IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ERIC ANDRÉ and CLAYTON ENGLISH,

Plaintiffs,

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.

Civil Action No. 1:22-cv-04065-MHC

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs Eric André and Clayton English are two Black men who were stopped by Clayton County police officers while boarding flights in Atlanta's Hartsfield-Jackson International Airport. Plaintiffs were not suspected of any crime. Yet officers singled each Plaintiff out from passengers in the jet bridge, stopped him, retained his ID and boarding pass while interrogating him about whether he had illegal drugs, and went so far as to riffle through Mr. English's bag. These encounters were conducted as part of a longstanding Clayton County Police Department ("CCPD") interdiction program.

These actions violated the United States Constitution twice over. First, they violated the Fourth Amendment because officers unreasonably seized both Plaintiffs and subjected Mr. English to an unreasonable search of his property. Second, because officers selected Plaintiffs based on race, they violated the Fourteenth Amendment's Equal Protection Clause.

Defendants' Motion to Dismiss disregards both established law and Plaintiffs' core factual allegations. Defendants argue that the individual officers are entitled to qualified immunity because the Constitution did not clearly proscribe their conduct. But it has been the law for over *forty years* in the Eleventh Circuit that the police airport activity alleged here—obstructing Plaintiffs' movement, retaining their

documents, and interrogating them about narcotics, all without suspicion—violates the Fourth Amendment. *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. Unit B 1982) (en banc).[1] As for Equal Protection, Defendants baselessly assert that Plaintiffs do "not allege any facts that show that other similarly situated individuals received more favorable or different treatment than them." Mot. 12. That is exactly what Plaintiffs allege and what their statistics—unaddressed by Defendants—show: white travelers at the Atlanta Airport are dramatically less likely to be stopped than Black travelers. FAC ¶¶77-80. Indeed, the odds that these purportedly random stops are race-neutral are literally astronomical: less than the chance of being struck by a meteorite. FAC ¶79. Those statistics, coupled with first-hand accounts, state an Equal Protection claim.

Defendants also contend incorrectly that Plaintiffs do not plead county liability for the constitutional violations because they do not allege injuries that were caused by a "policy or custom." Mot. 19-21. The Complaint, however, details the longstanding nature of CCPD customs and practices that caused the constitutional injuries. This Court should deny Defendants' Motion to Dismiss.

[1] "Unit B" became the Eleventh Circuit, which has adopted its decisions as binding. *United States v. Schultz*, 565 F.3d 1353, 1360 n.4 (11th Cir. 2009).

BACKGROUND

I. CCPD's Jet Bridge Program Relies on Coercion and Racial Profiling.

CCPD operates a jet bridge drug interdiction program at the Atlanta Airport. FAC ¶61. CCPD officers—sometimes joined by Clayton County District Attorney's Office investigators—stop, question, and search unwitting air travelers in the jet bridges that connect airport gates with planes. *Id.* ¶¶62-64. These interdictions are based on no individualized suspicion of criminal activity; rather, CCPD claims the stops are "random" and "consensual." *Id.*[2]

The location for these passenger interdictions is no accident: the jet bridge is a uniquely coercive space, with passengers packed together and under pressure to make their flights. FAC ¶69. And in the post-9/11 world, where airports have become one of the most secured places in America, individuals naturally feel under obligation to comply with law enforcement. *Id.* ¶¶65-66.

The selection of passengers also is no accident: they are dramatically disproportionately Black. *Id.* ¶¶76-80. CCPD records list passenger race for 378 of the 402 documented jet bridge stops during the period most relevant to this case. Of these passengers, 56% were Black and 68% were people of color. *Id.* ¶77. Given the

[2] The program finds almost no drugs, but it generates a financial windfall through seizures of cash from individuals never charged with crimes. FAC ¶¶83-91.

racial composition of Atlanta Airport travelers, the probability that random chance caused this racial disparity is *significantly* less than one in one hundred *trillion*. *Id.* ¶79. These racial disparities are well known to CCPD. *Id.* ¶¶81-82. Officers submit weekly logs recording the race of passengers they stop, providing notice of the racial disparity. *Id.* In 2019, one Black passenger who CCPD stopped pursuant to the program informed CCPD that he had been racially profiled by Defendants Hooks and Griffin. *Id.* ¶¶93-104. The Supervising Officer stated that the complaint would be ignored unless he flew back to Atlanta to file it in person.

II. Plaintiffs Were Stopped Pursuant to the Jet Bridge Program.

Plaintiffs English and André, both Black men, were stopped pursuant to the jet bridge program six months apart, while boarding flights to Los Angeles.

Clayton English. In October 2020, Mr. English entered the jet bridge to board his flight. Defendants Griffin and Campbell emerged from a bend in the tunnel, singled him out, and cut off his path. *Id.* ¶¶23, 31. The officers flashed their badges and asked whether he was carrying illegal drugs. *Id.* ¶33. Mr. English was confused and alarmed, but, like all passengers, understood compliance with officers in the airport was required. *Id.* ¶¶26-29. As the officers rattled off potential narcotics he might be carrying—cocaine, methamphetamine, unprescribed pills, and others—Mr. English repeatedly stated he did not have illegal drugs. *Id.* ¶33.

Mr. English understood that he was not free to leave during questioning. *Id.* ¶34. The officers instructed Mr. English to step to the side of the jet bridge. He complied. *Id.* ¶35. The officers blocked his path to the plane. *Id.* ¶36. One officer asked Mr. English to hand over his ID and boarding pass. Retaining the documents, the officers again asked Mr. English if he was carrying illegal drugs, and about his profession and reason for traveling. *Id.* ¶¶37-38. Throughout the interrogation, passengers gawked as they squeezed around the scene to board the flight. *Id.* ¶39.

While retaining Mr. English's documents, an officer stated that he wanted to search Mr. English's bags. *Id.* ¶¶41-42. Mr. English acquiesced, and the officer rummaged through the bags while the other questioned him. *Id.* The officers returned Mr. English's documents and, upon completing the search, only then told him that he was free to board. *Id.* ¶44. Mr. English worried that if he said anything perceived as "out of line," he would not be allowed to board the plane. *Id.* ¶45. Mr. English did not understand why he was singled out for this humiliating experience. *Id.* ¶46.

Eric André. Six months later, Defendants Branham and Hooks stopped Mr. André. The facts are strikingly identical. Defendants stopped Mr. André in the jet bridge, flashed their badges, and retained his ID and boarding pass as they questioned him about his work, travel, and whether he had illegal drugs. *Id.* ¶¶47-59. The officers stated that the stops were "random" and the questions were

"protocol." *Id.* ¶56. Like Mr. English, Mr. André did not believe he was free to leave, nor did he understand why the officers singled him out.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) must be denied when plaintiffs plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A court must accept a complaint's plausible factual allegations as true and draw all reasonable inferences in plaintiffs' favor. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010).

ARGUMENT

I. Plaintiffs State Fourth Amendment Claims Against Individual Defendants.

The Fourth Amendment prohibits the officers' unreasonable seizures of both Plaintiffs and the unreasonable search of Mr. English's property. U.S. Const. amend. IV. The individual officers are not entitled to qualified immunity, because the law proscribing their conduct has been clearly established for 40 years.

A. Plaintiffs State Claims for Unreasonable Seizures.

With little acknowledgment of the actual facts alleged in the Complaint, Defendants argue there can be no Fourth Amendment violation because the police encounters were consensual. They were not, as both law and common sense instruct. The Fourth Amendment inquiry is whether, "in view of all of the circumstances …

a reasonable person would have believed that he was not free to leave." *Brendlin v. California*, 551 U.S. 249, 255 (2007); *see also United States v. Drayton*, 536 U.S. 194, 207 (2002) ("[T]he totality of the circumstances must control."). It does not matter if "the purpose of the stop is limited and the resulting detention is quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979).

The Eleventh Circuit has long held that officers effect an unreasonable seizure in an airport when they, without individualized suspicion, make a display of authority, obstruct a passenger's path, take his identification and ticket, do not notify the passenger he is free to terminate the encounter, and interrogate him about narcotics. *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. Unit B 1982) (en banc). The Eleventh Circuit's en banc decision in *Berry*, 670 F.2d 583, clearly establishes the Fourth Amendment violations here. *Berry* clarified the "interplay of airport stops and the Fourth Amendment." *Id.* at 594. The Court emphasized the uniquely coercive nature of airport police stops, stressing: "the very nature of such stops may render them intimidating." *Id.* at 596. The Court elaborated:

> The nervousness that air flight often engenders, the need quickly to make connections for continuing one's journey, the mere surprise from being accosted in a crowded airport concourse by a law enforcement officer for no apparent reason, and the pressure to cooperate with police to avoid an untoward scene before the crowds of people, all make it easy for implicit threats or subtle coercion to exert tremendous pressure on an individual to acquiesce to the officer's wishes. *Id.*

Given those unique coercive pressures, *Berry* drew a bright line: airport stops must be "of extremely restricted scope and conducted in a completely non-coercive manner" to be deemed consensual. *Id.* at 594. *Berry* specifically instructed "that blocking an individual's path or otherwise intercepting him to prevent his progress in any way is a consideration of great, and probably decisive, significance" in the seizure analysis. *Id.* at 597. "Similarly, implicit constraints on an individual's freedom as would be caused by retaining an individual's ticket for more than a minimal amount of time…suggest that a seizure has occurred." *Id.*; *see also United States v. Elsoffer*, 671 F.2d 1294, 1297 (11th Cir. 1982) (officer seized air traveler by "retain[ing] [the traveler's] ticket while asking for his driver's license, then retained both documents while interrogating him"). Statements intimating "individuals are suspected of smuggling drugs" also indicate a seizure because they "could induce a reasonable person to believe that failure to cooperate would lead only to formal detention." *Berry*, 670 F.2d at 597.

Applying *Berry*, the Complaint clearly states Fourth Amendment violations. All of the *Berry* factors just detailed are present. CCPD officers obstructed Plaintiffs' paths and moved Mr. English to a different location in the jet bridge. *Supra* 4-6. Officers retained Plaintiffs' IDs and tickets during questioning. *Id.* And officers

repeatedly asked Plaintiffs if they had illegal narcotics. *Id.* Any one of those facts could be enough under *Berry* to allege a seizure. Having all three leaves no doubt.

Indeed, the coercive pressures *Berry* described in airport stops, *supra* 8, are more pronounced in the post-9/11 security environment. FAC ¶¶65-66. Those pressures reach their apex in the jet bridge, where passengers are almost on the plane and understand they must obey authorities for security reasons. *Id.* ¶72. By contrast, the defendants in *Berry* were seized *outside* an airport terminal. 670 F.2d at 588.

The principle cases Defendants rely upon—*United States v. Jenson* and *United States v. Armstrong*—do Defendants no favors. Mot. 6. *Both* recognize *Berry* as the controlling law. *See Jenson*, 689 F.2d 1361, 1363 (11th Cir. 1982) (per curiam); *Armstrong*, 722 F.2d 681, 683-84 (11th Cir. 1984). Both involved individualized suspicion of criminal conduct, *Jenson*, 689 F.2d at 1362-63; *Armstrong*, 722 F.2d at 682, which is entirely absent here. And both lacked the coercive elements *Berry* enumerates. The short per curiam opinion in *Jenson* described no obstruction of the plaintiff's movement; in fact, the plaintiff himself conceded he was not seized when officers first approached him and asked questions while he was seated in the terminal. 689 F.2d at 1363. In *Armstrong*, an officer "notified appellant that he was free to leave and that he did not have to consent." 722 F.2d at 684; *see also id.* at 685 (the officer "stressed to both men that they were free

to leave"). *Armstrong* also noted that the officers did not retain the individuals' identifications during questioning and observed there was no allegation that the officers were "blocking an individual's path or otherwise intercepting him to prevent his progress." *Id* at 685. The allegations here are to the contrary.

B. Mr. English States a Claim for an Unreasonable Search.

Mr. English also states a Fourth Amendment claim for an unreasonable search of his belongings. FAC ¶¶122-127. As an initial matter, if this Court agrees that Mr. English establishes an unconstitutional seizure, then he necessarily establishes an unreasonable search, because any "consent" was the product of the illegal seizure. *U.S. v. Santa*, 236 F.3d 662, 676-78 (11th Cir. 2000). But even if Mr. English had not been seized, the search independently violated the Fourth Amendment.

Defendants brush this cause of action off in a one-sentence assertion that Mr. English consented to the search. Mot. 10. They simply ignore the Complaint's factual allegations that consent was coerced, violating the Fourth Amendment. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 228, 248-49 (1973) (noting consent must be "freely and voluntarily given," and must "not be coerced"). The officers blocked Mr. English's path, took his documents, made him move to the side of the jet bridge, questioned him about narcotics in front of passengers, and, still holding his documents, asked to search his bags without telling him he could decline. *Supra*

4-5.[3] These allegations establish coercion; indeed, in the airport, "exceptionally clear evidence is required to establish voluntary consent." *U.S. v. Robinson*, 690 F.2d 869, 875 (11th Cir. 1982); *U.S. v. Chemaly*, 741 F.2d 1346, 1353 (11th Cir. 1984) (consent not voluntary where agent retained the passenger's "ticket and passport, removed him from the other passengers for questioning, and did not inform him of his right to refuse consent"); *U.S. v. Bacca-Beltran*, 741 F.2d 1361, 1362-63 (11th Cir. 1984) (same). In any event, issues of consent are poor candidates "for resolution at a motion to dismiss, because the issues of consent and coercion are painted in grays, not blacks and whites." *Noell v. Clayton Cnty.*, No. 1:15-CV-2404-AT, 2016 WL 11794207, at *6 (N.D. Ga. Sept. 21, 2016); *see Bustamonte*, 412 U.S. at 227.

C. Individual Defendants Are Not Entitled to Qualified Immunity.

Defendants assert qualified immunity from liability. Mot. 4. Qualified immunity is inappropriate where, as here, (1) plaintiffs' allegations establish a constitutional violation and (2) "the right violated was clearly established." *Baxter v. Roberts*, 54 F.4th 1241,1256 (11th Cir. 2022). An injured party can show that a constitutional right "was clearly established at the time of an alleged violation" by "point[ing] to a materially similar case that has already decided that what the police

[3] Those facts again contrast with the case Defendants cite. In *Jensen* the officer "told defendant he could refuse to consent to a search of his luggage," and the defendant then "consented in writing." 689 F.2d at 1362.

officer was doing was unlawful." *Ingram v. Kubik*, 30 F.4th 1241, 1252 (11th Cir. 2022) (citation omitted).

Berry is a "materially similar case" that decades ago established that the officers' conduct here violates the Fourth Amendment. The Eleventh Circuit took *Berry* en banc precisely to clarify the law regarding the application of the Fourth Amendment to airport stops, in the context of drug interdiction activity. It deliberately enumerated for officers the factors that create a seizure and described the coercion that vitiates consent. *Supra* 7-9. Thus, the law is clearly established for qualified immunity purposes. *See also United States v. Thompson*, 546 F.3d 1223, 1229 (10th Cir. 2008) (citing *Berry* as the Eleventh Circuit's standard for when a seizure occurs when officers "block an individual's path while he is on foot").

Defendants argue that officers *always* should receive qualified immunity for Fourth Amendment violations in airports, because no two airport stops are exactly alike. Mot. 18. This claim of blanket airport immunity is neither credible nor tenable; a prior case may have "factual differences" yet provide notice sufficient to extinguish qualified immunity. *Baxter*, 54 F.4th at 1263-64. *Berry* set guidelines to apply to officer conduct, identifying the factors that control. *Supra* 7-9. This clearly established law proscribes the seizures and search here. Defendants are not entitled to qualified immunity.

II. Plaintiffs State Equal Protection Claims Against the Individual Defendants.

The Equal Protection Clause proscribes selective police enforcement based on race, as Defendants recognize. Mot. 11; *Whren v. United States*, 517 U.S. 806, 813 (1996). To establish a race-based selective enforcement claim, plaintiffs must show that the challenged conduct (1) had a discriminatory effect and (2) was motivated by a discriminatory purpose. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). Here, Plaintiffs allege facts satisfying both elements.

A. Plaintiffs Allege the Program Has a Discriminatory Effect.

Challenged government action has a discriminatory effect when it "bears more heavily on one race than another." *Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299, 1321 (11th Cir. 2021). Defendants argue Plaintiffs do not state an Equal Protection claim because the Complaint "does not allege any facts that show that other similarly situated individuals received more favorable or different treatment than them." Mot. 12. To the contrary, the Complaint details the alarming extent to which CCPD's jet bridge program disproportionately targets Black passengers for interdiction, presenting meticulous statistical evidence—entirely unacknowledged in Defendants' motion—comparing similarly situated white and Black travelers in the Atlanta Airport. FAC ¶¶76-82.

If the passenger stops are "random," as CCPD claims (*id.* ¶¶56, 97), the racial demographics of those stopped should correspond to that of airport travelers. That is far from the case. During the eight months that include Plaintiffs' interdictions, CCPD recorded 402 jet bridge stops; 378 record the passenger's race. *Id.* ¶77. Of those, 56% (211) were Black passengers, even though Black people make up approximately 8% of travelers at the Atlanta Airport.[4] *Id.* Just 32% were white—a racial group that comprises approximately 67% of travelers at the Atlanta Airport. *Id.* By statistical standards, no more than 39 Black passengers should have been stopped if the interdictions were random. Instead, CCPD officers stopped more than five times that number (211). *Id.* ¶80.

The probability that random chance caused this disparity is less than 1 in one hundred trillion trillion trillion. *Id.* ¶79. That is more than 34 standard deviations

[4] The summary of passenger demographics at the Atlanta Airport is based on a study of U.S. domestic air travelers. The Complaint explains why using domestic air travelers to estimate the Atlanta Airport demographics is reasonable—the airport handles more domestic passengers than any other U.S. airport, and 60% of those passengers only travel through Atlanta to catch connecting flights. FAC ¶78. Even if the proportion of Black travelers were somewhat higher in the Atlanta Airport than nationally, the racial disparity among those stopped by CCPD would remain statistically significant evidence of discrimination. Black travelers would have to make up 52% of Atlanta travelers boarding domestic flights—more than six times the national average—for there to be a "statistically significant possibility that the racial disparities in the jet bridge stops were random." *Id.* ¶80.

from random chance, far less probable than what courts have required for a statistically significant showing of discriminatory effect. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (statistical evidence of discrimination was persuasive where the probability a disparity occurred randomly was less than 1 in 10,140); *Chavez v. Illinois State Police*, 251 F.3d 612, 636-38 (7th Cir. 2001) ("[t]wo standard deviations is normally enough to show that it is extremely unlikely . . . that [a] disparity is due to chance" (citation omitted)).[5]

The Complaint supports this statistical showing of discriminatory effect with first-hand accounts. Mr. André alleges that he did not see any other Black people boarding when he was interdicted. FAC ¶¶50-51.[6] Jean Elie, another passenger interdicted by Defendants Hooks and Griffin while boarding a flight in Atlanta in 2019, likewise stated he saw no other Black passengers in the jet bridge when he was stopped. *Id.* ¶¶ 93-96. In short, Plaintiffs have alleged adequately that the jet bridge program "bears more heavily" on Black passengers than similarly situated white passengers. *Greater Birmingham Ministries*, 992 F.3d at 1321.

[5] "[T]wo standard deviations corresponds approximately to a one in twenty, or five percent, chance that a disparity is merely a random deviation from the norm[.]" *Ottaviani v. State Univ. of New York at New Paltz*, 875 F.2d 365, 371 (2d Cir. 1989).

[6] Discovery will afford Plaintiffs the opportunity to specifically develop the composition of the passenger population boarding.

B. Plaintiffs Allege a Discriminatory Purpose.

A "clear pattern" of disparate impact can, on its own, suffice to establish discriminatory purpose if the disparity is so "stark" as to be "unexplainable on grounds other than race." *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also E & T Realty v. Strickland*, 830 F.2d 1107, 1114 n.9 (11th Cir. 1987) ("[P]urposeful discrimination can be indirectly proven by a 'stark' pattern of adverse impact on a particular group."); *Jean v. Nelson*, 711 F.2d 1455, 1490 (11th Cir. 1983), *vacated on other grounds on reh'g*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985) ("[I]mpact alone will suffice to prove [a] prima facie case [of discriminatory intent] when [the] pattern that emerges is stark…."). That is particularly so at this stage, where Plaintiffs need only allege facts permitting a reasonable inference of discriminatory purpose. *See, e.g.*, *Lewis v. Governor of Alabama*, 896 F.3d 1282, 1295-97 (11th Cir. 2018), *vacated on other grounds on reh'g*, 944 F.3d 1287 (11th Cir. 2019) (stating equal protection claim by showing the "disproportionate effect" of challenged law on Black residents); *City of S. Miami v. DeSantis*, 424 F. Supp. 3d 1309, 1344 (S.D. Fla. 2019) (stating equal protection claim where complaint "sets forth statistics and data indicating that racial minorities are more likely to be targeted … by local law enforcement").

Plaintiffs have met this burden. The number of Black passengers actually stopped is 34 standard deviations from the number expected to be stopped through random chance. That is far greater than the two or three standard deviations courts treat as sufficient to prove intentional racial discrimination. *See Nelson*, 711 F.2d at 1488 ("'[I]f the difference…is greater than two or three standard deviations,' then we suspect an unexplained factor, in this case discrimination, is responsible for the difference.") (quoting *Castaneda*, 430 U.S. at 496-97).

Purposefulness also is shown by the fact that CCPD knew of the jet bridge program's discriminatory impact yet did nothing. The weekly logs that CCPD created and reviewed (*see supra* 4) show extraordinary and persistent targeting of Black passengers. At least one passenger complained to a supervising officer that he was selected for interdiction by Defendants Hooks and Griffin based on race. FAC ¶¶102. Yet the officers continued this discriminatory practice.

Defendants' motion does not even acknowledge the profound racial disparity in stops. Rather, Defendants seem to argue Plaintiffs' Equal Protection claim fails because the Complaint does not allege Defendants stopped *zero* white people. Mot. 12. But the Equal Protection Clause is concerned with racial disparity, not absolute treatment of one group. *E.g.*, *Hunter v. Underwood*, 471 U.S. 222, 227 (1985). Defendants also seek to excuse the disparity by arguing the program has "numerous

legitimate non-race related reasons/goals." Mot. 13. That is legally irrelevant. Using race as a motivating factor, as Plaintiffs allege s*ee* FAC ¶¶76-82, 128-34, renders the program unconstitutional, regardless of the program's "goals."[7] *Vill. Of Arlington Heights*, 429 U.S. at 265-66.

C. Individual Defendants Are Not Entitled to Qualified Immunity.

Defendants acknowledge it is clearly established that the Equal Protection Clause prohibits selective policing based on race. Mot. 10-13; *see Swint v. City of Wadley*, 51 F.3d 988, 1000 (11th Cir. 1995). Because Plaintiffs have alleged a violation, *see supra*, Defendants are not entitled to qualified immunity.

III. Plaintiffs State Constitutional Claims Against the County.

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978), holds that a government body is liable under Section 1983 for a deprivation of constitutional rights "when a 'policy or custom' of the municipality inflicts the injury." *Baxter*, 54 F.4th at 1270. "A plaintiff can establish the existence of a municipal policy or custom in several ways, including by: …[1] identifying a widespread practice that, although not authorized by written or express municipal policy, is so permanent and well settled as to constitute a custom …; or [2]

[7] Defendants' reliance on *United States v. Matthews* is misplaced. Mot. 13. *Matthews* involved incidental racial disparities under facially neutral sentencing laws. 168 F.3d 1234, 1251 (11th Cir. 1999).

demonstrating that the municipality tacitly authorize[d] or displaye[d] deliberate indifference towards the constitutionally offensive actions of its employees." *Id.* (quotation marks, citations omitted). Plaintiffs' allegations satisfy both standards.

Fourth Amendment. Plaintiffs allege that the jet bridge program is a constitutionally defective "custom"—that is, "a longstanding and widespread practice" that was accepted by CCPD. *Young v. City of Augusta*, 59 F.3d 1160, 1172 (11th Cir. 1995). CCPD operated the program for at least seven years before Mr. André was interdicted. *See Noell*, 2016 WL 11794207 at *1 (describing 2014 CCPD jet bridge stop). There can be no doubt the program existed, that its practices were customary, or that the Department accepted those practices. CCPD conducted at least 402 jet bridge stops during the relevant eight-month period and collected over a million dollars. FAC ¶¶84, 86. Those interdictions follow a customary protocol, as affirmed by Plaintiffs' accounts and near identical passenger accounts from 2017 and 2019. *Id.* ¶¶92-112. That protocol includes: intercepting passengers in jet bridges without particularized suspicion; blocking passengers' paths; flashing badges; taking and retaining IDs and tickets; and interrogating and searching passengers. Officers even describe their questions as "protocol." FAC ¶56. This program caused the constitutional violations here.

The Complaint also establishes CCPD's "tacit authoriz[ation]" or "deliberate indifference towards the constitutionally offensive actions of" its officers. *Baxter*, 54 F.4th at 1270. CCPD operates a unit that its own documents call the "Airport Interdiction Unit." FAC ¶61. CCPD, like all law enforcement, knew or should have known of the coerciveness of police interdictions in airports generally, and especially in jet bridges. *Id.* ¶69, 74. The Complaint also details how, in 2016, another judge in this District ruled that a plaintiff who alleged CCPD officers stopped her as part of the same jet bridge program stated a Fourth Amendment claim. *Id.* ¶ 113; *Noell*, 2016 WL 11794207 at *1.[8] *Noell* put CCPD on specific notice that its program likely violated constitutional rights. *Id.* ¶113. Yet CCPD established no "written formal or informal policies or practices that even purport to constrain the discretion of the officers. . . ." *Id.* ¶74. This deliberate indifference caused the violations here. These allegations amply satisfy *Monell. See Piazza v. Jefferson Cnty.*, 923 F.3d 947, 957 (11th Cir. 2019) (A plaintiff can satisfy *Monell* by "show[ing] that the absence of a policy led to a violation of constitutional rights.").

[8] Defendants assert that *Noell* did not concern the jet bridge program. Mot. 21. That is wrong; it was the same program. *See* 2016 WL 11794207 at *1-2. Defendants also argue *Noell* is irrelevant to *Monell* because the Court made no findings of county liability. *Noell*, however, shows that the conduct here stretches back to at least 2016, and that County defendants were made aware of its constitutional deficiencies.

Equal Protection. Plaintiffs also allege that the jet bridge program included a longstanding, widespread practice of disproportionately targeting Black passengers for interdictions in violation of the Equal Protection Clause. This is confirmed by the statistical evidence. *Supra* 15-16. The Complaint also alleges that CCPD tacitly authorized discriminatory stops with deliberate indifference to the rights of Black passengers, because the Department knew or should have known about the racial disparities yet did nothing to stop them. FAC ¶81.

Defendants' argue that the county cannot be liable because "plaintiffs fail to allege facts to show that the county was on notice of any deficiencies in the jet bridge interdiction program.…" Mot. 21. But the Complaint thoroughly documents how the County received actual or constructive notice of the discriminatory conduct and did not intervene. FAC ¶81. *See also Young*, 59 F.3d at 1172 (government officials act with deliberate indifference when they have "actual or constructive notice" that the failure to act will be "substantially certain" to result in a constitutional violation). The Complaint's statistical analysis, which shows the program consistently relied on racial profiling, is based on standardized logs CCPD maintains, recording the race of passengers interdicted. FAC ¶¶77-82. Those logs provided clear notice that the program was violating Black passengers' constitutional rights. The Complaint also cites reports from federal agencies cautioning law enforcement about the racial

profiling risks inherent to airport interdiction programs. *Id*. ¶¶67-68. Yet CCPD established no policies to constrain officer discretion. *See supra* 21-22 (describing how the absence of a policy can create liability). A CCPD supervisory officer received a complaint that an individual was racially profiled in a jet bridge stop, and yet—rather than investigating—the officer told the individual that, pursuant to CCPD policy, he would have to fly back to Atlanta to file a complaint. FAC ¶¶102-03. All this is deliberate indifference.

Defendants argue the County cannot be liable unless or until Plaintiffs establish constitutional violations by County employees. Mot. 19. Putting aside that Plaintiffs *have* alleged constitutional violations by individual Defendants, that is an incorrect statement of the law. "Municipal liability can exist if a jury finds that a constitutional injury is due to a municipal policy, custom, or practice, but also finds that no officer is individually liable for the violation." *Barnett v. MacArthur*, 956 F.3d 1291, 1301 (11th Cir. 2020) (noting "[t]his is not a controversial concept" and cataloging cases that held the same).[9] Here, the allegations demonstrate the existence

[9] *See, e.g., Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985) ("Although the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts … of several employees acting under a governmental policy or custom may violate" those rights.) (citation omitted).

of a county custom or practice that was deliberately indifferent to Plaintiffs' constitutional rights. That is sufficient to establish *Monell* liability at this stage.

IV. Plaintiffs State Claims for Supervisory Liability.

A plaintiff establishes supervisory liability by showing "a causal connection between the actions of the supervising official and the alleged constitutional deprivation." *Christmas v. Corizon Health Services*, No. 21-13400, 2022 WL 5337649, at *5 (11th Cir. Oct. 7, 2022) (internal quotations omitted). A causal connection exists where 1) "a 'history of widespread abuse' puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he or she fails to do so" *or* 2) "facts support an inference that the supervisor … knew that subordinates would act unlawfully and failed to stop them from doing so." *Id.* Defendant Sgt. Smith is liable on both grounds for both constitutional violations.

Fourth Amendment. The Complaint details the "widespread" pattern of constitutional violations caused by officers implementing the jet bridge program under Smith's supervision. It describes multiple violations dating back to 2017. FAC ¶¶23-59, 92-112. Further, *Noell* held that a plaintiff's allegations regarding CCPD's jet bridge program stated a Fourth Amendment claim. *Noell*, 2016 WL 11794207 at *1. These "facts support an inference that" Smith "knew [his] subordinates would act unlawfully and failed to stop them." *Christmas*, 2022 WL 5337649, at *5.

Equal Protection. During the relevant period, Smith received weekly logs from subordinate officers, cataloging the race of passengers interdicted. FAC ¶82. That showed an unmistakable, widespread pattern of unconstitutional discrimination against Black passengers. *Supra* 15-18, 23. Smith took no remedial action. FAC ¶82. Those allegations state a claim for supervisory liability.

V. Plaintiffs State a Claim for a Violation of § 1981.

Section 1981 of the Civil Rights Act of 1866 guarantees the "full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. § 1981(a). It further assures that all persons "shall be subject to like punishment, pains, [and] penalties." *Id.* Defendants argue that the § 1981 cause of action must be dismissed because it "must be brought under § 1983." Mot. 23. That is what Plaintiffs have done: they bring a § 1983 claim for violation of the rights created by § 1981. FAC ¶¶135-42; *See Holmes v. City of Ft. Pierce, Fla.*, No. 20-13170, 2022 WL 247976, at *4 (11th Cir. Jan. 27, 2022). Defendants also incorrectly argue that § 1981 is limited to contractual rights. Mot. 24. The statute "has broad applicability" in forbidding racial discrimination, and specifically proscribes selective police enforcement based on race. *Mahone v. Waddle*, 564 F.2d 1018, 1028 (3d Cir. 1977); *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000).

VI. Plaintiffs Are Entitled to Declaratory and Punitive Relief.

Defendants' arguments about remedies are non-starters. They cite the standard for when declaratory relief is available against *judges and prosecutors*, which requires "a serious risk of continuing irreparable injury if the relief is not granted, and the absence of an adequate remedy at law." Mot. 24 (quoting *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000)). But there is no general requirement of "irreparable injury" for declaratory relief. *Steffel v. Thompson*, 415 U.S. 452, 471-72 (1974). Nor does the existence of another remedy—like damages—preclude declaratory relief. *Powell v. McCormack*, 395 U.S. 486, 517–18 (1969); *see also* Fed. R. Civ. P. 57. It is enough that Plaintiffs allege, as they do here, that the jet bridge program is an unconstitutional program that has caused them injury and continues to threaten injury.

As for punitive damages, Plaintiffs allege that Defendants recklessly and callously disregarded Plaintiffs' constitutional rights by operating the program. FAC ¶¶1-10, 23-113. They need do no more at this stage. *Wright v. Sheppard*, 919 F.2d 665, 671 (11th Cir. 1990) (punitive damages are "left to the factfinder").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss the First Amended Complaint.

Dated: February 14, 2023

Respectfully submitted,

/s/ Richard H. Deane, Jr.

Allegra J. Lawrence
(Georgia Bar No. 439797)
Rodney J. Ganske
(Georgia Bar No. 283819)
LAWRENCE & BUNDY LLC
1180 West Peachtree St., NW, Ste 1650
Atlanta, Georgia 30309
Telephone: (404) 400-3350
Facsimile: (404) 609-2504
allegra.lawrence-hardy@lawrencebundy.com
rod.ganske@lawrencebundy.com

Barry Friedman*
Farhang Heydari*
Annie Hudson-Price*
Paul Meyer*
POLICING PROJECT AT NYU SCHOOL OF LAW
Washington Square Legal Services, Inc.
40 Washington Square South, Ste 302
New York, NY 10012
Telephone: (212) 992-6950
barry.friedman@nyu.edu
farhang.heydari@nyu.edu
annie.hudsonprice@nyu.edu
paul.meyer@nyu.edu
** Admitted pro hac vice*

Richard H. Deane, Jr.
(Georgia Bar No. 214875)
Peter C. Canfield
(Georgia Bar No. 107748)
Rebecca M. Nocharli
(Georgia Bar No. 633621)
JONES DAY
1221 Peachtree St. N.E., Suite 400
Atlanta, Georgia 30361
Telephone: (404) 521-3939
Facsimile: (404) 581-8330
rhdeane@jonesday.com
pcanfield@jonesday.com
rnocharli@jonesday.com

Counsel for Plaintiffs

LOCAL RULE 5.1 CERTIFICATION

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of Local Rule 5.1C of the Northern District of Georgia, using 14-point Times New Roman font, as approved by the Court.

Dated: February 14, 2023

Respectfully submitted,

/s/ Richard H. Deane, Jr.
Richard H. Deane, Jr.

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on February 14, 2023, I have caused a copy of the foregoing to be electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Respectfully submitted,

/s/ Richard H. Deane, Jr.
Richard H. Deane, Jr.

Counsel for Plaintiffs