

**IN THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL CIRCUIT
STATE OF MISSOURI**

STATE OF MISSOURI, EX REL.)	
RON CALZONE,)	
Relator,)	Case No. 16AC-CC00155
vs.)	
)	Division I
ADMINISTRATIVE HEARING COMMISSION,)	
ET AL.,)	
Respondents.)	

**RELATOR’S REPLY BRIEF IN SUPPORT
OF HIS PETITION FOR WRIT OF PROHIBITION**

Introduction

The basis of Relator’s Petition is a single, straightforward claim: that the Missouri Ethics Commission (“Ethics Commission” or “MEC”), and, by extension, the Administrative Hearing Commission, lacks jurisdiction in the underlying matter because the initiating complaint was unlawfully filed, through counsel, by a corporation, the Missouri Society for Governmental Consultants (“Society”). § 105.957(2), RSMo (MEC jurisdiction limited to “[c]omplaints...filed *only* by a natural person”) (emphasis supplied).

Rather than engage with the merits of this claim,¹ the MEC spends more than half of its brief arguing that Mr. Calzone has waived the argument. Opp’n Br. at 1-8. This approach fails as a matter of law and fact. But it is also deeply ironic, as the MEC has never previously raised this suggestion, either before the AHC or this Court. More damningly,

¹ The MEC’s merits arguments, confined to the final third of its brief, are a virtual copy-and-paste of the policy arguments contained at pages 9-12 of its Answer. Mr. Calzone has already dealt with those suggestions at some length in his opening brief, and in the interest of brevity, refers the Court to pages 13-19 and 24-29 of that document.

the MEC directly contradicts its own Answer to Relator’s Petition for a Writ of Prohibition, where it judicially admitted that “Mr. Calzone has consistently argued that the complaint the Society filed against him did not vest the MEC, and by extension the AHC, with subject matter-jurisdiction because the complaint was filed by a corporation and not a natural person.” Ans. at 2, ¶ 4 (admitting paragraph 7 of the Petition). An “[a]llegation[] in a petition...[that is] admitted in an answer constitute[s] a judicial admission... which ‘waives or dispenses with the production of evidence and concedes for the purposes of the litigation, that a certain proposition is true.’” *Holdredge v. Mo. Dental Bd.*, 261 S.W.3d 690, 693 (Mo. App. W.D. 2008) (quoting *Bachman v. City of St. Louis*, 868 S.W.2d 199, 201 (Mo. App. E.D. 1994)); *see also Creech v. MBNA America Bank, N.A.*, 250 S.W.3d 715, 717 (Mo. App. S.D. 2008).

The MEC also counsels that prohibition ought not to lie because “Relator Calzone filed this writ appeal prematurely” and that he “used the writ process to increase litigation in costs.” Opp’n Br. at 5. Those arguments fare no better, and are based either upon misinterpretations of case law or misrepresentations of the record.

I. Challenges To An Administrative Agency’s Subject-Matter Jurisdiction Or Statutory Authority Cannot Be Waived.

The Ethics Commission contends that “unlike a federal court’s subject matter jurisdiction...an administrative tribunal’s statutory authority to proceed can be waived.” Opp’n Br. at 7. This is entirely and unambiguously incorrect, and a surprising error for a

state agency to make.² It is “a basic tenet of administrative law” that “an administrative agency has only such jurisdiction as may be granted by the legislature.” *Tetzner v. State*, 446 S.W.3d 689, 692 (Mo. App. W.D. 2014) (quoting *St. Charles Cty. Ambulance Dist., Inc. v. Mo. Dep’t of Health and Senior Servs.*, 248 S.W.3d 52, 54 (Mo. App. W.D. 2008)); also *City of O’Fallon v. Union Elec. Co.*, 462 S.W.3d 438, 445 (Mo. App. W.D. 2015) (“The legislature, not the Commission, sets the extent of the Commission’s authority”). “If the agency lacks statutory authority to consider a matter, it is without subject matter jurisdiction.” *Tetzner*, 446 S.W.3d at 692.³ And, as the MEC’s own cited authority clearly states, “[s]ubject-matter jurisdiction cannot be waived.” *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 478 (Mo. banc 2009).

Consequently, the Commission is badly mistaken in arguing that a challenge to its subject-matter jurisdiction may be waived.

II. Mr. Calzone Has Consistently Preserved His Challenge To The Ethics Commission’s Jurisdiction.

² The MEC’s error appears to stem from misreading case law regarding the jurisdiction of Missouri’s circuit courts, which is set by the state constitution, with the authority of administrative agencies, which are limited-purpose statutory creations. *J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009); *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473 (Mo. banc 2009).

³ Throughout its opposition brief, the MEC refers to an agency’s “statutory authority” rather than “subject-matter jurisdiction.” In the context of administrative agencies, those phrases have the same meaning. *McNeill v. City of Kansas City*, 459 S.W.3d 509, 515 (Mo. App. W.D. 2015) (“[I]t is immaterial whether we characterize an act in excess of an agency’s statutory powers as an act in excess of the agency’s subject matter jurisdiction...or simply an act in excess of the agency’s authority. In either case, the act is a *legal nullity*, an agency has *no* power to act except as authorized”) (emphasis supplied).

For the first time, after almost a year, and before the third tribunal asked to address the question, the Ethics Commission claims that Mr. Calzone “waived his argument in this writ action....that the Ethics Commission lacked statutory authority to investigate Relator Calzone because the complaint filed with the Ethics Commission was not filed by a natural person.” Opp’n Br. at 6.⁴ This is simply false. Before this very court, the Ethics Commission has judicially admitted that Mr. Calzone did not waive his challenge to the MEC’s subject-matter jurisdiction. Pet. at 2, ¶ 7 (“Mr. Calzone has consistently argued that the complaint the Society filed against him did not vest the MEC, and by extension the AHC, with subject matter-jurisdiction because the complaint was filed by a corporation and not a natural person”); Ans. to Relator’s Pet. for Writ of Prohibition (“Ans.”) at 2, ¶ 4 (“The Ethics Commission admits paragraph[]...7...of Relator Calzone’s Petition in Prohibition”).

In any event, to preserve an argument, a party need only give an “agency...a prior opportunity, on timely request by the complainant, to consider the point at issue.” *Mills v. Fed. Soldiers Home*, 549 S.W.2d 862, 868 (Mo. banc 1977); *Moses v. Carnahan*, 186 S.W.3d 889, 909 (Mo. App. W.D. 2006) (“Because Appellants did not properly present the

⁴ Throughout its brief, the Ethics Commission repeatedly uses the phrase “statutory authority to investigate.” But the MEC’s error is not merely the decision to investigate despite lacking statutory authority to do so, nor is the harm limited to the uncomfortable fact that having conducted such an investigation it developed actual knowledge that the Society filed the complaint and chose to proceed nonetheless. The larger issue is that without a valid complaint, neither the Ethics Commission nor the Administrative Hearings Commission were ever vested with jurisdiction to do *anything* in this matter—investigate, hold hearings, sanction, or compel discovery—and yet it has imposed all of those burdens upon Mr. Calzone.

exemption during the hearing conducted by the Commissioner, the Commissioner did not have a legitimate opportunity to address it, and Moses and Marsh have preserved nothing for appeal”). As demonstrated below, Mr. Calzone “properly present[ed]” his argument “during the hearing conducted by the [Ethics Commission].”⁵

a. The Ethics Commission has quoted Mr. Calzone’s legal filings in a misleading fashion.

The MEC tries to claw back its judicial admission of Mr. Calzone’s longstanding argument, claiming that “Relator Calzone specifically conceded that the complaint against Relator Calzone was field [*sic*] by a natural person.” Opp’n Br. at 6. As support for this claim, the MEC offers a partial quote from Mr. Calzone’s motion to dismiss before the Ethics Commission, which was filed on August 31, 2015. Specifically, the Ethics Commission quotes Mr. Calzone as stating:

The initiating complaint was brought by Mr. Dallmeyer individually, as required by state law, and not by the Society [of Governmental Consultants.] Mo. Rev. Stat. 105.957(2) (“Complaint filed with the commission shall be in writing and filed only by a natural person.”).

Opp’n Br. at 6-7 (brackets supplied by the MEC).

This quotation is truncated. The full passage reads:

The initiating complaint was brought by Mr. Dallmeyer individually, as required by state law, and not by the Society. Mo. Rev. Stat. § 105.957(2) (“Complaints filed with the commission shall be in writing and filed only by a natural person”). Because it is a sworn complaint, presumably Mr. Dallmeyer has direct personal knowledge of the facts alleged therein and did not improperly rely upon hearsay in making his allegations. Respondent presumes that the Commission fully investigated the basis for Mr.

⁵ Presumably, this would have been the only time that Mr. Calzone could have “properly presented” his argument to the MEC, given the Ethics Commission’s belief that it does not have the power to grant motions to dismiss. Opening Br. at 6.

Dallmeyer's sworn statement, but preserves the right to raise this issue should that belief prove to be misplaced.

Opp'n Br. Ex. 1 at 2, n.1.

Mr. Calzone's motion to dismiss was filed shortly after he acquired *pro bono* counsel, and four days before the MEC's September 3, 2015 hearing. The Commission had not supplied Mr. Calzone with Mr. Dallmeyer's cover letter, which on its face appears to demonstrate that Mr. Dallmeyer had entered into an attorney-client relationship with the Society and filed the complaint on that corporation's behalf, until the same month that the MEC completed its investigation into the Society's allegations and recommended the MEC compel Mr. Calzone's attendance at that hearing. Despite the suspicious particulars of the written complaint against Mr. Calzone, he gave the MEC the benefit of the doubt, and assumed—while preserving the issue in the event the assumption was misplaced—that the Commission had fully investigated that complaint and determined that Mr. Dallmeyer's filing was *not* merely filed on behalf of the Society, as the complaint seemed to suggest. More importantly, as detailed below, the details of Mr. Dallmeyer's representation were not made available to Mr. Calzone, and became apparent only as the result of cross examination at the hearing itself. Missouri law cannot require Mr. Calzone to have assumed that a state agency, aware of its own jurisdictional requirements, would investigate a claim, learn that it was improperly filed by a non-natural person, and still proceed to compel his attendance at an evidentiary hearing. State law cannot interpret the extension of professional courtesy to the state, in a motion filed on incomplete knowledge, before a tribunal that declared its inability to even consider that motion, as a waiver. Certainly the MEC has provided no authority supporting that remarkable conclusion.

Nevertheless, out of an abundance of caution, Mr. Calzone explicitly reserved the right to revisit the provenance of the Society's complaint should his good faith belief that the MEC would not act outside of its statutory authority "prove to be misplaced."

b. Before the MEC, Mr. Calzone's counsel repeatedly stated his belief that the Society's complaint was unlawful, and made it the very first point raised in his closing statement.

To preserve an argument, one must simply give an agency "a prior opportunity, on timely request by the complainant, to consider the point at issue." *Mills*, 549 S.W.2d at 868. The MEC was given such an opportunity, as Mr. Calzone's counsel prominently and repeatedly raised the illegality of the Society's complaint at the MEC hearing itself. The MEC's new insistence that "Relator Calzone never argued before the Ethics Commission, as he does now, that the Ethics Commission was without authority to investigate because the complaint was filed by Mr. Dallmeyer on behalf of the Society of Governmental Consultants" simply cannot be squared with the facts.

At the September probable cause hearing, the MEC chose not to call Mr. Dallmeyer, the purported complainant and the presumed source of the information underlying the complaint against Mr. Calzone. It chose rather to call Mr. Randy Scherr, secretary of the Missouri Society of Governmental Consultants. Mr. Scherr testified that he believed he was "subpoenaed because [he's] the secretary of the organization...[he did not] know any other reason why." Br. Ex. A at 80-81, l 24-3. During his direct examination of Mr. Scherr, the MEC's counsel asked Mr. Scherr questions about Mr. Calzone and his allegedly improper lobbying. *See* Opening Br. Ex. A at 42, l 14-15 ("And the next thing I'm going to ask you about is Mr. Ron Calzone. Are you familiar with Mr. Ron Calzone?"). All of

this, particularly combined with the decision not to examine Mr. Dallmeyer, is consistent with the MEC calling a representative of the true complainant to provide background into its decision to file a complaint.

Mr. Scherr's testimony, moreover, conclusively demonstrated that the Society, a non-natural person, filed the complaint against Relator. On cross-examination,⁶ Mr. Calzone's counsel had the following exchange with Mr. Scherr, which bears quoting in full:

Q. When did you first become aware of complaints [*sic*] in this matter?

A. It was—the Complaint was—as you well know. I mean, you have a copy. The Complaint was filed—

Q. I do.

A. —by the association.

Q. So you understand the association and not Mr. — I believe his name is Dallmeyer — to have been complaining?

A. He's the attorney —

MR. STOKES: Objection as to relevance.

MR. DICKERSON: The relevance is it's an unlawful complaint. It's not filed by a natural person.

CHAIR WEEDMAN: It's relevant. If you understand the question, Mr. Scherr, you can answer it.

BY MR. DICKERSON:

Q. You understood the society to be the complainant in this case?

⁶ Mr. Calzone was forced to defend himself blindly; no notice as to the MEC's intended witnesses was given. The substitution of Mr. Scherr for Mr. Dallmeyer in the role of complainant was thus not apparent until the hearing itself.

A. The society motivated the Complaint and had it filed by Mr. Dallmeyer.

Opening Br. Ex. A at 63-64, *l* 20-16.

And this interaction was merely one of *several* times that this argument was raised during the hearing, and responded to by the Ethics Commission's counsel.

Continuing his cross-examination of the Ethics Commission's witness, Mr. Calzone's counsel proceeded to verify that the Society's board took "official action... to bring about the filing of the Complaint." Opening Br. Ex. A at 64, *l* 17-18. He asked if the Society discussed bringing the complaint with outside individuals, including whether "any legislator...raised the question [with the Society] of bringing a complaint before this Commission on the subject of Mr. Calzone's status or nonstatus" as a lobbyist. *Id.* at 66, *l* 21-23. Over the Ethics Commission's objection to that question, the Society's secretary testified that two members, at least, of the legislature proposed that the Society file a complaint. *Id.* at 67, *l* 12-22. Additional testimony from Mr. Scherr demonstrated that political concerns influenced how the Society's board chose to time the filing of the complaint. *Id.* at 72, *l* 13 ("...so we waited until election day"). Mr. Calzone's counsel also determined, through cross-examination, the nature of Mr. Dallmeyer's legal representation of the Society. *id.* at 75, *l* 23-24. ("Q. Mr. Dallmeyer represented you pro bono? A. Yes, he did").

Relator's counsel also asked the Society's secretary, who earlier testified he was in the Capitol nearly every day and also "kn[e]w" Mr. Dallmeyer "fairly well," whether he had seen Mr. Dallmeyer in the Capitol or in conversations at the Capitol with Mr. Calzone

and other legislators. Opening Br. Ex. A at 68-69. The point of this line of questioning, plainly, was to demonstrate that Mr. Dallmeyer's complaint had been brought as a hired attorney, a functionary for the Society, and not a natural person having "direct personal knowledge of the facts alleged therein." Opp'n Br. Ex. 1 at 2, n.1. At one point, MEC counsel objected to one of the questions asked by Mr. Calzone's counsel during this cross-examination. In response, Mr. Calzone's counsel argued the question was relevant because "[i]t has to do with the fact that this entire Complaint was illegitimate from the first moment it was filed. It was filed by a nonnatural person...it's highly relevant to a probable cause determination." Opening Br. Ex. A at 74-75, l 21-1.

On redirect, the Ethics Commission's counsel asked no questions concerning the Society's complaint. *Id.* at 76-77, l 18-8. But during his examination of Ms. Della Luaders, Special Investigator for the MEC, the Ethics Commission's counsel addressed Mr. Calzone's jurisdictional argument, and asked Ms. Luaders whether, in the course of speaking with Mr. Dallmeyer, she found that "he was a real person." *Id.* at 84, l 20; *compare* Opp'n Br. at 11 ("Michael Dallmeyer is a natural person"). On cross-examination, when Mr. Calzone's counsel asked Ms. Luaders if, in the course of speaking to Mr. Dallmeyer, he had made "any representations to you outside of the scope of the affidavit initiated in this Complaint," MEC counsel objected. Opening Br. Ex. A at 119, l 22-25. The MEC's counsel explained his objection by arguing that "[t]he Complaint is signed by Mr. Dallmeyer, attested to by Mr. Dallmeyer...That really is enough to stand on its own to establish that the Missouri Ethics Commission received a Complaint signed by a natural

person...[a]nd that really stands on its own to establish the Missouri Ethics Commission had jurisdiction...and authority...” *Id.* at 120-121, *l* 19-3; *compare with* Opp’n Br. at 11.

It was at this time, during the hearing, that Mr. Calzone’s counsel introduced Mr. Dallmeyer’s cover letter, and Ms. Luaders testified that Mr. Dallmeyer told her that he “had noted that his client was the Missouri Society of Governmental Consultants, and he had referenced that in his letter.” Opening Br. Ex. A at 123, *l* 1-3. Relator next asked if “[a]t that point,” Ms. Luaders “underst[oo]d the complainant not to be Mr. Dallmeyer but to be the society?” *Id.* at 123, *l* 4-6. The Ethics Commission’s counsel attempted to object to this question on the ground that it “call[ed] for a legal conclusion, irrelevant.” *Id.* at *l* 7-8.⁷ Moreover, on his redirect examination of Ms. Luaders, the MEC’s counsel asked if the complaint “actually signed and notarized by Mr. Dallmeyer...reference[d] the cover letter.” *Id.* at 125, *l* 17-19; *compare with* Opp’n Br. at 11 (proffering complaint “signed...under penalty of perjury” by Mr. Dallmeyer as evidence that jurisdiction attached).

Nevertheless, the Ethics Commission suggests that statements made by Mr. Calzone’s counsel regarding the admission of the Ethics Commission’s Exhibit 6, the Society’s Complaint—which had been shorn of Mr. Dallmeyer’s cover letter—constitute waiver. Opp’n Br. at 4, 7. The MEC’s presentation of this discussion is misleadingly truncated. The record speaks for itself:

MR. STOKES: Commissioners, I’d like to admit Exhibit 6 into the record.

⁷ Ms. Luaders answered the question in the negative.

CHAIR WEEDMAN: Mr. Dickerson, is there any objection to the Complaint with exhibits?

MR. DICKERSON: Well, I guess I have a clarification. Is Exhibit 6 the Complaint with all of these attachments?

MR. STOKES: Yes.

MR. DICKERSON: I don't object to its introduction as an exhibit. I mean, the truth of the assertions, of course, is very much in doubt.

CHAIR WEEDMAN: And we understand that.

MR. DICKERSON: So I would object to the extent that it's inadmissible hearsay and probably fraudulent.

COMMISSIONER MUNICH: I'm sorry. Probably what?

MR. DICKERSON: Fraudulent.

COMMISSIONER MUNICH: Thank you.

CHAIR WEEDMAN: Mr. Stokes, the Complaint itself is admitted...

Opening Br. Ex. A at 83-84, l 8-4.

Only then, *after* the Complaint was admitted over Mr. Calzone's counsel's objection that it was "fraudulent"— not filed by Mr. Dallmeyer on his own behalf, but instead as counsel for a non-party corporation—did Mr. Stokes tell the Commission that "[t]he purpose of admitting Exhibit 6 is to establish that a Complaint was filed with the Commission, that it was signed under oath and verified by the complainant," meaning Mr. Dallmeyer. *Id.* at 84, l 8-11, *also* Opp'n Br. at 4. How the Ethics Commission genuinely believes that Mr. Calzone's counsel's statement that he "certainly [did] not object to that proffer" somehow constitutes waiver here is (and there is no other polite word for it) mystifying, given subsequent events. *Id.* at 84, l 12-13.

For that exchange was not the last time that Exhibit 6 was discussed during the MEC's hearing. Before calling Mr. Calzone to the stand, the Ethics Commission's counsel recalled the admission of Exhibit 6, perhaps inadvertently. *Id.* at 133, *l* 25 ("MR. STOKES: Yes, reserving 1, 6, 7 and 8"). After Mr. Calzone's testimony, Mr. Stokes again moved Exhibit 6 into evidence. Again, the record speaks for itself:

MR. STOKES: Exhibit 6, the Complaint, I would like to admit solely for the purposes of establishing the Missouri Ethics Commission authority to act as proof that we did receive a Complaint signed and verified.

MR. DICKERSON: I do not object to the existence of the Complaint. I do object to any legal conclusions, such as the Commission being legally permitted to act upon that Complaint.

CHAIR WEEDMAN: It is admitted with that understanding.

(EXHIBIT NO. 6 WAS RECEIVED INTO EVIDENCE WITH THE OBJECTIONS NOTED IN THE RECORD.)

Id. at 144-145, *l* 22-8.

Finally, Mr. Calzone made the MEC's lack of jurisdiction a centerpiece, indeed *the very first point raised*, in his closing argument. That he also asked to incorporate the arguments made in Mr. Calzone motion to dismiss, in part because he had been cautioned that only brief arguments would be permitted since the Commission wished to break for lunch,⁸ cannot undo the plain language of the transcript.

⁸ *E.g.* Opening Br. Ex. at 109, *l* 7-10 ("CHAIR WEEDMAN: Mr. Stokes and Mr. Dickerson, we're going to finish this hearing today, and we originally hoped that perhaps

CHAIR WEEDMAN: Okay. Mr. Dickerson, would you like to make some closing remarks?

MR. DICKERSON: I would, sir. I wonder if I might first ask that the motion filed as [*sic*] Motion to Dismiss be incorporated as argument, as part of my closing.

CHAIR WEEDMAN: It may be.

MR. DICKERSON: Thank you, sir. This order would be a travesty.⁹ This is a case where on the face of the Complaint[,] a non-natural person filed a Complaint in clear violation of the statute.

Id. at 160-161, l 22-8.

The Missouri Ethics Commission was certainly ““given a prior opportunity, on timely request by the complainant, to consider”” Mr. Calzone’s claim that the Ethics Commission was without jurisdiction. Opp’n Br. at 7 (quoting *Morfin v. Werdehausen*, 448 S.W.3d 343, 349 (Mo. App. W.D. 2014)). The argument was preserved in Mr. Calzone’s motion to dismiss, extensively presented and argued at the hearing, and counsel for the MEC engaged substantively with that argument before the Commission rendered its decision. The suggestion that “Relator Calzone never argued before the Ethics

by lunchtime we might get it done”); *id.* at 134, l 8-11 (“Guys, now it’s 12:37, and where do we think we stand as far as proceeding? You know, we’d love to try and get this done before we broke for some lunch”); *id.* at 156, l 5-9 (“CHAIR WEEDMAN: Your closing remarks will be no longer than Mr. Stokes. MR. STOKES: Ten minutes tops. Tops. CHAIR WEEDMAN: Oh, I was thinking much less than that. Maybe five”).

⁹ Referencing a draft order distributed by the MEC’s counsel shortly before closing arguments.

Commission, as he does now, that the Ethics Commission was without authority to investigate because the complaint was filed by Mr. Dallmeyer on behalf of the Society of Governmental Consultants” is obviously false. Opp’n Br. at 7.

Even if the Missouri Ethics Commission could be allowed to act *ultra vires* and in excess of its statutory authority as the result of a party’s waiver, which it cannot, Mr. Calzone plainly preserved this point. The MEC’s waiver argument should be rejected.

III. Mr. Calzone’s Writ Petition Was Not Premature.

The Ethics Commission next argues that Mr. Calzone prematurely sought the writ, and should therefore wait for the AHC to rule on a motion for summary decision.¹⁰ That was certainly Mr. Calzone’s preferred route. Had the MEC not chosen to derail briefing on summary decision by moving to compel discovery against Mr. Calzone and a non-party “ten days after Mr. Calzone filed his opening brief [on summary decision] according to the AHC’s briefing schedule,” and had the AHC granted Mr. Calzone’s motion for a protective order on the grounds “that discovery cannot be had until an adjudicative body establishes its jurisdiction,” perhaps this case would have been resolved by now. Opening Br. at 10.

The MEC argues that the AHC had no procedural option under its own rules, other than to act as it did. Opp’n Br. at 9. This is incorrect. In his opposition to the Ethics

¹⁰ The Ethics Commission suggests a motion for judgment on the pleadings was inappropriate, “because Relator Calzone referred to matters outside the pleadings in his motion to dismiss [*sic*].” Opp’n Br. at 9. This is misleading. Mere hours after the AHC hearing, where the MEC’s counsel was informed several times that the AHC would rule for Mr. Calzone on his jurisdictional argument, the MEC filed an unauthorized sur-reply and an amended answer, attaching a number of documents beyond the complaint cover letter the AHC had requested. *See* Opening Br. at 9. It is that action, and not Mr. Calzone’s filings in response, that spiked the AHC’s jurisdictional ruling and led to this writ petition.

Commission’s motion to extend the deadline for its summary decision brief, Mr. Calzone argued that “[a]t minimum, Respondent’s Motion should be granted only as to those portions of its Opposition to Summary Decision unrelated to this Commission’s subject matter jurisdiction and authority to approve discovery.” Reply Br. Ex. A at 5. But the Hearing Commission refused to narrow briefing to the jurisdictional question, thereby sidestepping its obligation to rule first on the question of jurisdiction, and instead issued orders relying on its “subpoena power,” which “cannot be more extensive than its jurisdiction.” *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (“*Catholic Conference*”). At that point, prohibition became not only appropriate but necessary. § 536.100, RSMo (“...nothing in this chapter shall prevent any person from attacking any void order of an agency at any time or in any matter that would be proper in the absence of this section...”)¹¹

The Ethics Commission argues that *Catholic Conference* is inapplicable, because it is a federal case. Specifically, the MEC argued that in *Catholic Conference*, the U.S. Supreme Court “ruled on a U.S. District Court’s jurisdiction.” Opp’n Br. at 8. That is inaccurate. The Court did not declare whether the district court had subject-matter jurisdiction, but merely ruled that an adjudicative body must determine its own jurisdiction before issuing orders relying on its subpoena power. 487 U.S. at 80. For that narrow

¹¹ The Ethics Commission believes that Rule 55.27(g)(3), which states that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action,” does not apply to the AHC. (emphasis supplied). Of course, Rule 55.27(g)(3) *does* inform this Court’s procedure, and counsels in favor of making the writ absolute.

holding, *Catholic Conference* is directly on point, resolves this case, and demonstrates the urgent need for a writ of prohibition. *State ex rel. Dep't of Soc. Servs. v. Tucker*, 413 S.W.3d 646, 647 (Mo. banc 2013) (“[P]rohibition is appropriate...to prevent the usurpation of judicial power when” a lower body “lacks jurisdiction”); *see also State ex rel. Sch. Dist. v. Williamson*, 141 S.W.3d 418, 423 (Mo. App. W.D. 2004) (issuing writ of prohibition for want of jurisdiction and ordering dismissal of petition for judicial review).

The Ethics Commission also argues that prohibition is unnecessary because “[i]f the Administrative Hearing Commission rules against Relator Calzone, Relator Calzone has a right to challenge the...decision on the grounds that the decision ‘is in excess of the statutory authority or jurisdiction of the agency.’” Opp’n Br. at 9 (quoting § 536.140.2(2)). But that position directly contradicts the MEC’s new contention that the Relator has waived that jurisdictional argument. The Commission cannot have it both ways. Either Mr. Calzone has waived his right to challenge the agency’s jurisdiction, or he has not. *Compare* Opp’n Br. at 1-8 *with id.* at 9.

In any event, “[w]here a presiding officer is wholly lacking in jurisdiction to hear a case, an appeal is not an adequate remedy because any action by the officer ‘is without authority and causes unwarranted expense and delay to the parties involved.’” *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915, 920 (Mo. App. W.D. 2003) (quoting *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 79 (Mo. banc 1974); *also* Opening Br. at 14 (citing same).

IV. The Ethics Commission’s New Allegation That Mr. Calzone Has Used The Writ Process To Compound Litigation Expenses Is Entirely Baseless.

The Ethics Commission argues that “Relator Calzone has used the writ process to increase litigation costs.” Opp’n Br. at 10. This is not the first time the MEC has made this claim. In its Answer, the MEC claimed that “Relator Calzone’s Motion for Summary decision [*sic*] is still pending even as Relator Calzone pursues his Petition in Prohibition.” Ans. at 8. As discussed in Mr. Calzone’s opening brief, this was “untrue” and “baseless.” *See* Opening Br. at 29-30.

The MEC now brings a new argument to support its old allegation that Mr. Calzone is vexatiously compounding costs. The Ethics Commission claims that, after this Court entered the preliminary writ, Mr. Calzone “opposed a motion to stay the Administrative Hearing Commission’s proceedings...[and] suggested that the briefing on Relator Calzone’s motion for summary decision, then and now pending before the Administrative Hearing Commission, continue,” but that this “motion in opposition to the stay was ultimately denied.”

This is all false.

After the writ issued, the MEC moved for a stay, and Mr. Calzone responded by filing suggestions in response pointing out that the AHC lacked authority to consider the MEC’s motion. He did not suggest “that the briefing... continue,” but instead simply noted that this Court’s preliminary writ barred any action by the AHC:

The Circuit Court has issued a preliminary writ of prohibition ordering this Commission ‘to refrain from all action in the premises.’ Consequently, until such time as the Circuit Court orders otherwise, this Commission lacks authority to take any action, including the action requested by the Ethics Commission. *State ex rel. Pattibone v. Mulloy*, 52 S.W.2d 402, 403 (Mo. banc 1932) (in dismissing suit, judge “violated” Supreme Court’s “preliminary rule in prohibition, in which he was commanded “to take no

further steps” concerning the case). *Similarly, this Commission lacks authority to enforce its present orders, including those related to scheduling.*

Opp’n Br. Ex. 5 at 1 (emphasis supplied).

The last sentence is important because it has the opposite meaning from that assigned to it by the Commission: relying on authority of long standing, it indicated not that Mr. Calzone wished briefing “to continue,” but that the AHC *could not* enforce its existing scheduling orders while a preliminary writ of prohibition is in effect. That is, it was an argument supporting a cessation of the briefing schedule.

The AHC agreed, stating that it “may take no action in this case until ordered by the Court. Therefore, all deadlines previously imposed are suspended, and we will not rule on any motions filed until such time.” Reply Br. Ex. B (AHC Order of Apr. 26, 2016) at 9. The suggestion that “Relator Calzone’s motion [*sic*] in opposition to the stay was ultimately denied,” Opp’n Br. at 10, is a baseless mischaracterization.

Bluntly, if any party is compounding litigation expenses, it is the Ethics Commission, which continues to raise new arguments, some based on frankly inaccurate characterizations of the record, in the context of an extraordinary writ petition premised upon a narrow and vital jurisdictional question.

V. The Complaint Was Filed By A Non-Natural Person.

The last four pages of the Ethics Commission’s brief finally address the jurisdictional question. For the most part, with an occasional new turn of phrase, these are the same “public policy rationales as to why the MEC need not have

dismissed ‘a complaint clearly lacking any basis in...law.’” Opening Br. at 24 (quoting § 105.957(4), RSMo), and ought to be dismissed for the reasons given at pages 24-29 of Mr. Calzone’s opening brief.

The MEC does, however, make one noteworthy concession—it concedes that “Mr. Dallmeyer stated that his motivation for filing the complaint was to do so ‘on behalf of’ a client.” Opp’n Br. at 11. That client, of course, was the Missouri Society of Governmental Consultants, which engaged Mr. Dallmeyer as its attorney for the express purpose of filing the Society’s complaint with the MEC. Writ Ex. A at 1, Br. Ex. A at 75, *l* 23-24. The Society is a non-natural person, and thus, the Society’s complaint never vested the MEC, and by extension the AHC, with subject-matter jurisdiction over this case. § 105.957(2), RSMo (“Complaints filed with the commission shall be in writing and filed only by a natural person”).

The Ethics Commission does not consider this concession to be material, stating that filing “‘on behalf of’ of a client [does not] mean[] that the client, and not Mr. Dallmeyer, filed the complaint.” Opp’n Br. at 11. But of course it does. Just as the MEC’s counsel is not the actual Respondent here merely because he files legal documents for the Missouri Ethics Commission, sometimes including sworn declarations, the Society filed the complaint against Mr. Calzone, through its counsel, Mr. Dallmeyer. *Naylor Senior Citizens Hous., LP v. Sides Constr. Co.*, 423 S.W.3d 238, 243 (Mo. banc 2014) (“In legal matters, [a corporation] must act, if at all, through licensed attorneys”) (citation and emphasis omitted); Br. Ex. at 63-64,

l 23-1 (Testimony of Randy Scherr) (“The Complaint was filed...by the association”).

CONCLUSION

“Mr. Calzone has consistently argued that the complaint the Society filed against him did not vest the MEC, and by extension the AHC, with subject matter jurisdiction because the complaint was filed by a corporation and not a natural person.” The MEC has judicially admitted this fact. Under Missouri law, an administrative agency such as the MEC does not have authority to act unless a lawful complaint is filed. *Mo. Comm’n on Human Rights v. Cooper*, 639 S.W.2d 902 (Mo. App. W.D. 1982) (striking down subpoena where no valid complaint vested an administrative agency with jurisdiction); *see also U.S. Catholic Conf.*, 487 U.S. at 80. The complaint in this case was devised by, authorized by, and filed on behalf of a non-natural person, the Missouri Society of Governmental Consultants. Because Missouri law does not authorize the MEC to accept complaints filed by non-natural persons, this complaint was unlawful and Missouri law did not give the MEC authority to act on that complaint. Consequently, both the MEC and the Administrative Hearing Commission lack subject matter jurisdiction over the underlying matter. The preliminary writ ought to be made absolute, and the Society’s unlawful efforts to intimidate and discourage Mr. Calzone from exercising his First Amendment rights should finally come to an end.

Respectfully submitted,



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Date: July 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd of July, I caused a copy of the forgoing to be delivered to this Court and to counsel for the Missouri Ethics Commission:

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