No. 23-13253

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ERIC ANDRÉ and CLAYTON ENGLISH,

Plaintiffs-Appellants,

v.

CLAYTON COUNTY, GEORGIA; KEVIN ROBERTS, in his official capacity as Chief of the Clayton County Police Department; AIMEE BRANHAM, individually and in her official capacity as a police officer of the Clayton County Police Department; MICHAEL HOOKS, individually and in his official capacity as an investigator of the Clayton County District Attorney; TONY GRIFFIN, individually and in his official capacity as a police officer of the Clayton County Police Department; KAYIN CAMPBELL, individually and in his official capacity as a police officer of the Clayton County Police Department; and CAMERON SMITH, individually and in his official capacity as a police sergeant of the Clayton County Police Department,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:22-cv-04065-MHC, Judge Mark H. Cohen

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF GEORGIA IN SUPPORT OF PLAINTIFFS-APPELLANTS/REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in Eleventh Circuit Rule 26.1-2 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible recusal or disqualification.

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I hereby certify that amicus American Civil Liberties Union of Georgia is not a publicly held corporation, nor does it issue stock or have a parent corporation. American Civil Liberties Union of Georgia is a non-profit organization.

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STATEMENT OF IDENTITY AND INTEREST

Founded in 1963, the American Civil Liberties Union ("ACLU") of Georgia is a non-profit organization that works to enhance and defend the civil liberties and rights of all Georgians through legal action, legislative and community advocacy, and civic education and engagement.

This case presents an example of a disturbing and increasingly widespread problem: the growing use by local law enforcement of so-called consensual encounters on airport jetways to seize money from travelers to fund their law enforcement operations. *Amicus curiae* submits this brief to urge this Court to further contextualize airport seizure jurisprudence, namely that a reasonable person subject to post-9/11 airport security protocols would not feel free to leave an encounter initiated by uniformed police officers on an airport jetway bridge.

STATEMENT REQUIRED BY FRAP 29(a)(4)(E)

In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), counsel certify that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or any other person other than amicus curiae, contributed money to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUES

Whether encounters of the kind plausibly alleged in the Amended Complaint between citizens and law enforcement agents in federally secured areas of airports are voluntary, especially in light of the proliferation of aggressive interdiction programs that do little to detect and deter crime but instead exist primarily to generate unearned revenue for law enforcement agencies.

SUMMARY OF THE ARGUMENT

In the 1980s, this Court and the U.S. Supreme Court established the decisional law governing assessments of the voluntariness of law enforcement-citizen encounters in airport terminals. *See, e.g.*, *Fla. v. Rodriguez*, 469 U.S. 1 (1984); *United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Berry*, 670 F.2d 583 (5th Cir. Unit B 1982) (en banc); *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984); *United States v. Jensen*, 689 F.2d 1361 (11th Cir. 1982). The district court misapplied those decisions to hold that Appellants Eric André and Clayton English failed to plausibly allege that their encounter with the Clayton County Police Department's ("CCPD's") drug-interdiction program officers on a jetway bridge at Hartsfield-Jackson Atlanta International Airport was a seizure under the Fourth Amendment.

Drug-interdiction programs like the one at issue here are becoming increasingly ubiquitous in major U.S. airports. They do not effectively further their

ostensible purpose of detecting and deterring drug trafficking and money laundering. They are quite effective, however, at generating substantial revenues for the law enforcement agencies. Officers with drug interdiction programs regularly find and seize cash from travelers under a civil forfeiture regime that provides little-to-no meaningful legal protection for travelers. As alleged in the Amended Complaint, Clayton County alone seized more than $1 million in cash and money orders from 25 passengers from August 2020 to April 2021. Of those 25 passengers, only eight challenged their seizures in court, leaving Clayton County with a windfall to fund county operations.

As alleged by Appellants, their encounter with CCPD officers on a jetway bridge of an actively boarding flight for the ostensible purpose of drug interdiction was an involuntary seizure under this circuit's clear precedent,[1] and the district court erred in concluding otherwise.[2] This legal conclusion is even clearer considering the

[1] The only reason for the Court to look at whether precedent clearly establishes a constitutional violation is the doctrine of qualified immunity. ACLU of Georgia believes that the concept of qualified immunity is not supported by the text of 42 U.S.C. § 1983 and should be reassessed. *See Zadeh v. Robinson*, No. 17-50518, 2018 WL 4178304, at *10-11 (5th Cir. Aug. 31, 2018) (Willett, J., concurring) (questioning "entrenched, judge-made . . . Kevlar-coated" doctrine of qualified immunity (citing Symposium, *The Future of Qualified Immunity*, 93 Notre Dame L. Rev. 1793 (2018)). But ACLU of Georgia understands this Court is bound by current Supreme Court precedent. *See, e.g.*, *Tolan v. Cotton*, 134 S. Ct. 1861, 1865-66 (2014).

[2] For the reasons set forth in the opening brief filed by Plaintiffs-Appellants, (Dkt. 36 at 18-34), the rights violated by Defendants-Appellees were clearly established by cases like *United States v. Berry*, 670 F.2d 583 (5th Cir. Unit B 1982) (en banc). For decades since *Berry*, law enforcement officers have known that the "balance . . . between the interests of the government and the intrusion on the individual" for purposes of airport stops "tips in favor of holding that a seizure has occurred

realities of post-9/11 airport environments. TSA-secured, limited-access airport terminals of today are unrecognizable when compared to the open and publicly accessible airport terminals of the 1980s, when those precedents were established. Today, reasonable people in the TSA-controlled area of an airport—where federal agents abound, admittance is heavily screened, and extensive security screenings are mandated—would not feel free to leave an encounter with a law enforcement officer. This is especially true for a passenger who is waiting to board a plane in the narrow confines of a jetway bridge. Especially considering the reality of today's airports, these encounters are not voluntary; they are seizures under the Fourth Amendment.

ARGUMENT

I. Airport drug-interdiction programs—and the lucrative civil asset forfeiture regimes that these programs facilitate—have proliferated and flourished.

The empirical realities of airport interdiction programs are such that reasonable people do not feel free to leave law enforcement encounters on jetway bridges of actively boarding flights. Airport interdiction, and civil asset forfeiture

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if there is an intrusion on the individual by law enforcement authorities that is greater than we outlined above." *Id.* at 595. The intrusion "outlined above" in *Berry*: "[i]n an airport stop, . . . it is possible for a law enforcement officer ***not to interfere*** with an individual's progress ***in any way*** and to ascertain whether an individual is willing to cooperate with police ***before*** making any further inquiries." *Id.* (emphasis added). Here, Appellants' well-pleaded Amended Complaint plausibly alleges that CCPD officers interfered with the progress of both Mr. André and Mr. English and asked questions far beyond whether they were willing to cooperate. Dkt. 36 at 8-10. These well-pleaded facts plausibly allege a clear Fourth Amendment violation under *Berry*. ACLU of Georgia's position is that the reality of airports post-9/11 makes those violations even clearer and more troubling.

more broadly, quite effectively serves one purpose: generation of revenue for law enforcement coffers. Given the large amounts of cash taken from travelers who have little legal recourse—a phenomena that has been publicized extensively in recent years[3]—why would reasonable people continue to submit to these programs, if they, in fact, feel free to leave them? And why do law enforcement agencies target travelers ***on jetway bridges*** of ***actively boarding flights***? The answer is obvious: Reasonable people ***do not feel free*** to withhold their consent in one of the most secure parts of the airport while hurriedly boarding their flights—a fact borne out by a brief review of these programs nationwide.

Most states and the federal government allow law enforcement officers to search and seize assets from law-abiding citizens with "only probable cause of the *property's* connection to an alleged crime."[4] Nationally, federal agencies seized more than $2 billion between 2000 and 2016 at airports alone; in that time, "[t]he value of currency seized at airports by [Department of Homeland Security ("DHS")] agencies more than ***doubled***," and "[t]he number of DHS agency currency seizure

[3] *See, e.g.*, Brendan Keefe, *Here's How Police Are Allowed to Seize Your Money at Atlanta's Airport*, Atlanta News First (Nov. 8, 2023), https://www.atlantanewsfirst.com/2023/11/08/plane-sight-police-can-take-your-money-without-an-arrest/.

[4] Lisa Knepper et al., Inst. for Just., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, at 36 (3d Ed. Dec. 2020), https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf; *see also* Ga. Advisory Comm., U.S. Comm'n on C.R., *Civil Asset Forfeiture and its Impact on Communities of Color in Georgia*, at 3 (Nov. 2022) ("In order to seize a person's private property under civil asset forfeiture, law enforcement officers need only probable cause to believe that the property was either involved in or derived from the commission of a crime.").

cases at airports . . . nearly ***tripled***."[5] At the state and federal levels, civil asset forfeiture is a "large and growing phenomenon,"[6] and the increased forfeiture activity is attributable in no small part to airport interdiction programs.

Despite the increasing use of civil asset forfeiture, evidence shows that these programs do not measurably reduce crime.[7] In a study conducted after New Mexico abolished civil forfeiture, the data showed that "New Mexico's overall crime rate did not rise following the implementation of strong forfeiture reform in 2015, nor did arrest rates drop" in comparison to neighboring Colorado and Texas.[8] Additionally, arrests following currency seizures at airports are "vanishingly rare": "69% of DHS agency airport currency seizure cases were not accompanied by an arrest, regardless of the alleged offense. This means less than a third of the time was . . . the evidence strong enough[] to warrant an arrest. This suggests many DHS airport currency seizures are not targeting serious crimes."[9] Indeed, "the most

[5] J. McDonald, Inst. for Justice, *Jetway Robbery?*, at 6 (July 2020) (emphases added); *see also id.* at 19 ("The annual value and number of these seizures rose steadily over this period, even after accounting for inflation and increases in air passenger traffic.").

[6] *Id.*; *see also* Ga. Advisory Comm., *supra* note 4, at 3 ("From 1986-2014, revenue to the U.S. Department of Justice from civil asset forfeitures increased from $93.7 million to $4.5 billion annually, an increase of 4,667%. Between 2000 and 2019, states and the federal government have reported civil asset forfeiture revenue of at least $68.8 billion—and likely much more." (footnotes omitted)).

[7] Knepper et al., *supra* note 4, at 5-6.

[8] *Id.* at 32.

[9] McDonald, *supra* note 5, at 15.

common reason for seizure" of cash is reporting violations by international travelers for failure to declare the currency, but these "paperwork violations . . . do not appear to be linked to criminal activity beyond the failure to report."[10]

While civil asset forfeiture is ineffective at preventing or targeting criminal activity, it is effective at channeling billions of dollars from travelers into law enforcement coffers without the robust sorts of legal protections afforded by the criminal process.[11] Indeed, citizens whose property has been forfeited must rely upon civil or administrative procedures to recover their assets—a process that "stacks the deck against property owners."[12] While these seizures are simply an inconvenience for some, "[f]or many, losing even relatively small cash amounts can create food and

[10] *Id.*

[11] *See* The Leadership Conf., *Fact Sheet: Why Civil Asset Forfeiture is Legalized Theft* (last updated July 23, 2015), https://civilrightsdocs.info/pdf/criminal-justice/Civil-Asset-Forfeiture-Fact-Sheet.pdf ("Federal forfeiture law provides law enforcement with a strong monetary interest in asset seizures. Under the Department of Justice's equitable sharing program, state and local law enforcement that turn over seized property to the federal government can pocket up to 80 percent of the forfeiture proceeds."); Ga. Advisory Comm., *supra* note 4, at 12 ("Federal law and Georgia law allow law enforcement agencies to keep up to 100% of the profits from forfeited assets, making civil asset forfeiture a significant source of revenue for many agencies." (footnotes omitted)); *accord* Knepper et al., *supra* note 4, at 5.

[12] McDonald, *supra* note 5, at 16 ("The vast majority—91%—of DHS airport currency seizure cases that result in forfeiture are conducted under civil, rather than criminal, procedures . . . . [P]roperty owners must affirmatively challenge the seizure. If they do not file a claim for their property's return, or if they file their claim incorrectly, their case never goes to court. . . . This is administrative forfeiture, and it accounts for 93% of civil forfeiture cases . . . ." (footnote omitted)); Knepper et al., *supra* note 4, at 6 ("[A]vailable data suggest forfeitures are frequently uncontested, resulting in nearly automatic wins for the government. In the four states that track this information, people seek return of their property in 22% of cases or fewer."); *accord* Ga. Advisory Comm., *supra* note 4, at 16-18.

housing instability, perpetuate cycles of poverty, and further damage already strained community/police relations."[13]

State and county drug-interdiction programs in Georgia are no different.[14] Law enforcement officers in Georgia seized more than $50 million between 2015 and 2018 through civil asset forfeiture.[15] In Georgia, "most owners of seized property are unsuccessful in getting their property back."[16] The Amended Complaint indicates that the CCPD's drug interdiction scorecard is as lackluster as that of their state and federal counterparts:

> As CCPD's records make clear, the department almost never finds drugs during the jet bridge passenger interdictions. The 402 jet bridge stops from August 30, 2020, to April 30, 2021, resulted in a grand total of three seizures [of drugs]: roughly 10 grams . . . of drugs from one passenger, 26 grams . . . of "suspected THC gummies" from another, and 6 prescription pills . . . from a third. Only two of the passengers . . . were charged with a crime.

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[13] Ga. Advisory Comm., U.S. Comm'n on C.R., *Policy Brief: Civil Asset Forfeiture and Its Impact on Communities of Color in Georgia*, at 2 (Jan. 2023), https://www.usccr.gov/files/2023-01/policy-brief_georgia.pdf.

[14] In fact, the revenue generated through civil asset forfeiture in Georgia is likely underreported because Georgia, unlike the federal government, imposes no auditing or reporting requirements on law enforcement. *See* Erik Randolph & Buzz Brockway, Ga. Ctr. for Opportunity, *Civil Asset Forfeitures in Georgia: Procedures, Activity, Reporting, and Recommendations*, at 3-4 (Mar. 2020), https://foropportunity.org/wp-content/uploads/2020/03/20-011-GCO-Civil-Asset-Forfeit_v3.pdf ("[T]hese numbers are low because of underreporting and non-reporting by numerous entities. . . . The federal programs require reports to Congress, but no such reports are sent to the Georgia State Legislature. The federal program requires annual audits, but Georgia does not.").

[15] Knepper et al., *supra* note 4, at 80-81; *see also* Ga. Advisory Comm., *supra* note 4, at 4 (noting the "alarming trends" of civil asset forfeiture in Georgia); *accord* Randolph & Brockway, *supra* note 14, at 3.

[16] Ga. Advisory Comm., *Policy Brief*, *supra* note 13, at 2.

> . . . .
>
> Although the jet bridge interdiction program utterly fails to seize drugs, it is financially lucrative for CCPD. Over the 8-month period in question, the program seized $1,036,890.35 in cash and money orders via 25 civil asset forfeitures . . . . Yet, of the 25 passengers who had cash seized, . . . only two were ever charged with any related crime . . . .

Doc. 24, ¶¶ 84, 86.[17]

Put simply, national, state, and local data show that civil asset forfeiture is ***ineffective*** at preventing crime but overwhelmingly ***effective*** at generating revenue for law enforcement agencies. Given that airport-interdiction programs yield vast revenues for law enforcement agencies nationwide but result in few arrests, it is plain that reasonable people do ***not*** feel free to leave these encounters. If reasonable people felt free to leave such encounters, these programs would not have yielded billions of dollars for law enforcement, and these programs—as illustrated by the allegations related to the CCPD's program (Doc. 24, ¶¶ 84-91)—would not have flourished and proliferated as they have. Unfortunately, the district court did not take Appellants' factual allegations about airport interdiction and civil asset forfeiture at face value, leading it to misapply the reasonable person standard.

II. The district court incorrectly applied the reasonable person test.

Airport interdiction programs have flourished across the country, generating

[17] Other sources provide nearly identical statistics: of 361 jet bridge searches by the CCPD conducted between 2020-2021, 93% did not result in arrests, and "passengers rarely got all their money back even after filing a claim with receipts." Keefe, *supra* note 3.

colossal law enforcement agency windfalls as they proliferated. This success is the outgrowth of the fact that passengers, like Appellants, do not feel free to leave encounters with police officers on jetway bridges of actively boarding aircraft. While this legal conclusion is compelled by this Circuit's holding in *Berry*, *supra* note 1, the fundamentally changed nature of airport environments and security after 9/11 (a fact that is alleged in the Amended Complaint and that the district court must therefore accept as true, Doc. 24, ¶¶ 3, 65-66, 72, 123) makes this conclusion inescapable.

A. 9/11 dramatically increased the perception of government control in airport environments.

Airports were vastly different places prior to 9/11. By statute, civil aviation security in the United States was a shared responsibility.[18] "Air carriers had the primary responsibility for screening passengers and baggage, and for applying security measures to everything that went on their planes."[19] Meanwhile, airports were responsible for keeping the airport grounds secure and for providing local law enforcement support.[20] Air carriers and airports typically outsourced those duties to

[18] David Schaper, *It Was Shoes On, No Boarding Pass or ID. But Airport Security Forever Changed On 9/11*, NPR (Sept. 10, 2021), https://www.npr.org/2021/09/10/1035131619/911-travel-timeline-tsa.

[19] Statement of Jane Garvey to the National Commission on Terrorist Attacks Upon the United States (May 22, 2003), https://9-11commission.gov/hearings/hearing2/witness_garvey.htm

[20] *Id.*

private security companies.[21] Indeed, "[t]he privatized aviation security sectors had no overseer and no regulations from the U.S. government."[22] Travelers did not need to show identification to board flights, and passengers were advised to arrive a mere thirty minutes before takeoff.[23]

That changed after 9/11. In November 2001, the federal government enacted the Aviation and Transportation Security Act. Aviation and Transportation Security Act, Pub. L. No. 107-17, 115 Stat. 597 (Nov. 19, 2001) ("ATSA"). The ATSA created the TSA, which became part of the newly created Department of Homeland Security ("DHS"). *Id.* The ATSA further required that 100% of all checked baggage be screened by X-rays.[24]

Since then, airport security has only increased. In August 2006, DHS "banned all liquids and gels from carry-on luggage aboard airplanes,"[25] and TSA began to require that all travelers remove their shoes so footwear could be screened for

[21] Schaper, *supra* note 18 ("Airport security at that time was carried out by private contractors, usually hired by the airlines, with few federal standards. Those security contracts usually went to the lowest bidder.").

[22] James Ford et al., *An Economic Study of the US Post-9/11 Aviation Security*, 8 Open J. Bus. & Mgmt. 1923, 1926 (2020), https://www.scirp.org/pdf/ojbm_2020080715021753.pdf.

[23] *Id.*

[24] Schaper, *supra* note 18; *see also* Statement of Jane Garvey, *supra* note 19.

[25] *See* Jeremy W. Peters & James Kanter, *U.S. Transportation Security Agency Prohibits Carrying Liquids and Gels on Flights*, N.Y. Times (Aug. 11, 2006), https://www.nytimes.com/2006/08/11/world/europe/11rules.html.

explosives at airport security checkpoints.[26] In 2007, TSA began testing advanced imaging technology (AIT) to detect explosives and other threats.[27] A few years later, TSA implemented AIT as the primary screening method for passengers at airports nationwide. Passengers who opt out of AIT screening "receive alternative screening, including a physical pat-down."[28]

All individuals must proceed through the TSA checkpoint and, typically, only ticketed passengers and authorized airport personnel can advance. Once in the TSA-controlled area of an airport—where federal agents abound and heightened security measures are clearly visible—travelers hear frequent announcements that unattended baggage is subject to search. The airport jetway is even more secure. Only authorized airport personnel and actively boarding or deplaning passengers who are specifically ticketed for the plane at that gate may enter.

With increased security measures, courts began to see litigants challenging those measures under the Fourth Amendment. But, so far, the lawsuits have focused on whether the TSA's checkpoint security-screening searches are lawful. Few post-9/11 cases examine seizures by local law enforcement that occur after the

[26] Schaper, *supra* note 18; *see also* Statement of Jane Garvey, *supra* note 19.

[27] Office of Inspector Gen., U.S. Dep't of Homeland Sec., OIG No. 12-06, TSA Penetration Testing of Advanced Imaging Technology (Nov. 2011), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_SLP_12-06_Nov11.pdf.

[28] *Id.*

traveler has passed through TSA security and is in the heavily controlled, restricted access boarding concourses, jetways, and airplanes themselves. While the Fourth Amendment airport seizure jurisprudence developed before TSA existed establishes that Appellants were seized in violation of the Constitution, that conclusion is compelled all the more by the enhanced airport security environment in which we now live. Said differently, reasonable people today do not feel free to leave encounters with law enforcement in the airport and especially on jetway bridges in the post-9/11 airport environment.

B. The district court misapplied the "reasonable person" test, an error that was exacerbated by the court's failure to consider the modern, post-9/11 airport security environment.

To determine if Appellees violated Appellants' Fourth Amendment rights, this Court must assess if Appellants were seized at any point during their encounters with the Clayton County police officers. *See Corbitt v. Vickers*, 929 F.3d 1304, 1313 (11th Cir. 2019). "There are three broad categories of police-citizen encounters for purposes of [] Fourth Amendment analysis: (1) police-citizen exchanges involving no coercion or detention; (2) brief seizures or investigatory detentions; and (3) full-scale arrests." *United States v. Perez*, 443 F.3d 772, 777 (11th Cir. 2006). "The first type of [police-citizen] encounter, often referred to as a consensual encounter, does not implicate the Fourth Amendment." *United States v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011). In evaluating whether an encounter with law

enforcement is a voluntary encounter or a seizure warranting Fourth Amendment protection, the Court must consider all the circumstances surrounding the encounter and determine if a reasonable person would believe he was not free to leave. *See California v. Hodari D.*, 499 U.S. 621, 627-28 (1991).

The district court held that when the Clayton County police officers stopped Appellants on jetway bridges while boarding their flights, retained their IDs and boarding passes, and interrogated them about whether they had illegal drugs, Appellants were not seized; rather, they merely had "consensual encounters." Doc. 40 at 21, 31. That was error under controlling precedent and a misapplication of the reasonable person test. That error is even more glaring given Appellants' well-plead allegations about the nature of the secured areas of airport environments, specifically after 9/11. *See* Doc. 24, Am. Compl. ¶¶ 3, 65-66, 72. The district court was required to accept those allegations as true, and its failure to do so tainted its subsequent analysis in at least three respects.

First, airports—at least, the parts of airports beyond the TSA-security checkpoint—are not "public" as suggested by the district court. Doc. 40 at 25. In its order, the district court relied upon *United States v. Armstrong*, a 1984 case where this Court "concluded that when police officers approached individuals in the public concourse of an airport and asked them questions, while briefly retaining their identifications for a minimal amount of time," it was not a seizure. Doc. 40 at 25

(citing *United States v. Armstrong*, 722 F.2d 681, 685 (11th Cir. 1984)). Not only is *Armstrong* distinguishable,[29] but airport concourses were fairly characterized as "public" in 1984. Indeed, it took virtually no time to get through the minimal security measures that existed, and non-travelers could routinely accompany their loved ones right to the gate.[30] But that is not the case today. The TSA mandates lengthy security screening procedures for all air travelers. With few exceptions, no one other than airport personnel and law enforcement, is permitted past the TSA checkpoint without a boarding pass. And, as a relevant here, passengers are not permitted on a jetway unless their boarding pass clears the scanner at the airline gate.

Second, there are unique concerns associated with jetway bridges that affect the "reasonable person" test. A jetway bridge is a narrow, enclosed connector that extends from an airport terminal gate to an airplane. There are only two exits available to passengers (either onto the plane or back to the terminal), and, at this point in a traveler's journey, they are in the final process of boarding a flight. This can be a time-sensitive and hectic process, particularly if one is traveling with luggage. Passengers understand that they should promptly comply with requests by airport personnel and others in authority lest they be forbidden from boarding the

[29] *See* Dkt. 36 at 26-28.

[30] AP, *How 9/11 Changed Air Travel: More Security, Less Privacy* (Sept. 6, 2021), https://apnews.com/article/how-sept-11-changed-flying-1ce4dc4282fb47a34c0b61ae09a024f4.

plane or labeled suspicious by the authorities or by fellow travelers. These factors, which the district court did not consider, contribute to the coerciveness of police interactions that occur specifically on jetway bridges.

The district court likened the airport jetway to a crowded bus, relying on *United States v. Drayton*, 536 U.S. 194 (2002) to erroneously determine that Appellants were not seized under the Fourth Amendment. In *Drayton*, the Supreme Court ruled that officers who entered a crowded bus and asked questions of passengers, including a request to search their bags, did not violate the Fourth Amendment because, among other things, "[t]here was no application of force, no intimidating movement, [and] no overwhelming show of force." *Id.* at 204. But *Drayton* is inapplicable, and its facts are easily distinguishable.[31] Drayton's encounter with law enforcement occurred on a bus that he was not intending to leave. *Id.* Meanwhile, Appellants encountered CCPD officers on the narrow jetway bridge when they wished to board the plane. Moreover, bus travel in 1999 was not subject to the same high-security measures present in the TSA-secured area at Atlanta's Hartsfield-Jackson International Airport in 2020.

For the same reasons, *Florida v. Bostick*, decided in 1991, is also inapplicable and distinguishable. 501 U.S. 429 (1991). As in *Drayton*, the plaintiff in *Bostick* had no desire to leave the "cramped confines of a bus." *Id.* at 435. Thus, his "freedom of

[31] *See* Dkt. 36 at 26-32.

movement was restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on a bus." *Id.* at 436. Here, Appellants well-pleaded allegations show that they did wish to leave and continue their boarding process. And again, a reasonable person encountering police officers on the jetway of an airport while waiting to board a plane—after clearing extensive TSA security screening *and* airport gate boarding pass checks in a post-9/11 environment—would respond much differently than if they encountered police officers while traveling by bus in the 1980s. The former carries with it a certain expectation by reasonable people that they must cooperate considering the time, location, and circumstances of the police encounter, while the latter does not.

Third, "brief" and "minimal" time on a jetway bridge is different than in other locations, a fact the district court failed to appreciate. On a jetway, passengers are only minutes away from boarding their flight and departing for their destination. Time is short once the boarding process has begun, and even a short delay may be consequential for an individual passenger and their flight—missed departures, rescheduling fees, and hours of lost time waiting. Thus, while the district court found persuasive that in *United States v. Armstrong*, officers briefly retained the plaintiffs' identifications in the airport concourse for a minimal amount of time (Dist. Ct. Order at 25 (citing *United States v. Armstrong*, 722 F.2d 681, 685 (11th Cir. 1984)), a brief intrusion by law enforcement officers is more consequential in the time-sensitive

environment of a jetway bridge, making it more likely that a seizure was plausibly alleged by Appellants.

Furthermore, law enforcement officers' conduct during the stop is relevant in determining whether the encounter is consensual. This Court in *Berry* instructed that law enforcement officers engaged in a consensual encounter should "ascertain whether an individual is willing to cooperate with police ***before making any further inquiries***," 670 F.2d at 595 (emphasis added). Here, by contrast, the CCPD officers in question peppered Appellants with repetitive questions about illegal drugs. Dkt. 36 at 8-10; Doc. 24 at ¶¶ 33, 40, 53-54. Repetitive questioning by law enforcement officers that does not take the citizen's denials at face value would plausibly suggest to any reasonable person that they are not at liberty to refuse. *See Berry*, 670 F.2d at 597 ("Statements which intimate that an investigation has focused on a specific individual easily could induce a reasonable person to believe that failure to cooperate would lead only to formal detention."); *see also id.* at 600 n.22 ("The [Supreme] Court has . . . sanctioned seizures or searches without individualized suspicion only in usual situations involving minimal intrusions and in which individuals are not singled out for the intrusion.").

The district court failed to accept as true and grapple with the realities of post-9/11 air travel as plausibly alleged by Appellants, nor did it consider how reasonable people in that reality would respond to encounters with law enforcement

in TSA-controlled sections of airports, especially on jetway bridges. This, in addition to the reasons set out in the opening brief filed by Appellants, caused the court to err when applying the reasonable person test. Accordingly, its decision should be reversed.

CONCLUSION

The district court's order perversely counsels travelers passing through Hartsfield-Jackson Atlanta International Airport that "reasonable" travelers should ignore law enforcement questioning on a jetway bridge. The Court should hold, consistent with decades of airport-seizure jurisprudence and the reality of airports post-9/11, that reasonable air travelers on a jetway bridge believe they are required to comply with law enforcement officer questioning and would not feel free to ignore that questioning. For the foregoing reasons, this Court should reverse the decision of the district court.

Dated: January 19, 2024

Respectfully submitted,

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Dated: January 19, 2024

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I hereby certify that on January 19, 2024, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court by using the Court's Appellate PACER system, which will automatically send a notice of electronic filing to all counsel of record. Under 11th Circuit Rule 25-3(a), no independent service by other means is required.

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Dated: January 19, 2024

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