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

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

**RELATOR'S SUPPLEMENTAL BRIEF**

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On August 23, 2016, this court held a hearing regarding Relator Ron Calzone's petition for a writ of prohibition. At that hearing, both Parties were ordered to provide briefing concerning the potential scope of a permanent writ.

Should this Court agree that the writ is appropriately invoked, it has two options: (1) order the Administrative Hearing Commission ("AHC" or "Hearing Commission") to confine its proceedings to the jurisdictional question raised by Mr. Calzone, and permit discovery and briefing only on that point, or (2) simply declare that, because subject-matter jurisdiction is so obviously wanting, the Respondents must "cease from exercising any further jurisdiction over the case."[1] *State ex rel. Southers v. Stuckey*, 867 S.W.2d 579, 581 (Mo. App. W.D. 1993); *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); *also State ex rel. Robinson v. Franklin*, 48 S.W.3d

[1] Relator attaches proposed orders consistent with either approach.

64, 67 (Mo. App. W.D. 2001) (“‘Prohibition is a powerful writ, divesting the body against whom it is directed to cease further activities’”) (quoting *State ex rel. Riverside Joint Venture v. Mo. Gaming Comm’n*, 969 S.W.2d 218, 221 (Mo. banc 1998). Relator urges the Court to adopt the second course, for three reasons.

First, this Court will be following settled practice, because “lack of jurisdiction” is “the foundational ground for a writ of prohibition.” *State ex rel. Goodson v. Hall*, 228 Mo. App. 766 (Mo. App. K.C. 1934); *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171, 175 (Mo. App. W.D. 2000) (prohibition proper “to remedy a clear excess of jurisdiction…such that the lower court lacks the power to act as contemplated”); *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998) (“[P]rohibition will lie…to remedy an excess of jurisdiction”); *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 943 (Mo. banc 1986) (“Prohibition is an independent proceeding to correct or prevent judicial proceedings that lack jurisdiction”).

While as “a general rule…an application for a writ of prohibition will not be considered unless a plea to the jurisdiction has been filed and overruled in the lower [body],” that “general rule” only applies where the administrative agency “has not been afforded the opportunity to render a decision on th[e] matter[].” *Mo. Dep’t of Soc. Servs. v. Admin. Hearing Comm’n*, 826 S.W.2d 871, 874-875 (Mo. App. W.D. 1992) (citation omitted, punctuation altered). Here, precisely the opposite is the case. Both forums below—the MEC and the AHC—were “afforded the opportunity” to render a decision relating to jurisdiction. Before the AHC, not one, but *two* timely motions—for judgment on the pleadings and for summary decision—raised the question of subject-matter

jurisdiction. Both were simply sidestepped by the Hearing Commission, despite its publicly-stated belief that it lacked jurisdiction. Opening Br. Ex. B at 22, *l* 13-15 ("[A]n attorney acts on behalf of his or her client…Here the client is clearly an organization. So I am going to side with Petitioner on that"). Despite being presented with multiple opportunities to decide the jurisdictional question presented, the AHC declined to do so, and instead ordered discovery related only to the merits.

In such circumstances, the Court of Appeals has issued a permanent writ of prohibition ordering an adjudicative body "to cease from exercising any further jurisdiction over [a] case." *Stuckey*, 867 S.W.2d at 581. In the case of *State ex rel. Southers v. Stuckey*, "the parties appeared" before a court "and arguments were heard on the motion to dismiss and the discovery motions." *Id*. As the AHC did below, "[t]he court deferred ruling on relator's motion to dismiss and ordered the parties to proceed with discovery." *Id*. The *Stuckey* relator then petitioned for the writ, arguing that the lower body "lacked jurisdiction in order[ing] the parties to proceed with discovery without deciding" a jurisdictional question of law—in that case, whether the relator enjoyed official immunity. The court agreed, ruling that the case should be dismissed "[b]ased upon…clear" law, and making "permanent and absolute the preliminary rule in prohibition." *Id*. at 581-583.

Here, the law and the facts are just as clear—and the lower body just as dilatory. The Court ought to order Respondents "to cease from exercising any further jurisdiction over the case." *Stuckey*, 867 S.W.2d at 581; *see also Williamson*, 141 S.W.3d at 423 (issuing writ of prohibition for want of jurisdiction and ordering dismissal below); *State ex rel. Mo. v. Campbell*, 386 S.W.3d 229, 234 (Mo. App. W.D. 2012) ("Respondent's Order

is in clear excess of jurisdiction…as the Respondent had no authority to impose the obligation to pay the cost of genetic paternity testing ordered pursuant to [statute] on the State"); *State ex rel. Moore v. Sharp,* 151 S.W.3d 104, 110-111 (Mo. App. S.D. 2004) ("In sum, the plain language of the drug court statute…compel a finding that nothing the drug court commissioner did in this case…had any legal effect").

Second, this Court can proceed secure in the knowledge that there are relatively few factual disputes in this case, and none going to jurisdiction. The complaint against Mr. Calzone was filed by the Missouri Society of Governmental Consultants ("Society"), as Randy Scherr, the Society's secretary admitted at the hearing below. Opening Br. Ex. A at 63-64, *l* 23-1 ("The Complaint was filed…by the association"); *but see* § 105.957(2), RSMo ("Complaints filed with the commission shall be in writing and filed only by a natural person"). Because it is a non-natural person, the Society contracted for *pro bono* legal counsel, held a board vote to authorize bringing the complaint, and directed the timing of that filing. *Naylor Senior Citizens Hous., LP v. Sides Contr. Co.,* 423 S.W.3d 238, 243 (Mo. banc 2014) ("In legal matters," corporations "must act, if at all, through licensed attorneys") (citation and quotation marks omitted, emphasis removed); Opening Br. Ex. A at 64, *l* 15-16 ("The Society motivated the complaint and had it filed by Mr. Dallmeyer"). The attorney filing on behalf of the Society listed his name on the complaint as "Mr. Michael A. Dallmeyer, Attorney," listed his address as that of his law firm ("Carver & Michael LLC, 712 East Capitol Ave."), and—contrary to the Ethics Commission's suggestion at the hearing before this Court—did not list a home or cell number, but merely a work number ("573-636-4215"). Writ Ex. B at 4. Those facts are dispositive. But, in

addition, the Society's attorney also included a cover letter stating that "[e]nclosed herewith for filing and action by the MEC is the complaint…that I am submitting on behalf of [his firm's] client, Missouri Society of Governmental Consultants." Writ Ex. A at 2.

There is no credible dispute as to the facts necessary to show that a non-natural person filed the complaint and the Ethics Commission—and by extension the AHC—consequently never had jurisdiction. "The facts and circumstances in this case demonstrate unequivocally that this Court should exercise its discretion to issue a writ of prohibition to remedy an excess of authority." *State ex rel. Amorine v. Parker*, 490 S.W.3d 372 (Mo. banc 2016).

Third, issuing a writ directly ending these ill-advised proceedings is in the interest of justice, and will avoid unnecessary delay and expense. Most obviously, the MEC has publicly labeled Mr. Calzone a likely lawbreaker based upon a fatally flawed, and constitutionally suspect, theory. Every day that the case against Mr. Calzone is not dismissed is a day in which he suffers that reputational harm and is chilled from exercising his First Amendment rights.

More prosaically, prohibition has been found to lie if it will "prevent unnecessary, inconvenient[,] and expensive litigation." *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. banc 2009) (collecting cases, citation and quotation marks omitted). "If a party cannot state facts sufficient to justify court action…it is fundamentally unjust to force another to suffer the considerable expense and inconvenience of litigation." *Id*. That is the case here. The Ethics Commission has repeatedly demonstrated that it will pursue a burdensome and vexatious approach to this litigation.

Before this Court, for instance, the MEC has made frivolous arguments as to waiver and repeatedly mischaracterized Mr. Calzone's own filings. *See generally* Reply Br. of Relator. But similar activity occurred below. It is a judicially-admitted fact that the evening after the AHC hearing, where Respondent indicated it would rule for Mr. Calzone, "the MEC filed a sur-reply and an amended answer, attaching a number of documents beyond those requested by the AHC Commissioner." Pet. at 3, ¶ 10; MEC Ans. at 2, ¶ 4 ("The Ethics Commission admits paragraph[] . . . 10"). At the hearing before this Court, the Ethics Commission suggested that it was granted leave to file those papers. It was not. The AHC merely "left the record open for the MEC to supplement an exhibit"—the Society's complaint including Mr. Dallmeyer's cover letter—but otherwise stated that the AHC had "everything [it] need[ed]" and would "wait for the transcript to be prepared" before ruling. Writ Ex. D at 21; Opening Br. Ex. B at 236, *l* 17-18. The MEC's unilateral decision to expand the record, unfortunately, was enough to distract the AHC before it could rule on Relator's motion for judgment on the pleadings.

Frankly, if this case is remanded, there is little indication that the Ethics Commission would be dissuaded from similarly dramatic efforts to keep its pursuit of Mr. Calzone alive. "In sum, to allow [this case]…to proceed, without meeting the most minimal level of" a demonstration that Respondents are vested with subject-matter jurisdiction "is a waste to the system and an unjust expense to the parties that cannot be repaired on appeal and is subject to a writ for abuse of judicial discretion." *Bickel*, 285 S.W.3d at 330. Consequently, a permanent writ should explicitly direct the MEC and AHC to cease further proceedings against Mr. Calzone.

The only reason to do otherwise would be if this Court believes that there must be further factual development concerning the circumstances surrounding, and validity of, the initiating complaint in this case. *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 80 (1988) ("Accordingly, on remand, the Court of Appeals must determine whether the District Court had subject-matter jurisdiction in the underlying action"). Certainly, the provenance of the complaint against Mr. Calzone was unusual—Mr. Scherr testified that sitting members of the General Assembly specifically asked the Society to file the complaint, and Mr. Dallmeyer's cover letter describing his attorney-client relationship was never provided to Ethics Commission's investigator until four months after it was filed. Opening Br. Ex. A at 67, *l* 7-25; *also id.* at 122, *l* 15-20 (Testimony of Della Luaders) ("When Complaints are received at our office and deemed within our jurisdiction, they are photocopied. A photocopy is provided to all investigators who are assigned the Complaint. The copy that I received did not include this letter").[2] Relator maintains that no further factual development is necessary at this juncture. *State ex rel. Barthelette v. Sanders*, 756 S.W.2d 536, 537 (Mo. banc 1988) ("…for the reasons previously discussed, no further discovery or other fact-finding was necessary to the issue whether relater…was entitled to be dismissed from the suit as a matter of law"). But if this

[2] At the hearing before this court, the Ethics Commission's counsel posited that Mr. Calzone ought to have acted in January, upon receipt of this cover letter, and asserted his jurisdictional objection. Of course, there would be no way to do so since the MEC declines to entertain motions to dismiss, and regardless "[j]urisdiction of the subject matter cannot be conferred by waiver or consent of the parties." *State ex rel. Adler v. Douglas*, 339 Mo. 187, 192 (Mo. 1936). In any event, the MEC did not actually charge Mr. Calzone until April 21, 2015, and Mr. Calzone did not acquire legal counsel until August of 2015. Opening Br. at 5-6.

Court disagrees, Mr. Calzone respectfully requests an opportunity to take discovery concerning the full circumstances surrounding the initiating complaint in this case.

Respectfully submitted,

David E. Roland Mo. Bar #60548
FREEDOM CENTER OF MISSOURI
P.O. Box 693
Mexico, MO 65265
Phone: (314) 604-6621
Fax: (314) 720-0989
Email: dave@mofreedom.org

Allen Dickerson*
Zac Morgan*
CENTER FOR COMPETITIVE POLITICS
124 S. West St., Suite 201
Alexandria, VA 22314
Phone: (703) 894-6800
Fax: (703) 894-6811
Email: adickerson@campaignfreedom.org

*Counsel for Relator*

*admitted *pro hac vice*

Date: September 7, 2016

## CERTIFICATE OF SERVICE

I hereby certify that on the7th of September, 2016, I caused a copy of the forgoing to be delivered to this Court and to counsel for the Missouri Ethics Commission:

Curtis R. Stokes
Attorney, Missouri Ethics Commission
P.O. Box 1370
Jefferson City, MO 65102
(573) 751-2020 (phone)
(573) 522-2226 (fax)
Curt.Stokes@mec.mo.gov
*Attorney for Missouri Ethics Commission*

/s/ David Roland
*Attorney for Petitioner*

Dated: September 7, 2016