STATE OF MICHIGAN
IN THE SUPREME COURT

LONG LAKE TOWNSHIP,

Plaintiff-Appellee,

-vs-

TODD MAXON AND HEATHER MAXON,

Defendant-Appellants.

Supreme Court No. 164948

Court of Appeal No. 3449230

Grand Traverse CC No. 18-034553-CE

BRIEF OF THE CATO INSTITUTE AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

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This case interests *amici* because it involves core questions of individual liberty protected by the U.S. and Michigan Constitutions. It presents an opportunity to for the

[1] Pursuant to MCR 7.312(H), *amici* state that no counsel for any party authored this brief in whole or in part. No one other than *amici* make a monetary contribution intended to fund the preparation or submission of this brief.

Court to improve the administration of cases involving unreasonable government searches and maintain important constitutional protections in the modern era.

INTRODUCTION

For over a decade, Long Lake Township has had its eye on Todd and Heather Maxon—and, more to the point for the purposes of this case, their home. The Maxons own five acres of land within the Township, which contains their home and two garages. In the yard behind the house, Mr. Maxon likes to keep old cars that he tinkers with in his spare time. The Township first took issue with Mr. Maxon's car-hobby in 2008, when it filed its first civil enforcement action against the Maxons for operating an illegal junkyard. Though that case ultimately settled, with the Township agreeing to let the Maxons keep their cars, it did not stop the Township's efforts to control how the Maxons used their land.

In 2018, the Township received tips that the Maxons had brought more cars onto their property. However, the Township quickly realized that the vehicles were not visible from street-level. So, in order to get the evidence needed for a new enforcement action, the Township hired a private drone company to fly an unmanned aerial vehicle (UAV) equipped with a high-resolution camera at low altitudes in and around the Maxons' property. The Township did this on three separate occasions and obtained videos and photographs containing intimate details of the Maxons' activities and associations.

The United States and Michigan Constitutions expressly protect individuals against unreasonable searches and seizures. Though the text of this command is clear and explicit, the U.S. Supreme Court has over the years articulated an often unwieldy doctrine that produces increasingly confounding and unpredictable outcomes. Under the "reasonable expectation of privacy" test first outlined by Justice Harlan in *Katz v United States*, a constitutionally cognizable search only occurs when government action upsets an expectation of privacy deemed reasonable by society and the judiciary. 389 U.S. 347, 360–62; 88 S Ct 507; 19 L Ed 2d 576 (1967) (Harlan, J., concurring). As many judges and scholars have recognized, however, this test is fatally flawed. Though the reasonable expectation of privacy framework certainly has an intuitive surface appeal, it necessarily requires judges to use their own subjective views about social perceptions of privacy, and the slipperiness of Justice Harlan's formulation is compounded by its inherent circularity. Societal expectations may guide judicial rulings, but those rulings in turn guide societal expectations, and so on.

The Maxons' case presents this Court with the opportunity to free itself of that conundrum and ground its reasoning more solidly in controlling text by applying the Fourth Amendment and the Michigan Constitution according to the ordinary meaning test. In hewing more closely to the relevant text, this Court should ask two questions: (1) Did a search occur? And (2) was the search reasonable?

Courts can determine what government actions constitute a "search" using the common, semantic understanding of the term. In this context, a "search" is when

someone looks over or through one thing with the purpose of finding, perceiving, or confirming the presence or absence of another thing. And here, the highly directed and persistent observation of the Maxons' property was plainly a "search" for evidence against them in the natural sense of that term.

This literal textual framework approach places attention on the key issue that is the central focus of the Fourth Amendment: the reasonableness of government agents in searching or seizing particular locations, persons, or items. A warrantless search is presumptively unreasonable without a "compelling need for official action and no time to secure a warrant." *Michigan v Tyler*, 436 US 499, 509; 98 S Ct 1942; 56 L Ed 2d 486 (1978). Against that rubric, the Township's search here—conducted without judicial supervision and with no justification for failing to procure a warrant other than mere convenience—was manifestly unreasonable.

And because the Township violated the Maxons' constitutional rights, this Court should apply the exclusionary rule to prohibit the Township from relying on evidence obtained via its unlawful warrantless drone surveillance of their home, curtilage, and other private property, including vehicles. The Supreme Court has appropriately extended the exclusionary rule to cover "quasi-criminal" proceedings, and because this civil action could result in significant fines for the Maxons, the exclusionary rule should apply based on that sound rationale, which *amici* urge this Court to embrace as a matter of Fourth Amendment and Michigan state constitutional law.

Moreover, it should not matter that the Maxons are facing civil, rather than criminal, proceedings. The exclusionary rule is one of the only remedies for individuals whose rights are violated by unreasonable searches and seizures. Allowing such constitutional violations to go unpunished will result in Michiganders losing any semblance of protection against government intrusion.

ARGUMENT

I. THIS COURT SHOULD GIVE "SEARCH" ITS PLAIN MEANING AND FIND THAT THE TOWNSHIP CONDUCTED AN UNREASONABLE SEARCH IN VIOLATION OF THE FOURTH AMENDMENT AND THE MICHIGAN CONSTITUTION.

Both the Fourth Amendment and the Michigan Constitution protect people's right "to be secure in their persons, houses, papers, and effects" against "unreasonable searches and seizures[.]" US Const amend IV; Const 1963 art. I, § 11.[2] The text of both provisions calls for a straightforward inquiry: First, did the government search or seize anything? Second, did any search or seizure involve a defendant's protected items—that is, "persons," "houses," "papers," or "effects"? And finally, was any such search or seizure unreasonable? When the answer to all three questions is "yes," then the claimant's rights have been violated. See Bellin, *Fourth Amendment Textualism*, 118 Mich L Rev 233, 254 (2019).

[2] The Michigan Constitution is actually more expansive than the Fourth Amendment: "The person, houses, *possessions, electronic data, and electronic communications* of every person shall be secure from unreasonable searches and seizures." Const 1963 art. I, § 11 (emphasis added).

While this approach is straightforward to articulate, over the last century the Supreme Court has promulgated an increasingly confusing and unworkable doctrine that can be difficult to reconcile with the constitutional text—particularly as technological progress exposes the shortcomings of analytical frameworks that were created for a different time and a much different material environment.

The Maxons' case presents this Court with a salutary opportunity to more faithfully embrace constitutional text and thereby safeguard the right of all Michiganders to be free from palpably unreasonable government searches. In determining whether the Township's conduct was unconstitutional, the Court should first give "search" its ordinary, conventional meaning and find that the Township's warrantless use of a drone to look over the Maxons' fence and surveil their curtilage was a search—both as any ordinary person would understand that term and within the legal meaning of the relevant constitutional provisions. Second, because the Township had no justification for intruding upon the Maxons' property without a warrant, the Court should find that search was unreasonable.

A. Current Doctrine is Confusing and Impractical in Cases Involving High-Tech Surveillance

It was true at the Founding and remains true today that to "search" means "'to 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.'" *Kyllo v*

United States, 533 US 27, 32 n1; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (quoting Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed 1989)).

In the years following ratification, courts dutifully applied the law according to the Fourth Amendment's plain text, consistently finding that warrantless searches violated the Fourth Amendment where officers entered a person's property in order to search for evidence of criminal activity. *Ex Parte Jackson*, 96 US 727, 73 L Ed 877 (1877) (opening and reading sealed packages and letters was an unreasonable search); *Larthet v Forgay*, 2 La Ann 524, 525 (La 1847) (entering into a man's shop and apartment to look for jewelry constituted an unreasonable search); *Bell v Clapp*, 10 Johns 263, 265 (NY 1813) (entering a man's basement in search of stolen barrels of flour was an unreasonable search).

Because searches inevitably required some degree of physical intrusion before the twentieth century, courts historically viewed the Fourth Amendment as closely linked to property rights. See Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich L Rev 801, 816 (2004); see also *Olmstead v United States*, 277 US 438; 48 S Ct 564; 72 L Ed 944 (1928) (Brandeis, J., dissenting) (noting that physical intrusions were necessary because there were no advanced methods of electronic surveillance). But with advances in modern technology came more ways for the government to surveil Americans without physically intruding on a person's property. And as courts came to rely on physical intrusion as a guide to applying the Fourth Amendment, they struggled in their early efforts to apply the

Fourth Amendment to cases involving electronic surveillance. See Kerr, *The Curious History of Fourth Amendment Searches*, 2012 Sup Ct Rev 67, 77 (2012).

In *Olmstead v United States*, the Supreme Court held that there was no search where federal officers wiretapped the defendants' phones. 277 US at 466. In writing for the majority, Chief Justice Taft reasoned that the Fourth Amendment did not apply because "[t]he taps from house lines were made in the streets near the houses," not in the houses themselves. *Id.* at 457. In other words, because there was no physical intrusion onto defendants' property, no search occurred. *Id.* at 466.

While the Court's opinion in *Olmstead* raised serious questions about the Fourth Amendment's role in the world of electronic surveillance, the Court held fast to the physical-intrusion requirement until the late 1960s. See *id.* at 473–74 (Brandeis, J., dissenting) (discussing concerns about how technology has made it easier for the government to spy on Americans); see also *On Lee v United States*, 343 US 747, 749–53; 72 S Ct 967; 96 L Ed 1270 (1952) (no search occurred where police used microphone to overhear conversations); *Goldman v United States*, 316 US 129, 131–32; 62 S Ct 993; 86 L Ed 1322 (1942) (no search occurred where officer used advanced listening device to overhear conversations next door). But *Olmstead's* physical intrusion test proved impractical as the government began to use new, increasingly high-tech surveillance methods. See Weaver, *The Fourth Amendment, Privacy and Advancing Technology*, 80 Miss L J 1131, 1138 (2011). Thus, it came as no surprise when the Court finally renounced the

physical intrusion requirement and chose to embrace a framework designed to "protect[] people, not places." *Katz*, 389 US at 361 (Harlan, J., concurring).

The Supreme Court thus sought to adapt Fourth Amendment doctrine to modern technology in 1967 with its decision in *Katz v. United States*. See Weaver, 80 Miss L J at 1137. In *Katz*, the Court overruled *Olmstead* and did away with the physical-intrusion requirement. 389 US at 353. In his solo concurrence, Justice Harlan famously expressed his sense of how the Constitution controls government access to private communications: "My understanding is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the exception be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). Justice Harlan's two-part inquiry has since become known as the "reasonable expectation of privacy" test, and to this day remains the predominant test for Fourth Amendment cases.

But in adopting the reasonable expectation of privacy test, the Supreme Court ensured that Fourth Amendment doctrine would begin straying from the constitutional text. On its face, the Fourth Amendment calls for separate inquiries into *whether* a search occurred and the *reasonableness* of that search if so. See Bellin, 118 Mich L Rev at 238–40. But the reasonable expectation of privacy framework conflates those two distinct inquiries by focusing on "whether the search was *reasonable*" rather than "whether a search *occurred* in the first place." *Morgan v Fairfield Co*, 903 F3d 553, 570 (CA 6, 2018) (Thapar, J., dissenting). Thus, under the *Katz* test, even where it is clear that the

government engaged in a search, its conduct could still fall outside the scope of the Fourth Amendment if society fails to recognize the place or thing being searched as sufficiently private. See Kozinski & Nguyen, *How Technology Killed the Fourth Amendment*, 2011 Cato Sup Ct Rev 15, 26 (2011–2012).

The *Katz* test's misguided reasonableness inquiry is especially problematic for two reasons. First, the reasonable expectation of privacy framework is circular by nature. See, e.g., Kerr, 102 Mich L Rev at 808–09 (noting that a reasonable expectation of privacy only exists "when the courts decide to protect it through the Fourth Amendment"). While courts are thus led to base their "decisions on society's expectations of privacy," it turns out that "society's expectations of privacy are, in turn, shaped by" decisions of the courts. *Carpenter v United States*, ___US___; 138 S Ct 2206, 2245; 201 L Ed 2d 507 (2018) (Thomas, J., dissenting). As the tools and techniques available to law enforcement continue to evolve, judges have to decide whether novel methods of performing surveillance do or do not implicate the Fourth Amendment based on what *they* think *society* thinks about the privacy implications of the new technology, thus rendering the resulting judicial determination of reasonableness or unreasonableness little more than a gut feeling. See *Id.* at 2265 (Gorsuch, J., dissenting) ("Deciding what privacy interests *should be* recognized often calls for a pure policy choice, many times between incommensurable goods—between the value of privacy in a particular setting and society's interest in combatting crime."); *Morgan*, 903 F3d at 572 (Thapar, J., concurring) ("Determining whether somebody has a subjective expectation

of privacy that society is willing to recognize as reasonable leaves much to 'judicial imagination.'").

Second, as technology advances, individual expectations of privacy become "less and less reasonable." Weaver, 80 Miss L J at 1183. For example, in *California v. Ciarolo*, police received an anonymous tip that the defendant was growing marijuana in his backyard; however, because of the defendant's 10-foot privacy fence, police could not see into the yard from street-level. 476 US 207, 209–10; 106 S Ct 1809; 90 L Ed 2d 210 (1986). Undaunted, police used a private plane to take photographs and make warrantless visual observations of the defendant's yard from 1,000 feet above. *Id.* In holding that no constitutionally cognizable search occurred, the Supreme Court asserted, somewhat tendentiously given the realities of commercial air travel, that "*[a]ny* member of the public flying in this airspace . . . could have seen *everything* that these officers observed." *Id.* at 213–14 (emphasis added). Thus, because "private and commercial flight in the public airway is routine," the defendant lacked any reasonable expectation of privacy. It scarcely requires elaboration how much work the unabashedly elastic term "public airway" is doing in that formulation—or how problematic that elasticity becomes as the height of the aerial vehicle in question comes down and its stealth and maneuverability go up.

Predictably, those precise concerns arose just a few years later in *Florida v. Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989), which likewise involved aerial surveillance of the defendant's property, but with different technology (a helicopter) at

less than half the altitude of the plane in *Ciarolo*—just 400 feet. *Id.* at 448. Once again, the Court held that the surveillance at issue was not a "search" under the Fourth Amendment based on the dubious rationale that the private and commercial operation of helicopters is routine and thus renders any expectation of privacy unreasonable. *Id.* at 450. But try telling any rancher, sunbather, or Secret Service Agent who has just experienced a surprise helicopter flyover at 400 feet that it's really no different than the passing 737 whose contrails they can just barely make out six miles up in the stratosphere.

Ciarolo and *Riley* neatly demonstrate the unavoidable—and inevitably increasing—tension between technology and privacy under the *Katz* framework. Simply put, as the pace of technological advancement increases, the ability of judges to reliably update their perceptions of societal expectations diminishes, with the result that courts become insufficiently protective of citizens' right to be free from manifestly unreasonable searches such as a helicopter hovering menacingly over a residential block at 400 feet or a drone at 40 feet skulking around children on a playground, or sunbathing teenagers by a backyard swimming pool, or as here, a fenced-in yard.

Recognizing this fatal flaw in the *Katz* framework, the Supreme Court tried for a second time to recalibrate Fourth Amendment doctrine—this time by reviving the *Olmstead*-era physical intrusion test. See *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012). And while "[t]his property-based approach is closer to the ordinary and original meaning" of the Fourth Amendment than the *Katz* test, "it, too,

imposes an artificial limit on the meaning of 'search.'" *Morgan*, 903 F3d at 571 (Thapar, J., concurring). Under the physical intrusion test, a search may occur, but if there is no physical invasion of private property by the government, then it will fall outside the scope of Fourth Amendment protection. But with modern advances in high-tech surveillance, the concerns that led the Court to abandon the physical intrusion test in *Katz* are even more prevalent today. See *Carpenter*, 138 S Ct at 2245 (Thomas, J., dissenting) ("The whole point of *Katz* was to 'discredi[t] the relationship between the Fourth Amendment and property law."). Thus, under current Supreme Court precedent, this Court is left to choose between two flawed and increasingly unworkable tests, neither of which are supported by the text of the Fourth Amendment.

B. This Court Should Embrace the Ordinary Meaning of "Search," Both to Improve Doctrinal Coherence and to Protect Michiganders From Unreasonable Government Searches.

As suggested above, plain meaning is not only sufficient for deciding whether an unlawful search occurred in this case, it yields better and clearer results than various competing doctrinal approaches discussed above and at even greater length in countless Supreme Court cases. Embracing the plain meaning will improve administration of the Fourth Amendment by making it a more straightforward exercise in the application of constitutional law to relevant facts. And as a result, Michiganders will be more secure in their right to be free from unreasonable government searches.

Current doctrine asks courts to grapple with "when a search is not a search", *Kyllo*, 533 US at 32, which in turn, leads to "inconsistent and bizarre results."

Wasserstrom & Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo L J 19, 29 (1988). At present, police are free to go through people's garbage, look into their barn with a flashlight, and read through their bank records without going through the hassle of first securing a warrant. See *California v Greenwood*, 486 US 35; 108 S Ct 1625; 100 L Ed 2d 30 (1988) (search did not occur where officers searched through garbage bags left on the curb for collection); *United States v Dunn*, 480 US 294; 107 S Ct 1134; 94 L Ed 2d 326 (1987) (search did not occur where DEA agents entered a fenced area to look into barn windows with flashlights); *United States v Miller*, 425 US 435; 96 S Ct 1619; 48 L Ed 2d 71 (1976) (search did not occur where the government obtained and searched through bank records without a warrant).

But applying the ordinary meaning of the word "search" would bring "many things that are currently considered outside" the scope of constitutional protection "back in." *Morgan*, 903 F3d at 571 (Thapar, J., concurring). Take *Ciarolo* and *Riley* as examples. In deciding whether aerial surveillance is a search, courts simply need to look at whether the aerial surveillance was a deliberate investigative act. It doesn't matter how high a plane was above a person's property, nor does it matter if the search was conducted from a private plane, a helicopter, or a hang glider—if the officer was in the air with the purpose of finding something on private property, a search occurred.

The ordinary meaning test is also more practical for cases involving high-tech surveillance. The Supreme Court's decision in *Kyllo* is illustrative. There, the Court considered whether use of a thermal imaging device to track heat emanations from the

defendant's home constituted a search. *Kyllo*, 533 US at 27. Answering in the affirmative, the Court reasoned that officers uncovered information concealed inside the home by using a device not "in general public use." *Id.* at 43. And while the *Kyllo* Court correctly held that a search occurred, it did not answer the question of what courts should do when surveillance technology *is* in general public use. But lower courts need not engage in doctrinal gymnastics to answer this question because under the ordinary meaning of "search," the question simply never arises. *Morgan*, 903 F3d at 572 (Thapar, J., concurring). Thus, even if the device in *Kyllo* was used by the public, the officers conducted a search "because using a thermal imager to determine whether heat is emanating from a house is a purposeful, investigative act." *Id.*

The reasonable expectation of privacy test and the physical intrusion test have "proven unworkable in practice," especially in cases involving high-tech police surveillance, as discussed above. *Carpenter*, 138 S Ct at 2244 (Thomas, J., dissenting). For this reason, judges and scholars have pushed for courts to abandon current doctrine and embrace the ordinary meaning test. See *Id.* at 2244–46 (Thomas, J., dissenting); *id.* at 2272 (Gorsuch, J., dissenting); *Morgan*, 903 F3d at 572 (Thapar, J., concurring); Baude & Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv L Rev 1821, 1824 (2016); Bellin, 118 Mich L Rev at 237. In *Carpenter v United States*, Justice Thomas called for a return to the text and described current doctrine as "a failed experiment" that the court is "dutybound" to reconsider. *Carpenter*, 138 S Ct at 2246 (Thomas, J., dissenting). Likewise, Justice Gorsuch explained why a return to the text and original understanding

of the Fourth Amendment is necessary, as current doctrine "fail[s] to vindicate the full protections of the Fourth Amendment." *Id.* at 2272 (Gorsuch, J., dissenting). Echoing those sentiments, Sixth Circuit Judge Amul Thapar has urged courts to "turn back to first principles" and apply the Fourth Amendment as written. *Morgan*, 903 F3d at 571–72 (Thapar, J., concurring).

States are especially well-positioned to turn away from *Katz* and return to the original meaning of the Fourth Amendment. Although Supreme Court holdings are binding as to the United States Constitution, those precedents "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489, 502 (1977). It was in this vein that the Iowa Supreme Court recently chose to abandon current doctrine and adopt a new test based on the original meaning of the word "search." *State v Wright*, 961 NW2d 396 (Iowa, 2021). Though the search-and-seizure provision in the Iowa constitution is nearly identical to the Fourth Amendment, the court held that the reasonable expectation of privacy test was too distant from the text and original meaning, and thus was "no longer tenable." *Id.* at 411–12.

The Michigan Supreme Court is "the ultimate authority with regard to the meaning and application of Michigan law." *People v Bullock*, 440 Mich 15, 27; 485 NW2d 866 (1992). This Court recently exercised that authority when it departed from the U.S. Supreme Court's rationale in *People v Parks*, 510 Mich 225; 987 NW2d 161 (2022). There, this Court was asked to extend the Michigan Constitution's prohibition on cruel and

unusual punishment to protect an 18-year-old facing a mandatory life sentence. *Id.* at 232. Though the U.S. Supreme Court has determined the Eighth Amendment does not prohibit such sentences, this Court held that such protections exist under the Michigan Constitution because the state constitution "has historically afforded greater bulwarks against barbaric and inhumane punishments." *Id.* at 243.

This Court can—and *amici* respectfully suggest should—exercise its prerogative to follow the same approach here. Though the Michigan Constitution has been construed "to provide the same protection as that secured by the Fourth Amendment," this Court has the ability to "impose a different interpretation" if there is a sufficiently compelling reason. *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011). This case presents an opportunity to do just that, particularly given that the U.S. Supreme Court's reasonable expectation of privacy and physical intrusion tests are so difficult to reconcile with the text of both the Fourth Amendment and the Michigan Constitution, particularly in cases like this where relatively new technology produces such clear tension between doctrine on the one hand and the plain meaning of the word "search" on the other—which would certainly seem to include *at least* the use of a UAV by law enforcement to effectively scale a fence and employ a drone-mounted camera to capture high-resolution recordings of items and activities deliberately shielded from public view. And while those images may "only" have captured a few second-hand cars this time, it's hardly a stretch to imagine the government using similar technology to look over a

homeowner's shoulder as they sort through their mail, carry their shopping bags in from the car, or scroll through the contacts list on their phone.

II. THE EXCLUSIONARY RULE SHOULD APPLY TO LONG LAKE TOWNSHIP'S CIVIL ZONING-ENFORCEMENT ACTION AGAINST THE MAXONS.

A. Long Lake Township's Zoning Ordinance Creates "Quasi-Criminal" Proceedings.

In *One 1958 Plymouth Sedan v Pennsylvania*, the United States Supreme Court held that the exclusionary rule applies to civil forfeiture proceedings. 380 US 693, 696; 85 S Ct 1246; 14 L Ed 2d 170 (1965). In that case, law enforcement officers had seized a man's car after finding alcoholic beverages without state tax seals during a warrantless search. *Id.* at 694. The Court based its decision to apply the exclusionary rule on the "quasi-criminal" nature of the forfeiture proceeding. *Id.* at 700–01. The proceeding was "quasi-criminal" because taking the car was a penalty intended to punish the man. *Id.*

Here, Long Lake Township's civil proceeding against the Maxons is "quasi-criminal" because the Maxons could face a fine for violating the ordinance. Under the heading "Penalties," the Long Lake Township Municipal Code states that anyone who violates the code is guilty of a "municipal civil infraction." Charter Township of Long Lake Zoning Ordinance, § 20.9. Michigan law permits a judge to impose a "civil fine" upon a person convicted of a "municipal civil infraction." MCL 600.8727. The plain meaning of the word "fine" includes the idea of punishment. See, e.g., *Black's Law Dictionary* (2d ed) (defining "fine" as a "pecuniary punishment" in which the offender

"pay[s] a penalty in money"). And the Michigan Supreme Court has noted that "[t]he Legislature is aware that a fine is generally a criminal punishment." *People v Earl*, 495 Mich 33, 40; 845 NW2d 721 (2014).

Merely labeling the fine "civil" does not transform the fine's essentially punitive function. And even if the government were to make the tactical decision to disclaim a fine, it would not alter the quasi-criminal nature of the charge or proceeding. Indeed, "prosecutions for violations of ordinances are in a sense criminal." *Huron Twp v City Disposal Sys, Inc*, 448 Mich 362, 365; 531 NW2d 153 (1995). Because the possibility of a fine makes the Maxons' proceeding a quasi-criminal one, the exclusionary rule should apply as it did under *One 1958 Plymouth Sedan*.

B. The United States Supreme Court Has Recognized That Warrantless Searches for Administrative Infractions Implicate Significant Fourth Amendment Interests—But These Interests Are Powerless Without the Exclusionary Rule.

In a case analogous to the present one, the United States Supreme Court found that a warrantless search for fire, health, and housing code violations violated the homeowner's Fourth Amendment rights. *Camara v Municipal Court of San Francisco*, 387 US 523, 525; 87 S Ct 1727; 18 L Ed 2d 930 (1967). Violating the code warranted only civil penalties, and the California Court of Appeals called the provisions "essentially civil rather than criminal." *Camara v Municipal Court of San Francisco*, 237 Cal App 2d 128, 137; 46 Cal Rptr 585 (Cal Ct App, 1965). The United States Supreme Court nevertheless found for the homeowner, saying that homeowners have "a very tangible interest" in

limiting government entries into their homes to prevent the "possibility of criminal entry under the guise of official sanction." *Camara*, 387 US at 530–31. And in other cases, the Court has continued to recognize that Fourth Amendment rights may protect people from administrative searches, even when no criminal penalties are involved. See, e.g., *Marshall v Barlow's, Inc*, 436 US 307, 312–13; 98 S Ct 1816; 56 L Ed 2d 305 (1978) (investigations for workplace OSHA violations); *Tyler*, 436 US at 504 (administrative fire department searches to determine a fire's cause).

Here, unless the exclusionary rule applies, the Maxons cannot protect their Fourth Amendment interests or effectively challenge Long Lake Township's searches. A separate lawsuit brought under 42 USC 1983 against Long Lake Township officials would likely cost thousands of dollars to pursue—an amount beyond the financial means of many. Such a lawsuit would not provide any defense or relief in the state court proceedings which the Maxons have to go through, and in most cases, the government will be found to have qualified immunity because the right violated was not "clearly established." See *Ashcroft v al-Kidd*, 563 US 731, 735; 131 S Ct 2074; 179 L Ed 2d 1149 (2011).

Because of the requirement for a right to have been "clearly established" in order to overcome qualified immunity, judges have noted that "the legal fiction created by qualified immunity" is "regrettable" and forces them to "reluctant[ly]" impose or concur with unjust outcomes. See *Sosa v Martin Cnty*, 57 F4th 1297, 1304 (CA 11, 2023)

(Jordan, J., concurring in the judgment). As criticized by Judge Jordan of the Eleventh Circuit Court of Appeals,

> The [United States] Supreme Court's recent qualified immunity decisions require that the facts of prior cases be very, very close to the ones at hand to give officers reasonable notice of what is prohibited. *See Rivas-Villegas v. Cortesluna*, —— U.S. ——, 142 S. Ct. 4, 7–9, 211 L.Ed.2d 164 (2021); *City of Tahlequah v. Bond*, —— U.S. ——, 142 S. Ct. 9, 11–12, 211 L.Ed.2d 170 (2021). Although the inquiry does not—at least not yet—demand "a case directly on point," it requires that "existing precedent . . . place[ ] the statutory or constitutional question beyond debate." *Rivas-Villegas* , 142 S. Ct. at 8.

Sosa, 57 F4th at 1303 (Jordan, J., concurring in the judgment).

But unfortunately, even prior cases with facts closely analogous to this one often fail to address the merits of a constitutional violation in order to clearly establish the right for subsequent cases because courts often address only the second prong of whether the right was previously clearly established. The United States Supreme Court recognized that this judicial practice of avoiding the first prong on the merits "threatens to leave standards of official conduct permanently in limbo." *Camreta v Greene*, 563 US 692, 704-06; 131 S Ct 2020; 179 L Ed 2d 1118 (2011). As explained by the Second Circuit Court of Appeals,

> *Camreta* warned of a "repetitive cycle" in which a court repeatedly declines to address the merits because [qualified] immunity exists, *and the official continues to engage in the challenged practice* because he will remain immune until the right is clearly established. *Id.* at 706, 131 S.Ct. 2020 & n.5. This cycle could happen "again, and again, and again," *id.* at 706, 131 S.Ct. 2020, *thereby allowing "palpably unreasonable conduct [to] go unpunished," Kisela v. Hughes* , —— U.S. ——, 138 S. Ct. 1148, 1162, 200 L.Ed.2d 449 (2018) (Sotomayor, J., dissenting).

Sabir v Williams, 52 F4th 51, 58 n 3 (CA 2, 2022) (emphasis added).

Thus, the Maxons and others like them are unlikely to prevail or have any remedy through a Section 1983 claim for a case like this because of the highly exacting standard they must meet to overcome qualified immunity combined with the repetitive cycle whereby rights are left unestablished by the courts. As courts have warned, this therefore fails to provide any remedy or to deter government officials from continuing to engage in their unconstitutional practices, because it allows their palpably unreasonable conduct to go unpunished. And for this reason, even though attorneys' fees could be awarded in lawsuits brought pursuant to Section 1983, few attorneys appear willing to take on the financial risk unless a client agrees to pay their fees, which then financially burdens victims of unconstitutional acts to challenge the government officials and makes the poor more vulnerable to being taken advantage of.

There is no point to having a right if there is no remedy for its violation; and if there is no remedy, then there is little to deter the violation of that right. If this Court fails to apply the exclusionary rule merely because the government classifies this as a "civil" case, then the government will be given a roadmap to circumvent Fourth Amendment protections by simply classifying its fines as "civil" to punish people for violating various laws and ordinances. But if the Court applies the exclusionary rule to this case, then "[t]he likelihood that illegally obtained evidence will be excluded from trial provides deterrence against Fourth Amendment violations" in future cases. See

Pennsylvania Bd of Probation & Parole v Scott, 524 US 357, 367; 118 S Ct 2014; 141 L Ed 2d 344 (1998).

C. Under the United States Supreme Court's Balancing Test, Applying the Exclusionary Rule to the Maxons' Zoning Proceeding Will Impose Low Social Costs While Providing Substantial Deterrence of Government Misconduct.

The United States Supreme Court applies the exclusionary rule when "a sufficient likelihood of deterring the conduct of the state police . . . outweighs the societal costs imposed by the exclusion." *United States v Janis*, 428 US 433, 453–54; 96 S Ct 3021; 49 L Ed 2d 1046 (1976). In one application of this balancing test, the Court determined that the exclusionary rule does not apply to parole revocation hearings. *Scott*, 524 US at 359. In that case, the Court found the societal costs high because states have an "overwhelming interest" in putting parolees back in prison if they show signs of continuing bad behavior. *Id.* at 365. On the other hand, the deterrence value was limited because "application of the rule in the criminal trial context already provides significant deterrence" related to parole revocations. *Id.* at 364, 368. For similar reasons, the Court had also declined to apply the exclusionary rule to civil tax proceedings. *Id.* at 363.

It was significant to the Court's reasoning in *Scott* that "[p]arole is a variation on imprisonment of convicted criminals in which the State accords a limited degree of freedom," and therefore a "revocation deprives the parolee not of the absolute liberty to which every citizen is entitled, but *only of the conditional liberty* properly dependent on observance of special parole restrictions." *Id.* at 365 (emphasis added) (quotation marks

and citation omitted). For this reason, the Court has held that "a parolee is not entitled to the full panoply of due process rights to which a criminal defendant is entitled." *Id.* at 365 n 5. Because of this diminished liberty interest, there is a "traditionally flexible, administrative nature of parole revocation proceedings" where, for example, "traditional rules of evidence generally do not apply." *Id.* at 364, 366. The different nature of the proceeding from a regular trial is also why the Court declined to apply the exclusionary rule to grand jury proceedings, which have a "traditionally flexible, nonadversarial nature," and to civil deportation proceedings, which have an "administrative nature." *Id.* at 363-64.

But here, the Maxons do not have a conditional or diminished liberty interest like someone who is on probation or parole for a criminal offense, their proceeding in the trial court is not a traditionally flexible, nonadversarial, administrative one, and there are no related criminal proceedings which already provide significant deterrence of such unconstitutional searches. Therefore, the exclusionary rule's deterrent value outweighs its social costs in this case. Unlike in *Scott*, application of the rule to this case would impose a low social cost because no convicted criminals who violate their parole conditions would remain at large. Rather, at most, someone might merely continue to violate a local zoning ordinance when the violation is not noticeable or in public view—unless government officials simply obtain a search warrant. And the rule creates a high deterrent value in this case, which is much needed because it appears to be the only realistic remedy since either the cost of pursuing a Section 1983 lawsuit or the qualified

immunity doctrine would likely foreclose most or all attempts to recover for Fourth Amendment violations related to civil zoning proceedings. See Section II.B above. Therefore, the United States Supreme Court's balancing test requires the exclusionary rule to cover the civil enforcement action in this case.

CONCLUSION

For the foregoing reasons this Court should grant the petition for review and reverse the lower court.

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the formatting rules in MCR 7.212. I certify that this document contains 6,466 countable words, according to the word count function in Microsoft Word. This document is set in 14-point Garamond font, with lines double spaced.

CERTIFICATE OF SERVICE

I certify that on September 8, 2023, I electronically filed the Cato Institute and the Rutherford Institute's Motion to File a Brief Amicus Curiae and this Brief of the Cato Institute and the Rutherford Institute as *Amici Curiae* in Support of Defendant-Appellants, causing all parties of record to be served through the MiFILE system of the Michigan Supreme Court.

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