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

ERIC ANDRÉ, ET AL.	)	
	)	
Plaintiffs,	)	CIVIL ACTION NO.
	)	1:22-cv-04065-MHC
v.	)	
	)	
CLAYTON COUNTY, ET AL.	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs Eric André ("André") and Clayton English ("English") ("plaintiffs") allege that the Clayton County Police Department ("CCPD") operates a drug trafficking interdiction program at Atlanta's Hartsfield-Jackson International Airport ("Atlanta Airport") that utilizes "racial profiling" and "coercive stops and searches" in violation of the Constitution and which also disproportionately violates the constitutional rights of "Black people." (Doc. 24, ¶ 1.) Plaintiffs allege that this program consists of CCPD officers and Clayton County District Attorney's Office ("CCDAO") investigators waiting in jet bridges—the tunnels that connect airplanes to airport gates—to selectively intercept passengers, take their boarding passes and identifications, interrogate

them before they board their flights, and search their carry-on luggage, all in an effort to combat drug trafficking (the "jet bridge interdiction program"). (Id., ¶ 2.)

Plaintiffs allege that they are both Black men who, months apart—October 30, 2020 and April 21, 2021—were stopped by CCPD and CCDAO officers wearing plain clothes with badges around their necks, while attempting to board their Delta flights from Atlanta to Los Angeles. (Id., ¶ 9 and ¶¶ 23-59.) Plaintiffs contend that they were unconstitutionally singled out because of their race. (Id., ¶ 9.) More specifically, English alleges that he was encountered by CCPD Officers Tony Griffin ("Officer Griffin") and Kayin Campbell ("Officer Campbell") in the jet bridge tunnel and asked "whether he was carrying any illegal drugs," to which he denied. (Id., ¶ 33) English was also asked to provide his identification and boarding pass, which he did, and was also questioned about his reason for travelling to Los Angeles and how long he planned to stay. (Id., ¶¶ 37, 38.) Finally, English alleges that the officers "wanted to search" his carry-on luggage, so he consented and then boarded his flight. (Id., ¶¶ 41-44.)

As for André, he alleges that he was encountered by CCPD Officer Aimee Branham ("Officer Branham") and CCDAO Investigator Michael Hooks ("Investigator Hooks") in the jet bridge tunnel and was asked "whether he was carrying any illegal drugs," to which he denied. (Id., ¶¶ 51, 53, 54.) André was also asked to provide his identification and boarding pass, which he did, and was

also questioned about his reason for travelling and his travel plans. (Id., ¶ 55.) After being asked these questions, André boarded his flight. (Id., ¶ 58.)

Based on these encounters, neither of which resulted in an arrest, plaintiffs filed this action against Clayton County, Georgia (the "County); Clayton County Police Chief Kevin Roberts ("Chief Roberts") in his official capacity; CCPD Officers Branham, Griffin, Campbell, and CCPD Sergeant Cameron Smith ("Sergeant Smith") in their individual and official capacities; and CCDAO Investigator Hooks in his individual and official capacity. (Doc. 24.) Under Section 1983, plaintiffs allege an unlawful seizure claim under the Fourth and Fourteenth Amendments and an equal protection claim under the Fourteenth Amendment against all defendants. (Doc. 24, Counts I and III.) Separately, English alleges an unlawful search claim under the Fourth and Fourteenth Amendments against the County, Chief Roberts, Officer Griffin, Officer Campbell, and Sergeant Smith. (Id., Count II.) Under Section 1981, plaintiffs allege a claim under the Civil Rights Act of 1866 against all defendants. (Id., Count IV.) Finally, based on the foregoing, plaintiffs seek declaratory relief, compensatory damages, punitive damages, and attorneys' fees against all defendants. (Id., Request for Relief.) Defendants now move to dismiss all of plaintiffs' claims against them.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Branham, Hooks, Griffin, Campbell, And Smith Are Entitled To Qualified Immunity

Qualified immunity "shields officers from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer would have known." Mullenix v. Luna, 136 S.Ct. 305, 308 (2015). Significantly, the immunity is "from suit rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 525 (1985). As such, the Supreme Court has "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227 (1991).

To claim qualified immunity, Branham, Hooks, Griffin, Campbell, and Smith must first show that they were performing a discretionary function. Barnes v. Zaccari, 669 F.3d 1295, 1303 (11th Cir. 2012). Here, plaintiffs allege that these defendants were at all relevant times acting within the course and scope of their employment and under color of state law, and performing law enforcement related functions. (Doc. 24, ¶¶ 15-19.) Therefore, there is no dispute that these defendants were acting within their discretionary authority. Plaintiffs, in turn, bear the burden of demonstrating that these defendants are not entitled to qualified immunity. Crosby v. Monroe Cnty., 394 F.3d 1328, 1332 (11th Cir. 2004). To meet their burden, plaintiffs must show that: (1) each defendant violated their constitutional rights and (2) each defendant's conduct as alleged was prohibited by clearly

established law. Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014). Plaintiffs cannot sustain their burden as shown below.

a. Unlawful Seizure And Search Claims (Count I and II)

Law enforcement officers do not violate the Fourth Amendment's prohibitions merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. Florida v. Royer, 460 U.S. 491 (1983). Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means. Florida v. Bostick, 501 U.S. 429, 434 (1991). In other words, consensual encounters between police officers and citizens do not trigger Fourth Amendment safeguards for searches and seizures. Id. To distinguish between consensual encounters and Fourth Amendment seizures, courts consider "all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." Id. at 439. The person's subjective state of mind is irrelevant; an innocent person is presupposed. Id. at 438. Factors relevant to this inquiry include, among other things: "whether a citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education and intelligence; the length of the suspect's detention and

questioning; the number of police officers present; the display of weapons; any physical touching of the suspect, and the language and tone of voice of the police." United States v. De La Rosa, 922 F.2d 675, 678 (11th Cir. 1991); United States v. Santibanez Garcia, 132 F. Supp. 2d 1338, 1342 (M.D. Fla. 2000), aff'd, 251 F.3d 161 (11th Cir. 2001) (discussing relevant factors and collecting cases); United States v. Mendenhall, 446 U.S. 544 (1980).

The Eleventh Circuit opinions in United States v. Jensen 689 F.2d 1361 (11th Cir. 1982) (per curiam) and United States v. Armstrong, 722 F.2d 681, 684 (11th Cir. 1984), both of which involved consensual airport encounters not within the purview of the Fourth Amendment, are instructive. In Jensen, a DEA agent approached defendant, showed his badge, identified his official capacity, and obtained defendant's consent to talk. 689 F.2d at 1362. Upon request, defendant produced his identification and ticket. Id. Upon returning defendant's documentation, the agent stated, "we're narcotics officers, and we're looking for drugs and narcotics at the airport. Are you carrying any drugs or narcotics either on your person or in your luggage?" Id. Defendant said no. Id. Next, the agent requested consent to search defendant's suitcase and person. Id. Defendant "responded by requesting that they go somewhere and talk." Id. The agent agreed, and, while walking, asked what defendant wanted to talk about. Id. "You know," replied Defendant. Id. When the agent asked whether defendant meant drugs,

defendant replied, "You already know." Id. Thereafter, the agent escorted defendant to a private office, read his Miranda rights, and told defendant he could refuse to consent to a search of his luggage. Id. Defendant consented in writing and the agent discovered cocaine inside his luggage. Id.

Appealing the denial of his motion to suppress, defendant took the position that an unlawful Fourth Amendment seizure occurred as soon as the agent requested consent to search defendant's luggage during the initial encounter. Id. at 1362–63. In support, defendant argued that "after being asked for documents and identification, being told that the person questioning him was a narcotics agent, being asked whether he was carrying drugs, and being asked to consent to a search, no person would have felt free to leave." Id. The Eleventh Circuit disagreed: the agent's "statements would not have indicated to a reasonable person that he had become the specific focus of an investigation or that failure to cooperate would lead only to formal detention." Id. Given that the agent never suggested defendant was lying, the agent's request for consent to search "would have merely appeared to a reasonable person to have been an attempt to obtain confirmation of denials of drug-smuggling activity, not an accusation that the denials were lies, and hardly would have indicated that that person no longer was free to leave if he wished." Id. at 1364. The Eleventh Circuit found no Fourth Amendment seizure. Id.

Two years after Jensen, the Eleventh Circuit held in Armstrong that no Fourth Amendment seizure occurs when an officer elicits a citizen's voluntary cooperation through non-coercive questioning. There, an officer decided to question defendant (and his traveling companion) after observing their nervous behavior and defendant's "large amount of cash." 722 F.2d at 682. The officer approached both men, identified his official capacity, and asked to speak with them. Id. Both men consented and the officer requested and inspected their identifications and tickets. Id. Next, the officer requested consent to search defendant's luggage. Id. Defendant refused and sought permission to call his father, a police lieutenant. Id. The officer assented and "told both men that they were not in custody and could go wherever they wished." Id. Call completed, defendant again refused consent and boarded his flight to Atlanta, Georgia, where he was later arrested under circumstances not particularly relevant here. Id. at 683.

Appealing the denial of his motion to suppress, defendant took the position that his initial encounter with the officer "was a seizure of his person which could be justified only by 'reasonable suspicion' of criminal activity, which the officer lacked." Id. The Eleventh Circuit disagreed, concluding "without question" that the encounter "was merely a contact, outside the realm of fourth amendment protection." Id. at 684. In so concluding, the court noted that the encounter took place in the public concourse, the officer wore plain clothes and never displayed

his weapon, no physical contact occurred, the officer "requested, but did not demand to see" defendant's documentation, and the officer informed defendant he was free to leave and could refuse consent to search. Id. Considering the totality of circumstances, defendant had no "objective reason to believe that he was not free to end the conversation in the concourse and proceed on his way." Id. Hence, the Eleventh Circuit found that defendant's Fourth Amendment rights were neither triggered nor violated. Id. at 684–85.

Here, plaintiffs complain about some basic questioning by two plain-clothed officers while boarding their flights, and English complains separately about having his luggage searched. However, plaintiffs were involved in nothing other than a consensual encounter in a public airport, surrounded by other people and presumably Delta employees. Plaintiffs do not allege that they were ever taken away from the jet bridge tunnel to any interrogation room or were even asked to relocate, that they were ever physically searched, that the officers ever placed their hands on them, that any force was used, or that they were ever placed under arrest or physically restrained. (Doc. 24, ¶¶ 51-58; 30-46.) Nor do they allege that any of the officers threatened them, coerced them, displayed any weapons, used threatening or intimidating language or tone of voice, questioned them outside the presence of the public, made any demands, spoke with plaintiffs or retained their

documentation for an inordinate amount of time,[1] made any suggestion that plaintiffs were the targets of any investigation, or made any suggestion of guilt or consequences for refusing to cooperate. (Id.) And as for the search of English's luggage, English admits that he consented to the search, which eviscerates his claim. United States v. Padron, No. 2:07-CR-0153-MEF, 2007 WL 4287740, at *2 (M.D. Ala. Dec. 5, 2007) aff'd, 296 F. App'x 834 (11th Cir. 2008) ("Consent, freely given, validates what might otherwise be an unlawful search."). Therefore, under the factors discussed in Mendenhall, De La Rosa, and Santibanez Garcia, plaintiffs were involved in a consensual encounter, and as in Jensen and Armstrong, plaintiffs cannot establish a violation of their rights.[2]

b. Equal Protection Claim (Count III)

Claims that similarly situated individuals have been treated differently on the basis of race arise under the Equal Protection Clause. City of Cleburne v.

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[1] Indeed, both plaintiffs allege that they boarded their flight after the encounter. (Doc. 24, ¶¶ 44, 58.)

[2] See, e.g., United States v. Williams, 267 F. Supp. 2d 1130, 1133 (M.D. Ala. 2003) (consensual encounter where consent to search was provided, there was no duress, complaining party agreed to accompany officer to airport office, was not physically restrained, was not told she was being detained, and even missed original flight); Santibanez Garcia, 132 F. Supp. 2d at 1341–44 (finding no Fourth amendment seizure during airport consensual encounter); United States v. Puglisi, 723 F.2d 779, 783 (11th Cir. 1984) (finding no seizure during airport questioning); United States v. Sanford, 658 F.2d 342, 343–44 (5th Cir. Unit B 1981), cert. denied, 455 U.S. 991 (1982) (finding no seizure or "stop"); United States v. Pulvano, 629 F.2d 1151, 1152–54 (5th Cir. 1980) (same).

Cleburne Living Center, 473 U.S. 432, 439 (1985) (holding that the Equal Protection Clause requires that the government treat similarly situated people alike). In order to establish such a claim, a plaintiff must prove that (1) he is similarly situated with other persons who received more favorable treatment; and (2) his discriminatory treatment was based on some constitutionally protected interest, such as race. Jones v. Ray, 279 F.3d 944, 946-47 (11th Cir. 2001). Additionally, the Equal Protection Clause "prohibits selective enforcement of the law based on considerations such as race." Whren v. United States, 517 U.S. 806, 813 (1996). To prevail on a selective enforcement claim, a plaintiff must show "(1) that others similarly situated have not generally been prosecuted and (2) that the government's discriminatory selection of [them] is invidious, or in bad faith that is based on constitutionally impermissible considerations, such as race or religion." Durruthy v. Pastor, 351 F.3d 1080, 1091 (11th Cir. 2003).[3]

[3] See also Swint v. City of Wadley, Ala., 51 F.3d 988, 1000 (11th Cir. 1995) ("Absent some evidence of racially disproportionate arrests compared to the actual incidence of violations by race, there is no basis for inferring racially selective law enforcement."); U.S. v. Bell, 86 F.3d 820, 823 (8th Cir. 1996) ("To establish discriminatory effect in a race case, the claimant must show people of another race violated the law and the law was not enforced against them."); U.S. v. Duque–Nava, 315 F.Supp.2d 1144, 1152 n. 15 (D.Kan.2004) (to prove Fourteenth Amendment selective enforcement claim, arrestee must "make a credible showing that a similarly-situated individual of another race could have been, but was not, arrested or referred for federal prosecution for the offense for which the defendant was arrested and referred").

Here, plaintiffs' complaint does not allege any facts that show that other similarly situated individuals received more favorable or different treatment than them. (Doc. 24.) Plaintiffs do not allege that any of the defendants chose not to conduct drug investigations, searches, and stops of non-Black people at Atlanta Airport to whom plaintiffs are similarly situated. See Urbanique Prod. v. City of Montgomery, 428 F. Supp. 2d 1193, 1224 (M.D. Ala. 2006) ("In short, there simply is no evidence that Conway and Wingard used race as a basis to commence their criminal investigation which resulted in their suspicion that Jointer was involved in the distribution of illicit drugs."). In Smith v. Barrow, No. 5:13-CV-179-MTT-MSH, 2013 U.S. Dist. LEXIS 178990, at *7-8 (M.D. Ga. Dec. 20, 2013), for example, the district court held:

> Plaintiff here has simply failed to assert in his complaint enough factual information to show that he and Inmate Adams are sufficiently similar to meet this standard. Nowhere does Plaintiff assert that the circumstances of Inmate Adams' request were the same as those of Plaintiff's, which Defendant points out contained the added issue of out-of-state travel. Without factual allegations establishing his similarity with Inmate Adams, Plaintiff cannot establish a sufficient claim of an Equal Protection violation to satisfy his burden in the qualified immunity analysis.

As in Barrow, plaintiffs' complaint fails to allege sufficient facts to establish a constitutional violation under the Equal Protection Clause and therefore plaintiffs' claim is subject to dismissal.

Additionally, plaintiffs' contention that the jet bridge interdiction program cannot survive scrutiny under the Equal Protection Clause is flawed. (Doc. 24, ¶¶ 5-6.) It is axiomatic that there are numerous legitimate non-race related reasons/goals for this program at the world's busiest airport, including combatting drug trafficking and particularly to and from flights to Los Angeles, California where, unlike in Georgia, it is legal for adults 21 or older to possess and consume cannabis. This also defeats plaintiffs' challenges to the jet bridge interdiction program under the Equal Protection Clause. United States v. Matthews, 168 F.3d 1234, 1251 (11th Cir.), opinion amended on denial of reh'g sub nom. United States v. Moore, 181 F.3d 1205 (11th Cir. 1999) (finding that legitimate and non-race related reasons and goals for crack cocaine sentencing guideless defeated challenges under the Equal Protection Clause).

c. No Constitutional Violation By Smith Under Supervisory Liability

Because plaintiffs have failed to allege facts to support an underlying constitutional violation as discussed above, plaintiffs' derivative supervisory liability claim against Smith is subject to dismissal. Beshers v. Harrion, 495 F.3d 1260, 1264 n.7 (11th Cir. 2007) (no need to address plaintiff's claims of municipal or supervisory liability since no constitutional violation occurred).

Second, Smith cannot be held liable under Section 1983 solely by virtue of his supervisory position. Hartley v. Parnell, 193 F.3d 1263, 1269 (11th Cir. 1999).

Rather, a supervisor can be held liable either when he personally participates in the alleged constitutional violation, or when there is a causal connection between the supervisor's actions and the alleged constitutional violation. Mathews v. Crosby, 480 F.3d 1265, 1270 (11th Cir. 2007). A causal connection may be established when: (1) a "history of widespread abuse" puts the supervisor on notice of the need to correct the alleged deprivation, and he fails to do so; (2) a supervisor's custom or policy results in deliberate indifference to constitutional rights; or (3) facts support an inference that the supervisor directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them. Crosby, 480 F.3d at 1270.

Here, plaintiffs' complaint fails to state a claim for supervisory liability. Plaintiffs do not allege that they were encountered by Smith. Rather, plaintiffs contend that Smith had "supervisory responsibilities" and allegedly was on "notice" of the unreasonable search and seizures and racial discrimination associated with the jet bridge interdiction program but failed to stop subordinate officers from acting unlawfully and furthered this program in deliberate indifference to plaintiffs' constitutional rights. (Doc. 24, ¶¶ 19, 70, 82, 119, 125, 132, 140.) First, these vague and conclusory allegations are insufficient to establish a causal connection between any actions or inaction of Smith and any constitutional violations. See Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir.

2003); Smith v. Owens, No. 14-14039, 2015 WL 4281241, at *3 (11th Cir. July 16, 2015) (finding conclusory allegation of improper custom resulting in deliberate indifference insufficient to state a claim); McClendon v. City of Sumiton, Ala., No. 2:14-CV-00150-AKK, 2015 WL 2354187, at *3 (N.D. Ala. May 15, 2015) ("[C]onclusory allegations are insufficient to support a claim…for deliberate indifference, ratification, or purported 'custom and policy liability.'").

Next, plaintiffs do not allege facts to show a "history of widespread abuse" which put Smith on notice of a need to correct a known deficiency in the jet bridge interdiction program. (Doc. 24.) Nor have plaintiffs alleged facts to establish a "pattern of similar constitutional violations." Watkins v. Willson, 824 F. App'x 938, 941 (11th Cir. 2020). Plaintiffs have not alleged any prior constitutional violations, let alone that Smith was on notice of same. Between 2017 and 2020, plaintiffs only identify two incidents — one involving Preston Lewis in 2017 and another involving Jean Elie in 2019. (See Doc. 24, pp. 32-38.) Plaintiffs, however, fail to allege that either of these incidents resulted in findings of unconstitutional conduct caused by the jet bridge interdiction program. Depew v. City of St. Marys, 787 F.2d 1496, 1499 (11th Cir. 1986) ("[R]andom acts or isolated incidents are insufficient to establish a custom or policy."). Moreover, two prior incidents are insufficient to establish widespread abuse. See, e.g., Hawk v. Klaetsch, 522 Fed. Appx. 733 (11th Cir. 2013) ("We fail to see how three incidents

over the span of nearly five years can constitute frequent, widespread, or rampant abuse."); Braddy v. Florida Dep't of Labor & Employment Sec., 133 F.3d 797, 802 (11th Cir. 1998) ("The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences.").

Finally, plaintiffs do not allege sufficient facts to show that Smith was deliberately indifferent. Indeed, plaintiffs do not allege that Smith was on prior notice that the jet bridge interdiction program violates the Constitution or was causing a deprivation of rights, or was on notice of a need to take corrective measures but chose not to. This is fatal to plaintiffs' claim. Watkins, 824 F. App'x at 941 ("a plaintiff ordinarily must show a pattern of similar constitutional violations by untrained employees because [w]ithout notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.").

In sum, plaintiffs' complaint falls woefully short of establishing any constitutional violation by Smith either personally or by a causal connection. See Faulkner v. Monroe Cnty. Sheriff's Dep't, 523 F. App'x 696, 701 (11th Cir. 2013) (dismissing plaintiff's supervisory liability claim because plaintiff did not establish a causal connection).

d. No Violation of Clearly Established Law

Notwithstanding the foregoing, Branham, Hooks, Griffin, Campbell, and Smith are each entitled to qualified immunity because they did not violate clearly established law. It is a plaintiff's burden to overcome qualified immunity by pointing to specific actions of an officer which violate clearly established law. Montoute v. Carr, 114 F.3d 181, 184 (11th Cir. 1997) ("Once an officer or official has raised the defense of qualified immunity, the burden of persuasion as to that issue is on the plaintiff."). "This burden is not easily discharged: That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities." Jones v. Ward, 514 F. App'x 843, 846-47 (11th Cir. 2013).

The Eleventh Circuit has held "many times" that "if case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000). A "plaintiff cannot rely on general, conclusory allegations or broad legal truisms to show that a right is clearly established." Kelly v. Curtis, 21 F.3d 1544, 1550 (11th Cir. 1994); White v. Pauly, 137 S. Ct. 548, 552 (2017) (reiterating the longstanding principle that clearly established law should not be defined at a high level of generality and must be particularized to the facts of the case). The law can be clearly established for qualified immunity purposes only by decisions of the

United States Supreme Court, the Eleventh Circuit Court of Appeals, or the Georgia Supreme Court. Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 823 n. 4 (11th Cir. 1997).

Here, there is no controlling precedent particularized to the facts alleged in this case that clearly establishes that Branham, Hooks, Griffin, Campbell, or Smith's actions under the circumstances clearly violated plaintiffs' constitutional rights. As Justice White aptly observed in Florida v. Royer, "*in the discrete category of airport encounters*, there will be *endless variations* in the facts and circumstances, so much variation that it is *unlikely that the courts can reduce to a sentence or a paragraph a rule* that will provide *unarguable answers* to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment." 460 U.S. at 491 (emphasis added). Given so many variations and the absence of a concrete "rule" or "unarguable answer," plaintiffs cannot sustain their burden of citing controlling and materially similar case law that would establish that Branham, Hooks, Griffin, Campbell, and Smith violated clearly established law. Therefore, they are each entitled to qualified immunity.

B. Federal Claims Against The County Should Be Dismissed For Failure To State A Claim Under Monell

The County cannot be held liable for the alleged actions of its employees based upon a *respondeat superior* theory of liability. Grech v. Clayton Cnty., 335 F.3d 1326, 1329 (11th Cir. 2003). Rather, to establish any claim against a local

government for an alleged violation of civil rights, a plaintiff must allege and prove facts which show that the local government itself, as opposed to one of its agents or employees, was actually responsible for causing such a violation. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978). In that regard, a local government may be held liable under § 1983 only when a constitutional violation was inflicted pursuant to the government's policy or custom. Monell, 436 U.S. at 694.

To state a § 1983 claim against the County, plaintiffs must allege: "(1) that [a] constitutional right [was] violated; (2) that the [County] had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004). To establish such a "policy or custom," plaintiff is required to demonstrate through specific factual allegations that the County, through its "deliberate conduct," was the "'moving force' behind the injury alleged." Jernard v. Owens, No. 4:11-CV-17-CDL-MSH, 2012 WL 2131117, at *5-6 (M.D. Ga. May 10, 2012).

Here, as shown above, because plaintiffs' complaint fails to allege sufficient facts to establish any violation of plaintiffs' constitutional rights by an employee of the County, there can be no viable federal claim against the County. Case v. Eslinger, 555 F.3d 1317, 1327 (11th Cir. 2009) (absent a violation of plaintiff's

constitutional rights, sheriff and city entitled to summary judgment); Beshers, 495 F.3d at 1264 n.7. Even assuming plaintiffs have alleged a substantive violation, which they have not, plaintiffs still fail to allege sufficient facts to establish liability under Monell.

Plaintiffs fail to allege sufficient facts to establish that any custom or policy of the County was adhered to with deliberate indifference. City of Canton v. Harris, 489 U.S. 378, 392 (1989). A plaintiff does not meet her burden simply by "point[ing] to something the [county] 'could have done' to prevent the unfortunate incident." City of Canton, 489 U.S. at 392. "Because deliberate indifference requires proof of a deliberate choice from among alternatives, [county] policymakers must have had 'actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of its citizens." Young v. City of Augusta, 59 F.3d 1160, 1172 (11th Cir. 1995). Here, there are no facts alleged to show that the County was deliberately indifferent to the jet bridge interdiction program. The problem with plaintiffs' claim, as discussed above, is that they cannot point to a widespread practice of unconstitutional conduct to begin with. "Without that, [their] contention that the [County] deliberately ignored an unconstitutional custom or policy has been cut off at the knees." Hawk, 522 F. App'x at 736. As discussed above, between 2017 and 2020, plaintiffs only identify two prior incidents involving Lewis and Elie, but

neither of these resulted in findings of unconstitutional conduct caused by the jet bridge interdiction program, and quantitatively, are too few to establish liability under Monell. Id. at 733; Braddy, F.3d at 802.

In an effort to establish deliberate indifference against the County, plaintiffs also cite to the 2016 order from District Judge Amy Totenberg on a motion for judgment on the pleadings filed by several defendants in that case, including Clayton County. (Doc. 24, ¶ 24) (citing Noell v. Clayton Cnty., No. 1:15-CV-2404-AT, 2016 WL 11794207 (NDGA, Sept. 21, 2016)). However, Noell is inapposite because that case did not involve the jet bridge interdiction program whatsoever. Nor did it involve any claims that the program disproportionately impacted Black people or that it violated any provisions of the Constitution. Finally, Judge Totenberg made no findings whatsoever with respect to any policies of the County, but rather, she *dismissed* all of plaintiffs' Section 1983 claims against the County. Id. at 24.

In sum, plaintiffs fail to allege facts to show that the County was on notice of any deficiencies in the jet bridge interdiction program, a pattern of constitutional violations resulting from this program, or that it was directly causing violations of anyone's rights and that any final policy maker made a conscious choice to disregard this as the cause of these violations. Without any such allegations, plaintiffs cannot show deliberate indifference. See, e.g., Young v. City of Augusta,

59 F.3d 1160, 1172 (11th Cir. 1995) ("Because deliberate indifference requires proof of a deliberate choice from among alternatives, [city] policymakers must have had 'actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of its citizens."); Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) ("The custom or policy must be a "deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."). Therefore, as in Noell, plaintiffs' Section 1983 claims against the County should be dismissed.

C. Official Capacity Claims Against Individual Defendants Are Duplicative

Plaintiffs' claims against Chief Roberts, Branham, Griffin, Campbell, Smith, and Hooks in their official capacities must likewise be dismissed. An official capacity claim is the same as a claim against the governmental entity that employs the officers, which in this case is the County. Kentucky v. Graham, 473 U.S. 159, 165-66 (1985). As such, "there no longer exists a need to bring official-capacity actions against local government officials, because local government units can be sued directly." Busby v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991); Brown v. Neumann, 188 F.3d 1289, 1290 (11th Cir. 1999) (a suit against a governmental official in her official capacity is deemed a suit against the entity that she represents). Because, as explained above, the claims against the County should

be dismissed for failure to state a claim, the redundant official capacity claims should be dismissed as well. See, e.g., Neal v. DeKalb Cnty., Georgia, No. 1:16-CV-184-WSD, 2016 WL 3476873, at *5 (N.D. Ga. June 27, 2016).

D. No Violations Under Section 1981/Civil Rights Act of 1866

A cause of action asserted under § 1983 extinguishes any claim brought pursuant to § 1981. Busby v. City of Orlando, 931 F.2d 764, 772 n.6 (11th Cir. 1991). The United States Supreme Court explained this principle in Jett v. Dallas Independent School District, 491 U.S. 701, 706 (1989), where it held that § 1983 "provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor." See also Butts v. County of Volusia, 222 F.3d 891, 893 (11th Cir. 2000) (advising Jett determined that § 1981 does not contain an action against state actors). Moreover, plaintiffs' claims for relief under § 1981 are redundant and duplicative of the relief they seek under § 1983. Brown v. City of Ft. Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991).

Likewise, § 1981 claims against local government employees also must be brought under §1983. Specifically, courts have extended Jett's prohibition of §1981 claims against state actors also to prohibit § 1981 claims against individual government employees. Ebrahimi v. City of Huntsville, 905 F. Supp. 993 (N.D. Ala. 1995). In sum, § 1981 claims against local government employers *and*

employees must be brought under § 1983. Therefore, plaintiffs' § 1981 claims must be dismissed because § 1983 provides the exclusive remedy for the alleged violation of rights secured by § 1981.

Additionally, "[a]ny claim brought under § 1981…must initially identify an impaired 'contractual relationship' under which the plaintiff has rights." Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 470 (2006). Here, there are no factual allegations in plaintiffs' complaint to support a claim of racial discrimination under § 1981. Plaintiffs do not allege that have any rights under any existing (or proposed) contract that they wish to "make or enforce." Therefore, plaintiffs have failed to make even a threshold showing sufficient to state a claim under § 1981 and this claim should be dismissed for this additional reason.

E. Plaintiffs Are Not Entitled To Declaratory Relief

"In order to receive declaratory or injunctive relief, plaintiffs must establish that there was a violation, that there was a serious risk of continuing irreparable injury if the relief is not granted, and the absence of an adequate remedy at law." Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000). Plaintiffs' claim for declaratory relief here should be denied for three reasons. First, as shown above, plaintiffs' complaint fails to allege any underlying constitutional violations. Brown v. Walker, No. 5:13-CV-326, 2013 U.S. Dist. LEXIS 130834, at *3 (M.D. Ga. Sept. 13, 2013) ("Injunctive relief claims fail if the underlying claim fails.").

Second, plaintiffs' complaint fails to allege the absence of an adequate remedy at law under Section 1983. Finally, plaintiffs fail to allege a serious risk of continuing irreparable injury if the declaratory relief is not granted. For these reasons, plaintiffs' claim for declaratory relief should be dismissed.

F. Punitive Damages And Attorney's Fees Claims Should Be Dismissed

The County and the official capacity defendants are immune from punitive damages. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259-60 (1981). Additionally, because plaintiffs' underlying claims should be dismissed, any claims for attorney's fees and punitive damages should be dismissed as well. OFS Fitel, LLC v. Epstein, Becker & Green, P.C., 549 F.3d 1344, 1357 (11th Cir. 2008). Finally, there are no factual allegations in the complaint of "malice" or "reckless indifference" to plaintiffs' federally protected rights that would justify an award of punitive damages against defendants under federal law. See Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535 (1999); Reynolds v. CSX Transportation, Inc., 115 F.3d 860, 869 (11th Cir. 1997). Therefore, defendants are entitled to dismissal of plaintiffs' claims for punitive damages and attorney's fees.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Local Rule 7.1(D), that the foregoing memorandum of law has been prepared in accordance with Local Rule 5.1(C) (Times New Roman font, 14 point).

This 17th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** to the Clerk of Court using the CM/ECF system which will automatically send electronic mail notification of such filing to all counsel of record.

This 17th day of January, 2023.

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