**IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS**
**STATE OF MISSOURI**

STATE OF MISSOURI, *ex informatione*
ANDREW BAILEY, Attorney General,
Relator,

vs.

KIMBERLY M. GARDNER,
Respondent.

Cause No. 2322-CC00383

**MOTION TO DISMISS PETITION AND**
**SUGGESTIONS IN SUPPORT**

Respondent Kimberly M. Gardner moves the Court under Missouri Supreme Court Rules 55.27(a)(6) and 98.06 to dismiss the Attorney General Andrew Bailey's Petition in *Quo Warranto* for failure to state a claim on which relief can be granted. Even taking the Petition's allegations as true and granting them their broadest intendment, as is required at this stage, Mr. Bailey's Petition nonetheless fails to state a lawful claim for Ms. Gardner's ouster under § 106.220, R.S.Mo. In support of this Motion to Dismiss, Ms. Gardner suggests:

**Summary**

- The ouster of a duly elected official is a drastic remedy, so § 106.220, R.S.Mo., must be strictly construed. The statute provides for removal only for willful neglect, failure, or refusal of an official's duties. To state a claim, then, a *quo warranto* petition must allege the official engaged in a corrupt intentional act of misconduct or a corrupt intentional failure to act in the performance of official duties, and a mere failure of such a duty is insufficient. In short, Mr.

Bailey must allege a willful and intentional failure, not negligence. (*Infra* at 7-9.)

- Section 106.220 has only been applied to oust a prosecutor (or any other official) when the prosecutor has engaged in intentional corrupt acts in derogation of her official duties, and ouster of prosecutors under this statute has been uniformly denied for anything less. (*Infra* at 9-19.)
- Taking Mr. Bailey's allegations in his Petition as true and giving them their broadest reading, his Petition fails to state facts that show Kimberly Gardner has engaged in intentional corrupt acts in derogation of her official duties. Instead, the Petition alleges mere negligence or mistakes in the administration of her office without any allegation of corrupt intent or bad faith. As a result, it fails to state a claim for ouster under § 106.220. (*Infra* at 20-27.)

## Argument

### A. Introduction

Mr. Bailey seeks a writ of *quo warranto* to oust Kimberly Gardner, the twice-elected Circuit Attorney of the City of St. Louis. He argues she has forfeited her office under § 106.220, R.S.Mo., a statute under which a public official who willfully neglects official duties, or who knowingly or willfully fails or refuses to do or perform official acts or duties, forfeits her office.

Mr. Bailey's Petition fails to meet the extremely high bar to state a lawful claim for ouster under § 106.220. Instead, his Petition is a gross power grab, an affront to the liberties of all Missourians. The Court should dismiss it.

In sum, Mr. Bailey alleges several selected instances of what he says are failings of Ms. Gardner's office, including that, in a particular case, her office failed to seek bond; that line attorneys in her office failed to appear in court or keep victims' families informed about proceedings; that her office was inadequately staffed; and that cases submitted by the police await her office's review. (In her Answer filed along with this Motion, Ms. Gardner disputes all of these allegations.)

Citing almost no authority about this in his suggestions in support of his Petition, Mr. Bailey then concludes these allegations constitute Ms. Gardner's willful neglect of her official duties or knowing or willful failure or refusal to do or perform official acts or duties, reasoning she therefore has forfeited her office under § 106.220. Though he was required by statute and caselaw to plead facts asserting intentional and willful conduct by Ms. Gardner, Mr. Bailey's Petition – when it asserts facts, as opposed to conclusions – alleges misjudgments by line attorneys in the conduct of individual cases. Even as to the impugning of those line attorneys, the Petition alleges – at most – negligence. As to Ms. Gardner, the Petition fails to do anything other than try to convert the alleged negligence of others into willful conduct by Ms. Gardner. This flawed alchemy does not suffice.

Mr. Bailey's application of § 106.220 to his allegations is in error, and his failure to cite almost any authority concerning § 106.220 is telling. He does not

accuse Ms. Gardner of any actual intentional acts of fraud or corruption, just bare violations, delays, and unfortunate failures by subordinates in her office. But § 106.220 is not and never has been a mechanism for Mr. Bailey to obtain the ouster of a public official for supposed negligent management of an office or for her allegedly performing her duties poorly.

Rather, ouster under § 106.220 is "a drastic remedy," *State ex inf. Connett v. Madget*, 297 S.W.2d 416, 428 (Mo. banc 1956), which always has been limited to the grossest cases of intentional corruption. This is what the words "willful and fraudulent violation" and "knowing and willful refusal" mean. "Willful or fraudulent violation" in § 106.220 means "malfeasance, that is, misconduct in the performance of official duties." *State ex inf. Fuchs v. Foote*, 903 S.W.2d 535, 538 (Mo. banc 1995). And "[w]illful neglect ... is something more than mere mistake or the thoughtless failure to act." *Id.* It is an "intentional[ ] fail[ure] to act, contrary to a known duty." *Id.* at 539. "The mere violation of an official duty … will not support a judgment of ouster." *Id.* at 538.

Only two prosecutors ever have been ousted under these provisions, both more than 80 years ago and both for Pendergast-era naked corruption in refusing even to investigate whole classes of cases with which they had personal involvement. *See State ex inf. McKittrick v. Graves*, 144 S.W.2d 91 (Mo. banc 1940) (intentional failure and refusal by Jackson County prosecutor even to investigate open and notorious gambling, prostitution, and illegal liquor facilities, or investigate notoriously corrupt 1936 election, all of which he was well aware); *State*

*ex inf. McKittrick v. Wymore*, 132 S.W.2d 979 (Mo. banc 1939)(Cole County prosecutor had understanding with operators of open and notorious illegal gambling facilities and so intentionally refused to make even casual investigation into them).

Mr. Bailey's Petition fails to come anywhere close to this high bar. Even taking his allegations as true and giving them their broadest intendment, as this Court must at this stage, his Petition fails to state a claim that Ms. Gardner committed intentional malfeasance or willful misconduct in office or intentionally failed to act, per § 106.220. Instead, Mr. Bailey alleges negligence: mere violations of duty, mistakes, or thoughtless failures by others. The law of Missouri is plain: this fails to state a lawful claim for ouster under § 106.220. Therefore, Mr. Bailey's Petition must be dismissed.

Were the law otherwise, § 106.220 would be a political tool for an Attorney General to remove a politically opposite prosecutor whenever he can point to some failing in the prosecutor's office with which he disagrees. But every office will make some mistakes. Allowing this Petition to proceed would allow any Attorney General – including an unelected one like the present one – to thwart the will of the people of a locality who have elected the prosecutor of their choice, as the people of St. Louis *twice* have Ms. Gardner, and say, "I know better, so *she's fired*."

That is not and never has been the law of Missouri. Rather, § 106.220 "defining the grounds for removal is given a strict construction," *Madget*, 297 S.W.2d at 416, to respect the democratic process and protect the people's elected

prosecutors from rogue Attorneys General. Mr. Bailey's allegations, taken as true, fail that strict construction.

The Court should dismiss Mr. Bailey's Petition with prejudice.

**B. Standard for motion to dismiss for failure to state a claim**

Rule 55.27(a)(6) allows a responding party to raise by motion to dismiss a defense of "[f]ailure to state a claim upon which relief can be granted[.]" The motion must be made "[w]ithin the time allowed for responding to the opposing party's pleading." *Id.* at Rule 55.27(a)(A).

Under Rule 98.01, generally "proceedings in quo warranto shall be governed by and conform to the rules of civil procedure …." Rule 98.06 provides that a respondent's answer to a petition for writ of *quo warranto* "may include or be accompanied by one or more motions." So, along with an answer, the respondent may move to dismiss the petition. *See, e.g.*, *State ex rel. Kelley Props., Inc. v. City of Town & Country*, 797 S.W.2d 519, 520 (Mo. App. 1990) (affirming grant of motion to dismiss petition for writ of *quo warranto* on statute of limitations defense). Therefore, this motion is timely and proper.

> A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

*State ex rel. Henley v. Bickel,* 285 S.W.3d 327, 329 (Mo. banc 2009).

### C. To state a claim for ouster of an official under § 106.220, R.S.Mo., for willful neglect, failure, or refusal of her official duties, a drastic remedy to be strictly construed, a *quo warranto* petition must allege the official engaged in a corrupt intentional act of misconduct or a corrupt intentional failure to act in the performance of official duties, and a mere violation of such a duty is insufficient.

The only legal basis Mr. Bailey cites for seeking Ms. Gardner's ouster is § 106.220, R.S.Mo. (Petition 4, 6, 12, 15, 18). This statute provides:

> Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner provided in sections 106.230 to 106.290.

*Id.* What is today § 106.220 has been in force for nearly 150 years, virtually unchanged. *See* L.1877, p. 346, § 1.

In his Petition, when block-quoting § 106.220, Mr. Bailey emphasizes in italics the words "neglect of any official duty" (though not italicizing its modifiers "willful or fraudulent") and "knowingly or willfully fail or refuse to do or perform any official act or duty" (Petition 4). Mr. Bailey then accuses Ms. Gardner of "'willful … violation or neglect' of her official duties and" having "knowingly and willfully failed to 'perform her duties which by law it is her duty to perform'" (Petition 6).

Although Mr. Bailey cites and quotes this language, his Petition and its accompanying Suggestions cite hardly any authority actually construing or applying

these provisions. This is because, as the Court will see below, the caselaw does not support removal based on the Petition's allegations, even taking those allegations as true.

Forfeitures of office under § 106.220 "are not favored …" *Madget*, 297 S.W.2d at 428. Rather, "[t]he remedy by the removal of a public officer has been said to be a drastic one, and the statutory provision defining the grounds for removal is given a strict construction.'" *Id.* (quoting 43 Am. Jur. Public Officers, § 34, p. 39). *See also State ex inf. Stephens v. Fletchall*, 412 S.W.2d 423, 428 (Mo. banc 1967) ("Since forfeitures are not favored, and the ouster of a public officer is a drastic remedy, the statutory provisions for removal are strictly construed");

"Under [§ 106.220], '[t]he mere violation of an official duty ... will not support a judgment of ouster.'" *State ex rel. Nixon v. Russell*, 45 S.W.3d 487, 493 (Mo. App. 2001) (Breckenridge, J.) (quoting *State ex inf. Fuchs v. Foote*, 903 S.W.2d 535, 539 (Mo. banc 1995), *abrogated on other grounds by State v. Olvera*, 969 S.W.2d 715 (Mo. banc 1998)). Rather, "[t]he statute requires a 'willful or fraudulent violation' or 'willful neglect' of the official duty at issue.'" *Id.* (quoting *Foote*, 903 S.W.2d at 539). As "the term 'willful or fraudulent violation' is separately stated," it "indicates that it is something different than the term 'willful neglect.'" *Foote*, 903 S.W.2d at 539.

"'Willful or fraudulent violation' has been defined by the Supreme Court as 'malfeasance, that is, misconduct in the performance of official duties.'" *Russell*, 45 S.W.3d at 493 (quoting *Foote*, 903 S.W.2d at 539). In *Foote*, the Supreme Court gave specific examples of cases showing what that means, both of which were corrupt,

intentional acts by law enforcement officials in derogation of their basic public trust:

> *See e.g. State ex inf. Ashcroft v. Riley*, 590 S.W.2d 903, 906 (Mo. banc 1979) (sheriff who misrepresented costs of food preparation for inmates to county court and pocketed the difference held guilty of *willful violation* of official duty); *State ex inf. Eagleton v. Elliott*, 380 S.W.2d 929, 939 (Mo. banc 1964) (sheriff who placed or had placed stolen billfold in suspect's car for purposes of wrongfully implicating suspect held guilty of *willful violation* of official duty).

903 S.W.2d at 539 (emphasis in the original). In *Fletchall*, the Supreme Court described what constitutes such acts as "willfull [*sic*] and deliberate acts of oppression and coercion designed to benefit the respondents personally and financially …." 412 S.W.2d at 428.

At the same time, "[w]illful neglect," the other ground for forfeiture under § 106.220, "is something more than mere mistake or the thoughtless failure to act." *Russell*, 45 S.W.3d at 493 (quoting *Foote*, 903 S.W.2d at 539). "Willful neglect," then, must be more than mere negligence: it is an "intentional[ ] fail[ure] to act, contrary to a known duty." *Id.* (quoting *Foote*, 903 S.W.2d at 539).

### D. Section 106.220 only ever has been applied to oust a prosecutor when the prosecutor has engaged in intentional corrupt acts in derogation of her official duties, and ouster of prosecutors under this statute has been uniformly denied for anything less.

Since its promulgation in 1877, Ms. Gardner and counsel have identified only six reported decisions in which § 106.220 or its prior codification was invoked to seek a prosecutor's ouster. Those cases are *Simmons v. McCulloch*, 501 S.W.3d 14 (Mo. App. 2016); *State ex rel. Reed v. Reardon*, 41 S.W.3d 470 (Mo. banc 2001); *State*

*ex inf. Dalton v. Moody*, 325 S.W.2d 21 (Mo. banc 1959); *State ex inf. McKittrick v. Wallach*, 182 S.W.2d 313 (Mo. banc 1944); *State ex inf. McKittrick v. Graves*, 144 S.W.2d 91 (Mo. banc 1940); and *State ex inf. McKittrick v. Wymore*, 132 S.W.2d 979 (Mo. banc 1939).

In only two of these decisions, *Graves* and *Wymore*, was the prosecutor ultimately ousted.[1] In both, this was because the prosecutor plainly had engaged in nakedly corrupt intentional conduct in failing to even investigate entire classes of open and notorious offenses with which he had personal involvement.

In *Graves*, the Attorney General sought to oust the Jackson County prosecutor. 144 S.W.2d at 93. Throughout the prosecutor's term,

> the operation of public gambling houses was widespread throughout Kansas City. These establishments, some of them operated in connection with night clubs and restaurants, were open day and night. No special introduction or password was necessary to gain admittance and anyone who desired was permitted to participate in the gambling. There was similar evidence to the effect that in a large number of establishments in the downtown metropolitan area of Kansas City and elsewhere the laws in regard to the sale of intoxicating liquor were openly and flagrantly violated, and that houses of prostitution were maintained whose inmates often frequented the streets openly soliciting men who were passing by. The

[1] In both cases, the relator was Attorney General Roy McKittrick, well-known for rooting out corruption during the fall of the "Pendergast Machine," under which for decades Kansas City's "Boss Tom" Pendergast had ruled much of Missouri like a dictatorship. *See Pollard v. Bd. of Police Comm'rs*, 665 S.W.2d 333, 335 (Mo. banc 1984) (giving historical overview of Pendergast's corrupting effect on Missouri law enforcement); *see also United States v. Pendergast*, 28 F. Supp. 601 (W.D. Mo. 1939). Attorney General McKittrick brought ouster proceedings against other Pendergast-affiliated law enforcement, too. *See, e.g.*, *Williams*, 144 S.W.2d at 98. The prosecutor ousted in *Graves*, Waller Graves, had close ties to Pendergast. *See* "May We Present W. W. (Tom) Graves," *Future: The Newsweekly for Today* (May 31, 1935), available online at https://kchistory.org/book/future-newsweekly-today-19.

> evidence as to the existence of these conditions came from eye witnesses.

*Id.* at 94.

The prosecutor clearly had knowledge of all of this. *Id.* at 94-95. The press had covered these issues extensively, including "a series of over fifty newspaper articles appearing in the Metropolitan Press of Kansas City concerning the widespread character of gambling and similar law violation in that community," including "list[ing] specific places where violations were occurring, and others were illustrated by the photographs of the places involved," and the prosecutor "admitted that he subscribed to two of the newspapers during the entire period." *Id.* at 95. Nonetheless, the prosecutor "made no bona fide effort to investigate these conditions or to institute proceedings to combat the evils described. His attitude seems to have been one of waiting for some other officer or private citizen to file a formal complaint upon which he could base criminal informations." *Id.*

At the same time, the prosecutor also knowingly and intentionally failed "to prosecute persons alleged to have been guilty of fraud in connection with the general election in 1936." *Id.* at 96. A federal grand jury in Kansas City had "returned a large number of indictments in which over two hundred individuals were charged with fraudulent and otherwise illegal conduct in connection with the 1936 election," many of whom pleaded guilty, and many of those guilty pleas showed evidence of corruption in the election for state offices, too, which was within the prosecutor's purview. *Id.* These facts, too, "were well known to the [prosecutor and] certainly required an investigation on his behalf. Yet, by his own admission,

respondent made no such investigation. He did not even choose to discuss the matter with the federal prosecutor." *Id.*

Importantly for the purposes of this motion, these were facts that Mr. Graves, the prosecutor, was personally aware of, before he, himself, personally decided not to take action to investigate. These were intentional acts of the person holding the office, rather than actions of subordinates within the office who are supervised, and often not even directly supervised, by the officeholder.

Accordingly, the prosecutor in *Graves* had knowingly and willfully neglected his public duty of even investigating open and notorious offenses of which he was well aware, forfeiting his office under § 106.220. *Id.* at 97-98.

*Wymore* is similar, though with even more evidence of direct corruption by the prosecutor at issue. In the 29 pages of Mr. Bailey's Suggestions in support of his Petition in this case, practically the only authority he cites is *Wymore*. Those citations do not mention the standards the Supreme Court applied or the facts of that case. This is obviously because the Supreme Court's analysis does not support removal here. In *Wymore* the Attorney General sought to oust the Cole County prosecutor. 132 S.W.2d at 981.

Throughout his term

> approximately two hundred and fifty machines, consisting of slot machines, punch boards, pin ball machines, marble machines, race horse machines, cigarette machines, dice machines and other illegal devices were operated in approximately one hundred and thirty places in Cole County. The machines received from one cent to twenty-five cent coins. They were in hotel lobbies, public eating places, taverns, drug stores, cafes, gasoline filling stations and other places, and, with few

> exceptions, were in plain view of the public. In a few places the machines were in the rear part of the business room, divided by an open partition.
>
> . . . . Occasionally, in response to alarm given, they would disappear until assured of safety. One man controlled about eighty per cent of the machines. Another man controlled about fifteen per cent of the machines. The balance were controlled by the owner of the business. Approximately ninety per cent of the machines were in the city. In other words, the city was plastered with machines. From time to time the man in control would call, remove the money from the machines and divide equally between himself and the owner of the business. There may have been, and no doubt were, other machines in the city and county.

*Id.* at 983.

As with the gambling houses, speakeasies, and brothels in *Graves*, the gambling machines in *Wymore*, too, were notorious, routinely covered in the press, and the prosecutor personally knew of them. *Id.* at 983-85. The Supreme Court observed it was likely the operators of the illegal machines "had an understanding with the prosecuting attorney and other law-enforcement officers" under which they would not be prosecuted, so he "had actual knowledge of the operation of the machines, and he is guilty of official misconduct." *Id.* at 985. This was not a question of the prosecutor's discretion. Instead, by not engaging in any investigation of the illegal machines at all, he "never reached the point where he even pretended to exercise discretion." *Id.* at 986-87.

Those two decisions are the only reported times in the 150 years of § 106.220 where a prosecutor was removed from office. Both ousters were based on knowing, willful, and intentional decisions of prosecutors to not investigate and prosecute notorious, widespread public crimes as the result of naked corruption – and both

times with a suggestion of the prosecutor's personal involvement in the criminal enterprises. That makes sense because these were clear instances of "misconduct in the performance of official duties" or "intentional failure to act, contrary to a known duty." *Foote*, 903 S.W.2d at 539. They were "willfull [*sic*] and deliberate acts of oppression and coercion designed to benefit the respondents personally and financially …." *Fletchall*, 412 S.W.2d at 428.[2]

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[2] The only reported ousters of public officials *other than* prosecutors under what today is § 106.220 have also been for equally personally corrupt, intentional behavior. *See:*

- *Russell*, 145 S.W.3d at 487 (sheriff intentionally and personally failed to keep inmate charged to his care confined in jail);
- *Foote*, 903 S.W.2d at 539-40 (sheriff intentionally detained prisoners unlawfully, fabricated documents for use in civil rights case, and misrepresented the number of police vehicles purchased for his personal gain);
- *Riley*, 590 S.W.2d at 906 (sheriff intentionally misrepresented costs of food preparation for inmates to county court and pocketed the difference);
- *Elliott*, 380 S.W.2d at 939 (sheriff intentionally placed or had placed stolen billfold in suspect's car for purposes of wrongfully implicating suspect);
- *State ex rel. Danforth v. Orton*, 465 S.W.2d 618, 621-26 (Mo. banc 1971) (sheriff committed misdemeanor abuse of authority by intentionally threatening alcohol control agents with incarceration if they did not leave county and radio station manager if he made report critical of sheriff, and personally and intentionally failed even to investigate open and notorious liquor and gambling law violations of which he knew);
- *Madget*, 297 S.W.2d at 429-31 (county judges intentionally required other parties' bond money to be given to agent for county collector and coerced county employees to pay money into a fund to pay their counsel to defend against *quo warranto* proceedings);

Conversely, in the four other cases in which a prosecutor's ouster was sought under § 106.220, the Court of Appeals or the Supreme Court held that the conduct did not rise to the necessary level of intentional, corrupt personal conduct that constituted willful neglect of the prosecutor's official duties or a knowing or willful failure or refusal to do or perform official acts or duties. Ouster was thus denied in each case.

In *Wallach*, the Attorney General sought to oust the St. Louis County Prosecutor. 182 S.W.2d at 314-15. He alleged the prosecutor had forfeited his office under what is now § 106.220 by failing to prosecute 95 liquor-law violations, as well as gambling and lottery violations, and dismissing various criminal cases. *Id.* The Supreme Court disagreed and dismissed the Attorney General's petition, holding there was no showing "remotely tending to establish that respondent was corrupt or lacking in integrity as a public official," any cases that the prosecutor dismissed were after investigation, his decisions were "free from any corrupt motive," and there was no showing that his "discretion was at any time arbitrarily exercised, or that his discretion was corruptly exercised, or exercised in bad faith." *Id.* at 323. "[T]he fact that [the Attorney General] or some one else, in a particular case, 'might have reached a different conclusion' as to commencing or continuing prosecution

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- *State ex inf. Dalton v. Mosley*, 286 S.W.2d 721, 731-32 (Mo. banc 1956) (sheriff intentionally failed even to investigate open and notorious illegal gambling and lotteries about which he admitted he knew); and
- *Williams*, 144 S.W.2d at 105 (sheriff intentionally failed even to investigate open and notorious violations of liquor, vice, and gaming laws, the violation of which he admitted he personally knew about).

falls far short of proving the allegations of the information." *Id.* at 318 (citation omitted).

In rejecting the Attorney General's allegations as insufficient in *Wallach*, the Supreme Court commented at length about the great discretion prosecutors have to act under the powers of their office in good faith, and how a disagreement about how to exercise that discretion is not an appropriate basis to remove an elected prosecutor from office. It includes the right to choose a course of action or non-action, chosen not willfully or in bad faith, but chosen with regard to what is right under the circumstances. Discretion denotes the absence of a hard and fast rule or a mandatory procedure regardless of varying circumstances. That discretion may, in good faith (but not arbitrarily), be exercised with respect to when, how and against whom to initiate criminal proceedings. *Id.* at 318-19 (internal citations omitted; emphasis added).

The Attorney General in *Wallach* tried to analogize the case to *Wymore* and *Graves* (and *Williams*, in which a sheriff was ousted for similar reasons as the prosecutor in *Graves*), but the Supreme Court found there was no comparison. *Id.* at 319. Unlike in those cases, there was no evidence of any intentional, corrupt, bad faith behavior by the prosecutor in *Wallach*:

> [T]he facts in those cases are far different from the situation in this case. In the Wymore case, there was a complete failure of the prosecuting attorney to ever commence any prosecution for violation of gambling laws, even after having full information about conditions. This court found that 'he made no effort whatsoever to perform his duties as prosecuting attorney'; and that he 'never reached the point where he even pretended to exercise discretion', but instead was 'under the influence of evil

> men.' Obviously that is not the situation here. Both the Graves and Williams cases involved continuous long existing conditions of flagrant, open and notorious gambling, prostitution and illegal sale of intoxicating liquor frequently pointed out by the press. The officers involved made no efforts to enforce these laws (and there were also many admitted violations of election laws in the Graves case) and claimed that they should be excused for not doing so because the Kansas City police did not attempt any enforcement. That likewise is clearly not the situation here.

*Id.* at 319.

In *Simmons*, a group of citizens appealed a trial court's dismissal of their request under § 106.240, R.S.Mo., to appoint a special prosecutor to seek the ouster under § 106.220 of the St. Louis County Prosecutor for his failure to charge Officer Darren Wilson for the killing of Michael Brown in Ferguson, in which a grand jury had returned no true bill and the prosecutor then opted not to charge Officer Wilson. 501 S.W.3d at 16. The group of citizens had alleged the prosecutor had conducted the grand jury in an arbitrary manner and in bad faith, warranting his ouster under § 106.220. *Id.*

Citing and then echoing *Wallach*, the Court of Appeals held the citizens failed to state a claim under § 106.220, as their allegations did not meet the elements required to find the prosecutor either willfully or fraudulently violated or neglected an official duty, or knowingly or willfully failed or refused to perform an official duty. *Id.* at 18-19."In order to have 'willfully neglected' an official duty, [the prosecutor] would have had to intentionally fail to act, contrary to a known duty." *Id.* at 19. "None of [the citizens'] allegations against [the prosecutor] r[o]se to the level of 'knowingly or willfully' failing to perform an official duty." *Id.* at 20. So, as "[t]he facts alleged by [the citizens] do not rise to the level to meet the elements

required for a finding that [the prosecutor] either willfully or fraudulently violated or neglected an official duty, nor that he knowingly or willfully failed or refused to perform an official duty," dismissal of their request for a special prosecutor was proper. *Id.* It affirmed a motion to dismiss for failure to state a claim under Rule 55.27(a)(6). *Id.* at 16.

Finally,[3] in *Moody*, the Attorney General sought to oust a prosecutor who had *nolle prossed* several indictments despite having "full and complete knowledge of the incriminating testimony given by the State's witnesses before the Grand Jury which returned the indictment in such cases and which testimony was known by [the prosecutor] to have been given by witnesses who were willing to voluntarily incriminate themselves before a Grand Jury," arguing he had willfully neglected his duties as a result. 325 S.W.2d at 22, 23 n.1. The Supreme Court disagreed. *Id.* at 32. The prosecutor's decision may have been "unwise and in poor taste" and showed "inexperience" and "a marked want of cooperation with the Attorney General's office" as was expected of him. *Id.* But that did not violate § 106.220. Rather, "his action in dismissing the indictments was within his discretionary power," and the "transgression was not such as worked a forfeiture of office." *Id.* at 32.

The inescapable conclusion from these cases is that a § 106.220 proceeding is not a vehicle for inserting the courts into a political difference of opinion about how a prosecutor's office should be run. Such a proceeding is not a forum for complaining

[3] In the other case cited above, *Reardon*, a trial court denied a special prosecutor's request to oust the Clay County Prosecutor under § 106.220, but the Supreme Court dismissed the special prosecutor's appeal as moot without reaching the merits of his allegations. 41 S.W.3d at 473-74.

about mistakes by a Circuit Attorney's Office. Rather, the question is whether the prosecutor was intentionally acting with a corrupt purpose. Mr. Bailey's allegations don't meet that standard. The Petition should be dismissed.

**E. Taking Mr. Bailey's allegations in his Petition as true and giving them their broadest intendment, his Petition fails to state any facts alleging Ms. Gardner has engaged in intentional corrupt acts in derogation of her official duties, but instead only alleges mere violations and thoughtless mistakes without any showing of intent or bad faith, and so fails to state a claim for ouster under § 106.220.**

From the face of Mr. Bailey's Petition, this case is like *Wallach*, *Moody*, and *Simmons* in which the attempted ouster of a prosecutor was denied or dismissed, not in any way like *Graves*, *Wymore*, or any of the decisions ousting other officials discussed *supra* at 10-14 and n.2.

At most, "assum[ing] that all of [the Attorney General]'s averments are true, and liberally grant[ing] to [him] all reasonable inferences therefrom," *Bickel,* 285 S.W.3d at 329, he has alleged only that Ms. Gardner was negligent in supervising her office, a "mere violation of an official duty" or "mistake or the thoughtless failure to act" that "will not support a judgment of ouster." *Foote*, 903 S.W.2d at 539.

Rather, to state a claim for relief under § 106.220, he had to allege facts showing that Ms. Gardner committed "malfeasance, that is, misconduct in the performance of official duties," *id.*, that is, "willfull [*sic*] and deliberate acts of oppression and coercion designed to benefit [her] personally and financially," *Fletchall*, 412 S.W.2d at 428, or that she "intentionally failed to act, contrary to a known duty." *Foote*, 903 S.W.2d at 539. He plainly has not.

Mr. Bailey's allegations in his Petition are devoid of any remote showing that the failings he alleges of Ms. Gardner were in any way deliberate or intentional, let alone offering "a short and plain statement of the facts showing" so, as Rule 55.05's fact-pleading standard requires. While Mr. Bailey uses the legal terms "willful" or "willfully" 35 times in his Petition and "knowing" or "knowingly" 14 times, he never once uses the words "intent" or "intentional." Nor does he ever discuss the actual legal standards at issue in his suggestions in support. He never once states any facts in any way tending to show the duties he alleges Ms. Gardner violated or neglected were intentional, deliberate, or corrupt. Therefore, his Petition fails to state a claim for relief under § 106.220, and the Court must dismiss it.

Mr. Bailey states his allegations against Ms. Gardner are for her "willful neglect, including without limitation," what he alleges (Petition 6, ¶ 19). Presumably he means there are other, unnamed, unalleged things that he believes constitute actionable willful neglect under § 106.220. But his Petition and his allegations against Ms. Gardner– by the very nature of his pleading being a Petition – *are* limited to what he specifically alleges in it.

Like any other pleader, Mr. Bailey may not rely on supposed facts not alleged in the Petition to survive a motion to dismiss for failure to state a claim. Rule 55.05. Instead, as "Missouri is a fact-pleading state," he "must allege ultimate facts and cannot rely on mere conclusions." *M&H Enters. v. Tri-State Delta Chems., Inc.*, 984 S.W.2d 175, 181 (Mo. App. 1998).

Mr. Bailey alleges three counts against Ms. Gardner. None lawfully states a claim for ouster under the standards of § 106.220.

First, in Count I, Mr. Bailey alleges Ms. Gardner "failed to prosecute criminal cases" (Petition 8). He alleges that in one case, *State v. Riley*, Ms. Gardner (but really another attorney in her office) failed to timely move to revoke the defendant's bond despite his having multiple violations, after the case was dismissed and refiled because the Assistant Circuit Attorney assigned to the case was not ready (Petition 8-10). He alleges that in another, *State v. Campbell*, Ms. Gardner (but really another attorney in her office), failed to fulfill discovery obligations or appear on multiple occasions and assigned the case to an attorney on leave, so the charges were dismissed (Petition 10). As the Petition concedes, these cases were not litigated by Ms. Gardner herself, but by others, and Mr. Bailey has provided no factual allegation of Ms. Gardner's personal involvement or knowledge of what happened in these cases (Petition 8-10). This is an action against Ms. Gardner; it must allege that Ms. Gardner, herself, acted intentionally or corruptly. The failure to make such allegations, alone, requires dismissal.

While Mr. Bailey repeatedly throws the words "willfully" or "knowingly" into his allegations (*see* Petition 8-10), he fails to allege any facts showing in any way that, even taking these allegations of failure as true, they were due either to Ms. Gardner's "deliberate acts of oppression and coercion designed to benefit [her] personally and financially," *Fletchall*, 412 S.W.2d at 428, or that she "intentionally failed to act, contrary to a known duty." *Foote*, 903 S.W.2d at 539. All his

allegations, taken as true, only show the "mere violation of an official duty" or "mistake or the thoughtless failure to act," which "will not support a judgment of ouster." *Foote*, 903 S.W.2d at 539. There is no allegation that Ms. Gardner, herself, intentionally caused any of these failures. To the contrary, Mr. Bailey alleges Ms. Gardner's office *did* prosecute the *Riley* and *Baldwin* cases, just not well. That is an allegation of negligence; it is not even close to sufficient for ouster under § 106.220.

In Count I, Mr. Bailey also alleges staffing shortages in "more than 200 case [*sic*] of First Degree Murder, Second Degree Murder, and Involuntary Manslaughter currently pending" in this Court, assigned to multiple attorneys (Petition 10-11). But for purposes of § 106.220, all that states, taken as true, is that Ms. Gardner's office *is prosecuting* 200 homicide cases. There is no allegation that she has failed in any way to investigate or prosecute them, only that Mr. Bailey would prefer the staffing be done differently. But "the fact that [the Attorney General] or some one else, in a particular case, 'might have reached a different conclusion' as to commencing or continuing prosecution falls far short of proving the allegations" of willful neglect under § 106.220. *Wallach*, 182 S.W.3d at 318.

Nothing in Count I of Mr. Bailey's Petition states a claim for relief under § 106.220, which would require alleging facts showing that Ms. Gardner committed "malfeasance, that is, misconduct in the performance of official duties," *id.*, that is, "willfull [*sic*] and deliberate acts of oppression and coercion designed to benefit [her] personally and financially," *Fletchall*, 412 S.W.2d at 428, or that she "intentionally failed to act, contrary to a known duty." *Foote*, 903 S.W.2d at 539. Instead, taken as

true and giving their broadest intendment, they only show "mere violation of an official duty" or "mistake or the thoughtless failure to act," which "will not support a judgment of ouster." *Foote*, 903 S.W.2d at 539.

Next, in Count II, Mr. Bailey alleges Ms. Gardner or others in her office "failed to inform and confer with victims" (Petition 12). Again, Mr. Bailey fails to allege any facts supporting a conclusion that Ms. Gardner, herself, was aware of any failure to confer with any victim (Petition 12-14). Mr. Bailey points again to the *Campbell* case and alleges prosecutors had not kept the victim's family informed (Petition 13), and then alleges the same for *State v. Johnson* (Petition 13-14).

But once again, while Mr. Bailey intersperses the word "willful" into these allegations (Petition 15), nothing in his Count II states any facts alleging or from which it even remotely could be inferred that the failure was due to Ms. Gardner's "deliberate acts of oppression and coercion designed to benefit [her] personally and financially," *Fletchall*, 412 S.W.2d at 428, or that she "intentionally failed to act, contrary to a known duty." *Foote*, 903 S.W.2d at 539.

All Mr. Bailey's allegations show, taken as true, are that some particular Assistant Circuit Attorneys, who are not Ms. Gardner, were negligent: that they engaged in the "mere violation of an official duty" or "mistake or the thoughtless failure to act," which "will not support a judgment of ouster." *Foote*, 903 S.W.2d at 539. This does not even, in itself, sufficiently allege Ms. Gardner was negligent in supervising these Assistant Circuit Attorneys. Regardless, there is no allegation that Ms. Gardner intentionally caused the failures to confer with victims he alleges,

let alone due to some corrupt motive. Absent that, his allegations are insufficient for ouster under § 106.220.

Finally, in Count III, Mr. Bailey alleges Ms. Gardner "refused to exercise her judgment to determine whether there is sufficient evidence to justify a prosecution" (Petition 15). However, the supposed refusal is not based on anything other than an assertion that cases are *awaiting* review, not that there is a *refusal* to review. The allegations are thus unlike the cases where removal was based on intentional and blanket decisions not to prosecute. Specifically, the Petition alleges that at least 3,000 cases charged by police, including in felony cases, "are awaiting review by the Circuit Attorney," and Ms. Gardner filed 3,123 cases in 2022, down from 9,129 in 2013 (Petition 16-17). In his suggestions in support, he analogizes this to *Wymore*, though without discussing the standards at issue or the actual facts of *Wymore* (Sugg. 24-26). The allegations do not even rise to an assertion of deliberate failures to prosecute worthy cases.

A more apt case is *Wallach*. Ms. Gardner was elected to a position requiring the exercise of discretion, and Mr. Bailey apparently disagrees with how he views Ms. Gardner to have exercised her discretion. But a disagreement about how prosecutorial discretion should be exercised is exactly what is not permitted as a basis for removal. *Wallach*, 182 S.W.2d at 318-19.

Unlike in *Wymore*, while Mr. Bailey continues to toss the word "willful" into his allegations in Count III (Petition 16-17), he alleges no facts even tending to show that Ms. Gardner *deliberately* is refusing to prosecute whole classes of cases,

let alone due to a motive "designed to benefit [her] personally and financially," *Fletchall*, 412 S.W.2d at 428, or that the lag in reviewing and processing charges is her "intentiona[l] fail[ure] to act." *Foote*, 903 S.W.2d at 539.

This is nothing at all like *Wymore*, in which "there was a complete failure of the prosecuting attorney to ever commence any prosecution for violation of gambling laws, even after having full information about conditions," he "made no effort whatsoever to perform his duties as prosecuting attorney," and "he never reached the point where he even pretended to exercise discretion, but instead was under the influence of evil men." *Wallach*, 182 S.W.2d at 319 (citations and quotation marks omitted). To the contrary, Mr. Bailey specifically states that the charged cases to which he points "are awaiting review by the Circuit Attorney," and that Ms. Gardner prosecutes thousands of felony cases each year (Petition 16-17).

Mr. Bailey's allegation in Count III, taken as true, is that Ms. Gardner is slower than he would prefer in bringing certain prosecutions, not that Ms. Gardner intentionally and deliberately refused to prosecute whole classes of cases due to her personal corruption. But *that* is what is required to state a claim under § 106.220. Even a decision "unwise and in poor taste" is insufficient. *Moody*, 325 S.W.2d at 32. Mr. Bailey's Count III, too, fails to state a lawful claim for ouster under § 106.220.

Ouster under § 106.220 is a drastic, strictly construed measure reserved for the grossest cases of deliberate and intentional corrupt derogations of a public office, as in *Wymore*, *Graves*, and the other decisions discussed *supra* at 10-14 and n2. It is not a vehicle for an Attorney General to unseat the two-time choice of the

people of the City of St. Louis of their state prosecutor, with whom he is politically opposed, simply because he does not feel she is doing a good enough job or running a tight enough ship. As the Supreme Court has held time and time again in the decisions cited above, § 106.220 requires far more than that: it requires a specific, deliberate, corrupt intent in refusing or failing to do what the law requires the officer to do.

Otherwise, prosecutors would become subordinate to the Attorney General and removable at a whim, anytime he could point to a failing in their office. That is not and never has been the law of Missouri. Rather, "[t]he facts alleged by [the Attorney General] do not rise to the level to meet the elements required for a finding that [Ms. Gardner] either willfully or fraudulently violated or neglected an official duty, [or] that [s]he knowingly or willfully failed or refused to perform an official duty." *Simmons*, 501 S.W.3d at 20.

Tragic and horrific crimes are going to occur in a city with a population of nearly 300,000. When they do, Ms. Gardner and her Office aggressively prosecute the criminals who commit those obscene crimes. But when such crimes occur, the blame rests on the criminal, not on the prosecutor (or the police). Mr. Bailey's Petition seeks to take advantage of a tragedy for political gain, while ignoring the will of the voters. This Court must dismiss Mr. Bailey's Petition as ill-advised and unsupported by the facts or the law.

Respectfully submitted,

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**Certificate of Service**

The undersigned certifies that on this 14th day of March, 2023, a copy of the foregoing was filed in this Court's CaseNet electronic filing system and served by operation of that case filing system upon all counsel of record in this matter.

/s/ *Michael P. Downey*