STATE OF MICHIGAN
IN THE SUPREME COURT

DENISHIO JOHNSON,

Plaintiff-Appellant.

v

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

Defendants-Appellees.

Supreme Court No. 160958
Court of Appeals No. 330536
Trial Court No. 14-007226-NO

KEYON HARRISON,

Plaintiff-Appellant.

v

CURT VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

Supreme Court No. 160959
Court of Appeals No. 330537
Trial Court No. 14-002166-NO

DEFENDANT-APPELLEE'S BRIEF ON APPEAL TO THE MICHIGAN SUPREME COURT

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COUNTER-STATEMENT OF JURISDICTION

Appellees rely on Appellants' statement of jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. To be a search under the Fourth Amendment, there must be a subjective expectation of privacy recognized by society as reasonable. Where a person's fingerprints are constantly exposed to the public, there cannot be an expectation of privacy in them. Did fingerprinting the Appellants pursuant to the City's Photograph and Print ("P&P") procedure constitute a search for Fourth Amendment purposes?

Court of Appeals Answered:	**No**
Appellants Answer:	**Yes**
Appellees Answer:	**No**

II. The question of whether the P&P procedure constituted a trespass to a person was not preserved by the Appellants. Even if it was preserved, a trespass can only constitute a Fourth Amendment search where there is a physical intrusion into one's home or placement of a device to track one's movements over time. Did fingerprinting the Appellants constitute a trespass giving rise to a Fourth Amendment search?

Court of Appeals Answered:	**No**
Appellants Answer:	**Yes**
Appellees Answer:	**No**

III. Law enforcement has a legitimate interest in accurately identifying individuals who are stopped on reasonable suspicion in compliance with *Terry*. Fingerprints taken during a legitimate *Terry* stop, including prints taken to determine an individual's identity, do not constitute an unreasonable search. Even if doing so was a search, did fingerprinting Appellants pursuant to the P&P procedure amount to an *unreasonable* search in violation of the Fourth Amendment or exceed the cope of a *Terry* stop?

Court of Appeals Answered:	**No**
Appellants Answer:	**Yes**
Appellees Answer:	**No**

IV. A *facial* challenge to a procedure (rather than a challenge to the procedure *as applied*), requires a showing that the procedure cannot be applied constitutionally *in any circumstance*. Here, the P&P required the officer, during a field investigation, to determine whether the facts and circumstances of the investigation rendered fingerprinting appropriate. Can the Appellants meet their burden of establishing that such a procedure may not constitutionally be utilized in any circumstance?

Court of Appeals Answered:	**No**
Appellants Answer:	**Yes**
Appellees Answer:	**No**

I. INTRODUCTION

This case is only about one issue: whether it is facially unconstitutional for police officers to fingerprint individuals during an investigatory stop when the individuals have no identification and the officers have reasonable suspicion that the individuals are involved in criminal conduct.

To succeed in a facial challenge of a custom or policy, Appellants must establish that policy may not be applied constitutionally in any circumstance. Appellants are unable to meet this burden.

First, even though the United States Supreme Court has not specifically decided the issue, it has indicated, in dicta, that fingerprinting is not a search. If it is not a search, then the Fourth Amendment is not implicated and no constitutional violation could occur.

To that end, there can be no reasonable expectation of privacy in one's hands or fingerprints, as they are constantly exposed to the public and in plain view. Further, it is of no moment that ink and paper are used to make one's prints more visible. Use of such "technology" does not convert fingerprinting into a search any more than the use of a flashlight to illuminate a darkened car interior converts that examination into a search. Therefore, pursuant to current jurisprudence, such a practice cannot constitute a search for Fourth Amendment purposes.

Second, even if fingerprinting is a search, the U.S. Supreme Court has set forth circumstances under which fingerprinting in the field on reasonable suspicion could be permissible under the Fourth Amendment and within the scope of a *Terry* stop. Therefore, Appellants' facial challenge must fail.[1]

[1] Note that, the record reflects that Appellant, Harrison, consented to being fingerprinted in this matter. Appellants have not substantively argued the issue of consent here. Therefore, Harrison's challenge must fail for this reason as well.

II. COUNTER-STATEMENT OF FACTS

A. The Fingerprinting of Keyon Harrison

On May 31, 2012, at about the time schools let out, Grand Rapids Police Captain, Curtis VanderKooi, was stopped at a red light when he saw two people on the sidewalk at the northeast corner of Fulton and Union Street. (Appellant's Appx. at 89a – *Dep. of VanderKooi* at pp. 7-9.) One was on foot; the other had a bicycle. The individual on foot was holding a large object that was either a train engine (Appellant's Appx. at 89a, *VanderKooi Dep.* at p.7) or a fire truck (Appellant's Appx. at 44a – *Dep. of Harrison* at p.8). VanderKooi thought that the item was ornamental and could be of value. (Appellant's Appx. at 89a, *VanderKooi Dep.* at p. 7.) Within seconds, he saw the boy on foot hand the item to the boy on the bike who began to ride away. (*Id.* at Appx. 89a, *VanderKooi Dep*. at pp. 8-9.)

Suspicious of the transaction, VanderKooi decided to watch what is going on, turned right onto Fulton and began heading eastbound. Still driving, VanderKooi lost sight of the two boys while heading back to the intersection where he had first seen them. (*Id.* at Appx. 89a, *VanderKooi Dep.* at p. 9.)

From Harrison's perspective, he had been walking home from school when he saw schoolmate, Pablo Aguilar, on a bike and struggling with items he was carrying. (Appellant's Appx. at 44a-45a, *Harrison Dep.* at pp.8-9.) Harrison helped Aguilar by taking the fire truck until they crossed Union. Then, Harrison handed the item back to Aguilar and they parted ways. (*Id.* Appx. at 45a-46a; *Harrison Dep.* at pp. 12-14.) Harrison testified that he then saw an injured bird in a park. He followed the bird, kneeling by it, then walking around it in circles, before finally deciding to leave it alone. (*Id.,* Appx. at 46a; *Harrison Dep.* at pp.14-15.)

As he drove back on Lake Drive, VanderKooi saw Harrison in the park near some brush. (Appellant's Appx. at 89a, *VanderKooi Dep.* at p.10.) VanderKooi then saw Harrison crouched

down, or on his knees, with his back to VanderKooi. (*Id.,* Appx. at 90a, *VanderKooi Dep.* at pp.12-13.) Given Harrison's prior actions with the object, and his current actions in a secluded position in the park, VanderKooi thought the situation warranted further investigation. (*Id.,* Appx. at 90a, *VanderKooi Dep.* at p. 13.)

VanderKooi got out of his car and asked if he could speak to Harrison. (Appellant's Appx. at 46a, *Harrison Dep.* at p.16.) Harrison said, "Sure." (*Id.,* Appx. at 46a, *Harrison Dep.* at p.16.) VanderKooi identified himself and asked Harrison what he was doing. (Appellant's Appx. at 90a, *VanderKooi Dep.* at pp.13-14.) VanderKooi told Harrison that he had seen Harrison carrying a firetruck and had thought Harrison was trying to sell the other boy something. (Appellant's Appx. at 46a, *Harrison Dep.* at pp.16-17; Appellant's Appx. at 90a, *VanderKooi Dep.* at p.14.)

Harrison replied, "no, I was just helping him carry his internship project back to his internship. I have to make my way home, so I gave it back to him, let him go on his way." (Appellant's Appx. at p. 47a, *Harrison Dep.* at 17.) Harrison also told VanderKooi that he had been trying to catch birds. (Appellant's Appx. at p. 90a, *VanderKooi Dep.* at p.13; Appellant's Appx. at 73a, *Dep. of Nagtzaam* at p. 15*;* Appellant's Appx. at 37a, *Dep. of Newton* at p. 11.)

VanderKooi knew that there were "a lot of larcenies and home invasions, especially after school in that area" and was consequently suspicious that Harrison's explanation was not entirely truthful. (Appellant's Appx. at 91a, *VanderKooi Dep.* at pp.14-15.) VanderKooi saw no birds near Harrison (*Id.*, Appx. 91a and *VanderKooi Dep.* at p.16.) and testified that:

> … his behavior in the park when I first saw him it just, to me, looked like he could, he was acting rather unusual and I was suspecting might be a lookout and that the property was, a lot of times when you get stolen property they'll secrete it at different locations near where they have taken it, and they take things, object by object they take it and deliver it somewhere else. So, that was what was running through my mind when I saw this transaction, and more so I was confirming what was going on looking suspicious the way he was in the woods, wooded area and he was actually kneeling or crouching.

VanderKooi asked Harrison to hold on and Harrison waited while VanderKooi called for backup. (Appellant's Appx. at 47a, *Harrison Dep*. at p.17.) About two minutes later, a uniformed officer arrived. (*Id.,*Appx. 47a, and *Dep.* at pp.18-19.) VanderKooi then radioed to have another officer locate the other boy, Pablo Aguilar, who had been carrying the object. (*Id.,* Appx. 47a-48a, *Harrison Dep*. at pp.20-21; *see also,* Appellant's Appx. at 92a, *VanderKooi Dep.* at p.21.) VanderKooi explained to Harrison that he was doing this to make sure their stories were the same. (Appellant's Appx. at 47a, *Harrison Dep.* at p.19.)

Harrison and VanderKooi then waited approximately four minutes, talking idly. (Appellant's Appx. at 47a, *Harrison Dep.* at pp.20-21; and Appellant's Appx. at 92a, *VanderKooi Dep*. at p.22.) According to Harrison, VanderKooi was "calm, collective," (Appellant's Appx. at 48a, *Harrison Dep.* at p.22), and the interaction was low-key and non-confrontational. (Appellant's Appx. at 75a, *Nagtzaam Dep.* at p.24.) VanderKooi asked for consent to search Harrison's knapsack because he suspected contraband. (Appellant's Appx. at 91a-92a, *VanderKooi Dep.* at pp.17-19.) Harrison said yes. (Appellant's Appx. at 48a-49a, *Harrison Dep.* at p.22 and p.27.) VanderKooi testified that he asked Harrison to open the knapsack. Harrison did so and VanderKooi looked inside. (*Id.* Appx. at 49a, *Harrison Dep.* at pp.27-28; Appellant's Appx. at 92a, *VanderKooi Dep.* at pp.19-20.) Officer Nagtzaam arrived and asked if he could search Harrison, and again Harrison said yes. (Appellant's Appx. at 48a, *Harrison Dep.* at p.22; Appellant's Appx. at 71a-72a, *Nagtzaam Dep.* at pp. 9-14.)

VanderKooi asked Harrison if he had identification; Harrison did not. (Appellant's Appx. at 50a, *Harrison Dep*. at pp.29-30.) VanderKooi then told Harrison that he would have to take Harrison's picture to identify him. (*Id.,* Appx. 50a, *Harrison Dep.* at p. 30.) Harrison asked, "did I do something illegal?" (*Id.*), and testified that VanderKooi told him "this was just to make sure

that I was who I say I am." (*Id.;* and *see,* Appellant's Appx. at 103a, *VanderKooi Dep.* at pp.65-67.) Harrison said "okay." (Appellant's Appx. at 50a, *Harrison Dep.* at p. 31.) Sgt. Lebrecque, also on scene, then stepped away with Harrison and took his picture. (*Id.,* Appx. 50a-51a, *Harrison Dep*. at pp. 31-33; Appellant's Appx. at 63a, *LaBreque Dep.* at pp.7-8.)

During this time, VanderKooi learned that an officer had found Aguilar but he did not have the object. (Appellant's Appx. at 93a, *VanderKooi Dep.* at pp.24-25; Appellant's Appx. at 37a, *Newton Dep.* at pp.8-10.) VanderKooi did not see this interaction but believed that Aguilar did have identification. (Appellant's Appx. at 93a, *VanderKooi Dep.*at pp. 24-26.) VanderKooi did not ask the officer to photograph or print Aguilar. (Appellant's Appx. at 94a, *VanderKooi Dep.* at pp.27-28.)

Harrison asked VanderKooi if there was anything else he wanted to know and VanderKooi told him that they needed to take his fingerprint. (Appellant's Appx. at 51a, *Harrison Dep* at p.33.) Harrison asked "why?" and VanderKooi responded, "just to clarify again to make sure you are who you say you are." Again, Harrison said, "okay." (*Id.* at 51a, *Harrison Dep* at p. 34.)

Sgt. LaBrecque took a print of Harrison's right thumb. (Appellant's Appx. at 51a-52a, *Harrison Dep.* at pp. 36-38; Appellant's Appx. at 63a-64a, *LaBreque Dep* at pp.8-9; Appellee's Appendix #1 at 1b, *Print Card*.) The process took no longer than two minutes. (Appellant's Appx. at 64a, *LaBrecque Dep* at p.10; Appellant's Appx. 52a, *Harrison Dep.* at p.38.)

Harrison asked VanderKooi why he had been stopped originally and VanderKooi again explained that he thought Harrison had been trying to sell Aguilar something and it had looked suspicious. (Appellant's Appx. at 52a, *Harrison Dep.* at pp.38-39.) VanderKooi also explained that there had been a lot of burglaries in the City of Grand Rapids, to which Harrison replied, "I never robbed anyone let alone did anything illegal, but I appreciate the concern." (*Id.*) Harrison

said thank you for your time, shook their hands, and headed home. (*Id.*, Appx. 52a, *Harrison Dep.* at pp.38-40.)

Sgt. LaBrecque uploaded the picture into the GRPD electronic records system and turned in the print card at the end of his shift. (Appellant's Appx. at 64a, *LaBrecque Dep.* at pp.10-12.) A Latent Print Examiner checked Harrison's thumbprint against the Kent County Correctional Facility's database and the Automated Fingerprint Identification System ("AFIS"). (Appellee's Appx. #2 at 3b, *Def. City's Resp. to 1st Rogs,* Resp. to #15; and Appellant's Appendix at 134a-135a, *City's Resp. to 4th Rogs,* Resp. to #5-7.) Neither resulted in a positive match. (*Id.*) The print card was then placed in a box in the GRPD Latent Print Unit office. (*Id.*)

B. The Fingerprinting of Denishio Johnson

In 2011, the Michigan Athletic Club ("MAC") was located at 2500 Burton SE Grand Rapids. (Appellant's Appx. at 77a, *Johnson Incident Report.*) The MAC experienced multiple episodes of breaking and entering and theft from vehicles parked in its parking lot. (*Id.;* Appellant's Appx. at 81a, *City's Resp. to Johnson's 1st Rogs.,* Resp. #4*;* and Appellant's Appx. at 119a, *Dep. of Bargas* at p.31.) GRPD officers who were assigned to patrol in the area were well aware of these problems and their captain, Curtis VanderKooi, disseminated emails about this and other crime trends in the area. (Appellant's Appx. at 119a, *Bargas Dep.* at p. 31; and *see,* Appellee's Appx. #3 at 7b-26b, *East Edge Emails.*)

On August 15, 2011, at 1:40 pm, the GRPD received a call from an employee at the MAC who reported someone looking into cars in the parking lot as if to steal something from them. (Appellant's Appx. at 77a, *Johnson Incident Report;* Appellant's Appx. at 28a, *Complaint*.) The caller described the suspect as a black male, approximately twenty years old, wearing a red jacket and blue jeans. (*Id.,* Appx. at 77a, *Incident Rpt.*)

GRPD Officers Edgcombe and Laudenslager were dispatched to the scene. (Appellant's Appx. at 81a, *City's Resp. to 1st Rogs.,* Resp. #4.) Edgecombe, as an officer in the East service area, where the MAC is located, was aware of the break-ins and thefts from cars in the parking lot. (*Id.*) Some of the suspects in the prior crimes had been described as young, black males who, after breaking and entering into the vehicles, would leave by walking over the berm behind the MAC. (*Id*.)

Upon arrival, Officer Edgcombe spoke with the MAC employee who said the suspect walked west on Burton. (Appellant's Appx. at 77a, *Incident Rpt.;* and Appellant's Appx. at 81a, *City's Resp. to 1st Rogs.,* Resp. #4.) Edgecombe searched the immediate area and west of the MAC, locating Johnson. (*Id.*) Edgecomb asked Johnson about walking through the parking lot and looking into cars. (Appellant's Appx. at 124a-125a, *Johnson Dep.* at pp.10-11.) Edgecomb also asked Johnson's name and date of birth. (*Id.* at Appx. 124a, *Johnson Dep.* at pp. 9-10.) Johnson did not have identification on him. (*Id.* at Appx. 124a and 127a, *Johnson Dep.* at pp.9, 19-20.) Johnson gave his name as Denishio Johnson and a birthday that would have made him fifteen years old. (*Id.* Appx. at 124a, *Johnson Dep.* at p. 10; Appellant's Appx. at 76a-77a, *Incident Rpt.*)

Johnson told Edgecomb that he was waiting for a friend and had walked through the MAC parking lot from his home on Burning Tree which is a street located behind the MAC on the other side of the berm. (Appellant's Appx. at 77a, *Incident Rpt.;* Appellant's Appx. at 124a, *Johnson Dep.* at pp.8-9.) Edgecomb thought that this route was consistent with the route traveled by a suspect in the prior vehicle break-ins. (Appellant's Appx. at 77a, *Incident Rept.*) Johnson denied trying to open any vehicle. (*Id*.)

Meanwhile, Officer Laudenslager spoke to a male witness who had seen the same suspicious activity as the MAC employee. (Appellant's Appx. at 77a, *Incident Rpt.;* Appellant's

Appx. at 81a, *City's Resp. to 1st Rogs.,* Resp. #4.) Laudenslager had this witness look at Johnson from afar and the witness identified Johnson as the person he had seen walking through the MAC parking lot, though he did not see Johnson trying to enter any vehicles. (Appellant's Appx. at 81a, *City's Resp. to 1st Interrogatories,* Resp. #4; Appellant's Appx. at 113a, *Bargas Dep.* at pp. 8-9.)

Sgt. Elliott Bargas – who was also aware of the previous burglaries in the MAC lot and that a suspect in a prior incident had been seen leaving the lot by walking south over the berm – arrived at the MAC after Edgecomb had detained Johnson and was trying to identify him. (Appellant's Appx. at 113a-114a, *Bargas Dep.* at pp.7, 10, and 12-13; Appellant's Appx. at 124a, *Johnson Dep.* at pp.9-10.) Edgecomb told Bargas that the subject said he was fifteen years old and lived on Burning Tree, south of the MAC. (Appellant's Appx. at 113a, *Bargas Dep.* at p.10.) Bargas then spoke to Johnson who admitted walking through the parking lot but denied looking into cars.[2] (Appellant's Appx. at 113a and 119a, *Bargas Dep.* at pp. 11, 32-33; Appellant's Appx. at 124a-125a, *Johnson Dep.* at p.8-11; Appellant's Appx. at 77a, *Incident Rpt.*) Bargas was skeptical of Johnson as Bargas thought Johnson looked older than fifteen given his stature and that he had tattoos on his arms. (Appellant's Appx. at 114a and 116a, *Bargas Dep.* at pp. 11, 14, and 21; Appellee's Appx. #4 at 27b-31b, *Photos of Johnson.*) Bargas also found that Johnson had no identification. (Appellant's Appx. at 113a-114a, *Bargas Dep.* at pp. 10, 17; Appellant's Appx. at 124a, *Johnson Dep.* at p. 9.)

[2] In his deposition, Johnson said that he'd been checking himself out in the car windows, but not checking out the cars themselves. (Appellant's Appx. at 125a, *Johnson Dep.* at p.11 ("… when I pass cars I usually look at myself like from the reflection of the window. I know I did that, but as far as staring into the cars, I didn't do that.")

Bargas then photographed Johnson and took a full set of fingerprints. [3] (Appellant's Appx. at 114a-116a, *Bargas Dep.* at pp. 14-15, 22; Appellee's Appx. #4 at pp.27b-31b, *Photos of Johnson*; Appellee's Appx. #5 at 32b-34b, *Print Card.*) Bargas explained that he photographed Johnson in case there were witnesses from the previous thefts who could identify a suspect. (Appellant's Appx. at 114a-115a, *Bargas Dep.* at pp.14-15.) He fingerprinted Johnson because GRPD had tried to obtain latent prints in the prior incidents. (*Id*.) Further, at the time he performed the P&P, Bargas and Edgecombe still were unsure of Johnson's actual identity and were trying to verify it. (*Id*.)

Johnson's mother was contacted and came to the scene. (Appellant's Appx. at 77a, *Incident Rpt.*; Appellant's Appx. at 125a, *Johnson Dep.* at pp.11-13; Appellant's Appx. at 115a, *Bargas Dep.* at p.16.) She produced her identification which reflected her address on Burning Tree and she confirmed that Johnson was her son, Denishio. (Appellant's Appx. at 115a, *Bargas Dep.* at p.17.) Bargas then explained the incident and their actions to her. (Appellant's Appx. at 77a, *Incident Rpt.;* Appellant's Appx. at 115a, *Bargas Dep.* at pp.16-18; Appellant's Appx. at 125a, *Johnson Dep* at p.13.) Johnson left with his mother. (*Id.*) No charges were filed. (Appellant's Appx. at 119a, *Bargas Dep.* at p.34; Appellant's Appx. at 126a, *Johnson Dep.* at pp.17-18.)

Bargas uploaded the photos to the GRPD's records system and the print card was turned in to the GRPD Forensics Services Unit at the end of Edgecomb's shift. (Appellee's Appx. #6 at 37b, *City's First Supp. Resp. to 1st Rogs.,* Resp. #14; Appellant's Appx. at 115a-118a, *Bargas Dep.* at pp. 18-19, 26-27.)

[3] Johnson testified that he was also searched, handcuffed, and placed in a cruiser. (Appellant's Appx. at 125a, *Johnson Dep.* at pp.12-13.) Bargas did not recall handcuffs. (Appellant's Appx. at 113a, *Bargas Dep.* at p.10.) Edgecomb did not believe Johnson was handcuffed, nor did he recall if Johnson sat in a cruiser. (Appellant's Appx. at 81a, *City's Resp. to 1st Rogs.,* Resp. #4.) Neither officer recalls a search. (Appellant's Appx. at 81a,*City's Resp. to 1st Rogs.,* Resp. #4.*;* Appellant's Appx. at 118a, *Bargas Dep.* at p.27).

On the following day, Captain Curtis VanderKooi requested that Johnson's fingerprints be compared with any latent prints found at any of the other larcenies from vehicles in the area. (Appellant's Appx. at 101a, *VanderKooi Dep*. at p.58.) VanderKooi testified that either there were no matches or the quality of the prints was inadequate to make the comparison. (*Id.* at Appx. 102a, *VanderKooi Dep.* at p. 59.) VanderKooi took no further action related to the incident. (*Id.*)

C. The GRPD's use of photographing and fingerprinting ("P&P") in the field

At the time of these events, the GRPD used a procedure referred to as "picture and print" or "P&P." Under the P&P, an officer was permitted to take a photograph and fingerprint of an individual when: (1) that person did not have identification on them, and the officer was in the course of writing a civil infraction or appearance ticket; or (2) the officer was in the course of a field investigation and the facts and circumstances of the incident rendered a P&P appropriate. (Appellee's Appx. #7 at 40b, *Def. Ans. to Req. to Admit,* Ans. #11; Appellant's Appx. at 117a-119a, *Bargas Dep.* at pp. 25, 30-31; Appellant's Appx. at 103a-104a, *VanderKooi Dep.* at pp. 65-67.)

While there was no specific policy on P&P, the GRPD Manual of Procedures contained references to the practice. (Appellee's Appx. #8 at 41b-60b, *Excerpt of GRPD MOP.*) Training documents show that the practice evolved over time. For example, when first implemented, officers took a polaroid picture of the person and affixed a thumbprint to the back of the photo. (Appellee's Appx. #9 at 61b-69b, *GRPD Officer Training*.) At the time of the field investigations here, GRPD used digital cameras. (Appellant's Appx. at 115a, *Bargas Dep.* at p.18.)

With respect to fingerprinting, patrol sergeants were assigned a fingerprint kit and used a GRPD "print card." (Appellee's Appx. #10 at 70b-71b, *GRPD Patrol Field Training Tasks.*) When an officer filled out a print card, he would then turn it in at the end of shift to a "patrol work box" at GRPD headquarters. Print cards were collected from the patrol work box and submitted to the Latent Print Unit. (Appellee's Appx. #11 at 73b, *City's Resp. to Harrison's 1st Rogs.,* Resp. #15.)

Once processed and compared by the Latent Print Unit, the cards were filed and stored by year in a box.

III. PROCEDURAL POSTURE

A. The Trial Court Proceedings

Harrison and Johnson filed separate suits in 2014 against the officers involved in their stops and against the City. In general, each case alleged that the City and the defendant-officers were liable under 42 USC §1983 for violating plaintiffs' Fourth and Fourteenth Amendment rights when officers performed P&Ps without probable cause, lawful authority, or lawful consent. (See Appellant's Appx. at 27a-32a, *Johnson Compl.*; Appellee's Appx. #12 at 77b-82b, *Harrison 2nd Am. Compl.*) Both plaintiffs also initially alleged that race was a factor in the decisions to employ the P&Ps, thereby violating plaintiffs' rights to equal protection under 42 USC §1981. (*Id.*) The cases were consolidated for discovery. (Appellant's Appx. at 1a, *Harrison Reg. of Actions;* Appellant's Appx. at 9a, *Johnson Reg. of Actions.*)

In 2015, the parties engaged in motions for summary disposition. The Court granted summary disposition in favor of all defendants and against each plaintiff. (Appellant's Appx. at 140a-158a, *Harrison Opinion and Order, Nov. 18, 2015*; and Appellant's Appx. at 159a-172a, *Johnson Opinion and Order, Nov 18, 2015*.)

1. Summary Disposition Against Harrison

With respect to the Fourth Amendment claims, the trial court noted that Harrison did not challenge the legality or validity of the initial stop. (Appellant's Appx. at 144a, *Harrison Op.* at p.5.) Harrison argued that his "constitutional rights were violated when VanderKooi detained him for an extended period of time without authority and executed a P&P without probable cause." (*Id.*) In other words, Harrison claimed that VanderKooi should have accepted Harrison's

explanation and ended the contact after looking into Harrison's backpack. (*Id.*, Appx. at 145a, *Harrison Op.* at p. 6.)

The trial court rejected Harrison's argument, finding first that the entire interaction (including the P&P) was consensual:

> Plaintiff consented to the initial police contact, and continued to consent to various requests as the investigation continued. Plaintiff was asked to stop and talk; he agreed to do so. He was asked if his bag could be searched; he said yes. Plaintiff was then asked or told that his photo and prints needed to be taken for identification purposes; he said okay.

(Appellant's Appx. at 146a, *Harrison Op.* at p.7.) The trial court also discussed the law of consent and concluded that Plaintiff's consent to the P&P was voluntary. (*Id.* at Appellant's Appx. 149a-150a.) But even if the contact became a stop, the trial court found that the scope and duration were reasonable because the stop was brief (ten to fifteen minutes), and the officers diligently pursued their investigation by interacting with Harrison, locating and interacting with Pablo Aguilar, confirming their stories, and then letting them go. (Appellants*'* Appx. 146a-148a, *Harrison Op.* at pp. 7-8.) These findings not only led the Court to deny Harrison's motion for partial summary disposition on his §1983 claims, the same findings supported granting VanderKooi's motion for summary disposition as the Court found that no Fourth or Fourteenth Amendment violation occurred. (*Id.* at Appx. 152a-153a, *Harrison Op.* at pp. 13-14.)[4]

[4] With respect to the overall spectrum of the cross-motions in *Harrison*, in summary, the Court found that: (1) Harrison's motion for partial summary disposition as to his §1983 claims was denied (Appx. 140a, *Harrison Op*. at p.1); (2) Harrison's Fifth Amendment and "constitutional right of privacy" claims failed as a matter of law (*Id*. Appx. 150a-151a, *Op.* pp.11-12); (3) VanderKooi was entitled to summary disposition and qualified immunity for all claims against him (*Id.* Appx. 152a-153a, *Op.* pp. 13-14); (4) Harrison's §1981 and equal protection claims failed because Harrison failed to offer evidence tending to show that VanderKooi's stop was racially motivated and discriminatory in purpose (*Id*. Appx. 153a-154a, *Op.* pp.14-15); and (5) the City was entitled to summary disposition because Harrison failed to establish the P&P practice at issue was unconstitutional on its face, or in its application. (*Id*. Appx. 156a-157a, Op. pp.17-18)

2. Summary Disposition Against Johnson

Unlike Harrison, Johnson did not move for partial summary disposition. Rather, the defendant officers and the City were the only movants, but many of the issues were the same as those raised in the cross-motions for summary disposition in Harrison's case.

With respect to Johnson's claim that the P&P constituted a Fourth Amendment search and seizure, the Court noted that Johnson's Complaint only "asserted a limited Fourth Amendment claim." (Appellant's Appx. at 163a, *Johnson Op.* at p.5.) Specifically, Johnson:

> … did not challenge the propriety of the initial stop, search of his person, or detention. Rather, Plaintiff argued that [Officer] Bargas had no legal cause to justify the P&P procedure.

(Appx. at 163a, *Op.* at p.5, citing Compl., ¶17.)

After reviewing *United States v Katz*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967) and *United States v Dionisio*, 410 US 1, 14; 93 S Ct 764; 35 L Ed 2d 67 (1973), the Court found that Johnson's face and fingerprints were not protected by the Fourth Amendment, that Johnson was in public, and that Johnson had no expectation of privacy in his various physical features which were readily observable by the public. (Appellant's Appx. at 163a-164a, *Johnson Op.* at pp. 5-6.) Therefore, no Fourth Amendment violation occurred when the officer performed the P&P on Johnson. (*Id.* at Appx. 164a, *Op.* at p. 6.)

Further, the Court found that, even if the P&P constituted a search and seizure, it was reasonable under the circumstances because it was justified at its inception and reasonable in its scope. (*Id.* at Appx. 165a, *Op.* at p. 7.) The Court noted that the officers had reasonable suspicion to stop Johnson as police had received a call reporting suspicious activity in the parking lot that had had a number of day-time break-ins and thefts and Johnson matched the description given by the most recent caller. (*Id.*) Further, while denying illegal activity, Johnson admitted walking through the lot and looking at cars, did not have identification, and appeared older than his stated

age. (*Id*.) Finally, the officer executed the P&P to assist in identifying Johnson and to compare with evidence collected during the prior theft investigations. (*Id*). The Court concluded that "[g]iven the information known to Bargas at the time of the investigation, his actions were objectively reasonable, and no Fourth Amendment violation occurred." (*Id*.) [5]

B. The Appellate Proceedings

Both Harrison and Johnson appealed the Trial Court decisions as of right. (See, *Harrison* Court of Appeals Case No. 330537; and *Johnson* Court of Appeals Case No. 330536.)

1. The Parties' Positions on Appeal

With respect to the officers, Harrison argued that: (1) he was unreasonably stopped for an extended period of time in violation of his Fourth Amendment rights; (2) his fingerprint was taken without probable cause and his picture was taken without lawful basis or just compensation; and; (3) his right to equal protection was violated. (Appellee's Appx. #13 at 103b, *Harrison Br. on Appeal* at p. 13.) With respect to the City, Harrison questioned "whether the City has a policy or custom of violating the Constitution by making unlawful stops and conducting unlawful P&Ps." (*Id*.)

Similarly, Johnson argued that he was stopped for an unreasonable length of time; that his fingerprints were taken without probable cause; that his picture was taken without legal justification or just compensation; and that the City had municipal liability for its P&P custom,

[5] With respect to other issues raised by Johnson, in summary, the Court found that: (1) Johnson's Fifth Amendment and "constitutional right of privacy" claims failed as a matter of law (Appellant's Appx. at 166a-167a, *Johnson Op* at 8-9); (2) the supervisory claim against VanderKooi failed and the officers were entitled to qualified immunity (*Id.* at Appx. 165a-166a and 169a, *Op*. at 7-8, 11); (3) Johnson abandoned his §1981 and equal protection claims (*Id.* at Appx. 168a, *Op*. at 10); and (4) the City was entitled to summary disposition because Johnson failed to establish that his constitutional rights were violated or that the P&P practice at issue was unconstitutional on its face face or in its application (*Id.* at Appx. 170a-171a, *Op*. at 12-13.)

policy or procedure. (Appellee's Appx. #14 at 155b, *Johnson Br. on Appeal* at p. 8.) Johnson also argued that he was searched and handcuffed in violation of the Fourth Amendment. (*Id*.) Johnson did not argue that his right to equal protection under 42 USC §1981 had been violated.

The ACLU filed an amicus brief in both cases. (Appellee's Appx. #15, *Amicus Curiae Brief of the ACLU.*) The ACLU argued that: (1) fingerprinting is a search under the Fourth Amendment because there is a reasonable expectation of privacy in one's fingerprints (*Id.* Appellee's Appx. at 198b-213b, Br. pp.10-25); (2) fingerprinting during a *Terry* stop is unreasonable (*Id.* at 214b-217b, Br. at pp.26-29); (3) photographing and fingerprinting were not reasonably related to the scope of the stop (*Id.* at 217b-222b, Br. at pp. 29-34); and (4) the trial court improperly denied municipal liability where the City had a policy, custom, or practice of fingerprinting and photographing during *Terry* stops. (*Id.* at 222b-236b, Br. at pp. 34-48.)[6]

Neither Harrison nor Johnson (nor the ACLU, for that matter) argued that fingerprinting was a trespass and therefore violated the Fourth Amendment on that basis.

2. The First Court of Appeals Decision

On May 23, 2017, the Court of Appeals issued a published decision in *Johnson* and a corresponding, but unpublished, decision in *Harrison*. *See, Johnson v VanderKooi*, 319 Mich App 589; 903 NW2d 843 (2017) and *Harrison v VanderKooi*, unpublished *per curiam* opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537).[7]

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[6] The ACLU also argued that Harrison's consent was invalid. (Appellee Appx. #15 at 183b, *Amicus Curiae Brief of the ACLU*.)

[7] Common to both cases the Court of Appeals affirmed: (1) that the officers were entitled to qualified immunity for the Fourth and Fifth Amendment claims relating to the P&P procedure (*Harrison*, *supra*, *at *4; Johnson,* 319 Mich App at 618-620); (2) that the City was entitled to summary disposition on the municipal liability claims (*Harrison*, at *9-10; *Johnson*, 319 Mich App at 626-628); and (3) the trial court's exclusion of Plaintiff's expert on the grounds that his data, methodology and statistical analysis were unreliable. (*Harrison*, at *9-10; *Johnson*, 319 Mich App at 628-632).

In *Johnson*, the Court of Appeals concluded that the officers were entitled to qualified immunity and therefore entitled to summary disposition under MCR 2.116(C)(7) because it was "not clearly established in the law that fingerprinting and photographing someone during the course of an otherwise valid investigatory stop violates the Fourth Amendment." *Johnson*, 319 Mich App at 618.[8] However, the Court specifically noted that "[i]n fact, prior statements from the United States Supreme Court and this Court suggest that such a procedure would be permissible under the Fourth Amendment if the initial stop was justified by reasonable suspicion." *Id*.[9]

In *Harrison,* the Court of Appeals agreed that VanderKooi had not violated Harrison's Fourth Amendment rights by making contact with him or performing a search of his bag, finding both to be consensual. *Harrison, supra,* at *5. Moreover, the Court agreed that the detention, as an investigatory stop, had been based on reasonable suspicion and had not been of an excessive duration. The Court described the totality of the circumstances underlying its conclusion of reasonable suspicion as follows:

> VanderKooi testified that he observed behavior between plaintiff and another individual that at least raised the question of whether a transfer of stolen property had occurred. VanderKooi explained that stolen property was often taken piece by piece and then delivered somewhere else, and he indicated that the transaction he had observed was consistent with moving stolen property, which led to the following thought going through his mind: "You've got a person that's walking and now he gets it to the person on the bike, and the guy on the bike can get away quicker and bring it to somewhere else." VanderKooi further explained that when

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[8] The Court noted that: "[t]he factual allegations of plaintiff's complaint relate solely to the taking of plaintiff's photograph and fingerprints. Plaintiff did not challenge his initial stop, the length of his detainment, or the fact that he was handcuffed or placed in a police car, as being unreasonable and violative of his Fourth Amendment rights. Rather, he alleged only that the P&P procedure was an unlawful search and seizure. This Court must limit its review to the allegations contained in the complaint." *Johnson*, 319 Mich App at 607-608 (citations omitted).

[9] Having determined that the rights asserted by Johnson were not clearly established, the Court declined to address whether, taken in the light most favorable to plaintiff, the P&P procedure violated plaintiff's Fourth Amendment rights. *Johnson*, 319 Mich App at 606.

> he observed plaintiff kneeling or crouching in a patch of small trees and grass, he suspected that plaintiff was acting as a lookout. In addition, VanderKooi testified that he had worked for GRPD since 1980 and that he was very familiar with Grand Rapids and its crime patterns. VanderKooi asserted that there were a lot of larcenies and home invasions in the area of the incident, especially after school, and that home invasions and larcenies were higher the closer one got to the core of the city. VanderKooi explained that most home invasions occurred during the daytime when people were not home and that, during his 36 years as a police officer in the city, he recognized the area where the incident occurred as one where there were more home invasions than other areas. (*Harrison,* at *6).

With respect to the duration of the stop, the Court of Appeals held that:

> … the evidence shows that GRPD officers 'diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.' *Sharpe,* 470 US at 686.[10] VanderKooi sought to ascertain plaintiff's identity and the origin of the object that he believed may have been stolen. Officers contacted the other individual involved, and the two stories were compared, after which VanderKooi recognized that he lacked probable cause for an arrest, and plaintiff was released. The trial court did not err by granting summary disposition in favor of VanderKooi on the ground that no Fourth Amendment violations occurred. (*Harrison*, at *7).

3. This Court's Decision to Remand

The two appeals were subsequently consolidated.[11] Johnson and Harrison jointly filed an application for leave to appeal to the this Court challenging the Court of Appeals rulings on municipal liability. This Court ordered and heard oral argument on whether to grant the application or take other action. *Johnson v VanderKooi,* 501 Mich 954, 905 NW2d 233 (2018). In lieu of granting leave to appeal, this Court held:

> [I]t has been conclusively established by the City's concession that there exists a custom of performing a P&P during a field interrogation when an officer deems it appropriate…. Genuine issues of material fact also remain concerning causation. Therefore the Court of Appeals erred by affirming the trial court's order granting summary disposition based on the Court's conclusion that the alleged constitutional violations were not the result of a policy or custom of the City. We express no

[10] *United States v Sharpe*, 470 US 675, 686; 105 S Ct 1568; 84 L Ed 2d 605 (1985).

[11] See *Johnson v VanderKooi*, unpublished order of the Court of Appeals, issued November 30, 2018 (Docket Nos. 330536 & 330537).

> opinion with regard to whether plaintiffs' Fourth Amendment rights were violated. Therefore we reverse Part III of the Court of Appeals opinion in both cases. We remand 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.[12]

Johnson, 502 Mich at 781.

4. Proceedings Post-Remand

The parties filed supplemental briefs in the Court of Appeals on the question of whether the photographs and prints violated the Fourth Amendment. On May 20, 2019, nearly six months after briefing had concluded, Appellants filed supplemental authority arguing for the first time that fingerprinting constitutes a trespass, and therefore a search, under the Fourth Amendment. (Appellee's Appx. #18 at 315b, *Plaintiffs-Appellants' Supplemental Authority.*)

On remand, the Court of Appeals determined that, "plaintiff's Fourth Amendment rights were not violated by the on-site taking of photographs and fingerprints based on reasonable suspicion" (i.e., during valid *Terry*[13] stops) and therefore the Court affirmed the trial court's orders granting summary disposition in favor of the City. *Johnson v VanderKooi*, 330 Mich App 506, 510; 948 NW2d 650 (2019) (*Johnson II*).

As an initial matter, the Court specifically noted that plaintiffs' challenge to the P&P procedure was necessarily a facial one:

> Moreover, the arguments presented by plaintiffs in their supplemental briefs on remand to this Court are, in our judgment, consistent with a purely "facial" (not an

[12] This Court specifically noted in *Johnson*, 502 Mich at 790, n 3 that: "In both cases, the Court of Appeals also affirmed that the individual officers were entitled to qualified immunity and that the motion to strike each plaintiff's proposed expert witness was properly granted. The Court of Appeals further held that the P&Ps did not violate plaintiffs' Fifth Amendment rights. *Johnson*, 319 Mich App at 618-620; *Harrison*, unpub op at 5. And in *Harrison*, unpub op at 9-11, the panel affirmed that the record did not support Harrison's equal-protection claim. These issues were not presented in plaintiffs' joint application for leave to appeal in this Court. *Johnson*, 502 Mich at 790, n 3.

[13] *Terry v Ohio*, 392 US 1, 30; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

> "as applied") constitutional challenge to the P&Ps. That is because plaintiffs' challenge is not that a municipal policy or custom, though constitutional, was improperly applied in their particular cases in an unconstitutional manner. Rather, plaintiffs' position is that because the policy or custom authorized the conducting of P&Ps without probable cause, the policy or custom was itself necessarily and inherently, i.e., facially, unconstitutional. In other words, plaintiffs' claim is expressly that the policy or custom was itself unconstitutional *because* it authorized P&Ps on less than probable cause. That, in our judgment, is by its very nature a facial challenge. … A facially unconstitutional custom or policy is one that may not be applied constitutionally in any circumstance.

Johnson II, 330 Mich App at 518-519, referencing *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71,* 479 Mich 1, 11; 740 NW2d 444 (2007).

Noting that "[p]laintiffs do not dispute that they were detained in the course of a valid *Terry* stop," the Court defined the issue before it as "whether either the fingerprinting or photograph by police is 'a search' under the Fourth Amendment." *Johnson II,* 330 Mich App at 521. Under the existing case law, the Court determined that they were not. *Id*. The Court noted that, while the United States Supreme Court has stopped short of deciding whether fingerprinting is a search for Fourth Amendment purposes, "it has on more than one occasion suggested that obtaining fingerprints during *Terry* stops may be permissible, at least in certain circumstances." *Johnson II,* 330 Mich App at 522. In this regard, the Court reviewed Supreme Court dicta in *Davis* v *Mississippi*, 394 US 721, 727; 89 S Ct 1394; 22 L Ed 2d 676 (1969); *United States v Dionisio, 4*10 US 1, 14-15; 93 S Ct 764; 35 L Ed 2d 67 (1973); and *Hayes v Florida*, 470 US 811, 816-7; 105 S Ct 1643; 84 L Ed 2d 705 (1985); *Johnson II,* 330 Mich App at 522-524.[14]

The Court also reviewed *Nuriel v Young Women's Christian Ass'n,* 186 Mich App 141; 463 NW2d 206 (1990) which the Court held to be binding precedent and not dicta. *Johnson II,* 330

[14] The Court also reviewed case law from lower federal courts that held that fingerprinting does not implicate the Fourth Amendment. See, generally, *Johnson II*, 330 Mich App at 524.

Mich App at 525. *Nuriel* held that "the taking of fingerprints is not violative of the prohibition on unreasonable searches and seizures," as "there is no reasonable expectation of privacy in one's fingerprints," and "the taking and furnishing of fingerprints does not represent an invasion of an individual's solitude or private affairs." *Johnson II*, 330 Mich App at 524-525, quoting *Nuriel,* 186 Mich App at 146. While not a case involving police contact, *Nuriel* was consistent with other Michigan cases that did involve police contact. *Johnson II* at 527, citing *People v Hulsey*, 176 Mich App 566, 569; 440 NW2d 59 (1989) and *People v Davis*, 17 Mich App 615, 616; 170 NW2d 274 (1969) In light of the federal and state case law, the Court of Appeals concluded that fingerprinting did not violate the Fourth Amendment. *Johnson II*, 330 Mich App at 527.[15]

Finally, the Court rejected plaintiffs' newly-raised "trespass theory" (that the taking of fingerprints constituted a physical intrusion on a constitutionally protected area) for several reasons: (1) Plaintiffs provided no cases in which the trespass theory had been applied to fingerprints; (2) the theory had typically been employed in the warrantless placements of electronic monitoring devices for purposes of collecting location data on a subject; (3) the supplemental authority on which plaintiffs relied – *Taylor v Saginaw*, 922 F3d 328 (CA 6, 2019) – was not binding on the Court; and (4) *Taylor* – which involved the chalking of tires to determine whether they had moved – was factually and legally distinguishable from the case at bar. *Johnson II,* 330 Mich App at 531.

[15] The Court applied the same rationale to the taking of photographs as one knowingly exposes one's physical appearance to the public and "we cannot reasonably declare the taking of a photograph of plaintiffs that merely depicts them as they appeared in public to be a search under the Fourth Amendment." *Johnson II,* 330 Mich App at 529-530.

Johnson and Harrison moved for reconsideration and the Court denied the motion. Johnson and Harrison then filed their joint application for leave to appeal to this Court. (Appellee's Appx. #16 at 239b, *Plaintiffs-Appellant's Joint Application for Leave to Appeal.*)

On February 26, 2021, this Court granted the joint application and ordered the parties to include three issues in their briefing: (1) "whether fingerprinting constitutes a search for Fourth Amendment purposes"; (2) "if it does, whether fingerprinting based on no more than a reasonable suspicion of criminal activity, as authorized by the Grand Rapids Police Department's 'photograph and print' procedures, is unreasonable under the Fourth Amendment"; and "whether fingerprinting exceeds the scope of a permissible seizure pursuant to *Terry v Ohio,* 392 US 1 (1968)."

IV. COUNTER-STANDARD OF REVIEW

The Court reviews *de novo* preserved questions of constitutional law. *Hardrick v Auto Club Ins Ass'n,* 294 Mich App 651, 685; 819 NW2d 28 (2011).

V. ARGUMENT

A. Appellants' Constitutional challenge is a facial challenge

Over the years, this case has been whittled down to one defendant – the City of Grand Rapids – and one constitutional issue – whether the City's practice of fingerprinting in the field, on reasonable suspicion, but without probable cause, violates the Fourth Amendment.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." US Const, Am IV. Thus, to prevail here, Appellants must establish first that the alleged government action (fingerprinting) is a search under the Fourth Amendment and, second, that it was unreasonable. *Taylor v City of Saginaw*, 922 F3d 328, 332 (CA 6, 2019).

To argue that a search occurred Appellants posit two alternative theories: (1) the traditional theory that fingerprinting is a search because people have a reasonable expectation of privacy in

their fingerprints;[16] or (2) the newly-raised theory that fingerprinting is a search because police physically intrude on a constitutionally protected area (the so-called "trespass theory").

In either case, Appellants must contend with the holding below that their Fourth Amendment challenge to fingerprinting was necessarily a facial one. *Johnson II*, at 515-519. Appellants did not challenge this holding in their current appeal to this Court.

As the Court of Appeals noted, "[a] facially unconstitutional custom or policy is one that may not be applied constitutionally **in any circumstance**." *Johnson II*, 330 Mich App at 519 (emphasis added) (citation omitted). To succeed on a facial challenge, Appellants face "'an extremely rigorous standard' and must show that no set of circumstances exist under which the …[P&P] would be valid." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 11, quoting *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 310; 586 NW2d 894 (1998) (TAYLOR, J., dissenting). This is a hurdle Appellants cannot meet under current case law regardless of their alternate theories of privacy or trespass.

First, even though the United States Supreme Court has not specifically decided the issue, it has indicated, although arguably in dicta, that fingerprinting is not a search because there is no reasonable expectation of privacy in one's fingerprints. If it is not a search, then the Fourth Amendment is not implicated and no constitutional violation could occur.

[16] Appellants actually framed this issue as "Johnson and Harrison had a reasonable expectation of privacy that government agents would not take their fingerprints without consent." (Appellants' Brief, p. 21.) However, the trial court found that Harrison *did* consent to the P&P. (Appellant's Appx. at 150a, *Harrison Op*. at p.11.) While the Court of Appeals did not rule on the issue, Harrison does not argue here that his consent was invalid. He merely makes an unsupported statement that it was nonconsensual. An issue that is not briefed, is waived. *See, Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (citations omitted). Under Michigan law consent voluntarily given validates an otherwise unreasonable search. *People v Dagwan*, 269 Mich App 338, 390; 711 NW 2d 386 (2005). As a result, even if this Court holds that fingerprinting constitutes an unreasonable search, it should still hold that summary disposition as to Harrison was proper.

Second, even if fingerprinting is a search, the Supreme Court has set forth circumstances under which fingerprinting in the field on less than probable cause could be permissible under the Fourth Amendment. Thus, Appellants cannot meet the "extremely rigorous," "no circumstances" standard required for a facial challenge. *In re Request, supra,* 479 Mich at 11.

B. Fingerprinting is not a search for Fourth Amendment purposes

1. Fingerprinting is not a search because there is no reasonable expectation of privacy in fingerprints.

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v United States*, 533 US 27, 33; 121 S Ct 2038; 150 L Ed 2d 94 (2001), citing, *Katz v United States*, 389 US 347, 361; 88 S Ct 507; 19 L Ed 2d 576 (1967) (HARLAN, J., concurring). See also, *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.").

A reasonable expectation of privacy requires a showing that: (1) the individual had an actual subjective expectation of privacy; and (2) society is prepared to recognize as reasonable the individual's subjective expectation of privacy. *Kyllo*, 533 US at 33.[17] Significantly, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz*, 389 US at 351 (citations omitted).

Thus, not all governmental inquiry – whether in the course of an investigative stop or otherwise – implicates the Fourth Amendment. The United States Supreme Court has made clear over time that where no reasonable expectation of privacy exists, police may probe for, and collect,

[17] In this regard, the Fourth Amendment exists to protect the privacies of life against arbitrary power. *Carpenter v United States*, 138 S Ct 2206, 2214; 201 L Ed 2d 507 (2018), citing *United States v Di Re*, 332 US 581, 595; 68 S Ct 222; 92 L Ed 2d 210 (1948).

evidence that a person would rather not have the police know about. For example, the Supreme Court has found that no reasonable expectation of privacy existed in:

- Items in plain view where an officer is lawfully present. *Horton v California*, 496 US 128, 141-142; 110 S Ct 2301; 110 L Ed 2d 112 (1990);
- Items discarded in the trash. *California v Greenwood*, 486 US 35, 39; 108 S Ct 1625; 100 L Ed 2d 30 (1988);
- The presence of illegal drugs in the interior of a car, where the drug's presence is detected by a suspicionless dog sniff of the car's exterior. *Indianapolis v Edmond*, 531 US 32, 40; 121 S Ct 447; 148 L Ed 2d 333 (2000);
- The chemical identity of white powder in a person's possession. *United States v Jacobsen*, 466 US 109, 123; 104 S Ct 1652; 80 L Ed 2d 85 (1984);
- Phone numbers dialed on a landline in one's home. *Smith v Maryland*, 442 US 735, 745-746; 99 S Ct 2577; 61 L Ed 2d 220 (1979);
- Original checks and deposit slips retained by a bank. *United States v Miller*, 425 US 435, 442; 96 S Ct 1619; 48 L Ed 2d 71 (1976);[18]
- Information voluntarily disclosed to a third party, even if "the information is revealed on the assumption that it will be used only for a limited purpose." *United States v Miller*, 425 US at 443.

Further, police may employ technology that enhances natural human senses to detect what otherwise would be imperceptible without running afoul of a reasonable expectation of privacy under the Fourth Amendment. For example, the United States Supreme Court has held that illuminating the interior of a car with a flashlight to look for weapons or contraband is not a search. *Texas v Brown*, 460 US 730, 739-740; 103 S Ct 1535; 75 L Ed 2d 502 (1983). Nor is taking an enhanced aerial view of an industrial park a search. *Dow Chemical Company v United States*, 476 US 227, 237-238; 106 S Ct 1819; 90 L Ed 2d 226 (1986). Even using a dog to sniff luggage at an airport to detect drugs – without any quantum of suspicion – is not a search. *United States v Place*,

[18] Abrogated by Right to Financial Privacy Act, 12 USC 3413. See *Hohman v Eadie*, 894 F3d 776 (CA 6, 2018) (noting that the Right to Financial Privacy Act was enacted in response to *Miller*).

462 US 696, 707; 103 S Ct 2637; 77 L Ed 2d 110 (1983).

Similarly, in Michigan, use of a sense-enhancing ultraviolet scan on a suspect's hands is not a search. *People v Hulsey*, 176 Mich App 566; 569; 440 NW2d 59 (1989). In *Hulsey*, the Court considered whether a fluoroscopic examination of the defendant's hands for "Bait Powder" (used to mark money) was a search. *Hulsey,* 176 Mich App at 569. The Court held, "the Fourth Amendment provides no protection for what a person knowingly exposes to the public.…This is true whether or not the thing exposed is examined by artificial means." *Id*. The Court said:

> The part of defendant's body here at issue – his hands – is not a body part hidden from public scrutiny. On the contrary, defendant's hands are constantly exposed to public scrutiny. It is therefore untenable to maintain that defendant had a reasonable expectation of privacy in his hands. Accordingly, the sense-enhancing ultraviolet scanning did not invade the privacy of defendants' body parts.

Hulsey, 176 Mich App at 570.[19]

On the other hand, where technology does not simply enhance a natural sense, and intrudes on a protected area, such as the interior of a home, a search does occur. For example, in *Kyllo v United States*, 533 US 27; 121 S Ct 2038; 150 L Ed 2d 94 (2001), police used an infrared sensor from the public way to determine that a wall of a house was unusually hot (consistent with the use of lights to grow marijuana indoors). Focusing on the "sanctity of the home" and drawing a bright line "at the entrance to the house," the Court held that use of the infrared sensor was a search because the device was not in public use and the police could not have "explored the details of the home [ie detected the interior heat] that would previously have been unknowable" without trespassing into the property. *Kyllo,* 533 US at 36, 40. Similarly, the Fourth Circuit held that using

[19] *Hulsey* also forecloses Appellants' theory that fingerprinting is a search because it requires applying ink and examination by a person with training. The Court in *Hulsey* noted that "[e]ven though the powder could not be detected with the naked eye, neither may a fingerprint be examined without an application of ink." *Id.* at 571. That is to say, examination of a person's hands by artificial means, including fingerprints, is not a search.

a metal detector constituted a search because no natural sense was being enhanced to see what was underneath a person's clothing. *United States v Epperson*, 474 F2d 769 (CA 4, 1972).

Together, these cases provide significant guidance by which to assess whether a Fourth Amendment search has occurred. First and foremost, the Supreme Court very broadly interprets the principle that there is no reasonable expectation of privacy in what one knowingly exposes to the public. Second, the use of technology to identify, enhance, or analyze data does not automatically mean a search has occurred. To the contrary, where the technology enhances natural senses and the object or information identified, enhanced or analyzed is otherwise open to plain view, no search occurs. Finally, the mere fact that police uncover evidence that a suspect would not have disclosed voluntarily does not mean a search has taken place. An actual and reasonable expectation of privacy must exist if the police action is to be considered a search.

Under these cases alone, this Court could conclude that fingerprinting is not a search.

Here, there can be no reasonable expectation of privacy in one's hands or fingerprints as they are constantly exposed to the public and in plain view. Fingerprints are the images one's fingers leave behind whenever one touches any surface – glassware, utensils, computer screens and keys, equipment, door knobs, car doors, steering wheels, the list is endless. Unless one chooses to wear gloves – which might suggest an intent to keep one's fingerprints secret and thus private – the physical characteristics and images of one's fingers (i.e., one's fingerprints) are constantly exposed to the public. Like trash in a trash bin, fingerprints are virtually discarded and left behind without any thought or care as to whether they can be seen by others.

Moreover, it is of no moment that ink and paper are used to make one's prints more visible. Use of such "technology" does not convert fingerprinting into a search any more than the use of a flashlight to illuminate a darkened car interior converts that examination into a search. Even the

use of computers to analyze and compare fingerprints, once they are taken, does not alter the calculus. Computer technology may make the process more accurate and efficient but fingerprints remain susceptible to examination by the enhanced human eye and to manual comparison.[20] "The mere fact that human vision is enhanced somewhat . . . does not give rise to constitutional problems." *Dow Chemical*, 476 US at 238 (discussing commercial cameras used in map-making to produce enhanced aerial photos).

Under these circumstances, the Court should conclude that: (1) there is no subjective expectation of privacy in fingerprints (unless one wears gloves) as one leaves one his/her fingerprints everywhere on a daily basis; and (2) even if there is a subjective expectation of privacy, it is not one that society would recognize as reasonable. Therefore, taking the fingerprints of one who is lawfully detained is not a search under the Fourth Amendment.

2. The United States Supreme Court has strongly suggested that the Fourth Amendment would permit fingerprinting in the field upon reasonable suspicion and under narrow circumstances.

Obtaining physical evidence from a person involves an analysis of potential Fourth Amendment violations at two different levels: (1) the initial seizure; and (2) the subsequent taking of physical evidence. *United States v Dionisio*, 416 US 1, 8; 93 S Ct 764; 35 L Ed 2d 67 (1973). Appellants do not dispute that the initial seizures were reasonable under the circumstances. *Johnson II*, 330 Mich App at 521. ("Plaintiffs do not dispute that they were detained in the course

[20] Appellants cite to the National Institute of Justice *Fingerprint Sourcebook* to warn that computerized analysis of fingerprints will permit invasions "of privacy at scale." See *e.g.,* Appellants' Brief at pp. 6, n.9. They also use this reference to introduce "facts" regarding the interpretation of fingerprints that were not presented to the trial court to bolster their theory that fingerprinting is an invasive procedure that requires "elaborate technical procedures." See Appellants' Br., at pp.23-24. However, even the *Fingerprint Sourcebook* acknowledges that fingerprints can be manually matched, though it is a "very tedious task" indeed. *Id.* at p.6, n.9.

of a valid *Terry* stop.") Again, the sole issue is whether the subsequent taking of physical evidence (the fingerprinting) was a search requiring probable cause or a warrant.

The United States Supreme Court has stopped short of specifically deciding this issue. However, the Court has repeatedly suggested that obtaining fingerprints during a *Terry* stop may be permissible in certain circumstances. See, e.g., *Davis v Mississippi*, 394 US 721; 89 S Ct 1394; 22 L Ed 2d (1969); *United States v Dionisio*, 410 US 1; 93 S Ct 764; 35 L Ed 2d 67 (1973); *Cupp v Murphy*, 412 US 291; 93 S Ct 2000; 36 L Ed 2d 900 (1973); *Hayes v Florida*, 470 US 811; 105 S Ct 1643; 84 L Ed 2d 705 (1985). The trajectory of these cases makes clear that fingerprinting in the field under defined circumstances is not a search.

In *Davis v Mississippi*, police transported the plaintiff ninety miles to jail to be fingerprinted and housed overnight as part of a dragnet investigation even though there existed no probable cause to believe that plaintiff had committed a crime. *Davis*, 394 US at 723. The Supreme Court distinguished the *seizure* of the plaintiff – which was unconstitutional – from the fingerprinting itself. The Court reasoned that, "[f]ingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis*, 394 US at 727. While the Court explicitly stated that it was not deciding whether fingerprints could be obtained during a criminal investigation absent probable cause,[21] the Court did note that "[i]t is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *Davis*, 394 US at 727-728.

[21] Specifically, the Court said "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." *Davis*, 394 US at 727-728.

Four years later, in *United States v Dionisio*, the Supreme Court upheld the constitutionality of a compelled collection of a voice exemplar, explaining that:

> The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No 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.

Dionisio, 410 US at 14, citing *Katz*, 389 US at 351. Most importantly, the Court in *Dionisio* likened a voice exemplar to a fingerprint, thereby suggesting again that the fingerprinting is not a search under the Fourth Amendment:

> [T]his is like the fingerprinting in *Davis*, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."

Dioniso, 410 US at 15, quoting *Davis*, 394 US at 727. In this regard, the Court's conclusion in *Dionisio* rests on a comparison of the privacy interests in fingerprints and the privacy interests in a voice exemplar, impliedly holding that there is no reasonable expectation of privacy in either.

The same year as *Dionisio*, the Supreme Court decided *Cupp v Murphy*, holding that defendant had been subjected to a search when police scraped under his fingernails for evidence. The Court reasoned:

> Unlike the fingerprint in Davis, the voice exemplar obtained in [Dionisio], or the handwriting exemplar obtained in [Mara[22]], the search of [Murphy's] fingernails went well beyond mere physical characteristics … constantly exposed to the public, and constituted the type of severe, though brief, intrusion upon cherished personal security that is subject to constitutional scrutiny.

Cupp, 412 US at 295. By distinguishing the scraping under Murphy's fingernails from

[22] *United States v Mara*, 410 US 19, 21; S Ct 774; 35 L Ed 2d 99 (1973) (compelled handwriting exemplar not a search as handwriting is repeatedly shown to the public)

fingerprinting, voice exemplars, and handwriting exemplars – the latter two of which unquestionably do not involve a reasonable expectation of privacy – the Court again implicitly recognized that there is no reasonable expectation of privacy in one's fingerprints, and therefore fingerprinting is not a search under the Fourth Amendment.

Finally, in *Hayes v Florida*, the Supreme Court reversed petitioner's conviction when the Court found that petitioner had been impermissibly removed from his home without probable cause or a warrant and transported to a police station for the purpose of fingerprinting him. *Hayes,* 470 US at 815-17. Notably, the Court said that "[n]one of the foregoing implies that 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." *Hayes,* 470 US at 816. The Court explained:

> In addressing the reach of a *Terry* stop in *Adams v Williams,* 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), we observed that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." Also, just this Term, we concluded that if there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information. *United States v. Henley, supra* [469 U.S. 221], at 229, 232, 234 [S.Ct. 675, 83 L.Ed.2d 604 (1985)]. Cf. *United States v. Place,* 462 U.S. 696 [103 S.Ct. 2637, 77 L.Ed.2d 110] (1983); *United States v. Martinez-Fuerte,* 428 U.S. 543 [96 S.Ct. 3074, 49 L.Ed.2d 1116] (1976; *United States v. Brignoni-Ponce*, 422 U.S. 873 [95 S.Ct. 2574, 45 L.Ed.2d 607] (1975). **There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch**.

Hayes, 470 US at 816 – 817 (punctuation and brackets in orig; emphasis added).

This language in *Hayes* – taken together with *Dionisio* and *Davis* – logically can be read to permit fingerprinting during a *Terry* stop either because (1) fingerprinting is not a search (ie, there is no reasonable expectation of privacy in one's prints); or (2) fingerprinting under these specific circumstances is reasonable. In either case, *Hayes* makes clear that there *are* circumstances in which the Fourth Amendment *would* permit fingerprinting in the field on reasonable suspicion. Therefore, Appellants facial challenge must fail. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 11.

For this Court to conclude otherwise would require an analytical leap that bypasses decades of United States Supreme Court statements. This Court would have to make such a leap without any relevant authority from Appellants for they have supplied none.[23] Instead, this Court should heed the United States Supreme Court's direction in *Davis, Dionisio, Cupp* and *Hayes* and conclude that fingerprinting is not a search under the Fourth Amendment.

3. Lower federal courts have followed the United States Supreme Court's lead to hold that there is no reasonable expectation of privacy in one's fingerprints.

[23] Appellants offer no meaningful authority that holds that there is a reasonable expectation of privacy in one's fingerprints. Instead, they rely on non-fingerprinting cases, most of which: (1) require intrusion *into* the body and/or the extraction of material from it – see, *Maryland v King,* 569 US 435; 133 S Ct 1958; 186 L Ed 2d 1 (2013) (using a bucchal swab to extract cells from the interior of the mouth); *Cupp v Murphy,* 412 US 291 (scraping under fingernails for evidence); *Skinner v R Labor Executives' Ass'n,* 489 US 602 (collecting blood, breath and urine samples); or (2) focus on the handling of private personal property. See, *Bond v United States,* 529 US 334; 120 S Ct 1462; 146 L Ed 2d (2000) (feeling a passenger's luggage on a luggage rack in an exploratory manner); *Arizona v Hicks,* 480 US 321; 107 S Ct 1149; 94 L Ed 2d (1987) (moving a stereo to see the serial number). The one case that did comment on fingerprinting – *Paulson v Florida,* 360 F Supp 156 (SD Fla, 1973) – is not binding on this court. *Abela v Gen Motors Corp,* 469 Mich 603, 607; 677 NW2d 325 (2004). It is also not persuasive. *Id.*, *Paulson*, assumed without analysis or discussion that fingerprinting, like taking a blood sample, is a search. *Paulson*, 360 F Supp, at 161. *Paulson*'s bare conclusion has never been followed, and even Appellants spend no time on it. Neither should this Court.

Lower federal courts have clearly followed the trajectory of the Supreme Court's dicta to declare that the taking of fingerprints by police is not a search. [24] See, e.g., *United States v Farias-Gonzalez,* 556 F3d 1181, 1188 (CA 11, 2009) ("The police can obtain both photographs and fingerprints without conducting a search under the Fourth Amendment"); *United States v Fagan,* 28 MJ 64, 66 (1989) ("[P]eople ordinarily do not have enforceable expectations of privacy in their physical characteristics which are regularly on public display, such as facial appearance, voice and handwriting exemplars, and fingerprints"); *In re Grand Jury Proceedings,* 686 F2d 135, 139 (CA 3, 1982) ("Fingerprints can be subject to compelled disclosure by the grand jury without implicating the Fourth Amendment…."); *United States v Sechrist,* 640 F2d 81, 86 (CA 7, 1981) (Fingerprinting does not infringe on Fourth Amendment rights because "[t]he taking of a person's fingerprints simply does not entail a significant invasion of one's privacy.") [25]

[24] As Appellants know, lower courts are "obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale." *American Civil Liberties Union of Kentucky v McCreary Cty, Ky*, 607 F3d 439, 447 (CA 6, 2010) (ACLU successfully argued against government's attempt to discredit Supreme Court dicta). Certainly, the Court of Appeals below recognized this principle. See *Johnson II*, 330 Mich App at 521 ("We nonetheless must take heed of what the Supreme Court has said on the subject, even in dicta."). So has this Court. See, eg, *J & J Const Co v Bricklayers & Allied Craftsmen*, *Local 1,* 468 Mich 722, 730-731; 664 NW2d 728 (2003) ("In so concluding, we believe the [U.S. Supreme] Court has *strongly signaled its view* [that] all Free Speech Clause and Free Press Clause defamation doctrine developed in the past forty years is to be imported without change to the constitutional adjudications arising under the Petition Clause.") (Emphasis added).

[25] Appellants cite to *Bryant v Compass Grp USA, Inc*, 958 F3d 617, 624 (CA 7, 2020) for the proposition that fingerprints are '"private information,' the nonconsensual taking of which is 'an invasion of [one's] private domain, much like an act of trespass would be.'" Appellants' Brief at 25. *Bryant* is not binding on this Court. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Nor should the Court consider the case persuasive. *Id*. *Bryant* dealt with the question of standing to sue in Federal Court under the Illinois Biometric Information Privacy Act (BIPA), 740 ILCS 14 (2008). The BIPA protected the privacy interests of consumers in their "biometric identifiers" which were defined by the statute to include fingerprints. *Bryant,* 958 F3d at 619 ("fingerprints are 'biometric identifiers' within the meaning of the Act."). Thus, the privacy interest in *Bryant* was created by state statute, rather than arising as a matter of Fourth Amendment jurisprudence. In fact, the need to create a statutory privacy interest reflects Illinois' recognition

While decisions of lower federal courts are not binding on this Court, they may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Certainly, lower courts in Michigan have concluded that fingerprinting is not a search as there is no reasonable expectation of privacy.

4. The Michigan Court of Appeals has explicitly held that there is no reasonable expectation of privacy in one's fingerprints.

In *Nuriel v Young Women's Christian Ass'n*, 186 Mich App 141; 463 NW2d 206 (1990), the Michigan Court of Appeals stated that "[t]he taking of fingerprints is not violative of the prohibition against unreasonable searches and seizures," in part, because "[t]here is no reasonable expectation of privacy in one's fingerprints." *Nuriel*, 186 Mich App at 146. Further, "[t]he taking and furnishing of fingerprints does not represent an invasion of an individual's solitude or private affairs." *Id.,* citing *Beaumont v Brown,* 401 Mich 80; 257 NW2d 522 (1977).

In *Johnson II,* the Court of Appeals concluded that it was bound to follow *Nuriel. Johnson II,* 330 Mich App at 525. Even though the issues before the Court in *Nuriel* did not involve police contact, the Court held that the constitutional determinations made in *Nuriel* were not dicta, but essential to the resolution of the case. *Johnson II*, 330 Mich App at 524-527.[26] Moreover, the Court noted that even if the *Nuriel* Court's constitutional determination was dicta, it was persuasive:

> The *Nuriel* Court's analysis comports with the statements to date from the United States Supreme Court and from other cited federal cases, as well as other statements from this Court. See *People v Hulsey*, 176 Mich App 566; 440 NW2d 59 (1989) (stating that "[a] defendant has no reasonable expectation of privacy in physical

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that one did not have a protectable privacy interest in one's fingerprints. As noted above, the Seventh Circuit had already held that "[t]he taking of a person's fingerprints simply does not entail a significant invasion of one's privacy." *United States v Sechrist*, 640 F2d 81, 86 (CA 7, 1981).

[26] *Nuriel* involved consideration of a motion to compel fingerprints from nonparties in a civil litigation which the trial court had denied on constitutional grounds. *Nuriel* at 145.

> characteristics such as a fingerprint or a voice print, both of which are constantly exposed to the public"); *People v Davis*, 17 Mich App 615; 170 NW2d 274 (1969) (stating that "fingerprints, like a man's name, height, color of his eyes, and physiognomy, are subject to non-custodial police inquiry, report, and preservation when reasonable investigation requires, even though probable cause for arrest may not exist at the moment").[27]

Johnson II, 330 Mich App at 527.

Thus, the trajectory of the United States Supreme Court statements (as well as the holdings and conclusions of the lower federal courts and the Court of Appeals in Michigan) all point to the conclusion that there is no reasonable expectation of privacy in fingerprints and that the taking of fingerprints in the field, on reasonable suspicion, is not a search. This Court should reach the same conclusion.

5. Appellants' claim that fingerprinting constitutes a trespass was not properly raised before the trial court, is therefore unpreserved, and this Court should decline to address it. Even if trespass had been properly raised, it is nonetheless inapplicable to this matter.

As noted above, this Court reviews *preserved* questions of constitutional law. *Hardick v Autoclub Ins Ass'n,* 294 Mich App 651, 685; 819 NW2d 28 (emphasis added). This Court may consider an *unpreserved* issue if it is one of law, and the facts necessary for resolution of the issue have been presented. *McNeil v Charlevoix Co*, 484 Mich 69, 81 n 8; 722 NW2d 18 (2009). However, this Court has held that "Michigan generally follows the 'raise or waive' rule of appellate review," and that even though "this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice," it should generally refrain from doing so, because "a 'failure to timely raise an issue waives review of that issue on appeal.'" *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (citations omitted).

[27] A detailed discussion of *Nuriel, Hulsey,* and *Davis* is contained in Defendants-Appellees' Supp. Resp. Br. on Remand (Appellee's Appx. #17, at 307b-310b, Br. pp.16-20) (the "Supplemental Brief"). The City incorporates by refence the Supplemental Brief in its entirety.

Appellants did not raise the claim of trespass in the trial court. Moreover, neither they, nor their amicus (the ACLU) raised the issue of trespass in their appeal of right or in their first application for leave to appeal. Instead, Appellants advanced their argument regarding trespass for the first time on remand to the Court of Appeals, and even then, they did not raise the trespass issue until they filed a supplemental authority brief on May 20, 2019. (Appellee's Appx. #18 at 315b-328b, *Plaintiffs-Appellants' Supplemental Authority.*)

MCR 7.212(F)(1) bars a party from raising "new issues" under the guise of supplemental authority. Appellants' trespass theory was plainly a new issue. Further, Appellants' "supplemental authority" suggesting a trespass theory was *Taylor v City of Saginaw*, 922 F3d 328 (CA 6, 2019), which admittedly was decided after briefing concluded on remand. But *Taylor* relied on *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012) a case that expressly invoked trespass as a Fourth Amendment theory in 2012. *See, Jones* 565 US at 405, 408 (common law tresspass to obtain information is a search). Thus, *Jones*, and therefore the trespass issue, were available to Appellants two years before they filed their lawsuits in 2014. Neither Appellant raised common law trespass in their complaints, though each raised a privacy claim. (Appellant's Appx. at 27a, *Johnson Compl.*; Appellee's Appx. #12 at 77b, *Harrison's 2nd Am. Compl.*)

As the Court of Appeals noted in *Johnson*, the scope of an appeal must be limited to the allegations originally raised in the complaints. *Johnson,* 319 Mich App at 608. As a result, Appellants' arguments regarding a trespass under the Fourth Amendment are unpreserved for appellate purposes. Absent exceptional circumstances, this Court "has repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims." *Booth Newspapers v Univ of Michigan Bd of Regents*, 444 Mich 211, 234, n 23; 507

NW2d 422 (1993) (citaions omitted). There are no exceptional circumstances here. This Court should therefore decline to consider the trespass issue

Even if this Court wishes to consider Appellants' new issue, trespass is nonetheless inapplicable to this matter.[28] Appellants rely upon *United States v Jones*, supra, and other property-based precedent, to broadly assert that "the slightest physical intrusion on a constitutionally protected area, such as a person's body, is a search," and to claim that "the magnitude of the physical intrusion" is immaterial.[29] (Appellants' Br. at pp. 6, 17). This is an inaccurate reliance on a specific jurisprudence which examined the Fourth Amendment's protection of one's property.

The act of common law trespass can be committed against the person or property of another, but if committed against the person it requires an assault, battery, wounding, or imprisonment: trespass vi et armis.[30] In short, trespass to the person has since been generally absorbed by other common law and statutory causes of action, and remains an antiquated

[28] The City incorporates by reference the trespass arguments made in its Answer to Plaintiffs' Application for Leave to Appeal to the Michigan Supreme Court dated 03/13/2020.

[29] This particular claim flies in the face of well-established case law that requires a balancing of the magnitude of the intrusion against legitimate governmental interests when determining whether a search is reasonable. See eg, *Maryland v King*, 569 US at 446 ("The fact that an intrusion is negligible is of central relevance to determining reasonableness.").

[30] See, for example, *Black's Law Dictionary* (11th ed). In the early Twentieth Century, this Court recognized that trespass vi et armis against a person was properly recognized as a claim of assault or battery. See for example: *Ducre v Sparrow-Kroll Lumber Co*, 168 Mich 49, 53; 133 NW 938 (1911) ("The case of *Zart v Singer Sewing Machine Co*, 162 Mich 387, 127 NW 272, was a case of trespass vi et armis, brought against defendant and a local manager of its business in Detroit, for an *assault* committed while the said manager of defendant and an employe [sic] of defendant were forcibly taking a sewing machine from plaintiff's home.") (Emphasis added); *Hill v Abram Smith & Son*, 176 Mich 151, 155; 142 NW 565 (1913) ("In the later case, […] an action was brought by an incompetent person, by his next friend, in a case of trespass, vi et armis, for injuries received for *assault and battery* upon him by a conductor of defendant company, in forcibly putting [sic] him from a car." (Emphasis added).

concept.[31] To now apply property-based trespass precedent to one's person would be a significant departure and would be a reversal of nearly a century's worth of precedent. It is not justified by the precedent on which Appellants now rely, all of which is distinguishable from the matter before this Court.

For example, in support of their position, Appellants cite *Jones*, which involved a trespass to chattels and the placement of a GPS tracking device on a vehicle. *Jones, 5*65 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012). There, the Court specifically held that it was the "physical occupation of private property" for the purpose of obtaining information that implicated the trespass-based analysis of the Fourth Amendment. *Jones*, 565 US at 404-405. In the case now before this Court, there was no physical occupation of the Appellants' private property for the purpose of obtaining information. *Jones* does not apply to this matter.

Appellants further cite *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017) to support their position regarding trespass. *Frederick* is also inapplicable to this matter. In *Frederick*, this Court held that it constituted a trespass in violation of the Fourth Amendment when officers performed a knock-and-talk at the defendants' homes at 4:00 a.m. and 5:30 a.m. *Frederick*, 500 Mich at 231-232, 238-239. This Court, employing a trespass-based analysis to the Fourth Amendment, held that "the implied license to approach a house and knock is time-sensitive" for the purpose of information-gathering. *Frederick*, 500 Mich at 238. In the case now before this Court, there was no approach to the Appellants' respective residences for information-gathering purposes. *Frederick* simply has no application to this matter.

Appellants additionally rely on *Taylor v City of Saginaw*, 922 F3d 328 (CA 6, 2019), in

[31] See, for example, 4 Gillespie, Michigan Criminal Law & Procedure (2d ed), chap 149 "Trespass," summary.

which the Sixth Circuit held that chalking the tires of one's vehicle constituted a trespass because there was an "intentional physical contact with [the plaintiff's] vehicle," and it was done "for the purpose of identifying vehicles that have been parked in the same location for a certain period of time." *Taylor*, 922 F3d at 332-333.[32] In the case now before this Court, it could be asserted that the fingerprinting procedure might leave ink residue behind on the Appellants' fingers, but that would ignore two important distinctions: (1) *Taylor* – and *Jones*, upon which *Taylor* relied – both apply to property, not one's physical body; and (2) if ink was left behind at all, it was not left behind for the purpose of gathering information; the information (i.e., the fingerprint itself) had already been gathered.

Appellants also rely on *Grady v North Carolina*, 575 US 306; 135 S Ct 1368; 191 L Ed 2d 459 (2015). While *Grady* involved government intrusion onto one's person, the Court's holding was particularly limited. Specifically, the Court held only that such an intrusion constitutes "a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Grady*, 575 US at 309. In the case now before this Court, no "device" was attached to anyone's body, one of the Appellants (Harrison) consented to being fingerprinted, and in neither case was fingerprinting performed to somehow track the Appellants' movements on a continuous basis, let alone over an extended period of time as it was in *Grady*. *Grady* at 307, 310. *Grady*'s analysis and ultimate holding simply do not apply to this matter.[33]

[32] The City notes that *Taylor* is not binding on Michigan courts. See, *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

[33] *Grady* does specifically cite to *Jones* and *Jardines* (*Florida v Jardines*, 569 US 1, 133 S Ct 1409, 185 L Ed 2d 495 (2013), in reaching its conclusion, however, the Court's opinion in *Grady* does not even employ the word "trespass," let alone the trespass analysis of either *Jones* or *Jardines*. Instead, the Court in *Grady* focused on those cases' analysis of Fourth Amendment's prohibition of government intrusion into "protected areas." It is worth noting that the Court in *Grady* did not decide the ultimate constitutionality of such an intrusion onto a person's body. Instead, the Court

Thus, the Court of Appeals correctly noted below that "*Jones* and its progeny typically involve the government's warrantless placement of electronic monitoring devices that collect location data for persons or property […]." *Johnson,* 330 Mich App at 531. Moreover, the Court correctly pointed out that Appellants have not cited to any "cases in which the 'trespass' theory has been applied to the collection of fingerprints." *Id.* That remains true today. Indeed, the vast majority of cases that have examined whether contact with one's body is a search involve an intrusion *into* the body and an analysis of that intrusion under the reasonable expectation of privacy rubric, not trespass. See e.g., *Maryland v King,* 569 US 435 (bucchal swab of interior cheek); [34] *Cupp v Murphy,* 412 US 291 (scraping evidence from under suspects fingernails); *Skinner v R Labor Executives' Ass'n,* 489 US 602 (collecting blood, breath, urine samples).

In sum, the trespass theory which Appellants proffered late in the appellate process fails as a matter of fact and law, and remains improperly raised.

C. Fingerprinting taken during a valid investigatory stop is not unreasonable under the Fourth Amendment when the officer determines that the facts and circumstances of the investigation render fingerprinting appropriate.

The Fourth Amendment does not constrain all searches and seizures as such. See e.g., *Schmerber v California*, 384 US 757, 768; 86 S Ct 1826; 16 L Ed 2d 908 (1966). Rather, "[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia School Dist 47J v Acton,* 515 US 646, 652; 115 S Ct 2386; 132 L Ed 2d 564 (1995).

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emphasized that, "[t]hat conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 575 US at 310.

[34] In this regard, *King* is of particular note as it was decided in 2013, the year after *Jones.*

To determine whether a search is reasonable, the Court must "balance the privacy-related and law enforcement-related concerns" *Maryland v King,* 569 US 435, 448; 133 S Ct 1958; 186 L Ed 2d 1 (2013) (citation omitted). As stated in *King*:

> This application of "traditional standards of reasonableness" requires a court to weigh "the promotion of legitimate government interests" against "the degree to which [the search] intrudes upon an individual's privacy."

King, 569 US at 446 (citation omitted).

1. Law enforcement has a legitimate interest in accurately identifying individuals stopped on reasonable suspicion of involvement in a crime.

It is beyond dispute that law enforcement officers have a legitimate need to *accurately* identify individuals who are suspected of involvement in criminal activity. Establishing identity "promotes the strong government interest in solving crimes and bringing offenders to justice." *United States v Hensley*, 469 US 221, 229; 105 S Ct 675; 83 L Ed 2d 604 (1985) (discussing governmental interest in "the ability to briefly stop [a suspect], ask questions, or check identification in the absence of probable cause"). This includes identification during a *Terry* stop. See, e.g., *Hiibel v Sixth Judicial Dist Court of Nev, Humboldt Cty*, 542 US 177, 186; 124 S Ct 2451; 159 L Ed 2d 292 (2004) ("Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops."). As the Court said in *Hiibel*:

> Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow police to concentrate their efforts elsewhere. *Id*.

And as noted in *King*:

> It is a well-recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity. Disguises used while committing a crime may be supplemented or replaced by changed names, and even changed physical features.

King, 569 US at 450, quoting *Jones v Murray,* 962 F 2d 302, 307 (CA 4, 1992). Further, "[a]n arrestee may be carrying a false ID or lie about his identity," *King,* 569 US at 450 (citation omitted). So, too, might an individual who has been subjected to a valid investigatory stop.

If during a valid stop, an individual has no identification on him whatsoever, and conducts himself in a manner that leads an officer to doubt his truthfulness (as occurred in both cases here), the need for an alternate method of identification becomes more acute. The alternative would be to let the person – who is already reasonably suspected of a crime – simply walk away. Not only would that frustrate the legitimate investigation of crime, and encourage wrongdoers to simply avoid carrying any form of identification on them, it could have catastrophic consequences in the long run. *King,* 569 US at 450 (stating that "[i]t is a common occurrence that '[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals.'")(citation omitted). For this reason:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.

Adams v Williams, 407 US 143, 145-146, 92 SCt 1921, 32 L Ed 2d 612 (1972), citing *Terry v Ohio*, 392 US at 23. Moreover, "a brief stop of a suspicious individual in order to determine his identity … may be most reasonable in light of the facts known to the officer at the time." *Id*. at 146. Thus, the need to accurately identify a suspect during a valid *Terry* stop constitutes a "strong governmental interest" when assessing the balance between legitimate government interests and privacy concerns.

2. The degree to which fingerprinting intrudes upon one's privacy is, at most, negligible.

As discussed above, there is no reasonable expectation of privacy in one's fingerprints under existing case law. To the extent that this Court disagrees, the intrusion presented by finger printing cannot be considered more than negligible.

First, fingerpinting merely involves the inking of the suspect's fingers, which are then rolled onto a print card, before being wiped clean. This is an entirely external process. There is no invasion *into* the body, no removal of the epidermis, nor indeed removal of any material whatsoever. In this regard, fingerprinting is far less intrusive than drawing blood (*Schmerber*, supra), scraping under an arrestee's fingernails (*Cupp,* supra), or even performing "a breathalyzer test, which generally requires the production of aveolar or 'deep lung' breath for chemical analysis" (*Skinner v Railway Labor Executives' Assn,* 489 US 602, 616; 109 S Ct 1402; 103 L Ed 2d 639 (1989)). Fingerprinting is also less intrusive, than a bucchal swab for DNA which in *King* was "deemed a search *within* the body." *King*, supra, 569 US at 446 (emphasis added). Fingerprinting, by contrast, may require a touch *to* the body, but it does not go *within* it. Not surprisingly, the Court in *King* noted that "the *additional* intrusion [by bucchal swab] upon the arrestee's privacy *beyond that associated with fingerprintin*g is not significant." *King,* 569 US at 459 (emphasis added). Since "the intrusion of a cheek swab to obtain a DNA sample is a minimal one," *King*, 569 US at 461, the intrusion occasioned by fingerprinting must be considered even more negligible.[35]

Significantly, "[t]he fact that an intrusion is negligible is of central relevance to determining reasonableness." *King,* 569 US at 446. Indeed, it suggests that the strong governmental interest in

[35] In *United States v Sechrist*, 640 F2d 81, 86 (CA 7, 1981), the Court noted that "[f]ingerprinting is such an unobtrusive process that it is used in many non-criminal contexts" and held that the "minimal burden imposed on *Sechrist* in requiring him to submit to fingerprinting did not therefore infringe his Fourth Amendment rights."

accurately identifying an individual who has been stopped on reasonable suspicion outweighs that suspect's privacy concerns regarding his/her fingerprints, if any exist at all.

This conclusion comports with the Supreme Court's statement in *Hayes v Florida*, that:

> In addressing the reach of a *Terry* stop in *Adams v Williams,* 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), we observed that "[a] brief stop of a suspicious individual, in order to *determine his identity* or to maintain the status quo momentarily while *obtaining more information*, may be *most reasonable in light of the facts known to the officer at the time.*" Also, just this Term, we concluded that if there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped *in order to identify him*, to question him briefly, or to detain him briefly while attempting to obtain additional information.

Hayes, supra, 470 US at 816 – 817 (citations omitted; emphasis added). The need to determine the identity of the "suspicious individual" or to obtain more information about him supported "the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." *Id.*

In this regard, the justification for taking a fingerprint under the P&P procedure at issue requires *more* than a mere lack of valid ID. An officer may fingerprint an individual in the field in only two circumstances: (1) when the individual has no identification and the officer is in the course of writing up an appearance ticket or civil infraction (in which case probable cause has been established); or (2) when the officer is in the course of a field investigation and the facts and circumstances of the incident render the fingerprinting appropriate. (Appellee's Appx. #7 at 40b, *City's Resp. to RTA*; Appellant's Appx. at 117a-119a, *Baragas Dep.* at pp. 25, 30-31; Appellant's Appx. at 103a, *VanderKooi Dep.* at pp.65-67.)

The latter circumstance, which applies here, invokes an assessment of the reasonable need

for fingerprinting under the totality of the circumstances. It does not, and should not be read to, give "police officers *carte blanche* to perform suspicionless P&Ps on any individual in public who catches their eye," as the Court of Appeals recognized. *Johnson II*, 330 Mich App at 528-529. Rather, the procedure comports with the constraints set forth in *Davis* for "narrowly circumscribed procedures" and particularly with the requirement in *Hayes* of "a reasonable basis for believing hat fingerprinting will establish or negate the suspect's connection with that crime." *Davis*, 394 S at 728; *Hayes* 470 US at 817.

While Appellants acknowledge the analysis in *Hayes,* they try to sidestep its application by claiming that "[t]he City's policy here, by contrast, authorizes fingerprinting to verify the identity of people who simply happen not to have ID, not to establish or negate a person's connection to the suspected crime that was the basis for the stop." Appellants' Brief, p.37. This is a significant misrepresentation of the P&P procedure which clearly requires an officer to determine whether the facts and circumstance of the field investigation render fingerprinting appropriate. Establishing identity is one factor; establishing a suspect's connection, or lack thereof to a crime, is part of that calculus as well. (*See,* e.g., Appellant's Appx. at 117a-119a, *Baragas Dep.* at pp. 25, 30-3.) (Johnson's prints taken not only for identification purposes but to compare to latent prints in other burglaries or to eliminate Johnson as a suspect). Thus, Appellants' attempt to avoid *Hayes* not only fails, it underscores that the fingerprinting procedure at issue is reasonable under *Hayes*, and therefore facially constitutional. [36]

[36] Although not an issue before this Court, the P&P was constitutional as applied here as well. All parties admit the police stopped Appellants on reasonable suspicion. Because neither Appellant had identification, there was a reasonable basis for believing that fingerprints would not only confirm their identity, but could tie them to or exonerate them from, the crimes under investigation. In Harrison's case, his fingerprints could tie him to the train, if it turned out to be stolen. In Johnson's case, his fingerprints could tie him to, or exonerate him from, the thefts from vehicles in the MAC parking lot. Finally, in each case, the fingerprinting procedure took mere minutes and

Significantly, Appellants failed to make any meaningful analysis of reasonableness under the standards set out in *Maryland v King*. Instead, they rely on their primary conclusion that fingerprinting is a search to mount the argument that the only search permitted during a *Terry* stop is a pat-down search for weapons. But *Terry* itself, was premised on the balance between legitimate government interests and the privacy concerns of an individual. *Terry*, 392 US at 20-21. Moreover, Appellants fail to recognize that an officer can take reasonable investigative steps during a *Terry* stop to confirm or dispel the officer's reasonable suspicion that crime is afoot. *Terry,* 392 US at 30. This includes (as *Hayes* underscores) confirming the suspect's identity.

3. Fingerprinting does not exceed the scope of a permissible seizure pursuant to *Terry v Ohio*, 392 US 1 (1968).

An officer may, without a warrant, stop a person for investigatory purposes when he has reasonable suspicion of criminal activity based upon specific, articulable facts that are known to him at the time of the stop. *Terry,* supra, 392 US at 27-28; *Embody v Ward*, 695 F3d 577, 580 (CA 6, 2012). "The length of the stop and the extent of the intrusion must be 'reasonably related in scope to the circumstances which justified the interference.'" *Embody*, 695 F3d at 580, citing *Terry* 392 US at 29. "'An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop [and] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion….'" *Illinois v Caballes*, 543 US 405, 420; 125 S Ct 834; 160 L Ed 2d 842 (2005), quoting *Florida v Royer*, 460 US 491, 500; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion). Stated another way, the investigative tool used by the officers must support the original mission of the stop and not prolong the interaction beyond the time reasonably required to complete the mission." *Rodriguez v United*

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so was carried out with dispatch. Thus, fingerprinting in the field, on reasonable suspicion – and upon the reasonable determination that fingerprinting was appropriate under the facts and circumstances under investigation – was reasonable under the Fourth Amendment.

States, 575 US 348, 349; 135 S Ct 1609; 191 L Ed 2d 492 (2015) (finding that canine sniff falls outside the ordinary mission of a traffic stop).

Terry noted that, "in justifying the particular intrusion the police officer must be able to point to specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. … And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry,* 392 US at 21-22 (citations omitted).

In this regard, it is clear that *Hayes*, which was premised on *Terry,* provides a framework for implementing *Terry*'s "objective standard" when assessing fingerprinting in the field. By requiring (a) reasonable suspicion for the stop, and (b) a reasonable basis for believing that fingerprinting would confirm or dispel the officer's suspicions, *Hayes* sets forth an objective test to determine whether the facts and circumstances would "warrant a man of reasonable caution in the belief" that fingerprinting was appropriate. The *Hayes* test also ensures that fingerprinting in the field will be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry,* 392 US at 19, quoting *Warden v Hayden,* 387 US 294, 310; 87 S Ct 1642; 18 L. Ed. 2d 782 (1967) (FORTIS, J. concurring). Finally, by requiring "dispatch," *Hayes* ensures that fingerprinting will not unreasonably lengthen the stop beyond its original purpose. *Embody*, 695 Fd 3d at 580. As discussed above, fingerprinting in accordance with the P&P procedures here fits well within parameters that the United States Supreme Court set forth in *Hayes* and therefore does not exceed the scope of a *Terry* stop.

While, the City continues to assert that *Hayes* can and should be read for the proposition that fingerprinting is not a search at all, at the very least *Hayes* must be read as setting forth

circumstances in which fingerprinting in the field on reasonable suspicion is permissible under the Fourth Amendment. This is particularly true, where, as here, the P&P procedure requires a determination under the totality of the circumstances, not just that a stop is justified, but that the fingerpinting, itself, is appropriate. Thus, Appellants' facial challenge to the P&P procedure fails.

To the extent that this Court believes that an as applied challenge exists, Appellants fair no better. It is undisputed that the officers had a reasonable suspicion that rendered the stops valid. The only question is whether the fingerprinting of Appellants reasonably fell within the scope of "the circumstances which justified the interference." *Embody,* 695 F3d at 580.

The circumstances which justified the stop of Harrison were stated by the trial court: "Vanderkooi observed a suspicious exchange between two young men in an area and at a time of day when property crime rates were higher. Plaintiff then entered a park and exhibited strange behavior." (Appellant's Appx. 146a, *Harrison Op.* at p. 7.) Once VanderKooi questioned Harrison about his actions, VanderKooi became skeptical that Harrison was being truthful. VanderKooi saw no birds near Harrison though Harrison claimed he had been trying to catch them. Moreover, Harrison's behavior of kneeling or crouching in the park was unusual and looked like he might be acting as a lookout or secreting stolen property. (Appellant's Appx. 91a, *VanderKooi Dep.* at p.16.)

Johnson was stopped because he matched the description of, and was subsequently identified by a MAC employee and another witness, as being the person who appeared to be looking into car windows in the MAC parking lot – actions that were sufficiently suspicious to cause the MAC employee to call 911. (Appellant's Appx. at 77a, *Johnson Incident Report.*) It is undisputed that, prior to Johnson's stop, vehicles in the MAC parking lot had been subject to break-ins and theft, and that these crimes were unsolved. (Appellee's Appx. #3 at 7b, *East Edge Emails*.) Looking at the facts in a light most favorable to Johnson, he did not match the description of at

least one of the previous car burglars, but he did live in the neighborhood behind the parking lot, consistent with the flight path of one of the suspects. (Appellant's Appx. at 77a, *Johnson Incident Report.*) Moreover, Johnson did match the description – provided *that day* by the MAC employee – of a suspicious person looking into vehicles at a location in which vehicles had been burglarized in the recent past. (*Id.*) Johnson ultimately admitted that he had been looking in car windows, allegedly at his reflection, but he denied looking into the cars with an intent to steal anything. (Appellant's Appx. at 125a, *Johnson Dep.* at p.11.)

Neither Harrison nor Johnson had identification on them. As discussed above, identification – and particularly *accurate* identification – is a critical factor in an investigation of a suspected crime. In both cases, in the absence of valid IDs, fingerprinting was the least intrusive means reasonably available at the time to verify or dispel the officers' suspicions about the Appellants' identities and their connection to the criminal activity under investigation.

In Harrison's case, fingerprinting would either: (1) establish Harrison's tie to the to the suspicious transaction with the other young man (if the train turned out to be stolen property), or to other home invasions in that area (if he, in fact, was serving as a lookout when crouched in the park); or (2) help dispel VanderKooi's concerns about Harrison's explanation of his actions both with the other young man and in the park. Thus, fingerprinting – as the investigative tool used by the officer to verify identity – supported the original mission of the stop. *See, Rodriquez*, 575 US at 349. As there is no dispute that the fingerprinting procedure took no more than two minutes, it did not prolong the interaction between Harrison and the officers beyond the time reasonably required to investigate Harrison's claims, identity, and actions. Moreover, as the Court of Appeals noted, the officers diligently pursued their investigation until Vanderkooi concluded that he had no probably cause to arrest and released Harrison. (Appellant's Appx. 147a, *Harrison Op.* at p.8.)

In Johnson's case, police were investigating his reported suspicious behavior (looking into cars) in a lot where a rash of car burglaries had already occurred. Confirming Johnson's identity by fingerprint would: (1) establish whether Johnson had been truthful with officers as to his name and his stated age as he appeared older than fifteen due to his stature and tattoos; and (2) confirm or dispel any connection with the prior break-ins and thefts as officers could compare Johnson's prints to latent prints that had been taken during the investigations of these crimes. Again, fingerprinting – as the investigative tool used by the officer to verify identity – supported the original mission of the stop and did not prolong the interaction between Johnson and the officers beyond the time reasonably required to investigate Johnson's claims, identity, and actions. *See, Rodriquez*, 575 US at 349.

Thus, in both cases, the officers fingerprinted Harrison and Johnson consistent with the requirements of *Hayes*, and therefore, necessarily within the scope of a *Terry* stop.

VI. CONCLUSION

For all of these reasons, the City respectfully requests that this Court affirm the Court of Appeals decision in *Johnson II* in all respects.

Respectfully submitted,

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