No. _____

In the Supreme Court of the United States

MARC M. SUSSELMAN,

Petitioner,

v.

WASHTENAW COUNTY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals violated Petitioner's right to due process under the Fourteenth Amendment by failing to adhere to the standard of review which applies to dismissal of a lawsuit pursuant to Fed. R. Civ. P. 12(b)(6).

2. Whether Petitioner pled a cognizable, plausible claim for violation of his First Amendment freedom of speech by his being criminally prosecuted and being charged with a criminal misdemeanor due to his alleged disorderly conduct related to his verbally arguing with a Michigan sheriff's deputy.

3. Whether Petitioner pled a cognizable, plausible claim of a civil conspiracy under 42 U.S.C. § 1983, in violation of his First Amendment right of freedom of speech, where a prosecutor and a sheriff's deputy exchanged emails agreeing to charge Petitioner with a criminal misdemeanor, despite the fact that there was no probable cause supporting the charge.

4. Whether being charged with a criminal misdemeanor, without probable cause, and without being arrested, constituted a violation of Petitioner's liberty interest and substantive due process under the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiff-Appellant

- Marc M. Susselman

Respondents and Defendants-Appellees

- Washtenaw County
- Deputy Sheriff Jonathan King
- Superior Township

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit

No. 23-1486

Marc M. Susselman, *Plaintiff - Appellant,* v. Washtenaw County Sheriff's Office; Jonathan King; Washtenaw County, Michigan; Superior Township, Michigan, *Defendants - Appellees.*

Final Opinion and Judgment: July 29, 2024

Rehearing Denial: September 5, 2024

U.S. District Court, Eastern District of Michigan

No. 20-cv-12278

Marc M. Susselman, *Plaintiff,* v. Washtenaw County Sheriff's Office, et al., *Defendants.*

Final Opinion and Order: May 4, 2023

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDERS

TABLE OF CONTENTS – Continued

Page

STATUTORY PROVISIONS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

JUDICIAL RULES

OPINIONS BELOW

The decision of the Court of Appeals affirming the district court's dismissal of the lawsuit is included below at App.1a *Reh'g denied* (6th Cir. September 5, 2024) is included below at App.41a. The decisions of the U.S. District Court for the Eastern District of Michigan, (E.D. Mich. June 21, 2022) and (E.D., Mich. May 4, 2023) dismissing the lawsuit are included at App.24a, 17a.

JURISDICTION

The Court of Appeals entered Judgment on July 29, 2024 (6th Cir. 2024) (App.1a), *reh'g denied*, September 5, 2024 (6th Cir.) (App.41a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const., amend. I (App.47a)
- U.S. Const., amend. XIV § 1 (App.47a)
- 42 U.S.C. § 1983 (App.47a)
- M.C.L. 257.602 (App.48a)
- M.C.L. 750.167 (App.48a)

STATEMENT OF THE CASE

In the opening statement of its published decision, 109 F.4th 864, 868 (6th Cir. 204), the Court of Appeals asserts, "Marc Susselman made a federal case out of a traffic ticket." This statement trivializes what this lawsuit is about. It is not about a mere traffic ticket. It is about the unconstitutional abuse of power by government officials-by a sheriff's deputy and a prosecutor. The fact that it arose in the context of a traffic ticket does not minimize the abuse of power, or its unlawfulness.

The following facts are taken from Petitioner's Second Amended Complaint (R. 33). On the evening of February 1, 2020, Petitioner, a licensed Michigan attorney, was returning from Ann Arbor, where he had met with a client, to his home in Canton, Michigan. As he drove East, he saw a police vehicle parked diagonally across the eastbound lane, with its emergency lights flashing. The police vehicle left the westbound lane entirely open. Petitioner approached the vehicle and lowered his passenger side window to ask a police officer how to proceed. There was no police officer in the vehicle, or in the vicinity of the vehicle. There were no barricades, traffic cones or flares in the vicinity. The westbound lane was open and free of traffic. (R. 33, ¶ s 9-14, PageID.597)

Petitioner drove around the police vehicle into the westbound lane. As he did so, a police officer further down the westbound lane came running towards him, waving his arms. Petitioner stopped and lowered his window. The police officer, sheriff's deputy John King,

told Petitioner he had entered a crime scene involving a fatal accident further down the road. The accident was not visible from Petitioner's vehicle. King informed Petitioner he was getting a ticket for having driven around the police vehicle, with its emergency lights flashing. Petitioner raised his voice, asserting that King should have blocked both lanes with his vehicle, or placed a traffic cone or flares down to warn drivers not to proceed further. King threatened to arrest Petitioner for disorderly conduct for yelling at him. At no time did Petitioner physically threaten King. (R. 33, ¶ s 15-19, PadeID.597-599; Exhibit 1, PageID.6d18)

King issued a ticket stating, "DISOBEYED POLICE OFFICER DIRECTING TRAFFICE FLOW," and which indicated the violation had occurred on 02/01/20 at 05:49 P.M. Petitioner pled not guilty. He received a Notice To Appear which stated the offense was "FAILED YIELD." Petitioner sent a letter to Jameel S. Williams, the attorney representing the People, in which he quoted the language from the failure to yield statute, M.C.L. 257.649, and explained that he had not failed to yield, since there were no vehicles in the vicinity to yield to. He indicated that he could not be charged with a violation because he had yelled at King, citing several decisions holding that arguing with, and yelling at, police officers are protected by the 1st Amendment, as long as the individual does not threaten to use physical force. *See Houston v. Hill*, 482 U.S. 451 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972). He urged Williams to dismiss the ticket. Williams sent an email to Petitioner, in which he acknowledged Petitioner had made a valid point and

that he was dismissing the ticket. (R. 33, ¶ s 21-31. PageID.599-601; Exhibits 2-9, PageID.619-637)

Petitioner thereafter received a new ticket by certified mail. The new ticket was signed by King, and stated: "I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief." The new ticket stated, "DISOBEYED POLICE OFFICER DIRECTING TRAFFIC FLOW." This statement was false, because there had been no police officer directing traffic at the intersection. The ticket stated it was being issued for an incident which occurred on "07/31/20" at "06:58 A.M." King was stating that Petitioner had committed the same traffic infraction on two separate dates, at two different times. (R. 33, ¶ s 32-38, PageID.601-603; Exhibit 10, PageID.610)

The new ticket constituted a criminal misdemeanor.[1] Petitioner sent a second email to Williams questioning the basis for the issuance of the new ticket, and requested he dismiss it. Williams refused, stating: "Mr. Susselman, I have to remind you that as a Prosecutor I represent the people and the officers that issued the ticket. For me to dismiss the charge at your request puts me in a difficult situation with the people that I represent.,,," (R. 33, ¶ 39, PageID.603; Exhibit 11, PageID.613-617)

Petitioner commenced this lawsuit on August 21, 2020, in the United States District Court for the Eastern District of Michigan, pursuant to 42 U.S.C.

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[1] At his deposition, Williams acknowledged that the first ticket constituted a civil infraction, whereas the second ticket charged Petitioner with a criminal offense. (R. 57, Exhibit 6, PageID. 1312)

§ 1983, alleging that issuance of the second ticket violated his free speech rights under the 1st Amendment. (R. 1)[2] In the course of the lawsuit, an email exchange between Williams and King dated July 29, 2020, was produced.[3] The email exchange stated (R. 33, ¶ 51, PageID.606-607; Exhibit 19, PageID.648-649)

> Williams:
>
> Good afternoon Dep Webb and Dep. King,
>
> Please see the attached letter from Mr. Susselman regarding his interpretation of the charge against him. Mr. Susselman makes some valid points, and I'm afraid he may be correct with regards to the Failed Yield charge.
>
> However, if you agree, it appears the appropriate charge for Mr. Susselman would be M.C.L. 257.602 Failure to Comply with Orders or Directions of Police Officers, adopted by Superior Township Ordinance No. 186. Procedurally, I assume we would agree to dismiss the original charge (make him think he is a badass and won something) and then issue the new ticket under M.C.L. 257.602. With this being my first Formal Hearing, I want to make sure that we have

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[2] Petitioner filed a First Amended Complaint ("FAC") by right on September 4, 2020, adding Washtenaw County as a Defendant, since the Washtenaw County Sheriff's Office may not be sued as a legal entity separate from Washtenaw County. (R. 6) The Defendants filed an Answer to the FAC on October 1, 2020. (R. 13)

[3] The email exchange was attached as an exhibit to the County's motion for a stay of the lawsuit pursuant to the *Younger* abstention doctrine. (R. 22)

> done everything correct within our control to get the outcome that we deserve. Does this make sense to you?
>
> Also, as you can see in his letter, he goes on about not being a Disorderly Person (which I feel he was). Another thought I have is if you feel that Mr. Susselman was in fact disorderly, then we could also charge him with that. I would then be willing to dismiss the disorderly charge if he agrees to plea responsible to the Failure to Comply Charge.
>
> Let me know what your think.
>
> Thanks again!
>
> King:
>
> Hi Mr. Williams,
>
> I think that is a great plan!
>
> Thank you for all the time you're putting into this!
>
> Have a good day,
>
> J. King

(Emphasis added.)

Williams's claim that the second ticket was issued because he had no control over the matter and he was complying with the demands of the police officers was therefore false. Dismissing the first ticket in order to make Petitioner "think he was a badass and won something," and then issuing the second ticket, was an artifice which he and King agreed to, motivated by their belief that by yelling at King, Petitioner had been guilty of "disorderly conduct."

Petitioner filed a motion for leave to file a Second Amended Complaint ("SAC") to include the email exchange as the basis of a civil conspiracy claim. The court granted the motion. (R. 30; R. 33)

The email exchange was quoted in Petitioner's SAC and was incorporated into Count I (First Amendment violation by King's issuance of the second ticket); Count IV (violation of substantive due process by Superior Township, which included an averment that Williams was the final policy making official for Superior Township regarding whom to prosecute, and on what basis, under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986)); and Count VIII (civil conspiracy between King and Superior Township).

Petitioner filed a motion to dismiss the ticket in the state trial court, based on the relevant statute, M.C.L. 257.602, which states (R. 33, ¶ 47, PageID.604):

> A person shall not refuse to comply with a lawful order or direction of a police officer when that officer, for public interest and safety, is guiding, directing, controlling, or regulating traffic on the highways of this state. (Emphasis added.)

In his response to the motion to dismiss, Williams did not dispute that no police officer was in the vicinity of the police vehicle, which King conceded in his Answer to the SAC, but contended that King was regulating traffic "through" the police vehicle with its emergency lights flashing. Petitioner argued that this interpretation of M.C.L. 257.602 was contrary to Michigan's established rules of statutory interpretation, according to which unambiguous words are to be given their common, everyday meaning, and the phrase "a

police officer when that officer, for public interest and safety, is guiding, directing, controlling, or regulating traffic" requires that the directions be given by a human being who is in the vicinity of the recipient of the direction, not through an inanimate object. Since King was nowhere near his patrol car, and his vehicle was not blocking the westbound lane, Petitioner had not disobeyed a police officer directing traffic. The trial judge rejected Petitioner's argument and denied the motion to dismiss the ticket. (R. 33, ¶ 50, PageID. 605; Exhibit 18, PageID.633-644; R. 43, Exhibit 13)

Petitioner filed an appeal in the Washtenaw County Circuit Court, maintaining that the second ticket was issued without probable cause. Williams did not file an opposing brief. The Circuit Court issued an Opinion granting Petitioner's appeal and dismissing the ticket.[4] Williams did not appeal the

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[4] Contrary to the Sixth Circuit's implication, 109 F.4th at 869, that given Williams's failure to file an appellate brief, the decision dismissing the ticket was not a ruling on the question of whether the second ticket was supported by probable cause, under Michigan law, a prosecutor's failure to file an appellate brief constitutes a concession that the Appellant's arguments are valid. *See People v. Miller*, 49 Mich. App. 53, 63 (Mich. Ct. App. 1973); *People v. Walma*, 26 Mich. App. 326, 328 (Mich. Ct. App. 1970). Williams acknowledged at his deposition that he intentionally did not file an appellate brief, under the erroneous belief that Petitioner had filed his appellate brief late. (R. 57, Exhibit 6, PageID.1382)

At the oral argument on March 21, 2024, the attorney representing Superior Township asserted that Williams had inadvertently missed the appellate brief filing deadline, and this therefore did not constitute a concession that the arguments in Petitioner's appellate brief were valid. She also asserted that the cases which Petitioner was relying on for the proposition that a prosecutor's failure to file an appellate brief constituted an admission that the

decision. (R. 33, ¶ 54, PageID.607; Exhibit 20, PageID.652)

Washtenaw County and Superior Township filed motions to dismiss the federal lawsuit pursuant to Fed. R. Civ. P. 12(b)(6), contending that none of the claims pled in the SAC pled legally cognizable claims. The trial court granted both motions.

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appellant's arguments were correct-in this case that there was no probable cause to charge Petitioner with a criminal offense-involved prosecutorial misconduct, and therefore were not on point. Both assertions were false. After the oral argument, Petitioner filed a motion in the Sixth Circuit to supplement the record of the oral argument to correct the opposing counsel's misrepresentations. (Doc. 37) In the supplemental brief, Petitioner cited Williams's admission at his deposition that he did not inadvertently fail to file an appellate brief, but that his decision not to file an appellate brief was intentional, because he believed Petitioner's appellate brief was tardy. (R. 57, Exhibit 6, PageID.1382) In addition, the claim that the two cases relied on by Petitioner both involved prosecutorial misconduct was also false. *People v. Walma, supra*, did not involve prosecutorial misconduct, but a question of improper jury instructions, which the prosecutor failed to dispute by failing to file an appellate brief. The Michigan Court of Appeals accordingly stated, 26 Mich. App. At 327: "In view of the lack of any opposition whatever by the Allegan County prosecutor we are led to the inevitable conclusion that the prosecutor, if he does not by such inaction or indifference agree with the defendant that reversible error was committed, at least does not object to reversal and remand for a new trial which we accordingly do, particularly in view of the questions raised." (Emphasis added.) Nowhere in the Sixth Circuit's decision did it address these misrepresentations, but instead implied that Williams's failure to file an appellate brief was the reason Petitioner prevailed in the state appeal, when under Michigan law it constituted an admission by Williams that there was no probable cause for charging him with a criminal offense.

Petitioner filed a timely appeal in the Sixth Circuit Court of Appeals. After briefing and oral argument, the Court affirmed dismissal of the lawsuit. Petitioner filed a timely petition for *en banc* review, which the Court denied.

SUMMARY OF ARGUMENT

Deputy King issued the traffic violation ticket against Petitioner claiming he had violated M.C.L. 257.602, which prohibits failing to obey a police officer directing traffic, when Petitioner drove around a patrol car which was blocking his lane of traffic, where there was no police officer in the vicinity directing traffic. Petitioner argued with King regarding his issuing the ticket. Although Petitioner had therefore not violated M.C.L. 257.602, Jameel Williams, the prosecutor for Superior Township where the alleged infraction had occurred, insisted on prosecuting Petitioner for a criminal misdemeanor, even though there was no probable cause for the prosecution. When Petitioner's motion to dismiss the ticket was denied, he filed an appeal in the Washtenaw Circuit Court, which dismissed the ticket. Petitioner filed a lawsuit pursuant to 42 U.S.C. § 1983, in which he included claims that King and Williams had conspired to continue the prosecution, without probable cause, in retaliation for his having argued with King, thereby violating his right to free speech under the 1st Amendment and his right to substantive due process under the 14th Amendment, notwithstanding that he had not been arrested. Since Williams was a policy-maker for Superior Township, he sued the township,

alleging violation of his right to substantive due process as well. He included pendent state claims for malicious prosecution and intentional infliction of emotional distress. The District Court erroneously dismissed all the claims, and failed to adhere to the parameters applicable to reviewing a 12(b)(6) motion.

The Sixth Circuit Court of Appeals affirmed the dismissal, also without properly applying the standard of review for a 12(b)(6) motion, and denied Petitioner's petition for *en banc* review.

ARGUMENT

I. Both the District Court and the Court of Appeals Violated Petitioner's Right to Due Process Under the Fourteenth Amendment by Failing to Adhere to the Standard of Review for a Motion to Dismiss Based on Fed. R. Civ. P. 12(b)(6).

Appellate review of a trial court's grant of summary judgment under Fed. R. Civ. P. 12(b)(6) is *de novo*. *Bowers v. City of Flint*, 325 F.3d 758, 761 (6th Cir. 2002). In *United States v. Raddatz*, 447 U.S. 667 (1980), the Court observed, *id.* at 690:

> The phrase "de novo determination" has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy.

In conducting *de novo* review, the appellate court is required to apply the same standard for reviewing

a trial court's grant of summary judgment which applied to the trial court. *Bowers, supra*, 325 F.3d at 761. The standard of review for a motion brought pursuant to FRCP 12(b)(6) was set forth in *Directtv, Inc. v. Tyreesh*, 487 F.3d 471 (6th Cir. 2007), as follows, *id.* at 476:

> "[A] Rule 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." . . . In reviewing a motion to dismiss, we construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff. . . . The defendant has the burden of showing that the plaintiff has failed to state a claim for relief. . . . While all the factual allegations of the complaint are accepted as true, "we need not accept as true legal conclusions or unwarranted factual inferences." . . . (Emphasis added; citations omitted.)

As Judge Gibbons cautioned in her concurrence in *Guertin v. Michigan*, 924 F.3d 309, 310 (6th Cir. 2019): "When considering a 12(b)(6) motion to dismiss, it is not our job to find the facts. Our job is, and only is, to determine whether any possible allegation plausibly states a claim under which relief can be granted. To decide any other issue would be judicial overreach. To discuss anything further would be an advisory opinion."

In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), which involved a class action claiming that

Incumbent Local Exchange Carriers created by the divestiture of AT &T engaged in a conspiracy which violated the Sherman Act, the trial court dismissed the lawsuit as failing to state a claim under 12(b)(6). The Second Circuit Court of Appeals reversed. In its decision reversing the Second Circuit, the Supreme Court rejected the standard of review set forth in *Conley v. Gibson*, 355 U.S. 41 (1957), which allowed discovery to be conducted in order to flesh out support for legal claims. The Court, reversing the Second Circuit and remanding the case for dismissal, stated, 550 U.S. at 944: "[T]he Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement." Here, however, Petitioner had documentary evidence, which he incorporated into the SAC, of an agreement between the prosecutor and deputy King to charge Petitioner with a criminal misdemeanor for which they had no evidence of probable cause. This evidence supported his claim of a civil conspiracy under 42 U.S.C. § 1983.

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court expanded on its ruling in *Twombly,* stating, *id.* at 678-679:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a

> "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" . . .
>
> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief." . . .
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework for a complaint, they must be supported by factual allegations. When facts are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.
>
> (Citations omitted.)

In his SAC, Petitioner set forth factual allegations, backed up by the record, supporting the legal claims pled which were sufficient to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), as articulated in *Twombly* and *Iqbal*, yet the Sixth Circuit Court of Appeals, as set forth below, disregarded the parameters applicable to a 12(b)(6) motion and dismissed Petitioner's lawsuit. In so doing, it violated Petitioner's right to due process under the Fourteenth Amendment.

A. The Sixth Circuit Failed to Adhere to the Parameters Governing Review of a Case Dismissed Pursuant to Fed. R. Civ. P. 12(B)(6), and in So Doing Violated Petitioner's Right to Due Process Under the Fourteenth Amendment and Improperly Dismissed Petitioner's First Amendment Claim, and His Pendent State Claims Alleging Intentional Infliction of Emotional Distress and Malicious Prosecution.

While the Sixth Circuit stated the standard of review which it was required to adhere to, 109 F.4th at 870, its decision evidences that it did not comply with the standard of review endorsed and required by *Twombly* and *Iqbal*–it did not construe the SAC in the light most favorable to Petitioner; it failed to accept all of the allegations in the SAC as true; and further failed to draw all reasonable inferences in favor of Petitioner. Curiously, nowhere in the decision did the Court address the central question in the lawsuit-whether Williams and King had probable cause to charge Petitioner with violating M.C.L. 257.602. Nor did the Court discuss the language contained in M.C.L. 257.602 and whether it provided that a police officer

could direct traffic via an inanimate object, as Williams contended.

Regarding the interpretation of statutory language, the Michigan Court of Appeals stated in *GMAC LLC v. Department of Treasury*, 286 Mich. App. 365 (Mich. Ct. App. 2009), *id.* at 372:

> The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation. . . . Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. . . . We may not speculate regarding the intent of the Legislature beyond the words expressed in the statute. . . . Once the intention of the Legislature is discovered, this intent prevails regardless of any conflicting rule of statutory construction. . . . "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." (Citations omitted.)

In *In re Schwein Estate*, 314 Mich. App. 51 (Mich. Ct. App. 2016), the Court amplified further on the principles set forth in the preceding case, stating, *id.* at 59:

> Appellate courts presume that the Legislature intended the meaning expressed by the plain, unambiguous language of a statute. . . . When interpreting statutes, <u>courts should give effect to every phrase, clause, and word</u>

> included. . . . "If the statutory language is certain and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." . . .
>
> (Emphasis added; citation omitted.)

Regarding the interpretation of the words in a statute, the Court in *People v. Flick*, 487 Mich. 1 (Mich. 2010), stated, *id.* at 11:

> The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. . . . An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a "term of art" with a unique legal meaning. . . . (Citations omitted.)

Federal courts apply equivalent rules of statutory construction. *See, e.g., Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 557 (1990); *Smith v. United States*, 360 U.S. 1, 9 (1959); *Thompson v. Greenwood*, 507 F.3d 416, 419 (6th Cir. 2007); *Mitchell v. Chapman*, 343 F.3d 811, 825 (6th Cir. 2003).

Applying these rules of statutory construction, the language of M.C.L. 257.602 was clear and unambiguous, and required that a human being be present directing traffic, not an inanimate object with its emergency lights flashing, as Williams contended. There was therefore no probable cause to charge Petitioner with a criminal misdemeanor that he had violated M.C.L. 257.602, yet nowhere in its decision did the Court of Appeals discuss this critical question.

Petitioner's SAC, moreover, did not contain mere "threadbare recitals of the elements of a cause of action." The SAC set forth specific, detailed statements of fact, supported by the record, from which the legal claims pled in the SAC could be plausibly inferred. Regarding Petitioner's claim in Count I, that King issued the second ticket as retaliation for Petitioner's having yelled at him, conduct protected by the 1st Amendment (*see Houston, Lewis, Gooding, supra*), the Court asserted that this claim was logically indefensible because King indicated during the traffic stop that he was going to issue the first ticket before Petitioner began yelling at him. 109 F.4th at 872.

But the 1st Amendment retaliation claim was not about the first ticket. It was about the second ticket, which the email exchange, quoted in ¶ 51 of the SAC, and incorporated thereafter in Count I, demonstrated unequivocally that King agreed, on Williams's urging, to issue the second ticket as part of a "plan" to punish Petitioner. The fact that the claim was based on the issuance of the second ticket, not the first ticket, was clearly and unambiguously pled in the SAC. Issuance of the second ticket occurred months after the traffic stop, months after Petitioner yelled at King during the traffic stop, as part of the "plan" to dismiss the first ticket and then retaliate against Petitioner by issuing the second ticket. The fact that the issuance of the first ticket could not have been motivated as retaliation against Petitioner's yelling at King, does not entail that the decision to issue the second ticket, and the decisions to prosecute Petitioner without probable cause based on the second ticket, both of which occurred months after Petitioner yelled at King, does not entail that the later decisions were not

motivated by Petitioner's earlier yelling at King. The Court disregarded the evidence of the email exchange, contained in the SAC. While the Court referred to the email exchange in its decision, 109 F.4th at 869, it omitted the portion of the email in which Williams stated that they could charge Petitioner with disorderly conduct based on his arguing with deputy King, for which there was no probable cause, in order to persuade him to plead guilty to violating M.C.L. 257.602, for which there also was no probable cause. This evidence supported the inference of causation required in a 1st Amendment retaliation claim, a reasonable inference which the Court was required to apply under the standard of review for a 12(b)(6) motion, a requirement the Court failed to comply with by erroneously focusing on the time line related to issuance of the first ticket.

The inference of causation was buttressed by Williams's assertion that he disputed Petitioner's assertion that he had not engaged in disorderly conduct by yelling at King, with no witnesses, other than the participants within earshot, and with no threat of physical violence, which, under Michigan law, M.C.L. 750.167, did not constitute disorderly conduct.[5] King's agreement that potentially issuing another ticket charging Petitioner with disorderly conduct, without probable cause, was a "great plan" in order to induce Petitioner to plead guilty to the failure to obey

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[5] Petitioner had not been a "window peeper"; did not engage in an illegal occupation or business; was not intoxicated in public; had not engaged in indecent or obscene conduct in a public place; was not a vagrant; had not been begging in a public place; had not been loitering; and had not been jostling or roughly crowding people in a public place.

a police officer directing traffic charge, without probable cause, further supported the retaliation claim. The Court's rejection of the causation element, given the evidence and the allegations in the SAC, constituted a repudiation of the standard of review for a 12(b)(6) motion.

The Court proceeded, 109 F.4th at 872, to reject the civil conspiracy claim pled in Count VIII of the SAC, on the basis that the Court had rejected Petitioner's 1st Amendment retaliation claim. But the Court's rejection of the retaliation claim was erroneous and was contrary to the standard of appellate review for a 12(b)(6) motion, and consequently the rejection of the civil conspiracy claim–which the email exchange unequivocally demonstrated that King and Williams had agreed on a "plan" intended to punish Petitioner by issuing the second ticket without probable cause-was likewise erroneous, and failed to comport with the standard of appellate review for a 12(b)(6) motion.

There are several instances in the decision where the Court failed to comply with the standard of *de novo* appellate review for a 12(b)(6) motion. At 109 F.4th at 872, the Court rejected the pendent state malicious prosecution claim against King (which the District Court had not declined to assert supplemental jurisdiction over), because Petitioner failed to offer evidence of malice by King, stating, "By Susselman's own account, King immediately informed him that he would be issuing him a ticket for driving around an emergency vehicle. Only later did Susselman yell at King." This analysis, again, focused on the wrong ticket-the first ticket. The malicious prosecution claim related to the issuance of the second ticket, after Williams dismissed the first ticket, and he and King

agreed to issue the second ticket, without probable cause. It is King's agreement to issue the second ticket, without probable cause, that demonstrated the presence of malice. *See Meehan v. Michigan Bell*, 174 Mich. App. 538, 366 (Mich. Ct. App. 1989). ("Where there is lack of probable cause, malice may be inferred.")

Rejecting Petitioner's intentional infliction of emotional distress claim, 109 F.4th at 873, the Court stated that a police officer does not commit extreme and outrageous conduct "by enforcing the law, even if it causes a plaintiff to experience emotional distress." But King was not "enforcing the law" by issuing the second ticket devoid of probable cause–he was violating the law. *Stobbe v. Parrinello*, 1998 WL 1988741 (Mich. Ct. App. Nov. 24, 1998), cited by the Court, was inapposite. The Michigan Court of Appeals held the defendant police officer did not violate the law, because he had probable cause to justify his arrest of the plaintiff. Here, there was no probable cause to issue the second ticket.

In sum, the Court of Appeals failed to adhere to the standard of review for a 12(b)(6) motion, and thereby violated Petitioner's right to due process under the Fourteenth Amendment. In so doing, the Court improperly dismissed Petitioner's First Amendment retaliation claim, his civil conspiracy claim, and his pendent malicious prosecution and intentional infliction of emotional distress state claims.

II. Criminally Prosecuting an Individual Without Probable Cause, Where the Individual Has Not Been Arrested, Violates the Individual's Right to Liberty and Substantive Due Process Under the Fourteenth Amendment.

In the plurality decision of *Albright v. Oliver*, 510 U.S. 266 (1994), Justices Stevens and Blackmun, dissenting, opined, *id.* at 296-97: "The initiation of a criminal prosecution, regardless of whether it prompts an arrest, immediately produces 'a wrenching disruption of ever day life.' . . . That impact . . . is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection." They also took issue with Justice Kennedy's assertion that such a claim was unnecessary if the state provided a post-deprivation malicious prosecution remedy, noting that such state remedies only redressed the deprivation of property, not the deprivation of liberty caused by a criminal prosecution without probable cause, in the absence of an arrest. Under these circumstances, they contended that only a cause of action under 42 U.S.C. § 1983 could adequately redress the deprivation of liberty, in the absence of a seizure.

In *Thompson v. Clark*, 142 S. Ct. 1332, 1337, note 2 (2022), the Court alluded, in *dicta*, to the proposition that a malicious prosecution claim, in the absence of an arrest, may lie under the 14th Amendment. While *Albright* held that where there has been an arrest, a malicious prosecution claim must be pled under the 4th Amendment, it did not hold that in the absence of an arrest, a malicious prosecution claim may not be pled under the 14th Amendment. *Albright*, therefore, does not require that this Court reject Petitioner's

substantive due process claim because he was not arrested. "Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense[.]'" (Citation omitted.) *See also*, *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("Since the time of our early explanation of due process, we have understood the core of the concept to be protection against arbitrary action[.]"). The Due Process Clause is intended to protect against officials "abusing governmental power, or employing it as an instrument of oppression . . . ." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986).

King and Williams did not act negligently, or grossly negligently, as did the prison officials in *Davidson*. They were not pressed, as was the police officer in *Lewis*, to make a split-second decision. In *Collins v. Harker Heights*, 563 U.S. 115 (1992), the Court rejected a substantive due process claim based on the employer's failure to provide adequate training and safety equipment for its employees. The employer's conduct was at worst grossly negligent, but not intentional, and therefore did not rise to the level of "shocking the conscience." Williams's conduct, by contrast, was a deliberate and intentional action to charge Petitioner with a criminal offense with a total absence of any evidence of probable cause. Williams and King acted intentionally and deliberatively to prosecute Petitioner for an alleged criminal misdemeanor without probable cause. They abused their official power in an oppressive and unconstitutional manner, violating substantive due process.

Regarding Petitioner's citation of *Thompson*, the Sixth Circuit stated, 109 F.4th at 871: "Though far from

a full-throated confirmation of a substantive due process right to be free from malicious prosecution, this dictum leaves open the possibility that such a right exists." Petitioner urges the Court to grant his petition for *certiorari* and recognize that the criminal prosecution of an individual without probable cause, where the individual has not been arrested, constitutes a violation of the individual's right to liberty and substantive due process under the Fourteenth Amendment.

The Sixth Circuit's citation of *Vasquez v. City of Hamtramck*, 757 F.2d 771 (6th Cir. 1985), for the proposition that a police officer's issuance of a ticket without probable cause does not "shock the conscience" was inapposite. In *Vasquez*, the police officer issued two phony illegal parking citations to the plaintiff for which the plaintiff was not criminally prosecuted without probable cause. Here, Petitioner was criminally prosecuted without probable cause, which, for many, would be conscience shocking, and would constitute the arbitrary and capricious exercise of governmental authority. Moreover, "Where government action does not deprive a plaintiff of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is rationally related to a legitimate state interest." *Valot v. Southeast Local School Dist. Board*, 107 F.3d 1220, 1228 (6th Cir. 1997). The issuance of the second ticket by King, and the criminal prosecution by Williams, were not rationally related to any legitimate state interest.

The Court rejected Petitioner's claim against Superior Township, Williams's employer, stating, 109 F.4th at 874: "[Susselman] has not alleged that . . .

King or Williams has final, unreviewable decision-making authority for Washtenaw County or Superior Township, respectively. Susselman insists that . . . Williams had final authority for prosecutorial decisions for Superior Township. But discretion to . . . pursue a prosecution is not the same as the authority to make final municipal policy." This assertion was erroneous, both as to the facts and as to the law. Petitioner alleged in Count IV of the SAC, ¶ 71 (R. 33, PageID.611): "Williams, as the prosecuting attorney for Superior Township, had final policy making authority for the Township, by virtue of which the Township is legally liable for his decision to continue to prosecute Plaintiff in the absence of any probable cause to do so. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986)." Williams acknowledged at his deposition that he had final policy-making authority for Superior Township as to whom to prosecute, and for what. (R. 57, Exhibit 6, PageID.1309) In *Pembaur*, the County Prosecutor, Leis, who authorized execution of the capias on Pembauer, had the same official status as Williams here.

The Court's assertion that Williams's policy-making authority did not constitute "the authority to make final municipal policy" is a distortion of the holdings in *Pembaur* and *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). A governmental entity can be held liable under 42 U.S.C. § 1983 for the unconstitutional actions of a final policy-making official, regardless the entity's name or governmental function, be it a school district (*see Jett v. Dallas Independent School District*, 491 U.S. 701 (1989); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Agema v. City of Allegan*, 826 F.3d 326 (6th Cir. 2016)), or a township (*see Cook County v. U.S.*

ex Rel, Chandler, 538 U.S. 119, 127, note 7 (2003); *Santiago v. Warminster Township*, 629 F.3d 121 (3d Cir. 2010). Superior Township qualified as a local governmental unit, regardless that it may not have qualified as a municipality.

Petitioner's claim that his criminal prosecution without probable cause violated his right to substantive due process, notwithstanding that he was not seized, should be recognized by this Court. Such conduct by government officials causes, "a wrenching disruption of ever day life.' . . . That impact . . . is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection." *Albright*, *supra*, 610 U.S. at 296.

CONCLUSION

Claiming that Petitioner has turned the issuance of "a traffic ticket" (not one ticket, but two), into a "federal case" trivializes what this case is about. It is not about the mere wrongful issuance of a traffic ticket. It is about the unlawful, unconstitutional abuse of power by two government officials, conspiring against a citizen to charge him with a criminal offense without probable cause. As Justice Brandeis asserted in his dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Justice Brandeis's

view was ultimately vindicated in *Katz v. United States*, 389 U.S. 346 (1967).

Petitioner was entitled to protections against the unlawful, unconstitutional abuse of power by government officials, a right enjoyed by every American citizen, be s/he a homeless person on the streets, or a former President of the United States–the right not to be criminally prosecuted without probable cause, with or without being arrested, whether the criminal prosecution be for a misdemeanor or a felony, a prosecution which jeopardized Petitioner's license to practice law, which dragged on, disrupting his life, for months, which adversely affected his ability to obtain professional liability insurance and its premium, and which caused him extreme emotional distress. If we are to be a nation of laws, and not merely of men or women, as is so often stated, then government officials must abide by the law like everyone else, and should be called to account when they fail, and in this case intentionally fail, to do so. For those who may consider this outcome "rough justice," it is rough justice which has crossed the line into injustice. *United States v. Halper*, 490 U.S. 435, 446 (1989).

Petitioner requests that his petition for *certiorari* be granted, and that this Honorable Court hold, after briefing and oral argument, that Petitioner's right to due process was violated by the courts' disregard of the standard of review for a 12(b)(6) motion; that he pled a cognizable claim of unconstitutional retaliation for his exercising his First Amendment right to freedom of speech; and that the criminal prosecution of a citizen without probable cause, regardless whether the individual is arrested, violates the citizen's right to

liberty and to substantive due process under the Fourteenth Amendment.

Respectfully submitted,

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