UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

KEVIN ALFARO and GEORGANA SZISZAK, *Plaintiffs*, v. MICHAEL REMPUSHESKI, *Defendant*.	Case No. 2:21-cv-02271-MCA-LDW

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

This case is about the abuse of police authority to suppress free speech. In June 2020, during a summer in which millions across the country marched for racial justice and reforms to the criminal legal system, Plaintiff Kevin Alfaro attended a protest in Nutley, New Jersey, that called for changes to police practices. When an on-duty police officer—whose badge was purposefully covered—appeared to befriend counter-protesters who had threatened Mr. Alfaro with physical violence, Mr. Alfaro pulled out his phone to document what he viewed as an injustice. Later that night, hoping to both express his frustration and learn the officer's identity so that he could eventually complain about the officer's conduct at the protest, Mr. Alfaro took to Twitter. He posted the picture of the officer with the caption: "If anyone knows who this bitch is throw his info under this tweet."

Mr. Alfaro never received a response to his tweet. Instead, he received a criminal summons charging him with a felony for "harassing" the officer in the picture. Over the course of the next month, Mr. Alfaro and four others who simply retweeted his post, including Plaintiff Georgana Sziszak, would be charged with felony cyber harassment by Defendant Michael Rempusheski of the Nutley Police Department—a co-worker of the pictured officer from the protest.

Yet Mr. Alfaro's tweet did not come close to establishing probable cause for cyber harassment, which requires the use of prurient sexual material ("lewd, obscene, or indecent material") and intent to cause, or place a reasonable person in fear of, harm.

Accordingly, an assistant district attorney dismissed the charges several weeks later. But the dismissal was not without injury to Mr. Alfaro and Ms. Sziszak (collectively, "Plaintiffs"), neither of whom had criminal records. Accordingly, Plaintiffs filed this lawsuit against Defendant Rempusheski to vindicate their First Amendment rights.

The Amended Complaint asserts three claims for relief—two based on retaliation in violation of the First Amendment, which Plaintiffs bring pursuant to 42 U.S.C. § 1983 (Count 1) and the New Jersey Civil Rights Act (Count 2), respectively, and one based on malicious prosecution under New Jersey law (Count 3). For the reasons that follow, this Court should deny Defendant Rempusheski's motion to dismiss the Amended Complaint.

BACKGROUND

On June 26, 2020, Mr. Alfaro joined a march and rally in Nutley to protest inequality and injustices in policing practices. Am. Compl., ECF No. 8, ¶ 14. By the time he arrived, the march had stopped in front of Nutley Town Hall. *Id.* ¶ 15. During the rally, counter-protesters taunted and verbally threatened him and other protesters on numerous occasions. *Id.* ¶ 16. For example, on one occasion, two counter-protesters shouted at Mr. Alfaro that they were going to "F[---]" him "up." *Id.*

Thankfully, these threats never came to pass, and the rally did not end in violence. *See id.* ¶ 17. Nevertheless, Mr. Alfaro was frustrated that the nearest police officer at the time—who turned out to be Detective PJ Sandomenico with the Nutley Police Department (NPD)—had failed to take action to address the situation, and even

appeared to befriend the counter-protesters who had physically threatened Mr. Alfaro. *Id.* ¶¶ 2, 17. Mr. Alfaro was also upset that the same officer had covered his badge, making it impossible for Mr. Alfaro or anyone else to identify him. *Id.*

So, Mr. Alfaro pulled out his phone and took a picture. *Id.* ¶ 17. When he returned home that night, he posted the picture on Twitter to see whether anyone could identify the officer. *Id.* ¶ 18. Specifically, he stated: "If anyone knows who this bitch is throw his info under the tweet." *Id.* He hoped to use the answer (if he received one) to complain about the officer's behavior. *Id.* ¶ 2.

Importantly, neither the tweet nor anything on Mr. Alfaro's Twitter page suggested that Mr. Alfaro intended to cause harm to or instill fear in the officer, and none of Mr. Alfaro's Twitter followers were NPD officers. *Id.* ¶ 19. He never posted another tweet attempting to identify, or otherwise comment on, Detective Sandomenico. *Id.* ¶ 25. Mr. Alfaro never received any identifying information about Detective Sandomenico in response to his tweet, and to this day, he does not know how the post eventually reached Detective Sandomenico (or Detective Rempusheski). *Id.* ¶¶ 19, 25.

Five people retweeted Mr. Alfaro's post. *Id.* ¶ 20. One of them was Ms. Sziszak, a friend of Mr. Alfaro. *Id.* ¶ 21. Like Mr. Alfaro, there was nothing on her Twitter page that could support an inference that she meant to cause harm to or instill fear in Detective Sandomenico by simply retweeting a message (without additional commentary), and she never received a response or further commented on the matter.

Id. ¶¶ 21, 23–25. Likewise, she had no NPD followers and does not know how NPD eventually learned of her (re)tweet. *Id.* ¶ 22.

Over the next few weeks, Detective Rempusheski issued complaint-summonses charging Mr. Alfaro, Ms. Sziszak, and three others who retweeted Mr. Alfaro's post with cyber harassment, a felony offense punishable by up to 18 months in prison under New Jersey law.[1] *Id.* ¶¶ 3, 26–27, 33. Nothing in the complaint-summonses or the accompanying probable-cause affidavits supported Detective Rempusheski's certification under penalty of perjury that these individuals committed cyber harassment—that is, that they posted "lewd, indecent, or obscene" material with intent to harm, or place in fear of harm, a reasonable person. *Id.* ¶¶ 31, 34; *see* N.J. Stat. § 2C:33-4.1(a)(2). The documents merely alleged (1) that Detective Sandomenico (whose identity had remained unknown to Plaintiffs until then) was on duty at the time

[1] As explained in the Complaint, under New Jersey law, a law enforcement officer such as Detective Rempusheski has the authority to charge a person with a crime through a "complaint-warrant" or a "complaint-summons." *Id.* ¶ 28. A complaint-warrant, which results in a physical arrest and is generally reserved for violent crimes, requires a judicial officer to make a probable-cause finding prior to its issuance. N.J. Crim. R. 3:3-1(a)(1), (e)–(f). A complaint-summons, by contrast, directs the accused to appear in court on a future date and does not require a law enforcement officer to first obtain an independent judicial finding of probable cause (or any other approval). N.J. Crim. R. 3:3-1(b). Once a complaint-summons issues, it is entered into a database and an arraignment is set, at which point the accused will be processed in the same way that they would be had they been arrested pursuant to a complaint-warrant. Am. Compl. ¶ 29. The issuance of a complaint-summons also triggers the involvement of a prosecutor, who must decide whether, in the case of a felony charge (an "indictable offense" under New Jersey law), to seek an indictment from a grand jury, to downgrade the charge to a misdemeanor, or to dismiss the charges entirely. *Id.* ¶¶ 27, 29.

the photo was taken and, for unexplained reasons, was fearful that "harm [would] come to himself, family and property" because of the tweet; (2) the text of the tweet; and, in Plaintiffs' cases, (3) that Mr. Alfaro and Ms. Sziszak were the individuals who posted the tweet. Am. Compl. ¶ 32 (quoting Ex. A (Alfaro Complaint-Summons & Affidavit) and Ex. B (Sziszak Complaint-Summons & Affidavit)).[2]

Detective Rempusheski is one of 12 officers in NPD's investigation unit, to which Detective Sandomenico is also assigned. Am. Compl. ¶ 11. He issued felony complaint-summonses against everyone he could identify who posted Mr. Alfaro's tweet, including a teenager who he knew was fresh out of high school. *Id.* ¶¶ 3, 33, 35; *see also id.* ¶ 33 n.4 (noting that according to news reports, the fifth individual who retweeted Mr. Alfaro's post could not be identified and thus was not charged). His apparent decision to do so—without any further information or allegations regarding each individual's specific intent—demonstrates that he sought to punish anyone who had, in his view, criticized one of his fellow officers. *Id.* ¶ 35.

[2] Although the Amended Complaint refers to Exhibits A and B, Plaintiffs' counsel inadvertently failed to attach the exhibits to the filing. When defense counsel notified Plaintiffs as to this omission on April 12, 2021, Plaintiffs' counsel immediately emailed both exhibits to defense counsel. Defense counsel confirmed receipt of the exhibits the next day, contrary to Defendant's representation that Plaintiffs failed to respond to the request, *see* Br. in Supp. of Def.'s Mot. to Dismiss, ECF No. 12-3, at 4 n.1 [hereinafter MTD]. Plaintiffs have attached a copy of that email confirmation, as well as copies of Exhibits A and B for ease of reference. Both exhibits are also attached to the motion to dismiss. *See* Def.'s Certification of Counsel, ECF No. 12-1, Exs. C–F.

The felony charges against Mr. Alfaro and Ms. Sziszak were dismissed by a prosecutor on August 7, 2020, before their scheduled arraignment dates. *Id.* ¶ 36.[3] In the meantime, however, Detective Rempusheski's filing of the criminal complaints had the predictable effect of chilling Plaintiffs' speech as well as inflicting physical and emotional harm. *Id.* ¶ 37. Both endured anxiety, sleeplessness, and distress from fear of spending time in jail, being labeled a criminal, and arranging a criminal defense. *Id.* ¶¶ 6, 40, 42–43. The persistence of these injuries caused Mr. Alfaro to seek professional help, and Ms. Sziszak experienced complications with her diabetes and had to miss work. *Id.* They also made their social media accounts private and cut back on their online activity out of fear of additional retaliation. *Id.* ¶¶ 7, 38–39, 41. And Mr. Alfaro, who lives near Nutley, stopped attending protests and rallies for fear he would be recognized and harassed, or worse. *Id.* ¶¶ 7, 39.

On February 10, 2021, Plaintiffs brought this action against Detective Rempusheski under 42 U.S.C. § 1983 and the New Jersey Civil Rights Act (NJCRA), N.J. Stat. § 10:6-2, respectively, for violation of their First Amendment rights. Specifically, they alleged that Detective Rempusheski issued the felony complaint-summonses in order to retaliate against them for exercising their First Amendment right

[3] As noted in the Complaint, local and national press outlets had covered the retaliatory charges against Plaintiffs. *See id.* ¶ 5 & n.1 (citing Jacyln Pieser, *A Protester Tried to ID a Police Officer on Twitter. Now He Faces a Felony—Along with Four Who Retweeted Him*, Wash. Post, Aug. 7, 2020, https://perma.cc/3C7F-CY9K; Mike Davis, *Cyber Harassment Charges Dismissed Against Tweeters, Retweeters of Nutley Cop Photo*, Ashbury Park Press, Aug. 7, 2020, https://perma.cc/LZL2-VVLW).

to speak about a public official engaged in public duties. Compl., ECF No. 1, ¶¶ 45, 50; *accord* Am. Compl. ¶¶ 45, 50. About a month later, they amended their Complaint to add a malicious prosecution claim. *See* Am. Compl. ¶¶ 54–56. As relief, Plaintiffs seek compensatory and punitive damages.

STANDARD OF REVIEW

Defendant Rempusheski has moved to dismiss Plaintiffs' Amended Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. When reviewing a motion to dismiss under Rule 12(b)(6), the court accepts all factual allegations in the complaint as true and views them in the light most favorable to the plaintiff as the non-moving party. *Klotz v. Celentano Stadtmauer & Walentowicz LLP*, 991 F.3d 458, 462 (3d Cir. 2021). The complaint need only set forth enough factual allegations to "state a claim to relief that is plausible on its face" in order to survive a Rule 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

ARGUMENT

I. Plaintiffs have stated valid claims for First Amendment retaliation (Counts 1 & 2).

The first two counts in the Amended Complaint allege unconstitutional retaliation. *See* Am. Compl. ¶¶ 44–53. Count 1 alleges Detective Rempusheski's actions "deprived Plaintiffs of their First Amendment rights" in violation of 42 U.S.C. § 1983,

Am. Compl. ¶¶ 44–48, while Count 2 alleges that he "interfered with and attempted to interfere with Plaintiffs' exercise" of those same rights in violation of the NJCRA,[4] Am. Compl. ¶¶ 49–53. In essence, both counts allege that Detective Rempusheski retaliated against Plaintiffs by filing baseless felony charges against them in retaliation for their protected First Amendment activity. *See id.* ¶¶ 45, 50.

To state a claim for First Amendment retaliation, "a plaintiff must allege: (1) that he or she engaged in constitutionally protected conduct; (2) that the defendant took action sufficient to deter an ordinary person from engaging in such conduct; and (3) a causal connection between the two." *Jacobs v. City of Philadelphia*, 836 F. App'x 120, 121 (3d Cir. 2020) (citing *Palardy v. Twp. of Millburn*, 906 F.3d 76, 80–81 (3d Cir. 2018)). Generally speaking, "[w]hen the alleged retaliation takes the form of criminal charges, causation requires a showing that the charges were not supported by probable cause." *Id.*; *see Hartman v. Moore*, 547 U.S. 250, 265–66 (2006); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1723–25 (2019) (adopting *Hartman*, and treating probable cause as antecedent to the ordinary causation inquiry, in most retaliatory arrest cases).

Here, Detective Rempusheski does not dispute that Plaintiffs have a First Amendment right to document, discuss, and publicly criticize police officers

[4] As Detective Rempusheski notes, the NJCRA "is the State's enforcement mechanism for constitutional violations under the New Jersey Constitution and United States Constitution," and the "fundamental rights" protected by the First Amendment to the U.S. Constitution are also protected under Article I, Paragraph 6 of New Jersey's state constitution. MTD at 8–9.

performing their official duties. Nor does he seriously dispute that felony charges are sufficient to deter an ordinary person from engaging in protected speech. Instead, he argues that: (1) he had probable cause to believe that Plaintiffs' specific actions in this case violated New Jersey's criminal "cyber harassment" statute, *see* MTD at 7, 9–10, 13–17; and (2) even if he lacked probable cause, he is entitled to qualified immunity, primarily because he acted "with the approval" of a prosecutor, *see id.* at 7, 17–19. As explained below, neither of these arguments can be squared with existing law and both are premature at this stage of the litigation.

A. Plaintiffs' tweets constitute protected First Amendment activity, and the felony charges were sufficient to deter future such activity.

Detective Rempusheski does not dispute that Plaintiffs were engaged in core First Amendment activity when they tweeted the image of Detective Sandomenico. Nor could he. Numerous courts have recognized that "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).[5] The Third Circuit relied on that wide body of case

[5] *See, e.g.*, *Askins v. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) ("The First Amendment protects the right to photograph and record matters of public interest. This includes the right to record law enforcement officers engaged in the exercise of their official duties in public places." (citations omitted)); *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) ("We conclude that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment

law in holding that "the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public." *Fields v. City of Philadelphia*, 862 F.3d 353, 355–56, 360 (3d Cir. 2017).

The fact that Plaintiffs' tweets referred to Detective Sandomenico by a profane term does not remove them from the ambit of First Amendment protection. To the contrary, "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). As the Supreme Court has explained, "[t]he freedom . . . 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." *Id.* at 462–63. That is precisely why "the First Amendment protects even profanity-laden speech directed at police officers." *Whaley v. Borough of Collingswood*, No. 10-cv-4343-JHR, 2012 WL 2340308, at *12 (D.N.J. June 18, 2012) (quoting *Payne v. Pauley,* 337 F.3d 767, 776 (7th Cir. 2003)).

Nor does Detective Rempusheski raise a serious argument that his actions were insufficient to deter ordinary people from exercising their First Amendment rights to document and discuss police activity. To be sure, in his motion, he posits that Plaintiffs

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right to record the police does exist[.]"); *ACLU v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012) (enjoining prosecutions under Illinois eavesdropping statute as applied to the act of recording police officers because such an application would "interfere[] with the gathering and dissemination of information about government officials performing their duties in public"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing "a First Amendment right . . . to photograph or videotape police conduct").

"appear[]" to have "either maintained an active social media presence, or unilaterally decided to reduce their social media interactions." MTD at 11. But that assertion is flatly contradicted by the allegations in the Complaint. *See* Am. Compl. ¶ 7 ("Defendant Rempusheski's actions also chilled [Plaintiffs'] speech. They both made their social media accounts private and cut back on their online activity out of fear of additional retaliation."); *see also id.* ¶¶ 39, 41. It also defies common sense. Plaintiffs' decision to restrict their social-media and protest activities after receiving the complaint-summonses represented a rational—and predictable—response to being charged with a felony. *Cf. Catalano v. City of Trenton*, No. 18-cv-11646-FLW, 2019 WL 2315092, at *8 (D.N.J. May 31, 2019) (holding that an officer's decision to charge the plaintiff with a petty disorderly offense and handcuff him without probable cause was "clearly . . . sufficient to deter a person of ordinary firmness from exercising his First Amendment rights" (internal quotation marks omitted)). Moreover, Plaintiffs need only show that the effect of Detective Rempusheski's conduct on their freedom of speech was "more than *de minimis*." *McKee v. Hart*, 436 F.3d 165, 169–70 (3d Cir. 2006) (acknowledging that even workplace harassment can have a cognizable chilling effect on protected speech). Plaintiffs have easily met that standard here.[6]

[6] And even if the Court were to hold otherwise, Plaintiffs' NJCRA claim would survive, as that statute not only covers claims alleging the deprivation of certain substantive rights but also claims alleging interference or attempted interference with those substantive rights by threats, intimidation, or coercion. *See* N.J. Stat. § 10:6-2(c); *see also Ramos v. Flowers*, 56 A.3d 869, 874 (N.J. Super. Ct. App. Div. 2012); *Perez v. Zagami, LLC*, 94 A.3d 869, 875 (N.J. 2014).

B. Detective Rempusheski lacked probable cause to charge Plaintiffs with felony cyber harassment.

The gravamen of Detective Rempusheski's motion to dismiss is that he had probable cause to charge Plaintiffs with felony cyber harassment. MTD at 7, 10–17. That argument fails. Probable cause exists where the "facts and circumstances" known to the officer at the time are based on "reasonably trustworthy information" and "sufficient in themselves to warrant a [reasonable officer to believe] that [a crime] has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (internal quotation mark omitted).

Here, that crime was cyber harassment, which is defined in N.J. Stat. § 2C:33-4.1(a)(2). Under that definition:

> A person commits the crime of cyber-harassment if, while making a communication in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person: . . . knowingly sends, posts, comments, requests, suggests, or proposes any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm to his person.

Id. As explained below, Detective Rempusheski could not have reasonably concluded that Plaintiffs violated § 2C:33-4.1(a)(2) for two independent reasons: (1) no reasonable officer could conclude that Plaintiffs' tweets were "lewd, indecent, or obscene"; and (2) no reasonable officer could conclude that the tweets were intended to reasonably "harm" Detective Sandomenico or place him in reasonable "fear of physical or emotional harm."

1. No reasonable officer could conclude that the tweets were "lewd, indecent, or obscene."

The cyber-harassment statute is explicitly limited to online speech that is "lewd, indecent, or obscene." N.J. Stat. § 2C:33-4.1(a)(2). The case law and accepted understanding of these terms (particularly when used together) demonstrate that, at a minimum, "lewd, indecent, or obscene material" must involve sexuality, nudity, or anatomy to fall within the purview of § 2C:33-4.1(a)(2). Because Detective Rempusheski completely ignored this element of the offense in charging Plaintiffs—and in his motion to dismiss—his probable-cause defense must fail. *See, e.g.*, *A.B. v. D.M.O.*, No. A-4648-18T3, 2020 WL 3041341, at *4 (N.J. Super. Ct. App. Div. June 8, 2020) ("The [trial] court, however, failed to account for the 'lewd, indecent, or obscene material' element of the statute. Without a showing that defendant's Facebook posts satisfied one of those characteristics, causing emotional harm to plaintiff was insufficient to satisfy a finding of cyber harassment." (citation omitted)).

Two years before Detective Rempusheski filed the charges against Plaintiffs in this case, New Jersey's Appellate Division made clear that the kind of material contained in Plaintiffs' tweets could not reasonably be construed as "lewd, obscene, or indecent" under § 2C:33-4.1(a)(2). In *State v. Carroll*, the court held that the State lacked probable cause to detain a defendant on cyber-harassment charges based on a series of offensive Facebook posts she had made about a witness at a gang-related homicide trial. 196 A.3d 106, 110–11, 114–15 (N.J. Super. Ct. App. Div. 2018). The posts—one of which

included a photo of the witness—were overtly threatening and laced with far more profanity than the tweets in this case. Indeed, the final Facebook post in the series stated: "BOY YOU A FUCKING RAT! ! ! hope somebody blow them glasses tf (the fuck) off his face." *Id.* at 111.[7]

Although the court described the posts as "indisputably coarse and insulting," it held that there was no basis to conclude that they were "lewd, indecent, or obscene." *Carroll*, 196 A.3d at 115. The court reasoned that the posts could not be considered "indecent" because they did not pertain to sexuality or nudity in any way. *Id.* (noting that the term "indecent" is "generally associated with nudity or sexuality" and citing several indecent-exposure cases). And even the State recognized that the posts "were neither lewd nor obscene"—terms that also typically connote sexual or anatomical

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[7] The other posts were similarly hostile. The first post, which was made at the conclusion of the underlying homicide case, read: "lying ass RAT nigga! fuck you! I swear I use to tell butt & jo all the time don't trust this nigga! how tf (the fuck) you go against ya mans for some chump change!! I'll never respect you!" *Carroll*, 196 A.3d at 111. The second post referred to the witness by name and nickname:

> PUBLIC SERVICE ANNOUNCENT RAT ALERT THIS ONE OF THE SCARIEST THINGS EVER THIS NIGGA HOLD GUNS & RUN TO THE COPS NEVER KNOW WHAT HE GOT UP HIS SLEEVE NEXT STAY AWAY FROM THIS RATATOUILLE MICKEY MOUSE STUART LITTLE ASS NIGGA TELL A FRIEND TO TELL A FRIEND [name deleted] AKA SNITCHOS I MEAN [nickname deleted] IS A FUCKING RATTTTTT CHECK HIS SHIRT & HIS PANTS I THINK HE WIRED.

Id. The third post contained a photo of two police officers talking as they stood in front of an unidentified person in the street, with the caption: "[nickname deleted] really friends w all the cops." *Id.*

material. *See id.* Accordingly, the court concluded: "[W]e find not even a well-grounded suspicion that [the] defendant committed cyber-harassment under N.J.S.A. 2C:33-4.1(a)(2). Therefore, the trial court erred in finding probable cause for the cyber-harassment charge." *Id.* (footnote omitted).

The same result obtains here. Like the Facebook posts at issue in *Carroll*, the tweets at issue in this case have absolutely nothing to do with nudity, sexuality, or anatomy. They simply contained a picture of the on-duty officer with the caption, "If anyone knows who this bitch is throw his info under this tweet." As such, there is "not even a well-grounded suspicion" that Plaintiffs violated § 2C:33-4.1(a)(2).

The legislative context surrounding § 2C:33-4.1(a)(2) reaffirms this conclusion. Although New Jersey's Criminal Code does not define "indecent," its definitions of "lewd" and "obscene" underscore that such terms refer to sexually explicit material. *See Yates v. United States*, 574 U.S. 528, 543 (2015) ("[A] word is given more precise content by the neighboring words with which it is associated." (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008))); *see also Carroll*, 196 A.3d at 115 & n.5 ("The Criminal Code does not define 'indecent.' . . . By contrast, the Code separately defines the offense of lewdness, N.J.S.A. 2C:14-4, and obscene material, N.J.S.A. 2C:34-3(a)(1).").

For instance, Chapter 34 of the Criminal Code—which immediately follows the chapter containing the cyber-harassment statute—contains multiple definitions of "Obscene material," all of which include depictions or displays of "sexual activity" or

"anatomical area[s]." N.J. Stat. § 2C:34-2(a)(1) ("Obscenity for Persons 18 Years of Age or Older"); N.J. Stat. § 2C:34-3(a)(1) ("Obscenity for Persons Under 18").

"Lewdness," by its very terms, is also sexual in nature. *See* N.J. Stat. § 2C:14-4. It is housed in a chapter of the Criminal Code entitled "Sexual Offenses," N.J. Stat. tit. 2C, subtit. 2, pt. 1, ch. 14, and its definitions expressly refer to sex, *see, e.g.*, N.J. Stat. § 2C:14-4(c) ("'lewd acts' shall include the exposing of the genitals for the purpose of arousing or gratifying the sexual desire of the actor or of any other person"); *see also* N.J. Model Jury Charge (Criminal), § 2C:14-4 "Lewdness" (Nov. 1988) ("Lewd means sexually indecent behavior.").[8]

Lest there be any doubt, these terms—often grouped under the umbrella of "obscenity"—have a long history of being interpreted to refer to prurient sexual material. In its seminal decision in *Roth v. United States*, 354 U.S. 476 (1957), the Supreme Court ruled that obscenity is a category of speech unprotected by the First Amendment and upheld two obscenity statutes as constitutional—one that prohibited mailing "obscene, lewd, lascivious, or filthy" material or "other publication of an indecent character," *id.* at 479 n.1 (quoting 18 U.S.C. § 1461), and another that punished the sale or advertising of "obscene or indecent" material, *id.* at 479 n.2 (quoting Cal. Penal Code § 311). In doing so, the Court defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest." *Id.* at 487; *see also id.* at 487 n.20 (defining

[8] *Available at* https://perma.cc/2TB5-PLKG.

"prurient" as "having a tendency to excite lustful thoughts"). And in 1962, the New Jersey legislature "defined obscenity in substantially the language used by Justice Brennan in *Roth*." *State v. De Santis*, 323 A.2d 489, 490 (N.J. 1974). Moreover, in interpreting a later predecessor to the current obscenity statute, the New Jersey Supreme Court adopted the three-part obscenity test announced in *Miller v. California*, 413 U.S. 15 (1973), which, like *Roth*, focuses on prurient sexual material. *See De Santis*, 323 A.2d at 490–95; *see also Miller*, 413 U.S. at 24–25 (obscenity relates to works that (a) depict sexual conduct that is patently offensive; (b) appeal to the prurient interest; and (c) lack serious literary, artistic, political, or scientific value).

The Third Circuit has interpreted these terms as connoting sexuality, too. In *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010), the court rejected a facial challenge to a university student-code-of-conduct provision that prohibited "lewd, indecent, or obscene conduct" on university property. The court concluded that it was reasonable to interpret "lewd," "indecent," and "obscene" collectively "to prohibit only speech that is unprotected by the First Amendment under the *Miller* obscenity test." *Id.* at 253.

The upshot is that New Jersey's cyber-harassment statute clearly refers to prurient sexual materials or, at the very least, materials that bear *some* relation to nudity, sexuality, or anatomy. That reading accords with the New Jersey Appellate Division's construction of the statute in *Carroll*. *See* 196 A.3d at 114–15. And it likewise accords with long-standing interpretations of these terms by other courts in a variety of

contexts. *See Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) ("[W]hen [the legislature] employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." (citation omitted)). Given these clear constraints on the scope of the cyber-harassment statute, there was no basis to charge Plaintiffs under that statute for tweeting material that was not even remotely sexual in nature. No reasonable officer in Detective Rempusheski's shoes could have concluded otherwise.

2. No reasonable officer could conclude that the tweets were posted with the intent to harm Detective Sandomenico or place him in reasonable fear of harm.

Probable cause is also lacking here for a second reason: no reasonable officer would believe that Plaintiffs' tweets were intended "to emotionally harm" a reasonable person (here, Detective Sandomenico) or to "place [him] in [reasonable] fear of physical or emotional harm." N.J. Stat. § 2C:33-4.1(a)(2).

The New Jersey Supreme Court has made clear that disseminating a photo of someone is not enough to place that person in reasonable fear of his or her safety—even when the photo is accompanied by disparaging or hostile insults. In *State v. Burkert*, 174 A.3d 987 (N.J. 2017), the court reversed the conviction of a corrections officer who had been charged with criminal harassment for disseminating flyers around the workplace featuring a co-worker's wedding photographs with "degrading and vile dialogue." *Id.* at 990–91. As the court explained, the harassment statute at issue in that case, N.J. Stat. § 2C:33-4(c), applied only to communications "that reasonably put [a]

person in fear for his safety or security or that intolerably interfere with that person's reasonable expectation of privacy." *Burkert*, 174 A.3d at 990.[9] Although the court acknowledged that the flyers—which it described as "boorish, crude, utterly unprofessional, and hurtful"—were plainly "intended to and did humiliate" his co-worker, the court held that the flyers "did not threaten or menace" the co-worker. *Id.* at 1003; *see also id.* ("Nothing in the record suggests that Halton's safety or security were put at risk by the flyers[.]"). The court therefore concluded that "placing offensive dialogue on [someone]'s wedding photograph and then circulating the flyers" did not constitute criminal harassment. *Id.*

Burkert's logic applies with even greater force here given that Detective Sandomenico is a police officer. As noted above, the public has a First Amendment right to photograph the public activities of on-duty police officers. *See supra* Part I.A; *Fields*, 862 F.3d at 360. Any officer who is placed in fear whenever a member of the public exercises that right would be incapable of doing his or her job. So, too, would any officer who is placed in fear whenever a member of the public refers to the officer in disparaging terms. *See supra* Part I.A; *Hill*, 482 U.S. at 461 ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police

[9] New Jersey's criminal harassment statute makes it an offense to engage in any "course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy [another] person." N.J. Stat. § 2C:33-4(c). To ensure that this statute did not exceed its constitutional reach in cases involving pure speech, the *Burkert* court held that acts to "alarm" and "seriously annoy" must be read to encompass only communications that meet the above-quoted standard. 174 A.3d at 990.

officers."). It was unreasonable for Detective Rempusheski to conclude that a fellow police officer would sincerely be placed "in fear of physical or emotional harm" by a tweet depicting his on-duty conduct and referring to him in demeaning terms. *Cf. Johnson v. Campbell*, 332 F.3d 199, 213 (3d Cir. 2003) ("[S]wear words, spoken to a police officer, do not provide probable cause for an arrest for disorderly conduct because the words, as a matter of law, are not 'fighting words.'"); *Patterson v. United States*, 999 F. Supp. 2d 300, 316 (D.D.C. 2013) (K.B. Jackson, J.) ("[C]ursing at an officer in the presence of a crowd, without some indication of a likely violent reaction from that crowd, does not give rise to probable cause to believe that the speaker is engaged in disorderly conduct.").

The fact that the tweet solicited information about Detective Sandomenico's identity does not salvage Detective Rempusheski's probable-cause argument. In his motion to dismiss, Detective Rempusheski characterizes the tweet and retweet as an "ostensibl[e]" attempt on the part of Plaintiffs to operate as "vigilante[s] in meting out retribution against the officer." MTD at 10. But, even setting aside the lack of support for that grossly exaggerated characterization of the language of Plaintiffs' tweets, the salient question is whether a *reasonable police officer* could have construed the tweets in that way. On the current record, the answer to that question is clearly no—especially when all reasonable inferences are drawn in Plaintiffs' favor, as they must be at the Rule 12(b)(6) stage. *See N.J. Carpenters & the Trs. Thereof v. Tishman Constr. Corp. of N.J.*, 760 F.3d 297, 302 (3d Cir. 2014).

Like the flyers in *Burkert*, the tweets contained no threats or calls for violence or "retribution." And Plaintiffs' Twitter pages were devoid of anything to suggest that the tweets were intended to harm or instill fear in the officer depicted in the photo. Am. Compl. ¶¶ 19–24. Plaintiffs have no Twitter followers in the NPD, and to this day, do not know how their tweets even reached Detective Sandomenico or Detective Rempusheski. *Id.* ¶¶ 19, 22.

Moreover, as alleged in the Complaint, Plaintiffs solicited the officer's identity for a legitimate—and constitutionally protected—purpose: namely, to file a complaint about a police officer who had actively sought to shield his identity from the public. *See* Am. Compl. ¶ 2 (explaining that Plaintiff Alfaro sought to use the answer to his tweet in order to "complain about the officer's conduct"); *see also, e.g.*, *McCann v. Winslow Twp.*, No. 06-cv-3189-NLH, 2007 WL 4556964, at *5 (D.N.J. Dec. 20, 2007) (noting that a "citizen's complaints [about the police] constitute activity protected by the First Amendment"). The Nutley Police Department itself formally provides citizens with a means for filing complaints about individual officers.[10] That process would be functionally useless if a citizen could be charged with felony harassment merely for inquiring into the identity of an officer about whom he or she seeks to file a complaint.

[10] NPD, *Citizen Complaint Information Sheet*, https://perma.cc/E267-QJDC (last visited May 17, 2021) ("It is in the best interests of everyone that your complaint about the performance of an individual officer is resolved fairly and promptly.").

On this record, Detective Rempusheski had no reasonable basis for concluding that Plaintiffs intended to cause Detective Sandomenico any fear.

C. Plaintiffs have alleged a sufficient causal connection between their tweets and Detective Rempusheski's charging decision.

For the foregoing reasons, Plaintiffs have adequately pleaded a lack of probable cause and may, therefore, proceed on their retaliation claim. *See Novak v. City of Parma*, 932 F.3d 421, 429 (6th Cir. 2019) ("If the police *did not* have probable cause to arrest Novak, then he may bring a claim of retaliation." (citing *Nieves*, 139 S. Ct. at 1725)). To the extent Detective Rempusheski challenges Plaintiffs' ability to show not only a lack of probable cause but also a sufficient causal connection, *see* MTD at 10, the Court should reject that argument.

As the Supreme Court has explained: "Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution." *Hartman*, 547 U.S. at 261; *accord Nieves*, 139 S. Ct. at 1723–24. That is precisely the case here. Additionally, in this case, Plaintiffs have pleaded other facts that support a reasonable inference of retaliatory motive.[11] The purported basis for the criminal charges (the tweet) was *itself* activity protected by the First Amendment, and it was also

[11] *See generally Novak*, 932 F.3d at 429 (explaining that to prevail on his retaliation claim, the plaintiff would ultimately need to show that "'retaliation was a substantial or motivating factor' for his arrest," at which point the burden would shift to the officers to show that they would have arrested him anyway (quoting *Nieves*, 139 S. Ct. at 1725)).

openly critical of one of Detective Rempusheski's fellow police officers in the NPD's 12-person investigation unit. Am. Compl. ¶¶ 31–35. Moreover, Detective Rempusheski charged Plaintiffs without serious investigation into their intent, and the charges were promptly dismissed by a prosecutor. *Id.* ¶¶ 35–36. These facts easily give rise to a plausible retaliatory motive. *Cf. Falco v. Zimmer*, 767 F. App'x 288, 310 (3d Cir. 2019) (explaining that although the causation element generally "presents a question of fact for the jury," at the motion-to-dismiss stage, the plaintiff need only produce "some evidence, direct or circumstantial, of [causation] that is enough to raise a right to relief above the speculative level" (internal quotation marks omitted)).

D. Detective Rempusheski is not entitled to qualified immunity.

Detective Rempusheski argues that, even if he violated Plaintiffs' constitutional rights by issuing the complaint-summonses in retaliation for their protected speech, he is nevertheless entitled to qualified immunity. *See* MTD at 11–12, 17–19. To defeat qualified immunity, a plaintiff must show that "the right in question was 'clearly established' at the time of the violation." *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). Plaintiffs have satisfied that burden here with respect to their First Amendment retaliation claim.[12]

[12] For the purposes of the qualified-immunity analysis, Plaintiffs assume that the rule from *Hartman* and *Nieves* requiring a plaintiff to show a lack of probable cause ("the *Nieves* rule") applies even when the sole basis for probable cause is protected speech itself. Plaintiffs note, however, that at least one circuit has cast doubt on whether a plaintiff must establish a lack of probable cause in order to state a retaliation claim in

1. Detective Rempusheski violated Plaintiffs' clearly established rights.

Detective Rempusheski does not dispute that "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman*, 547 U.S. at 256; *see also Nieves*, 139 S. Ct. at 1722–25 (same as to retaliatory arrests). Nonetheless, he contends that he did not violate Plaintiffs' clearly established First Amendment rights by filing criminal charges against them based on their protected speech. According to Detective Rempusheski, he remains entitled to qualified immunity—"*even if probable cause did not exist here*"—because a reasonable officer in his position could have concluded

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such circumstances. As Judge Thapar explained in the Sixth Circuit's decision in *Novak*, the rationale for the *Nieves* rule is premised on the "thorny causation issue[s]" that arise when a plaintiff "both did something and said something to get arrested." 932 F.3d at 431. In other words, *Nieves* was based on a concern that "the factfinder will not be able to disentangle whether the officer arrested [the plaintiff] because of what he did or because of what he said." *Id.* But that is not so when speech, and speech alone, supplies the probable cause. *Id.*; *see also* John S. Clayton, Note, *Policing the Press: Retaliatory Arrests of Newsgatherers After* Nieves v. Bartlett, 120 Colum. L. Rev. 2275, 2310 (2020) (noting that "speech and conduct are inseparable" in cases like *Novak*, in which officers arrested the plaintiff for creating a fake Facebook account designed to mimic that of the local police department). Moreover, such cases "strike[] at the heart of the problem" that the Supreme Court has recognized in its recent retaliation cases, i.e., the "'risk that some police officers may exploit the arrest power as a means of suppressing speech.'" *Novak*, 932 F.3d at 431 (quoting *Lozman v. City of Rivera Beach*, 138 S. Ct. 1945, 1953 (2018)).

For these reasons, Plaintiffs urge this Court to hold that the general rule announced in *Nieves* is inapplicable where, as here, the charges were brought based solely on protected speech. *See generally Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that district courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first"). Regardless of how this Court rules on Defendant's qualified-immunity defense, it should clarify the scope of the no-probable-cause rule to guide future cases.

(albeit mistakenly) that probable cause existed to charge Plaintiffs with felony cyber harassment. MTD at 17 (emphasis added).

That argument is untenable. As outlined above, in July 2020, Detective Rempusheski had ample reason to know that he lacked probable cause to charge Plaintiffs with cyber harassment under New Jersey law. *See supra* Part I.B. And, unlike in the prototypical qualified-immunity case, he also had ample opportunity to determine whether the charges were factually and legally sound. *See Reedy v. Evanson*, 615 F.3d 197, 224 n.37 (3d Cir. 2010) ("[Q]ualified immunity exists, in part, to protect police officers in situations where they are forced to make difficult, split-second decisions."). His failure to undertake those basic inquiries before issuing the complaint-summonses in this case only compounds the unreasonableness of his charging decision. *Cf. Spiess v. Pocono Mountain Reg'l Police Dep't*, No. 10-cv-287, 2013 WL 1249007, at *18 (M.D. Pa. Mar. 26, 2013) (noting that in light of their 16-hour investigation, the police detectives "did not make any split second probable cause decisions" in circumstances that were "tense, uncertain, and rapidly evolving" (citing *Reedy*, 615 F.3d at 224 n.37)).

Moreover, in the First Amendment retaliation context, the absence of probable cause generally counsels against granting qualified immunity to officers. The Third Circuit's decision in *Losch v. Borough of Parkesburg*, 736 F.2d 903 (3d Cir. 1984), is instructive on this point. In *Losch*, a Pennsylvania man alleged that a pair of officers charged him with criminal harassment, without probable cause, because he had complained about one of the officers. *Id.* at 906–07. The Third Circuit rejected the

officers' qualified-immunity defense, holding that the officers had violated the man's clearly established First Amendment rights. *See id.* at 910 (explaining that "there was no ambiguity in the law guaranteeing Losch's First and Fourteenth Amendment rights, or in the legal standard imposed by the Constitution on police officials"). In reaching that conclusion, the court reasoned that the Supreme Court had "clearly held that prosecution of a citizen in retaliation 'for nonprovocatively voicing his objection' to police conduct impermissibly punishes constitutionally protected speech," *id.* (quoting *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973)), and that "an arrest [that] lacks probable cause for its support . . . is, objectively speaking, in violation of clearly established law," *id.* (quoting *Trejo v. Perez*, 693 F.2d 482, 488 n.10 (5th Cir. 1982)).[13] For these reasons, "[t]he law protecting Losch from police officers' use of their official position to launch a private vendetta was clearly established and not uncertain." *Id.*[14]

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[13] *See also Patterson*, 999 F. Supp. 2d at 316–17 ("[B]ecause no reasonable officer could conclude that there was probable cause to believe that Patterson was committing disorderly conduct on the facts as alleged in the complaint, the complaint ably supports the claim that Patterson was arrested in retaliation for his protected speech and that the individual officers therefore violated Patterson's clearly established First and Fourth Amendment rights.").

[14] Numerous other courts—including district courts within the Third Circuit—have similarly held that it is clearly established that the government cannot retaliate against citizens for criticizing or insulting the police. *See, e.g.*, *Thurairajah v. City of Fort Smith*, 925 F.3d 979, 985 (8th Cir. 2019) ("[Plaintiff's] right to be free from retaliation was clearly established at the time of his arrest. The law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for speaking out. . . . Criticism of law enforcement officers, even with profanity, is protected speech." (internal quotation marks and alterations omitted)); *Beck v. City of Upland*, 527 F.3d 853, 871 (9th Cir. 2008) ("By 1990, it was well established

Losch also forecloses any argument that the relevant First Amendment precedents are not sufficiently analogous to the present case to establish that Detective Rempusheski's conduct violated Plaintiffs' "clearly established" rights. As explained above, the court in *Losch* held that the officers in that case had violated clearly established law by filing criminal harassment charges against an individual without probable cause because that individual had engaged in protected First Amendment activity, namely, the peaceful criticism of a police officer. 736 F.2d at 910. Because Plaintiffs' complaint alleges that Detective Rempusheski engaged in the same course of conduct as the officers who were found liable in *Losch*, Detective Rempusheski cannot plausibly argue that his conduct does not violate clearly established law.[15]

District courts in the Third Circuit have also denied qualified immunity to officers in closely analogous First Amendment retaliation cases. *See, e.g.*, *Booker v. Borough of North Braddock*, No. 19-cv-1649, 2021 WL 37618, at *6 (W.D. Pa. Jan. 5, 2021) ("[C]ourts in this Circuit have found that pressing charges in the absence of probable

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that government officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity." (internal quotation mark and alterations omitted)); *Montgomery v. Killingworth,* No. 13-cv-256, 2015 WL 289934, at *12 (E.D. Pa. Jan. 22, 2015) ("*Losch* was decided many years before the incident here, and it involved a constitutional right that almost mirrors the right asserted by [the plaintiff] in this case: the right to be free from an arrest that lacked probable cause and was initiated in retaliation for the peaceful observation and criticism of a police officer.").

[15] Although *Losch* did not involve the right to record a police officer while performing his duties in public, that right "is now clearly established in this Circuit." *Karns v. Shanahan*, 879 F.3d 504, 524 n.12 (3d Cir. 2018) (citing *Fields*, 862 F.3d at 356)).

cause, in retaliation for protected First Amendment conduct, is a per se violation of clearly established law because police officers are required to know the probable cause requirement." (internal quotation marks omitted)). In *Catalano*, for instance, Chief Judge Wolfson denied qualified immunity to an officer who had allegedly arrested someone under New Jersey's disorderly conduct statute for filing a citizen's complaint about several municipal officials. 2019 WL 2315092, at *1–2, *6–8, *11. The court held that the officer lacked probable cause for the arrest because the plaintiff was not "engaged in any sort of 'threatening,' 'violent,' or 'tumultuous' behavior" and did not "create[] a 'hazardous or physically dangerous conditions.'" *Id.* at *7 (quoting N.J. Stat. § 2C:33-2). Relying on that finding, *see id.* at *8 n.9, the court then held that "effectuating an arrest without probable cause" and "arresting an individual for exercising his first amendment rights to file a citizen's complaint" were "violations of clearly established rights," *id.* at *11; *see also id.* (concluding that "the illegality of the [officer's] actions was sufficiently clear that [he could] fairly be said to have been on notice of the impropriety of [his] actions" (third alteration in original; citation omitted)). Similar reasoning should apply here.

And even if there were no prior cases addressing the right at issue here—and, again, there are several—this case would still fall within the category of "obvious" constitutional violations for which qualified immunity is inappropriate. *See Hope*, 536 U.S. at 741 ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very

action in question has [not] previously been held unlawful" (second alteration in original; internal quotation mark omitted)). Simply put, no reasonable officer could have concluded that the tweets at issue here were actually intended to place a professional law-enforcement officer in "reasonable . . . fear of physical or emotional harm to his person," N.J. Stat. § 2C:33-4.1(a)(2). Nor could any reasonable officer have concluded that charging someone with felony cyber harassment—without probable cause—based on their criticisms of another officer in the same unit would not amount to unlawful retaliation. *Cf. Johnson v. Cnty. of San Bernardino*, No. 18-cv-2523, 2020 WL 5224350, at *25 (C.D. Cal. June 24, 2020) (concluding that even if the plaintiff had been unable to locate a case with the same unique facts and interface with probable cause, the facts alone, when viewed in the plaintiff's favor at the summary judgment stage, would have pushed the case into "obvious" territory, where "the constitutional question is 'beyond debate'" even absent a "same-set-of-facts scenario").[16]

2. Detective Rempusheski cannot avail himself of any presumption in favor of qualified immunity.

Contrary to Detective Rempusheski's assertions, he is also not entitled to a *presumption* of qualified immunity. *See* MTD at 18. Pointing to *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), Detective Rempusheski claims that he is entitled to such a

[16] Indeed, the implicit premise of the Supreme Court's decision in *Nieves* and various other cases addressing whether the existence of probable cause defeats a plaintiff's First Amendment retaliation claim is that such claims would plainly be *viable* in the *absence* of probable cause.

presumption because he consulted with a prosecutor before charging Plaintiffs with cyber harassment, as evinced by an investigative report attached to his motion to dismiss. *See* MTD at 3–4, 18. But neither *Kelly* nor the investigative report relied upon by Detective Rempusheski supports what he seeks, at least not at this early stage in the litigation.

(a) For starters, the fact that a police officer consults with a prosecutor—standing alone—does not automatically entitle the officer to a presumption in favor of qualified immunity. And it certainly cannot do so at the motion-to-dismiss stage here. *Kelly* itself demonstrates why.

As Detective Rempusheski notes, *Kelly* held that "a police officer who relies in good faith on a prosecutor's legal opinion that [an] arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause." 622 F.3d at 255–56. But *Kelly* did not stop there. The court made clear that a presumption of qualified immunity is just that—a presumption—which a plaintiff may rebut "by showing that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor's advice." *Id.* at 256. Put differently, an officer's reliance on prosecutorial advice "must itself be objectively reasonable." *Id.* That is because "a wave of the prosecutor's wand cannot magically transform an unreasonable probable cause determination into a reasonable one." *Id.* (quoting *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004)).

Moreover, *Kelly* held that even at the summary judgment stage, more facts were needed to determine whether the police officer in that case was entitled to qualified immunity. *See* 622 F.3d at 256, 258–59, 266. In particular, the court held that the district court needed to make clear factual findings as to whether the prosecutor called the assistant district attorney "to seek legal advice," or just to get "approval" for the arrest that the officer had decided to make. *Id.* at 256. After all, under the Third Circuit's test, only a "police officer who relies in *good faith*" on a prosecutor's advice may take advantage of the presumption. *See id.* at 255–56 (emphasis added).

The need for further factual elaboration is even stronger in this case than it was in *Kelly*. On the question of legal advice, the investigative report attached to Detective Rempusheski's motion to dismiss states the following: "As per [Assistant Prosecutor] Ohm Mr. Alfaro is to be charged with 2c:33-4.1a(2) Cyber Harassment which is a fourth degree crime. A.P. Ohm also approved charges for the five other individuals who re-tweeted Mr. Alfaro's original post." Def.'s Certification of Counsel, ECF No. 12-1 at 76 (Ex. G). This report leaves the same lingering questions that existed in *Kelly* about the significance—and content—of any consultation with Assistant Prosecutor Ohm (and thus the existence of the presumption in the first place). Indeed, it arguably leaves more. *Cf. Kelly*, 622 F.3d at 252 (noting that when the defendant officer returned to his car to call the ADA to confirm that the plaintiff had violated Pennsylvania's Wiretap Act by recording the stop, the ADA, per his deposition, concluded that the Act was violated "based on the facts as described" by the officer, namely, "that he had stopped

a car for speeding and bumper height violations" and seized the passenger's camera when he realized the passenger was videotaping him).

Importantly, this case also comes to the Court in a different posture. Where, as here, qualified immunity is raised in a *motion to dismiss*, it is "generally unwise" to venture into that analysis, "as it is necessary to develop the factual record in the vast majority of cases.'" *Johnson v. Stith*, No. 14-cv-5032-MCA, 2015 WL 4997413, at *5 (D.N.J. Aug. 20, 2015) (quoting *Newland v. Reehorst*, 328 F. App'x 788, 791 n.3 (3d Cir. 2009)); *see also Collick v. William Paterson Univ.*, 699 F. App'x 129, 130–31 (3d Cir. 2017) (reasoning that when "the complaint's allegations regarding the purportedly cursory investigation conducted by [the officer]" were accepted as true, the court could not hold, "without a factual record," that the officer's behavior was "reasonable" for purposes of granting her qualified immunity).

Adopting Defendant Rempusheski's argument here would turn the motion-to-dismiss standard on its head. When reviewing a motion to dismiss, the court must accept all of the complaint's factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Johnson*, 2015 WL 4997413, at *3; *see also Booker*, 2021 WL 37618, at *5 ("[Q]ualified immunity will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint." (quoting *Thomas v. Independence Twp.*, 463 F.3d 285, 291 (3d Cir. 2006))). Yet what Detective Rempusheski is essentially asking this Court to do is not only to accept the truth of the assertion in his report that an ADA approved the charges, but also to infer from that approval that he accurately

conveyed all of the relevant facts to the ADA—despite Plaintiffs' allegation in the Complaint that the charges were dismissed several weeks later. That is a big ask, and one that is antithetical to the well-established standard of review for 12(b)(6) motions.

(b) Indeed, the premise of Defendant's request—that this Court consider the investigative report for its truth in the first place—runs headlong into the basic rule that courts may only consider "the allegations contained in the complaint, exhibits attached to the complaint, and matters of public record when evaluating whether dismissal under Rule 12(b)(6) [is] proper." *Levins v. Healthcare Revenue Recovery Grp. LLC*, 902 F.3d 274, 279 (3d Cir. 2018) (internal quotation mark and alteration omitted).

Although the Third Circuit has recognized an exception when a plaintiff's claims are "based" on "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss," *id.* (quoting *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)), that exception is plainly inapplicable here because Plaintiffs' claims are not "based" on the investigative report. That is, the report is neither "integral to" nor "explicitly relied upon in" Plaintiffs' Complaint. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (internal quotation mark and emphasis omitted). Rather, the Complaint centers around Detective Rempusheski's lack of probable cause to issue the complaint-summonses and the affidavits upon which they were based, and alleges that Plaintiffs were charged in retaliation for their protected Twitter activity because that activity was neither "lewd,

indecent, or obscene" nor intended to place Detective Sandomenico in reasonable fear of harm. *See* Am. Compl. ¶¶ 3–4, 19–25, 30–35, 45, 47, 50, 52.

Even if the investigative report contains some of the same information contained in the complaint-summonses or the probable-cause affidavits, the Complaint did not rely on the report itself and Plaintiffs' claims are not "based" on the report.[17] *See Russell v. Richardson*, 905 F.3d 239, 244 n.2 (3d Cir. 2018) (refusing to consider a court marshal's affidavits and internal incident report filed with the superior court after the marshal allegedly shot a teenager on the ground that they merely contributed "extra detail [not found] in the complaint"); *cf. Oliver v. Roquet*, 858 F.3d 180, 190 n.7 (3d Cir. 2017) (properly considering a report attached to a motion to dismiss where the complaint referred to only "certain sections" of the same report); *Bridges v. Torres*, 809 F. App'x 69, 70–71 (3d Cir. 2020) (considering an extraneous search-warrant application in a case where the plaintiff's Fourth Amendment challenge to the execution of the warrant

[17] Due to discovery in her underlying criminal case, at least one of the Plaintiffs was in possession of the investigative report at the time the Complaint was filed. The touchstone, however, is whether Plaintiffs based their claims off of the report or selectively relied upon portions of it in their Complaint, which they did not. "What the rule seeks to prevent is," for example, "the situation in which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint," even though "it would be clear that the statement was not fraudulent" if it were "examined in the full context of the document." *In re Burlington Coat Factory*, 114 F.3d at 1426. That type of situation is simply not implicated here. But in any event, the report is not dispositive for all of the reasons stated above. Even assuming that a consultation with an assistant prosecutor occurred, Plaintiffs have no way of knowing (absent discovery) whether Detective Rempusheski gave the prosecutor all of the facts or otherwise acted in good faith. The investigative report does not shed any light on those questions.

"depended on" the application). And consideration of the report would be especially inappropriate here, given that Detective Rempusheski asks the Court to consider its contents for the truth of the matter asserted. *Cf. Sands v. McCormick*, 502 F.3d 263, 268–69 (3d Cir. 2007) (holding that it was proper for the district court to consider prior court records in concluding that there was probable cause to file criminal charges against an arrestee in a false arrest suit, but only because "the truth" of the records was beside the point for purposes of the probable-cause determination). As such, the report remains "off limits at this stage of the litigation." *Levins*, 902 F.3d at 280.[18]

[18] Although Defendant appears to rely solely on the integral-to-the-complaint exception based on the authorities cited in his brief, he does make one passing reference to "government records" in a footnote. *See* MTD at 15 n.3. To the extent this reference could be construed as an attempt to invoke precedent concerning "matters of public record" at the motion-to-dismiss stage, *see Levins*, 902 F.3d at 279, that precedent is inapposite here. For one thing, the investigative report does not appear to be public. Indeed, it was not produced in response to an open records request that Plaintiffs' counsel submitted last year, which sought records referencing the investigation of Plaintiffs and the other individuals who were charged in connection with Mr. Alfaro's tweet. *Cf. Pension Benefit*, 998 F.2d at 1197 (holding that even a document that "*might* be subject to disclosure under FOIA" is not a public record for purposes of a motion to dismiss (emphasis added)). For another, it would be inappropriate to rely on the report given Defendant's theory of relevance. *See, e.g.*, *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999) ("[O]n a motion to dismiss, we may take judicial notice of another court's opinion—not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity."); *see also Croci v. Town of Haverstraw*, 175 F. Supp. 3d 373, 381 (S.D.N.Y. 2016) (explaining that the public-records rule "does not mean that the courts may take as true any statement found in any document that a party asserts to be public"); *Dunn v. PHH Mortg. Corp.*, No. 20-cv-5848-RBK, 2021 WL 870659, at *3 (D.N.J. Mar. 9, 2021) ("If a court were to consider and judicially notice documents for their truth it would be, in essence, authorizing a trial by public documents, impermissibly expanding the scope of a Rule 12(b)(6) motion.").

* * *

For all of these reasons, the Court should reject Defendant Rempusheski's qualified-immunity defense and deny his motion to dismiss Counts 1 and 2.

II. Plaintiffs have stated a valid claim for malicious prosecution (Count 3).

Defendant Rempusheski contends that Plaintiffs' malicious-prosecution claim should be dismissed because Plaintiffs did not "suffer[] a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." MTD at 19. That contention, however, rests on the mistaken assumption that Plaintiffs' malicious-prosecution claim arises under the Fourth Amendment. *See id.* at 20 (citing Fourth Amendment cases such as *DiBella v. Borough of Beachwood*, 407 F.3d 599, 601 (3d Cir. 2005), and *Santiago v. City of Vineland*, 107 F. Supp. 2d 512, 566 (D.N.J. 2000)). In fact, Plaintiffs' malicious-prosecution claim arises under *New Jersey* law.[19]

To state a claim for malicious prosecution under New Jersey law, Plaintiffs must allege that: (1) a criminal action was instituted by the defendant against the plaintiff; (2) the action was motivated by malice; (3) there was an absence of probable cause for the proceeding; and (4) the action was terminated favorably to the plaintiff. *Brunson v.*

[19] Count 3 explicitly states that Plaintiffs submitted a timely notice of claim, Am. Compl. ¶ 56—a statement that would have no relevance if the claim arose under § 1983. *See generally Felder v. Casey*, 487 U.S. 131, 131 (1988). And Count 3 does not make any reference to the Fourth Amendment. *Compare* Am. Compl. 11 ("Count 1 – Violation of First Amendment Rights – 42 U.S.C. § 1983"), *and id.* at 12 ("Count 2 – Violation of First Amendment Rights – N.J.S. § 10:6-2"), *with id.* at 13 ("Count 3 – Malicious Prosecution").

Affinity Fed. Credit Union, 972 A.2d 1112, 1119 (N.J. 2009); *accord Trabal v. Wells Fargo Armored Serv. Corp.*, 269 F.3d 243, 248 (3d Cir. 2001). Deprivation of liberty is not a requirement. *See id.*; *see also Johnson*, 2015 WL 4997413, at *6 n.2 (observing that "[t]he elements of the common law tort of malicious prosecution under New Jersey are the same" as the elements of a malicious prosecution claim brought under § 1983 and the NJCRA, "except no deprivation of liberty need be shown").

Plaintiffs have satisfied each of the elements of malicious prosecution under New Jersey law. As noted above, Detective Rempusheski issued the complaint-summonses charging Plaintiffs with felony cyber harassment and those charges were later dismissed. *See* Am. Compl. ¶ 55. Thus, there is no dispute that the first and fourth elements are satisfied. *See* MTD at 19–20. Furthermore, as explained in Part I.B, Plaintiffs have alleged that Detective Rempusheski lacked probable cause to file those charges, thus satisfying the third element. And those same allegations also satisfy the second element. Under New Jersey law, it is well-settled that "[m]alice may be inferred . . . from a lack of probable cause." *Earl v. Winne*, 101 A.2d 535, 543 (N.J. 1953). The facts alleged in the Complaint, when viewed in the light most favorable to Plaintiffs, are thus sufficient to support a reasonable inference of malice on Detective Rempusheski's part: that is,

"the intentional doing of a wrongful act without just cause or excuse." *Brunson*, 972 A.2d at 1120 (citation omitted).[20]

Detective Rempusheski claims that he was motivated by the "administration of justice" in charging Plaintiffs with felony cyber harassment based on their tweets. MTD at 20. But that "[benign] alternative explanation" does not entitle him to dismissal where, as here, the factual allegations give rise to "a plausible inference of legal malice." *Collick v. William Paterson Univ.*, No. 16-cv-471-KM, 2016 WL 6824374, at *20 (D.N.J. Nov. 17, 2016) (alteration in original). Again, "[t]he only issue" at the motion-to-dismiss stage "is whether the Complaint, *if* we assume its allegations are true, states a legal claim. *Whether* the allegations are true can be determined only after the parties exchange discovery and the case is decided, either by summary judgment or trial." *Id.* at *1 (emphases and alteration in original; citation omitted). Accordingly, the Court should deny Defendant's motion to dismiss Count 3 as well.

[20] Specifically, Plaintiffs allege that "Defendant Rempusheski issued the felony complaint-summonses against Plaintiffs without probable cause and with malice, as demonstrated by his retaliatory motive," Am. Compl. ¶ 55, because Plaintiffs spoke about his co-worker in the NPD and, in his view, improperly criticized the police, *id.* ¶¶ 46, 51, 54; *see also id.* ¶¶ 3, 11, 17–25. Moreover, his apparent decision to issue felony complaint-summonses against several people who posted Mr. Alfaro's tweet, including a teenager he knew was fresh out of high school—without further information or allegations regarding each individual's specific intent—demonstrates that "he sought to punish anyone who had, in his view, criticized a fellow officer." *Id.* ¶¶ 34–35.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendant's motion to dismiss.

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Respectfully submitted,

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