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

REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED PETITION

Respondent Kimberly M. Gardner replies in support of her motion 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.

Mr. Bailey's suggestions in opposition misstate the well-established law of Missouri. Nothing in the suggestions refutes the plain fact that his allegations against Ms. Gardner in his Amended Petition, even taken as true and given their broadest reading, are woefully insufficient to state a claim for her ouster under § 106.220, R.S.Mo. The Court should dismiss Mr. Bailey's Amended Petition.

Summary

- That some ultimately unsuccessful *quo warranto* petitions seeking to oust prosecutors have gone to evidentiary hearings is of no consequence, as unlike Mr. Bailey's Amended Petition, the petitions in those cases stated proper claims under § 106.220, even though the evidence in them fell short. (pp. 3-6)
- "Willful violation" of a duty under § 106.220 requires showing a corrupt motive, and "willful neglect" requires showing an intentional failure to act, contrary to a known duty, rather than a mistake, and so inherently requires showing bad faith, even in light of amendments on which Mr. Bailey relies. (pp. 7-10)
- Mr. Bailey's conclusory statements repeating the language of § 106.220 without pleading facts actually meeting those conclusions are insufficient. (pp. 11-15)
- Mr. Bailey's allegations that people other than Ms. Gardner failed or neglected duties are insufficient to state a claim for her ouster under § 106.220. (pp. 15-22)
- Mr. Bailey's allegations of occurrences during Ms. Gardner's first term, rather than her present term, do not state a claim under § 106.220. (pp. 23-24)

Argument

A. Mr. Bailey's Amended Petition fails to state a lawful claim for Ms. Gardner's ouster under § 106.220, R.S.Mo., because Mr. Bailey does not allege facts – not conclusions – which, taken as true and accorded all reasonable inferences, would show Ms. Gardner either (1) committed willful and deliberate acts of oppression and coercion designed to benefit her personally and financially or (2) intentionally failed to act, contrary to a known duty.

In her motion to dismiss, Ms. Gardner explained that Mr. Bailey's Amended Petition for a writ of *quo warranto* fails to state a lawful claim for her ouster under § 106.220, R.S.Mo. gargantuan

This is because to state such a claim, Mr. Bailey would have to show Ms. Gardner engaged in corrupt intentional acts of misconduct or intentional failures to act in the performance of official duties (Motion to Dismiss ["Mot."] 6-9). Mere mistakes or actions with which Mr. Bailey disagrees, even violations of political duties, do not suffice (Motion to Dismiss ["Mot."] 6-9). The only two prior ousters of prosecutors under these provisions (and only ten ousters of other officials in 150 years of § 106.220) involved intentional bad-faith acts in derogation of their official duties, and the Supreme Court and Court of Appeals uniformly have held anything less insufficient (Mot. 10-18).

Mr. Bailey's Amended Petition fails to state any facts alleging Ms. Gardner has engaged in intentional bad-faith acts in derogation of her official duties. Instead, Mr. Bailey only alleges mere violations and mistakes, mostly by others, and without any showing of Ms. Gardner's intent (Mot. 23-38). Therefore, the Court must dismiss his Amended Petition.

1. **That some ultimately unsuccessful *quo warranto* petitions seeking to oust prosecutors have gone to evidentiary hearings is of no consequence, as unlike Mr. Bailey's Amended Petition, the petitions in those cases stated proper claims under § 106.220, even though the evidence in them fell short, while those that did not (like Mr. Bailey's) were dismissed.**

In his response, Mr. Bailey argues that because the only two prior successful ousters of prosecutors, *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), and two of the unsuccessful ones, *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), ultimately went to evidentiary hearings, his Amended Petition should, too (Suggestions in Opposition ["Opp."] 33-35).

Unlike Mr. Bailey's Amended Petition, the Attorney General's petitions in *Graves, Wymore*, and even *Moody* and *Wallach* all stated specific allegations meeting the high bar of § 106.220: that the prosecutor personally had engaged in corrupt intentional acts of misconduct or bad-faith intentional failures to act in the performance of his official duties, not just a mere violation of such a duty or actions with which the Attorney General disagreed. Failures of evidence, not allegations, is what led to the denial of ouster in those cases.

The allegations in *Graves* and *Wymore* were obviously sufficient, as the prosecutors were accused of specific instances of intentionally and corruptly failing to enforce laws against open and notorious crimes of which they had personal knowledge. *Graves*, 144 S.W.2d at 93; *Wymore*, 132 S.W.2d at 981. But even in *Wallach* and *Moody*, there is no report of a motion to dismiss (likely a "demurrer" back then), because the allegations, while not proven, also were plainly sufficient.

In *Wallach*, the Attorney General principally alleged the Supervisor of Liquor Control had sent the St. Louis County Prosecutor a list of 85 people alleged to have violated the liquor laws, the prosecutor was personally familiar with the facts of the

violations, and he "willfully, knowingly, continuously, corruptly and unlawfully neglected, failed and refused to investigate, commence prosecutions of and prosecute" those specific people. 182 S.W.2d at 314-15. Clearly, while the Commissioner in *Wallach* ultimately found the evidence was insufficient to support the allegation, that allegation itself was sufficient under § 106.220.

Conversely, nothing in Mr. Bailey's Amended Petition alleges Ms. Gardner was given information about an offense but *intentionally refused* to investigate or prosecute it. Instead, he alleges only that Ms. Gardner is slower than Mr. Bailey wishes in reviewing cases and processing warrants (Count 2). And none of his other counts allege any corrupt malfeasance or intentional refusal by Ms. Gardner at all (Mot. 22-38). While the allegations in *Wallach* were sufficient to state a claim under § 106.220, Mr. Bailey's are not.

Moody is similar. There, the Governor had directed the Attorney General under § 27.030, R.S.Mo., to summon a grand jury to investigate public corruption in Wright County, due to "the alleged failure of law enforcement officials of that county to enforce the laws." 325 S.W.2d at 22. This resulted in indictments against two individuals for election ballot theft, which the Attorney General signed, as well as an information against a relative of one of those defendants for further ballot theft. *Id.* The Attorney General alleged in his petition for a writ of *quo warranto* that the Wright County Prosecutor personally had full and complete knowledge of the incriminating testimony that State witnesses had given before the grand jury to result in the indictments and information, but then intentionally dismissed all three of the Attorney General's cases due to "bias and prejudice against the State of Missouri and" the Attorney General, which was misconduct and an abuse of his power. *Id.* at 23, 23 n.1. Again, while the Commissioner ultimately found the evidence was insufficient to support that this was a willful neglect of the prosecutor's duties, the allegation itself clearly was sufficient under § 106.220.

Conversely, while Mr. Bailey points in Count 1 to cases that the Court dismissed and others in which assistant circuit attorneys entered *nolle prosequis*, he makes no allegations that Ms. Gardner intentionally engineered the dismissals or directed the *nolle prosequi* at all, let alone in bad faith or for some improper purpose. While the allegations in *Moody*, too, were sufficient, Mr. Bailey's are not.

In her motion to dismiss, Ms. Gardner pointed to *Simmons v. McCulloch*, 501 S.W.3d 14 (Mo. App. 2016), as an example of a dismissal of an action under § 106.220 for failure to state a claim (Mot. 16-17). Mr. Bailey argues *Simmons* is distinguishable because it was a petition for appointment of a special prosecutor under §§ 106.230 and 106.240, R.S.Mo. to seek the prosecutor's ouster, rather than a petition for a writ of *quo warranto* by the Attorney General (Opp. 35). That is a distinction without a difference.

To justify appointment of a special prosecutor under §§ 106.230 and 106.240, an affiant must first file an affidavit alleging facts supporting the same grounds for ouster under § 106.220 that Mr. Bailey must allege here. § 106.230. The point in *Simmons* was that even taking the allegations as true, they were insufficient to state a claim under § 106.220, so the Court of Appeals affirmed the trial court's decision granting the prosecutor's motion to dismiss. 501 S.W.3d at 18-20. Mr. Bailey's allegations against Ms. Gardner are equally insufficient, so they, too, fail to state a claim under § 106.220 and must be dismissed.

That this is a *quo warranto* proceeding is not a procedural distinction. "In all particulars not provided for by [Rule 98], proceedings in quo warranto shall be governed by and conform to the rules of civil procedure …." Rule 98.01. Accordingly, when, taking its allegations as true, a *quo warranto* petition fails to state a claim on which relief can be granted, a motion to dismiss the petition under Rule 55.27 should be granted. *See, e.g.*, *Town of Weldon Springs v. Andor, Inc.*, 764 S.W.2d 734, 735-36 (Mo. App. 1989) (affirming judgment granting motion to dismiss

quo warranto petition challenging annexation of town's property); *cf. State ex rel. Thomas v. Olvera*, 987 S.W.2d 373, 377 (Mo. App. 1999) (affirming summary judgment on *quo warranto* ouster petition under § 106.220).

Mr. Bailey also argues that in *Simmons*, the trial court considered other materials including a lengthy Department of Justice report and grand jury records (Opp. 35) (citing *Simmons*, 501 S.W.3d at 16). But he ignores that, in fact, that was one of the *Simmons* appellants' arguments for error to the Court of Appeals – that the trial court should not have considered any outside materials. *Id.* at 21. He also ignores that in *Simmons*, the Court of Appeals confined its discussion to the § 106.220 petition itself, analyzing solely "Whether Appellants" Petition Alleges Facts Constituting a Recognized Cause of Action." *Id.* at 20. It concluded the petitioners "failed to allege facts which amounted to the elements of a recognized cause of action," and affirmed on that ground alone, holding their argument about the other materials was "extraneous." *Id.* Rather, the point was "[t]he facts alleged by [the petitioners] 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." *Id.*

The Court of Appeals did not address the use of extraneous evidence in *Simmons*, and Mr. Bailey's attempt to use *Simmons* for this purpose is inapt. As in *Simmons*, the Amended Petition should be dismissed.

2. Mr. Bailey's failure to present any facts – not conclusions – that Ms. Gardner either (1) committed willful and deliberate acts of oppression and coercion designed to benefit her personally and financially or (2) intentionally failed to act, contrary to a known duty, fails to state a claim under § 106.220.

a. "Willful violation" of a duty under § 106.220 requires showing a corrupt motive, and "willful neglect" requires showing an intentional failure to act, contrary to a known duty, rather than a mistake, and so inherently requires showing bad faith.

Mr. Bailey argues he is not required to allege Ms. Gardner had a corrupt motive in order to state a claim under § 106.220, as the word "corrupt" in fact was removed from the statute in 1907 and then from the Constitution of Missouri's former provision authorizing this statute, which did not continue with the Constitution of 1945 (Opp. 24-29).

While the word "corrupt" does not appear in the statute or Constitution, Mr. Bailey is incorrect that the legal standards of § 106.220 he is invoking do not require a showing of a corrupt action or bad faith. They plainly do, just as the Supreme Court has continued to hold long after the word "corrupt" stopped appearing in § 106.220 in 1907, and consistently through to the present day.

Tellingly, every case in which a public official was ousted under § 106.220 – and which both parties agree state the relevant standards – are from *after* 1907 (Mot. 10-14). The statute today is the same as it was in all of those authorities. Mr. Bailey's attempt to rely on the 1907 statutory amendment and the change to the 1945 Constitution is therefore unavailing at best, a ruse at worst.

In his opposition, Mr. Bailey concentrates almost entirely on his allegations of "willful neglect." But his Amended Petition alleges more under § 106.220, not just "willful neglect." Rather, his Amended Petition also (conclusorily) alleges more than 20 times that Ms. Gardner has "willfully violated" duties, often lumping this in with his "willful neglect" allegation as one phrase (Amended Petition 9, 32, 39, 40, 41, 42, 43, 48, 91, 101, 115, 116, 117, 118, 119). As Ms. Gardner explained in her

motion to dismiss, "willful violation" and "willful neglect" are two separate standards with two separate analyses (Mot. 8). The law of Missouri is that "willful violation" most certainly requires a showing of corrupt motive.

"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). Until 1978, this was its own misdemeanor, too, which was codified in § 558.110, R.S.Mo. *See, e.g.*, *State ex inf. Eagleton v. Elliott*, 380 S.W.2d 929, 939 (Mo. banc 1964) (statute provided, "Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor"). The language "willful violation" in § 106.220 means the civil version of this misdemeanor, such that commission of the misdemeanor was a willful violation under § 106.220 and vice-versa. *State ex inf. Stephens v. Fletchall*, 412 S.W.2d 423, 426-27 (Mo. banc 1967). Therefore, the malfeasance and misconduct that is a "willful violation," *Foote*, 903 S.W.2d at 939, means "willfull [*sic*] and deliberate acts of oppression and coercion designed to benefit the respondents personally and financially …." *Fletchall*, 412 S.W.2d at 428. In other words, it means corruption.

Accordingly, to state a claim for ouster under § 106.220 for a *willful violation* of a duty, Mr. Bailey must show that Ms. Gardner intentionally violated a duty so as to benefit herself personally and financially. He must show that she did so because she was corrupt. As he tacitly concedes, none of his allegations remotely rises to that level.

At the same time, "willful neglect" requires showing an intentional failure in bad faith, not a mistake. "Willful neglect is something more than mere mistake or the thoughtless failure to act," and instead is an "intentional[ ] fail[ure] to act, contrary to a known duty." *Foote*, 903 S.W.2d at 539. There must be *intent*

involved, not just a mistake. For the only prosecutors ousted, in *Wymore* and *Graves*, that intent was bad faith.

Every one of the only 12 reported cases[1] where a public official was ousted under § 106.220 involved corruption and bad faith conduct. Mr. Bailey's argument that the existing law does not require this (Opp. 27-29) thoroughly misstates the authorities he cites, all of which plainly do require corruption or bad faith conduct.

Mr. Bailey quotes *Graves* as saying no "corrupt motive" was found (Opp. 27-28). That is not a fair reading of *Graves*. In fact the Supreme Court *sustained* the charge of corruption as to one case, the "State v. Gargotta" case Mr. Bailey mentions elsewhere in his opposition (Opp. 33), holding that was a "wilful [*sic*] and corrupt entering of nolle prosequi …." 144 S.W.2d at 995. Rather, the statement about no corrupt motive was only as to the entry of a few of the *nolle prosequis* at issue. 144 S.W.2d at 998-99. But even then, the Attorney General in *Graves* had *alleged* a corrupt motive, that the decision to *nolle prosequi* those cases meant the prosecutor "was guilty of corrupt practice in dismissing criminal proceedings …." *Id.* The Supreme Court held the Attorney General had failed to prove that allegation, *due* to the absence of a corrupt motive, and therefore the prosecutor was not ousted on that allegation. *Id.* The prosecutor in *Graves* plainly was ousted for intentional, corrupt, and bad faith violation of his duties and failure to engage in his duties, nothing less.

Mr. Bailey says in *Wymore*, the Supreme Court's suggestion the prosecutor was corrupt was limited to a statement in passing at the end of its opinion (Opp. 28-29). Not so. The Supreme Court specifically held the evidence supported that the operators of the illegal gambling machines "had an understanding with the

[1] In addition to the 11 identified in Ms. Gardner's motion to dismiss (pp. 10-14), to which Mr. Bailey does not add, another is *State ex rel. Saunders v. Burgess*, 264 S.W.2d 339 (Mo. banc 1954), in which a county assessor was ousted for soliciting bribes.

prosecuting attorney and other law-enforcement officers" under which they would not be prosecuted, which meant the prosecutor was "guilty of official misconduct." 132 S.W.2d at 981. That, too, was corruption and bad faith intent, nothing less.

Finally, Mr. Bailey points to *Olvera* and claims, "the court found that [the official's] motive '[did] not matter'" (Opp. 29) (quoting *Olvera*, 987 S.W.2d at 377). That is not what the Court of Appeals held "did not matter" in *Olvera* at all. The word "motive" does not appear in the decision. The gist of *Olvera* is that a recorder of deeds was shown to have intentionally changed entries of the amounts of fees she had received, so she was underreporting (and presumably pocketing) a portion of the fees. The Court of Appeals held, "It does not matter that, according to Olvera, she did not know that the altered Dunbrooke entry or any of the other entries in the official fee book were incorrect." *Id.* Instead, the question was whether she "intentionally fail[ed] to act, contrary to a known duty" to properly state her fees *Id.* The recorder of deeds' *intent* was the motive. And she "intentionally failed to act" when she "summarily changed the entry, contrary to the known duty to keep and report an accurate record." *Id.*

To state a claim for Ms. Gardner's ouster under § 106.220's "willful violation" prong, Mr. Bailey had to allege intentional corrupt acts of malfeasance by Ms. Gardner. And to state a claim under its "willful neglect" prong, he had to allege that she intentionally – not mistakenly – failed to act, contrary to a known duty. He has not (Mot. 23-38).

b. Mr. Bailey's conclusory allegations repeating the language of § 106.220 without pleading facts actually meeting those conclusions are insufficient.

Having misstated the standard he must meet, Mr. Bailey says he met his preferred standard by "plead[ing] [Ms.] Gardner's[2] knowing and willful neglect or violation of her duties through the public nature of her office's misconduct, through the repeated pattern or practice of failure, and through Gardner's own actions and statements" (Opp. 10). But at no point in his Amended Petition has he once pleaded any actual fact alleging:

- Ms. Gardner *intentionally caused*[3] her assistants to fail to take actions that resulted in the dismissal of cases (Mot. 24-26, 28-29),
- Ms. Gardner entered or ordered any *nolle prosequi* due to a corrupt motive or in bad faith (Mot. 26-27),
- Ms. Gardner *intentionally failed* to prosecute anyone (Mot. 27, 30-32),
- Ms. Gardner *intentionally caused* her assistants to comply with speedy trial requirements (Mot. 28),
- Ms. Gardner *intentionally failed* to seek to revoke someone's bond in bad faith (Mot. 28-29),
- Ms. Gardner *intentionally violated* discovery rules (Mot. 32-33),
- Ms. Gardner *intentionally engineered* the improper destruction of property (Mot. 33),

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[2] Ms. Gardner objects to Mr. Bailey calling himself "the State" throughout his opposition and other pleadings, and to referring to her as "Gardner" rather than Ms. Gardner. Mr. Bailey is the Attorney General and represents himself. He does not represent "the State" in these proceedings any more than any other relator in any other writ proceeding, who only get to invoke the State of Missouri's name "by relation" or "by information," depending on the form of writ. The parties to this case are Attorney General Andrew Bailey and Circuit Attorney Kimberly Gardner, not "the State" and "Gardner."

[3] Or even "willfully caused" or whatever synonym Mr. Bailey or the Court prefer.

- Ms. Gardner *intended* vacancies in her office to remain vacant, for her office to be short-staffed or the like, or her assistants to be unprepared (Mot. 34-35), despite alleging for the first time *in his opposition to the motion to dismiss* that Ms. Gardner "assign[ed duties] to her assistants knowing that they will fail because she has made it impossible for them to succeed" (Opp. 12), when no such allegation appears in his Amended Petition,
- Ms. Gardner *intentionally violated* the Sunshine Law (Mot. 35-36),
- Ms. Gardner *intentionally violated* the law or *intentionally failed* a duty to handle office finances appropriately, as occurred in *Olvera* (Mot. 36-37),
- Ms. Gardner *intentionally engineered* her assistants' failure to keep victims informed (Mot. 37-38), or
- Ms. Gardner *intended* cases to take longer so as to violate victims' rights to speedy disposition (Mot. 38).

Instead, as he conceded at the hearing over Ms. Gardner's motion to dismiss, Mr. Bailey alleges in his Amended Petition facts that some cases were dismissed, some were *nolle prosequi*d, some suspects have not yet been charged, some bonds were not moved to be revoked, etc., and almost entirely by people *other than* Ms. Gardner. Then, underneath that, he states conclusions that, despite not having alleged any intentional conduct, let alone (by his own admission) any corrupt or bad-faith conduct, and let alone by Ms. Gardner, therefore *Ms. Gardner* has willfully violated or willfully neglected her duties.

The law of Missouri's fact-pleading system under Rule 55.05 simply does not allow this. Mr. Bailey "must have pled facts supporting the conclusion that" Ms. Gardner willfully violated a duty (i.e., intentionally committed acts of corrupt misconduct) or willfully neglected a duty (i.e., intentionally failed to act, contrary to a known duty), "because Missouri is a fact-pleading state." *Westphal v. Lake Lotawana Ass'n, Inc.*, 95 S.W.3d 144, 152 (Mo. App. 2003). "A pleading must

contain 'a short and plain statement of the facts showing that the pleader is entitled to relief.' Rule 55.05. Where a petition contains only conclusions and does not contain the ultimate facts or any allegations from which to infer those facts[,] a motion to dismiss is properly granted." *Id.* This is a petition in search of facts, not one based on facts.

It is because of Missouri's requirement of fact pleading that merely parroting the language of a statute is insufficient, unless there are ultimate facts pleaded to show that the defendant's conduct met that language. *See, e.g.*, *Ingle v. Case*, 777 S.W.2d 301, 305 (Mo. App. 1989) (Allegations in wrongful death complaint that defendants acted in disregard of statutes, regulations and rules governing transportation of school children were insufficient to state cause of action; petition did not allege any facts to establish that either defendant did not act in full compliance with statutes, regulations, and rules).

None of Mr. Bailey's allegations in any of his counts supports his repetitious conclusion that Ms. Gardner willfully violated or willfully neglected a duty within the meaning of § 106.220. There is nothing alleged from which the Court can even infer that Ms. Gardner intended any of the failures or regretful results of what Mr. Bailey complains. (Instead, Mr. Bailey's strategy seems to be filing this patently insufficient Amended Petition so as to engage in enormously broad discovery and hopefully uncovering something more.)

At the hearing, Mr. Bailey's counsel made the extraordinary suggestion that multiple examples of just failures or neglect, again almost entirely alleged to be by people other than Ms. Gardner, may transform unintentional conduct over time into a showing of intentional failures. His representative stated, "A pattern of negligence would suffice to remove a public official."

This alchemical effort to turn negligence into intentional conduct is without any authority whatsoever. Mr. Bailey appears to base this argument on a single

statement in *State ex inf. Danforth v. Orton*, 465 S.W.2d 618, 627 (Mo. banc 1971) (Opp. 14), in which one of the five findings against the sheriff was for failing to file a report of "salaries and nonaccountable fees received during the preceding calendar year" on time. Contrary to Mr. Bailey's suggestion, the Supreme Court *did not* find this amounted to intentional failure under § 106.220, even if it occurred repeatedly. Rather, the Supreme Court merely held "this would not likely be, of itself, a sufficient reason for ouster, but it is a proper matter to be considered along with evidence of other items of neglect." *Id.*

Ultimately, the sheriff in *Orton* was not ousted for his failure to file the report. Instead, he was ousted for intentional corruption: intentionally refusing in a small town to prosecute open and notorious gambling and liquor law violations of which he had personal knowledge, as well as associated conduct of intentionally threatening a radio station manager who made a critical report of him for this, intentionally threatening alcohol control agents with incarceration if they did not leave the county, and similar corrupt behavior. *Id.* at 625-26.

Mr. Bailey also points to a statement in *State ex rel. Nixon v. Russell,* 45 S.W.3d 487, 499 (Mo. App. 2001), referring to the sheriff's "repeated and numerous acts of misconduct" (Opp. 11). But the Court in *Russell* (with now Supreme Court Judge Patricia Breckenridge writing for the Court of Appeals) was not stating that allegations of unintentional or negligent conduct, repeated, can constitute allegations of intentional conduct sufficient to satisfy § 106.220.

Instead, in *Russell*, a sheriff was accused of multiple acts of intentional financial misconduct, including using inmate labor for his personal benefit to mow his grass, work on his car, lay carpet in his rental property, and remodel his restaurant, and allowing the inmates to leave the jail to do so, and paying himself $50 in proceeds from a sheriff's auction. *Id.* at 498-99. Faced with these multiple intentional, corrupt violations of his duties, the sheriff argued ouster was still

inappropriate because the benefits he received were *de minimis*. *Id.* 499. The Court of Appeals disagreed that this was even a defense, but held *as to this*, that "[w]hile each instance taken individually may not have been of substantial pecuniary value, Mr. Russell's repeated and numerous acts of misconduct that provided benefits to him establish a willful neglect of his duties as sheriff." *Id.* at 500. The point was *not* that the Attorney General did not have to allege the sheriff's intentional misconduct, but that there *were* repeated and numerous acts of intentional misconduct, each of which constituted willful neglect under § 106.220. *Id.*

No prior ouster decision under § 106.220 ever has allowed mere allegations of multiple failures, without any allegation of intentional violations or failures (let alone those not corrupt or bad faith) to be sufficient for ouster. This is obviously because the standard requires Mr. Bailey to show Ms. Gardner willfully violated a duty (i.e., intentionally committed acts of corrupt misconduct) or willfully neglected a duty (i.e., intentionally failed to act, contrary to a known duty). Mr. Bailey's suggestion that his alleging mere failures or outcomes with which he disagrees, and almost entirely by other people, with no showing of the requisite intent, is sufficient is contrary to the well-established law of Missouri.

B. Mr. Bailey's allegations that people other than Ms. Gardner failed or neglected duties are insufficient to state a claim for her ouster under § 106.220.

Mr. Bailey devotes most of his 37-page opposition (Opp. 2-23) to opposing Ms. Gardner's explanation that only intentional corrupt misconduct or intentional failures by Ms. Gardner *herself* could meet § 106.220, and allegations of the actions or inactions of her subordinates, without any allegation that she intended those actions or inactions, are insufficient to state a claim for her ouster under § 106.220 (Mot. 18-22). Mr. Bailey's argument is grossly in error.

1. Ms. Gardner is not stating a "pass-the-buck defense"

Mr. Bailey suggests Ms. Gardner is stating a "pass-the-buck defense" (Opp. 12). This is untrue. It is *Mr. Bailey*, not Ms. Gardner, who has accused Ms. Gardner's assistants and staff of failures and neglectful actions. In her answer, Ms. Gardner has denied all those allegations. Rather, as this is a motion to dismiss, the issue is whether Mr. Bailey's allegations *about Ms. Gardner's assistants and staff* (which Ms. Gardner denies), if taken as true, would be sufficient to state a claim under § 106.220 that *Ms. Gardner* should be forcibly ousted from office because *Ms. Gardner* willfully violated a duty (i.e., intentionally committed acts of corrupt misconduct) or willfully neglected a duty (i.e., intentionally failed to act, contrary to a known duty). The law of Missouri is that these allegations are not sufficient.

2. Ms. Gardner is not "strictly liable" to be ousted under § 106.220 for the alleged conduct of her assistants and staff.

Mr. Bailey argues Ms. Gardner "is strictly liable for the conduct of her assistants" (Opp. 2-7). In fact, it is the first argument in his suggestions in opposition. But the notion of strict liability here has no support whatsoever in the law of Missouri. "Strict liability" is a concept most often seen in products liability cases, under which a defendant who sells a defective product is liable to the consumer for any harm caused by that product's use, regardless of the defendant's intent or the ability even to prove the defendant's negligence. *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 439 (Mo. banc 2002). It is the opposite of liability for intentional conduct, as "the division of 'strict liability in tort' is separate from the divisions of 'negligence' … or intentional invasions of interest, such as assault, battery or trespass …." *Williams v. Ford Motor Co.*, 454 S.W.2d 611, 617 (Mo. App. 1970) (quoting 2 RESTATEMENT OF TORTS 2d, § 402A, cmt. m).

Section 106.220 requires a showing of *intentional* conduct by the officer, the antithesis of strict liability. No authority Mr. Bailey cites supports his notion that if

a deputy to a public officer violates or neglects a duty, without the officer's knowledge or without intending the result, a claim for the officer's ouster lies under § 106.220. And no authority relates to facts remotely like what Mr. Bailey alleges here. Instead, every prior authority alleged intentional conduct by the officer himself or herself in intentionally bringing about or ratifying the conduct at issue.

Mr. Bailey cites *State ex. inf. McKittrick v. Williams*, 144 S.W.2d 98, 105 (Mo. banc 1940) (Opp. 6), the sheriff cognate to *Graves*, 144 S.W.2d at 91, in which the Attorney General alleged the Sheriff of Jackson County *personally and intentionally refused to investigate or pursue* gambling, liquor, prostitution, and other notorious offenses of which he had personal knowledge. Mr. Bailey points to the sheriff's argument that in fact it was the Kansas City Police who had the duty to enforce the law, so he could not have willfully neglected his duties. *Id.* at 104. The Supreme Court disagreed, however, holding that he independently had a duty to investigate and pursue criminal suspects of which he had personal knowledge. *Id.* The sheriff was not held responsible and removed as vicariously liable (let alone strictly liable) somehow for the police's failure. *Id.*

Williams has nothing to do with this case. There was no issue in *Williams* of whether a *deputy sheriff*'s failure without any allegation of involvement by the sheriff himself – as Mr. Bailey has alleged of Ms. Gardner's assistants and staff – constituted the intentional violation or intentional failure of the sheriff in his duties. *Williams* also does not hold that the sheriff was strictly liable for such a failure and could be ousted for it. Rather, when the Attorney General *first* had alleged specific facts showing an intentional failure by the sheriff *himself*, the issue was whether the sheriff could excuse that by pointing to a wholly separate local police department's own failure. *Williams*' answer was the sheriff could not. *Williams* is inapposite and does not support that § 106.220 makes a prosecutor "strictly liable" in intentional violation or intentional failure proceedings for the

failures of a subordinate, with no allegation that the prosecutor intended or engineered the subordinate's failure.

Mr. Bailey also points to *Orton* for the same proposition, "that the Pemiscot County Sheriff could not avoid forfeiting his office by relying on the police to enforce laws inside the cities in his county" (Opp. 6) (citing 465 S.W.2d at 626-27).

Orton, too, has nothing to do with Mr. Bailey's argument here. Again, in *Orton*, the Attorney General made specific allegations that the sheriff in *personally and intentionally refused to investigate or pursue* open and notorious gambling and liquor law violations of which he had personal knowledge, and also personally had committed the associated conduct of intentionally threatening a radio station manager who made a critical report of him for this, intentionally threatening alcohol control agents with incarceration if they did not leave the county, and similar behavior. *Id.* at 625-26. The sheriff in *Orton* briefly argued the local police in one town should have investigated the offenses at issue, but the Supreme Court held that did not excuse his personal intentional failure. *Id.* at 626-27. Again, there was no issue of whether a *deputy sheriff*'s failure without any allegation of involvement by the sheriff himself – as Mr. Bailey has alleged of Ms. Gardner's assistants and staff – constituted the intentional violation or intentional failure of the sheriff in his duties. Nor did the Supreme Court in *Orton* hold the sheriff was strictly liable for his deputies' failure and could be ousted for it. *Orton* does not support Mr. Bailey's argument.

Mr. Bailey also points to *Graves* as support for his strict liability argument (Opp. 13). But in *Graves*, the Attorney General once again alleged specific, personal, intentional, corrupt failures by the prosecutor himself: the failure even to investigate open and notorious gambling, prostitution, and liquor violations. 144 S.W.2d at 94-95. The Attorney General alleged the prosecutor personally knew of these issues but intentionally decided not to investigate or prosecute them. *Id.*

There was no allegation, as here, that an assistant prosecutor's failures made the prosecutor strictly liable, and no holding that the prosecutor had strict liability for his assistant's failures. *Graves* does not support Mr. Bailey's argument. Mr. Bailey has not alleged that Ms. Gardner intentionally failed to prosecute anyone, only actions or inactions by some of her assistants or staff, with no allegation she intentionally directed or ratified them.

Finally, Mr. Bailey points to statements in *Foote*, 903 S.W.2d at 539-40, and *Elliot*, 380 S.W.2d at 939, mentioning the respective sheriffs' subordinates. Neither, too, supports his argument, and Mr. Bailey wholly misstates these authorities.

In *Foote*, the Attorney General alleged, and the evidence showed, that the sheriff intentionally kept detainees in jail longer the law allowed. 903 S.W.2d at 539-40. The Supreme Court *did not* hold, as Mr. Bailey argues, "that the sheriff was responsible for unlawful detentions caused by the failures of his officers" (Opp. 14). Instead, the Court held the notion that *the sheriff* did not intentionally keep the detainees too long, or held them in good faith, was "not supported under the facts." 903 S.W.2d at 539. This was because:

> Foote bases his claim of "good faith" on the fact that a bond schedule pertaining to all traffic offenses was issued by the local judge assigned to hear those cases. The bond schedule, he contends, appeared to require all persons incarcerated for traffic offenses to post bond before they could be released, even if no warrant was ever issued. In fact, the bond schedule did not contravene the 20-hour rule.
>
> The record discloses two key points that make suspect Foote's claim of good-faith reliance on the bond schedule and support the trial court's finding that Foote knew all along that the detentions were unlawful: First, *Foote admitted that he knew persons charged with felonies could not be incarcerated without a warrant for more than 20 hours.* As the trial court aptly stated, "It strains credulity beyond reason to believe that any law enforcement officer could believe that a person imprisoned on a traffic ticket could be held in jail when a person suspected of committing a serious offense could not." Second, and more damaging, is the Cass County "Blue Book," the sheriff's manual on

> operating procedures *prepared at Sheriff Foote's direction*. The "Blue Book" contains a section labeled "Arrest Without a Warrant – Felony or Misdemeanor " (emphasis added) that states: "[t]his department can only hold a person on a warrantless arrest for twenty (20) hours." *Given this evidence*, we uphold the trial court's finding of willful violations.

Id. at 539-40 (emphasis added).

There was no holding in *Foote*, as Mr. Bailey seeks against Ms. Gardner, that the sheriff was strictly liable and could be ousted under § 106.220 for actions of his deputies that he did not personally direct or ratify. To the contrary, the Attorney General in *Foote* alleged, and the Supreme Court found, that the sheriff personally and intentionally had kept detainees in jail longer than allowed and was ratifying or directing the ongoing conduct of his subordinates. *Id.* Mr. Bailey has not alleged Ms. Gardner ratified or directed any of the subordinates' conduct he alleges.

Similarly, in *Elliot*, where a sheriff was ousted for a willful violation under § 106.220 for placing or having placed a stolen billfold in a suspect's car for the purposes of wrongfully implicating him, even the language to which Mr. Bailey points alleged that the billfold was planted in a suspect's possession "by [the sheriff] or *at his direction*." 380 S.W.2d at 939 (emphasis added). There was no holding that a deputy had performed this action and the sheriff, even without any allegation of his knowledge or direction of it, was strictly liable for it. Instead, the allegation was the sheriff himself specifically had directed his subordinates to engage in this misconduct for him.

Here, Mr. Bailey presents no allegation anywhere in his Amended Petition that Ms. Gardner knew her assistants or other staff were engaging in the failures he alleges, let alone that she *directed* (as in *Elliot*) or *ratified* them (as in *Foote*). Instead, he alleges only that failures occurred, without any allegation of involvement by Ms. Gardner, let alone at her direction or with her ratification after the fact. Indeed, the conduct to which he points in *Foote* and *Elliot* was ongoing and

with the official's knowledge. Here, at most, Mr. Bailey alleges conduct that there is no allegation Ms. Gardner even knew about at the time. And he does not allege she ratified it later.

Simply put, Mr. Bailey cites no authority whatsoever in which a prosecutor or any other official was held "strictly liable" under § 106.220's standards of willful violation (i.e., intentionally committed acts of corrupt misconduct) or willful neglect a duty (i.e., intentionally failed to act, contrary to a known duty) solely from a bare allegation that a subordinate at one or more times had failed or violated a duty, without any allegation that the official ratified or engineered the failure. He cites not one ouster case that even uses the term "strict liability." All of this is because no authority supports this argument, nor could any, given the high standards of intentional misconduct § 106.220 states and the Supreme Court has drawn from it.

3. It is not a reasonable inference from bare allegations of actions or inactions by Ms. Gardner's assistants or staff that they mean Ms. Gardner willfully violated a duty (i.e., intentionally committed acts of corrupt misconduct) or willfully neglected a duty (i.e., intentionally failed to act, contrary to a known duty).

Mr. Bailey then argues it is a "reasonable inference" from the bare allegations of the failures of Ms. Gardner's assistants or staff that they were *her* actions (Opp. 7-9) or she "directed and controlled" those failures (Opp. 9-10). He cites no authority in which a public official was held so liable based on such an inference, again because none exists, nor could it. And he ignores that here, it has to be more than that: it has to be proof of an *intentional, corrupt act of misconduct* or an *intentional failure to act*, as in *Wymore* or *Graves*, not merely a mistake.

Mr. Bailey is proffering suppositions and conjectures, not reasoned inferences. "An 'inference' is a conclusion drawn by reason from facts established by proof; 'a deduction or conclusion from facts or propositions known to be true.'" *State v. Foster*, 930 S.W.2d 62, 64 (Mo. App. 1996) (citation omitted). But this is different

from a "supposition," which is "a conjecture based on the possibility that a thing could have happened. It is an idea or a notion founded on the probability that a thing may have occurred, but without proof that it did occur." *Id.* (citation omitted).

Mr. Bailey suggests that the mere fact assistant prosecutors work for the prosecutor mean any actions by an assistant *were* the actions of the prosecutor or were controlled by the prosecutor. But the only authority he cites are cases holding that an assistant prosecutor is allowed to sign an indictment or information (Opp. 7-10). In an office that by his own admission has handled more than 19,000 prosecutions over Ms. Gardner's tenure (Amended Petition 52), it is not a conclusion drawn by reason from the facts that a failure of an assistant to come to court, to confer with a victim's family, or any of the other failures he alleges in some 40 cases out of those 19,000 were *intended* by Ms. Gardner. Mr. Bailey states Ms. Gardner "assign[ed cases] to her assistants knowing that they will fail" (Opp. 11), but did not allege that in his Amended Petition, because he has no facts from which to do so.

Mr. Bailey's notion that stating allegations that an assistant prosecutor failed in a duty automatically means the Circuit Attorney herself has committed a willful violation of a duty (i.e., intentionally committed acts of corrupt misconduct) or willful neglect a duty (i.e., intentionally failed to act, contrary to a known duty) has no support in the law of Missouri. This is unsurprising, as it flies in the face of reason and is absurd. If in 40 out of 19,300 cases line prosecutors failed in duties, that provides no reason that the chief prosecutor of the jurisdiction either *directed* or *intended* those failures.

Section 106.220 imposes a difficult and onerous standard for removing an official, a standard requiring intentional corruption or bad-faith conduct by the official herself. By his own admissions, Mr. Bailey's Amended Petition fails to state such a claim at all. His attempt to extend that to anything less is untenable. It must be dismissed.

C. Mr. Bailey's allegations of occurrences during Ms. Gardner's first term, rather than her present term, do not state a claim under § 106.220.

In *Wymore*, 132 S.W.2d at 979, *Graves*, 144 S.W.2d at 91, *State ex inf. Dalton v. Mosely*, 286 S.W.2d 721, 729 (Mo. banc 1956), and *Orton*, 465 S.W.2d at 620-21, the Attorney General made allegations of events from before the official's present term to state claims under § 106.220. In each case, when the official objected to this, the Supreme Court held it did not have to answer whether this was proper, because the allegations from the present term were sufficient.

In none of those cases did the official move to dismiss the case, arguing failure to state a claim on which relief can be granted. Here, Ms. Gardner does. While the Courts in those cases held those earlier allegations might also be considered as evidence at a trial, none held they could independently be allegations on which to predicate an ouster under § 106.220.

In *Graves*, the Supreme Court held it was an open question in Missouri "whether an officer could be ousted from his second term because of misconduct arising during his first term." 144 S.W.2d at 93-94. But the next year, in *Eagleton v. Murphy*, 156 S.W.2d 683, 684-85 (Mo. 1941), the Supreme Court held that where a statute authorized removal of an official from the remainder of his present term, rather than a future term, only allegations from the present term could suffice.

Today, the weight of authority agrees with the Supreme Court in *Eagleton* and holds that an officer *cannot* be ousted from her present term on allegations from her first term. *See* "Removal of public officers for misconduct during previous term," 42 A.L.R.3d 691 (1972 supp. 2023).

Accordingly, at the very least, the Court must dismiss any allegation by Mr. Bailey against Ms. Gardner concerning anything from before her present term that began in January 2021. This includes:

- The *nolle prosequi*s of *State v. J.D.* and *State v. D.H.*, which Mr. Bailey alleges occurred in 2019 (Amended Petition 20-22);
- The six misdemeanor cases in which Mr. Bailey alleges assistant circuit attorneys either failed to appear or were not ready, all of which he alleges occurred in 2018-2019 (Amended Petition 36-39);
- The use of the Vera Institute to assist in determining which cases were best suited for prosecution, which Mr. Bailey alleges occurred in 2017 (Amended Petition 46-47);
- Any allegation relating to the murder of Xavier Usanga, all of which Mr. Bailey alleges occurred in 2019 (Amended Petition 48-51);
- Two of the six cases in which Mr. Bailey alleges discovery violations, *K.W.*, and *A.H.*, which Mr. Bailey alleges occurred in 2016-17 and 2018-19, respectively (Amended Petition 59-65);
- All hiring allegations in Count 6, all of which Mr. Bailey alleges occurred in 2017 (Amended Petition 73-77); and
- All of Count 7 alleging violation of the Sunshine Law, all of which Mr. Bailey alleges occurred in 2019-2020 (Amended Petition 91-95).

With the removal of these dated allegations outside Ms. Gardner's current term, the Court is forced to confront the issue that the Attorney General's counsel evaded at the hearing. Specifically, if the Court dismisses some claims or some factual conduct, would the remaining allegations be sufficient facts to state a claim for ouster under § 106.220? The answer to this question is clearly, "No," both as to specific counts and as to specific allegations. If the Court were effectively to strike the dated allegations, which infect multiple counts, and to also dismiss both Counts 6 and 7, what would be left would be woefully short of a basis for ouster – even if the allegations were in fact based on willful conduct by Ms. Gardner, which they are not.

Conclusion

Mr. Bailey's Amended Petition fails to allege facts – not conclusions – which, taken as true and accorded all reasonable inferences, would show Ms. Gardner either (1) committed willful and deliberate acts of oppression and coercion designed to benefit her personally and financially or (2) intentionally failed to act, contrary to a known duty. Accordingly, he has failed to state a lawful claim for Ms. Gardner's ouster under § 106.220, R.S.Mo. The Court should dismiss his Amended Petition in its entirety.

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 25, 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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