IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,

Petitioner,

v.

JOHN MCKELVEY, III,

Respondent.

Supreme Court No. S-17910

Court of Appeals No. A-12419
Trial Case No. 4FA-14-00040CR

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
HONORABLE BETHANY HARBISON, JUDGE

BRIEF OF AMICUS CURIAE ALASKA PUBLIC DEFENDER AGENCY

ALASKA PUBLIC DEFENDER AGENCY

SAMANTHA CHEROT (1011072)
PUBLIC DEFENDER

RENEE McFARLAND (0202003)
ASSISTANT PUBLIC DEFENDER
900 West 5th Avenue, Suite 200
Anchorage, Alaska 99501
Telephone: (907) 334-4400

Filed in the Court of Appeals
of the State of Alaska
May 9, 2022

MEREDITH MONTGOMERY, CLERK
Appellate Courts

Joyce Marsh
Deputy Clerk

VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513, that the font used in this document is Arial 12.5 point.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

AUTHORITIES RELIED UPON

CONSTITUTIONAL PROVISIONS

ALASKA CONSTITUTION
Article I Section 1 provides:

Inherent Rights

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

ALASKA CONSTITUTION
Article I Section 14 provides:

Searches and Seizures

The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ALASKA CONSTITUTION
Article I Section 22 provides:

Right of Privacy

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the Alaska Public Defender Agency as amicus curiae in support of the respondent. The Alaska Legislature created the agency in 1969 to represent, among others, indigent Alaskans charged with crimes in Alaska state courts. Each year, the agency represents indigent criminal defendants in approximately 20,000 cases in Alaska's courts, including many who are subject to warrantless searches by law enforcement. Amicus therefore has expertise and interest in the subject matter of this litigation, as it affects indigent Alaskans. The issues presented are of great importance to the agency's work and to the privacy and welfare of its clients.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held that, unless an exception to the warrant requirement applies, law enforcement officers must obtain a warrant before engaging in aerial surveillance using vision-enhancing technology. But this resolution was unnecessarily narrow. This court should hold that law enforcement officers must obtain a warrant before engaging in deliberate aerial surveillance. As the agency explains below, this broader rule comports with the Alaska Constitution and more fairly protects Alaskans regardless of their financial means.

ARGUMENT

This Court Should Hold that Law Enforcement Must Obtain a Warrant Before Engaging in Deliberate Aerial Surveillance of Alaskans.

A. The Alaska Constitution requires this court to distinguish between deliberate aerial surveillance by law enforcement and unintended aerial observation by the public.

The concept of privacy as an individual right requiring attention and protection in the law is more than a century old,[1] and the idea of respecting personal privacy, especially from unwarranted governmental intrusion, was a core value in territorial Alaska.[2] At statehood, the framers of the Alaska Constitution protected this value by providing Alaskans, in article I, section 14, with more robust protection from unwarranted governmental intrusion that that provided by the federal constitution.[3]

---

[1] *See* Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (Dec. 1890) (quoting *Winsmore v. Greenbank, Willes*, 577 (1745)) (cautioning that the "[r]ecent inventions and business methods" merit "attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone' " and stating advent of "[i]instantaneous photographs and newspaper enterprise," along with "numerous mechanical devices," "threaten[ed] to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops' ").

[2] *See* Susan Orlansky & Jeffrey M. Feldman, *Justice Rabinowitz and Personal Freedom: Evolving a Constitutional Framework*, 15 ALASKA L. REV. 1, 2 (June 1998) ("The community values of territorial Alaska evolved to reflect a high level of tolerance for personal idiosyncrasy, unconventional thought and lifestyle, and respect for personal privacy, later to be known as the 'right to be left alone.' ").

[3] *See* ALASKA CONST., art. I, § 14 ("The right of the people to be secure in their persons, houses, and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."); *see State v. Glass*, 583 P.2d 872, 874-75 (Alaska 1978) ("In its petition, the state relies primarily upon federal decisions dealing with the fourth amendment to the United States Constitution. The authority is questionable, and, in our view, not persuasive as to the construction of

And thirteen years after statehood, Alaskans amended their state constitution to explicitly protect the right to privacy in article I, section 22.[4] Section 22 "serves as a check on the power of government," protecting Alaskans "against governmental intrusion."[5] And while it does not create an independent ground for suppressing evidence in a criminal case, it does require "a liberal interpretation" of section 14's protection against unreasonable searches and seizures.[6]

This "liberal interpretation" must extend to the initial question presented by a claim under section 14, i.e., whether state action amounted to a search. Alaska employs the expectation of privacy test to determine whether a search has occurred under the state constitution.[7] That test asks: "(1) did the person harbor an actual (subjective) expectation of privacy, and, if so, (2) is that expectation one that society is prepared to recognize as reasonable?"[8] Here, the state concedes that McKelvey

---

Alaska's analogous provision." (internal footnotes omitted)); *Woods & Rohde, Inc. v. State, Dep't of Labor*, 565 P .2d 138, 148 (Alaska 1977) ("Concerning the guarantees furnished by article I, section 14 of the Alaska Constitution, we said in *Weltz v. State*, 431 P.2d 502, 506 (Alaska 1967), that '(t)he primary purpose of these constitutional provisions is the protection of personal privacy and dignity against unwarranted intrusion by the State.' " (internal quotation marks omitted)).

[4] *See* ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.").

[5] *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1129, 1133 (Alaska 1989).

[6] *State v. Gibson*, 267 P.3d 645, 659 (Alaska 2012) (quoting *Municipality of Anchorage v. Ray*, 854 P.2d 740, 750 (Alaska App. 1993)).

[7] *Cowles v. State*, 23 P.3d 1168, 1170 (Alaska 2001).

[8] *Id.*

had an actual expectation of privacy in his greenhouse.[9] [Pet. Br. 23] Thus, the question is whether that expectation of privacy is one Alaska recognizes as objectively reasonable.

In arguing that McKelvey's subjective expectation of privacy was reasonable, the state primarily relies on "open view" doctrine. [Pet. Br. 24-31] Because the trooper was in publicly navigable airspace, the state argues, "his viewing of the greenhouse was not a search." [Pet. Br. 26] The state supports this contention by characterizing the trooper's flight as "particularly unobtrusive" and consistent with "the abundance of small aircraft in Alaska." [Pet. Br. 26] Given this context, the state concludes, McKelvey's expectation of privacy in his greenhouse was not reasonable. [Pet. Br. 30]

"The meaning of privacy of a necessity must vary depending on the factual context and the often competing interests of society and the individual."[10] The state's argument ignores an important part of the factual context surrounding the surveillance of McKelvey's property: the fact that it was the result of deliberate surveillance by the government and not unintended observation by the public. Here, the trooper "received a tip from an informant who reported observing a marijuana grow"

---

[9] *McKelvey v. State*, 474 P.3d 16, 21 (Alaska App. 2020) (noting state's concession that first part of expectation of privacy test, explaining trial court's findings demonstrating McKelvey's subjective expectation of privacy, and concluding record supported trial court's conclusion).

[10] *State v. Glass*, 583 P.2d 872, 879-80 (Alaska 1978).

at McKelvey's house.[11] "[H]oping to confirm the informant's tip through aerial surveillance, [the trooper] had a wildlife trooper fly him near the property at an altitude of at least 600 feet. During this flyover, [the trooper] passed by McKelvey's property twice, and he took photographs of the property using a camera equipped with a 280-millimeter zoom lens."[12]

That is, the trooper did not observe McKelvey's property by chance, as a member of the public flying overhead might. Instead, the trooper deliberately engaged in aerial surveillance of McKelvey's property to further a criminal investigation. This deliberate surveillance implicates the freedom from governmental intrusion protected by sections 14 and 22 of the Alaska Constitution in a manner unintended public observation does not.

This court has long recognized the import of the deliberate nature of police action on the question whether a person's expectation of privacy was reasonable. In *State v. Glass*,[13] this court held the "Alaska Constitution mandates that its people be free from invasions of privacy by means of surreptitious monitoring of conversations."[14] In doing so, this court approvingly quoted Judge Hufstedler's dissent in *Holmes v. Burr*:[15]

---

[11] *McKelvey v. State*, 474 P.3d 16, 19 (Alaska App. 2020).

[12] *Id*. at 20.

[13] 583 P.2d 872 (Alaska 1978).

[14] *Id.* at 881.

[15] 486 F.2d 55 (9th Cir. 1973).

> Extensive police-instigated and clandestine participant recordings, coupled with their use as evidence of any self-incriminating remarks of the speaker, pose a grave danger of chilling all private, free, and unconstrained communication. In a free society, people ought not to have to watch their every word so carefully.[16]

This court explained that "Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant" and required police to obtain a warrant person secretly monitoring a person's conversations.[17] At that time, as today, the use of an eavesdropping device to hear or record an oral conversation was permitted so long as one party to the conversation consented.[18] This court stated that its holding was "unaffected by this statute" because it was "interpreting constitutional provisions."[19] And it noted that the statute was not intended to address "wiretap or other eavesdropping devices used in court proceedings."[20] As such, the fact that conduct may be deemed reasonable if done by a member of the public does not necessarily render similar conduct by law enforcement for investigative purposes reasonable.

Nearly all the cases on which the state relies for the application of the open view doctrine either do not implicate or do not address the distinction between

---

[16] *Glass*, 583 P.2d at 881 (quoting *Holmes*, 486 F.2d at 65-66 (Hufstedler, J., dissenting)) (cleaned up).

[17] *Id.* at 879 (emphasis added).

[18] AS 42.20.310(a)(1). An "eavesdropping device" is "any device capable of being used to hear or record oral conversation whether the conversation is conducted in person, by telephone, or by any other means." AS 42.20.310(b).

[19] *Glass*, 583 P.2d at 882 n.37.

[20] *Id.* (quoting 1966 House Journal 525-29).

deliberate surveillance and unintended observation as it relates to the question whether an expectation of privacy was reasonable. [Pet. Br. 24-25] For instance, in *Daygee*,[21] this court upheld a seizure of marijuana where the officer had lawfully stopped a vehicle for speeding and observed a bag of marijuana in the backseat of the car; this court explained that "[i]t is no search to observe that which is in the plain view of an officer who is rightfully in a position to have that view."[22] But because the officer had lawfully detained the individual, the officer's observation of marijuana during that detention is better analogized to the "plain view" doctrine.[23] And in *Pistro*,[24] this court applied the "open view" doctrine to conclude there was probable cause to arrest an individual; this court found the officer's observation, from a driveway open to the public, of information corroborating informant's tip did not invade "rights to privacy."[25] The officer, however, did not use the driveway to surveil the occupants; rather, he entered the driveway to "make contact" with the occupants.[26]

---

[21] *Daygee v. State*, 514 P.2d 1159 (Alaska 1973).

[22] *Id.* at 1163.

[23] *See Anderson v. State*, 444 P.3d 239, 243 (Alaska App. 2019) (explaining that "plain view" doctrine technically refers to legal justification for seizure of evidence that has not been particularly described in a warrant and which is inadvertently spotted in the course of a constitutional search in progress or during an otherwise justifiable intrusion into constitutionally protected area whereas "open view" doctrine addresses observations made by officer without prior physical intrusion into constitutionally protected area).

[24] *See Pistro v. State*, 590 P.2d 884 (Alaska 1979).

[25] *Id.* at 886-87.

[26] *Id.* at 885. Similarly, the *Weltz* court's description of what is not a search, i.e., "mere looking at that which is open to view is not a 'search,' " is inapposite, as an

By contrast, this court's decision in *Cowles*[27] supports the state's contention that the open view doctrine applies to deliberate police surveillance. There, this court upheld the video surveillance of an individual suspected of theft at her workplace, a theater box office, relying on the fact that the location being videotaped "could be seen by members of the public through the ticket window and the open door, and by her fellow employees who were walking around the office almost continuously during the videotaping."[28]

Justice Fabe and Justice Bryner, however, dissented, stating that the Alaska Constitution protects individuals from surreptitious police video surveillance.[29] Justice Fabe explained the majority's opinion "permits deeply intrusive police surveillance of individuals who have – and deserve – every reasonable expectation of privacy"; disregarded ample precedent supporting the conclusion "that police violate

---

officer who deliberately surveils an individual or location is not "merely" looking at it. *See Weltz v. State*, 431 P.2d 502, 506 (Alaska 1967) (quoting *Brown v. State*, 372 P.2d 785, 790 (Alaska 1962)); *see also McGee v. State*, 614 P.2d 800, 806 n.12 (Alaska 1980) (excusing lack of inadvertence in plain view seizure of evidence but explaining that "the initial intrusion which afforded the view must have been lawful" and stating that "[w]here there is no search, there is, a fortiori, no danger that the police will exceed their permissible limits); *Sumdum v. State*, 612 P.2d 1018, 1020-22 (Alaska 1980) (explaining that, although officers' plain view of suspect that provided probable cause for arrest was not inadvertent, "there has been no showing that the officers opened Sumdum's door or intended to do so in order to search" and that officers "were entitled to walk up to Sumdum's door in order to investigate the burglary"). [Pet. Br. 40]

[27] *Cowles v. State*, 23 P.3d 1168 (Alaska 2001).

[28] *Id.* at 1171.

[29] *Id.* at 1175-1185 (Fabe, J., dissenting).

reasonable expectations of privacy by engaging in more intrusive searches than a defendant would expect from a member of the public"; and overlooked the fact that secret police video surveillance was uniquely intrusive.[30]

The agency asserts Justice Fabe's dissent better interprets the rights guaranteed all Alaskans by the state constitution,[31] but even the majority opinion does not establish that it is reasonable for Alaskans to expect aerial surveillance of their homes by law enforcement. The majority determined that "the public nature of Cowles's office [w]as the critical factor" in determining whether her expectation of privacy was reasonable,[32] noting that "[w]here incriminating conduct occurs in a public area, . . . participants in that conduct already risk observation."[33]

McKelvey's conduct did not occur in a public area; it took place at his home. And the constitutional right to privacy – and the protection from governmental intrusion it protects – is at its strongest in Alaskans' homes. As this court stated in

---

[30] *Id*. at 1175-1183 (Fabe, J., dissenting).

[31] *See id.* at 1179 (Fabe J. dissenting) ("This court's conclusion that only inhabitants of private offices are protected from warrantless surveillance is particularly disturbing because it effectively ties a defendant's constitutional rights to her economic status. Following the standard articulated today, executives in private offices will be protected, but clerical workers in shared workspaces will not. This rule will disproportionately affect women, who represent 99% of secretaries, 96% of receptionists, 91% of bookkeepers, and 77% of cashiers. The impact of this rule is still greater for African-American women, who ware more likely to work in administrative support or service positions than in any other jobs.") (internal footnotes omitted); *see also infra* Part B.

[32] *Id.* at 1171.

[33] *Id.* at 1170.

Ravin,[34] "[i]f there is any area of human activity to which a right to privacy pertains more than any other, it is the home."[35] As such, given that "the home [is] a place where the individual's privacy receives special protection" and because section 22 was intended to protect Alaskans from governmental intrusion, McKelvey's expectation that his home would not be subjected to deliberate aerial surveillance is one Alaskan society deems reasonable.[36]

Indeed, if a layperson were to deliberately engage in aerial surveillance of his neighbor, the person could be civilly liable. "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[37] While unintended intrusions would not subject the layperson to liability, a deliberate decision to engage in surveillance – like the trooper's decision to surveil McKelvey – could.[38]

---

[34] *State v. Ravin*, 537 P.2d 494 (Alaska 1975).

[35] *Id.* at 503.

[36] *Id.* at 504 ("The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.").

[37] Intrusion upon Seclusion, 28A RESTATEMENT (SECOND) OF TORTS, § 652B (1977) (updated Oct. 2021)

[38] *See Smith v. State*, 510 P.2d 793, 803 (Alaska 1973) (Rabinowitz, C.J., dissenting) ("Without elaborating, the court rejects as being 'too attenuated' appellant's theory of 'differential expectations of privacy' and in so doing fails to recognize that citizens might expect a few, infrequent invasions of their privacy by

And where that deliberate surveillance includes photography, the invasion of privacy is amplified. As the court of appeals has observed, "under many circumstances, if a person is in a place where he or she can reasonably expect privacy, tort law protects the person from unconsented-to observation for photography."[39] The court of appeals characterized this court's decision in *Glass* as being "premised on the legal rule that people who knowingly reveal private matters to other occupants of a room are nonetheless entitled to expect that these private matters are not simultaneously broadcast to other locations or electronically recorded for later scrutiny."[40]

---

third persons, but might simultaneously expect their privacy to remain immune from governmental intrusion. I disagree. A telephone caller, for example, who conducts a conversation on a 'party line' might reasonably expect brief interruptions from others who were attempting to ascertain if the line were in use. It does not necessarily follow, however, that the same caller would also expect that government agents might be conducting a full-scale warrantless 'search' or tap of his conversation. Similarly, one who deposits refuse into a dumpster might expect some minor, inadvertent examination by garbagemen or other third persons, but such expectations would not necessarily include a detailed, systematized inspection of the garbage by law enforcement personnel."). Chief Justice Rabinowitz's proposed alternative to the *Katz* reasonable expectation of privacy test – i.e., " 'whether the person has exhibited a reasonable expectation of privacy, and if so, whether that expectation has been violated by unreasonable governmental intrusion' " – is likely a better reflection of the constitutional values embodied in sections 14 and 22 of the Alaska Constitution. *See id.* at 801 (Rabinowitz, C.J., dissenting) (quoting *People v. Edwards*, 458 P.2d 713, 715 (Cal. 1969)).

[39] *State v. Page*, 911 P.2d 513, 516 (Alaska App. 1996), *petition dismissed as improvidently granted*, 932 P.2d 1297 (Alaska 1997).

[40] *Id.*

Here, the trooper not only photographed McKelvey's property, he did so with "the use of vision-enhancing technology."[41] The court of appeals relied on this fact to conclude that the trooper's actions necessitated a warrant in the absence of an exception to the warrant requirement; in doing so, it failed to reach the broader question whether the deliberate warrantless surveillance alone, without the aid of vision-enhancing technology, was unconstitutional.[42] This court, however, should reach that question, and for the reasons laid out above, conclude that deliberate aerial surveillance, with or without vision-enhancing technology, violates the Alaska Constitution.[43]

---

[41] *McKelvey v. State*, 474 P.3d 16, 32 (Alaska App. 2020).

[42] *Id.*

[43] *Id.* at 31 ("Moreover, it is easy to see why Alaskans' sense of security might be severely compromised if our constitution did not regulate purposeful aerial surveillance of people's houses by law enforcement officers. Even if individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards without entirely giving up their enjoyment of those areas. And a person's right to privacy should not hinge on whether that person has the financial means to undertake the extraordinary measures that would be required to shield their curtilage from all aerial views.") (cleaned up); *see also infra* Part B.

Such a holding would not "prohibit[] an effective investigate method," as the state suggests. [Pet. Br. 31] It would merely require that this "effective investigative method" be employed within the confines of the Alaska Constitution. While the constitution would generally preclude warrantless surveillance as that conducted here, it would not preclude law enforcement from conducting deliberate aerial surveillance under exceptions to the warrant requirement, including the exigent circumstances and emergency aid exceptions, when necessary. [Pet. Br. 31] Nor would it preclude law enforcement from getting a warrant.

B. All Alaskans Are Entitled to Freedom from Deliberate Aerial Surveillance by Law Enforcement.

The state contends that McKelvey's actions, not just the trooper's, are relevant to the question whether the trooper's conduct comported with the Alaska Constitution, stating that McKelvey "did nothing to conceal the marijuana from aerial observation." [Pet. Br. 29] It argues that McKelvey's use of a translucent greenhouse demonstrates that he "was expecting to expose the marijuana to aerial views for the months it takes to grow." [Pet. Br. 30] The state's assertion that, to manifest a reasonable expectation of privacy from deliberate aerial surveillance by law enforcement officers, an Alaskan must shield his property from such surveillance insufficiently protects less privileged and indigent Alaskans from governmental intrusion.

McKelvey maintained a single-family home with a greenhouse within his curtilage; the greenhouse was "surrounded by a natural sight-barrier of tall woods," and he protected it "from ground-level observation by placement of the building away from the front of his home and placement of "KEEP OUT" and "NO TRESPASSING" signs all throughout the barrier to their property." [Exc. 329] That is, McKelvey was able to manifest a level of privacy in his home out of reach to many Alaskans. The state's suggestion that McKelvey was required to do more to establish the reasonableness of his expectation of privacy from deliberate aerial surveillance places the concept of "private curtilage" out of reach of all but the most privileged Alaskans.

Requiring an individual to erect sight barriers above his curtilage imposes significant costs, both personal and financial. "[E]ven individuals who have

taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards without entirely giving up their enjoyment of those areas."[44] Moreover, "blocking off all conceivable aerial views" of one's curtilage is not financially feasible for many Alaskans.

The cost of building materials continues to rise,[45] and premade structures that would shield curtilage from aerial surveillance range from hundreds to thousands of dollars,[46] if they are even readily available in a community or sufficiently large enough to effectively shield curtilage from aerial observation. When nearly 40 percent of Americans cannot afford an unexpected $400 expense without incurring debt,[47] the state's suggestion that Alaskans are required to do more than McKelvey

---

[44] *Florida v. Riley*, 488 U.S. 445, 454 (1989) (O'Connor, J., concurring).

[45] Michael Rudy, *Construction materials prices continue to climb*, YieldPro (Feb. 16, 2022) (stating that Bureau of Labor Statistics' producer price index report for January 2022 "showed that construction materials prices were up 2.9 percent in the month, seasonally adjusted", which "was 23.6 percent higher than its year-end level").

[46] Canopies shield little from observation and are insufficiently robust for Alaskan weather, but they cost at least $70. *See*, *e.g.,* Pop-Up Tents, https://www.homedepot.com/b/Sports-Outdoors-Tailgating-Gear-Pop-Up-Tents/N5yc1vZcby0?sortorder= asc &sortby=price. More substantial structures that would better protect curtilage from surveillance cost thousands of dollars and may still permit surveillance from oblique angles. *See*, *e.g.*, Carports, https://www.homedepot.com/b/SportsOutdoorsTailgatingGearPopUpTents/N5yc1vZcby0?sortorder=asc&sortby=price.

[47] *Dealing with Unexpected Expenses*, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2020 (Bd. of Governors of the Federal Reserve System May 2021) (explaining that "[r]elatively small, unexpected expenses, such as a car repair or a modest medical bill, can be a hardship for many families" and stating that, in November 2020, 36 percent of adults could not have covered such an expense with cash or its equivalent).

did to protect their curtilage from deliberate aerial surveillance magnifies the existing disparity in the protection from government intrusion afforded less privileged and indigent Alaskans.[48]

Both the court of appeals and members of this court have acknowledged the right of all Alaskans, regardless of economic means, to be free from governmental intrusion.[49] Below, the court of appeals observed that the right to privacy guaranteed by section 22 does not depend on socioeconomic status: "[A] person's right to privacy should not hinge on whether that person has the financial means to undertake the extraordinary measures that would be required to shield their curtilage from all aerial view."[50] This mirrors the concerns voiced by Justices Fabe and Bryner in their dissent

---

[48] *See* Carol Steiker, *"How Much Justice Can You Afford?" – A Response to Stuntz*, 67 GEO. WASH. L. REV. 1290, 1291 (June-Aug. 1999) ("The poor simply have less privacy to begin with than the rich, for all the reasons Stuntz relates (the poor have smaller homes or apartments on less land, and share their dwellings with more people; the poor have less privacy at their places of work; the urban poor tend to spend more time on the street or other common areas)."); *cf. State v. Pippin*, 403 P.3d 907, 917 (Wash. App. 2017) ("Against this backdrop, to call homelessness voluntary, and thus unworthy of basic privacy protections, is to walk blindly among the realities around us. Worse, such an argument would strip those on the street of the protections given the rest of us directly because of their poverty. Our constitution means something better.").

[49] Indeed, limiting freedom from governmental surveillance based on one's socioeconomic status could implicate constitutional guarantees of equal protection and liberty. ALASKA CONST. art. I, § 1 ("This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protections under the law; and that all persons have corresponding obligations to the people and to the State.").

[50] *McKelvey v. State*, 474 P.3d 16, 31 (Alaska App. 2020).

in *Cowles* about tying one's "constitutional rights to her economic status"[51] and by Chief Justice Rabinowitz in his dissent in *Smith* about limiting the rights provided in sections 14 and 22 to "property owners only."[52]

This concern regarding the distributive effects of this court's jurisprudence on freedom from governmental intrusion is well founded. In 1999, Professor William J. Stuntz suggested that common assumptions regarding the privacy protections provided by the fourth amendment "seem[ed] biased, both against

---

[51] *Cowles v. State*, 23 P.3d 1168, 1179 (Alaska 2001) ("The court's conclusion that only inhabitants of private offices are protected from warrantless surveillance is particularly disturbing because it effectively ties a defendant's constitutional rights to her economic status. Following the standard articulated today, executives in private offices will be protected, but clerical workers in shared work spaces will not.").

[52] *Smith v. State*, 510 P.2d 793, 805 (Alaska 1973) (Rabinowitz, C.J., dissenting) ("Finally, I disagree with the majority's holding insofar as it discriminates between the right to privacy of citizens occupying a single family dwelling, and those living in multiple unit dwelling places. In my opinion, such a distinction is unjustifiable as being either arbitrary or ultimately grounded in impermissible economic discrimination among living unit dwellers. Nowhere in the text of the fourth amendment, article I, section 14, or article I, section 22, is the proviso, 'for property owners only.' Many, if not most, of our citizens cannot afford to own their own homes and live in single family dwellings. Further, some persons may prefer to live in apartments or condominiums. Moreover, many urban dwellers are obliged to reside in high rise apartment buildings, due to the crowded spatial conditions of our cities. To make the protection of the fourth amendment, article I, section 14, or article I, section 22 depend upon the economic status of an individual, life-style preferences and urban spatial conditions is, in my opinion, unacceptable. The appropriate analytical focal point should be appellant's reasonable expectation of privacy. In my view, such expectation will remain constant, regardless of whether appellant's living unit is situated by itself on a spacious multi-acre estate or stacked upon others in a multi-unit apartment building. In other words, I am convinced that a resident's expectation that police will not be scavenging through his or her garbage when such refuse is deposited in the only available waste receptacle for the living unit remains the same, whether the dweller resides in a split-level ranch home in the suburbs or in a crowded tenement in the inner city.").

the poor and against blacks."[53] Stuntz argued privacy only exists in certain types of places and "[r]ich people have more access to those spaces than poor people;" "to the extent the law focuses on privacy rather than, say, the interest in avoiding police harassment or discrimination," Stuntz asserted, "it shifts something valuable – legal protection – from poorer suspects to wealthier ones."[54]

Stuntz's discussion of the distributive effects of the Fourth Amendment primarily focused on their effect on the urban poor, which led him to question whether it is proper to structure Fourth Amendment law around privacy.[55] Scholars questioned Stuntz's proposed reframing of the Fourth Amendment, but they did not dispute the role of search-and-seizure doctrine in perpetuating unfairness in the criminal legal system.[56]

---

[53] William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (June – August 1999) ("But there seems to be fairly widespread agreement on the twin propositions that (1) Fourth Amendment law should protect privacy, and (2) the protection should tend to increase as the privacy invasion increases. Indeed, to state these two propositions is to state the obvious. These obvious propositions may be wrong. Begin with the central problem of late twentieth-century American criminal justice: it seems biased both against the poor and against blacks.").

[54] *Id.* at 1287-89 (explaining that, notwithstanding interest in protecting privacy, Fourth Amendment "is the primary source of legal regulation of police," which "is a very strange thing to focus on when regulating the police," as "targets of police searches and seizures tend to be relatively poor" and [p]rivacy is an interest whose importance grows with one's bank account, or one's square footage;" because "[p]rivacy is not much at stake in street encounters" "Fourth Amendment law has little do with those encounters," regulating in "the body of law that most regulates the police, regulates very little when it comes to what the police do most").

[55] *Id.* at 1288-89.

[56] *See*, *e.g.*, Louis Michael Seidman, *Making the Best of Fourth Amendment Law: A Common on the Distribution of Fourth Amendment Privacy*, 67

Although the court of appeals acknowledged the risk deliberate aerial surveillance presents to the privacy of less privileged Alaskans, it declined to adopt a rule protecting all Alaskans from such governmental intrusion.[57] Instead, it held that such surveillance conducted without a warrant violates the Alaska Constitution when

---

GEO. WASH. L. REV. 1296, 1305-06 (June-Aug. 1999) ("[T]he real danger is that current Fourth Amendment law serves to legitimate an unfair criminal justice system. Although it provides only the most minimal protection against the most egregious police abuses, many Americans have nevertheless been persuaded that the police are somehow 'handcuffed.' This perception, in turn, fuels still more draconian enforcement and punishment strategies. I therefore share Professor Stuntz's view that a just version of the Fourth Amendment would do much more to regulate police practices that unfairly harm poor and minority communities. Instead of giving up on the Fourth Amendment, judges might invigorate it so as to extend a real guarantee of fair and equal treatment to our most vulnerable citizens. Nothing in the nature of things prevents judges from making this choice. They need only decide to make it."); Carol Steiker, *"How Much Justice Can You Afford?" – A Response to Stuntz*, 67 GEO. WASH. L. REV. 1290, 1294 (June-Aug. 1999) (explaining belief that Stuntz's proposed shift away from privacy would not "go very far toward equalizing the disparate impact of law enforcement in the United States" and proposing instead that "police officers, when seeking consent to search, [] advise all suspects of their right to refuse consent"; "improving the quality of defense counsel for the indigent by raising the bar for ineffective assistance of counsel under the Sixth Amendment as well as the stages at which the right to counsel ought to attach"; offering "a remedy for the illegal pretextual use of race or ethnicity in traffic stops (and other stops)"; and "allowing challenges to the disparate impact of sentencing laws" would better promote equality).

[57] *McKelvey v. State*, 474 P.3d 16, 31-32 (Alaska App. 2020) ("Moreover, it is easy to see why Alaskans' sense of security might be severely compromised if our constitution did not regulate purposeful aerial surveillance of people's houses by law enforcement officers. Even individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards without entirely giving up their enjoyment of those areas. And a person's right to privacy should not hinge on whether that person has the financial means to undertake the extraordinary measures that would be required to shield their curtilage from all aerial view. But we need not decide whether to adopt the same broad rule adopted in California and Hawaii because, in McKelvey's case, there is one more factor to consider: Trooper did not make his observations of McKelvey's backyard and greenhouse with his unaided naked eye; rather, he used a telephoto lens to enhance his view of the contents of the greenhouse.") (cleaned up).

accompanied by the use of vision-enhancing technology.[58] As such, it is questionable whether Alaskans are protected from deliberate aerial surveillance unaccompanied by vision-enhancing technology, and Alaskans who are unable to erect outbuildings or other structures to protect their curtilage from aerial surveillance (or who are unwilling to suffer the consequences to their enjoyment of their property of doing so) remain at risk of having the government intrude on their privacy.

But as Chief Justice Rabinowitz recognized nearly 50 years ago, and as Justices Fabe and Bryner recognized over 20 years ago, the right to privacy extends to all Alaskans, not only those with financial means. Because deliberate aerial surveillance is inconsistent with the ideals of the Alaska Constitution as evinced by sections 14 and 22, this court should hold that such surveillance by law enforcement may only be conducted upon the issuance of a warrant or with an exception to the warrant requirement.[59]

---

[58] *Id.* at 33.

[59] *Cf. Beltz v. State*, 221 P.3d 328, 344-45 (Alaska 2009) (Winfree, J., dissenting) ("When otherwise faced with the federal rule, transplanting the reasonable suspicion framework from investigatory stops to seizures and searches of garbage left for collection might at first blush seem a reasonable and adequate check on police conduct. But Chief Justice Rabinowitz had the correct response over thirty-five years ago: 'In my judgment it is preferable to entrust the decision to invade citizens' privacy to the scrutiny of neutral judicial officers – even police officers operating under great restraint.' . . . To the extent today's rule affords Alaskans any protection, it is better than the federal rule. But a far better course would be to apply the rule proposed by Chief Justice Rabinowitz. The people of Alaska deserve a rule that jealously protects their constitutional right to privacy, and I would adopt a rule requiring police to obtain a warrant to seize and search garbage that is left for collection in the normal course.").

CONCLUSION

The Alaska Public Defender Agency respectfully requests this court hold that the deliberate aerial surveillance of McKelvey's curtilage violated the Alaska Constitution's protection from unreasonable searches and seizures.

SIGNED on April 26, 2022, at Anchorage, Alaska.

ALASKA PUBLIC DEFENDER AGENCY

/s/ Renee McFarland
RENEE McFARLAND (0202003)
ASSISTANT PUBLIC DEFENDER