Baude & Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv L Rev 1821, 1871 (2016). The result is that courts are left to explain "when a search is not a search." *Kyllo*, 533 US at 32. Take *Ciraolo* and *Riley*, where the government chartered aircraft to investigate whether someone was growing

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

marijuana at their home. To say that the government was not "searching" for evidence is to strain the word "search" to its breaking point.[12]

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

The concept is not new. Justice Scalia suggested it in his opinion for the U.S. Supreme Court in *Kyllo*. There, in questioning the Court's precedents instructing that law enforcement's "visual observation" of a person's property "is no 'search' at all," he wrote in passing: "When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.'" 533 US at 32 & n 1 (quoting Noah Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed 1989)).

Justice Thomas and Judge Thapar brought the idea of an "ordinary meaning test" to the fore again in 2018. Each jurist explained that, unlike other constitutional phrases, "search" was not a term of art at the Founding, and there was no significant debate over its meaning. *Carpenter*, 138 S Ct at 2238 (Thomas, J., dissenting); *Morgan*, 903 F3d at 568 (Thapar, J., concurring). Each, therefore,

[12] This Court, too, has noted the counterintuitive result that "information-gathering," such as "looking into the windows of a home," is not itself necessarily a "search." See *People v Frederick*, 500 Mich 228, 237 n 4; 895 NW2d 54 (2017).

advocated a test that looks to the ordinary meaning of the term "search" at the Founding. *Id.* The Founding-era dictionary definitions were uniform: A search is a purposeful, investigative act.[13]

The full Iowa Supreme Court has adopted a similar test under its state search-and-seizure provision, the text of which is nearly identical to the Fourth Amendment. In so doing, that court abandoned the "reasonable expectation of privacy" framework as incompatible with the "fair and ordinary meaning" of the term "search." *State v Wright*, 961 NW2d 396, 413 (Iowa 2021). It instead held that, because an officer opened a defendant's garbage bags "to 'obtain information about what [he] may have been doing inside his house,'" the officer conducted a "search" regardless "whether Wright had an expectation of privacy in the garbage bags or the contents." *Id.* at 413-414. The owner's reasonable expectation of privacy, the court held, was "relevant only to the question of whether a seizure or search was *unreasonable*," not whether one "has occurred." *Id.*

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

[13] See *Carpenter*, 138 S Ct at 2238 (Thomas, J., dissenting) (citing the Webster definition from *Kyllo*, along with Nathan Bailey, *An Universal Etymological English Dictionary* (22d ed 1770) ("a seeking after, a looking for, &c."), and 2 John Ash, *The New and Complete Dictionary of the English Language* (2d ed 1795) ("An enquiry, an examination, the act of seeking, an enquiry by looking into every suspected place; a quest; a pursuit")); see also *Morgan*, 903 F3d at 568 & n 1 (similar).

Second, and similarly, more Fourth Amendment cases would turn on whether the government acted reasonably. Under the current frameworks, most cutting-edge surveillance cases reach appellate courts only on the first, threshold question: does the Fourth Amendment apply at all? *Carpenter*, for example, asked only whether accessing historical cell-site-location data is a *search*. 138 S Ct at 2211. *Kyllo* asked only whether using a thermal imaging device on a home was a *search*. 533 US at 29. And as the Court of Appeals first decided this case, the only question was whether drone surveillance of a home was a *search*. Because these cases ask only whether new technologies *implicate* the Fourth Amendment, they provide little guidance for lower courts on how to decide when uses of that new technology in different factual circumstances are *reasonable* under the Fourth Amendment. See *Carpenter*, 138 S Ct at 2266 (Gorsuch, J., dissenting) (explaining that the Court "supplie[d] little … direction" for future cases involving historical cell-site information"); *Morgan*, 903 F3d at 572 (Thapar, J., concurring) (noting *Kyllo*'s lack of guidance for uses of thermal imaging technology in other factual contexts).

And *third*, adopting the ordinary meaning test would not require overturning any prior decisions. In cases when a court—perhaps counterintuitively—held that a search did not occur despite a purposeful, investigative act, the same result could obtain by holding that the search was legal because it was *reasonable*. And *every* case the U.S. Supreme Court or this Court has found that a search occurred involved a purposeful, investigative act.

3. Here, Long Lake conducted a purposeful, investigative act when its agents stealthily flew a drone onto the Maxons' property to look for alleged violations of the township's code. Under the ordinary meaning test's threshold inquiry, that is a search. And, as explained above, it was a search of an area the Fourth Amendment protects—a house. Having satisfied that threshold inquiry, this Court can then determine whether the government's warrantless search was reasonable.

It was not. Under any test—whether reasonable-expectation-of-privacy, or physical intrusion, or ordinary meaning—warrantless searches are presumptively unconstitutional. *VanderKooi*, 2022 WL 2903868, at *6. The government never obtained a warrant for any of its three drone excursions here. It did not have the Maxons' consent, nor can it point to any exigent circumstances. Because no exception to the warrant requirement applies, the government's drone surveillance was an unreasonable search under the Fourth Amendment.

Of course, none of that is to say the government may never use drones. As explained above, it may use drones to the same extent that "any private citizen might." *King*, 563 US at 469. And as the Court of Appeals explained, the government may use drones for investigative purposes, as it did here, when authorized by a warrant. Indeed, the court suggested the government may have been able to secure a warrant here had it ever bothered to seek one. *Maxon*, 336 Mich App at 541-542. But because the government did not even try to get a warrant before making its three drone surveillance trips over the Maxons' property—over at least a 14-month span—its surveillance was unconstitutional. To ensure such "anytime, anywhere" drone surveillance of people and their property does not become the norm, this Court should grant leave to appeal and hold as such.

IV. The government should not be permitted to benefit from the use of unconstitutionally seized evidence in a punitive enforcement action.

The government's warrantless surveillance of the Maxons' property violated the Fourth Amendment. This Court should apply the exclusionary rule to suppress the evidence obtained because of that illegal search. If the government can retain unconstitutionally obtained evidence to punish the targets of its surveillance, it would open the door to "manifest neglect, if not [] open defiance" of the Fourth Amendment's guarantee against unreasonable searches and seizures. *Weeks v United States*, 232 US 383, 394; 34 S Ct 341; 58 L Ed 652 (1914). It would devolve one of the American legal system's most important protections into little more than "an empty promise." *Mapp v Ohio*, 367 US 643, 660; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).

The Court of Appeals incorrectly determined "that the exclusionary rule has no place here" based on its view that "the exclusionary rule is intended to deter police misconduct, not that of lower-level bureaucrats who have little or no training in the Fourth Amendment." *Long Lake Twp v Maxon*, ___ Mich App ___, ___; ___ NW2d ___; 2022 WL 4281509, at *6 (September 15, 2022). Contrary to the Court of Appeals' holding that "[t]he exclusionary rule was not intended to operate in this arena, and serves no valuable function," *id.* at *7, neither the federal or state constitution distinguishes between types of government officials or their training. Rather, their "protection applies to governmental action" generally. *Burdeau v McDowell*, 256 US 465, 475; 41 S Ct 574; 65 L Ed 1048 (1921). The suppression remedy is a necessary bulwark to ensure that *all* government officials cannot violate those protections with impunity. Ensuring the remedy's availability is of "significant public interest" and of "major significance to the state's jurisprudence." MCR 7.305(B)(2), (3). This Court should thus grant leave to appeal and hold that the government may not benefit from the use of evidence obtained only from its violation of the Maxons' Fourth Amendment rights.

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

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). This Court has made clear that Article 1, § 11 of the 1963 Michigan Constitution "is to be construed to provide the same protection as that secured by the Fourth Amendment, absent 'compelling reason' to impose a different interpretation." *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011) (citations omitted). Since the Founding, the right to be secure against unreasonable searches and seizures has occupied a cardinal place in our system of ordered liberty. In fact, "the patriot James Otis's 1761 speech condemning writs of assistance was 'the first act of opposition to the arbitrary claims of Great Britain' and helped spark

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

But to mean much of anything, rights need remedies. As the U.S. Supreme Court recognized in *Mapp v Ohio*, without the remedy of excluding unconstitutionally obtained evidence from use when the government seeks to punish, the Fourth Amendment's protections against unreasonable searches and seizures become no more than "'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties." 367 US at 655. This Court recognized that very same principle over 40 years earlier in its adoption of the exclusionary rule under the Michigan Constitution. *Marxhausen*, 204 Mich at 573. In doing so, the Court quoted with approval the U.S. Supreme Court's decision in *Weeks v United States* that "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value." *Id.* at 571 (quoting 232 US at 393). Without such a remedy, the Court wrote, protections against searches and seizures "might as well be stricken from the Constitution." *Id.*

The principle of an exclusion remedy was by no means a new one. In fact, its roots date to before the Founding. See Roots, *The Originalist Case for the Exclusionary Rule*, 45 Gonz L Rev 1 (2010). In the 1765 case *Entick v Carrington*, regarded as one of the "most revered search and seizure cases known to the Framers of the American Constitution" and explicitly cited by this Court in *Marxhausen*, the King's representatives ransacked John Entick's property, searching for and seizing papers that were supposedly seditious. *Id.* at 38; *Entick*, 19 How St Tr 1029, 1074 (1765); *Marxhausen*, 204 Mich at 564-565. Lord Camden (the Chief Justice of the Common Pleas) held that the warrant purportedly authorizing the search was invalid. He analogized the seizure to coercing a defendant into providing self-incriminating testimony: "It is very certain that the law obligeth no man to accuse himself," he observed, "and it should seem, that search for evidence is disallowed upon the same principle." *Entick*,

19 How St Tr at 1074. In the same way forced self-incriminating testimony could not be used against the accused, illegally seized physical evidence also had to be excluded and could not be used "to help forward the conviction[]." *Id.*

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

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

While mostly discussed in the context of criminal prosecutions, the U.S. Supreme Court has consistently applied the exclusionary rule in punitive civil enforcement cases that, like this one, are "quasi-criminal in character." *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 700; 85 S Ct 1246; 14 L Ed 2d 170 (1965); see also *Boyd v United States*, 116 US 616; 6 S Ct 524; 29 L Ed 746 (1886); *United States v James Daniel Good Real Prop*, 510 US 43, 49; 114 S Ct 492; 126 L Ed 2d 490 (1993) (citing *Plymouth Sedan* for the proposition that "the exclusionary rule applies to civil forfeiture"). In *Plymouth Sedan*, the Court clarified that whether a case is "quasi-criminal in character" depends on whether "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law." 380 US at 700. The Court analyzed *Boyd*—"[t]he leading case on the subject of search and seizure,"—which "itself was not a criminal case but was a proceeding by the United States to forfeit 35 cases of plate glass which had allegedly been imported without payment of the customs duty." *Id.* at 696. Though

"proceedings … may be civil in form," the Court continued, their characteristics can make "their nature criminal." *Id.* at 697 (quoting *Boyd*, 116 US at 633).[14]

This Court has cited the approach in *Plymouth Sedan* with approval. Indeed, while the Court of Appeals referred to *Plymouth Sedan* as an "outlying case," *Maxon*, 2022 WL 4281509 at *3, this Court has repeatedly applied the exclusionary rule in various civil proceedings. E.g., *In re Forfeiture of $176,598*, 443 Mich 261, 265; 505 NW2d 201 (1993) ("The exclusionary rule is applicable in forfeiture proceedings" (citing *Plymouth Sedan*, 380 US 693)); *Lebel v Swincicki*, 354 Mich 427, 440; 93 NW2d 281 (1958) (blood sample taken from unconscious motorist "constitute[d] a violation of his rights" under state constitution's search-and-seizure provision, and therefore "testimony based on the analysis of such blood should not be admitted in evidence" in subsequent civil action against him); *McNitt v Citco Drilling Co*, 397 Mich 384, 388 n 2; 245 NW2d 18 (1976) (reaffirming *Lebel*); see also *Kivela v Dep't of Treasury*, 449 Mich 220, 231; 536 NW2d 498 (1995) ("[T]he scope of the Michigan exclusionary rule depends on the facts of each case.").

Much like the civil-forfeiture proceeding in *Plymouth Sedan*, the government's civil enforcement action here is designed to penalize the Maxons. The government alleges that the Maxons violated the township's Zoning Ordinance. *Maxon*, 336 Mich App at 525. And as the language of the Ordinance makes clear, its explicit purpose is "to provide *penalties* for violations." Long Lake Township Nuisance Ordinance, Ordinance No 155 of 2016, at 1 <https://longlaketwpmi.documents-on-demand.com/document/d697aecb-c9a6-ec11-a36e-000c29a59557/Nuisance%20Ordinance%20/#_%20155.PDF> (emphasis added) (accessed October 26, 2022). "Its object," therefore, "like a criminal proceeding, is to penalize for the commission of an offense against the law." *Plymouth Sedan*,

[14] See also *Camara v Municipal Court of City & Co of San Francisco*, 387 US 523, 540; 87 S Ct 1727; 18 L Ed 2d 930 (1967) (refusing to permit prosecution of tenant who refused warrantless inspection by code enforcement officer).

380 US at 700. The Ordinance further provides that "[a]ny person who violates any provision of this Ordinance … *shall* be subject" to a fine of up to $500 per day—with each day a violation exists constituting a separate offense. Long Lake Township Nuisance Ordinance, Ordinance No 155 of 2016, at 3, § 5 (emphasis added).

The Ordinance's stated purpose, as well as its imposition of steep fines for violations, makes this case "quasi-criminal in character." *Plymouth Sedan*, 380 US at 700; see also *People v Earl*, 495 Mich 33, 40; 845 NW2d 721 (2014) ("The Legislature is aware that a fine is generally a criminal punishment."). To be sure, as the Court of Appeals noted, the government has not sought fines—yet. It *has* requested a declaration that the Maxons are in violation of the Ordinance, an order to abate the alleged nuisance, and "such other costs, fees and relief that the Court deems just." (App. 0042). The government's prayer for relief intentionally leaves the door open for the court to impose those $500 per day fines against the Maxons, as the Township's ordinances explicitly command such penalties.

Moreover, civil forfeiture—a context that is "quasi-criminal in character" and in which the U.S. Supreme Court has consistently affirmed the exclusionary rule's applicability—is closely intertwined with nuisance abatement. In both cases, the government alleges that otherwise-lawful private property is being used for unlawful ends, and it seeks a court order prohibiting the property's further use for that end.[15] Both actions seek to control a "man's property by reason of offenses committed by him," and "though they may be civil in form, are in their nature criminal." *Boyd*, 116 US at 634. In fact, according to the leading Fourth Amendment treatise, "there does not appear to be any doubt but that the *Plymouth Sedan* approach is called for when the government instead brings an action to abate a nuisance and would prove the illegal activity constituting the nuisance by the means of evidence come by through an unconstitutional search." LaFave, *Search & Seizure: A Treatise on the Fourth*

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

Amendment § 1.7(a) (6th ed 2022). That is true even when the nuisance action does not carry the potential for punitive, rapidly accumulating fines, as the Township's ordinances explicitly contemplate.

This conclusion is supported by caselaw from courts across the country. For example, in a civil suit against a bookstore to abate and enjoin an alleged obscenity nuisance, the Louisiana Supreme Court ordered the exclusion of five cartons of allegedly obscene materials that the government had seized without obtaining a warrant (along with two more that were seized under a defective warrant). *Jefferson Parish v Bayou Landing Ltd*, 350 So 2d 158, 161 (La, 1977). The Georgia Supreme Court followed the same course in a civil-enforcement action seeking to enjoin an alleged gambling house where the only evidence supporting the government's case was obtained by an illegally issued warrant. *Carson v State ex rel Price*, 221 Ga 299, 304; 144 SE2d 384 (1965). And in a similar civil suit to enjoin an alleged nuisance, the Alabama Supreme Court suppressed the testimony of officers who raided another alleged gambling house without a warrant. *Carlisle v State ex rel Trammell*, 276 Ala 436, 438; 163 So 2d 596 (1964). Just like in each of these cases, the township's civil enforcement action seeks to order the Maxons to remove an alleged nuisance from their property. And just as the various courts decided in each of those cases, the government should not be permitted to benefit from evidence it obtained only through its violation of the Fourth Amendment.

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

The U.S. Supreme Court has explained that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *United States v Calandra*, 414 US 338, 347; 94 S Ct 613; 38 L Ed 2d 561 (1974) (quoting *Elkins v United States*, 364 US 206, 217; 80 S Ct 1437; 4 L Ed 2d 1669 (1960)). As a result, the Court has refused the exclusionary remedy only in particular circumstances.

The Court of Appeals misapplied the U.S. Supreme Court's recent approach. In the Court of Appeals' view, the exclusionary rule is a one trick pony in civil cases: "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." *Maxon*, 2022 WL 4281509, at *5. But that view is hard to square with what both the U.S. Supreme Court and this Court have actually said about the suppression remedy's applicability. As Judge Jansen noted below, the exclusionary "remedy [is] designed to safeguard Fourth Amendment rights *generally* through its deterrent effect," *id.* at *7 (dissenting opinion) (emphasis added) (quoting *Calandra*, 414 US at 348). Far from the rigid line the Court of Appeals drew, the U.S. Supreme Court has made clear that withholding the exclusionary rule requires a case-by-case assessment. And this Court, for its part, has held that the remedy's availability will "depend[] on the facts of each case." *Kivela*, 449 Mich at 231.

As part of that case-by-case assessment, the Supreme Court has identified particular factors that caution against applying a suppression remedy. Rather than drawing a bright line between criminal and civil proceedings, it has urged courts to inquire into the *formality* of the proceeding. Rather than drawing a bright line between civil forfeiture and any other civil proceeding, it has urged courts to ask whether the officer intended the unconstitutionally seized evidence for use in *this* proceeding or a different one. And rather than asking whether the government officials who committed the violation were police officers or "lower-level bureaucrats who have little or no training in the Fourth Amendment," it has urged courts to examine how *strong* the deterrent effect would be—whether suppression would "safeguard Fourth Amendment rights *generally* through its deterrent effect." *Maxon*, 2022 WL 4281509, at *7 (Jansen, J., dissenting) (emphasis added) (quoting *Calandra*, 414 US at 348).

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

1. One factor that the U.S. Supreme Court considers in deciding whether to apply the exclusionary rule is how formal the proceeding is. In proceedings marked by a flexible, administrative nature, the Court has been more reluctant to apply the suppression remedy. Because such proceedings may not be "entirely adversarial" or governed by "traditional rules of evidence,"—or because the people who would rule on the admissibility of evidence may "not be judicial officers or lawyers," suppression can be a difficult proposition. *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 363-366; 118 S Ct 2014; 141 L Ed 2d 344 (1998); see also *Calandra*, 414 US at 343 (rejecting suppression remedy for grand jury proceedings, which are "secret" and "unrestrained by [] technical procedural and evidentiary rules"). But those characteristics are not present here.

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

But this case has none of those characteristics. The proceeding here is a markedly formal, punitive civil enforcement suit, brought in a standard Circuit Court. It is explicitly "adversarial," governed by "traditional rules of evidence," and not at all adjudicated under "traditionally flexible, administrative procedures." *Id.* at 363-366. The circuit court reviewed formal legal briefing before

holding a formal, live suppression hearing. (E.g., App. 0091.) This proceeding is as formal as any, and that weighs in favor of the exclusionary rule's applicability.[16]

2. In keeping with the exclusionary rule's deterrence rationale, the U.S. Supreme Court has also been more reluctant to suppress evidence obtained from negligent, rather than deliberate, constitutional violations. Start with *Herring v United States*. There, a police database showed that there was an active arrest warrant out for a man who'd just left a police station, so officers followed him out, pulled him over, and arrested him. 555 US 135, 137; 129 S Ct 695; 172 L Ed 2d 496 (2009). A search incident to that arrest revealed methamphetamine and an illegally-possessed handgun. But as it turned out, the information in the database was wrong: The arrest warrant against Herring had actually been recalled five months earlier. *Id.* at 138. Because his arrest was unconstitutional, the officers' search of him incident to the arrest was also illegal. So, Herring argued, the guns and drugs therefore had to be suppressed. *Id.* The Court disagreed. It held that the failure to update the warrant database wasn't "sufficiently deliberate" to justify exclusion; suppression, the Court explained, was unlikely to deter the police's mere "isolated negligence." *Id.* at 137, 144.

But here, far from being "isolated" or "negligent," the government's drone searches over the Maxons' property were deliberate and repeated over fourteen months. See *Maxon*, 336 Mich App at 525. Rather than stemming from miscommunication or incorrect information, the government intentionally surveilled the Maxons.

Likewise, the U.S. Supreme Court explained in *United States v Leon* that the exclusionary rule would not meaningfully deter investigators who obtained evidence "in objectively reasonable reliance"

[16] Similarly, *Pennsylvania Board* (parole) and *Lopez-Mendoza* (immigration) each arose in contexts in which the U.S. Supreme Court has repeatedly held Fourth Amendment scrutiny is more relaxed. See *Samson v California*, 547 US 843, 850; 126 S Ct 2193; 165 L Ed 250 (2006) (suspicionless searches of parolees valid because parolees remain under "state-imposed punishment[]"); *United States v Ramsey*, 431 US 606, 616; 97 S Ct 1972; 52 L Ed 2d 617 (1977). Whatever the merits of those holdings, the Court has not similarly scaled back the Fourth Amendment's protections in the zoning context.

of a search warrant later invalidated. 468 US 897, 922; 104 S Ct 3405; 82 L Ed 2d 677 (1984). In *Leon*, the investigating officers submitted an "extensive" search warrant application in accordance with usual procedures, and a detached magistrate issued the requested warrant. *Id.* at 902. But the court later determined that the warrant should not have issued because the application's substance was not sufficient to establish probable cause. *Id.* at 903-905. Rather than contest that conclusion on appeal to the U.S. Supreme Court, the government argued that the officers' "good-faith reliance on a search warrant" counsels against suppressing evidence obtained in executing that warrant. *Id.* at 905. The Court agreed, highlighting that it is a "magistrate's responsibility to determine whether the officer's allegations establish probable cause." *Id.* at 921. An officer who otherwise followed proper procedures in applying for a warrant, the Court held, "cannot be expected to question" that determination. *Id.* In the Court's view, it would not make sense to "[p]enaliz[e] the officer" by excluding evidence because of "the magistrate's error." *Id.*

In that way, *Leon* directly encourages officers to seek a warrant before they conduct a search. Here, on the other hand, the government cannot claim to have reasonably relied on an invalid warrant; over its three separate drone surveillance trips to the Maxons' property, it never sought a warrant once. See *Maxon*, 336 Mich App at 541. Contrary to the Court of Appeals' conclusion that exclusion will likely deter Township officers "from ever again resorting to a drone to gather evidence of a zoning violation," *Maxon*, 2022 WL 4281509, at *7, *Leon* directly incentivizes them to seek a warrant for any future drone surveillance—whether of the Maxons or anyone else.

The Court of Appeals found it important that the search was performed by a "lower-level bureaucrat[]." *Maxon*, 2022 WL 4281509, at *6. In its view, the suppression remedy exclusively exists to deter "*police* misconduct." *Id.* (emphasis added). But neither the U.S. Supreme Court nor this Court have ever endorsed such a restrictive view. And rightfully so. The Fourth Amendment contains no limitation on the types of government officials it constrains. Rather, "its protection applies to

governmental action" generally, *Burdeau*, 256 US at 475, and the exclusionary rule is "designed to safeguard" those protections "*generally*," *Calandra*, 414 US at 348 (emphasis added). Constitutional violations are just as concerning no matter the hat worn by the offending government official. E.g., *Safford Unified Sch Dist No 1 v Redding*, 557 US 364, 374-375; 129 S Ct 2633; 174 L Ed 2d 354 (2009) ("embarrassing, frightening, and humiliating" strip search of middle school student by non-police school officials violated Fourth Amendment); *Zadeh v Robinson*, 928 F3d 457, 474 (CA 5, 2019) (Willett, J., concurring) (State Medical Board investigators violated Fourth Amendment when they, "without notice and without a warrant, entered a doctor's office and demanded to rifle through the medical records of 16 patients."). The question is one of deterring constitutional violations, not of the label printed on the agent's uniform.

3. Finally, both the U.S. Supreme Court and this Court have refrained from applying the exclusionary rule "when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit" that "falls outside the offending officer's zone of primary interest." *United States v Janis*, 428 US 433, 458; 96 S Ct 3021; 49 L Ed 2d 1046 (1976) (quoted in part in *Kivela*, 449 Mich at 235). In other words, the exclusionary rule may not serve its goal of deterrence when the governmental entity seeking to use the evidence is not the governmental entity that committed the constitutional violation. Because a state-level criminal law enforcement officer is already "punished" for their Fourth Amendment violation "by the exclusion of the evidence in the state criminal trial," the Court in *Janis* reasoned, exclusion from a different kind of case, outside the officer's "zone of primary interest" and involving a "different sovereign," is "unlikely to provide significant … additional deterrence." *Id. at* 448, 458.[17]

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

But that is not what happened here. Here, the drone photographs were obtained solely for Long Lake's use in a punitive civil enforcement action to enforce Long Lake's ordinances. It is squarely within the offending governmental entity's "zone of primary interest." If exclusion would not serve the purpose of deterrence here, it is hard to imagine a situation in which it would. As Judge Jansen noted in dissent below, the agency in *Kivela* seeking admission of the unconstitutionally obtained evidence "was wholly distinct from the one responsible for the Fourth Amendment violation, … an institutional separation to which our Supreme Court attached great significance." *Maxon*, 2022 WL 4281509, at *7 (Jansen, J., dissenting). By contrast, "[t]here is no dispute that the drone operator here was acting as an agent for Long Lake Township, that Long Lake Township is a governmental entity, and that Long Lake Township seeks admission of its own allegedly illegally obtained evidence." *Maxon*, 336 Mich App at 529.

At base, the factors cautioning against applying the exclusionary rule do not apply here. Nor can the Court of Appeals' warning of the "cost" of excluding evidence save its erroneous decision. See *Maxon*, 2022 WL 4281509, at *7. While the Court concluded that exclusion might lead to the government's allegation of a zoning violation "potentially remain[ing] unabated," *id.*, the government can simply get a warrant if it has reason to believe the Maxons are committing a violation. Indeed, were the "cost" of suppressing unconstitutionally obtained evidence sufficient to foreclose the exclusionary rule, it would never apply even in *criminal* cases, where it may result in "dangerous defendants go[ing] free." *Herring*, 555 US at 141. But that is obviously not the rule (nor is that specific concern at issue here; the Maxons are accused merely of an aesthetic code violation).

And on the other side of the coin, the costs of *not* affording a suppression remedy in nearly all civil cases—or, the benefits of exclusion in such cases—are huge. Contrary to the Court of Appeals' view that the suppression remedy would "serve[] no valuable function" in such cases, *Maxon*, 2022 WL 4281509, at *7, failure to afford a suppression remedy would impose a major societal cost: it

would effectively bless even blatant Fourth Amendment violations by a huge subset of government officials. Whether snooping for evidence of medical history or financial data or intimate familial relationships or anything in between—see pp. 12-13, above—the Court of Appeals' rule would leave little incentive for officials to respect the Fourth Amendment rights of their civil investigation targets. And as explained below, suppression is the *only* remedy available that would provide a meaningful deterrent against officials' encroaching on the rights of people in the Maxons' shoes.

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

Both the Court of Appeals majority and dissent agreed that the exclusionary rule's purpose is to deter constitutional encroachments. Here, suppression is the only remedy that would meaningfully deter the government from conducting similar warrantless drone surveillance in the future.

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

Second, the possibility of a separate civil suit by the Maxons against the offending government officials is also unlikely to meaningfully deter the misconduct here. The Court of Appeals, for example, suggested the Maxons pursue "a civil lawsuit sounding in constitutional tort." *Maxon*, 2022 WL 4281509, at *7 (citing *Bauserman v Unemployment Ins Agency*, ___ Mich ___; ___ NW2d ___; 2022 WL 2965921 (July 26, 2022)). But in *Bauserman*, this Court decided only that the state may be liable for its own violations of the state constitution; it did not address whether such claims are available against municipal entities or individual government actors. 2022 WL 2965921, at *14 n 13. It is thus no panacea for deterring the local officials who organized the warrantless surveillance of the Maxons.

And, whether the action sounds in constitutional or ordinary tort, the risk of those officials being liable for any meaningful damages is slim to none; any such suit simply wouldn't be worth the effort. Compensatory damages in a trespass action are measured "by the difference between the value of the land before the harm and the value after the harm." *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997). And while the government's surveillance deeply disturbed the Maxons' security in their property, it is unlikely to have affected the property's market value. As a result, any official who conducted such warrantless surveillance against the Maxons (or someone else in their shoes) would likely need to pay no more than nominal damages if found liable in a separate civil action. See *Morse v Colitti*, 317 Mich App 526, 551; 896 NW2d 15 (2016). And even if there was a greater financial risk on the line for an official who violates the Fourth Amendment in this way, the U.S. Supreme Court's "qualified immunity decisions have nevertheless made it increasingly difficult for plaintiffs to show that defendants have violated clearly established law," and, therefore, to recover at all. Schwartz, *The Case Against Qualified Immunity*, 93 ND L Rev 1797, 1814 (2018).

In practice, the exclusionary rule is the only reliable incentive officials have to respect the Fourth Amendment rights of people in the Maxons' shoes. Without consequences for arbitrary invasions into their rights, no one can be secure in their person, house, papers, or effects. *Marbury v Madison*, 5 US (1 Cranch) 137, 147; 2 L Ed 60 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress."). To preserve that security, the exclusionary rule must continue to apply in cases like this one. Instead, the Court of Appeals created a bright line rule *foreclosing* the suppression remedy's applicability in nearly all civil enforcement cases, even for egregious constitutional violations. Under that rule, the government will reap the benefit of using whatever illegally seized evidence it wants to punish people, no matter how blatant the constitutional violation—so long as the proceeding is civil and the investigating officers were not police. Respectfully, the people's security in their constitutional rights requires better.

Relief Sought

Defendants-Appellants Todd and Heather Maxon request that this Court grant their application for leave to appeal, reverse the Court of Appeals' decision below, and remand to the Circuit Court for entry of an order suppressing all evidence obtained from the government's warrantless drone surveillance of their property.

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2022, I electronically filed the foregoing Application for Leave to Appeal on behalf of Defendants-Appellants, causing all parties of record to be served through the MiFILE system of the Michigan Supreme Court.

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