

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

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause Number: 2022-CR01301
	)	
vs,	)	Division Number: 25
	)	
MARK MCCLOSKEY,	)	
	)	
Defendant.	)	
	)	

**Circuit Attorney Office’s Response to Defendant’s Motion to Disqualify the Circuit Attorney and the Circuit Attorney’s Office**

The State of Missouri, by and through its counsel, the Circuit Attorney’s Office for St. Louis City, opposes Defendant’s motion to disqualify the Circuit Attorney and the Circuit Attorney’s Office. As the Supreme Court of Missouri recently reiterated, “only in rare circumstances should a circuit court interfere with the democratic process and override the voters’ choice as to who is best suited to represent the interests of the people as prosecuting attorney.” *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 399 (2018) (internal citation omitted). This is not such a case. Any reasonable review of the two emails the defense questions make clear that they responded to attacks levied at Circuit Attorney Kim Gardner by Republicans in the state of Missouri and nationally, which led directly to her personally receiving violent and racist threatening messages. To suggest the emails decrying attempts to stymie ordinary and fair prosecutorial process evidenced a financial or improper personal interest in the outcome of this

specific case or any other improper motive tied to this case is stretching the content beyond reasonable limits. Moreover, any such suggestion is consistent with a pattern of prior efforts to attack the Circuit Attorney that began long before the charging decision. Respectfully, this Court should deny the Defendant's motion.

### **BACKGROUND**

On June 28, 2020, Defendants were captured on video brandishing guns at a group of protesters marching down their street. The next day, Circuit Attorney Gardner issued a brief statement addressing both the incident involving the Defendants and another incident in which a man who appeared to be praying was assaulted. The statement read that she was "alarmed at the events that occurred over the weekend, where peaceful protesters were met by guns," alluding to the situation with the Defendants, "and a violent assault," alluding to the separate incident where the man was assaulted. "My office is currently working with the public and police to investigate these events. Make no mistake, we will not tolerate the use of force against those exercising their First Amendment rights, and will use the full power of Missouri law to hold people accountable."<sup>1</sup> Following this statement, the Circuit Attorney made no other public statements specifically about this case while it was under investigation by her office.

On the other hand, the Defendants and their attorney made repeated public statements—even before being charged—to both local and national media outlets.<sup>2</sup> Their

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<sup>1</sup> The Circuit Attorney's full statement is available at <https://bit.ly/2D2G7WD> (last visited July 30, 2020). The Circuit Attorney's Office filed charges against the man captured in the video in that separate incident, and did so before any charges were filed in this case. *See* Trager, Lauren, "Man seen throwing punches at Louis IX statue charged after speaking with News 4," KMOV4 (July 14, 2020), [https://www.kmov.com/news/man-seen-throwing-punches-at-louis-ix-statue-charged-after-speaking-with-news-4/article\\_03a38898-c08b-11ea-9bbe-ab2d5c112c99.html](https://www.kmov.com/news/man-seen-throwing-punches-at-louis-ix-statue-charged-after-speaking-with-news-4/article_03a38898-c08b-11ea-9bbe-ab2d5c112c99.html)

<sup>2</sup> *See* Bell, Kim, "I'd do it all again,' says armed lawyer who confronted St. Louis protesters," St. Louis Post-Dispatch (July 2, 2020), <https://www.stltoday.com/news/local/crime-and-courts/i->

attorney at the time told the St. Louis Post-Dispatch, “My clients, as melanin-deficient human beings, are completely respectful of the message Black Lives Matter needs to get out, especially to whites,” but they acted out of “fear and apprehension, the genesis of which was not race-related.”<sup>3</sup>

Almost immediately, the incident gained tremendous national attention, especially from Republican lawmakers and right-wing media outlets both locally and nationally, even though no charges had yet to be filed. Numerous Missouri Republican officials spoke publicly about the case, often with inflammatory rhetoric directed specifically towards the Circuit Attorney. For example:

- On July 12, 2020, a headline in the Washington Examiner read, “Missouri attorney general slams St. Louis prosecutor in McCloskey case for ‘politically motivated decisions,’”<sup>4</sup> after having gone on Fox News<sup>5</sup> where

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[d-do-it-all-again-says-armed-lawyer-who-confronted-st-louis-protesters/article\\_e4b5d080-62ec-51e1-85e8-3d8c909730e5.html](https://www.washingtonexaminer.com/news/missouri-attorney-general-slams-st-louis-prosecutor-in-mccloskey-case-for-politically-motivated-decisions); Carlson, Tucker, “Who are the criminals destroying your country,” Fox News (July 3, 2020), <https://www.foxnews.com/opinion/who-are-the-criminals-destroying-your-country-tucker-carlson>; King, Chris, “McCloskeys not yet charged but offering apparent defense,” St. Louis American (July 11, 2020), [http://www.stlamerican.com/news/local\\_news/mccloskeys-not-yet-charged-but-offering-apparent-defense/article\\_176354ec-c3ad-11ea-8112-c3e110b6cd04.html](http://www.stlamerican.com/news/local_news/mccloskeys-not-yet-charged-but-offering-apparent-defense/article_176354ec-c3ad-11ea-8112-c3e110b6cd04.html); Halon, Yael, “Armed St. Louis homeowner says protesters threatened to kill her, move into her home,” Fox News (July 6, 2020), <https://www.foxnews.com/media/armed-st-louis-homeowner-protests-mccloskey>; Garcia, Victor, “St. Louis home defender Mark McCloskey updates ‘Watters’ World’ on possible charges,” Fox News (July 18, 2020), <https://www.foxnews.com/media/st-louis-home-defender-mark-mccloskey-updates-watters-world-on-possible-charges>.

<sup>3</sup> Bell, Kim, Rice, Rachel, Currier, Joel, “St. Louis couple who pointed guns at protests saw threat by ‘bad actors,’ lawyer says; protests says he feared ‘bloodbath,’” St. Louis Post-Dispatch (June 30, 2020), [https://www.stltoday.com/news/local/crime-and-courts/st-louis-couple-who-pointed-guns-at-protesters-saw-threat-by-bad-actors-lawyer-says/article\\_bd402520-4f02-5d63-8d07-a38632f28585.html](https://www.stltoday.com/news/local/crime-and-courts/st-louis-couple-who-pointed-guns-at-protesters-saw-threat-by-bad-actors-lawyer-says/article_bd402520-4f02-5d63-8d07-a38632f28585.html).

<sup>4</sup> See Colton, Emma, “Missouri attorney general slams St. Louis prosecutor in McCloskey case for ‘politically motivated decisions,’” Washington Examiner (July 12, 2020), <https://www.washingtonexaminer.com/news/missouri-attorney-general-slams-st-louis-prosecutor-in-mccloskey-case-for-politically-motivated-decisions>.

<sup>5</sup> See Saaverda, Ryan, “Missouri AG On Warrant Served On St. Louis Couple: Democrat Prosecutor Has History Of ‘Politically Motivated Decisions,’ Has Not Charged Those Who Attacked Prayerful Protesters,” Daily Wire (July 10, 2020), <https://www.dailywire.com/news/missouri-ag-on-warrant-served-on-st-louis-couple-democrat-prosecutor-has-history-of-politically-motivated-decisions-has-not-charged-those-who-attacked-prayerful-protesters?>.

he accused the Circuit Attorney of “making politically motivated decisions,” and having been “complicit in the release of dozens and dozens of inmates charged with violent crimes.”<sup>6</sup>

- On July 14, Governor Mike Parson said that the President of the United States “understands the situation in St. Louis, and how out of control it is for a prosecutor to let violent criminals off and not do their job and try to attack law-abiding citizens,”<sup>7</sup> and that he was talking with the president because the couple had “every right to protect their property;”<sup>8</sup>
- On July 16, 2020, Missouri Senator Josh Hawley asked the United States Justice Department to investigate Circuit Attorney Gardner, claiming that she had engaged in an “unacceptable abuse of power,” despite no charges having been filed at that point.<sup>9</sup>

National Republicans also contributed to stirring up controversy surrounding the case, repeatedly and publicly questioning the Circuit Attorney even before any charges had been filed. For instance, on July 10, 2020, a dozen Republican members of the United States Congress sent a letter to United States Attorney General William Barr encouraging him to take action because charges against the Defendants would “have a

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<sup>6</sup> The Attorney General’s oft-repeated claim that the Circuit Attorney had been “complicit in the release of dozens and dozens of inmates,” which also appears on both his facebook and twitter pages, has been shown to be false. See Messenger, Tony, “Schmitt says Gardner is weak on crime. These numbers tell a different story,” St. Louis Post-Dispatch (July 13, 2020), [https://www.stltoday.com/news/local/columns/tony-messenger/messenger-schmitt-says-gardner-is-weak-on-crime-these-numbers-tell-a-different-story/article\\_79cfc1c1-27ee-5bd9-8c69-958c36e5fd4.html](https://www.stltoday.com/news/local/columns/tony-messenger/messenger-schmitt-says-gardner-is-weak-on-crime-these-numbers-tell-a-different-story/article_79cfc1c1-27ee-5bd9-8c69-958c36e5fd4.html).

<sup>7</sup> Salter, Jim, “Parson: Trump ‘focused’ on situation with St. Louis couple,” Washington Post (July 14, 2020), [https://www.washingtonpost.com/national/parson-trump-focused-on-situation-with-st-louis-couple/2020/07/14/b6b9ab26-c642-11ea-a825-8722004e4150\\_story.html](https://www.washingtonpost.com/national/parson-trump-focused-on-situation-with-st-louis-couple/2020/07/14/b6b9ab26-c642-11ea-a825-8722004e4150_story.html).

<sup>8</sup> Flynn, Meagan, Jackman, Tom, and Guarino, Ben, “‘A modern-day night ride’: St. Louis prosecutor receives death threats as Trump defends couple who pointed guns at protesters,” Washington Post (July 15, 2020), <https://www.washingtonpost.com/nation/2020/07/15/trump-st-louis-mccloskeys/>.

<sup>9</sup> Jackman, Tom, “Sen. Josh Hawley calls for civil rights probe of St. Louis prosecutor Kim Gardner over McCloskey case,” Washington Post (July 16, 2020), <https://www.washingtonpost.com/nation/2020/07/16/sen-josh-hawley-calls-civil-rights-probe-st-louis-prosecutor-kim-gardner-over-mccloskey-case/>.

chilling effect on the *entire nation*”<sup>10</sup> (emphasis added). On July 14, 2020, former New York Governor and attorney to the current president Rudy Giuliani turned to Twitter to accuse the Circuit Attorney of “undermining our legal system.”<sup>11</sup> And the President, as chief executive officer of the nation, chose to get involved in this single case in Missouri. On July 14, 2020, he falsely stated that the Defendants “were going to be beat up badly and the house was going to be . . . burned down,” and he referred to the attempts to prosecute the Defendants—who again had not been charged at this point— as a “a disgrace.”<sup>12</sup> Three days later, the Defendants took part in a virtual Trump campaign event.<sup>13</sup>

After a nearly month-long investigation that followed all requisite process and procedures, on July 20, 2020, the Circuit Attorney announced that the Defendants were being charged in this case. Yet, she did not have them physically arrested, relying instead on a summons. After charges were announced, Republican politicians kept up with the challenges to the Circuit Attorney: the Governor announced he would pardon them despite not having the authority to do so for anyone not yet convicted of a crime;<sup>14</sup> Senator Hawley called it an “outrageous abuse of power” and cited the since-debunked

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<sup>10</sup> Calicchio, Dom, “Missouri couple’s gun rights defended in letter to AG Barr by 12 GOP lawmakers,” Fox News (July 12, 2020), <https://www.foxnews.com/us/missouri-couples-gun-rights-defended-in-letter-to-ag-barr-from-12-gop-lawmakers>

<sup>11</sup> See <https://twitter.com/RudyGiuliani/status/1283056548923703298?s=20> (posted July 14m 2020).

<sup>12</sup> See Jermina McEvoy, “Trump Defends St. Louis Couple Who Pointed Guns At Protesters,” Forbes (July 14, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/07/14/trump-defends-st-louis-couple-who-pointed-guns-at-protesters/#534d97ca3f56>.

<sup>13</sup> See Linton, Caroline, “Trump campaign event features St. Louis couple who pointed guns at protesters,” CBS News (July 18, 2020), <https://www.cbsnews.com/news/mark-patricia-mccloskey-guns-kimberly-guilfoyle-interview-trump-campaign/>.

<sup>14</sup> See Justin Wise, “Missouri governor says he’d pardon St. Louis couple if they are charged for brandishing guns at protesters,” The Hill <https://thehill.com/homenews/state-watch/507988-missouri-governor-says-hed-pardon-st-louis-couple-if-they-are-charged> (July 19, 2020).

claim that the Circuit Attorney had released “dozens of violent protesters”;<sup>15</sup> and the Attorney General of the State of Missouri rushed to appear on Fox News to discuss his plan to intervene in the case and then filed an amicus brief in this Court, despite not having the statutory authority to do so.<sup>16</sup> Once charges were filed, the President’s press secretary called the charges an “egregious abuse of power” with Governor Parson agreeing.<sup>17</sup> Even after being charged, the Defendants continued with their media tour.<sup>18</sup>

The inflammatory and constant nature of verbal attacks against the Circuit Attorney were quickly followed by her receiving an increased level of violence-threatening messages, in particular following the initial public comments by Governor Parson and the President. One email to the Circuit Attorney read, “It is YOU who are the racist, unfairly targeting white McCloskeys for exercising their 2nd Amendment rights while your people stormed their property. U really need to be run out of town you black b----!,” one person even left a note on her car, “I hope you hang from a tree.”<sup>19</sup> Because

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<sup>15</sup> See the official Twitter Page of Senator Josh Hawley (@HawleyMO), available at <https://twitter.com/HawleyMO/status/1285363169238687744> (July 20, 2020).

<sup>16</sup> The only authority the Attorney General cited that would permit him to file an amicus brief is Mo. Sup. Ct. R. 84.05(f)(4), which has no bearing in this Court as it is a rule for appellate courts. See Motion to Strike Amicus Brief of Attorney General Eric Schmitt Supporting Dismissal of the Case (filed July 24, 2020).

<sup>17</sup> Cummings, William, “‘An outrageous abuse of power’: Republicans decry prosecution of McCloskeys, who trained guns on protesters,” USA Today (July 21, 2020), <https://www.usatoday.com/story/news/politics/2020/07/21/republicans-act-prosecution-mark-patricia-mccloskey-st-louis/5479005002/>.

<sup>18</sup> See Musto, Julia, “Mark McCloskey describes clash with protesters: ‘It was a very, very frightening experience,’” Fox News (July 22, 2020), <https://www.foxnews.com/media/mark-mccloskey-describes-clash-with-protesters-it-was-a-very-frightening-experience>.

<sup>19</sup> Flynn, Meagan, Jackman, Tom, and Guarino, Ben, “‘A modern-day night ride’: St. Louis prosecutor receives death threats as Trump defends couple who pointed guns at protesters,” Washington Post (July 15, 2020), <https://www.washingtonpost.com/nation/2020/07/15/trump-st-louis-mccloskeys/>

of the death threats she has received, the Circuit Attorney had to file pleadings under seal.<sup>20</sup>

The Circuit Attorney is in the midst of a Democratic primary with an election scheduled for August 4, 2020, for which her campaign communicates with voters to urge them to vote their consciences in full view of recent local and national news. In the month of July, her campaign sent out a pair of fundraising emails. An email sent on July 17 asked supporters to contribute to the Circuit Attorney's campaign to help her "fight back" against the Governor and the President's attacks on her and her valid exercise of prosecutorial discretion. The contention in the campaign email specified that the state and national leaders should not be focused on her and an isolated criminal case but on their own jobs, especially in view of the raging pandemic. The email reads, in part:

You might be familiar with the story of the couple who brandished guns during a peaceful protest outside of their mansion. Well, today the Governor of Missouri weigh in, telling the press: **"[President Trump] understands the situation in Missouri, he understands the situation in St. Louis and how out of control it is for a prosecutor to let violent criminals off and to not do their job and try to attack law-abiding citizens."** (emphasis original). Instead of fighting for the millions of Americans affected by the pandemic . . . President Trump and the Governor are fighting for the two who pointed guns at peaceful citizens during the Black Lives Matter protest. Both President Trump and Governor Parson are playing politics at a time when they should be doing their elected jobs. Kim needs your help to fight back. Her election is only weeks away. **And right now she is under national scrutiny from our divisive President, the Republican establishment of Missouri, and the right-wing media, including Fox News. (emphasis added).** Will you show Kim you stand with her and rush a donation today?

\_\_\_\_\_ The following week, on July 22, 2020, the Circuit Attorney's campaign sent another fundraising email as the attacks against her from Republicans raged on. The

<sup>20</sup> See King, Chris, "News analysis: the detective who investigated the McCloskeys," St. Louis American (July 24, 2020), [http://www.stlamerican.com/news/local\\_news/news-analysis-the-detective-who-investigated-the-mccloskeys/article\\_2d79bd6c-ce01-11ea-9d90-9beafeda3309.html](http://www.stlamerican.com/news/local_news/news-analysis-the-detective-who-investigated-the-mccloskeys/article_2d79bd6c-ce01-11ea-9d90-9beafeda3309.html).

email read, in part: “In the last 24 hours, there has been a lot of national attention surrounding Kim’s decision to press charges against a couple that brandished guns at a peaceful Black Lives Matter protest. For merely doing her job, Kim has received death threats, been attacked by Donald Trump, and berated by Missouri’s Governor, Senator, and Attorney General.” The next two paragraphs detailed the verbal attacks against Gardner by Governor Parson and Senator Hawley. It concluded by stating:

This is what happens when leaders like Kim stand up against a system that elevates the privileged and powerful. When Kim was first elected to office, she took an oath to uphold the law and hold those accountable who break it. **The Republican leaders in Missouri are politicizing this incident and attempting to maim Kim’s character in the process.** (emphasis added). Right now, Kim’s re-election is only weeks away. We need to do everything in our power to re-elect Kim for St. Louis [Circuit] Attorney to send a message to Washington DC that the people of St. Louis give her their full support. . . . **While the Governor, the President, and others will continue to politicize this situation, the people of St. Louis are the ultimate decision makers.** The next 2 weeks are critical and we must get our message out there.

### ARGUMENT

Although the legal standard went ignored in the Defendant’s motion, a court may only remove a prosecutor from a case in extremely rare circumstances tightly constrained by law. Nothing in either of the two campaign emails the Defendant complains about approaches the type or level of misconduct needed to remove the Circuit Attorney or her entire office. The Defendants make no argument of an actual conflict of interest that would require a prosecutor to be removed from the case. (Def. Mot. at 6). Their argument of an “appearance of impropriety” falls flat when evaluated against the necessary standard to remove a prosecutor and an application of that standard to any reasonable review of all the facts. Applying the legal standard, this Court

must therefore deny the motion and should instruct the defense to cease its attempts to turn these criminal proceedings into political theater. <sup>21</sup>

Courts have permitted the disqualification of individual prosecutors from a case rarely and only in extreme circumstances. *Young v. United States*, 481 U.S. 787, 807 (1987); *see also United States v. Bolden*, 353 F.3d 870, 878-79 (10th Cir. 2003) (to remove and disqualify a prosecutor or a prosecutor's office from a criminal case is a drastic measure that a court should "hesitate to impose" except when absolutely necessary). Generally, courts have been "unreceptive, if not hostile" to attempts to disqualify prosecutors from a specific case. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 493 (2017). *See, e.g., Starr v. Mandanici*, 152 F.3d 741, 743 (8th Cir. 1998) (rejecting claim that independent counsel had a disqualifying conflict of interest arising out of his political affiliation); *United States v. Vlahos*, 33 F.3d 758, 763 n.5 (7th Cir. 1994) (the weight of authority does not require a prosecutor's office to be disqualified from a case); *McFarlan v. District Court*, 718 P.2d 247, 250-51 (Colo. 1986) (no error in refusing to disqualify a prosecutor from a case who had a prior attorney-client relationship with a co-defendant).

In part, this reticence to constrain prosecutorial discretion is because prosecutors, who are representatives of the sovereign, *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976), are trusted to subordinate their inherent political or personal self-interests in order to

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<sup>21</sup> It can be no surprise that very shortly after the defense filed this motion, it was being reported in numerous local outlets. The defense motion was time stamped at 9:41 AM on July 29, 2020, and by 12:35 pm, it was already being reported in the local news. *See* Byers, Christine, "St. Louis prosecutor used McCloskey case in campaign literature and should be dismissed, according to new motion," KSDK (July 29, 2020), <https://www.ksdk.com/article/news/local/mccloskeys-attorney-files-motion-to-disqualify-circuit-attorney-gardner-from-case/63-8fedfaf7-2dab-4d2e-8521-f80064c17f61>.

serve the public as ministers of justice. *See, e.g., Hollywood v. Superior Court*, 182 P.3d 590, 599 (Cal. 2008) (denying disqualification of a prosecutor because even though the prosecutor contemplated writing a book about the case, such an act did not overcome the presumption that a prosecutor will exercise his discretion fairly). These precedents demonstrate that courts cannot lightly interfere with the role and discretionary decisions of an elected prosecutor.

Furthermore, depriving an elected prosecutor of her constitutional authority over criminal cases is anti-democratic. *See Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J. dissenting) (explaining that “the primary check against prosecutorial abuse is a political one” and not judicial). “A court may intervene to disqualify [a prosecuting] attorney only under limited circumstances. This is especially so in the case of [an elected prosecutor], who is a constitutional officer chosen by the electorate and whose removal by a court implicates separation of powers considerations.” *In re Schumer v Holtzman*, 454 N.E.2d 522, 526 (N.Y. 1983). “The unparalleled authority of the American prosecutor has often been attributed to the fact that district attorneys in the United States are elected, county-level officials. Prosecutorial power, in this view, is an outgrowth of the peculiar emphasis the United States places on local, democratic control. The ‘locally elected status’ of American prosecuting attorneys provides them with an ‘independent source of power’ and is the reason they enjoy ‘discretionary privilege unmatched in the world.’” *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 398 (Mo. 2018) (quoting David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. Crim. L. & Criminology 473, 491 (2016)).

Thus, while it is not inconceivable that there may be circumstances where a prosecutor should be removed, there must be sufficient evidence of an improper

motivation that rises to the level of creating an appearance the defendant cannot receive a fair trial. *See State v. Lemaster*, 456 S.W.3d 416, 419-20 (Mo. 2015) (a prosecutor may only be removed from a case when a reasonable view of all the facts establishes the appearance of impropriety of such magnitude as to deny a defendant the right to a fair trial); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) (“We do not suggest” that there are no “limits on the partisanship of administrative prosecutors. . . . In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.”). A review of the entirety of the facts from a *reasonable* perspective—not the defendant’s *subjective* perspective—must establish the necessity of disqualifying a prosecutor. *See Lemaster*, 456 S.W.3d at 423 (“[A]n appearance of impropriety judged only from the defendant’s perspective cannot be sufficient for relief. Instead the touchstone for claims that present a real threat to the apparent fairness of the system is what knowledge of all the facts and circumstances would suggest to a reasonable person.”). Defendants accordingly must be able to show that the Circuit Attorney has an improper personal interest, or at least the appearance of one, in the “outcome of the criminal prosecution which might preclude affording the defendant the fair treatment to which defendant is entitled.” *State v. McWhirter*, 935 S.W.2d 778, 781 (Mo. 1996).

Reviewing all the facts here shows there is no basis to disqualify the Circuit Attorney from this case. Specifically, there is no “realistic possibility” that the actions and decisions of the Circuit Attorney have been “distorted” by improper motivations or the appearance of such. *Marshall*, 446 U.S. at 250. *See also Gibson v. Berryhill*, 411 U.S. 564,

579 (1973) (there must be “sufficient substance” to the accusations in order to disqualify an “administrative adjudicator[s]” from a case).

Five considerations support this conclusion, as a matter of fact and law. **First**, defendants have presented no evidence that the prosecutor’s campaign violated the legal standards for abuse of discretion on the part of the prosecutor. The Circuit Attorney’s campaign sent out a pair of fundraising emails—standard operating procedure in any campaign today—asking voters to help the Circuit Attorney fight back against the unprecedented level of verbal attacks from prominent Republicans and right-wing media outlets for the exercise of her constitutional duties. Far from violating the law, her careful steps to consider, investigate, and come to a charging decision to enforce Missouri state laws and to uphold constitutional rights to free speech fell well within her scope of discretion. Moreover, the campaign references the case and her decisions related to charging without respect to outcome, which she affirmed was a matter for “the people” to decide. Recall that the second email noted as follows: “**While the Governor, the President, and others will continue to politicize this situation, the people of St. Louis are the ultimate decision makers.**” Not a single word in either campaign email tied the Circuit Attorney’s personal, professional, or financial interest to whether she would prosecute the Defendants or how she might pursue an outcome in that case. The reference to the Defendants was at most incidental to the requests in the fundraising emails sent by the Circuit Attorney’s campaign.

**Second**, the nearly unprecedented amount of public verbal attacks against the Circuit Attorney and her legitimate exercise of her prosecutorial duties, were the clear impetus for the campaign’s decision to send the two fundraising emails. Likewise, the personal attacks against the Circuit Attorney were unrelated to her actual charging

decision here, as they began before she filed charges and have continued in substance since the charging decision. The legal standard requiring review of all of the facts mean that defendants cannot cast aside the backdrop of the attacks against the CA for legitimate exercise of prosecutorial discretion, as they form the basis of the fundraising emails and frame how any reasonable person would interpret them. As detailed at length in the background recitation of facts, prominent local and national Republican politicians assaulted the Circuit Attorney's discretion for even investigating the incident involving the Defendants, something which she is obligated to do by law. These attacks accompanied increasingly violent and racist attacks against the Circuit Attorney, including a note on her car bearing the words, "I hope you hang from a tree."

**Third**, any reasoned reading of the two fundraising emails the Defendant complains about establishes that there was nothing improper, let alone sufficient to disqualify the Circuit Attorney, in either. The Defendant's contention that a few paint a "direct line" from the Defendants to a request for campaign contributions is unfounded. In light of all the surrounding facts, as the law requires, no fair reading can reach such a conclusion. Merely mentioning the Defendant's case that had already received widespread national attention does not establish justification for removal.

The point is well-illustrated in both emails. The first email, sent before charges were filed, makes a single passing reference to the Defendants, pointing out that people might already be "familiar" with their actions. Based on the Defendants' own repeated appearances on national news outlets, there was no secret being revealed there. The rest of the email has nothing to do with the Defendants, but highlights statements about the Circuit Attorney by the governor and the president, and notes how their efforts have placed the Circuit Attorney "under national scrutiny." The email concludes by asking

supporters to “stand with [the Circuit Attorney,” with the clear implication being that the email wants supporters to stand up for the Circuit Attorney legitimate exercise of prosecutorial discretion and duties to uphold the law in the face of Republican that would stymie both. It in no way links any decision or outcome the Circuit Attorney made in this specific case to fundraising efforts.

The second email, sent after charges in this case were filed, is similarly unavailing as a basis for defendants to erroneously claim improper or disqualifying prosecutorial conflict. That email similarly asked people to support the Circuit Attorney as she stands for her legitimate exercise of her prosecutorial duties against the onslaught of attacks seeking to stop her from doing so, coming from both state and national Republican leaders. The email did mention the Defendants at its start, merely noting that charges had been filed—which, again in part due to the Defendants’ own decision to appear in the press, was a well-known fact at the time the email was sent. The email served only to contextualize the need for voter support for proper prosecutorial conduct.

Filing charges is part of the job of any circuit attorney. What is not ordinarily part of the job, and what the remainder of the campaign email decried, is to receive “death threats;” to be “attacked by Donald Trump; and to be berated by Missouri’s Governor, Senator, and Attorney General” [as outlined in the email] for filing charges in a case where video evidence showed the Defendants brandishing guns at protesters. The email accused Republican politicians of politicizing the incident—evidenced by their verbal attacks even before charges had been filed—and asked supporters to help Kim “send a message to Washington DC,” the origin of many of the attacks against prosecutorial discretion and local authority over criminal law. Any “direct line” in the second email traced a connection

between contribution requests and sending a message to Washington DC about the value of upholding constitutional and statutorily mandated prosecutorial duties.

**Fourth**, a review of all the facts involved in the Circuit Attorney's actions in charging the Defendants establishes there is neither a conflict nor an appearance of conflict that would approach the legal standards justifying removal. The defense appears to believe that any mention in email of their conduct, that they brandished guns at peaceful protesters, is sufficient to establish grounds to remove a prosecutor from a case. Not so. Other than the fact that the events occurred and that charges were filed, the Circuit Attorney has been silent about the facts of this case to the public. In doing so she went above and beyond her institutional duties. As a prosecutor, the Circuit Attorney is permitted to have opinions about the Defendants' conduct and does not have to be "neutral and detached" in how she views that conduct. *See Marshall*, 446 U.S. at 248 ("Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process" and "[p]rosecutors need not be entirely 'neutral and detached.'") (internal citations omitted). *See also People v. Eubanks*, 927 P.2d 310, 316 (Cal. 1996) ("Of course, a prosecutor need not be disinterested on the issue whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means.).

Moreover, it is established law that prosecutors such as the Circuit Attorney have "broad discretion in determining whether to bring charges, as long as [she] believes the evidence is sufficient to support a conviction." *See State v. Retzlaff*, 490 N.W.2d 750, 753 (Wis. Ct. App. 1992) (noting that a prosecutor has "broad discretion" to bring criminal charges, and affirming the trial court's decision that the mere fact the prosecutor received

a \$300 campaign contribution from the victim in the case was not sufficient to warrant removal). In this case, she exercised that discretion only after the result of a proper, thorough process, including a month-long investigation that relied on the assistance of the police; an experienced police detective authored the statement of probable cause and swore an oath in doing so;<sup>22</sup> and a neutral judge issued the summons after reviewing that statement for its legal sufficiency. *See* Mo. R. Crim. Pro. 22.04; *see also Boyer*, 561 S.W.3d at 398 (a prosecutor has an obligation to “investigate, i.e., inquire into the matter with care and accuracy, that in each case [s]he examine the available evidence, the law and the facts, and the applicability of each to the other.”) (internal citations omitted); *Commonwealth v. Jaynes*, 64 Va. Cir. 443 (2004) (no justification to remove Attorney General’s office from prosecuting case even though a victim had also been a campaign donor, in part because there was an “independent determination” by the grand jury as to probable cause). The Circuit Attorney’s actions throughout this case thus far establish any proper, lawful motive; and even the fundraising emails establish her interest was only in pushing back against Republican attacks on her and her prosecutorial authority—which have nothing to do with the Defendants. *See McWhirter*, 935 S.W.2d at 782 (finding no reason to remove a prosecutor from a case where there was no evidence of a “continuing” conflict that would show the prosecutor had an improper personal interest in the outcome of the case).

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<sup>22</sup> *See* King, Chris, “News analysis: the detective who investigated the McCloskeys,” St. Louis American (July 24, 2020), [http://www.stlamerican.com/news/local\\_news/news-analysis-the-detective-who-investigated-the-mccloskeys/article\\_2d79bd6c-ce01-11ea-9d90-9beafeda3309.html](http://www.stlamerican.com/news/local_news/news-analysis-the-detective-who-investigated-the-mccloskeys/article_2d79bd6c-ce01-11ea-9d90-9beafeda3309.html) (detailing the probable cause statement authored by a St. Louis police detective).

Moreover, the fact that the Circuit Attorney chose to rely on a summons in this case instead of trying to create a public spectacle of arresting the Defendants and having them hauled off in handcuffs in a police car (and then immediately offering the Defendants diversion instead of prosecution), adds weight to the argument that the Circuit Attorney is the one party in this case who has done all she can to *not* politicize it. Rather, when all the facts are reviewed, there is no indication whatsoever that she has acted with improper motives, and no fair review of the case suggests that there is even such an appearance. In short none of the Circuit Attorney's actions or the related campaign emails would cause a reasonable person to question whether the Defendants will receive a fair trial.

**Fifth**, the cases on which the defendants rely do not aid their case and, instead, support this Court denying the requested relief, principally because the Circuit Attorney and her campaign evidenced interest in the duty and discretion to prosecute, not to unduly support a particular outcome in the case. The defense primarily relies upon *State v. Hohman*, 420 A.2d 852 (Vt. 1980). But the facts there are far different than the emails the defense questions here. In that case, a prosecutor in a fundraising effort drew a connection between being elected and pursuing the prosecution of a high-profile case, directly implying that a violent case would not be prosecuted unless he was re-elected. *Id.* at 854. The advertisement discussed the case history, that the defendant had a murder conviction overturned, and that bail had been set far lower than the prosecutor had requested. It then read: "The Hohman case is the most important case pending. My opponent is disqualified from prosecuting George Hohman. If I am re-elected, I will vigorously prosecute Hohman and obtain a second conviction. Your support would be appreciated[.]" *Id.* at 854. The Vermont court found this advertisement to be improper,

warranting the prosecutor's removal from the case, reasoning that the "awesome power to prosecute ought never be manipulated for personal or political profit." *Id.* at 855.

There is not a single word in either of the emails sent by the Circuit Attorney's campaign that approaches the improper content of the advertisement in *Hohman*. There, a prosecutor told supporters that whether a person who had been convicted of murder could be brought to trial depended on his being re-elected. That was a direct, uninterrupted line. Point A was Hohman being brought to trial a second time; point B was the prosecutor being re-elected. That was a clear case of a conflict warranting removal because the advertisement raised a legitimate question that the prosecutor was tying his ability to be re-elected to how he prosecuted this one specific case. Moreover, it was a case where the stakes were high: a murder trial with life-and-death punishment scenarios that require the type of scrutiny that court levied.

The factual differences make clear that *Hohman* is an inapplicable standard here. Here, the case is about an unlawful use of weapons statute that carries relatively minor punishments on the scale of most misdemeanors. Here, there is no parallel to the *Hohman* prosecutor seeking a second trial so vigorously (and with interest in the outcome) only in order to be re-elected. By contrast, the emails from the Circuit Attorney neither make nor imply any similar connection. In fact, unlike in *Hohman*, the decision to prosecute was made prior to the Circuit Attorney's election. She did not tie her re-election to the prosecution of this or any case. Here, the reference to the Defendants was not to outcomes and the future, but to facts in the past: their conduct as captured on video and the fact they had been charged. Not a word discussed, referenced, or implied that the future prosecution of this case was related in any way to the Circuit Attorney obtaining financial support from those receiving the email.

The defense also relies on *People v. Phillips*, 169 Cal. App. 3d 632 (Cal. Ct. App. 1985). But that case is similarly unhelpful to their position. There, the court found no reason to disqualify a prosecutor who went on a radio talk show to discuss how he participated in the prosecution of a defendant charged with sexually assaulting a young child. The court found no indication the prosecutor's comments showed the "DA's office may not exercise its discretionary function in an even handed manner," and that a prosecutor expressing "concern" for a child victim "was within the realm of proper prosecutorial function." Such a statement "failed to show the type of conflict which requires recusal." *Id.* at 642. Here too, the Circuit Attorney's campaign emails did not show the "type of conflict which requires" disqualification. Briefly referencing well-known facts in the public domain is in no way improper.

The defense also cites *State v. Pennington*, 365 S.E.2d 803 (W. Va. 1987), but that case undermines the defense's contentions. There, like here, the prosecutor was engaged in a case that was receiving wide-spread attention. He then issued an advertisement where he explained his actions in the pending case and certain decisions about granting immunity. *Id.* at 811-12. The West Virginia court, in contrasting the case with the *Hohman* case discussed above, found that the prosecutor's conduct did not warrant removal, largely because nothing in the advertisement "mentioned [the defendant] by name, never promised to obtain a jury conviction and emphasized that the final verdict rested with the jury. *Id.* at 852 (citing *Hohlman*, 420 A.2d at 855). Similarly, the emails in this case did not name the defendants,<sup>23</sup> did not promise to obtain a jury verdict, and focused on the

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<sup>23</sup> It is undisputed that the emails in question did not mention the Defendants by name. To any extent that the defense contends their identity was easily known by the content of the email, that has nothing to do with the emails specifically and everything to do with the fact that their conduct was captured on video for the entire world to see and they almost immediately and then

need to stand up for justice without discussing a prospective conviction. In *Pennington*, the advertisement referenced that a final verdict rested with the jury and discussed a specific witness. So did the emails here.

Finally, the defendants rely, in their prayer to disqualify the Circuit Attorney and her entire office, on *State v. Lemasters*, 456 S.W.3d 416 (Mo. 2015). There, a particular prosecutor was disqualified because of a conflict of interest identified under the Rules of Professional Conduct (Mo. Sup. Ct. R. 4-1.11). The defendants' motion to dismiss misinterprets *Lemasters*. That case does not require that a prosecutor "should be disqualified where a reasonable person would have factual grounds to find an appearance of impropriety." Rather, *Lemasters* holds that if a prosecutor has a conflict of interest, they *personally* are disqualified. For the entire prosecutors' office to be disqualified there should also be an appearance of impropriety: "...disqualification of a prosecutor is appropriate when a conflict of interest prohibits the attorney's participation in the underlying case." *McFadden v. State*, 2020 Mo. LEXIS 130, \*46 (Mo. April 14, 2020) (citing *State v. Lemasters*, 456 S.W.3d 416, 420 (Mo. banc 2015)).

Furthermore, a "conflict of interest" is a term of art under Missouri law that does not obtain here. Section 56.110 R.S.Mo. defines conflicts of interest: "If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his or her office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to

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repeatedly spoke to the media about the facts of this case, both before and after charges were filed. Thus, the email did not alert campaign supporters to any information relating to this case or the Defendants that had not already widely been disseminated in the press and was a matter of public record.

prosecute or defend the cause. Such special prosecutor shall not otherwise represent a party other than the state of Missouri in any criminal case or proceeding in that circuit for the duration of that appointment and shall be considered an appointed prosecutor for purposes of section 56.360.” The defendants have alleged no such conflict of interest, nor do past precedent support their interpretation of the emails evincing such conflict. Even if there were such a conflict, the proper remedy would not be disqualifying the entire office. *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380 (Mo. December 4, 2018) held that even where one prosecutor has a conflict of interest, the whole office should not be disqualified unless the office fails to screen out that prosecutor. This recent case follows the *Lemasters* framework, and, following the same framework in this case necessarily leads to the conclusion of no specific or office-wide conflict on the part of the Circuit Attorney or her office because of campaign emails.

Examples of prosecutors in Missouri employing permissible campaign ads abound, even from the very actors who now complain about the Circuit Attorney. This year, for example, Attorney General Eric Schmitt, who is running for AG for the first time because he was previously appointed when his predecessor left for the US Senate, features this statement about being a party to a current investigation:

#### Holding Big Tech Accountable

Eric joined a bipartisan coalition of Attorneys General in announcing a multi-state investigation aimed at getting to the truth and determining if Google and Facebook’s practices compromise privacy, and if they are anti-competitive and illegal.

Eric is investigating Google and Facebook to ensure that even the biggest of Big Tech companies are held accountable and are subject to the rule of law.<sup>24</sup>

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<sup>24</sup> <https://schmittformissouri.com/issues/>

Apropos of the same, in a news interview discussing his campaign, the Attorney General was asked “why is it that you should stay in this position?” and his response included that he was “taking on big tech.”<sup>25</sup>

The rule that defendants urge this court to fashion would render nearly all elected prosecutors in Missouri. The campaign ads released by the campaign for the Circuit Attorney’s re-election are no different in kind or character than the sort of communications made by other elected prosecutors in Missouri.

\* \* \*

Upon review of all the legal standards and facts, there is simply no evidence to establish that the Circuit Attorney has an actual or apparent conflict in this case. The two emails questioned by the defense do not prove any perceived conflict that would undermine the Circuit Attorney’s ability to prosecute this case in a fair manner. Since there is no justification to disqualify the Circuit Attorney as an individual, there is likewise no merit to the defense’s contention that the entire office should be disqualified. *See Boyer*, 561 S.W.3d at 396 (stating that under the *Lemasters* framework, if an individual attorney does not have a conflict warranting removal, then there is no basis to determine if an entire office should be removed).

WHEREFORE, the State of Missouri, by and through the Circuit Attorney, asks this Court to deny the defense’s motion to disqualify her and her office from this case.

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<sup>25</sup> Eric Schmitt announces campaign for Missouri attorney general, Feb 20, 2020, [https://www.youtube.com/watch?v=QtUeT\\_hvU0Q&t=25s](https://www.youtube.com/watch?v=QtUeT_hvU0Q&t=25s).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 5, 2020, the foregoing was electronically filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon Joel J. Schwartz, attorney for defendant.