



INSTITUTE FOR JUSTICE

Sub H.B. 251 Supporter Testimony

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Chairman Johnson, Vice Chair Wilson, Ranking Member Weinstein, and members of the Senate Armed Services, Veterans Affairs, and Public Safety Committee: Thank you for the opportunity to speak on House Bill 251, concerning the use of unmanned aerial vehicles, also known as drones, by law enforcement. And thank you to Representative Willis for the invitation to speak today.

My name is Mike Greenberg. I'm an attorney with the Institute for Justice, a nonprofit, public-interest law firm headquartered in Virginia but which operates around the country to secure, protect, and defend ordinary Americans' constitutional rights. One of the most prominent rights we have defended since our founding 35 years ago is property rights. One of the many ways we defend property rights is protecting the right to be secure in one's property through our Project on the Fourth Amendment. And that's why I'm thrilled to be here in support of HB 251, which aims to protect Ohioans' property rights from unreasonable government surveillance.

It is critical that we stay vigilant when new technologies make it possible to erode our fundamental right to be free from unreasonable searches. This bill has just that in mind.

Drones are smaller, stealthier, quieter, and fly at significantly lower altitudes than traditional manned aircraft. Indeed, they *must* fly lower than 400 feet, and typically fly much lower than that. They often come equipped with high-powered cameras or even more advanced technology, like heat sensors. For those reasons, drones are a powerful investigative tool. They can capture intimate details of private spaces, like inside of homes and backyards, efficiently and surreptitiously. And because they intrude from overhead, they can do so despite a private property owner's best efforts to keep their property private from the rest of the world.

Against that backdrop, HB 251 is modest. It does not prevent law enforcement from using this powerful and invasive investigative tool—not close. As we understand its intent, it is only requiring that law enforcement obtain a warrant when searching the private person or property *without* the benefit of this modern technology would require a warrant. And a warrant, of course, is not some mission killer—it just requires going to a neutral third party to explain that there is a decent reason for conducting the surveillance in question. It prevents private property from being the subject of arbitrary fishing expeditions. When the law *presumes* that there is a decent reason for conducting a search, like when life and limb are in jeopardy or to survey a crime scene, the bill creates exceptions from the drone

warrant requirement. The benefit to the security of private property is massive, and the burden on law enforcement's use of a powerful tool is small.

Our expertise in this field comes from the horror story of a property owner in that state up north. Our organization represented Todd Maxon, who lives on a five-acre parcel in rural Michigan. His township's zoning officer had a vendetta against him and, for years, was trying to pin *some* violation of the Township's zoning code on him. The property was closed off from street-level views, and the official didn't have a good reason to think Mr. Maxon had done anything wrong—he couldn't just trespass on the property to snoop around. So the Township used a drone to repeatedly surveil the home and backyard, without a warrant, for over two years. It flew all over their property, taking intrusive, high-resolution photographs and videos of the home and backyard—photos and videos it could not have otherwise seen from any public vantage point. We've heard similar stories of abuses of drones in states from California to North Carolina.

No Ohioan should suffer the arbitrary snooping around of their property, and invasion of their privacy and dignity that Mr. Maxon did without a judicial officer stamping it. And Ohio would be in good company by saying so. Over the last decade-plus, at least 20 states have enacted statutes requiring that law enforcement merely obtain a warrant before using stealthy drones to surveil people's private property. That includes Ohio's neighbors to the west and south, Indiana and Kentucky. The states with the most property-protective laws on this front range from progressive states like Vermont and Minnesota, to conservative stalwarts like Tennessee and Idaho. Protecting basic property rights from the threat of government overreach is not a left or right issue; it's common sense.

I've talked about the bill's *intent*, and that's intentional. I want to highlight one area where we feel the bill's intent could be buttressed—where removing a possible loophole could ensure that intent is realized. Lines 183 to 185 provide a warrant exception when a drone is operating “in navigable airspace, in a physically nonintrusive manner, in order to observe what is otherwise visible to the naked eye.” Our worry is that a court could interpret that to bless warrantless surveillance of any backyard so long as the drone stays hovering *in the air* over the backyard so long as it doesn't touch, say, a tree or a fence. We don't think that is the intent behind the exception—our understanding is that it is meant to cover situations where a law enforcement drone is on a non-investigatory mission and *incidentally* captures suspicious information. In our view, clarifying that this exception applies only when the drone is not *intending* to surveil a particular private property would go a long way toward ensuring that a court cannot misinterpret the bill's intent and effectively cancel out the warrant requirement the bill earlier provides. We've been in touch with the sponsor, Representative Willis, about this concern and we hope to continue those discussions. We would ultimately love to see the bill passed, particularly with its property-protecting intent fully realized.

Thank you for the opportunity to testify before you today, and I'm happy to answer any questions to the best of my ability.