

NO. 2023DCV-0244-G

STATE OF TEXAS,	§	IN THE DISTRICT COURT
EX. REL. COLBY WILTSE,	§	
	§	
v.	§	319 th JUDICIAL DISTRICT
	§	
MARK GONZALEZ, IN HIS OFFICIAL	§	
CAPACITY AS DISTRICT ATTORNEY	§	
OF THE 105 TH JUDICIAL DISTRICT	§	NUECES COUNTY, TEXAS

RESPONDENT’S MOTION TO DISMISS FOR LACK OF JURISDICTION

TO THE HONORABLE PRESIDING JUDGE:

NOW COMES Mark Gonzalez, in his Official Capacity as the duly elected (and re-elected) District Attorney of the 105th Judicial District, filing this his *Respondent’s Motion to Dismiss for Lack of Jurisdiction*, and showing unto the Court as follows:

**I.
PROCEDURAL HISTORY AND FACTUAL ALLEGATIONS**

On January 20, 2023, Colby Wiltse (hereinafter “Relator”) filed his *Petition to Remove District Attorney for the 105th Judicial District Pursuant to Texas Constitution, Art. V., §24 & Chapter 87, Local Gov’t Code* (hereinafter “*Original Petition*”). Therein, in a rather convoluted and/or confusing fashion, Relator alleged – in support of his request that the re-elected Nueces County District Attorney Mark Gonzalez (hereinafter “Gonzalez” and/or “Respondent”) be removed from office for “incompetency,” “official misconduct,” and “failure to give bond” – the following as to Gonzalez:

- a) that he failed to “provide office oversight, policies, and procedures” as it pertains to certain specific cases;
- b) that he failed to “pursue indictments in support of motions to revoke” as it pertains to one specific case and without any particular facts indicating what was improper about the procedures followed in the case and/or what “indictment” would be involved in a motion to revoke proceeding;

- c) that he dismissed too many cases without any reference to *any* particular case and/or the facts of any particular case;
- d) that he failed “to represent the State Government in the prosecution of criminal offenses, ignoring duly enacted Texas Law, and nullifying the criminal justice system” by not denying prosecutions for cases involving abortions and/or transgender issues;
- e) that he failed to “represent the 105th Judicial District” when he did not appear before a meeting of the Nueces County Board of Judges;
- f) that he misused “governmental resources to obtain a private benefit” by making social media posts from his office concerning a private business;
- g) that he failed to “disclose travel benefits”; and
- h) that he failed to “give bond within the time prescribed by law.”

In support of the *Original Petition*, Relator attached as Exhibit W thereto his *Verification*, which reads in its entirety as follows:

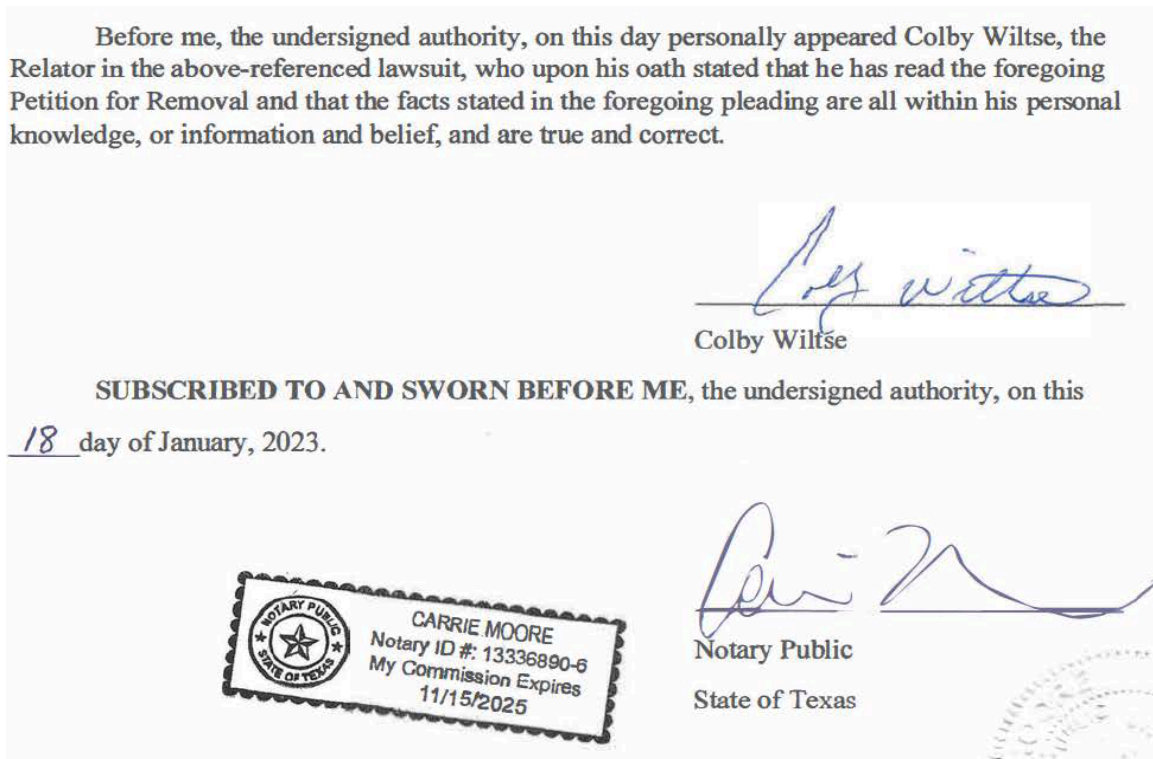


Exhibit W to *Original Petition*.

On February 17, 2023, Nueces County Attorney Jenny P. Dorsey (hereinafter “Dorsey”) filed her *Entry of Appearance in Support of Citation*.

On March 8, 2023, this Court held a hearing concerning the instant matter, and after hearing argument of counsel and Dorsey’s repeated statement that several of the above-noted allegations (“attested” to by Relator under penalty of perjury) contained within the *Original Petition* were without evidence in support and were not going to be pursued, allowed Dorsey to file an amended petition to reflect same.

On March 22, 2023, Dorsey filed her *First Amended Petition to Remove District Attorney of the 105th Judicial District Mark Gonzalez and Jury Demand* (hereinafter “*Amended Petition*”), wherein Dorsey seems to remove any assertion of “official misconduct” (and/or improperly-blends such with issues addressing “competence”), instead asserting in support of her request that Gonzalez be removed from office on grounds of “incompetency” and “failure to give bond.” Additionally, Dorsey chose to forego any claims and/or facts concerning allegations for “failure to disclose” travel benefits and the like and “not pursuing criminal prosecutions” concerning prosecution of abortion and/or transgender-related cases and instead focuses her assertions on

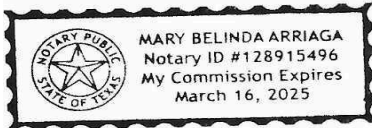
- a) gross ignorance based on absence supported by “key card” swipes;
- b) incompetence based on specific “high-profile” cases;
- c) incompetence based on the dismissal of cases for purposes of maintaining CJIS grants for the Nueces County and then not dismissing cases leading to the loss of CJIS grants, as well as the particular results of a single MTR-case;
- d) gross ignorance in using “governmental resources”; and
- e) gross ignorance as it pertains to the execution of Gonzalez’s bond.

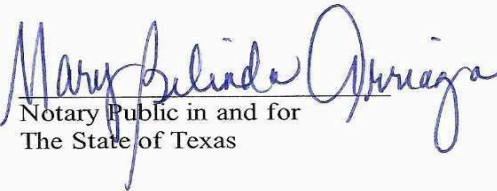
See *Amended Petition*. In support of the *Amended Petition*, Dorsey attached an additional *Verification* for Relator (Exhibit “1”) and an identical *Verification* for herself (Exhibit “2”), both of which read in their entirety as follows:

BEFORE ME, the undersigned authority, on this date personally appeared Colby Wiltse, the relator in the above-referenced lawsuit, who by me being duly sworn, on his oath deposed and said that he has read the foregoing First Amended Petition for Removal and that the facts stated in the foregoing pleading are within his personal knowledge, or information and belief, and are true and correct.



Colby Wiltse
Relator-Plaintiff

SUBSCRIBED TO AND SWORN BEFORE ME, the undersigned authority, on this the 21st day of March, 2023.

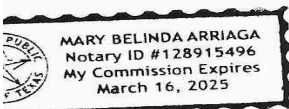



Notary Public in and for
The State of Texas

BEFORE ME, the undersigned authority, on this date personally appeared Jenny P. Dorsey, Nueces County Attorney representing the State of Texas in the above-referenced suit, who by me being duly sworn, on her oath deposed and said that the facts asserted in the foregoing pleading are within her personal knowledge, or information and belief, and are true and correct.


Jenny P. Dorsey
Nueces County Attorney
State of Texas

SUBSCRIBED TO AND SWORN BEFORE ME, the undersigned authority, on this the 21st day of March, 2023.



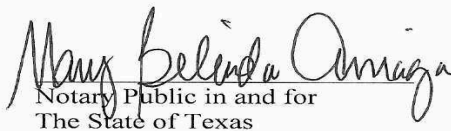

Notary Public in and for
The State of Texas

Exhibit “1” and Exhibit “2” to *Amended Petition*.

While Respondent might and does take issue with the above-noted *Original Petition* and *Amended Petition* as to their sufficiency as a matter-of-law and/or fact, and expects to file post-answer motions (if necessary) addressing such concerns shortly, such is not the substance of this motion. Instead, this specific motion concerning the jurisdiction of this Court in light of the above-noted insufficient-verifications.

II. LACK OF JURISDICTION

As obviously understood by Relator and Dorsey, it is a necessity that “in proceedings for the removal of officers, a proper petition, verified as required by law, is a prerequisite to the jurisdiction of the court.” *Johnson v. Mooney*, 241 S.W. 308, 309 (Tex. Civ. App. 1922). In *Johnson*, the “verification” discussed by the Court read (in almost an identical-fashion to those at hand) as follows:

“The above and foregoing petition has been read by me, and the statements therein are true, except those made from information and belief, and those I verily believe to be true.”

Johnson at 309-310. In dismissing the cause following an appeal from a trial on the merits for “fundamental error” apparent upon the face of the record, the *Johnson* court found, in pertinent part, as follows¹:

The said petition does not disclose what allegations are made on knowledge, or which on information, or which on belief. It is believed that it cannot be seriously contended that the affidavit was sufficient. We take it that a party who seeks to oust from office one who has been legally elected by the voters should do so upon unqualified allegations of facts, and not upon averments of hearsay and belief. *Ewing v. Duncan*, 81 Tex. 230, 16 S.W. 1000; *Pullen v. Baker*, 41 Tex. 419; *Moss v. Whitson* (Tex. Civ. App.) 130 S.W. 1034; *Smith v. Banks* (Tex. Civ. App.) 152 S.W. 449; *Lane v. Jones* (Tex. Civ. App.) 167 S.W.177.

¹ Respondent understands that the foregoing cite is rather voluminous in nature, but is extremely important in this Court’s determination in this case and is much better phrased than paraphrased.

...

“The test of an affidavit, as laid down by the Commission of Appeals (*Whitmore & Co. v. Wilson*, 1 Posey 213), is that the affidavit of facts sworn to must be so direct and unequivocal as that an indictment for perjury would lie, if the oath is falsely made. The affidavit in this case will not meet that test, for it would be impossible to prove that any certain part of the petition was sworn to upon knowledge, information, or belief, and consequently an indictment for perjury would have nothing upon which it could be predicated, with that definiteness required in criminal proceedings.”

...

When the institution of proceedings is by petition, and it is necessary that same should be verified on oath, there must be a compliance with this requirement, or the proceeding will be deemed invalid. 17 Ency. Pl. & Pr. 221. In cases of this character, the rule of strict construction prevails. *State v. Alcorn*, 78 Tex. 387, 14 S.W. 663. In the case cited, a removal from office case, Judge Stayton says: “The statute under consideration is one penal in character, and must be construed as though it were one defining a crime and prescribing its punishment.”

...

The affidavit required to be made and attached to the petition is a matter of substance -- an essential part of the application -- so much so that the court acquires no jurisdiction without it. The statute is mandatory, and the court acquired no jurisdiction of the cause, because the petition was fatally defective for want of proper verification. Article 6042, R. S.; *Bland v. State* (Tex. Civ. App.) 36 S.W. 914; *Hinkle v. Lovelace*, 204 Mo. 208, 102 S.W. 1015, 11 L. R. A. (N. S.) 730; 120 Am. St. Rep. 698, 11 Ann. Cas. 794; *Nichols v. Nichols*, 128 N.C. 108, 38 S.E. 296; *De Armond v. De Armond*, 92 Tenn. 40, 20 S.W. 422; *Ayres v. Gartner*, 90 Mich. 380, 51 N.W. 461; *In re Rockwell's Estate*, 17 Misc. 670, 41 N.Y.S. 431; *Bullock v. Aldrich*, 11 Gray (Mass.) 206.

Johnson at 310.

Based on the above and/or the fact that the courts have consistently and uniformly held that when the affidavit required which is an essential part in a removal proceeding is lacking, a court acquires no jurisdiction of such a cause. The verifications at hand are nearly-identical in nature to the verifications discussed by above-noted various courts and suffer from the same insufficiencies addressed therein. Neither of the verifications of Relator and/or Dorsey actually “verify” or attest

to anything in particular and certainly could not be considered sufficient to form the basis of perjury were such attested statements proven incorrect. Accordingly, and because Relator and Dorsey have failed to properly support either the *Original Petition* and/or the *Amended Petition* as required, this politically-motivated cause meant to oust an elected official based on vague hearsay, information and/or belief should be dismissed.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Court dismiss this cause and grant him all further relief (including sanctions for fees necessary to defend this unsupported cause in his individual and/or official capacity), either at law or equity, to which he may be justly entitled.

Respectfully submitted,

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By: /s/ Amie Augenstein
Amie Augenstein
Texas Bar No: 24085184
Email: Amie@GaleLawGroup.com
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of March, 2023, a true and correct copy of the above and foregoing has been sent to the following by the means indicated below:

Jenny P. Dorsey
Nueces County Attorney
901 Leopard St., Room 207
Corpus Christi, Texas 78401

Via E-File Notification
& *By E-Mail:* County.Attorney@nuecesco.com

Judge David Peebles

Via E-Mail: DPeebles99@gmail.com

Emily Waldrop

Via E-Mail: Emily.Waldrop@Nuecesco.com

/s/ Christopher J. Gale

Christopher J. Gale