

New Civil Liberties Alliance

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Re: *Unlawful Use of Unmanned Drones*

Dear Chief Capri:

The New Civil Liberties Alliance (NCLA) submits the following letter urging the City of Daytona Beach Police Department to immediately cease its use of unmanned drones to monitor the temperatures of its residents for signs of fever. This practice violates clear constitutional limits and is an affront to the privacy of innocent members of the community.

I. STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The “civil liberties” of the organization’s name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to be free from unreasonable searches and seizures. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because lawmakers, federal and state administrative agencies and executives, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still

enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent.¹ This unconstitutional administrative state within the Constitution’s United States is the focus of NCLA’s attention. To this end, NCLA has filed lawsuits against governmental agencies and law enforcement entities that have promulgated policies in contravention of constitutional protections, most notably against the City of Coral Gables, Florida, for its unlawful use of automated license plate reading cameras. *See Mas Canosa v. City of Coral Gables, Florida Department of Law Enforcement, and Florida Department of State*, Case No. 18-33927 CA-01 (11th Judicial Circuit).

Even where NCLA has not yet brought a suit to challenge the unconstitutional exercise of regulatory or executive power, it encourages government actors themselves to curb the unlawful exercise of such power by establishing meaningful limitations on their exercise of authority. NCLA believes that executive actors, such as police departments, must ensure that they are not contradicting their constitutional obligations.

II. THE DAYTONA BEACH POLICE DEPARTMENT’S USE OF DRONES

According to recent statements by representatives from the Daytona Beach Police Department, the Department has recently deployed an unmanned drone that “is equipped with a digital camera and a heat detecting device, FLIR (Forward Looking Infrared)” “that can check for fevers” among citizens who are not suspected of any wrongdoing. Patricio G. Balona, *Coronavirus Drone Display: Daytona Police Show Off Aircraft With Loudspeaker, Heat Detector*, *Daytona Beach News Journal Online* (Apr. 7, 2020) available at <https://www.msn.com/en-us/news/us/coronavirus-drone-display-daytona-police-show-off-aircraft-with-loudspeaker-heat-detector-video/ar-BB12huOZ>.

According to police spokesman Messod Bendayan, “The drone equipped with FLIR will be able to read people’s temperatures from a distance of 300 to 400 feet.” According to Sergeant Tim Ehrenkauffer, the drone will be deployed specifically to monitor the public for symptoms of the novel coronavirus and attempt to check innocent members of the public for fevers. Sergeant Ehrenkauffer said, “If I zoom in on a crowd of people and somebody in there had a ... everybody was 98.6 degrees, or whatever the new normal is 97, and somebody has a 102 fever, he would be red in a crowd of orange people[.]” Finally, according to Sergeant Ehrenkauffer, the Police Department has already used this technology multiple times.

¹ See generally Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

III. THE FOURTH AMENDMENT PROTECTS THE PUBLIC FROM WARRANTLESS SEARCHES IMPLICATING BODILY INTEGRITY AND PRIVATE HEALTH INFORMATION

The Fourth Amendment to the U.S. Constitution provides that “[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” (emphasis added). “Virtually any intrusion into the human body will work an invasion of cherished personal security that is subject to constitutional scrutiny.” *Maryland v. King*, 569 U.S. 435, 446 (2013) (citations omitted). Thus, drawing a person’s blood, “scraping an arrestee’s fingernails,” conducting a “negligible” intrusion by swabbing their cheeks, or even examining their expelled *breath* are all searches requiring particularized suspicion of criminal wrongdoing. *Id.* (collecting cases).

A person also has a reasonable expectation of privacy in their health information. “[B]ecause the analysis of biological samples, such as those derived from blood, urine, or other bodily fluids, can reveal ‘physiological data’ and a ‘host of private medical facts,’ such analyses may ‘intrude[] upon expectations of privacy that society has long recognized as reasonable’” and thus constitute searches. *United States v. Davis*, 690 F.3d 226, 243 (4th Cir. 2012) (quoting *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 616-17 (1989)). The same is true for analysis of DNA profiles, “because an individual retains a legitimate expectation of privacy in the information obtained from the testing.” *Id.* at 243-44 (collecting cases). Even when there is *no* physical intrusion, a search can still occur when government gathers health information without appropriate levels of particularized suspicion. *See id.* at 244, 250 (gathering DNA samples from person’s *clothes* was a search requiring particularized suspicion of criminal conduct).

Law enforcement cannot circumvent these limitations in reliance on new technology. “It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology,” such as a “video camera showing heat images.” *Kyllo v. United States*, 533 U.S. 27, 33-34, 30 (2001). Thus, if the government uses technology to gather details of a private area “that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” *Id.* at 40.

IV. THE CITY’S PRACTICES ARE UNLAWFUL

Your Department’s use of drones to conduct mass surveillance of people’s temperatures with the express purpose of discerning whether they may have a virus is plainly unconstitutional.

NCLA therefore urges the Department to immediately suspend use of such drones.

There is little doubt that the Department has stated its intention to conduct a widespread and warrantless search of all its citizens any time they appear in public. Indeed, the Department has apparently already begun conducting mass searches into its citizens' bodies and to gather private health information from them. This is an intrusion into their bodies akin to forcibly placing a thermometer on their tongue. *See King*, 569 U.S. at 446. It also intrudes into their most private health information—whether they are ill from coronavirus disease or *any other* sickness. And what the Department cannot do by physically taking a person's temperature to check for a fever, it cannot lawfully accomplish with novel infrared technology. *See Kyllo*, 533 U.S. at 33-34. Because a person's health information "would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *See id.* at 40.

Of course, the Police Department has also stated its intention to continue conducting this mass surveillance indiscriminately, without even the barest assertion of criminal wrongdoing. Indeed, it has suggested that it will conduct these invasive searches and gather massive amounts of private information on every law-abiding citizen in the City, by, for example, "zoom[ing] in on a crowd of people" to pick out someone with a fever. *Balona, supra*. This is an affront to the Fourth Amendment's protection and a grave constitutional violation.

The Police Department should seriously reconsider its plainly unconstitutional conduct and cease these constitutional violations immediately. Otherwise, this conduct could well invite a lawsuit from Daytona Beach's citizens. While NCLA's attorneys are not members of the Florida Bar, they have appeared as counsel, *pro hac vice*, in lawsuits against other governmental entities in Florida. NCLA is always prepared to file appropriate legal action to protect the rights of Americans.

Sincerely,

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New Civil Liberties Alliance