IN THE MICHIGAN SUPREME COURT

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

DENISHIO JOHNSON,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

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

KEYON HARRISON,

Plaintiff-Appellant,

v

CURT VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. THE CITY'S WARRANTLESS FINGERPRINTING POLICY IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Defendants contend that because Plaintiffs are challenging a municipal policy, their challenge is necessarily and solely a facial one, and that they must satisfy an "extremely rigorous" standard of showing that no set of circumstances exist in which a photograph and print ("P&P") would be constitutional. Defs' Br at 23. Plaintiffs, however, have consistently challenged the City's policy both on its face and as applied. See, e.g., Pls' Supp Br on Remand at 22–25. And the "distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v FEC*, 558 US 310, 331; 130 S Ct 876; 175 L Ed 2d 753 (2010). Some challenges have "characteristics of both," and "[t]he label is not what matters." *John Doe No 1 v Reed*, 561 US 186, 194; 130 S Ct 2811; 177 L Ed 2d 493 (2010); see also *Project Veritas Action Fund v Rollins*, 982 F3d 813, 826 (CA 1, 2020) ("This battle over labels is not fruitful."). In any event, this Court has already held in this case that the facial/as-applied distinction "is beside the point" for the purposes of determining municipal liability "because the policy or custom identified by plaintiffs represents a municipal action that *itself* 'authorized' allegedly unconstitutional conduct." *Johnson v VanderKooi*, 502 Mich 751, 780; 918 NW2d 785 (2018); Appendix 340a. So long as the P&P policy is a "moving force" behind a violation of Johnson or Harrison's Fourth Amendment rights, which in this case it surely is, the municipality is liable regardless of whether the P&P policy is unconstitutional on its face or as applied. See *id.* at 767–771, 774–777; Appendix 328a–332a, 335a–338a.

Moreover, "facial challenges under the Fourth Amendment are not . . . especially disfavored." *Los Angeles v Patel*, 576 US 409, 415; 135 S Ct 2443; 192 L Ed 2d 435 (2015).

This is because when a statute or policy authorizes warrantless searches, it is facially invalid when, as in *Patel*, it does not conform to one of the "few specifically established and well-delineated exceptions" to the warrant requirement. See *id.* at 419–421. Here, Defendants' P&P policy, like the ordinance in *Patel*, authorizes warrantless searches outside a recognized exception to the warrant requirement. Therefore, the correct and most straightforward resolution of this case is to hold that the P&P policy is facially unconstitutional because fingerprinting is a search, and warrantless searches other than pat-downs for weapons are impermissible during *Terry* stops. Alternatively, the P&P policy is facially unconstitutional because it authorizes police conduct that necessarily exceeds the scope of a permissible *Terry* stop. And, although it is unnecessary to go beyond Plaintiffs' facial challenge, the policy is also unconstitutional as applied to Johnson and Harrison under the facts of their cases—that is, fingerprinting *them* unreasonably intruded on *their* persons, or exceeded the permissible scope of *their* stops.

II. FINGERPRINTING IS A FOURTH AMENDMENT SEARCH.

A. Plaintiffs' Trespass-Based Argument Is Properly Before This Court.

Defendants say that this Court should not consider whether physical intrusions on the body are a search under the Fourth Amendment because Plaintiffs did not raise the "claim of trespass" in the trial court. Defs' Br at 36. There are two reasons why that is wrong. First, the trespass rationale is not a free-standing legal claim; it is an alternative argument supporting the legal claim that Plaintiffs have made since the start of this case: their compelled fingerprinting violated their Fourth Amendment rights against unreasonable searches and seizures. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v City of Escondido*, 503 US 519, 534; 112 S Ct 1522; 118 L Ed 2d 153 (1992). In *Yee*, for example, where landlords challenged a rent-control ordinance as taking their property without just compensation in

violation of the Fifth Amendment, the Court explained that their "arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*," but "rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking." *Id.* at 534–535. Here, too, Plaintiffs' trespass- and privacy-based arguments both support a single, "properly presented" Fourth Amendment claim of unreasonable search and seizure.[1]

Second, Plaintiffs *did* raise this argument below via supplemental authority under MCR 7.212(F), as the Court of Appeals acknowledged before then deciding the trespass issue on the merits. *Johnson v VanderKooi (On Remand)*, 330 Mich App 506, 530–531; 948 NW2d 650 (2019); Appendix 369a–370a. Once an issue is "passed upon" and "expressly decided" in a court below, it is preserved for review. See *United States v Williams*, 504 US 36, 41–45; 112 S Ct 1735; 118 L Ed 2d 352 (1992); *Steward v Panek*, 251 Mich App 546, 551 n 6; 652 NW2d 232 (2002) (recognizing that an issue is preserved when raised in a supplemental brief and addressed in the court's ruling). The trespass argument is thus properly before this Court.

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

Defendants offer no meaningful response to Plaintiffs' argument that by intruding upon their bodies for the purpose of obtaining information, police effected a search. The United States Supreme Court has said that a search "undoubtedly" occurs "[w]hen the Government obtains information by physically intruding on *persons*, houses, papers, or effects." *Florida v Jardines*, 569 US 1, 5; 133 S Ct 1409; 185 L Ed 2d 495 (2013) (quotation marks omitted; emphasis

[1] Defendants' suggestion that Plaintiffs raised only a "privacy claim" in their complaints, Defs' Br at 36, is plainly incorrect. Plaintiffs' complaints allege that Defendants violated their "rights under the Fourth and Fourteenth Amendments to be free from unlawful search and seizure." Johnson Compl, Appendix 29a; Harrison Compl, Appendix 79b. Thus, there is no "privacy claim," only a Fourth Amendment claim.

added). Defendants' suggestion that this rule should extend to houses and effects but not to persons, see Defs' Br at 38–39, is firmly belied by binding precedent. See *Grady v North Carolina*, 575 US 306, 309; 135 S Ct 1368; 191 L Ed 2d 459 (2015) (per curiam); see also *Skinner v R Labor Executives' Ass'n*, 489 US 602, 613–614; 109 S Ct 1402; 103 L Ed 2d 639 (1989) ("The [Fourth] Amendment guarantees the privacy, dignity, and security of *persons* against certain arbitrary and invasive acts by officers of the Government." (emphasis added)).

Plaintiffs agree with Defendants that nonconsensual, offensive contact with a person's body that was once subject to an action for trespass *vi et armis* is now generally actionable as a battery. See Defs' Br at 37–38. Both at the time of the framing of the Fourth Amendment and today, "to lay hands on another in a hostile manner is a battery, though no damage follows." Cooley, A Treatise on the Law of Torts, p 162 (Chicago: Callaghan & Co, 1879). Accord, e.g., *Respublica v De Longchamps*, 1 US 111, 114; 1 L Ed 59 (Pa Oyer & Terminer, 1784) ("though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal difinition of Assault and Battery"); M Civ JI 115.02 ("A battery is the willful or intentional touching of a person against that person's will."); *Commonwealth v Vieira*, 483 Mass 417, 423; 133 NE3d 296 (2019) ("Offensive battery . . . requires only that the defendant, without justification or excuse, intentionally touched the victim, and that the touching, however slight, occurred without the victim's consent." (quotation marks omitted)). If a private person had touched and applied ink to Plaintiffs' hands, it would be actionable as a battery. When police made such unlicensed intrusion, and did so to obtain information, it was a search.

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

Defendants acknowledge, as they must, that the United States Supreme Court has not decided whether taking fingerprints is a Fourth Amendment search. They instead rely heavily on

dicta from Supreme Court opinions deciding *other* Fourth Amendment questions, where neither the parties nor the Court had the opportunity or incentive to fully brief the matter or consider a developed record. See Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 NYU L Rev 1249, 1261–1267 (2006) (noting the dangers of relying on dicta published in the absence of sufficient briefing, adversity, concreteness, and judicial scrutiny, particularly when commenting on hypothetical counterfactuals). As explained in Plaintiffs' opening brief, controlling principles that govern the Court's cases compel the conclusion that Plaintiffs had a reasonable expectation of privacy against the nonconsensual taking of their fingerprints.

Defendants' argument that there is no reasonable expectation of privacy in one's fingerprints because one's hands are often exposed to the public and in plain view ignores the reality of how Defendants go about acquiring fingerprint data through the P&P policy. To obtain useable fingerprints during a *Terry* stop, officers cannot merely look at someone's hands; they are required to physically manipulate suspects' bodies, ink their thumbs, and press them onto a card for subsequent computerized analysis—which is *not* what a reasonable person would allow or expect a member of the public to do. See *Bond v United States*, 529 US 334, 337–339; 120 S Ct 1462; 146 L Ed 2d 365 (2000) (explaining that an officer's "physical manipulation" of luggage is a search, even when a purely visual observation of the luggage would not be). Similarly, that fingerprints can sometimes be found on objects like glassware or utensils does not negate one's reasonable expectation of privacy against police officers taking them, as described above, during a *Terry* stop. "The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo v United States*, 533 US 27, 35 n 2; 121 S Ct 2038; 150 L Ed 2d 94 (2001).

Equally unavailing is Defendants' suggestion that, because "illuminating the interior of a

car with a flashlight" is not a search, police can freely use surveillance "technology that enhances natural human senses" without implicating the Fourth Amendment. Defs' Br at 25. To the contrary, the United States Supreme Court has warned that using "sense-enhancing technology" to obtain private information where "the technology in question is not in general public use" *does* implicate the Fourth Amendment. *Kyllo*, 533 US at 34. As described in Plaintiffs' opening brief, the elaborate technical procedures used to extract identifying biometric information from a fingerprint easily satisfies that criterion.

III. FINGERPRINTING DURING A *TERRY* STOP IS PER SE UNREASONABLE BECAUSE IT IS A WARRANTLESS SEARCH AND NO EXCEPTION TO THE WARRANT REQUIREMENT APPLIES.

The Fourth Amendment requires that "in *every* case addressing the reasonableness of a warrantless search," a court's analysis must begin "with the basic rule that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject *only* to a few specifically established and well-delineated exceptions." *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009) (quotation marks omitted; emphases added). Defendants, however, neither acknowledge this "basic rule" nor attempt to identify an exception that applies here. Instead, they contend that if fingerprinting during a *Terry* stop is a search, it "is not unreasonable under the Fourth Amendment when the officer determines that the facts and circumstances of the investigation render fingerprinting appropriate," Defs' Br at 40, and that such a search is reasonable when "law enforcement-related concerns" outweigh those that are "privacy-related," *id.* at 41.

Defendants' argument seriously distorts Fourth Amendment law on *Terry* stops and warrantless searches. Under *Terry*, there is one "specifically established and well-delineated exception" to the warrant requirement for searches: a pat-down search for weapons for officer safety, and only if based on reasonable suspicion that a suspect is armed and dangerous.

Defendants cite no authority, and none exists, for the proposition that police officers may conduct *other* warrantless searches during a *Terry* stop so long as government interests outweigh privacy concerns on that particular occasion. Cf., e.g., *State v Webber*, 141 NH 817, 820–821; 694 A2d 970 (1997) (holding that there is no "identification search" exception to the warrant requirement). Indeed, Defendants' approach would open the floodgates to strip searches, DNA harvesting, and countless other warrantless searches by law enforcement when no recognized exception to the warrant requirement applies—completely eviscerating the "basic rule" that such searches are per se unreasonable, *Gant*, 556 US at 338, as well as the *Terry*-specific rule that any "sort of evidentiary search" is impermissible during such a stop, *Minnesota v Dickerson*, 508 US 366, 378; 113 S Ct 2130; 124 L Ed 2d 334 (1993).[2]

Defendants' reliance on the balancing test described in *Maryland v King*, 569 US 435; 133 S Ct 1958; 186 L Ed 2d 1 (2013), is misplaced. Courts weigh the government's legitimate interests against the individual's privacy concerns to determine reasonableness when they are operating *within a recognized exception* to the warrant requirement, see *id.* at 448, not when law enforcement conduct clearly falls outside the scope of an exception that is already "specifically established and well-delineated," *Gant*, 556 US at 338. In *King*, the Court observed that once an individual is lawfully arrested and taken into custody, routine administrative procedures incident to arrest are a well-recognized exception to the warrant requirement.[3] See *King*, 569 US at 449, 461. During a *Terry* stop, by contrast, the only exception to the warrant requirement for searches

[2] In the Court of Appeals, Defendants acknowledged that "an officer may only conduct a Fourth Amendment search for weapons during a *Terry* stop" and "his investigative techniques cannot constitute a search under the Fourth Amendment." Defs' Supp Br on Remand, Appendix 297b. Only now do they argue that if warrantless fingerprinting during a *Terry* stop is a search, it may be reasonable under the circumstances. Defs' Br at 40–46.

[3] Moreover, *King*'s holding was predicated on the "diminished" expectation of privacy of people under arrest, 569 US at 462, and is thus inapplicable to people who are not in custody.

is the pat-down for weapons; searches that go beyond that are invalid. *Dickerson*, 508 US at 373.

IV. EVEN IF FINGERPRINTING IS NOT A SEARCH, IT VIOLATES THE FOURTH AMENDMENT DURING A *TERRY* STOP BECAUSE IT EXCEEDS THE SCOPE OF A REASONABLE SEIZURE.

Defendants rely almost exclusively on dicta from *Hayes v Florida*, 470 US 811; 105 S Ct 1643; 84 L Ed 2d 705 (1985), to support their argument that forcing an individual to provide their fingerprints does not exceed the scope of a permissible seizure under *Terry*. See Defs' Br at 47–48. But the Court in *Hayes* actually *reversed* the conviction of a defendant who had been fingerprinted at a police station without probable cause, and as observed in a concurring opinion, "the record . . . contain[ed] no information useful in applying *Terry* to [the] hypothetical police practice" of "detain[ing] an individual for on-site fingerprinting." *Hayes*, 470 US at 819 (Brennan, J., concurring). The concurring opinion in fact expressed serious doubt whether such a practice would pass constitutional muster, noting that "on-site fingerprinting (apparently undertaken in full view of any passerby) would involve a singular intrusion on the suspect's privacy." *Id.*

Meanwhile, cases that do involve *Terry* stops make clear that the scope of a reasonable seizure under that doctrine is normally limited to *asking questions* to determine identity and confirm or dispel suspicions. "And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released." *Berkemer v McCarty*, 468 US 420, 439–440; 104 S Ct 3138; 82 L Ed 2d 317 (1984). In upholding Nevada's stop-and-identify statute in *Hiibel v Sixth Judicial Dist Court*, 542 US 177, 185; 124 S Ct 2451; 159 L Ed 2d 292 (2004), the United States Supreme Court emphasized that the statute did "not require a suspect to give the officer a driver's license or any other document," and was satisfied once the suspect provided their name. By contrast, requiring an individual to submit to fingerprinting during a *Terry* stop fundamentally "alter[s] the nature of the stop itself" and upsets the careful balance struck in

Hiibel between the seizure's "intrusion on the individual's Fourth Amendment interests [and] its promotion of legitimate government interests." *Id.* at 188 (citation and quotation marks omitted).

Even if the Court were to follow dicta from *Hayes*, fingerprinting would still require reasonable suspicion that the detained person committed a criminal act and a reasonable basis to believe that fingerprinting would establish or negate their connection with *that* crime. *Hayes*, 470 US at 817. Defendants cannot meet that standard here. Harrison's fingerprints were taken even through there were no other prints to which they could be compared; the sole justification was to "make sure you are who you say you are." Harrison Dep, Appendix 51a. That justification could apply to any police encounter, and would allow for indiscriminate fingerprinting at every *Terry* stop. In Johnson's case, he was stopped because he was walking through a parking lot where previous thefts from parked vehicles had occurred, and officers wanted to be able to compare Johnson's fingerprints to those from the earlier car break-ins. Bargas Dep, Appendix 112a–115a. No cars had been broken into at that time, there was nothing to connect Johnson to the earlier break-ins, and he did not even match the description of a bald suspect in the previous incidents. *Id.*; VanderKooi Dep, Appendix 102a. His fingerprinting was thus "nothing more than an unlawful fishing expedition" "for evidence in the hope that something might turn up." *United States v Babwah*, 972 F2d 30, 34 (CA 2, 1992) (quotation marks omitted). To hold otherwise would mean that whenever officers conduct a *Terry* stop based on allegedly suspicious behavior, they can then take fingerprints in the hopes that the prints might match those from some earlier crime, even though there is no reason to suspect the person of the earlier offense.

V. HARRISON DID NOT CONSENT.

Although the Court of Appeals never ruled on whether Harrison consented to

fingerprinting,[4] Defendants argue that Harrison did consent, thus undermining his Fourth Amendment claim. The record is to the contrary. Captain VanderKooi *told* Harrison—a 16-year-old—that he *needed* to take Harrison's fingerprints, and Harrison said, "okay." Harrison Dep, Appendix 51a. That is not consent.

When the government "seeks to rely upon consent to justify the lawfulness of a search," its "burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v North Carolina*, 391 US 543, 548–549; 88 S Ct 1788; 20 L Ed 2d 797 (1968). This rule is perfectly illustrated by *United States v Weidul*, 325 F3d 50, 53–54 (CA 1, 2003), where the First Circuit affirmed a trial court's determination that a suspect's "uttering of the word 'okay' as [an officer] stated that he was about to search [her] laundry room" was not voluntary consent, but rather "simple acquiescence . . . to a claim of lawful authority to search."

Harrison's case is no different. His utterance of the word "okay," in response to Captain VanderKooi *saying* that he *needed* to conduct a search, was mere acquiescence to a claim of lawful authority, not consent. At the very least, the record reflects a genuine issue of material fact regarding consent, precluding summary disposition in favor of the City on that basis.

Respectfully submitted,

Dated: August 12, 2021

By: /s/ Daniel S. Korobkin

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[4] Harrison appealed the trial court's determination that he had consented to the P&P, but the Court of Appeals affirmed the grant of summary disposition without addressing the issue of consent. This Court reversed and remanded. On remand, the parties filed supplemental briefs, and Plaintiffs again argued that Harrison did not consent—but Defendants failed to address the consent issue at all. The Court of Appeals again affirmed without addressing consent. In answering Plaintiffs' application for leave to appeal, Defendants again failed to raise consent as a defense to Harrison's claim that the P&P violated his Fourth Amendment rights. Thus, it is clear that Plaintiffs have preserved this issue, but doubtful whether Defendants have done so.

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