

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

WORCESTER, ss.

NO. 2022-J-_____

_____)
 JOAO DEPINA)
)
 v.)
)
 WORCESTER COUNTY)
 DISTRICT ATTORNEY'S)
 OFFICE, et al.)
 _____)

**COMMONWEALTH DEFENDANTS' RECORD APPENDIX IN
SUPPORT OF PETITION FOR INTERLOCUTORY
RELIEF PURSUANT TO G. L. c. 231, § 118, FIRST PAR.**

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2285CV00971 Depina, Joao vs. Worcester County District Attorney's Office et al

- Case Type: Actions Involving the State/Municipality
- Case Status: Open
- File Date: 08/24/2022
- DCM Track: A - Average
- Initiating Action: Tortious Action involving the Commonwealth, Municipality, MBTA, etc.
- Status Date: 08/24/2022
- Case Judge: Dupuis, Hon. Renee P
- Next Event:

[All Information](#) [Party](#) [Tickler](#) [Docket](#) [Disposition](#)

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Party Attorney

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Ticklers

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Service	08/24/2022	11/22/2022	90	
Answer	08/24/2022	12/22/2022	120	
Rule 12/19/20 Served By	08/24/2022	12/22/2022	120	
Rule 12/19/20 Filed By	08/24/2022	01/23/2023	152	
Rule 12/19/20 Heard By	08/24/2022	02/21/2023	181	
Rule 15 Served By	08/24/2022	10/18/2023	420	
Rule 15 Filed By	08/24/2022	11/17/2023	450	
Rule 15 Heard By	08/24/2022	11/17/2023	450	
Discovery	08/24/2022	08/13/2024	720	

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Rule 56 Served By	08/24/2022	09/12/2024	750	
Rule 56 Filed By	08/24/2022	10/14/2024	782	
Final Pre-Trial Conference	08/24/2022	02/10/2025	901	
Judgment	08/24/2022	08/25/2025	1097	

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
08/24/2022	Complaint electronically filed.	1	Image
08/24/2022	Civil action cover sheet filed.	2	Image
08/24/2022	Attorney appearance On this date Marc J Randazza, Esq. added for Plaintiff Joao Depina		
08/24/2022	Attorney appearance On this date Jay Marshall Wolman, Esq. added for Plaintiff Joao Depina		
08/24/2022	Case assigned to: DCM Track A - Average was added on 08/24/2022		
08/24/2022	Demand for jury trial entered. Applies To: Depina, Joao (Plaintiff)		
08/25/2022	Plaintiff Joao Depina's Notice of Plaintiff's Certification Pursuant to Rule 11(a)(1) (E-FILED)	3	Image
09/15/2022	Attorney appearance electronically filed. Applies To: Boodoo, Esq., Jesse Mohan (Attorney) on behalf of Worcester County District Attorney's Office (Defendant)		Image
09/15/2022	Defendant Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia, Rachael Rollins's Submission of Notice of appearance of AAG Hannah C. Vail, as counsel for Defendant Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia and Rachael Rollins		Image
09/15/2022	Attorney appearance electronically filed. Applies To: Bocian, Esq., Thomas E (Attorney) on behalf of Worcester County District Attorney's Office (Defendant)		Image
09/21/2022	ORDER: FOR SPECIAL ASSIGNMENT it is hereby ORDERED that the Honorable Renee P. Dupuis, Associate Justice of the Superior Court, is specially assigned to hear the above-captioned case for all purposes. The Clerk's Office will notify Counsel of record. (see Order) Entered and Copies mailed 09/21/2022	5	Image
09/21/2022	Defendant Worcester County District Attorney's Office, Anthony Melia, Rachael Rollins, Joseph D. Early, Jr.'s Assented to Motion to Extend Time to Respond to Complaint [E-FILED]	6	Image
10/20/2022	Endorsement on Motion to extend time to respond to complaint (#6.0): Other action taken The defendants motion to extend time to respond to the complaint is allowed by agreement. Going forward, all filings shall be sent to the attention of Assistant Clerk Magistrate Cheryl O'Connell Riddle at the Worcester Superior Court. A courtesy copy shall be sent to my attention by e-mail via the Bristol Superior Court at the following address: mark.ferriera@jud.state.ma.us e-documents sent 10/20/2022 Judge: Dupuis, Hon. Renee P		Image
10/24/2022	Plaintiff Joao Depina's Motion for Recusal (E-FILED)	7	Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
10/24/2022	Joao Depina's Memorandum in Support of Motion for Recusal (E-FILED)	7.1	Image
10/24/2022	Defendants Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia, Rachael Rollins's Response to Motion for Recusal (E-FILED)	7.2	Image
10/24/2022	Plaintiff Joao Depina's Submission of Certification of Conference Pursuant to Rule 9C (E-FILED)	7.3	Image
10/24/2022	Affidavit of Compliance (E-FILED)	7.4	Image
10/24/2022	Plaintiff Joao Depina's Request for Hearing (E-FILED)	7.5	Image
10/24/2022	Plaintiff Joao Depina's Notice of Filing (E-FILED)	7.6	Image
10/24/2022	Plaintiff Joao Depina's Submission of List of Documents (E-FILED)	7.7	Image
10/24/2022	Defendants Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia, Rachael Rollins's Submission of Rule 9E Notice of Motion to Dismiss (E-FILED)	8	Image
10/25/2022	Endorsement on Motion for Recusal (#7.0): DENIED After review of the submissions, Plaintiff's motion for recusal is DENIED without a hearing. e-document sent 10/27/2022 Judge: Dupuis, Hon. Renee P		Image
10/26/2022	Plaintiff Joao Depina's Motion for extension of time to respond to Defendants' motion to dismiss (E-FILED)	9	Image
10/26/2022	Defendants Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia, Rachael Rollins's Motion to stay discovery and for a protective order (E-FILED)	10	Image
10/26/2022	Opposition to p#10: Motion to stay discovery and for a protective order filed by Joao Depina (E-FILED)	10.1	Image
10/26/2022	Reply/Sur-reply of Defendants Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia, and Rachel Rollins in support of their motion to stay discovery and for a protective order (E-FILED)	10.2	Image
10/26/2022	Defendant Worcester County District Attorney's Office's Notice of filing (E-FILED)	10.3	Image
10/26/2022	Endorsement on Motion for extension of time to respond to Defendants' motion to dismiss (#9.0): ALLOWED Notices mailed 10/27/22 Judge: Dupuis, Hon. Renee P		Image
10/26/2022	Endorsement on Motion to stay discovery and for a protective order (#10.0): DENIED Notices mailed 10/27/22 Judge: Dupuis, Hon. Renee P		Image

Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Pending		Dupuis, Hon. Renee P



\$275-

Date Filed 8/24/2022 3:45 PM
Superior Court - Worcester
Docket Number

E-FILED

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: 2285CV00971A

<p>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.</p>
--

**VERIFIED COMPLAINT AND
DEMAND FOR JURY TRIAL**

11

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

THE PARTIES

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

³ Her nomination was unfavorably reported out of the Senate Judiciary Committee. On December 8, 2021, a month after DePina was coerced into silence through threat of prosecution, Rollins was, ultimately, confirmed by the Senate following the historic need for the Vice President to cast a tie-breaking vote, twice. *U.S. Senate: U.S. Senate Roll Call Votes 117th Congress*, 1st Session www.senate.gov/legislative/LIS/roll_call_votes/vote117/vote_117_1_00485.htm, (accessed Aug. 23, 2022); *U.S. Senate: U.S. Senate Roll Call Votes 117th Congress*, 1st Session www.senate.gov/legislative/LIS/roll_call_votes/vote117/vote_117_1_00486.htm, (accessed Aug. 23, 2022)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transcript 7: 10-18.

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

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

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

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

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

MR. ADA: No, Judge.

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

MR. ADA: Yes.

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

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

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

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

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

MR. ADA: No, Judge.

Transcript 12:7- 13:9.

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

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

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

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

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

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

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

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

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



Brelis, Matthew (DAA) <matthew.brelis@pstate.ma.us>
to me ▾

Sep 21, 2020, 4:04 PM ☆ ↶ ⋮

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

Rachael Rollins

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

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

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

CAUSES OF ACTION

Count I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Count IV
(Intentional or Reckless Infliction of Emotional Distress)

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

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

81. Defendants' conduct was extreme and outrageous.

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

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

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

Count V
(Negligent Infliction of Emotional Distress)

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

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

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

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

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

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

DEMAND FOR TRIAL BY JURY

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks this Court:

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

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

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

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

Dated: August 24, 2022.

Respectfully Submitted,

/s/ Marc J. Randazza

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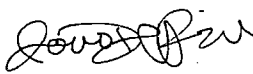
Attorneys for Plaintiff,
Joao DePina

Date Filed 8/24/2022 3:45 PM
Superior Court - Worcester
Docket Number

VERIFICATION OF COMPLAINT

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

Dated: 08 / 24 / 2022

By: 
Joao DePina

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: 2285CV00971

JOAO DEPINA,

Plaintiff,

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: August 25, 2022

Respectfully Submitted,

/s/ Marc J. Randazza

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Joao DePina

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2285CV00971 A

JOAO DEPINA

vs.

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 WILIAMS, in his personal and
official capacities, and RACHAEL ROLLINS, in her personal capacity.

ORDER FOR SPECIAL ASSIGNMENT

It is hereby **ORDERED** that the Honorable Renee P. Dupuis, Associate Justice of the
Superior Court, is specially assigned to hear the above-captioned case for all purposes. The
Clerk's office will notify all counsel of record.


Heidi E. Brieger
Chief Justice

DATED: 9/16/22

RECEIVED

SEP 23 2022

OFFICE OF THE ATTORNEY GENERAL
TRIAL DIVISION

1151

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: 2285CV00971

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.

PLAINTIFF'S MOTION FOR RECUSAL

Plaintiff Joao DePina respectfully moves for the recusal of Justice Renee P. Dupuis from this pending case pursuant to Code of Judicial Conduct, S.J.C. Rule 3:09, Canon 2, Rule 2.11 (2016). Plaintiff does not seek to impugn Justice Dupuis. However, as a career prosecutor prior to becoming a jurist, Justice Dupuis likely has an unconscious bias and, at a minimum, there will be an appearance of bias in a case challenging long-standing protections of prosecutors, residues of which she enjoys to this day

Pursuant to article 29 of the Massachusetts Constitution Declaration of Rights, "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit." *King v. Grace*, 293 Mass. 244, 246 (Mass. 1936). Plaintiff believes that recusal is required to "enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality." *Litecky v. United States*, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring, with Blackmun, Stevens, and Souter, JJ.).

In support hereof, Plaintiff refers to the accompanying memorandum of law, filed herewith and incorporated herein by reference.

Dated: October 6, 2022

Respectfully Submitted,

/s/ Marc J. Randazza

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Attorneys for Plaintiff,

Joao DePina

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 6th day of October, 2022, or otherwise caused for service via The Suffolk County Sheriff’s Department, as follows:

Thomas E. Bocian
Assistant Attorney General
Criminal Bureau/Appeals
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thomas.bocian@mass.gov

Jesse M. Boodoo
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Counsel for Defendants Worcester County Prosecutor’s Office, Joseph D. Early, Jr., Anthony Melia, and Rachael Rollins. Served via the Court’s electronic filing system.

Additionally, I caused Defendants Dante Williams and Boston Police Department to be served by mailing the foregoing document to the Suffolk County Sheriff’s Department for their service of process, return of which will be separately made.

/s/ Marc J. Randazza
Marc J. Randazza

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: 2285CV00971

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.

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION FOR RECUSAL**

1.0 INTRODUCTION

The facts are not in dispute in this case. During a live televised press conference, Plaintiff Joao DePina questioned Defendant Rachael Rollins' ability to do her job. DePina challenged former Suffolk County District Attorney Rachael Rollins, a government servant, on whether she could competently serve the people in her district. The entire incident was recorded on video.

Because he challenged a state prosecutor, three days after the live televised press conference DePina was charged with attorney intimidation in violation of G.L. c 268 § 13B. *See Commonwealth v. DePina*, No. 2107CR003064 (Boston Municipal Court Dorchester Division). Attorney intimidation is a felony subject to a maximum of 10 years in prison. The criminal complaint and police report are not in dispute.

The criminal charge against DePina was dismissed for lack of probable cause. The order dismissing the criminal charge against DePina and the transcript of the hearing are not in dispute.

What is in dispute is the law. The doctrine of absolute prosecutorial immunity is in dispute. Defendant Worcester County District Attorney's Office should never have prosecuted this egregious violation of DePina's right to speak freely and petition his government. The Commonwealth of Massachusetts is being called upon to abolish the doctrine of absolute prosecutorial immunity in this case. Because Justice Renee P. Dupuis served as a prosecutor for over 20 years in the Commonwealth, Plaintiff respectfully requests Honorable Dupuis recuse herself.

2.0 BACKGROUND

DePina was the victim of malfeasance by Massachusetts prosecutors and Boston police officers. Defendants conspired to prosecute DePina for a felony without any reasonable basis in law or fact to do so. In fact, a year prior, DePina performed an almost identical act where he heckled former Boston Police Chief William Gross during a live televised press conference. There, Defendant Rachael Rollins stepped in to protect DePina and his right to freedom of speech because she feared white police officers were going to attack him—a black man. “Hold my badge and my phone, I trust you with my belongings.” Defendant Rachael Rollins told DePina after he heckled former Boston Police Chief Williams Gross. In a public response after the incident, Defendant Rollins explained why she helped de-escalate that situation, stating in defense of DePina that “As I am sure you are aware, yelling your opinion is free speech.”

But then, a mere year later, Defendant Rachael Rollins found herself on the receiving end of DePina's criticism, and she used the criminal justice system to unjustly silence him. Defendant Rachael Rollins had DePina charged with a felony where he could have received a 10-year jail sentence. Defendant Rachael Rollins farmed out the prosecution. At the time, Defendant Rachael Rollins was the Suffolk County District Attorney. She had Defendant Detective Dante Williams prepare a criminal complaint against DePina and Defendant Worcester District Attorney's Office prosecute the case.

Ultimately, the case against DePina was dismissed for lack of probable cause. Justice Fraser noted in the order dismissing the charge that “[DePina’s] speech is within the First Amendment’s protective reach.”

Defendants knew that DePina was lawfully exercising his right to freedom of speech . Defendants maliciously abused the criminal justice system to silence DePina. Defendant Worcester District Attorney Joseph D. Early, Jr. willingly served as Defendant Rollins’s henchman and sent his foot soldier Defendant Assistant District Attorney Anthony Melia to maliciously prosecute DePina without any factual or legal basis to support the charges.

When pressed by Justice Fraser for evidence at the hearing on the motion to dismiss the charges for lack of probable cause, Defendant Assistant District Attorney Melia stated, “My only argument would be that with DePina questioning [Rollins] ability to be the district attorney, he’s indirectly referencing her ability to fairly prosecute him as a defendant.” Justice Fraser followed up asking, “So does that mean that when anybody who has a case appears at a press conference questions the ability of the prosecutor to do their job, that is witness intimidation?” Defendant Melia responded, “If they’re under prosecution by that district attorney, yes.”

Defendant Assistant District Attorney Melia, and every government official involved in this conspiracy, was aware that DePina was merely questioning Defendant Rachael Rollins – a government servant – on her ability to do her job. The entire incident was on video, and the prosecutor defendants had access to the video throughout the pendency of the criminal case. In no way, shape or form did DePina threaten Defendant Rollins. Defendant Assistant District Attorney Melia prosecuted DePina for questioning a government official’s ability to do her job. This malicious conduct from government officials can not stand in a free society. DePina was abused.

Defendants flipped the criminal justice system into a criminal injustice system. Defendants will necessarily put forth the doctrine of absolute prosecutorial immunity and other immunity doctrines as a defense to protect their conduct. Because Justice Renee P. Dupuis honorably served as a prosecutor for over 20 years in Massachusetts, DePina respectfully requests Honorable Dupuis

recuse herself from this case. Unfortunately, Justice Dupuis’s interests in this case are inherently adverse to DePina obtaining justice. For the doctrine of absolute prosecutorial immunity to be overturned, by implication, it opens Honorable Dupuis’s career as a prosecutor to scrutiny and exposure to potential lawsuits. A reasonable person on the street would look at this inherent conflict as raising serious questions.

3.0 ARGUMENT

The principle of impartial justice is expressly enshrined in article 29 of the Massachusetts Constitution Declaration of Rights:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

“A rigid adherence to that principle is essential to the maintenance of free institutions. It has been strictly upheld by decisions of this court.” *Commonwealth v. Leventhal*, 364 Mass. 718, 721 (1974) (quoting *Thomajanian v. Odabshian*, 272 Mass. 19, 23 (Mass. 1930)). The requirement of an unbiased tribunal is fundamental to due process. *See Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972). “A fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136 (1955).

“The administration of justice by the courts ought not only to be, but it ought to appear to be, impartial and efficient. The principles of natural justice as well as the mandates of the Constitution establish a strict and lofty standard.” *King v. Grace*, 293 Mass. 244, 247 (Mass. 1936). Article 29 is “at least as rigorous in exacting high standards of judicial propriety as are those of the Fourteenth Amendment of the Constitution of the United States.” *Id.*

When a question of recusal is raised, a “judge must ‘consult first his own emotions and conscience’ to determine whether he possesses the capacity to rule fairly at trial.” *Commonwealth v. Daye*, 435 Mass. 463, 469 (2001) (quoting *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976)).

Plaintiff asks this Honorable Court to make that assessment in light of her background serving as a prosecutor for over 20 years in the Commonwealth, and whether overturning the doctrine of absolute prosecutorial immunity would open her up to exposure to potential lawsuits. “A judge shall disqualify herself in any proceeding in which the judge cannot be impartial.” Massachusetts Code of Judicial Conduct, S.J.C. Rule 3:09, Canon 2, Rule 2.11 (2016). There is potential legal and economic exposure to Justice Dupuis as a former prosecutor in Massachusetts if the absolute prosecutorial immunity doctrine were overturned. And, these are doctrines she, herself, enjoyed for decades, even if she never invoked them nor had cause to.

If this Court determines that it does possess the capacity to rule fairly, this Court must nonetheless “disqualify himself or herself in any proceeding in which . . . the judge’s impartiality might reasonably be questioned.” Code of Judicial Conduct, S.J.C. Rule 3:09, Canon 2, Rule 2.1. This requires an “objective appraisal” rather than a subjective one. *Daye*, 435 Mass. at 469 (*quoting Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991)). The Appeals Court has stated that this requirement tracks 28 U.S.C. § 455(a), under which the standard is “whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge’s impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion . . . but rather in the mind of the reasonable man.” *Commonwealth v. Zine*, 52 Mass. App. Ct. 130, 131 n.1 (2001) (*quoting United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977)). The question is “how his participation looks to the average person on the street.” *Zine*, 52 Mass. App. Ct. at 131 n.1. Recusal should be allowed where there is an appearance of bias or prejudice, there is no requirement that an actual subjective bias be present.

Justice Dupuis served as a prosecutor in Massachusetts for over 20 years. DePina is making a good faith challenge to the immunity doctrines, including absolute prosecutorial immunity. *See* Notice of Rule 11(a)(1) certification. Plaintiff’s success in defeating the doctrine of absolute prosecutorial immunity conflicts with the interests of Justice Dupuis. Her entire 20 year

prosecutorial career is currently shielded by absolute immunity. This case attacks that immunity and seeks to end it. If it is ended, then she will be subject to at least potential lawsuits over her conduct. This is not to suggest that DePina or his counsel have any present reason to believe that she was one of the bad-apple-prosecutors. But, how can she rule impartially if this case transforms her from 100% bulletproof into a mere mortal like the rest of us?

It is also likely that any career prosecutor would have close friends in that profession. This adverse interest is tangible and creates doubt in the mind of the reasonable man on the street as to the outcome of this case. The reasonable man on the street will be forced to believe that any unfavorable outcome or ruling against DePina is the direct result of this Honorable Court inserting her own bias and protecting her own economic and legal interests.

4.0 CONCLUSION

Based on the foregoing, DePina believes that recusal is required, as Justice Dupuis personal interests are materially adverse to his in this case. At a minimum, Justice Dupuis would not appear to be fair and impartial to the “average person on the street.” For the foregoing reasons, DePina respectfully moves that this Court, Dupuis, J., recuse itself from presiding over any proceedings in connection with the instant matter.

Dated: October 6, 2022

Respectfully Submitted,

/s/ Marc J. Randazza

Marc J. Randazza, BBO# 651477

mjr@randazza.com, ecf@randazza.com

Jay M. Wolman, BBO# 666053

jmw@randazza.com

RANDAZZA LEGAL GROUP, PLLC

30 Western Avenue

Gloucester, MA 01930

Tel: (978) 801-1776

Attorneys for Plaintiff,

Joao DePina

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 6th day of October, 2022, or otherwise caused for service via The Suffolk County Sheriff’s Department, as follows:

Thomas E. Bocian
Assistant Attorney General
Criminal Bureau/Appeals
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Boston, MA 02108
Hannah.Vail@mass.gov

Counsel for Defendants Worcester County Prosecutor’s Office, Joseph D. Early, Jr., Anthony Melia, and Rachael Rollins. Served via the Court’s electronic filing system.

Additionally, I caused Defendants Dante Williams and Boston Police Department to be served by mailing the foregoing document to the Suffolk County Sheriff’s Department for their service of process, return of which will be separately made.

/s/ Marc J. Randazza
Marc J. Randazza

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
C.A. NO. 2285CV00971-A

<p>JOAO DEPINA,</p> <p>Plaintiff,</p> <p>v.</p> <p>WORCESTER COUNTY DISTRICT ATTORNEY'S OFFICE, JOSEPH D. EARLY, JR., ANTHONY MELIA, BOSTON POLICE DEPARTMENT, DANTE WILLIAMS, and RACHAEL ROLLINS,</p> <p>Defendants.</p>
--

**DEFENDANTS WORCESTER COUNTY DISTRICT ATTORNEY’S OFFICE, JOSEPH D. EARLY, JR., ANTHONY MELIA, AND RACHAEL ROLLINS’
RESPONSE TO MOTION FOR RECUSAL**

Defendants the Worcester County District Attorney’s Office, Joseph D. Early, Anthony Melia, and Rachael Rollins (collectively, the “Commonwealth Defendants”) do not agree with Plaintiff Joao DePina’s contention that Judge Dupuis’ service as a prosecutor renders her an interested party or otherwise creates reasonable doubt as to her impartiality. Nevertheless, because the question of recusal is one for Judge Dupuis to decide alone, the Commonwealth Defendants take no position on the relief sought by the motion.

Defendants,

WORCESTER COUNTY DISTRICT ATTORNEY'S
OFFICE, JOSEPH D. EARLY, JR., ANTHONY
MELIA, and RACHAEL ROLLINS

By their Attorneys

MAURA HEALEY
ATTORNEY GENERAL

/s/ Jesse M. Boodoo
Thomas E. Bocian, BBO No. 678307
Jesse M. Boodoo, BBO No. 678471
Hannah C. Vail, BBO No. 698577
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
Tel: (617) 963-2592
Thomas.Bocian@mass.gov
Jesse.Boodoo@mass.gov
Hannah.Vail@mass.gov

Date: October 8, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on October 8, 2022, I served a copy of the foregoing on counsel for the plaintiff by email to:

Marc J. Randazza, Esq.
Jay Wolman, Esq.
Randazza Legal Group, PLLC
30 Western Avenue
Gloucester, MA 01930
mjr@randazza.com
jmw@randazza.com

/s/ Jesse M. Boodoo
Jesse M. Boodoo

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
C.A. NO. 2285CV00971-A

<p>JOAO DEPINA,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>WORCESTER COUNTY DISTRICT ATTORNEY’S OFFICE, JOSEPH D. EARLY, JR., ANTHONY MELIA, BOSTON POLICE DEPARTMENT, DANTE WILLIAMS, and RACHAEL ROLLINS,</p> <p style="text-align: center;">Defendants.</p>
--

**DEFENDANTS WORCESTER COUNTY DISTRICT ATTORNEY’S OFFICE,
JOSEPH D. EARLY, JR., ANTHONY MELIA, AND RACHAEL ROLLINS’
MOTION TO STAY DISCOVERY AND FOR A PROTECTIVE ORDER**

Defendants the Worcester County District Attorney’s Office, Joseph D. Early, Jr., Anthony Melia, and Rachael Rollins (collectively, the “Commonwealth Defendants”) hereby file this Motion to Stay Discovery and for a Protective Order. For the reasons described herein, there can be no discovery in this matter until after the Commonwealth Defendants’ forthcoming Motion to Dismiss—which will raise defenses of absolute immunity, qualified immunity, sovereign immunity, and lack of subject matter jurisdiction—is decided:

1. This case, which was filed in August 2022, generally relates to the Worcester County District Attorney’s Office’s prosecution of the plaintiff on charges pursuant to G. L. c. 268, § 13B(b) – intimidating an attorney to interfere with a criminal

proceeding. *See Commonwealth v. DePina*, Case No. 2107CR003064 (BMC Dorchester). The Complaint here alleges claims of malicious prosecution, malicious abuse of process, retaliation, and intentional and negligent infliction of emotional distress in connection with that prosecution.

2. On September 21, 2022, the Commonwealth Defendants filed their Assented Motion to Extend Time to Respond to the Complaint to November 15, 2022.

3. The Commonwealth Defendants are currently drafting a Motion to Dismiss that will seek dismissal of all claims against them on grounds of, *inter alia*, absolute immunity and qualified immunity. Indeed, the Plaintiff has already filed a Notice of Plaintiff's Certification Pursuant to Rule 11(a)(1), acknowledging that his claims are subject to absolute immunity defenses, and announcing his intent to use the claims as "impact litigation to challenge these immunity doctrines as a matter of public interest." Dkt. No. 3 at 1-2. The Worcester County District Attorney's Office and the Individual Defendants in the official capacities will also seek dismissal of all claims for lack of subject matter jurisdiction on the basis of sovereign immunity.

4. On October 6, 2022, the Plaintiff served a First Set of Requests for Admissions and a First Set of Requests for Production of Documents on each Defendant—including Defendants Dante Williams and the Boston Police Department, whom do not yet have counsel appearing in this matter.

5. Pursuant to Mass. R. Civ. P. 26(c), the Court may enter a protective order for good cause shown whenever necessary "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

6. As the Commonwealth Defendants will raise substantial defenses of absolute and qualified immunity, no discovery can properly be taken from them until after a ruling on the forthcoming Motion to Dismiss. The rule in this regard is as straightforward as it is firmly entrenched. See *Hornibrook v. Richard*, 488 Mass. 74, 83-84 (2021) (“[T]he question of whether a defendant is entitled to absolute immunity is not one that should be determined through narrowly tailored discovery”) (internal citations and quotations omitted). See also *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“[T]he driving force behind the creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials [will] be resolved prior to discovery.”) (internal citations and quotation marks omitted); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (where qualified immunity defense is raised in a motion to dismiss, a trial court “should resolve that threshold question before permitting discovery” so that “officials are not subjected to unnecessary and burdensome discovery or trial proceedings”); *Johnson v. Fankell*, 520 U.S. 911, 915 n.2 (1997) (“Of course, when a case can be dismissed on the pleadings or in an early pretrial stage, qualified immunity also provides officials with the valuable protection from the burdens of broad-reaching discovery[.]”) (internal citations and quotation marks omitted); *Hegarty v. Somerset Cty.*, 25 F.3d 17, 18 (1st Cir. 1994), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“The immunity from suit includes protection from the burdens of discovery. Until this threshold immunity question is resolved, discovery should not be allowed.”); *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009) (“The basic thrust of the qualified immunity doctrine is to free officials from concerns of litigation, including avoidance of disruptive discovery.”) (internal citations and quotation marks

omitted); *Hudson v. Comm’r of Correction*, 46 Mass. App. Ct. 538, 549 (1999), *aff’d*, 431 Mass. 1 (2000) (protective order properly entered to stay discovery until after a ruling on motion to dismiss raising qualified immunity); *Dinsdale v. Com.*, 424 Mass. 176, 181 n.10 (1997) (questions of immunity for government officials are to be “resolved at the earliest possible stage of litigation” as “the entitlement is an immunity from suit, rather than a mere defense to liability”) (internal citations and quotation marks omitted).

7. Similarly, as the Commonwealth Defendants will raise substantial defenses of lack of subject matter jurisdiction based on sovereign immunity, no discovery can properly be taken from them until those questions of subject matter jurisdiction are resolved. *See* Mass. R. Civ. P. 12(h)(3) (“Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”); *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 320 n.4 & 322 n.6 (1998) (“[T]he question of subject matter jurisdiction goes to the power of the court to hear and decide the matter.”); *HSBC Bank U.S.A., N.A. v. Matt*, 464 Mass. 193, 199 (2013) (“Courts . . . have both the power and the obligation to resolve questions of subject matter jurisdiction whenever they become apparent [.]”) (citations and quotation marks omitted); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252 (11th Cir. 2004) (*per curiam*) (“The defense of sovereign or qualified immunity protects government officials not only from having to stand trial, but from having to bear the burdens attendant to litigation, including pretrial discovery.”); *Liverman v. Comm. On The Judiciary, U.S. House Of Representatives*, 51 F. App’x 825,

827-28 (10th Cir. 2002) (trial court properly stayed discovery until after ruling on motion to dismiss raising sovereign immunity).

8. Finally, Plaintiff can offer no sound justification for seeking immediate, pre-Motion to Dismiss discovery in this case. The underlying criminal case against the Plaintiff was dismissed on May 25, 2022. Compl. ¶ 45. The Plaintiff has offered no persuasive basis to conclude that he will be prejudiced by any delay in discovery.

WHEREFORE, for the foregoing reasons, the Commonwealth Defendants respectfully request that the Court enter a protective order and stay all discovery in this matter until after their Motion to Dismiss is decided.

Defendants,

WORCESTER COUNTY DISTRICT
ATTORNEY'S OFFICE, JOSEPH D. EARLY,
JR., ANTHONY MELIA, and RACHAEL
ROLLINS

By their Attorneys

MAURA HEALEY
ATTORNEY GENERAL

/s/ Jesse M. Boodoo _____

Jesse M. Boodoo, BBO No. 678471
Assistant Attorney General
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Tel: (617) 963- 2592
Jesse.Boodoo@mass.gov

Date: October 11, 2022

**CERTIFICATE OF COMPLIANCE
WITH MASSACHUSETTS SUPERIOR COURT RULE 9C**

Undersigned counsel for the moving party hereby certifies that the conference required by Massachusetts Superior Court Rule 9C was held by telephone on October 7, 2022 by and between undersigned counsel and counsel for the Plaintiff, Jay Wolman.

/s/ Jesse M. Boodoo
Jesse M. Boodoo
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Jesse M. Boodoo, Assistant Attorney General, hereby certify that I have this day, October 11, 2022, served the foregoing document, upon the attorney of record for the plaintiff by emailing a copy to:

Marc J. Randazza, Esq.
Jay Wolman
Randazza Legal Group, PLLC
30 Western Avenue
Gloucester, MA 01930
mjr@randazza.com
jmw@randazza.com

/s/ Jesse M. Boodoo
Jesse M. Boodoo
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: 2285CV00971

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.

**PLAINTIFF'S OPPOSITION TO
COMMONWEALTH DEFENDANTS'
MOTION TO STAY DISCOVERY AND FOR
A PROTECTIVE ORDER**

Plaintiff Joao DePina hereby files his Opposition to Motion to Stay Discovery and for a Protective Order.

1.0 BACKGROUND

On November 9, 2021, DePina heckled Defendant Rachael Rollins while she was giving a press conference on a public street. (Plaintiff's Verified Complaint and Demand for Jury Trial "Complaint" at ¶¶ 12-16) At the time of the incident, Defendant Rollins was the Suffolk County District Attorney. (*Id.* at ¶ 13) For heckling Defendant Rollins, three days later, on November 12, 2021, a felony charge for attorney intimidation in violation of G.L. c.268, § 13B was filed against DePina. (*Id.* at ¶ 17) In the words of Defendant Assistant District Attorney Anthony Melia, DePina was prosecuted for merely "questioning [Defendant Rachael Rollins] ability to be the district attorney...." (*Id.* at ¶ 43)

After the Commonwealth filed criminal charges against DePina, the Suffolk County District Attorney's Office recused itself from prosecution and farmed the case out. (*Id.* at ¶¶ 26)

Norfolk County District Attorney's Office, mindful of its obligations under the Massachusetts Rule of Professional Conduct Rule 3.8(a), declined to take the case. (*Id.* at ¶ 27) On the other hand, Worcester County District Attorney's Office accepted the case. (*Id.* at ¶¶ 29-37)

On May 25, 2022, the criminal charge against DePina was dismissed for lack of probable cause. (Complaint at ¶ 46) The trial court held that “[t]here exists no probable cause or references, direct or indirect, to [DePina’s] pending criminal cases. [DePina’s] speech is within the First Amendment’s protective reach.” (*Id.*)

There was a three-day window between the filing of criminal charges against DePina and his encounter with Defendant Rollins. There was also time between the filing of criminal charges and Worcester County District Attorney's Office accepting the case. Neither of these timeframes involved split-second decisions. There were communications and discussions between the Defendants. It is inequitable for the Commonwealth Defendants to have put DePina through the hell of a criminal prosecution for the obvious exercise of his right to speak freely and petition his government, and then for the Commonwealth Defendants to turn around and slam the door shut on discovery of exactly how that all transpired.

2.0 LEGAL AUTHORITY

Pursuant to Mass. R. Civ. P. 26(c), the Court may enter a protective order only for good cause shown “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”

3.0 LEGAL ARGUMENT

There is no good cause to grant the Commonwealth Defendants motion to stay discovery and for a protective order. The Commonwealth Defendants argue that no discovery can be had until this Court rules on a motion to dismiss because they will raise defenses of qualified and absolute immunity. (Motion to Stay Discovery and For a Protective Order “Motion” at ¶ 3) The caselaw does not support their position. At its essence, the Commonwealth Defendants argue that

there is a standard operating procedure that this Court is duty bound to follow. There is no such thing.

The SJC has stated in dictum that the Massachusetts Civil Rights Act claims adopt “the standard of immunity for public officials developed under § 1983.” *Duarte v. Healy*, 405 Mass. 43, 46 (Mass. 1989); *see also Dinsdale v. Commonwealth*, 424 Mass. 176, 182 (Mass. 1997). Qualified immunity is a judicially-created doctrine that 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.” *Rodrigues v. Furtado*, 410 Mass. 878, 882 (Mass. 1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

The bulk of caselaw cited by the Commonwealth Defendants relates to qualified immunity. (See Motion at ¶ 6) The only binding precedent on qualified immunity cited by the Commonwealth Defendants is *Hudson v. Comm’r of Correction*, 46 Mass. App. Ct. 538 (1999), *aff’d* 431 Mass. 1 (2000). In *Hudson*, the Appeals Court held the trial court did not abuse its discretion in granting a motion for protective order and to stay discovery where a *pro se* litigant’s “entire argument” on appeal was premised on procedural indulgences granted to *pro se* litigants. *Id.* at 549. Finding it was not an abuse of discretion to grant a stay does not mean that a stay must always be granted. The Commonwealth argues to strip the Court of that very discretion.

Here, the Commonwealth Defendants provides no argument under Mass. Civ. P. 26(c) to support staying discovery, and the Commonwealth Defendants are not likely to succeed on a qualified immunity defense. The encounter between DePina and Defendant Rollins occurred on an open street, the pinnacle of an open forum, where the right to speak freely and petition the government 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.”) (quotation marks and citations omitted). For exercising his constitutionally protected right to speak

freely and petition his government, the Commonwealth Defendants retaliated against DePina through an unjust abuse of the criminal justice system. The criminal charge against DePina was dismissed for lack of probable cause. (Complaint at ¶ 46) There is no reasonable argument that the defense of qualified immunity applies to all of the Commonwealth Defendants. *Houston v. Hill*, 482 U.S. 451, 462-63 (1987) (“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.”).

The central issue for the Commonwealth Defendants is whether absolute prosecutorial immunity applies. There is no presumption that the Commonwealth Defendants are entitled to absolute immunity. The Commonwealth Defendants “bear the burden of showing that such immunity is justified for the function in question.” *C.M. v. Comm’r of Dep’t of Children & Families*, 487 Mass. 639, 646 (Mass. 2021) (quotation marks and citations omitted). Determining the scope of prosecutorial immunity requires a functional analysis, a fact-specific inquiry, that “must thus focus not merely on the status or title of the officer, but also on the nature of the official behavior challenged.” *Chicopee Lions Club v. Dist. Attorney for Hampden Dist*, 396 Mass. 244, 248 (Mass. 1985). “Where the activity in question is closely related to the judicial phase of a criminal proceeding, or involves the skills or judgment of an advocate, the activity will be subject to absolute immunity.” *Id.* “A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). “[A]ctions taken as an investigator enjoy only qualified immunity.” *Zahrey v. Coffey*, 221 F.3d 342, 346 (2d Cir. 2000).

Only two cases the Commonwealth Defendants cite pertain to absolute immunity. (*See* Motion at ¶ 6) Neither case is dispositive.

First, the Commonwealth Defendants cites *Dinsdale*, 424 Mass. at 181 n.10 to support their argument that discovery cannot be had until the issue of absolute immunity is resolved. (Motion at 4) In *Dinsdale*, the SJC expanded absolute immunity to government litigators for their conduct in civil litigation. *Id.* at 182. In a footnote, the SJC acknowledged a “strong Federal policy” to resolve immunity claims in the early stages of litigation. *Id.* at n.10. However, *Dinsdale* does not address discovery. Therefore, this case does not support the Commonwealth Defendants’ assertion that discovery can not be had until a motion to dismiss is decided.

Next, the Commonwealth Defendants cites *Hornibrook v. Richardi* for the proposition that discovery cannot be had in cases involving absolute immunity until a motion to dismiss is resolved. 488 Mass. 74, 83-84 (2021). In *Hornibrook*, the SJC held a conservator is entitled to absolute immunity for conduct that is ordered by a probate court. *Id.* at 75. In *dicta*, the SJC addressed the lower court regarding discovery. *Id.* at 83-34. The lower court had ordered narrowly tailored discovery to aid the court in determining whether the complaint alleged conduct that falls outside the quasi-judicial immunity afforded the defendant. *Id.* at 83 (“We briefly address the Superior Court judge's ruling ordering “narrowly tailored discovery” to *aid the court* in determining whether the complaint alleged conduct that falls outside the quasi-judicial immunity afforded to the defendant.”) (emphasis added). The SJC noted that “whether a defendant is entitled to absolute immunity is not one that should be determined through “narrowly tailored discovery” based on what the judge described as “paper-thin” allegations in the complaint . . . it is incumbent on the plaintiff to set forth factual allegations plausibly suggesting that the defendant acted outside her jurisdiction.” *Id.* at 83-84. The problem in *Hornibrook* was that the plaintiff failed to plead allegations “that plausibly suggeste[ed]” the defendant acted outside her role as a conservator. *Id.*

Here, DePina’s allegations are not paper-thin. The Commonwealth Defendants consist of three prosecutors spanning two separate district attorney’s offices that have varying roles as outlined in the Complaint. Only one of the prosecutors, Defendant Melia, actively prosecuted DePina. (Complaint at ¶ 38-46) Meanwhile, all of the Commonwealth Defendants presumably

seek to stay discovery. At the same time, administrative and investigative duties are not protected by absolute immunity and DePina has plausibly pled that the Defendants performed these duties in his Complaint.

Even if there were no jurisdiction over some defendants, DePina is entitled to third-party discovery from those defendants as third-parties to Plaintiff's case against the remaining defendants. *See* Mass. R. P. 34(c)(2).¹

Three days lapsed between DePina's altercation with Defendant Rollins and the filing of criminal charges. During that time, the Defendants engaged in conversations and communications regarding DePina. Communication between the Defendants was also necessary to transfer DePina's case to the Worcester County District Attorney's Office. These communications served the common goal of using government authority to silence DePina for exercising his constitutionally protected rights. None of that activity enjoys absolute immunity.

Perhaps some of the Defendants conduct can avail itself to absolute prosecutorial immunity, but qualified immunity absolutely does not apply to the Commonwealth Defendants. DePina respectfully request this Court to allow discovery to continue in the normal course, allowing him to gain a full and complete picture of the behind-the-scenes communications between the Defendants to understand their roles more fully. Moreover, robust discovery will allow the Supreme Judicial Court a wider lens if this case is taken on appeal. *See* Plaintiff's Rule 11 Certification.

¹ Separately, Plaintiff has requested information from the Worcester County District Attorney's Office through a public records request. **Exhibit A**. Unfortunately, Worcester County District Attorney's Office refused to provide the requested documents by citing to a non-existent litigation exception. **Exhibit B**. The denial of DePina's public records request was appealed to the Secretary of the Commonwealth. **Exhibit C**. The Secretary of the Commonwealth "decline[d] to opine" on Plaintiff's appeal. **Exhibit D**. Worcester County District Attorney's Office has caused undue burden on DePina. Denying the Commonwealth Defendants' motion here would be in the interest of judicial economy as it would potentially render separate litigation unnecessary.

4.0 Conclusion

For the foregoing reasons, Plaintiff respectfully request this Court deny the Commonwealth Defendants Motion to Stay Discovery and For a Protective Order.

Dated: October 21, 2022.

Respectfully Submitted,

/s/ Marc J. Randazza

Marc J. Randazza, BBO# 651477

mjr@randazza.com, ecf@randazza.com

Jay M. Wolman, BBO# 666053

jmw@randazza.com

RANDAZZA LEGAL GROUP, PLLC

30 Western Avenue

Gloucester, MA 01930

Tel: (978) 801-1776

Attorneys for Plaintiff,

Joao DePina

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 21st day of October, 2022, or otherwise caused for service via U.S. Mail, as follows:

Thomas E. Bocian
Assistant Attorney General
Criminal Bureau/Appeals
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thomas.bocian@mass.gov

Jesse M. Boodoo
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Hannah C. Vail
Assistant Attorney General
Government Bureau/Trial
Division
One Ashburton Place
18th Floor
Boston, MA 02108
Hannah.Vail@mass.gov

Counsel for Defendants Worcester County Prosecutor's Office, Joseph D. Early, Jr., Anthony Melia, and Rachael Rollins. Served via the Court's electronic filing system.

Additionally, I caused Defendants Dante Williams and Boston Police Department to be served by U.S. Mail as follows:

Dante Williams
31 Blake Street
Hyde Park, MA 02136

Boston Police Department
c/o Boston Law Department
1 City Hall Square
Room 615
Boston, MA 02201

/s/ Marc J. Randazza
Marc J. Randazza

EXHIBIT A

Public Records Request
To Worcester County District Attorney's Office

COMMONWEALTH OF MASSACHUSETTS

Office of

District Attorney Joseph D. Early, Jr.

Worcester County
(Middle District)
(508)-755-8601



Worcester Trial Court
225 Main St. G301 Worcester, MA 01608
www.worcesterda.com

PUBLIC RECORDS REQUEST FORM

**BEFORE MAKING YOUR REQUEST, PLEASE CONSULT
THE DISTRICT ATTORNEY'S GUIDELINES FOR PUBLIC RECORDS REQUESTS**

To: Records Access Officer
District Attorney's Office

From: Name Robert Morris
Street Address 30 Western Avenue
City/Town, State, Zip Code Gloucester MA 01915
Email rjm@randazza.com
Telephone number (optional) 978-801-1776

This is a request under the Massachusetts Public Records Law (G. L. c. 66, § 10) for copies of records pertaining to:

Commonwealth v. _____

Docket # _____ OR

Investigation and date of incident _____ OR

Other: Public Complaints filed against prosecutors of the Worcester DA's Office.

I request the following specific record(s):
Public Complaints filed against prosecutors in the Worcester DA's Office
between January 1, 2018 to the present.

I prefer to receive any released records (check one):
By mail (you may be charged for postage)
By email (if the records are available in electronic form) at the above address
Call the above phone number and I will pick up the records

I recognize that you may charge reasonable costs for copies, photographs, computer disks, or personnel time needed to comply with this request in accordance with G.L. c. 66, § 10(d), and that I may be required to pay in advance. If you cannot comply with my request, please provide an explanation in writing.

Sincerely,
Robert J. Morris, II

For office use only:
Records request # _____
Date received: _____
ADA assigned: _____

EXHIBIT B

Response to Public Records Request
Worcester County District Attorney's Office

COMMONWEALTH OF MASSACHUSETTS

Office of

District Attorney Joseph D. Early, Jr.

Worcester County
(Middle District)
(508)-755-8601



Worcester Trial Court
225 Main St. G301 Worcester, MA 01608
www.worcesterda.com

September 21, 2022

Robert Morris
Via email: rjm@randazza.com

Re: Public Records Request

Dear Mr. Morris,

The District Attorney's Office has received your request dated September 7, 2022 in which you request complaints filed against prosecutors in our office.

The District Attorney's Office is unable to provide the requested documents at this time as public records because the requested records constitute discovery materials in the open and pending civil case regarding this matter. When public record requests are made during the course of open and ongoing cases, "discovery should follow normal procedures." Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976); see G.L. c. 4, § 7(26)(a).

If you are unsatisfied with the response I have provided and wish pursue this matter further, you may do so by contacting the Massachusetts Supervisor of Public Records.

Very truly yours,

A handwritten signature in black ink that reads "Mark Relation".

Mark Relation
Records Access Officer

EXHIBIT C

Public Records Request Appeal to the Secretary of the Commonwealth

RANDAZZA

LEGAL GROUP

Robert J. Morris II, JD
Licensed in HI, DC, American Samoa

03 October 2022

Via Email Only

Massachusetts Supervisor of Public Records
pre@sec.state.ma.us

Re: Appeal Denial of Public Records Request re: Worcester County District Attorney's Office

Dear Supervisor of Public Records:

I am writing to appeal the decision made by the Worcester District Attorney's Office to deny my request for public records. Specifically, on September 7, 2022, I requested "Public Complaints filed against prosecutors in the Worcester County DA's Office between January 1, 2018 to the present." See **Exhibit A**.

On September 22, 2022, the Worcester District Attorney's Office denied my request based on *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 64 (1976) stating that "[w]hen public records requests are made during the course of open and going cases, 'discovery should follow normal procedures.'" See **Exhibit B**.

While it is true that my law firm has filed a case that involves Worcester District Attorney's Office, see **Exhibit C**, the justification they have cited is inapplicable. *Bougas* does not stand for the proposition that documents that might be obtained in discovery are exempt from public records request disclosure. The exemption in *Bougas* was a separate issue, and the statement about discovery was dicta, merely addressing other theoretical avenues the plaintiffs had to obtain the documents. In fact, the court in *Bougas* noted that the plaintiffs there (criminal defendants) had the same rights as any member of the public, and it is preposterous to suggest that any other Massachusetts citizen, who is not currently suing them, could somehow obtain them in formal litigation discovery.

The applicable case law supports disclosure under the Freedom of Information law. See **Exhibit C** – *Del Rosario v. Nashoba Regional Sch. Dist.*, Nos. 145840, MICV2018-1899D, 2020 Mass. Super. LEXIS 192, at *6 (Feb. 11, 2020) ("[T]he District flatly refused to produce any documents on the grounds that litigation was pending between the parties. This, as described above, is not a valid basis for the District to withhold any and all public records from being reviewed by and copied for plaintiff."). Because there is no litigation exception to providing the request documents, I request that you overrule their decision and order Worcester District Attorney's Office to provide me the request for documents.

30 Western Avenue, Gloucester, Massachusetts 01930
rjm@randazza.com | 702.420.2001

R.A. 61

Public Records Request Appeal
Page 2 of 2

RANDAZZA
LEGAL GROUP

On letter dated September 22, 2022, I sent a letter to Worcester County District Attorney's Office explaining the aforementioned and did not receive a response. **Exhibit D.**

Sincerely,



Robert J. Morris II

encl: Exhibit A – Public Records Request September 7, 2022
Exhibit B – Denial of Public Records Request September 21, 2022
Exhibit C – Complaint *DePina v. Worcester County District Attorney's Office, et. al.*
with attached case *Del Rosario v. Nashoba Regional Sch. Dist.*, Nos. 145840, MICV2018-
1899D, 2020 Mass. Super. LEXIS 192, at *6 (Feb. 11, 2020)
Exhibit D – Follow Up on Public Records Request Letter September 22, 2022

Exhibit A

COMMONWEALTH OF MASSACHUSETTS

Office of

District Attorney Joseph D. Early, Jr.

Worcester County
(Middle District)
(508)-755-8601



Worcester Trial Court
225 Main St. G301 Worcester, MA 01608
www.worcesterda.com

PUBLIC RECORDS REQUEST FORM

**BEFORE MAKING YOUR REQUEST, PLEASE CONSULT
THE DISTRICT ATTORNEY'S GUIDELINES FOR PUBLIC RECORDS REQUESTS**

To: Records Access Officer
District Attorney's Office

From: Name Robert Morris
Street Address 30 Western Avenue
City/Town, State, Zip Code Gloucester MA 01915
Email rjm@randazza.com
Telephone number (optional) 978-801-1776

This is a request under the Massachusetts Public Records Law (G. L. c. 66, § 10) for copies of records pertaining to:

Commonwealth v. _____

Docket # _____ OR

Investigation and date of incident _____ OR

Other: Public Complaints filed against prosecutors of the Worcester DA's Office.

I request the following specific record(s):
Public Complaints filed against prosecutors in the Worcester DA's Office
between January 1, 2018 to the present.

I prefer to receive any released records (check one):
By mail (you may be charged for postage)
By email (if the records are available in electronic form) at the above address
Call the above phone number and I will pick up the records

I recognize that you may charge reasonable costs for copies, photographs, computer disks, or personnel time needed to comply with this request in accordance with G.L. c. 66, § 10(d), and that I may be required to pay in advance. If you cannot comply with my request, please provide an explanation in writing.

Sincerely,
Robert J. Morris, II

For office use only:
Records request # _____
Date received: _____
ADA assigned: _____

Exhibit B

COMMONWEALTH OF MASSACHUSETTS

Office of

District Attorney Joseph D. Early, Jr.

Worcester County
(Middle District)
(508)-755-8601



Worcester Trial Court
225 Main St. G301 Worcester, MA 01608
www.worcesterda.com

September 21, 2022

Robert Morris
Via email: rjm@randazza.com

Re: Public Records Request

Dear Mr. Morris,

The District Attorney's Office has received your request dated September 7, 2022 in which you request complaints filed against prosecutors in our office.

The District Attorney's Office is unable to provide the requested documents at this time as public records because the requested records constitute discovery materials in the open and pending civil case regarding this matter. When public record requests are made during the course of open and ongoing cases, "discovery should follow normal procedures." Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976); see G.L. c. 4, § 7(26)(a).

If you are unsatisfied with the response I have provided and wish pursue this matter further, you may do so by contacting the Massachusetts Supervisor of Public Records.

Very truly yours,

A handwritten signature in black ink that reads "Mark Relation".

Mark Relation
Records Access Officer

Exhibit C

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: _____

JOAO DEPINA,

Plaintiff,

v.

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

Defendants.

**VERIFIED COMPLAINT AND
DEMAND FOR JURY TRIAL**

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

THE PARTIES

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transcript 7: 10-18.

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

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

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

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

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

- MR. ADA: No, Judge.
- THE COURT: What's the veiled reference to those cases? Is there any veiled reference? So he questions her authority. I think everybody in the room would agree, he questions her authority, he questions her ability to do her job well?
- MR. ADA: Yes.
- THE COURT: So what's the veiled reference to those cases if it's not a direct reference?
- MR. ADA: I don't think there's veiled references directly to his cases, Judge. My only argument would be that with Mr. DePina questioning her ability to be the district attorney, he's indirectly referencing her ability to fairly prosecute him as a defendant.
- THE COURT: So does that mean that when anybody who has a case appears at a press conference questions the ability of the prosecutor to do their job, that is witness intimidation?
- MR. ADA: If they're under prosecution by that district attorney, yes.
- THE COURT: Is there anything else you want me to know before [sic] any other argument that you want me to make [sic] before I take this into consideration or under consideration?
- MR. ADA: No, Judge.

Transcript 12:7- 13:9.

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

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

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

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

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

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

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

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

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



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

Sep 21, 2020, 4:04 PM ☆ ↩ ⋮

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

Rachael Rollins

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

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

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

CAUSES OF ACTION

Count I

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

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

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

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

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

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

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

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

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

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

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

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

Count II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Count IV
(Intentional or Reckless Infliction of Emotional Distress)

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

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

81. Defendants' conduct was extreme and outrageous.

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

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

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

Count V
(Negligent Infliction of Emotional Distress)

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

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

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

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

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

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

DEMAND FOR TRIAL BY JURY

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks this Court:

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

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

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

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

Dated: August 24, 2022.

Respectfully Submitted,

/s/ Marc J. Randazza

Marc J. Randazza, BBO# 651477
mjr@randazza.com, ecf@randazza.com
Jay M. Wolman, BBO# 666053
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30 Western Avenue
Gloucester, MA 01930
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Joshua Dixon (*pro hac vice* forthcoming)
Center for American Liberty
1311 S. Main Street, Suite 302
Mount Airy, MD 21771
Tel: (703) 687-6200
JDixon@libertycenter.org

Attorneys for Plaintiff,
Joao DePina

VERIFICATION OF COMPLAINT

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

Dated: 08 / 24 / 2022.

By: 
Joao DePina

Exhibit D

RANDAZZA

LEGAL GROUP

Robert J. Morris II, JD
Licensed in HI, DC, American Samoa

22 September 2022

Via Email Only
Mark Relation
mark.relation@state.ma.us

Re: Follow Up on Public Records Request

Dear Relation:

It appears you have cited *Bougas v. Chief of Police of Lexington*, 471 Mass. 59 (Mass. 1976) for a civil litigation exemption to deny the public records request. Such an exemption does not exist.

In fact, the Court in *Bougas* noted that the plaintiffs there (criminal defendants) had the same rights as any member of the public, and it is preposterous to suggest that any other Massachusetts citizen, who is not currently suing them, could somehow obtain them in formal litigation discovery. *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 64 (Mass. 1976) ("It appears that the statute does not provide a "standing" requirement but extends the right to examine public records to "any person" whether intimately involved with the subject matter of the records he seeks or merely motivated by idle curiosity. Nor do we read the exemption in § 7, Twenty-sixth (f), for certain investigatory materials as discriminating among persons seeking disclosure.").

The applicable case law supports disclosure under the Freedom of Information law. See **Attachment** – *Del Rosario v. Nashoba Regional Sch. Dist.*, Nos. 145840, MICV2018-1899D, 2020 Mass. Super. LEXIS 192, at *6 (Feb. 11, 2020) ("[T]he District flatly refused to produce any documents on the grounds that litigation was pending between the parties. This, as described above, is not a valid basis for the District to withhold any and all public records from being reviewed by and copied for plaintiff.").

Because there is no litigation exception to providing the request documents, I request that you reconsider denying our request and provide the requested for documents. Thank you for your time and review. We will give you an additional 48 hours to respond to the request before appealing your office's denial.

Sincerely,



Robert J. Morris II

encl: *Del Rosario v. Nashoba Regional Sch. Dist.*, Nos. 145840, MICV2018-1899D, 2020 Mass. Super. LEXIS 192, at *6 (Feb. 11, 2020)

30 Western Avenue, Gloucester, Massachusetts 01930

rjm@randazza.com | 702.420.2001

R.A. 84

Rosario v. Nashoba Reg'l Sch. Dist.

Superior Court of Massachusetts, At Middlesex

February 11, 2020, Decided

Civil No. 18-1899D

Reporter

2020 Mass. Super. LEXIS 416 *

MARIA DEL ROSARIO¹, Plaintiff vs. NASHOBA REGIONAL SCHOOL DISTRICT, Defendant

Judges: [*1] Peter B. Krupp, Justice of the Superior Court.

Opinion by: Peter B. Krupp

Opinion

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNT HI OF THE SECOND AMENDED COMPLAINT

Among other claims, plaintiff Maria del Rosario's Second Amended Complaint (Docket #31) alleges that Nashoba Regional School District ("the District") failed to comply with the Massachusetts Public Records Law, [G.L. c. 66, § 10A](#), when it declined to produce any records in response to plaintiff's public records request dated April 23, 2019. While plaintiff seeks a jury trial on her other claims, the case is before me on plaintiff's motion for judgment on the pleadings on her public records claim (Count III). After review, the motion is allowed in large part and the matter is remanded to the District.

BACKGROUND

Plaintiff filed this case on December 12, 2018 to enforce an alleged agreement by the District to pay for an out-of-district special education placement for her daughter. On April 23, 2019, plaintiff served her first request for production of documents ("the RFP"). The RFP sought eight categories of documents.

At the same time she served her RFP, plaintiff sent the District a public records request in the form of a letter under [*2] [G.L. c. 66, § 10](#), seeking ten categories of documents. Although there was some overlap between the RFP and the public records request, the latter was considerably broader and sought documents different from those sought in the RFP. In response to the public records request, on May 7, 2019, counsel for the District sent a response to plaintiff's counsel, declining to produce any responsive documents. Specifically, the District cited [950 C.M.R. §§ 32.08\(2\)\(b\)\(i\)](#) and [\(2\)](#), and claimed that the documents sought are the subject of disputes in

¹ As guardian and parent of Gwendolyn Burke.

active litigation, many of the requests have already been made or the documents have already been produced, and the District's attorneys "do not believe that it is our client's obligation to continue to produce the same documents or to respond to the same document requests over and over again." The District also indicated that "some of the categories of records sought... are likely subject to one or more of the exemptions to the Public Record Law that are set forth at G.L. c. 4, § 7(26) et. seq.," but it provided little detail and cited only one such provision: G.L. c. 4, § 7(26)(c) ("personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute [*3] an unwarranted invasion of personal privacy").

With this action pending, after receipt of the District's response, plaintiff successfully moved to amend her complaint to add a count for review under the Public Record Law, G.L. c. 66, § 10 A. Plaintiff now moves for judgment on the pleadings on that count.

DISCUSSION

I. The Public Records Act

"The primary purpose of G.L. c. 66, § 10, is to give the public broad access to government documents." Harvard Crimson. Inc. v. President and Fellows of Harvard College, 445 Mass. 745, 749 (2006) (and cases cited). While "disclosure is favored by a presumption that the record sought is public," the legislature has exercised its "considered judgment" and determined "that the public right of access should be restricted in certain circumstances." Id. at 749-750 (internal quotations and citations omitted). See generally G.L. c. 4, § 26 (itemizing exceptions to the definition of "public records"). The existence of litigation, however, does not eliminate the obligation of a public agency to comply with the Public Records Law, nor are records relevant to pending litigation exempted from the definition of "public records."

Under G.L. c. 66, § 10 (eff. Jan. 1, 2017), upon receipt of a request for public records, the agency or municipality must respond in writing. If the agency "does not intend to permit inspection or furnish [*4] a copy of a requested record," or if "the magnitude or difficulty of the request... unduly burdens the other responsibilities of the agency" such that it cannot provide the record within 10 business days, the agency must say so in writing. Among other things, the agency's written response must (1) identify any requested records that are not in the agency's possession custody or control; (2) identify the agency that may be in possession of such records; (3) identify any records the agency "intends to withhold" with "the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based;" (4) identify any records the agency intends to produce but requires additional time to do so; (5) identify the reasonable timeframe for the agency to produce the record sought; (6) suggest a reasonable modification to the scope of the request to facilitate the production of documents "more efficiently and affordably;" and (7) provide an itemized estimate of the fees to produce the records. G.L. c. 66, § 10(b). Nothing in G.L. c. 66, § 10, authorizes the agency to withhold public records during the pendency of related litigation.

A party aggrieved by an agency's decision to withhold [*5] public records may seek redress through a petition to the Supervisor of Records under [G.L. c. 66, § 10A\(a\)](#) and [\(b\)](#), and/or, as here, to the Superior Court in the county in which the municipality is located under [G.L. c. 66, § 10A\(c\)](#) and [\(d\)](#). Certain regulations govern review by the Supervisor of Records, see generally 950 [C.M.R. § 32.01](#), *et seq.*, including authorization for the Supervisor of Records to deny an appeal "if, in the opinion of the Supervisor: 1. the public records in question are the subjects of disputes in active litigation." 950 [C.M.R. § 32.08\(2\)\(b\)](#).

No such limit cabins a Superior Court's review of a public records dispute. If review is sought in the Superior Court, the court is required to "determine the propriety of any agency or municipal action de novo," must, "when feasible, expedite the proceeding," and must apply "a presumption ... that each record sought is public," with the burden on the agency "to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law." [G.L. c. 66, § 10A\(d\)\(l\)](#). If the requester is successful in the Superior Court, the court "may award reasonable attorney fees and costs," with "a presumption in favor of an award of fees and costs unless the agency or municipality establishes," [*6] among other things, that it "reasonably relied upon" a published opinion of a Massachusetts appellate court or of the Attorney General based on substantially similar facts, or "the request was designed or intended to harass or intimidate." The court may also waive any fee that would otherwise be assessed under [G.L. c. 66, § 10\(d\)](#), or award punitive damages. [G.L. c. 66, § 10A\(d\)\(3\)](#) and [\(4\)](#).

II. The District's Response to Plaintiffs Public Records Request

In this case, the District's response to plaintiff's public records request did not comply with the Public Records Law. The District does not deny that it has responsive documents or that at least some such documents are public records. Instead, the District flatly refused to produce any documents on the grounds that litigation was pending between the parties. This, as described above, is not a valid basis for the District to withhold any and all public records from being reviewed by and copied for plaintiff.

Beyond this improper articulated basis to withhold all public records, the District's response failed in various other material respects. The District's response failed to identify any records the District intended to produce, failed to identify a reasonable timeframe for it to [*7] produce any such records, failed to suggest a reasonable modification to the scope of the requests to facilitate the production of documents, and failed to provide an itemized estimate of the fees to produce the records. Although the District's response suggested generally that "some of the categories" of documents sought in the public records request are "likely" subject to an exemption, the District failed to itemize the records the District intended to withhold with "the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based." [G.L. c. 66, § 10\(b\)](#).

Having found the District's response to be in violation of the Public Records Law, the question before the court is what remedy should apply. Plaintiff argues that the court should require the District to produce all responsive documents to the court and then the court should conduct an in camera review of the documents. The court is ill-equipped to perform such an evaluation in

2020 Mass. Super. LEXIS 416, *7

the first instance. Moreover, many of the requested records may indeed be subject to an exemption, including by containing confidential information about specific individuals the disclosure of which would be an unwarranted [*8] invasion of personal privacy.² The District is in the best position to make this evaluation at least initially.

Instead of compelling the District to provide all responsive records to the court for evaluation, the court will remand the matter to the District for a proper written response in compliance with the Public Records Law and this opinion. Specifically, the District will have to make a determination in the first instance, among other things, which requested records exist, which will be produced, which can be produced in redacted form, and whether any exemptions apply to justify withholding certain records from production; and will have to state the results of its evaluation in writing and with particularity.

There is a presumption that plaintiff will recover her reasonable attorney's fees in this context. The District has failed to demonstrate that it reasonably relied upon a published opinion of a Massachusetts appellate court or of the Attorney General on similar facts, or that plaintiff's request was designed or intended to harass or intimidate the District. Accordingly, an award to plaintiff of her reasonable attorney's fees to prosecute this public records appeal is appropriate. [*9] Moreover, any fee that would otherwise be assessed under [G.L. c. 66, § 10\(d\)](#) shall be waived. Given the nature of this dispute, I do not find that punitive damages are appropriate.

ORDER

Plaintiff's Motion for Judgment on the Pleadings on Count III of her Pleadings Petitioning for Compliance with her Public Records Request by Defendant Nashoba Regional School District, for an In-Camera Inspection of the Public Records Wrongfully Withheld by Defendant School District, and for her Attorney's Fees and Waiver of Defendant's Production Costs (Docket #35) is **ALLOWED in rjart** as follows, but **otherwise DENIED**:

By February 25, 2020, the District shall respond in writing to plaintiff's public records request dated April 23, 2019 with respect to any public records created through the date of this Order. Such response shall comply with the Public Records Law and this opinion. To the extent any responsive public records are withheld, the public record shall be identified in writing and the specific exemption shall be cited. To the extent any responsive public records are withheld on the ground of privilege, a privilege log shall be produced within thirty (30) days of the date of this Order, identifying each document [*10] withheld and the particular privilege claimed as a basis to withhold the document.

All documents the District agrees will be produced shall be produced within thirty (30) days of the date of this Order, or such later time as the court may permit by motion.

Any fees or costs that could be assessed under [G.L. c. 66, § 10\(d\)](#), including for searching for or producing any documents responsive to plaintiff's public records request, are waived.

² See, e.g., Letter dated April 23, 2019, Item 1 (documents regarding hiring Joan DeAngelis) and Items 5 and 9 (documents potentially regarding specific students in the District's "transitions classroom").

2020 Mass. Super. LEXIS 416, *10

If plaintiff seeks her reasonable attorney's fees in connection with prosecuting her appeal from the District's original response to her public records request, plaintiff shall serve a motion for fees, with a supporting affidavit, by February 26, 2020, and shall file it in compliance with [Superior Court Rule 9A](#) by March 13, 2020. The court will likely decide any such motion on the papers.

Dated: February 11, 2020

/s/ [Signature]

Peter B. Krupp

Justice of the Superior Court

End of Document

EXHIBIT D

Response to Public Records Request Appeal
Secretary of the Commonwealth



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Manza Arthur
Supervisor of Records

October 14, 2022
SPR22/2236

Mark Relation, Esq.
Records Access Officer
Worcester County District Attorney's Office
225 Main Street, G301
Worcester, MA 01608

Dear Attorney Relation:

I have received the petition of Attorney Robert J. Morris II appealing the response of the Worcester County District Attorney's Office (Office) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On September 7, 2022, Attorney Morris requested "Public Complaints filed against prosecutors in the Worcester County DA's Office between January 1, 2018 to the present." The Office responded on September 21, 2022, denying the request. Unsatisfied with the Office's response, Attorney Morris appealed, and this case was opened as a result.

Pending Litigation

950 C.M.R. 32.08(2)(b) provides in pertinent part:

the Supervisor may deny an appeal for, among other reasons if, in the opinion of the Supervisor:

1. the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation.

In its September 21, 2022 response, the Office states that "the requested records constitute discovery materials in the open and pending civil case regarding this matter." This office has reviewed the trial court's docket and verified that the civil litigation, concerning the requested records, is still active and ongoing in the Worcester Superior Court. See Joao Depina v. Worcester County District Attorney's Office, et al. (Superior Court Docket No. 2285CV00971).

Mark Relation, Esq.
Page 2
October 14, 2022

SPR22/2236

In light of the pending matter, I decline to opine on these matters at this time. See 950 C.M.R. 32.08(2)(b). It should be noted that a change in the status of this action could impact the applicability of 950 C.M.R. 32.08(2)(b).

Sincerely,

A handwritten signature in black ink, appearing to read "Manza Arthur". The signature is written in a cursive, flowing style.

Manza Arthur
Supervisor of Records

cc: Robert J. Morris II, Esq.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
C.A. NO. 2285CV00971-A

<p>JOAO DEPINA,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>WORCESTER COUNTY DISTRICT ATTORNEY’S OFFICE, JOSEPH D. EARLY, JR., ANTHONY MELIA, BOSTON POLICE DEPARTMENT, DANTE WILLIAMS, and RACHAEL ROLLINS,</p> <p style="text-align: center;">Defendants.</p>
--

**REPLY OF DEFENDANTS WORCESTER COUNTY DISTRICT ATTORNEY’S
OFFICE, JOSEPH D. EARLY, JR., ANTHONY MELIA, AND RACHAEL
ROLLINS IN SUPPORT OF THEIR MOTION TO STAY DISCOVERY AND
FOR A PROTECTIVE ORDER**

Defendants the Worcester County District Attorney’s Office, Joseph D. Early, Jr., Anthony Melia, and Rachael Rollins (collectively, the “Commonwealth Defendants”) hereby submit their reply to Plaintiff Joao DePina’s (“DePina”) Opposition to their Motion to Stay Discovery and for a Protective Order until the Court rules on their forthcoming motion to dismiss.

When a motion to dismiss asserting immunity defenses is pending, discovery is not appropriate. “In light of the desirability of resolving immunity issues quickly, it is preferable to dispose of the question before discovery, as on a motion to dismiss.” *Brum v. Dartmouth*, 428 Mass. 684, 688 (1999) (discussing immunity defenses pursuant to the Massachusetts Tort Claims Act). *See also Harlow v. Fitzgerald*, 457 U.S. 800, 818

(1982) (“Until [a] threshold immunity question is resolved, discovery should not be allowed.”). Massachusetts courts have consistently held that qualified and absolute immunity defenses should be decided prior to discovery. *Hornibrook v. Richard*, 488 Mass. 74, 83-84 (2021) (absolute immunity); *Hudson v. Comm’r of Correction*, 46 Mass. App. Ct. 538, 549 (1999), *aff’d*, 431 Mass. 1 (2000) (qualified immunity); *Caron v. Silvia*, 32 Mass. App. Ct. 271, 273 (1992) (“[I]t [is] important that the immunity issue be resolved at the earliest possible stage of litigation, preferably before any discovery . . .”). To allow discovery to proceed prior to a ruling on the motion to dismiss is to defeat the very purpose of absolute and qualified immunity – to shield officials like prosecutors from the specter of expensive civil litigation, time-consuming discovery, and potential damages. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-526 (1985).

DePina attempts to circumvent this principle by characterizing the Commonwealth Defendants’ prosecutorial immunity and qualified immunity defenses as fact-bound questions that cannot be answered prior to discovery. *Opp.* at 4-6. This argument has no support in precedent. As the Supreme Judicial Court observed in *Hornibrook*, 488 Mass. at 84, it is the plaintiff’s burden to plead facts indicating that an immunity defense does not apply. On a motion to dismiss, “courts must assess whether a plaintiff’s allegations . . . make out a claim sufficient to overcome qualified immunity before . . . authorizing discovery.” *Estate of Rahim by Rahim v. Doe*, No. 21-1086, 2022 WL 11602542 at *7 (1st Cir. Oct. 20, 2022). Indeed, in *Chicopee Lions Club v. Dist. Att’y for Hampden Dist.*, the Supreme Judicial Court expressly held that the absolute prosecutorial immunity defense must be resolved on the pleadings because “[o]ne of the primary purposes of absolute immunity is to spare public officials the burden of having to

defend their official actions in a civil lawsuit” and “[m]erely requiring a prosecutor to file a responsive pleading could involve him in vexatious and harassing litigation.” 396 Mass. 244, 253 (1985).

Here, the Commonwealth Defendants have asserted absolute immunity and qualified immunity defenses that bar DePina’s claims, and have already served their Motion to Dismiss under Superior Court Rule 9A. Ex. A, Commonwealth Defendants’ Memorandum in Support of Motion to Dismiss at 4-8, 12-15. For the reasons set forth in the Commonwealth Defendants’ Motion to Dismiss briefing, DePina has not plausibly alleged a claim that would overcome the asserted immunity defenses. *Id.* at 7-8, 13-14. Indeed, DePina has conceded in his Opposition that qualified immunity and prosecutorial immunity defenses are available to at least some of the Commonwealth Defendants.¹ Opp. at 4 (“There is no reasonable argument that the defense of qualified immunity applies to all of the Commonwealth Defendants) (emphasis added); Opp. at 6 (“Perhaps some of the Defendants’ conduct can avail itself to absolute prosecutorial immunity . . .”). Therefore, sufficient “good cause” exists to stay discovery until the pending immunity issues have been adjudicated by this Court, particularly where DePina has not identified any prejudice he would incur if the stay pending ruling was issued.²

¹ DePina does not identify in his Opposition which Commonwealth Defendants he believes are not protected by immunity defenses.

² In his Opposition, DePina acknowledges that he seeks pre-motion to dismiss discovery to “allow[] him to gain a full and complete picture of the behind-the-scene communications between the Defendants to understand their roles more fully” and to “allow the Supreme Judicial Court a wider lens if this case is taken on appeal.” Opp. at 6. “Parties may not ‘fish’ for evidence on which to base their complaint in hopes of somehow finding something helpful to their case in the course of the discovery procedure.” *Alphas Co. v. Kilduff*, 72 Mass. App. Ct. 104, 114 (2008) (internal citations and quotations omitted).

WHEREFORE, for the foregoing reasons, the Commonwealth Defendants respectfully request that the Court enter a protective order and stay all discovery in this matter until after their Motion to Dismiss is decided.

Defendants,

WORCESTER COUNTY DISTRICT
ATTORNEY'S OFFICE, JOSEPH D. EARLY,
JR., ANTHONY MELIA, and RACHAEL
ROLLINS

By their Attorneys

MAURA HEALEY
ATTORNEY GENERAL

/s/ Jesse M. Boodoo

Jesse M. Boodoo, BBO No. 678471
Assistant Attorney General
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One Ashburton Place, 18th Floor
Boston, MA 02108
Tel: (617) 963- 2592
Jesse.Boodoo@mass.gov

Date: October 26, 2022

CERTIFICATE OF SERVICE

I, Hannah C. Vail, Assistant Attorney General, hereby certify that I have this day, October 26, 2022, served the foregoing document, upon the attorney of record for the plaintiff by emailing a copy to:

Marc J. Randazza, Esq.
Jay Wolman
Randazza Legal Group, PLLC
30 Western Avenue
Gloucester, MA 01930
mjr@randazza.com
jmw@randazza.com

/s/ Hannah C. Vail
Hannah C. Vail
Assistant Attorney General

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
C.A. NO. 2285CV00971-A

JOAO DEPINA,

Plaintiff,

v.

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

Defendants.

**DEFENDANTS WORCESTER COUNTY DISTRICT ATTORNEY’S OFFICE,
JOSEPH D. EARLY, JR., ANTHONY MELIA, AND RACHAEL ROLLINS’
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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INTRODUCTION

Defendants the Worcester County District Attorney’s Office, Joseph D. Early, Jr., Anthony Melia, and Rachael Rollins (collectively, the “Commonwealth Defendants”) hereby move to dismiss Plaintiff Joao DePina’s (“DePina”) claims against them pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6). DePina has brought this case in what he calls “impact litigation” to challenge the doctrine of absolute prosecutorial immunity, inviting dismissal of his claims in the Superior Court so that he may challenge the “currently controlling law” of absolute immunity in the appellate courts. Dkt. No 3, Notice of Plaintiff’s Certification Pursuant to Rule 11(a)(1) at 1-2. Claiming that “[a]bsolute immunity stands on a foundation far more porous and weak than *Roe v. Wade*,” DePina hopes to persuade the Supreme Judicial Court that immunity is an “ignoble judicial activist doctrine [that] must be terminated.” *Id.* at 4.

In this forum, at least, there is no question that DePina’s claims against the Commonwealth Defendants are barred by absolute immunity and must be dismissed. Beyond that, DePina’s claims are defective for various other reasons as well. Sovereign immunity and the Massachusetts Tort Claims Act bar DePina’s claims against the Worcester County District Attorney’s Office and Joseph D. Early, Jr. and Anthony Melia in their official capacities. And to the extent that DePina is suing Defendants Rollins, Early, and Melia in their individual capacities, DePina fails to allege facts sufficient to support any viable claims or to overcome qualified immunity.

BACKGROUND

DePina is a “community activist and past candidate for the Boston City Council.” Complaint ¶ 11. He was also, during 2021, a criminal defendant in three pending criminal

cases being prosecuted by the Suffolk County District Attorney’s Office. *Id.* ¶ 17. On November 9, 2021, Defendant Rachael Rollins, then the District Attorney of Suffolk County,¹ spoke at a televised press conference concerning a shooting in Dorchester earlier that day. *Id.* ¶¶ 12-14. DePina attended the press conference and, according to his allegations, “questioned Rollins over . . . the incompetency of the District Attorney’s Office” in investigating his brother’s 2014 murder, and “criticiz[ed] Rollins for abusing her power as a public official.” *Id.* ¶¶ 14, 16.

On November 12, 2021, an application for a criminal complaint—listing Detective Dante Williams of the Boston Police Department as the complainant and attaching a police report prepared by Williams—was filed against DePina in the Boston Municipal Court. *Id.* ¶¶ 7, 17, 18; Exhibit A (Criminal Complaint and Application in Case No. 2017CR003064).² The application charged DePina with intimidation under G. L. c. 268, § 13B on the theory that “DePina intended to intimidate Rollins because the Suffolk District Attorney’s Office, which Rollins was overseeing at the time, had three active pending criminal cases against DePina.” Complaint ¶ 17; *see* Exhibit A. A Boston Municipal Court Clerk-Magistrate found probable cause to believe that the offense had been committed and ordered the complaint and summons to issue. Exhibit A.

The Suffolk County District Attorney’s Office recused itself from the prosecution and the case was transferred to Defendant the Worcester County District Attorney’s Office for prosecution. Complaint ¶¶ 26, 34. Defendant Joseph D. Early, Jr. is the District Attorney of

¹ Rollins served as the Suffolk County District Attorney from 2019 through 2022.

² The criminal complaint and application are subject to notice under Rule 12 as records from a related judicial proceeding. *See Jarosz v. Palmer*, 436 Mass. 526, 530 (2002) (in considering a motion to dismiss, “a judge may take judicial notice of the court’s records in a related action”).

Worcester County.³ *Id.* ¶ 4. Defendant Anthony Melia was the Assistant District Attorney assigned to prosecute the intimidation case against DePina. *Id.* ¶¶ 5, 34, 38.

In January 2022, DePina filed a motion to dismiss the prosecution for lack of probable cause. *Id.* ¶ 33. Melia appeared on behalf of the Commonwealth to oppose the motion to dismiss and argued in court that when “DePina question[ed] [Rollins’] ability to be the district attorney, he[] indirectly referenc[ed] her ability to fairly prosecute him as a defendant.” *Id.* ¶¶ 39, 43. In May 2022, the Boston Municipal Court (Fraser, J.) allowed DePina’s motion, concluding that DePina had not referenced his pending criminal cases at the press conference and, as a result, DePina’s speech was protected by the First Amendment and there was no probable cause for the charge. *Id.* ¶ 46. The Commonwealth did not appeal from the dismissal. *See id.*

Alleging emotional distress as a result of the prosecution, DePina filed this five-count complaint on August 24, 2022. Count I alleges Malicious Prosecution under the Massachusetts Civil Rights Act (“MCRA”), G. L. c. 12, § 11I, on the theory that “Defendants initiated and/or continued criminal prosecution against DePina with malice” and without probable cause. *Id.* ¶¶ 55-58. Count II alleges Malicious Abuse of Process under the MCRA on the theory that “Defendants initiated criminal prosecution against DePina for an ulterior purpose and for an illegitimate purpose.” *Id.* ¶ 66. Count III alleges Retaliation under the MCRA on the theory that DePina engaged in protected speech at the press conference and “Defendants retaliated against DePina’s protected speech by criminally prosecuting him for violation of the Attorney Intimidation Law despite having no probable cause.” *Id.* ¶¶ 72-73. Count IV alleges Intentional or Reckless Infliction of Emotional Distress on the theory that

³ DA Early has served as the Worcester County District Attorney since 2006.

“DePina[] sustained severe distress as a result of Defendants’ conspiracy of threatening felonious charges against him without probable cause.” *Id.* ¶ 83. Finally, Count V alleges Negligent Infliction of Emotional Distress on the theory that Defendants breached “a duty of care in that a . . . prosecutor should not pursue charges against a citizen where it is obvious that there was no probable cause.” *Id.* ¶ 86. Early and Melia are named in the complaint in both their personal and official capacities, while Rollins is named only in her personal capacity. *Id.* at p.1.

ARGUMENT

DePina’s claims against the Commonwealth Defendants are barred by absolute immunity and must be dismissed. To the extent necessary to reach other arguments—and it is not—DePina’s claims are barred for various other reasons as well. All of DePina’s claims against the Worcester County District Attorney’s Office and the individuals in their official capacities are barred by sovereign immunity. DePina’s negligence claim against the individuals is barred by the immunity provision of the Massachusetts Tort Claims Act. Finally, DePina’s MCRA and intentional tort claims against the individuals in their individual capacities are both inadequately pled and barred by qualified immunity.

I. DePina’s Claims Against the Commonwealth Defendants Are Barred by Absolute Prosecutorial Immunity.

As an initial matter, the doctrine of absolute prosecutorial immunity disposes of all DePina’s claims against the Commonwealth Defendants. DePina appears to agree. *See* Dkt. No. 3, Notice of Plaintiff’s Certification Pursuant to Rule 11(a)(1) at 1-4; *see also Hornibrook v. Richard*, 488 Mass. 74, 84 (2021) (absolute immunity requires dismissal of complaint unless “plaintiff . . . set[s] forth factual allegations plausibly suggesting” why immunity would not apply; immunity questions cannot be deferred until after discovery);

Dinsdale v. Commonwealth, 424 Mass. 176, 181 n.10 (1997) (absolute immunity is “an immunity from suit, rather than a mere defense to liability” and immunity questions must be “resolved at the earliest possible stage of litigation”) (internal citations and quotation marks omitted).

Since at least 1939, the Supreme Judicial Court (“SJC”) has recognized that the common law of prosecutorial immunity precludes civil liability against prosecutors “for the performance of [their] official duties.” *Chicopee Lions Club v. Dist. Atty. for Hampden Dist.*, 396 Mass. 244, 251 (1985), citing *Andersen v. Bishop*, 304 Mass. 396, 399 (1939); see *Dinsdale*, 424 Mass. at 181. “This absolute prosecutorial immunity is premised on the concern that ‘harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.’” *C.M. v. Comm’r of Dep’t of Child. & Fams.*, 487 Mass. 639, 647 (2021), quoting *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976).

In *Chicopee Lions Club*, the SJC established the modern doctrine of prosecutorial immunity that controls this case. 396 Mass. at 246. There, the District Attorney of Hampden County, upon learning of the plaintiff’s plan to hold a gambling-themed fundraiser, instructed police to shut down the fundraiser and “threatened to send members of the State police force to raid the event, confiscate all gambling equipment and revenues, and arrest those . . . in attendance.” *Id.* The plaintiff alleged “that the district attorney made these threats maliciously and with knowledge that the plaintiff’s activities were lawful and properly licensed.” *Id.* at 246. Based on these facts, the plaintiff brought MCRA and tort claims

against the District Attorney of Hampden County, Hampden County, and the Commonwealth. *Id.* at 245.

The SJC held that absolute immunity required dismissal of the complaint. *Id.* at 250-53. The District Attorney’s challenged conduct all involved either “directing the efforts of the police in regard” to a “specific suspect” who might be prosecuted, evaluating information to determine whether the law was being violated, or threatening prosecution. *Id.* The plaintiff’s tort claims were thus barred by the settled common law rule that prosecutors are immune from “private suits for what they do in the discharge of their official duties.” *Id.* at 251. Similarly, the plaintiff’s MCRA claims were barred because the District Attorney’s alleged actions were all “sufficiently related to the prosecutorial function to warrant absolute protection.” *Id.* at 252.⁴

Since the 1985 decision in *Chicopee Lions Club*, the SJC and the Appeals Court have both repeatedly reaffirmed the doctrine of absolute prosecutorial immunity and, indeed, expanded the doctrine to other categories of state officials. *See Dinsdale*, 424 Mass. at 180-82 (government attorneys developing civil litigation strategy and providing legal advice are protected by absolute immunity); *C.M.*, 487 Mass. at 649-52 (social workers performing quasi-prosecutorial function of initiating judicial proceedings are protected by absolute immunity); *Padmanabhan v. City of Cambridge*, 99 Mass. App. Ct. 332, 341, rev. den’d, 487 Mass. 1106 (2021) (administrative prosecutors who prepare for or advocate within licensure

⁴ As to the immunity analysis for the MCRA claims, the SJC declined to decide whether the appropriate test should be “the more recent ‘functional approach’ of the Federal courts under [42 U.S.C.] § 1983, or the somewhat broader ‘performance of official duties’ test under State common law” that applied to the tort claims. *Chicopee Lions Club*, 396 Mass. at 252. “[U]nder either approach the district attorney [was] immune . . . because his actions in questioning the legality of the club’s activities [were] sufficiently related to the prosecutorial function to warrant absolute protection.” *Id.*

proceedings are protected by absolute immunity). Today, the case law firmly establishes that absolute immunity applies notwithstanding a complaint’s allegations of maliciousness or bad faith on the part of a prosecutor. *See Dinsdale*, 424 Mass. at 182-83; *Chicopee Lions Club*, 396 Mass. at 252 (allegations “that the district attorney may have erred or even acted maliciously in this case [are] irrelevant”); *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989) (“[A]llegations of malice, or bad faith or, as here, a claim of conspiracy will not defeat the protection of . . . absolute immunity . . .”). The case law also establishes that absolute immunity bars claims against individual officials and their employer alike. *See Chicopee Lions Club*, 396 Mass. at 245 (Superior Court held that “since the prosecutor was immune from suit, the[] [agency] defendants could not be held liable under a theory of respondeat superior”); *Harihar v. U.S. Bank Nat’l Ass’n*, 15-cv-11880-ADB, 2017 WL 1227924, at *15 (D. Mass. March 31, 2017) (unpublished) (“[Absolute] immunity . . . bars respondeat superior lawsuits premised on the otherwise immune conduct of . . . officials.”); *LeBlanc v. Commonwealth*, 457 Mass. 94, 101 (2010) (similar); *see also* G. L. c. 258, § 2 (for purposes of tort claims, the Commonwealth may only be liable “in the same manner and to the same extent as a private individual under like circumstances”).

DePina’s claims in this case seek to challenge the Commonwealth Defendants’ preparation, initiation, or litigation of DePina’s criminal prosecution. Complaint ¶¶ 55-56, 66, 73, 83, 86. Rollins allegedly directed police officers to target DePina for prosecution, and allegedly caused the prosecution to be initiated through the filing of the application for criminal complaint. *Id.* ¶¶ 17-25. The Worcester County District Attorney’s Office and Melia allegedly prosecuted the case and opposed DePina’s motion to dismiss. *Id.* ¶¶ 29-47. Early is not alleged to have had any personal involvement in

DePina's criminal case; he has only been named, so far as it appears, because he was the District Attorney of Worcester County with the "power" to "decline" DePina's prosecution if he had wished. *Id.* ¶ 4.

As against the Commonwealth Defendants, all five counts of DePina's complaint are squarely barred by absolute prosecutorial immunity. As in *Chicopee Lions Club*, state law claims that a District Attorney threatened prosecution, or directed police activity with an eye toward prosecution of a specific suspect, implicate conduct within the scope of a District Attorney's prosecutorial duties and are therefore barred. 396 Mass. at 250-53. As in the Appeals Court's decision in *Padmanabahn*, and many other cases, state law claims that prosecutorial officials "prepar[ed] for and act[ed] as . . . [an] advocate at adversarial proceedings" are also barred. 99 Mass. App. Ct. at 341; *see Imbler*, 424 U.S. at 431 ("[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages . . ."). And as in the SJC's decision in *C.M.*, and many other cases, there is no dispute that when a supervisory prosecutorial official is sued, "any immunities afforded to [the line prosecutor] also apply to [the supervisor]." 487 Mass. at 654; *see Van de Kamp v. Goldstein*, 555 U.S. 335, 345 (2009) (supervisory prosecutor entitled to absolute immunity for approving advocacy conduct of trial prosecutor).

For these reasons, and as DePina already all but concedes, the claims against the Commonwealth Defendants are barred by absolute prosecutorial immunity and must be dismissed pursuant to Mass. R. Civ. P. 12(b)(6).

II. DePina’s Claims Against the Worcester County District Attorney’s Office and the Individuals in Their Official Capacities Are Barred by Sovereign Immunity and the Massachusetts Tort Claims Act.

In addition to being barred by absolute immunity, DePina’s claims against the Worcester County District Attorney’s Office and the individual defendants in their official capacities are barred by sovereign immunity and the Massachusetts Tort Claims Act.

A. Civil Rights Claims Against State Agencies and Officials in Their Official Capacities Are Barred by Sovereign Immunity.

As to the MCRA claims in Counts I, II, and III, it is well settled that state agencies and state officials in their official capacities are not subject to suit under the MCRA; such claims are barred by sovereign immunity. *See Commonwealth v. ELM Medical Labs., Inc.*, 33 Mass. App. Ct. 71, 76 (1992) (Commonwealth is not a “person” subject to suit under the MCRA, G. L. c. 12, § 11); *Williams v. O’Brien*, 78 Mass. App. Ct. 169, 173 (2010) (Commonwealth agencies are not subject to suit under the MCRA); *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989) (official capacity suits are suits against the official’s office, “[a]s such, it is no different from a suit against the State itself”). The Worcester County District Attorney’s Office is a state agency. *See Miller v. City of Bos.*, 297 F. Supp. 2d 361, 368 (D. Mass. 2003) (District Attorney’s Office is state agency entitled to sovereign immunity); *Rahim v. Dist. Att’y for Suffolk Dist.*, 486 Mass. 544, 550 (2020) (identifying district attorney’s office as state agency). As such, Counts I, II, and III, as against the Worcester County District Attorney’s Office and the individuals in their official capacities, are barred by sovereign immunity and must be dismissed pursuant to Mass. R. Civ. P. 12(b)(1).

B. Intentional Tort Claims Against State Agencies and Officials in Their Official Capacities Are Barred by the Massachusetts Tort Claims Act, G. L. c. 258, § 10(c).

As to Count IV, for Intentional or Reckless Infliction of Emotional Distress, Commonwealth agencies and officials in their official capacity are also immune from any intentional torts under the doctrine of sovereign immunity. The Massachusetts Tort Claims Act (“MTCA”) provides sovereign immunity to any state agency, as well as any of its officials operating in their official capacity, from “any claim arising out of an intentional tort, including . . . intentional mental distress” G. L. c. 258, §10(c); *see Tilton v. Town of Franklin*, 24 Mass. App. Ct. 110, 112-13 (1987) (claim of reckless infliction of emotional distress barred by § 10(c)). The limitations of G. L. c. 258, § 10(c) cannot be circumvented (and the Commonwealth cannot be made responsible for intentional torts) merely by naming a public employee in his “official capacity.” *See Pruner v. Clerk of Superior Ct.*, 382 Mass. 309, 314 (1981). “Official capacity” intentional tort claims are barred by the MTCA, just the same as intentional tort claims pled directly against an agency. *See Saxonis v. City of Lynn*, 62 Mass. App. Ct. 916, 918 (2004) (intentional tort claim against public employee in his official capacity barred by G. L. c. 258, § 10(c)). As such, Count IV, as against the Worcester County District Attorney’s Office and the individuals in their official capacities, is barred by sovereign immunity and must be dismissed pursuant to Mass. R. Civ. P. 12(b)(1).

C. DePina Has Not Alleged and Cannot Allege Compliance with the Massachusetts Tort Claims Act’s Presentment Requirement for Negligence Claims, G. L. c. 258, § 4.

Finally, as to the claim for Negligent Infliction of Emotional Distress in Count V, DePina’s claim against the Worcester County District Attorney’s Office and the

individuals in their official capacities is barred by DePina's failure to comply, or allege compliance, with the MTCA's presentment requirement. No negligence action can be instituted against the Commonwealth or any of its agencies "unless the claimant shall have first presented his claim in writing . . . within two years after the date upon which the cause of action arose." G. L. c. 258, § 4. In enacting the MTCA as a limited waiver of the Commonwealth's sovereign immunity, the Legislature mandated that the presentment requirements of G. L. c. 258, § 4 be satisfied prior to filing suit. *See Gilmore v. Commonwealth*, 417 Mass. 718, 721 (1994) ("Presentment must be made in strict compliance with the statute.") (internal quotations omitted). Presentment, in other words, "is a statutory condition precedent to recovery under c. 258." *Lodge v. Dist. Attorney of Suffolk Dist.*, 21 Mass. App. Ct. 277, 284 (1985); *see also Drake v. Town of Leicester*, 484 Mass. 198, 199 (2020) ("Proper presentment is . . . a condition precedent to bringing suit under the act, and failure to do so is fatal to the plaintiff's complaint.").

Here, the complaint does not allege proper presentment in accordance with G. L. c. 258, § 4 or even mention the presentment requirement at all. This mandates dismissal under Mass. R. Civ. P. 12(b)(6). *See Rodriguez v. Somerville*, 472 Mass. 1008, 1010 n.3 (2015), citing Mass. R. Civ. P. 9(c) ("Because proper presentment [under G. L. c. 258] is a condition precedent, the rule requires the plaintiff to plead performance of the condition in his complaint"); *Silva v. Roden*, 83 Mass. App. Ct. 1134, 2013 WL 2420716, at *1 (2013) (unpublished) ("[P]laintiff has failed to allege presentment to the appropriate official under G. L. c. 258, § 4. This is fatal to any claim he might . . . have brought."). As such, Count V, as against the Worcester County District Attorney's Office and the individuals in their official capacities, must be dismissed pursuant to Mass. R. Civ. P.

12(b)(6).

III. DePina’s Claims Against the Individuals in Their Individual Capacities Are Non-Actionable and Barred by Qualified Immunity.

In addition to being barred by absolute immunity, DePina’s claims against Rollins, Early, and Melia in their individual capacities are also subject to dismissal for various other reasons.

A. DePina’s Civil Rights Claims Are Barred by Qualified Immunity.

To begin with, DePina’s MCRA claims in Counts I, II, and III are barred by qualified immunity. “Public officials have the same protection for violations of the Massachusetts Civil Rights Act, G. L. c. 12, § 11I, as they have under Federal law for violations of 42 U.S.C. § 1983.” *Ortiz v. Morris*, 97 Mass. App. Ct. 358, 362 (2020), citing *Duarte v. Healy*, 405 Mass. 43, 46 (1989). Courts follow a two-step inquiry in assessing a claim of qualified immunity raised in a motion to dismiss, considering: (1) “whether the facts alleged show the [official]’s conduct violated a constitutional right”; and (2) “if so, whether the right was clearly established so that ‘it would be clear to a reasonable [official] that his conduct was unlawful’” *Longval v. Comm’r of Correction*, 448 Mass. 412, 419 (2007) (citations and quotations omitted). “A negative answer to either query results in the application of qualified immunity in favor of the defendant official.” *Earielo v. Carlo*, 98 Mass. App. Ct. 110, 115 (2020).

DePina’s MCRA claims fail at both steps of the qualified immunity inquiry.

i. DePina Fails to Allege That the Individuals Engaged in “Threats, Intimidation, or Coercion.”

A plaintiff bringing MCRA claims must plausibly allege that each defendant, through their own personal conduct, “interfered with, or attempted to . . . interfere[] with”

the plaintiff's protected rights "by threats, intimidation or coercion." G. L. c. 12, §§ 11H, 11I; see *Pollard v. Georgetown Sch. Dist.*, 132 F. Supp. 3d 208, 229 (D. Mass. 2015), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (to state a viable MCRA claim, a "plaintiff must plead that each Government-official defendant, through the official's own individual actions" committed a civil rights violation). "The Legislature explicitly limited the [MCRA's] remedy to situations where the derogation of secured rights occurs by threats, intimidation or coercion in order to prevent it from establishing a vast constitutional tort." *Glovsky v. Roche Bros. Supermarkets, Inc.*, 469 Mass. 752, 762 (2014) (quotations omitted). "Threats" are the "intentional exertion of pressure to make another fearful or apprehensive of injury or harm"; "intimidation" is "putting in fear for the purpose of compelling or deterring conduct"; and "coercion" is "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done." *Planned Parenthood League of Massachusetts, Inc. v. Blake*, 417 Mass. 467, 474 (1994) (quotations omitted). Even a direct deprivation of right is not "actionable under the act unless it were accomplished by means of one of these three constraining elements." *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 645-46 (2003).

Here, Early, Melia, and Rollins are alleged to have initiated the prosecution, prosecuted, or overseen the prosecution of the intimidation charge against DePina. Complaint ¶¶ 17, 34, 38-39. Melia is not alleged to have ever interacted with DePina outside of court proceedings, and Early is not alleged to have ever met or interacted with DePina at all. *Id.* ¶¶ 34-39. Melia prosecuted the case, and Early indirectly supervised Melia. *Id.* ¶¶ 36, 38. Both became involved only after a Clerk-Magistrate found

probable cause and caused the complaint to issue. *Id.* ¶¶ 17, 34; Exhibit A. Rollins was accosted by DePina at the November 9, 2021 press conference but did not respond to his comments or say anything to him. *Id.* ¶¶ 12-14. While Rollins allegedly then decided that DePina should be prosecuted, she never saw or interacted with DePina again after the press conference. *Id.* ¶¶ 17-19.

DePina’s complaint does not even attempt to allege “threats, intimidation, or coercion,” *see id.* ¶¶ 54-78, and no such allegation could plausibly be implied. Claims that prosecutorial officials prosecuted, supported prosecuting, or worked towards prosecuting a suspect do not suggest “threats, intimidation, or coercion” within the meaning of the MCRA. As the SJC has recognized, these “constraining elements,” *Buster*, 438 Mass. at 645-646, do not and cannot encompass a state official’s “threat to use lawful means to reach an intended result.” *Sena v. Commonwealth*, 417 Mass. 250, 263 (1994); *cf. Benevolent & Protective Ord. of Elks, Lodge No. 65 v. Plan. Bd. of Lawrence*, 403 Mass. 531, 560 (1988) (“[A]bsent extraordinary circumstances, a party may petition ‘for the redress of grievances’ without subjecting himself or herself to liability under G. L. c. 12, § 11F”). Furthermore, “[i]t is rare for a MCRA claim to involve no physical threat of harm” and “claims based on non-physical coercion” necessarily require “a pattern of harassment and intimidation.” *Thomas v. Harrington*, 909 F.3d 483, 492 (1st Cir. 2018), quoting *Howcroft v. City of Peabody*, 51 Mass. App. Ct. 573 (2001). A prosecutor’s pursuit of a criminal complaint for which a Clerk-Magistrate finds probable cause does not and cannot constitute “a pattern of harassment and intimidation.” *Id.* Because Rollins, Early, and Melia were prosecutorial officials acting as prosecutors and using “lawful means to reach an intended result,” *Sena*, 417

Mass. at 263, they cannot plausibly be said to have engaged in actionable “threats, intimidation, or coercion” under the MCRA.

ii. No Clearly Established Law Supports DePina’s MCRA Claims.

DePina’s claims also fail at the second step of the qualified immunity analysis because he can point to no clearly established MCRA case law supporting his claims.

On a motion to dismiss, the salient question at the second step of the qualified immunity analysis is “whether it would have been clear to a reasonable [official] that the alleged conduct was unlawful in the situation he confronted.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (internal citations and quotation marks omitted). “In assessing whether an official’s conduct violated clearly established law, [a court] typically reason[s] by analogy, asking whether there is any prior case in which the [challenged conduct] was deemed unlawful under circumstances reasonably similar to those present in the case at hand.” *Escalera-Salgado v. United States*, 911 F.3d 38, 41 (1st Cir. 2018). It is the plaintiff’s burden to point to clearly established case law sufficient to overcome qualified immunity. *See Maxwell v. AIG Domestic Claims, Inc.*, 460 Mass. 91, 104 (2011) (“Massachusetts decisions are uniform in holding that, once immunity has been invoked, the burden of overcoming the immunity rests exclusively with the plaintiff.”).

DePina cannot point to any MCRA case—because there is no MCRA case—that has ever entertained even the possibility of civil liability against prosecutors for conduct of the sort alleged here. Indeed, the decision in *Chicopee Lions Club* squarely rules out the possibility of such liability. Moreover, with respect to Count II, neither the SJC nor the Appeals Court has ever recognized a MCRA civil rights claim for “Malicious Abuse of Process” against any category of defendant, much less a prosecutor. In Massachusetts,

abuse of process is an intentional tort and not a civil rights claim. *See* G. L. c. 258, § 10(c) (MTCA bars “any claim arising out of an intentional tort, including . . . malicious abuse of process”); *cf. Faust v. Coakley*, No. CIV A 07-11209-RWZ, 2008 WL 190769, at *4 (D. Mass. Jan. 8, 2008) (unpublished) (no federal civil rights claim for “abuse of process” lies under 42 U.S.C. § 1983).

Recognizing the lack of any case law to support his efforts, DePina filed a letter with this Court to explain that, although there may be no current legal grounds to support his complaint, he seeks in good faith to change the law. *See* Dkt. No. 3, Notice of Plaintiff’s Certification Pursuant to Rule 11(a)(1) at 1-4. He then followed up with a Motion to Recuse reiterating that he seeks to create new “legal and economic exposure” for prosecutors and to end protective doctrines prosecutors have “enjoyed for decades.” Dkt. No. 7.1, Plaintiff’s Memorandum in Support of Motion for Recusal at 5. DePina’s gambit will not succeed. But in the extraordinarily unlikely event that it did, qualified immunity would still bar DePina’s MCRA claims based upon the law as it exists today. *See Penate v. Hanchett*, 944 F.3d 358, 366 (1st Cir. 2019) (qualified immunity looks only to the law “at the time of the defendant’s alleged violation”).

B. DePina Alleges No Plausible Claim of Intentional or Reckless Infliction of Emotional Distress.

To state a claim for intentional or reckless infliction of emotional distress, as DePina attempts to do in Count IV, a plaintiff must plausibly allege: (1) that the defendant “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,” was “beyond all possible bounds of decency” and was “utterly intolerable in a civilized community[.]” (3) that the defendant’s actions caused the

plaintiff distress, and (4) that the plaintiff's emotional distress was severe. *Howell v. Enter. Publ'g Co., LLC*, 455 Mass. 641, 672 (2010) (internal citations omitted). "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 and quotations omitted).

Aside from being barred by absolute prosecutorial immunity, DePina's claim for intentional or reckless infliction of emotional distress fails for two further reasons. First, allegations that Rollins, Melia, and Early sought or pursued a criminal charge, approved by a Clerk-Magistrate but later dismissed by a Boston Municipal Court judge, do not in any way suggest "extreme and outrageous" conduct "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." In this respect, the Appeals Court's decision in *Padmanabahn* is controlling. 99 Mass. App. Ct. at 342-43 (affirming dismissal of intentional infliction of emotional distress claim; allegations in a complaint that the defendants "ma[de] false allegations of wrongdoing" and "perverse[ly] us[ed] the litigation process" do not plausibly establish conduct "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"); *see also Sena*, 417 Mass. at 253, 264 (notwithstanding the fact that prosecution ended in the criminal defendant's favor, police officers applying for arrest warrant and making arrest at the outset of the case could not be "considered 'utterly intolerable in a civilized community'").

Second, a common law privilege bars intentional infliction of emotional distress claims when a defendant has “done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.” Restatement (Second) of Torts § 46 (1965); *see Norton v. McOsker*, 407 F.3d 501, 511 (1st Cir. 2005). This privilege is akin to the common law absolute prosecutorial immunity applicable to DePina’s tort claims. *See Chicopee Lions Club*, 396 Mass. at 251-52, citing *Andersen*, 304 Mass. at 400. Whether viewed as an absolute immunity issue or a common law privilege issue, no intentional infliction of emotional distress claim can lie to challenge a prosecutor’s discharge of their official duties.

C. The Massachusetts Tort Claims Act Immunizes Individual State Employees from Negligence Claims.

Finally, DePina’s claim for negligent infliction of emotional distress in Count V, as against Rollins, Melia, and Early, is barred by the MTCA, which is the exclusive remedy for negligence claims based on the acts or omissions of public employees within the scope of their employment. *See G. L. c. 258, § 2* (“Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment . . .”). The MTCA precludes plaintiffs from asserting negligence claims directly against public employees. *McNamara v. Honeyman*, 406 Mass. 43, 46 (1989) (“If a defendant is a public employee and his conduct constitutes simple or ordinary negligence, § 2 of chapter 258 clearly applies and the Commonwealth, as a public employer, is liable for the harm and the employee is not liable.”). This is true as to both individual capacity claims and official capacity claims. *See Pruner*, 382 Mass. at 314-15; *Canales v. Gatzunis*, 979 F. Supp. 2d 164, 175 (D. Mass. 2013). Because the

complaint only challenges conduct within the scope of Rollins, Early, and Melia's employment, *see* Complaint ¶ 86, the negligence claim against the individuals is barred.

CONCLUSION

For the foregoing reasons, the Commonwealth Defendants respectfully request that the claims against them be dismissed in their entirety and with prejudice.

Defendants,

WORCESTER COUNTY DISTRICT
ATTORNEY'S OFFICE, JOSEPH D. EARLY,
JR., ANTHONY MELIA, and RACHAEL
ROLLINS

By their Attorneys

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Date: October 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on October 24, 2022 I served a copy of the foregoing on all parties appearing in this action by emailing a copy to:

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/s/ Hannah C. Vail
Hannah C. Vail
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: 2285CV00971

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.

PLAINTIFF’S MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANTS’ MOTION TO DISMISS

Plaintiff Joao Depina, pursuant Mass. R. Civ. P. 6(b), respectfully requests an additional 30 days to oppose the Commonwealth Defendants' Motion to Dismiss. As the Court is aware, Mr. DePina previously assented to an extension of time for the Commonwealth Defendants to answer or move to dismiss, which the Court allowed. The Commonwealth Defendants filed their motion to dismiss, however, twenty days sooner than anticipated. As a result, counsel for Plaintiff cannot respond within the 10 days afforded by Rule 9A; the attorney who would be drafting the response, for example, is now on his honeymoon.

Additionally, as a dispositive motion, the Commonwealth's motion raises a host of issues that will need to be addressed in an opposition. While the Commonwealth correctly points out that Mr. DePina is aware that the current judicial-invented doctrine of absolute prosecutorial immunity that circumvents the Constitution and legislation to the contrary is dispositive in this court, a mistaken doctrine Mr. DePina directly seeks to have the Supreme Judicial Court correct,

the Commonwealth seeks dismissal on additional grounds. Those additional grounds require additional time to brief.

Thus, Mr. DePina seeks an additional 30 day to respond to the motion, which is less time than the Commonwealth had to prepare its motion. Counsel for the Commonwealth assents to the relief requested herein.

Dated: October 26, 2022

Respectfully Submitted,

/s/ Marc J. Randazza

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Attorneys for Plaintiff,

Joao DePina

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 26th day of October, 2022, or otherwise caused for service via U.S. Mail, as follows:

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Counsel for Defendants Worcester County Prosecutor’s Office, Joseph D. Early, Jr., Anthony Melia, and Rachael Rollins. Served via the Court’s electronic filing system.

Additionally, I caused Defendants Dante Williams and Boston Police Department to be served by U.S. Mail as follows:

Dante Williams
31 Blake Street
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Boston Police Department
c/o Boston Law Department
1 City Hall Square
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Boston, MA 02201

Additionally, I caused a courtesy copy to be served upon anticipated counsel for Defendant, Boston Police Department, in anticipation of their appearance in this matter as follows:

Sarah McAteer
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/s/ Marc J. Randazza
Marc J. Randazza

CLERK'S NOTICE

DOCKET NUMBER

2285CV00971

**Trial Court of Massachusetts
The Superior Court**



CASE NAME:

Joao Depina vs. Worcester County District Attorney's Office et al

Dennis P. McManus, Clerk of Courts

TO:

Jesse Mohan Boodoo, Esq.
Office of the Attorney General, Trial Division
One Ashburton Place
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COURT NAME & ADDRESS

Worcester County Superior Court
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Worcester, MA 01608

You are hereby notified that on 10/26/2022 the following entry was made on the above referenced docket:

Endorsement on Motion to stay discovery and for a protective order (#10.0): DENIED
Notices mailed 10/27/22

Judge: Dupuis, Hon. Renee P

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
10/27/2022	Hon. Renee P Dupuis	(508)831-2358
R.A. 124		

CERTIFICATE OF SERVICE

I, Hannah C. Vail, Assistant Attorney General, hereby certify that I have this day, November 1, 2022, served the foregoing document, upon the attorney of record for the plaintiff by emailing a copy to:

Marc J. Randazza, Esq.
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/s/ Hannah C. Vail
Hannah C. Vail
Assistant Attorney General