

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals

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

_____ /

**BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., IN SUPPORT OF PLAINTIFFS-
APPELLANTS DENISHIO JOHNSON AND KEYON HARRISON**

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JURISDICTIONAL STATEMENT

The jurisdictional statement in the Appellants' Brief is adopted by amicus curiae. For the reasons stated in the accompanying Motion for Leave to File an Amicus Curiae Brief, amicus curiae respectfully requests that this Court accept this amicus brief under MCR 7.312(H).

STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”) is the nation’s first and foremost civil rights law organization. Since its incorporation in 1940, LDF has fought to eliminate the arbitrary role of race in the administration of the criminal justice system by challenging laws, policies, and practices that discriminate against Black people and other people of color. LDF’s advocacy includes serving as counsel in cases like *Davis v City of New York*, 959 F Supp 2d 324 (SDNY, 2013), which challenges the NYPD’s unlawful trespass enforcement practices and targeted searches and seizures of Black and Latino New Yorkers, in New York City Housing Authority residences. LDF has also submitted amicus briefs in state and federal courts challenging the discriminatory application and enforcement of criminal laws. *See, e.g., United States v Weaver*, 975 F3d 94 (CA 2, 2020).

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INTRODUCTION AND SUMMARY OF THE ARGUMENT¹

Plaintiffs-Appellants, Denishio Johnson and Keyon Harrison, were two Black boys who, on separate occasions, were stopped by officers with the City of Grand Rapids Police Department for engaging in benign behaviors that the officers deemed “suspicious.” The officers asked the Appellants to identify themselves—which they did by providing their names and, in Mr. Johnson’s case, an address and date of birth—and the officers then subjected them to field interrogations. Mr. Harrison’s belongings were searched. These searches and seizures confirmed that Mr. Johnson and Mr. Harrison had done nothing wrong.

Nonetheless, in accordance with the Department’s longstanding policy, the officers took photographs of the Appellants and, using an ink pad and paper, gathered their fingerprints—a thumbprint from Mr. Harrison and a full set of fingerprints, including palmprints, from Mr. Johnson—solely because they did not have photo identification. The officers retained the Appellants’ fingerprints and photographs and later added them to a large database that houses the fingerprints and photographs of thousands of the City’s residents, most of whom are Black, for potential use in pending or future criminal investigations. The court below held that the officers’ actions in photographing and fingerprinting the Appellants, and the City’s general policy of photographing and fingerprinting people without photo identification (the “P&P Policy”), do not implicate the Fourth Amendment at all. That was error.

Amicus curiae agrees with the Appellants that the P&P Policy constitutes both an unreasonable search and an unreasonable seizure when applied during an investigative stop under *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Amicus curiae writes separately to

¹ No party or counsel for a party authored this brief either in whole or in part. No person or entity other than LDF, LDF’s members, and its counsel, contributed money intended to fund preparing or submitting this brief.

explain that the Grand Rapids Police Department’s P&P Policy represents a widespread and disturbing denial of full citizenship to the City’s Black residents. The Fourth Amendment’s prohibition against “unreasonable searches and seizures” was intended to serve as a bulwark against arbitrary and oppressive police action. *See Carpenter v. United States*, __ US __, __; 138 S Ct 2206, 2213; 201 L Ed 2d 507 (2018) (“The ‘basic purpose of this Amendment,’ our cases have recognized, ‘is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.’”) (citation omitted). The Michigan Constitution contains a similar provision that protects people from “unreasonable searches and seizures.” Const 1963, art 1, § 11. These constitutional protections are especially important for Black people and other people of color, who are regularly and disproportionately the subject of abusive police practices and whose Fourth Amendment rights are often encroached upon by law enforcement.

The Grand Rapids Police Department’s P&P Policy represents one such unconstitutional encroachment. Black people have been subject to the intrusive Policy—having their fingerprints and photographs solely because they lacked identification and even when they’ve done nothing wrong—at rates that are starkly disproportionate to their percentage of the population. This troubling disparity suggests racial profiling in searches and seizures, with officers collecting fingerprints and photographs of Black residents to add to their database in anticipation of future criminality.

A rule embracing the decision of the court below would permit officers to continue to engage in the unfettered collection of who will primarily be Black people or other people of color—and especially Black youth, who risk being targeted for heightened police scrutiny and who are less likely to possess photo identification than their white counterparts. This would result in the denial of full citizenship to Black people and other people of color, would undermine trust

between law enforcement and communities of color, and would erode public confidence in the rule of law. This Court should reverse.

ARGUMENT

The Appellants, like thousands of other people in the City of Grand Rapids, were stopped, interrogated, searched, and, under the Department's P&P Policy, required to provide a fingerprint and photograph before they were free to leave. Amicus curiae agrees that application of the P&P Policy constitutes a Fourth Amendment search. *See* Appellants' Br. at pp. 16–27. Not only did collecting the Appellants' fingerprints require the physical intrusion on and manipulation of their bodies, but it also invaded their reasonable expectations of privacy in their personal biometric data. *Id.* Amicus curiae also agrees with the Appellants that the P&P Policy is both an unlawful search when conducted during an investigative stop, which is limited to a search of a person's outer clothing for a search of weapons, *Terry*, 392 US at 30, and exceeds the bounds of a lawful seizure under *Terry*, which cannot last longer than is necessary to dispel any reasonable suspicion that justified the stop, *Florida v. Royer*, 460 US 491, 500; 103 S Ct 1319; 75 L Ed 2d 229 (1983). *See* Appellants' Br. at pp. 29–40. For all the reasons the Appellants explain, the P&P Policy flouts these fundamental principles of Fourth Amendment law.

In addition, the Grand Rapids Police Department has not neutrally applied the P&P Policy. Black residents, including Black children like the Appellants, have been subjected to the policy at much higher rates than white residents in the City of Grand Rapids. The Fourth Amendment's protections are especially important when, as here, unconstitutional police conduct disproportionately targets communities of color.

I. The Fourth Amendment to the United States Constitution, and Article I, Section 11 of the Michigan Constitution, Are Essential Bulwarks Against Governmental Intrusions and Overreach.

The Fourth Amendment protects people against “unreasonable searches and seizures.” US Const, Am. IV. The Michigan Constitution contains a similar provision that provides protections coextensive with the United States Constitution. Const 1963, art 1, § 11; *see also People v. Pagano*, unpublished opinion of the Supreme Court, issued April 22, 2021 (Docket No. 159981) (VIVIANO, J., concurring), p. 8 (explaining this Court’s construction of Article I, Section 11 as providing “the same protections in the Fourth Amendment,” and further noting the possibility of a broader interpretation of the Michigan constitutional provision when there is a “compelling reason” for such an interpretation). The “basic purpose” of the Fourth Amendment’s protections is, and has always been, “to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *Carpenter*, 138 S Ct at 2213.

The Fourth Amendment’s reasonableness requirement is an especially important bulwark against racial profiling, intrusive and demeaning searches, and even police violence for Black people and other people of color. At its core, the Fourth Amendment is designed to prohibit searches and seizures based on nothing more than an officer’s whim. *See* Devon W. Carbado, *Race and the Fourth Amendment*, <https://law.asu.edu/sites/default/files/pdf/academy_for_justice/6_Reforming-Criminal-Justice_Vol_2._Race-and-the-Fourth-Amendment.pdf> (accessed August 11, 2021). This is the essence of racial profiling, an insidious and particularly harmful type of racial discrimination that implicates notions of safety and security. Racial profiling plagues our criminal justice and disproportionately subjects Black people and other people of color to unwarranted and intrusive interactions with law enforcement. *Id.*; *see also* Alexi Jones, Prison Policy Initiative, *Police stops*

are still marred by racial discrimination, new data shows <<https://www.prisonpolicy.org/blog/2018/10/12/policing/>> (accessed August 11, 2021).

II. Law Enforcement Intrusions on the Constitutional Rights of Black People and Other People of Color are Widespread

A. Racially Disparate Policing Is Endemic Throughout the Country

Across the country, Black people and other people of color are more likely than any other racial group to be stopped, questioned, and searched by police officers. A 2019 study of 100 million traffic stops nationwide found that Black and Latino people were more likely to be stopped and searched despite not being more likely to carry contraband. Emma Pierson et al, *A large-scale analysis of racial disparities in police stops across the United States*, Nature Human Behavior, July 2020, p 736. Similar studies in Philadelphia, New York and Chicago found that Black and Latino people were stopped and frisked at significantly higher rates than white people. Rudovsky & Harris, *Terry Stops-and-Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 Ohio State L J 501 (2018); Prison Policy Initiative, *Police stops are still marred by racial discrimination, new data shows, supra* (observing that in Chicago, Black residents were more likely to be stopped by police than non-Black people, and Black and Latino people were more likely to have multiple contacts with police than white people); *see also Floyd v City of New York*, 959 F Supp 2d 540 (SDNY, 2013) (describing unconstitutional *Terry* investigative stops in a New York housing project).

Racially disproportionate policing across the country has also been confirmed in a spate of completed pattern-and-practice investigations, which have confirmed that Black people and other people of color are more likely than white people to have their Fourth Amendment and other constitutional rights violated. For example, in 2015, the United States Department of Justice

conducted an investigation into the Ferguson Police Department and found that “Ferguson’s law enforcement activities stem in part from a discriminatory purpose and thus deny African Americans equal protection of the laws in violation of the Constitution.” U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* (March 4, 2015), p 63, available at <https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf> (accessed August 11, 2021). In a two-year period between 2012 and 2014, Ferguson police officers stopped and searched Black people at more than two times the rate of their white counterparts. *Id.* at 65. In the end, Black people were less likely than white people to have contraband, indicating “either that officers’ suspicion of criminal wrongdoing was less likely to be accurate when interacting with African Americans, or that officers are more likely to search African Americans without any suspicion of criminal wrongdoing.” *Id.* at 67. A Department of Justice investigation into the Baltimore Police Department and the Newark Police Department revealed similar racial disparities. *See* U.S. Department of Justice, Civil Rights Division, *Investigation of the Baltimore City Police Department* (August 10, 2016), p 6, available at <<https://www.justice.gov/crt/file/883296/download>> (accessed August 11, 2021) (finding that the Baltimore Police Department concentrated suspicionless stops in two small, predominantly Black neighborhoods and disproportionately stopped Black people); U.S. Department of Justice, Civil Rights Division, *Investigation of the Newark Police Department* (July 22, 2014), pp 2, 19, available at <https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf> (accessed August 11, 2021) (concluding that Black people in Newark are stopped at a greater rate than white people and “bear the brunt of the NPD’s pattern of unconstitutional stops

and arrests”). And the Department of Justice recently launched new major investigations into police departments throughout the country.²

Racially disparate policing is endemic in law enforcement agencies—large and small—throughout the country. The Grand Rapids Police Department’s enforcement of its P&P Policy is not immune.

B. The Grand Rapids Police Department’s P&P Policy Disproportionately Violates Black People’s Fourth Amendment Rights.

For more than 30 years, the City of Grand Rapids Police Department has employed the P&P Policy during investigative stops throughout the City. A relic of the City’s response to widespread crack-cocaine use in the late 1970s and 1980s, the policy has long permitted officers to take the photographs and fingerprints of any person on the street during a stop “if appropriate based on the facts and circumstances of that incident.” Appellants’ Br. at p. 9; Josh Sidorowicz, *Grand Rapids Police Department changes fingerprinting procedures* <<https://www.fox17online.com/2015/12/01/grand-rapids-police-changes-fingerprinting-procedures>> (accessed August 11, 2021) (explaining that the P&P Policy “was created largely in response to crack cocaine epidemic during the late 1970s and 80s”). Grand Rapids police officers are not required to make any probable cause determination before obtaining a person’s fingerprints

² See U.S. Department of Justice, *Department of Justice Announces Investigation of the Louisville/Jefferson County Metro Government and Louisville Metro Police Department* <<https://www.justice.gov/opa/pr/department-justice-announces-investigation-louisvillejefferson-county-metro-government-and>> (accessed August 5, 2021) (Department of Justice announcing civil rights investigation into the Louisville Police Department to assess whether it “engages in discriminatory policing, and also whether it conducts unreasonable stops, searches, [and] seizures;” U.S. Department of Justice, *Justice Department Announces Investigation of the City of Phoenix and the Phoenix Police Department* <<https://www.justice.gov/opa/pr/justice-department-announces-investigation-city-phoenix-and-phoenix-police-department>> (accessed August 6, 2021) (Department of Justice announcing civil rights investigation into “whether PhxPD engages in discriminatory policing”).

and photographs. *Id.* And until recently, there was no guidance or other limiting principles on when and under what circumstances Grand Rapids police officer should collect photographs and fingerprints under the Policy.³

Statistics about the Grand Rapids Police Department’s P&P Policy reveal stark racial disparities in its enforcement. A review of 439 stops under the P&P Policy from 2011 and 2012 found that 75 percent of the people stopped, photographed, and fingerprinted by police were Black, while only 15 percent were white, even though the City’s overall racial makeup is 21 percent Black and 65 percent white. *See Harrison v. Vanderkooi*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537), rev’d in part on other grounds 502 Mich 751 (2018), pp 10–11.

This racially disparate result is predictable and troubling. It is widely known that law enforcement policies that afford officers unfettered decision-making flexibility often leads to bias-infused policing, racial profiling, and racial inequities in policing outcomes. *See* Elizabeth Hinton et al, Vera Institute of Justice, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* <<https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>> (accessed August 11, 2021); The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*,

³ In 2019, the Department amended its P&P Policy to permit officers to get photographs and fingerprints from people who are “reasonably suspected of committing a crime.” Bryce Huffman, *GRPD says it won’t go back to old “photos and prints” policy despite favorable court ruling* <<https://www.michiganradio.org/post/grpd-says-it-wont-go-back-old-photos-and-prints-policy-despite-favorable-court-ruling>> (accessed August 11, 2021). This change, however, likely would not have affected Appellants, who were deemed “suspicious” even for engaging in benign behaviors. *See* Appellees’ Br. at pp 3–4 (describing Captain Curtis Vanderkooi, the officer who stopped, photographed, and fingerprinted Mr. Harrison, as “suspicious” and thinking that Harrison may have been involved in “a lot of larcenies and home invasions” despite any evidence that he was); *id.* at pp 8–9 (describing witness and officer perceptions of Mr. Johnson as engaged in “suspicious activity”).

<<https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf>> (accessed August 11, 2021), pp 11-12. These dramatic racial disparities may also reflect broader trends in who is most likely to have (and to not have) photo identification. Of all racial groups, Black people, and specifically Black youth like the Appellants, are least likely to have photo identification. See Vanessa M. Perez, Project Vote, *Americans with Photo ID: A Breakdown of Demographic Characteristics*, <<http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf>> (accessed August 11, 2021), p 10 (demonstrating that nationwide, “the youngest [Black] individuals are least likely to have identification (those younger than 25)” and 36 percent of Black individuals between 17 and 20 lack a driver’s license or passport). For these reasons, Black boys like the Appellants are most likely to continue to be subject to the P&P Policy and to have their fingerprints and photographs unlawfully taken, stored, and used in anticipation of their future criminality. This form of discrimination in policing has far-reaching impact.

C. The P&P Policy Denies Black Michiganders Full Citizenship and Causes Community Distrust

Racial selectivity in law enforcement practices and the degradation of Black people’s Fourth Amendment rights work even more grave harms. Generally, these constitutional encroachments represent the denial of full citizenship to Black Americans. *Cf. Utah v. Strieff*, __ US __; 136 S Ct 2056, 2069; 195 L Ed 2d 400 (2016) (Sotomayor, J., dissenting) (racially motivated, arbitrary, unlawful “stops” relegate Black people to second-class citizenship); *Commonwealth v. Long*, 485 Mass 711, 718; 152 NE3d 725 (2020) (similar). They result in the arbitrary characterization of Black people as criminals and unfairly subject them to the at-will

intrusion on their privacy and dignity in the course of routine daily activities.⁴ For many Black people, the risk of unconstitutional racial profiling is a justifiable source of fear. In the worst cases, racially motivated stops can result in serious injury or death to the person who is stopped. Carbado, *Race and the Fourth Amendment, supra* (explaining that increased police encounters based on suspicionless stops are likely to result in death of the person stopped). Additionally, racial profiling in stops unlawfully and disproportionately exposes Black people and other people of color to civil infractions and potential criminal prosecution as compared with their white counterparts.⁵ And finally, racial profiling in stops undermine public confidence in the rule of law itself. *See generally Rose v. Mitchell*, 443 US 545, 555-556; 99 S Ct 2993, 61 L Ed 2d 739 (1979) (describing that race discrimination in the criminal justice system destroys the appearance of justice and casts doubt on the integrity of the system).

Fallout from the Grand Rapids Police Department's enforcement of the P&P Policy has illustrated the grave harms discriminatory policing can have on communities, as has also been the case in other cities where law enforcement agencies that have engaged in systemic and disproportionate Fourth Amendment violations. *See, e.g., Investigation of the Baltimore City Police Department, supra*, pp 62–73 (concluding that BPD stops, searches, and arrests disproportionately impact Black neighborhoods, and the racial discrimination undermines community trust in BPD). Several Grand Rapids community members have openly spoken about how the P&P Policy—and specifically the way it was enforced in neighborhoods made up predominately of people of color—made them feel “targeted and uncomfortable.” Heather Walker, *GRPD ends standard of fingerprinting without ID*, <<https://www.woodtv.com/news/grand->

⁴ *See* Charles Epp et al, *Pulled Over: How Police Stops Define Race and Citizenship* (Chicago: University of Chicago Press, 2014), p 2.

⁵ *Id.* at 150.

rapids/grpd-ends-standard-of-fingerprinting-without-id/> (accessed August 11, 2021). The Department has fielded multiple complaints about the inconsistent manner in which the P&P policy was enforced across communities. *Id.*

A breakdown in community trust is reflected in more widespread complaints about the Grand Rapids Police Department and its discriminatory policing practices. Between 2018 and 2019, more than two dozen people submitted complaints to the Michigan Department of Civil Rights, alleging discrimination in the form of police intimidation, disrespect, and racial profiling. Justin P. Hicks, *Discrimination complaints against Grand Rapids police still being investigated*, <<https://www.mlive.com/news/grand-rapids/2020/01/discrimination-complaints-against-grand-rapids-police-still-being-investigated.html>> (accessed August 11, 2021). After holding a public listening session, the number of complaints grew, leading the MDCR to broaden the investigation to determine whether the discrimination is systemic to the department. That investigation is ongoing.

The P&P Policy has worked substantial harms on Black people and other people of color throughout Grand Rapids. This Court should forcefully condemn and prohibit the unconstitutional racial targeting and collection of fingerprints of Black people.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the judgment of the Court of Appeals.

Dated: August 12, 2021

Respectfully submitted,

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