TRIAL COURT OF MASSACHUSETTS
BOSTON MUNICIPAL COURT
DORCHESTER DIVISION

COMMONWEALTH OF MASSACHUSETTS *Plaintiff,*	)	
v.	)	Case No. 2107 CR 003064
JOAO DEPINA, *Defendant*.	)	

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."

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[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.

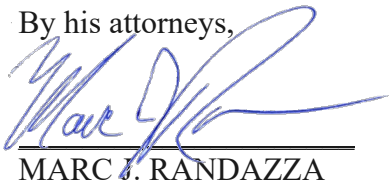
The Commonwealth tries to bolster its case by reporting that DePina "… has 'made multiple attempts to contact' D .A. Rollins to 'talk directly' about his pending cases but has been unsuccessful". *See* Opposition. Why wouldn't he? A party is permitted to contact the opposing counsel. Is the Commonwealth's 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:

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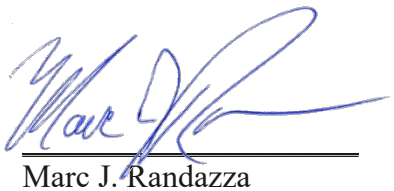

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