

IN THE MICHIGAN SUPREME COURT

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

DENISHIO JOHNSON,

MSC No. 160958

Plaintiff-Appellant,

COA No. 330536

v.

Trial Court No. 14-007226-NO

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

Defendants-Appellees.

KEYON HARRISON,

MSC No. 160959

Plaintiff-Appellant,

COA No. 330537

v.

Trial Court No. 14-002166-NO

CURT VANDERKOOI and CITY OF
GRAND RAPIDS,

Defendants-Appellees.

**BRIEF OF AMICI CURIAE THE CATO INSTITUTE AND THE MACKINAC
CENTER FOR PUBLIC POLICY IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iii
INTEREST OF AMICI CURIAE	vi
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. The Founding Generation Would Have Understood Fingerprinting To Entail A Search. .	2
A. The Original Meaning Of The Word “Search,” As Used In The Fourth Amendment, Encompasses Fingerprinting.....	2
B. Historical Usage And Context Confirm That Bodily Intrusions Like Fingerprinting Are Searches.	5
II. The Founding Generation Would Have Considered The City’s Fingerprinting Policy Unreasonable.....	7
A. The City’s Policy Raises The Same Concerns As General Warrants.....	8
B. The Policy Allows The City To Obtain Identifying Information That Would Have Been Obtainable In The Founding Era Only Through Extreme And Outrageous Measures. 10	
III. The City’s References To Founding Era Practices Do Not Support Its Position.	12
CONCLUSION.....	15

INDEX OF AUTHORITIES

	Page
CASES	
<i>Atwater v City of Lago Vista</i> , 532 US 318; 121 S Ct 1536; 149 L Ed 2d 549 (2001).....	7, 14
<i>Batshon v Mar-Que Gen Contractors, Inc</i> , 463 Mich 646; 624 NW2d 903 (2001).....	5
<i>California Dep't of Corr v Morales</i> , 514 US 499; 115 S Ct 1597; 131 L Ed 2d 588 (1995).....	3
<i>Carpenter v United States</i> , 138 S Ct 2206; 201 L Ed 2d 507 (2018).....	3, 8
<i>Crawford v Washington</i> , 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).....	3, 5
<i>Florida v Jardines</i> , 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013).....	1
<i>Hecht v Nat'l Heritage Acads, Inc</i> , 499 Mich 586; 886 NW2d 135 (2016).....	3
<i>Kyllo v United States</i> , 533 US 27; 121 S Ct 2038; 150 L Ed 2d 94 (2001).....	3, 10
<i>Minnesota v Dickerson</i> , 508 US 366; 113 S Ct 2130; 124 L Ed 2d 334 (1993).....	13, 15
<i>Money v Leach</i> , 97 Eng Rep 1075; 1088 KB 1765 (1765)	9
<i>NLRB v Noel Canning</i> , 573 US 513; 134 S Ct 2550; 189 L Ed 2d 538 (2014).....	3
<i>People v Jennings</i> , 252 Ill 534; 96 NE 1077 (1911).....	7
<i>People v Tanner</i> , 496 Mich 199; 496 Mich 199, 223–24 (2014).....	2, 3, 5

<i>Riley v California</i> , 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014).....	8, 9
<i>Stanford v State of Tex</i> , 379 US 476; 85 S Ct 506; 13 L Ed 2d 431 (1965).....	8
<i>State v Wright</i> , 961 NW2d 396 (Iowa 2021)	13
<i>Terry v Ohio</i> , 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).....	10
<i>United States v Jones</i> , 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012).....	1, 10, 11
<i>Vernonia Sch Dist 47J v Acton</i> , 515 US 646; 115 S Ct 2386; 132 L Ed 2d 564 (1995).....	6
<i>Wilkes v Wood</i> , 98 Eng Rep 489 (1763)	8, 9 10, 12

CONSTITUTIONAL PROVISIONS

Fourth Amendment	passim
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OTHER AUTHORITIES

Angle, <i>By These Words: Great Documents of American Liberty, Selected and Placed in Their Contemporary Settings</i> (Rand McNally, 1954)	9
<i>American Edition of Jacob's Law Dictionary</i> (4th ed).....	14
Ash, <i>The New and Complete Dictionary of the English Language</i> (2d ed 1795).....	4
Bailey, <i>An Universal Etymological English Dictionary</i> (22d ed 1770).....	3
Bellin, <i>Fourth Amendment Textualism</i> , 118 Mich L Rev 233, 257 (2019).....	4
Cuddihy, <i>The Fourth Amendment: Origins and Original Meaning</i> (Oxford University Press, 2009)	5, 6

Davies, <i>The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v Lago Vista</i> , 37 Wake Forest L Rev 239 (2002)	14
Dictionary of the English Language (5th ed 1773)	3
Encyclopedia Britannica, <i>Death Mask</i> < https://www.britannica.com/topic/death-mask#ref198271 > (accessed July 29, 2021)	11
Hale, <i>Historia Placitorum Coronae</i> (1736)	8
2 Hawkins, <i>Treatise of the Pleas of the Crown</i> (3d ed 1739)	8
2 Hawkins, <i>Treatise of the Pleas of the Crown</i> (8th ed 1824)	15
Jordan, <i>Fingerprinting: Its Use and Limitation</i> 12 Va L Rev 470 (1926)	7
Logan, <i>Policing Identity</i> , 92 BU L Rev 1561 (2012)	7
Thomas III, <i>Stumbling Toward History, The Framers Search and Seizure World</i> , 43 Tex Tech L Rev 199 (2010).....	6, 12
Warner, <i>The Uniform Arrest Act</i> , 28 Va L Rev 315, 324 (1942)	13
Webster, <i>An American Dictionary of the English Language</i> (1828)	4

INTEREST OF AMICI CURIAE

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The Mackinac Center for Public Policy ("Mackinac Center") is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

Both the Cato Institute and the Mackinac Center have an interest in this case because they are committed to maintaining a strong and historically rooted Fourth Amendment that protects individual liberty and limits government overreach.

Pursuant to MCR 7.212(H)(3), the Cato Institute and the Mackinac Center affirm that neither the parties nor their counsel authored or contributed anything toward the production, preparation, or filing of this brief, and no person or entity other than amici and their counsel funded its preparation or submission.

SUMMARY OF ARGUMENT

Plaintiffs-Appellants Denishio Johnson (“Johnson”) and Keyon Harrison (“Harrison”) have the original meaning of the Fourth Amendment on their side. The U.S. Supreme Court has emphasized that modern Fourth Amendment doctrine may “add to the baseline” protections provided by the Fourth Amendment as originally understood in 1791, but cannot “subtract” from those protections. *Florida v Jardines*, 569 US 1, 5; 133 S Ct 1409; 185 L Ed 2d 495 (2013); see also *United States v Jones*, 565 US 400, 406; 132 S Ct 945; 181 L Ed 2d 911 (2012) (“At bottom, we must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’”) (quoting *Kyllo v United States*, 533 US 27, 34; 121 S Ct 2038; 150 L Ed 2d 94 (2001)). And the forced fingerprinting policy implemented by the City of Grand Rapids contravenes the Fourth Amendment’s “baseline” protections.

First, historical materials suggest that forced fingerprinting would have been considered a “search” at the time the Fourth Amendment was ratified. Founding era dictionaries show that the term would have encompassed the act of forcibly pressing another person’s fingers to obtain identifying information. Evidence of historical usage cuts the same way. And the circumstances that gave rise to the Fourth Amendment likewise indicate that the Founding generation would have understood the City’s forced fingerprinting policy to fall within the Fourth Amendment’s ambit.

Second, historical materials suggest that the City’s policy would have been considered “unreasonable”—and thus unconstitutional—in 1791. Although investigative fingerprinting was then unknown, the City’s policy raises the same concerns as the general warrants the Founding generation so despised. Moreover, the precise biometric information now obtainable through fingerprinting could not have been obtained at the Founding absent extreme and outrageous measures.

The City makes no serious argument that its policy is consistent with the original meaning of the Fourth Amendment. It contends that the trespass precedents on which Johnson and Harrison rely are irrelevant because they are limited to trespass of property rather than trespass of the person. But those precedents demonstrate that unauthorized physical contact would have supported an action for trespass at the Founding. In earlier briefing, the City also argued that historical “nightwalker statutes” show that the Founding generation would have been untroubled by the City’s forced fingerprinting policy. But those statutes have no bearing on this case because they authorized a different kind of official action, were applied in a different context, and served a different purpose.

Consistent with the original meaning of the Fourth Amendment, this Court should hold that the City’s forced fingerprinting policy is unconstitutional.

ARGUMENT

I. The Founding Generation Would Have Understood Fingerprinting To Entail A Search.

Historical sources suggest that the Founding generation would have considered fingerprinting to entail a “search.” Contemporaneous dictionaries define “search” to encompass practices that, like fingerprinting, involve looking something over to uncover information. Moreover, historical context confirms that bodily intrusions like fingerprinting implicate the search-and-seizure framework embodied in the Fourth Amendment.

A. The Original Meaning Of the Word “Search,” As Used In the Fourth Amendment, Encompasses Fingerprinting.

“The first rule a court should follow in ascertaining” the original meaning of a constitutional provision is to “give effect to the plain meaning of [that provision] as understood by the people who adopted it.” *People v Tanner*, 496 Mich 199, 223–24; 853 NW2d 653 (2014) (quoting *Bond v Ann Arbor Sch Dist*, 383 Mich 693, 699–700; 178 NW2d 484 (1970)); cf.

Crawford v Washington, 541 US 36, 60; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (relying on historical sources to determine “the original meaning of the Confrontation Clause”). That plain meaning is most immediately conveyed through contemporaneous dictionaries. See *Tanner*, 496 Mich at 224–25; see also *NLRB v Noel Canning*, 573 US 513, 527; 134 S Ct 2550; 189 L Ed 2d 538 (2014) (reviewing “Founding-era dictionaries”). For certain terms of art, legal dictionaries are appropriate. Cf., e.g., *California Dep’t of Corr v Morales*, 514 US 499, 504; 115 S Ct 1597; 131 L Ed 2d 588 (1995) (reaffirming that “the Ex Post Facto Clause incorporated a term of art with an established meaning”). But when the word in question was “common” and “lack[ed] a unique legal meaning,” then a “lay dictionary may be consulted.” *Hecht v Nat'l Heritage Acads, Inc*, 499 Mich 586, 621 n 62; 886 NW2d 135 (2016).

At the Founding, the word “search” “probably was not a term of art, as it does not appear in legal dictionaries from the era.” *Carpenter v United States*, 138 S Ct 2206, 2238; 201 L Ed 2d 507 (2018) (Thomas, J., dissenting). As both the U.S. Supreme Court and this Court have recognized, it is therefore appropriate to consult “lay dictionary[ies]” to give “search” its ordinary meaning. *Hecht*, 499 Mich at 621 n 62; see also *Kyllo*, 533 US at 32 n 1 (consulting lay dictionaries for original meaning of “search” used in the Fourth Amendment).

Those lay dictionaries show that the word “search” generally meant then what it means now. Samuel Johnson’s dictionary, published just before the colonies declared independence, defined “search” as “[i]nquiry by looking into every suspected place.” 2 Johnson, *A Dictionary of the English Language* (5th ed 1773). Another late colonial dictionary explained that the term conveyed “a seeking after, a looking for.” Bailey, *An Universal Etymological English Dictionary* (22d ed 1770). Dictionaries published just after the Fourth Amendment was ratified offered similar definitions. For example, John Ash’s dictionary defined “search” to encompass “[a]n enquiry, an

examination, the act of seeking, an enquiry by looking into every suspected place; a quest; a pursuit.” 2 Ash, *The New and Complete Dictionary of the English Language* (2d ed 1795). And Noah Webster’s seminal 1828 dictionary explained that to “search” meant “[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.” Webster, *An American Dictionary of the English Language* (1828), p 66. Each of these definitions varies slightly, but the concept is uniform: Put simply, at the time of the Founding a “search” meant “an examination of an object or space to uncover information.” Bellin, *Fourth Amendment Textualism*, 118 Mich L Rev 233, 257 (2019) (using Founding era sources to distill that definition).

That definition plainly encompasses the City’s enforcement of its fingerprinting policy. In applying that policy to Johnson and Harrison, officers “look[ed] into,” “looked over,” or “examin[ed]” their fingers to “look for,” “seek[] after,” or “uncover” information. Record testimony confirms as much. See Deposition of Curt VanderKooi (“VanderKooi Dep”) at 58; App 101a; Deposition of Elliot Bargas (“Bargas Dep”) at 15; App 115a; Deposition of Denishio Johnson (“Johnson Dep”) at 9; App 124a; Deposition of Keyon Harrison (“Harrison Dep”) at 34; App 51a. Indeed, Officer Bargas admitted that he pressed Johnson’s fingers to uncover identifying information and that he planned to compare that information with other information already in the City’s possession. Bargas Dep at 15; App 115a. And Captain VanderKooi acknowledged that Harrison’s fingers were pressed not only to look for identifying information but also because that information could be “incriminating or eliminating.” VanderKooi Dep at 34, 61; App 95a, 102a. The City thus “searched” Johnson and Harrison when it forcibly pressed their fingers to uncover identifying and other information.

B. Historical Usage And Context Confirm That Bodily Intrusions Like Fingerprinting Are Searches.

Dictionaries are only the starting point. Original meaning also turns on “contemporary usage” of the word in question. *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 650; 624 NW2d 903 (2001) (quoting *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 356; 596 NW2d 190 (1999); see also *Crawford*, 541 US at 48–50. So too can the meaning of a provision be informed by the historical “circumstances leading to [its] adoption.” *Tanner*, 496 Mich at 226; see also *Crawford*, 541 US at 44–45. Both historical usage and the historical circumstances confirm that bodily intrusions to obtain information are searches.

Start with historical usage. As far as back as the seventeenth century, Massachusetts empowered certain citizens, literally called “*searchers*,” to perform personal body searches on suspicious persons. See Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602–1791 (Oxford University Press, 2009), p 421 (citing Mass Col St, 1 Oct 1645, Mass Col Recs, vol 2 (1642–49)). Similar bodily intrusions (regrettably) were performed on women suspected to be witches, and in at least in one case (mercifully) “in searching no token was found upon them but of Innocence!” See *id.* (quoting Sewel, *The History of the Rise, Increase and Progress of the . . . Quakers* (London, 1722), p 160). Another report relates an occurrence in which “all the men were *searched* and their cabins as well,” after luggage was found missing from the ship in which the men were set to disembark. See *id.* (quoting *Entry*, 11 May 1712, Byrd, *Diary*, 1709–12, pp 528, 625). In fact, it was just such a bodily intrusion that revealed Benedict Arnold’s treachery: The “*search[]*” of another officer uncovered papers incriminating the American turncoat. See *id.* at 752 (quoting Entry n.d., Elias Boudinot, *Journal of Events During the American Revolution* (Philadelphia, 1894), p 87). In each instance, the word “*search*” was used to encompass a bodily

intrusion to uncover information—just like holding and pressing a person’s fingers to reveal the identifying information they contain.

The historical circumstances surrounding the Fourth Amendment’s ratification point in the same direction. The Founding generation debated extensively the laws and customs surrounding government searches and seizures. Searches of the body were part of that debate. For example, one Benjamin Gale protested the practice of stopping and searching highway travelers during the War of Independence. See *id.* (citing Gale, *Remarks*, pp 43–44). He asserted that such searches undercut the “essential rights of a Free State.” See *id.* Matthew Bacon, in turn, opined that a constable with a lawful warrant to search a home nonetheless could not perform a bodily search of a woman within that home in certain circumstances. See Thomas III, *Stumbling Toward History, The Framers Search and Seizure World*, 43 Tex Tech L Rev 199, 224–25 (2010) (describing “scope of search” rule).

Other examples abound. Indeed, there was a “long history of outrage at personal searches before 1789.” *Vernonia Sch Dist 47J v Acton*, 515 US 646, 673; 115 S Ct 2386; 132 L Ed 2d 564 (1995) (O’Connor, J., dissenting). And the particular objects of that outrage matter less than the fact of the outrage itself. The robust debate concerning whether, when, why, and how government officials could physically intrude on a person’s body to obtain information confirms that such intrusions were universally understood to implicate questions of government authority and personal rights at the heart of the Fourth Amendment. All to say: Those who drafted and ratified the Fourth Amendment would have understood fingerprinting—a forced bodily intrusion meant to obtain information—to constitute a “search” subject to the Amendment’s protections.

II. The Founding Generation Would Have Considered The City's Fingerprinting Policy Unreasonable.

The government did not use fingerprinting for identification and investigation until the early twentieth century. See Logan, *Policing Identity*, 92 BU L Rev 1561, 1573–75 (2012) (noting that fingerprinting did not receive public notice until the turn of the twentieth century and that the International Association of Chiefs of Police endorsed the use of fingerprinting in 1911); see also *People v Jennings*, 252 Ill 534; 96 NE 1077 (1911) (relying on fingerprints in criminal case); Jordan, *Fingerprinting: Its Use and Limitation*, 12 Va L Rev 470 (1926) (describing practices). As a result, no Founding era sources expressly address whether fingerprinting an individual on an officer's suspicion of criminal activity would have been considered “unreasonable.” But that does not mean that historical sources are irrelevant to the practice’s constitutionality. Even in cases where there is no precise historical analog, the Founding era understanding of officers’ search and arrest authority remains “relevant, if not entirely dispositive,” in attempting to discern “what the Framers of the Amendment might have thought to be reasonable.”” *Atwater v City of Lago Vista*, 532 US 318, 326; 121 S Ct 1536; 149 L Ed 2d 549 (2001) (quoting *Payton v New York*, 445 US 573, 591; 100 S Ct 137; 63 L Ed 2d 639 (1980)).

There are at least two features of the Founding era search and seizure framework that suggest those who ratified the Fourth Amendment would have considered the City’s forced fingerprinting policy unreasonable. First, the City’s policy raises the same concerns as the general warrants the Founding generation so deeply despised. Second, the City’s policy allows the City to obtain precise identifying information that would have been discoverable at the Founding only through extreme and outrageous measures.

A. The City's Policy Raises The Same Concerns As General Warrants.

It is no secret that the Fourth Amendment was ratified in large part to prevent the newly founded government from using general warrants. *Carpenter*, 138 S Ct at 2213 (“The Founding generation crafted the Fourth Amendment as a response to the reviled general warrants and writs of assistance of the colonial era.”). The defining feature of general warrants was authority to arrest or search without specifying the target of the arrest or the particular place to be searched. See *Riley v California*, 573 US 373, 403; 134 S Ct 2473; 189 L Ed 2d 430 (2014). British general warrants had “bedeviled the colonists” and remained “[v]ivid in the memory of the newly independent Americans.” *Stanford v State of Tex*, 379 US 476, 481; 85 S Ct 506; 13 L Ed 2d 431 (1965).

By the time of the Founding, many English jurists had already recognized the threat general warrants posed to the rule of law. Sir Matthew Hale, for example, condemned general warrants because they “make[] the party to be in effect the judge; and therefore searches made by pretense of such general warrants give no more power to the officer or party, than what they may do by law without them.” Hale, *Historia Placitorum Coronae* (1736), p 150. Sir William Blackstone described general warrants as “illegal and void for uncertainty; for it . . . ought not to be left to the officer, to judge of the ground of suspicion.” 3 Blackstone, *Commentaries on the Laws of England*, p *288. And William Hawkins expressed similar concerns. 2 Hawkins, *Treatise of the Pleas of the Crown* (3d ed 1739), p 82 (explaining that general warrants were problematic because they “leave it to the discretion of a common officer to arrest what Persons, and search what Houses he thinks fit”).

Concerns about general warrants were reflected in case law, too. In the leading case of *Wilkes v Wood*, Lord Camden held that the general warrant at issue was “illegal” because it gave

“discretionary power” to the “messengers to search wherever their suspicions may chance to fall.” 98 Eng Rep 489 (1763). Lord Camden reiterated this point just two years later in *Entick v Carrington*, where he held that if the general warrant in that case were lawful, then “the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge.” 19 Howell’s State Trials 1029 (1765). Later that same year, Lord Mansfield held that a similar general warrant was unlawful because it is “not fit” that it “should be left to the officer” whom, where, or why he may search. *Money v Leach*, 97 Eng Rep 1075; 1088 KB 1765 (1765).

If anything, the American colonists had more antipathy toward general warrants than their English counterparts. For example, in the famous Writs of Assistance Case, James Otis challenged a species of general warrant known as a writ of assistance. Such writs, he argued, were “destructive of English liberty and the fundamental principles of law.” Angle, *By These Words: Great Documents of American Liberty, Selected and Placed in Their Contemporary Settings* (Rand McNally, 1954), pp 62–63 (excerpting Otis speech). “[W]ith this writ,” he reasoned, anyone “may be a tyrant” because he “is accountable to no person for his doings.” *Id.* None less than John Adams believed Otis’s argument birthed the revolution. See *Riley*, 573 US at 403 (quoting Letter from John Adams to William Tudor (March 29, 1817), in 10 The Works of John Adams, at 247–48 (1856) (remarking of Otis’s speech that “[t]hen and there the child Independence was born”)).

The City’s policy closely resembles the general warrants and writs of assistance the Fourth Amendment was ratified to dislodge. Like general warrants, the City’s policy vests government officials with broad discretion to decide whom to detain and search. And like general warrants, the City’s policy vests those same officials with broad discretion to decide how that detention and search should be effected. The individual unfortunate enough to be subjected to the policy may

be in the square, at the park, or on the street. He may be with his family, out with friends, or by himself. And it may be morning, afternoon, or evening. No matter the place, company, or time, an officer may stop an individual he reasonably deems suspicious. See *Terry v Ohio*, 392 US 1, 27–30; 88 S Ct 1868; 20 L Ed 2d 889 (1968). And pursuant to the City’s policy, he may then—at his own, apparently unreviewable discretion—conduct a forced bodily search to obtain his identifying information.

The City’s policy, in other words, gives officers “discretionary power” to “search wherever their suspicions may chance to fall.” *Wilkes*, 98 Eng Rep 489. It therefore threatens the very tyranny against which James Otis warned. The Founding generation’s revulsion towards general warrants reflects a firm belief that an individual’s liberty must not be subordinated to the hunches of government officials. The City’s forced fingerprinting of Johnson and Harrison is precisely the type of unreasonable intrusion the Fourth Amendment was meant to protect against.

B. The Policy Allows The City To Obtain Identifying Information That Would Have Been Obtainable In The Founding Era Only Through Extreme And Outrageous Measures.

The closest late-eighteenth century analogs to fingerprinting also suggest that the Founding generation would have considered the City’s policy unreasonable. The U.S. Supreme Court has previously looked to such analogs in assessing the constitutionality of technology unavailable at the Founding. In *Kyllo*, for example, the Court held that the government’s warrantless use of thermal imaging to search a home was unlawful in part because the information revealed what “would previously have been unknowable without physical intrusion.” 533 US at 40. And in *Jones*, the Court held that surreptitiously placing a tracking device onto an automobile constituted a Fourth Amendment search after noting that one possible “18th-century analog”—a constable “concealing himself in the target’s coach in order to track its movements”—would certainly have

qualified as such. 565 US at 406 n 3. Employing the same approach here suggests that the Founding generation would have understood the City’s policy to violate the Fourth Amendment.

That is because an eighteenth-century officer would have had to engage in an exceedingly intrusive process in order to obtain anything like the precise, biometric identifying information now available through fingerprinting. One potential—though admittedly imperfect—analog would have been the taking of “life mask”—*i.e.*, a wax or plaster replica of a person’s head and facial features. Encyclopedia Britannica, *Death Mask* <<https://www.britannica.com/topic/death-mask#ref198271>> (accessed July 29, 2021) (describing life masks). Like a fingerprint, life masks made a permanent record of the person’s unique identifying characteristics. And the process of creating one was onerous indeed. For example, when French sculptor Jean-Antoine Houdon created a life mask of George Washington in 1785, he “had the general lie down,” “prepared [his] face with a protective layer of grease and covered his eyes before adding a coat of wet plaster, [and] inserting straws in the general’s nose so that he could breathe.” See The Morgan Library & Museum, George Washington Life Mask, <<https://www.themorgan.org/collection/George-Washington-Life-Mask>> (accessed July 22, 2021). Needless to say, neither the Nation’s first President nor any other member of the Founding generation would lightly have allowed themselves to be subjected to that travail simply to confirm their identify.

Even seemingly less intrusive analogs still are problematic. Later in the nineteenth century, officials began to use a process called anthropometry to record biometric data about a person to enable later identification. *Policing Identity*, 92 BU L Rev at 1570–73. Specially trained clerks would use close observation, along with calipers and other tools, to collect physical information about a person, including: “body part dimensions, such as the head, finger, and ear; descriptions of facial features; and notations of ‘peculiar marks,’ such as scars, birthmarks, and tattoos.” *Id.* at

1571. While the anthropometry process was perhaps not as intrusive as taking a life mask, it nonetheless is inconceivable that the Founding generation would have thought such practices reasonable when forcibly employed against citizens like Johnson and Harrison.

Of course, officials at the Founding also could have obtained at least some identifying information by rifling through an individual's pockets or bag for personal papers or seals, or by following him home and then rummaging through his papers and personal effects. But absent a particularized warrant, such practices would have been considered paradigmatic unlawful searches. See, e.g., *Wilkes*, 98 Eng Rep 489; *Stumbling Toward History*, 43 Tex Tech L Rev at 224–25.

In short, officers at the Founding would have had to engage in extreme measures to obtain anything approach the precise identifying information now ascertainable through fingerprinting. That such tactics no doubt would have been considered unreasonable at the Founding suggests that the City's fingerprinting policy is unreasonable, too.

III. The City's References To Founding Era Practices Do Not Support Its Position.

The City makes no serious effort to justify its forced fingerprinting policy by reference to Founding era practices. Indeed, the City engages with historical practices and sources on only two limited occasions—once in its merits brief and once in its earlier briefing. Neither argument is availing.

In its merits brief, the City responds to Johnson and Harrison's trespass-based arguments by suggesting that trespass against persons (rather than against property) is an “antiquated concept” and therefore “inapplicable” to this case. Br. 37–38. The City is of course right that the common-law concept of trespass against persons has largely been “absorbed by other common law and statutory causes of action.” Br. 37. But that does not mean that the historical doctrine has no

bearing on this case. To the contrary, the historic action of trespass, or trespass *vi et armis*, demonstrates that the common law provided a remedy for unauthorized physical contact, including even the “slightest” or “least touching of another’s person willfully.” 3 Blackstone, *Commentaries on the Laws of England*, p *120; see also Chitty, 1 A Practical Treatise on Pleading, and on the Parties to Actions, and Forms of Actions, p 124 (“The degree of violence with which the act is done is not material as far as regards the form of action, for if a log were put down in the most quiet way upon a man’s foot, the action would be trespass.”). And that is exactly what happened to Johnson and Harrison here. The fact that trespass *vi et armis* has been subsumed by the modern tort of battery, if anything, only reinforces the conclusion that they were subjected to an unreasonable search. Cf. *State v Wright*, 961 NW2d 396, 412 n 5 (Iowa 2021) (explaining that, in some contexts, “what constitutes a trespass can change over time without changing the original meaning” of a constitutional provision).

In prior briefs, the City also suggested that the so-called “nightwalker statutes” lend historical support to its position. Answer in Opposition, pp 29–33. The City omitted this argument from its merits brief for good reason: Far from conferring broad authority to search, those statutes addressed a narrowly defined context in which warrantless arrests were considered appropriate. They are readily distinguishable for at least four different reasons.

First, the nightwalker statutes primarily addressed the question of arrest, not search. Consistent with those statutes, a watchman who came upon a nightwalker could “arrest him and then search him for weapons, but the watchman had no right to search before arrest.” Warner, *The Uniform Arrest Act*, 28 Va L Rev 315, 324 (1942); cf. *Minnesota v Dickerson*, 508 US 366, 380–81; 113 S Ct 2130; 124 L Ed 2d 334 (1993) (Scalia, J., concurring) (“I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed

themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity [of a frisk for weapons].”). Here, however, Johnson and Harrison were searched without ever being arrested.

Second, nightwalking—in a time before streetlamps, 24-hour business, and overnight shifts—was long and widely considered a threat to public order. The Statute of Winchester, which was in force in England from 1285 through its repeal in 1827, required towns and cities to close their gates at sunset and appoint a body of men to keep watch through the night. 13 Edw I, ch 4. It further provided that, “[i]f any [s]tranger do pass by [the watchmen] he shall be arrested until [m]orning.” *Id.*; see also *Atwater*, 532 US at 333. There was virtually no good reason for a stranger to be wandering through a gated town after dark, so nightwalking was closely correlated with criminality. See 4 *American Edition of Jacob’s Law Dictionary* (4th ed), p 393 (defining “nightwalkers” as “such Persons as sleep by Day and walk by Night, being oftentimes Pilferers, or Disturbers of the Peace”). The City’s policy, by contrast, is not limited to contexts in which criminality may fairly be presumed. Indeed, Johnson and Harrison were walking through their hometown in broad daylight.

Third, the nightwalker statutes originated during a period in which the citizens of a town could be jointly liable when a felony was committed and no felon was caught. See Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v Lago Vista*, 37 Wake Forest L Rev 239, 328–30 (2002). The nightwalker statutes, at least as first conceived, were thus premised on the possibility that a nightwalker could commit a crime that would not be evident until morning, by which time the nightwalker might be gone, and the townspeople left liable. *Id.* Today, neither the City nor its citizens are collectively liable to any authority for crimes committed by others, and thus have no

need to preemptively detain persons simply because they might have committed as yet uncovered crimes.

Fourth, many nightwalker statutes (and common law analogs) authorized detention of a nightwalker only “till he give good account of himself.” 2 Hawkins, *Treatise of the Pleas of the Crown* (8th ed 1824), p 129; see also *Dickerson*, 508 U.S. at 381 (Scalia, J., concurring) (concluding that, at common law, a custodial search would have been appropriate “when a suspect was unable to provide a sufficient account of himself”). And Johnson and Harrison both did exactly that. Johnson explained that he had passed through an athletic club parking lot as a shortcut to reach a bus stop, at which point he waited for the bus. Johnson Dep 6–7; App 123a–124a. And Harrison explained that he had helped his friend with an internship project and was on his way home. Harrison Dep 17; App 47a; VanderKooi Dep 13–14, 18; App 90–91a. Because Johnson and Harrison both fairly accounted for themselves, a search thus would not have been warranted under the nightwalker regime, even had an initial detention been justified.

In sum, neither the City’s brief reference to trespass *vie et armis* nor its earlier reliance on the nightwalker statutes suggest that the City’s fingerprinting policy would have been deemed reasonable at the Founding.

CONCLUSION

Amici Curiae respectfully request that the Court reverse the judgment of the Court of Appeals and hold that the City’s fingerprinting policy violates the Fourth Amendment.

Dated: August 12, 2021

s/ Amanda K. Rice

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2021, I caused the foregoing to be filed with the Court using the Court's electronic filing system, which will send notice of filing to all parties of record.

/s/ Amanda K. Rice