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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS JANEKA CREESE AND DEBRA CREESE

Brian Wolfman
Bradley Girard
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Ave., NW, Suite 312
Washington, DC 20001
(202) 661-6582

Amy Rameau
THE RAMEAU LAW FIRM
16 Court St., Suite 2504
Brooklyn, NY 11241
(718) 852-4759

Counsel for Plaintiffs-Appellants

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INTRODUCTION AND SUMMARY OF ARGUMENT

Officer Martinez lacked probable cause to arrest Janeka and Debra Creese. The lack of probable cause for their arrests was compounded by Defendants' fabrication of two pieces of evidence purportedly implicating the Creeses: the supposed identifications at the bar and the affidavits signed at the station. Defendants then maliciously prosecuted Debra despite a lack of probable cause that a prosecution could succeed.

In arresting the Creeses, Officer Martinez failed to meet basic probable-cause requirements: He lacked individualized suspicion for either Plaintiff's arrest, made unreasonable assumptions that conflicted with the facts, and arrested Debra despite clear indications that she was only a bystander. Defendants attempt to justify Officer Martinez's actions by relying on the truism that officers have leeway to draw conclusions from facts to establish probable cause. But under basic Fourth Amendment principles those conclusions must be based on reasonable assumptions, and here they were not.

Far from acting as a competent, experienced officer, Officer Martinez made a string of unreasonable assumptions. He assumed the young men bought alcohol from the bar, despite their lack of wristbands and the other, much simpler and likelier ways they could have obtained their drinks. He assumed Janeka, and Janeka *specifically*, must have sold the alcohol despite his own contemporaneous understanding that there were multiple bartenders present. And he assumed Debra—an older woman sitting in front of the bar like any bar patron—was responsible for an illegal sale of alcohol. Each assumption plainly conflicts with what happened at Cafe Omar that night. Especially when inferences are properly drawn in the Creeses' favor, as they must be at summary

judgment, it is clear that Officer Martinez lacked probable cause to arrest either Janeka or Debra.

To make matters worse, Defendants fabricated evidence at the police station by directing N.D.'s and B.A.'s completion of their affidavits. This faulty evidence was then used to support Janeka's and Debra's prosecutions, depriving them of their due-process rights to a fair trial. Debra's prosecution was also malicious: There was never probable cause for her prosecution, based neither on the evidence existing when she was arrested nor on the later-created affidavits.

ARGUMENT

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

When all material disputes and plausible inferences are viewed in the Creeses' favor, the only surviving facts not in dispute are that (1) Janeka was a bartender and (2) underaged men were drinking at Cafe Omar. Defendants assert that's all they need. *See* Def. Br. 15. That's not so under basic Fourth Amendment principles. Those facts alone left Officer Martinez without individualized suspicion to arrest Janeka and Debra. And they led him to make unreasonable assumptions about what happened in the bar and to ignore clear indications that Debra was a bystander.

A. Officer Martinez was not entitled to summary judgment on Janeka's false-arrest claim.

1. The facts surrounding Janeka's arrest are disputed and material to the existence of probable cause, so the district court erred in granting summary judgment.

Material disputes exist over whether the identifications happened, and if so, where they happened, making summary judgment inappropriate. To be sure, Officer Martinez asserted that N.D. pointed out Janeka. A. 224. But N.D. unequivocally stated that he did not identify Janeka after his arrest. A. 158-59. And Janeka's and Debra's accounts on that score also conflict with Officer Martinez's testimony. A. 88-90, 121-22, 126-27.

Janeka testified that Officer Martinez did not question the young men in the bar area. A. 88. Debra testified that Officer Martinez accused her and her daughter of selling alcohol before he allegedly stepped outside to speak with N.D. and B.A., then returned with a more pointed accusation based on their "identifications." A. 120-21. Debra's account strongly suggests Officer Martinez accused them before speaking with the young men, indicating that if the alleged identifications did occur, Officer Martinez may have coerced the identifications to support his own premature accusation.

Further, Officer Martinez's own words to Janeka and Debra before their arrests indicate his uncertainty about who gave alcohol to N.D. and B.A., despite his claims that the young men specifically identified them. Officer Martinez walked over to Janeka and Debra *after* the alleged identifications and still asked, "*Who* sold the minor the liquor?" A. 88 (emphasis added). This question undermines Officer Martinez's testimony that N.D. and B.A. identified Janeka and Debra specifically as having sold them alcohol. A. 224-27. Though there could be multiple reasons Officer Martinez

asked this question, any inferences must be drawn in the Creeses' favor. Officer Martinez would not have needed to ask who sold the alcohol if N.D. and B.A. had already told him that Janeka and Debra had done so. Of course, it's possible that Officer Martinez was trying to confirm what the young men had already told him. But the question creates more than enough ambiguity about Officer Martinez's knowledge of the situation, or lack thereof, to send the probable-cause issue to a jury. *See Bellamy v. City of New York*, 914 F.3d 727, 744-45 (2d Cir. 2019).

2. Officer Martinez justified his arrest of Janeka based on unreasonable assumptions.

Even (improperly) crediting Officer Martinez's version of events, he did not act as would an objectively reasonable officer and thus lacked probable cause for Janeka's arrest. Defendants argue (at 16) that the most reasonable scenario is that N.D. and B.A. received their drinks from Janeka at the bar. Far from being the *most* reasonable scenario, it is an *un*reasonable scenario. Janeka testified she told Officer Martinez—before he arrested her—that she had both checked whether drink purchasers wore the wristbands given only to over-twenty-one patrons and had verified younger-looking customers' IDs. A. 90.

Though officers may, of course, draw commonsense conclusions based on the totality of the circumstances, *see District of Columbia v. Wesby*, 138 S. Ct. 577, 587 (2018), Officer Martinez's conclusion that the young men must have received alcohol by purchasing it from Janeka at the bar is at war with common sense. Any reasonable assessment about what happened would have included ways for the underaged drinkers to *avoid* going to the bar, where they would likely be caught. There are a number of ways

they could have easily obtained alcohol: by asking an of-age friend to buy them a drink, by paying a stranger to obtain it from the bar on their behalf, or by taking a drink off another patron's table. These schemes could be executed without approaching the bar, and they would be sensible because the young men knew it was unlikely a bartender would sell them alcohol. Approaching the bar would trigger security steps. They would be asked to display their wristbands and perhaps their IDs.

N.D.'s testimony creates the inference that he did not acquire the drink at the bar: "I doubt I paid the bartender $10; because I didn't have the bracelet." A. 185 This testimony reflects not just a plausible theory of events, but rather one borne out by reality. N.D. knew about these security measures, further supporting the commonsense conclusion that youngsters seeking to drink illegally would not go up to a bartender—whose goal would be to keep underaged patrons from consuming alcohol. Construing facts and permissible inferences in Janeka's favor, and disregarding Officer Martinez's unreasonable assumptions, destroys the factual link between the young men's possession of alcohol and Janeka's role as a bartender.

3. Officer Martinez lacked individualized suspicion to arrest Janeka.

a. Officer Martinez also lacked individualized suspicion that Janeka sold the alcohol. Individualized suspicion is a well-established element of probable cause necessary for warrantless arrests involving general crime control. *Chandler v. Miller*, 520 U.S. 305, 313 (1997). General crime control includes "the ordinary enterprise of investigating crimes." *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). The Supreme Court has been reluctant to "recognize exceptions to the general rule of individualized suspicion

where governmental authorities primarily pursue" such "general crime control ends." *Id.* at 43. Officer Martinez arrested Janeka and Debra as part of his general-crime-control duties.

Officer Martinez lacked individualized suspicion because he had no reliable evidence that Janeka was the *specific* bartender who sold alcohol to N.D. and B.A., even if he did believe (unreasonably) that the young men approached the bar. N.D. himself testified that he "did not" identify anyone inside Cafe Omar as having sold him a drink. A. 158. Defendants assert that Officer Martinez had individualized suspicion because he knew Janeka was the sole bartender, but they impermissibly rely not on Martinez's understanding at the time, but only on Janeka's later testimony. Def. Br. 16 & n.3. A court may consider only the information an official had at the time of the incident when evaluating whether probable cause existed. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017). Because Officer Martinez thought at the time there was more than one bartender, A. 200-01, 227, and because he did not perform the investigation necessary to distinguish who made the alleged sale, he would have been guessing whether the bartender behind the bar at the time, Janeka, had actually earlier sold N.D. a drink.

b. The disputed location of the alleged identifications—whether Cafe Omar's entryway or close to the bar—raises doubts about the identifications' ability to create a reasonable suspicion to trigger Janeka's arrest. Again, according to N.D.'s testimony, N.D. and B.A. could not see Janeka and Debra when the (supposed) identifications took place. A. 157-60. So, Officer Martinez either fabricated or coerced the identifications, or would have been operating from a description supplied by N.D.—but not from a point-out identification as Officer Martinez claims. A. 224-25, 227-28. It is unknowable

whether any such description could have been more specific than "bartender," and a general description of an alleged perpetrator, or a person's mere presence in a certain place, is insufficient on its own to establish probable cause. *See Jenkins v. City of New York*, 478 F.3d 76, 90 (2d Cir. 2007) (arrestee's match with victim's general description of her assailant did not create probable cause); *United States v. Fisher*, 702 F.2d 372, 375-76 (2d Cir. 1983) (no probable cause where information about a person who committed a crime could apply to multiple people). Thus, an officer cannot use general information that *some* bartender made a sale to arrest a *particular* bartender.

An out-of-sight description would also have added an attenuated step to the identification process. Officer Martinez needed to rely on the likely vague descriptions of the bartenders the young men supposedly provided and then match those descriptions to Janeka and Debra. Officer Martinez's statement to Janeka and Debra—"Well somebody [sold alcohol]. Both of you have to go."—underscores his uncertainty over which of the bartenders might be responsible for furnishing the alcohol and strongly implies he did not know *who*, if anyone, was responsible. A. 131.

c. Even Defendants' own arguments show there was no individualized suspicion to arrest Janeka. Defendants argue (at 16) that "the information available to [Officer Martinez] at the time was that Janeka was, at least, one of two people possibly selling alcohol." Defendants continue (at 18) that Officer Martinez had probable cause to arrest Debra because he thought there were multiple bartenders. But this assertion

undermines individualized suspicion to arrest Janeka, which Defendants derive from Janeka's role as the only bartender.[1]

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

Three independent reasons demonstrate that the grant of summary judgment to Defendants on Debra's false-arrest claim was erroneous. First, at summary judgment, the district court should not have considered as fact the disputed identification of Debra by B.A.; without considering the supposed identification, it was unreasonable for Officer Martinez to have concluded Debra was a bartender. Second, Officer Martinez should not have credited B.A.'s alleged identification because of B.A.'s strong motivation to lie and the presence of conflicting facts. Third, Officer Martinez lacked individualized suspicion to arrest Debra, even if impermissibly crediting his unreasonable conclusion that she was a bartender.

1. Without crediting B.A.'s disputed identification, Officer Martinez could not reasonably have concluded Debra was a bartender.

It is irrelevant to Officer Martinez's probable-cause assessment whether he concluded that Debra was Janeka's "clear companion," Def. Br. 20-21—although it is

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[1] Paradoxically, Defendants also argue (at 16 n.3) that the link between Janeka's role as bartender and the young men's possession of alcohol hinges on Janeka being the *sole* bartender that night—undermining their argument by destroying probable cause to arrest Debra. The inferences underlying this second, contradictory argument—that Officer Martinez knew Janeka was the sole bartender—are factually inconsistent with the record. A. 227 (Officer Martinez testifying about the "other bartender in the bar"); *see also* A. 200-01.

unclear what, other than Debra's proximity to Janeka, forms the basis for that conclusion. What matters is that it was objectively unreasonable for Officer Martinez to conclude that Debra was a bartender or had sold any alcohol based on the facts available to him when he arrested her. Any contrary conclusion would have to rely on impermissible inferences about B.A.'s identification and illogical assumptions by Officer Martinez.

The summary-judgment standard dictates that all material, factual disputes—such as over B.A.'s purported identification of Debra—be construed in Debra's favor. As discussed above (at 3-4) and in our opening brief (at 19-22), substantial factual disputes exist over whether the identifications occurred at all and, if they did, where they occurred. These disputes involve both N.D.'s and B.A.'s identifications. N.D. testified unequivocally that he never identified anyone at the bar and also refused to testify about B.A.'s actions, saying "[y]ou would have to ask [B.A.]" whether he identified anyone. A. 158. At summary judgment, this statement is insufficient to support an inference in favor of Defendants that B.A. identified Debra at the bar, especially when read in context with the rest of N.D.'s testimony contradicting Officer Martinez's account.

With B.A.'s supposed identification set aside, it is objectively unreasonable for Officer Martinez to have concluded Debra was a bartender. Without the identification, no basis exists for his conclusion other than illogical assumptions. Debra was easily distinguishable from a bartender due to her appearance and location. She was an older woman wearing a pink shirt. A. 283. In contrast, Janeka, an actual Cafe Omar bartender, was a younger woman wearing an all-black outfit. A. 279-80. It is reasonable to infer that the all-black clothing is part of the bar's dress code for employees. Debra was sitting

in front of the bar, A. 87, 118, 120, as would any bar patron. In contrast, a bartender would be found behind the bar. No bar patron would ever walk up to the bar and try to order a drink from Debra—especially when someone clearly a bartender is behind the bar—because no reasonable person would assume that Debra was a bartender.

That Debra remained at the bar after most patrons left is also insufficient to support an inference by Officer Martinez that he had probable cause to arrest her. Mere proximity to a crime, even when paired with odd behavior, is not itself enough to create probable cause. *United States v. Fisher*, 702 F.2d 372, 375, 378-79 (2d Cir. 1983) (pausing and backtracking near a bank robbery did not support an inference that the person was anything other than an "innocent indecisive stroller"). Besides, the number of people remaining near the bar while the events unfolded is disputed. Debra was likely not the only person near the bar, as people were slow to leave even after the officers began clearing Cafe Omar. A. 87, 211. There are many more commonsense explanations for Debra's conduct than that she was a bartender: She was older and may not have wanted to stand and walk outside until she had to, or she may simply have wanted to keep her daughter company through an intimidating encounter.

Most importantly, Officer Martinez's own conduct underscores that he himself did not believe Debra was a bartender, drawing into question whether any identification happened in the first place. After returning to the bar, he asked, "what is this old lady doing there?" A. 104-05, 148. Officer Martinez disputes that he asked this question. A. 231. But both Janeka and Debra testified that he did, and their testimony must be credited at summary judgment. *Bellamy v. City of New York*, 914 F.3d 727, 746 (2d Cir. 2019) (a plaintiff's testimony alone is sufficient to raise a dispute of material fact). This

question indicates that Officer Martinez thought Debra was not really a bartender and thought her presence at Cafe Omar incongruous. Debra told Officer Martinez she was not a bartender and had not sold alcohol. A. 130. Officer Martinez then responded, "[w]ell somebody did. Both of you have to go," A. 131, further underscoring his own uncertainty about what had happened and *who*, if anyone, gave the young men alcohol. This obvious doubt, combined with Debra's statements, would lead a "person of reasonable caution" to realize there was insufficient evidence to conclude Debra had committed a crime. *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991).

The proximity of a bystander, like Debra, to a crime is not alone sufficient to establish probable cause for an arrest. *Rogers v. City of Amsterdam*, 303 F.3d 155, 159-60 (2d Cir. 2002). Debra's arrest is like the arrest found impermissible in *Rogers*. There, an officer arrested a bystander, Pelcher, though the officer "had no information suggesting Pelcher had committed any crime." *Id.* at 159. Instead, the officer was told "Pelcher had just dropped by to see how things were going," and all information indicated Pelcher was "nothing more than an interested bystander." *Id.* at 159-60. Here, analogous to *Rogers*, Officer Martinez did not witness Debra selling alcohol and was told that Debra had not been behind the bar, that she had not sold alcohol, and that Janeka—not Debra—was a bartender. These statements would have reinforced the distinction between Officer Martinez's perception of Janeka—the bartender—behind the bar, and Debra—the bystander—in front of the bar. That Debra, like Pelcher, was near the incident does not negate her lack of connection to the alleged sale of alcohol to underaged drinkers.

Officers lack probable cause if their basis for an arrest is that the "suspect has suspicious acquaintances, or happens to be at the scene of a crime—particularly when, as here, the crime occurs in a crowded public place." *Dufort v. City of New York*, 874 F.3d 338, 350 (2d Cir. 2017); *see also Ybarra v. Illinois*, 444 U.S. 85, 90-91 (1979) (searching a bar patron based on a warrant to arrest the bartender for selling drugs was impermissible); *United States v. Fisher*, 702 F.2d 372, 378-79 (2d Cir. 1983). Debra was a bystander, and not involved at all in the supposed sale to the young men, and, therefore, Officer Martinez lacked probable cause to arrest her.

2. Officer Martinez's reliance on B.A.'s identification was unreasonable because the identification was uncorroborated, unreliable, and conflicted with other facts.

Even if B.A.'s identification is (improperly) inferred to have happened, Officer Martinez should not have blindly relied on it because B.A. is not a credible witness. Though officers may rely on some informant statements, reliance is impermissible where "circumstances raise doubt as to the person's veracity." *Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006). Information from a "single complainant" may establish probable cause only "when that information is sufficiently reliable and corroborated." *Oliveira v. Mayer*, 23 F.3d 642, 647 (2d Cir. 1994). Contrary to Defendants' assertions (at 19-20), B.A.'s identification was neither corroborated nor reliable.

First, his identification was uncorroborated. No other witnesses, including N.D., confirmed that Debra had made the sale, and Officer Martinez does not allege that he ever saw her sell alcohol. Again, Officer Martinez's later question—"what is this old lady doing there?"—demonstrates this lack of corroboration, while also strongly

suggesting no identification actually occurred. A. 104-05, 148. Debra's role at the bar was unclear to Officer Martinez even after the identification allegedly took place. Officer Martinez's incredulity about Debra's presence directly conflicts with any assertion that B.A.'s identification reliably demonstrated Debra sold alcohol to B.A. and certainly does not support an inference that B.A.'s identification was corroborated by other witnesses or was confirmed by Officer Martinez's understanding of the situation.

Second, despite Defendants' contrary argument (at 21-22), B.A.'s identification is unreliable because he was not a trustworthy source. As our opening brief discusses (at 31-33), B.A. had clear motivation to lie. Informant evidence normally comes from "the putative victim or eyewitness," *Panetta*, 460 F.3d at 395 (quoting *Martinez v. Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000)), but B.A. was neither. His statement is not analogous to that of a typical victim recounting a crime, who generally is motivated to truthfully convey events to officers to aid the investigation. It is also not analogous to a neutral-bystander account, where the eyewitness has no motive to lie given her lack of a stake in the investigation's outcome.

Instead, B.A. was an arrestee asked to implicate a potential co-conspirator. By lying, he could have been protecting a friend who gave him the alcohol; he could have thought pointing to the bartender would shift responsibility for his underaged drinking to the person whose job was to ensure minors were not served; he could have thought that implicating the bartender would give the police a "bigger fish," which then would get him off the hook. Any of these motivations would be readily apparent to an officer accustomed to interacting with suspects. Each independently undermines the credibility of the identification.

Defendants contend (at 22) that B.A.'s identification is credible because it further implicates B.A., somehow suggesting that he was being truthful. That is not the correct inference to draw because, first, it is equally plausible that B.A. lied to get him and N.D. out of trouble, and, second, B.A. had already admitted to underaged drinking—no further self-incrimination was possible.

Reasonable officers would not rely on B.A.'s (supposed) identification, especially when paired with the other facts apparent about Debra, including her appearance and location at the bar. There was no emergency that precluded Officer Martinez from taking a moment to pause and consider whether B.A.'s identification was reasonable when considered together with Debra's actual location, statements, and appearance. A reasonably cautious officer would at least stop to think about all the circumstances and whether the young men's accounts made sense. That pause would have made clear to Officer Martinez that he lacked probable cause to arrest Debra. An officer is not permitted to "ignore evidence tending to exculpate the suspect." *Figueroa v. Mazza*, 825 F.3d 89, 102 (2d Cir. 2016); *Jocks v. Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003).

3. Officer Martinez lacked individualized suspicion to arrest Debra.

Even if Debra was considered (unreasonably) to be a potential bartender, Officer Martinez lacked individualized suspicion to conclude that she was *the* bartender who sold alcohol to the young men. As already established, the Court at this stage must disregard the disputed identifications by N.D. and B.A. Therefore, Officer Martinez's only relevant, undisputed knowledge when he arrested Debra was that he believed there were multiple bartenders. A. 200-01 (Officer Martinez saw "people" behind the bar).

Just as Officer Martinez lacked individualized suspicion to arrest Janeka, so too did he lack individualized suspicion to arrest Debra. "It has long been established … that when [a] description could have applied to any number of persons and does not single out the person arrested, probable cause does not exist." *Jenkins v. City of New York*, 478 F.3d 76, 90 (2d Cir. 2007). Officer Martinez had no basis to conclude that Debra, if she were a bartender, was *the* bartender who sold to the young men, and therefore he lacked probable cause for her arrest.

C. Officer Martinez is not entitled to qualified immunity at this stage.

Despite several disputes of material fact, Defendants argue that Officer Martinez is entitled to qualified immunity on the false-arrest claims because he possessed arguable probable cause to arrest Janeka and Debra. Def. Br. 22. Arguable probable cause—which confers qualified immunity—demands that "(a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991). Put the other way around, "[i]f officers of reasonable competence would have to agree that the information possessed by the officer at the time of arrest did not add up to probable cause, the fact that it came close does not immunize the officer." *Ackerson v. City of White Plains*, 702 F.3d 15, 21 (2d Cir. 2012) (quoting *Jenkins*, 478 F.3d at 87). Here, contrary to Defendants' contention, officers of reasonable competence would agree that Officer Martinez lacked probable cause.

1. Individualized suspicion—an indisputable probable-cause requirement—was clearly lacking in both arrests.

As previously discussed, individualized suspicion is a foundational probable-cause requirement, rendering seizures "ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Officer Martinez did not have individualized suspicion for either arrest. As Officer Martinez himself acknowledged, he thought there was more than one bartender who could have been responsible for selling alcohol to minors, and no evidence supports an inference that both Janeka and Debra sold alcohol. Officer Martinez even admitted he lacked individualized suspicion during the arrests: "Well somebody [sold the alcohol]. Both of you have to go." A. 131. Therefore, he lacked arguable probable cause to arrest either Janeka or Debra because no reasonably competent officer would disagree that individualized suspicion is required for an arrest or that it was lacking here.

2. An officer lacks arguable probable cause to arrest a mere bystander.

Contrary to Defendants' argument (at 20) that Officer Martinez could have reasonably concluded that Debra was a bartender, he had no basis for suspecting that she was anything other than a bystander, as explained above (at 8-12). He himself did not think Debra was a bartender, as evidenced by his questioning what she was "doing there." A. 104-05, 148. Furthermore, unlike a situation where an officer is entitled to rely on a victim's account of the crime, Officer Martinez was not entitled to blindly rely on B.A., an arrestee, as a (supposed) informant. Officer Martinez thus had no reliable basis for his conclusion that Debra was not simply a bystander. It is clearly established

that arrests of bystanders, without some other credible source of particularized suspicion, lack probable cause. *See, e.g.*, *Ybarra v. Illinois*, 444 U.S. 85, 90-91 (1979); *Dufort v. City of New York*, 874 F.3d 338, 350 (2d Cir. 2017); *United States v. Valentine*, 539 F.3d 88, 95-96 (2d Cir. 2008); *United States v. Fisher*, 702 F.2d 372, 378-79 (2d Cir. 1983). This principle is so well-established, and Debra's status as a bystander so clear, that no reasonable officer could have concluded otherwise.

3. Officer Martinez's inferences, which were necessary to create arguable probable cause, were plainly unreasonable.

Defendants rely heavily on the principle that officers may draw commonsense conclusions from facts to establish probable cause. Def. Br. 24. But the inferences Officer Martinez drew to create probable cause were unreasonable—such that no reasonably competent officer would find the probable-cause standard had been met. As discussed above, Officer Martinez made several impermissible inferences in both Janeka's and Debra's arrests that were necessary to link otherwise innocuous or unconnected facts. As for Janeka's arrest, Officer Martinez made unreasonable assumptions that the young men had bought the alcohol at the bar, despite other readily apparent, much simpler means by which the alcohol was most likely obtained. For Debra, he inferred she was a bartender, which, based on the totality of the circumstances—including Debra's age, appearance, and location in relation to the bar—was plainly illogical. These inferences were necessary to support a finding of probable cause but were both unsupported by the circumstances and contrary to common sense, such that no reasonable officer would have come to the same conclusion.

4. The authority Defendants cite is inapposite.

In support of its arguable-probable-cause argument, Defendants cite just one case, *Villarosa v. North Coventry Township*, 711 F. App'x 92 (3d Cir. 2017), to assert the arrests were supported by clearly established law. *See* Def. Br. 24. But *Villarosa* cuts in the Creeses' favor because the arresting officer in that case possessed many facts supporting probable cause, while Officer Martinez had none. The statute said to be violated in *Villarosa*—furnishing alcohol to minors—requires only that a person "allow a minor to possess [an alcoholic beverage] on premises or property owned or controlled by the person charged." 711 F. App'x at 96. The officer arrested the owner of a house where underaged drinking occurred only after he first stopped a car of drunk teenagers who all confirmed that they had been drinking with the owner's knowledge, after multiple other teenagers confirmed that the owner was present and knew about the drinking, and after the owner herself *admitted to the officer* that she knew the minors had possessed alcohol in her house, thus acknowledging her crime. *Id.* at 95-97.

In contrast, Officer Martinez arrested both Janeka and Debra after a single, uncorroborated, unreliable, and disputed identification, with Janeka and Debra expressly denying that a sale had happened, and without individualized suspicion. The dearth of inculpatory evidence available to Officer Martinez underscores his lack of arguable probable cause.

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

When disputed facts and plausible inferences are viewed in the Creeses' favor, a reasonable jury could find that Defendants fabricated both N.D.'s and B.A.'s

identifications and affidavits implicating Janeka and Debra. Janeka and Debra established a fair-trial claim because they can show that a reasonable jury could find that (A) Defendants fabricated the identifications at Cafe Omar and the affidavits at the precinct, (B) the fabrication would likely influence a criminal-trial jury, and (C) the Creeses suffered deprivations of liberty after the fabricated evidence was forwarded to prosecutors. *See Garnett v. Undercover Officer C0039*, 838 F.3d 265, 279-80 (2d Cir. 2016).

A. Defendants fabricated identifications and affidavits implicating Janeka and Debra—information likely to influence a jury.

1. A reasonable jury could decide that N.D.'s and B.A.'s identifications were fabricated.

A reasonable jury could find that N.D.'s and B.A.'s identifications of Janeka and Debra never occurred, or if they had, occurred out of sight of Janeka and Debra. Officer Martinez provided the only testimony affirming that these identifications occurred. A. 224-27. As described above (at 3-4), every other witness—N.D., Janeka, and Debra—stated that Officer Martinez, N.D., and B.A. were not in sight of the bar, making it impossible for N.D. and B.A. to point out Janeka and Debra. Defendants assert there is no "non-speculative evidence supporting the claim that Officer Martinez intentionally lied about N.D.'s earlier in-person identification of Janeka," Def. Br. 29, but what they characterize as "speculative" evidence is an inference permissibly drawn from N.D.'s testimony. Defendants state that "N.D.'s claim that he never identified anyone is not a basis for a jury to conclude that Martinez deliberately fabricated the information." *Id.* 30. That's wrong. This is a classic factual dispute: Either N.D., Janeka,

and Debra are all lying about whether the identifications took place—or Officer Martinez is.

2. A reasonable jury could infer that N.D.'s and B.A.'s affidavits were fabricated.

a. When plausible inferences are drawn in the Creeses' favor, the evidence indicates that the affidavits were also fabricated. First, if N.D. and B.A. never pointed out Janeka and Debra at the bar, then the underlying content of the affidavits is questionable. The incorporation of information resulting from a factually disputed point-out undermines the veracity of the statements themselves—further basis for a jury to determine the affidavits were fabricated. Plus, contrary to Defendants' argument (at 28), N.D. testified that he did not fill out the affidavit on his own. A. 185-86. He acknowledged that "it would be fair to say that someone gave [him Janeka's] height." A. 185. This evidence flatly contradicts Defendants' argument (at 28) that N.D. did "not indicate that he was fed specific details." A key fact like Janeka's height, especially given the lack of other individually identifying details in the affidavit, had the power to implicate Janeka.

Defendants argue (at 28) that N.D. "denied that he had been threatened with any adverse consequences." Perhaps Defendants did not explicitly threaten N.D., but they did use incentives to motivate him to include information in his affidavit that he did not himself possess, resulting in fabrication. *See* Opening Br. 37-38. N.D. was motivated to fill out the affidavit in a particular way. He testified: "I was instructed on putting something down on this paper so that I would be released as soon as possible." A. 182. N.D. continued: "I know that I had to follow certain instructions … under the premise that I would be getting out." A. 182. A reasonable jury could easily conclude from this

testimony that N.D. included in the affidavit information provided to him by Defendants so he could leave the station more quickly—and thus, could also conclude the affidavits were fabricated.

A jury could find that B.A.'s affidavit was also coerced or fabricated. B.A. and N.D. were at the station together, and their affidavits arose from the same circumstances. A. 164. At this stage in the proceedings, we have only N.D.'s testimony, but a jury could fairly find that, like N.D., B.A. was also induced to fabricate the evidence provided in his affidavit so he could leave the station more quickly and without punishment. B.A., as a foreigner, and as the younger of the two, A. 152, was likely following N.D.'s lead in allowing Defendants to suggest specific details for inclusion in his affidavit.

b. Defendants fixate on the presence of a legal warning at the bottom of the affidavit, explaining that making false statements in an affidavit is a misdemeanor, to support the notion that the affidavits were not fabricated. Def. Br. 8, 27, 28; *see* A. 277-78. Their statement that the presence of a legal warning makes an affidavit "presumptively reliable" is unadorned by any precedent. Def. Br. 27. Though a warning that particular behavior is illegal may have some effect on deterring that behavior, that doesn't mean the affidavits should be free from scrutiny. Many people commit crimes knowing they are illegal. In fact, N.D. and B.A. knowingly engaged in illegal behavior that very night when they chose to drink underaged. And, at the same time the young men would have had the affidavits in their hands, they were told by officers that they would be free to go if they included certain information in those affidavits, counteracting the effect, if any, of the written warning. A. 168-69. The officer's conflicting instructions likely negated the warning's intended purpose to elicit the truth.

B. Defendants' fabrications would have influenced a jury if presented during trial.

Defendants claim that the identifications were "not integral … to [Janeka's] arrest" and thus would not have been important at trial. Def. Br. 30. Not so. The identifications that N.D. and B.A. allegedly made at the bar, and the affidavits they later signed at the station, go to the heart of the Creeses' supposed violation of Section 65. The information contained in the identifications and affidavits is all that pins them to the young men's alcohol possession. Thus, Officer Martinez's account of the identifications would "likely [have] influence[d] a jury's decision." *Garnett*, 838 F.3d 265, 280 (2d Cir. 2016).

Defendants also assert that testimony regarding N.D.'s and B.A.'s identifications would be inadmissible. Def. Br. 30-31. But, for fair-trial-claim purposes, the admissibility (or not) of fabricated evidence is irrelevant. The court must look to whether "the materiality of the false information presented … would likely influence the jury *if* it arrived at a jury." *Garnett v. Undercover Officer C0039*, No. 13-cv-7083, 2015 WL 1539044, at *8 (S.D.N.Y. Apr. 6, 2015), *aff'd*, 838 F.3d 265 (2d Cir. 2016) (emphasis in original).

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

As our opening brief shows (at 39-42), the Creeses suffered deprivations of liberty at multiple points during their ordeal: when they were arrested, when they were held in jail, and when they were made to go to court. Though the physical confinement in jail was not as lengthy as in other cases, *see* Def. Br. 31, Plaintiffs have to show, and do show,

only the *existence* of a deprivation of liberty, *see* Opening Br. 39-42; *Zahrey v. Coffey*, 221 F.3d 342, 349 (2d Cir. 2000) (defining the fair-trial right as the right "not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity"). The magnitude of the deprivation goes to damages, not liability. *See Wellner v. City of New York*, 393 F. Supp. 3d 388, 400 (S.D.N.Y. 2019). In *Wellner*, the judge granted damages in proportion to the magnitude of the deprivation arising from the plaintiff's approximately twenty-four-hour imprisonment and court appearances resulting from the charges. *Id.* The Creeses suffered similar deprivations of liberty. They spent a similar amount of time in jail and also had to appear in court to defend against their charges.

Their suffering extended beyond their time in jail, and Janeka and Debra continue to suffer. Janeka waited six months before her charges were adjourned in contemplation of dismissal. A. 96. Janeka and Debra remain humiliated, and Janeka experienced, and Debra continues to experience, negative health effects resulting from these deprivations. A. 91, 99, 136-40. Debra remains traumatized when she encounters police and hears a siren. A. 136-37.

III. Debra's malicious-prosecution claim survives summary judgment because Defendants never had probable cause for her prosecution.

As explained above and in our opening brief, Officer Martinez never had probable cause to believe Debra's prosecution would succeed. It did not exist at the time of her arrest and was not later created by the affidavits. Therefore, correcting the complaint to name Debra on the malicious-prosecution claim would not be futile.

The degree of probable cause needed to defeat a malicious-prosecution claim is "slightly higher than the standard for false arrest cases," *Stansbury v. Wertman*, 721 F.3d 84, 95 (2d Cir. 2013), and requires "such facts and circumstances as would lead a reasonably prudent person to believe the plaintiff guilty," *Boyd v. City of New York*, 336 F.3d 72, 76 (2d Cir. 2003). Defendants argue (at 25-27) that probable cause existed. But, as discussed above (at 8-15), Officer Martinez's arrest of Debra was unsupported by probable cause because he lacked undisputed, reliable evidence that she was anything other than a bystander, and he lacked individualized suspicion that she had committed a crime. Given B.A.'s unreliability as an informant, his alleged identification—the only evidence available at the time of Debra's arrest—did not meet the lower probable-cause threshold needed to arrest her, let alone the higher probable-cause threshold needed to support her prosecution.

The affidavits did not later create probable cause to prosecute Debra. B.A.'s affidavit did not establish probable cause because it was fabricated, as discussed above (at 20-21), and is otherwise unreliable. N.D.'s testimony establishes that the affidavits were very likely the result of police coercion and suggestion, A. 176-85, and they therefore should not be taken at face value. The affidavits, like Defendants' other faulty justifications for Debra's arrest, do not supply sufficiently reliable evidence to meet the heightened probable-cause standard for prosecution.

Based on this evidence, no reasonable jury would believe that Debra, an older woman simply keeping her daughter Janeka company during Janeka's shift, had sold the young men alcohol. Indeed, the judge presented with the charges against Debra immediately dismissed them, showing just how little evidence existed to support her

prosecution. A. 133. This Court should therefore reverse the grant of summary judgment on the malicious-prosecution claim and remand for a determination on whether Debra should be allowed to amend the complaint to present that claim.

CONCLUSION

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

Respectfully submitted,

/s/ Brian Wolfman
Brian Wolfman
Bradley Girard
GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC
600 New Jersey Ave., NW, Suite 312
Washington, DC 20001
(202) 661-6582

Amy Rameau
THE RAMEAU LAW FIRM
16 Court St., Suite 2504
Brooklyn, NY 11241
(718) 852-4759

Counsel for Plaintiffs-Appellants

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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)(B) because it contains 6,726 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016, in Garamond 14-point type.

/s/ Brian Wolfman
Brian Wolfman