

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 STATE DEFENDANTS' MOTION TO DISMISS

1.0 INTRODUCTION

The absolute prosecutorial immunity doctrine wrongly places prosecutors above the law. In doing so, it not only excuses wrongdoing, but invites it. Even in the case – as here – where there is a clear vendetta and shopping for a prosecutor's office willing to do the dirty work, prosecutors are persecutors who violated Plaintiff's unequivocal right to speak freely and petition his government. Even the alleged victim, Rachael Rollins, acknowledged Plaintiff's clearly established right to freedom of speech when she intervened in a nearly identical situation a year prior. But, where *she* was the recipient of the criticism, she colluded to retaliate against Plaintiff for his exercise of fundamental constitutional rights. Rollins, abusing her power but not acting as prosecutor herself in this case, does not enjoy immunity.

The Commonwealth has a monopoly on violence. From stalking, *see Commonwealth v. Perry*, 489 Mass. 436, 447 (2022) (discussing breadth of government surveillance); to forced detentions also known as *Terry* stops; to legalized kidnapping also known as arrests; to legalized homicide also known as use of force protocol. With this great power, it is supposed to police its own corruption. It does not. How often does evidence of suppression for an unconstitutional search result in police discipline? How often do *Brady* violations and other prosecutorial misconduct result in disbarments? The Bar Discipline page of the *Massachusetts Lawyers Weekly* rarely, if ever, has such a case. Appellate decisions rarely even name prosecutors whose actions result in reversals of convictions, while innocents have arrest reports follow them for life.

Study after study, as discussed below, has shown that professional disciplinary organizations are not effective in holding prosecutors accountable. The Commonwealth has often led the way toward greater liberty – from the Revolution to marriage equality. It can continue this tradition by charting a new course – holding government officials to account for shedding their ethical responsibilities and trampling on constitutional rights. Prosecutors are human—they must not be granted divine rights, but rather must answer to earthly authorities.

2.0 FACTUAL BACKGROUND

2.1 The Incident

On November 9, 2021, Plaintiff Joao DePina showed up to the corner of Ferndale Street and Norfolk Street. **Exhibit 1** (Criminal Complaint and Application in Case No. 2017CR003064).¹ Defendant Rachael Rollins, then Suffolk County District Attorney, was giving a press conference

¹ The criminal complaint and application are subject to notice as records from a related judicial proceeding. *Dwight v. Dwight*, 371 Mass. 424, 426 (1976) (“We take judicial notice of our own records.”); *see also Miller v. Norton*, 353 Mass. 395, 399 (1967); *Poland v. New Bedford, Woods Hole, Martha's Vineyard Nantucket S.S. Authority*, 342 Mass. 75, 77 n. 2 (1961).

regarding a shooting that occurred earlier that day. Plaintiff's Verified Complaint and Demand for Jury Trial ("Compl.") at ¶¶ 12-16. That day, three police officers were injured during a standoff with a person with a gun—police officers returned fire, killing the person. *Id.* at ¶ 12. This was not the first time gun violence occurred in the area, nor was it the first issue of government incompetency under Rollins' watch. *Id.* at ¶¶ 14, 16.

The press conference was on the public street. **Exhibit 1** at 3. DePina questioned Rollins over the continued gun violence in Boston and the continued government incompetency, including the incompetency of the Suffolk County D.A.'s Office to respond to his brother's murder. *Id.* DePina exercised his right to criticize Rollins for abusing her power as a public official, opportunistically seeking high office without caring for the people of Boston and failing to take adequate care of Boston police officers. *Id.* at ¶¶ 15-16.

This was not the first time DePina attended a press conference to give a public servant a piece of his mind. A year earlier, in September 2020, DePina appeared at a press conference and engaged in almost identical conduct toward former Police Chief Williams Gross. Compl. at ¶ 49. At that time, Rollins herself intervened and later issued a press statement that explained that she intervened on behalf of DePina to protect his constitutionally protected right to freedom of speech by stating "*As I am sure you are aware, yelling your opinion is free speech. It may be annoying but it is protected.*" *Id.* at ¶ 50 (emphasis added).

2.2 The Criminal Complaint

Despite being fully aware of DePina's rights, three days after her press conference, Rollins caused a criminal complaint to be filed against DePina accusing him of Attorney Intimidation in violation of G.L. c. 268, § 13B. *Id.* at ¶ 17. The complaint alleged that DePina intended to

intimidate Rollins because the Suffolk D.A.’s Office, which Rollins was overseeing at the time, had three active pending criminal cases against DePina. *Id.*

The criminal charge was filed by Defendant Detective Williams. *See* **Exhibit 1**. Detective Williams was present during the press conference. *Id.* at 4. DePina had recorded the entire incident at the press conference and uploaded it to his Facebook page, and Defendant Williams “secured a copy of this record.” *Id.* at 4. Williams falsely alleged that DePina committed the crime of Attorney Intimidation while heckling Rollins during the press conference. **Exhibit 1** at 3. According to Williams, the incident occurred during a press conference on a “Highway/Road/Alley/Street/Sidewalk”, which was “Public.” *Id.* at 3-4. Williams falsely alleged that DePina’s heckling “appeared as an intent to effect or interfere with [DePina’s] pending Suffolk County cases.” *Id.* at 3. Williams further accused DePina of making “multiple attempts to contact the DA, Ms. Rollins directly to talk about these pending cases, to no avail.” *Id.* at 4.

Defendant Rollins is listed as the victim, and there is information provided in the criminal complaint that could only have come from Rollins, including the “multiple attempts” to contact her. *Id.* at 4. Upon information and belief, Detective Williams filed the charges against DePina at Rollins’ behest. Compl. at ¶ 19.

2.3 The Criminal Case

After Rollins and Williams conspired to violate DePina’s civil rights and civil liberties, the Suffolk County D.A.’s Office recused itself from prosecuting DePina. *Id.* at ¶ 21, 26. The file was transferred to Norfolk County, but the Norfolk County District Attorney was mindful of his obligations under the Mass. Rules of Prof. Conduct Rule 3.8(a) and declined to take the case. *Id.* at ¶ 27. Upon information and belief, the file bounced to other District Attorneys who also showed the same good judgment. *Id.* at ¶ 28.

Eventually the file was presented to Defendants Worcester County District Attorney Joseph Early and his office. *Id.* at ¶ 29. Presumably out of a desire to curry political favor with Rollins and silence DePina through the threat and coercion that comes with political persecutions, Early took leave of his ethics and respect for constitutional rights, agreeing to prosecute DePina. *Id.* Defendant Assistant District Attorney Melia handled the prosecution. In Melia’s own words, DePina was prosecuted for merely “questioning [Defendant Rachael Rollins] ability to be the district attorney.” *Id.* at ¶ 43.

DePina moved to dismiss charge for lack of probable cause. **Exhibit 2** (Motion to Dismiss and Memorandum in Support in Case No. 2017CR003064). The Motion to Dismiss contained DePina’s statements during Rollins’ press conference. *Id.* at 3-6. Melia, for Early and his office, on behalf of the Commonwealth, filed an opposition. **Exhibit 3** (Commonwealth’s Opposition to the Defendant’s Motion to Dismiss in Case No. 2017CR003064). Melia, having full access to the video, improperly argued that “[DePina] made indirect references to [his pending criminal] cases and his comments demonstrated an intent to interfere with or affect these upcoming cases.” DePina filed a Reply. **Exhibit 4** (Reply in Support of Defendant’s Motion to Dismiss in Case No. 2017CR003064).

On April 25, 2022, the trial court held a hearing on DePina’s Motion to Dismiss. When pressed by the trial court to identify which statements by DePina were specifically unlawful, Defendant Melia could not point to a single instance where DePina made a “direct,” “indirect,” or “veiled” reference to the pending criminal cases against him. Compl. at ¶¶ 39, 43. After Defendant Melia failed to identify any conduct by DePina referencing his pending criminal cases, the court asked, “So does that mean that when anybody who has a case appears at a press conference questions the ability of the prosecutor to do their job, that is witness intimidation?” *Id.* at ¶ 43.

Defendant Melia responded that “If they’re under prosecution by that district attorney, yes.” *Id.* This was a prosecutor attempting to stretch a criminal statute beyond its plausible meaning.

On May 25, 2022, the trial court dismissed the charges against DePina for lack of probable cause. Compl. at ¶ 45-46; *see also* **Exhibit 5** (Order Granting Motion to Dismiss in Case No. 2017CR003064). Justice Fraser, in dismissing the matter, emphasized that “The parties agreed to allow the Court to review the electronic recording of the press conference. There exists no probable cause or references, direct or indirect, to the defendant’s pending criminal cases. [DePina’s] speech is within the First Amendment’s protective reach.” Compl. at ¶ 46.

3.0 LEGAL ARGUMENT

3.1 Absolute Prosecutorial Immunity is Abhorrent to a Democratic Society

Rollins, Melia, Early, and his office will suffer no consequences for their blatant, knowing, and coordinated violation of DePina’s rights if they are afforded 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 (2021) (cleaned up). Even if Absolute Immunity applies to some of the defendants, it should not be applied to all, as they were not all engaged in functions subject to this doctrine.

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 (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).² “[A]ctions taken as an investigator enjoy only qualified immunity.” *Zahrey v. Coffey*, 221 F.3d 342, 346 (2d Cir. 2000).

3.1.1 Defendant Rollins

Rollins is listed as the victim in the Criminal Complaint. **Exhibit 1** at 4. When engaged in activity unrelated to advocacy, such as serving as a complaining witness, prosecutors are entitled to only *qualified* immunity. *Kalina v. Fletcher*, 522 U.S. 118, 129-35 (1997).

In *Kalina*, the question was whether a prosecutor had absolute prosecutorial immunity for making false statements in an affidavit supporting an application for arrest. *Id.* at 120. The Court held that absolute prosecutorial immunity does not extend to conduct in obtaining an arrest warrant. *Id.* at 123. Similarly, prosecutors providing legal advice to police during pretrial investigation are protected only by qualified immunity, not absolute immunity. *Burns v. Reed*, 500 U.S. 478, 492-496 (1991). Importantly, a prosecutor is not acting as an advocate while holding a press conference or fabricating evidence concerning an unsolved crime. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 276-278 (1993). As the Supreme Court held, “[w]hen the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same.” *Id.* at 276.

Here, Rollins directed police officers to target DePina for prosecution, and caused the prosecution to be initiated through the filing of the false application for criminal complaint. **Exhibit 3** at 7; *see also* Compl. at ¶¶ 17-25. At most, Rollins is entitled to the same immunity as Detective Williams, the complaining witness listed in the application for criminal complaint.

² Federal law provides guidance. “[T]he scope of prosecutorial immunity under G.L. c. 12 is at least as broad as under § 1983.” *Dinsdale v. Commonwealth*, 424 Mass. 176, 182 (1997) (cleaned up).

Exhibit 1 at 1. At common law, complaining witnesses were not entitled to absolute immunity. *Malley v. Briggs*, 475 U.S. 335, 3401-341 (1986). Therefore, Detective Williams, at most, would be entitled to qualified immunity, but not absolute immunity. Similarly, Rollins is not entitled to absolute immunity; at most, qualified immunity could potentially be available to her.

That said, while qualified immunity is theoretically available to prosecutors engaging in non-prosecutorial functions, it should be summarily removed from Rollins' defenses. The qualified immunity doctrine asks if there is fair warning that conduct would violate a citizen's rights. *See United States v. Lanier*, 520 U.S. 259, 270-72 (1997); *see also Hope v. Pelzer*, 536 U.S. 730, 740 (2002). In this case, not only would any high school student know that Rollins' actions violated the First Amendment, but we have clear documentation that *Rollins herself* knew. Indeed, evaluating the exact same actions, involving the exact same protester, when the subject of criticism was someone other than herself, Rollins concluded that "yelling your opinion . . . is protected." Compl. at ¶ 50. Rollins cannot plausibly claim qualified immunity now.

3.1.2 Defendant Melia

While Melia's actions were related to the judicial phase of a criminal proceeding, there was a serious lack of judgment. *See* Compl. at ¶ 38. Melia had the press conference video at his disposal through the pendency of the criminal proceedings. **Exhibit 3** at 5-6. It was plain from the video that DePina had not committed a crime and that there was no probable cause to pursue the charge. Melia tried to conceal the video from the trial court because the trial court could find no probable cause if the evidence was reviewed. *Id.* Melia could not point to a single instance where DePina made a "direct," "indirect," or "veiled" reference to the pending criminal cases against him while he was protesting Rollins. Compl. at ¶¶ 39, 43. The crux of Melia's argument was that DePina was prosecuted for "questioning [Rollins'] ability to be the district attorney." *Id.* at ¶ 43.

Melia, and any other prosecutor, cannot persecute an innocent person for questioning a public servant's fitness for their position. The skill and judgment used by Melia was beneath what the citizens of the Commonwealth have a right to expect. Melia attempted to stretch a criminal statute well-beyond its plausible meaning, while also attempting to ensure the vindicating video would not be reviewed, at least until DePina suffered the costs of going to trial. This dehumanizing conduct is part and parcel of the underlying bedrock of systemic racism that has led to an exponential rise in minority incarceration rates. Melia had the incentive of doing a political favor for the now-U.S. Attorney that could accelerate his career.³ Rollins was undoubtedly in a position to accelerate Melia's career as she was confirmed as the U.S. Attorney for the District of Massachusetts within a month after silencing DePina through threat of criminal prosecution.⁴

The Commonwealth Defendants argue that "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." (Motion at 5) (quoting *C.M. v. Comm'r of Dep't of Child. & Fams.*, 487 Mass. 639, 647 (2021)). This is an unscientific conjecture that would not survive *Daubert-Lanigan* scrutiny. "Public trust in our institutions requires that when these institutions stray, they be held accountable and made to absorb the costs of their conduct." *Donahue v. United States*, 660 F.3d 523, 525 (1st Cir. 2011).

³ Or he could claim he was "just following orders." The so-called "Nuremberg Defense," is morally bankrupt. Melia has an independent responsibility to exercise his independent judgment. Even if his supervisor ordered him to prosecute this case, and he was reluctant, he had a responsibility to decline. The Commonwealth cannot be a free state if there is no independent accountability placed on even the lowliest new prosecutor (and Melia was far from that).

⁴ This confirmation required two tie-breaking votes by the Vice President. One wonders how many of Rollins's critics were chilled by DePina's prosecution and did not dare act to cause her to lose a single additional vote. If this was the intent of the Defendants' actions, it lies on the same moral level as a coup or an insurrection.

There is well-founded litigation here. A court already found DePina had a First Amendment right to question Rollins, and he was prosecuted for exercising that right without probable cause. Absolute immunity must be abolished to deflect prosecutors' energies away from blatantly dishonest conduct and immoral behavior.

Prosecutors have an ethical duty under Mass. R. P. C. 3.8(a) to "refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists." Further, under Mass. R. Prof. C. 3.8(j), a prosecutor knowing "that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice." The principle underlying these rules is that prosecutors should not attempt to convict a defendant when they possess clear and convincing evidence of a defendant's innocence. Melia had the video, yet he knowingly pursued charges despite being fully aware of DePina's innocence.

Study after study has shown that prosecutors are not held to account for violating their ethical obligations. See B. Sarma, *Private: After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors*, American Constitution Society, (July 19, 2016), https://www.acslaw.org/?post_type=acsblog&p=11579. It is claimed, without proof, that the chaos will ensue if prosecutors can be sued; it will not. In Canada they've allowed such suits for decades, without problems. In *Nelles v. Ontario*, our neighbors to the north wisely wrote:

It is said by those in favour[sic] of absolute immunity that the rule encourages public trust and confidence in the impartiality of prosecutors. However, it seems to me that public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust.

1989 2 S.C.R. 170, 195.⁵ The Commonwealth should follow this lead. There is no true recourse through disciplinary proceedings, and this dehumanizing malevolent conduct by prosecutors will continue to fuel the loss of trust by the public if no accountability can be had.

3.1.3 Defendant Early

D.A. Early received the DePina file to evaluate and determine whether to accept the case. Compl. at ¶ 29. Unlike Norfolk County District Attorney's Office and other District Attorney's offices, Early made the decision to accept the case and disregard his ethical obligations. *Id.* at ¶¶ 27-28; *see also* Mass. Rules of Prof. Conduct 3.8(a) and (j).

“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*, 509 U.S. at 273. When D.A. Early accepted the case from Suffolk County, it was an administrative duty. Compl. at ¶¶ 29-30. Moreover, there was an investigative function involved when Early reviewed the DePina file to determine whether to accept it. *Id.*

As the Supreme Court made clear, under the absolute prosecutorial immunity doctrine, “it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of primary importance.” *Kalina*, 522 U.S. at 125. When Early accepted the DePina file, he shirked his ethical obligations and ran roughshod over DePina's constitutional rights. This is disordered functioning of the Worcester D.A.'s Office, which does not serve the policy considerations behind the absolute immunity doctrine.

⁵ <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/499/index.do>.

3.2 Defendants are Not Shielded by Qualified Immunity

Qualified immunity shields public officials from liability for performing discretionary functions “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Rodrigues v. Furtado*, 410 Mass. 878, 882 (1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The SJC has stated 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 (1989); *see also Dinsdale v. Commonwealth*, 424 Mass. 176, 182 (1997).

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

In evaluating qualified immunity, judges do not “exhibit a naiveté from which ordinary citizens are free.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted). Qualified immunity does not shield what reasonable officials should recognize is “obvious[ly]” unconstitutional, even without combing the federal reporter. *Hope*, 536 U.S. at 737–46. Qualified immunity is not a “license to lawless conduct.” *Harlow*, 457 U.S. at 819. “Where an official could be expected to know that certain conduct would violate . . . constitutional rights, he should be made to hesitate.” *Id.* (emphases added).

The Commonwealth Defendants argue that their conduct falls outside the MCRA. (Motion at 12-14.) However, “[a]n arrest without probable cause may be a basis for a claim under the MCRA.” *Arias v. City of Everett*, No. 19-10537-JGD, 2019 U.S. Dist. LEXIS 209532, at *17 (D. Mass. Dec. 4, 2019); *see also Nuon v. City of Lowell*, 768 F. Supp. 2d 323, 335 n.8 (D. Mass. 2011) (“An arrest without probable cause has been found to constitute coercion within the meaning of the MCRA.”) (collecting cases). Courts have also found that “[a]rranging for the arrest” of a person without probable cause “may be sufficient to satisfy the requirement of threats, intimidation or coercion.” *Grant v. John Hancock Mut. Life Ins. Co.*, 183 F. Supp. 2d 344, 371 (D. Mass. 2002). Here, Rollins and Williams conspired to violate DePina’s civil rights and civil liberties by jointly creating a knowingly false narrative in a police report. Compl. at ¶ 21. This states a viable claim under the MCRA. In addition, Early and Melia knew or should have known with the exercise of reasonable diligence that the case was ripe for dismissal for lack of probable cause because they had access to the incident recording. *Id.* at ¶¶ 35-38. Early and Melia furthered the Rollins-Williams conspiracy to silence DePina by abusing the criminal justice system. *Id.* at ¶¶ 40, 44.

The encounter between DePina and 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.”) (cleaned up). 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. DePina’s rights were clearly established and there was no basis for a prosecution. *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.”); *see also* *Haley v. City of Boston*, 657 F.3d 39, 50 (1st Cir. 2011) (“[I]f any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit.”) (quoting *Limone v. Condon*, 372 F.3d 39, 44-45 (1st Cir. 2004)).

The Defendants may not rely on the statute to license their conduct. Even if the language of the statute supported their actions, which it does not, at least seven circuits recognize that reliance on “a statute [that] authorizes conduct that is patently violative of fundamental constitutional principles . . . does not immunize” misconduct, *Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005) (cleaned up). *See also* *Guillemard-Ginorio v. Contreras-Gómez*, 490 F.3d 31, 40–41 (1st Cir. 2007); *Vives v. City of New York*, 405 F.3d 115, 117–19 (2d Cir. 2005); *Leonard v. Robinson*, 477 F.3d 347, 359, 361 (6th Cir. 2007); *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002); *Cooper v. Dillon*, 403 F.3d 1208, 1220–21 (11th Cir. 2005); *Lederman v. United States*, 291 F.3d 36, 47 (D.C. Cir. 2002).

It is rare that qualified immunity can be avoided by a defendant’s own admission. But in this case, the Court has that luxury. Rollins explicitly acknowledged the clarity of DePina’s rights a year prior. When the subject of DePina’s criticism was someone other than herself, she was an articulate advocate for DePina’s clearly established First Amendment rights. But, when he criticized her, she chose to ignore those rights.

Even if the intimidation statute purported to provide probable cause to arrest a person for questioning a public servant’s ability to do her job, doing that is so “patently violative of

fundamental constitutional principles” that it “does not immunize the [defendants’] conduct.” *Lawrence*, 406 F.3d at 1232 (citation omitted). Moreover, Defendants’ “time to make calculated choices about enacting or enforcing unconstitutional policies” takes their misconduct further from qualified immunity’s reach. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement regarding denial of certiorari). Granting qualified immunity in these circumstances would render free speech a luxury afforded to those who protest against ethical government officials, but nonexistent to those who protest against the power-drunk.

The Defendants sought to frame DePina for a crime he did not commit. Rollins, Melia, Williams, and Early knew that DePina was exercising his constitutional rights to speak freely and petition his government when he stood on the street “questioning [Rollins] ability to be the district attorney.” Compl. at ¶ 43. The conduct by the Commonwealth Defendants – prosecuting DePina without probable cause for speaking on a public sidewalk – violated DePina’s constitutional rights, and a reasonable attorney would know that their conduct was unlawful in the situation. Thus, Defendants do not enjoy qualified immunity.

3.3 The D.A.’s Office and the Official Capacity Defendants Should Not be Dismissed

DePina recognizes that, per the Appeals Court, “the Commonwealth, including its agencies, is not a ‘person’ subject to suit pursuant to G. L. c. 12, § 11H.” *Williams v. O’Brien*, 78 Mass. App. Ct. 169, 173 (2010). *See also Commonwealth v. ELM Med. Lab., Inc.*, 33 Mass. App. Ct. 71, 75-80 & n.9 (1992) (MCRA did not waive sovereign immunity of State agencies). This Court may be compelled to dismiss Plaintiffs’ claims against the D.A.’s office and those sued in their official capacities as state actors, DePina seeks to have those decisions overturned as wrongly decided. DePina recognizes “it is a widely accepted rule of statutory construction that general words in a statute such as “persons” will not ordinarily be construed to include the State or political

subdivisions thereof.” *Hansen v. Commonwealth*, 344 Mass. 214, 219 (1962). But, constitutional violations are not ordinary—they are extraordinary, and there is nothing to suggest the legislature intended to exempt anyone, even state agencies and officials, from their constitutional obligations. Thus, while dismissal is inappropriate, this court is bound by precedent. DePina, preserves this issue for appeal, where he will seek a change in the law.

3.4 The Personal Capacity Defendants are Liable for Intentional or Reckless Infliction of Emotional Distress⁶

The elements of a cause of action for intentional infliction of emotional distress (IIED) include: "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; . . . (2) that the conduct was 'extreme and outrageous' . . .; (3) that the actions of the defendant were the cause of the plaintiff's distress; . . . and (4) that the emotional distress sustained by the plaintiff was 'severe' . . ." *Haddad v. Gonzalez*, 410 Mass. 855, 871 (1991) (citations omitted). "Conduct qualifies as extreme and outrageous only if it goes beyond all possible bounds of decency, and is regarded as atrocious, and utterly intolerable in a civilized community." *Polay v. McMahon*, 468 Mass. 379, 385 (2014) (cleaned up); *see also Lanier v. President & Fellows of Harvard Coll.*, No. SJC-13138, at *18 (Mass. June 23, 2022) ("To qualify as extreme and outrageous, then, a defendant's actions must flout the most basic community standards of decency and propriety.") DePina has met his burden to survive a motion to dismiss for an IIED claim against the Commonwealth Defendants. *See Roman v. Trustees of Tufts Coll.*, 461 Mass. 707, 718 (2012) ("In considering whether a plaintiff has made out a claim for intentional infliction of emotional distress, we have said that the trier of

⁶ DePina agrees that G.L. c. 258, § 10(c) excludes claims for intentional torts against the D.A.'s office and the official capacity state defendants.

fact ‘would be entitled to put as harsh a face on the [defendant's actions] as the basic facts would reasonably allow.’”) (cleaned up).

The Commonwealth Defendants argue that their conduct does not rise to the level of “extreme and outrageous.” (Motion at 17.) In *Padmanabhan v. City of Cambridge*, there was an ongoing employment dispute between a neurologist and his former employer. 99 Mass. App. Ct. 332, 333-36 (2021). The court suggested that false allegations and perversely using the litigation process during employment hearings did not rise to the level of extreme and outrageous conduct. *Id.* at 342-43. Moreover, there appeared to be an issue with the plaintiff’s ability to clearly identify the conduct of individual defendants. *See id.*

Padmanabhan is inapposite. Here, DePina explicitly identified that Rollins conspired with her co-defendants to violate DePina’s civil rights and civil liberties by jointly creating a knowingly false narrative in the police report. Compl. at ¶¶ 18-21. DePina faced up to 10 years imprisonment for this felony. Public servants conspiring to persecute DePina by knowingly creating a false narrative to abuse the criminal justice system is utterly intolerable in a civilized community.

The Commonwealth Defendants also rely on *Sena v. Commonwealth*, 417 Mass. 250 (1994). In *Sena*, the defendants were arrested, prosecuted, and acquitted of charges of receiving stolen property. *Id.* at 252. Unlike DePina, there were no allegations in *Sena* that the police knowingly filed a false narrative in the police report or that prosecutors had clear and convincing evidence that the defendants were innocent. Here, Melia and Early had the incident video throughout the pendency of the criminal proceedings that showed DePina was innocent, and Rollins knew the truth as a witness. Melia, Early, and Rollins have ethical obligations to forego prosecuting cases where there is no good faith argument that probable cause existed. *See Mass.*

R. Prof. C. 3.8(a) & (j). Despite these requirements, the Commonwealth Defendants continued to pursue bad faith persecution, conduct that is utterly intolerable in a civilized society.

Moreover, a common law privilege based on *Norton v. McOsker*, 407 F.3d 501 (1st Cir. 2005) is misplaced. (Motion at 18). In *Norton*, there was a promise between two persons having an extramarital affair. *Id.* at 511. A legal right to break up with a significant other is not akin to prosecutors conspiring to use vague generalities in a charging document and attempting to conceal evidence from the trial court. The Commonwealth Defendants do not enjoy any privilege as they had no “legal rights in a permissible way” to cause the unconstitutional prosecution of DePina. There is nothing permissible about violating the Constitution.

3.5 Negligent Infliction of Emotional Distress

Plaintiff recognizes that G.L. c. 258, § 4, presently bars his claim for Negligent Infliction of Emotional Distress (NIED) against the D.A.’s office and the official capacity defendants. He also recognizes that Early and Melia enjoy the benefits of G.L. c. 258, § 2, for claims against them in their personal capacities. However, Rollins does not. Being a complaining witness was not within the scope of Rollins’s employment. The four corners of the complaint do not suggest any facts that she was acting within the scope of her employment. “Factors to be considered include whether the conduct in question is of the kind the employee is hired to perform, whether it occurs within authorized time and space limits, and whether it is motivated, at least in part, by a purpose to serve the employer.” *Clickner v. City of Lowell*, 422 Mass. 539, 542 (1996). Rollins’s actions meet none of these factors. Thus, the NIED claim cannot be dismissed as against her in her individual capacity.

4.0 CONCLUSION

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

Dated: January 3, 2023.

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

RANAZZA 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 3rd day of January, 2023, or otherwise caused for service via U.S. Mail, as follows:

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/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.

DECLARATION OF MARC J. RANDAZZA

I, Marc J. Randazza, hereby declare as follows:

1. I am an attorney admitted to practice in the Commonwealth of Massachusetts and understand the obligation of an oath.
2. I am writing this declaration in support of Plaintiff's Opposition to Defendants' Motion to Dismiss.
3. **Exhibit 1**, filed herewith, is a true and correct copy of the Complaint and Application in the matter of *Commonwealth of Massachusetts v. Joao DePina*, Case No. 2017CR003064 in the Boston Municipal Court, Dorchester division.
4. **Exhibit 2**, filed herewith, is a true and correct copy of the Motion to Dismiss, Memorandum in Support of Defendant's Motion to Dismiss, and exhibits attached thereto, in the

matter of *Commonwealth of Massachusetts v. Joao DePina*, Case No. 2017CR003064 in the Boston Municipal Court, Dorchester division.

5. **Exhibit 3**, filed herewith, is a true and correct copy of the Commonwealth's Opposition to the Motion to Dismiss in the matter of *Commonwealth of Massachusetts v. Joao DePina*, Case No. 2017CR003064 in the Boston Municipal Court, Dorchester division.

6. **Exhibit 4**, filed herewith, is a true and correct copy of the Reply in Support of Defendant's Motion to Dismiss in the matter of *Commonwealth of Massachusetts v. Joao DePina*, Case No. 2017CR003064 in the Boston Municipal Court, Dorchester division.

7. **Exhibit 5**, filed herewith, is a true and correct copy of the Order granting Defendant's Motion to Dismiss in the matter of *Commonwealth of Massachusetts v. Joao DePina*, Case No. 2017CR003064 in the Boston Municipal Court, Dorchester division.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 3, 2022.

/s/ Marc J. Randazza
Marc J. Randazza

Exhibit 1

Criminal Complaint and Application
Commonwealth v. DePina

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



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

ORIGINAL

DEFENDANT DOB 12/12/1978	COMPLAINT ISSUED 11/12/2021	DATE OF OFFENSE 11/09/2021	ARREST DATE
------------------------------------	---------------------------------------	--------------------------------------	-------------

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

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

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

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

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

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

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

SIGNATURE OF COMPLAINANT <i>[Signature]</i>	SWORN TO BEFORE CLERK/MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK <input checked="" type="checkbox"/>	DATE 11/12/21
NAME OF COMPLAINANT Bernardo Deo Cruz	CLERK/MAGISTRATE/ASST. CLERK <i>[Signature]</i>	DATE 11/12/21

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



APPLICATION FOR CRIMINAL COMPLAINT

1 of 1

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

- ONLY MISDEMEANOR(S). I request a hearing WITHOUT NOTICE, because of an imminent threat of
 - BODILY INJURY COMMISSION OF A CRIME FLIGHT WITH NOTICE to accused
- ONE OR MORE FELONIES. I request a hearing WITHOUT NOTICE WITH NOTICE to accused
- WARRANT is requested because prosecutor represents that accused may not appear unless arrested.

ARREST STATUS OF ACCUSED
 HAS HAS NOT been arrested

INFORMATION ABOUT ACCUSED

NAME (FIRST MI LAST) AND ADDRESS DEPINA, JOAO GOMES				BIRTH DATE		SOCIAL SECURITY NUMBER	
PCF NO. 002446892				MARITAL STATUS			
DRIVERS LICENSE NO.				STATE MA			
GENDER MALE		HEIGHT 509		WEIGHT 215		EYES BROWN	
HAIR Black		RACE BLACK		COMPLEXION MEDIUM BROWN		SCARS/MARKS/TATTOOS	
EMPLOYER/SCHOOL				BIRTH STATE OR COUNTRY		DAY PHONE	
MOTHER'S MAIDEN NAME (FIRST MI LAST) GOMES				FATHER'S NAME (FIRST MI LAST) DEPINA, JOSE			

CASE INFORMATION

COMPLAINANT NAME (FIRST MI LAST) WILLIAMS, DETECTIVE DANTE			COMPLAINANT TYPE <input checked="" type="checkbox"/> POLICE <input type="checkbox"/> CITIZEN <input type="checkbox"/> OTHER			PD BOSTON POLI	
ADDRESS 1 BULFINCH PL. BOSTON, MA 02114			PLACE OF OFFENSE FERNDAL ST. AND NORFOLK ST., BOSTON, MA 02124				
			INCIDENT REPORT NO. 212082441		OBTN		
			CITATION NO(S). 212082441				

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

REMARKS: DEF. MADE STATEMENTS TO THE VT. W/ INTENT TO INTIMIDATE HER

COMPLAINANT'S SIGNATURE: *[Signature]* DATE FILED: 11/12/21

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

DATE	PROCESSING OF NON-ARREST APPLICATION (COURT USE ONLY)	CLERK/JUDGE
	NOTICE SENT OF CLERK'S HEARING SCHEDULED ON:	
	NOTICE SENT OF JUDGE'S HEARING SCHEDULED ON:	
	HEARING CONTINUED TO:	
	APPLICATION DECIDED WITHOUT NOTICE TO ACCUSED BECAUSE: <ul style="list-style-type: none"> <input type="checkbox"/> IMMINENT THREAT OF <input type="checkbox"/> BODILY INJURY <input type="checkbox"/> CRIME <input type="checkbox"/> FLIGHT BY ACCUSED <input type="checkbox"/> FELONY CHARGED AND POLICE DO NOT REQUEST NOTICE <input type="checkbox"/> FELONY CHARGED BY CIVILIAN; NO NOTICE AT CLERK'S DISCRETION 	

DATE	COMPLAINT TO ISSUE	COMPLAINT DENIED	CLERK/JUDGE
11/12/21	<input checked="" type="checkbox"/> PROBABLE CAUSE FOUND FOR ABOVE OFFENSE(S) NO(S): 1. <input type="checkbox"/> 2. <input type="checkbox"/> 3. BASED ON <input checked="" type="checkbox"/> FACTS SET FORTH IN ATTACHED STATEMENT(S) <input type="checkbox"/> TESTIMONY RECORDED: TAPE NO. _____ START NO. _____ END NO. _____ <input type="checkbox"/> WARRANT <input checked="" type="checkbox"/> SUMMONS TO ISSUE ARRAIGNMENT DATE: 12/27/21	<input type="checkbox"/> NO PROBABLE CAUSE FOUND <input type="checkbox"/> REQUEST OF COMPLAINANT <input type="checkbox"/> FAILURE TO PROSECUTE <input type="checkbox"/> AGREEMENT OF BOTH PARTIES <input type="checkbox"/> OTHER: COMMENT	<i>[Signature]</i>

Exhibit 2

Motion to Dismiss
Commonwealth v. DePina

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT OF MASSACHUSETTS
QUINCY DISTRICT COURT

_____)	
COMMONWEALTH OF MASSACHUSETTS)	
<i>Plaintiff,</i>)	
)	
v.)	Case No.: 2156 CR 3600
)	Former Case No. 2107 CR 003064
JOAO DEPINA,)	(Dorchester Division, Boston
<i>Defendant.</i>)	Municipal Court) ¹
_____)	

MOTION TO DISMISS

Defendant Joao DePina hereby moves, pursuant to Mass. R. Crim. P. 13 and *Bradford v. Knights*, 427 Mass. 748, 695 N.E.2d 1068 (1998) that the above-entitled matter be dismissed, as there was no probable for the issuance of the complaint. As the SJC cited in *Bradford*, “[i]f the person complained of believes that there was not probable cause to charge him with a crime, he may move to dismiss the complaint.”

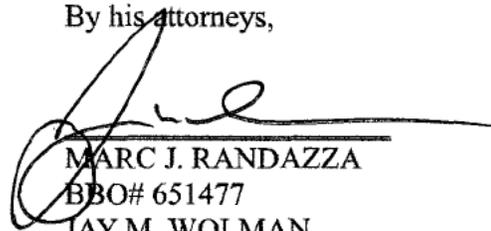
As further reasons thereof, based on the facts set forth in the Suffolk County Police Report authored by Officer Dante Williams, the Commonwealth is unable to establish probable cause that Defendant committed intimidation of a person connected to a criminal proceeding. As such, upon the annexed Affidavit of Jay M. Wolman and exhibits filed herewith, Defendant moves for this

¹ This matter was originally brought in the Boston Municipal Court. On December 8, 2021, it was transferred to this Court. See **Exhibit 5**.

Court to dismiss all counts of the above numbered complaint.

Date: January 6, 2022

Respectfully submitted,
JOAO DEPINA
By his attorneys,

A handwritten signature in black ink, appearing to read "M. Randazza", is written over a horizontal line. The signature is stylized and extends to the right of the line.

MARC J. RANDAZZA

BBO# 651477

JAY M. WOLMAN

BBO# 666053

Randazza Legal Group, PLLC

30 Western Avenue

Gloucester, MA 01776

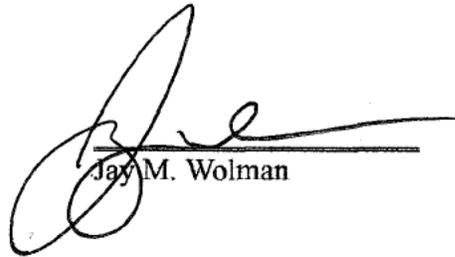
(978) 801-1776

ecf@randazza.com

CERTIFICATE OF SERVICE

I, Jay M. Wolman, hereby certify that a true and correct copy of the foregoing document was served upon all attorneys of record via first-class mail, postage prepaid, this 6th day of January 2022, as follows:

Michael W. Morrissey, Esq.
Norfolk County District Attorney
45 Shawmut Road
Canton, Massachusetts 02021



Jay M. Wolman

Rollins decided to retaliate unconstitutionally by criminally prosecuting him.

1.0 NATURE OF THE ALLEGED OFFENSE

The Suffolk County Police Report authored by Officer Dante Williams, Incident # 212082441, alleges that then-Suffolk County District Attorney Rachael Rollins was making statements to members of the press on public property on November 9, 2021, at approximately 6:10 p.m. (Police Report, attached as **Exhibit 1.**) Officer Williams claims that while Rollins was making her statements, Mr. DePina “began to loudly heckel [sic] her, while making multiple offensive comments of a personal nature directly to her” (*Id.*) The report goes on to claim that Mr. DePina’s statements “appeared as an intent to effect [sic] or interfere with” pending criminal matters in Suffolk County in which Mr. DePina was a defendant, and that Mr. DePina “made several indirect references to these cases during his verbal offensive.” (*Id.*)

Mr. DePina recorded this encounter and uploaded it to his Facebook page. (*Id.*) The Report alleges that Mr. DePina previously made multiple attempts to contact Ms. Rollins to talk to her about these pending criminal matters. (*Id.*)

The recording on the Facebook page shows, in actuality, that Mr. DePina was engaged in protected speech under the First Amendment to the U.S. Constitution and Art. XXI & LXXVII of the Massachusetts Declaration of Rights. The recording further shows that Officer Williams made a knowingly false report. The transcript of this event speaks for itself. (**Exhibit 2.**)

2.0 FACTUAL BACKGROUND

The Police Report and Complaint deliberately omit any mention of the statements Mr. DePina actually uttered, despite Rollins, Officer Williams, and the Clerk-Magistrate having access to a recording of the incident. An electronic copy of the recording is provided herewith as **Exhibit 3.** For the convenience of the Court, attached as **Exhibit 2** to this Motion is a transcript of the

relevant portion of Mr. DePina's recording, starting from when Rollins begins to address the press.

Here are Mr. DePina's statements to Rollins during the press conference, in full:

JOAO DEPINA: What was you saying? What was you saying? Oh, last December. Shit. Yeah. Yeah. Good.

Oh. It's just her. This is going to be great. This is going to be amazing. All right. Ready, guys.

DA ROLLINS: Thank you. (Inaudible) facts of the case. As you know, (inaudible) district attorneys of the Commonwealth of Massachusetts.

JOAO DEPINA: And what happens when civilians are hurt?

DA ROLLINS: So right now in the last three days we had multiple –

JOAO DEPINA: In the last 40-something years I've been alive we had several black men in Boston shot.

DA ROLLINS: -- emotional –

JOAO DEPINA: So we need to really get emotionally correct and help ourselves. And then we sit there and we got to get answers from our DA.

DA ROLLINS: -- right now –

JOAO DEPINA: And so our DA can give us answers and allow us to survive. PTSD is real in Boston. And –

DA ROLLINS: -- emotionally disturbed people –

JOAO DEPINA: I am very emotionally disturbed because she is emotionally disturbed because she has a duck for a boyfriend and she's very nasty to people and she's, she abuses her power.

UNKNOWN: Excuse me, sir. Excuse me. I'm sorry.

JOAO DEPINA: To lock up black men in the community.

DA ROLLINS: -- since I –

JOAO DEPINA: And this is how it's going to happen because we got to stand up for ourselves.

Every guy, let everybody know what really happens with our fake ass DA, because what happens is she comes and she tells us lies.

And when people get shot, we should get answers. Everybody deserves answers in Boston. Every single family –

DA ROLLINS: -- right now –

JOAO DEPINA: Every single family deserves answers. Like mine.

DA ROLLINS: -- wonderful –

JOAO DEPINA: My mom needs answer, too. My mom needs answers.

DA ROLLINS: -- three days we've had –

JOAO DEPINA: My mom needs answers and my mom needs answers, Rachael. My mom needs answers for the murder of my brother, Rachael.

Michael DePina was murdered in the streets of Dorchester and we still have no answers and the DA's office is still not doing that because she is very in tuned into, into locking black and brown men up for petty crimes, and that is what's going on.⁵ Yeah.

Imagine what the police are going through right now. I am emotionally disturbed because of Rachael Rollins. I am emotionally disturbed because, yeah. And our families get stabbed and shot and raped, and Rachael Rollins' office don't give two shits about us.

DA ROLLINS: -- going into this --

JOAO DEPINA: Thank you. And you should not be confirmed because you are no good. You abuse your power. Let's keep going.

DA ROLLINS: Just remember –

JOAO DEPINA: Just remember, abuse of power is not good for an elected official. And this is what we're dealing with all the time because we deal with –

DA ROLLINS: -- men and women –

JOAO DEPINA: You put your life at risk? You sit behind a desk, Rachael.

DA ROLLINS: This is nothing.

⁵ 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/activists-family-is-hit-by-violence/>.

JOAO DEPINA: Yeah. This is nothing. Just like you are nothing. Let's ask your duck boyfriend. Let's ask your duck boyfriend if this is nothing.

This is what will happen, because when we don't like you, Rachael, because you are turning your back on black and brown people like we said that you would, Rachael.

Yes, Rachael. We're going to get a little louder so everybody can hear us, Rachael. Yes. Because this is what's going to happen.

I don't care about the press. You know, I don't care. Sorry, press. Sorry, people. Freedom of speech. This is beautiful. This is called freedom of speech. When Channel 10 wants to answer a question, just let me know. I'll be quiet, sir.

DA ROLLINS: No one –

JOAO DEPINA: Telemundo.

DA ROLLINS: -- in order to –

JOAO DEPINA: But, yeah. You can't sign a job that you're going to get killed and up for they don't get paid enough. And you treat the police like shit.

DA ROLLINS: -- people –

JOAO DEPINA: The city of Boston been treating the police like shit. You make them work overtime. You make them get tired. They don't get good recovery time. The poor police.

DA ROLLINS: The men –

JOAO DEPINA: Yes. They need better services. The poor police shouldn't have to come to a job after they witness a traumatic situation. The police should deserve to have two days off and have time with their family, Rachael.

DA ROLLINS: Well, they were grateful –

JOAO DEPINA: The police are always under stress, and they're grateful that people like me are speaking up for them because nobody else speaks up for the police.

Hey, Rachael Rollins, I'm here talking to you, honey. Yes. I'm talking to you. Freedom of speech, isn't that a bitch. Huh.

Freedom of speech. Freedom of speech. Free press. Free speech. You won't get a good interview with me around, ever. Ever. Ever. Because what you're doing is abuse of power, Rachael.

Let's talk about the state rep going to Michigan and using state funds. And let's talk about the state rep that is using, that used a cell phone that is from a state issued cell phone to talk derogatory to other women, to other black women like you, Rachael.

Aren't you black? Aren't you black, darling? Yeah. This is what mental health looks like, huh, Rachael? Because that's what you just told the press. This is what mental health is. This is what mentally disturbed people look like.

And what does, what does mentally disturbed lawyers look like? What does a scorned woman look like? Oh. Oh. Oh. You want me tell you about it.

Why did BU fire you? They fired you. They fired you, Rachael. And then also, let's talk about your ex-boyfriend, your ex-duck boyfriend, Rachael. The same one that you be watching their kids for. Yes. And let's talk about your current boyfriend, Rachael, your other duck boyfriend. Everybody knows him.

Have you ever met a DA that has a duck for a boyfriend? Today you meet him. Today you meet Rachael Rollins. Hi, honey. I'm here to give it to you. I'm here. I'm here for it. I'm here for it, honey.

Rachael, just tell them the truth. You don't care. All you care about is going to the next position. You don't care about our black and brown community. You're worried about going to the next position, Rachael. Yes. You got a good picture of me?

Make sure, Rachael, make sure they know that you only worry about yourself and becoming the U.S. attorney. That's, you don't get, you don't, you -- no. Because I'm blocking their stuff. I'm sorry but I told you guys this.

Rachael, Rachael, I'm here, honey. Here comes the other counterparts. Okay. We'll let the Commissioner Long talk. Come on, Commissioner Long. He's a nice guy. Now we let him have an interview.

COMMISSIONER LONG: Good evening. At about 9:30 this morning officers assigned to District B-3 reported (inaudible).

JOAO DEPINA: Bye, Rachael.

COMMISSIONER LONG: Upon arrival –

JOAO DEPINA: Love you still. I'm mentally disturbed. Don't forget that. You said it on camera so when we go to court I'm going to use it.

(Exhibit 2 at 2-9.)

Mr. DePina made no threats. Mr. DePina engaged in no form of harassment, nor anything that could possibly be construed as intimidation of someone connected to a pending criminal proceeding. Rather, Mr. DePina exercised his right to criticize a District Attorney for abusing her power, opportunistically seeking higher office without caring for the people of Boston, and not taking adequate care of Boston police officers. Mr. DePina has a First Amendment right to do so. Contrary to the falsifications made by Officer Williams in the Police Report, there are no references, whether direct or indirect, to any pending criminal matters against Mr. DePina in his remarks to Rollins while she was speaking, except perhaps an allusion to this not-yet-filed complaint for the equivalent of *lese majeste*.

Also notably absent from the Police Report is any mention that Mr. DePina is not merely a citizen with criminal matters pending against him, but he is also a politician who ran for Boston City Council, District 7 in both 2017 and 2021. (See “Ballotpedia” page for Mr. DePina, attached as **Exhibit 4**.)⁶ It is galling to claim that a politician criticizing the job performance of a public official constitutes criminal intimidation or harassment.

3.0 ARGUMENT

“After the issuance of a [criminal] complaint, a motion to dismiss will lie for a failure to present sufficient evidence to the clerk-magistrate (or judge), *see* Commonwealth v. McCarthy, 385 Mass. 160, 430 N.E.2d 1195 (1982), for a violation of the integrity of the proceeding, *see* Commonwealth v. O'Dell, 392 Mass. 445, 466 N.E.2d 828 (1984), or for any other challenge to the validity of the complaint.” Commonwealth v. DiBennadetto, 436 Mass. 310, 313, 764 N.E.2d 338 (2002). The court must view the evidence presented in the complaint and reasonable inferences in

⁶ Available at: https://ballotpedia.org/Joao_DePina (last visited Jan. 6, 2022).

the light most favorable to the Commonwealth. See Commonwealth v. Rex, 469 Mass. 36, 41, 11 N.E.3d 1060 (2014).

The evidence presented in the Complaint, namely video directly referenced therein, is insufficient evidence, demonstrating a lack of probable cause. To the extent Officer Williams withheld the relevant portion, the integrity of the proceedings were violated. And, the complaint is otherwise invalid under the U.S. Constitution and the Massachusetts Declaration of Rights.

3.1 Standards for Section 13B

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

Whoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; . . . or (iii) misleads, intimidates or harasses another person who is a: . . . (C) judge, juror, grand juror, attorney, victim witness advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer; . . . with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type or a parole hearing, parole violation proceeding or probation violation proceeding; or an administrative hearing or a probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation or any other civil proceeding of any type; or (2) punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's participation in any of the proceedings described in this section, [commits a criminal offence].

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

unrelated grounds) (noting that intimidation is “putting a person in fear for the purpose of influencing his or her conduct”).

Application of the statute is restrained by the Constitution. “In considering the First Amendment's protective reach, ‘critical’ to the examination is the context . . . of the speech at issue.” Commonwealth v. Bigelow, 475 Mass. 554, 562 (2016), citing Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 744, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978). In O'Brien v. Borowski, 461 Mass. 415, 425, 961 N.E.2d 547, 556 (2012), the SJC confined the definition of “harassment” under G.L. c. 258E to the constitutionally unprotected categories of fighting words and true threats. Notably, the definition of “harassment” in G.L. c. 258E expressly includes violations of Section 13B. Similarly, the federal witness intimidation statute, 18 U.S.C. § 1512, is limited to constitutionally unprotected speech such as true threats. U.S. v. Colhoff, 833 F.3d 980, 984-85 (8th Cir. 2016); accord United States v. Carmichael, 326 F. Supp. 2d 1267, 1279 (M.D. Ala. 2004). Thus, O'Brien must be read to similarly restrict Section 13B to only unprotected speech of fighting words or true threats. Mr. DePina uttered neither fighting words nor true threats.

3.2 The Criminal Complaint was Issued Without Probable Cause

To pass constitutional muster, a criminal statute that seeks to punish an individual for speech must apply only to unprotected speech. Otherwise, the statute would be void under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution. Mr. DePina's statements are protected and the complaint must be dismissed.

“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Virginia v. Black, 538 U.S. 343, 359 (2003). As the SJC observed in O'Brien, “the ‘true threat’ doctrine applies not only to direct threats of imminent physical harm, but to words

or actions that -- taking into account the context in which they arise -- cause the victim to fear such harm now or in the future and evince intent on the part of the speaker or actor to cause such fear.” 461 Mass. at 425. Similarly, the “fighting words” exception “is limited to words that are likely to provoke a fight: face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace.” *Id.* at 423. Such provocation must be immediate. See Byrnes v. City of Manchester, 848 F. Supp. 2d 146, 157 (D.N.H. 2012) citing Chaplinsky v. New Hampshire, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). The “heckl[ing]” and “offensive comments of a personal nature” alleged in the Police Report do not constitute such unprotected speech.

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

any pending criminal matters against him while she was speaking,⁸ and there is no allegation that Rollins actually felt intimidated by any of Mr. DePina's statements. Criticizing a public official for being lousy at their job does not constitute intimidation or harassment. If there were probable cause to arrest someone for criticizing a district attorney during a press conference, then no one involved with pending criminal cases could ever dare criticize a district attorney for fear of criminal prosecution. This would give prosecutors enormous, and unconstitutional, control over the speech of criminal defendants. This is what Ms. Rollins wants. This court stands between this censorious and unconstitutional desire and reality.

Rollins may very well have felt annoyed at a citizen criticizing her during a press conference, while campaigning for her personal confirmation as U.S. Attorney. But, merely voicing negative opinions of a public official and political nominee, without any implication of physical violence or contact, does not constitute fighting words. O'Brien at 429. None of Mr. DePina's statements were so abusive as to provoke an immediate violent reaction or breach of peace. Compare Baker v. Glover, 776 F. Supp. 1511, 1516 (M.D. Ala. 1991) ("To the extent that there are any true fighting words left, the court is of the opinion that the phrase 'Eat Shit' does not fall within this category. Such words do not 'by their very utterance inflict injury or tend to incite an immediate breach of the peace'"), quoting Chaplinsky, 315 U.S. at 572. Mr. DePina's statements are constitutionally protected.

⁸ After Rollins left the podium, Mr. DePina stated "Love you still. I'm mentally disturbed. Don't forget that. You said it on camera so when we go to court I'm going to use it." (**Exhibit 2.**) None of the other statements regarding Rollins mentioned court. Mr. DePina saying that he would use Rollins's statement that Mr. DePina was mentally disturbed as part of court proceedings is neither fighting words nor a true threat. It is, at most, a statement to opposing counsel of a defense. Of course, this statement only came after Rollins besmirched Mr. DePina, accusing him of being "mentally disturbed" because he dared to criticize her while she wanted to preen for the cameras.

Mr. DePina's statements do not constitute a true threat, either. Though Mr. DePina was in the same physical location as Rollins, there were other members of the press recording the conference, as well as members of law enforcement present. Under these circumstances, Rollins could not have had any reasonable apprehension of physical violence from Mr. DePina. Mr. DePina also did not make any statements that could reasonably be construed as a threat to later engage in violence. He was merely a member of the public, and a fellow politician, criticizing Rollins for what he felt was her poor job performance.

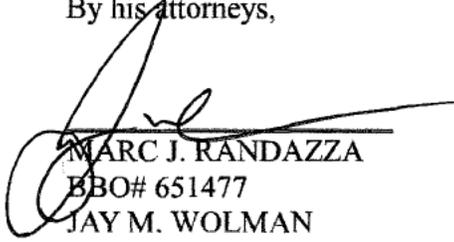
Even if Officer Williams's false statement that Mr. DePina somehow made indirect reference to the other matters pending against him, this does not alter the analysis. A criminal defendant is free to say, in public, at a prosecutor's press conference, "You're a terrible prosecutor for prosecuting me in these X, Y, Z cases." Professional criticism, even from a defendant, is neither fighting words nor a true threat. Whether Officer Williams sought to curry favor from Rollins, or Rollins abused her office to prosecute Mr. DePina, the Constitution does not tolerate this charge.

4.0 CONCLUSION

For the foregoing reasons, Mr. DePina respectfully requests that this Court allow the Motion to Dismiss.

Date: January 6, 2022

Respectfully submitted,
JOAO DEPINA
By his attorneys,

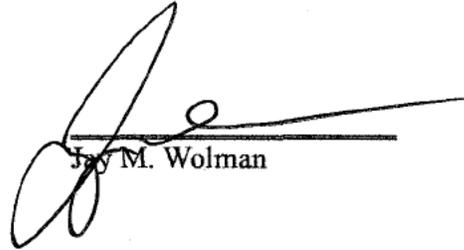
A handwritten signature in black ink, appearing to read "Marc J. Randazza", is written over a horizontal line. The signature is stylized and extends to the right of the line.

MARC J. RANDAZZA
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JAY M. WOLMAN
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CERTIFICATE OF SERVICE

I, Jay M. Wolman, hereby certify that a true and correct copy of the foregoing document was served upon all pro se parties and all attorneys of record in via first-class mail, postage prepaid, this 6th day of January, 2022 as follows:

Michael W. Morrissey, Esq.
Norfolk County District Attorney
45 Shawmut Road
Canton, Massachusetts 02021



Jay M. Wolman

EXHIBIT 1

Suffolk County Police Report,
Incident # 212082441



1 SCHROEDER PLAZA | BOSTON, MA 02200

Boston Police Department
Boston PD

212082441 - Offense/Incident Report

REPORTED ON DATE / TIME Nov 10, 2021 15:35	DISTRICT / SECTOR / REPORTING AREA / SUBDIVISION 4 / SUBDIVISION 1 A1 / A422	OCCURRED FROM DATE / TIME - OCCURRED TO DATE / TIME Nov 9, 2021 18:10
---	---	--

REPORTING OFFICER
DANTE WILLIAMS #011474

REPORT TAKEN LOCATION
1 BULFINCH PL, BOSTON, MA 02114

- EVENT STATISTICS
- | | |
|--|--|
| <input type="checkbox"/> Gun | <input type="checkbox"/> Drugs |
| <input type="checkbox"/> Sexual Assault | <input type="checkbox"/> NIDV |
| <input type="checkbox"/> Child Present | <input type="checkbox"/> Homeless |
| <input type="checkbox"/> CRU - Hate/Bias | <input type="checkbox"/> Car Jack |
| <input checked="" type="checkbox"/> Other Agency/Unit Notified | <input type="checkbox"/> Bicycle |
| <input type="checkbox"/> DVIP | <input type="checkbox"/> Licensed Premise |
| <input type="checkbox"/> Warrant Arrest | <input type="checkbox"/> School |
| <input type="checkbox"/> Juvenile | <input type="checkbox"/> Disabled |
| <input type="checkbox"/> Gang | <input type="checkbox"/> Search Warrant |
| <input type="checkbox"/> Homeland Security | <input type="checkbox"/> Shots Fired |
| <input type="checkbox"/> Sex Offender | <input type="checkbox"/> Elderly |
| <input type="checkbox"/> Homeland Security UASI | <input type="checkbox"/> Victim Shot |
| <input type="checkbox"/> Home Invasion | <input type="checkbox"/> Victim Stabbed |
| <input type="checkbox"/> Human Trafficking | <input type="checkbox"/> Child Abuse |
| <input type="checkbox"/> Body Worn Camera | <input type="checkbox"/> Auto Investigator |

NARRATIVE

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

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

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

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

The suspect, Joao G. Depina, D.O.B. 12/1278, has made multiple attempts to contact the DA, Ms. Rollins directly to talk about these pending cases, to no avail. This incident appears to be an escalation from a prior similar incident on 8/2 /21, during the Caribbean Festival.

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

REPORTING PARTY - 1

REPORTING PARTY - ORGANIZATION

R-1 Myself

OFFENSE-1

OFFENSE CODE

INTIMIDATING WITNESS

OCCURRED FROM DATE/TIME Nov 9, 2021 18:10	OCCURRED TO DATE/TIME Nov 9, 2021 18:15	OFFENSE COMPLETION <input checked="" type="checkbox"/> COMPLETED <input type="checkbox"/> ATTEMPTED	SUSPECTED HP'S COUN <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
--	--	---	--

TOXIC / VIOLENT <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	LANGUAGE INFORMATION None/Unknown
--	--------------------------------------

OFFENSE LOCATION

CITY DORCHESTER	STATE MA	ZIP 02124	COUNTRY CODE US
ADDRESS LINE 1 FERNDALE ST	INTERSECTION STREET 2 NORFOLK ST	DISTRICT / SECTION / REPORTING AREA / SUBDIVISION 1 / SUBDIVISION 2 B3 / C421 / 437	
LOCATION CATEGORY Highway / Road / Alley / Street / Sidewalk	PUBLIC / PRIVATE Public		

VICTIMS-1

VICTIM 1 NAME (LAST, FIRST MIDDLE) V-1 ROLLINS, RACHEL	DOB / ESTIMATED AGE RANGE 45 - 50 years old
SEX Female	RACE / ETHNICITY Black

VICTIM OFFICER <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO

SUSPECTS-1

SUSPECT 1 NAME (LAST, FIRST MIDDLE) S-1 DEPINA, JOAO GOMES	DOB / ESTIMATED AGE RANGE [REDACTED]
SEX Male	RACE / ETHNICITY Black / Not of Hispanic Origin

HOME ADDRESS
59 ELM HILL AVE, S, ROXBURY, MA 02121

WITNESS-1

WITNESS 1 NAME (LAST, FIRST MIDDLE) W-1 WILLIAMS, DET. DANTE	SEX Male	PHONE NUMBER (617) 343-4234 (primary, WORK)
---	-------------	--

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

EXHIBIT 2

Transcript of the Recording of the Alleged
Events Giving Rise to the Complaint

PAGES: 1 - 18

VIDEO TRANSCRIPTION

November 9, 2021

Transcribed by Jessica F. Story, CSR, RPR

BRAMANTI & LYONS COURT REPORTING, INC.
REGISTERED PROFESSIONAL REPORTERS
92 STATE STREET, BOSTON, MA 02109
TEL: 617.723.7321 / FAX: 617.723.7322
www.bramanti-lyons.com

1 * * * *

2
3 JOAO DEPINA: What was you saying? What
4 was you saying? Oh, last December. Shit.
5 Yeah. Yeah. Good.

6 Oh. It's just her. This is going to be
7 great. This is going to be amazing. All right.
8 Ready, guys.

9 DA ROLLINS: Thank you. (Inaudible)
10 facts of the case. As you know, (inaudible)
11 district attorneys of the Commonwealth of
12 Massachusetts.

13 JOAO DEPINA: And what happens when
14 civilians are hurt?

15 DA ROLLINS: So right now in the last
16 three days we had multiple --

17 JOAO DEPINA: In the last 40-something
18 years I've been alive we had several black men
19 in Boston shot.

20 DA ROLLINS: -- emotional --

21 JOAO DEPINA: So we need to really get
22 emotionally correct and help ourselves. And
23 then we sit there and we got to get answers from
24 our DA.

1 DA ROLLINS: -- right now --

2 JOAO DEPINA: And so our DA can give us
3 answers and allow us to survive. PTSD is real
4 in Boston. And --

5 DA ROLLINS: -- emotionally disturbed
6 people --

7 JOAO DEPINA: I am very emotionally
8 disturbed because she is emotionally disturbed
9 because she has a duck for a boyfriend and she's
10 very nasty to people and she's, she abuses her
11 power.

12 UNKNOWN: Excuse me, sir. Excuse me.
13 I'm sorry.

14 JOAO DEPINA: To lock up black men in the
15 community.

16 DA ROLLINS: -- since I --

17 JOAO DEPINA: And this is how it's going
18 to happen because we got to stand up for
19 ourselves.

20 Every guy, let everybody know what really
21 happens with our fake ass DA, because what
22 happens is she comes and she tells us lies.

23 And when people get shot, we should get
24 answers. Everybody deserves answers in Boston.

1 Every single family --

2 DA ROLLINS: -- right now --

3 JOAO DEPINA: Every single family
4 deserves answers. Like mine.

5 DA ROLLINS: -- wonderful --

6 JOAO DEPINA: My mom needs answer, too.
7 My mom needs answers.

8 DA ROLLINS: -- three days we've had --

9 JOAO DEPINA: My mom needs answers and my
10 mom needs answers, Rachael. My mom needs
11 answers for the murder of my brother, Rachael.

12 Michael DePina was murdered in the
13 streets of Dorchester and we still have no
14 answers and the DA's office is still not doing
15 that because she is very in tuned into, into
16 locking black and brown men up for petty crimes,
17 and that is what's going on. Yeah.

18 Imagine what the police are going through
19 right now. I am emotionally disturbed because
20 of Rachael Rollins. I am emotionally disturbed
21 because, yeah. And our families get stabbed and
22 shot and raped, and Rachael Rollins' office
23 don't give two shits about us.

24 DA ROLLINS: -- going into this --

1 I don't care. Sorry, press. Sorry, people.
2 Freedom of speech. This is beautiful. This is
3 called freedom of speech. When Channel 10 wants
4 to answer a question, just let me know. I'll be
5 quiet, sir.

6 DA ROLLINS: No one --

7 JOAO DEPINA: Telemundo.

8 DA ROLLINS: -- in order to --

9 JOAO DEPINA: But, yeah. You can't sign
10 up for a job that you're going to get killed and
11 they don't get paid enough. And you treat the
12 police like shit.

13 DA ROLLINS: -- people --

14 JOAO DEPINA: The city of Boston been
15 treating the police like shit. You make them
16 work overtime. You make them get tired. They
17 don't get good recovery time. The poor police.

18 DA ROLLINS: The men --

19 JOAO DEPINA: Yes. They need better
20 services. The poor police shouldn't have to
21 come to a job after they witness a traumatic
22 situation. The police should deserve to have
23 two days off and have time with their family,
24 Rachael.

1 DA ROLLINS: Well, they were grateful --

2 JOAO DEPINA: The police are always under
3 stress, and they're grateful that people like me
4 are speaking up for them because nobody else
5 speaks up for the police.

6 Hey, Rachael Rollins, I'm here talking to
7 you, honey. Yes. I'm talking to you. Freedom
8 of speech, isn't that a bitch. Huh.

9 Freedom of speech. Freedom of speech.
10 Free press. Free speech. You won't get a good
11 interview with me around, ever. Ever. Ever.
12 Because what you're doing is abuse of power,
13 Rachael.

14 Let's talk about the state rep going to
15 Michigan and using state funds. And let's talk
16 about the state rep that is using, that used a
17 cell phone that is from a state issued cell
18 phone to talk derogatory to other women, to
19 other black women like you, Rachael.

20 Aren't you black? Aren't you black,
21 darling? Yeah. This is what mental health
22 looks like, huh, Rachael? Because that's what
23 you just told the press. This is what mental
24 health is. This is what mentally disturbed

1 people look like.

2 And what does, what does mentally
3 disturbed lawyers look like? What does a
4 scorned woman look like? Oh. Oh. Oh. You
5 want me tell you about it.

6 Why did BU fire you? They fired you.
7 They fired you, Rachael. And then also, let's
8 talk about your ex-boyfriend, your ex-duck
9 boyfriend, Rachael. The same one that you be
10 watching their kids for. Yes. And let's talk
11 about your current boyfriend, Rachael, your
12 other duck boyfriend. Everybody knows him.

13 Have you ever met a DA that has a duck
14 for a boyfriend? Today you meet him. Today you
15 meet Rachael Rollins. Hi, honey. I'm here to
16 give it to you. I'm here. I'm here for it.
17 I'm here for it, honey.

18 Rachael, just tell them the truth. You
19 don't care. All you care about is going to the
20 next position. You don't care about our black
21 and brown community. You're worried about going
22 to the next position, Rachael. Yes. You got a
23 good picture of me?

24 Make sure, Rachael, make sure they know

1 that you only worry about yourself and becoming
2 the U.S. attorney. That's, you don't get, you
3 don't, you -- no. Because I'm blocking their
4 stuff. I'm sorry but I told you guys this.

5 Rachael, Rachael, I'm here, honey. Here
6 comes the other counterparts. Okay. We'll let
7 the Commissioner Long talk. Come on,
8 Commissioner Long. He's a nice guy. Now we let
9 him have an interview.

10 COMMISSIONER LONG: Good evening. At
11 about 9:30 this morning officers assigned to
12 District B-3 reported (inaudible).

13 JOAO DEPINA: Bye, Rachael.

14 COMMISSIONER LONG: Upon arrival --

15 JOAO DEPINA: Love you still. I'm
16 mentally disturbed. Don't forget that. You
17 said it on camera so when we go to court I'm
18 going to use it.

19 COMMISSIONER LONG: -- individual
20 (inaudible). As a result, SWAT assets were
21 brought down here (inaudible) negotiations.
22 Negotiations went on for about five or six hours
23 with this individual in an attempt for him to
24 surrender peacefully.

1 At some point this afternoon during the
2 negotiations the individual fired, fired at the
3 officers, striking three officers on scene.

4 JOAO DEPINA: Three officers were shot.

5 COMMISSIONER LONG: As a result of being
6 fired upon, officers on scene returned fire,
7 threatened the suspect. The suspect suffered
8 multiple gunshot wounds and was pronounced on
9 scene.

10 JOAO DEPINA: Told you guys.

11 COMMISSIONER LONG: The three officers
12 were taken to local area hospitals where they
13 all suffered nonlife-threatening gunshot wounds.
14 Multiple other officers were also brought to
15 local area hospitals for evaluation.

16 This is still --

17 JOAO DEPINA: Good. Get them help.

18 COMMISSIONER LONG: -- an active crime
19 scene. Witnesses are being interviewed. Still
20 canvassing for video.

21 You know, I want to highlight and make
22 note of this, that in the last three days we've
23 had four Boston police officers suffer injuries
24 as a result of facing --

1 JOAO DEPINA: Yes. She did say that.

2 COMMISSIONER LONG: Again, this
3 highlights the dangers the men and the women of
4 the department every single day they put on
5 their uniforms. I can't say enough about the
6 professionalism, courage and bravery that
7 officers show every day, not just on Saturday
8 night and not just here today, but every day
9 they put on the uniform.

10 NEWSPERSON: Commissioner, how are the
11 officers doing and what was that like, to go to
12 the hospital (inaudible) your officers?

13 COMMISSIONER LONG: It's never a good
14 thing, right. You know --

15 JOAO DEPINA: That was a stupid question.
16 Like whoever wants to see somebody hurt.

17 COMMISSIONER LONG: -- it's emotional for
18 their (inaudible). You know, we have officers
19 (inaudible) last couple days. Emotional
20 (inaudible). It's a strong department and they
21 continue to do, they'll go out and (inaudible).

22 JOAO DEPINA: Thank you.

23 COMMISSIONER LONG: Like I said, all I
24 know is at the time (inaudible) investigation.

1 That this individual is (inaudible) pointed a
2 firearm at officers (inaudible).

3 NEWSPERSON: Did he live there?

4 COMMISSIONER LONG: We're investigating.

5 JOAO DEPINA: He was visiting.

6 COMMISSIONER LONG: -- three officers.

7 JOAO DEPINA: He's been here for ten
8 days.

9 COMMISSIONER LONG: I can't give you
10 (inaudible). That's still under investigation.

11 JOAO DEPINA: Oh. Come on. Stupid,
12 stupid questions for the press.

13 COMMISSIONER LONG: On behalf of
14 (inaudible).

15 UNKNOWN: Last question.

16 COMMISSIONER LONG: They were inside.

17 JOAO DEPINA: It's not okay to shoot at
18 anybody.

19 COMMISSIONER LONG: I'll tell you. This
20 is a great neighborhood (inaudible). No.

21 JOAO DEPINA: It's not okay to shoot at
22 police officers. It's not okay to shoot at
23 anybody. This is ridiculous. We should not
24 have to live in a war zone.

1 COMMISSIONER LONG: (Inaudible).

2 Speaking with them.

3 JOAO DEPINA: How many questions?

4 COMMISSIONER LONG: (Inaudible).

5 Downtown. It goes to the city street.

6 JOAO DEPINA: You buried that?

7 COMMISSIONER LONG: -- officer training.

8 Again, every time we see this (inaudible)

9 training (inaudible) put in the practice

10 (inaudible).

11 NEWSPERSON: You mentioned that the
12 injuries are nonlife-threatening?

13 COMMISSIONER LONG: Nonlife-threatening.

14 JOAO DEPINA: Yes. They're alive.

15 NEWSPERSON: How bad are they?

16 COMMISSIONER LONG: I'd categorize
17 (inaudible).

18 JOAO DEPINA: Yes.

19 NEWSPERSON: Can you go over again
20 (inaudible). The officers (inaudible).

21 COMMISSIONER LONG: Like I said --

22 JOAO DEPINA: That's too much. Too much.

23 They start -- he got a lot of work to go do.

24 Thank you, Commissioner Long, for all

1 your great work you guys been doing.

2 COMMISSIONER LONG: Appreciate that.

3 Thank you.

4 JOAO DEPINA: Thank you for all your
5 great work, Commissioner Long. We appreciate

6 you.

7

8 (End of video clip.)

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C E R T I F I C A T E

I, JESSICA F. STORY, Certified Shorthand Reporter, Registered Professional Reporter, do hereby certify that the foregoing testimony is true and accurate, to the best of my knowledge and ability, of the video file provided to me by the Randazza Legal Group.

WITNESS MY HAND THIS 6th day of December, 2021.



Jessica Fayre Story, CSR, RPR

My Commission expires
on August 12, 2027

0	amazing [1] - 2:7 answer [2] - 4:6, 6:4 answers [10] - 2:23, 3:3, 3:24, 4:4, 4:7, 4:9, 4:10, 4:11, 4:14 anybody [2] - 12:18, 12:23 appreciate [2] - 14:2, 14:5 area [2] - 10:12, 10:15 aren't [2] - 7:20 around [1] - 7:11 arrival [1] - 9:14 ask [2] - 5:14, 5:15 ass [1] - 3:21 assets [1] - 9:20 assigned [1] - 9:11 attempt [1] - 9:23 attorney [1] - 9:2 attorneys [1] - 2:11 August [1] - 15:18	buried [1] - 13:6 but [3] - 6:9, 9:4, 11:8 by [2] - 1:10, 15:9 bye [1] - 9:13	D	E
02109 [1] - 1:23			DA [22] - 2:9, 2:15, 2:20, 2:24, 3:1, 3:2, 3:5, 3:16, 3:21, 4:2, 4:5, 4:8, 4:24, 5:4, 5:9, 5:12, 6:6, 6:8, 6:13, 6:18, 7:1, 8:13 DA's [1] - 4:14 dangers [1] - 11:3 darling [1] - 7:21 day [4] - 11:4, 11:7, 11:8, 15:12 days [6] - 2:16, 4:8, 6:23, 10:22, 11:19, 12:8 deal [1] - 5:8 dealing [1] - 5:7 December [2] - 2:4, 15:12 department [2] - 11:4, 11:20 DePina [1] - 4:12 DEPINA [39] - 2:3, 2:13, 2:17, 2:21, 3:2, 3:7, 3:14, 3:17, 4:3, 4:6, 4:9, 5:1, 5:5, 5:10, 5:13, 6:7, 6:9, 6:14, 6:19, 7:2, 9:13, 9:15, 10:4, 10:10, 10:17, 11:1, 11:15, 11:22, 12:5, 12:7, 12:11, 12:17, 12:21, 13:3, 13:6, 13:14, 13:18, 13:22, 14:4 derogatory [1] - 7:18 deserve [1] - 6:22 deserves [2] - 3:24, 4:4 desk [1] - 5:11 district [1] - 2:11 District [1] - 9:12 disturbed [8] - 3:5, 3:8, 4:19, 4:20, 7:24, 8:3, 9:16 does [3] - 8:2, 8:3 doing [4] - 4:14, 7:12, 11:11, 14:1 don't [11] - 4:23, 5:18, 5:24, 6:1, 6:11, 6:17, 8:19, 8:20, 9:2, 9:3, 9:16 Dorchester [1] - 4:13 down [1] - 9:21 downtown [1] - 13:5 duck [6] - 3:9, 5:14, 5:15, 8:8, 8:12, 8:13 during [1] - 10:1	electd [1] - 5:6 else [1] - 7:4 emotional [3] - 2:20, 11:17, 11:19 emotionally [6] - 2:22, 3:5, 3:7, 3:8, 4:19, 4:20 end [1] - 14:8 enough [2] - 6:11, 11:5 evaluation [1] - 10:15 evening [1] - 9:10 ever [4] - 7:11, 8:13 every [7] - 3:20, 4:1, 4:3, 11:4, 11:7, 11:8, 13:8 everybody [4] - 3:20, 3:24, 5:22, 8:12 ex [2] - 8:8 ex-boyfriend [1] - 8:8 ex-duck [1] - 8:8 excuse [2] - 3:12 expires [1] - 15:17
1		C		
12 [1] - 15:18		called [1] - 6:3 camera [1] - 9:17 can't [3] - 6:9, 11:5, 12:9 canvassing [1] - 10:20 care [5] - 5:24, 6:1, 8:19, 8:20 case [1] - 2:10 categorize [1] - 13:16 cell [2] - 7:17 Certified [1] - 15:5 certify [1] - 15:7 Channel [1] - 6:3 city [2] - 6:14, 13:5 civilians [1] - 2:14 clip [1] - 14:8 come [3] - 6:21, 9:7, 12:11 comes [2] - 3:22, 9:6 Commission [1] - 15:17 Commissioner [5] - 9:7, 9:8, 11:10, 13:24, 14:5 COMMISSIONER [23] - 9:10, 9:14, 9:19, 10:5, 10:11, 10:18, 11:2, 11:13, 11:17, 11:23, 12:4, 12:6, 12:9, 12:13, 12:16, 12:19, 13:1, 13:4, 13:7, 13:13, 13:16, 13:21, 14:2 Commonwealth [1] - 2:11 community [2] - 3:15, 8:21 confirmed [1] - 5:2 continue [1] - 11:21 correct [1] - 2:22 counterparts [1] - 9:6 couple [1] - 11:19 courage [1] - 11:6 court [1] - 9:17 COURT [1] - 1:22 crime [1] - 10:18 crimes [1] - 4:16 CSR [2] - 1:10, 15:16 current [1] - 8:11		
2				
2021 [2] - 1:5, 15:13 2027 [1] - 15:18				
4				
40-something [1] - 2:17				
6				
617.723.7321 [1] - 1:23 617.723.7322 [1] - 1:23 6th [1] - 15:12	B			
9	B-3 [1] - 9:12 back [1] - 5:19 bad [1] - 13:15 beautiful [1] - 6:2 because [16] - 3:8, 3:9, 3:18, 3:21, 4:15, 4:19, 4:21, 5:2, 5:8, 5:17, 5:18, 5:23, 7:4, 7:12, 7:22, 9:3 becoming [1] - 9:1 been [4] - 2:18, 6:14, 12:7, 14:1 behalf [1] - 12:13 behind [1] - 5:11 being [2] - 10:5, 10:19 best [1] - 15:8 better [1] - 6:19 bitch [1] - 7:8 black [8] - 2:18, 3:14, 4:16, 5:19, 7:19, 7:20, 8:20 blocking [1] - 9:3 Boston [5] - 2:19, 3:4, 3:24, 6:14, 10:23 BOSTON [1] - 1:23 boyfriend [8] - 3:9, 5:15, 8:8, 8:9, 8:11, 8:12, 8:14 BRAMANTI [1] - 1:22 bravery [1] - 11:6 brother [1] - 4:11 brought [2] - 9:21, 10:14 brown [3] - 4:16, 5:19, 8:21 BU [1] - 8:6			
92 [1] - 1:23 9:30 [1] - 9:11				
A				
ability [1] - 15:9 about [14] - 4:23, 5:24, 7:14, 7:16, 8:5, 8:8, 8:11, 8:19, 8:20, 8:21, 9:1, 9:11, 9:22, 11:5 abuse [3] - 5:3, 5:5, 7:12 abuses [1] - 3:10 accurate [1] - 15:8 active [1] - 10:18 after [1] - 6:21 afternoon [1] - 10:1 again [3] - 11:2, 13:8, 13:19 alive [2] - 2:18, 13:14 all [7] - 2:7, 5:7, 8:19, 10:13, 11:23, 13:24, 14:4 allow [1] - 3:3 also [2] - 8:7, 10:14 always [1] - 7:2 am [3] - 3:7, 4:19, 4:20				
				F
				facings [1] - 10:24 facts [1] - 2:10 fake [1] - 3:21 families [1] - 4:21 family [3] - 4:1, 4:3, 6:23 FAX [1] - 1:23 Fayre [1] - 15:16 file [1] - 15:9 fire [2] - 8:6, 10:6 firearm [1] - 12:2 fired [5] - 8:6, 8:7, 10:2, 10:6 five [1] - 9:22 foregoing [1] - 15:7 forget [1] - 9:16 four [1] - 10:23 free [2] - 7:10 freedom [5] - 6:2, 6:3, 7:7, 7:9 funds [1] - 7:15
				G
				get [13] - 2:21, 2:23, 3:23, 4:21, 5:21, 6:10, 6:11, 6:16, 6:17, 7:10, 9:2, 10:17 give [4] - 3:2, 4:23, 8:16, 12:9

<p>go^[5] - 9:17, 11:11, 11:21, 13:19, 13:23</p> <p>goes^[1] - 13:5</p> <p>going^[14] - 2:6, 2:7, 3:17, 4:17, 4:18, 4:24, 5:3, 5:21, 5:23, 6:10, 7:14, 8:19, 8:21, 9:18</p> <p>good^[9] - 2:5, 5:2, 5:6, 6:17, 7:10, 8:23, 9:10, 10:17, 11:13</p> <p>got^[4] - 2:23, 3:18, 8:22, 13:23</p> <p>grateful^[2] - 7:1, 7:3</p> <p>great^[4] - 2:7, 12:20, 14:1, 14:5</p> <p>Group^[1] - 15:10</p> <p>gunshot^[2] - 10:8, 10:13</p> <p>guy^[2] - 3:20, 9:8</p> <p>guys^[4] - 2:8, 9:4, 10:10, 14:1</p>	<p>2:10, 9:21, 11:12, 11:19, 11:24, 12:1, 13:8, 13:9</p> <p>inaudible^[15] - 9:12, 9:20, 11:18, 11:20, 11:21, 12:2, 12:10, 12:14, 12:20, 13:1, 13:4, 13:10, 13:17, 13:20</p> <p>INC^[1] - 1:22</p> <p>individual^[4] - 9:19, 9:23, 10:2, 12:1</p> <p>injuries^[2] - 10:23, 13:12</p> <p>inside^[1] - 12:16</p> <p>interview^[2] - 7:11, 9:9</p> <p>interviewed^[1] - 10:19</p> <p>into^[3] - 4:15, 4:24</p> <p>investigating^[1] - 12:4</p> <p>investigation^[2] - 11:24, 12:10</p> <p>isn't^[1] - 7:8</p> <p>issued^[1] - 7:17</p> <p>it's^[8] - 2:6, 3:17, 11:13, 11:17, 11:20, 12:17, 12:21, 12:22</p>	<p>11:24</p> <p>knowledge^[1] - 15:8</p> <p>knows^[1] - 8:12</p>	<p>mental^[2] - 7:21, 7:23</p> <p>mentally^[3] - 7:24, 8:2, 9:16</p> <p>mentioned^[1] - 13:11</p> <p>met^[1] - 8:13</p> <p>Michael^[1] - 4:12</p> <p>Michigan^[1] - 7:15</p> <p>mine^[1] - 4:4</p> <p>mom^[5] - 4:6, 4:7, 4:9, 4:10</p> <p>morning^[1] - 9:11</p> <p>much^[2] - 13:22</p> <p>multiple^[3] - 2:16, 10:8, 10:14</p> <p>murder^[1] - 4:11</p> <p>murdered^[1] - 4:12</p> <p>MY^[1] - 15:12</p> <p>my^[7] - 4:6, 4:7, 4:9, 4:10, 4:11, 15:8</p> <p>My^[1] - 15:17</p>	<p>officer^[1] - 13:7</p> <p>officers^[16] - 9:11, 10:3, 10:4, 10:6, 10:11, 10:14, 10:23, 11:7, 11:11, 11:12, 11:18, 12:2, 12:6, 12:22, 13:20</p> <p>official^[1] - 5:6</p> <p>oh^[6] - 2:4, 2:6, 8:4, 12:11</p> <p>okay^[4] - 9:6, 12:17, 12:21, 12:22</p> <p>one^[2] - 6:6, 8:9</p> <p>only^[1] - 9:1</p> <p>order^[1] - 6:8</p> <p>other^[5] - 7:18, 7:19, 8:12, 9:6, 10:14</p> <p>our^[5] - 2:24, 3:2, 3:21, 4:21, 8:20</p> <p>ourselves^[2] - 2:22, 3:19</p> <p>out^[1] - 11:21</p> <p>over^[1] - 13:19</p> <p>overtime^[1] - 6:16</p>
H			N	P
<p>HAND^[1] - 15:12</p> <p>happen^[3] - 3:18, 5:17, 5:23</p> <p>happens^[3] - 2:13, 3:21, 3:22</p> <p>he's^[2] - 9:8, 12:7</p> <p>health^[2] - 7:21, 7:24</p> <p>hear^[1] - 5:22</p> <p>help^[2] - 2:22, 10:17</p> <p>her^[2] - 2:6, 3:10</p> <p>here^[10] - 7:6, 8:15, 8:16, 8:17, 9:5, 9:21, 11:8, 12:7</p> <p>hereby^[1] - 15:7</p> <p>hey^[1] - 7:6</p> <p>hi^[1] - 8:15</p> <p>highlight^[1] - 10:21</p> <p>highlights^[1] - 11:3</p> <p>him^[4] - 8:12, 8:14, 9:9, 9:23</p> <p>honey^[4] - 7:7, 8:15, 8:17, 9:5</p> <p>hospital^[1] - 11:12</p> <p>hospitals^[2] - 10:12, 10:15</p> <p>hours^[1] - 9:22</p> <p>how^[4] - 3:17, 11:10, 13:3, 13:15</p> <p>huh^[2] - 7:8, 7:22</p> <p>hurt^[2] - 2:14, 11:16</p>	<p style="text-align: center;">J</p> <p>JESSICA^[1] - 15:5</p> <p>Jessica^[2] - 1:10, 15:16</p> <p>JOAO^[39] - 2:3, 2:13, 2:17, 2:21, 3:2, 3:7, 3:14, 3:17, 4:3, 4:6, 4:9, 5:1, 5:5, 5:10, 5:13, 6:7, 6:9, 6:14, 6:19, 7:2, 9:13, 9:15, 10:4, 10:10, 10:17, 11:1, 11:15, 11:22, 12:5, 12:7, 12:11, 12:17, 12:21, 13:3, 13:6, 13:14, 13:18, 13:22, 14:4</p> <p>job^[2] - 6:10, 6:21</p> <p>just^[9] - 2:6, 5:4, 5:5, 5:14, 6:4, 7:23, 8:18, 11:7, 11:8</p>	<p style="text-align: center;">K</p> <p>keep^[1] - 5:3</p> <p>kids^[1] - 8:10</p> <p>killed^[1] - 6:10</p> <p>know^[9] - 2:10, 3:20, 5:24, 6:4, 8:24, 10:21, 11:14, 11:18,</p>	<p>nasty^[1] - 3:10</p> <p>need^[2] - 2:21, 6:19</p> <p>needs^[5] - 4:6, 4:7, 4:9, 4:10</p> <p>negotiations^[3] - 9:21, 9:22, 10:2</p> <p>neighborhood^[1] - 12:20</p> <p>never^[1] - 11:13</p> <p>NEWSPERSON^[5] - 11:10, 12:3, 13:11, 13:15, 13:19</p> <p>next^[2] - 8:20, 8:22</p> <p>nice^[1] - 9:8</p> <p>night^[1] - 11:8</p> <p>no^[5] - 4:13, 5:2, 6:6, 9:3, 12:20</p> <p>nobody^[1] - 7:4</p> <p>nonlife^[3] - 10:13, 13:12, 13:13</p> <p>nonlife-threatening^[3] - 10:13, 13:12, 13:13</p> <p>not^[9] - 4:14, 5:2, 5:6, 11:7, 11:8, 12:17, 12:21, 12:22, 12:23</p> <p>note^[1] - 10:22</p> <p>nothing^[4] - 5:12, 5:13, 5:14, 5:16</p> <p>November^[1] - 1:5</p> <p>now^[5] - 2:15, 3:1, 4:2, 4:19, 9:8</p>	<p>paid^[1] - 6:11</p> <p>peacefully^[1] - 9:24</p> <p>people^[8] - 3:6, 3:10, 3:23, 5:19, 6:1, 6:13, 7:3, 8:1</p> <p>petty^[1] - 4:16</p> <p>phone^[2] - 7:17, 7:18</p> <p>picture^[1] - 8:23</p> <p>point^[1] - 10:1</p> <p>pointed^[1] - 12:1</p> <p>police^[10] - 4:18, 6:12, 6:15, 6:17, 6:20, 6:22, 7:2, 7:5, 10:23, 12:22</p> <p>poor^[2] - 6:17, 6:20</p> <p>position^[2] - 8:20, 8:22</p> <p>power^[4] - 3:11, 5:3, 5:6, 7:12</p> <p>practice^[1] - 13:9</p> <p>press^[5] - 5:24, 6:1, 7:10, 7:23, 12:12</p> <p>Professional^[1] - 15:6</p> <p>PROFESSIONAL^[1] - 1:22</p> <p>professionalism^[1] - 11:6</p> <p>pronounced^[1] - 10:8</p> <p>provided^[1] - 15:9</p> <p>PTSD^[1] - 3:3</p> <p>put^[4] - 5:10, 11:4,</p>
I		<p style="text-align: center;">L</p> <p>Last^[1] - 12:15</p> <p>last^[5] - 2:4, 2:15, 2:17, 10:22, 11:19</p> <p>lawyers^[1] - 8:3</p> <p>Legal^[1] - 15:10</p> <p>let^[4] - 3:20, 6:4, 9:6, 9:8</p> <p>let's^[7] - 5:3, 5:14, 5:15, 7:14, 7:15, 8:7, 8:10</p> <p>lies^[1] - 3:22</p> <p>life^[1] - 5:10</p> <p>like^[16] - 4:4, 5:14, 5:18, 5:19, 6:12, 6:15, 7:3, 7:19, 7:22, 8:1, 8:3, 8:4, 11:11, 11:16, 11:23, 13:21</p> <p>little^[1] - 5:22</p> <p>live^[2] - 12:3, 12:24</p> <p>local^[2] - 10:12, 10:15</p> <p>lock^[1] - 3:14</p> <p>locking^[1] - 4:16</p> <p>Long^[4] - 9:7, 9:8, 13:24, 14:5</p> <p>LONG^[23] - 9:10, 9:14, 9:19, 10:5, 10:11, 10:18, 11:2, 11:13, 11:17, 11:23, 12:4, 12:6, 12:9, 12:13, 12:16, 12:19, 13:1, 13:4, 13:7, 13:13, 13:16, 13:21, 14:2</p> <p>look^[3] - 8:1, 8:3, 8:4</p> <p>looks^[1] - 7:22</p> <p>lot^[1] - 13:23</p> <p>louder^[1] - 5:22</p> <p>love^[1] - 9:15</p> <p>LYONS^[1] - 1:22</p> <p>lyons.com^[1] - 1:24</p>	O	
<p>imagine^[1] - 4:18</p> <p>inaudible^[9] - 2:9,</p>	<p>know^[9] - 2:10, 3:20, 5:24, 6:4, 8:24, 10:21, 11:14, 11:18,</p>	<p style="text-align: center;">M</p> <p>MA^[1] - 1:23</p> <p>make^[5] - 6:15, 6:16, 8:24, 10:21</p> <p>many^[1] - 13:3</p> <p>Massachusetts^[1] - 2:12</p> <p>me^[8] - 3:12, 6:4, 7:3, 7:11, 8:5, 8:23, 15:9</p> <p>meet^[2] - 8:14, 8:15</p> <p>men^[6] - 2:18, 3:14, 4:16, 5:9, 6:18, 11:3</p>	<p>off^[1] - 6:23</p> <p>office^[2] - 4:14, 4:22</p>	

11:9, 13:9	saying [2] - 2:3, 2:4 scene [4] - 10:3, 10:6, 10:9, 10:19 scorned [1] - 8:4 see [2] - 11:16, 13:8 services [1] - 6:20 several [1] - 2:18 she [7] - 3:8, 3:9, 3:10, 3:22, 4:15, 11:1 she's [2] - 3:9, 3:10 shit [3] - 2:4, 6:12, 6:15 shits [1] - 4:23 shoot [3] - 12:17, 12:21, 12:22 Shorthand [1] - 15:5 shot [4] - 2:19, 3:23, 4:22, 10:4 should [4] - 3:23, 5:1, 6:22, 12:23 shouldn't [1] - 6:20 show [1] - 11:7 sign [1] - 6:9 since [1] - 3:16 single [3] - 4:1, 4:3, 11:4 sir [2] - 3:12, 6:5 sit [2] - 2:23, 5:11 situation [1] - 6:22 six [1] - 9:22 somebody [1] - 11:16 sorry [4] - 3:13, 6:1, 9:4 speaking [2] - 7:4, 13:2 speaks [1] - 7:5 speech [6] - 6:2, 6:3, 7:8, 7:9, 7:10 stabbed [1] - 4:21 stand [1] - 3:18 start [1] - 13:23 state [4] - 7:14, 7:15, 7:16, 7:17 STATE [1] - 1:23 still [6] - 4:13, 4:14, 9:15, 10:16, 10:19, 12:10 Story [2] - 1:10, 15:16 STORY [1] - 15:5 street [1] - 13:5 STREET [1] - 1:23 streets [1] - 4:13 stress [1] - 7:3 striking [1] - 10:3 strong [1] - 11:20 stuff [1] - 9:4 stupid [3] - 11:15, 12:11, 12:12 suffer [1] - 10:23 suffered [2] - 10:7, 10:13	sure [2] - 8:24 surrender [1] - 9:24 survive [1] - 3:3 suspect [2] - 10:7 SWAT [1] - 9:20	tuned [1] - 4:15 turning [1] - 5:18 two [2] - 4:23, 6:23	1:24 www.bramanti-lyons.com [1] - 1:24
Q		T	U	Y
question [3] - 6:4, 11:15, 12:15 questions [2] - 12:12, 13:3 quiet [1] - 6:5		taken [1] - 10:12 talk [6] - 7:14, 7:15, 7:18, 8:8, 8:10, 9:7 talking [2] - 7:6, 7:7 TEL [1] - 1:23 telemundo [1] - 6:7 tell [3] - 8:5, 8:18, 12:19 tells [1] - 3:22 ten [1] - 12:7 testimony [1] - 15:7 thank [6] - 2:9, 5:1, 11:22, 13:24, 14:3, 14:4 their [5] - 6:23, 8:10, 9:3, 11:5, 11:18 them [6] - 6:15, 6:16, 7:4, 8:18, 10:17, 13:2 they [15] - 6:11, 6:16, 6:19, 6:21, 7:1, 8:6, 8:7, 8:24, 10:12, 11:4, 11:9, 11:20, 12:16, 13:15, 13:23 they'll [1] - 11:21 they're [2] - 7:3, 13:14 thing [1] - 11:14 THIS [1] - 15:12 threatened [1] - 10:7 threatening [3] - 10:13, 13:12, 13:13 three [7] - 2:16, 4:8, 10:3, 10:4, 10:11, 10:22, 12:6 through [1] - 4:18 time [5] - 5:7, 6:17, 6:23, 11:24, 13:8 tired [1] - 6:16 today [3] - 8:14, 11:8 told [3] - 7:23, 9:4, 10:10 too [3] - 4:6, 13:22 training [2] - 13:7, 13:9 transcribed [1] - 1:10 TRANSCRIPTION [1] - 1:4 traumatic [1] - 6:21 treat [1] - 6:11 treating [1] - 6:15 true [1] - 15:8 truth [1] - 8:18	U.S [1] - 9:2 under [2] - 7:2, 12:10 uniform [1] - 11:9 uniforms [1] - 11:5 UNKNOWN [2] - 3:12, 12:15 up [6] - 3:14, 3:18, 4:16, 6:10, 7:4, 7:5 upon [2] - 9:14, 10:6 us [5] - 3:2, 3:3, 3:22, 4:23, 5:22 use [1] - 9:18 used [1] - 7:16 using [2] - 7:15, 7:16	years [1] - 2:18 you're [3] - 6:10, 7:12, 8:21 yourself [1] - 9:1
R			V	Z
Rachael [24] - 4:10, 4:11, 4:20, 4:22, 5:11, 5:18, 5:20, 5:21, 5:22, 6:24, 7:6, 7:13, 7:19, 7:22, 8:7, 8:9, 8:11, 8:15, 8:18, 8:22, 8:24, 9:5, 9:13 Randazza [1] - 15:10 raped [1] - 4:22 ready [1] - 2:8 real [1] - 3:3 really [2] - 2:21, 3:20 recovery [1] - 6:17 Registered [1] - 15:6 REGISTERED [1] - 1:22 remember [2] - 5:4, 5:5 rep [2] - 7:14, 7:16 reported [1] - 9:12 Reporter [2] - 15:6 REPORTERS [1] - 1:22 REPORTING [1] - 1:22 result [3] - 9:20, 10:5, 10:24 returned [1] - 10:6 ridiculous [1] - 12:23 right [6] - 2:7, 2:15, 3:1, 4:2, 4:19, 11:14 risk [1] - 5:10 ROLLINS [18] - 2:9, 2:15, 2:20, 3:1, 3:5, 3:16, 4:2, 4:5, 4:8, 4:24, 5:4, 5:9, 5:12, 6:6, 6:8, 6:13, 6:18, 7:1 Rollins [3] - 4:20, 7:6, 8:15 Rollins' [1] - 4:22 RPR [2] - 1:10, 15:16			very [3] - 3:7, 3:10, 4:15 VIDEO [1] - 1:4 video [3] - 10:20, 14:8, 15:9 visiting [1] - 12:5	zone [1] - 12:24
S			W	
same [1] - 8:9 Saturday [1] - 11:7 say [2] - 11:1, 11:5			want [2] - 8:5, 10:21 wants [2] - 6:3, 11:16 war [1] - 12:24 watching [1] - 8:10 we've [2] - 4:8, 10:22 Well [1] - 7:1 went [1] - 9:22 what's [2] - 4:17, 5:23 whoever [1] - 11:16 why [1] - 8:6 will [1] - 5:17 WITNESS [1] - 15:12 witness [1] - 6:21 witnesses [1] - 10:19 woman [1] - 8:4 women [4] - 5:9, 7:18, 7:19, 11:3 won't [1] - 7:10 wonderful [1] - 4:5 work [4] - 6:16, 13:23, 14:1, 14:5 worried [1] - 8:21 worry [1] - 9:1 would [1] - 5:20 wounds [2] - 10:8, 10:13 www.bramanti [1] -	

EXHIBIT 3

True and Correct Copy of the Recording of the
Alleged Events Giving Rise to the Complaint

RECORDING PRODUCED ELECTRONICALLY

EXHIBIT 4

True and Correct Copy of the Ballotpedia Page
For Joao DePina, Available at
https://ballotpedia.org/Joao_DePina



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Why this ad? ▶

Joao DePina

Joao DePina ran for election to the Boston City Council to represent District 7 in Massachusetts. DePina lost in the primary on September 14, 2021.

Biography

DePina attended the English High School in Boston. He studied to be a pharmacy technician at Newbury College and received an associate degree in biological science from Roxbury Community College in 2012. He is the owner of At Your Time Of Need Floral Designs.^[1]

Elections

2021

See also: *City elections in Boston, Massachusetts (2021)*

General election

General election for Boston City Council District 7

Tania Anderson defeated Roy Owens in the general election for Boston City Council District 7 on November 2, 2021.

	Candidate	%	Votes
✓	 Tania Anderson (Nonpartisan)	73.9	5,345
	 Roy Owens (Nonpartisan)	25.6	1,849
	Other/Write-in votes	0.5	36



This page was current at the end of the individual's last campaign covered by Ballotpedia. Please contact us with any updates.

Joao DePina



Nonpartisan

Elections and appointments

Last election September 14, 2021

Education

High school The English High School

Associate Roxbury Community College

Personal

Profession Business owner

BP There were no incumbents in this race. Source 1 Source 2

Total votes: 7,230
(81.48% precincts reporting)

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Nonpartisan primary election

Nonpartisan primary for Boston City Council District 7

The following candidates ran in the primary for Boston City Council District 7 on September 14, 2021.

	Candidate	%	Votes
✓ 	Tania Anderson (Nonpartisan)	26.7	2,014
✓ 	Roy Owens (Nonpartisan)	17.0	1,284
	Angelina Camacho (Nonpartisan)	16.6	1,256
	Brandy Brooks (Nonpartisan)	9.8	741
	Lorraine Wheeler (Nonpartisan) 	9.2	697
	Santiago Rivera (Nonpartisan)	7.5	568
	Marisa Luse (Nonpartisan)	7.3	550
	Joao DePina (Nonpartisan)	5.4	407
	Other/Write-in votes	0.5	34

BP There were no incumbents in this race. Source 1 Source 2

Total votes: 7,551

 = candidate completed the Ballotpedia Candidate Connection survey.

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2017

See also: Municipal elections in Boston, Massachusetts (2017)

The city of Boston, Massachusetts, held elections for mayor and city council on November 7, 2017. A primary election occurred on September 26, 2017. All 13 seats on the city council were up for election. The filing deadline for candidates wishing to run in this election was May 23, 2017.

The following candidates ran in the primary election for District 7 on the Boston City Council.^[2]

Boston City Council, District 7 Nonpartisan Primary Election, 2017 [hide]

Candidate	Vote %	Votes
✓ Kim Janey	25.00%	1,534
✓ Rufus Faulk	11.72%	719
Deeqo Jibril	9.86%	605
Domonique Williams	9.66%	593
Charles Clemons Muhammad	6.89%	423
Roy Owens	6.03%	370

Jose Lopez	5.92%	363
Brian Keith	5.67%	348
Joao DePina	4.87%	299
Hassan Williams	4.64%	285
Carlos Henriquez	4.29%	263
Angelina Camacho	4.03%	247
Steven Wise	1.04%	64
Write-in votes	0.37%	23
Total Votes		6,136

Source: City of Boston, "Official District 7 election results," September 26, 2017 [↗](#)

Campaign themes

2021

Ballotpedia survey responses

See also: *Ballotpedia's Candidate Connection*

Joao DePina did not complete Ballotpedia's 2021 Candidate Connection survey.



See also

2021 Elections



Who is on my ballot?

U.S. Congress special elections
State executives
State legislatures
State courts
Ballot measures
Municipal government
School boards

Government



Who represents me?
U.S. Congress
State executives
State legislature
State courts
Ballot measures
Municipal government
School boards

Newsletters



The Daily Brew
The Tap
The Ballot Bulletin
Number of the Day
Bold Justice
Checks and Balances
Union Station
Fact Check

External links

- [Search Google News for this topic](#)

Footnotes

1. [Facebook](#), "Joao DePina: About," accessed July 13, 2017 [↗](#)
2. [City of Boston](#), "Election Department Certifies Candidates For Municipal Election," June 5, 2017 [↗](#)



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EXHIBIT 5

True and Correct Copy of the Order of the
Boston Municipal Court Transferring this Matter
to this Court

COMMONWEALTH OF MASSACHUSETTS**SUFFOLK, ss.****TRIAL COURT****ORDER OF TRANSFER**

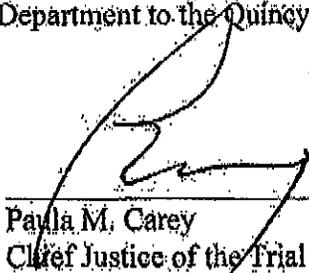
Commonwealth v. Joao Gomes Depina
Dorchester Division, Boston Municipal Court Department
No. 2107CR003064,

Commonwealth v. Joao Gomes Depina
Dorchester Division, Boston Municipal Court Department
No. 2007CR002818

and

Commonwealth v. Joao Gomes Depina
Dorchester Division, Boston Municipal Court Department
No. 1807CR003369

Pursuant to the authority contained in G.L. c. 211B, § 9 and my inherent authority as the Chief Justice of the Trial Court I hereby transfer the above-entitled actions from the Dorchester Division of the Boston Municipal Court Department to the Quincy Division of the District Court Department.



Paula M. Carey
Chief Justice of the Trial Court

Dated: December 8, 2021

Exhibit 3

Opposition to Motion to Dismiss
Commonwealth v. DePina

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

BOSTON MUNICIPAL COURT
DOCKET NO. 2107CR003064

COMMONWEALTH OF MASSACHUSETTS

v.

JOAO G. DEPINA

COMMONWEALTH'S OPPOSITION TO THE
DEFENDANT'S MOTION TO DISMISS

The Commonwealth of Massachusetts does hereby oppose the defendant's motion to dismiss. As grounds therefor, the Commonwealth states that there was sufficient evidence presented to the clerk-magistrate to establish probable cause to believe that the defendant committed the crime of intimidation of a witness.

Prior Proceedings

On November 12, 2021, a complaint charging the defendant with intimidation of a witness, G.L. c. 268, § 13B, was issued by this Court. On January 6, 2022, the defendant filed a motion to dismiss. A hearing on the defendant's motion to dismiss is scheduled for March 31, 2022.

Facts¹

On November 9, 2021, around 6:10 p.m., then-Suffolk County District Attorney Rachel Rollins² ("D.A. Rollins") was holding a press conference at Ferndale Street and Norfolk Street, regarding a shooting incident that had occurred earlier that day. The area had been cordoned off for the press to assemble. As D.A. Rollins began making her statement, the defendant began to

¹ The Commonwealth's statement of facts is based upon the statement of facts filed in support of the application for criminal complaint, which the Commonwealth has attached as Comm. Exhibit A.

² Rachel Rollins is currently the United States Attorney for the District of Massachusetts.

“loudly heck[le] her” and “mak[e] multiple offensive comments of a personal nature directly at her.” Indeed, the defendant repeatedly invoked her name. The defendant, at the time, had three separate and open cases pending in District Court which were being prosecuted by the Suffolk County District Attorney’s Office, of which D.A. Rollins was then in charge. One of the defendant’s cases had an upcoming pretrial court date on November 16, 2021. The defendant’s comments “appeared as an intent to [a]ffect or interfere with these pending Suffolk County cases.” The defendant “made several indirect references to these cases during his verbal offensive.”

Boston Police Detective Dante Williams and Detective Jeffrey Cecil were in close proximity to both D.A. Rollins and the defendant and witnessed this incident. The defendant recorded this incident and uploaded the recording to his Facebook account. Detective Williams was able to obtain a copy of this recording. The defendant has “made multiple attempts to contact” D.A. Rollins to “talk directly” about his pending cases but has been unsuccessful. This incident “appears to be an escalation” from a prior incident at the Caribbean Festival on August 2, 2021. The defendant’s behavior immediately ceased once D.A. Rollins finished her statement and stepped away from the press.

Argument

This Court should deny the defendant’s motion to dismiss, where there was sufficient evidence presented to the clerk-magistrate to establish probable cause to believe that the defendant committed the crime of intimidation of a witness.

A complaint cannot be issued unless there has been a determination of probable cause to believe that a crime was committed and that it was committed by the defendant. *Commonwealth v. Valchuis*, 40 Mass. App. Ct. 556, 560 (1996). A motion to dismiss a complaint may be appropriate if the complaint is not supported by probable cause. *Commonwealth v. DiBennadetto*, 436 Mass. 310, 313 (2002). “A motion to dismiss for lack of probable cause is evaluated from the

four corners of the application for a complaint.” *Commonwealth v. Richardson*, 479 Mass. 344, 352 (2018). “The complaint application must allege facts sufficient to establish probable cause as to each element of the offense charged.” *Commonwealth v. Ilya I.*, 470 Mass. 625, 627 (2015). “The probable cause standard on a motion to dismiss a complaint is identical to that applied in the analysis of a motion to dismiss an indictment for lack of probable cause.” *Id.*

“In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Commonwealth v. Cullen*, 62 Mass. App. Ct. 390, 402 (2004) (citation omitted), *rev. denied*, 443 Mass. 1103 (2005). “[P]robable cause requires considerably less evidence than that which is required to support a finding of guilty.” *Commonwealth v. Goldstein*, 54 Mass. App. Ct. 863, 866 (2002).

Circumstantial evidence, which “is competent to establish guilt beyond a reasonable doubt,” *Commonwealth v. Gilbert*, 423 Mass. 863, 868 (1996), may certainly establish probable cause. *See Commonwealth v. Torres*, 442 Mass. 554, 563 (2004) (“The evidence, although entirely circumstantial, was sufficient to support” the conviction); *Commonwealth v. Guerrero*, 32 Mass. App. Ct. 263, 266 (1992) (“web of circumstantial evidence” supported conviction). “An inference drawn from circumstantial evidence need only be reasonable and possible; it need not be necessary or inescapable.” *Gilbert*, 423 Mass. at 868 (citation omitted). “Whether an inference is warranted or is impermissibly remote must be determined, not by hard and fast rules of law, but by experience and common sense.” *Commonwealth v. Gonzalez*, 452 Mass. 142, 146 (2008) (citation omitted). The evidence alleged, and reasonable inferences therefrom, must be “viewed in the light most favorable to the Commonwealth.” *Commonwealth v. Rodriguez*, 75 Mass. App. Ct. 235, 238 (2009) (citation omitted).

The defendant claims that there was insufficient evidence presented to establish probable cause to believe that he committed the offense of intimidation of a witness. Because there was sufficient evidence presented to support a finding of probable cause for the charge, this Court should deny the defendant's motion to dismiss.

In the relevant context, a person commits the crime of intimidation of a witness when he "willfully, either directly or indirectly ... intimidates or harasses another person who is a[n] ... attorney... with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type...." G.L. c. 268, § 13B; *Commonwealth v. Carvalho*, 88 Mass. App. Ct. 840, 845 (2016) (in order to establish intimidation of a witness, the Commonwealth is required to prove that the defendant, either directly or indirectly, made a willful effort to intimidate or harass another person who is an attorney at any stage of a criminal investigation or proceeding). The term "harass" shall mean "to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress." G.L. c. 268, § 13B. "Intimidation is putting a person in fear for the purpose of influencing his or her conduct." *Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 799 (1998).

"Words do not need to be expressly intimidating, threatening, or harassing" to fall within the meaning of intimidation. *Hrycenko v. Commonwealth*, 459 Mass. 503, 511 (2011). "The assessment whether the defendant made a threat is not confined to a technical analysis of the precise words uttered[;] ... the jury may consider the context in which the allegedly threatening statement was made and all of the surrounding circumstances." *Carvalho*, 88 Mass. App. Ct. at

845-46 (citations omitted). “The Commonwealth does not need to prove that the victim of witness intimidation was actually intimidated or frightened.” *Commonwealth v. Nordstrom*, 100 Mass. App. Ct. 493, ___, 179 N.E.3d 593, 602 (2021). “An action does not need to be overtly threatening to fall within the meaning of ‘intimidation.’” *Commonwealth v. Casiano*, 70 Mass. App. Ct. 705, 708 (2007).

Here, during a press conference, the defendant was heckling and making numerous offensive comments of a personal nature towards D.A. Rollins. At the time, D.A. Rollins’s office was prosecuting the defendant on three separate cases. As alleged in the complaint, during his verbal barrage, the defendant made indirect references to these cases and his comments demonstrated an intent to interfere with or affect these upcoming cases. Finally, the defendant has repeatedly attempted to contact D.A. Rollins to discuss his cases and this incident was an escalation of a prior incident in August. Taking these facts together, there was sufficient evidence presented to establish probable cause to charge the defendant. *See Carvalho*, 88 Mass. App. Ct. at 347 (defendant landlord’s approaching tenant victim, after victim obtained a harassment prevention order, and asking her if she “feel(s) good about yourself,” was sufficient to sustain defendant’s witness intimidation conviction); *Commonwealth v. Rivera*, 76 Mass. App. Ct. 530, 531 (2010) (intimidation of witness where defendant yelled at victim, who was about to be questioned by police, “we were just joking around right”); *Hrycenko*, 459 Mass. at 505-10 (defendant’s sending letter to judge’s home after judge had sentenced defendant, referencing his long criminal record and knowing the judge’s address and asking judge to reconsider sentence, constituted intimidation of a witness).

Moreover, in arguing that there was insufficient evidence to sustain the charge, the defendant refers to facts outside the complaint, including newspaper articles and a transcript of the

defendant's recording. A motion to dismiss a complaint, however, "is decided from the four corners of the complaint application, without evidentiary hearing." *Commonwealth v. Humberto H.*, 466 Mass. 562, 565 (2013) (citations omitted). "A motion to dismiss a complaint, in which the defendant challenges whether the charge is supported by probable cause, is a very limited remedy analogous to a postindictment [*McCarthy*] motion to dismiss." *Commonwealth v. Huggins*, 84 Mass. App. Ct. 107, 111 (2013). Thus, this Court is limited to the facts outlined in the complaint when deciding the defendant's motion. As argued above, there was sufficient evidence presented therein to charge the defendant.

The defendant, nevertheless, argues that the comments he made at the press conference are protected free speech under the First Amendment, and, as such, cannot constitute a crime.

"While most speech is protected from government regulation by the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, ... there are 'certain well-defined and narrowly limited classes of speech' that are not protected because they are 'no essential part of any exposition of ideas, and are of such slight social value as a step to truth' that whatever meager benefit that may be derived from them is 'clearly outweighed' by the dangers they pose."

O'Brien v. Borowski, 461 Mass. 415, 422 (2012) (citations omitted). Among these well-defined and narrowly limited classes of speech are "fighting words" and "true threats." *Id.* True threats have been defined as the following:

those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'

Commonwealth v. Walters, 472 Mass. 680, 690-91 (2016) (citations omitted). A true threat "need not take the form of an explicit statement that the speaker intends to cause imminent, physical harm to the victim, but may comprise 'words or actions that—taking into account the context in

which they arise—cause the victim to fear such harm now or in the future.” *Id.* at 691 (citations omitted). “The term ‘true threat’ has been adopted to help distinguish between words that literally threaten but have an expressive purpose such as political hyperbole, and words that are intended to place the target of the threat in fear, whether the threat is veiled or explicit.” *Commonwealth v. Chou*, 433 Mass. 229, 236 (2001). Fighting words are “limited to words that are likely to provoke a fight: face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace.” *O’Brien*, 461 Mass. at 423. “In considering the First Amendment’s protective reach, ‘critical’ to the examination is the context and content of the speech at issue. *Commonwealth v. Bigelow*, 475 Mass. 554, 562 (2016). “The regulation of threatening speech has been held not to violate the First Amendment where the speech harasses or is a ‘true threat.’” *Chou*, 433 Mass. at 236.

In the present case, the defendant’s speech was neither lawful nor protected. The purpose of the defendant’s comments was to harass D.A. Rollins and attempt to intimidate her so that her office would address his current cases in a different manner. The offense of intimidation of a witness exists to protect the integrity of court proceedings, among other reasons (*Rivera*, 76 Mass. App. Ct. at 532-35), and the defendant does not have a protected right to use speech to interfere with a court proceeding. Thus, the defendant’s comments are not protected by the First Amendment. *See Commonwealth v. Johnson*, 470 Mass. 300, 309-10 (2014) (where the sole purpose of defendants’ speech was to harass victims and where speech was integral to criminal conduct, such speech is not protected by First Amendment); *Chou*, 433 Mass. at 235-37 (defendant producing and putting up numerous missing persons flyers about his ex-girlfriend/victim, where flyers contained identifying information and sexually explicit language, did not constitute protected free speech). Moreover, the issue of whether the defendant’s comments constitute

constitutional protected speech or “whether the speech fits within a category of unprotected speech constitutes a question of fact for the fact finder to decide” with the appropriate jury instructions. *Bigelow*, 475 Mass. at 571-72.

Conclusion

Based upon the foregoing, this Court should deny the defendant’s motion to dismiss.

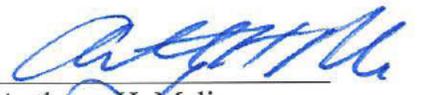
Respectfully submitted,
For the Commonwealth



ANTHONY H. MELIA
Assistant District Attorney
District Attorney’s Office
225 Main Street, Room G301
Worcester, MA 01608

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon Marc J. Randazza, Esquire, electronically at ecf@randazza.com, on March 22, 2022.



Anthony H. Melia

Exhibit 4

Reply in Support of Motion to Dismiss
Commonwealth v. DePina

TRIAL COURT OF MASSACHUSETTS
BOSTON MUNICIPAL COURT
DORCHESTER DIVISION

COMMONWEALTH OF MASSACHUSETTS)

Plaintiff,)

v.)

JOAO DEPINA,)

Defendant.)

Case No. 2107 CR 003064

REPLY IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS

Defendant Joao DePina hereby files his Reply in support of his Motion to Dismiss.

1.0 INTRODUCTION AND FACTUAL BACKGROUND

Rachel Rollins was under consideration to be the U.S. Attorney for the District of Massachusetts. Mr. DePina, a political activist, came to an outdoor press conference and expressed his opinion about Rollins’s abuse of power and neglect of her duties – including neglect of a case involving his own brother’s murder. The Commonwealth would prefer to exclude what DePina actually said from the record, instead relying on a materially false police report. However, it cannot do so. *See Franks v. Delaware*, 438 U.S. 154 (1978) (if the complaint contains intentionally or recklessly false information, the defendant is entitled to be heard on the discrepancy).¹ Once the court reviews the transcript and/or the actual video of the event, as it must under *Franks v. Delaware*, it will see what any reasonable person would – the police report is materially false, as is the Commonwealth’s legal position.

¹ Further, even in the absence of *Franks v. Delaware*’s clear mandate, if the complaint references an external document or recording, as this one does, this necessarily incorporates the material, which is properly considered in a motion to dismiss hearing. *See* Section 2.1, *infra*.

2.0 ARGUMENT

Rollins initiated this prosecution under Mass. Gen. L. c 268, § 13B. This requires that the Commonwealth prove, beyond a reasonable doubt, that (1) the target of the alleged intimidation was an attorney involved in a criminal proceeding, (2) the defendant willfully endeavored or tried to influence the target, (3) the defendant did so by means of intimidation, force, or threats of force, and (4) the defendant did so with purpose of influencing the target as to a pending proceeding. *Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 702 N.E.2d 37 (1998).

It can do none of the above.

2.1 The Court May Conclude Now that Mr. DePina's Speech is Protected

It is not even clear that the statute at hand applies to Ms. Rollins. There is no case in which an elected District Attorney responded to a First Amendment protected protest with a prosecution under this statute. However, there is a case that is close. The Commonwealth cites *Commonwealth v. Bigelow*, 475 Mass. 554 (2016) incorrectly – for the proposition that “whether the speech fits within a category of unprotected speech constitutes a question of fact for the fact finder to decide.” Opp. at 8, citing *Bigelow* at 571-72. The Commonwealth carefully edited that quote to only give the Court half of the ruling. The true quote is: “**if it cannot be concluded that, as a matter of law, the speech at issue is constitutionally protected speech**, the question whether the speech fits within a category of unprotected speech constitutes a question of fact for the fact finder to decide.”

The prosecution's position wilts if the Court reviews the transcript. The Commonwealth argues that it cannot do so, as the transcript lies outside the four corners of the Complaint and must be ignored when deciding a motion to dismiss. Opp. at 6. What the Commonwealth fails to acknowledge, however, is that the Complaint refers to Mr. DePina's statements shown in the

transcript in summary fashion and even refers to a recording of the video of Mr. DePina's interaction with Ms. Rollins that law enforcement obtained. The Commonwealth's Complaint is vague as to the contents of Mr. DePina's statements. If it actually identified what Mr. DePina said, the lack of probable cause would be obvious. Because of the possibility for such deliberate obfuscation, a court may consider matters of public record and documents integral to, referred to, or explicitly relied on in the complaint, whether or not attached, on a motion to dismiss. *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004); *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000); *Reliance Ins. Co. v. City of Boston*, 71 Mass. App. Ct. 550, 555, 884 N.E.2d 524 (2008); and *Shuel v. DeIeso*, 16 LCR 329, 329 n.2 (2008).

Although the Commonwealth cites to *Commonwealth v. Bell*, 83 Mass. App. Ct. 61, 62, 981 N.E.2d 200 (2013), as to whether the Court may look outside the four corners of the application, the Court may consider this material if there is no objection. *Commonwealth v. Murphy*, 98 Mass. App. Ct. 1103, 150 N.E.3d 1155 (2020). There does not appear to be an objection, only a recitation of the ordinary caselaw. The Commonwealth is obviously aware of the contents of Mr. DePina's speech as it avers possession of the recording, which should cause it to question whether it should prosecute this matter at all under *Murphy*. If it were responsible in its prosecution, it would have specifically identified what statements were allegedly unlawful. The Court should not allow this political prosecution to go forward simply because the Commonwealth chose to be vague, especially because it knows full well that if the Court considers the actual content of Mr. DePina's speech, rather than the deliberately (or at least recklessly) false "summary" of it, this case would need to be dismissed.

2.2 Mr. DePina Did Not "Intimidate" or "Harass" Ms. Rollins

The Commonwealth claims that the statute applies because DePina "*intimidated*" or

“*harassed*” Rollins. Opp. at 4. The Commonwealth admits that for speech to be “*harassing*” it must “*seriously alarm*” or “*cause a reasonable person ... to suffer substantial emotional distress.*” The Commonwealth further admits that to claim the “victim” is “*intimidated*” requires putting the person “*in fear.*” Opp. at 4. However, the record shows that neither of these conditions could have been met even if the standard was a hypersensitive person, much less a “reasonable” person.

Let us address “intimidation” first. Was Rachel Rollins, surrounded by police, while a man stood on the outskirts of a press conference criticizing her record in “fear?” If so, she had a peculiar way of showing it, as nothing the Commonwealth has presented shows anything except Rollins responding to mock and insult DePina. (See Motion to Dismiss *Exhibit 2* at 3:1-11) (calling Mr. DePina “emotionally disturbed.”) There is no statement from Rollins that she was “in fear.” The complaint does not even allege that she was “in fear.”

We now address whether a reasonable person would “suffer substantial emotional distress” if confronted with DePina’s words. It is certain that the most powerful law enforcement official in Boston was *annoyed* at her moment in the limelight being marred by a citizen challenging her record and her pending appointment. But, the U.S. Constitution does not recognize *lèse majesté*² as an offense. If this causes “*severe emotional distress,*” then any journalist who writes negatively about a prosecution should also be haled into court to answer for their “crime.”

However, we really get to the core of the Commonwealth’s lack of probable cause when we finally get to page 7 – where the Commonwealth argues “In the present case, the defendant’s speech was neither lawful nor protected.” Opp. at 7. The Commonwealth tries to support this position by claiming that DePina’s protest was either “true threats” or “fighting words.”

² Merriam-Webster’s dictionary defines *lèse majesté* as “(1)(a) a crime (such as treason) committed against a sovereign power; (1)(b) an offense violating the dignity of a ruler as the representative of a sovereign power; and (2) a detraction from or affront to dignity or importance.

2.3 Mr. DePina Did Not Utter Any “True Threats” or “Fighting Words”

The Commonwealth claims that DePina’s speech constitutes “fighting words.” This is the last refuge of an anemic attempt by Rollins to abusively use the power of the state to swat down a political opponent. Chaplinsky’s “fighting words” exception applies “only when a defendant's spoken words, when directed to another person in a public place, ‘tend to incite an immediate breach of the peace.’” *State v. Read*, 165 Vt. 141, 148, 680 A.2d 944, 948 1996 Vt. LEXIS 44, *12 (1996) (quoting *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942)). This doctrine is already a derelict theory on the sea of jurisprudence. Justice Morse, of the Supreme Court of Vermont, had a reasonable editorial discussion of this doctrine in *Read*:

In my view, the “fighting words” doctrine has become an archaic relic, which found its genesis in more chauvinistic times when it was considered bad form for a man to back down from a fight. Even the United States Supreme Court, which created it in *Chaplinsky v. New Hampshire*, has never since used the “fighting words” doctrine to uphold a conviction. Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129, 1129 (1993). Recognition in legal analysis that it is “reasonable” to expect a person to retaliate with his fists when provoked by speech, it seems to me, runs counter to what the law should endorse.

Id. at 156 (citation omitted).

To the extent that the fighting words doctrine remains intact, and to the extent that this Court wishes to apply it despite its ludicrous and sexist roots in the theory that there are words that would provoke a “real man” to violence, it does not apply here. The transcript of Mr. DePina’s speech is in the record and properly considered here. There is nothing in the transcript nor in the broadest interpretation of common sense or human nature that would suggest that any reasonable person would be so strongly provoked by Mr. DePina’s words that she would lose control of herself and feel the need to physically attack DePina in order to defend her honor.

The assertion that Mr. DePina made a true threat is even more ridiculous. As the

Commonwealth notes, true threats are limited to “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual” *Commonwealth v. Walters*, 472 Mass. 680, 690-91 (2016); *see also Virginia v. Black*, 538 U.S. 343, 359 (2003) (same). The Commonwealth does not explain how Mr. DePina’s statements constitute even an oblique hint of a threat, much less a true threat; it merely mentions that true threats are not constitutionally protected and asserts in conclusory fashion that Mr. DePina’s purpose was to harass and intimidate Ms. Rollins. (Opp. at 7-8.) It fails to address the context of Mr. DePina’s statements, *i.e.*, criticisms of a public official about her job performance during a press conference. It fails to identify any case in any jurisdiction where a statement during a press conference has been found even potentially to be a true threat. It fails to identify how Mr. DePina’s statements could possibly be viewed by anyone as a threat to commit an act of violence. It also fails to identify any alleged facts supporting even an inference that Mr. DePina’s purpose in making his statements was to communicate such a non-existent threat to Ms. Rollins. As a matter of law, Mr. DePina’s statements were not true threats.

2.4 DePina did not “willfully endeavor or try to influence the target”

The record shows that DePina’s statements had nothing to do with trying to “influence” anyone from taking any action with respect to any pending case. The police report and the opposition to the motion to dismiss lack candor, claiming that DePina made “several” references to pending cases. The police report references the recording, which is the best evidence, and the transcript is in the record. The only time that DePina even fleetingly refers his pending cases is in response to Rollins insulting him as “mentally disturbed.” DePina then says that he intends to use this statement in court. *See Motion to Dismiss Exhibit 2, Transcript at p. 9, lines 15-18.* This fails to meet this element.

The Commonwealth tries to bolster its case by reporting that DePina "... has 'made multiple attempts to contact' D .A. Rollins to 'talk directly' about his pending cases but has been unsuccessful". *See* Opposition. Why wouldn't he? A party is permitted to contact the opposing counsel. Is the Commonwealth's position that if an attorney is working on a case, that phone calls to the attorney's office are "intimidation?" Even the police report makes it clear, on the surface, that none of these attempts to contact Rollins were successful. How can attempted phone contact with opposing counsel rise to the level of "true threats," or "fighting words?" It can not.

3.0 CONCLUSION

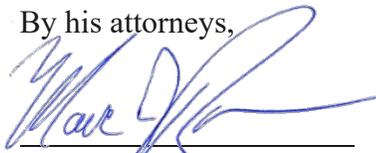
If the Court examines nothing more than the Complaint, it should be able to come to the conclusion that Mr. DePina's words were in no way a violation of the statute under which he was charged. However, if the Court refuses to consider the actual transcript of the hearing, it will have committed reversible error both as a matter of procedure and as a matter of Mr. DePina's fourth and fourteenth amendment rights as discussed in *Franks v. Delaware*. Once the Court reviews the actual transcript and recordings of the event in question, it again would commit reversible error if it did not dismiss this prosecution as a First Amendment violation.

Dated: March 29, 2022

Respectfully submitted,

JOAO DEPINA

By his attorneys,



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CERTIFICATE OF SERVICE

I, Marc J. Randazza, hereby certify that a true and correct copy of the foregoing document was served upon all pro se parties and all attorneys of record in via e-mail and first-class mail, postage prepaid, this 29th day of March, 2022, as follows:

Suffolk County District Attorney
Anthony Melia
<anthony.melia@state.ma.us>
510 Washington Street
Dorchester Center, Massachusetts 02124



Marc J. Randazza

Exhibit 5

Order Granting Motion to Dismiss
Commonwealth v. DePina

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT OF MASSACHUSETTS
QUINCY DISTRICT COURT

COMMONWEALTH OF MASSACHUSETTS
Plaintiff,

v.

JOAO DEPINA,
Defendant.

Case No.: 2156 CR 3600
Former Case No. 2107 CR 00300
(Dorchester Division, Boston
Municipal Court)¹

MOTION TO DISMISS

Defendant Joao DePina hereby moves, pursuant to Mass. R. Crim. P. 13 and *Bradford Knights*, 427 Mass. 748, 695 N.E.2d 1068 (1998) that the above-entitled matter be dismissed, as there was no probable for the issuance of the complaint. As the SJC cited in *Bradford*, "[i]f the person complained of believes that there was not probable cause to charge him with a crime, he may move to dismiss the complaint."

As further reasons thereof, based on the facts set forth in the Suffolk County Police Report authored by Officer Dante Williams, the Commonwealth is unable to establish probable cause that Defendant committed intimidation of a person connected to a criminal proceeding. As such, upon the annexed Affidavit of Jay M. Wolman and exhibits filed herewith, Defendant moves for this

¹ This matter was originally brought in the Boston Municipal Court. On December 8, 2021, it was transferred to this Court. See **Exhibit 5**.

4/29/22 - After hearing, the motion is ALLOWED. The defendant was charged with various intimidation, in violation of G.L. c. 26B, §13B. According to a report of Robert Blue, the defendant made statements to the Suffolk County D.A. Rachael Palmer 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 to prosecute or re-arrest, director cause to prosecute or re-arrest, director criminal case. The defendant's speech was not made. Paul O. T. Frazer FENNER, F.

11 within the first Amendment's protective indirect to the defendant's pending criminal case. There exists no probable cause to prosecute or re-arrest, director criminal case. The defendant's speech was not made. Paul O. T. Frazer FENNER, F.