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Attorney General Dana Nessel
Mr. John Buck, investigator
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3030 W. Grand Blvd., Suite 10-200
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VIA FAX: (517) 335-7644
VIA EMAIL buckj4@michigan.gov

Re: Rep. Cynthia A. Johnson, 5th District

Dear Attorney General Dana Nessel and Mr. Buck,

Thank you for returning my call. Today, sitting Rep. Cynthia A. Johnson said: "So this is just a warning to you Trumpers. Be careful. Walk lightly. We ain't playing with you. Enough of the shenanigans. Enough is enough. And for those of you that are soldiers, you know how to do it. Do it right. . . . Make them pay."

<https://www.ptnewsnetwork.com/mi-state-rep-cynthia-a-johnson-threatens-trump-supporters-telling-her-soldiers-to-make-them-pay/>

<https://www.thegatewaypundit.com/2020/12/make-pay-michigan-democrat-cynthia-johnson-issues-threat-calls-soldiers-take-care-trumpers-video/>

When she sent the video, Rep. Johnson sat on the Michigan House Oversight Committee that is presently dealing with the fraud committed in the 2020 election. I now understand that she has been removed from the committee. She is angry that fraud has been uncovered. She is often very vocal in her opposition to the fraud investigation. Indeed, she despises people like me. I am an attorney in Kalamazoo/Portage, Michigan. I filed the lawsuit in Antrim County regarding election fraud. *William Bailey v Antrim County*, Antrim County Circuit Court, Case No. 2020-009238-CZ. This case has now made national news.

To combat actions like this lawsuit, Rep. Johnson wants her soldiers to make people like me pay. Since her video, I have seen increased traffic outside my house. I am putting your office on notice of this increased traffic, people "slow rolling" or even stopping. This is clearly a result of Rep. Johnson's call-to-action. I expect your office to protect me and my family after

Rep. Johnson's call for harm. As stated, I called the Michigan State Police today and left a message for Col. Joseph Gasper after his officers refused to take my complaint.

Rep. Johnson's conduct is a crime. See MCL 750.505. Common law misconduct in office is defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Perkins*, 468 Mich 448, 456 (2003), quoting *People v Coutu*, 459 Mich 348, 354 (1999). MCL 750.505 is the statutory gateway to a criminal penalty for a common law crime, and provides, "[a]ny person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than \$10,000.00, or both in the discretion of the court."

The basic elements of misconduct in office are as follows: [1] the person must be a public officer, [2] the conduct must be in the exercise of the duties of the office or done under the color of the office, [3] the acts were malfeasance or misfeasance, and [4] the acts must be corrupt behavior. *People v Carlin (On Remand)*, 239 Mich App 49, 64 (1999).

[1] Rep. Johnson holds a public office. "A public officer [i]s distinguished from an employee 'in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to given an official bond.'" *Coutu*, 459 Mich at 354, quoting *People v Freedland*, 308 Mich 449, 458 (1944). Further, the Constitution and statute create this public office. See Mich Const 1963, art 4, sec 3 ("The house of representatives shall consist of 110 members elected for two-year terms . . .").

[2] Rep. Johnson was acting under color of law. She sent a video through Facebook asking her "soldiers" to "make them pay." She wants people like me "to pay." Now, I need to "walk lightly." She "ain't playing." She told her soldiers to "do it right." She sent this video and pronounced her calls for action and violence under color of her office. She knew her constituents and soldiers would watch the video. She knew they will take action. She wants people harmed. A Representative's powers conferred and duties discharged are defined. See Mich Const 1963, art 4; MCL Chap 4. The Representative's duties are performed independently and without control of a superior power other than the law. *Id.* And, certainly, the office has permanency and continuity. *Id.* If you have any doubts, this is a question for the jury. See *People v Neal*, 201 Mich App 650, 655 (1993); *People v Laws*, 218 Mich App 447, 452 (1996). Further, Rep. Johnson does not have immunity for her conduct. See e.g. *United States v Brewster*, 408 US 501, 512 (1972) ("preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress" are not protected.) "Because Michigan's Speech or Debate Clause is substantially similar to the Speech or Debate Clause found in the Constitution of the United States, it should be similarly construed." *Cotton v Banks*, 310 Mich App 104, 112 (2015). The same holds true for her video.

[3] Rep. Johnson committed malfeasance (an act that is itself wrongful) or misfeasance (a lawful act in a wrongful manner). See *People v Perkins*, 468 Mich 448, 456 (2003). Rep. Johnson sent her "call-to-action" video to constituents, others in the House, the general public, and the media. Communications, including videos, with these groups easily fall within a Representative's duties. And wrongfulness is the standard. In *People v Hardick*, 258 Mich

App 238 (2003), for example, a police officer took a sergeant's promotional test after he had reviewed advanced copies of the test. The Court of Appeals affirmed the trial court's bench ruling that he committed misconduct in office after "he made deliberate and knowing use of [an] advance copy of [a] test to assist him in taking the sergeant's examination and thereby improperly obtain[ed] a promotion." *Id.* at 247. The Court of Appeals held that the defendant violated the duties of his office by possessing test material in advance of the exam, by failing to report that he had such access, and by failing to avoid conduct unbecoming an officer. *Id.* There is no crime for cheating on a test, but it is still "wrongful" and supported a conviction for misconduct in office. So too here. Today I contacted the Michigan State Police. The officers I talked to refused to take my complaint. Regardless, calling on her "soldiers" to make people like myself pay, is "wrongful." It is misconduct in office. Indeed, as a Representative, Ms. Johnson has a fiduciary relationship, including a duty of honesty and integrity, to her constituents as well as her colleagues. *State of Nebraska v Douglas*, 217 Neb 199 (1984) (Hastings, J., dissenting) (collecting cases) ("Throughout the United States, public officers have been characterized as fiduciaries and trustees charged with honesty and fidelity in administration of their office and execution of their duties."); *Jersey City v Hague*, 18 NJ 584, 590; 115 A2d 8 (1955) ("As fiduciaries and trustees of the public weal [elected representatives] are under an inescapable obligation to serve the public with the highest fidelity . . . [A]nd above all to display good faith, honesty and integrity.") (emphasis added). As the New Jersey Supreme Court has recognized, "[t]hese obligations are *not mere theoretical concepts or idealistic abstractions of no practical force and effect*; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office." *Hague*, 18 NJ at 591 (emphasis added). Here, Rep. Johnson's attempt to incite her soldiers to make "Trumpers" pay breached her fiduciary duty of integrity.

[4] Rep. Johnson acted with corrupt intent. The element of a corrupt intent is related to the malfeasance element. The evidence need only show "corrupt intent," or "a sense of depravity, perversion, or taint." *Perkins*, 468 Mich at 456 (internal quotation marks omitted). The Court of Appeals expanded on this definition in *People v Coutu (On Remand)*, 235 Mich App 695, 706-707 (1999) (some internal quotations and citations omitted):

Pursuant to the definitions, a corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer. See also *Perkins & Boyce, supra* at 542 ("It is corrupt for an officer purposely to violate the duties of his office.") (emphasis added). [*Id.* at 707.]

See also *Hardrick*, 258 Mich App at 247 (the definition of corrupt intent is quite broad: "It is corrupt for an officer *purposely* to violate the duties of his office.") (emphasis added; internal quotation marks omitted.) As just discussed, Rep. Johnson's conduct here was intentional or purposeful misbehavior or wrongful conduct pertaining to the duties of her office. She crafted the Facebook video to be sent to her constituents, her colleagues, the public, and the media. She asked her "soldiers" to "do it right . . . make them pay."

I am curious if Dana Nessel will prosecute this crime, or let Rep. Johnson off because she is a Democrat. Yesterday, Dana Nessel was on CNN complaining about the protests in front of Secretary of State Jocelyn Benson's home. Today, I have seen no reaction from Dana Nessel. I'm calling out her partisanship in advance. She is only outraged when it suits her political and subjective morality. Prove me wrong. I look forward to hearing from you.

Very Truly Yours,

DePERNO LAW OFFICE, PLLC



Matthew S. DePerno