

No. 23-13253

**In the United States Court of Appeals
for the Eleventh Circuit**

ERIC ANDRÉ and CLAYTON ENGLISH,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

**BRIEF OF CURRENT AND FORMER LAW ENFORCEMENT OFFICIALS
AS AMICI CURIAE SUPPORTING APPELLANTS AND REVERSAL**

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Issues.....	1
Interest of Amici Curiae	1
Summary of the Argument.....	6
Argument.....	9
I. The District Court’s Decision Harms Public Trust in and Cooperation with Law Enforcement.....	9
A. Airports Are Sensitive, High-Security Areas That Require the Public to Engage with Law Enforcement.	11
B. Government Officials Have Long Sought Travelers’ Cooperation with Law Enforcement at Airports.....	13
C. The District Court’s Decision Undermines Goals of Public Trust in and Collaboration with Law Enforcement.....	15
D. The CCPD Interdiction Program, Which Disproportionately Stops Black Travelers, Particularly Undermines Trust of Black Communities in Law Enforcement.	18
II. Jet-Bridge Stops Are an Ineffective Law Enforcement Tool.....	24
A. Random Jet-Bridge Stops Are Ineffective Because Passengers and Their Belongings Have Already Been Subject to TSA Screenings and Random Security Searches.	25
B. Available Data Confirm That Random Stops on Jet Bridges Are Ineffective at Impeding Drug Trafficking.....	28
C. Seizing Cash from Travelers Does Not Promote Public Safety and Runs Contrary to the Purpose of Civil Asset Forfeiture.....	31
Conclusion.....	34

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>United States v. Aukai</i> , 497 F.3d 955 (9th Cir. 2007).....	12
<i>United States v. Berry</i> , 670 F.2d 583 (5th Cir. 1982).....	11
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STATEMENT OF THE ISSUES

Whether the district court erred in dismissing Plaintiffs-Appellants' Fourth Amendment and equal-protection claims, where the district court's order would undermine crucial cooperation between the public and law-enforcement officers in airports and where the challenged jet-bridge interdiction program is an ineffective law-enforcement tool.

INTEREST OF AMICI CURIAE

Amici curiae are a nonprofit law-enforcement organization and current and former high-ranking law-enforcement personnel, including chiefs of police of numerous municipalities and former federal officials.¹ Amici have spent decades working in policing and promoting effective and equitable law-enforcement practices nationwide. Considering their decades of public service and their familiarity with the law enforcement-related matters at issue here, amici maintain an active interest in the proper resolution of the important constitutional questions raised on appeal. Amici respectfully submit this brief to offer their views that the district court's order upholding the Clayton County

¹ No counsel for a party authored this brief in whole or part, no counselor party contributed money intended to fund the preparation or submission of this brief, and no person other than amici or their counsel contributed money intended to fund its preparation or submission. Amici have moved for leave of the Court to file under FRAP 29(a).

Police Department's ("CCPD") jet-bridge interdiction program will undermine the valuable trust and cooperation between the public and law enforcement in airports and that the interdiction program is an ineffective law-enforcement tool.

Amici are the following:

The Law Enforcement Action Partnership ("LEAP") is a nonprofit organization comprising police, prosecutors, judges, correctional officers, and other law-enforcement officials advocating for criminal-justice reform. LEAP's mission is to unite and mobilize the voice of law enforcement in support of drug policy and criminal-justice reforms aimed at making communities safer by focusing resources on the biggest threats to public safety, promoting alternatives to arrest and incarceration, addressing the root causes of crime, and working toward healing police-community relations.

Art Acevedo is currently Interim Chief of Police for the Aurora, Colorado, Police Department. He previously served as Chief of Police for the Miami, Austin, and Houston Police Departments and Chief of the California Highway Patrol. He has held various leadership positions with law-enforcement associations, including the International Association of Chiefs of Police

and the Major Cities Chiefs Association. He serves on the Advisory Board of the Policing Project at NYU School of Law.

Hassan Aden is the former Chief of Police of Greenville, North Carolina. He also served for twenty-six years with the Police Department of Alexandria, Virginia, including as Deputy Chief. He is the Founder and Principal of The Aden Group LLC, which advocates for the continuous improvement of police organizations worldwide. He currently serves in numerous advisory roles, including as Deputy Federal Monitor in Baltimore; Associate Monitor in Chicago; and DOJ's Strategic Site Liaison to the Louisville Metro Police Department.

Jerry L. Clayton has over thirty years of experience in public safety and is currently serving his fourth term as the Sheriff of Washtenaw County, Michigan. Before his position as Sheriff, Clayton served as a front-line Corrections Officer, Deputy Sheriff, command officer, Corrections Commander, Police Services Commander, and SWAT Team Commander of Washtenaw County. He serves on the Advisory Board of the Policing Project at NYU School of Law.

Chris Magnus recently served as Commissioner of U.S. Customs and Border Protection from 2021 to 2022. Throughout his forty-year career, Magnus served as Police Chief in major cities such as Fargo, North Dakota; Richmond, California; and Tucson, Arizona. As Police Chief, Magnus implemented programs and initiatives that strengthened police-community relationships through creative approaches to outreach and engagement. He serves as Senior Public Safety Advisor to the Policing Project at NYU School of Law.

Sylvia Moir is the undersheriff of the Marin County, California, Sheriff's Department. She has over three decades of local police practice, with over ten years as Chief of Police in cities such as Napa, California; Tempe, Arizona; and El Cerrito, California. Chief of Police Ret. Moir currently serves as a Coordinator for the California Police Executive Development Course. She previously served on the Executive Board of the Arizona and California Associations of Chiefs of Police and the Police Executive Research Forum.

Sue Rahr has served in numerous high-ranking roles throughout her forty-one-year career, including as Sheriff of King County, Washington, and in the Washington State Criminal Justice Training Commission, the Washington Association of Sheriffs and Police Chiefs, the National Sheriffs Association, and the National Police Foundation. Rahr has also served in positions

with the Executive Session on Policing at the Harvard Kennedy School, the President's Task Force on 21st Century Policing, the Council on Criminal Justice, LEAP, and Law Enforcement Leaders to Reduce Crime and Incarceration.

Darrel W. Stephens has over forty years of law-enforcement experience, including as Chief of Police in cities such as Charlotte Mecklenburg, North Carolina; St. Petersburg, Florida; Newport News, Virginia; and Largo, Florida. Stephens was Executive Director of the Major Cities Chiefs Association and has held roles with the National Academy of Public Administration, the Police Executive Research Forum, the Harvard University Executive Sessions for Policing, and other law-enforcement associations.

Robert Wasserman has served as a senior executive in several large American police agencies, including Dayton, Boston, and Houston. He previously served as Senior Advisor on International Law Enforcement for the Bureau of International Narcotics and Law Enforcement at the U.S. Department of State and as Chief of Staff of the White House Office of National Drug Control Policy. He also served as Deputy Commissioner/Operations and Commissioner of the United Nations International Police Task Force in Bosnia.

SUMMARY OF THE ARGUMENT

The district court incorrectly dismissed Plaintiffs-Appellants Eric André and Clayton English’s complaint asserting Fourth Amendment and equal-protection challenges to CCPD’s jet-bridge interdiction program. Amici respectfully submit this brief in support of Mr. André and Mr. English’s appeal of the district court’s order and offer their views on two main points. *First*, the district court’s order is likely to undermine trust and cooperation between the public and law enforcement—crucial for ensuring safety everywhere, but especially in the hyper-sensitive and highly secure domain of airports. *Second*, the district court upheld the CCPD interdiction program even though purportedly random jet-bridge stops are an ineffective law-enforcement tool—as exemplified by the CCPD program itself, which has uncovered scarcely any evidence of drug activity despite that being its alleged purpose.

I. The district court order threatens the important cooperative relationship between the public and law enforcement in airports. Collaboration between the public and law enforcement is crucial to effective policing. Airports are especially sensitive, high-security areas, where it is exceptionally important that the public cooperates with law-enforcement requests. The entire

airport experience after the terrorist attacks of September 11, 2001, is designed to stress public compliance with security and law-enforcement procedures. Noncompliance generally means that one does not fly.

Nonetheless, the district court held that Mr. André and Mr. English—whom officers had singled out and detained based on their race, hemmed in, and interrogated on the jet bridges of their respective flights—were not seized for Fourth Amendment purposes because they should have felt free to leave and terminate their encounters with the officers. In doing so, the district court sent a message that to protect their constitutional rights, passengers should decline law-enforcement officers' requests and assert their freedom to leave rather than cooperate—and in exactly the place where cooperation with law enforcement is most often emphasized.

Furthermore, the district court's position flies in the face of the modern-day flying experience and common sense. The idea that passengers stopped in the narrow, crowded confines of a jet bridge—who have participated in the airport security experience all the way through the TSA checkpoint and nearly to the airplane's door—will suddenly reverse course, imagine they are free to go if they wish, decline to cooperate with CCPD officers, and fear no repercussions is fanciful.

2003 pilot program—confirm that random stops like CCPD’s jet-bridge interdictions are substantially less likely than investigative-based stops to find criminal activity.² Civil forfeiture of cash from passengers—a far more frequent result of the CCPD program than drug seizures—are likewise poorly correlated with public safety: in most cases, cash is seized with no accompanying arrest.³ The ineffectiveness of the CCPD program robs the program of its legitimacy and provides another compelling reason why the program, and the district court’s order upholding it, are likely to undermine trust in and collaboration with law enforcement in airports.

ARGUMENT

I. THE DISTRICT COURT’S DECISION HARMS PUBLIC TRUST IN AND COOPERATION WITH LAW ENFORCEMENT.

Both before and especially after September 11, airports are unusually sensitive areas that require a high degree of trust and cooperation with law

² Office of Inspector Gen., DOJ, *Review of the Drug Enforcement Administration’s Use of Cold Consent Encounters at Mass Transportation Facilities* 22 (Jan. 2015), <https://www.oversight.gov/sites/default/files/oig-reports/e153.pdf> [hereinafter DOJ Report].

³ Jennifer McDonald, *Jetway Robbery? Homeland Security and Cash Seizures at Airport*, Inst. for Just. 15 (July 2020), <https://ij.org/wp-content/uploads/2020/07/Jetway-Robbery-July-2020-WEB-FINAL.pdf> [hereinafter IJ Report].

enforcement from the public to operate securely. Accordingly, government officials have long sought the public's engagement with law enforcement at airports. Yet the district court's order effectively undermines that crucial collaborative relationship. The district court, in finding that reasonable people in Mr. André and Mr. English's positions should have felt free to leave and end their encounters with CCPD officers, sends a message that to protect their constitutional rights, passengers stopped by officers should decline or ignore those officers' requests rather than cooperate. That is an adverse outcome for law enforcement and does not make real-world sense, given that compliance with law-enforcement requests is assumed in today's airport environment and generally is necessary to fly. It is illogical to conclude that a passenger stopped in a jetway could reasonably believe that he or she could just walk away from that encounter. Furthermore, because CCPD disproportionately targets Black passengers, CCPD's program, and the district court's decision rejecting Mr. André and Mr. English's challenges, specifically undermines the trust of Black communities in law enforcement—exactly where trust most needs to be rebuilt.

A. Airports Are Sensitive, High-Security Areas That Require the Public to Engage with Law Enforcement.

Airports are uniquely sensitive, high-security environments. Millions of individuals travel to, from, and through airports in the United States every day. Owing in large part to that volume of traffic, airports present significant security vulnerabilities. Accordingly, the United States has developed a robust security and law-enforcement apparatus at airports to safeguard against these risks and promote public safety. Created after September 11, the federal Transportation Security Administration (“TSA”) within the Department of Homeland Security (“DHS”) has largely overseen and managed that security apparatus.

The entire post-September 11 airport experience is designed to stress compliance with law enforcement. Even before September 11, airport travel required significant cooperation with law enforcement and police. *See, e.g., United States v. Berry*, 670 F.2d 583, 596 (5th Cir. 1982). Air travelers today interact frequently with homeland-security and law-enforcement officers, and must trust those officers and follow security procedures, in order to advance the government’s interest in ensuring public safety and maintaining a secure environment. For example, federal law and regulations provide that “[n]o individual may enter a sterile area or board an aircraft without submitting to the

screening and inspection of his or her person.”⁴ Before boarding a flight, passengers must pass through TSA checkpoints and submit to extensive screening using X-rays, millimeter wave advanced imaging, walk-through metal detectors, and other technology.⁵ *See generally Corbett v. TSA*, 767 F.3d 1171, 1180–81 (11th Cir. 2014) (discussing security screening methods used at airports); *Elec. Priv. Info. Ctr. v. DHS*, 653 F.3d 1, 10 (D.C. Cir. 2011) (same).

Passengers generally understand that they have no choice but to cooperate with screening and inspection. An airport law-enforcement request that a traveler submit to a search of his or her person or baggage, for instance, is nearly always a precondition to boarding an aircraft. Travelers’ only alternative to submitting to airport searches is not to fly at all. *See, e.g., United States v. Aukai*, 497 F.3d 955, 960–62 & n.4 (9th Cir. 2007).

⁴ 49 C.F.R. § 1540.107(a); *see also* 49 U.S.C. § 44901(a) (“The Administrator of the Transportation Security Administration shall provide for the screening of all passengers and property . . . that will be carried aboard a passenger aircraft . . .”).

⁵ *Security Screening*, TSA, <https://www.tsa.gov/travel/security-screening> (last visited Jan. 12, 2024).

B. Government Officials Have Long Sought Travelers' Cooperation with Law Enforcement at Airports.

Consistent with the importance of building a relationship of trust in airports, government officials have long requested public cooperation with security procedures and law-enforcement activities in order to protect public safety. TSA described its core approach to security as follows: “We . . . look to our greatest assets – our partners, stakeholders, and *the American public* – to help us in [our] shared security mission.”⁶ For example, in a 2015 video, former Secretary of Homeland Security Jeh Johnson said to the public, “We ask for your help to protect you and your fellow travelers. Working together we can keep our airports, our planes, and our country secure.”⁷ Similarly, the TSA’s Federal Security Director for upstate and Western New York stated that “it is crucial to cooperate with the TSA officers” and “ask[ed] everyone to trust the agents’ expertise and listen to their instructions.”⁸ The public has

⁶ *TSA Strategy: 2018-2026*, TSA 1, https://www.tsa.gov/sites/default/files/tsa_strategy.pdf (last visited Jan. 12, 2024) (emphasis added).

⁷ TSA, *If You See Something, Say Something*, YouTube (Nov. 23, 2015), <https://www.youtube.com/watch?v=N07MBQghI4A>.

⁸ Sergio Cruel, *New York TSA offers advice for smooth travel over Memorial Day weekend*, Spectrum News (May 25, 2023), <https://spectrumlocal-news.com/nys/rochester/public-safety/2023/05/25/new-york-tsa-offers-advice-for-smooth-travel-over-memorial-day-weekend>. Similarly, the Washington

heard the message: as one court remarked, “in contemporary society, and especially in the heightened security atmosphere of airline travel, no one . . . believes they should do anything other than listen closely to the authorities and follow instructions.” *United States v. Cohen*, 372 F. Supp. 2d 340, 350 (E.D.N.Y. 2005).

The importance of public participation in security procedures finds further support in the “If You See Something, Say Something” program, itself a collaboration between law enforcement and the public. The campaign is intended to inform the public how to recognize signs of potential terrorism and how to report suspicious activity to law-enforcement authorities.⁹ According to DHS, “[P]artnerships [with various communities and organizations] have been critical to the success of the campaign.”¹⁰ Georgia is an active participant

Attorney General’s Office states on its website that the public must “[c]ooperate with the airport personnel. If you are asked to have an additional screening, you must cooperate. If you don’t, you will not be able to go any further through security.” *Air Travel Guidelines*, Wash. State Off. of Att’y Gen., <https://www.atg.wa.gov/air-travel-guidelines> (last visited Jan. 12, 2024).

⁹ *If You See Something, Say Something: About the Campaign*, DHS, <https://www.dhs.gov/see-something-say-something/about-campaign>.

¹⁰ *Id.*

in the “If You See Something, Say Something” campaign.¹¹ Notably, the program is implemented most frequently and visibly in highly sensitive areas particularly attuned to security threats, like crowded urban areas, train stations, subways—and airports.

C. The District Court’s Decision Undermines Goals of Public Trust in and Collaboration with Law Enforcement.

“Building trust with the community is fundamental to effective policing.”¹² “People are more likely to obey the law when they believe those who are enforcing it have the right—the legitimate authority—to tell them what to do.”¹³ Notwithstanding the important collaborative relationship between the public and law enforcement, the district court’s decision has a perverse result: to undermine public trust in law enforcement and the government, with negative results for public safety.

¹¹ *If You See Something, Say Something Outreach Materials: Georgia*, DHS, <https://www.dhs.gov/publication/seesay-GA-4693>.

¹² *Building Trust*, DOJ Office of Cmty. Oriented Policing Servs., <https://cops.usdoj.gov/buildingtrust> (last visited Jan. 13, 2024).

¹³ *Final Report of the President’s Task Force on 21st Century Policing*, DOJ Office of Cmty. Oriented Policing Servs. 5 (May 2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [hereinafter Task Force Report] (explaining that building trust and legitimacy involves not only policing but all components of the criminal-justice system).

As Mr. André and Mr. English prepared to board their flights in the Atlanta airport, CCPD Airport Interdiction Unit officers stopped them in narrow jet bridges, obstructed their paths, peppered them with questions, requested and held their identification documents, and searched their luggage—causing Mr. André and Mr. English to feel that they must comply and that they were not free to leave. *E.g.*, Doc. 24 ¶¶ 31–38, 41–43, 51–55. Nevertheless, the district court concluded that Mr. André and Mr. English were not seized by CCPD because the interactions were consensual (despite their allegations to the contrary)—*i.e.*, reasonable individuals in their position should have felt free to decline the officers’ requests, terminate the encounter with the officers, and walk away. *See, e.g.*, Doc. 40 at 21–22, 30–31, 33.

Based on the district court’s order, if travelers put in Mr. André and Mr. English’s position want to avoid being searched and seized and to safeguard their Fourth Amendment rights, what they should do is walk away—not say yes to law-enforcement requests, but say no. The district court order undermines rather than supports the important security-minded goals of building public trust in law enforcement. And the district court sends that message in exactly the wrong place: in the sensitive, secure environment of an

airport, where the interest in public cooperation with law enforcement is at its apex.

The district court's position also flies in the face of real-world experience and common sense. Post-September 11, airport travel is built around compliance and consent with numerous security procedures. *See supra* Part I.A. The district court implausibly presumes that, nonetheless, passengers who have traveled this far—complying with numerous law-enforcement requests all the way up to the jet bridge—will feel free to suddenly reverse course, decline to answer CCPD officers' questions, and fear no consequences in doing so.¹⁴ Declining to cooperate with law enforcement is difficult to do under any circumstances, but even more difficult given the present-day airport security environment and in the crowded jetway with other passengers waiting to board.

¹⁴ The district court's holding also does not comport with Amici's decades of experience in law enforcement. In Amici's experience, a reasonable person in the position of Mr. André and Mr. English—depending on the facts and circumstances of the particular case—would plausibly feel no choice but to comply with an officer's directives. Accordingly, in Amici's view, the question of whether Mr. André and Mr. English freely gave consent during their jet-bridge interdictions is best decided after factual development rather than at the motion-to-dismiss stage.

As explained above, a collaborative relationship between the public and law enforcement is fundamental to effective policing. *See supra* Part I.C. However, as a DOJ publication observed, “[i]n the wake of recent incidents involving police use of force and other issues, the legitimacy of the police has been questioned in many communities.”¹⁵ Trust in law enforcement has especially declined among Black Americans, who “have a history of being marginalized and mistreated by the police, leading to a lack of trust and resentment.”¹⁶ “Black Americans’ perceptions of policing in their communities remain substantially less positive than those of other U.S. adults.”¹⁷ These numbers have remained remarkably constant across years of tracking: “non-Whites have always had less confidence in law enforcement than Whites.”¹⁸ According to one recent survey, “[t]wo-thirds of black Americans don’t trust

¹⁵ Cmty. Rels. Serv., *Importance of Police-Community Relationships and Resources for Further Reading*, DOJ 1, <https://www.justice.gov/file/1437336/download> (last visited Jan. 13, 2024).

¹⁶ *Id.* at 2.

¹⁷ M.C. Brown II and Camille Lloyd, *Black Americans Less Confident, Satisfied With Local Police*, Gallup (Sept. 18, 2023), <https://news.gallup.com/poll/511064/black-americans-less-confident-satisfied-local-police.aspx>.

¹⁸ Task Force Report 9 (showing white confidence in law enforcement exceeding nonwhite confidence in law enforcement from 1986 to present).

the police to treat them equally,” whereas “[m]ost white Americans do.”¹⁹ The erosion of Black community trust in law enforcement has numerous, complex causes, including racial disparities in enforcement of criminal laws and sentencing; over-policing; mass incarceration; and a spate of “police-involved killings of black people.”²⁰

Thus, Black communities are exactly the communities where trust in law enforcement most needs to be restored and repaired. But the district court order, in rejecting Mr. André and Mr. English’s challenge to a program disproportionately targeting Black Americans, does exactly the opposite—it upholds a discriminatory program, with likely costs to security and effective policing. As numerous courts have concluded, racially disproportionate policing programs damage cooperation with law enforcement and undermine authorities’ ability to promote public safety.

¹⁹ Laura Santhanam, *Two-thirds of black Americans don’t trust the police to treat them equally. Most white Americans do.*, PBS NewsHour (June 5, 2020, 12:00 PM), <https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do>.

²⁰ *Id.*

For example, the Second Circuit has explained that biased policing undermines community trust and thereby police effectiveness:

The effectiveness of a city’s police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias. If [a] police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are a product of bias, rather than well-founded, protective law enforcement. And the department’s ability to recruit and train personnel from that community will be damaged.

Pappas v. Giuliani, 290 F.3d 143, 146–47 (2d Cir. 2002) (citations omitted; citing research identifying “the costs that the perception of inequality and disparate treatment places on law enforcement; it engenders distrust and unwillingness to cooperate and encourages crime”).²¹

²¹ See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013) (“Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified

Similarly, President George W. Bush recognized that, by stopping racial profiling in law enforcement, “we will add to the public confidence our police officers earn and deserve.”²² Attorney General John Ashcroft acknowledged, “Using race . . . as a proxy for potential criminal behavior is unconstitutional, and it undermines law enforcement by undermining the confidence that people can have in law enforcement.”²³ DOJ under Attorney General Ashcroft made clear that “when law enforcement practices are perceived to be biased or unfair, the general public, and especially minority communities, are less willing

that stops make them feel unwelcome in some parts of the City, and distrustful of the police. This alienation cannot be good for the police, the community, or its leaders. Fostering trust and confidence between the police and the community would be an improvement for everyone.”); *Martinez v. Vill. of Mount Prospect*, 92 F. Supp. 2d 780, 783 (N.D. Ill. 2000) (“Any hint of racism in policing erodes the public support so necessary to law enforcement efforts.”); *People v. McWilliams*, 524 P.3d 768, 797 (Cal. 2023) (“For every search of a Black person that yields contraband, there are far more—and disproportionately more—searches of Black people that turn up nothing. These practices are not only inefficient but also detrimental to building trust between minority communities and law enforcement.”) (Liu, J., concurring).

²² *Fact Sheet: Racial Profiling*, DOJ 1 (June 17, 2003), https://www.justice.gov/archive/opa/pr/2003/June/racial_profiling_fact_sheet.pdf.

²³ *Id.*

to trust and confide in officers, report crimes, be witnesses at trials, or serve on juries.”²⁴

Beyond the issues specifically relating to Black communities, the general public’s trust in law enforcement requires that it believes that authorities will apply the law fairly and without prejudice. Here, where the CCPD program appears to be applied in a discriminatory manner, members of the public are likely to lose trust in CCPD and become less likely to obey its requests, resulting in a concomitant decrease in the safety of airports and travelers.

²⁴ *Id.* Before becoming Attorney General, then-Senator Ashcroft recognized that racially biased law enforcement undermines the trust necessary for effective policing:

So long as whole groups of our citizens believe that there is a two-tiered system of treatment by Government officials arbitrarily divided by race, they won’t have confidence in that system. . . . This is particularly true if that perception is held of law enforcement, the very Government agency entrusted with protecting citizens from injustice. Such an erosion of trust would not only undermine the ability of law enforcement officers to do their jobs, it would undermine any efforts that we in Government make to try and improve the lives of all Americans through Government.

Racial Profiling Within Law Enft Agencies: Hearing Before the Subcomm. on the Const., Federalism, and Prop. Rights of the Comm. on the Judiciary, 106th Cong. (2000) (statement of Sen. John Ashcroft), available at <https://www.govinfo.gov/content/pkg/CHRG-106shrg72780/html/CHRG-106shrg72780.htm>.

Thus, the district court order, in dismissing Mr. André and Mr. English’s challenge to a jet-bridge interdiction program primarily targeting Black travelers, likely undermines public trust in law-enforcement authorities, with a detrimental effect on public safety.

II. JET-BRIDGE STOPS ARE AN INEFFECTIVE LAW ENFORCEMENT TOOL.

The stated purpose of the CCPD jet-bridge interdiction program is combating drug trafficking. Doc. 24 ¶ 2. According to CCPD, during an eight-month period between August 30, 2020, and April 30, 2021, the Airport Interdiction Unit engaged in 402 “random” jet-bridge stops. *Id.* ¶ 84.²⁵ Those 402 interdictions resulted in only three seizures of small quantities of drugs: less than one percent of interdictions during this eight-month period. *Id.* The 402 interdictions led to only three arrests, and CCPD only charged two passengers with any crime. *Id.*

The CCPD program’s ineffectiveness at finding illicit drugs is unsurprising. By the point of a jet-bridge interdiction, passengers have already passed

²⁵ CCPD reportedly tells passengers that they have been chosen at “random.” *E.g.*, Doc. 24 ¶ 5. The searches are admittedly not based on reasonable suspicion or probable cause.

through TSA’s intensive screening procedures and potentially random security searches. Available DEA data and Amici’s experience confirm that random stops on jet bridges are unlikely to combat drug trafficking. And seizing cash from passengers, which occurs far more often in the CCPD program than finding drugs, likewise does not promote public safety.

A. Random Jet-Bridge Stops Are Ineffective Because Passengers and Their Belongings Have Already Been Subject to TSA Screenings and Random Security Searches.

On the surface, fully random searches for drugs on a jet bridge might appear to be a plausible means of finding illicit drugs or deterring individuals from transporting such substances on flights. Yet as anyone who has spent time in an airport knows, by the time travelers enter the jet bridge, those travelers and their belongings have already been subject to an extraordinarily extensive search at the TSA checkpoint. *See supra* Part I.A. Given those comprehensive security measures, there is little reason to think that an added randomized jet-bridge search would turn up any illegal contraband.

That is doubly true because on top of the checkpoint screening, TSA engages in a regime of random searches at every airport, including Atlanta—just as CCPD purportedly does. A Management Directive explains that TSA operates according to a “Playbook” that deploys security assets “in a random or

unpredictable manner.”²⁶ These “unpredictable security measures” include random pat-down screenings and luggage searches.²⁷ According to TSA, certain “passengers are selected at random by computer” for additional checkpoint searches through its “Secondary Security Screening Selection” (“SSSS”) program.²⁸ Even beyond the security checkpoint, TSA performs random checks at airport gates as a “random, unpredictable layer” of security.²⁹

TSA’s extensive searches (both systematic and randomized) are likely to turn up any evidence of drugs, and under TSA policy, “if any illegal substance

²⁶ Office of Ass’t Sec., *TSA Management Directive No. 100.4: Transportation Security Searches*, TSA, https://www.tsa.gov/sites/default/files/foia-read-ingroom/transportation_security_searches_100.4.pdf.

²⁷ *Security Screening*, TSA, <https://www.tsa.gov/travel/security-screening> (last visited Jan. 12, 2024); see *Frequently Asked Questions*, TSA, <https://www.tsa.gov/travel/frequently-asked-questions> (last visited Jan. 12, 2024) (“Pat-down screening is used . . . as an unpredictable security measure.”).

²⁸ *Women Complain About Airport Patdowns*, NBC News (Nov. 30, 2004), <https://www.nbcnews.com/id/wbna6617853>.

²⁹ *Random screenings resume at airport gates*, NBC News (Mar. 18, 2009), <https://www.nbcnews.com/id/wbna29757224>; *TSA: More gate searches in store for fliers*, ABC News (Mar. 17, 2009), <https://abcnews.go.com/Travel/story?id=7107837>.

is discovered during security screening, TSA will refer the matter to a law enforcement officer.”³⁰ Thus, members of the public, on notice of TSA’s extensive searches and random additional screenings, know that TSA officers may freely search their person and belongings and find any illicit drugs, and are thereby deterred from transporting such contraband. CCPD’s alleged law-enforcement purpose—combating drug trafficking—is already fully satisfied.

It is therefore no surprise that CCPD has been largely ineffective at finding drugs over the course of its 400 interdictions. CCPD’s ineffectiveness at locating illegal drugs, let alone significant quantities on those few occasions on which drugs were found—and the district court’s decision upholding the program—will likely further compound the public’s mistrust in the CCPD program. “Belief in the legitimacy of legal authority and trust in law enforcement leads to greater compliance with law.” *Pappas*, 290 F.3d at 146; *see supra* Part I.C. Ineffective search programs detract from the public legitimacy of law enforcement and fundamentally undermine the public-safety goal they purport to serve: they encourage the public to evade airport law enforcement personnel rather than cooperate.

³⁰ *Medical Marijuana*, TSA, <https://www.tsa.gov/travel/security-screening/whatcanibring/items/medical-marijuana> (last visited Jan. 12, 2024).

B. Available Data Confirm That Random Stops on Jet Bridges Are Ineffective at Impeding Drug Trafficking.

The data show that CCPD’s interdictions—a type of stop sometimes called a “cold” consent encounter, based on no particular suspicious behavior or prior investigative information—are unlikely to combat drug trafficking effectively.³¹ In 2015, DOJ’s Office of the Inspector General (“OIG”) issued a report concerning the effectiveness of such “cold” consent interdictions by DEA in mass transportation facilities (airports, bus stations, and train stations). DOJ found that, based on DEA data from a pilot program between 2000 and 2003, “cold consent encounters conducted at airports, bus stations, and train stations between 2000 and 2002 showed that they had a substantially lower success rate than encounters based on previously acquired information.”³² Specifically, investigative-based encounters were approximately twice as likely as cold-consent encounters to result in a seizure.³³

³¹ These interdictions are a “suspicionless” policing activity—one “conducted in the absence of cause to believe that the particular individual, place, or item subject to agency action is involved in prohibited conduct or is a threat to public safety.” Principles of the L. of Policing § 2.01(b) (Am. L. Inst. 2023).

³² DOJ Report iii.

³³ *Id.* at 22; *see* Principles of the L. of Policing § 5.03 cmt. a. (“[S]uspicionless policing may affect large numbers of people, most of whom will by definition be innocent of any wrongdoing.”).

Amici’s on-the-ground policing experience comports with the DEA data. “Cold” random searches in transit facilities are generally less effective at uncovering illicit drugs than investigative-based searches. That makes sense: after all, random searches are (allegedly) random, not based on any evidence of criminal wrongdoing or prior investigative information. The ineffectiveness of the CCPD program seriously calls into question both its justifications and its legitimacy.³⁴

Moreover, cold-consent encounters have long raised civil rights concerns because they are particularly vulnerable to racial discrimination under the pretext of randomness.³⁵ DOJ has “long been concerned about the potential for racial profiling to occur in connection with cold consent encounters.”³⁶

³⁴ “Jurisdictions should make an effort both to evaluate periodically the necessity and effectiveness of suspicionless programs, and to gather, when possible, additional data to enable more careful scrutiny of existing programs.” Principles of the L. of Policing § 5.03, Reporters’ Note 2 (citing, *e.g.*, Tracey Meares & Bernard Harcourt, *Randomization and the Fourth Amendment*, 78 U. Chi. L. Rev. 809, 848 (2011)).

³⁵ Amici agree with Mr. André and Mr. English that less discriminatory alternatives exist to the CCPD program. Among other things, CCPD could make stops only based on some previously acquired information and articulable suspicion—which should be feasible given the extensive security apparatus described in this brief—rather than engaging in purportedly random but generally ineffective stops that lend themselves to racial profiling.

³⁶ DOJ Report 11.

A 2003 DOJ report observed that “racial profiling is more often associated with such encounters than with encounters based on previously acquired information.”³⁷ Accordingly, DOJ’s Civil Rights Division has entered into various consent decrees with law-enforcement agencies requiring oversight of cold-consent encounters and searches designed to “detect and prevent racial profiling.”³⁸ For example, a 2001 consent decree required that Los Angeles police officers complete a report that included the race of the person stopped each time an officer conducted a pedestrian stop; a 2013 consent decree required that Puerto Rico police officers collect demographic data on all investigatory searches, whether or not they resulted in an arrest or citation; and a third consent decree required that New Orleans police officers must immediately notify a supervisor when considering a search based on consent, and the supervisor must approve the search before it is conducted.³⁹

³⁷ *Id.* (citing U.S. Dep’t of Justice, *Race or Ethnicity as a Factor in Law Enforcement Operations: A Survey of Federal Agencies* 3 (June 2003)).

³⁸ DOJ Report 17.

³⁹ *Id.*

C. Seizing Cash from Travelers Does Not Promote Public Safety and Runs Contrary to the Purpose of Civil Asset Forfeiture.

While the CCPD program (like any non-investigative-based jet-bridge interdictions) is highly unlikely to result in confiscation of illicit drugs, let alone any significant quantities, the program has been lucrative: it has enabled CCPD to confiscate large sums of money from travelers via civil forfeitures without any suspicion of wrongdoing. As noted above, of 402 interdictions over an eight-month period, CCPD's Airport Interdiction Unit seized drugs from only three individuals. Doc. 24 ¶ 84. Of those three, CCPD criminally charged only two with a related offense. *Id.* ¶ 86. At the same time, CCPD officers deprived twenty-five individuals of \$1,036,890.35 in cash and money orders. *Id.* Of those twenty-five passengers who had money seized, twenty-four were allowed to continue their travels, and only two were ever charged with any crime. *Id.*

Again, this is unsurprising: the data confirm there is poor correlation between seizures of cash and criminal activity. As a 2020 Institute for Justice report explains, “Available data do not indicate a strong link between airport currency seizures and criminal activity.”⁴⁰ According to that report, in 69% of

⁴⁰ IJ Report 15.

cases of currency seized at airports by DHS from 2000 to 2016, the cash was seized with no accompanying arrest⁴¹—similar to most individuals stopped by CCPD. And travelers whose currency is seized at airports then face an arduous process when attempting to retrieve their money and have few legal rights when doing so.⁴²

Because it is not based on investigative-based suspicion of criminal activity and generally does not uncover such activity, the CCPD program runs counter to the proper goal and function of civil asset forfeiture. Amici accept that civil forfeiture may be appropriate under certain circumstances—specifically, when the asset subject to forfeiture was likely involved in a crime. As the Georgia Advisory Committee to the U.S. Commission on Civil Rights explains, “In order to seize a person’s private property under civil asset forfeiture, law enforcement officers need only probable cause to believe that the property was either involved in or derived from the commission of a crime.”⁴³

⁴¹ *Id.*

⁴² *Id.* at 16.

⁴³ *Civil Asset Forfeiture and its Impact on Communities of Color in Georgia*, U.S. Comm’n on Civil Rights 3 (Nov. 2022), https://www.usccr.gov/files/2022-11/2022_civil-asset-forfeiture-in-ga_report.pdf.

Under the Georgia Code, “Property subject to forfeiture may be seized without process if probable cause exists to believe that the property is subject to forfeiture or the seizure is incident to an arrest or search pursuant to a search warrant or to an inspection under an inspection warrant.” Ga. Code § 9-16-6; *see* Ga. Code § 9-16-17.

Here, more than twenty individuals were subjected to civil forfeiture of their money even though CCPD officers had no basis to suspect them of any crime (let alone “probable cause”), did not find drugs on them, and ultimately did not charge them with a crime. Civil asset forfeiture is intended to deprive criminals of ill-gotten gains—not fill the coffers of police departments. CCPD’s pretextual conduct “undermine[s] the legitimacy of law-enforcement agencies, and increase[s] the likelihood that the program is not justifiable either as a legal or policy matter.”⁴⁴

⁴⁴ Principles of the L. of Policing § 5.06 cmt. a.

CONCLUSION

The district court's order should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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JANUARY 19, 2024

**CERTIFICATE OF COMPLIANCE WITH
TYPEFACE AND WORD-COUNT LIMITATIONS**

I, Loretta E. Lynch, counsel for amici curiae current and former law enforcement officials, certify, pursuant to Federal Rules of Appellate Procedure 32(a)(7) and 32(g)(1), that the attached brief is proportionately spaced, has a typeface of 14 points or more, was prepared using Microsoft Word 365, and contains 6,472 words.

/s/ LORETTA E. LYNCH
LORETTA E. LYNCH

JANUARY 19, 2024

CERTIFICATE OF SERVICE

I, Loretta E. Lynch, counsel for amici curiae current and former law enforcement officials, certify that, on January 19, 2024, a copy of the attached brief was filed with the Clerk and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ LORETTA E. LYNCH

LORETTA E. LYNCH