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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI, *ex informatione* ANDREW BAILEY, Attorney General, Relator, vs. KIMBERLY M. GARDNER, Respondent.	Cause No. 2322-CC00383

MOTION TO DISMISS AMENDED PETITION AND
SUGGESTIONS IN SUPPORT

Respondent Kimberly M. Gardner moves the Court under Rules 55.27(a)(6) and 98.06 to dismiss Attorney General Andrew Bailey's Amended Petition in *quo warranto* for failure to state a claim on which relief can be granted. Even taking its allegations as true and granting them their broadest reading, as is required at this stage, the Amended Petition nonetheless fails to state a lawful claim for Ms. Gardner's ouster under § 106.220, R.S.Mo. In support, 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 the official's *willful* neglect, failure, or refusal to perform her duties. This means that 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 to perform such a duty is insufficient. In short, Mr. Bailey must allege a willful and intentional failure, not negligence. (pp. 6-9)
- 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. (pp. 10-18)
- The actions or inactions of subordinates in Kimberly Gardner's office and people other than Ms. Gardner, even intentional misconduct by those subordinates, which Mr. Bailey does not even allege, is insufficient to meet the high bar of § 106.220 and its strict construction to oust Ms. Gardner. Only intentional corrupt acts by Ms. Gardner herself could meet § 106.220. (pp. 18-22)

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

- Taking Mr. Bailey's allegations in his Amended Petition as true and giving them their broadest reading, his Amended Petition fails to state facts that show Kimberly Gardner has engaged in intentional corrupt acts in derogation of her official duties. Instead, Mr. Bailey 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. (pp. 23-38)

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 knowingly or willfully fails or refuses to do or perform official acts or duties, forfeits her office.

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

In sum, Mr. Bailey alleges select instances in a few dozen particular cases out of the thousands he concedes Ms. Gardner's office prosecutes each year of what he says are failings of her office, including that her office failed to seek bond; that line attorneys in her office failed to appear in court or take other actions that resulted in dismissals; that line attorneys failed to 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.)

In his Amended Petition, his second bite at the apple, Mr. Bailey again cites almost no authority about this. And this time, he does not even provide any suggestions in support of his Amended Petition at all (in violation of Rule 98.03's command that a *quo warranto* petition "shall be accompanied by suggestions in

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

support thereof"). Nonetheless, despite this continuing lack of authority, 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 the Rules of Civil Procedure and caselaw required Mr. Bailey to plead facts asserting intentional and willful conduct by Ms. Gardner, his Amended Petition – when it asserts facts, as opposed to conclusions – generally alleges just misjudgments by line attorneys in the conduct of a few dozen cases out of the thousands of cases Ms. Gardner's office has prosecuted during her tenure. Even as to those allegations, the Amended Petition alleges – at most – negligence. As to Ms. Gardner, the Amended Petition fails to do anything other than try to convert the alleged negligence of Ms. Gardner or others into willful conduct by Ms. Gardner alone. This flawed alchemy does not suffice.

Mr. Bailey's application of § 106.220 to his allegations is in error, and his continuing failure to cite almost any authority concerning § 106.220 is telling. He does not accuse Ms. Gardner of any intentional acts of fraud or corruption, just bare unfortunate failures and delays, mostly 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, for performing her duties poorly, or for her subordinates' alleged conduct.

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 terms "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

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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 intentionally 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, with 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).

Conversely, beginning with *State ex inf. McKittrick v. Wallach*, 182 S.W.2d 313 (Mo. banc 1944), the Supreme Court prohibited using § 106.220 to criticize a prosecutor's exercise of her discretion, limiting its use to instances of demonstrable intentional corruption as in *Graves* and *Wymore*. Since then, every case seeking a prosecutor's ouster has failed, often citing the Supreme Court's statement in *Wallach* of prosecutors' broad authority. An Attorney General's criticism of how a prosecutor exercises her authority, absent showing intentional corruption, is not a lawful basis for removal. *Wallach*, 182 S.W.2d at 318-19.

Like his original Petition, Mr. Bailey's Amended Petition still fails to come anywhere close to the high bar of § 106.220. Even taking his allegations as true and giving them their broadest reading, as this Court must at this stage, despite 120-plus pages and 620-plus paragraphs, his Amended Petition fails to state any claim that Ms. Gardner committed intentional malfeasance or willful misconduct in office or intentionally failed to act, per § 106.220. Instead, he alleges negligence: mere

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violations of duty, mistakes, or thoughtless failures, and even then, mostly by others and not Ms. Gardner. The law of Missouri is plain: this fails to state a lawful claim for ouster under § 106.220. The Amended 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 comb through all the cases in her office and point to failings with which he disagrees. But every office, particularly one in a large city, will make mistakes. Allowing this Amended Petition to proceed would allow any Attorney General – including an unelected one like the present one – to use those mistakes 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 the intrusion of a rogue Attorney General. Mr. Bailey's allegations, taken as true, fail that strict construction.

The Court should dismiss Mr. Bailey's Amended 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).

> 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).

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.

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. (Amended Petition 5, 40, 54, 57, 65, 70, 91, 95, 101, 116, 119). 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's § 106.220 has been in force for nearly 150 years, virtually unchanged. *See* L.1877, p. 346, § 1.

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

In his Amended Petition, Mr. Bailey accuses Ms. Gardner of forfeiting her office under this statute by having "willfully violated and neglected her official duties and knowingly and willfully failed to perform her official duties, as set forth in" his ten counts (Amended Petition 9). In his conclusion to each count, Mr. Bailey then says the count's respective allegations mean Ms. Gardner "willfully violated or neglected, or knowingly or willfully failed" some duty (Amended Petition 40, 54, 57, 65, 70, 91, 95, 101, 116, 119).

Although Mr. Bailey quotes this language from § 106.220, his Amended Petition cites hardly any authority actually construing or applying these provisions. This is particularly curious because Ms. Gardner already filed a motion to dismiss Mr. Bailey's original Petition explaining nearly all the law discussed in this motion, but even in the face of all her authority Mr. Bailey still offers none. Moreover, for his Amended Petition he even failed to provide the Court with any suggestions in support of his Amended Petition, which Rule 98.03 expressly requires, the function of which would be to apply the law to the facts he has alleged. This is because, as the Court will see below, the caselaw does not support his claim for ouster based on the Amended 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 *Foote*, 903 S.W.2d at 539, *abrogated on other*

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

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.

Mr. Bailey cites *Foote* (which he calls *"Fuchs"*) several times for the proposition that a "duty" under § 106.220 includes everything properly belonging to that duty (Amended Petition 8, 24, 70, 73, 92, 96). But he never mentions its discussion of what a *willful violation or willful neglect* of that duty means. This is because it is directly contrary to how he is seeking to use § 106.220.

"'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 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 these 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,"

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

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).

Finally, "[q]uo warranto is an extraordinary remedy." 74 C.J.S. *Quo Warranto* § 3 (Mar. 2023). It "is not a substitute for mandamus or injunction nor for an appeal or writ of error. *It is not to be used to prevent an improper exercise of power lawfully possessed*. Its purpose is solely to prevent an officer or a corporation or persons purporting to act as such from usurping a power which they do not have." *State ex inf. Nixon v. Kinder*, 89 S.W.3d 454, 458 (Mo. banc 2002) (citation omitted; emphasis added). It does not lie when the relator alleges merely that the officer improperly used her lawful authority, but rather only where the relator alleges the officer exercised a power she does not have:

> In a case of *quo warranto*, if the constitution or a statute in conformity therewith intrusts an officer with the performance of a certain governmental function and he proceeds to perform that function in a manner contrary to law, there is no usurpation and quo warranto will not lie, but where the officer steps entirely outside the scope of his authority to exercise a function which neither the constitution nor the statute has intrusted to him, the remedy by quo warranto is available.
>
> In other words, *quo warranto* is only available to deal with usurpation of power not possessed; prohibition or mandamus is the appropriate remedy where, as here, the basis of the allegation against [the officer] is really that they have illegally or improperly used powers granted to them.

Id. (citations omitted).

Here, there is no question of Ms. Gardner usurping a power not belonging to her office. Rather, Mr. Bailey complains she (or, actually, junior members of her office) used powers undeniably committed to her office, but only in a manner he believes was improper. Therefore, per the Supreme Court's statement in *Kinder*, *quo warranto* does not lie and Mr. Bailey's Amended Petition must be dismissed.

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

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).

1. Decisions ousting a prosecutor: *Graves* and *Wymore*

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. That is, in those cases there was corrupt action outside the realm of conduct permitted to the respective prosecutors' offices, so per *Kinder*, *quo warranto* was appropriate.

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[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 dictator. *See Pollard v. Bd. of Police Comm'rs*, 665 S.W.2d 333, 335, 335 n.2 (Mo. banc 1984) (giving historical overview of Pendergast's corrupting effect on Missouri law enforcement) (citing, among other authorities, *Graves*, and *United States v. Pendergast*, 28 F. Supp. 601 (W.D. Mo. 1939)). Mr. McKittrick brought ouster proceedings against other Pendergast-affiliated law enforcement, too. *See, e.g.*, *State ex rel. McKittrick v. Williams*, 144 S.W.2d 98 (Mo. banc 1940) (also cited in *Pollard*). 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.

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

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

Id. at 94.

The prosecutor clearly had personal 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, [the prosecutor] 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 and intentionally 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. Mr. Bailey cites *Wymore* a handful of times in his Amended Petition for the proposition of what discretion a prosecutor lacks (Amended Petition 7, 41, 54, 55), but he never mentions the standards the Supreme Court applied there 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

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

> 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. Indeed, the Supreme Court observed there was evidence 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 the prosecutor "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, despite his direct personal knowledge of them, the prosecutor in *Wymore* "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 personally knowing 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);
- *State ex rel. Thomas v. Olvera*, 987 S.W.2d 373, 374-76 (Mo. App. 1999) (county recorder of deeds intentionally failed to keep and report true record of all fees she received, including failing to report fees she was paid and changing the amounts of fees she was paid to lesser amounts);
- *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 intentionally threatened 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 had personal knowledge);
- *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);
- *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).

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

2. Decisions refusing to oust a prosecutor

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 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 therefore was denied in each case.

a. *Wallach*

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 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 wide 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:

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

> 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 held 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.

b. *Simmons*

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 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," their request for a special prosecutor had to be dismissed. *Id.* The Court of Appeals affirmed the prosecutor's motion to dismiss for failure to state a claim under Rule 55.27(a)(6). *Id.* at 16.

c. *Moody*

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

[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 of its denial as moot without reaching the merits of his allegations. 41 S.W.3d at 473-74. Still, it bears note that the trial court denied ouster of the prosecutor in that case, too. *Id.*

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

[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," that was expected of him. *Id.* But that did not violate § 106.220 and was not proper grounds for a writ of *quo warranto*. 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 about mistakes by a prosecutor's office. Rather, the question is whether, with a corrupt purpose, the prosecutor was intentionally failing to act. Mr. Bailey's allegations do not remotely meet that standard. If anything, the improper proceeding Mr. Bailey has brought itself is a detriment to public safety, because it presents a distraction to the Circuit Attorney's office, hobbles its ability to engage in its function, and diverts resources that Ms. Gardner should be using to discharge her duties as the prosecutor in the City of St. Louis.

The Amended Petition should be dismissed.

E. The actions or inactions of subordinates in Kimberly Gardner's office and others besides Ms. Gardner, even intentional misconduct by those subordinates, is insufficient to meet the high bar of § 106.220 and its strict construction to oust Ms. Gardner. Only intentional corrupt acts by Ms. Gardner herself could meet § 106.220.

Three times in his Amended Petition, Mr. Bailey states "acts or omissions by an assistant circuit attorney in his or her official capacity as an assistant circuit

attorney are regarded as if [Ms. Gardner] acted, or did not act, herself" (Amended Petition 8, 59, 71). For this, he cites § 56.550, R.S.Mo, *State v. Falbo*, 333 S.W.2d 279, 284 (Mo. 1960), and *State v. Tierney*, 584 S.W.2d 618, 620 (Mo. App. 1979) (Amended Petition 8, 59, 71). He then uses this argument to conclude that failings of line prosecutors in Ms. Gardner's office, even without her knowledge or direction, mean she, herself, has forfeited her office.

Mr. Bailey's argument that principles of *respondeat superior* or vicarious liability apply to an action in *quo warranto* to oust an elected official, such that the alleged misconduct of the official's subordinate means the official has forfeited her office, is contrary to the law of Missouri. Rather, to state a claim for Ms. Gardner's ouster, he must show *she, herself, personally* committed the requisite intentional misconduct, not her subordinates.

First, none of the authorities Mr. Bailey cites supports his argument. The statute he cites, § 56.550, merely provides the Circuit Attorney and any assistants must swear to support the Constitution, and what the assistants' duties are. It provides in its entirety:

> Before entering upon the duties of their office, the circuit attorney and said assistants shall be severally sworn to support the Constitution of the United States and the Constitution of Missouri, and to faithfully demean themselves in office. The duties of said assistants shall be to assist the circuit attorney generally in the conduct of his office, under his direction and subject to his control; and said circuit attorney and his assistants shall institute and prosecute all criminal actions in the circuit court. The circuit attorney and said assistant circuit attorneys, when so directed by the circuit attorney, may attend upon the grand jury.

Id. Nothing in § 56.550 states that misconduct by an assistant circuit attorney means the Circuit Attorney, herself, has committed that that misconduct.

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

The two decisions Mr. Bailey cites, *Falbo* and *Tierney*, have no application here, either. Neither is a *quo warranto* or ouster case. Neither has anything to do with § 106.220.

In both, a criminal defendant argued his charges should have been dismissed because his indictment or information was signed by an *assistant* prosecuting attorney rather than the actual county prosecutor. *Falbo*, 333 S.W.2d at 284; *Tierney*, 584 S.W.2d at 620. In both, the appellate court disagreed. In *Falbo*, the Supreme Court held, "an assistant prosecuting attorney had the authority to sign informations," so "the indictment in question was not invalid because it was signed by the assistant prosecuting attorney rather than by the prosecuting attorney." 333 S.W.2d at 284. And in *Tierney*, citing *Falbo*, the Court of Appeals held, "The term Prosecutor as used in the Rules of Criminal Procedure, however, by the very terms of Rule 36.05 includes an Assistant prosecutor for the reason, no doubt, that the office commands from both the same qualifications and the same duty," so "[t]he signature of the assistant prosecutor on the information brought against the defendant was as if done by the prosecutor." 584 S.W.2d at 620.

None of these authorities addresses § 106.220 or *quo warranto* ouster proceedings at all, let alone remotely hold that actions or inactions by an assistant prosecutor, even ones that would fit § 106.220, mean the prosecutor, herself, vicariously has committed misconduct that forfeits her office. No authority holds so.

This is because that is not the law of Missouri. In fact, there is plenty of authority that, for example, the actions of one assistant prosecutor creating a conflict of interest requiring his or her disqualification generally does not impute to the county prosecutor or Circuit Attorney, herself, and require the whole office's disqualification. *See, e.g.*, *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 385-86 (Mo. banc 2018) (actions of assistant prosecutor creating conflict of interest did

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

not impute to Jackson County Prosecutor herself); *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 395-97 (Mo. banc 2018) (same re Ms. Gardner).

At the outset, Mr. Bailey's reading is contrary to the strict construction of § 106.220 that the law of Missouri requires. Strict construction means a "statute can be given no broader application than is warranted by its plain and unambiguous terms." *Harness v. S. Copyroll, Inc.*, 291 S.W.3d 299, 303 (Mo. App. 2009). "A strict construction of a statue presumes nothing that is not expressed." *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. 2010) (citation omitted).

Section 106.220 provides it is *the* "*person* elected … to any county … office in this state … 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" that "shall thereby forfeit *his* office …." (Emphasis added). The plain and unambiguous language is that *the person* elected to the office, not her subordinate, must have committed the requisite misconduct. Reading "subordinate" into that invalidly presumes something not expressed, failing strict construction. And tellingly, for this reason, none of the decisions ousting an official under § 106.220, all of which are discussed above at pp. 10-14, involved any vicarious liability for the actions or inactions of a subordinate.

The flaws of Mr. Bailey's argument are also shown by the fact that if it is the elected official's subordinate who committed actionable misconduct within the meaning of § 106.220, rather than the official, *the subordinate* can be removed under § 106.220. Section 106.220 expressly applies to any person elected *or appointed* to any county office. *Id.* This means any office, even deputies. *State ex rel. Flowers v. Morehead*, 165 S.W. 746, 747-48 (Mo. banc 1914) (observing that "one clothed with the powers, exercising the functions, and receiving the emoluments of a public office is a public officer" within the meaning of what today is

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

§ 106.220, even including a "deputy constable," and applied in that case to the member of a county highway board). In *Tellmann v. Civil Serv. Comm'n of St. Louis Cnty.*, 564 S.W.2d 226, 229 (Mo. App. 1978), the Court of Appeals assumed without deciding that it even could apply to seek the removal for cause of an ordinary data processing employee of the City of St. Louis.

Therefore, if the Attorney General believes an assistant circuit attorney has committed acts that fall within § 106.220 and he or she therefore has forfeited his or her office, the remedy is not to seek *Ms. Gardner's* ouster, but to seek *that person's* ouster.

To be clear: Ms. Gardner is not in any way agreeing with Mr. Bailey that any assistant circuit attorney or other subordinate actually committed any misconduct at all, let alone what he alleges, let alone that what he alleges of her subordinates is even actionable misconduct within the meaning of § 106.220, per the standards cited above. It is not. Ms. Gardner is proud of her hardworking staff and the work they do for the people of St. Louis. Rather, Ms. Gardner's point is that as a matter of law, any misconduct Mr. Bailey *does* allege of her subordinates, all of which she expressly denies, nonetheless cannot be attributed to Ms. Gardner for purposes of an ouster proceeding under § 106.220.

Mr. Bailey's argument that actions or inactions of any people *other than Ms. Gardner* somehow can meet the high bar of § 106.220 to state a claim for the ouster *of Ms. Gardner* has no support in Missouri law. Only intentional corrupt acts by Ms. Gardner herself could meet § 106.220. Were it otherwise, any misconduct by an assistant attorney general would mean Mr. Bailey would forfeit *his* office.

For his Amended Petition to state a claim on which relief can be granted under § 106.220, Mr. Bailey must be able to show that Ms. Gardner, personally, engaged in intentional corrupt acts in derogation of her official duties. His allegations fail that requirement. His Amended Petition should be dismissed.

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

F. Taking Mr. Bailey's allegations in his Amended Petition as true and giving them their broadest reading, his Amended 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, mostly by others, and 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 Amended 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 above at pp. 10-14.

At most, "assum[ing] that all of [Mr. Bailey]'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, at most 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.

Rather, to state a claim for relief under § 106.220, Mr. Bailey had to allege facts showing 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 Amended Petition are devoid of any remote showing that the failings he alleges were in any way personally deliberate or intentional by Ms. Gardner, 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" more than 100 times in his Amended Petition and "knowing" or "knowingly" some 70 times, he never once uses the words "intent" or "intentional" when ascribing conduct to Ms. Gardner. Nor does he ever

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

discuss the actual legal standards at issue. 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 Amended Petition fails to state a claim for relief under § 106.220, and the Court must dismiss it.

Throughout his Amended Petition, Mr. Bailey states what he alleges against Ms. Gardner "is not limited to" what he specifies (Amended Petition 10, 16, 20, 37, 40, 42, 60, 83, 91). Presumably he means there are other, unnamed, unalleged things that he believes constitute actionable willful neglect under § 106.220. But his Amended Petition – by its very nature of being a petition – *is* limited to what he specifically alleges in it.

Like any other pleader, Mr. Bailey may not rely on supposed facts not alleged in the Amended Petition to survive a motion to dismiss for failure to state a claim. Rule 55.05. Instead, since "Missouri is a fact-pleading state," Mr. Bailey "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).

In his Amended Petition, Mr. Bailey alleges ten counts against Ms. Gardner. While he says each of them "set[s] forth" that Ms. Gardner "has willfully violated and neglected her official duties and knowingly and willfully failed to perform her official duties," none lawfully states a claim for ouster under the standards of § 106.220.

1. Count 1

In Count 1, Mr. Bailey first alleges 2,735 criminal cases have been dismissed by the Court during Ms. Gardner's tenure, conclusorily stating "the majority" were due to *Ms. Gardner*'s failures (Amended Petition 10). But he then provides specific facts for only four such cases, none of which he alleges even involved Ms. Gardner, let alone that she personally acted intentionally or corruptly:

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

- He alleges that in *State v. E.P.*, Ms. Gardner's office charged the defendant, but an assistant circuit attorney – not Ms. Gardner – told the victim not to appear for a hearing and then told the defense the victim was not cooperating, and the Court dismissed the case as a result when the victim did not show (Amended Petition 10-11). No conduct by Ms. Gardner is alleged at all.
- He alleges that in *State v. Campbell*, Ms. Gardner's office charged the defendant, but the assistant circuit attorneys involved – not Ms. Gardner – failed to provide discovery, so the case ultimately was dismissed (Amended Petition 12-16). While some of Mr. Bailey's allegations say "Respondent," presumably meaning Ms. Gardner, did so (Amended Petition 12-16 ¶¶ 76-77), the exhibit he incorporates shows it was an assistant circuit attorney involved and requests were directed to Ms. Gardner's office, not Ms. Gardner personally (Exhibits 2 and 4). The only conduct the Amended Petition specifically ascribes to Ms. Gardner personally in this is in not answering an e-mail (Amended Petition 12).
- He alleges that in *State v. A.S.*, Ms. Gardner's office obtained an indictment against the defendant, prosecuted it to verdict, which then was reversed, and on remand the assistant circuit attorney, not Ms. Gardner, failed to appear for trial (Amended Petition 16-17). Again, while Mr. Bailey's petition ascribes this to "Respondent," meaning Ms. Gardner, the exhibit he incorporates to show this only refers to "the State," not Ms. Gardner personally (Exhibit 5).
- He alleges that in *State v. R.F.*, Ms. Gardner's office charged the defendant three different times, but in the end the absence of a complaining witness resulted in the case's dismissal (Amended Petition 17-18). Again, while Mr. Bailey's petition ascribes this to Ms. Gardner, the exhibit he incorporates to

show this, too, only refers to "the State," not Ms. Gardner personally (Exhibit 6).

None of this remotely meets the standard for ouster in § 106.220. As the Amended Petition and its attachments concede, 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. Regardless, there is no allegation whatsoever that Ms. Gardner, herself, acted intentionally or corruptly. The failure to do that, alone, is a failure sufficient to require dismissal.

Next, Mr. Bailey alleges Ms. Gardner enters *nolle prosequi* shortly before trials are to begin, up to 30% of the time (Amended Petition 19). But he only alleges four examples of this, again none of which involve Ms. Gardner at all:

- He alleges that in *State v. J.D.*, a *nolle prosequi* had occurred several times, but does not allege how Ms. Gardner was involved, let alone intentionally or corruptly so (Amended Petition 19);
- He alleges that in *State v. J.L.C.*, Ms. Gardner's office prosecuted the defendant, and an assistant circuit attorney failed to turn over some discovery and then entered a *nolle prosequi* (Amended Petition 20-21). Though Mr. Bailey's allegations several times state it was "Respondent," meaning Ms. Gardner, who failed to do so, the exhibit he incorporates states it was an assistant city attorney, not Ms. Gardner, personally (Exhibit 8).
- He alleges that in *State v. D.H.*, Ms. Gardner's office twice prosecuted the defendant, but one time an assistant attorney entered a *nolle prosequi*, and the other time the Court dismissed the charges (Amended Petition 21-22).
- He alleges that in *State v. V.D.C.*, Ms. Gardner's office prosecuted the defendant, but an assistant attorney entered a *nolle prosequi* mistakenly stating a superseding indictment had been filed on a new case, when it had

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

not, the case then was refiled, but because the main witness would not appear, the assistant entered a *nolle prosequi* (Amended Petition 22-23).

Again, none of that in any way meets the standard for ouster in § 106.220. Not a single one of the actions alleged is ascribed to Ms. Gardner, herself, personally. All that is alleged are possible mistakes by subordinates and otherwise ordinary prosecutorial conduct. There is no allegation that any *nolle prosequi* was due to Ms. Gardner's personally intentional corrupt failure to meet some duty that she had. To the contrary, Mr. Bailey alleges Ms. Gardner's office *did* prosecute all of these cases, just not well or in the manner Mr. Bailey would have preferred. At most, and like in *Wallach*, that is an allegation of negligence, and is not remotely close to sufficient for ouster under § 106.220. *See also Moody*, 375 S.W.2d at 32 (even *nolle prosequi* that is "unwise and in poor taste" does not meet § 106.220).

Moreover, Mr. Bailey does not even argue that the number of *nolle prosequi*s or other failures are different from what is common in any large municipality's criminal docket. He does not even try to make a case that the few instances here are uncommon. This is true throughout all of his counts.

Next, despite acknowledging the Circuit Attorney's office has prosecuted thousands of felony and misdemeanor cases of all types each year Ms. Gardner has been in office (Amended Petition 52-53) and that the office proceeds against the vast majority of those (Amended Petition 19 ¶ 106), Mr. Bailey plucks out three cases in which he alleges assistant circuit attorneys failed to writ the defendant, leading to the cases being dismissed (Amended Petition 24-26). Nowhere does he present any allegations that Ms. Gardner committed any actions or inactions toward that end, let alone intentionally and corruptly so (Amended Petition 24-26). That is nothing more than an allegation of negligence by others, not the intentional misconduct by Ms. Gardner that would be required to satisfy § 106.220.

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

Similarly, Mr. Bailey next discusses one case in which an assistant circuit attorney failed to comply with speedy trial requirements (Amended Petition 26-28). He says this means *Ms. Gardner* "repeatedly" failed to comply with those requirements (Amended Petition 26), but introduces no facts impugning Ms. Gardner personally in that one case at all, let alone repeatedly, intentionally, or corruptly in any case. That plainly does not meet the high bar of § 106.220.

The same goes for Mr. Bailey's claim that Ms. Gardner "repeatedly failed to prosecute in the associate circuit court" (Amended Petition 28). He points to two cases, one in which the Court dismissed a case due to the noncooperation of a victim, and the other in which the Court merely warned it would dismiss if the State (meaning the assistant circuit attorney assigned to the case) failed to produce an indictment or witness at the next hearing, with no indication of any such failure following the Court's warning (Amended Petition 28-29). No facts supporting "repeated" failure are presented, nor is any misconduct alleged personally of Ms. Gardner, let alone intentional and corrupt failure of a known duty (Amended Petition 28-29).

Next, Mr. Bailey points to two cases, *State v. Riley* and *State v. Jones*, where assistant circuit attorneys – not Ms. Gardner personally, let alone intentionally and corruptly – 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 (Amended Petition 29-36). Although Mr. Bailey says "Respondent," presumably meaning Ms. Gardner, herself, handled these cases (Amended Petition 29-36), the exhibits he incorporates show it was in fact assistant circuit attorneys who did so, not Ms. Gardner (Exhibits 15, 16, 18, and 19). In the *Riley* case, Mr. Bailey does not allege any specific personal conduct by Ms. Gardner at all (Amended Petition 29-33). And in *Jones*, the only conduct alleged is that Ms. Gardner, *in the course of prosecuting the defendant*,

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

agreed to a bond amount that the Court ultimately disagreed with (Amended Petition 35-36).

None of that remotely shows a "deliberate ac[t] of oppression and coercion designed to benefit [Ms. Gardner] personally and financially," *Fletchall*, 412 S.W.2d at 428, or an allegation that she "intentionally failed to act, contrary to a known duty." *Foote*, 903 S.W.2d at 539. There is no allegation of intentional conduct at all by Ms. Gardner, let alone for a corrupt reason. Rather, this allegation, taken as true, only shows the "mere violation of an official duty" or "mistake or the thoughtless failure to act," which "will not support a judgment of ouster." *Id*. Otherwise, woe to any prosecutor whose subordinate takes a position with which a judge ultimately disagrees.

Mr. Bailey next points to six misdemeanor cases in which assistant circuit attorneys either failed to appear or were not ready, and the cases were dismissed (Amended Petition 36-39). None of those allegations mentions Ms. Gardner at all, let alone that she personally, intentionally, and corruptly engineered these dismissals (Amended Petition 36-39).

In the nearly 40 pages of Count I, that is all Mr. Bailey presents. Not once is there any allegation that Ms. Gardner committed either "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 allege the "mere violation of an official duty" or "mistake or the thoughtless failure to act," *Foote*, 903 S.W.2d at 539, or things he believes were "unwise and in poor taste," *Moody*, 325 S.W.2d at 32, which "will not support a judgment of ouster." *Foote*, 903 S.W.2d at 539. Moreover, nearly all his allegations are about the alleged actions of others, *not* Ms. Gardner.

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

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 thousands of cases, including each and every one to which he specifically points, just not well. At most, that is an allegation of negligence, and almost entirely of others besides Ms. Gardner. The law of Missouri is that this is nowhere close to sufficient to state a claim for ouster under § 106.220.

2. Count 2

In Count 2, Mr. Bailey alleges Ms. Gardner's office has a backlog of 1,200 cases awaiting review (Amended Petition 42) and 3,500 pending applications for warrants in the system (Amended Petition 43). He then points to two cases: *Cromwell*, in which a defendant was prosecuted, an agreement for release on bond was reached, and when he re-offended, there was a delay in re-prosecuting him, and *Smith*, in which there was an unprocessed warrant application for the defendant (Amended Petition 43-36).

Mr. Bailey also alleges Ms. Gardner used an outside resource, the Vera Institute, to assist her in determining which cases are best suited for prosecution given her limited resources (Amended Petition 46-48). He then points to the murder of Xavier Usanga, which was prosecuted by federal authorities rather than Ms. Gardner's office (Amended Petition 48-51). He does not allege any personal, intentional conduct by Ms. Gardner, let alone intentional and corrupt misconduct, only that her office did not follow up with police (Amended Petition 49).

Mr. Bailey alleges all of this means Ms. Gardner "has willfully violated or neglected, or knowingly or willfully failed or refused to perform," her duties (Amended Petition 43). But the supposed refusals are not based on anything other than an assertion that cases are *awaiting* review, not that there is a *refusal* to review. The allegations are therefore unlike *Graves* or *Wymore* where removal was based on intentional and blanket corrupt decisions not to prosecute. Specifically,

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

the Amended Petition alleges that at least 3,500 warrant applications are "pending," along with a "backlog" of cases (Amended Petition 42-43), and acknowledges Ms. Gardner has had between 1,974 and 4,984 "issued cases" during her tenure depending on the year (Amended Petition 52).

Mr. Bailey briefly suggests this is like *Wymore*, though without discussing the standards at issue or the actual facts of *Wymore* (Amended Petition 41-42). The allegations do not rise anywhere close to an assertion of deliberate corrupt failures to prosecute worthy cases like the prosecutor in *Wymore*.

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 under § 106.220. *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 2, 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. Again, Ms. Gardner already apprised Mr. Bailey in her motion to dismiss his original petition that his allegations failed the legal standard. Undeterred, and with no citation to any law in his support, he just continues to reassert the wrong standard. The Attorney General's allegations for ouster are not law. They are politics.

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

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

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 allegations in Count 2, taken as true, are 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 2, too, fails to state a lawful claim for ouster under § 106.220.

3. Count 3

Mr. Bailey's allegation in Count 3 – that Ms. Gardner "willfully neglected or knowingly or willfully failed to investigate officer-involved shootings" (Amended Petition 54) – is just as lacking as his Count 2. He alleges Ms. Gardner merely "has not made decisions about whether to issue or refuse charges in at least forty police use-of-force cases" (Amended Petition 56). That is woefully insufficient to meet § 106.220. There is no allegation that Ms. Gardner is intentionally refusing to prosecute any use-of-force cases, let alone corruptly so. But that is what he must show to meet the statute. Count 3 fails, too.

4. Count 4

Count 4, alleging discovery violations, depends entirely on Mr. Bailey's incorrect argument that a failure of duty by an assistant circuit attorney makes Ms. Gardner vicariously liable and subject to ouster (Amended Petition 59). Ms. Gardner explains above at pp. 18-22 why that is simply untrue. Count 4 points to six cases in which assistant circuit attorneys failed to comply with discovery rules, leading to dismissals (Amended Petition 59-65). No actual conduct by Ms. Gardner

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

personally is alleged, let alone an intentional and corrupt refusal to obey discovery rules (Amended Petition 59-65). The negligent conduct of subordinates is insufficient to state a claim under § 106.220.

5. Count 5

In Count 5, Mr. Bailey alleges Ms. Gardner violated § 106.220 in failing or refusing to timely move for the disposal of property, leading to the destruction of controlled substances that could be evidence (Amended Petition 66-70). The only conduct by Ms. Gardner specifically alleged is that she failed to respond to a letter from a Commissioner, but ultimately became personally involved (Amended Petition 68). Beyond that, he points to a Court finding of "delay and mismanagement," of which he acknowledges Ms. Gardner sought reconsideration (Amended Petition 68-69). In the order denying reconsideration, the Court found that Ms. Gardner's office, but not Ms. Gardner personally, may not have been candid with the Court (Amended Petition 69).

None of this alleges intentional failure by Ms. Gardner of a known duty. Instead, it continues to allege mere negligence by Ms. Gardner in mismanaging her office, or misconduct by others in her office in relation to that episode. But there remains no allegation that Ms. Gardner committed "malfeasance, that is, misconduct in the performance of official duties," *Foote*, 903 S.W.2d at 538, 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 reading, Mr. Bailey's allegations in Count 5 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.

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

6. Count 6

Mr. Bailey's Count 6 concerns staffing shortages in Ms. Gardner's office and supervision of her subordinates (Amended Petition 70-91). Much of it depends, again, on Mr. Bailey's incorrect argument that a failure of duty by an assistant circuit attorney makes Ms. Gardner vicariously liable and subject to ouster (Amended Petition 71).

Mr. Bailey alleges Ms. Gardner has failed to fill vacancies (Amended Petition 73-77). He points to salary expenditures having dropped between 2017 and 2022, and alleges the resignation or firing of 85 assistant circuit attorneys, the hiring of two attorneys with disciplinary issues, the decision of Ms. Gardner not to hire one once press informed her about the issues, Ms. Gardner's seeking non-disclosure agreements with her staff about hiring decisions, and her hiring a former nightclub owner as an administrative assistant (Amended Petition 73-77). (Mr. Bailey does not explain how the latter is any form of misconduct.)

Next, Mr. Bailey alleges Ms. Gardner has a "toxic office environment" (Amended Petition 77) and her staff has "out-of-control caseloads" (Amended Petition 77). He also points to two cases, *J.G.* and *E.P.*, in which assistant circuit attorneys had health issues or were overworked (Amended Petition 78-81), and alleges other staff were overworked, too (Amended Petition 81-82).

Finally, Mr. Bailey alleges ethical violations by assistant circuit attorneys (Amended Petition 82-90). He points to incidents when assistant circuit attorneys have lied to a court, were unprepared before a grand jury, mismanaged the docket process for grand juries, did not thoroughly prepare grand jury witnesses, did not make sure witnesses received grand jury subpoenas, did not proofread grand jury case records, were unprepared before the grand jury, badgered the grand jury, and were disorganized (Amended Petition 82-90). But he then alleges this means *Ms. Gardner* "willfully neglected her supervisory duties" (Amended Petition 90).

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

None of Mr. Bailey's allegations in Count 6 remotely allege intentional conduct by Ms. Gardner within the confines of § 106.220: "malfeasance, that is, misconduct in the performance of official duties," *Foote*, 903 S.W.2d at 538, 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.

For example, Mr. Bailey does not allege Ms. Gardner deliberately, intentionally, and corruptly *decided* not to hire assistant circuit attorneys, to hire those who could not cut it, to make assistant circuit attorneys quit, to engineer staffing shortages, or to engineer ethical violations by assistant circuit attorneys. But as in *Graves* and *Wymore*, *that* is what § 106.220 would require. Mismanagement of an office and bad actions by subordinates is not enough.

7. Count 7

In Count 7, Mr. Bailey alleges Ms. Gardner failed to obey the Sunshine Law (Amended Petition 91-95). In his allegations, Mr. Bailey initially states "Respondent," i.e. Ms. Gardner, "refused to produce any records," failed to respond to a petition, and suffered a default judgment (Amended Petition 93-94). But he inserts "Respondent," meaning Ms. Gardner, in brackets, when the actual party named in his attached exhibit was the "St. Louis Circuit Attorney," meaning Ms. Gardner's office, not her personally (Amended Petition 93-34; Exhibit 56). Ultimately, when quoting the Court of Appeals' decision affirming that judgment, he is forced to admit that the alleged wrongdoing was by "[the assistant city attorney] (a licensed attorney responsible for defending suits against Defendant under the Sunshine Law)" (Amended Petition 94) (brackets in the original).

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

Once again, Mr. Bailey can point to no inactions by Ms. Gardner *personally*, let alone her *intentional* failure of a known duty, in Count 7. Unless he could allege that she *directed* the assistant circuit attorney at issue in the Sunshine Law case not to respond, and did so with a corrupt motive, it would not fit § 106.220. Mr. Bailey's Count 7 is not enough.

8. Count 8

Mr. Bailey's Count 8 alleges Ms. Gardner mismanaged her office's finances by hiring outside counsel (Amended Petition 96-101). He points to a case in which a plaintiff sought to prevent Ms. Gardner from entering into agreements with certain outside counsel, which remains ongoing, and in which she is represented by counsel (Amended Petition 97-101).

Count 8's allegations do not amount to a violation of a duty, let alone intentionally and corruptly by Ms. Gardner. While Ms. Gardner has a duty to manage her office's finances, Mr. Bailey's allegation is not that she has failed to do so, let alone intentionally, but that she has done so *poorly*. There is no allegation, as in *Olvera*, 987 S.W.2d at 374-76, that Ms. Gardner has intentionally changed the numbers in accounts, or as in *Foote*, 903 S.W.2d at 539-40, or *Riley*, 590 S.W.2d at 906, that she misrepresented costs and pocketed the difference for her own personal gain, or anything of the like. Rather Mr. Bailey merely alleges Ms. Gardner incurred costs that he would rather she not. There is no allegation that she is giving kickbacks to supporters, skimming from accounts, or anything else that actually would be actionable under § 106.220.

Rather, as in *Wallach*, Ms. Gardner was elected to a position requiring the exercise of discretion, including in spending money in the course of her work, and Mr. Bailey apparently disagrees with how he views Ms. Gardner to have exercised that discretion. But again, a disagreement about how prosecutorial discretion

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

should be exercised is exactly what is not permitted as a basis for removal. *Wallach*, 182 S.W.2d at 318-19.

Moreover, Count 8 concerns ongoing litigation, in which Ms. Gardner's position is well-taken. Its allegations certainly do not remotely rise to the level of § 106.220's requirement of intentional, corrupt derogations of known duties.

9. Count 9

In Count 9, Mr. Bailey alleges Ms. Gardner or others in her office "failed to inform and confer with victims" (Amended Petition 101). He points to eight cases in which Ms. Gardner's office prosecuted offenders but assistant circuit attorneys or others in Ms. Gardner's staff did not keep them informed or did not respond to inquiries (Amended Petition 101-16). But Mr. Bailey again fails to allege any facts supporting a conclusion that Ms. Gardner, *herself*, was aware of any failure to confer with any victim at all, let alone that she intentionally and corruptly engineered it (Amended Petition 101-16).

While Mr. Bailey continues to intersperse the word "willful" into these allegations (Amended Petition 101, 107-08, 115-16), nothing in his Count 9 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

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

alone due to some corrupt motive. Absent that, Mr. Bailey's allegations in Count 9 are insufficient for ouster under § 106.220.

10. Count 10

Finally, in Count 10, Mr. Bailey re-alleges all his previous allegations and alleges they mean Ms. Gardner has violated victims' rights to a speedy disposition of their cases (Amended Petition 116-18). He points to the length of case dispositions growing from 200 to 525 days (Amended Petition 118). He points to one case that has taken 1,063 days, and in which assistant city attorneys have only contacted the victim's family sporadically (Amended Petition 118-19).

But once again, Mr. Bailey points to no actual conduct by Ms. Gardner personally, only others, let alone intentional and corrupt conduct. He does not allege that Ms. Gardner *intentionally* made cases take longer, let alone for some personal corrupt gain, only that they *are* taking longer. At most, that is a 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. Count 10 does not meet § 106.220, either.

Conclusion

Ouster under § 106.220 is a drastic, strictly construed measure reserved for the grossest cases of deliberate, intentional, and corrupt derogations of a public office, as in *Wymore*, *Graves*, and the other decisions discussed above at pp. 10-14. It is not a vehicle for an Attorney General to unseat the democratically twice-elected choice of the people of the City of St. Louis of their state prosecutor, with whom he is politically opposed, simply because, as the Supreme Court rejected in *Wallach* and *Moody*, he feels she is doing a bad job or mismanaging her office. As the Supreme Court has held time and again in the decisions cited above, § 106.220 requires far more than that: it require 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, and for good reason: the distraction of those efforts would undermine, rather than promote, public safety. Rather, "[t]he facts alleged by [Mr. Bailey] 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, nor 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 crimes. But when such crimes occur, the blame rests on the criminal, not on the prosecutor (or the police). That the Attorney General can point to failings in a few dozen cases out of – by his own admission – multiple thousands of prosecutions is unsurprising. Those failings do not remotely constitute the grounds for ouster that § 106.220 requires. If the Attorney General, or the political interests behind his petition for a writ of *quo warranto*, were truly concerned about crime in the City of St. Louis, they would seek to assist Ms. Gardner's office with resources, not distract it and drive away its staff through continued attacks.

Mr. Bailey's Amended Petition seeks to take advantage of tragedy for political points, while ignoring the will of the voters. This Court must dismiss his Amended Petition as the ill-advised political stunt that it is, unsupported by the facts or the law.

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

Electronically Filed - City of St. Louis - April 11, 2023 - 05:44 PM

Respectfully submitted,

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Certificate of Service

I certify that I signed the original of the foregoing, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on April 11, 2023, I filed a true and accurate Adobe PDF copy of the foregoing via the Court's electronic filing system, which notified the following of that filing:

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