

**COMMONWEALTH OF MASSACHUSETTS**

**SUPREME JUDICIAL COURT**

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FAR No.

Appeals Court No. 2023-P-0985

Worcester County, ss.

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WORCESTER COUNTY DISTRICT ATTORNEY'S OFFICE, JOSEPH D.  
EARLY, JR., ANTHONY MELIA, RACHAEL ROLLINS, BOSTON  
POLICE DEPARTMENT, and DANTE WILLIAMS, Appellees,

v.

JOAO DEPINA, Appellant.

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ON APPEAL FROM A JUDGMENT OF THE  
WORCESTER SUPERIOR COURT

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**Plaintiff-Appellant's Application for  
Further Appellate Review**

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Date: February 21, 2025

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**TABLE OF CONTENTS**

I.REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW 6

II.STATEMENT OF PRIOR PROCEEDINGS IN THE CASE ..... 8

III. STATEMENT OF FACTS ..... 10

    1.0 BACKGROUND ..... 10

    2.0 THE INCIDENT ..... 11

    3.0 THE CRIMINAL COMPLAINT ..... 13

    4.0 THE CRIMINAL CASE ..... 13

IV.STATEMENT OF POINTS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT..... 16

V.STATEMENT WHY FURTHER APPELLATE REVIEW IS APPROPRIATE17

    1.0 ABSOLUTE PROSECUTORIAL IMMUNITY SHOULD BE ABOLISHED ... 17

        1.1 Prosecutors Must be Held Accountable ..... 17

        1.2 Prosecutorial Immunity at Common Law was Erroneous ..... 20

        1.3 Absolute Prosecutorial Immunity for Claims under G.L. c. 12, § 11I, was Wrongly Implemented 21

    2.0 ROLLINS IS NOT IMMUNE..... 25

CERTIFICATE OF COMPLIANCE ..... 27

CERTIFICATE OF SERVICE ..... 28

**TABLE OF AUTHORITIES**

**CASES**

Andersen v. Bishop,  
304 Mass. 396 (1939) ..... 20, 21

Chicopee Lions Club v. Dist. Attorney for Hampden  
Dist., 396 Mass. 244 (1985) ..... passim

Commonwealth v. Brown,  
431 Mass. 772 (2000) ..... 23

Commonwealth v. DePina,  
Case No. 2156 CR 3600 (Quincy Dist.  
Ct. Apr. 29, 2022) ..... 8

DePina v. Worcester Cty. D.A.,  
No. 2022-J-0613, 2022 Mass. App.  
LEXIS 123 (App. Ct. Nov. 16, 2022) (Blake, J.) ..... 9

DePina v. Worcester Cty. Dist. Attorney's Office,  
105 Mass. App. Ct. 1112 (2025) ..... 7, 9, 25

Ellis v. Simonds,  
168 Mass. 316 (1897) ..... 18

Hankins v. Wheeler,  
109 F.4th 839 (5th Cir. 2024) ..... 22

Hoar v. Wood,  
44 Mass. (3 Met.) 193 (1841) ..... 20

Hubbard v. Beatty & Hyde, Inc.,  
343 Mass. 258 (1961) ..... 18

Imbler v. Pachtman,  
424 U.S. 409 (1976) ..... 6, 22, 23

Kalina v. Fletcher,  
522 U.S. 118 (1997) ..... 25

Park v. Huntington,  
69 Mass. 124, 2 Gray 124 (1854) ..... 18

Rogers v. Jarrett,  
63 F.4th 971 (5th Cir. 2023) ..... 23

<u>Rosenblum v. Ginis,</u> 297 Mass. 493 (1937) .....	18
<u>Steffe v. Old C. R. Co.,</u> 156 Mass. 262 (1892) .....	24
<u>Stone v. Crocker,</u> 24 Pick. 81 (1833) .....	18
<u>Williams v. Ivory,</u> 173 Pa. 536, 34 A. 291 (1896) .....	24
<u>Wynne v. Rosen,</u> 391 Mass. 797 (1984) .....	17
<u>Yaselli v. Goff,</u> 12 F.2d 396 (2d Cir. 1926) .....	20

**STATUTES**

42 U.S.C. § 1983.....	21, 23, 24
Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 .....	6, 23
G.L. c. 12, § 11.....	6
G.L. c. 12, § 11I.....	passim
G.L. c. 231, § 118.....	8
G.L. c. 268, § 13B.....	8, 10, 13
G.L. c. 4, § 6, Third.....	23

**OTHER AUTHORITIES**

2 Am. & Eng. Enc. Law (2d ed.) 414.....	24
4 W. Blackstone, Commentaries 352.....	19
Green, Prosecutors and Professional Regulation, 25 GEO. J. LEGAL ETHICS 873, 874 (2012) .....	18
Jaicomo, Section 1983 (Still) Displaces Qualified Immunity (February 03, 2025) .....	6, 22

Johns, Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity, 80 FORDHAM L. REV. 509 (2011) .....	18
Reinert, Qualified Immunity's Flawed Foundation, 111 Calif. L. Rev. 201, 207-08 (2023) .....	22
Taddei, Beyond Absolute Immunity: Alternative Protections for Prosecutors Against Ultimate Liability for § 1983 Suits, 106 NW. U. L. REV. 1909-1922 (2012) .....	19

**RULES**

Mass. R. App. P. 27.....	9
Mass. R. App. P. 27.1.....	7
Mass. R. Prof. C. 3.8(a).....	13

**I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW**

In Chicopee Lions Club v. Dist. Attorney for Hampden Dist., 396 Mass. 244, 250-52 (1985), the Court made it possible for prosecutors to run roughshod over constitutional freedoms of opponents in the name of "absolute prosecutorial immunity." G.L. c. 12, § 11, affords no immunities from suit whenever "any person" whose rights are interfered with seeks relief. The Chicopee Lions Court declined to presume that the legislature "intended to abrogate a tradition of judicial and prosecutorial immunity" (396 Mass. at 252), yet nothing in the statutory text suggests that the legislature did not so intend. "Any person" does not exclude persons who were harmed by prosecutors.

The Court relied upon immunities from suit under Section 1983 claims. Id. citing Imbler v. Pachtman, 424 U.S. 409 (1976). Recent scholarship has shown that the U.S. Supreme Court misapprehended Section 1983, ignoring a clause omitted when the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, was codified. See, e.g., Jaicomo, Section 1983 (Still) Displaces Qualified Immunity (February 03, 2025) available at <https://papers.ssrn.com/sol3/papers.cfm?>

[abstract id=5124275](#). This Court should revisit Chicopee Lions and declare that prosecutors, like the disgraced Rachael Rollins, can be held to account, in appropriate cases, for violating “any person’s” civil rights.

Pursuant to Mass. R. App. P. 27.1, Plaintiff-Appellant Joao DePina respectfully requests that this Court grant further appellate review of the Appeals Court’s Memorandum and Order Pursuant to Rule 23.0 issued in this case on January 31, 2025. See DePina v. Worcester Cty. Dist. Attorney's Office, 105 Mass. App. Ct. 1112 (2025) (appended hereto).

Further appellate review is necessitated by substantial reasons affecting the public interest and the interests of justice. The Appeals Court lacked the authority to overturn Chicopee Lions. Further appellate review will clarify the rights of “any persons” to vindicate their state and federal rights, no matter who violates them.

## II. STATEMENT OF PRIOR PROCEEDINGS IN THE CASE

On August 24, 2022, Plaintiff-Appellant Joao DePina filed a complaint in the Worcester County Superior Court against Defendant-Appellee former Suffolk County District Attorney Rachael Rollins and others for Malicious Prosecution, Malicious Abuse of Process, and Retaliation under G.L. c. 12, § 11I,<sup>1</sup> arising from DePina's prosecution for purported attorney intimidation under G.L. c. 268, § 13B(b). See Commonwealth v. DePina, Case No. 2156 CR 3600 (Quincy Dist. Ct. Apr. 29, 2022) (dismissing charge for lack of probable cause). On May 22, 2023, the Superior Court dismissed the Section 11I claims against Rollins and the other Commonwealth Defendants (the Worcester County District Attorney's Office, Joseph D. Early, Jr., and Anthony Melia) on the grounds of absolute prosecutorial immunity.

No discovery occurred; it was stayed, which stay was affirmed on a petition pursuant to G.L. c. 231, § 118, ¶1, in light of the immunity from suit afforded by absolute prosecutorial immunity. DePina v. Worcester

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<sup>1</sup> Common law claims for intentional and negligent infliction of emotional distress were also brought, but they are not the subject of this petition.



Cty. D.A., No. 2022-J-0613, 2022 Mass. App. LEXIS 123 (App. Ct. Nov. 16, 2022) (Blake, J.).

DePina timely appealed the dismissal. The matter was fully briefed, and argument was held on Oct. 10, 2024. On Jan. 31, 2025, the Appeals Court affirmed the judgment on the basis of absolute prosecutorial immunity. DePina v. Worcester Cty. Dist. Attorney's Office, 105 Mass. App. Ct. 1112 (2025). Throughout these proceedings, DePina has urged that absolute prosecutorial immunity be abolished, albeit acknowledging the inability of the lower courts to do so. See, e.g., id. at n.5. Because only this Court can abolish the immunity, no motion for reconsideration under Mass. R. App. P. 27 was filed. This petition follows.

### III. STATEMENT OF FACTS

#### 1.0 Background

Joao DePina is a "community activist, [and a] past candidate for the Boston City Council." AA024 at ¶ 11.<sup>2</sup> DePina is a former volunteer for Rollins, and the two know each other well. AA029 at ¶ 50.

In 2020, DePina heckled Police Chief William Gross during a press conference. Id. at ¶ 49. Rollins herself intervened and de-escalated the situation. Id. at ¶ 50. In doing so, she made it clear that she understood perfectly the well-established First Amendment right DePina was exercising.

A year later, in 2021, DePina heckled Rollins during her press conference. AA024 at ¶¶ 12-16. This time, with Rollins on the receiving end of the heckling, had DePina prosecuted for "intimidation," for an alleged violation of G.L. c. 268, § 13B. AA025 at ¶¶ 17-21. DePina's criminal case (prosecuted by the Worcester DA's office) was dismissed for lack of probable cause, as DePina's speech was within the First Amendment's protected reach. AA028 at ¶ 46.

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<sup>2</sup> All "AA" references are to the appendix filed with the Appeals Court.

DePina made no threats. AA029 at ¶ 47. He engaged in no form of harassment nor anything that could possibly be construed as intimidation; rather, he exercised his constitutionally protected right to criticize a public official in a traditional public forum. Id. This was patent in the video that Defendant Boston Police Detective Dante Williams and the Worcester District Attorney claimed to have reviewed; such was also clear from press coverage of the event and what any eyewitness would have observed. Id. Yet, Rollins, Williams, and the Worcester DA acted together to violate DePina's civil rights. Id.

DePina filed this lawsuit against Rollins and those who did her bidding, seeking recompense for their abuses. His allegations observe that while DePina's criminal case was dismissed for lack of probable cause, the process is also a punishment.

## **2.0 The Incident**

On November 9, 2021, Plaintiff-Appellant Joao DePina went to the corner of Ferndale Street and Norfolk Street. See Criminal Complaint and Application in Case No. 2017CR003064 ("Criminal Compl.") AA095. Defendant-Appellee Rachael Rollins, then-Suffolk County District Attorney, was giving a press conference. AA024 at ¶¶

12-16. That day, three police officers were injured during an armed standoff. Id. at ¶ 12.

The press conference was on the public street. AA023 at 3. As set forth in the Complaint, DePina criticized Rollins over continued gun violence in Boston, racial justice issues, and continued government incompetency, including the incompetency of the Suffolk County D.A.'s Office to respond to his brother's murder. AA024 at ¶ 14. DePina exercised his right to criticize Rollins for abusing her power as a public official, opportunistically seeking high office without caring for the people of Boston and failing to take adequate care of Boston police officers. Id. at ¶¶ 15-16.

This was not the first time DePina attended a press conference to give a public servant a piece of his mind. A year earlier, in September 2020, DePina appeared at a press conference and engaged in almost identical conduct toward former Police Chief Williams Gross. AA029 at ¶ 49. At that time, Rollins herself intervened and later issued a press statement that explained that she intervened on behalf of DePina to protect his constitutionally protected right to freedom of speech by stating "As I am sure you are aware, yelling your opinion is free speech. It may be annoying but it is protected."

Id. at ¶ 50. There is no doubt that DePina's rights were well-established and well-known at the time.

### **3.0 The Criminal Complaint**

Despite being fully aware of DePina's rights, three days after the November 9, 2021, press conference, Rollins caused a criminal complaint to be filed against DePina accusing him of Attorney Intimidation in violation of G.L. c. 268, § 13B. AA025 at ¶ 17. The complaint alleged that DePina intended to intimidate Rollins because the Suffolk D.A.'s Office, which Rollins was overseeing at the time, had three pending criminal cases against DePina. Id.

Rollins is listed as the victim, and there is information provided in the criminal complaint that must have come from Rollins, including the "multiple attempts" to contact her. AA071.

### **4.0 The Criminal Case**

After Rollins acted to violate DePina's civil rights and civil liberties, the Suffolk County D.A.'s Office nominally recused itself from prosecuting DePina. Id. at ¶ 21, 26. The file was transferred to Norfolk County, but the Norfolk County District Attorney was mindful of his obligations under the Mass. R. Prof. C. 3.8(a) and declined to take the case. AA026 at ¶ 27.

The file is believed to have bounced to other District Attorneys who also showed the same good judgment. Id. at ¶ 28.

Eventually, the file was presented to Defendants-Appellees Worcester County District Attorney Joseph Early and his office. Id. at ¶ 29. Early set aside any respect for DePina's constitutional rights and prosecuted DePina. Id. Defendant-Appellee Assistant District Attorney Melia handled the prosecution. In Melia's own words, on behalf of the Commonwealth, DePina was prosecuted for merely "questioning [Rollins's] ability to be the district attorney..." AA027 at ¶ 43.

DePina moved to dismiss the criminal charge for lack of probable cause. See AA098. The Motion to Dismiss contained DePina's statements during Rollins' press conference. AA104-107. Melia, for Early and his office, on behalf of the Commonwealth, opposed. See AA149. Melia, having full access to the video, improperly argued that "[DePina] made indirect references to [his pending criminal] cases and his comments demonstrated an intent to interfere with or affect these upcoming cases." AA154.

On April 25, 2022, the District Court in the criminal matter heard DePina's Motion to Dismiss. When

pressed by the trial court to identify which statements by DePina were unlawful, Melia could not point to a single instance where DePina made a "direct," "indirect," or "veiled" reference to the pending criminal cases against him. AA027 at ¶¶ 39, 43. After Melia failed to identify any conduct by DePina referencing his pending criminal cases, the court asked, "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?" Id. at ¶ 43. Melia responded, attempting to stretch a criminal statute beyond its plausible meaning, that "If they're under prosecution by that district attorney, yes." Id.

On May 25, 2022, the trial court dismissed the charges against DePina for lack of probable cause. AA028 at ¶ 45-46; see also AA167. Justice Fraser, in dismissing the matter, emphasized that "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. [DePina's] speech is within the First Amendment's protective reach." Id. This proceeding followed.

**IV. STATEMENT OF POINTS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT**

The Superior Court dismissed DePina's Section 11I claims against Rollins and the other Commonwealth Defendants on the basis of absolute prosecutorial immunity. DePina seeks further appellate review as to the following points:

1) Whether the doctrine of absolute prosecutorial immunity, especially in claims under G.L. c. 12, § 11I, should be abolished; and

2) Whether, even if the doctrine is not abolished, Rollins is entitled to immunity.



**V. STATEMENT WHY FURTHER APPELLATE REVIEW IS APPROPRIATE**

**1.0 Absolute Prosecutorial Immunity Should be Abolished**

The Superior Court deemed absolute prosecutorial immunity a "closer" question for Rollins than for the other Commonwealth Defendants. AA014. That court credited DePina's allegations Rollins was motivated by personal animus, but her advocacy for filing the criminal complaint, knowingly unsupported by probable cause, despite her conflict of interest of also being the named victim, did not strip her of the immunity. AA015-AA016. The Appeals Court affirmed, determining that her use of her personal influence was prosecutorial advocacy. The law should not suffer such abuses; absolute prosecutorial immunity should be abolished.

**1.1 Prosecutors Must be Held Accountable**

In Wynne v. Rosen, this Court overruled precedent when there was "overwhelming support for [the] position" to ensure those maliciously prosecuted could seek justice. 391 Mass. 797, 799-801 (1984). This Court previously recognized a claim against prosecutors for malicious prosecution for the "wrongful initiation of criminal proceedings[.]" Hubbard v. Beatty & Hyde, Inc.,

343 Mass. 258, 261 (1961).<sup>3</sup> Absolute immunity is in derogation of the justice memorialized in these cases.

There are few, if any guardrails, on prosecutors. In practical effect, prosecutors are above the law.<sup>4</sup> Since Chicopee, it has been shown that state ethics boards are insufficient to hold prosecutors accountable.<sup>5</sup>

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<sup>3</sup> See also Park v. Huntington, 69 Mass. 124, 2 Gray 124 (1854) (holding that public prosecutors could be liable for malicious prosecution); Rosenblum v. Ginis, 297 Mass. 493, 497 (1937) ("The action for malicious prosecution lies for abuse of civil as well as criminal process."); Stone v. Crocker, 24 Pick. 81, 87 (1833) ("The want of probable cause may not be conclusive evidence, but certainly it is not only competent, but very stringent evidence of malice. The authorities on this point are very numerous. Scarcely a case of this kind can be found, in which this principle is not directly or impliedly admitted.") (collecting sources); see also Ellis v. Simonds, 168 Mass. 316, 326 (1897) ("If the prosecutor acts as a reasonable and discreet person would have acted under the circumstances, then it must follow that there is probable cause for the prosecution, or, in other words, ground for a strong suspicion of, or an honest belief in, the guilt of the accused. If there was probable cause, then, even though the prosecution was malicious, the court was right in saying that the defendant was entitled to a verdict.").

<sup>4</sup> See Johns, Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity, 80 FORDHAM L. REV. 509, 511 (2011) ("In reality, prosecutors who engage in misconduct - even when found to have engaged in misconduct by [California] courts of appeals - are subject to discipline less than 1 percent of the time.").

<sup>5</sup> Green, Prosecutors and Professional Regulation, 25 GEO. J. LEGAL ETHICS 873, 874 (2012) ("Courts often interpret the generally applicable rules of professional

Strong policy considerations support abolition - "the law holds that it is better that ten guilty persons escape, than that one innocent suffer." 4 W. Blackstone, Commentaries 352. Honesty should be required of prosecutors and insurance coverage alleviates the concern that prosecutors will have their focus deviated by lawsuits.<sup>6</sup> Prosecutors should act under stiff penalty, because even one innocent person going to jail is too many. The Brady rule and other similar rules do not put sufficient skin in the game for prosecutors to take adequate care of their cases. Unscrupulous prosecutors seeking baseless personal retribution and political vendetta transform the criminal justice system into a political injustice system for selfish ends.

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conduct as less restrictively applied to prosecutors than to other lawyers. When prosecutors engage in questionable conduct that does implicate professional conduct rules, professional discipline rarely follows. For every case in which a prosecutor is publicly sanctioned for egregious misconduct, there are many more in which prosecutors' questionable conduct goes unpunished.").

<sup>6</sup> See Taddei, Beyond Absolute Immunity: Alternative Protections for Prosecutors Against Ultimate Liability for § 1983 Suits, 106 Nw. U. L. REV. 1909-1922 (2012) Available at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1097&context=nulr> (arguing various indemnification laws and policies, insurance, and other protections provides a sufficient shield).

## 1.2 Prosecutorial Immunity at Common Law was Erroneous

In Chicopee, the Court relied on Andersen v. Bishop, 304 Mass. 396 (1939), which held that the policy considerations supporting common law absolute judicial immunity also warranted absolute prosecutorial immunity. In Andersen, it was determined that absolute immunity was a general rule. 304 Mass. at 399, citing Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926). This was incorrect; courts were split when Yaselli was decided. Id. Some courts reasoned that since grand juries and judges were immune, a prosecutor should also be immune. See Yaselli at 404. Courts balanced the competing interests of truth-seeking and reputational harm. See Hoar v. Wood, 44 Mass. (3 Met.) 193, 197-98 (1841) (collecting cases). But judges are independent adjudicators; prosecutors are non-neutral advocates. And Yaselli failed to acknowledge Parker, supra, in which this Court appeared to recognize prosecutorial liability. The litigation privilege and the anti-SLAPP statute are sufficient to protect prosecutors and they do not require absolute immunity.

Furthermore, Andersen was not a case pursued without probable cause. Rather, a prosecutor was sued

for malicious prosecution upon entering a *nolle prosequi*. 304 Mass. at 307. The public interest in ensuring prosecutors dismiss meritless cases without fearing private action does not exist when a prosecutor wrongly prosecutes a claim involuntarily dismissed for lack of probable cause. Thus, if anything, Andersen should be read narrowly to only apply to voluntary dismissals.

Because Anderson misapprehended the general state of the law at the time, prosecutors can otherwise take advantage of the litigation privilege and the anti-SLAPP statute, and need only not have voluntary dismissals turned against them, this Court should take the opportunity to narrow or eliminate common law absolute prosecutorial immunity.

### **1.3 Absolute Prosecutorial Immunity for Claims under G.L. c. 12, § 11I, was Wrongly Implemented**

Even if absolute prosecutorial immunity should continue at common law, such immunity was abrogated under G.L. c. 12, § 11I; the Chicopee Court erred and this Court should say so. In Chicopee, the Court said “Like the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, the Massachusetts Civil Rights Act by its terms admits of no immunities. We do not presume, however,

that the Legislature in passing this statute intended to abrogate a tradition of judicial and prosecutorial immunity rooted in history and based upon sound considerations of public policy." 396 Mass. at 252 citing Imbler, 424 U.S. at 418. There is a fundamental problem with this pronouncement: Imbler relied on cases purporting to establish "that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." 424 U.S. at 418. We now know that this body of caselaw rests on a misreading of Section 1983 occasioned by the codification process editing out what was believed to be redundant language that demonstrates that it was, in fact, intended to be in derogation of state immunities and defenses. See Jaicomo, et al., supra. Specifically, "Section 1983 as originally enacted contained a 'Notwithstanding Clause' that appears to abrogate common-law immunities." Hankins v. Wheeler, 109 F.4th 839, 845 (5th Cir. 2024) citing Reinert, Qualified Immunity's Flawed Foundation, 111 Calif. L. Rev. 201, 207-08 (2023). Thus, "[t]he Reviser of Federal Statutes made an unauthorized alteration to [that] language," which "was compounded when the various revised statutes were later published in the first United States Code"

and "has never been corrected." Rogers v. Jarrett, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring).<sup>7</sup> The Chicopee Court engaged in an incomplete analysis of Section 11I—in but a single sentence it said that express abrogation was lacking, pointing to the now clearly erroneous Imbler decision.

Per G.L. c. 4, § 6, Third, "Words and phrases shall be construed according to the common and approved usage of the language[.]" "When the language of a statute is plain and unambiguous, it must be given its ordinary meaning." Commonwealth v. Brown, 431 Mass. 772, 775 (2000). As Chicopee itself notes, Section 11I "admits

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<sup>7</sup> Section 1 of the Civil Rights Act of 1871 (now known as § 1983) read:

[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . .

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871). As Justice Willett agreed, "the italicized language—the 'Notwithstanding Clause,' as Professor Reinert calls it—explicitly displaces common-law defenses." 63 F.4th at 979 (concurrence).

of no immunities"—it is plain and unambiguous, and it must be given its ordinary meaning.

"Any person" in Section 11I should mean "every person." See, e.g., Williams v. Ivory, 173 Pa. 536, 542, 34 A. 291, 292 (1896) ("'Any person' means every person.") "The word 'any' is frequently used in the sense of 'all' or 'every,' and when thus used has a very comprehensive meaning." 2 Am. & Eng. Enc. Law (2d ed.) 414. That is the manner in which this Court previously construed the term "any person" elsewhere at law. Compare Steffe v. Old C. R. Co., 156 Mass. 262, 264 (1892) ("The statute includes every person" where the St. of 1887, c. 270, § 1, cl. 3 used "any person".) Thus, G.L. c. 12, § 11I, should not be read as "any person except those harmed by a prosecutor." It means every person, including those harmed by prosecutors, even those acting within the scope of their offices. Moreover, it is incongruent to believe that Section 1983, and Section 11I following, did not abrogate prosecutorial immunity when the first case to hold that a public prosecutor was entitled to absolute immunity, no matter how malicious their motives, was decided in 1896, twenty-five years after the Civil Rights Act of 1871. Griffith v. Slinkard, 146 Ind. 117 (1896); see



also, Kalina v. Fletcher, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) ("There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted.") Thus, absolute immunity is an error that should be fixed.

## **2.0 Rollins is Not Immune**

Although absolute immunity should be abolished, even if this Court declines to correct the error of absolute immunity, Rollins should not be permitted to take advantage of it. The Appeals Court misapprehended DePina's arguments as to Rollins having "caused" the criminal complaint to have been filed. She did not do so in an advocacy function—she was the purported victim, and her own office recused itself. She caused the charge to be filed as any politically powerful person can use their influence while sycophants do their bidding.

The Appeals Court was contradictory in its decision. On the one hand, they said "Only a prosecutor, in exercising her discretion, can decide which criminal complaints will be filed." 105 Mass. App. Ct. 1112, 2025 Mass. App. Unpub. LEXIS 69 at \*4. On the other hand, they noted it was Boston Police Officer Bienvenido Delacruz who was the complainant, not the Suffolk D.A.'s office. Id. at \*1, n.3. It was Delacruz, not Rollins,

who was exercising discretion. Thus, even if absolute prosecutorial immunity is not abolished, this Court should clarify the functional approach such that prosecutors wielding their personal authority, but not participating directly in the judicial phase, are not immune.

WHEREFORE, Appellant DePina requests the Court grant further appellate review, abolish the doctrine of prosecutorial immunity or otherwise hold Rollins not immune, and reverse the dismissal of Rollins and/or the Commonwealth Defendants.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of applications and appendices, including, but not limited to:

Rule 27.1(b) (format for applications);  
Rule 20 (typesize, margins, and form of briefs and appendices).

Pursuant to Rule 16(k)(1) & (2), this brief was written in the 12-point Courier New monospaced font, with 10 characters per inch. A total of 10 non-excluded pages and 1,976 non-excluded words appear herein. This document was written in Microsoft Word for Office 365.

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**CERTIFICATE OF SERVICE**

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on February 21, 2025, I have made service of this Application upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by efileing, First Class mail, and/or electronic mail on:

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Date: February 21, 2025

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

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FAR No.

Appeals Court No. 2023-P-0985

Worcester County, ss.

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WORCESTER COUNTY DISTRICT ATTORNEY'S OFFICE, JOSEPH D.  
EARLY, JR., ANTHONY MELIA, RACHAEL ROLLINS, BOSTON  
POLICE DEPARTMENT, and DANTE WILLIAMS, Appellees,

v.

JOAO DEPINA, Appellant.

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ON APPEAL FROM A JUDGMENT OF THE  
WORCESTER SUPERIOR COURT

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**Plaintiff-Appellant's Appendix Volume 1 of 1**

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Date: February 21, 2025

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**TABLE OF CONTENTS**

Judgment, January 31, 2025..... 3

Memorandum and Order Pursuant to Rule 23.0,  
January 31, 2025..... 4

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 23-P-985

JOAO DEPINA

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vs.

WORCESTER COUNTY DISTRICT ATTORNEY'S OFFICE & others.

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Pending in the Superior

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Court for the County of Worcester

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Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,



\_\_\_\_\_, Clerk  
Date January 31, 2025.

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NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

23-P-985

JOAO DEPINA

vs.

WORCESTER COUNTY DISTRICT ATTORNEY'S OFFICE & others.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In 2021, Suffolk County District Attorney Rachael Rollins caused a criminal complaint to be filed against the plaintiff, Joao DePina, alleging intimidation after he heckled Rollins during a televised press conference.<sup>2</sup> At the time, DePina was

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<sup>1</sup> Joseph D. Early, Jr.; Anthony Melia; Dante Williams, in their personal and official capacities; Rachael Rollins, in her personal capacity; and the Boston Police Department.

<sup>2</sup> During the press conference, DePina interrupted Rollins repeatedly, loudly questioning her on policies related to gun violence, her nomination as the United States Attorney for the District of Massachusetts, and her lack of response to his brother's fatal shooting. He also "criticize[d] Rollins for abusing her power as a public official." DePina shouted to Rollins that she was "emotionally disturbed" and made derogatory comments about her boyfriend. He referred to one of his pending criminal cases involving alleged harassment of a State representative using a State-issued cell phone.



both a "community activist" and a defendant in three pending criminal cases being prosecuted by the Suffolk County district attorney's office. DePina video-recorded events beginning before and extending after the press conference, then uploaded the recording to his Facebook Live page. Boston Police Detective Dante Williams, who was present at the press conference, filed a police report detailing DePina's behavior at the press conference. Williams's police report was appended to an application for a criminal complaint filed in the Boston Municipal Court (BMC).<sup>3</sup> A magistrate found probable cause to issue the complaint against DePina for intimidation pursuant to G. L. c. 268, § 13B. The Suffolk County district attorney's office recused itself, and the Worcester County district attorney's office took over prosecution of the case. In 2022, a BMC judge dismissed the intimidation complaint for lack of probable cause. DePina then commenced this action in the Superior Court alleging malicious prosecution, malicious abuse of process, retaliation for free speech, intentional infliction of emotional distress, and negligent infliction of emotional distress against Rollins, the Worcester County district

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<sup>3</sup> Williams was not the complainant; the complainant was Bienvenido Delacruz, presumably another Boston police officer. We note that Williams's name does appear as the complainant in one portion of the application for criminal complaint, but the signature on both the application and the complaint, as well as the printed name of the complainant is "Bienvenido Delacruz."

attorney's office, Worcester County District Attorney Joseph Early, Jr., Assistant District Attorney Anthony Melia, the Boston Police Department, and Detective Williams. A judge allowed the defendants' motions to dismiss each of these claims based on absolute and qualified immunity. DePina appeals only the dismissals of his claims against Rollins and Williams.<sup>4</sup> We affirm.

Discussion. 1. Standard of review. "We review the allowance of a motion to dismiss de novo, accepting as true all well-pleaded facts alleged in the complaint" (citation omitted). Osborne-Trussell v. Children's Hosp. Corp., 488 Mass. 248, 253 (2021). To survive a motion to dismiss, the plaintiff must present, at the pleading stage, "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." United Oil Heat, Inc. v. M.J. Meehan Excavating, Inc., 95 Mass. App. Ct. 579, 581 (2019), quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

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<sup>4</sup> During oral argument, DePina conceded that District Attorney Early, Assistant District Attorney Melia, and the Worcester County district attorney's office acted solely within the bounds of their official duties as prosecutors, and thus were entitled to absolute prosecutorial immunity.

2. Rollins's absolute prosecutorial immunity.<sup>5</sup> The doctrine of absolute prosecutorial immunity protects prosecutors from "private suits for what they do in the discharge of their official duties" (citation omitted). Chicopee Lions Club v. District Attorney for the Hampden Dist., 396 Mass. 244, 251 (1985). Prosecutors "are entitled to the protection the law gives them, not because of concern for their personal immunity, but because such immunity tends to insure zealous and fearless administration of the law" (citation omitted). Id. "[T]he touchstone for absolute immunity for prosecutorial functions is conduct that is 'intimately associated with the judicial phase of the criminal process.'" C.M. v. Commissioner of the Dep't of Children & Families, 487 Mass. 639, 648 (2021), quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

DePina contends that Rollins abused her power "to target [DePina] for prosecution." His complaint alleged that "Rollins caused a criminal complaint to be filed." It also alleged that Detective Williams filed his report, which was the basis for the criminal complaint, at Rollins's "behest."

DePina argues that Rollins was not entitled to absolute immunity because she was "merely a complaining witness." See

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<sup>5</sup> Although the plaintiff argues that absolute prosecutorial immunity should be abolished, he acknowledges that this court lacks the authority to do so. See Commonwealth v. Dube, 59 Mass. App. Ct. 476, 485-486 (2003).

C.M., 487 Mass. at 647-648 (prosecutor not entitled to absolute immunity when acting as witness by attesting to facts in support of warrant). However, this assertion is untenable given the allegations of DePina's own complaint. Moreover, it is belied by DePina's argument on appeal that Rollins abused her power to target DePina for prosecution.

In DePina's complaint, he alleged that "Rollins caused a criminal complaint to be filed." He also alleged that Detective Williams filed his report, which was the basis for the criminal complaint, at Rollins's "behest." A private citizen does not have the legal authority to "cause" a criminal complaint to be filed or to command a police officer to file a report to initiate a prosecution. See Matter of Chapman, 482 Mass. 1012, 1014 (2019) (private individuals have no standing to demand prosecution where Commonwealth alone has prerogative and responsibility to prosecute criminal offenses); Commonwealth v. Orbin O., 478 Mass. 759, 765-766 (2018) (private citizen lacks judicially cognizable interest in prosecution).

To the extent DePina contends that Rollins's "personal influence" was a separate power distinct from her authority as a prosecutor in this case, we disagree. Only a prosecutor, in exercising her discretion, can decide which criminal complaints will be filed. See Commonwealth v. Johnson, 75 Mass. App. Ct. 903, 906 (2009) (Commonwealth retains authority to make

determination regarding charging decisions). Because we conclude that Rollins's ability to "cause" the criminal complaint to be filed was inextricable from her authority as Suffolk County's chief prosecutor, we agree with the motion judge that Rollins's conduct was a prosecutorial advocacy function necessarily implicating her "exercise [of] independent judgment" in deciding "which suits to bring and in conducting them in court" (citation omitted). Kalina v. Fletcher, 522 U.S. 118, 125 (1997). Initiating DePina's prosecution and directing police to take steps necessary to prosecute him for his conduct at the press conference were actions "sufficiently related to the prosecutorial function to warrant absolute protection." Chicopee Lions Club, 396 Mass. at 252. Thus, Rollins was entitled to absolute prosecutorial immunity and the claims against her were properly dismissed.

3. Williams's qualified immunity. "[Police] officers performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (quotation and citation omitted). Gallagher v. South Shore Hosp., Inc., 101 Mass. App. Ct. 807, 828 (2022). Analysis of the qualified immunity defense requires a two-part inquiry into whether,

"[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional right, and, if so, whether the right was clearly established so that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted" (quotations and citation omitted).

Longval v. Commissioner of Correction, 448 Mass. 412, 419 (2007).

According to DePina's complaint, Detective Williams violated his constitutional rights by knowingly filing a false police report in response to DePina's exercise of free speech at the press conference. DePina also alleged that Williams conspired with Rollins to "create" the police report that led to DePina's criminal prosecution for Rollins's benefit. The complaint further alleged that Williams initiated<sup>6</sup> a criminal complaint against DePina for intimidation that no reasonable police officer "could have believed . . . was valid and was anything other than a retaliatory act against DePina for his [protected] speech [against Rollins]."<sup>7</sup>

DePina does not identify, in his complaint or on appeal, any particular statements in Detective Williams's police report

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<sup>6</sup> Again, we note that Williams was not the complainant.

<sup>7</sup> As relevant here, intimidation is established by probable cause of (1) willful (2) direct or indirect (3) threats, intimidation or harassment (4) of an attorney (Rollins) (5) with the intent to or with reckless disregard for the fact that it may (6) impede, obstruct, delay, prevent or otherwise interfere with a criminal proceeding. G. L. c. 268, § 13B.

that were false. Williams stated in his report that he witnessed DePina from about ten feet away making loud, heckling, personally offensive statements to Rollins during her press conference. The report also stated that Rollins was aware at the time that DePina had three pending criminal cases being prosecuted by the Suffolk County district attorney's office. It described DePina as making "indirect" references to those cases during his "verbal offensive," and stated that DePina appeared to intend to "effect or interfere" with his pending cases. The report noted that one of those cases was scheduled to be heard in court less than a week after the press conference. Finally, Williams's narrative cited DePina's "multiple" unsuccessful prior attempts to contact Rollins to discuss his pending cases and a "similar incident" a few months prior, from which "this incident appear[ed] to be an escalation."

William's descriptions of the scene, as well as the tone, volume, tenor, and content of DePina's statements were corroborated by DePina's Facebook Live video recording. See Rosenberg v. JPMorgan Chase & Co., 487 Mass. 403, 408 (2021) (any extrinsic documents attached or incorporated by reference to complaint may be considered in motion to dismiss). DePina also referred to his pending Suffolk County cases in the Facebook Live video, and his complaint implicitly acknowledged that he was being prosecuted by Rollins's office on more than

one case at the time of the press conference.<sup>8</sup> Williams's statement of his own impression of DePina's apparent intent when he referred to his pending criminal cases cannot be said to be false. Finally, DePina's complaint did not dispute that he attempted to contact Rollins privately about his cases and had appeared at an earlier press conference. In short, there were no "well-pleaded" allegations of a false police report by Williams. See Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534, 538 (2022) ("[w]e do not regard as 'true' legal conclusions cast in the form of factual allegations" [citation omitted]). Thus, even in the light most favorable to DePina, the facts alleged in his complaint do not show that Williams violated a constitutional right. See Longval, 448 Mass. at 419.

Moreover, we disagree with DePina that no reasonable police officer could have believed that criminally charging DePina based on his behavior at the press conference was anything other than retaliation for his exercise of free speech.

"Because probable cause, by its nature, turn[s] on the assessment of probabilities in particular factual contexts and cannot be reduced to a neat set of legal rules, qualified immunity will protect an officer in the absence of an identified body of relevant case law that clearly establishes the answer with respect to probable cause" (quotation and citation omitted).

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<sup>8</sup> We take Williams's statement that he "secured a copy of the recording" to mean that he reviewed the video before writing his report.



Ortiz v. Morris, 97 Mass. App. Ct. 358, 363 (2020). Here, no such identified body of case law exists.<sup>9</sup> Furthermore, taken together, the facts outlined in Detective Williams's police report, supplemented by the Facebook Live video, supported at least arguable probable cause to charge DePina with intimidation. See Hrycenko v. Commonwealth, 459 Mass. 503, 511 (2011) ("Words do not need to be expressly intimidating, threatening, or harassing" to constitute intimidation); see also Commonwealth v. McCreary, 45 Mass. App. Ct. 797, 799 (1998) (purpose of witness intimidation statute is to prevent interference with administration of justice). Based on the circumstances known to Detective Williams at the time he wrote his report, it would not have been clear to a reasonable police officer that it was unlawful to follow the district attorney's order to write a report that initiated the process to prosecute DePina for intimidation. We thus conclude that Detective Williams was protected by qualified immunity for his role in the process that resulted in the criminal complaint for intimidation against DePina. The claims against Detective Williams were properly dismissed. See Longval, 448 Mass. at 418 n.10

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<sup>9</sup> The only authority cited by DePina is a United States Court of Appeals for the Third Circuit case that, unlike the present case, turned on witness credibility. See Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 909 (3d Cir. 1984).

(qualified immunity may be decided on motion to dismiss where applicability clear from allegations in complaint).

Judgment affirmed.

By the Court (Rubin, Hand &  
Brennan, JJ.<sup>10</sup>),

A handwritten signature in blue ink, appearing to read "Paul Little".

Clerk

Entered: January 31, 2025.

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<sup>10</sup> The panelists are listed in order of seniority.