February 6, 2023

VIA ELECTRONIC FILING AND FIRST CLASS MAIL

Bristol Superior Court
Civil Clerk's Office
186 South Main Street
Fall River, MA 02721

Re: *Joao Depina v. Worcester County District Attorney's Office et al.*
Worcester Civil Action No. 2285CV00971A

Dear Sir or Madam:

Enclosed for filing with regard to the above-captioned matter are the following documents:

1. ***Dante Williams and City of Boston's Motion to Dismiss Plaintiff's Complaint and Supporting Memorandum of Law.***
2. ***Plaintiff's Opposition to Dante Williams and City of Boston's Motion to Dismiss Plaintiff's Complaint.***
3. ***Dante Williams and City of Boston's Reply Memorandum.***
4. ***Documents List Pursuant to Rule 9A.***
5. ***Certificate of Notice of Filing Pursuant to Rule 9A.***

Please note that the electronic filing does not include Exhibit 2 of the City Defendants' Motion to Dismiss, which is a large video file. Exhibit 2 will be included in the hard copy of the 9A package sent to the court by first class mail. Thank you for your attention in this matter.

Sincerely,

Randall F. Maas
Assistant Corporation Counsel
(617) 635-4042

Enclosures
cc: Thomas Bocian, Jessee Boodoo, Hannah Vail
Marc Randazza, Jay M. Wolman, Robert J. Morris, II, Josh Dixon (via e-mail)

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT
DOCKET NO. 2285CV0971A

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 RACHEL ROLLINS, in her personal capacity,
Defendants.

DANTE WILLIAMS AND CITY OF BOSTON'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND SUPPORTING MEMORANDUM OF LAW

Now come Defendants Detective Dante Williams and City of Boston ("City")[1] (collectively, the "City Defendants") and hereby respectfully move this Honorable Court pursuant to Mass. R. Civ. P. 12(b)(6) to dismiss the claims of Plaintiff Joao Depina ("Plaintiff") against them. This case arises from a November 9, 2021, incident in which Plaintiff heckled and interrupted Suffolk District Attorney Rachael Rollins while she was addressing the media following a shooting. The gravamen of Plaintiff's claims against the City Defendants are that

[1] The City of Boston is properly a defendant because the Boston Police Department is a department of the City and not an independent legal entity capable of being sued. See Stratton v. City of Boston, 731 F. Supp. 42, 46 (D. Mass. 1989) ("[T]he Police Department is not an independent legal entity. It is a department of the City of Boston.").

Detective Williams made false statements in a police report concerning the substance of Plaintiff's comments during the press conference, and that he filed a criminal charge against Plaintiff for witness intimidation that was unsupported by probable cause.[2] However, a careful comparison of Detective Williams's police report with a video recording posted by Plaintiff on Facebook reveals that the police report contains no false statements, and that the witness intimidation charge was supported by probable cause. Moreover, Plaintiff has not cited sufficient facts to overcome Detective Williams's invocation of qualified immunity. Finally, sovereign immunity and the Massachusetts Tort Claims Act bar Plaintiff's claims against the City and against Detective Williams in his official capacity.

FACTUAL BACKGROUND

The Complaint makes the following allegations with respect to Detective Williams and the City.[3] On Tuesday, November 9, 2021, there was a shooting in Dorchester, Massachusetts. Complaint, ¶ 12. That evening, then-Suffolk County District Attorney Rachael Rollins held a televised press conference regarding the shooting. Id. at ¶ 13. According to the Complaint, Plaintiff 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." Id. at ¶ 14. The Complaint alleges that Plaintiff 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." Id. at ¶ 16.

[2] Strictly speaking, the Complaint only alleges that "[District Attorney] Rollins caused a criminal complaint to be filed" against Plaintiff, while Detective Williams conspired with her to violate Plaintiffs civil rights by filing the false police report. See Complaint, at ¶¶ 17, 21.
[3] For the limited purposes of the instant motion, the Defendants accept the facts cited in the Plaintiff's motion as true.

The Complaint alleges that three days after the November 9, 2021, press conference, to retaliate for Plaintiff's public criticism, District Attorney Rollins caused a criminal complaint to be filed against Plaintiff accusing him of Attorney Intimidation in violation of G.L. c. 268, §13B. Id. at ¶ 17. The criminal complaint stated that Plaintiff 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 Plaintiff. Id. According to the Complaint, Detective Williams, who is an employee of the Boston Police Department, was present at the press conference and was able to observe all the events, yet he "filed a knowingly false police report" at the behest of District Attorney Rollins, for her benefit. Id. at ¶¶ 7, 18–19. The Complaint alleges that Detective Williams and District Attorney Rollins conspired to violate Plaintiff's civil rights and civil liberties by jointly creating the knowingly false narrative in the police report. Id. at ¶ 21. Plaintiff denies that he engaged in unlawful intimidation within the meaning of G.L. c. 268, § 13B. Id. at ¶ 24. As support for this position, he cites a video recording of the incident that Detective Williams claimed to have reviewed. Id. at ¶ 47.

On May 25, 2022, Justice Carol-Ann Fraser allowed the Plaintiff's motion to dismiss the criminal charge. Id. at ¶ 45. Justice Fraser issued the following ruling:

> After hearing, the motion is ALLOWED. The defendant was charged with witness intimidation, in violation of G.L. c. 268, § 13B. According to a report of Boston Police, the defendant made statement 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.

Id. at ¶ 46.

APPLICABLE STANDARD OF LAW

In testing claims against a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), "a complaint is sufficient unless it shows beyond doubt that there is no set of facts which the plaintiff could prove in support of his claim which would entitle him to relief." White v. Spence, 5 Mass. App. Ct. 679, 683 (1977), quoting Howard v. G. H. Dunn Ins. Agency, Inc., 4 Mass. App. Ct. 868 (1976). "[T]he allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true." Nader v. Citron, 372 Mass. 96, 98 (1977). At the same time, a plaintiff is not entitled "to rest on subjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts." See Schaer v. Brandeis Univ., 432 Mass. 474, 478 (2000). A court should "not accept legal conclusions cast in the form of factual allegations." Id. at 477. "What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief . . . ." Iannanchino v. Ford Motor. Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).

ARGUMENT

I. The Claims Against Detective Williams In His Individual Capacity Are Non-Actionable and Barred by Qualified Immunity.

A. The Police Report Did Not Contain False Statements and the Witness Intimidation Charge Was Supported by Probable Cause.

Plaintiff contends that Detective Williams filed a "knowingly false police report" at the behest of District Attorney Rollins, for her benefit. Complaint, at ¶¶ 18-19. Plaintiff argues that the supposed fact that he was not engaging in witness intimidation or "anything that could possible be construed as intimidation of someone connected to a pending criminal proceeding" was "all clear from the video that Williams and Worcester DA Defendants claim to have

reviewed." Id. at ¶ 47. Plaintiff also cites Justice Fraser's decision allowing the motion to dismiss the criminal complaint, which states that she had reviewed the recording of the press conference and determined that it contains no "references, direct or indirect, to the defendant's pending criminal cases." Id. at ¶ 46.

In support of their motions to dismiss, the City Defendants have attached both the police report written by Detective Williams and the video posted on Plaintiff's Facebook page as Exhibits 1 and 2 to this motion. While courts do not normally consider documents that were not attached to the complaint or expressly incorporated therein when reviewing a motion to dismiss, narrow exceptions have been made for "documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiff's claim; or for documents sufficiently referred to in the complaint." Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993); see also Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n.4 (2004) ("Where, as here, the plaintiff had notice of these documents and relied on them in framing the complaint, the attachment of such documents to a motion to dismiss does not convert the motion to one for summary judgment . . . ."). Such documents can include video or audio recordings whose authenticity is not in dispute. See Barrigas v. United States, No. 17-10232, 2018 WL 1244780, at *1 (D. Mass. Mar. 9, 2018) (because content of audio recording was central to dispute and referenced throughout complaint, court considered recording and transcripts in reviewing whether plaintiff plausibly stated claims). In this case, both the police report and the video are referred to in the Complaint and, indeed, are central to Plaintiff's claims against the City defendants.

A thorough examination and comparison of the police report and video reveals that the two are consistent, and that the police report does not contain false statements. In his police

report, Detective Williams wrote that on the evening of November 9, 2021, District Attorney Rollins made a statement to members of the press concerning a shooting incident that had occurred earlier in the day. Exhibit 1. He wrote further:

> As the DA began making her statement an individual -- known to her as having 3 separate criminal cases . . . pending prosecution by the Suffolk County District Attorneys Office, which she leads -- began to loudly heckel her, while making multiple offensive comments of a personal nature directly to her (invoking her name several times while doing so), which appeared as an intent to effect or interfere with these pending Suffolk County cases (he made several indirect references to these cases during his verbal offensive). One of the cases has a pretrial court date coming-up on 11/16/21 . . . .
>
> Detectives Dante Williams and Jeffrey Cecil, witnessed this incident, while in close proximity (within 10 ft.) to either the victim or the suspect. The suspect recorded the incident and uploaded it to his Facebook page. Det. Williams secured a copy of this recording.
>
> The suspect, Joao G. Depina . . . has made multiple attempts to contact the DA, Ms. Rollins directly to talk about these pending cases, to no avail. This incident appears to be an escalation from a prior similar incident on 8/2/21, during the Caribbean Festival.
>
> The suspect's behavior, immediately ceased as Ms. Rollins stepped away from the press, as other public officials were approaching.

Exhibit 1. In contending that Detective Williams made "knowingly false statements" in the police report, Complaint, at ¶ 18, Plaintiff is apparently referring to Detective Williams's claim that Plaintiff's heckling "appeared as an intent to effect or interfere with [his] pending Suffolk County cases (he made several indirect references to these cases during his verbal offensive)." Exhibit 1.

A close review of the entire two hour, forty minute video posted by Plaintiff on his Facebook page demonstrates that he made several direct and indirect references to one of his pending criminal cases, which, as Plaintiff discloses in the video, apparently involved an alleged

violation of an harassment prevention order filed by a state politician.[4] Most notably, just a few minutes before District Attorney Rollins addressed the media, and while Plaintiff was standing a matter of yards from her,[5] Plaintiff made the following statement about the criminal case:

> [The DA's Office] waste their money and taxpayer's money to get people's IEP [sic] addresses and Instagram pages and Facebook pages to protect one of their own representatives that was doing bad things while on the job. That's not our fault. It's not our fault that her story came out. It's not my fault that it came out; I just told a story. And I'm being prosecuted, by this woman right here, OK? For holding a woman accountable – an elected official – for misuse of a state-issued cellphone.

Exhibit 2, at 1:47:42 (emphasis added).

This was not the only instance in which Plaintiff referred to his criminal case in the video. At the beginning of the video, while driving alone in his car, Plaintiff refers to subpoenas and a criminal case in a direct address to District Attorney Rollins:

> Rachael, are you on the scene, Rachael? Rachael, this is what you should be focused on. If you stop focusing, wasting your time, trying to bring people into court for petty s*** that you said you wasn't going to do, Rachael, then you would be busy catching people with the guns. Yeah, Rachael Rollins, I'm talking to you, you punk a**. Half-a** DA. You waste your money and waste taxpayers' dollars to get people's phone records and stuff when you could be actually doing some work and solving crimes that really matter.

[4] In allowing Plaintiff's motion to dismiss the criminal case, Justice Fraser appears to have focused her attention solely on the six-minute period during which District Attorney Rollins was addressing the media scrum. See Complaint, at ¶ 46. Justice Fraser was guided in this ruling by Plaintiff's criminal defense attorney, who directed the court's attention to that portion of the video in the motion to dismiss, and included a transcript of "the relevant portion of Mr. DePina's recording, starting from when Rollins begins to address the press." See Exhibit 2 of Plaintiff's Opposition to State Defendants' Motion to Dismiss, Dkt. No. 21.2. But provided there is no dispute about the authenticity of the remaining portions of the video recording, this Court is free to review the recording in its entirety, just as it would be free to review the entirety of a contract even where the parties focused their arguments on only one clause from the contract.

[5] The undersigned attorney represents that the shorter of the two men standing with District Attorney Rollins in this video excerpt, who at one point appears to look directly at Plaintiff, is Detective Williams.

Exhibit 2, at 20:37 (emphasis added). Later in the video, while waiting for the press conference to begin, Plaintiff discussed his criminal case as well the case of an apparent codefendant with an unidentified individual in the small crowd of journalists and residents gathering for the press conference:

> DEPINA: We're waiting for her. She is not a good DA.
>
> INTERLOCUTOR: You don't like her?
>
> DEPINA: I hate her right now. I used to be down with her. But right now, I'm having a problem. That whole thing with [the politician]?
>
> INTERLOCUTOR: Yeah, yeah, yeah, yeah.
>
> DEPINA: So she's protecting [the politician] and she's doing unethical things to protect [the politician].
>
> INTERLOCUTOR: Like a restraining order or whatever?
>
> DEPINA: But it's with me.
>
> INTERLOCUTOR: It's with you?
>
> DEPINA: Yes, it's with me and the girl, [codefendant]. She took me to court because I spoke about the issues on Facebook Live. And they gave me a harassment order for that. From there, now Rachael has requested this woman's IP address stuff, her Facebook. She's subpoenaing all that stuff to help [the politician].

Exhibit 2, at 1:04:38.

Following the press conference, Plaintiff again referenced his criminal case in a conversation with someone from the crowd:

> There's abuse of power when you try to lock up a black man for bull****. Because I stole the story on Facebook about a state representative, and she took me to court for harassment because I spoke about truth to power. And she's using Rachael to get back at me with the court system. And Rachael's abusing her power to do it. That's why.

Exhibit 2, at 2:04:06. A few minutes later, Plaintiff stated explicitly that his actions at the press conference were connected to his criminal case:

> My thing is, Rachael is abusing her power, because right now I'm having a problem with [the politician], which is a state rep. Because I talk about her on Facebook. If you go on YouTube, Turtleboy did the same exact story I did, but [the politician] and Rachael Rollins drive me to court. But me and the black woman - I actually have paperwork she just sent me. She's wasting all of her money asking for this woman's Instagram and stuff to talk about. And the mainstream media doesn't want to cover it, so this is why I did that to her.

Exhibit 2, at 2:07:24 (emphasis added).

The comments from the full video are significant not only in themselves, but also because they lend crucial context to Plaintiff's statements while he was interrupting District Attorney Rollins's address to the media, and make clear that Plaintiff was in fact indirectly referencing his criminal case at that time. For instance, at one point while he was interrupting District Attorney Rollins, Plaintiff claimed that she was neglecting murder investigations because she was "very tuned into, into locking black and brown men up for petty crimes, and that is what's going on." Exhibit 2, at 1:52:00. This statement is similar to Plaintiff's various comments throughout the evening that District Attorney Rollins was wasting public funds on the prosecution of his criminal case and the criminal case of a codefendant. Exhibit 2, at 20:37, 2:04:06, 2:07:24. Later, Plaintiff stated: "Let's talk about the state rep going to Michigan and using state funds. And let's talk about the state rep that [used] a state issued cell phone to talk derogatory to other women, to other black women like you, Rachael." Exhibit 2, at 1:54:36. This was a plain reference to the facts of his criminal prosecution and his interactions with a state politician. See Exhibit 2, at 2:04:06, 2:07:24.

Against this factual backdrop, Detective Williams had probable cause to believe that Plaintiff committed witness intimidation pursuant to G.L. c. 268, § 13B. Given that Plaintiff

made multiple references to his pending criminal cases both in the video, which Detective Williams stated that he had "secured" (Exhibit 1"), and in Detective Williams's physical presence, Detective Williams had probable cause to believe that Plaintiff's actions were taken "with the intent to or with reckless disregard for the fact that it may . . . impede, obstruct, delay, prevent or otherwise interfere with" a criminal prosecution. G.L. c. 268, § 13B. Moreover, Detective Williams properly reasoned that Plaintiff's actions over the course of the evening constituted harassment, which is defined in the witness intimidation statute as "engag[ing] in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress." Id. See also Commonwealth v. McCreary, 45 Mass. App. Ct. 797, 799 (1998) ("Intimidation is putting a person in fear for the purpose of influencing his or her conduct."). In addition to Plaintiff's statements on the night of the press conference, the police report indicates that there had been a similar incident involving Plaintiff and District Attorney Rollins a few months earlier, and that Plaintiff had made "multiple attempts to contact the DA, Ms. Rollins directly to talk about [his] pending cases." See Exhibit 1. Detective Williams thus had ample basis for charging Plaintiff with witness intimidation. See Commonwealth v. Carvalho, 88 Mass. App. Ct. 840, 846 (2016) (sustaining witness intimidation conviction against landlord who approached tenant after tenant obtained harassment prevention order and told her to "drop the no contact order sometime" while staring at her); Commonwealth v. Rivera, 76 Mass. App. Ct. 530, 531 (2010) (sustaining witness intimidation conviction where defendant yelled at victim, who was about to be questioned by police, "we were just joking around right?").

B. The Complaint Fails to Allege Claims Against Detective Williams for Violations of the Massachusetts Civil Rights Act, Intentional Infliction of Emotional Distress, or Negligent Infliction of Emotional Distress.

Plaintiff's claims against Detective Williams are deficient in a number of ways. Counts 1 through 3 of Plaintiff's complaint allege three separate violations of the Massachusetts Civil Rights Act ("MCRA"), G.L. c. 12, § 11I: malicious prosecution, malicious abuse of process, and retaliation. However, no Massachusetts case has recognized a claim under the MCRA for malicious abuse of process. It is also unclear how the retaliation claim differs from claims of malicious prosecution and abuse of process.

Moreover, Plaintiff's Complaint does not even satisfy the elements of a malicious prosecution claim. "To establish a claim under . . . G.L. c. 12, § 11I, [the plaintiff] must prove that (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by 'threats, intimidation or coercion.'" Bally v. Northeastern Univ., 403 Mass. 713, 717 (1987). The Complaint does not explain how the mere act of filing a police report and taking out criminal charges constitutes "threats, intimidation, or coercion" within the meaning of the Massachusetts Civil Rights Act. See Sena v. Commonwealth, 417 Mass. 250, 263 (1994) (officers' statement that they would have warrants the next time the plaintiffs saw them merely threatened plaintiffs' arrest through lawful means, which by itself, is not actionable under G.L. c. 12,§ 11I); Walsh v. Town of Lakeville, 431 F. Supp. 2d 134, 150 (D. Mass. 2006) ("It is unclear how [the filing of a criminal complaint] amounts to threats, intimidation or coercion as defined by Massachusetts case law .. . . [E]nforcement of the law does not constitute threats, intimidation or coercion.").

In this case, Detective Williams sought criminal charges against Plaintiff for an apparent violation of the witness intimidation statute, and a complaint issued against Plaintiff only after a clerk-magistrate agreed with Detective Williams that there was probable cause to charge Plaintiff. See Exhibit 3 (Criminal Complaint and Application). Detective Williams's actions do not amount to a "pattern of harassment and intimidation," the requirement for MCRA claims "based on non-physical coercion." See Thomas v. Harrington, 909 F.3d 483, 492 (1st Cir. 2018), quoting Howcroft v. City of Peabody, 51 Mass. App. Ct. 573 (2001). It also bears emphasizing that the probable cause determination was supported by video evidence showing that Plaintiff made references to his pending criminal cases in the course of heckling District Attorney Rollins, and by Detective Williams's assertions that the November 9, 2021, incident was an escalation from a previous encounter between Plaintiff and District Attorney Rollins, and that Plaintiff had attempted to contact District Attorney Rollins to discuss his pending cases. See Section I.A, supra, at pp. 4-10.

The Complaint also fails to state a claim for Intentional Infliction of Emotional Distress against Detective Williams. To make out a claim for intentional infliction of emotional distress, Plaintiff would have to allege sufficient facts to demonstrate that "(1) [Detective Williams] intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of [the] conduct, . . . (2) that the conduct was 'extreme and outrageous,' was 'beyond all possible bounds of decency' and was 'utterly intolerable in a civilized community,' . . . (3) that the actions of [Detective Williams] were the cause of the plaintiff's distress, . . . and (4) that the emotional distress sustained by the plaintiff was 'severe' and of a nature 'that no reasonable [person] could be expected to endure.'" Agis v. Howard Johnson Co., 371 Mass. 140, 144–145 (1976). "The standard for making a claim of intentional

infliction of emotional distress is very high . . . . [It is not] enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." Polay v. McMahon, 468 Mass. 379, 385 (2014) (internal citations omitted).

Here, the Complaint alleges that Detective Williams collaborated with District Attorney Rollins to file a "knowingly false police report" for her benefit. Complaint, at ¶¶ 7, 18–19, 21. But such allegations, even if accepted as true, simply do not rise to the level of intentional infliction of emotional distress. See Padmanabham v. City of Cambridge, 99 Mass. App. Ct. 332, 341, rev. den'd 487 Mass. 1106 (2021) (while allegations of 'making false allegations of wrongdoing' and 'perverse[ly] us[ing] the litigation process' "may give rise to liability under other theories, the allegations of the complaint fail to establish that it was 'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'"). What's more, considering that the police report filed by Detective Williams accurately stated that Plaintiff made references to his pending criminal cases, and thus the charge of witness intimidation against Plaintiff was supported by probable cause, the IIED claim against Detective Williams is all the more deficient. Count 4 against Detective Williams must be dismissed.

Finally, Detective Williams is immune from liability for Negligent Infliction of Emotional Distress Under the Massachusetts Tort Claims Act, G.L. c. 258, § 2, which provides that "no . . . public employee . . . shall be liable for any injury or loss of . . . caused by his negligent or wrongful act or omission while acting within the scope of his office or employment . . . ." See also Berry v. Commerce Insurance Company, 488 Mass. 633, 636 (2021). Because

Detective Williams is a public employee and the Complaint does not suggest that he was not acting in the scope of his employment, Count 5 against him must be dismissed in both his official and individual capacities. See Canales v. Gatzunis, 979 F. Supp. 2d 164, 176 (D. Mass. 2013).

C. Detective Williams Is Entitled to Qualified Immunity.

Even if Plaintiff successfully alleged violations of the Massachusetts Civil Rights Act (which, to be clear, he has not), Detective Williams is still entitled to qualified immunity for Plaintiff's claims given that, against the backdrop of the entire investigation, it was at least reasonable for him to believe that there was probable cause to charge Plaintiff with witness intimidation. A police officer is entitled to qualified immunity "so long as the presence of probable cause is at least arguable." Ricci v. Urso, 974 F.2d 5, 7 (1st Cir. 1992). See also Hunter v. Bryant, 502 U.S. 224, 227 (1991) ("law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity") (citations omitted); Duarte v. Healy, 405 Mass. 43, 46 (1989) (applying the federal qualified immunity standard to claims under Massachusetts Civil Rights Act). "Because probable cause, by its nature, turns 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." Ortiz v. Morris, 97 Mass. App. Ct. 358, 363 (2020). "Massachusetts decisions are uniform in holding that, once immunity has been invoked, the burden of overcoming the immunity rests exclusively with the plaintiff." See Maxwell v. AIG Domestic Claims, Inc., 460 Mass. 91, 104 (2011).

Here, Plaintiff cannot meet his burden of overcoming Detective Williams's invocation of qualified immunity. Detective Williams was physically present at District Attorney Rollins's appearance before the media in which Plaintiff heckled her and made references to his criminal

case. Over the two hours and forty minutes of the video recording that he posted on his Facebook page, Plaintiff made further references to his criminal case and the criminal case of a codefendant. In that video, Plaintiff also admitted that he heckled District Attorney Rollins at the press conference because of his criminal prosecution. Additionally, Detective Williams wrote in the police report that the November 9, 2021, incident was an escalation from an incident that had occurred a few months earlier, and that Plaintiff had made multiple attempts to contact District Attorney Rollins to discuss his pending criminal cases. Plaintiff can point to no body of law clearly establishing that probable cause was lacking in the circumstances described in Detective Williams's police report and seen in the video posted on Plaintiff's Facebook page. Accordingly, Detective Williams is entitled to qualified immunity for the claims under the Massachusetts Civil Rights Act.

II. The Claims Against the City and Detective Williams in His Official Capacity Are Barred by Sovereign Immunity.

The Complaint fails to state a claim against the City for violation of G.L. c. 12, § 11I, the Massachusetts Civil Rights Act. That statute provides for a cause of action against "any person or persons" who "by threats, intimidation, or coercion" interferes "with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the Commonwealth." G.L. c. 12, §§ 11H and 11I. It is well-established that municipalities are immune from suit under G.L. c. 12, § 11I, because they are not "persons" as that term is defined in the act. See Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 592–593 (2001) ("[T]here is no indication in the MCRA that the word 'person' includes either the Commonwealth or any of its political subdivisions."); LeBeau v. Town of Spencer, 167 F. Supp. 2d 449, 455 (D. Mass. 2001) ("A municipality is not a 'person' within the meaning of the MCRA."). See also Commonwealth v. ELM Medical

Laboratories, Inc., 33 Mass. App. Ct. 71, 77 (1992) ("[T]here is no reason to believe that the Legislature intended, by the enactment of G.L. c. 12, §§ 11H and 11I, to waive sovereign immunity"). In addition, the claims against Detective Williams in his official capacity amount to claims against the City and are accordingly barred by the doctrine of sovereign immunity as well. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . . As such, it is no different from a suit against the State itself.") (citations omitted). Accordingly, Counts 1 through 3 against the City and against Detective Williams in his official capacity must be dismissed.

Plaintiff's claims of Intentional Infliction of Emotional Distress (IIED) and Negligent Infliction of Emotional Distress against the City also fail. With respect to the former, G.L. c. 258, § 10(c), expressly immunizes municipalities from "any claim arising out of an intentional tort, including assault . . . intentional mental distress." See also Saltzman v. Town of Hanson, 935 F. Supp. 2d 328, 347 (D. Mass 2013) (municipality cannot be sued for intentional torts such as intentional infliction of emotional distress). Moreover, the same statutory provision immunizes Detective Williams from intentional torts such as IIED in his official capacity . See Saxonis v. City of Lynn, 62 Mass. App. Ct. 916, 918 (2004).

Regarding Count 5, the Complaint makes clear that the factual basis for the negligence claim is the same as the IIED claim. It asserts that a police officer "should not pursue charges against a citizen where it is obvious that there was no probable cause and that [Plaintiff] was lawfully exercising his constitutionally protected rights . . . ." See Complaint, at ¶ 86. Count 5 evidently refashions intentional conduct as failure to exercise due care for a negligence claim. This is impermissible. See Hathaway v. Stone, 687 F. Supp. 708, 711 (D. Mass. 1988), citing

Ortiz v. Cnty of Hampden, 16 Mass. App. Ct. 138 (1983) (negligence claim should not '"arise out of" intentional torts, "but rest[] on an independent negligent act by the City"). Moreover, the Complaint does not allege proper presentment pursuant to G.L. c. 258, § 4, and indeed, the City received no presentment prior to being served with the lawsuit. "Proper presentment is accordingly a condition precedent to bringing suit under the act, and failure to do so is fatal to the plaintiff's complaint." Drake v. Leicester, 484 Mass. 198, 199 (2020). Counts 4 and 5 against the City must be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Defendants Dante Williams and City of Boston respectfully request that this Honorable Court dismiss all of Plaintiff's claims against them.

Date: January 17, 2023

Respectfully submitted,

DEFENDANTS DANTE WILLIAMS AND CITY OF BOSTON,

By their attorneys:

Adam Cederbaum
Corporation Counsel

/s/ Randall Maas
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Certificate of Service

I, Randall Maas, hereby certify that on January 17, 2023, a true copy of the above document was served upon plaintiff's counsel by e-mail and first class mail.

/s/ Randall Maas

Randall Maas

Superior Court Rule 9C Certification

I hereby certify that on January 13, 2023, I conferred with Plaintiff's counsel in a good-faith effort to narrow the issues in dispute in the present motion.

January 17, 2023 — */s/ Randall Maas*

Date — Randall Maas

Exhibit 1

I# 212082441 - Offense/Incident Report

REPORTED ON DATE / TIME	DISTRICT / SECTOR / REPORTING AREA / SUBDIVISION 4 / SUBDIVISION 5	OCCURRED FROM DATE / TIME - OCCURRED TO DATE / TIME
Nov 10, 2021 15:35	A1 / A422	Nov 9, 2021 18:10

REPORTING OFFICER

DANTE WILLIAMS #011474

REPORT TAKEN LOCATION

1 BULFINCH PL, BOSTON, MA 02114

EVENT STATISTICS

- ☐ Gun
- ☐ Sexual Assault
- ☐ Child Present
- ☐ CRU - Hate/Bias
- ■ Other Agency/Unit Notified
- ☐ DVIP
- ☐ Warrant Arrest
- ☐ Juvenile
- ☐ Gang
- ☐ Homeland Security
- ☐ Sex Offender
- ☐ Homeland Security UASI
- ☐ Home Invasion
- ☐ Human Trafficking
- ☐ Auto Investigator
- ☐ Section 12/35
- ☐ Drugs
- ☐ NIDV
- ☐ Homeless
- ☐ Car Jack
- ☐ Bicycle
- ☐ Licensed Premise
- ☐ School
- ☐ Disabled
- ☐ Search Warrant
- ☐ Shots Fired
- ☐ Elderly
- ☐ Victim Shot
- ☐ Victim Stabbed
- ☐ Child Abuse
- ☐ Body Worn Camera

NARRATIVE

On Tuesday, 11/09/21, at around 6:10 P.M., while holding a press conference at Ferndale St and Norfolk St., relative to a shooting incident that occurred hours earlier, the Suffolk County District Attorney, Rachel Rollins was attempting to make a statement to members of the press. The area had been cordoned-off for members of the press to assemble, and the DA was within that area.

As the DA began making her statement an individual -- known to her as having 3 separate criminal cases (BMC-Dorchester Div. Docket numbers 2107CR002559A, 2007CR002818A {3 counts}, and 1807CR003369A) pending prosecution by the Suffolk County District Attorneys Office, which she leads -- began to loudly heckel her, while making multiple offensive comments of a personal nature directly to her (invoking her name several times while doing so), which appeared as an intent to effect or interfere with these pending Suffolk County cases (he made several indirect references to these cases during his verbal offensive). One of the cases has a pretrial court date coming-up on 11/16/21 (Docket #1807CR003396A).

REPORTING OFFICER SIGNATURE / DATE	SUPERVISOR SIGNATURE / DATE
DANTE WILLIAMS #011474 Nov 10, 2021 16:54 (e-signature)	DANIEL ADAMS #011575 Nov 10, 2021 16:59 (e-signature)
PRINT NAME	PRINT NAME
DANTE WILLIAMS #011474	DANIEL ADAMS #011575

Detectives Dante Williams and Jeffrey Cecil, witnessed this incident, while in close proximity (within 10 ft.) to either the victim or the suspect. The suspect recorded the incident and uploaded it to his Facebook page. Det. Williams secured a copy of this recording.

The suspect, Joao G. Depina, [redacted] has made multiple attempts to contact the DA, Ms. Rollins directly to talk about these pending cases, to no avail. This incident appears to be an escalation from a prior similar incident on 8/2 /21, during the Caribbean Festival.

The suspect's behavior, immediately ceased as Ms. Rollins stepped away from the press, as other public officials were approaching.

REPORTING PARTY -1

REPORTING PARTY -1 (ORGANIZATION)

R-1 Myself

OFFENSE-1

OFFENSE CODE

INTIMIDATING WITNESS

OCCURRED FROM DATE/TIME	OCCURRED TO DATE/TIME	OFFENSE COMPLETION	SUSPECTED HATE CRIME
Nov 9, 2021 18:10	Nov 9, 2021 18:15	■ COMPLETED ☐ ATTEMPTED	☐ YES ■ NO

DOMESTIC VIOLENCE	GANG INFORMATION
☐ YES ■ NO	None/Unknown

OFFENSE LOCATION

CITY	STATE	ZIP	COUNTRY CODE
DORCHESTER	MA	02124	US

INTERSECTION STREET 1	INTERSECTION STREET 2
FERNDALE ST	NORFOLK ST

LOCATION CATEGORY	DISTRICT / SECTOR / REPORTING AREA / SUBDIVISION 4 / SUBDIVISION 5	PUBLIC / PRIVATE
Highway/ Road/ Alley/ Street/ Sidewalk	B3 / C421 / 437	Public

VICTIMS-1

VICTIMS-1 NAME (LAST, FIRST MIDDLE)	DOB / ESTIMATED AGE RANGE
V-1 ROLLINS, RACHEL	45 - 50 years old

SEX	RACE / ETHNICITY
Female	Black

VICTIM IS OFFICER

☐ YES ■ NO

SUSPECTS-1

SUSPECTS-1 NAME (LAST, FIRST MIDDLE)	DOB / ESTIMATED AGE RANGE
S-1 DEPINA, JOAO GOMES	[redacted]

SEX	RACE / ETHNICITY
Male	Black / Not of Hispanic Origin

HOME ADDRESS

[redacted]

WITNESS-1

WITNESS-1 NAME (LAST, FIRST MIDDLE)	SEX	PHONE NUMBER
W-1 WILLIAMS, DET. DANTE	Male	[redacted] (primary, WORK)

WITNESS-2

REPORTING OFFICER SIGNATURE / DATE	SUPERVISOR SIGNATURE / DATE
DANTE WILLIAMS #011474 Nov 10, 2021 16:54 (e-signature)	DANIEL ADAMS #011575 Nov 10, 2021 16:59 (e-signature)
PRINT NAME	PRINT NAME
DANTE WILLIAMS #011474	DANIEL ADAMS #011575

WITNESS-2 NAME (LAST, FIRST MIDDLE)		DOB / ESTIMATED AGE RANGE
W-2 Cecil, Det. Jeffrey		41 - 56 years old
SEX	RACE / ETHNICITY	PHONE NUMBER
Male	White	[redacted] (primary, work)

HOME ADDRESS

1 SCHROEDER PLZ, ROXBURY, MA 02120

RELATIONSHIPS ADDENDUM

NAME	RELATIONSHIP	SUBJECT
RACHEL ROLLINS	ACQUAINTANCE OF	JOAO GOMES DEPINA

REPORTING OFFICER SIGNATURE / DATE	SUPERVISOR SIGNATURE / DATE
DANTE WILLIAMS #011474 Nov 10, 2021 16:54 (e-signature)	DANIEL ADAMS #011575 Nov 10, 2021 16:59 (e-signature)
PRINT NAME	PRINT NAME
DANTE WILLIAMS #011474	DANIEL ADAMS #011575

I# 212082441 - Supplemental - 1 Report

REPORTED ON DATE / TIME	OCCURRED FROM DATE / TIME - OCCURRED TO DATE / TIME	REPORTING OFFICER
Dec 17, 2021 16:03	Nov 9, 2021 18:10	DANTE WILLIAMS #011474

SUPPLEMENT TYPE

Other

NARRATIVE

This supplemental report corrects a typo on the original 1.1, that shows an incomplete date when referencing the incident that occurred at the Caribbean Festival. The date of that incident was actually, Saturday, 8/28/21. The correct spelling of the victim's name on the original 1.1 report should read, Rachael Rollins.

REPORTING OFFICER SIGNATURE / DATE	SUPERVISOR SIGNATURE / DATE
DANTE WILLIAMS #011474 Dec 17, 2021 16:17 (e-signature)	JASON CLUTTERBUCK #103789 Dec 17, 2021 18:41 (e-signature)
PRINT NAME	PRINT NAME
DANTE WILLIAMS #011474	JASON CLUTTERBUCK #103789

Exhibit 2

Exhibit 3

APPLICATION FOR CRIMINAL COMPLAINT

1 of 1

Trial Court of Massachusetts
DORCHESTER COURT - BMC

I, the undersigned complainant, request that a criminal complaint issue against the accused charging the offense(s) listed below, if the accused **HAS NOT BEEN ARRESTED** and the charges involve:

☐ ONLY MISDEMEANOR(S). I request a hearing ☐ **WITHOUT NOTICE**, because of an imminent threat of ☐ BODILY INJURY ☐ COMMISSION OF A CRIME ☐ FLIGHT ☐ **WITH NOTICE** to accused

☐ ONE OR MORE FELONIES, I request a hearing ☐ **WITHOUT NOTICE** ☐ **WITH NOTICE** to accused

☐ WARRANT is requested because prosecutor represents that accused may not appear unless arrested.

ARREST STATUS OF ACCUSED
☐ HAS ☒ **HAS NOT** been arrested

INFORMATION ABOUT ACCUSED

NAME (FIRST MI LAST) AND ADDRESS	BIRTH DATE	SOCIAL SECURITY NUMBER
DEPINA, JOAO GOMES [redacted]	[redacted]	[redacted]
	PCF NO.: 002446892	MARITAL STATUS:
	DRIVERS LICENSE NO.: [redacted]	STATE: MA
	GENDER: MALE / HEIGHT: 509 / WEIGHT: 215 / EYES: BROWN	

HAIR	RACE	COMPLEXION	SCARS/MARKS/TATTOOS	BIRTH STATE OR COUNTRY	DAY PHONE
Black	BLACK	MEDIUM BROWN			

EMPLOYER/SCHOOL	MOTHER'S MAIDEN NAME (FIRST MI LAST)	FATHER'S NAME (FIRST MI LAST)
	GOMES	DEPINA, JOSE

CASE INFORMATION

COMPLAINANT NAME (FIRST MI LAST)	COMPLAINANT TYPE	PD
WILLIAMS, DETECTIVE DANTE	☒ POLICE ☐ CITIZEN ☐ OTHER	BOSTON POLI
ADDRESS: 1 BULFINCH PL. BOSTON, MA 02114	PLACE OF OFFENSE: FERNDALE ST. AND NORFOLK ST., BOSTON, MA 02124	
	INCIDENT REPORT NO.: 212082441	OBTN:
	CITATION NO(S).: 212082441	

	OFFENSE CODE	DESCRIPTION	OFFENSE DATE
1	268/13B/A-5	WITNESS/JUROR/POLICE/COURT OFFICIAL, INTIMIDATE c268 §13B	11/09/2021
	VARIABLES (e.g. victim name, controlled substance, type and value of property, other variable information; see Complaint Language Manual): 11/09/2021 (OFFENSE DATE)		
2	OFFENSE CODE	DESCRIPTION	OFFENSE DATE
	VARIABLES		
3	OFFENSE CODE	DESCRIPTION	OFFENSE DATE
	VARIABLES		

REMARKS	COMPLAINANT'S SIGNATURE	DATE FILED
DEF. MADE STATEMENTS TO THE VT. W/ INTENT TO INTIMIDATE HER	[signature]	11/12/21

COURT USE ONLY — A HEARING UPON THIS COMPLAINT APPLICATION WILL BE HELD AT THE ABOVE COURT ADDRESS ON: DATE OF HEARING: ____ AT TIME OF HEARING: ____ — COURT USE ONLY

PROCESSING OF NON-ARREST APPLICATION (COURT USE ONLY)

DATE | CLERK/JUDGE

NOTICE SENT OF CLERK'S HEARING SCHEDULED ON:

NOTICE SENT OF JUDGE'S HEARING SCHEDULED ON:

HEARING CONTINUED TO:

APPLICATION DECIDED WITHOUT NOTICE TO ACCUSED BECAUSE:
☐ IMMINENT THREAT OF ☐ BODILY INJURY ☐ CRIME ☐ FLIGHT BY ACCUSED
☐ FELONY CHARGED AND POLICE DO NOT REQUEST NOTICE
☐ FELONY CHARGED BY CIVILIAN; NO NOTICE AT CLERK'S DISCRETION

DATE	COMPLAINT TO ISSUE	COMPLAINT DENIED	CLERK/JUDGE
11/12/21	☒ PROBABLE CAUSE FOUND FOR ABOVE OFFENSE(S) NO(S). ☒ 1. ☐ 2. ☐ 3. BASED ON ☒ FACTS SET FORTH IN ATTACHED STATEMENT(S) ☐ TESTIMONY RECORDED; TAPE NO. ____ START NO. ____ END NO. ____ ☐ WARRANT ☒ SUMMONS TO ISSUE ARRAIGNMENT DATE: 12/22/21	☐ NO PROBABLE CAUSE FOUND ☐ REQUEST OF COMPLAINANT ☐ FAILURE TO PROSECUTE ☐ AGREEMENT OF BOTH PARTIES ☐ OTHER: COMMENT	[signature]

Date/Time Printed: 11-12-2021 16:02:16 Revised: 07/16

CRIMINAL COMPLAINT ORIGINAL	DOCKET NUMBER 2107CR003064	NO. OF COUNTS 1	Trial Court of Massachusetts BMC Department

DEFENDANT NAME & ADDRESS	COURT NAME & ADDRESS
Joao G Depina [redacted]	BMC Dorchester 510 Washington Street Dorchester, MA 02124- (617)288-9500 ORIGINAL

DEFENDANT DOB	COMPLAINT ISSUED	DATE OF OFFENSE	ARREST DATE
[redacted]	11/12/2021	11/09/2021	

OFFENSE CITY / TOWN	OFFENSE ADDRESS	NEXT EVENT DATE & TIME
Boston	Ferndale St. and Norfolk St.	12/27/2021 09:00 AM

POLICE DEPARTMENT	POLICE INCIDENT NUMBER	NEXT SCHEDULED EVENT
Boston PD Area B-3	212082441	Arraignment

OBTN	PCF NUMBER	DEFENDANT XREF ID	ROOM / SESSION
	2446892	6492112	Arraignment (1st) Session

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.

COUNT	CODE	DESCRIPTION
1	268/13B/A	WITNESS/JUROR/POLICE/COURT OFFICIAL, INTIMIDATE c268 §13B

On 11/09/2021did, directly or indirectly, wilfully threaten, attempt or cause physical injury, emotional injury, economic injury or property damage to; or did convey a gift, offer or promise of something of value to; or did mislead, intimidate or harass another person who was a witness or potential witness; person who is or was aware of information, records,documents or objects that relate to a violation of a criminal law or a violation of conditions of probation, parole, bail or other court order; judge, juror, grand juror, attorney, victim witness
advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer; person who is or was attending or a person who had made known an intention to attend a proceeding described in this section; or family member of a person described in this section, with intent to or with reckless disregard for the fact that it may; (i) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type or a parole hearing, parole violation proceeding or probation violation proceeding; or an administrative hearing or a probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation or any other civil proceeding of any type; or (ii) punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's participation in any of the proceedings described in this section, in violation of G.L. c.268, § 13B(1).

(PENALTY: state prison not more than 10 years; or jail or house of correction not more than 2½ years; or fine not less than $1000, not more than $5000; or both. Superior Court jurisdiction, however, District Court has final jurisdiction for intimidation of a witness or juror under G.L. c.218, §26.)

SIGNATURE OF COMPLAINANT	SWORN TO BEFORE CLERK/MAGISTRATE/ASST.CLERK/DEP. ASST. CLERK	DATE
X [signature]	X [signature]	11/12/21
NAME OF COMPLAINANT Bernardo DeSouza	CLERK-MAGISTRATE/ ASST. CLERK X [signature]	DATE 11/12/21

Notice to Defendant: *42 U.S.C. § 3796gg-4(e) requires this notice: If you are convicted of a misdemeanor crime of domestic violence you may be prohibited permanently from purchasing and/or possessing a firearm and/or ammunition pursuant to 18 U.S.C. § 922 (g) (9) and other applicable related Federal, State, or local laws.*

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT DEPARTMENT
DOCKET NO. 2285CV0971A

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 RACHEL ROLLINS, in her personal capacity,
Defendants.

REPLY MEMORANDUM OF DANTE WILLIAMS AND CITY OF BOSTON

The City Defendants submit this reply memorandum to briefly respond to Plaintiff's argument that the doctrine of collateral estoppel (issue preclusion) bars Detective Williams from asserting that there was probable cause to charge Plaintiff with witness intimidation. (Opp. 7–8). Applying collateral estoppel requires this court to answer four questions in the affirmative: "(1) was there a final judgment on the merits in the prior adjudication; (2) was the party against whom estoppel is asserted a party (or in privity with a party) to the prior adjudication; (3) was the issue decided in the prior adjudication identical with the one presented in the action in question; and (4) was the issue decided in the prior adjudication essential to the judgment in the prior adjudication?" Alba v. Raytheon Co., 441 Mass. 836, 842 (2004).

As Plaintiff himself all but acknowledges, the invocation of collateral estoppel founders on the second question of the four-part test: the City defendants are not in privity with the Commonwealth as prosecutorial authority in the criminal case against Plaintiff. Neither the City of Boston nor Detective Williams in his individual capacity were represented at the hearing on the motion to dismiss in Plaintiff's criminal case, and it would be grossly unfair to deprive them of the opportunity to make arguments about probable cause in this subsequent civil action for declaratory relief and damages. See Bilida v. McCleod, 211 F.3d 166, 170–171 (1st Cir. 2000) (ruling that individual state officials are not bound in their individual capacities by determinations adverse to state in prior criminal proceedings because "interests and incentives of the individual police or officials are not identical to those of the state, and the officers normally have little control over the conduct of a criminal proceeding"); see also Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 978 n. 8 (1st Cir. 1995), quoting Kyricopoulos v. Town of Orleans, 967 F.2d 14, 16 (1st Cir. 1992) (party invoking issue preclusion must demonstrate that "the party against whom issue preclusion will be applied had a fair opportunity to litigate the issue fully"). There is an abundance of authority supporting the proposition that law enforcement officials in a civil rights suit are not collaterally estopped from arguing that they had probable cause to seek criminal charges against the plaintiff. See, e.g., Novitsky v. City of Aurora, 491 F.3d 1244, 1252 n.2 (10th Cir. 2007) ("[A] court's conclusion during a criminal prosecution that a law enforcement officer's conduct was unconstitutional is not afforded collateral estoppel effect in a subsequent civil case against the officer because there is no privity between the prosecution in the criminal case and the officer."); Jenkins v. City of New York, 478 F.3d 76, 85–86 (2d Cir. 2007) (because detectives and City are not in privity with State in criminal prosecution, court erred in precluding detectives from asserting they had probable cause to arrest plaintiff); 18 C.

Wright and A. Miller, Federal Practice and Procedure § 4458 (1981) ("a judgment against a government or one government official does not bind a different official in subsequent litigation that asserts a personal liability against the official").

Date: February 6, 2023

Respectfully submitted,

DEFENDANTS DANTE WILLIAMS AND CITY OF BOSTON,

By their attorneys:

Adam Cederbaum
Corporation Counsel

/s/ Randall Maas
Randall Maas (BBO#684832)
Assistant Corporation Counsel
Sarah McAteer (BBO#706403)
Assistant Corporation Counsel
City of Boston Law Department
City Hall, Room 615
Boston, MA 02201
(617) 635-4042
Randall.maas@boston.gov
Sarah.mcateer@boston.gov

Certificate of Service

I, Randall Maas, hereby certify that on February 6, 2023, a true copy of the above document was served upon plaintiff's counsel by e-mail.

/s/ Randall Maas

Randall Maas

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT DEPARTMENT

SPECIAL ASSIGNMENT CIVIL ACTION NO.: 2285CV00971(A)

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.

OPPOSITION TO DANTE WILLIAMS AND CITY OF BOSTON'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant Williams lacked probable cause to charge Plaintiff Joao DePina with attorney intimidation. The City of Boston and Detective Williams (collectively the "City Defendants")[1] can muddy the water as much as they want. But, at the end of the day, a reasonable officer knew or should have known that his actions violated clearly established law.

1.0 FACTUAL BACKGROUND

On Tuesday, November 9, 2021, there was a shooting in Dorchester. Plaintiff's Verified Complaint ("Compl.") at ¶ 12. That evening, Defendant Rachael Rollins, then Suffolk County District Attorney, held a televised press conference regarding the incident. *Id.* at ¶ 13. DePina, who had arrived to report on the disparate level of investigation the Boston Police Department gives to shootings where an officer, rather than an ordinary taxpayer, is the victim, attended the press

[1] The City of Boston responded on behalf of Defendant Boston Police Department. As needed, Plaintiff does not oppose substituting the City for the Department.

conference and questioned Rollins over the continued gun violence in Boston and government incompetence, including the incompetency of the District Attorney's Office to respond to his brother's murder. *Id.* at ¶ 14; *see also* Defendants' Exhibit 2 at 1:51:40-1:52:15. DePina exercised his right to criticize Rollins for abusing power, using tragedies to seek office without caring for the people of Boston, failing to take care of Boston police officers. Complaint at ¶ 16.

Three days after the press conference, to retaliate for DePina's public criticism, Rollins, through Williams, caused a criminal complaint to be filed against DePina accusing him of Attorney Intimidation under G.L. c. 268, § 13B. *Id.* at ¶ 17. Rollins and Williams alleged that DePina intended to intimidate Rollins because the Suffolk District Attorney's Office had three active pending criminal cases against DePina. *Id.* Anyone of ordinary intelligence who was on-scene or watched the video would know this was false.

Detective Williams, an employee of the Boston Police Department ("BPD"), was present during the press conference and was able to observe the events, yet he filed a knowingly false police report. *Id.* at ¶¶ 7, 18. At no time did DePina engage in unlawful intimidation within the meaning of G.L. c. 268, § 13B(b)(E)(2). *Id.* at ¶ 24. DePina was placed in emotional distress through the threat of a felony prosecution and the process of defending himself, in a case that should never have been brought in the first place. *Id.* at ¶ 25. Upon information and belief, Detective Williams filed the criminal charge against DePina at Rollins's behest, for Rollins's benefit as part of her unlawful scheme to intimidate her critics. *Id.* at ¶¶ 19 & 20; *see also Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 823 (1985) (threat of arrest for exercising constitutional rights is intimidation or coercion under G.L. c. 12, § 11I). Detective Williams and Rollins conspired to violate DePina's civil rights and civil liberties by jointly creating the knowingly false narrative in the police report. Compl. at ¶ 21.

In Detective William's police report, the subject-matter is the press conference, which took place on a public street "at Ferndale St. and Norfolk St." *See* Defendants' Exhibit 1 at 1. Detective Williams claimed that DePina "began to loudly heckle [Rollins], while making multiple offensive comments of a personal nature directly to her (invoking her name several times while doing so), which appeared as an intent to effect or interfere with these pending Suffolk County cases (he made several indirect references to these cases during his verbal offensive." *Id.* On November 12, 2021, the complaint, filed by Detective Williams, issued 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. *Id.* at ¶ 32. DePina moved to dismiss for lack of probable cause. *Id.* at ¶ 33. ADA Melia, to his credit refused to lie and admitted there was no evidence of intimidation. *Id.* at ¶ 43.[2] He stated, "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." *Id.* On May 25, 2022, the trial court dismissed the charge against DePina for lack of probable cause. *Id.* at ¶ 45. The trial court held that "[t]here exist 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.* at ¶ 46.

DePina made no threats. *Id.* at ¶ 47. DePina engaged in no form of harassment, nor anything that could possibly be construed as intimidation of someone connected to a pending criminal proceeding. *Id.* DePina exercised his right to criticize a public official. *Id.* This was clear from the video that Williams claimed to have possessed (his report never claims he watched it, and

[2] While he should be credited for not lying about the facts, ADA Melia should have upon such an admission, withdrawn the charges against DePina.

Defendants carefully avoid saying he did in their motion). *Id.* This was clear from press coverage of the event. *Id.* This was all clear to any eyewitness. *Id.* Nevertheless, Williams was involved in, and initiated, the conspiracy to violate DePina's civil rights. *Id.* at ¶¶ 17-21, 32, & 47.

2.0 LEGAL STANDARD

"It is now well established that in passing on a motion to dismiss under Rule 12(b)(6), a trial court is required to accept as true all well-pleaded facts and inferences that may be drawn from the complaint in [plaintiff's] favor." *M.T. Realty Corporation v. Allen*, 1983 Mass. App. Div. 257, 264 (1983) (quoting *Nader v. Citron*, 372 Mass. 96 (1977)). The factual allegations are sufficient to survive a motion to dismiss if they plausibly suggest that the plaintiff is entitled to relief. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). The "factual allegations must be enough to raise a right to relief above the speculative level." *Lanier v. President & Fellows of Harvard College*, 490 Mass. 37, 71 (2022) (quoting *Dunn v. Genzyme Corp.*, 486 Mass. 713, 721 (2021). "All that is required under Mass. R. Civ. P. 8(a)(1), 365 Mass. 749 (1974), is a short and plain statement of the claim … which affords fair notice to the defendant of the basis and nature of the action against him." *Id.* (cleaned up).

3.0 ARGUMENT

3.1 The claims against Detective Williams are actionable and not protected by qualified immunity.

3.1.1 There Was No Probable Cause in the Underlying Criminal Case and Collateral Estoppel Precludes Re-litigating the Issue of Probable Cause

As noted above, there is nothing to suggest Williams actually reviewed the video prior to filing the criminal complaint. "[I]f what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the

correct version, that factual dispute must be resolved by a fact finder." *Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991). This issue alone suffices to deny the motion to dismiss.

Even had Williams reviewed it, he would not have had probable cause. As demonstrated by the video, when DePina went to the scene, he intended show the difference between a police and a civilian shooting. Defendants' Exhibit 2 at 50:05. ("Because I just like to show you all the difference between a police [sic] police shooting and a civilian shooting and you all obviously see the difference.") DePina did not know Rollins would be present, let alone that there would be a press conference. *Id.* at 49:53 ("If I could just get over there, even if I don't know somebody, somebody will get to know me in two seconds and let me do it."). Arriving, DePina stated:

> They're alive. Some of our black men aren't alive. A lot of them. They don't get this kind of service. Maybe if they got my brother took [sic] to the hospital as fast [sic] my brother would have lived. And if they blocked off the neighborhood like this my brother might have gotten [sic] maybe they might have caught the person that killed my brother.

Id. at 55:36-56:00.

The press conference is the only relevant time based on Detective Williams's Police Report and is located at 1:50:00-1:56:56 of Defendants' Exhibit 2. *Commonwealth v. Ilya I.*, 470 Mass. 625, 627 (2015) ("The complaint application must allege facts sufficient to establish probable cause as to each element of the offense charged."). Per the Police Report, the incident began "at or around 6:10 P.M." when "the DA began making her statement." Defendants' Exhibit 1 at 1. And the incident "immediately ceased as Ms. Rollins stepped away from the press, as other public officials were approaching." *Id.* at 2. Specifically, the incident, per the Police Report occurred from "November 9, 2021 18:10" to "November 9, 2021 18:15." *Id.*[3]

[3] DePina does not agree the City may rely on any portion of video beyond the "incident," which Detective Williams identifies in his complaint application as the time during the press conference.

The City Defendants cite to only one instance during the press conference where DePina allegedly referenced his case.[4] (Mot. at 9). Even they cannot justify Williams's lie of "several indirect references" during it. Defendants' Exhibit 1 at 1. The instance is DePina stating: "Let's talk about the state rep going to Michigan and using state funds. And let's talk about the state rep that [used] a state issued cell phone to talk derogatory to other women, to other black women like you, Rachael." Mot. at 9; Defendants' Exhibit 2 at 1:54:36. While an ongoing criminal case *related* to that state representative, DePina makes no reference to his prosecution. By the City's argument, someone who ties themselves to a tree in a national forest can never criticize the destruction of that forest ever again, if they happen to get prosecuted, because the prosecutor might hear it. This would give license for corrupt Attorneys General to silence their critics by filing baseless charges and then prosecute them for "intimidation" if they're called "corrupt" again.

To the extent the Court considers the video outside the relevant time period, the City Defendants reference a statement that DePina made a few minutes before the press conference began. (Mot. at 7). It appears that DePina was having a conversation with an unidentified third-party, complaining that Rollins is grandstanding over a crime scene where the perpetrator could not face prosecution (he was killed), and was wasting resources on his case. While Williams and

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Police officers are expected to be honest and meticulous when submitting their criminal application to a magistrate. *See Commonwealth v. Bell*, 83 Mass. App. Ct. 61, 62 (2013) ("Unless the Commonwealth consents, a motion to dismiss a criminal complaint for lack of probable cause is decided on the four corners of the complaint application, without evidentiary hearing"). There are no do-overs and the absence of any reference to other portions of the video suggests Williams did not rely on them to establish his supposed probable cause.

[4] The City Defendants also rely on a "factual backdrop" to argue that DePina's statement that Rollins was "very tuned into, into locking black and brown men up for petty crimes, and that is what's going on" is similar to comments he previously made throughout the night, but they do not go so far as to say that this could be considered an indirect reference to his criminal cases during the press conference. Mot. at 9; *see also* Defendants' Exhibit 2 at 1:52:00.

Rollins appear to stand an unidentified distance away, on the other side of caution tape. Defendants' Exhibit 2 at 1:47:42. The City does not claim Williams or Rollins ever heard it.

Similarly, the City Defendants reference statements that DePina made on his way to the press conference. Mot. at 7; Defendants' Exhibit 2 at 20:37. The City Defendants acknowledge that DePina was driving alone his car. The City Defendants reference a conversation that occurred between DePina and an unidentified individual approximately 50 minutes before the press conference. Mot. at 8; Defendants' Exhibit 2 at 1:04:38. They also reference statements DePina made about 10 minutes after the incident occurred. (Mot. at 8-9). There is no evidence that Rollins heard these, and there was no threat or any conduct these times to suggest his operative statements would violate G.L. c. 268, § 13B. Moreover, they were not included in the criminal application.

The City Defendants argue that Williams did not make knowingly false statements. (Mot. at 6). This is false. Either Detective Williams observed a felony occur on November 9, 2021, during the press conference, and he took no action to arrest DePina at the time. Or, Detective Williams did not observe a felony, and then, only after (presumably in conspiracy with Rollins) to manufacture charges did he file a charging document. Even Melia could not support Detective Williams's Police Report. Compl. at ¶ 43 ("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 issue of probable cause was already litigated. The City Defendants cite no case law to support their argument that the issue can be relitigated. "The doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or *should have been* adjudicated in the action (emphasis supplied)." *Massaro v. Walsh*, 71 Mass. App. Ct. 562, 565 (2008) (quoting *Heacock v. Heacock*, 402 Mass. 21, 23(1988)).

"[I]ssue preclusion provides that when an issue has been actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or different claim." *Jarosz v. Palmer*, 436 Mass. 526, 530-31 (2002) (quoting *Cousineau v. Laramee*, 388 Mass. 859, 863 n.4 (1983)). There was a valid and final judgment in the criminal case. The probable cause determination was essential in the judgment. The appropriate route to challenge the issue of probable cause was on appeal in the criminal case, as set forth in the case cited by the City Defendants. *Sena v. Commonwealth,* 417 Mass. 250, 260 (1994) ("We now state conclusively that for collateral estoppel to preclude litigation on an issue, there must have been available some avenue for review of the prior ruling on the issue."). The Commonwealth chose not to appeal the criminal case. Therefore, as a matter of law, the issue of probable cause should be deemed settled.

Plaintiff acknowledges that the question of whether Williams is in privity with the Commonwealth may be an open question. *See, e.g., Bilida v. McCleod*, 211 F.3d 166, 170-71 (1st Cir. 2000) (discussing Section 1983 claim against individual officers). But, even if that is the case, "the issue addressed is nearly identical to that currently facing the court, and the reasoning discussed [in the other ruling] is both sound and persuasive." *Kingdom of Swed. v. Akbarian*, No. 1977-CV-00045-D, 2020 Mass. Super. LEXIS 2071, at *8 n.4 (Dec. 16, 2020).

3.1.2 There Was Never Probable Cause to Prosecute DePina

There was no probable cause to prosecute DePina for Attorney Intimidation.

Mass. Gen. Laws c. 268, § 13B provides, in relevant part, that:

> Whoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; . . . or (iii) misleads, intimidates or harasses another person who is a: … (C) judge, juror, grand juror, attorney, victim witness advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer; … with the intent to or with reckless disregard for the fact that it

> may; (1) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type or a parole hearing, parole violation proceeding or probation violation proceeding; or an administrative hearing or a probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation or any other civil proceeding of any type; or (2) punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's participation in any of the proceedings described in this section, [commits a criminal offence].

The statute defines "harass" as "to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress . . . ." *Id*. at § 13B(a). Though the term "intimidates" is not defined by the statute, "the essence of intimidation is fear." *Commonwealth v. Potter*, 39 Mass. App. Ct. 924, 926 (1995); *see also Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 799 (1998) (superseded by statute on unrelated grounds) (noting that intimidation is "putting a person in fear for the purpose of influencing his or her conduct").

Application of the statute is restrained by the Constitution. "In considering the First Amendment's protective reach, 'critical' to the examination is the context . . . of the speech at issue." *Commonwealth v. Bigelow*, 475 Mass. 554, 562 (2016). In *O'Brien v. Borowski*, 461 Mass. 415, 425 (2012), the SJC confined the definition of "harassment" under G.L. c. 258E to the constitutionally unprotected categories of fighting words and true threats. "Harassment" in G.L. c. 258E expressly includes violations of Section 13B. Similarly, the federal witness intimidation statute, 18 U.S.C. § 1512, is limited to constitutionally unprotected speech such as true threats. *U.S. v. Colhoff*, 833 F.3d 980, 984-85 (8th Cir. 2016); accord *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1279 (M.D. Ala. 2004). Thus, Section 13B must be similarly restricted to only unprotected speech of fighting words or true threats. DePina uttered neither.

‘“True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). As in *O’Brien*, “the ‘true threat’ doctrine applies not only to direct threats of imminent physical harm, but to words or actions that -- taking into account the context in which they arise -- cause the victim to fear such harm now or in the future and evince intent on the part of the speaker or actor to cause such fear.” 461 Mass. at 425. The “fighting words” exception “is limited to words that are likely to provoke a fight: face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace.” *Id*. at 423. Such provocation must be immediate. *See Byrnes v. City of Manchester*, 848 F. Supp. 2d 146, 157 (D.N.H. 2012) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942)).

DePina’s statements did not come close to being harassing, intimidating, or threatening. He was standing among a crowd of press and citizens on a public road during a press conference. Rollins was not alone and DePina was not in immediate physical proximity to her. DePina did not make any statements regarding any form of physical harm to Rollins or anyone else. Rather, DePina, a candidate for public office, merely criticized Rollins for not paying sufficient attention to criminal matters involving average citizens, not taking sufficient care of Boston police officers, lying to the public, and caring more about becoming a U.S. Attorney than helping the people of Boston. Williams himself, in his Police Report, states that DePina’s statements amounted to no more than “loudly heck[ling] her” and “making multiple offensive comments of a personal nature,” conduct that any public official should expect as a possibility when addressing the public. Defendants’ Exhibit 1 at 1. DePina did not reference any pending criminal matters against him

while she was speaking,[5] and there is no allegation that Rollins actually felt intimidated.

Rollins may very well have felt annoyed, but merely voicing negative opinions of a public official and political nominee, without any implication of physical violence or contact, does not constitute fighting words. *O'Brien*, 461 Mass. at 429. None of DePina's statements were so abusive to provoke an immediate violent reaction or breach of peace. DePina's statements do not constitute a true threat, as Rollins could not have had a reasonable apprehension of physical violence. DePina also did not make any statement that could reasonably be construed as a threat to engage in violence.

Even Williams's false statement that DePina made indirect references to other matters pending does not alter the analysis. A criminal defendant is free to say, in public, at a prosecutor's press conference, "You're a terrible prosecutor for prosecuting me in these X, Y, Z cases." Professional criticism, even from a defendant, is neither fighting words nor a true threat. Just as probable cause was found to lacking in the criminal proceeding, that finding must be made here.

3.1.3 DePina Pleads Plausible Claims Against Detective Williams

3.1.3.1 DePina's MCRA Claims Are Sufficient

DePina claims malicious prosecution, malicious abuse of process, and First Amendment retaliation under the MCRA. To establish a claim under the MCRA, a plaintiff must show that "(1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by threats, intimidation, or coercion."

[5] After Rollins left the podium, Mr. DePina stated "Love you still. I'm mentally disturbed. Don't forget that. You said it on camera so when we go to court. I'm going to use it." (Defendants' Exhibit 2). This statement only came after Rollins besmirched Mr. DePina, accusing him of being "mentally disturbed" because he dared to criticize her while she preened for the cameras. It is, at most, a statement to opposing counsel of a defense—it is not a threat.

Bally v. Northeastern Univ., 403 Mass. 713, 717 (1987). The City Defendants appear to only challenge the malicious prosecution count, and the rest must be permitted to proceed.[6] (Mot. at 11-12). To make out a claim for malicious prosecution, a plaintiff must prove: "(1) the institution of criminal process against the plaintiff with malice; and (2) without probable cause; and (3) the termination of the criminal proceeding in favor of the plaintiff." *Guiterrez v. Mass. Bay*, 347 Mass. 396, 405 (2002). DePina's speech was protected under art. 16 as amended by art. 77 and the First Amendment, and the filing of a criminal charged interfered with his right to speak and petition his government. Compl. at ¶¶ 16-21, 40, 50 & 62. Detective Williams instituted the criminal process with malice against DePina as part of a criminal conspiracy without probable cause. *Id.* at ¶¶ 16-21, 32, 55-56. And the criminal proceeding terminated in DePina's favor. *Id.* at ¶¶ 45-46, 58.

The City Defendants only challenge whether Detective Williams's conduct qualifies as threats intimidation, or coercion. (Mot. at 11-12). They argue it was a "mere act of filing a police report and taking out criminal charges." (Mot. at 11). "The Massachusetts civil rights law, G.L. c. 12, §§ 11H and 11I, like other civil rights statutes, is remedial" and "entitled to liberal construction of its terms." *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 822 (1985) (*Batchelder II*). "[T]he Legislature intended to provide a remedy under G.L. c. 12, § 11I, coextensive with 42 U.S.C. § 1983 (Supp. V. 1981)[.]" *Id.* In *Batchelder II,* the SJC held a uniformed security guard "order[ing] [the plaintiff] to stop soliciting and distributing his political handbills . . . was sufficient intimidation or coercion to satisfy the [MCRA] statute." *Batchelder II* at 823.

Detective Williams unlawfully used the criminal justice system in a scheme to silence DePina and dissuade him from exercising his constitutional rights to speak freely and petition his

[6] Pursuant to *Gutierrez v. Mass. Bay*, 437 Mass. 396 (2002), malicious prosecution, malicious abuse of process, and first amendment retaliation are separate and distinct claims.

government. Compl. at ¶¶ 18-21, 34. Further, "[a]n arrest without probable cause may be a basis for a claim under the MCRA." *Arias v. City of Everett*, No. 19-10537-JGD, 2019 U.S. Dist. LEXIS 209532, at *17 (D. Mass. Dec. 4, 2019); *see also Nuon v. City of Lowell*, 768 F. Supp. 2d 323, 335 n.8 (D. Mass. 2011) ("An arrest without probable cause has been found to constitute coercion within the meaning of the MCRA.") (collecting cases). Courts have also found that "[a]rranging for the arrest" of a person without probable cause "may be sufficient to satisfy the requirement of threats, intimidation or coercion." *Grant v. John Hancock Mut. Life Ins. Co.*, 183 F. Supp. 2d 344, 371 (D. Mass. 2002). While DePina was not arrested, he was placed in greater fear of a loss of liberty (and the violence that accompanies it) more so than the behavior in *Batchelder II,* and such qualifies as threats, intimidation, and coercion under the MCRA.

The City Defendants rely on *Sena v. Commonwealth*, 417 Mass. 250 (1994) to argue their conduct falls outside of the MCRA. (Mot. at 11). Yet, the SJC acknowledged that the officers' statement that they would have warrants the next time they saw plaintiffs "**could be considered a threat**." *Id.* (emphasis added). However, the SJC ruled that the threat was through lawful means. *Id.* The City Defendants also rely on *Walsh v. Town of Lakeville*, 431 F. Supp. 2d 134, 150 (D. Mass. 2006). However, again, the conduct in alleged in *Walsh* was lawful conduct. Here, Detective Williams filed a false narrative in his police report and pursued a criminal charge against DePina without probable cause. Compl. at ¶¶ 18-21, 40, 47-48. Those were not lawful means.

3.1.3.2 DePina's IIED Claim is Sufficient

The elements of a cause of action for intentional infliction of emotional distress (IIED) include: "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; . . . (2) that the conduct was `extreme and outrageous' . . .; (3) that the actions of the defendant were the cause of the plaintiff's

distress; . . . and (4) that the emotional distress sustained by the plaintiff was `severe'. . . ." *Haddad v. Gonzalez*, 410 Mass. 855, 871 (1991) (citations omitted). "Conduct qualifies as extreme and outrageous only if it goes beyond all possible bounds of decency, and is regarded as atrocious, and utterly intolerable in a civilized community." *Polay v. McMahon*, 468 Mass. 379, 385 (2014) (cleaned up); *see also Lanier v. President & Fellows of Harvard Coll.*, No. SJC-13138, at *18 (Mass. June 23, 2022) ("To qualify as extreme and outrageous, then, a defendant's actions must flout the most basic community standards of decency and propriety.") DePina sufficiently pleaded his IIED claim against Detective Williams. *See Roman v. Trustees of Tufts Coll.*, 461 Mass. 707, 718 (2012) ("In considering whether a plaintiff has made out a claim for intentional infliction of emotional distress, we have said that the trier of fact 'would be entitled to put as harsh a face on the [defendant's actions] as the basic facts would reasonably allow.") (cleaned up).

The City Defendants argue that there conduct "simply do[es] not rise to the level of intentional infliction of emotional distress. (Mot. at 13). The City Defendants cite a parenthetical from *Padmanabhan v. City of Cambridge*, 99 Mass. App. Ct. 332, 341 (2021) to support their position. In *Padmanabhan*, false allegations and perversely using the litigation process during employment hearings did not rise to the level of extreme and outrageous conduct. *Id.* at 342-43. Moreover, the plaintiff did not clearly identify the conduct of individual defendants. *See id.* This case is about more than a mere employment dispute and there is specific identification of what Williams did. DePina explicitly identified that Williams conspired to file a felony charge at the behest of Rollins to violate DePina's civil rights and civil liberties by jointly creating a knowingly false narrative in the police report. Compl. at ¶¶ 18-21. DePina faced up to 10 years imprisonment. Public servants conspiring to persecute DePina by knowingly creating a false narrative to pursue a criminal charge without probable cause is utterly intolerable in a civilized community. Detective

Williams's conduct flouted "the most basic community standards of decency and propriety." *Lanier v. President & Fellows of Harvard Coll.*, No. SJC-13138, at *18 (Mass. June 23, 2022). It is extreme and outrageous conduct, and the IIED claim cannot be dismissed.

3.1.3.3 DePina's NIED Claim

Plaintiff recognizes that G.L. c. 258, § 4, presently bars his claim for Negligent Infliction of Emotional Distress (NIED) against BPD and Detective Williams in his official capacity. He also recognizes that Detective Williams enjoys the benefits of G.L. c. 258, § 2, for claims against him in his personal capacity. These claims will be withdrawn.[7]

3.1.4 Detective Williams is Not Entitled to Qualified Immunity

The right to challenge the actions of the state is clearly established. "The Constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Houston v. Hill*, 482 U.S. 451, 462-63 (1987). Similarly, the right to be free from being framed by the police is clearly established. "[I]f 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." *Haley v. City of Boston*, 657 F.3d 39, 50 (1st Cir. 2011) (quoting *Limone v. Condon*, 372 F.3d 39, 44-45 (1st Cir. 2004).

Detective Williams does not, and cannot, explain why a "felony" happened right in front of him on the night of November 9, 2021, and, yet, he did not arrest DePina on the spot. Compl.

[7] However, the City Defendants argument that Detective Williams exercised due care in pursuing criminal charges against DePina without probable cause is inexcusable. (Mot. at 16). BPD and its agents have history of harassing the public and perpetuating white supremacy that continues to this day, and silencing DePina because he dared to petition his government and exercise his right to speak freely is a violation of the City Defendants' duty of care.

at ¶ 18. The explanation is there was no crime. Detective Williams knew that a sidewalk is the a place where free speech is at its apex. *Cornelius v. NAACP Legal Defense Ed. Fund*, 473 U.S. 788, 817 (1985) ("[T]he quintessential public forums, includes those places which by long tradition or by government fiat have been devoted to assembly and debate, such as parks, streets, and sidewalks.") (cleaned up). Detective Williams is not a rookie. He has over 25 years of experience.[8] Detective Williams cannot avail himself to qualified immunity.

Qualified immunity shields public officials from liability for performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Rodriques v. Furtado*, 410 Mass. 878, 882 (1991) (quoting *Harlow v. Fitzgerarld*, 457 U.S. 800, 818 (1982)). The SJC has stated that MCRA claims adopt "the standard of immunity for public officials developed under § 1983." *Duarte v. Healy*, 405 Mass. 43, 46 (1989).

Qualified immunity is a two-part inquiry: (1) "whether taken in the light most favorable to the party asserting the injury the facts alleged show the officer's conduct violated a constitutional right" and (2) "if so, the judge then must ask whether the right was clearly established that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Gutierrez v. Mass. Bay*, 437 Mass. 396, 403-404 (2002) (cleaned up). "To be clearly established for purposes of qualified immunity, the contours of the right allegedly violated must be sufficiently definite so that a reasonable official would appreciate that the conduct in question was unlawful." *Longval v. Comm'r of Corr.*, 448 Mass. 412, 418 (2007) (citations and quotation marks omitted).

In evaluating qualified immunity, judges do not "exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted).

[8] https://www.linkedin.com/in/dante-williams-det-a81426129?original_referer=

Qualified immunity does not shield what reasonable officials should recognize is "obvious[ly]" unconstitutional, even without combing the federal reporter. *Hope v. Pelzer*, 536 U.S. 730, 737-46 (2002). Qualified immunity is not a "license to lawless conduct." *Harlow*, 457 U.S. at 819. "Where an official could be expected to know that certain conduct would violate . . . constitutional rights, he should be made to hesitate." *Id.* (emphases added).

DePina plausibly pled that Detective Williams engaged in conduct that violated his constitutional rights. DePina's rights to speak and petition his government were protected under art. 16 of the Mass. Dec. of Rights, as amended by art. 77 and the First Amendment, and Detective Williams filing a criminal charge without probable cause violated DePina's rights. *See* Compl. at ¶¶ 14-21, 32, 40-42, 45-47, 50-53.

The remaining question is whether the right was clearly established that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Gutierrez*, 347 Mass. at 403-404. "The doctrine [of qualified immunity] protects all state actors except 'the plainly incompetent [and] those who knowingly violate the law.'" *Haley*, 657 F.3d at 46 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "[Q]ualified immunity does not shield public officials who, from an objective standpoint, should have known that their conduct was unlawful." *Id.* (quotation marks and citations omitted). The qualified immunity doctrine asks if there is fair warning that conduct would violate a citizen's rights. *See United States v. Lanier*, 520 U.S. 259, 270-72 (1997); *see also Hope*, 536 U.S. at 740. When a government official is being criticized by a member of the public, the police officer cannot arrest that individual merely for his speech. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). "[Speech] concerning public affairs is more than self-expression; it is the essence of self-

government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Thus, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 14 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). That is why Detective Williams did not arrest DePina on the night of the incident. Defendants' "time to make calculated choices about enacting or enforcing unconstitutional policies" takes their misconduct further from qualified immunity's reach. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement regarding denial of certiorari). Moreover, Detective Williams included information in his police report that clearly came from speaking with Rollins. *See* Defendants' Exhibit 1 at 1. ("As the DA began making her statement an individual – **known to her as having 3 separate criminal cases**. . . ." (emphasis added). And, Rollins is on record knowing that DePina's conduct was protected. Compl. at ¶ 50 ("As I am sure you are aware, yelling your opinion is free speech. It may be annoying but it is protected."). Therefore, Williams interacted with the complaining witness, Rollins, to prepare the charge and police report, and it is reasonable to presume that they both understood that what they were doing was an affront to the Constitution, merely to advance Rollins's political career.

Detective Williams knew that he was violating clearly established constitutional rights, but he let his morals and good judgment get away from him. In *Losch v. Borough of Parkesburg*, in a case with similar facts, the Third Circuit wrote "[t]he Supreme Court has clearly held that prosecution of a citizen in retaliation 'for nonprovocatively voicing his objection' to police conduct impermissibly punishes constitutionally protected speech.'" 736 F.2d 903, 910 (3d Cir. 1984) (quoting *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (per curiam). Moreover, "A police officer . . . is ordinarily charged to know the probable cause requirement." *Id.* (quoting *Trejo v. Perez*, 693 F.2d 482, 488 n. 10 (5th Cir. 1982)). "Therefore, if an arrest lacks probable cause for

its support it is, objectively speaking, in violation of clearly established law." *Id.* "When a right is well established . . . 'no one who does not know about it can be called reasonable in contemplation of law.'" *Id.* (quoting *Goodwin v. Circuit Court*, 729 F.2d 541, 546 (8th Cir. 1984). Therefore, the "law protecting [plaintiff] from police officers' use of their official position to launch a private vendetta was clearly established and not uncertain[.]" *Id.* The First Circuit summarily endorsed *Losch* in *Franco-De Jerez v. Burgos*, 876 F.2d 1038, 1040 (1st Cir. 1989).

Here, there was a vendetta and no probable cause to bring a criminal charge against DePina. Compl. at ¶¶ 18-21, 40-42. Williams initiated prosecution against DePina Rollins' behest to retaliate against DePina for voicing his opinions. *Id.* at ¶¶ 18-21.

The City Defendants cite to *Ricci v. Urso*, 974 F.2d 5 (1st Cir. 1992) and *Hunter v. Bryant*, 502 U.S. 224 (1991) to argue that probable cause was reasonable. Both cases involved whether officers had "objectively reasonable grounds for obtaining an arrest warrant[.]" *Ricci*, 974 F.2d at 7. The issue here is not probable cause; there was none. Here, the issue is whether there was clearly established constitutional right for DePina to attend a press conference on a public sidewalk to speak freely and petition his government while being free from the government retaliating against him for exercising his rights. There was a clearly established constitutional right.

3.2 BPD and Detective Williams in his Official Capacity Should Not be Dismissed

DePina recognizes that per the Appeals Court, "the Commonwealth, including its agencies, is not a 'person' subject to suit pursuant to G.L. c. 12, §11H." *Williams v. O'Brien*, 79 Mass. App. Ct. 169, 173 (2010); *see also Commonwealth v. ELM Med. Lab., Inc.*, 33 Mass. App. Ct. 71, 75-80 & n.9 (1992) (MCRA did not waive sovereign immunity of State agencies). This Court may be compelled to dismiss Plaintiff's claims against BPD and Detective Williams in his official capacity as state actors, DePina seeks to have those decisions overturned as wrongly decided.

DePina recognizes "it is a widely accepted rule of statutory construction that general words in a statute such as "persons" will not ordinarily be construed to include the State or political subdivisions thereof." *Hansen v. Commonwealth*, 344 Mass. 214, 219 (1962). But, constitutional violations are not ordinary—they are extraordinary, and there is nothing to suggest the legislature intended to exempt anyone, even state agencies and officials, from their constitutional obligations. Thus, while dismissal is inappropriate, this court is bound by precedent. DePina, preserves this issue for appeal, where he will seek a change in the law.

4.0 CONCLUSION

For the foregoing reasons, DePina respectfully requests that the Court deny the City Defendants' motion to dismiss.

Dated: January 27, 2023.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon all parties through the Court's electronic filing system on this 27th day of January, 2023, or otherwise caused for service via U.S. Mail, as follows:

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT DEPARTMENT
DOCKET NO. 2285CV0971A

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 RACHEL ROLLINS, in her personal capacity,
Defendants.

CERTIFICATE OF NOTICE OF FILING PURSUANT TO RULE 9A

I, Randall F. Maas, counsel of record for Defendants Dante Williams and City of Boston, hereby certify that I filed the following documents:

1. Dante Williams and City of Boston's Motion to Dismiss Plaintiff's Complaint and Supporting Memorandum of Law.
2. Plaintiff's Opposition to Dante Williams and City of Boston's Motion to Dismiss Plaintiff's Complaint.
3. Dante Williams and City of Boston's Reply Memorandum.
4. Documents List Pursuant to Rule 9A.
5. Certificate of Notice of Filing Pursuant to Rule 9A.

[signature on following page]

Date: February 6, 2023

Respectfully submitted,

DEFENDANTS DANTE WILLIAMS AND CITY OF BOSTON,

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Certificate of Service

I, Randall Maas, hereby certify that on February 6, 2023, a true copy of the above document was served upon plaintiff's counsel by e-mail.

/s/ Randall Maas

Randall Maas

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT
DOCKET NO. 2285CV0971A

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 RACHEL ROLLINS, in her personal capacity,
Defendants.

DOCUMENTS LIST PURSUANT TO RULE 9A

1. Dante Williams and City of Boston's Motion to Dismiss Plaintiff's Complaint and Supporting Memorandum of Law.
2. Plaintiff's Opposition to Dante Williams and City of Boston's Motion to Dismiss Plaintiff's Complaint.
3. Dante Williams and City of Boston's Reply Memorandum.
4. Documents List Pursuant to Rule 9A.
5. Certificate of Notice of Filing Pursuant to Rule 9A.

[signature on following page]

Date: February 6, 2023

Respectfully submitted,

DEFENDANTS DANTE WILLIAMS AND CITY OF BOSTON,

By their attorneys:

Adam Cederbaum
Corporation Counsel

/s/ Randall Maas
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Certificate of Service

I, Randall Maas, hereby certify that on February 6, 2023, a true copy of the above document was served upon plaintiff's counsel by e-mail.

/s/ Randall Maas

Randall Maas