No. _____

IN THE

Supreme Court of the United States

MARCUS TRAYLOR,

Petitioner,

v.

GIDEON YORKA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent is a police officer who fabricated evidence used to bring misdemeanor criminal charges against Petitioner, which were subsequently dismissed after a video of the interaction was presented to the prosecution in the criminal case. Petitioner filed suit against Respondent in Federal District Court. After the District Court denied Respondent's Motion for Summary Judgment on the fabrication of evidence claim, the Fifth Circuit reversed and granted qualified immunity.

The Fifth Circuit found that while fabrication of evidence to be used in a criminal prosecution is a clearly established violation of the due process clause, this clearly established law only pertained to the fabrications of evidence of felony charges, opposed to misdemeanor charges like Petitioner was forced to defend in his criminal case. Further, in finding that the law was not clearly established, the Fifth Circuit added elements of "time or deliberation to fabricate evidence" and "extreme consequences"; i.e., felony charges, to the pleading requirements for a fabrication of evidence claim. The Fifth Circuit created two circuit splits that this Court should resolve.

1. Whether a Fourteenth Amendment due process violation based on fabrication of evidence depends on the severity of the fabricated criminal charges, i.e., felony vs. misdemeanor, as held by the Fifth Circuit below, or, if the severity of the fabricated criminal charges is irrelevant as demonstrated by all other Circuits.

2. Whether the law is clearly established that an officer commits a due process violation under the Fourteenth Amendment by knowingly fabricating evidence used against a criminal defendant, regardless of the severity of the fabricated criminal charges, as held by the Second Circuit, or if this law is not clearly established meaning officers are not on notice that they violate the Constitution by fabricating evidence used to bring misdemeanor charges, as held by the Fifth Circuit below.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Marcus Traylor and Respondent Gideon Yorka.

RELATED PROCEEDINGS

Traylor v. Yorka, No. 3:21-CV-406-S, 2022 WL 3349146, at *1 (N.D. Tex. Aug. 11, 2022), aff'd in part, rev'd in part and remanded, No. 22-10783, 2024 WL 209444 (5th Cir. Jan. 19, 2024)

Traylor v. Yorka, No. 22-10783, 2024 WL 209444, (5th Cir. Jan. 19, 2024)

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

Page

CONSTITUTIONAL PROVISIONS

STATUTES

Page

INTRODUCTION

The decision below allows officers in Texas, Mississippi, and Louisiana to fabricate evidence against innocent people so long as the crimes they are fabricating do not rise to the level of felony offenses. This decision implicates an important federal question, which this Court has not addressed and should grant certiorari to resolve. Additionally, the Fifth Circuit's holding is directly at odds with the Second Circuit and the decision below is misaligned with holdings out of the Eighth Circuit and lower courts in the Ninth and Eleventh Circuits. This Court should grant certiorari to resolve this circuit split and make it the law of this nation that officers are on notice they violate the Constitution by fabricating evidence to be used against criminal defendants, regardless of whether the fabricated crimes are felonies or misdemeanors.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is not officially reported but may be found at 2024 WL 209444 and is reproduced at Pet. App. 1a-14a. The order of the district court denying summary judgment as to the fabrication of evidence claim is not officially reported but may be found at 2022 WL 3349146 and is reproduced at Pet. App. 19a-38a. The order of the Court of Appeals denying Petitioner's motion for leave to file petition for rehearing en banc out of time is reproduced at Pet. App. 40a.

JURISDICTION

The Fifth Circuit entered its judgment on January 19, 2024. Pet. App. 13a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of

> Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On February 16, 2020, Petitioner Marcus Traylor and three of his friends were patrons at Clutch Bar and Restaurant in Dallas, Texas. Pet. App. 2a. At some point, Clutch security asked the group to leave because Traylor's friend had fallen asleep. *Id.* When Traylor lingered to pay his tab, a Clutch bouncer grabbed him from behind and brought him to the ground. *Id.* That night, Respondent Dallas Police Department Officer Gideon Yorka was working as private security for the club. *Id.* Yorka escorted Traylor outside and then shoved him into the street. Pet. App. 3a. Yorka instructed Traylor to leave, but Traylor told Yorka that his wallet and belongings were still inside Clutch. *Id.* Traylor then walked towards the curb to find assistance from a security guard or another person to help get his wallet. *Id.* As Traylor approached the curb, Yorka struck him in the face, causing him to fall to the ground causing injuries necessitating hospitalization. Pet. App. 3a, 4a.

A bystander recorded a portion of the relevant events. Pet. App. 4a. The video shows a crowded scene both inside and outside of the bar. *Id.* The camera then pans to the left and shows Traylor in a white hoodie standing in the street. *Id.* Yorka is standing a few feet away facing Traylor. *Id.* Traylor walks in Yorka's direction. *Id.* Yorka then punches Traylor in the face, and Traylor falls to the ground. *Id.*

Traylor was then arrested and charged with felony assault against a peace officer based solely on Yorka's

narrative of events. Pet. App. 4a, 22a. The jail supervisor, however, rejected the charge and reduced it to a class C misdemeanor for offensive contact. Pet. App. 4a. Officers issued Traylor a citation and released him that night. *Id.* The misdemeanor was later dismissed. *Id.*

On February 25, 2021, Traylor filed this suit against Yorka pursuant to 42 U.S.C. § 1983. Pet. App. 4a. Traylor alleges that Yorka (1) used excessive force in violation of the Fourth Amendment, (2) unlawfully arrested him in violation of the Fourth Amendment, and (3) fabricated evidence of assault in violation of Traylor's Fourteenth Amendment substantive due process right. *Id.* Upon Yorka's motion for summary judgment, the district court granted qualified immunity to Yorka on the excessive force and unlawful arrest claims. *Id.* However, the district court denied qualified immunity on Traylor's fabrication-of-evidence claim. *Id.* The district court entered a partial final judgment and both parties timely appealed. Pet. App. 39a, 4a.

The district court denied qualified immunity on Plaintiff's fabrication of evidence claim despite the Defendant arguing that this due process claim should be dismissed because Plaintiff had not been officially charged with a felony. Pet. App. 35a-37a. The District Court held,

> As in *Cole I*, Plaintiff's Fourteenth Amendment substantive due process claim stems from the disputed fact that Defendant allegedly fabricated evidence by stating to officers that Plaintiff struck Defendant. It is undisputed that the subsequent felony assault charge

> brought against Plaintiff was based solely on Defendant's statements to officers. Thus, Defendant's allegedly wrongful conduct, if true, violates clearly established law under *Cole I*. The Court finds that genuine issues of material fact exist regarding the reasonableness of Defendant's conduct. Accordingly, Defendant's Motion is DENIED as to Plaintiff's due process claim.

Pet. App. 37a.

On January 19, 2024, after requesting supplemental briefing on the fabrication of evidence claim, the Fifth Circuit entered its Judgment reversing the district court's ruling on that claim and granted qualified immunity for Respondent. Pet. App. 14a, 15a-16a, 17a-18a. The Fifth Circuit found that while the fabrication of evidence used to criminally prosecute someone is a clearly established violation of the due process clause, this clearly established law only pertained to fabrications of evidence related to felony charges, opposed to a misdemeanor charge like Petitioner was forced to defend in his criminal case. Pet. App. 11a-14a. Additionally, in finding that the law was not clearly established, the Fifth Circuit added elements of "time or deliberation to fabricate evidence" and "extreme consequences"; i.e., felony charges, to Petitioner's pleading requirements for a fabrication of evidence claim. Pet. App. 13a.

On February 14, 2024, the Fifth Circuit denied Petitioner's unopposed motion for leave to file petition for rehearing en banc out of time. Pet. App. 40a.

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition due to the Fifth Circuit entering a decision below, on an important question of federal law that has not been, but should be settled by this Court, which conflicts with decisions of the Second and Eighth Circuits regarding whether the law is clearly established that fabricating evidence of a misdemeanor criminal offense violates the Fourteenth Amendment of the United States Constitution. In finding that the law was not clearly established so that an officer would know he could not fabricate evidence of a misdemeanor crime, the Fifth Circuit added an additional element to the fabrication of evidence claim, which is not shared by any other Circuit Court of Appeals – that the severity of the consequences must amount to a felony crime. This holding authorizes government officials in Texas, Mississippi, and Louisiana to freely fabricate evidence against innocent citizens so long as the fabricated evidence does not rise to the level of a felony offense. This cannot be the law and must be resolved by this Court forthwith.

Despite acknowledging and determining an accrual date for the cause of action, this Court has not articulated the elements of a fabrication of evidence claim under the Fourteenth Amendment to the United States Constitution, resulting in a circuit split of what is required to plead and prove such a claim. *See McDonough v. Smith*, 139 S. Ct. 2149, 2156, 204 L. Ed. 2d 506 (2019) ("this case provides no occasion to opine on what the elements of a constitutional malicious prosecution action under § 1983 are or how they may or may not differ from those of a fabricated-evidence claim."). Dissenting in *McDonough*, Justices Thomas, Kagan, and Gorsuch explained,

> The better course would be to dismiss this case as improvidently granted and await a case in which the threshold question of the basis of a "fabrication-of-evidence" claim is cleanly presented. Moreover, even if the Second Circuit were correct that McDonough asserts a violation of the Due Process Clause, it would be preferable for the Court to determine the claim's elements before deciding its statute of limitations.
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> ***
>
> McDonough asks the Court to bypass the antecedent question of the nature and elements of his claim and first determine its statute of limitations. We should have declined the invitation and dismissed the writ of certiorari as improvidently granted. I therefore respectfully dissent.

McDonough, 139 S. Ct. at 2162.

Here, Petitioner's case presents the Court with the opportunity to answer the threshold question of what is required to show a violation of due process under the Fourteenth Amendment based on an officer's fabrication of evidence, thereby rectifying the current circuit split and confusion surrounding this obvious constitutional wrong.

Additionally, this case allows the Court to clearly establish the law – what is already self-evident – that fabrication of evidence results in a constitutional violation regardless of whether the falsified crime is a felony or a misdemeanor.

I. The Decision Below Conflicts with Circuit Court Decisions Articulating the Requirements of a Fabrication of Evidence Claim, None of Which Include the Requirement that the Fabricated Evidence Lead to Felony Charges Opposed to Misdemeanor Charges.

Fabrication of evidence claims have been analyzed by each Circuit Court of Appeals. The common elements to a fabrication of evidence claim around the nation are (1) knowing fabrication, (2) of material evidence, (3) which causes harm to the Plaintiff.

A. No Other Circuit Includes Severity of the Crime as an Element of a Fabrication of Evidence Claim.

The First Circuit has held that "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit. *Limone v. Condon*, 372 F.3d 39, 44–45 (1st Cir. 2004). Officers may not fabricate evidence to obtain a conviction. *Id.* The standard is nearly identical to the *Pyle*-style suppression standard: (1) fabrication of inculpatory evidence that is (2) material / causal to the conviction and (3) deliberate deception. *Cosenza v. City of Worcester, Massachusetts*, 651 F. Supp. 3d 311, 317–18 (D. Mass. 2023), *appeal dismissed sub nom. Cosenza v. Hazelhurst*, No. 23-1123, 2023 WL 9596753 (1st Cir. Dec. 6, 2023).

In the Second Circuit, a § 1983 plaintiff "may sue for denial of the right to a fair trial based on a police

officer's fabrication of information ... when the information fabricated is the officer's own account of his or her observations of alleged criminal activity, which he or she then conveys to a prosecutor." *Barnes v. City of New York*, 68 F.4th 123, 129 (2d Cir. 2023). For fabricated-evidence claims based on due process, we have previously recognized that a plaintiff's "prosecution" can be a "deprivation of liberty." *Id.* "To succeed on a fabricated-evidence claim, a plaintiff must establish that 'an (1) investigating official (2) fabricate[d] information (3) that is likely to influence a jury's verdict, (4) forward[ed] that information to prosecutors, and (5) the plaintiff suffe[red] a deprivation of life, liberty, or property as a result.' " *Id.* at 128.

The Third Circuit has recognized a due process violation for fabrication of evidence. *Black v. Montgomery Cnty.*, 835 F.3d 358, 372 (3d Cir. 2016). To properly assert a fabrication of evidence claim, a plaintiff must demonstrate: a " 'meaningful connection' between the injury and the use of the fabricated evidence[;]" and that "the evidence [is] 'so significant that it could have affected the outcome of the criminal case[.]' " *Guzman v. City of Newark*, No. 20CV6276 (EP) (JSA), 2023 WL 373025, at *10 (D.N.J. Jan. 23, 2023); citing *Boseman v. Upper Providence Twp.*, 680 F. App'x 65, 69-70 (3d Cir. 2017); quoting *Halsey v. Pfeiffer*, 750 F.3d 273, 295 (3d Cir. 2014).

In the Fourth Circuit, police officers violate due process when they fabricate or falsify evidence that is used to secure a defendant's conviction. *Johnson v. Gondo*, No. CV GLR-19-995, 2020 WL 1529002, at *5 (D. Md. Mar. 31, 2020); citing *Burgess v. Balt. Police Dep't*, 300 F.Supp.3d 696, 707 (D. Md. 2018), *appeal dismissed sub*

nom. Burgess v. Goldstein, 763 F.App'x 301 (4th Cir. 2019). To establish a § 1983 claim for fabrication of evidence, a plaintiff must show that "(1) the defendants fabricated evidence, and (2) the fabrication 'resulted in a deprivation of [the plaintiff's] liberty.' " *Id.*; citing *Martin v. Conner*, 882 F.Supp.2d 820, 847 (D. Md. 2012) (quoting *Washington v. Wilmore,* 407 F.3d 274, 282 (4th Cir. 2005)). Notably, unlike the other Circuits, the Fourth Circuit requires a conviction to show the requisite harm. As the United States Court of Appeals for the Fourth Circuit explained in *Massey v. Ojaniit*, "[f]abrication of evidence alone is insufficient to state a claim for a due process violation; a plaintiff must plead adequate facts to establish that the loss of liberty—i.e., his conviction and subsequent incarceration—resulted from the fabrication." *Id.*; quoting *Massey v. Ojaniit*, 759 F.3d at 354 (4th Cir. 2014) (citing *Washington*, 407 F.3d at 282–83).

In the Sixth Circuit, the basis of a fabrication-of-evidence claim under § 1983 is an allegation that a defendant "knowingly fabricated evidence against [a plaintiff], and [that] there is a reasonable likelihood that the false evidence could have affected the judgment of the jury." *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017); quoting *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997). It should be noted that the Sixth Circuit holds fabricated evidence claims to arise under the Fourth Amendment opposed to the Fourteenth Amendment. *Price v. Montgomery Cnty., Kentucky*, 72 F.4th 711, 723 (6th Cir. 2023).

In the Seventh Circuit, to state a claim for the denial of due process based on the fabrication of evidence, a plaintiff must demonstrate four elements: "(1) the

defendant knowingly fabricated evidence against the plaintiff, (2) the evidence was used at his criminal trial, (3) the evidence was material, and (4) the plaintiff was damaged as a result." *Olson v. Cross*, No. 18 CV 2523, 2024 WL 361200, at *9 (N.D. Ill. Jan. 30, 2024); quoting *Brown v. City of Chicago*, 633 F. Supp. 3d 1122, 1156-57 (N.D. Ill. 2022); *see Patrick v. City of Chicago*, 974 F.3d 824, 835 (7th Cir. 2020).

In the Eighth Circuit, "[A] manufactured false evidence claim requires proof that investigators deliberately fabricated evidence in order to frame a criminal defendant." *Riddle v. Riepe*, 866 F.3d 943, 947 (8th Cir. 2017); quoting *Winslow v. Smith*, 696 F.3d 716, 732 (8th Cir. 2012).

In the Ninth Circuit, "[T]here is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc). "To prevail on a § 1983 claim of deliberate fabrication, a plaintiff must prove that (1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty." *Toland v. McFarland*, No. 221CV04797FWSAGR, 2023 WL 8884397, at *16 (C.D. Cal. Sept. 18, 2023); quoting *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017) (citing *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1111 (9th Cir. 2010)).

The Tenth Circuit has explained that "where the alleged fabrication of evidence was performed by a member of the executive branch, like the prosecutor

here, the deprivation violates due process only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.' " *Truman v. Orem City*, 1 F.4th 1227, 1236 (10th Cir. 2021); quoting *Crowson v. Washington Cnty.*, 983 F.3d 1166, 1190 (10th Cir. 2020) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). "To state a fabrication of evidence claim, a plaintiff must allege (1) the defendant knowingly fabricated evidence, (2) the fabricated evidence was used against the plaintiff, (3) the use of the fabricated evidence deprived the plaintiff of liberty, and (4) if the alleged unlawfulness would render a conviction or sentence invalid, the defendant's conviction or sentence has been invalidated or called into doubt." *Id.*; *See Warnick v. Cooley*, 895 F.3d 746, 753 (10th Cir. 2018); *Heck v. Humphrey*, 512 U.S. 477, 478, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

In the Eleventh Circuit, fabrication of evidence claims are treated as malicious prosecution claims. "[I] n the Eleventh Circuit, a fabrication-of-evidence claim is really just a species of malicious prosecution. Put differently, in this Circuit, the right a fabrication-of-evidence claim vindicates is the right not to be prosecuted with fabricated evidence. *See, e.g.*, K*ingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004) ("Kingsland also asserts a § 1983 claim for malicious prosecution based on the defendants' alleged fabrication of evidence against her[.]"); *Johnson v. Darnell*, 781 F. App'x 961, 964 (11th Cir. 2019) ("As to Johnson's claim for malicious prosecution, he failed to allege facts that would plausibly suggest Cruz or Pino-Diaz were the legal cause of the proceeding against him. Specifically, as noted above, he failed to allege any facts concerning the substance of the

evidence or statements Cruz or Pino-Diaz fabricated."); *Williams v. Miami-Dade Police Dep't*, 297 F. App'x 941, 947 (11th Cir. 2008) ("Williams's malicious prosecution claim against Baaske is based upon Baaske's alleged act of fabricating evidence, which resulted in the prosecutor being presented with false and misleading evidence.")." *Watkins v. Officer Davlin Session*, No. 19-60810-CIV, 2021 WL 663762, at *10 (S.D. Fla. Feb. 19, 2021). "To establish a federal malicious prosecution claim under § 1983, the plaintiff must prove a violation of his Fourth Amendment right to be free from unreasonable seizures in addition to the elements of the common law tort of malicious prosecution." *Id.*; quoting *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003). "Under the common-law elements of malicious prosecution, [the plaintiff] must prove that the officers 'instituted or continued' a criminal prosecution against him, 'with malice and without probable cause,' that terminated in his favor and caused damage to him." *Id.*; quoting *Williams v. Aguirre*, 965 F.3d 1147, 1157 (11th Cir. 2020).

B. The Fifth Circuit Now Requires Felony Criminal Charges to Substantiate a Fabrication of Evidence Claim, Permitting the Fabrication of Evidence of Misdemeanor Crimes.

However, Fifth Circuit has now added the elements of "time or deliberation to fabricate evidence" and "extreme consequences as those of the plaintiff in *Cole*;" i.e., felony criminal charges. Pet. App. 13a. The addition of the element regarding severity of the consequences, i.e., felony charges, is not found in any other Circuit's analysis of a fabrication of evidence claim. It effectively permits the fabrication of evidence as to crimes that do not rise to the level of a felony.

This creates a circuit split regarding what must be shown to prove a violation of due process based on the fabrication of evidence. The Fifth Circuit's holding below will result in injustices throughout Texas, Mississippi, and Louisiana. This Court should grant certiorari to resolve this split.

II. The Decision Below Conflicts with Circuit Court Decisions That Have Found the Law was Clearly Established that Fabrication of Evidence of Misdemeanor Crimes is a Constitutional Violation.

The Fifth Circuit held that the law is not clearly established that officers violate a person's due process rights under the Fourteenth Amendment when they fabricate evidence of a misdemeanor crime, while it is clearly established that fabrication of a felony crime would violate this same right. Pet. App. 11a-14a.

It does not take much to demonstrate the absurdity in this holding.

For example, under the Fifth Circuit's holding, an officer is on notice that she cannot plant a gram of cocaine in someone's car, but not on notice that she cannot plant a gram of marijuana in someone's car. (*Compare* Tex. Health & Safety Code Ann. § 481.115 (possession of a gram of a penalty group 1 drug is a felony in the third degree) *with* Tex. Health & Safety Code Ann. § 481.121 (possession of less than two ounces of marijuana is a Class B misdemeanor).

Further, under the Fifth Circuit's holding, an officer in Texas is on notice that he cannot make up that a suspect

destroyed property over $2,500.00 but is not on notice that he cannot make up that a suspect destroyed property under $2,500.00. (See Tex. Penal Code Ann. § 28.03 distinguishing the severity of the crime of Criminal Mischief based on value of pecuniary loss).

In this very case, the Fifth Circuit's holding would have changed if the criminal charges against Mr. Traylor matched the initial charge he was arrested for – felony assault on a public servant – instead of being downgraded to misdemeanor offensive touching.

A. The Second Circuit Found a Fourteenth Amendment Violation for Fabrication of Evidence of a Misdemeanor Crime.

The Fifth Circuit has created a circuit split with this holding, as the Second Circuit found a violation of due process under the Fourteenth Amendment for a fabrication of evidence of a misdemeanor crime over twenty-five years ago and then relied on that case less than a year ago to uphold another fabrication of evidence claim. *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997); *Barnes v. City of New York*, 68 F.4th 123, 131 (2d Cir. 2023). In *Ricciuti*, the plaintiffs were charged with felony assault and misdemeanor aggravated harassment, and it was the less serious offense—the aggravated harassment—that was allegedly based on fabricated evidence. *Barnes*, 68 F.4th at 131; citing *Ricciuti*, 124 F.3d a 130. As the Second Circuit explained,

> The plaintiffs in *Ricciuti* were initially charged with second-degree assault, a class D felony punishable by imprisonment for up to seven

> years. *Ricciuti*, 124 F.3d at 126; N.Y. Penal Law §§ 120.05, 70.00. The additional charge, based on fabricated evidence, was second-degree aggravated harassment—a class A misdemeanor punishable by imprisonment for one year at most. *Ricciuti*, 124 F.3d at 126–27; N.Y. Penal Law §§ 240.30, 70.15. The additional charge based on fabricated evidence thus carried a much *smaller* penalty than the charge not based on fabricated evidence. Even when the assault charge was later reduced to the third degree, it became a class A misdemeanor—the *same* as the additional harassment charge based on fabricated evidence. *Ricciuti*, 124 F.3d at 127; N.Y. Penal Law § 120.00.

Barnes, 68 F.4th at 131.

Knowing the alleged fabrication went to a misdemeanor crime, the Second Circuit in *Riccuiti* held,

> Here, a reasonable jury could find, based on the evidence, that defendants Lopez and Wheeler violated the plaintiffs' clearly established constitutional rights by conspiring to fabricate and forward to prosecutors a known false confession almost certain to influence a jury's verdict. These defendant police officers are not entitled to summary judgment on the ground of qualified immunity. Qualified immunity is unavailable where, as here, the action violates an accused's clearly established constitutional

> rights, and no reasonably competent police officer could believe otherwise.

Ricciuti, 124 F.3d at 130.

Accordingly, the law was clearly established in the Second Circuit back in 1997 that officers could not fabricate evidence in relation to a misdemeanor offense. Thus, the Fifth Circuit's holding that the law was not clearly established as to fabrication of evidence related to misdemeanor crimes creates a circuit split that this Court should resolve.

B. The Eighth Circuit Addressed a Fourteenth Amendment Violation for Fabrication of Evidence of a Misdemeanor Crime.

The Eighth Circuit has addressed a fabrication of evidence claim regarding a city ordinance violation. *Riddle v. Riepe*, 866 F.3d 943, 947 (8th Cir. 2017) ("Riddle was arrested pursuant to § 50-44(a), which in relevant part makes it a violation to "hinder, obstruct, molest, resist or otherwise interfere with any city public safety officer ... in the discharge of his/her official duties." Kan. City Code § 50-44(a). Section 50-44 is a "[s]imilar provision[ ]" to Missouri Statute § 575.150, which makes forms of resisting and interfering with arrests a misdemeanor. Kan. City Code § 50-44; see Mo. Rev. Stat. § 575.150.1."). The Eighth Circuit ultimately dismissed Riddle's fabrication of evidence claim. However, the dismissal was not due to the severity of the crime only being a city ordinance opposed to a felony, but instead because of a lack of evidence of fabrication. *Id.* at 948. ("In combination with evidence of falsity, such facts, viewed in the light most favorable to

Riddle, can be relevant to a fabrication of evidence claim. *See, e.g., Winslow*, 696 F.3d at 732–35; *White v. Smith*, 696 F.3d 740, 754–57 (8th Cir. 2012). But without any evidence of fabrication, evidence of motive is insufficient to survive summary judgment. *See Livers v. Schenck*, 700 F.3d 340, 354 (8th Cir. 2012) ("[T]he Fourteenth Amendment's guarantee of due process is violated by 'the manufacture of ... false evidence' in order 'to falsely formulate a pretense of probable cause.' ")).

Accordingly, the Eighth Circuit raised no issues in 2017 regarding whether a claim of fabrication of evidence pertaining to a city ordinance was clearly established, and the Fifth Circuit has created a circuit split that this Court should resolve.

C. District Courts in the Ninth and Eleventh Circuits Have Addressed Fourteenth Amendment Violations for Fabrication of Evidence of Misdemeanor Crimes.

Further, support of this circuit split is the fact that district courts in both the Ninth and Eleventh Circuits have addressed fabrication of evidence claims without dismissing them due to it not being clearly established that fabricating evidence of a misdemeanor crime was a violation of the Constitution.

Three district courts in the Eighth Circuit have addressed misdemeanor fabrications of evidence without dismissing on the basis that it was not clearly established. See *Theodoropoulos v. Cnty. of Los Angeles*, No. 219CV00417JGBKES, 2020 WL 5239859, at *3 (C.D. Cal. July 17, 2020), *report and recommendation adopted*,

No. 219CV00417JGBKES, 2020 WL 6161454 (C.D. Cal. Oct. 20, 2020) ("[plaintiff] alleges that the County Defendants fabricated violations in inspection reports from farmers' markets between April 2008 and August 2008. (TAC at 5-6.) Those inspection reports provide the factual basis for Prosecution Three's 50 misdemeanor counts."); *Gonzalez v. City of Huntington Beach*, No. SACV180953DOCDFMX, 2018 WL 9537311, at *2 (C.D. Cal. Oct. 12, 2018) (""Plaintiff was then released and cited for a violation of [Cal.] Penal Code § 148(a)(1)[, resisting arrest,] and [Cal.] Penal Code § 602(L)[trespassing on private property]." *Id.* ¶ 53."…"On March 28, 2017, the OCDA filed a misdemeanor complaint against Plaintiff for violation of Cal. Penal Code § 148(a)(1).""); *Glazier v. Cnty. of Los Angeles*, No. 220CV00924SSSRAOX, 2023 WL 9645464, at *1 (C.D. Cal. Apr. 6, 2023) ("Dep. Adams' arrest report indicates that he arrested Plaintiff for (1) "driving under the influence of a drug" in violation of Cal. Veh. Code § 23152 and (2) "obstructing a peace officer['s] investigation" in violation of Cal. Penal Code § 148(a)(1)."…"Plaintiff was ultimately charged with four counts of obstruction of a police investigation, but no drug-related offenses.").

One district court in the Eleventh Circuit has also addressed a misdemeanor fabrication of evidence claim without dismissing on the basis that it was not clearly established. *Watkins v. Officer Davlin Session*, No. 19-60810-CIV, 2021 WL 663762, at *5 (S.D. Fla. Feb. 19, 2021). ("Watkins was arrested for exposing his sexual organs in a public park, in violation of Florida Statutes § 800.03, a first-degree misdemeanor.").

Consequently, the Fifth Circuit created a circuit split when it held that,

> Traylor did not face the extreme consequences as those of the plaintiff in *Cole*. Indeed, Traylor's charge was reduced to a misdemeanor the same night of the incident. Given this significant divergence of facts, *Cole* did not clearly establish that "every reasonable official" in Yorka's position would have understood that his conduct violated Traylor's Fourteenth Amendment right. *See Mullenix*, 577 U.S. at 11 (quotation omitted). Yorka is thus entitled to qualified immunity on Traylor's fabrication-of-evidence claim.

Pet. App. 13a-14a.

Petitioner asks this Court to grant the petition so that the circuit split on this important question can be resolved.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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April 16, 2024