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. _____

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. _____

COA No. 330537

Trial Court No. 14-002166-NO

PLAINTIFFS' JOINT APPLICATION FOR LEAVE TO APPEAL

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Plaintiffs-Appellants Denishio Johnson (COA Docket No. 330536) and Keyon Harrison (COA Docket No. 330537) seek leave to appeal the Court of Appeals' decision dated November 21, 2019 (Exhibit 1) affirming the trial court's separate orders of November 18, 2015 (Exhibits 2 and 3) granting the motions for summary disposition filed by Defendants-Appellees City of Grand Rapids and several City police officers. Plaintiffs submit this joint application for leave to appeal because these cases were consolidated on remand by the Court of Appeals in an order dated November 30, 2018 (Exhibit 4).[1]

For the second time in the course of this litigation, critical civil rights issues are before this Court. The case arises out of the City of Grand Rapids Police Department's standard practice of taking photographs and fingerprints ("P&Ps") 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. The City retains that information indefinitely, and therefore can use it to identify and track people far into the future. This Court initially concluded that "a policy or custom that authorizes, but does not require, police officers to engage in specific conduct may form the basis for municipal liability." *Johnson v VanderKooi*, 502 Mich 751, 781; 918 NW2d 785 (2018). It then remanded 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.* On remand, the Court of Appeals found "the plaintiffs' Fourth Amendment rights were not violated by the on-site taking of photographs and fingerprints based on reasonable suspicion (i.e., during

[1] This Court previously treated these cases in a consolidated fashion, granting a joint application for leave following a 2017 decision by the Court of Appeals and scheduling a combined oral argument for the two cases on whether to grant the application or take other action. See also *Johnson v VanderKooi*, 502 Mich 751, 757; 918 NW2d 785 (2018) (referring to the cases as "consolidated").

valid *Terry* stops)." *Johnson v VanderKooi*, ___ Mich App ___, ___; ___ NW2d ___ (2019), slip op at 2.

Johnson and Harrison were doing nothing wrong when, on separate occasions in 2011 and 2012, they were individually stopped by City police officers. During these stops, Johnson and Harrison, each an African-American minor male, 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 any suspicion that may have led to the stops. Accordingly, when each stop concluded, the officers determined that they had no basis to further detain either young man. However, in accordance with the City's long-standing policy of taking P&Ps 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, the officers took photos and fingerprints of the teens before releasing them.[2]

In doing so, the City violated Plaintiffs' constitutional rights in several ways, which the courts below erred in failing to recognize and protect. First, the City physically intruded on Plaintiffs' bodies, a constitutionally protected area, in an attempt to obtain information. This was a search under the common-law trespass approach to the Fourth Amendment recognized in

[2] Plaintiffs were far from the only residents of the City to be subjected to such conduct. The P&P practice was used so extensively that the City's police chief estimated in late 2015 that the GRPD was "on page [sic] to take over 2,000 fingerprints" resulting from police interactions where "we came in contact with someone who didn't have identification." See Gordan, *Grand Rapids Modifies Its Fingerprint Policy*, Michigan Radio (December 2, 2015) <http://michiganradio.org/post/grand-rapids-modifies-its-fingerprint-policy> (accessed February 12, 2020), Ex 1 to Amicus Curiae's Br. The City has since supposedly relaxed its policy, purportedly now only seeking photos and fingerprints from people who are "reasonably suspected of committing a crime." See Huffman, *GRPD Says It Won't Go Back to Old "Photos and Prints" Policy Despite Favorable Court Ruling*, Michigan Radio (November 25, 2019) <https://www.michiganradio.org/post/grpd-says-it-wont-go-back-old-photos-and-prints-policy-despite-favorable-court-ruling> (accessed February 12, 2020).

United States v Jones, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012), and subsequent cases. Second, under an alternative and conceptually separate approach to the Fourth Amendment, the City also conducted a search when it infringed on Plaintiffs' reasonable expectation of privacy by obtaining biometric information that would not be visible to the casual viewer.

These searches exceeded the permissible scope of a *Terry* stop and were thus unreasonable. Specifically, the fingerprinting was in no way linked to officer safety, which is the only justification for the limited exception under which searches are permitted during *Terry* stops. Nor can the absence of probable cause or a warrant be justified by the officers' desire to confirm the youths' stated identities, search for evidence, or compile a database of fingerprints that resulted in the long-term retention of the youths' biometric information in a government database.

Johnson and Harrison filed separate suits in 2014 against the City and the police officers involved in each stop. The cases were consolidated for discovery purposes. After discovery concluded, the trial court granted the Defendants' motions for summary disposition in both cases. In 2017, the Court of Appeals affirmed the judgments of the trial court on municipal liability grounds, finding that the City could not be held liable because a policy that does not direct or require police officers to take a specific action cannot give rise to municipal liability under 42 USC 1983. The Court of Appeals did not decide whether the P&Ps violated Johnson's or Harrison's Fourth Amendment right to be free from unreasonable searches and seizures. See *Johnson*, 502 Mich at 760.

As noted above, this Court reversed the Court of Appeals' 2017 decision about municipal liability and remanded on the search and seizure issue, which the Court of Appeals subsequently

decided in the City's favor. That published decision will result in material injustice not only to the two Plaintiffs, but countless others in this state who, as a result of the Court of Appeals' endorsement of fingerprinting in the absence of probable cause or a warrant, are or will be subjected to unconstitutional and invasive biometric searches and seizures. For these reasons, Johnson and Harrison respectfully request that this Court grant leave to appeal, reverse the decision of the Court of Appeals, and remand for trial.

QUESTIONS PRESENTED

Without probable cause or 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 those fingerprints and photos 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 is not useful for investigative or identification purposes without specialized training and equipment, was the P&P that Defendants conducted on Plaintiffs a search within the meaning of the Fourth Amendment, either under a "common-law trespass" line of authority 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. Because warrantless searches are per se unreasonable unless they come within narrowly defined exceptions, and no exception applies here because taking fingerprints during a *Terry* stop is not a search for weapons to ensure officer safety and does nothing to verify or dispel suspicion during the course of a brief stop, was the search unreasonable, thereby violating the Fourth Amendment?

   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, because the P&P was not strictly tied to or justified by the circumstances that purportedly justified stopping Plaintiffs in the first place, did the P&P exceed the permissible scope of the *Terry* stop, thereby violating the Fourth Amendment?

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

JURISDICTION

This is a joint application for leave to appeal from the consolidated decision by the Michigan 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 by appeal a case after a decision by the Court of Appeals.

On November 21, 2019, the Court of Appeals, in a consolidated and published 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). Plaintiffs-Appellants filed a motion for reconsideration with the Court of Appeals on December 12, 2019. The Court of Appeals denied the motion for reconsideration on January 3, 2020. This timely application is being filed within 42 days of the Court of Appeals' denial of the motion for reconsideration. MCR 7.305(C)(2).

GROUNDS FOR GRANTING THE APPLICATION

The issues presented by this application are of significant public interest and involve legal principles of major significance to Michigan jurisprudence. MCR 7.305(B).[3]

This case provides the Court with the opportunity to address two important unresolved Fourth Amendment issues. First, whether fingerprinting is a search under the Fourth Amendment is an issue that neither this Court nor the United States Supreme Court has ever expressly resolved, though established Fourth Amendment doctrine will allow this Court to easily resolve it here. The outcome of this question is important, because if police officers can compel a person

[3] The ways in which the Court of Appeals erred, and the material injustice caused to Johnson and Harrison as a result, are set forth in the Argument section below.

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 the whims of police whenever officers wish to gather sensitive biometric information. This issue certainly affects all people who, like Johnson and Harrison, might be fingerprinted by police simply because they are not carrying identification.

By itself such a practice represents a disturbing encroachment on individual liberty and expansion of police power. But the implications of the Court of Appeals' ruling do not end there, because a conclusion that the Fourth Amendment does not apply at all risks giving police carte blanche to fingerprint people, or potentially even obtain other types of sensitive biometric information, for any reason or no reason at all. Moreover, the Court of Appeals' resolution of this issue fails to properly address the decisions of the U.S. Supreme Court and this Court applying the common-law trespass approach to Fourth Amendment searches, under which the slightest physical intrusion on a constitutionally-protected area such as a person's body is a search, so long as performed with the goal of obtaining information. Further, the Court of Appeals' misreading of U.S. Supreme Court dicta about fingerprinting under the "reasonable expectation of privacy" line of Fourth Amendment analysis is particularly significant given that its opinion is published and thus gives municipalities statewide a roadmap to allow their police departments to pursue the same unjustified practices as does the City of Grand Rapids.

Second, under the Fourth Amendment, searches and seizures are *per se* unreasonable unless conducted with probable cause and a warrant. A limited exception to the probable cause and warrant requirements was set forth in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), which allows police to make limited, brief seizures upon reasonable suspicion of criminal activity and limited searches (frisks) based on reasonable belief that the individual is

armed and dangerous. This appeal would allow the Court to decide the following issue: As part of a *Terry* stop, can police require individuals who are not carrying identification, but who identify themselves, to submit to the taking of their fingerprints and photographs absent probable cause or a warrant, and then retain their information indefinitely in a government database? Because photographing and fingerprinting do not serve the narrowly defined purposes of a *Terry* stop, they are unreasonable under the Fourth Amendment.

The outcome of these Fourth Amendment questions is a matter of significant public interest, because the City's "picture and print" policy is part of a larger and disturbing trend of police practices that have consumed the nation's attention over the past several years. As detailed in several scathing U.S. Department of Justice (DOJ) reports, such as the DOJ's 2016 investigation of Baltimore's police, police departments nationwide are increasingly coming under scrutiny for policing tactics that infringe the rights of urban residents, and that disproportionally target African-Americans.[4] Courts are increasingly concerned 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

[4] The DOJ called into question many unconstitutional aspects of the Baltimore City Police Department's practices, explaining that stops and searches are 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." US Dep't 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 February 12, 2020). Grand Rapids' "picture and print" policy has similarly strained relationships between the Grand Rapids Police Department and the City's African-American community. See 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/> (accessed February 12, 2020), Ex 2 to Amicus Curiae's Br (describing community complaints).

constitutional bounds.[5] Taken as a whole, these reports and cases demonstrate how some individual officers and police departments can mask discriminatory conduct under the guise of detaining a suspect on the purported grounds of reasonable suspicion. A common theme of these nationwide investigations into police practices is that the techniques invariably affect minority groups disproportionately; those same concerns are present here.[6]

Further, this issue disproportionately affects juveniles, because they may be too young to carry a driver's license, may not have the resources necessary to obtain a driver's license or other identification, or may live in areas where obtaining a license when reaching the appropriate age is not a priority because other transportation methods are readily available. It also disproportionately affects poor people, who may not be able to afford IDs or who may not be able to afford a car and thus have no reason to carry a driver's license with them.[7]

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[5] See, e.g., *Floyd v City of New York*, 959 F Supp 2d 540 (SDNY, 2013); *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) <https://www.aclu.org/legal-document/order-and-settlement-agreement-0> (accessed February 12, 2020)

[6] The Michigan Department of Civil Rights has opened a systemic investigation into 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*, 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 February 12, 2020). In the current cases, although Plaintiffs' equal protection claims are not before this Court, it is noteworthy that the evidence below showed stark racial disparities in the use of P&Ps. For example, 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), slip op at 10-11, rev'd in part on other grounds 502 Mich 751 (2018).

[7] See Project Vote, *Research Memo: Americans with Photo ID: A Breakdown of Demographic Characteristics* (February 2015), at 1 (presenting results of the 2012 American National Elections Study; key findings include that lower-income individuals ("12% of adults living in a household with less than $25,000 annual income lack photo ID") and young adults ("15 percent

Preventing constitutional protections from being eroded is itself an issue of major significance to the public and Michigan jurisprudence. But the practices involved here have wider implications. Improper police practices can poison the relationships between police and the communities they are sworn to protect, and indeed the City's former police chief has acknowledged that the P&P policy has undermined community trust.[8]

Finally, the ever-increasing developmental pace of identification technology magnifies the civil liberties impact of concluding that taking fingerprints is not a search. The U.S. Supreme Court has explained that "[a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to '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) (alteration in original). Significant concerns already exist about the privacy implications of facial-recognition cameras in public spaces, retinal scanners, digital fingerprint terminals, and similar technological devices that make it possible to collect, analyze, compare, and retain all kinds of biometric information in ways that were unthinkable when the Fourth Amendment was framed, and were impracticable even just a few years ago. The Court of Appeals' decision about information obtainable through traditional methods of fingerprinting fails to "take account of more sophisticated systems that are already in use or in development." See *Kyllo*, 533 US at 36.

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of 17-20 year-olds lack photo ID") are less likely to have photo ID) <http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf> (accessed February 12, 2020).

[8] 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 February 12, 2020), Ex 1 to Amicus Curiae's Br.

Its published opinion sets a dangerous precedent allowing for the widespread use of finger-printing and similar technologies without any judicial oversight to ensure reasonableness.

Indeed, such a ruling would have implications far beyond the law enforcement context, because if taking fingerprints is not a search, 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 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."). Addressing whether compelled fingerprinting is a search under the Fourth Amendment would allow this Court to clarify whether Michigan is aligned with U.S. Supreme Court precedent requiring protection of Fourth Amendment rights in a rapidly-changing world.

For these reasons, this Court should grant leave to clarify the proper scope of Fourth Amendment protections when the police take fingerprints during *Terry* stops without a warrant or probable cause.

FACTS AND PROCEDURAL HISTORY

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*, 502 Mich at 771. Indeed, the City of Grand Rapids Police Department admits that, for over thirty 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 at 5

(*Johnson v Bargas*). This "custom, practice, or procedure [is] referred to as 'picture and print' or 'P&P.'" Def/Appellee's Br on Appeal at 5 (*Johnson v Bargas*). 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 may also be taken in the course of a field interrogation or a stop if appropriate based on the facts and circumstances of that incident.*

Johnson, 502 Mich at 771–772. It is "undisputed that GRPD officers are not required to make a probable cause determination before performing a P&P." *Id.* at 772. To obtain a thumbprint as part of a P&P, officers "have an ink pad that [an officer] will press onto the thumb and roll it onto" a department-issued thumbprint card. LaBrecque Dep 8–9, Ex 3 to Amicus Curiae's Br.

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 at 6 (*Harrison v VanderKooi*). 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 12–13, Ex 3 to Amicus Curiae's Br; Bargas Dep 26–27, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*).

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. Pl/Appellant's Br on Appeal at 9, Ex 13 (*Harrison v VanderKooi)*.

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

Keyon Harrison, a 16-year-old African-American high school student, was walking home from school on May 31, 2012, when he offered to help a classmate, Pablo Aguilar, carry Aguilar's toy fire truck to Aguilar's internship site. Harrison Dep 8, Ex F to Def/Appellee's Br

on Appeal (*Harrison v VanderKooi*). Harrison offered to help Aguilar because Aguilar was having a hard time riding his bike and carrying the toy fire truck at the same time. *Id.* at 13. Harrison carried the truck for Aguilar until the two had to go in different directions; he then returned the truck to Aguilar and continued walking. *Id.* at 14. As he walked home, Harrison noticed a bird in a park that appeared to have a broken wing. *Id.* at 14–15. Harrison followed the bird for a moment, and then continued on his way. *Id.* at 15.

Unbeknownst to Harrison, Captain Curt VanderKooi had observed him carrying the toy fire truck, returning it to Aguilar, and observing the bird. VanderKooi Dep 7, 10, Ex G to Def/Appellee's Br on Appeal (*Harrison v. VanderKooi*). Captain VanderKooi testified that he thought Harrison's behavior was suspicious, and stopped him. *Id.* at 13.

Harrison did not have identification on him when he was stopped, but he provided his name to Captain VanderKooi. *Id.* at 65. Further, Harrison explained to Captain VanderKooi that he was helping his friend, Pablo Aguilar, carry an internship project and was trying to catch or help birds. Harrison Dep 17, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*); VanderKooi Dep 13–14, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*); Nagtzaam Dep 15, Ex 5 to Amicus Curiae's Br; Newton Dep 11, Ex 6 to Amicus Curiae's Br. Captain VanderKooi asked for Harrison's consent to search his backpack, VanderKooi Dep 20, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*), and Harrison agreed, Harrison Dep 27, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). Captain VanderKooi found that his backpack contained only school materials. VanderKooi Dep 20, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). Another officer questioned Pablo Aguilar, and Aguilar's story corroborated Harrison's story. Newton Dep 16, Ex 5 to Amicus

Curiae's Br. Captain VanderKooi concluded that there was no probable cause to arrest Harrison. VanderKooi Dep 25, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*).

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 30–31, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). 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 34. 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 8, Ex 3 to Amicus Curiae's Br. 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 36, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). LaBrecque then attached the photograph to the electronic copy of the incident report. *Id.* at 10. The incident report was uploaded to the central police computer at the end of LaBrecque's shift. *Id.* at 11–12. 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 13–14. The City continues to maintain Harrison's photograph and print in its files. Def/Appellee's Br on Appeal at 5 (*Harrison v VanderKooi*).

Harrison later had to fend off his schoolmates' questions about why he'd been stopped; he believes that a bus drove by and someone on the bus from school saw him. Rumors soon

spread at school that he was involved in drugs, a robbery, or even that he had shot someone. See Harrison Dep 57–58, App F to Def-Appellee's Br on Appeal (*Harrison v VanderKooi*).

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

Denishio Johnson, a 15-year-old African American male, was walking through an athletic club parking lot on his way to wait for a friend to arrive on the bus. Johnson Dep 7–8, App F to Def-Appellee's Br on Appeal (*Johnson v Bargas*). As he walked through the parking lot, Johnson looked at himself in the reflection of the car windows. *Id.* at 11. There had been earlier break-ins in the lot, and after an athletic club employee observed Johnson walking through the parking lot, appearing to be looking into cars, the employee called the police. Bargas Dep 4–5, App G to Def-Appellee's Br on Appeal (*Johnson v Bargas*).

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 6–7 App F to Def-Appellee's Br on Appeal (*Johnson v Bargas*). When Johnson was stopped by police, Bargas Dep 7, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*), Johnson explained that he lived nearby and was using the lot as a shortcut, Def's Resp to Johnson's First Set of Interrogatories ¶ 4, Ex 4 to Amicus Curiae's Br, and that he did not try to enter into or access any of the vehicles in the lot. Bargas Dep 24, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*).

Johnson did not have identification, Johnson Dep 9, App F to Def-Appellee's Br on Appeal (*Johnson v Bargas*), but provided his name, address, and birthdate, Bargas Dep 10–11, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*), and one of the officers present confirmed that he had no outstanding warrants or previous arrests. Incident Report, Ex 6 to Pl/Appellant's Br on Appeal.

An officer photographed Johnson and took a full set of his fingerprints, including his palms. Johnson Dep 17, App F to Def-Appellee's Br on Appeal (*Johnson v Bargas*). No one asked Johnson if officers could take his fingerprints or his photograph. *Id.* at 17–18. Johnson was then handcuffed and placed in the back of a police car. *Id.* at 15. After his mother identified him, Johnson was allowed to leave with her. *Id.* at 16.

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 12–13, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*), and there were no suspect descriptions from the other prior larcenies to which Johnson's appearance could be compared, VanderKooi Dep 62, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*).

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 24–25, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*). 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 [the athletic club parking lot] . . . looking into cars." VanderKooi Dep 60, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*).

Johnson's photographs and fingerprints were not submitted or processed 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 at 5 (*Johnson v Bargas*).

Johnson's and Harrison's prints and photos, like those of all other people whose information has been collected by the City, will apparently remain on file for as long as the City deems it necessary: "[t]he 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."[9]

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." Ex 2, p 6. 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.* at 6–7.

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. Ex 3, p 7. The court also found that Captain VanderKooi obtained Harrison's consent to perform a P&P. *Id.* at 11.

In both cases, because the court found no constitutional violation, it granted the City's motion for summary disposition as to municipal liability. Ex 2, p 13; Ex 3, p 18.

[9] See 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/> (accessed February 12, 2020), Ex 2 to Amicus Curiae's Br.

The Court of Appeals' Affirmance

Johnson and Harrison timely appealed, and oral argument in the two cases was combined. On May 23, 2017, 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 officers were entitled to qualified immunity because "[i]t is not clearly established 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), rev'd in part on other grounds 502 Mich 751 (2018). The Court of Appeals held that the Plaintiff failed to show that any constitutional violation was caused by an official municipal policy or custom. *Id.* at 626–627. The Court of Appeals adopted this reasoning in *Harrison v VanderKooi*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537), pp 5, 11, rev'd in part 502 Mich 751 (2018), and also concluded that the stop of Harrison was not of unreasonable duration, *id.* at 7–8.

This Court's Reversal and Remand

Johnson and Harrison timely filed their application for leave to appeal with this Court. After oral argument on the application, this Court issued an opinion on July 30, 2018, 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.

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. 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.

The Court of Appeals' Affirmance on Remand

In its decision on remand, the Court of Appeals began by characterizing Johnson's and Harrison's claims as a "purely 'facial' (not an 'as applied') constitutional challenge to the P&Ps." *Johnson*, slip op at 7. The Court of Appeals "conclude[d] that the P&Ps were constitutionally permissible because, under current caselaw, no constitutionally protected interest was violated." *Id.* at 8. 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]." *Id.* at 14–15. Judge Letica, in concurrence, wrote that if she were "unbounded by" the Court of Appeals' "prior decisions and the parties' earlier framing of the issues to address their current claim as solely a facial challenge," she "would reach a different conclusion." *Johnson v VanderKooi*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (LETICA, J., concurring), slip op at 1–2.

Johnson and Harrison filed a motion for reconsideration of the Court of Appeals' decision, which the Court of Appeals denied on January 3, 2020.

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*, 482 Mich 136, 139; 753 NW2d 591 (2008) (internal quotation marks omitted).

ARGUMENT

Taking fingerprints is a Fourth Amendment search. The Court of Appeals' conclusion to the contrary reflects two critical errors: 1) failing to apply the common-law trespass approach to the City's physical intrusions on the bodies of Johnson and Harrison, *Johnson*, slip op at 14–15, and 2) concluding that under its reading of "current caselaw" addressing the reasonable expectation of privacy approach as applied to fingerprinting, Johnson and Harrison had "no constitutionally-protected interest" that was violated. *Id.* at 8.

Because fingerprinting is a search, it is unconstitutional when performed as part of a *Terry* stop without probable cause. Warrantless searches are *per se* unreasonable unless they fall within narrowly defined exceptions, none of which apply here. Fingerprinting is not a search for weapons, for example, nor does it verify or dispel an officer's reasonable suspicion during the course of a brief *Terry* stop.

Further, the Court of Appeals erred in not deciding whether the police officers exceeded the permissible scope of a *Terry* stop when they took fingerprints of Johnson and Harrison. 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. Nor is this issue determined by the length of the stop. Rather, the dispositive point is whether police officers have gone beyond what they are permitted to do as part of such a stop. 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 requiring them to allow their photo and prints to be taken.

I. Fingerprinting Is a Search Subject to Fourth Amendment Protections.

A. Fingerprinting Is a Search Under the Fourth Amendment Because the City 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 "common-law trespass" approach to the Fourth Amendment, although most often applied in instances of unreasonable government intrusion on private property, see *id.*, is not limited to such situations and applies equally to situations involving 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 committed 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." *Jones*, 565 U.S. at 404, quoting US Const, Am IV. In recognition of the Fourth Amendment's "close connection" to these listed items, *id.* at 405, the U.S. 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 attachment of 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 it is a search when police 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)

(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 the 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.[10]

To determine whether a search has occurred, 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. That is true regardless of the magnitude of the physical intrusion. For example, attaching a GPS tracker to a car is a trespass to chattels under the common law, even though the device causes no damage, "weighs two ounces and is the size of a credit card." *Id.* 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).

[10] Michigan lower courts have applied this reasoning in similar ways. See *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).

Here, to fingerprint Harrison and Johnson, police "physically intrud[ed] on [their] bod[ies]," *Grady*, 575 US at 310, by holding and manipulating their hands, marking their thumbs with ink, and applying their thumbs to fingerprint cards. LaBrecque Dep 8–9, Ex 3 to Amicus Curiae's Br; Harrison Dep 36, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*); Johnson Dep 17, App F to Def-Appellee's Br on Appeal (*Johnson v Bargas*). In common-law terms, this "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. Like common-law trespass, the tort of battery does not require physical harm. Restatement of 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 a tort. 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).

It is no excuse 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. The obtaining of fingerprints is quite plainly intended to obtain information, including information about identity. That is the entire purpose of the City's "picture and print" 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 34, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). That is quintessential information-gathering, and therefore constitutes a search. In concluding otherwise, the Court of Appeals erred.

B. Fingerprinting Is Also a Search Under the Fourth Amendment Because There Is a Reasonable Expectation of Privacy in One's Fingerprints.

Separately from the *Jones* trespass approach, fingerprinting Johnson and Harrison was also a Fourth Amendment search because it invaded their reasonable expectation of privacy in their fingerprints. Under this distinct approach to the Fourth Amendment,[11] a search occurs when "the person invoking [the Fourth Amendment's] protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v Maryland*, 442 US 735, 740; 99 S Ct 2577; 61 L Ed 2d 220 (1979). Here,

[11] The trespass approach is separate from and does not hinge on whether a person has a reasonable expectation of privacy. See *Jones,* 565 US at 406–407 ("[*Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967)] did not repudiate that understanding [i.e., the historical concern with government trespass on the areas enumerated in the Fourth Amendment text].").

Johnson and Harrison had a reasonable expectation that government agents would not take their fingerprints without consent.

1. This Court and the U.S. 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 U.S. Supreme Court ever done so, as the Court of Appeals correctly recognized. *Johnson*, slip op at 8; *Maryland v King*, 569 US 435, 477; 133 S Ct 1958; 186 L Ed 2d 1 (2013) (SCALIA, J., dissenting).

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

Although the U.S. Supreme Court has not decided the question whether fingerprinting is a search, controlling principles in its cases governing searches of a person's physical characteristics compel the conclusion that Harrison and Johnson had a reasonable expectation of privacy in their fingerprints. Thus, the Court of Appeals erred in concluding that fingerprinting is not a search. *Johnson*, slip op at 11–12.

First, the 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). Indeed, 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 Railway Labor Exec Ass'n*, 489 US 602, 616–618; 109 S Ct 1402; 103 L Ed 2d 639 (1989) (collecting breath, urine, and blood samples).

Second, fingerprints cannot be interpreted with the naked eye, which should be dispositive in determining that fingerprinting is a search. 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 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 begin to discern even the *existence* of fingerprints on a person's hand, much less to make out their features and analyze their distinctive details, 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)[12] (police observation

[12] 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

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"). Instead, that information can be revealed only if subjected to elaborate procedures and analysis that most people one encounters in day-to-day interactions are unable to perform.

That distinction makes all the difference, as LaFave suggests in his Search and Seizure treatise:

> 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.*[13]

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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)).

[13] In other contexts, the Supreme Court has similarly been sensitive 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

Fingerprints are similar. They can, of course, be used in special circumstances to identify people. But using them in that way requires time and training and equipment. It is not something that people can do quickly, with the naked eye. 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 evaluating fingerprints makes possible what is otherwise not achievable in its absence: the 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. Taking fingerprints is thus akin to GPS location information: 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*, *supra*, 138 S Ct at 2218. Here, people expose their fingers to the world, but using technological tools to search those fingers for identifying patterns is a search.

As a result, people such as Johnson and Harrison, as well as anyone else subject to the City's P&P policy, have a reasonable expectation of privacy in their fingerprints. Absent special circumstances, people reasonably expect that other people they encounter in daily interactions will not be able to obtain any biometric information from their fingers.[14] This alone shows that

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general public use." (internal quotations and citations omitted)). A person's body, like a home, is a "constitutionally protected area," government intrusions on which are subject to heightened scrutiny.

[14] The Court of Appeals mischaracterized Plaintiffs' position on this point, describing it to the effect that fingerprints are "constitutionally protected because its collection relies on technology other than the naked eye." *Johnson*, slip op at 13 n 19. The manner in which information is *collected* is not the only relevant criterion of reasonable-expectations analysis. Plaintiffs, and all other persons, have a reasonable expectation of privacy in information that may theoretically be observable absent technology but cannot reasonably be *analyzed* by an ordinary person absent

when the City and its police officers take fingerprints, they are performing a search, and cannot do so without complying with the Fourth Amendment.

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 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 that sort of interaction from a distance is likely to be able to determine exactly what is occurring.

In that way, the indignity and humiliation suffered by Johnson and Harrison—or anyone else—in being publicly fingerprinted is not far removed from the reaction that someone subject to a frisk as part of a *Terry* stop is likely to experience:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.

United States v Askew, 381 US App DC 415, 424; 529 F3d 1119 (2010), quoting *Terry,* 392 US at 16–17. Just as a pat-down search incident to arrest or a *Terry* frisk for weapons may sometimes need to occur in a public setting, there may be occasions where police need to take fingerprints in a public place. But any decision about whether people should be forced to endure

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such technology, 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 information contained in a person's fingerprints.

such procedures cannot be dodged on the grounds that the fingerprinting procedure is not itself a search.

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

Dicta in some U.S. Supreme Court cases about fingerprinting should not be read to exempt fingerprinting from Fourth Amendment scrutiny. Those cases hold only that transporting detainees before obtaining their fingerprints can violate the Fourth Amendment if appropriate protections are not provided. For example, the Court has 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 before fingerprinting 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 on the street as part of a *Terry* stop was permissible in the absence of probable cause. In dicta, the *Davis* Court suggested that detentions for fingerprinting might be found to comply with the Fourth Amendment in "narrowly defined circumstances" even absent probable cause. 394 US at 727. *Hayes*, in turn, suggested that it was not clear 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 question is simply whether the circumstances, however they are "narrowly defined," reasonably justify that search.

Finally, *Dionisio*, which held only that voice exemplars were 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 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 doesn't mean that a person lacks a reasonable expectation of privacy in the 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 *Hayes*, 470 US at 814. As *Hayes* suggests, the intrusion that fingerprinting imposes may well be "less serious than other types of searches and detentions," *id.*, but that presumes that fingerprinting is in fact a search.

The Court in the 30 years since *Hayes* has never moved to convert its dicta into a holding. But the Court of Appeals appeared to erroneously rely on this limited dicta to read more into *Davis*, *Hayes*, and other cases than is actually there. See *Johnson*, slip op at 12.[15] In doing so, the Court of Appeals improperly rejected the principles announced in various Fourth Amendment

[15] The federal lower court cases cited in *Johnson*, slip op at 10-11, 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). At least one federal magistrate has read *Hayes* to mean that fingerprinting is a Fourth Amendment search. See *In the Matter of Search Warrant Application for Cellular Telephone in United States v Anthony Barrera*, __ F Supp 3d __, 2019 WL 6253812, at *1 (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'"). 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, see *Johnson*, slip op at 9-14, predate the reaffirmation of the common-law 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," *Jones*, 565 US at 406, and thus do not provide a comprehensive survey of viable approaches to assessing the P&Ps in this case.

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 Without a Warrant or Probable Cause.

The search the officers performed when they fingerprinted Harrison and Johnson, despite the fact that both had already provided their names upon request, was unreasonable, and therefore a violation of 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). It is not enough for the government to merely invoke an exception to the warrant requirement, however; 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 application of 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 are *per se* unreasonable under the Fourth Amendment. If there is reasonable suspicion of criminal activity, police may briefly detain a person for questioning in order to "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 narrow, and the City's P&P policy is not remotely tethered to it.

A. Officer Safety Concerns Do Not Justify Fingerprinting During *Terry* Stops.

To begin, searches during a *Terry* stop 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. "Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, 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). Accordingly, absent a lawful arrest or probable cause, the Fourth Amendment does not permit officers to perform an evidentiary search as part of a *Terry* stop. See *People v Arterberry*, 431 Mich 381, 385; 429 NW2d 574 (1988) (permitting a search of the defendant because there was probable cause for arrest); *People v Williams*, 63 Mich App 398, 401; 234 NW2d 541 (1975) (holding that even though the officer had reason to believe the suspect was lying when he said he had no identification, the officer's action in looking in the suspect's wallet at a driver's license was an unreasonable search because it did not fit within any category of permissible warrantless search). Fingerprinting is a search, see *supra* Part I, but assuredly not one that is calculated to discover weapons secreted in a detainee's clothes. It therefore does not advance the "particular purposes served by the exception," *Royer*, 460 US at 500, and so violates the Fourth Amendment.

B. The City Was Not Justified in Taking the P&Ps to Determine Identity.

Similarly, while questions regarding identity are a permissible part of some *Terry* stops, there is no requirement that individuals substantiate their identity through any particular means.

See *Hiibel v Sixth Judicial Dist Court*, 542 US 177, 186; 124 S Ct 2451; 159 L Ed 2d 292 (2004). Indeed, the government interest in identity does not require that an individual provide any particular form of identification; the individual's name alone is sufficient to determine whether the individual is wanted for another offense or has a record of violence, or to clear the individual of suspicion. See *id.*

Harrison and Johnson were both told that the fingerprinting was necessary to identify them, but *Terry* does not allow police to conduct a search solely to determine identity. See *Ybarra*, 444 US at 93–94 ("Nothing in *Terry* can be understood to allow . . . any search whatever for *anything* but weapons." (emphasis added)); see also *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). Therefore, a *Terry* search for identification is per se unreasonable.

Further, even if such a search could in theory be countenanced for identification purposes, under the City's P&P practice neither the photographs nor fingerprints were submitted or processed within a time frame that would justify the intrusion under *Hiibel*. Instead, the photographs and prints were submitted at the end of the officers' shift, and were not actually processed until some indeterminate time after that—long after Harrison and Johnson were told they were free to go, and the *Terry* stops had concluded. LaBrecque Dep 12, 13, Ex 3 to Amicus Curiae's Br; GRPD Manual of Procedures, p 3, Ex 6 to Pl/Appellant Harrison's Br on Appeal; Def's Resp to Johnson's First Set of Interrogatories, ¶¶ 14, 15, Ex 4 to Amicus Curiae's Br.

If the asserted justification for the government's search is to identify a person *during the stop* in order to quickly confirm or dispel suspicion of wrongdoing, then running the prints long

after the stop has concluded cannot serve that justification. In other words, allowing warrantless fingerprinting in this context would "untether the rule from the justifications underlying the [*Terry*] exception." *Riley*, 573 US at 386. Moreover, obtaining fingerprints during a *Terry* stop is pointless unless the individual's fingerprints are already in a government database. Thus, the assumption that collecting fingerprints during a *Terry* stop will be useful as a matter of routine to ascertain an individual's identity is inherently unsound. Cf. *id.* at 387 (requiring that in order to invoke an exception to the warrant requirement, law enforcement agencies must provide actual "evidence to suggest that their concerns are based on actual experience").

Harrison's and Johnson's names alone, without further proof of identification, were sufficient to serve the government interests identified in *Hiibel*; based on this information alone, officers could and did determine whether Harrison or Johnson were wanted for another offense or had a record of violence. See 542 US at 186. Because the photographs and fingerprints were not necessary to ascertain Harrison's or Johnson's identity and were not in fact used to do so, the fingerprinting was an unreasonable search.

III. The P&Ps Separately Violated Plaintiffs' Rights Under the Fourth Amendment Because They Exceeded the Permissible Scope of a *Terry* Stop.

A. The Court of Appeals Erred in Not Addressing Plaintiffs' Arguments That the City Exceeded the Proper Scope of a *Terry* Stop.

As a preliminary matter, the Court of Appeals apparently concluded that its decision about whether fingerprints are a search disposed of all of Plaintiffs' constitutional arguments, without considering whether the P&P procedure, by exceeding the proper scope of the *Terry* stop, was an unconstitutional seizure.[16] This was error. For example, Plaintiffs argued that the

[16] This Court had remanded the case "to determine whether the P&Ps at issue here violated plaintiffs' Fourth Amendment right to be free from unreasonable searches *and* seizures."

City exceeded the proper scope of a *Terry* stop by taking the P&Ps after it became evident that no probable cause existed. Pls' Supp Br on Remand at 20–24; Pls' Supp Reply Br on Remand at 8. The Court of Appeals did not address this issue in any way in its opinion, even though Plaintiffs' argument on this point did not necessarily hinge on whether a P&P is a search.

A *Terry* stop does not give police officers carte blanche to do what they want so long as they do not perform a search. To be sure, an officer can exceed the permissible scope of a stop by performing an impermissible search of some nature, as Plaintiffs of course contend happened here. But, alternatively, officers can also impermissibly go outside the scope of a *Terry* stop and thus violate the Fourth Amendment by conduct that is not itself a search. See, e.g., *Royer*, 460 US at 500 ("It is the [City's] burden to demonstrate that the seizure . . . was sufficiently limited in scope and duration."). Plaintiffs consistently contended that the City violated their constitutional rights in this way, too, by engaging in activity—photographing and fingerprinting—that was not "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.*; see, e.g., Pls' Supp Br on Remand at 20–24; Pls' Supp Reply Br on Remand at 8. By focusing solely on whether P&P was a search and apparently viewing that as dispositive of any potential claims that Plaintiffs raised, the Court of Appeals failed to properly address and decide this issue.

B. The P&Ps Were Not Reasonably Related to the Scope of the Stop Because the City Failed to Show That Photographing and Fingerprinting Plaintiffs was "Strictly Tied to or Justified By" the Original Basis for the Stop.

It is the City's "burden to demonstrate that the seizure . . . was sufficiently limited in scope and duration." *Royer*, 460 US at 500. "The scope of the search must be strictly tied to and

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Johnson, 502 Mich at 781 (emphasis added). The scope of this directive covered all types of Fourth Amendment claims that Plaintiffs might raise.

justified by the circumstances which rendered its initiation permissible." *Terry*, 392 US at 18 (quotation marks omitted). If either the scope of the seizure or its duration is unreasonable, it violates the Fourth Amendment. See, e.g., *United States v Hensley*, 469 US 221, 235–236; 105 S Ct 675; 83 L Ed 2d 604 (1985); *Royer*, 460 US at 504–506.

Here, the P&P procedure cannot be used as an investigative technique during *Terry* stops unless it was "strictly tied to or justified by" the original basis for the stop. See *Terry*, 392 US at 18. As discussed above, searches during *Terry* stops are limited to searches for weapons. Other searches of suspects are allowed incident to arrest based on probable cause, but not before. Moreover, assuming that there could be occasions when fingerprinting is permissible without probable cause, which the Supreme Court has never held, fingerprinting during a *Terry* stop would be permissible only "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 failed to show that photographing and fingerprinting Harrison was strictly tied to and justified by the original basis for the stop, or that it was necessary to establish or negate his connection with any suspected crime. The original suspicion that served as the basis for the stop of Harrison was Captain VanderKooi's observation that Harrison handed a toy to another individual and then went to a secluded area in the park. VanderKooi Dep 13, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). It is undisputed that during the stop, Harrison explained to Captain VanderKooi that he was helping a friend, Pablo Aguilar, carry an internship project and trying to catch or help birds. Harrison Dep 17, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*); VanderKooi Dep 13–14, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi)*; Nagtzaam Dep 15, Ex 5 to Amicus Curiae's Br; Newton Dep

11, Ex 6 to Amicus Curiae's Br. Similarly, it is undisputed that Aguilar's story corroborated Harrison's story. Newton Dep 16, Ex 6 to Amicus Curiae's Br. Once Harrison provided an explanation of his behavior and once his explanation was verified, the original suspicion that served as the basis for the stop was dispelled, and it was impermissible to obtain Harrison's fingerprints or photographs for the purpose of any other investigation.[17]

Similarly, the City failed to show that photographing and fingerprinting Johnson was strictly tied to and justified by the original basis for the stop or that it was necessary to establish or negate his connection with any suspected criminal activity. The original suspicion that served as the basis for stopping Johnson was a complaint about trespassing in a parking lot and looking into cars. Bargas Dep 5, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*). During the course of the investigation, however, the officers confirmed that Johnson lived nearby and was using the lot as a shortcut, Def's Resp to Johnson's First Set of Interrogatories ¶ 4, Ex 4 to Amicus Curiae's Br, and that he did not try to enter into or access any of the vehicles in the lot. Bargas Dep 24, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*). Like Harrison, once

[17] A recent unpublished Court of Appeals opinion illustrates this point in the context of a traffic stop, concluding that a police officer impermissibly extended a traffic stop by asking for the driver's registration and license even though the officer knew that the rationale for the stop was no longer justified. See *People v Thornton*, unpublished opinion per curiam of the Court of Appeals, issued October 8, 2019 (Docket No. 347561), slip op at 6-7. The Court explained: "As the seizure's permissible scope had been reached and thus the seizure was, as a matter of law, at an end once the officer determined that the car had a facially valid temporary registration, any further detention of defendant constituted a new seizure, and even a 30-second extension of the initial stop constituted a violation of defendant's rights." *Id.* at 7; see also *Rodriguez v United States*, 575 US 348, 354; 135 S Ct 1609; 191 L Ed 2d 492 (2015) ("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." (internal citations omitted)).

Johnson provided an explanation and once it was verified, the original suspicion that served as the basis for the stop was dispelled, and it was impermissible to obtain Johnson's fingerprints or photographs for any other purpose.

In both cases, to the extent that the photographs and fingerprints were used to investigate suspicions unrelated to the *original* basis for the stop, they were by definition not necessary to investigate the *original* basis for the stop. Despite the fact that the information obtained from Johnson and witnesses was sufficient to dispel the original suspicion that served as the basis for the stop, 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 24–25, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*). 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 60, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). The police had nothing that connected Johnson to the earlier break-ins, as there were no suspect descriptions from some of the prior larcenies to which Johnson's appearance could be compared, *id.* at 62, and Johnson did not match the description of a "black male that was bald wearing a hood" in two other incidents, *id.* at 12–13. (Notably, there had been no larcenies in the lot for at least one or two months. *Id.* at 61–62.)

None of these steps were necessary to "establish or negate the suspect's connection with *that* crime," *Hayes*, 470 US at 817. Thus, taking the fingerprints and photographs was impermissible because doing so was irrelevant to any unanswered suspicion related to the original basis for the *Terry* stop.

CONCLUSION

For the reasons set forth above, Plaintiffs-Appellants respectfully request that this Court grant their application for leave to appeal.

Respectfully submitted,

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Dated: February 14, 2020