COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT
C.A. NO. 2285CV00971-A

JOAO DEPINA,

Plaintiff,

v.

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

Defendants.

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

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

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

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

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

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

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

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

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

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

Defendants,

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

By their Attorneys

MAURA HEALEY
ATTORNEY GENERAL

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

Date: October 26, 2022

CERTIFICATE OF SERVICE

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

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

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

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT
C.A. NO. 2285CV00971-A

JOAO DEPINA,

Plaintiff,

v.

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

Defendants.

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

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

TABLE OF CONTENTS

INTRODUCTION

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

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

BACKGROUND

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

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

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

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

[1] Rollins served as the Suffolk County District Attorney from 2019 through 2022.
[2] The criminal complaint and application are subject to notice under Rule 12 as records from a related judicial proceeding. *See Jarosz v. Palmer*, 436 Mass. 526, 530 (2002) (in considering a motion to dismiss, "a judge may take judicial notice of the court's records in a related action").

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

The SJC held that absolute immunity required dismissal of the complaint. *Id.* at 250-53. The District Attorney's challenged conduct all involved either "directing the efforts of the police in regard" to a "specific suspect" who might be prosecuted, evaluating information to determine whether the law was being violated, or threatening prosecution. *Id.* The plaintiff's tort claims were thus barred by the settled common law rule that prosecutors are immune from "private suits for what they do in the discharge of their official duties." *Id.* at 251. Similarly, the plaintiff's MCRA claims were barred because the District Attorney's alleged actions were all "sufficiently related to the prosecutorial function to warrant absolute protection." *Id.* at 252.[4]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12(b)(6).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To state a claim for intentional or reckless infliction of emotional distress, as DePina attempts to do in Count IV, a plaintiff must plausibly allege: (1) that the defendant "intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct[,]" (2) that the conduct was "extreme and outrageous," was "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community[,]" (3) that the defendant's actions caused the

plaintiff distress, and (4) that the plaintiff's emotional distress was severe. *Howell v. Enter. Publ'g Co., LLC*, 455 Mass. 641, 672 (2010) (internal citations omitted). "The standard for making a claim of intentional infliction of emotional distress is very high . . . . [It is not] enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Polay v. McMahon*, 468 Mass. 379, 385 (2014) (internal citations and quotations omitted).

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

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

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

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

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

CONCLUSION

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

Defendants,

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

By their Attorneys

MAURA HEALEY
ATTORNEY GENERAL

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

Date: October 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on October 24, 2022 I served a copy of the foregoing on counsel for the plaintiff by email to:

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

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