

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: \_\_\_\_\_

JOAO DEPINA,

Plaintiff,

v.

WORCESTER COUNTY DISTRICT  
ATTORNEY'S OFFICE; JOSEPH D.  
EARLY, JR., in his personal and official  
capacities; ANTHONY MELIA in his  
personal and official capacities;  
BOSTON POLICE DEPARTMENT;  
DANTE WILLIAMS in his personal  
and official capacities; and RACHAEL  
ROLLINS, in her personal capacity,

Defendants.

**VERIFIED COMPLAINT AND  
DEMAND FOR JURY TRIAL**

This is a Civil Action brought by Plaintiff Joao DePina against Defendants Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia, Boston Police Department, Dante Williams, and Rachael Rollins. DePina brings a claim under G.L. c. 12, § 11 for Defendants' malicious prosecution, abuse of process, and violation of DePina's freedom of speech rights under art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution, as well as for Negligent Infliction of Emotional Distress and Intentional or Reckless Infliction of Emotional Distress, and alleges as follows:

**THE PARTIES**

1. Plaintiff Joao DePina is an individual who resides in Dorchester, Massachusetts.
2. Defendant Rachael Rollins is currently the U.S. Attorney for the District of Massachusetts, however this complaint is not relevant to her conduct as U.S. Attorney. At the time of her abuse of power and tortious activity, she was the District Attorney for Suffolk County, Massachusetts. Upon information and belief, she resides in Middlesex County, Massachusetts.

3. Defendant Worcester County District Attorney's Office is located in Worcester, Massachusetts and has the power to prosecute for Intimidation of Witnesses, Jurors and Persons Furnishing Information in Connection with Criminal Proceedings under G.L. c. 268, § 13B.

4. Defendant Joseph D. Early, Jr., is the Worcester County District Attorney, whose office is located in Worcester, Massachusetts. District Attorney Early has the power to prosecute (or to decline to prosecute) for Intimidation of Witnesses, Jurors and Persons Furnishing Information in Connection with Criminal Proceedings under G.L. c. 268, § 13B.

5. Defendant Anthony Melia was, at all relevant times herein, an Assistant District Attorney with the Worcester County District Attorney's Office, and has the power to prosecute (or to decline to prosecute) for Intimidation of Witnesses, Jurors and Persons Furnishing Information in Connection with Criminal Proceedings under G.L. c. 268, § 13B.

6. Defendant Boston Police Department is located in Boston, Massachusetts.

7. Defendant Detective Dante Williams, at all relevant times herein, was employed with the Boston Police Department in Boston, Massachusetts.

### **JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction over this civil action per G.L. c. 212, sec. 3, as there is no reasonable likelihood that recovery will be less than or equal to \$25,000.

9. This Court has personal jurisdiction over Defendants generally, as they are domiciled in the Commonwealth of Massachusetts, and specifically, per G.L. c. 223A, sec. 3(a), (b), and (c), as this matter arises from Defendants' transaction of business in the Commonwealth, contracting to supply legal services in the Commonwealth, and causing tortious injury by act and omission in the Commonwealth.

10. Venue is proper in Worcester County per G.L. c. 223, sec. 1, as Defendants Worcester District Attorney's Office, Early, and Melia have their usual place of business therein.

## FACTUAL BACKGROUND

11. Joao DePina is a community activist and past candidate for the Boston City Council.

12. On Tuesday, November 9, 2021, there was a shooting in Dorchester, Massachusetts.<sup>1</sup> Three police officers were injured during a standoff with a person with a gun. Officers returned fire, killing the person, and the three police officers were injured.

13. That evening, Defendant Rachael Rollins, the Suffolk County District Attorney at the time, held a televised press conference regarding the shooting incident.

14. DePina attended the press conference and questioned Rollins over the continued gun violence in Boston and government incompetency, including the incompetency of the District Attorney's Office to respond to his brother's murder.<sup>2</sup>

15. At the time, Rollins was a nominee for the office of United States Attorney, having been nominated on or about July 26, 2021.

16. DePina exercised his right to criticize Rollins for abusing her power as a public official, opportunistically seeking higher office without caring for the people of Boston, and failing to take adequate care of Boston police officers.<sup>3</sup>

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<sup>1</sup> Julia Taliesin, *3 officers shot, suspect killed in Dorchester standoff*, Boston.com, (Nov. 9, 2021), available at <https://www.boston.com/news/crime/2021/11/09/dorchester-standoff-officers-civilian-shot/>.

<sup>2</sup> See, e.g., Antonio Planas, "Activist's family is hit by violence," Boston Herald (Jun. 8, 2014) (discussing Defendant's call for ending violence in the wake of his brother Michael's homicide on June 6, 2014), available at <https://www.bostonherald.com/2014/06/08/activistsfamily-is-hit-by-violence/>.

<sup>3</sup> Her nomination was unfavorably reported out of the Senate Judiciary Committee. On December 8, 2021, a month after DePina was coerced into silence through threat of prosecution, Rollins was, ultimately, confirmed by the Senate following the historic need for the Vice President to cast a tie-breaking vote, twice. *U.S. Senate: U.S. Senate Roll Call Votes 117th Congress, 1st Session* [www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote1171/vote\\_117\\_1\\_00485.htm](http://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00485.htm), (accessed Aug. 23, 2022); *U.S. Senate: U.S. Senate Roll Call Votes 117th Congress, 1st Session* [www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote1171/vote\\_117\\_1\\_00486.htm](http://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00486.htm), (accessed Aug. 23, 2022)

17. Three days after the November 9, 2021, press conference, to retaliate for DePina's public criticism, Rollins caused a criminal complaint to be filed against DePina accusing him of Attorney Intimidation in violation of G.L. c. 268, § 13B. The complaint alleged that DePina intended to intimidate Rollins because the Suffolk District Attorney's Office, which Rollins was overseeing at the time, had three active pending criminal cases against DePina.

18. Defendant Detective Dante Williams was present during the press conference and was able to observe all of the events, yet he filed a knowingly false police report.

19. Upon information and belief, Williams did so at Rollins's behest, for Rollins's benefit.

20. Rollins has previously threatened journalists and other citizens with false charges for engaging in their constitutionally protected rights.

21. Rollins and Williams conspired to violate DePina's civil rights and civil liberties by jointly creating the knowingly false narrative in the police report.

22. The Intimidation statute states in relevant part that "whoever willfully, either directly or indirectly threatens, attempts or causes ... emotional ... or economic injury or property damage to ... or misleads, intimidates or harasses another person who is a[n] ... attorney ... with the intent to or with reckless disregard for that fact that it may interfere with ... [a] criminal proceeding of any type." G.L. c. 268, § 13B(b).

23. A violation of the Intimidation statute is subject to "imprisonment in the state prison for not more than 10 years or by imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not less than \$1,000 or more than \$5,000 or by both such fine and imprisonment." G.L. c. 268, § 13B(b)(E)(2).

24. At no time did DePina engage in unlawful intimidation within the meaning of G.L. c. 268, § 13B.

25. DePina was placed in emotional distress by facing such penalties and the process of defending himself, in a case that should never have been brought in the first place.

26. The Suffolk County District Attorney's office recused itself from the prosecution.

27. The file was transferred to Norfolk County, but the Norfolk County District Attorney was mindful of his obligations under the Massachusetts Rules of Professional Conduct Rule 3.8(a) and, thus, he showed the ethics and good sense to decline to take the case.

28. On information and belief, the file bounced to other District Attorneys who showed the same good judgment and declined to prosecute DePina in a clearly frivolous case.

29. The Worcester District Attorney's office took leave of its ethics and good judgment, instead choosing to prosecute DePina, presumably out of a desire to curry political favor with Rollins, without regard to their ethical obligations nor the constitutional rights it was trampling for no good cause whatsoever.

30. The prosecutors who pressed the case should have had the ethics of the prosecutors who declined to take the case. *See* Massachusetts Rules of Professional Conduct Rule 3.8(a).

31. Their failure to exercise such ethics and their abuse of their power and their abuse of the process was the direct and proximate cause of DePina's emotional distress.

32. The complaint was issued against Plaintiff DePina without probable cause and in violation of art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

33. On or about January 6, 2022, DePina, through counsel, moved to dismiss the prosecution for lack of probable cause.

34. This Motion to Dismiss was in the file when Defendants Worcester County District Attorney's Office, District Attorney Early, and District Attorney Melia (hereinafter, "The Worcester DA Defendants") decided to take the case, either in order to silence DePina or to try to curry favor with Rollins, without any regard for DePina's constitutional rights, and without any regard to their ethical obligations.

35. The Worcester DA Defendants knew or should have known, with the exercise of reasonable diligence, at the time they agreed to prosecute the case that the matter was ripe for dismissal for lack of probable cause.

36. At all relevant times herein, Melia acted on behalf of Defendants Worcester County District Attorney's Office and District Attorney Early.

37. The Worcester DA Defendants had access to the recording of the incident, and yet they knowingly prosecuted charges that they knew were unsupportable under the law.

38. Notwithstanding the lack of merit, on March 22, 2022, Melia audaciously filed an opposition to the motion to dismiss.

39. At an April 25, 2022, hearing on the motion to dismiss, Defendant Melia stated the following:

MR. ADA: So, Judge, I think with witness intimidation you're allowed to take what was said and taken within the context of how it's said. When you have a man being prosecuted by DA Rollins's office and he appears seven days prior to his next court date, indirectly referencing the cases for which he's being prosecuted, I think there's at least probable cause to show that his statements were designed to interfere with the justice process.

Transcript 7: 10-18.

40. Twisting constitutionally protected speech and attempting to shoehorn it into the Intimidation Statute through mere conjecture would chill the speech of any person who would dare criticize a prosecutor.

41. One does not lose the right to criticize a prosecutor merely because they are themselves facing charges, else it creates a perverse incentive to charge all detractors so that any criticism is silenced under the threat of purported intimidation.

42. DePina did not directly or indirectly reference the cases for which he was being prosecuted for by Defendant Rollins nor did DePina commit any act that could plausibly constitute a violation of the Attorney Intimidation statute.

43. When pressed for evidence by the trial court judge, Defendant Melia admitted there was no evidence of intimidation.

THE COURT: So when you say "indirectly references," is there any reference to those cases, any of those cases?

MR. ADA: No, Judge.

THE COURT: What's the veiled reference to those cases? Is there any veiled reference? So he questions her authority. I think everybody in the room would agree, he questions her authority, he questions her ability to do her job well?

MR. ADA: Yes.

THE COURT: So what's the veiled reference to those cases if it's not a direct reference?

MR. ADA: I don't think there's veiled references directly to his cases, Judge. My only argument would be that with Mr. DePina questioning her ability to be the district attorney, he's indirectly referencing her ability to fairly prosecute him as a defendant.

THE COURT: So does that mean that when anybody who has a case appears at a press conference questions the ability of the prosecutor to do their job, that is witness intimidation?

MR. ADA: If they're under prosecution by that district attorney, yes.

THE COURT: Is there anything else you want me to know before [sic] any other argument that you want me to make [sic] before I take this into consideration or under consideration?

MR. ADA: No, Judge.

Transcript 12:7- 13:9.

44. In essence, Melia, for all Defendants, was using the Intimidation Statute as an unconstitutional gag.

45. On May 25, 2022, the trial court correctly (and courageously) dismissed the charges against DePina for lack of probable cause.

46. Specifically, Justice Fraser, in dismissing the matter, ruled as follows:

After hearing, the motion is ALLOWED. The defendant was charged with witness intimidation, in violation of G.L. c. 268, s. 13B. According to a report of Boston Police, the defendant made statements to then Suffolk County D.A. Rachael Rollins during a press conference that appear as an intent to interfere with the defendant's criminal cases, being prosecuted by DA Rollins' office. The report author posits that the defendant made several indirect references to his criminal cases. The parties agreed to allow the Court to review the electronic recording of the press conference. There exists no probable cause or references, direct or

indirect, to the defendant's pending criminal cases. The defendant's speech is within the First Amendment's protective reach.

47. DePina made no threats. DePina engaged in no form of harassment, nor anything that could possibly be construed as intimidation of someone connected to a pending criminal proceeding. DePina exercised his constitutionally protected right to criticize a public official. This was all clear from the video that Williams and the Worcester DA Defendants claimed to have reviewed. This was all clear from press coverage of the event. This was all clear to any eyewitness. Nevertheless, Rollins, Williams and the Worcester DA Defendants conspired to violate DePina's civil rights.

48. Rollins and Williams knew that DePina was no threat, as did the Worcester DA Defendants.

49. A little more than a year earlier, in September 2020, DePina was heckling Police Chief William Gross. In that situation, Rollins intervened and deescalated the situation, including handing DePina her badge and cell phone.

50. Rollins explained in 2020 that she intervened on behalf of DePina to protect his constitutionally protected right to freedom of speech by stating that "there were about five to ten white police officers standing off camera that were about to 'remove' Joao from the scene for yelling. As I am sure you are aware, *yelling your opinion is free speech. It may be annoying but it is protected.*" (emphasis added).



Breilis, Matthew (DAA) <matthew.breilis@state.ma.us>  
to me ▾

Sep 21, 2020, 4:04 PM ☆ ↩ ⋮

"The reason I tried to de-escalate that situation was two-fold. First, three people had just been shot and one of them had died. I believed that Joao's behavior was disrespectful to those families and the community that had a right to know details about the violence that had happened earlier that evening in their neighborhood. He was upset because he said the Commissioner had given him the finger and made a derogatory comment to him. All I was saying to Joao was that this very moment was not the time or place to erupt. That he needed to calm down or he was going to potentially get arrested. Second, there were about five to ten white police officers standing off camera that were about to "remove" Joao from the scene for yelling. As I am sure you are aware, yelling your opinion is free speech. It may be annoying, but it is protected. Had those officers gone over to remove Joao and that situation potentially escalated into a struggle with five to ten white police officers restraining and arresting a Black man in front of multiple news media outlets, how is that helpful? If we are truly trying to mend relationships between the communities that experience the majority of violence and crime and the members of law enforcement that protect us and solve those crimes, how does that potentially violent restraint and arrest help us get there? I went over and spoke to Joao to ask him to relax. I did that for the families of the three shooting victims (one of whom that had died) and the community, and I did it for the police officers that as a result didn't have to be subjected to potential ridicule and accusations had the situation potentially escalated. And I would do it again."

Rachael Rollins



51. This demonstrates that Rollins was well aware of the rights she was violating when, a year later, she engaged in her retaliatory abuse of power.

52. Apparently, for Rollins, it is only free speech if she is not the one being criticized.

53. DePina experienced severe emotional distress and physical harm manifested by objective symptomatology from the lawless actions by Defendants, including insomnia and inability to concentrate, and fear of engaging in other constitutionally protected activity that resulted from fear of imprisonment.

### **CAUSES OF ACTION**

#### **Count I**

#### **(G.L. c. 12, § 11I – Malicious Prosecution)**

54. Plaintiff hereby repeats and realleges the preceding paragraphs of the Complaint as if set out in full herein.

55. Defendants initiated and/or continued criminal prosecution against DePina for violation of the Attorney Intimidation Law.

56. Defendants initiated and/or continued criminal prosecution against DePina with malice.

57. There was no probable cause for criminal prosecution of DePina for violation of the Intimidation Law.

58. The termination of the criminal proceeding was in favor of DePina.

59. The prosecution against DePina was dismissed for lack of probable cause with the trial court noting that DePina’s speech was “within the First Amendment’s protective reach.”

60. DePina has the right, pursuant to G.L. c. 12, § 11I, to institute and prosecute a civil action against Defendants for their interference with, and attempts thereof, DePina’s exercise of rights supported by the Massachusetts Constitution.

61. No reasonable attorney nor police officer could have believed that the prosecution was valid and was anything other than a retaliatory act against DePina for his speech protected by

art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

62. Defendants' prosecution for DePina's speech protected by art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution, was content-based and viewpoint-based and is in violation of art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

63. As a direct and proximate result of Defendants' violations, through malicious prosecution, of DePina's constitutional and common law rights, DePina suffered harm including emotional distress, physical harm, and pecuniary loss entitling DePina to declaratory relief and compensatory damages.

**Count II**  
**(G.L. c. 12, § 11I – Malicious Abuse of Process)**

64. Plaintiff hereby repeats and realleges the preceding paragraphs of the Complaint as if set out in full herein.

65. Defendants initiated criminal process against DePina for violation of the Attorney Intimidation Law.

66. Defendants initiated criminal prosecution against DePina for an ulterior purpose and for an illegitimate purpose.

67. The criminal prosecution against DePina was dismissed for lack of probable cause with the trial court noting that DePina's speech was "within the First Amendment's protective reach."

68. DePina has the right, pursuant to G.L. c. 12, § 11I, to institute and prosecute a civil action against Defendants for their interference with, and attempts thereof, DePina's exercise of rights supported by the Massachusetts Constitutions.

69. Defendants' prosecution for DePina's speech protected by art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution, is content-based and viewpoint-based and is in violation of art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

70. As a direct and proximate result of Defendants' violation, through malicious abuse of process, of DePina's constitutional and common law rights, Plaintiff suffered irreparable harm, including potential loss of his constitutional rights, emotional distress, physical harm, and pecuniary loss entitling DePina to declaratory relief and compensatory damages.

**Count III**  
**(G.L. c. 12, § 11I –Retaliation)**

71. Plaintiff hereby repeats and realleges the preceding paragraphs of the Complaint as if set out in full herein.

72. DePina was engaged in activity protected by art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Declaration of Rights when he attended Defendant Rachael Rollin's televised press conference and spoke his mind. His actions constitute speech on an important matter of public concern and therefore are afforded a high level of protection from government interference.

73. Defendants retaliated against DePina's protected speech by criminally prosecuting him for violation of the Attorney Intimidation Law despite having no probable cause and no reasonable person could possibly think DePina violated the law.

74. Defendants prosecuted DePina for the specific purpose of silencing his protected speech and prohibit DePina from speaking out in the future.

75. It is clearly established that there is a constitutional right to openly speak on a public sidewalk.

76. DePina has the right, pursuant to G.L. c. 12, § 11I, to institute and prosecute a civil action against Defendants for their interference with, and attempts thereof, DePina's exercise of rights supported by the Massachusetts Constitution.

77. Defendants' prosecution for DePina's speech protected by art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution, is content-based and viewpoint-based and is in violation of art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

78. As a direct and proximate result of Defendants' retaliatory violation of art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution, Plaintiff suffered irreparable harm, including potential loss of his constitutional rights, emotional distress, physical harm, and pecuniary loss entitling DePina to declaratory relief and compensatory damages.

**Count IV**  
**(Intentional or Reckless Infliction of Emotional Distress)**

79. Plaintiff hereby repeats and realleges the preceding paragraphs of the Complaint as if set out in full herein.

80. Defendants intended to inflict emotion distress or should have known that emotional distress was the likely result of their conduct.

81. Defendants' conduct was extreme and outrageous.

82. Defendants' actions were the cause of DePina's distress.

83. DePina's sustained severe distress as a result of Defendants' conspiracy of threatening felonious charges against him without probable cause as an unconstitutional means to muzzle him.

84. As a direct and proximate result of Defendants' conduct, Plaintiff suffered irreparable harm, including potential loss of his constitutional rights, severe emotional distress, physical harm, and pecuniary loss entitling DePina to compensatory and punitive damages.

**Count V**  
**(Negligent Infliction of Emotional Distress)**

85. Plaintiff hereby repeats and realleges the preceding paragraphs of the Complaint as if set out in full herein.

86. Defendants owed a duty of care in that a police officer and a prosecutor should not pursue charges against a citizen where it is obvious that there was no probable cause and that DePina was lawfully exercising his constitutionally protected rights under art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

87. DePina experienced severe emotional distress and physical harm manifested by objective symptomatology from the lawless actions by Defendants, including insomnia and inability to concentrate, and fear of engaging in other constitutionally protected activity that resulted from fear of imprisonment.

88. A reasonable person would have suffered emotional distress under the circumstances of this case.

89. The Worcester DA Defendants, Rollins, and the Boston Police Department are liable to Plaintiff for their negligent infliction of emotional distress.

90. As a direct and proximate result of Defendants' conduct, Plaintiff suffered irreparable harm, including potential loss of his constitutional rights, severe emotional distress, physical harm, and pecuniary loss entitling DePina to compensatory and punitive damages.

**DEMAND FOR TRIAL BY JURY**

Plaintiff hereby demands a trial by jury on each claim asserted or hereafter asserted in the Complaint, and on each defense asserted or hereafter asserted by the Defendants.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff asks this Court:

A. To declare that Defendants' prosecution of Plaintiff violated art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution as set forth in this Complaint;

B. To award Plaintiff compensatory and punitive damages for the past loss of his constitutional rights, severe emotional distress, physical harm, and pecuniary loss;

C. To award Plaintiff his reasonable attorneys' fees, costs, and expenses pursuant G.L. c. 12, § 11I, and any other applicable law; and,

D. To award such other relief as this Honorable Court may deem just and proper.

Dated: August 24, 2022.

Respectfully Submitted,

/s/ Marc J. Randazza

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Joao DePina

**VERIFICATION OF COMPLAINT**

I, Joao DePina, am the Plaintiff in the above-captioned matter. I have reviewed the foregoing allegations in this Verified Complaint, and I hereby declare under the penalty of perjury that the foregoing allegations are true and correct to the best of my knowledge and understanding.

Dated: 08 / 24 / 2022.

By:   
Joao DePina

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: 2285CV00971

JOAO DEPINA,

Plaintiff,

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WORCESTER COUNTY DISTRICT  
ATTORNEY'S OFFICE; JOSEPH D.  
EARLY, JR., in his personal and official  
capacities; ANTHONY MELIA in his  
personal and official capacities; BOSTON  
POLICE DEPARTMENT; DANTE  
WILLIAMS in his personal and official  
capacities; and RACHAEL ROLLINS, in  
her personal capacity,

Defendants.

**NOTICE OF PLAINTIFF'S**  
**CERTIFICATION PURSUANT**  
**TO RULE 11(a)(1)**

This case presents novel theories – but they are brought in good faith. Mass. R. Civ. P. 11 provides that the signature of any attorney to a pleading constitutes a certificate that the attorney has read the pleading; that to the best of the attorney's knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay. Plaintiff is well aware of the doctrines of municipal and absolute prosecutorial immunity and that this court may very well dismiss some of the claims, at least, as a matter of currently controlling law. However, this “settled law” should be disturbed and reversed. *See, e.g., Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_ (2022) (even 49 years' worth of “settled” law can be unseated if it receives scrutiny); *see also Lanier v. President & Fellows of Harvard Coll.*, No. SJC-13138 (Mass. June 23, 2022) (Supreme Judicial Court recognized never-before considered theories of liability in order to right a wrong that had no pre-existing remedy).



Mass. R. Civ. P. 11(a)(1) permits good faith challenges to these immunity doctrines. See *Lanier v. President & Fellows of Harvard Coll.*, No. SJC-13138 (Mass. June 23, 2022); *see also Tucker v. U.S. Bank, N.A.*, 292 F. Supp. 3d 546, 554 (D. Mass. 2018) (“It is a bedrock principle of our legal system that attorneys may in good faith argue that previous cases were decided incorrectly.”); *see also Eldridge v. Gordon Bros. Grp., L.L.C.*, 863 F.3d 66, 87 (1st Cir. 2017). The Plaintiff has brought these claims in impact litigation to challenge these immunity doctrines as a matter of public interest. *See, e.g., Wearry v. Foster*, No. 20-30406, at \*28 (5th Cir. May 3, 2022) (Ho, J., dubitante) (“Worthy civil rights claims are often never brought to trial. That’s because an unholy trinity of legal doctrines-qualified immunity, absolute prosecutorial immunity, and *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978)-frequently conspires to turn winnable claims into losing ones.”).

We currently live under a legal regime where prosecutors have *no accountability* for their abuse of power.<sup>1</sup> The following three examples, which are far from an exhaustive list of such incidents, highlight the ongoing, systemic unaccountability epidemic.

In 1989, a couple in Texas found their 4-year-old daughter wounded and bloody. *Loveless v. State*, 800 S.W.2d 940, 942 (Tex. App. 1990). The couple called paramedics who responded to the scene to find the 4-year-old girl wrapped in a blanket to keep her warm. *Id.* The girl was airlifted to a hospital and underwent surgery but did not survive. *Id.* at 944. The couple told the authorities that their daughter was mauled by a wild dog. *Id.* The couple was charged with murder and convicted to life in prison. *Id.* at 947.

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<sup>1</sup> *See* David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 THE YALE L.J. ONLINE 203 (2011); *see also* Edward C. Dawson, *Replacing Monell Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. CIN. L. REV. 483 (2018).

Four years later, lawyers for the couple obtained emergency room and autopsy photos that the prosecutors failed to turn over to the defense. The photos showed that the couple was telling the truth. In one photo, a paw print was visible on their daughter's back. The couple filed a writ of habeas corpus in 1993. After a four-day hearing, the couple's life sentence conviction was vacated and the Texas Court of Criminal Appeals affirmed the ruling. To date, so far as the public record reflects, the prosecutor Alwin Smith, was never sanctioned nor sued and continues to practice law.

The second example, in 2010, former San Francisco assistant district attorney Linda Allen won a murder conviction against Jama Trulove on the basis of a single eyewitness. *People v. Trulove*, No. A130481, 2014 Cal. App. Unpub. LEXIS 26, \*4, 2014 WL 36469 (Cal. Ct. App. Jan. 6, 2014). In her closing argument, Allen praised the witness for coming forward despite explicit threats to her and her family by Trulove and his associates. *Id.* at \*2. Allen told the jury the threats both demonstrated Trulove's consciousness of guilt and attested to the credibility to the witness, who risked her life to come forward. *Id.* Except none of it was true. The witness herself later admitted as much. An appellate court overturned Truelove's conviction. The court found Allen had committed "highly prejudicial misconduct," adding, "The People did not present a scintilla of evidence ... that defendant's friends and family would try to kill [the witness] if she testified against him ... This yarn was made out of whole cloth." *Id.* at \*22. To date, so far as the public record reflects, this prosecutor has not been sanctioned or sued and continues to practice law.

In a recent case, a court vacated the judgments of conviction for three defendants because the District Attorney of Queens County office withheld exculpatory evidence that implicated other perpetrators in the crime. *People v. Bell*, 71 Misc. 3d 646, 660-62 (N.Y. Sup. Ct. 2021). There the court went on to note that "the repeated denial of any connection between the perpetrators of the armored car robbery and these crimes was a complete misrepresentation." *Id.* at 644. And "[m]ost

troublingly, it was a misrepresentation made by a prosecutor, ADA Testagrossa, whose own handwritten notes refuted it. This was, in short, not a good-faith misstatement; it was a deliberate falsehood.” *Id.* After the court overturned the convictions, the Queens District attorney dropped the charges against the three defendants. To date, so far as the public record reflects, the prosecutor who the court admonished for his “deliberate falsehood” has not been sanctioned nor sued and continues to practice law.

Mr. DePina is not such an extreme factual example. However, his case is one in the chorus of voices crying out for the end of this abomination of *absolute* prosecutorial immunity. Had the prosecutor in this case simply called DePina and threatened prosecution, this would have at least been a matter of *qualified* immunity. However, because the prosecution simply threw DePina into the jaws of the criminal justice system for no other reason than he heckled a corrupt politician with a history of abuse of power, that’s just fine under our present regime.

Enough is enough. Absolute immunity stands on a foundation far more porous and weak than *Roe v. Wade*. This ignoble judicial activist doctrine must be terminated. There must be consequences for prosecutors who deliberately engage in misconduct or prosecuting claims that are clearly unconstitutional – beyond merely losing. In a criminal case, the unlimited power of the State comes down on one person and that person’s best hope – even in examples of extreme prosecutorial misconduct – is that they will be able to pay to defend themselves. This cannot be the way we live in a truly free society. The tide must turn. It is turning. It is Mr. DePina’s hope that through this case, this turn will continue. *See Rogers v. Smith*, No. 20-517, 2022 U.S. Dist. LEXIS 86675, at \*9 (E.D. La. May 13, 2022) (holding there is no qualified immunity for police officers where “no reasonable officer could have believed that probable cause existed where the unconstitutionality of Louisiana’s criminal defamation statute as applied to public officials has

long been clearly established and where the officers had been specifically warned that the arrest would be unconstitutional”); *see also Frampton v. City of Baton Rouge*, No. 21-CV-362-JWD-SDJ, 2022 U.S. Dist. LEXIS 3754, at \*110 (M.D. La. Jan. 7, 2022) (“The record is replete with evidence supporting the Court’s conclusion that the City/Parish would have not pursued this matter in the absence of its bad faith motive to retaliate.”)

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Respectfully Submitted,

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