

No. 19-2502

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Janeka Creese and Debra Creese,

Plaintiffs–Appellants,

v.

The City of New York, P.O. Jelinson Martinez, Shield No. 301, P.O. John Doe
No. 1 through 10 in their individual and official capacities as employees of the
City of New York,

Defendants–Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of New York
No. 17-cv-3659, Hon. Allyne R. Ross

BRIEF FOR PLAINTIFFS-APPELLANTS JANEKA CREESE AND DEBRA CREESE

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INTRODUCTION

When Officer Jelinson Martinez arrested Janeka Creese and her mother, Debra Creese, at Cafe Omar for allegedly serving alcohol to minors, he based the arrest on just two undisputed facts: Two teenagers possessed alcoholic beverages, and Janeka and Debra were present at the restaurant's bar.

But the Fourth Amendment requires more. Its prohibition on unreasonable seizures forbids officers from arresting or prosecuting citizens absent probable cause—a reasonable belief based on reliable information that the suspect has committed a crime. The only reliable information available to Martinez was that Janeka was behind the bar and Debra was sitting on a stool in front of it, visiting with her daughter after bringing her dinner. The Creeses nevertheless endured eighteen hours in jail, baseless criminal charges, and emotional trauma—all because Martinez chose to arrest them without further investigation. Decades of caselaw, however, affirm that a person's mere presence at the scene of a crime, without more, does not justify a seizure.

Perhaps sensing that the initial evidence was insufficient to justify the Creeses' arrests, defendants then elicited affidavits from the two teenagers to attempt to validate the arrests. The evidence—particularly when viewed in favor of the Creeses, as it must be—indicates that defendants pressured the young men to submit the affidavits and to do so in a certain way. One of the teenagers testified that he did not identify Janeka or Debra in-person, that officers provided him information purportedly matching the Creeses' descriptions, and that these officers promised him a quick release from police custody if he signed an affidavit.

The charges against the Creeses were eventually dismissed. The Creeses then sued under Section 1983 to enforce their Fourth Amendment right to be free from unreasonable seizures and their Fourteenth Amendment right to due process, seeking relief for their false arrests, the denial of their right to a fair trial, and Debra's malicious prosecution.

On defendants' motion for summary judgment, the district court was required to consider only undisputed facts and construe inferences against defendants. Yet in granting that motion, and in granting Martinez qualified immunity on the Creeses' Fourth Amendment claims, the district court ignored both the summary-judgment standard and clearly established constitutional law. The court failed to view all facts and to draw all permissible inferences in favor of the Creeses, the nonmoving parties. Instead, it impermissibly construed the alleged identification of the Creeses, their locations within Cafe Omar, and the potential fabrication of evidence in favor of defendants, the moving parties.

The district court's rationale would protect officers who arrest people based only on their physical proximity to a suspected crime—an outcome prohibited by the Fourth Amendment's individualized probable-cause requirement and controlling precedent. And the court's refusal to consider the potential fabrication of evidence or draw inferences in favor of the Creeses failed to protect them from a baseless arrest and prosecution.

For these and other reasons explained below, this Court should reverse.

JURISDICTIONAL STATEMENT

The Creeses sued in the Eastern District of New York under 42 U.S.C. § 1983. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. A. 9. The district court's judgment dismissing all claims against all defendants was entered on July 24, 2019. A. 58. The notice of appeal was timely filed on August 14, 2019. A. 59. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Bartender Janeka Creese and her mother, Debra Creese, alleged that Officer Jelinson Martinez falsely arrested them at Cafe Omar after he discovered that two teenagers possessed alcohol. In sworn testimony, Debra denied working as a bartender, and Janeka maintained that she did not interact with the teenagers at all.

The first issue is whether the district court erred at summary judgment in granting qualified immunity to Martinez and in determining that Martinez had arguable probable cause to arrest Janeka and Debra based on the undisputed facts.

2. The Creeses alleged that they suffered a violation of their right to a fair trial because defendants twice fabricated and provided to prosecutors evidence that would have influenced a jury to the Creeses' detriment. Officer Martinez provided prosecutors with a false account of the events at Cafe Omar and officers pressured the two teenagers to provide affidavits purportedly matching Janeka's and Debra's descriptions.

The second issue is whether the district court erred at summary judgment by drawing inferences against the Creeses and in concluding that defendants did not fabricate evidence that caused a deprivation of liberty beyond the Creeses' initial arrests.

3. The Creeses' complaint mistakenly labeled (as Janeka's claim) Debra's claim that defendants maliciously prosecuted her after the arrests. The district court did not reach the question whether the complaint could be amended to fix the mistaken labeling and instead granted defendants summary judgment on Debra's malicious-prosecution claim.

The third issue is whether the district court erred at summary judgment in finding that arguable probable cause defeated Debra's malicious-prosecution claim, and, if so, whether the claim should be remanded to allow the district court to decide in the first instance whether Debra may plead her malicious-prosecution claim.

STATEMENT OF THE CASE

Defendants arrested and charged Janeka Creese and Debra Creese with serving alcohol to minors in violation of New York Alcohol and Beverage Control Law Section 65(1). The Creeses had not violated Section 65(1) and suffered immediate and ongoing harms from the arrests and their aftermath. They then brought false-arrest, fair-trial, and malicious-prosecution claims in the Eastern District of New York under Section 1983 for violations of their Fourth and Fourteenth Amendment rights. On July 23, 2019, the Honorable Allyne R. Ross granted defendants' motion for summary judgment on all claims. *See Creese v. City of New York*, No. 17-3659, 2019 WL 3302436 (E.D.N.Y. July 23, 2019).

In the pages that follow, we first describe the facts giving rise to the Creeses' claims. We then detail the suit and the decision below. As the district court should have done, this Court must construe the evidence and draw all permissible inferences in the light

most favorable to the Creeses, the nonmoving parties. *See Dufort v. City of New York*, 874 F.3d 338, 347 (2d Cir. 2017).

I. Factual background

A. Cafe Omar the night of March 18

Janeka Creese worked as a bartender at Cafe Omar, a Brooklyn restaurant and bar, in March 2016. A widow and mother of a young daughter, Janeka worked nights as a bartender to supplement her income as a salesperson at Macy's. Her fifty-five-year-old mother, Debra Creese, lived with Janeka across the street from Cafe Omar. A. 67. On March 18, 2016, Janeka worked her day shift at Macy's and then began her night shift at Cafe Omar. A. 64-68.

Cafe Omar consists of an entry room with a coat check and a larger room containing restaurant tables, a dance floor, a stage, and the bar itself. A. 69. To enter the building and get to this larger room, patrons come in off the street and go up a ramp through the entry room. *Id.* The bar cannot be seen from the entry room. A. 70. The bar is located in the back-right corner of the larger room, beyond the restaurant tables and the dance floor. A. 69-70. Cafe Omar accommodates around 200 people. A. 70. Cafe Omar's clientele, as well as the surrounding neighborhood, is predominantly black. A. 244-45.

Cafe Omar is open to patrons eighteen and up, including those who are too young to legally purchase alcohol. The restaurant provides wristbands to patrons over twenty-one, authorizing them to purchase alcohol. On March 18, two security guards were stationed outside Cafe Omar checking IDs and giving out wristbands. *Dist. Ct. Op.*,

A. 35-36. Janeka was checking guests who approached the bar for wristbands before serving them alcohol. A. 78, 90.

Shortly before midnight, Janeka called her mother Debra to ask her to bring dinner to Cafe Omar, as Debra often did. A. 75-76. Because she was at home knitting when Janeka called, Debra soon arrived with Janeka's dinner. A. 108, 111, 124. After bringing dinner, Debra stayed to keep Janeka company.

B. Officer Martinez arrives at Cafe Omar.

After midnight, Officer Jelinson Martinez entered Cafe Omar with several other officers to conduct a "business inspection." A. 194. Martinez had previously conducted at least one other inspection of Cafe Omar. A. 198-99. Martinez testified that the purpose of the inspection was to check the bar and to "count" the patrons. A. 210-12. Although when deposed Martinez could not remember the details of the Cafe Omar bar inspection, he testified that bar inspections generally include checking the bar's liquor license, fire extinguisher, and record book, as well as examining liquor bottles for signs of contamination. A. 212-17. The "count" involved ordering all customers out of Cafe Omar and then counting those who decided to reenter to ensure the establishment was not over capacity. A. 207, 210.

Upon entering Cafe Omar, Martinez used a flashlight to look around the main room, which was dimly-lit. A. 203. Martinez told the DJ to stop the music and turn up the lights. *Id.* Martinez testified that he turned to two women he saw "at" the bar and ordered them to stop serving alcohol, but that he "didn't exactly look" at who the women were. A. 204. Martinez then directed all patrons out of Cafe Omar to perform

the count. A. 205. As patrons began leaving, Martinez went behind the bar with another officer and asked to see the liquor license. Janeka testified that Martinez inspected the liquor license and then walked out of sight into Cafe Omar's front room. A. 86-87.

C. Officer Martinez arrests N.D. and B.A.

As he walked away after inspecting the bar, Officer Martinez encountered several young-looking patrons, including N.D., a nineteen-year-old from New York, and B.A., N.D.'s eighteen-year-old cousin visiting from Turks and Caicos. A. 152, 221, 277-78. Martinez remembers little about the inspection other than this encounter, and where this encounter took place is disputed. Martinez claims that he was fifteen feet in front of the bar, while Janeka and Debra testified that Martinez had walked to the entrance room of Cafe Omar, outside of the main room and out of sight of the bar. A. 87-89, 117, 122, 219-20.

Martinez observed the two teenagers carrying glasses that appeared to contain liquor and asked them for their IDs. A. 221. The teenagers were not wearing wristbands indicating that they were over twenty-one. A. 153-54. N.D. testified that he identified himself as underage without presenting identification. A. 156-57. Martinez then arrested N.D. and B.A. *Id.* Martinez also arrested another individual standing next to N.D. and B.A. for using a fake ID. A. 271-73. Martinez detained N.D. and B.A. near Cafe Omar's front entrance, although, again, precisely where is disputed. A. 159. Some of this confusion is owed to use of the term "bar" to describe both the entire establishment and the bar itself. Martinez testified that he detained the young men fifteen feet from the bar. A. 220. But N.D. stated that he was detained "towards the

front entrance,” A. 159, and the Creeses testified that Martinez was then in the entrance room (out of sight of the room where the bar is located), A. 88, 121. Martinez testified that he could not remember any other details about the teenagers, including whether he handcuffed them and whether he brought them to the precinct. A. 221-23, 230-31.

Martinez’s account also contradicts other accounts regarding whether the teenagers identified anyone who sold them alcohol at Cafe Omar. Martinez claims that the teenagers pointed to two bartenders who served them alcohol, but he does not remember who they identified, and he did not document—contemporaneously or otherwise—any identification procedure conducted at the bar. A. 225-229. In stark contrast, N.D. repeatedly testified that he did not point out or otherwise identify anyone who gave him alcohol at Cafe Omar. A. 157-58, 169-70, 175. He does not remember where he got the alcohol, but conclusively stated that he did not get it from the bartender. A. 154, 168, 171. He also testified that he knew other people at Cafe Omar that night, including people who could have been over twenty-one. A. 155. And N.D. stated that he and B.A. were both handcuffed as soon as they admitted to being underage. A. 157, 161. Debra and Janeka testified that the young men did not identify them and could not have done so because Martinez was in a different room when he interviewed the teenagers. A. 88, 120-22.

D. Officer Martinez arrests Janeka and Debra.

After the arrests of N.D. and B.A., Officer Martinez then returned to the bar area, finding Janeka behind the bar and Debra sitting on a bar stool outside of it. A. 118, 120. Debra and Janeka testified that Martinez asked them, “Who sold the minor

liquor?” but did not provide the names of the minors who had allegedly been served alcohol or any details to support this accusation. A. 88-91, 120-22. Janeka and Debra testified that Martinez then looked at Debra and asked, “What is this old lady doing there?” A. 104. Janeka told Martinez that she had not served any minors, while Debra stated that she was not working at the bar and did not see any minors served alcohol. A. 88, 130. Martinez replied, “Well somebody did. Both of you have to go.” A. 131. Janeka told Martinez that her mother had a heart condition and needed medication from her purse, to which Martinez replied, “Fuck her heart condition. What’s she doing here?” A. 135, 148; *see also* A. 92.

Martinez handcuffed the Creeses and led them out of Cafe Omar. A. 90-91. They did not know who accused them at the time, and there is no evidence that B.A. or N.D. came into contact with or identified the Creeses after both groups were arrested. A. 90-92.

The Creeses were taken to the sixty-seventh precinct in the early morning of March 19, where they were placed in a jail cell without access to Debra’s heart medication. A. 92-95, 130. Janeka and Debra were eventually brought before a judge the evening of March 19, around 7 or 8 p.m. A. 95-96, 129-132. The case against Debra was dismissed immediately. A. 134. The judge told Janeka to stay out of trouble for six months, and Janeka accepted an adjournment in contemplation of dismissal. (Her case was dismissed six months later, on September 19, 2016. A. 98, 286.) Debra and Janeka were released from custody the night of March 19. They had been in jail for about eighteen hours.

E. N.D. and B.A. are taken to the police station.

While Janeka and Debra were being arrested and transported to the precinct holding area, N.D. and B.A. were transported separately to the same precinct. A. 273-275. They were handcuffed to a railing in the station. A. 163-65, 167-68. During this time, N.D. and B.A. were given and signed form Affidavits of Sale of Alcohol. The affidavit signed by N.D. indicates that he purchased a cup of Hennessy for ten dollars from a “Bartender” who was described on the form as “female, 5'6[“], black.” A. 277. The affidavit signed by B.A. indicates that he purchased a ten-dollar cup of Hennessy from a “Bartender” who was described on the form as “female, 5'5[“], old lady.” A. 278. The affidavits do not include the Creeses’ names or photos, and they do not contain the name or signature of the police officer who took the affidavits.

The record raises genuine factual disputes about whether N.D. and B.A. voluntarily provided all of the affidavit information themselves. N.D. testified that he filled out the form to “expedite the process” and that the pair “had to follow certain instructions ... under the premise that [they] would be getting out.” A. 167, 182. He testified that he was “not saying that I lied.” A. 172. But N.D. acknowledged under oath that an “officer [told him] that if [he] told” the officer that he “bought the drink at the bar from the female bartender, 5'6,” that the officer would let him go “as soon as possible or within 20 minutes.” A. 176. N.D. also admitted to not knowing several key details included on the affidavit, including where he purchased the alcohol and his description of the bartender. A. 167-85. Although N.D. and B.A. filled out the affidavits, they were never asked to identify Janeka or Debra in person at the station to clarify how and from whom they obtained the alcohol.

It is also unclear who was present when N.D. and B.A. signed the affidavits. The accompanying areas on the affidavits for a police officer to fill out were left blank. A. 277-78. Although Officer Martinez noted in his arrest reports that the pair “did sign [sic] affidavit of sale of alcohol form,” A. 279, 282, he testified that he did not remember whether he arrested the teenagers or whether they were taken to the precinct at all, A. 262-63, 270, 273-76. N.D. testified that he and B.A. were released from police custody after three hours at the station. A. 164.

II. Proceedings below

Janeka and Debra filed a complaint under Section 1983 for false arrest under the Fourth Amendment and denial of their due-process right to a fair trial. A. 15-17 (¶¶ 41-43, 55-59). Debra also claimed malicious prosecution under the Fourth Amendment. (The complaint mistakenly stated that this claim was advanced on Janeka’s behalf. A. 18-19 (¶¶ 71-74), A. 51. *See infra* at 42.) The Creeses also pressed related state-law claims.

The district court granted defendants’ motion for summary judgment and dismissed the Creeses’ claims. A. 35. The court found that Officer Martinez was entitled to qualified immunity on the false-arrest claims because he had arguable probable cause for the arrests. A. 47. The court adopted, contrary to the Creeses’ testimony, Martinez’s allegation that N.D. and B.A. were near the bar when he encountered the teenagers. A. 46-47. Because Janeka was working as a bartender when N.D.’s arrest took place, the court determined that it was reasonable for an officer in Martinez’s position to believe Janeka was responsible for serving N.D. alcohol. *Id.* The court also inferred, as Martinez asserted, that B.A. identified Debra as an individual who provided him with alcohol at

Cafe Omar and then used that inference to conclude that Martinez had arguable probable cause to arrest Debra. A. 46, 48-50.

The court used the same reasoning to find that Martinez was entitled to qualified immunity on the malicious-prosecution claim. A. 52. It did not reach the question whether the malicious-prosecution claim, initially alleged on Janeka's behalf, could be maintained by Debra, as the Creeses urged in their summary-judgment opposition. A. 51. Rather, the court concluded that even if the claim could be advanced by Debra, B.A.'s sworn affidavit provided an additional basis to find arguable probable cause for Debra's prosecution. A. 52.

Regarding the fair-trial claims, the court held that the Creeses failed to make out a disputed fact about whether evidence was fabricated to implicate them in a crime. A. 54. The court concluded that the affidavits provided Martinez probable cause to arrest the Creeses and thus precluded their fair-trial claims. A. 56. Because the court discounted the Creeses' argument that N.D. and B.A. were improperly guided on how to complete the affidavits and were pressured to submit them, it did not consider whether the Creeses suffered any further harm stemming from the fair-trial violation beyond the harm flowing from their arrests. A. 54-55.

SUMMARY OF ARGUMENT

I. The district court erred in granting summary judgment on the Creeses' false-arrest claims. The court ignored disputed material facts and impermissibly drew inferences in defendants' favor to erroneously conclude that Officer Martinez had arguable probable cause to arrest Janeka and Debra Creese.

A. There is a genuine issue for a jury determination regarding whether a reasonable officer could believe that Janeka violated Section 65(1). Whether N.D. identified anyone who sold him alcohol is disputed, as is N.D.'s location at the time he supposedly made the identification. Qualified immunity is based on facts known to an officer at the time of an arrest, and Officer Martinez did not know that Janeka was the only bartender when he arrested her. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017). The only undisputed facts that Martinez could have relied on to arrest Janeka were the teenagers' possession of alcohol and Janeka's presence behind the bar.

Based on these two undisputed facts, Martinez lacked arguable probable cause to arrest Janeka as a matter of law. Janeka's presence behind the bar did not provide Martinez with the individualized suspicion required to arrest her. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). And Martinez had no evidence that *Janeka* participated in or had knowledge of N.D. being served alcohol. Martinez was thus not entitled to qualified immunity on Janeka's false-arrest claim.

B. Genuine disputes over material facts preclude summary judgment on Debra's false-arrest claim. Evidence indicates that B.A. did not identify Debra as the person who sold him alcohol at Cafe Omar because B.A. was not in a position in the bar room to make that identification. A jury also could reasonably infer that Officer Martinez never saw Debra behind the bar or understood her to be a bartender.

Summary judgment as to Debra was improper for another reason. As a matter of law, Debra's proximity to the bar and B.A.'s supposed identification could not supply arguable probable cause to arrest Debra. Qualified immunity is unavailable to officers who arrest bystanders without individualized suspicion. *See Rogers v. City of Amsterdam*,

303 F.3d 155, 160 (2d Cir. 2002). Debra was merely sitting on a stool at the bar, as would any bar patron, when B.A. supposedly pointed in the bar's direction. Though B.A. supposedly identified her, his identification was inherently untrustworthy, and no reasonable officer should have taken B.A.'s word at face value at the time of his arrest.

II. The district court also erred in granting summary judgment to defendants on the Creeses' fair-trial claims. The Fourteenth Amendment prohibits police from fabricating or otherwise distorting evidence against suspects. *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 278-79 (2d Cir. 2016). When properly construed in favor of the Creeses, the facts suggest that defendants twice fabricated evidence against Janeka and Debra: first, when Officer Martinez told prosecutors that N.D. and B.A. had identified the Creeses at the bar, and second, when defendants pressured the teenagers to provide affidavits implying that Janeka and Debra sold them alcohol. The district court failed to recognize these instances of fabricated evidence and applied the wrong causation standard to measure the resulting deprivations.

N.D.'s, Janeka's, and Debra's testimony all indicate that Martinez fabricated evidence when he told prosecutors that someone identified the Creeses at Cafe Omar. N.D., who supposedly identified Janeka, denies identifying anyone to Martinez. The Creeses testified that Martinez was not in the same room when he arrested the teenagers and that he had no basis to know whether the Creeses had served the teenagers alcohol. A reasonable jury could find that Martinez knew that the Creeses did not serve N.D. and B.A. but nonetheless told the prosecutor's office they had. The facts also suggest that defendants improperly provided information to N.D. and B.A. and pressured them to

sign the affidavits that led to the Creeses' continued detention. Thus, disputed facts surrounding these fabrications preclude summary judgment.

The Creeses need only show that they experienced some deprivation of liberty as a result of defendants' fabrications. *See Garnett*, 838 F.3d at 277. They met this burden by introducing evidence indicating that Martinez's false account of the events at Cafe Omar led to the unwarranted charges. The district court also failed to recognize that the Creeses suffered further deprivations of liberty beyond their arrests as a result of the affidavits the teenagers were coerced to provide. This fabrication caused the Creeses' continued detention, criminal charges, and other collateral consequences.

III. Because the district court erred in granting defendants qualified immunity from Debra's malicious-prosecution claim, her claim should be remanded to the district court to allow it to decide in the first instance whether to grant leave to amend the complaint. The district court declined to decide whether Debra's complaint could be corrected to put the malicious-prosecution claim in her name and instead found that B.A.'s affidavit supplied arguable probable cause to prosecute Debra. But this affidavit, when combined with other undisputed facts, is too weak to provide arguable probable cause, and summary judgment was unwarranted on Debra's malicious-prosecution claim for that reason.

STANDARD OF REVIEW

The district court's grant of summary judgment must be reviewed by this Court *de novo*. *Ricciuti v. NYC Transit Authority*, 124 F.3d 123, 127 (2d Cir. 1997). When reviewing a district court's grant of summary judgment, this Court must "resolve all ambiguities

and draw all factual inferences in favor of” the nonmoving party, here the Creeses. *Estate of Gustafson ex rel. Reginella v. Target Corp.*, 819 F.3d 673, 675 (2d Cir. 2016) (quoting *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 312 (2d Cir. 1997)).

ARGUMENT

I. The district court erred in granting summary judgment on the Creeses’ Fourth Amendment false-arrest claims.

A. Background legal principles

The Fourth Amendment prohibition on unreasonable seizures protects against warrantless arrests without probable cause. *Henry v. United States*, 361 U.S. 98, 100 (1959). The Creeses maintain that Officer Martinez violated this Fourth Amendment guarantee by falsely arresting them—a claim governed by the New York legal standard for false arrest. See *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996). To establish that they were falsely arrested, Janeka and Debra must show that (1) Martinez intended to confine them, (2) they were conscious of the confinement, (3) they did not consent to the confinement, and (4) the confinement was not otherwise justified. *Posr v. Doherty*, 944 F.2d 91, 97 (2d Cir. 1991) (citing *Broughton v. State*, 335 N.E.2d 310, 314 (N.Y. 1975)).

The first three elements are met here, and Martinez disputes only the fourth element, arguing that he had probable cause to arrest both Janeka and Debra. Probable cause is a defense to a false-arrest claim against a police officer because it justifies the decision to confine the plaintiff. *Weyant*, 101 F.3d at 852 (citing *Bernard v. United States*, 25 F.3d 98, 102 (2d Cir. 1994)). But in keeping with the Fourth Amendment’s purposes, probable cause to arrest imposes a significant obligation on law enforcement that cannot be unduly relaxed “without jeopardizing the privacy or security of the citizen.”

See Henry, 361 U.S. at 102. Martinez was thus required to “have knowledge or reasonably trustworthy information of facts and circumstances ... sufficient to warrant a person of reasonable caution in the belief that *the person to be arrested*” committed a crime. *Weyant*, 101 F.3d at 852 (emphasis added). Martinez’s probable cause must have been “more than rumor, suspicion, or even a strong reason to suspect.” *United States v. Fisher*, 702 F.2d 372, 375 (2d Cir. 1983) (quotations and citations omitted).

Without deciding whether Martinez had probable cause to arrest Janeka and Debra, the district court incorrectly found that Martinez was entitled to qualified immunity on their false-arrest claims. An officer is entitled to qualified immunity on a false-arrest claim if there is “arguable” probable cause at the time of arrest. *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007). Arguable probable cause exists if it was “objectively reasonable” for an officer to believe that probable cause existed, or if “officers of reasonable competence could disagree on whether the probable cause test was met.” *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (quoting *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991)).

A finding of qualified immunity at the summary-judgment stage is appropriate only when there are no disputed issues of material fact, *see Jenkins*, 478 F.3d at 88, and the arrest did not violate “clearly established” legal rules that “prohibit the officer’s conduct in the particular circumstances before him,” *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). These two inquiries are related. Because qualified immunity depends on the reasonableness of an officer’s actions, “summary judgment is inappropriate” if “the officer’s reasonableness depends on material issues of fact” that are disputed. *Jenkins*, 478 F.3d at 88; *see also Tsesarskaya v. City of New York*, 843 F. Supp. 2d 446, 459-60

(S.D.N.Y. 2012) (finding that material factual disputes precluded resolution of the qualified-immunity defense to a false-arrest claim). If—but only if—material facts are “not in serious dispute” does reasonableness become a question of law. *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995). In conducting that purely legal inquiry, the court must ask whether “at the time of the officer’s conduct, the law was ‘sufficiently clear’ that every ‘reasonable official would understand that what he is doing’ is unlawful.” *Wesby*, 138 S. Ct. at 589 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

* * *

With these background principles in mind, we now show that the district court incorrectly found that Martinez was entitled to qualified immunity on both Janeka’s and Debra’s false-arrest claims. The court failed to recognize the existence of disputed issues of material fact and ignored clearly established law governing probable cause. These errors preclude summary judgment and require a trial.

B. Officer Martinez was not entitled to summary judgment on Janeka Creese’s false-arrest claim.

Officer Martinez arrested Janeka Creese for selling alcohol to an underage person in violation of New York Alcohol and Beverage Control Law Section 65(1). No one has suggested that Janeka broke any other law. The district court was thus required to ask, interpreting evidence and making permissible inferences in the light most favorable to Janeka, whether “officers of reasonable competence could disagree” over whether there was probable cause to arrest her for violating Section 65(1). *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007) (quoting *Lennon v. Miller*, 66 F.3d 416, 423-24 (2d Cir. 1995)). To criminally violate Section 65(1), a bar employee must “participate [in],

encourage[,] or know about” the sale of alcohol to minors. *People v. Byrne*, 570 N.E.2d 1066, 1067 (N.Y. 1991) (holding that Section 65(1) does not impose vicarious liability). Under the arguable-probable-cause standard, there must have been facts and circumstances sufficient to warrant a reasonable officer to believe that Janeka had participated in or had knowledge of the sale of alcohol to minors.

The district court reasoned that “[t]he combination of Janeka’s job and N.D.’s admission regarding his age” was sufficient to establish “a reasonable inference that Janeka sold N.D. alcohol.” Dist. Ct. Op., A. 48. In turn, the court concluded that this inference gave Martinez arguable probable cause to arrest Janeka. *Id.* The court’s conclusion that arguable probable cause existed was incorrect because (1) it ignored material facts about N.D.’s conduct and drew impermissible inferences concerning Officer Martinez’s knowledge, and (2) N.D.’s admission of guilt and Janeka’s presence behind the bar were legally insufficient to establish arguable probable cause.

1. The district court ignored disputed facts and drew inferences in favor of Officer Martinez, turning the summary-judgment standard on its head.

The district court’s analysis went awry because it ignored material disputes about Officer Martinez’s testimony and construed Janeka’s presence as the only bartender in Martinez’s favor. The court impermissibly used this evidence to support its conclusion that Martinez had arguable probable cause.

The district court correctly acknowledged that N.D.’s alleged identification of Janeka was disputed and could not be used in assessing Martinez’s probable cause. *See* A. 46. But then the court failed to wholeheartedly embrace this standard. It mistakenly fixated

on N.D.'s testimony that he "never attempted to get a drink at the bar" to the exclusion of more direct evidence that N.D. never even identified Janeka. A. 48. The court discounted N.D.'s denial of getting a drink as "immaterial" to the arguable-probable-cause analysis because it did "not determine whether it was reasonable for Officer Martinez to believe that Janeka had committed a crime at the *time* of the arrest." *Id.* (emphasis in original). But the court failed to consider that N.D. denied *identifying anyone* when Martinez approached him. A. 158. N.D.'s conclusive testimony that he did not identify anyone supports the inference that Martinez had no individualized basis to suspect Janeka before he arrested her.

Like N.D.'s supposed identification of Janeka, N.D.'s location at Cafe Omar is also disputed. In its recitation of "undisputed" facts, the court noted that N.D. "was standing approximately 15 feet away from the bar with a cup of alcohol." A. 46. Based on that defendant-favorable view of the facts, the court then went on to consider the evidence that "N.D. was standing relatively close to the bar, in the open space surrounding the bar." *Id.* But Janeka and Debra both testified that Martinez left the larger room of Cafe Omar and went into the entry room before returning to arrest them. A. 87-88, 117, 121. As Janeka put it, Martinez "walked back out to the area that I couldn't see." A. 88. N.D.'s testimony does not contradict this account.¹

¹ As noted above (at 7-8), N.D.'s testimony is unclear on this point because of his dual use of the word "bar" to refer to both the Cafe Omar building as whole and the room where the bar is located. *E.g.*, A. 159 (N.D.'s testimony: "Q: Where in the bar did you sit down? A: Inside but like towards the front entrance.").

The court then drew impermissible inferences surrounding Janeka's statement that she was the only bartender. In assessing qualified immunity, the analysis must be limited to "facts that were knowable to the defendant officers' at the time they engaged in the conduct in question. Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (quoting *White v. Pauly*, 137 S. Ct. 548, 550 (2017)). Nothing in the record indicates that Martinez had evidence available to him at the time of the arrest that Janeka was the only bartender. Quite the contrary: Martinez's testimony that he saw multiple bartenders and "didn't exactly look" at who they were indicates that he did not know how many bartenders were working at Cafe Omar. *See* A. 204.

These disputed pieces of evidence are material to the arguable-probable-cause analysis. Martinez's arguable probable cause to arrest Janeka depended on his "knowledge or reasonably trustworthy information of facts and circumstances" that would make it objectively reasonable that Janeka had sold alcohol to a minor. *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996). Because "there is a genuine issue for a jury as to whether a reasonable officer in [Martinez's] position" could believe Janeka was committing a crime, and consequently whether he could have probable cause or arguable probable cause to arrest her, summary judgment was inappropriate. *Simpson v. City of New York*, 793 F.3d 259, 266 (2d Cir. 2015).

Courts in similar situations have denied qualified immunity at summary judgment: when the presence of money and dice on a bar table was disputed, *see Glover v. City of New York*, No. 15-4899, 2018 WL 4906253, at *23-24 (E.D.N.Y. Oct. 9, 2018), and when an officer's knowledge of an arrestee's presence in a suspicious group was disputed,

Fowler v. Kingston City Police Dept., No. 1:07-00873, 2009 WL 3064775, at *6 (N.D.N.Y. Sept. 22, 2009). N.D.’s disputed location vis-à-vis Janeka, as well as Martinez’s limited knowledge of who was bartending that night, are material in assessing whether Martinez could specifically suspect Janeka of serving N.D. alcohol. Those disputes—which the district court chose to ignore—could easily lead a reasonable jury to conclude that there was not arguable probable cause to arrest Janeka for a violation of Section 65(1).

In sum, had the district court recognized factual disputes and drawn inferences in favor of the nonmoving party, as the law requires, it would have recognized issues of material fact that precluded summary judgment on the arguable-probable-cause question.

2. Officer Martinez lacked arguable probable cause to arrest Janeka based solely on her presence as a bartender.

Excluding disputed facts and improperly drawn inferences, the only undisputed facts available to Officer Martinez when he arrested Janeka were that N.D. possessed alcohol as a minor and that Janeka was working as a bartender on the night in question. The district court indicated these facts alone were sufficient to find arguable probable cause, but any reasonable officer would agree that more evidence was needed to arrest. *Cf. Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007) (holding that an officer is entitled to qualified immunity if “officers of reasonable competence could disagree” on probable cause). In rejecting as unconstitutional an illegal search of tavern patrons, the Supreme Court enshrined the principle that “a person’s mere propinquity to others

independently suspected of criminal activity does not, without more, give rise to probable cause.” *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

In making an arrest merely because of Janeka’s presence behind the bar, Martinez violated a clearly established right based on forty years of precedent “clear enough that every reasonable official would interpret it” to foreclose the arrest. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). Because the undisputed facts indicate that Martinez failed to investigate and arrested Janeka because of her presence alone, the arrest was clearly unconstitutional and thus unprotected by qualified immunity.

This Court has interpreted the individualized probable-cause requirement in a way that places Janeka well within its protections. It denied qualified immunity to officers who arrested large groups of protestors “[w]ithout the ability to identify those individuals” suspected of violating the law. *Jones v. Parmley*, 465 F.3d 46, 60 (2d Cir. 2006); see also *Dinler v. City of New York*, No. 04-7921, 2012 WL 4513352, at *11 (S.D.N.Y. Sept. 30, 2012) (“[I]t was clearly established by 2004 that an officer must have individualized probable cause to arrest an individual and that mere proximity to illegal conduct does not establish probable cause with respect to an individual.”). And in a nongroup context, this Court held that “it would be unreasonable to base probable cause [to arrest]” on a plaintiff’s presence in a suspect’s apartment—even when he matched a vague description of an accomplice—because his “presence ... on its own, created no more than a suspicion worthy of investigation.” *Jenkins*, 478 F.3d at 91.

That Janeka was a bartender did not absolve Martinez of his responsibility to suspect her *individually* of committing a crime before making an arrest. The underlying violation she is accused of—serving alcohol to a minor—requires evidence of her knowledge or

participation. Under Section 65(1), evidence that a patron is “19 years old and ... holding a mixed drink” at an establishment is insufficient to establish a violation; there must be “evidence concerning the manner in which the minor obtained the drink, the length of time that he was in possession of the drink, or his proximity to the bar and ... employees.” *Ferlito v. New York State Liquor Authority*, 723 N.Y.S. 2d 809, 810 (N.Y. App. Div. 2001). A similar “knowledge or participation” requirement led a court to reject arguable probable cause to arrest where a plaintiff was found in an apartment with “hundreds of pills of ecstasy, eighteen bags of marijuana and scales for weighing it, and fifty rounds of ammunition” because the government did not produce any evidence of her knowledge of or participation in drug trafficking other than her presence in the apartment. *Miyares v. City of New York*, No. 11-4297, 2013 WL 3940816 at *4-5 (S.D.N.Y. July 31, 2013).

Even if Martinez had evidence that *Café Omar* was itself culpable—and that has not been established on this record—he would not have had arguable probable cause to arrest *Janeka* as a bartender. In *Flores v. City of Mount Vernon*, 41 F. Supp. 2d 439, 441-44 (S.D.N.Y. 1999), the court found no arguable probable cause to arrest a bartender when an informant observed the bar owner selling drugs, drugs were exchanged over the bar, and drugs were stored in the basement of the establishment. Though incriminating evidence existed in the restaurant as a whole, the court found that the arresting officer “had no reason to believe that [the bartender] had committed or was about to commit a crime at the time he ordered her arrest.” *Id.* at 443-44. Thus, the officer was not entitled to qualified immunity because he “could not have been under any illusion that what he was doing was justifiable.” *Id.* at 445.

So too here. Because Martinez lacked individualized evidence of Janeka's participation in or knowledge of N.D. being served alcohol, his claim of qualified immunity fails.

C. Officer Martinez was not entitled to summary judgment on Debra Creese's false-arrest claim.

Officer Martinez's arrest of Debra Creese was even more unmistakably unlawful than was his arrest of Janeka Creese. Based on his surmise that Debra did not belong there, Martinez arrested an older woman simply because she was sitting on a stool at Cafe Omar's bar.

Martinez's arrest of an innocent bystander precludes summary judgment. The district court again ignored material disputes and impermissibly drew inferences in favor of Martinez in reaching a contrary conclusion. When the facts are properly construed in Debra's favor, Martinez's decision to arrest Debra was objectively unreasonable. *See Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991). That alone is dispositive. But even if this Court views the facts as the district court viewed them, no reasonable officer would believe that Martinez had probable cause to arrest Debra while she sat at Cafe Omar's bar. *See Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007).

1. Construing all facts and inferences in favor of Debra establishes that Officer Martinez lacked probable cause to arrest her.

One point bears repeating: Summary judgment is impermissible when material facts are disputed. Here, the parties dispute two key factual issues: whether B.A. identified Debra as the person who gave him alcohol at Cafe Omar and whether Debra remained

outside Cafe Omar's bar. *See* Dist. Ct. Op., A. 48-50. Rather than looking at these disputes from the perspective of the nonmoving party, the district court improperly ignored both to Debra's detriment. *See id.* But when the evidence is viewed in the light most favorable to Debra—and all permissible inferences are drawn in her favor—a jury easily could conclude that no reasonable officer would believe that probable cause existed for Debra's arrest.

We first address B.A.'s supposed identification of Debra, then turn to Debra's location before her arrest.

a. B.A.'s identification. Officer Martinez asserted that B.A. pointed out “the other bartender” as the person who sold him alcohol at Cafe Omar. A. 227. Martinez has produced no evidence to substantiate this claim, and Debra testified that she did not see the identification take place. A. 120-21. Yet the district court impermissibly accepted “Martinez's version of the facts,” drew inferences in Martinez's favor, and concluded that B.A. identified Debra by pointing her out at the bar. Dist. Ct. Op., A. 48-51.

The district court should have inferred the opposite. When construed in Debra's favor, the evidence suggests that no identification occurred at Cafe Omar because B.A. was not in a position in the bar room to point out who gave him alcohol. For starters, it is disputed whether B.A. was even in the same room as Debra when he encountered Martinez. Rather, Martinez likely encountered B.A. in the entrance room outside of the bar room as B.A. waited to exit Cafe Omar for the count. This inference is supported by Debra's and Janeka's testimony that Martinez left the bar room for five to ten minutes, remained out of sight, and did not allege that minors had been sold alcohol until after he returned. A. 88, 121.

Moreover, both Debra and Janeka testified that they did not see Martinez encounter B.A. or see B.A. make the supposed identification. A. 88-89, 120-22. In fact, neither Debra nor Janeka had any idea to whom Martinez was referring when he alleged that minors had been served. A. 88, 121. These facts strongly suggest that Martinez found B.A. with alcohol only after B.A. and Martinez both left the bar room for the count. (After B.A. left the bar room and Martinez made the arrests, there is no evidence that B.A. and the Creeses were ever in the same room together, and no one has suggested otherwise.)

N.D.'s testimony further supports the inference that B.A. could not have pointed out Debra in the bar room at Cafe Omar. N.D. testified that Martinez immediately handcuffed B.A., supporting the inference that he did so too quickly for B.A. to point anyone out. A. 157-59. N.D. also testified that he and B.A. were handcuffed "towards the front entrance" of Cafe Omar—strongly suggesting that B.A. was in the entry room, not in the bar room, when Martinez says that B.A. pointed toward the bar. A. 159. Taking these facts together under the summary-judgment standard, the district court should have inferred that B.A. did *not* point out Debra to allege that she sold him a drink—and, more important for present purposes, the court certainly should not have inferred the opposite.

Martinez's own testimony also supports the inference that B.A. did not identify Debra. Martinez testified only that B.A. pointed to "the other bartender in the bar." A. 227. Martinez does not remember the specific people B.A. and N.D. allegedly identified through the point-out procedure. A. 224-28. And Martinez never documented—contemporaneously or otherwise—the identification B.A. supposedly

made. A. 227-28. Martinez's selective amnesia regarding the events at Cafe Omar—setting aside that the few details he does recall conflict with Janeka's, Debra's, and N.D.'s testimony—establishes that the district court erred in resolving the disputed identification in defendants' favor.

b. Debra's location. The district court also improperly construed Debra's location in favor of Officer Martinez.

Debra testified that she was sitting at, or “outside of,” the bar during Officer Martinez's inspection. A. 118. By contrast, the district court noted that Martinez located Debra “*in* the bar,” whatever that might mean. A. 49-50 (emphasis in original). The district court should have resolved this material dispute in Debra's favor and inferred that Debra was merely sitting near the bar as would any customer. Yet the court impermissibly concluded that Debra's “proximity to the bar” was alone enough to support Martinez's theory of the case. *Id.* Its conclusion would allow officers to arrest *anyone* sitting at a bar where underage drinking had been discovered anywhere in an adjoining restaurant.

Martinez's own words make it obvious that no one had previously identified Debra and that he did not understand her, in particular, to be a bartender. Though Martinez testified that he saw “two females at the bar” when he entered Cafe Omar, he also admitted that he “didn't exactly look” in their direction. A. 204. Both Debra and Janeka testified that Martinez asked, “What is this old lady doing there?” when he later saw Debra sitting on a stool at the bar. A. 105; *see also* A. 135, 148. When the Creeses informed Martinez that Debra did not sell anyone alcohol, Martinez responded, “Well somebody did. Both of you have to go.” A. 131. Martinez also knew that Debra was

Janeka's mother and was in ill health. The Creeses testified that Janeka informed Martinez of both facts when she asked for her mother's heart medication during her arrest. A. 92, 135, 148. Martinez acknowledged them by responding, "Fuck her condition. What's she doing here?" and continued to handcuff Debra. A. 135, 148; *see also* A. 92. A jury considering these statements could easily conclude that Martinez did not believe Debra to be working at Cafe Omar on the night of her arrest.

The objective unreasonableness of Debra's arrest is dispositive. A jury considering the facts in Debra's favor could easily conclude that B.A. never identified Debra and that Martinez never saw her behind the bar. The grant of summary judgment on Debra's false-arrest claim should be reversed on this basis alone.

2. As a matter of law, no competent officer could reasonably believe that Debra served a minor alcohol.

Summary judgment on Debra's false-arrest claim should be reversed for another reason. Even if this Court views the facts as the district court (impermissibly) viewed them, no reasonable officer would believe that Officer Martinez had probable cause to arrest Debra while she sat at Cafe Omar's bar. Together, Debra's proximity to the bar and B.A.'s (supposed) identification of Debra did not supply arguable probable cause to arrest her for violating Section 65(1).

a. Proximity. Officers rarely arrest an individual with so little evidence that she has committed a crime. What caselaw exists, however, demonstrates that Debra's arrest was clearly unlawful. Officer Martinez is thus not entitled to qualified immunity on Debra's false-arrest claim. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

As discussed above (at 22-25), controlling authority prohibits officers from arresting bystanders without individualized suspicion. The Supreme Court has held that officers who have probable cause to believe that a crime was committed within a building or other property do not have probable cause to search or seize anyone and everyone in the vicinity. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). The probable-cause requirement, the Court emphasized, “cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another.” *Id.*

In applying *Ybarra*, this Court has repeatedly refused to grant qualified immunity to officers who arrest bystanders to crime. In *Rogers v. City of Amsterdam*, 303 F.3d 155, 159-60 (2d Cir. 2002), for example, this Court stressed that an officer had no information suggesting that an “interested bystander” who had stopped to watch a robbery had committed a crime. Similarly, in *Jenkins v. City of New York*, 478 F.3d 76, 82, 90-91 (2d Cir. 2007), this Court reversed a grant of summary judgment to officers where they arrested an individual who was present in a robbery suspect’s apartment. *See also Dinler v. City of New York*, No. 04-7921, 2012 WL 4513352, at *11 (S.D.N.Y. Sept. 30, 2012) (“mere proximity to illegal conduct does not establish probable cause with respect to an individual”). And in the exclusionary-rule context, this Court concluded that officers looking for a gun in a bar did not have probable cause to search a patron without articulable grounds to suspect his wrongdoing. *United States v. Jaramillo*, 25 F.3d 1146, 1153 (2d Cir. 1994). These precedents recognize that the probable-cause requirement would be meaningless if proximity alone provided reasonable grounds for arrest.

Ybarra, Rogers, Jenkins, and Jaramillo control here. Martinez had probable cause to believe that someone, somewhere gave B.A. alcohol, but he did not have *particularized* suspicion that *Debra* supplied it. *See Ybarra*, 444 U.S. at 91. Martinez himself acknowledged that he did not individually suspect Debra: He told the Creeses that because “somebody” sold minors alcohol, both of them—illogically—would “have to go.” A. 131. At that point, Debra was merely sitting on a stool at the bar. Without more, no reasonable officer could believe that he had probable cause to arrest Debra, because no reasonable officer could believe that any person near a bar violated Section 65(1) just because a minor possessed a drink. The district court erred by reaching the opposite conclusion.

b. Informant identifications. Nor did B.A.’s (supposed) identification of Debra provide Officer Martinez with probable cause to arrest. For starters, a description cannot provide probable cause if it “could have applied to any number of persons and does not single out the person arrested.” *Jenkins v. City of New York*, 478 F.3d 76, 90 (2d Cir. 2007). By pointing across a crowded room in the general direction of the bar, B.A. hardly singled out *Debra* as the person who allegedly sold him alcohol.

Moreover, probable cause also requires “reasonably trustworthy information” that the suspect allegedly committed the crime. *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996). And B.A.’s identification of Debra—assuming generously that it occurred, as Martinez alleged—was inherently untrustworthy because B.A. was already engaged in criminal activity when he purportedly pointed Debra out.

Officers may rely on tips from an informant if the informant has shared the basis of his knowledge or officers know that the informant is reliable. *Illinois v. Gates*, 462 U.S.

213, 233-34 (1983). Ordinarily, officers may assume that eyewitness informants are reliable because “unquestionably honest citizen[s]” would not expose themselves to criminal liability by submitting false criminal reports. *Id.* at 233-24. It is reasonable for an officer to presume, for example, that a store clerk’s signed complaint of shoplifting, *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995), a wife’s sworn statement of domestic violence, *Lee v. Sandberg*, 136 F.3d 94, 102-03 (2d Cir. 1997), a neighbor’s reports of disorderly conduct, *McKinney v. George*, 726 F.2d 1183, 1187 (7th Cir. 1984), or a business’s complaints of trespassing, *Miloslavsky v. AES Eng’g Soc.*, 808 F. Supp. 351, 355 (S.D.N.Y. 1992), *aff’d*, 993 F.2d 1534 (2d Cir. 1993), are credible.

But the district court erred in treating B.A. as a witness whose word should be taken at face value. *See* Dist. Ct. Op., A. 45. Rather, B.A. was *committing a crime* when he supposedly identified Debra—a distinction that fundamentally undermines the reliability of the identification he supposedly made at Cafe Omar.

First, the logic behind believing eyewitness accounts—that innocent witnesses would not expose themselves to criminal liability by fabricating identifications—does not apply to B.A. because he was *already* facing criminal liability when he allegedly pointed to Debra. *See Gates*, 462 U.S. at 233-34.

Second, a witness statement cannot alone provide probable cause to arrest if the witness had an “apparent motive to falsify” his account, *cf. Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006) (quoting *Caldarola v. Calabrese*, 298 F.3d 156, 163 (2d Cir. 2002)), or where the circumstances raise doubts about his veracity, *McGee v. Doe*, 568 F. App’x 32, 37 (2d Cir. 2014) (quoting *Lee v. Sandberg*, 136 F.3d 94, 103 (2d Cir. 1997)). B.A.’s motive for pointing at the bartender was clear: He would only get in more trouble if he

showed a fake ID or implicated a friend for helping him obtain alcohol. Martinez's own testimony suggests that B.A. was with other individuals who could have provided him alcohol and were also at risk of being found out. A. 155. Martinez may even have identified one of them when he arrested a young man with a fake ID who was "walking around" N.D. and B.A. A. 270-72.

Third, witness statements are not credible where there is evidence that officials intimidated the witness or directed the witness in offering a statement. *McGee*, 568 F. App'x at 37-39. For instance, an eyewitness identification is unreliable when there is evidence officers threatened the witness with further prosecution if he did not identify a suspect. *Thagard v. Lauber*, 317 F. Supp. 3d 669, 676-79 (W.D.N.Y. 2018). Here, Martinez intimidated B.A. into providing an identification by making clear that B.A. would at least receive a summons for drinking underage. A. 262. Martinez also handcuffed B.A. while—or immediately after—B.A. made an identification. A. 157-59.

For all of these reasons, even viewing the case as the district court viewed it, B.A.'s identification did not furnish arguable probable cause to arrest Debra Creese.

II. The district court erred in granting summary judgment on the Creeses' fair-trial claims.

The Fourteenth Amendment prohibits deprivations of liberty without due process of law. Defendants violated Janeka's and Debra's right to due process—specifically, their right to a fair trial—when they fabricated information likely to influence a jury's verdict, forwarded that information to prosecutors, and caused Janeka and Debra to suffer a

deprivation of liberty as a result. *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 279 (2d Cir. 2016).²

Harms caused by fabrications of evidence are redressable under Section 1983. *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997). Janeka and Debra seek redress for the harm caused by Officer Martinez's false account of the events at Cafe Omar and for the harm caused when defendants pressured N.D. and B.A. to provide false affidavits. The two fabrications resulted in deprivations of Janeka's and Debra's liberty, causing further injuries that lasted until the charges against Janeka and Debra were dropped.

Before discussing why the district court erred in granting summary judgment on the Creeses' fair-trial claims, we note two undisputed attributes of a fair-trial claim. First, a plaintiff need not have gone to trial to state a claim. *See* Dist. Ct. Op., A. 53; *see also, e.g., Ricciuti*, 124 F.3d at 125 (considering plaintiff's fair-trial claim though plaintiff never went to trial); *Brandon v. City of New York*, 705 F. Supp. 2d 261, 276 (S.D.N.Y. 2010) (same).

Second, qualified immunity cannot defeat a fair-trial claim, *Ricciuti*, 124 F.3d at 130; *Zabrey v. Coffey*, 221 F.3d 342, 355-56 (2d Cir. 2000), because qualified immunity does not extend to conduct that violates "clearly established" constitutional rights, *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), and no officer could reasonably believe that it is permissible to fabricate (or induce others to fabricate) evidence against a suspect,

² Though Martinez testified that he does not remember whether he was at the precinct with N.D. and B.A., a jury could easily infer that Martinez was involved in securing the affidavits because *his* police reports note that the teenagers provided them. A. 279, 282.

Ricciuti, 124 F.3d at 127, 130. Allowing police officers to “fabricate false confessions at will”—even where officers lawfully arrest a suspect—“would make a mockery of the notion that Americans enjoy the protection of due process of the law.” *Id.* at 130.

A. Defendants twice fabricated information likely to influence a jury.

“*[A]ny* information fabricated by an officer can serve as the basis of a claim for a denial of the right to a fair trial.” *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 279 (2d Cir. 2016) (emphasis in original). Here, defendants twice fabricated information likely to influence a jury: first, when Officer Martinez told the prosecutor that N.D. and B.A. identified Janeka and Debra and that he saw both behind the bar; and second, when defendants pressured N.D. and B.A. to provide affidavits alleging that Janeka and Debra sold them alcohol.

1. Officer Martinez’s account. When inferences are drawn in favor of the Creeses, the evidence indicates that Officer Martinez provided prosecutors with a false account of the events at Cafe Omar. An officer’s fabrication of his own account of criminal activity provides a proper basis for a fair-trial claim. *Garnett*, 838 F.3d at 274.

In *Garnett*, this Court found that an officer violated a defendant’s right to a fair trial when he provided false information to prosecutors about what he heard the defendant say and do during an alleged offense. 838 F.3d at 275. The same logic applies here, where a reasonable jury could conclude that Martinez made a number of false representations to prosecutors about what he saw at Cafe Omar. A. 225-28, 259. For example, if Janeka’s and Debra’s versions of events are correct, Martinez falsely stated that there were multiple bartenders working at Cafe Omar on the night of Debra’s

arrest. *See* A. 200, 204, 212. If Debra in fact remained outside the bar, then Martinez provided false information to prosecutors when he stated that he saw Debra behind it. If N.D. and B.A. were exiting Cafe Omar when Martinez encountered them, as N.D. testified, then Martinez's account of finding and arresting them near the bar is false. *See* A. 220-21. And, as explained above (at 19-22, 26-29), if Janeka's, Debra's, or N.D.'s testimony is correct, the evidence would indicate that Martinez fabricated the young men's "point-out" identifications in the bar area. *See* A. 224-28. Indeed, N.D. testified explicitly that he did not point out or otherwise identify anyone, and he conclusively stated that he did not buy alcohol from Cafe Omar's bar. A. 157-58, 171, 175.

The district court was required to view this evidence in the light most favorable to Janeka and Debra and draw all factual inferences in their favor. *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 129 (2d Cir. 1997). But the court impermissibly played the role of jury, noting that it was "unpersuaded by plaintiffs' arguments" that Martinez fabricated the identifications. A. 54. Had the district court instead sought out issues of material fact, as it was required to do, it would have found a genuine dispute over whether Martinez provided a false account. A reasonable jury could find that Martinez knew that the Creeses did not serve N.D. and B.A. but nonetheless told the prosecutor they had. *See Ricciuti*, 124 F.3d at 129; *Garnett*, 838 F.3d at 275.

2. Affidavits. Defendants also fabricated N.D.'s and B.A.'s Affidavits of Sale of Alcohol by pressuring them to implicate Janeka and Debra on those forms. A. 167-82; *see Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997). An officer fabricates evidence when he conducts a witness identification procedure in an improper and unduly suggestive way. *Thagard v. Lauber*, 317 F. Supp. 3d 669, 679 (W.D.N.Y. 2018); *see*

also *Jenkins v. City of New York*, 478 F.3d 76, 93 (2d Cir. 2007) (discussing similar fabrication in the false-arrest context). Coerced witness statements are “meaningless,” *Stansbury v. Wertman*, 721 F.3d 84, 93 (2d Cir. 2013), because identifications provided under threat or direction are inherently unreliable, see *Thagard*, 317 F. Supp. 3d at 679. “Overwhelming evidence” of a fabrication is not required to defeat summary judgment on a fair-trial claim. *Jocks v. Tavernier*, 316 F.3d 128, 138 (2d Cir. 2003).

Although defendants did not forge N.D.’s and B.A.’s affidavits by their own hands, the Creeses’ version of events indicates that defendants pressured N.D. and B.A. to provide false accounts. Viewing the facts in the light most favorable to the Creeses indicates that defendants both coerced N.D. and B.A. to provide the affidavits and gave them specific information to include on the affidavits. N.D. testified that he understood that he and B.A. would be released sooner if they provided the affidavits. A. 167-69, 173, 178-80, 182. He testified that an officer told him that he would be let out in twenty minutes if he filled out the affidavit “in a certain way.” A. 180. “I know,” he said, “that I had to follow certain instructions like under the premise that I would be getting out.” A. 182.

Some of these instructions were quite explicit:

Q. Did the officer tell you that if you told him that you bought the drink at the bar from the female bartender, 5'6, that he would let you go as soon as possible or within 20 minutes?

A [N.D.]. Yes, he did say that.

A. 176. N.D. also testified that it would be fair to say that someone “gave [him] her [Janeka’s] height.” A. 185. To be sure, N.D. earlier testified that an officer did not give him information about Janeka’s height and sex. A. 177; see Dist. Ct. Op., A. 41, 54. But

given the summary judgment standard, and the need to draw inferences in the nonmoving parties' favor, this fleeting contradictory statement hardly undermines the conclusion that an officer induced a false affidavit.³

Defendants' intimidation of B.A. is especially problematic. Officers took advantage of the fact that B.A. was not a U.S. citizen or resident—he was only visiting—to pressure N.D. and B.A. to fill out the affidavits. N.D. testified that he was “just trying to comply” because B.A. “doesn't live in this country” and he wanted to secure his cousin's release. A. 167. A jury hearing the fair-trial claim could reasonably conclude that defendants' manipulation shaped the affidavits and could therefore have improperly influenced a criminal trial.

Defendants argue that the affidavits must be reliable because it would have been a misdemeanor to provide false information on the form affidavit (which included language warning as much). *See* ECF 38, PageID.275; Dist. Ct. Op., A. 56. But the affidavits' warning language did not (of course) free defendants to fabricate information against the Creeses. *See Garnett v. Undercover Officer C0039*, 838 F.3d 265, 278 (2d Cir. 2016). A reasonable jury *could* construe N.D.'s and B.A.'s affidavits in defendants' favor because the forms were submitted under penalty of perjury. But a reasonable jury could also construe the forms in the Creeses' favor due to defendants' coercive conduct. That either conclusion is permissible precludes summary judgment.

³ Neither affidavit implicates Janeka or Debra by name and both lack detail. For example, the affidavit the district court interpreted as identifying Debra does not do that; it refers only to a “bartender” (which Debra was not), who is “female, 5'5, old lady.” A. 278.

B. Defendants' fabrication caused Janeka and Debra further deprivations of liberty beyond their initial false arrests.

The district court erred in finding that defendants' fabrication of evidence did not deprive the Creeses of their liberty, for two reasons. First, the court applied the wrong causation standard. Second, the court misapplied that erroneous standard because, contrary to the court's conclusion, the Creeses have shown that defendants' fabrications caused "further deprivations" of liberty beyond their initial arrests.

1. To succeed on the causation element of their fair-trial claims, the Creeses need only demonstrate that fabricated evidence caused them some deprivation of liberty. *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 277 (2d Cir. 2016). They can easily make this showing: The district court's mistaken conclusion that Martinez had arguable probable cause to arrest depended on Martinez's false account of the events at Cafe Omar. Dist. Ct. Op., A. 46-50. The Creeses can therefore demonstrate that Martinez's fabricated account led to a deprivation of liberty in the form of their false arrests.

The district court mistakenly applied a higher causation standard. It required the Creeses to establish that defendants' fabrications caused a "further" deprivation of liberty beyond their arrests. Dist. Ct. Op., A. 55-56. Plaintiffs are required to make this higher showing only if their initial arrests were supported by probable cause. *See Garnett*, 838 F.3d at 277 (applying the higher causation standard because probable cause existed to arrest); *Ganek v. Leibowitz*, 874 F.3d 73, 91 (2d Cir. 2017) (applying the higher causation standard because probable cause existed to search). The Creeses' arrests were

not supported by probable cause, as explained above (at 16-33). The district court therefore erred by applying the “further deprivation” standard in this case.⁴

2. Though the Creeses do not need to show further deprivations of liberty beyond their false arrests, they are more than capable of doing so. Thus, even if Officer Martinez had arguable probable cause for arresting Janeka and Debra, the Creeses are still entitled to go to trial on their fair-trial claims.

Fabricated evidence imposes many consequences beyond arrest. *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 277, 279 (2d Cir. 2016). False information may “critically influenc[e]” prosecutors’ and magistrates’ decisions and assessments of the strength of a case. *Id.* Fabrications can determine whether an individual is released or confined, *id.*, or even charged in the first place, *Zabrey v. Coffey*, 221 F.3d 342, 352 (2d Cir. 2000). Fabrications may also result in an individual being charged with a more serious offense, or having additional restraints imposed on her freedom before charges are dismissed. *Garnett*, 838 F.3d at 277; *Zabrey*, 221 F.3d at 348; *Ricciuti*, 124 F.3d at 126-27. More generally, being “‘framed and falsely charged’ damages an individual’s reputation, requir[ing] that individual to ‘mount a defense, and plac[ing] him in the power of a court of law.’” *Garnett*, 838 F.3d at 279 (citing *Cole v. Carson*, 802 F.3d 752, 772 (5th Cir. 2015), *cert. granted, judgment vacated on other grounds sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016)).

⁴ Because this Court’s decision in *Ganek* involved whether there was probable cause to *search*, it also applied a different—and less demanding—probable-cause standard than applies here. *Compare Ganek*, 874 F.3d at 86 (holding that probable cause to search a property does not require individualized suspicion regarding who committed the crime), *with Jenkins v. City of New York*, 478 F.3d 76, 90 (2d Cir. 2007) (holding that probable cause to arrest requires individualized suspicion).

The district court did not consider this universe of potential deprivations before rejecting the Creeses' fair-trial claims. If it had, it would have found evidence that the Creeses suffered many other deprivations beyond arrest. Both Janeka and Debra were charged with crimes based on Martinez's false account and the coercively-obtained affidavits. A. 42. Janeka faced the charge for six full months before accepting an adjournment in contemplation of dismissal (which did not qualify as a favorable termination). *Id.* The Creeses were also traumatized by the experience. A. 99-100, 135-36. Debra still becomes nervous when she sees police officers or hears a siren, and stress from the incident has significantly harmed her health. A. 136-40. Her heart condition worsened, forcing her to change her medication and complete blood work more often than she had prior to the arrest. *Id.* Janeka remains afraid even to discuss the experience. A. 100.

The fabrications damaged the Creeses' reputations as well. A. 91, 99-100, 136. Neither had ever committed a crime, gotten "in trouble," or even interacted with the criminal-justice system before their false arrests. A. 91, 101. The indignity hangs over their heads, they believe, and continues to sully their names. A. 143.

The district court failed to find this evidence of further deprivations because it refused to consider it. The court did not examine how Martinez's account of the events at Cafe Omar, if false, caused liberty deprivations beyond the Creeses' initial arrests. *See* Dist. Ct. Op., A. 55-56. Nor did it consider whether the affidavits viewed in their entirety, if coercively obtained, led to the Creeses' detention, criminal charges, reputational damage, or other harms. *Id.* Rather, the district court considered *only* the potential effect of an officer providing N.D. with information *only* about Janeka's height

as he filled out the form. *Id.* It concluded that Janeka could not establish deprivations resulting from this single, suggestive fact. *Id.* Yet, as just explained, defendants' fabrications were much wider in scope, and much more pernicious in effect, than the district court's incomplete analysis allowed. The district court should not have granted summary judgment before considering all deprivations defendants' fabrications caused.

III. Because the district court erred in finding arguable probable cause to prosecute Debra, the malicious-prosecution claim should be remanded for the court to decide in the first instance whether to allow a corrected complaint.

The complaint stated that the malicious-prosecution claim was filed on Janeka's behalf. But Debra explained in opposition to summary judgment that this mistake was counsel's inadvertent error and that the complaint was intended to name her. Instead of deciding whether to grant leave to correct this mistake, the district court granted summary judgment to defendants on the merits of the malicious-prosecution claim. Because the court incorrectly held that defendants were entitled to qualified immunity for prosecuting Debra, this Court should reverse on that score and then remand for the district court to decide in the first instance whether to grant Debra leave to correct the complaint.

The Fourth Amendment protects against "pretrial detention unsupported by probable cause." *Manuel v. City of Joliet*, 137 S. Ct. 911, 919 (2017). In addition to her false-arrest and fair-trial claims, Debra seeks to sue defendants for malicious prosecution. Defendants are liable for malicious prosecution if (1) they initiated a prosecution against Debra, (2) the matter terminated in Debra's favor, (3) they lacked

probable cause to believe that the proceeding could succeed, and (4) they acted with malice towards Debra. *See Smith-Hunter v. Harvey*, 734 N.E.2d 750, 752-53 (N.Y. 2000).

Officer Martinez provided information to prosecutors asserting that Debra served alcohol to minors, defendants prosecuted Debra, and the prosecution terminated in Debra's favor through a dismissal. A. 225-29, 259-61. The district court incorrectly found that there was at least arguable probable cause to prosecute her, granting summary judgment on qualified-immunity grounds. *See* A. 52.

A. Issues of material fact precluded the district court from finding that defendants had arguable probable cause to prosecute Debra. For malicious-prosecution claims, "an issue of material fact as to probable cause" makes "the element of malice ... an issue of material fact as well," precluding summary judgment. *Boyd v. City of New York*, 336 F.3d 72, 78 (2d Cir. 2003). As shown above (at 26-29), it is seriously disputed whether Officer Martinez had any evidence that Debra served drinks to minors. And based solely on the undisputed evidence, Martinez lacked sufficient individualized probable cause to arrest Debra at Cafe Omar. There is also evidence indicating that B.A.'s affidavit was fabricated. *See supra* at 36-38.

Even if B.A.'s affidavit was not fabricated, that affidavit is still too weak to provide arguable probable cause. This Court has recognized that a "weak statement, made under considerable pressure ... is by itself not sufficient to permit the district court to grant summary judgment" to a defendant on a malicious-prosecution claim. *Dufort v. City of New York*, 874 F.3d 338, 351 (2d Cir. 2017).

The district court relied on B.A.'s completion of an affidavit "that he paid \$10 for an alcoholic drink to a black woman described as an 'old lady' who was 5'5'" to provide

additional undisputed evidence in support of probable cause. Dist. Ct. Op., A. 52. A serious threshold problem is that the district court's reliance on the identification of a "black" suspect in the affidavit is flatly incorrect—unlike N.D.'s affidavit, B.A.'s affidavit does *not* provide any racial characteristics. *See* A. 278.

Moreover, defendants' reliance on a description of a 5'5" "old lady" to prosecute Debra—without any undisputed positive identification—is plainly insufficient. This Court has held that an identification cannot supply probable cause where it is "equally applicable to a number of individuals likely to be in the area." *United States v. Fisher*, 702 F.2d 372, 379 (2d Cir. 1983). An eighteen-year-old's description of an "old lady" is relative—it is unclear if B.A. is describing someone in her thirties, forties, or fifties, given that B.A. was only a teenager who might well have viewed anyone a couple decades his senior as "old." All this Court is left with is an affidavit describing an older woman of average height, which could easily apply to any number of people in a crowded bar.

Although the district court found B.A.'s affidavit convincing because it distinguished Debra from Janeka, the court erred in assuming that B.A. was selecting from a universe of only two women. As demonstrated above (at 26-29), there is no undisputed evidence that B.A. identified Debra in the crowded bar. To the extent the district court used B.A.'s affidavit to distinguish Debra from Janeka, it impermissibly drew factual inferences in favor of defendants by assuming that B.A. had already identified Debra. Instead of having B.A. sign a vague affidavit, defendants could have confirmed whether Debra actually served B.A. alcohol. After all, Debra was sitting in a jail cell in the *same precinct*. A. 93; *see* A. 273-75. The record indicates that they neglected to do so. Where an officer

makes “only the most superficial and credulous inquiries” of a witness, a jury can permissibly infer that the officer was unlawfully determined to prosecute the suspect while ignoring exculpatory evidence of inconsistencies. *See Manganiello v. City of New York*, 612 F.3d 149, 162-63 (2d Cir. 2010). Because B.A.’s initial identification of Debra is disputed, the role of “evaluating the credibility and probative weight of [the affidavit] ... can only be [performed] by a jury,” precluding summary judgment. *Dufort*, 874 F.3d at 351.

B. Because it found probable cause, the district court declined to address leave to amend. *See* Dist. Ct. Op., A. 51. This issue should be addressed by the district court. This Court has left it “within the sound discretion of the district court to grant or deny leave to amend.” *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). In other cases where the district court has yet to rule on leave to amend, this Court has remanded to allow the district court to decide in the first instance whether to grant leave. *See, e.g., Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009) (per curiam); *Goss v. Revlon, Inc.*, 548 F.2d 405, 407 (2d Cir. 1976); *see also National Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 692 (2d Cir. 2013) (“As ours is not a court of first review, when we reverse on a threshold question, we typically remand for resolution of any claims the lower courts’ error prevented them from addressing.”).

C. The district court dismissed both the Fourth Amendment and New York state-law malicious-prosecution claims, noting that the two are “substantially the same.” A. 51. For the reasons just stated, this Court should reverse and remand the state-law claim as well as the Fourth Amendment claim.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because it contains 12,688 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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