IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals
Wilder, P.J., and Boonstra and O'Brien, JJ.

DENISHIO JOHNSON,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

Supreme Court No. 156057
Court of Appeals No. 330536
Lower Court No. 14-007226-NO

KEYON HARRISON,

Plaintiff-Appellant,

v

CURT VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

Supreme Court No. 156058
Court of Appeals No. 330537
Lower Court No. 14-002166-NO

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QUESTION PRESENTED

Grand Rapids authorizes its police officers to obtain fingerprints and photographs of people who they detain as part of a *Terry* stop. The procedure is set forth in the police department's field training manual, the City admits that it has a custom and practice of authorizing its police officers to use that procedure, and its officers regularly used the procedure for over 30 years. Using the procedure, however, is apparently not required; in any given instance, officers had discretion whether to use it, and they chose to do so during the encounter with each plaintiff that gave rise to this case. Was any alleged violation of the plaintiffs' constitutional rights the result of a policy or custom instituted or executed by the defendant City of Grand Rapids? See *Monell v Dep't of Social Servs of New York*, 436 US 658 (1978).

The Trial Court did not decide this question.
The Court of Appeals said: No
Defendants-Appellees say: No
Plaintiffs-Appellants say: Yes

INTRODUCTION

The record in this case amply demonstrates that the City of Grand Rapids has an official policy or custom of authorizing its Police Department and police officers to use a "picture and print" (P&P) procedure to take photographs and fingerprints of people who are not carrying identification when stopped by police, even though there is no probable cause for an arrest and no evidence of criminal activity is found. That policy or custom authorizing the City's police officers to engage in particular conduct—in this case, to take P&Ps as part of *Terry* stops absent probable cause—is causally linked as the "moving force" to the constitutional violations on which Plaintiffs' claims are based. Absent the policy or custom, no P&P would have taken place and no constitutional violation would have occurred.

The P&P practice, as the City admits, has been a regular part of police interactions with Grand Rapids citizens for over 30 years. Police are instructed to conduct P&Ps and provided with equipment to make it easy for them to do so. Technology has advanced over the decades, of course—the police now take pictures with digital cameras instead of Polaroids, for example, and can upload those photos to computers in their patrol vehicles—but the experience of citizens who lack identification when detained as part of *Terry* stops has remained remarkably consistent and widespread.[1]

This longstanding procedure caught up with Plaintiffs-Appellants Denishio Johnson (Docket No. 156057) and Keyon Harrison (Docket No. 156058) when they were individually stopped on separate occasions in 2011 and 2012. During these stops, Johnson and Harrison told

[1] As recently as 2015, the P&P procedure swept in potentially more than 2,000 people to be photographed and printed solely because they were not carrying photo ID. See Virginia Gordan, Michigan Radio, *Grand Rapids Modifies its Fingerprint Policy* (Dec 2, 2015) < http://michiganradio.org/post/grand-rapids-modifies-its-fingerprint-policy#stream/0> (accessed February 14, 2017), quoting the City's police chief.

the officers their names and cooperatively responded to numerous questions. At the end of each stop, the officers determined that they had no basis to detain either young man further. However, in accordance with the City's policy and using the techniques they'd been taught and encouraged to perform, the officers took photos and fingerprints of both teens before releasing either of them.

In 2014, Johnson and Harrison filed separate suits against the City and the police officers involved in each stop, alleging that their Fourth Amendment rights had been violated when the officers conducted the P&Ps. Consistently with this Court's January 12, 2018 Order limiting the scope of the supplemental briefing, Plaintiffs explicitly assume for purposes of this brief that those violations will be established. The sole question here is whether the City is responsible for the violations under theories of municipal liability.

The courts below said no. In doing so, they erred, rejecting Johnson and Harrison's claims for municipal liability even though it was undisputed that the City has for decades followed a P&P policy and that the policy authorizes and encourages officers to take P&Ps during field interrogations and *Terry* stops like those at issue here. Specifically, the Court of Appeals erred as a matter of law by adopting a standard that allows plaintiffs to recover from municipalities for constitutional violations only if the challenged municipal policy explicitly *requires* unconstitutional conduct, as opposed to "merely" authorizing it. This approach to municipal liability fails to properly address the foundational question of *responsibility*: whether a municipal policymaker has made a meaningful and conscious choice that caused a constitutional injury. This approach would therefore allow municipalities to avoid responsibility for unconstitutional conduct that they explicitly authorize, so long as officers are not mandated to engage in the unconstitutional act.

The Court of Appeals' emphasis on whether the City mandated unconstitutional conduct conflicts with the Supreme Court's explicit decision not to go so far in limiting municipal liability. Instead, the Supreme Court's approach is broader in scope, holding municipalities liable for constitutional violations not only when they specifically order that officers or employees engage in such conduct, but also when the municipality gives official sanction to it—here, authorizing P&Ps during *Terry* stops.

The City had many alternatives in how it might structure a policy addressing P&Ps, or indeed whether to allow its officers to take P&Ps at all. When it chose to adopt a policy authorizing P&Ps in field interrogations and *Terry* stops absent probable cause, and chose to encourage its officers to conduct P&Ps in those circumstances, it took on the responsibility for any violations that might arise when officers subsequently acted in accordance with the policy. The fact that an officer is not compelled to take a P&P in each and every *Terry*-stop encounter with a citizen does not and should not shield the City from responsibility for its foundational decision to implement the policy under which an officer then decides whether to take a P&P in a particular situation. By sanctioning P&Ps during *Terry* stops, by establishing procedures for police to follow when doing so, and by implementing procedures for what the Police Department can then do with the photos and prints that had been obtained, the City's policy led directly to the officers' actions during the individual stops.

FACTS AND PROCEDURAL HISTORY

The City's Photograph & Print Policy

The City of Grand Rapids admits that, for over thirty years, its Police Department (GRPD) has had a standard practice of taking photos and fingerprints of people who are not carrying identification when stopped by police, even though they are not arrested and no evidence of criminal activity is found. Def/Appellee's Br on Appeal (*Johnson v Bargas*),

Appendix 298a. This "custom, practice, or procedure [is] referred to as 'picture and print' or 'P&P.'" *Id.* Under this policy,

> [a] GRPD officer may take a photograph and fingerprint of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. *A photograph and print may also be taken in the course of a field interrogation (i.e., a citizen contact or a stop, depending on the circumstances), if appropriate, based on the facts and circumstances of that incident.*

Id. (emphasis added).

The City further admits that this policy is referenced in the GRPD Field Training Manual used to prepare and train officers for situations that they might face while on patrol. *Id.* at 298a-299a. Specifically, the Manual includes "picture and print" as part of the procedures that officers should follow when preparing field interrogation reports. GRPD Field Training Manual, Appendix 171a. The Manual further identifies "picture and print procedures" as one of the "training considerations" for field interrogations. *Id.* at 172a. Captain Curt VanderKooi, an individual defendant in both cases and the officer who initiated and who was in charge at the stop of Harrison, described the field interrogation procedures as instructing officers to "take a P and P, meaning photograph and print, under circumstances where you're engaged in a contact or stop or detained somebody." VanderKooi Dep, Appendix 114a. He further explained that the field interrogation procedures "outline[] the guidelines for taking pictures and prints, as well as writing police reports." *Id.* To assist police in performing P&Ps, "[p]atrol sergeants are assigned a fingerprint kit and use a GRPD 'print card,'" Def/Appellee's Br on Appeal (*Harrison v VanderKooi*), Appendix 245a, and carry digital cameras with which to perform P&Ps, *id.* Captain VanderKooi and Sergeant Bargas (the officer who took the P&P of Plaintiff Johnson) stated that both the decision to take Plaintiffs' photographs and fingerprints, and the manner in

which it was done, was in keeping with departmental policy. VanderKooi Dep, Appendix 114a; Bargas Dep, Appendix 136a.

The GRPD has established procedures that officers should follow after they take a P&P. These procedures include completing print cards, submitting them to the patrol work box at the police station at the end of a shift to be processed by the Latent Print Unit, and filing and storing the print cards. Def/Appellee's Br on Appeal (*Harrison v VanderKooi*), Appendix 245a. Similarly, photos are transferred from digital cameras to computers in an officer's patrol vehicle, and then uploaded to the Police Department's central police computer. LaBrecque Dep, Appendix 75a. Following both of the stops at issue in this case, the officers submitted the P&P cards at the end of their shifts according to these procedures. *Id.* at 75a-76a; Bargas Dep, Appendix 136a-137a. They also uploaded the photos consistently with how they'd been trained and the equipment that had been provided to them. LaBrecque Dep, Appendix 75a; Bargas Dep, Appendix 134a, 136a.

P&Ps are not isolated occurrences. The City produced the incident reports and other documents associated with the fingerprints obtained in 2011 and 2012, which showed that the City obtained 1,100 total print cards; 609 were obtained in 2011 and 491 in 2012. Def/Appellee's Br on Appeal, Appendix 245a.

As the City's police chief admitted in 2015, the P&P practice was used extensively enough to cause potentially more than 2,000 people to be photographed and printed each year, solely because they were not carrying photo ID.[2] The City has since supposedly relaxed its policy, purportedly now only seeking photos and fingerprints from people who lack ID and act in

[2] See Gordan, *supra* n 1.

a "highly suspicious" manner.[3] Still, the police chief estimates that a hundred or so people who have committed no crime will continue to be photographed and printed each year.[4] The City apparently retains all of these photos and prints indefinitely. In response to interrogatories, the City admitted that its Latent Print Unit "currently" stored print cards from "calendar year 2011-present [2015] in its office" and cards from "2002-2010 . . . in the third floor records room." City's Resp to Harrison's First Discovery Set, Appendix 40a-41a.

The City's Use of the Photograph & Print Policy on Harrison

Keyon Harrison, a 16-year-old African-American high school student, was walking home from school when he offered to help a classmate carry a toy fire truck. Harrison Dep, Appendix 55a. Captain VanderKooi observed him carrying the toy fire truck and returning it to his friend. VanderKooi Dep, Appendix 108a. Captain VanderKooi thought Harrison's behavior was suspicious, and stopped him. *Id.* at 109a.

Harrison did not have any identification on him when he was stopped, but he provided his name to Captain VanderKooi. *Id.* at 122a. Captain VanderKooi ultimately concluded that there was no probable cause to arrest Harrison and allowed him to leave. *Id.* at 112a.

Before Captain VanderKooi allowed Harrison to leave, however, he told Harrison that to "identify who I am he would have to take my picture." Harrison Dep, Appendix 61a. At Captain VanderKooi's direction, Sergeant LaBrecque took Harrison's photo and thumbprint, LaBrecque Dep, Appendix 74a, using "a department issued thumb print card for just this type of P and P that lists some information as an open space for the thumb print," *id.*

[3] *Id.*
[4] *Id.*

The City's Use of the Photograph & Print Policy on Johnson

Denishio Johnson, a 15-year-old African American male, was walking through an athletic club parking lot. Johnson Dep, Appendix 143a. An athletic club employee observed Johnson walking through the parking lot, believed he was looking into cars, and called the police. Bargas Dep, Appendix 131a. When Johnson was stopped by police, he did not have identification, Johnson Dep, Appendix 143a, but provided his name, address, and birthdate. Bargas Dep, Appendix 132a-133a. Based on that information, one of the officers present confirmed that he had no outstanding warrants or previous arrests. Johnson Incident Report, Appendix 88a.

An officer photographed Johnson and took a full set of his fingerprints, both for identification purposes and because he thought Johnson could be a suspect in previous burglaries in the lot. Bargas Dep, Appendix 136a. Johnson's photographs and fingerprints were not submitted or processed immediately. Instead, Sergeant Bargas gave them to another officer to submit at the end of the other officer's shift, and the prints were not actually processed until some indeterminate time after that. Def/Appellee's Br on Appeal (*Johnson v Bargas*), Appendix 298a. Johnson was never charged with an offense. *Id.* at 297a.

The Lower Court Proceedings

On the issue of municipal liability, the trial court found no constitutional violation in either case, and thus granted the City's motion for summary disposition as to municipal liability. *Johnson* Trial Court Opinion & Order, Appendix 228a-229a; Trial Court Opinion & Order, Appendix 215a. The Court of Appeals did not reach the constitutional violation issue, holding in its published *Johnson* opinion that the Plaintiffs failed to show that any constitutional violation was caused by an official municipal policy or custom. *Johnson* Court of Appeals Opinion, Appendix 367a. In so ruling, the Court of Appeals relied on the City's claim that a "P&P was

discretionary and dependent on the particular facts of the incident in question." *Id.* at 367a. The Court of Appeals concluded as follows:

> We therefore conclude that plaintiff failed to raise a genuine issue of material fact concerning whether Bargas's action was taken "under color of some official policy" whether written or unwritten, when the most that can be gleaned from the evidence presented to the trial court was that the P&P procedure was *available for use by GRPD officers and could, depending on particularized circumstances*, be used during the field interrogation of a person who was never arrested or charged with a crime.

Id. at 368a (emphasis added). On numerous other occasions, the Court of Appeals emphasized its view that there was no municipal liability because the City's policy did not require officers to take P&Ps. E.g., *id.* at 367a ("However, the documentation relied upon by plaintiff does not indicate that the city has a policy of *requiring* P&Ps during field interrogations and stops.") (emphasis added); *id.* at 367a ("Nothing about these references *instruct* GRPD officers to take P&Ps *during every field interrogation or stop or every such encounter* where the subject lacks official identification or to P&P 'innocent citizens.'" (emphasis added); *id.* at 368a ("In this case . . . plaintiff cannot show that the city '*specifically directed*' Bargas to violate plaintiff's rights.") (emphasis added). The opinion in *Harrison* adopted *Johnson*'s reasoning about municipal liability. *Harrison* Court of Appeals Opinion, Appendix 340a, 346a.

Proceedings in this Court

Plaintiffs-Appellants timely filed their application for leave to appeal on July 5, 2017. By order of January 12, 2018, this Court directed the Clerk to schedule oral argument on whether to grant the application or take other action, and ordered the parties to file supplemental briefs "addressing whether any alleged violation of the plaintiffs' constitutional rights were the result of a policy or custom instituted or executed by the defendant City of Grand Rapids."

ARGUMENT

I. General Principles of Municipal Liability Establish the Importance of Holding Municipalities Responsible for Conduct that They Officially Authorize.

The Supreme Court's current approach to municipal liability begins with *Monell v Department of Social Services of New York*, 436 US 658, 691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). In that case, the Court for the first time held that municipalities can be sued under 42 USC 1983, ruling that municipalities are persons within the meaning of the statute and can be found liable under the statute for constitutional violations. *Id.* at 694. Extending §1983 liability to municipalities did much to make constitutional guarantees meaningful to injured plaintiffs, of course, but of even more importance are the principles laid down by *Monell* and fleshed out by later cases for *when* municipalities can be sued. A municipality is liable under 42 USC 1983 where an "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. Assuming a constitutional violation has occurred, plaintiffs establish a municipal liability claim against a municipal entity under 42 USC 1983 by showing that a (1) municipal *policy or custom* (2) *caused* the alleged constitutional violation. *Id.* at 694; *Jackson v Detroit*, 449 Mich 420, 433; 537 NW2d 151 (1995); *York v Detroit*, 438 Mich 744, 754-755; 475 NW2d 346 (1991).

There are "at least four avenues" available for plaintiffs to satisfy the municipal "policy or custom" prong of a municipal liability claim. *Thomas v Chattanooga*, 398 F3d 426, 429 (CA 6, 2005). First, plaintiffs may demonstrate the existence of an official policy, as in *Monell*, 436 US at 694. Second, plaintiffs may point to the decisions or actions of an official with final policy-making authority, as in *Pembaur v City of Cincinnati*, 475 US 469, 480; 106 S Ct 1292; 89 L Ed 2d 452 (1986). Third, plaintiffs may produce evidence to demonstrate a municipality's failure to train, supervise, screen, etc., as in *Canton v Harris*, 489 US 378, 388-389; 109 S Ct

1197; 103 L Ed 2d 412 (1989) (failure to train) or *York*, 438 Mich at 756 n 4 (failure to supervise jail facilities and screen for potentially suicidal prisoners). Fourth, plaintiffs may produce evidence to demonstrate the existence of a custom that may not be written or formally approved, but that is "so permanent and well settled as to constitute a 'custom or usage' with the force of the law," as the Supreme Court explained in *Monell*, 436 US at 691, quoting *Adickes v S H Kress & Co*, 398 US 144, 167-168; 90 S Ct 1598; 26 L Ed 2d 142 (1970). Here, as set forth later, Plaintiffs proceed under the first and fourth ways of showing "policy or custom," as the record establishes either an official policy or, at a minimum, a widespread custom or practice.

The causation prong of the test for municipal liability requires "an affirmative link between the policy or custom and the particular constitutional violation alleged. The alleged policy or custom must be the 'moving force' of the constitutional violation in order to establish liability." *Jackson*, 449 Mich at 433. This requirement of a "direct causal link between the municipal action and the deprivation of federal rights" mitigates concerns about respondeat superior liability for municipalities and ensures that responsibility for a constitutional injury is attributed to the appropriate party. *Bd of Co Comm'rs v Brown*, 520 US 397, 404; 117 S Ct 1382; 137 L Ed 2d 626 (1997).

As the earlier discussion suggests, these general principles incorporate the fundamental idea of responsibility, ensuring that while respondeat superior is not enough to pin liability on a municipality, plaintiffs can recover "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 US at 694. This ensures that municipalities are not able to escape responsibility over matters that are properly in their control, and that they cannot avoid

accountability simply by, as the City tries to do here, pushing matters downward to lower-level employees and letting them take the heat when constitutional violations occur.

II. Consistent with this Court's Order Limiting the Scope of the Supplemental Briefs, Municipal Liability Can Be Assessed without Determining if the Challenged Police Conduct is Unconstitutional.

This Court's January 12, 2018 Order limits the scope of supplemental briefing to the municipal liability question. Accordingly, as noted earlier, Plaintiffs assume that supplemental briefing will proceed without argument by either side on whether a constitutional violation occurred. This assumption is consistent with Supreme Court case law assessing the constitutional inquiry and the municipal liability inquiry separately and without order of priority. See *Collins v Harker Hts*, 503 US 115, 121-122; 112 S Ct 1061; 117 L Ed 2d 261 (1992). Put another way, the municipal liability claim can be decided without first deciding the constitutional claim. *Id.* at 123, citing *Canton*, 489 US at 385. *Collins* explains that for the purposes of assessing a municipal liability claim, courts can either assume a constitutional violation *arguendo* or the constitutional question can be ignored altogether. See *id.* at 121-124, citing *Oklahoma City v Tuttle*, 471 US 808; 105 S Ct 2427; 85 L Ed 2d 791 (1985); *St Louis v Praprotnik*, 485 US 112; 108 S Ct 915; 99 L Ed 2d 107 (1988); *Canton*, 489 US 378.

In sum, there is no need to decide the constitutional question first or to somehow aggregate it with the municipal liability issue. Plaintiffs understand this Court's briefing order as asking whether the City has responsibility for the actions that Plaintiffs allege are unconstitutional. Plaintiffs thus assume for purposes of the following argument that the asserted constitutional violations will be established and need not be further addressed here to answer the municipal liability question presented by this Court's order.

III. The Assumed Violation of the Plaintiffs' Constitutional Rights was the Result of a Policy or Custom Instituted or Executed by the City of Grand Rapids.

A. The City has an Official Policy or Custom of performing P&Ps during *Terry* Stops.

Municipalities are liable when "action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell*, 436 US at 691. The record includes extensive evidence that the City has authorized the police to take fingerprints and photographs during *Terry* stops where there is no warrant and no probable cause for arrest. That is the policy at issue here.[5] The GRPD Field Training Manual sets out this policy, and the City admits to the existence of this policy. Moreover, the policy is confirmed by the City's conscious choice to authorize the P&P procedure, as well as the existence of a corresponding procedure for processing, handling, and storing fingerprints and photographs gathered through the use of the P&P procedure. And even if the Court finds that this evidence is not sufficient to show the existence of a formal policy, the City's use of the P&P procedure is, at minimum, a persistent and widespread custom. The existence of this custom is confirmed by, again, the City's admissions, as well as the evidence that the City has trained officers to use this policy for at least thirty years.

1. The City's P&P policy is confirmed by extensive evidence, including the GRPD Field Training Manual, the City's own admissions, the City's choice to authorize the P&P procedure, and the existence of a procedure for handling information gathered pursuant to the P&P procedure.

A municipality is responsible for "the acts of its policymaking officials." *Connick v Thompson*, 563 US 51, 61; 131 S Ct 1350; 179 L. Ed. 2d 417 (2011). See also *Pembaur*, 475 US

[5] Plaintiffs do not contend that P&Ps in all circumstances are unconstitutional—for example, after a suspect is properly arrested. Nor do Plaintiffs argue to this Court that the City's policy speaks in terms of "innocent people," which is how the City framed the policy in its brief opposing leave. Rather, the challenged policy is as described: taking P&Ps without a warrant or probable cause during field investigations that do not result in an arrest. The question is not whether there are ever circumstances when a P&P would be legal, but rather whether the City's policy authorizes P&Ps in circumstances, such as those here, where P&Ps are (in Plaintiffs' view) unconstitutional.

at 479-480. As a matter of law, the City is responsible for the policies promulgated by the Chief of Police through the GRPD's Field Training Manual and other materials that establish when and how to conduct P&Ps. See *Rushing v Wayne Co*, 436 Mich 247, 260, 462 NW2d 23 (1990).

Here, the record contains numerous pieces of evidence that confirm the existence of GRPD's P&P policy: (1) written documents, including the GRPD Field Training Manual; (2) the City's own admissions regarding the existence of a policy; (3) the City's conscious choice to authorize the GRPD to use the P&P procedure; and (4) the existence of a procedure for processing, handling, and storing fingerprints and photographs gathered pursuant to the P&P policy.

The GRPD's Field Training Manual is itself enough to establish the City's P&P policy. A police training manual is, by definition, a set of "formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." See *Pembaur*, 475 US at 480-481; see also *Garner v Memphis Police Dep't*, 8 F3d 358 (CA 6, 1993) (finding a "policy" where police department order authorized use of deadly force to apprehend fleeing felon). Here, the record is replete with written documents, including the GRPD Field Training Manual, developed and/or approved by top officials within the GRPD, showing that the City intended to, and did, establish a procedure for officers to follow when they stopped individuals without identification. For example, the City admits that this policy is referenced in the GRPD Field Training Manual, Def/Appellee's Br on Appeal (*Johnson v Bargas*), Appendix 298a-299a, which includes "picture and print" as part of the procedures for field interrogation reports and further identifies "picture and print procedures" as one of the "training considerations" for field interrogations. GRPD Field Training Manual, Appendix 171a-172a. Indeed, Captain VanderKooi described the field

interrogation procedures as instructing officers to "take a P and P, meaning photograph and print, under circumstances where you're engaged in a contact or stop or detained somebody." VanderKooi Dep, Appendix 114a. Further, he explained that "in [the field interrogation procedures] it outlines the guidelines for taking pictures and prints, as well as writing police reports." *Id.*

Likely recognizing the undeniable conclusions to be drawn from this written and testimonial documentation, the City has essentially admitted on several occasions in this litigation that its P&P procedures are a policy for municipal liability purposes. Specifically, the City admitted that the GRPD "has developed a custom, practice, or procedure referred to as 'picture and print' or 'P&P,'" Def/Appellee's Br on Appeal (*Johnson v Bargas*), Appendix 298a, and that this practice has been in use "for over thirty years," *id.* Under this policy,

> [a] GRPD officer may take a photograph and fingerprint of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. *A photograph and print may also be taken in the course of a field interrogation (i.e., citizen contact or a stop, depending on the circumstances), if appropriate, based on the facts and circumstances of that incident.*

Id. (Emphasis added). The City's admissions are phrased in part using the terminology of "custom" (see later Section II.A.2). But the City's candid recognition that the GRPD has comprehensive and longstanding procedures authorizing its officers to take P&Ps and directing them when and how to do so, including during *Terry* stops, goes well beyond mere custom, and instead shows that even the City admits it has an official policy about P&Ps. The City acknowledges that it has a set of standard procedures for its officers to follow, and which they in fact have followed for decades. This is more than enough to establish the existence of an official policy. See *Pembaur*, 475 US at 480-481.

The existence of a policy is further demonstrated by the City's conscious decision to authorize the GRPD to use the P&P procedure, as opposed to alternative courses of action. "[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives." *Tuttle*, 471 US at 823; see also *Pembaur*, 475 US at 483 ("[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."). For example, as one option, the City could have prohibited the GRPD and its officers from photographing and fingerprinting individuals without an arrest or evidence of criminal activity. Alternatively, the City could have authorized a different method for determining when and how to confirm the identity of individuals who provide their names and contact information but who lack identification. Further, the City has now chosen an apparently more limited policy that restricts the situations in which P&Ps will be taken during *Terry* stops.[6] This change in enforcement procedures itself shows that the City is indeed capable of consciously choosing a course of action from alternative options.

The City's admitted policy of performing P&Ps during *Terry* stops is further reinforced by the record evidence that shows that the GRPD also has a practice for what comes after such stops: storing photographs in the electronic management system, submitting print cards to the patrol work box at the police station at the end of a shift to be processed by the Latent Print Unit, and filing and storing the print cards. Def/Appellee's Br on Appeal (*Harrison v VanderKooi*), Appendix 245a. The officers in both *Harrison* and *Johnson* followed these procedures when

[6] John Agar, MLive, *Police accused of targeting minorities for photos, fingerprints cleared in court* (June 2, 2017) <http://www.mlive.com/news/grand-rapids/index.ssf/2017/06/police_accused_of_targeting_mi.html> (accessed Feb 14, 2017).

submitting the P&P cards at the end of their shifts. LaBrecque Dep, Appendix 75a-76a; Bargas Dep, Appendix 136a-137a. Even after the City purportedly changed its policy to no longer automatically take fingerprints and photos of everyone who lacked ID when detained as part of a *Terry* stop, it acknowledged that "[t]he fingerprints and photos that have already been taken will not be purged from the department's databases at this time."[7]

The City's admissions are themselves enough to show that it has an official policy of allowing P&Ps during *Terry* stops. But the record contains much more than that. It is impossible to reconcile the City's admissions and the record with the Court of Appeals' conclusion that there was no official policy authorizing P&Ps during *Terry* stops. The evidence shows, and the City essentially admits, that the City's authorization of the P&P procedure was intended to and did establish a fixed plan of action to be followed consistently and over time by police officers. See *Pembaur*, 475 US at 480-81.

The City cannot escape liability by claiming that the officers who administered the P&P were not policymakers. That officers were permitted to decide whether to administer the P&P procedure in particular instances is insufficient to establish that it was not a "policy" for purposes of *Monell*. For example, in *Chew v Gates*, 27 F3d 1432 (CA 9, 1994), "departmental policy *authorized* seizure of all concealed suspects—resistant or nonresistant, armed or unarmed, violent or nonviolent—by dogs trained to bite hard and hold." *Id.* at 1444 (emphasis added). The court found that, even if lower-level officers were responsible for implementing the policy, the city could not "escape liability for the consequences of established and ongoing departmental policy regarding the use of force simply by permitting such basic policy decisions to be made by

[7] See Heather Walker, WOOD 8 TV, *GRPD ends standard of fingerprinting without ID* (Dec 1, 2015) <http://woodtv.com/2015/12/01/grpd-ends-routine-practice-of-taking-prints-of-people-without-i-d/> (accessed Feb 14, 2018).

lower level officials who are not ordinarily considered policymakers." *Id.* at 1445. Here, too, the City cannot escape liability for implementing a policy authorizing officers to take P&Ps by couching the policy in terms that merely "authorize" officers to perform P&Ps rather than requiring them to do so.

2. At a minimum, the City has a "persistent and widespread" custom of performing P&Ps during *Terry* stops; the City admits that it uses the P&P procedure, and the record shows that the City has trained officers to perform P&Ps for at least thirty years.

The previous section shows the ample evidence of an official P&P policy. But even if no such formal policy existed—a conclusion at odds with the City's admissions and its officers' testimony—there is also more than enough evidence of the existence of a custom of performing P&Ps during *Terry* stops. "Section 1983 also authorizes suit 'for constitutional deprivations visited pursuant to governmental custom even though such a custom has not received formal approval through the body's official decisionmaking channels.'" *Cash v Hamilton Co Dep't of Adult Probation*, 388 F3d 539, 542-543 (CA 6, 2004), quoting *Praprotnik*, 485 US at 121. This includes government custom in the form of "practices so persistent and widespread as to practically have the force of law." *Connick*, 563 US at 62. See also *Pembaur*, 475 US at 480-481. Practices that reflect a course of action deliberately chosen from among various alternatives are "customs" for the purposes of municipal liability. *Doe v Claiborne Co*, 103 F3d 495, 508 (CA 6, 1996), citing *Tuttle*, 471 US at 823. In short, a widespread governmental practice, even if not authorized in writing, gives rise to governmental liability as a "custom." *Feliciano v City of Cleveland*, 988 F2d 649, 655 (CA 6, 1993).

The City's admission regarding its long-standing use of the P&P procedure is sufficient to show the existence of a custom. For example, in *Mobley v City of Detroit*, 938 F Supp 2d 669 (ED Mich, 2012), the city was liable for its widespread, permanent, and well settled practice of

detaining individuals without probable cause for their presence at an illegal bar and of impounding the cars driven to those venues. *Id.* at 684. The court found that the city's admission that these practices were standard operating procedure, along with officer testimony on this practice, was sufficient to show the existence of a custom. *Id.* Here, as in *Mobley*, the City has similarly admitted that it has a standard operating procedure for when and how to take P&Ps, a procedure it has expected its officers to comply with for over 30 years. Def/Appellee's Br on Appeal (*Johnson v Bargas*), Appendix 298a.

Beyond the City's admissions as to the use of the P&P procedure, additional record evidence also supports the conclusion that P&Ps during *Terry* stops are both "persistent and widespread." See *Connick*, 563 US at 61-62. Even in the absence of formal written documentation of a government practice, evidence showing that officers were trained to engage in those practices is enough to establish a custom. In *O'Brien v Grand Rapids*, 23 F3d 990 (CA 6, 1994), the court found that the Grand Rapids Police Department had a policy of not securing warrants when conducting searches during "critical incidents" that did not rise to the level of exigent circumstances that would justify a warrantless search. *Id.* at 1004. "[T]he procedure manual was drafted to be silent on the general warrant requirement of the Fourth Amendment," but the consulting expert hired to train officers on critical incident procedure "instructed the city's officers that warrants were not required in critical incidents, making no distinction between the varying circumstances that could be presented." *Id.* The development of the written procedures and the training sessions lasted for four years, *id.* at 1004, and the city continued to follow these procedures for an additional three years until the incident giving rise to the suit, see *id.* at 1004 ("In accordance with [the consultant's teachings about the scope of the Fourth

Amendment], Grand Rapids followed the routine practice of not securing warrants during the management of critical incidents.").

Similarly, even if, as in *O'Brien*, the GRPD Field Training Manual is viewed as being silent on the existence of an official policy of authorizing P&Ps during *Terry* stops (as described earlier in Section III.A.1, it is not), the record evidence shows that officers were trained to perform P&Ps under these circumstances. Cf. *Jones v Powell*, 227 Mich App 662, 678; 577 NW2d 130 (1998) (finding no policy of entering homes without a warrant where there was no evidence that police department "approved of or condoned" such incidents), aff'd 462 Mich 329, 612 NW2d 423 (2000). The City not only "approved of" and "condoned" P&Ps during *Terry* stops, it trained officers to perform them. Captain VanderKooi explained that GRPD's field interrogation procedures "state that you can take a P and P . . . under circumstances where you're engaged in a contact or stop or detained somebody." VanderKooi Dep, Appendix 114a. Similarly, Sergeant LaBrecque affirmed that department issued thumb print cards are used for "just this type of P&P." LaBrecque Dep, Appendix 74a. The GRPD's Field Training PowerPoint includes numerous references to P&Ps in the context of field interrogations, including an example of a P&P card, a sample field interrogation report including the use of the P&P procedure on suspects who were subsequently released, and the use of P&Ps during stops of suspected gang members and drug dealers where no contraband was found. PowerPoint Slides from Officer Training, Appendix 179a, 182a. Consistent with these training documents, Captain VanderKooi, who served as the commander of the training unit and as a certified ethics instructor, testified that "police officers taking photographs and thumbprints known as P and P of individuals with whom they made contact is a commonly known longstanding custom and

practice of the Grand Rapids Police Department" since at least 1980. VanderKooi Dep, Appendix 115a.

The P&P practice is also widespread: the City produced the incident reports and other documents associated with the fingerprints obtained in 2011 and 2012, showing that the City obtained 1,100 total print cards over the two-year period. Def/Appellee's Br on Appeal (*Harrison v VanderKooi*), Appendix 245a. As the City's police chief admitted in 2015, this practice was used extensively enough to potentially lead to over 2,000 people being asked each year, solely because they were not carrying photo ID, to submit to photographing and fingerprinting when stopped by police.[8]

The existence of a shared set of norms for completing print cards, submitting them to the patrol work box at the police station at the end of a shift to be processed by the Latent Print Unit, and filing and storing the print cards, Def/Appellee's Br on Appeal (*Harrison v VanderKooi*), Appendix 245a, is further evidence that officers were acting pursuant to custom. See *Bordanaro v McLeod*, 871 F2d 1151, 1156 (CA 1, 1989) ("A reasonable inference to draw from this is that all of the officers involved were operating under a shared set of rules and customs. The fact that all of these officers acted in concert is further evidence that there was a pre-existing practice of breaking down doors when apprehending felons."). It beggars belief to conclude that an elaborate set of procedures for all aspects of taking P&Ps and handling print cards somehow sprung to life *ex nihilo*. Procedures this intricate did not come about as the unsupervised frolics of one or two wayward individual officers. See *O'Brien*, 23 F3d at 1005 (rejecting the argument that a municipality's "demonstrated commitment of money and personnel, over a period of four years, was that of renegades acting in an ultra vires capacity"). Instead, this widespread practice

[8] Gordan, *supra* n 1.

of 30 years' duration could not have been created and followed for so long without the active participation and/or tacit support of the City's police chief, captains and other supervisors within the GRPD, as well as the many other officers who regularly engaged in P&P procedures during *Terry* stops.

B. Because the Photograph & Print Policy or Custom Authorized Officers to Perform P&Ps during *Terry* Stops, it was the "Moving Force" behind the Alleged Constitutional Violations.

1. Causation for municipal liability hinges on standard tort causation concepts such as reasonable foreseeability.

A municipality is liable for a constitutional violation when its policies are the "moving force [behind] the constitutional violation." *Monell*, 436 US at 694-695. As noted earlier, requiring a "direct causal link between the municipal action and the deprivation of federal rights" distinguishes *Monell* from respondeat superior liability and ensures that responsibility for a constitutional injury is attributed to the appropriate party. *Brown*, 520 US at 404.

"Traditional tort concepts of causation inform the causation inquiry on a § 1983 claim." *Powers v Hamilton Co Pub Defender Comm*, 501 F3d 592, 608 (CA 6, 2007). Specifically, "§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" *Malley v Briggs*, 475 US 335, 344 n 7; 106 S Ct 1092; 89 L Ed 2d 271 (1986), quoting *Monroe v Pape*, 365 US 167, 187; 81 S Ct 473; 5 L Ed 2d 492 (1961). If it is "reasonably foreseeable that the complained of harm would befall the § 1983 plaintiff as a result of the defendant's conduct" and there is no superseding cause, the municipality is liable as the proximate cause for the constitutional violation. *Powers*, 501 F3d at 609.

Where a custom or policy authorizes a constitutional violation, it is reasonably foreseeable that a violation will occur. See *Garner*, 8 F3d at 364-364 (finding that a policy

authorizing the use of deadly force to apprehend "nondangerous fleeing burglary suspects" was the "moving force of the constitutional violation"). Accordingly, liability flows not only when a local government orders its employees to engage in conduct, but also when it officially *sanctions* that conduct. See *Pembauer*, 475 US at 480; *Bielevicz v Dubinon*, 915 F2d 845, 851 (CA 3, 1990) ("A sufficiently close causal link between . . . a known but uncorrected [unconstitutional] custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom."), quoting *Spell v McDaniel*, 824 F2d 1380, 1391 (CA 4, 1987).

2. Causation for municipal liability purposes is not limited to situations where a municipality requires its employees to engage in unconstitutional conduct.

A municipality may not shield itself from liability simply by couching its official directives to its employees in non-mandatory terms. The Court of Appeals erred in concluding that there was no municipal liability because the P&P did not *require* police officers to conduct P&Ps during field interrogations and stops. The Court of Appeals cites no authority for this proposition, and Plaintiffs are aware of no authority that supports it. Adopting the Court of Appeals' reasoning would ignore the primary focus of *Monell* on "responsibility," under which the "'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur*, 475 US at 478-479. The Court of Appeals' focus on whether a challenged policy *orders* police officers to engage in certain acts will allow municipalities throughout the state to avoid liability by explicitly authorizing but not requiring improper conduct by its officers, and thus would provide an unjustified loophole for municipalities to escape liability for constitutional injuries that they clearly caused. The fact that the City's policy reserves a "choice" to individual officers to decide

whether to take a P&P in any given encounter with a citizen does not and should not shield the City from the foundational choice it made to implement the policy in the first place.

Specifically, under the Supreme Court's approach to government liability for constitutional violations, municipalities are not liable under respondeat superior theories for everything their employees do or don't do in the course of their employment. When the sole nexus between a municipality and the alleged unconstitutional conduct happens to be that the conduct was performed by a municipal employee, then the municipality is not responsible. In other words, simply because a government employee is on the job does not automatically make the government liable. But when the acts of the employee stem from a policy or custom, the municipality is responsible. A far different scenario arises, for example, when the employer explicitly directs employees in how to do something, because in that instance the employee is acting essentially as a pass-through conduit for the tasks that the employer wants performed. That situation is a paradigmatic example of the sort of responsibility that *Monell* and other cases properly lay on the shoulders of the government.

That result does not change when the government employer authorizes rather than requires particular conduct. A municipality cannot dodge liability simply because its policies are framed in terms of actions that employees *may* take rather than actions that they *must* take. Nor does it matter if some of the conduct authorized under the policy is lawful. A policy that authorizes unconstitutional conduct is the moving force behind that conduct, and the municipality is therefore responsible for constitutional violations resulting from the actions authorized under the policy.

To illustrate, suppose a city has a policy that allows but does not require officers to break down doors without knocking when executing search warrants. Some officers will knock and

some will not. Some no-knock door-breaking entries will be legal and some will not, depending on how exigent the circumstances are. But when an unconstitutional door-breaking entry occurs, it is the city's policy authorizing such unconstitutional action that is the moving force behind the violation, not some rogue officer's decision to conduct the entry in that manner.

The same is true here. The City specifically authorized the conduct that Plaintiffs allege is unconstitutional: conducting P&Ps during *Terry* stops. The fact that officers do not conduct a P&P during every *Terry* stop does not change the fact that the City specifically gave officers permission to do P&Ps in these circumstances. This is not a circumstance where a rogue officer decided to take Johnson's and Harrison's fingerprints and photographs: the officers did a P&P because that is what they had been told they could do and trained how to do. Nor does it matter for the causation analysis whether conducting P&Ps during *Terry* stops is legal. The question of whether the policy is the moving force behind the conduct is different from whether the conduct is in fact lawful (which of course Plaintiffs contend it is not.) Moreover, even assuming, theoretically, that not *every* P&P done during a *Terry* stop is unconstitutional, all that means is that the City's policy authorizes both constitutional and unconstitutional conduct. In other words, it still authorizes unconstitutional conduct, and is still the moving force behind that conduct.

The case law is clear that municipalities are liable where their policies authorize rather than require unconstitutional conduct. For example, in *Garner*, police officers were "authorized" to use deadly force "when necessary to apprehend a fleeing burglary suspect" if all other reasonable means of apprehension had been tried and failed. 8 F3d at 364. The existence of this policy, and the fact that the police department had trained the officer that "it was proper to shoot a fleeing burglary suspect in order to prevent escape," was enough to establish the necessary causal connection between the policy and the injury that occurred when an officer shot and killed

a fleeing 15-year-old unarmed boy. *Id.* at 360, 364-365. Even though the city's policy merely "authorized" police officers to use deadly force as opposed to requiring officers to do so, the city was nonetheless liable; the fact that the officers had discretion under the policy to shoot or not to shoot did not erase the fact that the city authorized the shooting. *Id.* at 364; see also *Stevens-Rucker v City of Columbus*, 242 F Supp 3d 608, 633 (SD Ohio, 2017) (finding municipal liability where the policy invited officers to make an unconstitutional decision to use lethal force); *Jones*, 227 Mich App at 678 (finding no municipal liability because there was insufficient evidence that the officer's action was "ordered or authorized" by the department).

Similarly, here, the P&P procedure was the moving force behind the constitutional violations because it was reasonably foreseeable that application of the policy would result in constitutional violations. The GRPD trained and authorized its officers to use the P&P procedure. As Captain VanderKooi explained, the field interrogation procedures instruct officers to "take a P and P, meaning photograph and print, under circumstances where you're engaged in a contact or stop or detained somebody." VanderKooi Dep, Appendix 114a. Consistent with this training, the field interrogation procedures "outline[] the guidelines for taking pictures and prints, as well as writing police reports." *Id.* Similarly, Officer Bargas stated that he performed the P&P procedure in accordance with departmental policy. Bargas Dep., Appendix 136a.

Officers were acting in accordance with the policy and how they had been trained under that policy when they used the P&P procedure on Harrison and Johnson. If not for the policy, officers would not have performed the P&Ps, and no constitutional violation would have occurred. See *O'Donnell v Brown*, 335 F Supp 2d 787, 817 (WD Mich, 2004) (finding a causal connection where, "[w]ere it not for the policy of relying on verbal court orders, the entry would not have happened and none of the constitutional violations would have ensued."). Indeed, the

GRPD over many years allocated significant resources and personnel to performing P&Ps, as shown by the investment in and provision of equipment used in performing P&Ps, as well as creating and revising the procedure for processing P&Ps as a result of technological changes in how P&Ps are taken. See *O'Brien*, 23 F3d 990 (finding that the police department's "critical incident" policy was moving force of violation where resources were deliberately allocated to the development and implementation of the policy).

The City argued in opposition to Plaintiffs' application that it should not be liable because the causal connection between its P&P policy and the constitutional deprivation is attenuated. See Defendants' Answer in Opposition to Plaintiffs' Joint Application at 20. There are, of course, some municipal decisions where the challenged policy is too far removed from the constitutional deprivation to give rise to liability. For example, a municipality's policy to establish a police force is, in some sense, a cause of anything that any police officer later does, but does not establish an "affirmative link between the policy and the particular constitutional violation alleged." See *Tuttle*, 471 US at 823 (opinion by REHNQUIST, C.J.) Here, in contrast, the City's policy creates the very procedures that Plaintiffs challenge as applied to them and others like them, trains police in how to implement those procedures, and authorizes police to do so in circumstances like those of Plaintiffs. It would be difficult for the link between the policy and the officers' conduct to be any more direct.

In sum, the Court of Appeals' reasoning misapplies the law of municipal liability for unconstitutional acts of police officers or other municipal employees and agents, and imposes new and potentially insurmountable obstacles for citizens challenging conduct municipalities authorize but do not require. The overly narrow approach adopted by the Court of Appeals undercuts the emphasis of *Monell* and other cases on ensuring that municipalities bear

responsibility for conduct that they authorize. The proper standard imposes liability not only when a local government orders its employees to engage in conduct, but also when it officially *sanctions* that conduct. *Pembauer*, 475 US at 480 ("*Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned ***or*** ordered.") (emphasis added.) Here, the City's policy was the "moving force" behind the alleged constitutional violations that occurred as a result of the P&Ps because the City officially sanctioned precisely that conduct when it authorized officers to perform P&Ps in field interrogations and other citizen contacts and stops.

CONCLUSION

For the reasons set forth above and in their application for leave to appeal, Plaintiffs-Appellants respectfully request that this Court grant their application for leave to appeal, reverse the decisions of the Court of Appeals, and remand.

Respectfully submitted,

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