IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals
BOONSTRA P.J., and O'BRIEN and LETICA, JJ.

DENISHIO JOHNSON,

Plaintiff-Appellant,

v

CURT VANDERKOOI, ELLIOT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

MSC No. 160958
COA No. 330536
Trial Court No. 14-007226-NO

KEYON HARRISON,

Plaintiff-Appellant,

v

CURT VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

MSC No. 160959
COA No. 330537
Trial Court No. 14-002166-NO

PLAINTIFFS-APPELLANTS' BRIEF

ORAL ARGUMENT REQUESTED

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JURISDICTION

This is a joint appeal from the consolidated decision by the Court of Appeals in Docket Nos. 330536 and 330537.

This Court has jurisdiction pursuant to Const 1963, art 6, § 4, MCL 600.212, MCL 600.215(3), and MCR 7.303(B)(1) to review a case after a decision by the Court of Appeals.

On November 21, 2019, the Court of Appeals, in a consolidated decision, affirmed the November 18, 2015 judgments of the trial court granting summary disposition against Plaintiffs Denishio Johnson (Docket No. 330536) and Keyon Harrison (Docket No. 330537). On December 12, 2019, Plaintiffs-Appellants filed a motion for reconsideration, which the Court of Appeals denied on January 3, 2020. On February 14, 2020, Plaintiffs-Appellants filed a joint application for leave to appeal, which this Court granted on February 26, 2021.

QUESTIONS PRESENTED

Without a warrant, but pursuant to *Terry v Ohio*, City of Grand Rapids police officers stopped Plaintiffs, two African-American teenagers, who were walking down the street and had done nothing wrong. At the conclusion of the *Terry* stop, the police took Plaintiffs' photographs and fingerprints as permitted by the City's so-called "photograph and print" ("P&P") policy, purportedly to identify them, even though Plaintiffs had already identified themselves and even though they were not arrested and were never charged with any crime. The City has since indefinitely retained their fingerprints in a database of persons similarly stopped who are not carrying photo identification.

1. Given that fingerprinting required officers to physically intrude upon Plaintiffs' bodies for the purpose of obtaining information about them and was done to obtain biometric data that is not readily apparent to the naked eye and that is not useful for investigative or identification purposes without specialized training and equipment, was the fingerprinting procedure that Defendants conducted on Plaintiffs a search for Fourth Amendment purposes, either under a trespass-based analysis or because it invaded a reasonable expectation of privacy?

   The Trial Court said: No.
   The Court of Appeals said: No.
   Plaintiffs-Appellants say: Yes.

2. If the fingerprinting done here was a search, was it unreasonable and thus a violation of the Fourth Amendment, as it was conducted without a warrant and no exception to the warrant requirement applies?

   The Trial Court said: No.
   The Court of Appeals did not answer the question.
   Plaintiffs-Appellants say: Yes.

3. Regardless of whether taking Plaintiffs' fingerprints was a search, where the fingerprinting was not strictly tied to or justified by the circumstances that purportedly justified stopping Plaintiffs in the first place, did the fingerprinting exceed the scope and duration of a permissible seizure pursuant to *Terry*, thereby violating the Fourth Amendment?

   The Trial Court said: No.
   The Court of Appeals did not answer the question.
   Plaintiffs-Appellants say: Yes.

INTRODUCTION

For over 30 years, the City of Grand Rapids Police Department has had a standard practice of taking photographs and fingerprints of people who are not carrying identification when stopped by police, even though they are not arrested and no evidence of criminal activity is found. In applying this "photograph and print" (P&P) policy, the City has subjected thousands of its residents to unconstitutional searches and seizures, solely because they were not carrying photo ID.[1] The City could then retain this information indefinitely to identify and track them.

On separate occasions in 2011 and 2012, City police officers stopped Denishio Johnson and Keyon Harrison and subjected them to the City's unconstitutional practices. During these stops, Johnson and Harrison, both African-American teenagers, cooperated with the requests of the officers, telling the officers their names and responding to the numerous questions that the police asked. During each stop, the officers found nothing to confirm their suspicions. Accordingly, when each stop concluded, the officers determined that they had no basis to further detain either Harrison or Johnson. However, in accordance with the City's longstanding P&P policy, and in violation of the Fourth Amendment, the officers took photos and fingerprints of both teens before releasing them.

[1] As the City's police chief admitted in 2015, the P&P policy was used extensively enough to cause potentially more than 2,000 people to be photographed and printed each year. See Gordan, *Grand Rapids Modifies Its Fingerprint Policy*, Michigan Radio (December 2, 2015) <http://michiganradio.org/post/grand-rapids-modifies-its-fingerprint-policy#stream/0> (accessed May 20, 2021). The City has now supposedly relaxed its policy, purportedly only taking photos and fingerprints from people who act in a "suspicious" manner and lack ID. *Id.* In the police chief's estimation, as a result of this change the police will still photograph and print a hundred or so people each year who have committed no crime. *Id.*

The City's P&P policy is part of a larger and disturbing trend of police practices that infringe the rights of urban residents, many of whom are African-American.[2] Indeed, the evidence below showed stark racial disparities in the use of P&Ps.[3] Improper police practices can poison the relationships between police and the communities they are sworn to protect.[4] Here, the City's former police chief has acknowledged that the P&P policy has undermined community trust.[5] In response to this larger trend, courts have become increasingly concerned

[2] For example, the Department of Justice's 2016 investigation of Baltimore's police called into question many unconstitutional practices, finding that stops and searches were made "without the required justification," that "enforcement strategies . . . unlawfully subject African Americans to disproportionate rates of stops, searches and arrests," and that these "systemic deficiencies [have] . . . exacerbated community distrust of the police, particularly in the African-American community." U.S. Department of Justice, *Justice Department Announces Findings of Investigation into Baltimore Police Department* (August 10, 2016) <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department> (accessed May 20, 2021). More recently, the Department of Justice announced that it has opened a civil rights investigation into the Louisville Police Department to assess, among other things, whether it "engages in discriminatory policing, and also whether it conducts unreasonable stops, searches, [and] seizures." U.S. Department of Justice, *Department of Justice Announces Investigation of the Louisville/Jefferson County Metro Government and Louisville Metro Police Department* (April 26, 2021) <https://www.justice.gov/opa/pr/department-justice-announces-investigation-louisvillejefferson-county-metro-government-and> (accessed May 20, 2021).

[3] While Plaintiffs' equal protection claims are not before this Court, in *Harrison*, Plaintiff provided evidence summarizing 439 incident reports from 2011 and 2012 and concluding that "75% of the officer-initiated encounters . . . involved a black subject while only 15% involved white subjects, despite the 2010 Grand Rapids census showing that the city's population was 21% black and 65% white." *Harrison v VanderKooi*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537), rev'd in part on other grounds 502 Mich 751 (2018); Appendix 287a–288a.

[4] See *Justice Department Announces Findings of Investigation into Baltimore Police*, *supra*.

[5] See *Grand Rapids Modifies Its Fingerprint Policy*, *supra*; Walker, *GRPD Ends Standard of Fingerprinting Without ID*, WOOD TV (December 1, 2015) <https://www.woodtv.com/news/grand-rapids/grpd-ends-standard-of-fingerprinting-without-id/> (describing community complaints) (accessed May 20, 2021). The Michigan Department of Civil Rights has opened an investigation into the policies and practices of the Grand Rapids Police Department following a number of highly publicized incidents involving people of color, including an incident involving Captain Curtis VanderKooi, who is also one of the defendants here. See Rahal, *State Civil Rights Agency Reviews Complaints Against Grand Rapids Police*,

about the unconstitutional expansion of *Terry* stops and have, in high-profile class action litigation, ordered police departments to fundamentally change their use of *Terry* stops to bring them within constitutional bounds.[6]

In addition to disproportionately affecting African-American residents, the City's use of P&Ps also disproportionately affects juveniles and indigent persons. The police may subject a juvenile like Johnson or Harrison to a P&P because they are too young to carry a driver's license or may not have the resources necessary to obtain a driver's license or other identification. Similarly, the City may disproportionately use the P&P procedure against those without the financial means to afford an ID or a car and who thus have no reason to carry a driver's license with them.[7]

The Court of Appeals erred by trivializing the encroachment on individual liberty effected by the City's P&P policy. This Court should hold that the Fourth Amendment prohibits the police from forcing individuals to submit to warrantless fingerprinting solely because they are not carrying identification during a *Terry* stop.

Detroit News (May 7, 2019) <https://www.detroitnews.com/story/news/local/michigan/2019/05/07/state-civil-rights-agency-reviews-complaints-against-grand-rapids-police/1129890001/> (accessed May 20, 2021).

[6] See, e.g., *Floyd v City of New York*, 959 F Supp 2d 540 (SDNY, 2013); see also *Collins v City of Milwaukee*, unpublished order of the United States District Court for the Eastern District of Wisconsin, issued July 23, 2018 (Docket No. 17-CV-234-JPS) (approving comprehensive settlement agreement), available at <https://www.clearinghouse.net/chDocs/public/PN-WI-0001-0003.pdf>.

[7] See Project Vote, *Research Memo: Americans with Photo ID: A Breakdown of Demographic Characteristics* (February 2015), p 1 (presenting results of the 2012 American National Elections Study; key findings include that lower-income individuals ("Twelve percent of adults living in a household with less than $25,000 annual income lack photo ID") and young adults ("15 percent of 17-20 year-olds lack photo ID") are less likely to have photo ID), available at <http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf>.

First, taking Plaintiffs' fingerprints was a Fourth Amendment search for two independent reasons: it involved a physical intrusion on Johnson's and Harrison's bodies, and it invaded Johnson's and Harrison's reasonable expectations of privacy. Under the trespass-based approach to Fourth Amendment searches, the slightest physical intrusion on a constitutionally protected area, such as a person's body, is a search, so long as it is performed with the goal of obtaining information. And under the familiar reasonable-expectation-of-privacy test, fingerprinting is a search both because it involves physically manipulating a person's body to reveal details that are not otherwise exposed to the public, and because it violates people's expectation that although their hands may be exposed to public view, the unique biometric identifying information contained in their fingerprints is not.

If police officers can compel a person to provide fingerprints without having to satisfy the Fourth Amendment's requirement that searches be reasonable, the people of Michigan will find themselves at the mercy of police whims whenever officers wish to gather this sort of sensitive biometric information, for any reason or no reason at all. Although police took Plaintiffs' fingerprints in this case using ink and paper, companies are aggressively marketing mobile digital fingerprint scanners to law enforcement across the country.[8] Absent Fourth Amendment protection, police would be free to capture individuals' fingerprints virtually without constraint, unfettered by the practical limitations that have traditionally made it difficult for police to invade privacy at scale.[9] The United States Supreme Court has made clear that "[a]s technology has

[8] See, e.g., M2Sys, *RapidCheck: Mobile Fingerprint Scanner for Handheld Use* <https://www.m2sys.com/rapidcheck-mobile-fingerprint-scanner/> (accessed May 20, 2021); Bayometric, *Portable Fingerprint Scanners for Law Enforcement: Identity Verification on the Street* <https://www.bayometric.com/portable-fingerprint-scanners-law-enforcement/> (accessed May 20, 2021).

[9] E.g., National Institute of Justice, *The Fingerprint Sourcebook*, ch 6, p 6-27 ("Manual fingerprint matching is a very tedious task. . . . Automatic fingerprint matching can perform

enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, [courts must] 'assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter v United States*, __ US __, __; 138 S Ct 2206, 2214; 201 L Ed 2d 507 (2018), quoting *Kyllo v United States*, 533 US 27, 34; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (third alteration in original). Yet the Court of Appeals' decision leaves individuals "at the mercy of advancing technology" by failing to "take account of more sophisticated systems that are already in use or in development." See *Kyllo*, 533 US at 35–36.

If taking fingerprints is not a search at all, government agents can fingerprint people far outside the context of *Terry* stops without any quantum of suspicion or cause. Indeed, there would be implications far beyond the law enforcement context—there would be no Fourth Amendment scrutiny of governmental decisions to mandate fingerprinting and create databases of those fingerprints in other contexts, or even of a governmental decision to create a general fingerprint registry. Cf. *Carpenter*, 138 S Ct at 2219 ("The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years.").

Second, fingerprinting is unreasonable when performed as part of a *Terry* stop. *Terry* created a narrow exception to the Fourth Amendment's warrant requirement by allowing police to make limited, brief seizures upon reasonable suspicion of criminal activity and conduct limited searches (frisks) based on reasonable belief that the individual is armed and dangerous. *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). These limited exceptions do not

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fingerprint comparisons at the rate of tens of thousands of times each second."), available at <https://www.ncjrs.gov/pdffiles1/nij/225320.pdf> (accessed May 20, 2021).

apply here: fingerprinting is not a search for weapons, and *Terry* does not allow searches for identification purposes or to seek evidence of a crime.

Third, taking Plaintiffs' fingerprints exceeded the scope of a permissible seizure under the Fourth Amendment. This issue does not depend on the resolution of the search question. Exceeding the scope of a *Terry* stop is itself a constitutional violation—even if the challenged conduct does not rise to the level of a search—because the police conduct during a stop must be "strictly tied to and justified by the circumstances" that led to the stop. See *Terry*, 392 US at 18 (quotation marks omitted). Because officers went beyond what they were permitted to do as part of such a stop, their actions violated the Fourth Amendment. Once Johnson and Harrison told the police their names, the police were not justified in forcing them to take additional steps to prove their identity, such as providing their fingerprints.

FACTS

The City's Admitted P&P Policy

This Court has recognized "that the City has a practice of performing P&Ps during field interrogations and stops and that the practice legally constitutes a governmental custom within the meaning of *Monell* [*v Department of Social Services*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978).]" *Johnson v VanderKooi*, 502 Mich 751, 771; 918 NW2d 785 (2018); Appendix 332a. Indeed, the City of Grand Rapids Police Department admits that, for over 30 years, it had a standard practice of taking photos and fingerprints of people who are not carrying identification when stopped by police, even though they are not arrested and no evidence of criminal activity is found. Def/Appellee's Br on Appeal, Appendix 186a. This "custom, practice, or procedure [is] referred to as 'picture and print' or 'P&P.'" *Id.* Under this policy, a GRPD officer may take

> [a] photograph and fingerprint . . . of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. A photograph and print might also be taken in the

> course of a field interrogation or a stop if appropriate based on the facts and circumstances of that incident. [City's Resp to Requests for Admissions, Appendix 130a, quoted in *Johnson*, 502 Mich 771–772; Appendix 333a.]

It is "undisputed that GRPD officers are not required to make a probable cause determination before performing a P&P." *Johnson*, 502 Mich 771–772; Appendix 333a. To obtain a thumbprint as part of a P&P, officers press an ink pad onto a person's thumb before rolling the thumb onto a department-issued thumbprint card. LaBrecque Dep, Appendix 63a–64a.

The City also has a practice for what comes after stops where P&Ps are collected: completing print cards, submitting them to the patrol work box at the police station at the end of a shift to be processed by the Latent Print Unit, and filing and storing the print cards. Def/Appellee's Br on Appeal, Appendix 187a. Following both of the stops at issue in this case, the officers submitted the P&P cards at the end of their shifts according to these procedures. LaBrecque Dep, Appendix 64a–65a; Bargas Dep, Appendix 117a–118a.

The City produced incident reports associated with the fingerprints obtained in 2011 and 2012, showing that the City obtained 1,100 print cards in 2011 and 491 in 2012. Def/Appellee's Br on Appeal, Appendix 187a.

The City's Use of the P&P Policy on Harrison

Keyon Harrison, an African-American 16-year-old, was walking home from school on May 31, 2012, when he offered to help a classmate carry a toy fire truck to his classmate's internship site. Harrison Dep, Appendix 44a. Harrison offered to help because his classmate was having a hard time riding his bike and carrying the toy fire truck at the same time. *Id.* at 46a. Harrison carried the truck for his classmate until the two had to go in different directions; he then returned the truck and continued walking. *Id.* As he walked home, Harrison noticed a bird in a park that appeared to have a broken wing. *Id.* Harrison followed the bird for a moment, and then continued on his way. *Id.*

Unbeknownst to Harrison, Captain Curt VanderKooi had observed him carrying the toy fire truck, returning it to his classmate, and looking at the bird. VanderKooi Dep, Appendix 89a. Captain VanderKooi testified that he thought Harrison's behavior was suspicious, and he therefore stopped Harrison. *Id.* at 90a.

Harrison did not have identification on him when he was stopped, but he provided his name to Captain VanderKooi. *Id.* at 103a. Further, Harrison explained to Captain VanderKooi that he was helping his classmate carry an internship project and was trying to catch or help birds. Harrison Dep, Appendix 47a; VanderKooi Dep, Appendix 90a; Nagtzaam Dep, Appendix 73a; Newton Dep, Appendix 37a. Captain VanderKooi asked for Harrison's consent to search his backpack. VanderKooi Dep, Appendix 92a. Harrison agreed. Harrison Dep, Appendix 49a. Captain VanderKooi found that his backpack contained only school materials. VanderKooi Dep, Appendix 92a. Another officer questioned Harrison's classmate, whose account corroborated Harrison's. Newton Dep, Appendix 38a. Captain VanderKooi concluded that there was no probable cause to arrest Harrison. VanderKooi Dep, Appendix 93a.

Before Captain VanderKooi allowed Harrison to leave, he told Harrison that to "identify who I am he would have to take my picture." Harrison Dep, Appendix 50a. Harrison asked, "did I do something illegal," *id.*, and Captain VanderKooi told Harrison that the picture "was just to make sure that I was who I say I am," *id.*, and Harrison said "okay," *id.* Similarly, Captain VanderKooi told Harrison that "we need to take your fingerprints," and Harrison asked why. *Id.* at 51a. Captain VanderKooi said "this is just to clarify again to make sure you are who you say you are," *id.*, and Harrison said "okay," *id.*

At Captain VanderKooi's direction, Sergeant Stephen LaBrecque took Harrison's photo and thumbprint. LaBrecque Dep, Appendix 63a. Sergeant LaBrecque took Harrison's thumbprint

by "plac[ing Harrison's] thumb on the ink cartridge, reeled [sic] it around for a little while, then put [Harrison's] thumb on the piece of paper with a small box." Harrison Dep, Appendix 51a. LaBrecque then attached the photograph to the electronic copy of the incident report. LaBrecque Dep, Appendix 64a. The incident report was uploaded to the central police computer at the end of LaBrecque's shift. *Id.* Similarly, LaBrecque held the print card until the end of his shift, and submitted it to the workbox for processing at the end of his shift. *Id.* at 65a. The City continues to maintain Harrison's photograph and print in its files. Def/Appellee's Br on Appeal, Appendix 186a.

The City's Use of the P&P Policy on Johnson

Denishio Johnson, an African-American 15-year-old, was walking through an athletic club parking lot on his way to wait for a friend to arrive on the bus. Johnson Dep, Appendix 124a. As he walked through the parking lot, Johnson looked at himself in the reflection of the car windows. *Id.* at 125a. There had been earlier break-ins in the lot, and an athletic club employee called the police after observing Johnson walking through the parking lot, appearing to be looking into cars. Bargas Dep, Appendix 112a.

After he walked through the parking lot, Johnson waited for the bus at a street corner in front of a Denny's restaurant, on the same side of the street as the athletic club and across the street from a bus stop. Johnson Dep, Appendix 123a. When the police stopped Johnson, Bargas Dep, Appendix 113a, he explained that he lived nearby and was using the lot as a shortcut. City's Resp to Johnson's First Set of Interrogatories, Appendix 81a. He further explained that he did not try to enter into or access any of the vehicles in the lot. Bargas Dep, Appendix 117a.

Johnson did not have identification, but he provided his name, address, and birthdate. Johnson Dep, Appendix 124a. One of the officers present confirmed that he had no outstanding warrants or previous arrests. Incident Report, Appendix 77a.

An officer photographed Johnson and took a full set of his fingerprints, including his palms. Johnson Dep, Appendix 126a. No one asked Johnson if officers could take his fingerprints or his photograph. *Id.* Johnson was then handcuffed and placed in the back of a police car. *Id.* After his mother identified him, Johnson was allowed to leave with her. *Id.*

The police had nothing that connected Johnson to the earlier break-ins, as Johnson did not match the description of a "black male that was bald wearing a hood" in two of the incidents. Bargas Dep, Appendix 114a. And there were no descriptions of suspects from the other prior larcenies to which Johnson's appearance could be compared. VanderKooi Dep, Appendix 102a.

Nevertheless, Sergeant Bargas took photographs of Johnson not only for identification purposes, but also because he considered Johnson a suspect in previous burglaries in the lot. Bargas Dep, Appendix 117a. Similarly, Captain VanderKooi testified that he believed Johnson's fingerprints should be compared to those from earlier larcenies in that area because "[h]e was walking through the [athletic club parking lot] . . . looking into cars." VanderKooi Dep, Appendix 102a.

The police did not submit or process Johnson's photographs and fingerprints immediately. Instead, Sergeant Bargas gave them to another officer to submit at the end of the other officer's shift, and the prints were not actually processed until some indeterminate time after that. Def/Appellee's Br on Appeal, Appendix 240a.

Johnson's and Harrison's prints and photos, like those of all other people whose information the City has collected, will apparently remain on file for as long as the City deems it necessary: "The fingerprints and photos that have already been taken will not be purged from the

department's databases at this time. What will happen to them in the long term has not yet been determined."[10]

PROCEDURAL HISTORY

The Trial Court's Grant of Summary Disposition

In 2014, Johnson and Harrison filed separate suits against the City and the police officers involved in each stop. The cases were consolidated for discovery purposes, and the parties moved for summary disposition. In Johnson's case, the trial court found that "Plaintiff was in public and had no reasonable expectation of privacy in his various physical features which were readily observable by the public. Therefore, Bargas did not violate Plaintiff's Fourth Amendment rights when he executed the P&P." Op & Order, Appendix 164a. Moreover, the court found that "[e]ven if the P&P was a search and seizure under the Fourth Amendment . . . Bargas's actions were reasonable under the circumstances." *Id.* 164a–165a.

In Harrison's case, the trial court denied summary disposition to Harrison because it found that the stop was reasonable and not of excessive duration. Op & Order, Appendix 146a. The court also found that Captain VanderKooi obtained Harrison's consent to perform a P&P. *Id.* at 150a.

In both cases, because the court found no constitutional violation, it granted the City's motion for summary disposition as to municipal liability. Op & Order (*Johnson*), Appendix 171a; Op & Order (*Harrison*), Appendix 157a.

The Court of Appeals' Affirmance

The Court of Appeals affirmed the trial court in separate published (*Johnson*) and unpublished (*Harrison*) opinions. In *Johnson*, the Court of Appeals found that the individual

[10] See *GRPD Ends Standard of Fingerprinting Without ID*, *supra*.

officers were entitled to qualified immunity because "[i]t is . . . not clearly established in the law that fingerprinting and photographing someone during . . . an investigatory stop violates the Fourth Amendment." *Johnson v VanderKooi*, 319 Mich App 589, 618; 903 NW2d 843 (2017); Appendix 304a. The Court of Appeals held that Johnson failed to show that any constitutional violation was caused by an official municipal policy or custom. *Id.* at 626–627; Appendix 305a. The Court of Appeals adopted this reasoning in *Harrison v VanderKooi*, unpub per curiam op; Appendix 282a, 288a, and also concluded that the stop of Harrison was not of unreasonable duration, *id.* at 284a–285a.

This Court's Reversal and Remand

Johnson and Harrison jointly filed an application for leave to appeal with this Court. After oral argument on the application, this Court issued an opinion holding that the Court of Appeals "erred by affirming the trial court's order granting summary disposition based on the Court [of Appeals'] conclusion that the alleged constitutional violations were not the result of a policy or custom of the City." *Johnson*, 502 Mich at 781; Appendix 342a.

This Court held that "a municipality may be held liable for unlawful actions that it sanctioned or authorized, as well as for those it specifically ordered." *Id.* at 765; Appendix 326a. This Court reversed Part III of the Court of Appeals' opinions in both cases, expressing no opinion on the merits of Johnson and Harrison's Fourth Amendment arguments, and remanded "these cases to the Court of Appeals to determine whether the P&Ps at issue here violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures." *Id.* at 781; Appendix 342a.

The Court of Appeals' Affirmance on Remand

In its decision on remand, the Court of Appeals "conclude[d] that the P&Ps were constitutionally permissible because, under current caselaw, no constitutionally protected interest

was violated." *Johnson v VanderKooi (On Remand)*, 330 Mich App 506, 519; 948 NW2d 650 (2019); Appendix 363a. Further, the Court of Appeals rejected Johnson's and Harrison's argument that "fingerprinting is a physical intrusion on a constitutionally protected area and is therefore a search under [*United States v*] *Jones*, [565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012)]." *Id.* at 531; Appendix 369a. Judge LETICA, "reluctantly concur[ring]," wrote that if she were "unbounded by" the Court of Appeals' "prior decisions and the parties' earlier framing of the issues," she "would reach a different conclusion." *Id.* at 532 (LETICA, J., concurring); Appendix 371a–372a. Johnson and Harrison filed a motion for reconsideration of the Court of Appeals' decision, which was denied.

Proceedings in this Court

Plaintiffs-Appellants timely filed a joint application for leave to appeal. On February 26, 2021, this Court granted the application and ordered the parties to file briefs addressing "whether fingerprinting constitutes a search for Fourth Amendment purposes" and, "if it does, whether fingerprinting based on no more than a reasonable suspicion of criminal activity, as authorized by the Grand Rapids Police Department's 'photograph and print' procedures, is unreasonable under the Fourth Amendment." This Court also directed the parties to address "whether fingerprinting exceeds the scope of a permissible seizure pursuant to *Terry v Ohio*, 392 US 1 (1968)."

STANDARD OF REVIEW

"This Court reviews de novo both questions of constitutional law and a trial court's decision on a motion for summary disposition." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 183; 880 NW2d 765 (2016). "A court reviewing a motion under MCR 2.116(C)(10) must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt

to the opposing party." *White v Taylor Distrib Co, Inc*, 482 Mich 136, 139; 753 NW2d 591 (2008) (quotation marks and citation omitted).

ARGUMENT

I. FINGERPRINTING IS A FOURTH AMENDMENT SEARCH.

A. Fingerprinting Is a Search Under the Fourth Amendment Because the Police Physically Intruded on Plaintiffs' Persons to Obtain Information.

When the government "physically occupie[s] private property for the purpose of obtaining information," it conducts a search under the Fourth Amendment. *Jones*, 565 US at 404–405. This trespassory approach to the Fourth Amendment, although most often arising in instances of government intrusion on private property, see *id.*, applies equally to government intrusions on a person's body. See *Grady v North Carolina*, 575 US 306, 309; 135 S Ct 1368; 191 L Ed 2d 459 (2015) (per curiam). Here, when police officers intruded on Johnson and Harrison's persons by touching and manipulating the youths' thumbs and hands in order to apply ink and extract a fingerprint, those officers conducted a search.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." US Const, Am IV. In recognition of the Fourth Amendment's "close connection" to these listed items, *Jones*, 565 US at 405, the United States Supreme Court has repeatedly recognized that "[w]hen the Government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred." *Florida v Jardines*, 569 US 1, 5; 133 S Ct 1409; 185 L Ed 2d 495 (2013), quoting *Jones*, 565 US at 406 n 3 (quotation marks omitted). Thus, in *Jones*, the Court held that attaching a GPS tracking device to a car in order to record location information is a search. *Jones*, 565 US at 404. In *Jardines*, the Court held that police effect a search when they trespass on the curtilage of a home in order for a

drug-sniffing dog to seek the odor of drugs emanating from the house. *Jardines*, 569 US at 11–12; see also *People v Frederick*, 500 Mich 228, 238–239; 895 NW2d 541 (2017) (holding that police entry onto the curtilage in the middle of the night to conduct a "knock and talk" is a trespass and therefore is a search). And in *Grady v North Carolina*, the Court explicitly applied this approach to intrusions on the body, holding that in light of *Jones* and *Jardines*, the government "conducts a search when it attaches a [GPS] device to a person's body, without consent, for the purpose of tracking that individual's movements." *Grady*, 575 US at 309.[11]

Under this trespass-based approach, the analysis is simple. The City's "program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Id.* at 310.[12]

Both elements of this test are straightforward. First, it does not matter how much information is obtained, or whether its collection would implicate a reasonable expectation of privacy: "[I]nformation-gathering that is not a search [because it does not intrude on a reasonable expectation of privacy] nevertheless becomes a search when it is combined with a trespass on Fourth-Amendment-protected property." *Frederick*, 500 Mich at 237.

Second, the Fourth Amendment is implicated regardless of the magnitude of the physical intrusion. Any unlicensed trespass suffices. For example, attaching a GPS tracker to a car is a search because unconsented attachment of the tracker is a trespass to chattels at common law,

[11] See also *People v Hallak*, 310 Mich App 555, 579; 873 NW2d 811 (2015) ("On the basis of *Grady*, we must hold that the placement of an electronic monitoring device to monitor defendant's movement constitutes a search for purposes of the Fourth Amendment."), rev'd in part on other grounds 499 Mich 879 (2016).

[12] A textualist interpretation of the Fourth Amendment leads to a similar conclusion. See Bellin, *Fourth Amendment Textualism*, 118 Mich L Rev 233, 260, 275 (2019) (concluding on textualist grounds that taking fingerprints is a "search" of a "person" within the meaning of the Fourth Amendment because doing so examines "the body (as an object) to uncover information").

even though the device causes no damage, "weighs two ounces and is the size of a credit card." *Jones*, 565 US at 418 n 1 (Alito, J., concurring in the judgment). Likewise, because "there is generally no implied license to knock at someone's door in the middle of the night," police entering a home's curtilage to conduct a late-night "knock and talk" are committing a trespass—and therefore a search—even though no damage to property results. *Frederick*, 500 Mich at 238–239. Even the mere act of using chalk to mark the tire of a parked car in order to enforce parking regulations constitutes a search, because "this physical intrusion, regardless of how slight, constitutes common-law trespass. This is so, even though 'no damage [is done] at all.'" *Taylor v City of Saginaw*, 922 F3d 328, 333 (CA 6, 2019), quoting *Jones*, 565 US at 405 (alteration in original). See also *United States v Correa*, 908 F3d 208, 216–218 (CA 7, 2018) (merely clicking the button on a suspect's garage-door opener without consent in order to ascertain which condominium the suspect lives in is a search); *United States v Richmond*, 915 F3d 352, 358 (CA 5, 2019) ("The . . . 'relatively minor' act of tapping tires is thus a trespass. Because that trespass occurred to learn what was inside the tires, it qualifies as a search.").

To conclude that the fingerprinting in this case implicates the Fourth Amendment, this Court need look no further than the United States Supreme Court's explanation that "physically intruding on a subject's body" in order to obtain information constitutes a search. *Grady*, 575 US at 310. To fingerprint Harrison and Johnson, police "physically intrud[ed] on [their] bod[ies]," *id.*, by holding and manipulating their hands, marking their thumbs with ink, and applying their thumbs to fingerprint cards. LaBrecque Dep, Appendix 63a–64a; Harrison Dep, Appendix 51a; Johnson Dep, Appendix 126a. Because "the Government obtain[ed] information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred." *Grady*, 575 US at 309, quoting *Jones*, 565 US at 406 n 3.

If this Court has any doubt, it should be guided by the United States Supreme Court's direction that courts must look, at a minimum, to "whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment." *Jones*, 565 US at 406 n 3. The starting point is to assess whether the intrusion constitutes a "common-law trespass"; if so, the Fourth Amendment applies. *Id.* at 405. At common law, "[t]he slightest degree of force suffices to constitute trespass to the person." 7 Speiser, Krause & Gans, American Law of Torts, § 23:4. Likewise, the "willful touching of the person" without consent is a battery, *Tinkler v Richter*, 295 Mich 396, 401; 295 NW 201 (1940), quoting 6 CJS, Assault and Battery, § 1, p 796, and such battery does not require physical harm. Restatement Torts, 2d, § 19, comment *c* (1965) ("the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body"). Even fleeting contact, if unwanted and beyond the implied license any member of the public might have to come into contact with one's body, is tortious. See, e.g., *Clarke v K Mart Corp,* 197 Mich App 541, 549; 495 NW2d 820 (1992) (allegation that defendant "snatched the bag out of plaintiff's hands" establishes "a prima facie case of assault and battery"); *Seigel v Long*, 169 Ala 79, 81; 53 So 753 (1910) (pushing a person's hat back on his head while he walks down the street in order to see his face and identify him is a battery); Woodbine, *The Origins of the Action of Trespass*, 34 Yale L J 343, 369 (1925) ("the action of trespass to the person developed from the idea not that damages should be recovered merely for the blows and wounds inflicted on one, but rather for that form of violence which resulted in an affront to the dignity and personal liberty of the one wronged").

It is no answer to say that the intrusion here was by police. For Fourth Amendment purposes, the question is whether the "officers stray[ed] beyond what any private citizen might

do," not whether there is some special privilege for police to engage in a particular trespass. *Frederick*, 500 Mich at 239. Just as there is no "common practice among private citizens to place chalk marks on other individual's tires," *Taylor*, 922 F3d at 333 n 3, there is no implied license to ink and print a stranger's thumb. This is no consensual handshake; it is an intrusion on the body beyond what is countenanced by the common law.

Once it is established that police committed an "unlicensed physical intrusion," *Jardines*, 569 US at 7, the next question is whether in doing so they "were seeking 'to find something or to obtain information,' such that the Fourth Amendment is implicated." *Frederick*, 500 Mich at 240, quoting *Jones*, 565 US at 408 n 5. Fingerprinting is quite plainly intended to obtain information, including information about identity. That is the entire purpose of the City's P&P policy. As Captain VanderKooi put it when demanding to fingerprint Harrison, the fingerprinting is intended to ascertain whether "you are who you say you are." Harrison Dep, Appendix 51a. That is quintessential information-gathering, and therefore constitutes a search.

B. Fingerprinting Is Also a Search Under the Fourth Amendment Because People Have a Reasonable Expectation of Privacy Against the Nonconsensual Taking of Their Fingerprints.

Separately from the *Jones* trespass approach, fingerprinting Johnson and Harrison was also a Fourth Amendment search because it invaded their reasonable expectations of privacy. Under this distinct approach to the Fourth Amendment,[13] "[w]hen an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, . . . official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter*, 138 S Ct at 2213 (quotation marks

[13] If this Court finds that fingerprinting is a search under the trespass-based approach, it "need not address" the reasonable-expectation-of-privacy analysis. *Jones*, 565 US at 406.

omitted). Here, Johnson and Harrison had a reasonable expectation that government agents would not take their fingerprints without consent.[14] Indeed, the City's policy enables exactly the kind of "too permeating police surveillance" that the framers of the Fourth Amendment sought to avoid. *Id.* at 2214.

1. This Court and the United States Supreme Court Have Never Decided Whether Fingerprinting Is a Search Under the Fourth Amendment.

"[W]hether obtaining evidence of an individual's personal characteristics in certain ways constitutes a Fourth Amendment search [ ] will be of central importance only in rather unusual circumstances." 1 LaFave, Search & Seizure: A Treatise on the Fourth Amendment (5th ed), § 2.6(a), ¶ 2. This case poses exactly those circumstances. "Although it is well established that the taking of fingerprints is permissible incident to a lawful arrest, courts have rarely addressed the question of whether the act of fingerprinting is itself a search." *Id.* This Court has never decided the issue. Nor has the United States Supreme Court ever done so, as the Court of Appeals correctly recognized. *Johnson*, 330 Mich App at 521; Appendix 363a; see also *Maryland v King*, 569 US 435, 477; 133 S Ct 1958; 186 L Ed 2d 1 (2013) (Scalia, J., dissenting).

2. The United States Supreme Court's Jurisprudence Governing Searches Shows that Harrison and Johnson Had a Reasonable Expectation of Privacy in Their Fingerprints.

Although the United States Supreme Court has not decided whether fingerprinting is a search, controlling principles in its cases compel the conclusion that Harrison and Johnson had a

[14] Holding that fingerprinting a person is a search does not implicate police's ability to dust a crime scene for latent fingerprints, which does not involve intrusion on or manipulation of a person's body. It is axiomatic that the Fourth Amendment is concerned not just with *what* information police obtain, but with *how* they obtain it and from where. See *Kyllo*, 533 US at 35 n 2 ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.").

reasonable expectation of privacy against the nonconsensual taking of their fingerprints. Thus, the Court of Appeals erred in concluding that fingerprinting is not a search.

First, the United States Supreme Court has concluded on numerous occasions that obtaining identifying or evidentiary information from a person's body is a Fourth Amendment search. "Virtually any intrusion into the human body will work an invasion of cherished personal security that is subject to constitutional scrutiny"— even if doing so involves only a "light touch" as in the case of DNA swabs. *King*, 569 US at 446 (opinion of the Court) (citations, brackets, and quotation marks omitted). Even scraping an arrestee's fingernails to obtain trace evidence is a search. See *Cupp v Murphy*, 412 US 291; 93 S Ct 2000; 36 L Ed 2d 900 (1973); see also *Skinner v R Labor Executives' Ass'n*, 489 US 602, 616–618; 109 S Ct 1402; 103 L Ed 2d 639 (1989) (collecting breath, urine, and blood samples). Thus, "fingerprinting, no less than obtaining blood samples, constitutes a search of a 'person.'" *Paulson v Florida*, 360 F Supp 156, 161 (SD Fla, 1973).

Second, people do not in any meaningful sense expose their fingerprints to the public because fingerprints cannot be interpreted with the naked eye. In concluding that some physical characteristics that do not require bodily intrusion to collect (like voice exemplars or handwriting) are not protected by the Fourth Amendment, the Court has emphasized that those characteristics can be viewed as something that the person "knowingly exposes to the public, even in his home or office." *United States v Dionisio*, 410 US 1, 14; 93 S Ct 764; 35 L Ed 2d 67 (1973). For example, "[n]o person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." *Id.*

That analysis does not apply to the taking of a person's fingerprints. A person's hands, as a physical feature, are certainly exposed to the world. But the biometric information contained in people's fingerprints is not. To discern even the *existence* of ridges on a person's fingertip, an observer would have to hover their eyes mere inches from that person's hand—a violation of social conventions and an intrusion no person would reasonably expect. Cf. *Florida v Riley*, 488 US 445, 455; 109 S Ct 693; 102 L Ed 2d 835 (1989) (O'Connor, J., concurring in the judgment)[15] (police observation of a home's curtilage from a helicopter hovering at 400 feet is not a search because "there is considerable public use of airspace" at that altitude, but "public use of altitudes lower than that . . . may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy"). And even close observation with the naked eye would not, on its own, reveal an interpretable fingerprint. Extracting the biometric information in a fingerprint requires making a two-dimensional impression of the ridges on a fingertip, processing the image, extracting features (often called "minutiae points") from the image using an algorithm, and using those features to create a "template" that can then be algorithmically matched against other fingerprint templates in a database. See National Institute of Justice, *The Fingerprint Sourcebook*, ch 6, pp 6-20 to 6-24, available at <https://www.ncjrs.gov/pdffiles1/nij/225320.pdf>. Obtaining and analyzing the fingerprints in this case thus required several invasive steps: unwanted physical trespass on Johnson and

[15] Justice O'Connor's concurrence was necessary to constitute a majority in the case, and therefore is best understood as providing the holding of the Court. See *Marks v United States*, 430 US 188, 193; 97 S Ct 990; 51 L Ed 2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quotation marks omitted)).

Harrison's bodies, followed by elaborate technical procedures and analysis that most people one encounters in day-to-day interactions are unable to perform.

The manipulation of Johnson and Harrison's bodies through inking their thumbs and pressing them to cards is quite beyond what any person reasonably expects as they go about their daily lives. See *supra* Part I.A. The United States Supreme Court's decision in *Bond v United States*, 529 US 334; 120 S Ct 1462; 146 L Ed 2d 365 (2000), explains why this amounts to a search. There, the Court held that although people expose the exterior of their luggage to public view by placing it on the luggage rack in a public bus, the "physical manipulation" of that luggage by police constitutes a search because "[p]hysically invasive inspection is simply more intrusive than purely visual inspection." *Id.* at 337–338. Just as people do "not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner," *id.* at 338–339, people do not expect others to apply ink to their hands and press their digits to print cards to obtain their biometric information. See also *Arizona v Hicks*, 480 US 321, 325; 107 S Ct 1149; 94 L Ed 2d 347 (1987) (explaining that "the distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment," and holding that such action constitutes a search (quotation marks omitted)).

Fingerprinting is also a search because, far from constituting a simple visual inspection, it involves use of specialized methodology to extract details not visible to the naked eye. LaFave's Search and Seizure treatise provides a useful illustration of the distinction:

> Assume . . . that a person is subpoenaed to appear before a grand jury and to supply samples of the hair on his head . . . [to] be compared with hairs found at a crime scene. Does the person subpoenaed have a legitimate claim that the taking of hair samples is governed by the Fourth Amendment . . . ? . . . In [one] respect, the situation is like that in *Dionisio*, but in other respects it is not. . . .

> *[W]hile the hair is "constantly exposed" in the sense that the person knowingly exposes the color and style of his hair, it cannot really be said that the hair is exposed in the sense of revealing those characteristics that can be determined only by microscopic examination*. [LaFave, *supra*, § 2.6(a) (emphasis added).]

LaFave further explains why this distinction is so crucial, looking to *Cupp v Murphy*: A person walking into a police station "with evidence on his hands in plain view . . . nonetheless has a protected expectation of privacy with respect to that evidence when its incriminating character is not evident to the naked eye and it must be seized and then subjected to microscopic analysis to be of evidentiary value." *Id.*

Fingerprints are similar. They can, of course, be used in special circumstances to identify people. But unlike using the sound of someone's voice to identify him, using fingerprints in that way requires time, intensive training, and specialized equipment. It is not something that people can do quickly with the naked eye. And the technology used in taking and analyzing fingerprints does not merely sharpen or clarify a person's unaided senses. Rather, the technology used in collecting and extracting fingerprints makes possible what is otherwise not achievable in its absence: the extraction of the uniquely identifying biometric information contained within the fingerprint, what the Seventh Circuit has described as "private information," the nonconsensual taking of which is "an invasion of [one's] private domain, much like an act of trespass would be." *Bryant v Compass Grp USA, Inc*, 958 F3d 617, 624 (CA 7, 2020).

The capacity for rapid, computer-assisted comparison of a person's biometric information with thousands or perhaps millions of data points stored in a government computer, all with the investigatory purpose of gleaning insight into the unique characteristics of a person that are otherwise inscrutable to the prying eyes of a casual observer, accentuates the intrusion. Taking fingerprints is thus akin to technology-enabled location tracking: People expose their

whereabouts to others as they move about, but law enforcement's use of technological tools to learn more about location over time than any one person could realistically observe is a search. *Carpenter*, 138 S Ct at 2218. Similarly, here, people expose their fingers to the world, but using technological tools to extract miniscule identifying patterns from those fingers is a search.[16]

As a result, people have a reasonable expectation of privacy against the nonconsensual taking of their fingerprints. People reasonably expect that other people they encounter in daily interactions will not obtain biometric information from their fingers. When police officers take fingerprints, they are performing a search, and they cannot do so without complying with the Fourth Amendment.[17]

Finally, unlike the voice exemplars in *Dionisio*, the fingerprinting to which Johnson and Harrison were subjected pursuant to the City's P&P policy impacted their "interests in human

[16] The Supreme Court has been similarly sensitive in other contexts to the implications of police using technology to obtain information that humans cannot see or interpret without assistance. See *Kyllo*, 533 US at 34–35 ("[O]btaining by sense-enhancing technology any information regarding the interior of a home"—infrared radiation that was not visible to the naked eye—"that could not otherwise have been obtained without physical intrusion into a constitutionally protected area . . . constitutes a search—at least where . . . the technology in question is not in general public use." (quotation marks and citation omitted)). A person's body, like a home, is a "constitutionally protected area," and so government intrusions into that area are subject to heightened scrutiny.

[17] The Court of Appeals mischaracterized Plaintiffs' position on this point, describing it to the effect that a fingerprint is "constitutionally protected because its collection relies on technology other than the naked eye." *Johnson*, 330 Mich App at 527 n 19; Appendix 367a–368a. But it is the manner *both* of collection (i.e., manipulating the hand and applying the thumb to a print card) *and* of analysis (extracting an otherwise non-interpretable biometric identifier) that violates reasonable expectations of privacy. And even ignoring the manner of collection, Plaintiffs, and all other persons, have a reasonable expectation of privacy in information that may be contained in theoretically observable places but cannot reasonably be *extracted* by an ordinary person absent technology or specialized analysis, as LaFave demonstrates with his distinction between a person's hair color and the microscopic characteristics of that hair. See LaFave, *supra*, § 2.6(a). The same holds for the difference between the readily observable physical characteristics of a person's hands and the biometric information contained in a person's fingerprints, which cannot readily be observed.

dignity and privacy" and involved a "severe, though brief, intrusion upon cherished personal security . . . [that was] surely . . . an annoying, frightening, and perhaps humiliating experience." See *Dionisio*, 410 US at 14–15, citing *Schmerber v California*, 384 US 757, 769–770; 86 S Ct 1826; 16 L Ed 2d 908 (1966), and *Terry*, 392 US at 24–25. The fingerprinting of Johnson and Harrison occurred in public, adjacent to a busy street or a busy workout facility. Anyone observing fingerprinting from a distance is likely to be able to determine exactly what is occurring; there is no mistaking it for a casual voluntary conversation with an officer on the street. Indeed, Harrison testified that he later had to fend off his schoolmates' questions; he believes that a bus drove by and someone on the bus from school saw the encounter. Rumors soon spread at school that he was involved in drugs, a robbery, or even that he had shot someone. See Harrison Dep, Appendix 57a.

3. Supreme Court Dicta Should Not Be Misread to Shield Fingerprinting from Fourth Amendment Protection.

Dicta in some United States Supreme Court cases about fingerprinting should not be read to exempt fingerprinting from Fourth Amendment scrutiny. Those cases hold only that transporting detainees to obtain their fingerprints at the stationhouse can violate the Fourth Amendment if appropriate protections are not provided. For example, the Court invalidated the stationhouse detention and fingerprinting of various suspects who were seized in a police dragnet. *Davis v Mississippi*, 394 US 721; 89 S Ct 1394; 22 L Ed 2d 676 (1969). Relying on *Davis*, the Court later held that absent probable cause or prior judicial authorization, transporting a burglary-rape suspect to the stationhouse to fingerprint him was an improper seizure. See *Hayes v Florida*, 470 US 811; 105 S Ct 1643; 84 L Ed 2d 705 (1985).

In neither of these cases did the Court have occasion to determine whether fingerprinting is a search, nor whether doing so on the street as part of a *Terry* stop would have been

permissible. In dicta, the *Davis* Court reserved judgment on whether detentions for fingerprinting might be found to comply with the Fourth Amendment in "narrowly defined circumstances" even absent probable cause. 394 US at 727. Similarly, *Hayes* declined to decide whether a "brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment." 470 US at 816. In both cases, the analysis implicitly assumes that a search-and-seizure is involved; the unanswered question is whether there may be circumstances, "narrowly defined," that might reasonably justify it.

Finally, *Dionisio*, which held only that taking voice exemplars was not a search, cited to the *Davis* dicta to support its reasoning. *Dionisio*, 410 US at 15, citing *Davis*, 394 US at 727. But *Hayes*, decided a decade after *Dionisio*, does not cite to *Dionisio* anywhere in the opinion, including in the fingerprinting dicta. See *Hayes*, 470 US 811. This is perhaps because the Court had come to recognize that although fingerprinting might not always involve probing into an individual's private life and thoughts, that does not mean that a person lacks a reasonable expectation of privacy in the sensitive information that fingerprints do reveal. In fact, *Hayes* read the *Davis* dicta to say only that fingerprinting does not involve the probing into private life and thoughts that "often marks" an interrogation or search, which of course means that such probing is not required for a search to occur. See *id.* at 814; see also *Hicks*, 480 US at 325 ("It matters not that the search uncovered nothing of any great personal value to respondent . . . . A search is a search, even if it happens to disclose nothing but the bottom of a turntable."). As *Hayes* suggests, the intrusion that fingerprinting imposes may well be "less serious than *other* types of searches and detentions," 470 US at 814 (emphasis added), but that presumes that fingerprinting is in fact a search.

The Court of Appeals in this case read more into the dicta in *Davis*, *Hayes*, and other cases than is actually there. See *Johnson*, 330 Mich App at 522–524; Appendix 364a–365a.[18] In doing so, the Court of Appeals improperly rejected the principles announced in various Fourth Amendment opinions demonstrating that individuals do have a reasonable expectation of privacy in their fingerprints. Accordingly, the City's fingerprinting procedures subjected Johnson and Harrison to a Fourth Amendment search, and the Court of Appeals erred in deciding to the contrary.

II. FINGERPRINTING IS AN UNREASONABLE SEARCH WHEN CONDUCTED DURING A *TERRY* STOP.

Because fingerprinting is a Fourth Amendment search, it can be justified only by a warrant or by a recognized exception to the warrant requirement. Here, officers lacked a warrant and no exception to the warrant requirement applied. Therefore, the search the officers

[18] The federal lower court cases cited by the Court of Appeals either erroneously overstate the Supreme Court's dicta or did not actually decide whether fingerprinting was a search. See, e.g., *United States v Farias-Gonzalez*, 556 F3d 1181, 1188 (CA 11, 2009) (erroneously stating that the court held in *Dionisio* that fingerprinting was not a search, when the cited statement in *Dionisio* was dicta because that case only involved voice exemplars). And some courts have more correctly read *Haye*s and *Davis* to mean that fingerprinting is a Fourth Amendment search. See *In re Search Warrant Application for Cellular Telephone in United States v Anthony Barrera*, 415 F Supp 3d 832, 834 (ND Ill, 2019) (citing *Hayes* for the proposition that "fingerprinting is a search subject to the constraints of the Fourth Amendment even though 'fingerprinting . . . represents a much less serious intrusion upon personal security than other types of searches and detentions'"); *Paulson*, 360 F Supp at 161 (discussing *Davis* and concluding that fingerprinting is a search); *In re Search Warrant No. 5165*, 470 F Supp 3d 715, 721 (ED Ky, 2020) (citing *Hayes* for the proposition that "[t]he Supreme Court has unquestionably held that the taking of a fingerprint is a search"). Indeed, even a case cited by the City recognizes that "the taking of a fingerprint is undeniably a search." *In re Search of [Redacted]*, 317 F Supp 3d 523, 531 (D DC, 2018), citing *Hayes*, 470 US at 816–817. In any event, the federal and state cases cited by the Court of Appeals for the principle that fingerprinting is not a search under a "reasonable expectation of privacy" approach to the Fourth Amendment predate the reaffirmation of the trespass approach in *Jones* and that case's recognition that a person's "Fourth Amendment rights do not stand or fall with the *Katz* [reasonable expectation of privacy] formulation," 565 US at 406, and thus do not provide a comprehensive survey of viable approaches to assessing the fingerprinting in this case.

performed pursuant to the City's P&P policy when they fingerprinted Harrison and Johnson was unreasonable and violated the Fourth Amendment.

Warrantless searches are "per se unreasonable under the Fourth Amendment" unless they fall within one of the "few specifically established and well-delineated exceptions" to the warrant requirement. *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009). Further, even when an exception to the warrant requirement is invoked, warrantless searches "must be limited in scope to that which is justified by the particular purposes served by the exception." *Florida v Royer*, 460 US 491, 500; 103 S Ct 1319; 75 L Ed 2d 229 (1983); accord *Collins v Virginia*, __ US __, __; 138 S Ct 1663, 1671–1672; 201 L Ed 2d 9 (2018) (a warrantless search must not be "untether[ed]" from "the justifications underlying it"); *Riley v California*, 573 US 373, 386; 134 S Ct 2473; 189 L Ed 2d 430 (2014) (courts must ask whether applying an exception to a new context would "untether the rule from the justifications underlying the . . . exception"), quoting *Gant*, 556 US at 343.

Terry v Ohio provides one narrow exception to the rule that warrantless searches and seizures are per se unreasonable under the Fourth Amendment. If officers have reasonable suspicion of criminal activity, they may briefly seize a person for questioning "to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 US at 500. During that brief detention, and only if based on reasonable articulable suspicion that a person is armed and dangerous, police may "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault [the officer]." *Terry*, 392 US at

30. But this exception to the warrant requirement is limited, and the City's P&P policy is not tethered to the justifications underlying it.[19]

A. Fingerprinting During *Terry* Stops Is Unreasonable Because *Terry* Allows Searches Only to Protect Officer Safety, Not to Investigate Crime.

The narrow scope of permissible searches during a *Terry* stop is well settled. *Terry* searches are limited to "that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, 392 US at 26. "*Terry* strictly limits the permissible scope of a patdown search to that reasonably designed to discover guns, knives, clubs, or other hidden instruments that could be used to assault an officer." *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996). "Nothing in *Terry* can be understood to allow . . . any search whatever for anything but weapons." *Ybarra v Illinois*, 444 US 85, 93–94; 100 S Ct 338; 62 L Ed 2d 238 (1979).

In recognizing these limits on searches during *Terry* stops, the United States Supreme Court has repeatedly warned that *Terry* does not permit police officers to conduct searches for evidence of crime: "The purposes of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Adams v Williams*, 407 US 143, 146; 92 S Ct 1921; 32 L Ed 2d 612 (1972). *Terry* "expressly refused to authorize" any "sort of evidentiary search." *Minnesota v Dickerson*, 508 US 366, 378; 113 S Ct 2130; 124 L Ed 2d 334 (1993). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry*." *Id.* at 373.

This limitation on *Terry* searches is critical to protecting the Fourth Amendment requirement that warrantless searches be "limited in scope to that which is justified by the

[19] The City has not raised any of the other limited exceptions to warrantless searches, and none is applicable here.

particular purposes served" by whatever exception to the warrant requirement is being invoked. *Royer*, 460 US at 500. *Terry* searches are a narrow exception to the warrant requirement for the purpose of protecting officer safety. If, instead, *Terry* permitted "general rummaging in order to discover incriminating evidence" by officers "engaged in the often competitive enterprise of ferreting out crime," see *Florida v Wells*, 495 US 1, 4; 110 S Ct 1632; 109 L Ed 2d 1 (1990); *Johnson v United States*, 333 US 10, 14; 68 S Ct 367; 92 L Ed 2d 436 (1948), then the *Terry* exception would swallow the Fourth Amendment rule. See *Riley v California*, 573 US at 382 ("Our cases have determined that where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant." (alterations and quotation marks omitted)).

Applying that well-settled law here, it is clear that fingerprinting is not a permissible search during a *Terry* stop. Fingerprinting is obviously not designed to discover weapons secreted in a detainee's clothes that could be used to immediately threaten an officer or others nearby. It does not help protect officer safety or otherwise advance the "particular purposes served by the [*Terry*] exception." *Royer*, 460 US at 500. Such a search is therefore unreasonable and, accordingly, violates the Fourth Amendment.

B. Fingerprinting During *Terry* Stops Cannot Be Justified by an Interest in Verifying Identity.

That leaves the City's principal justification for its policy allowing fingerprints to be taken during a *Terry* stop: determining the identity of a person the police have stopped. See Answer to Pls' Application for Leave to Appeal, p 6. Simply put, *Terry* does not allow police to conduct a warrantless search for this purpose. As discussed above, the *only* warrantless search permissible under *Terry* is a pat-down search for weapons. See *Ybarra*, 444 US at 93–94. A

search to ascertain identity during a *Terry* stop is therefore "per se unreasonable under the Fourth Amendment." *Gant*, 556 US at 338.

Courts have repeatedly rejected the argument that police officers conducting a *Terry* stop can conduct a search to identify the person being stopped. See *United States v Hernandez-Mendez*, 626 F3d 203, 212 (CA 4, 2010) (stating that *Terry* does not permit a search of a person's belongings to locate photo ID); *People v Garcia*, 145 Cal App 4th 782, 787–788; 52 Cal Rptr 3d 70 (2006) (holding that *Terry* does not authorize a pat-down search for identification); *State v Webber*, 141 NH 817, 820–821; 694 A2d 970 (1997) (holding that there is no "identification search" exception to the warrant requirement); *State v Biegel*, 57 Wash App 192, 195; 787 P2d 577 (1990) (holding that removing a suspect's wallet from his pocket to ascertain his identity "constituted a search, was beyond the scope of a *Terry* stop, and was an unreasonable intrusion into . . . private affairs"); *People v Williams*, 63 Mich App 398, 401–402; 234 NW2d 541 (1975) (holding that even though an officer had reason to believe a suspect was lying when he said he had no identification, searching the suspect's wallet for his driver's license was unreasonable because it did not fall within any exception to the warrant requirement). In other words, a *Terry* search for identification purposes is per se unreasonable, which means that taking fingerprints during a *Terry* stop for that purpose is likewise not allowed.

To be sure, once a lawful *Terry* stop is underway, police are permitted to ask seized persons to identify themselves if the request for identification is reasonably related to the circumstances justifying the stop. In some jurisdictions disclosing one's identity during a *Terry* stop can be required by law. See *Hiibel v Sixth Judicial Dist Court*, 542 US 177, 187–188; 124 S Ct 2451; 159 L Ed 2d 292 (2004). But asking or even requiring a person to disclose their identity, see *id.*, is categorically different from conducting a warrantless search of that person to

discover their identity, see *supra*. So while questions regarding identity are often a permissible part of *Terry* stops,[20] warrantless searches to confirm identity are not. No such intrusion could be "justified by the particular purposes served by [*Terry*'s] exception" to the warrant requirement. *Royer*, 460 US at 500.[21] Accordingly, as there is no "'identification search' exception to the warrant requirement," *Webber*, 141 NH at 821, fingerprinting pursuant to the City's P&P policy is an unreasonable search in violation of the Fourth Amendment.

III. FINGERPRINTING DURING A *TERRY* STOP ALSO VIOLATES THE FOURTH AMENDMENT BECAUSE IT EXCEEDS THE SCOPE AND DURATION OF A PERMISSIBLE SEIZURE.

In addition to violating Plaintiffs' rights under the Fourth Amendment because the P&Ps were an unreasonable *search*, the P&Ps separately violated Plaintiffs' rights under the Fourth Amendment because obtaining their fingerprints in order to identify them exceeded the permissible scope and duration of a *seizure* based on reasonable suspicion. A *Terry* stop, even when justified at its inception, does not give police officers carte blanche to do what they want so long as they do not perform an impermissible search. An officer can exceed the permissible scope of a *Terry* stop by performing an impermissible search or, alternatively, by subjecting the

[20] In this case, Johnson and Harrison did disclose their identities, but were nonetheless subjected to the P&Ps because, as teenagers and pedestrians, they could not produce photo ID.

[21] Taking a person's fingerprints to confirm identity *after* a lawful arrest is justifiable under the exception to the warrant requirement for routine administrative procedures incident to arrest because the police have probable cause that the arrestee has committed a crime, a necessary constitutional checkpoint for triggering the extensive intrusions on a person's liberty and privacy that the criminal justice process entails. See *Maryland v King*, 569 US at 461. These constitutionally permissible intrusions include collecting fingerprints to ensure that an arrestee is who he says he is—subject, of course, to any other applicable requirements, such as those contained in Michigan's statute regulating how the government may use biometric information such as fingerprints. See generally MCL 28.241 *et seq.* But the state's interest in verifying identity is not nearly as significant when a person is simply being questioned by police as part of a *Terry* stop that does not result in arrest. The government interest in double-checking a person's identity in such circumstances is much less; and a person's interest in being free of unwarranted government intrusion into their private affairs is much greater.

person to a detention that is not "carefully tailored to its underlying justification" or that lasts "longer than is necessary to effectuate the purpose of the stop." *Royer*, 460 US at 500. To prevent unwarranted intrusions on a person's liberty, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.* If either the scope or duration of the seizure is unreasonable, it violates the Fourth Amendment. See, e.g., *id.* at 504–506; *Rodriguez v United States*, 575 US 348, 354; 135 S Ct 1609; 191 L Ed 2d 492 (2015); *United States v Hensley*, 469 US 221, 235–236; 105 S Ct 675; 83 L Ed 2d 604 (1985).

Here, the City's P&P procedure violated Plaintiffs' constitutional rights not just through an unconstitutional search, but also by going beyond the permissible scope and duration of a *Terry* seizure. It is the government's "burden to demonstrate that [a] seizure . . . was sufficiently limited in scope and duration." *Royer*, 460 US at 500. The City cannot do so here.

A. Fingerprinting Exceeds the Scope of a Permissible Seizure Under *Terry*.

Turning first to the scope of a *Terry* stop, the Fourth Amendment requires not only that "the officer's action was justified at its inception" (i.e., that there was reasonable suspicion), but also that the action "was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 US at 20. The *Terry* Court emphasized that "[t]he manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." *Id.* at 28–29.

The City's P&P policy authorizes police to take fingerprints in order to verify the identity of a person who is not carrying identification. As argued above, fingerprinting is unconstitutional during a *Terry* stop because fingerprinting is a search, searches during *Terry* stops are limited to

searches for weapons, and no other exception to the Fourth Amendment's warrant requirement applies. But even if fingerprinting is not a search, fingerprinting to verify identity during a *Terry* stop exceeds the permissible scope of the *seizure* for similar reasons.

"The reasonableness of a seizure under the Fourth Amendment is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Hiibel*, 542 US at 187–188 (citation and quotation marks omitted). As *Hiibel* explained in upholding Nevada's stop-and-identify statute, the government has a legitimate interest in learning a person's identity during a *Terry* stop, and "questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops." *Id*. at 186. But the *Hiibel* Court also made clear that even the request that a person disclose their identity must be tied to the basis for the stop: "[A]n officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." *Id.* at 178. And the Court, in upholding the stop-and-identify statute at issue against a Fourth Amendment challenge, emphasized that the statute did "not require a suspect to give the officer a driver's license or any other document" and was satisfied once the suspect provided their name. *Id.* at 185. The Court also explained that simply requiring a person to state her name "does not alter the nature of the stop itself." *Id.* at 188.

The same cannot be said for P&Ps under the City's policy. The government does not have a legitimate interest in taking the fingerprints of people, like Plaintiffs, who identify themselves upon request, but happen not to be carrying an official form of government-issued identification (such as youth without government ID). Once a suspect who is not being arrested provides their name upon request, the police interest in determining identity is met. Subjecting a person to fingerprinting fundamentally "alter[s] the nature of the stop itself," *id*., and works a far

greater intrusion on a person's liberty than simply requiring disclosure of one's name. The fact that the City stores the fingerprints indefinitely in a government database only magnifies the intrusion.

The United States Supreme Court has never decided whether fingerprinting is permissible during a *Terry* stop, but has suggested in dicta that if fingerprinting could ever be justified during a *Terry* stop, it would be "if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." See *Hayes*, 470 US at 817. The City's policy here, by contrast, authorizes fingerprinting to verify the identity of people who simply happen not to have ID, not to establish or negate a person's connection to the suspected crime that was the basis for the stop.

The original suspicion that served as the basis for the stop of Harrison was that he handed a toy to another individual. Harrison provided an explanation—that he was helping a classmate carry an internship project—which the officers then verified such that the original suspicion that served as the basis for the stop was dispelled. See Harrison Dep, Appendix 47a; VanderKooi Dep, Appendix 90a; Nagtzaam Dep, Appendix 73a; Newton Dep, Appendix 37a–38a. Moreover, the officers had no reason to believe that fingerprinting would establish or negate Harrison's connection to the suspected crime that was the basis of the stop—the possibility that he had stolen the toy he was carrying. Rather, fingerprints were taken, as Captain VanderKooi said, "to make sure you are who you say you are." Harrison Dep, Appendix 51a.

Similarly, for Johnson, the original suspicion that served as the basis for stopping Johnson was dispelled during the *Terry* stop. The police were called because Johnson was observed walking through a parking lot and appeared to be looking into cars. Bargas Dep,

Appendix 112a. During the course of the investigation, the officers confirmed that Johnson lived nearby and was using the lot as a shortcut, City's Resp to Johnson's First Set of Interrogatories, Appendix 81a, and that he did not try to enter into or access any of the vehicles in the lot. Bargas Dep, Appendix 117a. Like Harrison, once Johnson provided an explanation and it was verified, it was impermissible to obtain Johnson's fingerprints to identify him or to investigate some other offense.[22]

Permitting the City to use fingerprinting as a way to corroborate identity when someone is not carrying ID would set a troubling precedent. It could open up the floodgates for police to use biometric technology that exists today (e.g., iris scanners[23]) or that which might be developed tomorrow (e.g., DNA scanners[24]) to ostensibly double-check the identity of innocent people during *Terry* stops, and then store that information indefinitely in government biometric

[22] Sergeant Bargas claimed that he took photographs of Johnson not only for identification purposes, but also because he considered Johnson a suspect in previous burglaries in the lot. Bargas Dep, Appendix 117a. Similarly, Captain VanderKooi testified that he believed Johnson's fingerprints should be compared to those from earlier larcenies because "[h]e was walking through the [lot] . . . looking into cars." VanderKooi Dep, Appendix 102a. The police had nothing that connected Johnson to the earlier break-ins; there were no suspect descriptions from some of the prior larcenies to which Johnson's appearance could be compared, *id.* at 102a, and Johnson did not match the description of a "black male that was bald wearing a hood" in two other incidents, *id.* at 90a. (Notably, there had been no larcenies in the lot for at least one or two months. *Id.* at 102a.) Thus, taking the fingerprints was impermissible because doing so was irrelevant to any unanswered suspicion related to the *original* basis for the *Terry* stop. None of these steps were necessary to "establish or negate the suspect's connection with *that* crime," *Hayes*, 470 US at 817 (emphasis added). To the extent that Johnson's fingerprints were obtained to investigate other crimes, rather than suspicions related to the *original* basis for the stop, the fingerprints were by definition not necessary to investigate the *original* basis for the stop. And they were obtained *after* information from Johnson and witnesses dispelled the original suspicion that served as the basis for the stop, thus falling outside its permissible scope and duration.

[23] See Howard, *Police to Begin iPhone Iris Scans Amid Privacy Concerns*, Reuters (July 20, 2011) <https://www.reuters.com/article/us-crime-identification-iris-idUSTRE76J4A120110720> (accessed May 20, 2021).

[24] See FBI, *Rapid DNA* <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/rapid-dna> (accessed May 20, 2021).

databases. Asking about a person's identity during a *Terry* stop will usually be reasonable. But it is not reasonable to allow the police to collect biometric information just because someone left home without ID—particularly in light of evolving technologies that could collect even more information than what is contained in a fingerprint. Accepting the City's position would force people to choose between subjecting themselves to invasive fingerprinting when they venture outside, or having to ensure that they never leave home without ID, even though Michigan does not require pedestrians to carry an ID (nor does any other state), and many people do not have access to an ID because of poverty or age. Such a practice, regardless of whether it is a search, exceeds the permissible scope of a reasonable seizure under *Terry v Ohio*.

B. Fingerprinting Exceeds the Duration of a Permissible Seizure Under *Terry*.

Not only did the P&Ps impermissibly exceed the *scope* of the Plaintiffs' stops, but they also exceeded the permissible *duration* of a seizure under *Terry*. As explained in *Rodriguez v United States*, 575 US at 354:

> Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, and attend to related safety concerns. . . . Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." [Citations omitted.]

The same logic necessarily applies here, for a *Terry* stop unrelated to a traffic violation. Use of the P&P procedure impermissibly extended Plaintiffs' *Terry* stops even after the initial suspicion justifying the stops had been allayed.[25] Once the concerns that allegedly warranted the *Terry*

[25] In its Answer to Plaintiffs' Application for Leave to Appeal, the City argued that Plaintiffs' challenge to the duration of their stops was barred by the law of the case. However, the law of the case is not binding on this Court with respect to prior decisions of the Court of Appeals. *Raven v Bd of Comm'rs of Wayne Co*, 399 Mich 585, 587 n 1; 250 NW2d 477 (1977) ("We are not precluded by the earlier determination of the Court of Appeals from reaching a conclusion

stops in the first place were addressed, officers were prohibited from extending the duration of the stops to take Plaintiffs' photographs and collect their fingerprints.

Defendants may argue that the P&Ps were completed promptly, and therefore only prolonged the stops for a brief period. But that is immaterial. Indeed, in *Rodriguez* the Supreme Court specifically rejected the lower court's reasoning that extending a stop by seven or eight minutes was a *de minimis* intrusion on liberty, holding that the officer had unlawfully prolonged the stop after the "mission" of the stop had been satisfied. *Id.* at 352, 356; see also *United States v Urrieta*, 520 F3d 569, 579 (CA 6, 2008) ("[L]aw enforcement does not get a free pass to extend a lawful detention into an unlawful one simply because the unlawful extension was brief."); *United States v De La Cruz*, 703 F3d 1193, 1197 (CA 10, 2013) ("Once reasonable suspicion has been dispelled, even a very brief extension of the detention without consent or reasonable suspicion violates the Fourth Amendment." (quotation marks and alterations omitted)); *Ramsey v United States*, 73 A3d 138, 149 (DC, 2013) (holding that extending the duration of a stop "by only a brief time (perhaps less than a minute or two)" can constitute an impermissible seizure); 4 LaFave, *supra*, § 9.3(g) & n 114 (collecting cases).

Indeed, rapid advances in police technology mean that significant invasions of privacy can occur with unprecedented speed, meaning that even very short extensions of a *Terry* stop can impermissibly change the character of the seizure. Digital fingerprint terminals, iris scanners,

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contrary to that expressed in its first opinion."); *People v Phillips*, 227 Mich App 28, 35; 575 NW2d 784 (1997) ("[T]he Supreme Court itself is not bound to any law of the case, having not itself rendered any pronouncement regarding the merits."). Defendants also argue that Johnson's complaint does not adequately plead a challenge to the P&P as a seizure (as compared to a search). Not so. The complaint alleges that "[t]here was no legal cause to justify the seizure of Plaintiff Johnson's photographic image and fingerprints," and the Defendants had violated "[h]is rights under the Fourth and Fourteenth Amendments to be free from unlawful search and seizure." Johnson Compl, Appendix 249a.

contactless heart rate monitors,[26] electronic noses,[27] and other technologies make collection of biometric and biological information "remarkably easy, cheap, and efficient compared to traditional investigative tools." *Carpenter*, 138 S Ct at 2218. Extending a *Terry* stop to gather information using those technologies is no more permissible than extending a stop to use a drug-sniffing dog, see *Rodriguez*, 575 US at 350, even if the dog takes slightly longer to do its work. A ruling to the contrary would leave people "at the mercy of advancing technology," *Kyllo*, 533 US at 35–36, but that is not what the Fourth Amendment permits.

In sum, taking fingerprints in order to verify identity, regardless of whether it constitutes a search, exceeds the permissible scope and duration of a *Terry* stop because it is "untether[ed]" from "the justifications underlying" the *Terry* doctrine. See *Riley v California*, 573 US at 386. The City's P&P policy thus authorizes unreasonable seizures in violation of the Fourth Amendment.

CONCLUSION AND RELIEF REQUESTED

Fingerprinting Johnson and Harrison pursuant to the Grand Rapids P&P policy was a search within the meaning of the Fourth Amendment and was per se unreasonable because it was conducted without a warrant and no exception to the warrant requirement applied. Fingerprinting pursuant to the P&P policy also violated the Fourth Amendment because, regardless of whether

[26] E.g., Boccanfuso et al, *Collecting Heart Rate Using a High Precision, Non-Contact, Single-Point Infrared Temperature Sensor*, in Ge et al, eds, *Social Robotics* (New York: Springer, 2012) pp 86–97, available at <https://link.springer.com/chapter/10.1007/978-3-642-34103-8_9>.

[27] Haddi et al, *A Portable Electronic Nose System for the Identification of Cannabis-Based Drugs*, 155 Sensors and Actuators B: Chemical 456 (2011), available at <https://www.researchgate.net/publication/235468689_A_Portable_Electronic_Nose_System_for_the_Identification_of_Cannabis-Based_Drugs>.

it was a search, it exceeded the scope and duration of a permissible seizure pursuant to *Terry v Ohio*.

For these reasons, the judgment of the Court of Appeals should be reversed, and the case remanded to the trial court for further proceedings.

Respectfully submitted,

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Dated: May 21, 2021