UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Number: 20-1538/20-1588

ALISON PATRICIA TAYLOR,
Plaintiff-Appellant,

v

CITY OF SAGINAW; TABITHA HOSKINS,
Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN-NORTHERN DIVISION
CASE NUMBER: 1:17-CV-11067
HONORABLE THOMAS L. LUDINGTON

DEFENDANT – APPELLEE / CROSS-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Defendants – Appellees / Cross Appellants make the following disclosure pursuant to Sixth Circuit Rule 26.1:

1. Is either Defendant – Appellee / Cross Appellant a subsidiary of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome?

   No.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants – Appellees / Cross-Appellants ("hereinafter Defendants") respectfully request that this matter be submitted for oral argument before this Honorable Court pursuant to Federal Rule of Appellate Procedure 24(a) and Sixth Circuit Rule 34(a). Oral argument in this case will serve as a productive tool in helping to clarify the novel constitutional issues before the Court. The issues presented here pertain to the utilization of chalk by a government employee to mark tires in connection with enforcing local parking regulations and whether said method of parking enforcement is a violation of the Fourth Amendment. This is a novel issue that was previously presented to this Honorable Court on appeal by Plaintiff-Appellant / Cross-Appellee (hereinafter "Plaintiff") from the district court's granting of a 12(b)(6) Motion. The opinion of this Court garnered national attention and affected the policies and practices of countless municipalities. On appeal once more, the Defendants submit that oral argument will fully serve to clarify the novelty of the issue, including that the issue does not demonstrate a Fourth Amendment violation.

JURISDICTIONAL STATEMENT

Defendants agree that the District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1343 as this case involves federal questions under the United States Constitution and federal civil rights under 42 U.S.C § 1983.

Defendants agree that this Court has jurisdiction to hear Plaintiff's appeal of the District Court's final judgment pursuant to 28 U.S.C. § 1291. (Judgment, RE 78, PageID# 1409). For the same reason, this Court also has jurisdiction to hear Defendants cross- appeal of the District Court's opinion and final order entered on June 9, 2020 pursuant to 28 U.S.C. § 1291. (Opinion and Order RE 77, PageID# 1385). Plaintiff and Defendants timely appealed to this Court.

COUNTER- STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the District Court err in holding that a search occurred when Defendants used chalk to mark tires of parked vehicles in accordance with local customs and practices and/or the chalk is not used by the City to obtain any information?

Plaintiff - Appellant / Cross Appellee would answer: "No."
Defendant - Appellee / Cross Appellant would answer: "Yes."
The District Court would answer: "No."

II. Did the District Court err in dismissing Plaintiff – Appellant / Cross-Appellee's First Amended Complaint on the basis that the alleged search at issue falls under the administrative search exception to the Fourth Amendment's warrant requirement?

Plaintiff - Appellant / Cross Appellee would answer: "Yes."
Defendant - Appellee / Cross Appellant would answer: "No."
The District Court would answer: "No."

III. Did the District Court err by not ruling that chalking is reasonable under Fourth Amendment jurisprudence to enforce parking ordinances pursuant to other well-delineated exceptions to the Fourth Amendment, in addition to administrative search?

Plaintiff - Appellant / Cross Appellee would answer: "No."
Defendant - Appellee / Cross Appellant would answer: "Yes."
The District Court would answer: "No."

IV. Did the District Court err by not ruling that the City is free from liability when chalking is discretionary, not an official policy, not a pervasive custom, not a practice that lawmakers know of, and not an act by a final decision-maker?

Plaintiff - Appellant / Cross Appellee would answer: "No."
Defendant - Appellee / Cross Appellant would answer: "Yes."
The District Court would answer: "No."

V. Did the District Court err by not ruling that Tabitha Hoskins in entitled to qualified immunity when there was no clearly established precedent and she acted reasonably?

Plaintiff - Appellant / Cross Appellee would answer: "No."
Defendant - Appellee / Cross Appellant would answer: "Yes."
The District Court would answer: "No."

STATEMENT OF THE CASE

I. BACKGROUND

The City of Saginaw Code of Ordinances sets forth parking restrictions for all vehicles and their owners taking advantage of parking within the City. (Motion, RE 64-5, Page ID# 1117). The parking ordinances are designed to promote safe use on the roadways and access to parking and businesses for customers when they frequent the downtown shopping / business district. (Motion, RE 64-2, PageID #1045 (¶ 5); Motion, RE 64-4, PageID #1114 (¶ 6)). Parking ordinances promote equal access by ensuring parking spots are available throughout the day and can be utilized by anyone, not just those individuals who get to the spots first and hold the spot for the entirety of the day. (Motion, RE 64-2., PageID # 1045 (¶ 4,5)); Motion, RE 64-4, PageID # 1114 (¶ 5,6)). If a person violates a parking ordinance, he/she will be liable for a civil infraction, not a criminal penalty, and are required to pay a small fine. (Motion, RE 64-5, Page ID# 1117).

To enforce the City's parking ordinances, the City employs parking enforcement officials. (Motion, RE 64-4, Page ID# 1114, (¶ 3)). Prior to 2019, the parking enforcement officials would mark the tires of certain vehicles with chalk. Ms. Hoskins explained that chalking was discretionary:

> Q: All right. Why do you have a chalking wand then if you're putting things down on a piece of paper?
> A: It's your discretionary (sic) to use it if you want to.

(Motion, RE 64-3, PageID # 1085). Ms. Hoskins further explained the process of enforcing parking ordinances, stating that when she saw a vehicle in a timed parking spot, she would note the time on a paper form. (Motion, RE 64-3, PageID # 1084-1085). She would also input this information into a handheld device. (Motion, RE 64-3, PageID# 1084-1085). She would always write the vehicle information on a piece a paper. (Motion, RE 64-3, PageID# 1085-1086). However, she did not always use chalk. (Motion, RE 64-3, PageID# 1085-1086). She explained that she does not have to use it and can tell if someone exceeds the time limitations in a parking zone without it. (Motion, RE 64-3, PageID# 1073). Therefore, parking enforcement officials, such as Ms. Hoskins, did not rely on the chalk to gather information about parking violations. (Motion, RE 64-3, PageID # 1085; Motion, RE 64-4, Page ID# 1114-1115 (¶¶ 8, 9)). In an affidavit, Ms. Hoskins stated:

> That the use of chalk to enforce parking was not required and was not done on every vehicle that parking in a time-limited space within the City of Saginaw from the time I have been employed with the City as a parking enforcer until present.

(Motion, RE 64-4, PageID# 1115, ¶ 10). John Stemple, City Director of Neighborhood Services and Inspections, confirms Ms. Hoskins, stating in an affidavit "[t]hat using chalk was not a required policy or practice by the City." (Motion, RE 64-2, PageID# 1045, ¶ 7).

The purpose of the "chalking" was to help enforce the parking ordinances and promote the City's interests regarding safe use on the roadways, helping downtown

businesses, and providing equal access to parking. (Motion, RE 64-2, PageID # 1045 (¶ 4,5); Motion, RE 64-4, PageID # 1114 (¶ 5,6)). Importantly, chalking was not used by parking enforcement officials to identify any information from the vehicle. (Motion, RE 64-3, PageID # 1081- 1088; Motion, RE 64-4, PageID # 1114-1115 (¶¶ 8, 9)). Rather, chalking was used to alert vehicle owners that parking ordinances, including time restrictions, were being enforced. (Motion, RE 64-3, PageID # 1081- 1088; Motion, RE 64-4, PageID # 1114-1115 (¶¶ 8, 9)). Again, Ms. Hoskins testified that this practice was discretionary. (Motion RE 64-3, PageID # 1085).

Within the City there is a custom of placing tickets, leaflets, flyers, and business cards on parked vehicles. (Motion, RE 64-3, PageID # 1098-1099). In fact, people expect such items to be placed on their vehicles:

> Q: Oh. What do you do -- what do you do otherwise then [when a ticket cannot be placed on the door handle]?
> A: The windshield.
> Q: Windshield. Okay; all right. It's just like we -- like we come to expect; right? Like we come to learn. All right. I'd like you to take a look at -- I'm going to give you Exhibit C, as well. That's a copy -- I'll make the representation to you, that's a copy of an ordinance that I believe involved the parking -- the way parking laws are handled for -- the City of Saginaw. Do you recognize those provisions in there at all?

(Motion, RE 64-3, PageID # 1098-1099). It is not unusual for a parked vehicle to obtain several leaflets and flyers when it occupies a public space. These small intrusions occur often and without objection by vehicle owners.

II. ALLISON TAYLOR'S SYSTEMIC VIOLATIONS OF PARKING ORDINACES

Plaintiff, Allison Taylor, frequently violated the City's parking ordinances. (Amended Complaint, RE 9, PageID # 72, ¶ 13). Since 2014, Plaintiff accumulated fourteen (14) parking tickets. (Amended Complaint, RE 9, PageID # 72, ¶ 13). In connection with several of these parking tickets, the tire of Plaintiff's vehicle was marked with a small line of chalk. (Amended Complaint, RE 9, PageID # 72, ¶ 15). Parking officials also took pictures of Plaintiff's vehicle to enforce the parking ordinances and issue the tickets against Plaintiff. (Amended Complaint, RE 9, PageID # 72, ¶ 15).

III. PROCEDURAL HISTORY

Plaintiff filed her Complaint on April 5, 2017 under § 1983 alleging that the small chalk marks placed on her tire when enforcing parking violations within the City of Saginaw violated the Fourth Amendment. (Complaint, RE 1, PageID #1). Plaintiff filed a first amended Complaint on May 17, 2017 (Amended Complaint, RE 9, PageID # 70).

The City and Ms. Hoskins filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (Motion, RE 10, PageID# 132). The District Court granted the Motion and dismissed Plaintiff's Complaint relying on the community caretaker exception to the Fourth Amendment warrant requirement. (Opinion and Order, RE 14, PageID# 201). Plaintiff subsequently appealed the dismissal to the Sixth Circuit.

(Notice of Appeal, RE 16, PageID # 215). This Court found that *at the pleading stage* there was a question regarding whether an unreasonable search occurred. *Taylor v City of Saginaw*, 922 F.3d 328, 336 (6th Cir. 2019). This Court issued an amended opinion to address that the holding did not extend beyond the pleading stage and the City was free to renew its arguments. *Id.*

This matter now comes before the Court following the District Court's granting of Defendant's Motion for Summary Judgment, filed pursuant to Fed. R. Civ. P. 56. (Order, RE 77, PageID # 1394). The lower court granted Defendant's Motion for Summary Judgment on the grounds that there was a reasonable search pursuant to the administrative exception to the warrant requirement under Fourth Amendment jurisprudence. (Order, RE 77, PageID # 1407-1408). As a result, the Court did not address whether any other exceptions apply to the facts of this case, nor whether the Defendants are in fact liable under § 1983. (Order, RE 77, PageID # 1407-1408). Indeed, Defendant Tabitha Hoskins enjoys qualified immunity from the sort of action presented herein. As a result, Defendants filed a cross-appeal as to the lower court's opinion and order addressing those issues.

Defendants otherwise submit to this Court that the lower court was correct in ruling that the administrative exception to the Fourth Amendment applies requiring full dismissal of Plaintiff's meritless action.

SUMMARY OF THE ARGUMENT

Plaintiff filed a First Amended Complaint under § 1983 alleging that the small chalk marks placed on her tire when enforcing parking violations within the City of Saginaw violated the Fourth Amendment. (Complaint, RE 1, PageID #1). The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. Const. amend. IV.

Under the Fourth Amendment a search occurs when there is (1) a trespass into a constitutionally protected area for (2) the purpose of gathering information. *United States v Jones*, 565 U.S. 400, 406 (2012). A trespass does not occur if there is a common practice that creates a "license" to physically intrude onto some area. *Florida v Jardines*, 569 U.S. 1, 8 (2013). In this case, there was no trespass where local customs permit small intrusions onto parked vehicles within the City. Moreover, the City used the chalk to inform vehicle owners that that their vehicle is subject to the time limitations as set forth by the local ordinances. In other words, when an individual observes a chalk mark on their tire, they are alerted to the fact that parking enforcement was underway in that location.

Even where there is a search within the meaning of the Fourth Amendment, the Supreme Court has recognized several exceptions to the warrant requirement where a search is reasonable. The well-delineated exceptions to the warrant requirement include the administrative search, *de minimis* searches, community

caretaker search, automobile search, and searches subject to consent. See *Mich. Dep't of State Police v Sitz*, 496 U.S. 444, 449-450 (1990); *United States v Jacobsen*, 466 U.S. 109, 125 (1984); *Cady v Dombrowski*, 413 U.S. 433, 441 (1973); *Carroll v United States*, 267 U.S. 132, 157-58 (1925); *Schneckloth v Bustamonte*, 412 U.S. 218, 219 (1973). The district court held that the administrative search exception applied and dismissed the case. Defendants agree. However, Defendants also submit to this Court that the other exceptions to the warrant requirement apply to the facts of this case.

In addition, to hold a municipality liable under 42 U.S.C § 1983 for an alleged Fourth Amendment violation, a plaintiff must show that the injury is "a product of the city's own acts; thus, an unconstitutional policy of the city must be identified as having been the moving force of the plaintiff's constitutional deprivation." *Meyers v City of Cincinnati*, 14 F.3d 1115, 1120 (6th Cir. 1994). Herein, Plaintiff cannot prove that there existed an unconstitutional policy, a pervasive custom or practice that the city lawmakers know of, or a single act by a city employee with final policymaking authority. *Id.*

Finally, individual government officials are entitled to qualified immunity and are not personally liable when there is no clearly constitutional prohibition, or they act reasonable. *Shively v Green Local School Dist. Bd. of Ed.*, 579 Fed. Appx., 348, 354 (6th Cir. 2014). Herein, there is no clearly delineated constitutional prohibition

pertaining to tire chalking. Indeed, this issue is particularly novel. Moreover, Ms. Hoskins acted reasonably under the circumstances.

In terms of Plaintiff's argument pertaining to class action certification, Defendants submit to this Court that, respectfully, Plaintiff is mistaken. The District Court has discretion to address a summary judgment motion prior to determining the appropriateness of class certification. *Thompson v County of Medina, Ohio*, 29 F.3d 238, 240-41 (6th Cir. 1994). In support of her argument, Plaintiff relies only on non-binding authority. Moreover, that authority is clear that there is no issue with one-way intervention in this case by deciding the Motion for Summary Judgment in advance of ruling on Plaintiff's Motion to Certify the Class and potential class members are not prejudiced by this.

LAW AND ARGUMENT

I. THE DISTRICT COURT DID NOT ERR BY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PRIOR TO RESOLVING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION.

A. STANDARD OF REVIEW

"This Court reviews a district's court's decision on a motion for class certification under Rule 23 for abuse of discretion." *Thompson v County of Medina, Oh*, 29 F.3d 238, 241 (6th Cir. 1994).

B. LAW AND ARGUMENT

The District Court has discretion to address a summary judgment motion prior to determining the appropriateness of class certification. *Thompson v County of Medina, Ohio*, 29 F.3d 238, 240-41 (6th Cir. 1994). This Court has explained, "It is reasonable to consider a Rule 56 motion first before ruling on a motion for class certification when early resolution of a motion for summary judgment seems likely to protect both the parties and the court from needless and costly further litigation." *Id*. at 241 (citation omitted). In *Thompson*, as argued here, Plaintiff maintained that since they were in fact appropriate class representatives and that the Rule 23(a) requirements were satisfied, the district court erred in not certifying the class as to the issues disposed of by way of summary judgment. *Id.* at 240. This Court disagreed. *Id.* Rather, the applicable rule is that "'when a district court is determining whether a class action may properly be maintained under Feder Rule of Civil Procedure 23, the relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action.'" *Id.* at 241 (citing, *Marx v Centran Corp*., 747 F.2d 1536, 1552 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985)).

As in *Thompson*, the alleged violations never existed and neither plaintiff nor members of the punitive class were prejudiced by the order of the Court's rulings. *Id.* at 241. The District Court held that Plaintiff's motion for class certification was

denied as moot after granting Defendants' Motion for Summary Judgment for the reason that chalking tires is a reasonable search under the Fourth Amendment pursuant to the administrative exception to the warrant requirement.

Plaintiff relies on non-binding authority including a Seventh Circuit Opinion, *Costello v BeavEx, Inc.*, 810 F.3d 1045, 1058 (7th Cir. 2016). In *Costello*, the Court warned Plaintiff that it "came dangerously close to precluding review of the class certification decision" because Plaintiff filed its Motion for Class Certification contemporaneously with its Motion for Summary Judgment. *Id.* at 1058. It is a cautionary statement to Plaintiffs to file their Motions for Class Certification early. *Id.* It is not a directive to the lower courts to decide a Motion for Summary Disposition in advance of a Motion for Class Certification. *Id.*

Herein, Plaintiff delayed her Motion for Class Certification on her own. She filed her First Amended Complaint on May 17, 2017. (Amended Complaint, RE 9, PageID# 70). Defendants subsequently filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (Motion to Dismiss, RE 10, PageID# 132). The District Court granted the Motion. (Opinion and Order, RE 14, PageID# 201). Plaintiff filed an Appeal to this Court. (Notice of Appeal, RE 16, PageID# 215). The Opinion and Order on Appeal from this Court was issued on April 22, 2019 and an Amended Opinion on April 25, 2019. *Taylor v City of Saginaw*, 922 F.3d 328, 336 (6th Cir. 2019). Thereafter, it took Plaintiff until January 14, 2020 to file a Motion to Certify

the Class, almost eight months after this Court's ruling on Appeal, remanding the case back to the district court. (Motion, RE 47, PageID #502). During this time, there is no doubt that Plaintiff was aware of her intent to file a Motion to Certify the Class. Rather, she waited until less than a month before the close of discovery and only two months prior to the dispositive motion cut off that was set by the District Court on October 11, 2019 by way of a case management and scheduling order. (Scheduling Order, RE 38, PageID # 347). In addition, with the Court's ruling on Defendant's Motion for Summary Judgment, a Summary Judgment Motion filed by Plaintiff would be of no consequence as the result would remain the same.

As addressed by the District Court, it is the Defendants who take the risk of filing a Motion for Summary Judgment prior to class certification.

> When the defendant moves for and obtains summary judgment before the class has been properly notified, the defendant waives the right to have notice sent to the class, and the district court's decision binds only the named plaintiffs. 'in such a situation, the defendants . . . assume the risk that a judgment in their favor will not protect them from subsequent suits by other potential class members, for only the slender reed of stare decisis stands between them and the prospective onrush of litigants.

Faber v Ciox Health, LLC, 944 F.3d 593, 602 (6th Cir. 2019) (quoting *Schwarzchild v Tse*, 69 F.3d 292, 295 (9th Cir. 1995) (citations omitted)); (*See also*, Order, RE 66, PageID # 1123). Plaintiff also relies on *Faber* to argue that "class certification should occur first" stating that this Court has "admonished" such a practice. That simply is not the case. One important distinction from *Faber* is that the district court

entered summary judgment for [defendant] *after* certifying the class but *before* notice could be sent. *Faber*, 944 F.3d at 602-603. In such a scenario, post-judgment notice would present no meaningful opportunity for class members to make their case." *Id.* at 603. That is not the situation occurring here. Rather, class certification had not yet occurred. Again, this Court in *Faber* acknowledged "the general rule of movant beware: A defendant's motion for summary judgment made prior to class certification carries the risk of only binding the named plaintiffs, and not the entire class." *Id.* at 604. Thus, the Court held that the district court's decision binds only the named Plaintiff and not potential class members. *Id.* at 605. In *Faber*, this Court ultimately affirmed the District Court's decision in favor of Defendants and held that the trial court's certification of the class was therefore moot. *Id.*

Plaintiff further misapplies the rule and reasoning of the one-way intervention rule. This Court has explained, "[t]he rule against one-way intervention prevents potential plaintiffs from awaiting merits rulings in a class action before deciding whether to intervene in that class action." *Gooch v Life Investors Ins. Co. of America,* 672 F.3d 402, 432 (6th Cir. 2012), (citing, *American Pipe & Const. Co. v Utah*, 414 U.S. 538, 547 (1974). That is not the issue that exists here. In fact, Plaintiff makes no mention of any issue pertaining to potential plaintiffs awaiting rulings in this action.

Therefore, there is no evidence that the district court abused its discretion or otherwise erred in any respect by ruling on Defendant's Motion for Summary Judgment prior to ruling on Plaintiff's Motion to Certify the Class.

II. CHALKING TIRES IS NOT A SEARCH UNDER THE FOURTH AMENDMENT.

A. STANDARD OF REVIEW

The standard of review of the District Court's granting of Defendants' Motion for Summary Judgment is reviewed *de novo*. *Darrah v City of Oak Park*, 255 F.3d 301, 305 (2001). Likewise, a question of law is reviewed *de novo*, including reasonableness under the Fourth Amendment. *U.S. v. Spikes*, 158 F.3d 913, 922-23 (1998). "The district court's factual findings, however, will be set aside only if they are clearly erroneous." *Id*. at 923.

This matter was previously before this Court on review of the district court's granting of Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). This Court issued an opinion and order on April 4, 2020. *Taylor v City of Saginaw*, 922 F.3d 328, 336 (6th Cir. 2019). Thereafter, this Court submitted an Amended Opinion on April 25, 2019. *Id.* The Amended Opinion was expressly limited to the pleading stage of the litigation under 12(b)(6). *Id.* Under a 12(b)(6) motion, the Court must take the allegations in Plaintiff's Complaint as true. However, under a Rule 56 Motion, summary judgment is proper where the movant shows that there is no genuine issue of material fact. Fed. R. Civ. P. 56(a). The moving party bears the

burden of establishing no genuine issue of material fact. *Copeland v Machulis*, 57 F.3d 476, 478, 79 (6th Cir. 1995). However, once meeting its burden, it is on the non-moving party to present evidence *beyond* the pleadings "with significant probative evidence in support of the Complaint." *Id.* Defendants submit there was no search under the Fourth Amendment under the facts presented during discovery in this case.

B. THERE WAS NO SEARCH WHERE THE CITY DID NOT TRESSPASS AND/OR COLLECT INFORMATION RELATING TO THE PLAINTIFF.

In *U.S. v. Jones*, the Supreme Court articulated that a search occurs when the government (1) physically trespasses into a constitutionally protected area (2) for the purpose of obtaining information. 565 U.S. 400, 406 (2012). Subsequently, in *Florida v Jardines*, the Court reasoned that knocking on a door was not a trespass, and therefore not a search, because local customs permitted the physical intrusion. 569 U.S. 1, 8 (2013). The Court relied, in part, on *McKee v Gratz*, 260 U.S. 127, 136 (1922), wherein the Court explained, "a license may be implied from the habits of the country." An officer is permitted to knock on a front door without a warrant because "it is no more than any private citizen might do." *Jardines*, 569 U.S. at 8, quoting *Kentucky v King*, 131 S. Ct. 1849, 1862 (2011)(internal quotes omitted).

Here, no trespass occurred where customs allow small intrusions onto parked vehicles in the City. Just as knocking on a door is a traditional custom, placing items

temporarily on vehicles is also a traditional custom in the City. Tickets, leaflets, flyers, advertisements, and other materials are frequently placed on vehicles that are parked in the City. (Motion, RE 64-3, PageID# 1098-1099). These temporary intrusions are customary and commonplace. (Motion, RE 64-3, PageID# 1098-1099). In fact, it is also expected that a vehicle tire may be chalked by parking enforcement when a vehicle is parked in municipal lots. (Motion, RE 64-3, PageID# 1098-1099). This method is recognized throughout the country. Therefore, when the City placed chalk marks on tires, it was acting in accordance with the customs of the City and no trespass occurred.

Additionally, the City did not use chalking to gather information for itself or its agents. Under *Jones* a trespass is only a search if it is for the purpose of obtaining information. 565 U.S. at 406. Rather, here, the City used the chalk to inform vehicle owners about parking enforcement. (Motion, RE 64-3, PageID# 1081-1088); (Motion, RE 64-4, PageID# 1114-1115 (¶¶ 8, 9)). Ms. Hoskins testified that this practice was discretionary. (Motion RE 64-3, PageID # 1085). She did not always use chalk. (Motion, RE 64-3, PageID# 1085-1086). Also, she can tell if someone exceeds the time limitations in a parking zone without it. (Motion, RE 64-3, PageID# 1073). On all occasions, however, Ms. Hoskins would note a vehicle and the time on a piece of paper and input the information into a handheld device. (Motion, RE 64-3, PageID # 1084-1086). Therefore, parking enforcement officials,

such as Ms. Hoskins, did not rely on the chalk to gather information about parking violations. (Motion, RE 64-3, PageID # 1085; Motion, RE 64-4, Page ID# 1114-1115 (¶¶ 8, 9)).

III. CHALKING TIRES IS REASONABLE UNDER THE FOURTH AMENDMENT.

A. STANDARD OF REVIEW

The standard of review of the District Court's granting of Defendants' Motion for Summary Judgment is reviewed *de novo*. *Darrah v City of Oak Park*, 255 F.3d 301, 305 (2001). Likewise, a question of law is reviewed *de novo*, including reasonableness under the Fourth Amendment. *U.S. v. Spikes*, 158 F.3d 913, 922-23 (1998). "The district court's factual findings, however, will be set aside only if they are clearly erroneous." *Id*. at 923.

The District Court correctly applied the law and held that the administrative search exception to the warrant requirement applies to the facts herein and dismissing Plaintiff's First Amended Complaint against defendants in its entirety. However, the District Court did not address the other exceptions to the warrant requirement that also apply including *de minimis*, automobile exception, community caretaker, and consent. The district court also did not address defendant's arguments under § 1983, including qualified immunity as to defendant Hoskins. Should this Honorable Court find that the administrative exception does not apply, this Court

should still find that there was no search and any search was reasonable. Moreover, Defendants are not liable under § 1983.

B. THE ADMINISTRATIVE SEARCH EXCEPTION TO THE WARRANT REQUIREMENT APPLIES.

The alleged "searches" at issue constitute administrative searches under Fourth Amendment jurisprudence. Notably, this Court already stated that "we chalk this practice up to a regulatory exercise." *Taylor v City of Saginaw*, 922 F.3d 328, 336 (6th Cir. 2019).

In *U.S. v Martinez – Fuerte*, the Supreme Court explained:

> The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual.

428 U.S. 543, 555 (1976)(internal citations omitted); See also, *Camara v Municipal Court*, 387 U.S. 523, 538 (1967).

It is well-accepted Fourth Amendment law that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *Martinez-Fuerte*, 428 U.S. at 561. The Supreme Court has "allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited." *City of Indianapolis v Edmond*, 531

U.S. 32, 37 (2000); see also, *Martinez-Fuerte*, 428 U.S. at 566. Indeed, in *Martinez v Fuerte*, the Supreme Court held that warrantless searches without individualized suspicion of wrongdoing was valid because the Government and public have a have a valid interest in apprehending illegal aliens and the intrusion on drivers is minimal, including inconvenience and flow of traffic. *Id.* at 562. The Court went on to analyze why the search and seizure of a vehicle at a checkpoint does not require a warrant, even an area warrant. *Id*. at 565. Specifically, it was concluded that "the strong Fourth Amendment interests that justify the warrant requirement" are absent. *Id.* Indeed, "the degree of intrusion upon privacy that may be occasioned by a search of a house hardly can be compared with the minor interference with privacy resulting from the mere stop for questioning as to residence." *Id*. The warrant assurances can be fulfilled by other means, including the mere presence of field officers with manifested authority at a checkpoint. *Id*.

In this case, there is also an important governmental and public interest in parking enforcement. (Motion, RE 64-2, PageID #1045 (¶ 5); Motion, RE 64-4, PageID #1114 (¶ 6)); (Motion, ECF No., PageID # 1045 (¶ 4,5); Motion, RE 64-4, PageID # 1114 (¶ 5,6)). Namely, parking enforcement promotes safety and order on its roadways and ensure equal access to downtown, including local businesses. (Motion, RE 64-2, PageID #1045 (¶ 5); Motion, RE 64-4, PageID #1114 (¶ 6)); (Motion, ECF No., PageID # 1045 (¶ 4,5); Motion, RE 64-4, PageID # 1114 (¶ 5,6)).

The use of chalk to enforce the local parking ordinances provides notice to vehicle owners and operators that parking enforcement is underway. (Motion, RE 64-3, PageID # 1081- 1088; Motion, RE 64-4, PageID # 1114-1115 (¶¶ 8, 9)). In fact, the tire chalk reminds drivers of the time limitation in the location and encourages the drivers to move their vehicle, allowing others access to the parking space. (Motion, RE 64-3, PageID # 1081- 1088; Motion, RE 64-4, PageID # 1114-1115 (¶¶ 8, 9)). Without the chalk mark, more drivers would remain in the parking space either forgetting to move their vehicle or otherwise risking the violation in hopes enforcement was not underway.

The interference in this instance is minimal. A discrete chalk mark on a tire that washes away does not interfere with an individual's liberty. Indeed, it is understood that there is less expectation of privacy in one's vehicle. Herein, there is little, at most, privacy, related to the tire tread of one's vehicle. There is no dispute that the chalk does not track the vehicle's movement when it leaves the parking space, and the chalk washes off in a matter of seconds on the road. The chalk mark is harmless, is temporary, and is unobtrusive.

Unlike Plaintiff's assertions, pre-compliance review[1] is not a pre-requisite to a warrantless search under all circumstances. *New York v Burger*, 482 U.S. 691, 703

[1] Moreover, pre-compliance review would undermine the purpose of parking enforcement and even chalking. To promote safe use on the roadways and access to parking and businesses, immediate and frequent parking enforcement of time-

(1987). The Supreme Court in *New York v Burger*, explained a three-prong analysis to determine whether a warrantless administrative search is reasonable under the Fourth Amendment: (1) "First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made;" (2) "Second, the warrantless inspections must be 'necessary to further the regulatory scheme;'" and (3) "Finally, 'the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.'" 482 U.S. 691, 703 (1987). As it pertains to the third prong, the Court further explained that "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the [property] that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.*

In this case, there is a substantial government interest in parking enforcement. The purpose of parking ordinances and the enforcement within the City is to promote safe use of the roadways and promote equal access to parking for businesses and customers of the downtown shopping / business district. (Motion, RE 64-2, PageID #1045 (¶ 5); Motion, RE 64-4, PageID #1114 (¶ 6)). The ordinances and

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limited spaces is necessary to ensure that drivers move their vehicles. If, however, pre-compliance review was required, parking violators could remain in the time limited space for longer, potentially all day, while the officer was pre-occupied with pre-compliance review of the parking space. During this time, others are not afforded the opportunity to park in the space and frequent the downtown businesses.

enforcement thereof ensure that parking spots are available throughout the day and can be utilized by anyone, not just those individuals who get to the spots first and hold the spot for the entire day. The alleged "search," i.e. tire chalking, was necessary to further the regulatory scheme by advising vehicle owners and operators that parking enforcement was underway. (Motion, RE 64-3, PageID # 1081- 1088; Motion, RE 64-4, PageID # 1114-1115 (¶¶ 8, 9)). In other words, the amount of time available for that space begins when the tire was chalked. This necessarily promotes safe use of the roadways / parking spaces and provides equal access to all customers as the vehicle owners and operators knew to move their vehicle within the time allotted or be subject to a civil infraction by way of a parking ticket. Finally, the City ordinance language is clear, and is posted throughout the City at or near the enforced parking locations, that all those who park in the City spaces are subject to enforcement of their vehicle and any violators may be subject to a civil infraction. (Motion, RE 64-5, Page ID# 1117)[2]. The officers' scope is limited only to the enforcement of parking ordinances. (Motion, RE 64-5, Page ID# 1117); (Motion, RE 64-3, PageID# 1099). The ordinance does not permit an officer to search inside of a vehicle or anything beyond that of parking. (Motion, RE 64-5, Page ID# 1117).

[2] *See also,* Saginaw Code of Ordinances, Title VII Traffic Regulations, Chapter 70.99 Impoundment of Vehicles; Saginaw Code of Ordinances, Title VII Traffic Regulations, Chapter 72.50 Parking Violations Bureau. (Opinion, RE 77, PageID#1042-1045)

Unlike Plaintiff's assertion, *Dow Chemical Co v U.S.*, does not stand for the proposition that there is a Fourth Amendment violation under an administrative search unless the government obtains a warrant or there exists a "pre-cleared challenge" to the search.[3] 749 F.2d 307, 311 (1984). In fact, the Court in *Dow* recognized that there are exceptions to the warrant requirement when conducting administrative searches. *Id*. at 311. Moreover, in *Benjamin v Stemple*, this Court acknowledged that one exception to the warrant requirement "applies when the warrant requirement is impracticable and the 'primary purpose' of the search is 'distinguishable from the general interest in crime control.'" 915 F.3d 1066, 1069 (6th Cir. 2019). While *Benjamin* involved pre-compliance review, the Court's analysis was limited to search of a "building or property on the ground that it has become dangerous." *Id.*[4]

Moreover, Plaintiff mischaracterizes traffic violations as a "traditional law enforcement function" that is unlike inspectors. However, this is in direct contradiction to the function of a parking enforcement officer. In the City, parking enforcement is overseen by John Stemple, the Director of Neighborhood Services

[3] Importantly, *Dow Chemical* follows the pre-*Jones Katz* analysis of a search.
[4] Also, this Court in *Benjamin* relied on *Patel*. *Id*. The Court in *Patel* also explained that a warrantless search is reasonable where "the warrant and probable-cause requirement is impracticable" and "the primary purpose of the search is distinguished from the general interest in crime control." City of Los Angeles, California v *Patel*, 576 U.S. 409, 420 (2015) (internal citations omitted).

and Inspections. (Motion, RE 64-2, Page ID # 1044-1045). The ordinance setting forth parking violations is no different than ordinances regarding housing and fire inspections. (Motion, RE 64-5, Page ID# 1117). The parking ordinances amount to a civil infraction, at most, and individuals are afforded an opportunity to appeal. (Motion, RE 64-5, Page ID# 1117). Parking enforcement is also undertaken by City parking enforcement officers that have no discretion beyond enforcing the local ordinances. (Motion, RE 64-5, Page ID# 1117); (Motion, RE 64-3, PageID# 1099). Thus, parking enforcement could not be more akin to that of other inspections under which the administrative exception applies.

C. THE DISTRICT COURT DID NOT ERR IN ITS ANALYSIS OF POLICE POWERS AND ADMINSTRATIVE SEARCH.

As the District Court correctly acknowledged, "regulation of parking falls within the purview of a municipality's police powers." (Order, RE 77, Page ID# 8). Furthermore, "an ordinance which represents an exercise of the municipality's police powers is presumed to be constitutionally valid, with the burden of unreasonableness being case upon those who challenge the ordinance." *Curto v City of Harper Woods*, 954 F.2d 1237, 1242 (6th Cir. 1992). In this case, and the District Court acknowledged, there is no dispute over the ordinance provision regarding the regulation of parking within the City's jurisdiction. (Response to Defendant's Motion for Summary Judgment, RE 68, PageID # 1137-1138).

Plaintiff inartfully attempts to circumscribe the district court's analysis under the administrative exception by focusing this Court's attention on the brief discussion relating to municipality police powers. For the reasons stated above, the district court correctly opined that the administrative exception applies to this case. The district court explained, "The City's use of chalk is reasonable because it is in the public interest and the 'severity of the interference with individual liberty' is minimal. (Opinion and Order, RE 77, PageID# 1407). This evaluation is directly referring to the administrative exception. See *U.S. v Martinez – Fuerte,* 428 U.S. 543, 562 (1976)[5].

D. THAT EVEN IF THE ADMINISTRATIVE SEARCH EXCEPTION DOES NOT APPLY, THE SEARCH WAS REASONABLE UNDER AN EXCEPTION TO THE WARRANT REQUIREMENT.

i. CHALKING TIRES IS *DE MINIMIS*.

Chalking tires is reasonable under the Fourth Amendment because it is *de minimis*. The Supreme Court held that minor intrusions into private property by government officials are considered reasonable under the *de minimis* rationale when the government's interests outweigh the minor intrusion. *See Jacobsen*, 466 U.S. at 125. As mentioned above, the City has significant interests that are furthered by

[5] While *Brown v Texas*, 443 U.S. 47 (1979) may have involved a seizure, the analysis for a search as applied by the district court in this case is no different as set forth in *U.S. v Martinez – Fuerte,* 428 U.S. 543, 562 (1976). See also*, New York v Burger*, 482 U.S. 691, 703 (1987).

enforcing its parking ordinances through the use of chalk, and these interests greatly outweigh the minimal intrusion that a chalk mark creates.

When a minor intrusion occurs, a balancing test is employed. In *Jacobsen*, the Court found that the warrantless destruction of a small amount of cocaine during field drug test was *de minimis* because only a trace amount of material was involved. *Id.* The Court explained the destruction was reasonable because the government interests justifying the search and seizure were "substantial" and outweighed the minimal intrusion into private property. *Id.* Similarly, in *Cardwell v. Lewis,* 417 U.S. 583, 591-92 (1974), the Court found that examining the outside of a tire and taking small paint scrapings from a vehicle were *de minimis* searches of an individual's constitutional interest.[6]

Chalking is a minimal intrusion. Like the small amount of cocaine involved in *Jacobson*, chalking involves a small amount of material. A parking official will only mark a single tire, with a small line of chalk. The chalk will wash off shortly after it is applied. Additionally, chalking is less intrusive than the small amount of scrapings that were taken in *Cardwell*. Chalking is not permanent like the taking of

[6] While the Court in *Cardwell* did not explicitly state that it was applying the *de minimis* rationale, the Court later explained in *Jacobsen* that *Cardwell* was based on the *de minimis* rationale. 466 U.S. at 125. Specifically, the Court explained, "examination of automobile's tires and taking of paint scrapings was a de minimis invasion of constitutional interests" *Id.*

scrapings in *Cardwell,* and both involve only the exterior of the vehicle. Taken together, chalking fits neatly within the *de minimis* rationale.

The City's interests greatly outweigh any intrusion by tire chalking. As mentioned above, the City has significant interests in promoting road safety and downtown economic vitality. (Motion, RE 64-2, PageID #1045(¶ 4)); (Motion, RE 64-4, PageID # 1114(¶ 5)). By providing equal access to parking, the City was ensuring that vehicles were parked in an orderly fashion and road safety was preserved. (Motion, RE 64-2, PageID #1045(¶ 4)); (Motion, RE 64-4, PageID # 1114(¶ 5)). Moreover, by providing equal access to downtown parking, the City was helping to provide consistent parking spots for local businesses that their customers rely upon. (Motion, RE 64-2, PageID #1045(¶ 5)); (Motion, RE 64-4, PageID # 1114(¶ 6)). The City's interests greatly outweigh the temporary intrusion of chalking. Thus, chalking is reasonable under the *de minimis* rationale.

ii. THE AUTOMOBILE EXCEPTION

Chalking is reasonable because vehicles can be searched under the "trespass theory" when a government official has probable cause.[7] The Court in *Jones* did not address whether a search of a vehicle under the "trespass theory" was reasonable.

[7] The Sixth Circuit Opinion and Order on Appeal specifically provides that the Defendants may re-argue the vehicle exception and/or the community caretaker exception to the warrant requirement beyond the pleading stage. *Taylor v City of Saginaw*, 922 F.3d 328, 336 (6th Cir. 2019).

565 U.S. at 413. The Court considered that argument to be forfeited. *Id*. However, the Court has previously addressed whether a warrantless search is reasonable for a vehicle under the "trespass theory" in *Carroll*. 267 U.S. at 158-59.

At the time *Carroll* was decided, the "trespass theory" was the controlling theory for Fourth Amendment jurisprudence. *See Olmstead v. United States,* 277 U.S. 438, 457 (1928)*; Katz v. U.S.*, 389 U.S. 347, 352-53 (1967). The Court in *Carroll* reasoned that the officers could search a vehicle without a warrant because they had probable cause that some type of violation occurred. 267 U.S. at 159. The Court explained that the type of violation did not matter, but instead it was whether the searching officer had a probable cause to believe some violation occurred. *Id.* at 158.

Like the officers in *Carroll*, the City parking officials had probable cause to believe some type of violation occurred, or would occur, when they marked vehicles with chalk. Each vehicle that was marked was parked in a location subject to the City's parking ordinances. (Motion, RE 64-3, PageID# 1088-1091). Parking violations occurred in these locations frequently. The violations all related to a vehicle's occupation of the space. (Motion, RE 64-5, PageID # 1117). Thus, each vehicle that was occupying a space, was potentially in violation of a parking ordinances, thereby creating probable cause. Because parking officials had probable

cause to believe a violation occurred, or would occur, the temporary chalk mark was reasonable.

In *Carroll*, the Court explained that it did not matter what type of violation occurred; rather, what was key was whether the investigating officer had probable cause to believe that some violation occurred. 267 U.S. at 158. Here, just like in *Carroll*, it does not matter what type of violation occurred, just that the investigating parking officials had probable cause to believe that a violation did occur or would occur. Although these violations were ordinances and not criminal statutes, *Carroll* explains that the distinction does not matter. *Id.* Therefore, pursuant to *Carroll,* chalking tires is reasonable because the City had a probable cause to believe a violation of a parking ordinance occurred. Thus, Plaintiff's action should be dismissed.

iii. COMMUNITY CARETAKER EXCEPTION

Chalking tires is reasonable under the Fourth Amendment because parking officials are undertaking a reasonable and long-accepted community caretaking activity. "The community-caretaking exception applies most clearly when the action of the police is 'totally divorced from the detection, investigation, or acquisition of evidence relating **to the violation of a criminal statute**[.]'" *United States v. Brown*, 447 Fed. Appx. 706, 709 (6th Cir. 2012) (quoting *Cady*, 413 U.S. at 441) (emphasis added). When the community caretaker exception is applied, the actions of the

government official must be reasonable. *United States v. Lewis*, 869 F.3d 460, 462 (6th Cir. 2017). Chalking tires was not designed to enforce criminal statutes and the practice was objectively reasonable and long accepted by society; therefore, chalking tires was reasonable under the Fourth Amendment.

In *Lewis*, the Court of Appeals found that the community caretaker exception was applicable because a police officer opened a car door for the sole reason of finding the passenger a safe ride home. *Id.* In *Brown,* the Court reasoned that the community caretaker exception applied to a police officer's stopping of a vehicle because the officer was not seeking to investigate a crime, but only to question the driver as to the whereabouts of a missing minor. 447 Fed. Appx. at 710. Thus, when the purpose of the search is not primarily to enforce a criminal statute, but it is for another purpose, then the community caretaker exception is applicable.

Chalking by the City was designed to enforce its own City ordinances, and not criminal statutes; therefore, the community caretaker exception applies. (Motion, RE 64-5, PageID # 1117). Like the officer in *Brown,* the parking officials for the City are not enforcing any criminal statutes and are thus divorced from criminal enforcement. This Court should therefore follow *Brown* and find the community caretaker exception to be applicable.

Chalking is less invasive and more reasonable than opening the doors of a vehicle. In *Lewis*, the Sixth Circuit found that opening a door of a car to determine

if a passenger needed a safe ride home was reasonable under the community caretaker rationale. 869 F.3d at 462. Opening the door was intrusive and provided the officer with much more information than a simple chalk mark. However, the Court in *Lewis* found that opening the door was reasonable because the officer was promoting the goal of safe road travel. *Id.* Similarly, the City's use of chalk was promoting its parking ordinances, which were designed to help road safety. (Motion, RE 64-2, PageID# 1045 (¶ 4)); (Motion, RE 64-4, PageID# 1114 (¶ 5)). If opening a car door is reasonable under the community caretaking exception to promote road safety, then chalking a tire is reasonable under the community caretaking exception to promote road safety. Therefore, chalking does not violate the Fourth Amendment.

iv. CONSENT

Chalking is reasonable because individuals who park in the City's parking spaces consent to a minimal search of the outside of their vehicles. A search of private property that occurs after the owner of the property provides consent to search is reasonable under the Fourth Amendment. *See Schneckloth*, 412 U.S. at 219. There are three elements that must be met for consent to be valid: (1) the consent must be granted voluntarily, (2) the consent must be obtained from someone with real or apparent authority to give consent, and (3) the scope of the search must not exceed the consent granted. *See Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

Individuals who park in a city parking area are voluntarily giving their consent for officials to search the outside of their vehicles. Throughout the City there are signs notifying individuals that they are subject to parking enforcement. An individual who parks in a public parking area is, or should be, aware that parking enforcement may occur. This includes minor examinations of the exterior of a vehicle. Thus, individuals who park in public areas consent to having the exterior of their vehicles searched.

Individuals who park in public spaces have actual or apparent authority to grant permission to government officials to conduct a search. In *Rodriguez*, the Supreme Court explained that consent can be given by an individual with actual authority or apparent authority. 497 U.S. 185. Here, anyone driving and parking a vehicle in a public parking area would have apparent authority to consent to a search. A reasonable government official would believe that an individual who drives a vehicle has the ability to consent to having that vehicle searched. Thus, a person who parks in a public parking spot has apparent authority to consent to a search.

Chalking did not exceed the scope of the consent that was granted. In *Florida v. Jimeno*, 500 U.S. 248, 250-251 (1991) the Supreme Court reasoned that the scope of the consent dictates the scope of the permissible search. By parking in a public space, the driver of the vehicle is only consenting to have the outside of his vehicle searched. Leaflets can be placed on the vehicle; tickets can be placed on the vehicle;

and identifying information, such as the license plate, can be observed. These are all permissible searches that individuals consent to when they park in a public parking spot.

Chalking tires does not exceed that scope because it only involves searching the outside of the vehicle. Individuals only consent to small intrusions on the outside of their vehicles by parking them in the public space. Chalking the tires of these vehicles stays safely within those parameters. Thus, chalking does not exceed the scope of the consent. Because individuals consented to having the outside of their vehicles searched, and the parking officials stayed within the parameters of that consent, the alleged searches were reasonable. Ultimately, Plaintiff's action must be dismissed because if any search did occur it was reasonable.

I. DEFENDANTS ARE NOT LIABLE UNDER § 1983

A. STANDARD OF REVIEW

The standard of review of the District Court's granting of Defendants' Motion for Summary Judgment is reviewed *de novo*. *Darrah v City of Oak Park*, 255 F.3d 301, 305 (2001). This Court also reviews a question of law *de novo*. U.*S. v. Spikes*, 158 F.3d 913, 922-23 (1998).

B. THE CITY OF SAGINAW IS NOT LIABLE UNDER *MONELL*.

In *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978), the Supreme Court held that a local governing body can be sued under

§ 1983 when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision *officially* adopted and promulgated by that body's officers." Thereafter, in *Meyers*, the Sixth Circuit set forth the principles to be used to determine under *Monell* whether a municipality is liable pursuant to § 1983. 14 F.3d at 1120. To be liable, the injury "must always and only be a product of the city's own acts; thus, an unconstitutional policy of the city must be identified as having been the moving force of the plaintiff's constitutional deprivation." *Id.* The Court explained a plaintiff can prove such a policy exists under three means:

> (1) an officially promulgated *policy* as that term is commonly understood, *i.e.* a general statement adopted by the city's lawmakers with an intention of governing future conduct; (2) a pervasive *custom or practice*, of which the city lawmakers know or should know; and (3) a *single act* taken by a city employee who, as a matter of state law, has final policymaking authority with respect to the area in which the action was taken.

Id. (internal citations omitted).

First, there does not exist an "official policy" adopted by City lawmakers regarding chalking tires. Further, this was not a single act by a City employee with final policymaking authority in parking enforcement. Thus, Plaintiff must prove that it was a pervasive custom or practice.

In *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985), the Supreme Court considered the meaning of a pervasive *custom or practice* within the meaning

of *Monell*. The Court held that, "proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, **which policy can be attributed to a municipal policymaker.**" *Id.* at 821. (emphasis added). The Court explained, "some limitation must be placed on establishing municipal liability through policies that are not themselves, unconstitutional, or the test set out in *Monell* will become a dead letter." *Id.* at 823. It is necessary that the policy is attributed to a municipal policymaker. *Id*. at 821. Thus, to establish proof of such a policy under *Monell*, there must be a statement of the policy by the municipal corporation and its exercise thereof. *Id.* at 822.

In this case, Plaintiff attempts to hold the City liable for "an official custom and practice," *i.e.* chalking tires. Specifically, the alleged "policy" at issue is not the result of an "official" act and the exercise of chalking tires cannot be traced back to any municipal policymaker. In addition, there is no statement of said policy. Rather the City provided Ms. Hoskins and its parking officials with chalk as a tool that could be used to perform their job. Ms. Hoskins even testified that she did not have to chalk tires to enforce tickets. (Motion, RE 64-3, PageID# 1085-1086). There are identifiable time-limited parking tickets issued without chalk. (Motion, RE 64-3, PageID# 1085-1086); (Motion, RE 64-6, PageID# 1118-1120). Moreover, Ms. Hoskins's job was not impacted in any respect if she did not chalk tires. (Motion,

RE 64-3, PageID # 1102). She was not disciplined for not chalking tires and she was never told that she was *required* to chalk tires. (Motion, RE 64-3, PageID # 1102). Rather, her job is to enforce the parking ordinances. How she chooses to do so is at her own discretion. (Motion RE 64-3, PageID # 1085). It was not the result of any official custom, official practice, or traced back to any particular municipal policymaker.

C. DEFENDANT HOSKINS IS NOT LIABLE PURSUANT TO QUALIFIED IMMUNITY.

Regardless of whether a constitutional violation occurred, Ms. Hoskins cannot be liable because she is protected by qualified immunity. Qualified immunity protects "[g]overnment officials performing discretionary functions" from liability for civil damages so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Poe v. Hayden*, 853 F.2d 418, 423 (6th Cir. 1988) (citations omitted). The Sixth Circuit applies a three-pronged analysis in determining a defendant's entitlement to qualified immunity. *Shively*, 579 Fed. Appx. at 354. First, a court must evaluate whether the facts demonstrate that a constitutional violation occurred. *Id.* Second, a court must determine whether the violation involved a clearly established constitutional right of which a reasonable person would have known. *Id.* Third, a court must consider whether the plaintiff has offered sufficient evidence to indicate

that what the official allegedly did was objectively unreasonable in light of clearly established constitutional rights. *Id.*

As detailed above, no constitutional violation occurred because no search occurred, and if a search did occur it was reasonable. However, even if this Court finds that a constitutional violation did occur, Ms. Hoskins is entitled to qualified immunity because there was no clearly established constitutional right indicating that chalking tires was an unreasonable search under the Fourth Amendment. Further, Ms. Hoskins acted reasonably at all relevant times.

Ms. Hoskins did not violate a clearly established constitutional right under the Fourth Amendment because the issue has never been squarely decided. Prior to this case, no other Circuit had addressed the issues of the Fourth Amendment and chalking. No case had established if chalking was a search under the "trespass theory," and the Supreme Court indicated that chalking would be reasonable under the above circumstances. *See Sitz*, 496 U.S. at 449-450; *Jacobsen*, 466 U.S. at 125; *Cady*, 413 U.S. at 441; *Carroll,* 267 U.S. at 158; *Schneckloth*, 412 U.S. at 219. Therefore, no clear precedent was established, and Ms. Hoskins cannot be liable Ms. Hoskins acted reasonably in her role as a parking official. A plaintiff must offer sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of clearly established constitutional rights to avoid qualified immunity. *Shively*, 579 Fed. Appx. at 354. Plaintiff simply has not shown that Ms.

Hoskins acted unreasonably. Ms. Hoskins marked tires so that she could alert individual vehicle owners about the parking ordinances. She did not target specific individuals and she did not act with any malice. She was simply doing her job the best way she knew how. Therefore, Ms. Hoskins cannot be liable.

CONCLUSION

Defendants submit that the District Court's Judgment should not be disturbed, and the dismissal of the Plaintiff's First Amended Complaint should be affirmed. If, however, this Honorable Court were to find that the administrative exception does not apply, Defendants aver that one of the other enumerated exceptions do apply. Moreover, Defendants are not liable under § 1983.

WHEREFORE, for all of the reasons set forth herein, Defendants – Appellees / Cross- Appellants, CITY OF SAGINAW and TABITHA HOSKINS, respectfully request that this Honorable Court AFFIRM the Judgment of the District Court granting Defendants' Motion for Summary Judgment.

Respectfully submitted,

Dated: August 5, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(g), the undersigned certifies this brief complies with the type-volume limitations of F.R.A.P 28.1(e)(2)(B)(i).

I. EXCLUSIVE OF THE EXEMPTED PORTIONS IN F.R.A.P 32(f), THE BRIEF CONTAINS:

A. 9,429 words

II. THE BRIEF HAS BEEN PREPARED:

A. In proportionally spaced typeface using; “Times New Roman” in font size 14.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send confirmation of such filing to counsel of record at their email address(es) of record.

Date: August 5, 2020

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ADDENDUM – RELEVANT DISTRICT COURT DOCUMENTS

REF. NUMBER	DOCUMENT DESCRIPTION	PAGE ID#
RE 1	Complaint	1-5
RE 9	Plaintiff's First Amended Complaint	70-76
RE 10	Motion to Dismiss	132-165
RE 14	Opinion and Order	201-213
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RE 47	Motion to Certify Class	502-522
RE 64-2	Motion for Summary Judgment -EX. 1	1044-1046
RE 64-3	Motion for Summary Judgment -EX. 2	1047-1112
RE 64-4	Motion for Summary Judgment -EX. 3	1113-1116
RE 64-5	Motion for Summary Judgment -EX 4	1117
RE 77	Opinion and Order	1394-1408