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; CHIEF OF CLAYTON COUNTY POLICE DEPARTMENT; AIMEE BRANHAM; MICHAEL HOOKS; TONY GRIFFIN; KAYIN CAMPBELL; AND CAMERON SMITH
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division.
No. 1:23-cv-04065

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF PLAINTIFFS-APPELLANTS ERIC ANDRÉ AND CLAYTON ENGLISH

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and the Eleventh Circuit Court Rule 26.1-1, undersigned counsel certifies that the following list of interested persons and the corporate disclosure statement is true and correct:

1. André, Eric – Plaintiff-Appellant
2. Branham, Aimee – Defendant-Appellee
3. Burnette, Jason Todd – Counsel for Plaintiffs-Appellants
4. Cain, Molly M. – Counsel for Amicus Curiae
5. Campbell, Kayin – Defendant-Appellee
6. Canfield Law LLC – Counsel for Plaintiffs-Appellants
7. Canfield, Peter – Counsel for Plaintiffs-Appellants
8. Chief of the Clayton County Police Department – Defendant-Appellee
9. Clayton County, Georgia – Defendant-Appellee
10. Cohen, Mark H. – U.S. District Judge for the Northern District of Georgia
11. Deane, Jr., Richard Hunter – Counsel for Plaintiffs-Appellants
12. English, Clayton – Plaintiff-Appellant

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13. Freeman Mathis & Gary, LLP – Counsel for Defendants-Appellees
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No other persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities are financially interested in the outcome of this case or appeal.

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STATEMENT OF THE ISSUES

Whether the District Court erred in dismissing Plaintiffs' Fourth and Fourteenth Amendment Claims that challenged the Clayton County Police Department's (CCPD) racially discriminatory drug interdiction program run out of Atlanta's Hartsfield-Jackson International Airport (Atlanta Airport).

STATEMENT OF INTEREST

Founded in 1940 by Justice Thurgood Marshall, the NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans and to break barriers that prevent Black people from realizing their basic civil and human rights. LDF has long been concerned about racial bias in law enforcement and has a history of serving as counsel of record and amicus curiae challenging laws and policies and that discriminate against Black people and other communities of color. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986); *Brown v. City of Oneonta,* 235 F.3d 769 (2d Cir. 2000); *People v. Hill*, 33 N.Y.3d 990 (N.Y. 2019).

Based on the historical and geographical breadth of its expertise in identifying and combating racial discriminatory law enforcement practices, LDF's perspective will assist the Court.

STATEMENT OF THE CASE

The Clayton County Police Department's ("CCPD") jet bridge interdiction program run out of the Atlanta airport racially profiles Black people, subjects them to unwarranted police suspicion and control, and impinges on their freedom of movement. Plaintiffs Eric André and Clayton English are two internationally recognized Black comedians who experienced CCPD's discriminatory policing firsthand. CCPD officers targeted Mr. André and Mr. English on a narrow jet bridge, blocked their entry to the plane, held onto their identification and boarding passes, and interrogated them about their alleged drug possession. CCPD conducted these humiliating "interdictions" without any suspicion that Mr. André or Mr. English were engaged in criminal activity or wrongdoing.

Mr. André and Mr. English sued CCPD and individual officers that conducted their stops ("Defendants") alleging violations of their constitutional rights. Defendants claim that the jet bridge stops are "random," but Plaintiffs presented data that suggests otherwise. From September 2020 through April 2021, CCPD conducted 378 stops for which the race of the passengers was recorded. Of those, 68% of passengers stopped were people of color, and 56% of passengers were Black. *Id.* ¶¶5, 77. This racial disparity is particularly stark given that only 8% of air travelers nationwide are Black, and Atlanta's domestic airline population reflects the general population of American air travelers. *Id.* ¶78. Based on this data, Black

passengers were stopped over five times more than they would have been had CCPD's stops been truly random. *Id.* ¶80.

CCPD's interdiction program purports to combat drug trafficking, but over the course of this eight-month period, CCPD officers confiscated less than 36 grams of illegal drugs and brought charges only against two people. *Id.* ¶5. In addition to the program's clear failure to find illegal drugs, the Complaint also alleges an illegitimate financial windfall for CCPD, with cash seizures from the program totaling $1,000,000 that "tak[e] advantage of the permissive civil standards for asset forfeitures and the reluctance of individuals (particularly individuals of color) to challenge seizures." *Id.* ¶8.

Despite Plaintiffs' well-pled facts showing that CCPD's suspicionless and coercive jet bridge stops violated their Fourth and Fourteenth Amendment rights, the District Court granted Defendants' motion to dismiss. Doc 40 - Pg 54. It held that the jet bridge stops were "voluntary encounters" that did not merit Fourth Amendment protection, and that Plaintiffs failed to allege sufficient discriminatory effect to state a claim under the Fourteenth Amendment. In so doing, the District Court made legal errors, overlooked Plaintiffs' well-pled factual allegations, and misapplied the 12(b)(6) standard. The ruling, if left untouched by this Court, would frustrate litigants who are entitled to discovery to develop their claims under the Federal Rules and who seek to hold law enforcement accountable for violating their

constitutional rights. And it would allow CCPD to continue this unlawful program undeterred, furthering the harms of racial profiling and threatening Black people's freedom of movement. The District Court's decision should be reversed.

ARGUMENT

I. CCPD's Interdiction Program is an Example of Harmful Racial Profiling that Restricts Black People's Freedom of Movement.

In two separate incidents, six months apart, Mr. André and Mr. English were both racially profiled in the process of boarding their flights from Atlanta to Los Angeles, Doc 24 - ¶¶23, 47. Two CCPD officers abruptly appeared and singled out Mr. André and Mr. English while they were walking on the jet bridge, the narrow tunnel that connects the boarding gate to the airplane door. *Id.* The officers blocked their path forward, flashed their badges and began peppering them with questions about whether they were carrying illegal drugs. Though both Mr. André and Mr. English denied carrying any illegal drugs (and had not otherwise been suspected of wrongdoing or criminal activity), the officers continued to rattle off a litany of illegal substances they might be carrying, such as cocaine, methamphetamine, prescription drugs and other narcotics. *Id.* ¶¶33, 52–53. Mr. André and Mr. English repeated their denials, but the officers continued to detain them and further, asked for their identifications and boarding passes. Neither Mr. André nor Mr. English believed they

could say no. The officers proceeded to interrogate them about their profession, travel plans and reason for flying. *Id.* ¶¶38, 55.

The officers detaining Mr. André recorded his personal information, including his full name, address, identification number, and date of birth. *Id.* ¶55–56. Mr. English was instructed to step to the side of the jet bridge, with officers standing on either side of him, while one officer asked to search his carry-on luggage. Believing that he could not say no, and that he would not be able to board the plane if he did anything perceived "out of line," Mr. English acquiesced. *Id.* ¶41. The officers rummaged through Mr. English's belongings but did not recover any contraband. *Id.* ¶44. During both Mr. English and Mr. André's detentions, other passengers squeezed past them to board the plane, "gawking" at the interaction. *Id.* ¶¶39, 57. Eventually, the officers returned Mr. André and Mr. English their documents and allowed them to board their flights. *Id.* ¶¶44, 58. Mr. English spent the entire flight worried something else was going to happen; both Mr. English and Mr. André felt traumatized, degraded, and humiliated. *Id.* ¶¶46, 59.

Mr. André and Mr. English are among the millions of Black people who have experienced the indignity, humiliation, and degradation caused by racial profiling. Racial profiling, the act of targeting a person based on their race rather than on individual suspicion, is a systemic practice in United States law enforcement and "strikes at the root of our national principles of fairness and violates the human

dignity of those victimized." U.S. Domestic Hum. Rts. Program, Amnesty International, Threat and Humiliation: Racial Profiling, Domestic Security and Human Rights in the United States at ix (2004), https://www.amnestyusa.org/wp-content/uploads/2017/04/rp_report.pdf. Police practices that racially profile Black people, like CCPD's interdiction program, "deprives persons of their individual dignity," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984), by treating those it targets as "as 'innately inferior' and therefore as less worthy participants in the political community." *Heckler v. Mathews*, 465 U.S. 728, 728–40 (1984). It also causes racially-profiled individuals to "live in constant fear that they will be stopped, harassed, and physically harmed" by police. Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture,* 49 Wake Forest L. Rev. 849, 851 (2014).

The mental and physical toll of racial profiling is so profound that it has been deemed a public health and health disparities issue. *See* Cato T. Laurencin & Joanne M. Walker, *Racial Profiling is a Public Health and Health Disparities Issue*, 7 J. Racial & Ethnic Health Disparities 393 (2020), https://doi.org/10.1007/s40615-020-00738-2. Black people who experience racial profiling suffer from adverse health effects, ranging from psychiatric, mood and anxiety disorders to cardiovascular disease, diabetes, and cancer. *See Laurencin & Walker supra.* And, rather than promoting public safety, the pernicious practice erodes trust in law enforcement and

undermines community policing efforts. Aldrina Mesic et al., *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level,* 110 J. Nat'l Med. Assoc. 106 (2018).

CCPD's interdiction program perpetuates the ongoing, present-day harms of racial profiling that are reminiscent of Georgia's long history of restricting Black people's freedom of movement. The "American identity has long been defined by mobility," but Black people "have never fully shared in that freedom." Mia Bay, Traveling Black: A Story of Race and Resistance at 3 (Harv. U. Press 2021). Black people have been subjected to discriminatory policing since the earliest commercial flights, facing "numerous and persistent" indignities at airports. *Id.* at 193. This is particularly true at the Atlanta airport, where, even after the Interstate Commerce Commission outlawed segregation in interstate travel in 1955, the airport maintained segregated bathrooms. This was strictly enforced by Atlanta Airport police, meaning a hurried traveler who missed the small signs segregating the bathrooms could easily wind up in a "jail cell when all he wanted to do was wash his face." *Id.* at 267.

In modern times, racially-targeted policing of Black people continues to limit their freedom of movement. When drug interdiction programs proliferated in the 1980s, for example, they targeted drivers "using highly subjective criteria that usually involved race or ethnicity." *Id.* at 314–15. And while "Black drivers have always attracted special scrutiny from law enforcement," racial profiling sharply

escalated as roads and other forms of transit have become major sites for the "war on drugs." *Id.* at 313.

As more Black people turn to air travel, Black passengers report "being singled out for invasive scrutiny," at the hands of airline personnel. *Id.* at 319. This is especially pronounced in a post-9/11 era where airport security disproportionately focuses on people of color. Doc 24 - ¶¶ 67, 68. Even the technology used in airport security lines invites racial profiling. TSA's full-body scanners, for example, are more likely to give false alerts for Black hairstyles such as locs and afros, leading to invasive searches of Black passengers. Breanna Edwards, *TSA Body Scanners More Likely to Give False Alarms for Black Hairstyles,* Essence, Oct. 23, 2020, https://www.essence.com/news/tsa-body-scanners-more-likely-to-give-false-alarms-for-black-hairstyles/.

As Plaintiffs outlined in their Complaint, the prevalence of discrimination by airport security is well documented. Doc 24 - ¶¶67, 68. The U.S. Government Office of the Inspector General, for example, emphasized the "civil rights concerns" posed by suspicionless stops of passengers, which are "more often associated with racial profiling" rather than stops based on actual suspicion. *Id.* ¶68 (citing U.S. Gov't Office of the Inspector General, *Review of the Drug Enforcement Administration's Use of Cold Consent Encounters at Mass Transportation Facilities* (2015)). And the Chairman of the House Homeland Security Committee testified that the TSA's

decades-long behavior detection program opens the door to "unlawful profiling [and] it is unconscionable that TSA has not developed better oversight procedures." *Id.* ¶67 (citing *Hearing on Perspectives on TSA's Policies to Prevent Unlawful Profiling Before the Comm. on Homeland Security*, No. 116-24, 116th Cong. (2019)).

CCPD's interdiction program builds upon this history and allows the dignitary harms against Black people to persist—all without meaningfully combatting illegal drug trafficking. *See id.* ¶¶5, 6. Indeed, Mr. André and Mr. English described their experience of being targeted by the interdiction program as "degrading," "disturbing," "traumatizing," and "humiliating." *Id.* ¶¶46, 59. As discussed below, the District Court erred in holding that Plaintiffs had not plausibly alleged violations of their constitutional rights. Especially here, where the challenged program perpetuates the substantial harms of racial profiling, such an erroneous decision should be reversed.

II. The District Court Erred in Holding that Plaintiffs Failed to State a Claim Under the Fourth and Fourteenth Amendments.

The District Court erred in holding that Plaintiffs failed to state a claim under the Fourth and Fourteenth Amendments. The District Court ignored the uniquely coercive nature of CCPD's jet bridge stops and wrongly held, as a matter of law on a motion to dismiss, that the officers' stops were "voluntary encounters" that

warranted no Fourth Amendment scrutiny. The District Court likewise erred in dismissing Plaintiffs' Equal Protection claims, by failing to accept Plaintiffs' allegations of the racial disparity of CCPD's jet bridge stops as true and by improperly raising the pleading standard.

Both rulings should be reversed.

A. The District Court Erred in Dismissing Plaintiffs' Fourth Amendment Claims.

Taking all Plaintiffs' allegations as true and drawing all reasonable inferences in their favor, Plaintiffs more than adequately pled that they were unlawfully seized under the Fourth Amendment. On a narrow jet bridge shortly before the departure of their flights, Mr. André and Mr. English were each singled out and cornered by two CCPD officers, while other non-Black passengers walked by. *Id.* ¶¶31, 50, 51. The officers obstructed their path, interrogated them repeatedly about their alleged drug possession, and commanded them to hand over their boarding passes and identifications. CCPD officers conducted this stop all without any basis to suspect that Mr. André or Mr. English were engaged in any criminal activity or wrongdoing. Doc 40 – Pg. 20.

Neither Plaintiff, nor any reasonable person in that situation, would feel free to leave or refuse the officers' commands, especially if doing so would likely result in a forfeiture of their ability to board their flight or recover their identifications. The

timing, manner, and location of Plaintiffs' stops were coercive, and the totality of the circumstances make clear that Defendants unlawfully seized Mr. André and Mr. English. In holding that Plaintiffs' interactions were "voluntary encounters" that warranted no Fourth Amendment scrutiny, the District Court misconstrued Plaintiffs' allegations, misapplied the motion to dismiss standard, and relied on inapposite cases.

i. Plaintiffs Sufficiently Pled that They Were Illegally Seized Under the Fourth Amendment.

The Fourth Amendment protects "[t]he right of the people . . . against unreasonable searches and seizures." U.S. Const. amend. IV. While consensual encounters with the police are outside of the Fourth Amendment's protections, a police encounter stops being consensual—and a seizure occurs—if a reasonable person, in the plaintiff's position, would not feel free to leave. *See California v. Hodari D.*, 499 U.S. 621, 628 (1991). A person who is not free to walk away is seized even if "the resulting detention [is] quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653–55 (1979). The seizure analysis considers "the particular police conduct at issue" as well as "the setting in which the conduct occurs." *Michigan v. Chesternut*, 468 U.S. 567, 573 (1988). Courts should consider the "totality of the circumstances" in determining whether a reasonable person would feel free to leave. *United States v. Knights*, 989 F.3d 1281, 1288 (11th Cir. 2021).

Based on the totality of circumstances, there is no question that Plaintiffs were seized under the Fourth Amendment. In each encounter, Mr. André and Mr. English were outnumbered by officers, flanked on either side in a narrow jet bridge, ordered to hand over documents, and aggressively asked questions about their alleged criminal conduct—all while the officers held onto their boarding passes and identifications and physically obstructed their ability to walk away. Doc 24 - ¶¶31, 36, 37, 42, 51, 53, 55. Mr. English was additionally ordered to step to the side of the jet bridge and felt coerced into allowing the officers to search his carry-on luggage. *Id.* ¶¶35, 41–42.

To extricate themselves from that situation, Plaintiffs would have had to ignore law enforcement orders and forcibly squeeze past two officers. *Id.* ¶¶39, 57. And even then, leaving the encounter without their ticket and identification would require them to either attempt to board their flight or re-enter the terminal without crucial documents—neither of which would be a viable option for a person who had invested time and money to take a flight outside of the state. A reasonable person would not feel "free to walk away" under these circumstances and thus would be seized under the Fourth Amendment. *West v. Davis*, 767 F.3d 1063, 1070 (11th Cir. 2014); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("'[W]henever a police officer accosts an individual and restrains his freedom to

walk away, he has 'seized' that person.'") (quoting *Terry v. Ohio*, 392 U.S. 1, 16 (1968)).

The totality of the circumstances also requires the court to consider that Mr. André and Mr. English were issued numerous commands by CCPD officers during their interactions. Courts have consistently held that officers seize people when they issue commands that cause the civilians to comply. *See United States v. McHugh*, 639 F.3d 1250, 1257 (10th Cir. 2011) (a civilian was seized when officers ordered him to exit vehicle and he obeyed the command); *United States v. Beauchamp*, 659 F.3d 560, 567 (6th Cir. 2011) (a reasonable person would not feel free to leave after being "instructed" to turn around and walk toward the officer after walking away). Officers effectuate a seizure when they order civilians to stop. *See United States v. Johnson*, 620 F.3d 685, 690–91 (6th Cir. 2010) (a civilian was seized "when the officers ordered him to stop"); *see also United States v. Amos*, 88 F.4th 446, 452 (3d Cir. 2023) (a reasonable person would not feel free to leave when multiple officers approached and commanded civilian to stop and show his hands). It is reasonable to infer from the pleadings that Mr. André and Mr. English were commanded to hand over their boarding passes and identifications; Mr. English was additionally commanded to step to the side of the jet bridge. Doc 24 - ¶¶35, 37, 55. Especially after being subjected to repeated orders by two officers, a reasonable person would not feel free to leave in this situation.

a. The *Berry* Factors Also Support that Plaintiffs Were Unlawfully Seized.

As the court underscored in *United States v. Berry*, "the very nature of [airport] stops may render them intimidating." 670 F.2d 583, 596 (5th Cir. Unit B 1982). The *Berry* Court acknowledged as much even before 9/11 and the sharp increase in racially discriminatory airport security measures that followed. *See* Doc 24 - ¶¶67, 68; *see also* N.Y. Advisory Comm. to the U.S. Comm'n on C.R., Civil Rights Implication of Post-September 11 Law Enforcement Practices in New York at 6 (2003), https://www.usccr.gov/files/pubs/sac/ny0304/ny0304.pdf. In determining whether the police had seized Mr. Berry during a police interaction at an airport, the court identified three factors that should be accorded "great weight" when analyzing the "totality of the circumstances of an airport stop." *Berry,* 670 F.2d at 597. These factors include: (1) whether officers "block[] an individual's path or otherwise intercept[] him to prevent his progress in any way;" (2) whether there are "implicit constraints on an individual's freedom," like "retain[ing] an individual's ticket for more than a minimal amount of time;" and (3) whether officers make statements intimating that "individuals are suspected of smuggling drugs." *Id.* All three of the relevant *Berry* factors weigh heavily in favor of Plaintiffs.

The first *Berry* factor, which the *Berry* court considered to have "great, and probably decisive, significance," favors Plaintiffs' claims because CCPD officers

blocked their path or "otherwise intercepted" them "to prevent [their] progress" down the jet bridge. *Id*. Mr. English pled that CCPD officers "cut off his path" and commanded him "to step to the side of the jet bridge." Doc 24 - ¶¶31, 35. After "moving him off the side of the jet bridge," Mr. English was flanked with one officer on either side of him, continuing to obstruct his path to the airplane door. *Id.* ¶¶36, 37. Similarly, two officers intercepted Mr. André, physically "obstruct[ing] his path" down the jet bridge. *Id.* ¶¶51, 55, 57. In both instances, other passengers had to "squeeze" past Plaintiffs, lending further support to the fact that Plaintiffs' path forward was restricted. *Id.* ¶¶39, 57. The unique physical constraints, in a tunnel above ground where there is no viable opportunity to exit, have decisive significance under both *Berry* and *Davis*.

The second *Berry* factor similarly favors Plaintiffs' claims of an unlawful seizure. There were inherent constraints on Plaintiffs' freedom as the officers retained Plaintiffs' identifications and boarding passes, leaving them "effectively immobilized" in an airport setting that requires identification and boarding passes at every juncture. *See United States v. Thompson*, 712 F.2d 1356, 1359 (11th Cir. 1983); Doc 24 - ¶¶38, 41, 43, 53, 55. Indeed, as this Court has recognized even outside the airport context, an officer holding a person's identification is a factor indicating a seizure finding, and one that often makes an "encounter mature[] into an investigative stop." *Thompson*, 712 F.2d at 1359; *see also United States v. Elsoffer*,

671 F.2d 1294, 1297 (11th Cir. 1982) (airport passengers cannot feel free to leave when their ticket is retained since they "need the ticket in order to continue their flight…").

Finally, the third *Berry* factor supports a finding that Plaintiffs were seized because the officers intimated that they "suspected [Plaintiffs] of smuggling drugs." 670 F.2d at 597. Mr. English was "pepper[ed]" with questions about whether he was carrying any illegal drugs. Doc 24 - ¶33. When he denied that he was, the officers did not relent; instead, they "began rattling off a litany of potential illegal substances he might be carrying, such as cocaine, methamphetamine, unprescribed pills, and others." *Id.* Mr. English was then commanded to step to the side of the jet bridge, where CCPD officers searched his carry-on luggage for illegal drugs. *Id.* ¶38. Mr. André was also "challeng[ed]" with "a series of questions" about whether he was carrying illegal drugs and specifically whether he was "carrying cocaine, methamphetamine, prescription drugs that were not prescribed to him by a doctor, or other narcotics." *Id.* ¶53. Beyond "intimating," CCPD officers made explicit that they suspected Mr. English and Mr. André were illegal drug smuggling, clearly satisfying the third *Berry* factor.

Based on the totality of the circumstances, Plaintiffs sufficiently pled that they were seized under the Fourth Amendment as they were not free to leave. Plaintiffs' allegations of a seizure are further supported by the relevant *Berry* factors which

provide a useful framework to analyze airport stops and which decidedly weigh in favor of Plaintiffs' claims.

ii. The District Court Misapplied the Motion to Dismiss Standard and Relied on Inapposite Cases.

In dismissing Plaintiffs' Fourth Amendment claims, the District Court ignored Plaintiffs' well-pled factual allegations and improperly drew inferences *against* Plaintiffs in violation of the motion to dismiss standard. The District Court then compounded its error by relying on materially different, inapposite cases to conclude that CCPD's seizure of Plaintiffs did not warrant Fourth Amendment protections.

On a motion to dismiss, the court must accept all allegations as true and "draw all reasonable inferences in the plaintiff's favor." *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010) (citations omitted). The District Court failed to do so here, and this error alone warrants reversal. *Edwards v. Dothan City Schools*, 82 F.4th 1306, 1312 (11th Cir. 2023) (reversing a grant of a motion to dismiss because district court ignored that plaintiff had a plausible claim to relief and did not draw reasonable inferences in her favor).

The District Court improperly rejected Mr. André and Mr. English's allegations that Defendants had blocked their path on the narrow jet bridge. Doc 24 - ¶¶38, 51. For instance, the District Court questioned whether Mr. English's path was actually blocked: "[Mr. English's] ability to move towards the door of the

airplane *somehow was compromised* because the officers blocked his path." Doc 40 - Pg 23–24 (emphasis added). But the pleadings clearly state that "one officer stood on Mr. English's left while the other stood on his right, effectively blocking his path onto the plane"—a fact that the District Court was required to accept as true. Doc 24 - ¶36. The District Court similarly dismissed Mr. André's allegation that the Defendants "obstructed his path," Doc 24 - ¶51; *see* Doc 40 - Pg 30.

The District Court also improperly drew inferences in favor of Defendants, finding Mr. André and Mr. English were somehow free to leave. *Id.* at 23. The District Court inferred that even if the officers blocked Mr. English's path, he could walk past them "towards the door of the airplane." *Id.* In addition to favoring Defendants and not Plaintiffs—and in contravention of the motion to dismiss standard—this inference is completely illogical. Mr. André and Mr. English were effectively immobilized: to walk away they would have had to abandon their boarding pass and identification, risking forfeiting their flight, and likely causing them to abandon subsequent travel plans that require identification—not to mention the countless other occasions when identification is required. It is also unreasonable to assume that a person would feel free to push past two officers who are physically blocking them in a narrow tunnel, all while other passengers are squeezing past to board, further constraining the space available.

Rather than accept the veracity of Mr. André's allegation that he was not "free to leave," based on the assertions that Defendants had physically blocked his path and were retaining his travel documents, the District Court dismissed these facts as "subjective beliefs" and thus "irrelevant." *Id.* at 29. This finding is in plain violation of the motion to dismiss standard. The Court should have accepted Mr. André's allegations as true; and certainly, whether a person's exit is blocked by law enforcement bears upon whether a reasonable person would feel free to leave. *See Knights*, 989 F.3d at 1286.

The District Court also minimized the amount of time Defendants retained Plaintiffs' identifications and boarding passes. It mischaracterized Mr. English's encounter with CCPD officers as "brief," Doc 40 - Pg 21, contrary to the allegations in the Complaint. Rather, Mr. English describes an extensive encounter during which the officers peppered him with questions (ranging from asking about a litany of illegal substances to the details of his travel plans), ordered him to step the side of the jet bridge, and searched his carry-on luggage—all while his documents were being held. Doc 24 - ¶42. These allegations describe an encounter that is far from "brief." Doc 40 - Pg 21.

Having failed to accept all of Plaintiffs' well-pled allegations as true and having failed to draw all reasonable inferences in their favor, the District Court compounded its error by relying on inapposite cases to grant Defendants' motion to

dismiss. The District Court relied on cases where officers *did not* hold onto individuals' identifications during the officers' questioning. *See id.* at 25 (citing *United States v. Armstrong*, 722 F.2d 681, 685 (11th Cir. 1984); *United States v. Jensen*, 689 F.2d 1361 (11th Cir. 1982); *see also* Doc 40 - Pg 29 (citing *Armstrong*, 722 F.2d at 685; *United States v. Puglisi*, 723 F.2d 779 (11th Cir. 1984)). In addition, the police interactions in *Armstrong*, *Puglisi*, and *Jensen* occurred in airport concourses—which, unlike jet bridges—are spacious hallways that were open to the public and where boarding passes and identification were not needed for entry. *See Armstrong*, 722 F.2d at 685; *Puglisi*, 723 F.2d at 781; *Jensen*, 689 F.2d at 1362.

Similarly, *United States v. Mendenhall* occurred "in the public concourse," after the passenger disembarked her flight, a time that is decidedly less coercive (as there is no imminent flight to catch) and where one no longer needs a boarding pass. 446 U.S. 547, 555 (1980). And, unlike in *Drayton*, Plaintiffs here allege that their jet bridge stops *did* involve "intimidating movement," clear "blocking of exits," and "command[s]" by the officers, who abruptly emerged in the jet bridge, obstructed the their path in and out of the jet bridge, and ordered them to hand over their identifications and boarding passes. Doc 40 - Pg 30 (citing *Drayton*, 536 U.S. at 204). The District Court cited no authority where the circumstances surrounding a police encounter were as coercive as the jet bridge interdictions here.

Mr. English and Mr. André more than adequately alleged that they were improperly seized under the Fourth Amendment. No reasonable person subjected to CCPD's jet bridge stops would feel free to simply ignore the officers' commands to hand over their travel documents or refuse to answer accusatory questions about their alleged drug possession and travel plans. Doc 24 - ¶¶33, 37, 38, 53, 55. While undergoing such an unwarranted and degrading series of questions, a person would also not feel free to squeeze past the officers and continue along to board a flight without a ticket. Failing to properly weigh the facts, apply the correct legal standard, or rely on factually similar cases, the District Court committed numerous errors in dismissing Plaintiffs' Fourth Amendment claims. These errors should be reversed.

B. The District Court Erred in Dismissing Plaintiffs' Fourteenth Amendment Claims.

The District Court likewise erred in holding that Plaintiffs failed to state a claim under the Fourteenth Amendment. Doc 40 - Pg 37-45. Under the guise of a "drug interdiction program," CCPD officers single out Black passengers and passengers of color, obstruct their freedom of movement, and subject them to constitutional and dignitary harms. Where 56% of passengers stopped by CCPD are Black, compared to only 8% of Black people comprising domestic airline flyers, the Complaint more than adequately pled that Defendants' program discriminates against Black passengers in violation of the Equal Protection Clause. Doc 24 - ¶77.

In holding that Plaintiffs had not met their burden of pleading an Equal Protection claim, the District Court made three distinct errors. First, it wrongly discounted Plaintiffs' statistical evidence showing that Black passengers and people of color were distinctly singled out by CCPD. Second, it incorrectly faulted Plaintiffs for not providing a similarly-situated-comparator, as Plaintiffs did provide a comparator—and even if they had not, it is not required in this case. Finally, it improperly required more granular statistical evidence at the pleading stage where Plaintiffs have not been afforded the opportunity of discovery to further develop their claims.

During the eight months when Plaintiffs' stops occurred, CCPD conducted a total of 402 jet bridge interdictions. Doc 24 - ¶77. CCPD documented the passengers' race for 378 of those interdictions. Of those interdictions, 68% of passengers stopped were people of color, 56% were Black, and only 32% were white. *Id.* This disparity is enough to support an inference of discrimination at the pleading stage where Plaintiffs also allege that (1) only 8% of domestic airline travelers are Black while 67% are white, and (2) the demographics of airline travelers in the Atlanta airport plausibly mirror that of national domestic airline travelers given that the Atlanta airport handles the largest amount of national domestic air travel and 60% of its passengers are merely connecting to other flights. Doc 24 - ¶¶77–78.

Even if the Atlanta airport's percentage of Black travelers is not identical to that of domestic airline travelers, Plaintiffs nevertheless allege enough of a disparity to state a claim under the Fourteenth Amendment. Indeed, the Complaint alleges that that if CCPD's interdiction stops were truly random, "no more than 39 of the 378 travelers stopped would have been Black," and the fact that 211 Black passengers were stopped far exceeds that number. Doc 24 – Pg. 27; *see, e.g., Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (finding discriminatory effect in juror summonses where, based on total population statistics, 688 Mexican-American jurors should have been summoned, but only 339 Mexican-Americans were actually summoned).

The Complaint also alleges a similarly-situated-comparator. CCPD officers were purportedly conducting random stops, meaning that Plaintiffs were similarly situated to the other passengers boarding their flight and walking through the jet bridge. And the demographic data of the 378 stops show that a similarly-situated white person had a much lower likelihood of being stopped, whereas a Black passenger was over five times more likely to be stopped than they would have been had the stops been truly random. *See* Doc 24 - ¶¶77-80. The District Court further erred in wholly ignoring the allegations concerning the experiences of Mr. André and Jean Elie (another Black passenger racially profiled by CCPD on the jet bridge), who both did not observe any other Black passengers around them when they were

boarding their flights and who saw CCPD allow other white passengers to continue to board freely. *See id.* at ¶¶50, 57, 95, 99, 101. It was a misapplication of the legal standard to discount these allegations of a comparator, where there are more than enough facts pointing to the racial disparity in interdiction stops to "nudge a plaintiff's claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

It was also erroneous to hold that a comparator was required for Plaintiffs to prevail on their Fourteenth Amendment claims when those claims were not based on a selective enforcement theory.[1] The Equal Protection Clause protects against race discrimination that "can result from *either* misapplication (i.e., departure from or distortion of the law) *or* selective enforcement (i.e., correct enforcement in only a fraction of cases)." *Red Door Asian Bistro v. City of Fort Lauderdale,* No. 22-11489, 2023 WL 5606088, at *7 (11th Cir. Aug. 30, 2023) (emphasis added) (citing *E & T Realty v. Strickland*, 830 F.2d 1107, 1113 (11th Cir. 1987)). The comparator requirement "makes sense" in the context of a selective enforcement claim where "the issue is whether the plaintiff was unfairly targeted for correct enforcement, not whether the reasons offered for the official action were valid or genuine." *Red Door*,

[1] Even if this Court views Plaintiffs' Equal Protection claims as predicated on a selective enforcement theory, they have sufficiently alleged a similarly-situated-comparator. *See supra* pp. 23-24; Appellants-Pls.' Br. 37–44.

2023 WL 5606088 at *7-8. (citations omitted) ("[P]reventing [] official conduct based on race is at the core of the equal-protection guarantee. Requiring a more direct comparison with a similarly situated party in these circumstances would necessarily frustrate that guarantee."); *see also Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) ("Not every [claimant] subjected to unlawful discrimination will be able to produce a similarly situated comparator. Among other things, a proper comparator may simply not exist . . .").

But here, Plaintiffs are not arguing that they were unfairly targeted for *correct* enforcement: they were racially profiled in seizures that were not supported by sufficient suspicion of criminal activity or wrongdoing. *See* Doc 24 - ¶120. This Circuit's recent analysis in *Red Door Asian Bistro* is instructive. There, the plaintiff had challenged the City of Fort Lauderdale's departure from ordinary building inspections due to racial animus. The District Court granted summary judgment to the city, holding that the plaintiff's Equal Protection claim failed for lack of a similarly-situated-comparator. *Id*. This Court reversed on appeal, holding that a comparator was not necessary where the defendant had refused to "correctly apply [the law] because of Anti-Asian animus." *Red Door Asian Bistro* at *8; *see also Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004) (declining to impose a strict comparator requirement where plaintiff had not alleged a "typical selective prosecution claim where the target of the enforcement action does not contest that

there is probable cause to prosecute," but instead "argue[d] that the charges against him are entirely false."); *Pyke v. Cuomo*, 258 F.3d 107, 109 (2d Cir. 2001) (limiting the comparator requirement to selective-prosecution cases, as opposed to "traditional" equal protection claims).

Similarly, Plaintiffs bring a "traditional" Equal Protection claim here, challenging how their race, as Black individuals, prompted CCPD to profile and stop them, and indeed, pleading facts that point to the illegitimacy of CCPD's drug interdiction program. *See* Doc 24 - ¶6. For instance, the Complaint details how CCPD officers' discretion is not sufficiently constrained, allowing them to conduct suspicionless jet bridge stops that violate the rights of Black passengers: "CCPD does not have any written formal or informal policies or practices that even purport to constrain the discretion of the officers when conducting the jet bridge interdiction program." *Id.* ¶74; *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 559, (1976) (random, suspicionless stops raised "grave danger that such unreviewable discretion would be abused by some officers in the field). In arguing that this program commits suspicionless racial profiling, therefore, Plaintiffs put at issue whether the entire interdiction program is "valid" or "genuine"—suggesting there are no instances of "correct" enforcement, let alone the specific CCPD stops Plaintiffs endured. *See Red Door*, 2023 WL 5606088 at *7.

To the extent that more granular statistical evidence would be required to sustain an ultimate finding of liability, it is improper to demand that of Plaintiffs at this stage. Plaintiffs "should be afforded the opportunity of discovery" to ascertain the full scope of flights monitored by CCPD's interdiction program—and certainly some of this data may require subpoenas to third parties, such as flight manifests from the airlines themselves. *Forsyth v. Univ. of Alabama Bd. of Trustees*, No. 7:17-CV-00854-RDP, 2018 WL 4517592, at *6 (N.D. Ala. Sept. 20, 2018) ("Without the benefit of discovery, it is virtually impossible for a Plaintiff to present data reflecting disparate impact. To hold otherwise would, in the vast majority of cases, shut the courthouse door on a plaintiff alleging a claim based on disparate impact."); *Bartholomew v. Lowe's Home Centers, LLC*, No. 219CV695FTM38MRM, 2020 WL 321372, at *4 (M.D. Fla. Jan. 21, 2020) ("[P]laintiffs need not provided detailed statistics in their Complaints."). Thus, Plaintiffs should not be faulted for not providing the specific statistical breakdown that the District Court calls, and their allegations of racial disparity in interdiction stops more than supports a claim under the Fourteenth Amendment at this stage in the litigation.

CONCLUSION

CCPD's drug interdiction program is unconstitutional, serves no legitimate purpose, and hinders Black people's freedom of movement. Unless this Court reverses the decision below, CCPD's program will continue with impunity, allowing

Black passengers and passengers of color to suffer constitutional and dignitary harms. Plaintiffs more than adequately pled violations of the Fourth and Fourteenth Amendments. Accordingly, this Court should reverse the District Court's decision and allow Plaintiffs to continue to challenge this clearly discriminatory police practice.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH FRAP 32(G)(1)

The undersigned certifies that this brief complies with the applicable typeface and volume limitations of Federal Rules of Appellate Procedure 29(a)(5). This brief contains 6396 words, exclusive of the components that are excluded from the word count limitation in Rule 32(f). This certificate was prepared in reliance upon the word-count function of the word processing system used to prepare this brief (Microsoft Word 365). This brief complies with the typeface and type style requirements of Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface using Times New Roman, font size 14.

Date: Jan. 19, 2024

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CERTIFICATE OF SERVICE

In accordance with Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that on this 19th day of January 2024, I electronically filed the foregoing Brief of Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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