

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

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

vs.

KIMBERLY M. GARDNER,
Respondent.

Cause No. 2322-CC00383

MOTION TO STAY DISCOVERY

Respondent Kimberly M. Gardner, by and through undersigned counsel, moves this Court for an Order to stay discovery until her Motion to Dismiss Petition (also the “Motion to Dismiss”) is resolved. In support of this Motion to Stay Discovery, Ms. Gardner states:

A. Attorney General Andrew Bailey’s Petition fails to state a claim such that it should be dismissed in its entirety.

1. On February 23, 2023, Mr. Bailey filed a Petition in *Quo Warranto* (the “Petition”) seeking to oust Kimberly Gardner, the twice-elected Circuit Attorney of the City of St. Louis, under § 106.220, R.S.Mo.

2. As explained in that Motion to Dismiss (which Ms. Gardner adopts herein by reference), § 106.220 allows removal of a public official only when the public official willfully neglects official duties, or knowingly or willfully fails or refuses to do or perform official acts or duties, forfeits and may be removed from office.

3. Mr. Bailey’s Petition fails even to allege that Ms. Gardner has engaged in misconduct that would allow her removal under § 106.220. Rather, the Petition

merely alleges that Ms. Gardner's subordinates neglected to effectively prosecute some cases, her office did not keep victims well informed, and that Ms. Gardner exercised her prosecutorial discretion in a manner not supported by Mr. Bailey.

4. Even if these allegations are true – Ms. Gardner contends they are not – such allegations simply do not meet the standard necessary for the Court to grant the drastic remedy of removing an elected Circuit Attorney from office through a writ of *quo warranto*.

5. Therefore, concurrent with this Motion to Stay Discovery, Ms. Gardner is filing a Motion to Dismiss that Petition because the Petition fails to state a claim.

B. Mr. Bailey has used his Petition to engage in an overly broad and unduly burdensome fishing expedition largely directed at non-parties.

6. Within days of filing the Petition, Mr. Bailey and his counsel began serving discovery, a notice of deposition upon Ms. Gardner and several other employees of the Circuit Attorney's Office, and subpoenas upon non-parties, including the Circuit Attorney's Office where Ms. Gardner presides; the Mayor of the City of St. Louis; and the Comptroller of the City of St. Louis.

7. Missouri Supreme Court Rule 57.09(c) directs that “[a] party or attorney responsible for the issuance and service of a subpoena shall take reasonable steps to ***avoid imposing undue burden or expense*** on a non-party subject to the subpoena.” (Emphasis added.)

8. Despite this mandate to “avoid imposing undue burden and expense,” Mr. Bailey's discovery – particularly as currently directed to non-parties – is extraordinarily overbroad and unduly burdensome.

9. The first subpoena Mr. Bailey served on non-party the Circuit Attorney's Office on March 1, for example, lists 34 categories of documents sought, including all organization charts and all telephone lists or rosters for the Circuit Attorney's Office for the last ten years, from 2013 to the present (longer than Ms. Gardner has been in office); copies of all office procedures and policies for the same ten-year period; all applications and documents regarding the receipt, loss, and spending of any grant from the same ten-year period; and all email communications sent or received by five people for the last two years on a broad range of issues including staff turnover and hiring procedures and notifications to victims pursuant to Missouri law.

10. Mr. Bailey's first subpoena also has demands that the Circuit Attorney's Office produce numerous other categories of documents including those indicating the number of warrant applications submitted to the Office; the number of charges issued; the number of cases filed, dismissed, and/or sent to diversion; and details of any warrant application that was refused or taken under advisement, as well as Ms. Gardner's complete personnel file. All these documents are to be produced only fifteen days after the subpoena was first filed.

11. Subsequently, Mr. Bailey served a second subpoena on non-party the Circuit Attorney's Office on March 10, 2023. This second subpoena contained two additional requests for various documents and communications between the Circuit Attorney's Office and the Vera Institute, a non-profit that works to end mass incarceration. See <https://www.vera.org/who-we-are/about-us>. Obviously, in addition to increasing the burden on the Circuit Attorney's Office, communications between

the Vera Institute and the Circuit Attorney's Office seem wholly political in nature, not connected to any legitimate effort to remove Ms. Gardner under § 106.220. If any communications between the Circuit Attorney's Office and the Vera Institute exist, this information could only potentially reveal information about ideological considerations that differ from Mr. Bailey's approach for making charging decisions.

12. Mr. Bailey's discovery directed to other non-parties is similarly overly broad and unduly burdensome. Mr. Bailey served more narrow subpoenas on the Mayor and Comptroller than the two he has served on the Circuit Attorney's Office, for example, but the Mayor and Comptroller still ended up producing more than 5,000 documents and 19,000 pages of responsive documents. Many of these documents – and many more withheld from the production due to privilege or personal health confidentiality concerns – clearly have “no logical or legal relationship to the allegations” contained in Mr. Bailey's Petition. *See* Letter from City Counselor Sheena Hamilton dated March 13, 2023, Exhibit A.

C. All discovery should be stayed, or other relief provided, to Mr. Bailey's overly broad and unduly burdensome discovery requests.

13. It is well established that “[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). Trial courts are also “allowed broad discretion in the control and management of discovery.” *State ex rel. Lichtor v. Clark*, 845 S.W.2d 55, 59 (Mo. App. W.D. 1992); *see also Sansone v. Governor of Missouri*, 648 S.W.3d 13, 30 (Mo. App. W.D. 2022). This broad discretion

will not be disturbed except for an abuse of discretion. *Sansone*, 648 S.W.3d at 30.

14. This Court should exercise its inherent authority and stay discovery until Ms. Gardner's Motion to Dismiss is resolved. Ms. Gardner's Motion to Dismiss is very compelling and it should be granted. The Motion to Dismiss proves that Mr. Bailey's Petition completely fails to state a claim upon which relief can be granted. The Petition alleges, at best, only negligence, rather than the type of gross willful corruption that is required to obtain a writ of *quo warranto* to issue.

15. Alternatively, if this Court decides for some reason to allow Mr. Bailey's claims to proceed, Ms. Gardner anticipates the surviving claims will be narrowed, and that likewise Mr. Bailey or this Court can reduce the overly broad and unduly burdensome discovery that Mr. Bailey has propounded to date.

16. Mr. Bailey should not be unduly prejudiced by a stay of discovery. Rather, the Missouri Supreme Court Rules allowed Mr. Bailey to initiate this *quo warranto* action only if he had sufficient evidence in hand to proceed with trying to remove Ms. Gardner. He did not; accordingly, his claims should be dismissed in their entirety. Further, the proper narrowing of discovery, if some claim does survive, would only reduce the cost non-parties may bear, if this Court does not shift the costs of Mr. Bailey's non-party discovery to Mr. Bailey as provided in Rule 57.09(b).

WHEREFORE, Respondent, Kimberly Gardner, respectfully requests this Court to enter an Order staying discovery while her meritorious Motion to Dismiss Petition is pending, and ultimately order a narrowing of that discovery and for the Attorney General Andrew Bailey if this case proceeds beyond Ms. Gardner's

Motion to Dismiss, or for this Court to order such other and further relief as it deems just and proper.

Respectfully submitted,

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Certificate of Service

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

/s/ Michael P. Downey _____