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

STATE OF MISSOURI, EX REL. RON CALZONE, Relator, vs. ADMINISTRATIVE HEARING COMMISSION, ET AL., Respondents.	)))))))	Case No. 16AC-CC00155 Division 1

RELATOR'S BRIEF IN SUPPORT OF HIS PETITION FOR WRIT OF PROHIBITION

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 Petitioner

*admitted *pro hac vice*

Date: June 24, 2016

Table of Contents

Table of Authorities ii

Introduction 1

Missouri's Legislative Lobbyist Statute 1

Procedural History 2

Legislators Ask A Corporation To File An Ethics Complaint 2

The Ethics Commission Conducts An Investigation 4

The Ethics Commission's Hearing. 6

Mr. Calzone Seeks Review Before The Administrative Hearing Commission 8

The Ethics Commission Derails All Briefing On Summary Decision 10

Standard of Review 11

Argument 13

I. The Complaint In This Matter Was Brought By A Corporation, Not A Natural Person, And Therefore There Is No Jurisdiction 13

II. Without Established Subject-Matter Jurisdiction, The AHC Cannot Compel Discovery 19

III. The Ethics Commission's Position Violates A Tribunal's Obligation To Ensure Underlying Jurisdiction 22

IV. The Ethics Commission's Policy Justifications For Investigating An Illegally Filed Complaint, Rather Than Dismissing The Complaint As Required By Law, Are Unavailing 24

V. The Ethics Commission's Allegation That Relator Has Used The Writ Process To Compound Litigation Expenses Is Baseless 29

Conclusion 30

Table of Authorities

Cases

Antares Aircraft, L.P. v. Fed. Republic of Nigeria,
999 F.2d 33 (2d Cir. 1993) 16

Bauer v. Missouri Ethics Comm'n.,
2008 Mo. Admin. Hearings LEXIS 287 (Mo. Admin. Hearing 2008) 4, 21

Burlington Northern Inc. v. North Western Transp. Co.,
649 F.2d 556 (8th Cir. 1981) 15

Clark v. Austin,
101 S.W.2d 977 (Mo. banc 1937) 4, 16

Christianson v. Colt Indus. Operating Corp.,
486 U.S. 800 (1988) 20

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010) 16

Derfelt v. Yocom,
692 S.W.2d 300 (Mo. banc 1985) 20

Fed. Power Comm'n v. La. Power & Light Co.,
406 U.S. 621 (1972) 14, 15

Golden Rule Ins. Co. v. Mo. Dep't of Ins.,
56 S.W.3d (Mo. 2001) 24

Impey v. Mo. Ethics Comm'n,
442 S.W.3d 42 (Mo. banc 2014) 2

James v. Poppa,
85 S.W.3d (Mo. 2002) 24

J.C. Nichols Co. v. Director of Revenue,
796 S.W.2d 16 (Mo. banc 1990) 21-22

Karashin v. Haggard Hauling & Rigging, Inc.
653 S.W.2d 203 (Mo. 1983) 18-19

McCoy v. Caldwell City,
145 S.W.3d 427 (Mo. banc 2004) 24

Mo. Comm'n on Human Rights v. Cooper,
639 S.W.2d 902 (Mo. App. W.D. 1982) 21

Naylor Senior Citizens Hous., LP v. Sides Constr. Co.,
423 S.W.3d 238 (Mo. banc 2014) 3, 16

Osborn v. Bank of the U.S.,
22 U.S. 738 (1824) 16

Parktown Imp., Inc. v. Audi of Am., Inc.,
278 S.W.3d 670 (Mo. banc 2009) 25

Pattibone v. Mulloy,
52 S.W.2d 402 (Mo. banc 1932) 30

State ex rel. AG Processing, Inc. v. Thompson,
100 S.W.3d 915 (Mo. App. W.D. 2003) 12, 14

State ex rel. C.F. White Family P'ship v. Roldan,
271 S.W.3d 569 (Mo. 2008) 12

State ex rel. Carter v. City of Independence,
272 S.W.3d 371 (Mo. App. W.D. 2008) 12

State ex rel. Dep't of Soc. Servs. v. Tucker,
413 S.W.3d 646 (Mo. banc 2013) 15

State ex rel. Ford Motor Co. v. Messina,
71 S.W.3d 602 (Mo. 2002) 11

State ex rel. Ford Motor Co. v. Manners,
239 S.W.3d 583 (Mo. banc 2007) 12, 22

State ex rel. Henley v. Bickel,
285 S.W.3d 327 (Mo. banc 2009) 20

State ex rel. Mo. State Bd. of Pharm. v. Admin. Hearing Comm'n,
220 S.W.3d 822 (Mo. App. W.D. 2007) 12

State ex rel. Riverside Joint Venture v. Mo. Gaming Comm'n,
969 S.W.2d 218 (Mo. banc 1998) 12

State ex rel. Sch. Dist. v. Williamson,
141 S.W.3d 418 (Mo. App. W.D. 2004) 15

State ex rel. T.J.H. v. Bills,
504 S.W.2d 76 (Mo. banc 1974) 14

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 26

Tovey v. Prudential Ins. Co. of Am.,
42 F. Supp. 2d 919 (W.D. Mo. 1999) 21

U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.,
487 U.S. 72 (1988) ..... *passim*

Weems v. Montgomery,
126 S.W.3d 479 (Mo. App. W.D. 2004) 24

Constitutional Provisions

Mo. Const. art. II, § 1 23

Mo. Const. art. V, § 1 23

Statutes and Regulations

§ 105.470(5), RSMo 1, 2, 7

§ 105.470(5)(d)d 5, 7

§ 105.473(6), RSMo 2

§ 105.473(12), RSMo 1

§ 105.957(2), RSMo ..... *passim*

§ 105.957(3), RSMo 26-27

§ 105.957(4), RSMo 4, 24

§ 105.961(3), RSMo 6

§ 491.070, RSMo 7

§ 536.063(4), RSMo 6

§ 536.070(3), RSMo 7

1 CSR 50-2.080(2) 6

Missouri Supreme Court Rules

Rule 4-1.2(b) 18

Rule 4-1.13 17

Rule 4-1.13, *Comment 3* 17

Rule 4-3.7 18

Rule 55.27(g)(3) 1, 24, 26

Other Sources

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK I,
Available at: http://avalon.law.yale.edu/18th_century/blackstone_bk1ch18.asp .. 16

George Orwell, NINETEEN EIGHTY-FOUR,
(Houghton Mifflin Harcourt, Kindle Edition) 27

INTRODUCTION

The Administrative Hearing Commission ("Hearing Commission" or "AHC") has ordered Relator Ron Calzone to comply with the Missouri Ethics Commission's ("MEC" or "Ethics Commission") discovery requests below. However, because the initiating complaint in this matter was filed by a corporation rather than a natural person, both the AHC and the MEC plainly lack jurisdiction.

The United States Supreme Court has held that adjudicative bodies may not enforce subpoenas while there is an open question as to jurisdiction. Here, the AHC has stated, on the record, that it does not believe it has jurisdiction in this case. Yet it has refused to rule on valid motions raising precisely that point. Rule 55.27(g)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action") (emphasis supplied).

The writ of prohibition exists for precisely such extraordinary circumstances. This Court should make the preliminary writ absolute, and finally conclude the Ethics Commission's unfounded, costly, and invasive 18-month-long effort to label Mr. Calzone a "legislative lobbyist" on the basis of an unlawful complaint.

MISSOURI'S LEGISLATIVE LOBBYIST STATUTE

The State of Missouri, like the federal government and a number of its sister states, regulates the act of lobbying legislators and legislative staff. § 105.470(5), RSMo. Lobbyists must register with the state, file monthly reports under penalty of perjury, and twice a year describe "the proposed legislation or action" that the lobbyists or their lobbyist principals "supported or opposed." § 105.473(12), RSMo. Lobbyist reports are

"kept available . . . at all times open to the public for inspection and copying . . . for a period of five years." § 105.473(6), RSMo.

Only the laws relating to legislative lobbyists are at issue here. Under Missouri law, in relevant part, a "'[l]egislative lobbyist' [is] any natural person who acts for the purpose of attempting to influence . . . any bill, resolution, amendment, . . . or any other matter pending or proposed in a legislative committee in either house of the general assembly, or in any matter which may be the subject of action by the general assembly." § 105.470(5), RSMo. In addition, to be considered a legislative lobbyist, such a person must meet one of four conditions, of which the third is most relevant here: be "designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity." *Id.*[1]

PROCEDURAL HISTORY

Legislators Ask A Corporation To File An Ethics Complaint.

Sometime before November 4, 2014, the Missouri Society of Governmental Consultants ("Society"), a professional organization for state lobbyists, was approached by a number of legislators, including Senator Ron Richard and Representative Kevin

[1] The four conditions are as follows: (a) be "acting in the ordinary course of employment, which primary purpose is to influence legislation on a regular basis, on behalf of or for the benefit of such person's employer"; (b) be "engaged for pay or for any valuable consideration for the purpose of performing such activity"; (c) be "designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity"; or (d) "[m]ake[] total expenditures of fifty dollars or more during the twelve-month period beginning January first and ending December thirty-first for the benefit of one or more public officials or one or more employees of the legislative branch of state government in connection with such activity." § 105.470(5), RSMo.

Engler. Br. Ex. A at 65, 67, *l* 7. These officeholders requested that the Society file a complaint with Respondent Missouri Ethics Commission ("MEC" or "Ethics Commission") against Mr. Calzone, accusing Relator of being an unauthorized legislative lobbyist. *Id*. at 67, *l* 7.

Because the Society is a nonprofit corporation, it could not oblige the legislators' request without approval by its board of directors. The board voted to bring a complaint against Mr. Calzone, *id*. at 76, *l* 5, and the Society asked Mr. Michael A. Dallmeyer of the law firm Carvin & Michael, LLC, to represent them in filing the complaint. *Id*. at 64, *l* 15; *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). The board instructed their attorney that he not file the complaint until after the 2014 election so as not to "impact . . . [the] reelection" of a member of the legislature. MEC Tr. at 72, *l* 5.

The Society's counsel had the complaint against Mr. Calzone delivered by hand to the Ethics Commission on November 4, 2014. Writ Ex. A at 2 (MEC stamp indicating receipt of the letter on Nov. 4, 2014); Pet. for Writ of Prohibition ("Pet.") at 2, ¶ 4. Mr. Dallmeyer, the Society's counsel, attached a cover letter stating that he was "submitting" the complaint "on behalf of [his firm's] client, Missouri Society of Governmental Consultants." Writ Ex. A at 2. For the purpose of bringing the complaint, the Society's attorney listed his name as "Michael A. Dallmeyer, *Attorney*" and provided his firm's address. Writ Ex. B at 4 (emphasis supplied). Mr. Dallmeyer submitted the complaint with his office phone number, consistent with his role as counsel for the Society, and

declined to provide a personal home or cell number. *Id*. Mr. Dallmeyer sworn to the truth of the Society's complaint under penalty of perjury. *Id*.

The Ethics Commission Conducts An Investigation

"Complaints filed with the commission shall be in writing and filed *only* by a natural person." § 105.957(2), RSMo (emphasis supplied). In Missouri, as is the universal rule, "[a] corporation is not a natural person." *Clark v. Austin*, 101 S.W.2d 977, 982 (Mo. banc 1937). Yet, even though the Society's complaint was brought by a corporation, through its attorney, the MEC chose not to dismiss the complaint as required by law. § 105.957(4), RSMo. ("If the commission finds that any complaint is frivolous in nature . . . the commission *shall* dismiss the case . . . '[F]rivolous' shall mean a complaint clearly lacking any basis in . . . law" (emphasis supplied)); *Bauer v. Missouri Ethics Comm'n*, 2008 Mo. Admin. Hearings LEXIS 287 at 6 (Mo. Admin. Hearing 2008) ("'Shall' signifies a mandate and means 'must'").

The MEC notified Mr. Calzone that the complaint had been filed against him, and it assigned Special Investigator Della Luaders to investigate the Society's charges. Neither Mr. Calzone nor Ms. Luaders were provided with the cover letter showing that the Society brought the complaint. § 105.957(2), RSMo ("Within five days after receipt of a complaint by the commission, a copy of the complaint, including the name of the complainant, shall be delivered to the alleged violator").

For her investigation, Ms. Luaders interviewed a number of people, including legislators, the Society's president and secretary, and Mr. Calzone (without counsel). Ex. A at 119. We cannot know all those with whom Ms. Luaders spoke or what they said,

however, because Ms. Luaders testified that she could not "remember the rest of the individuals' names." *Id*. And she could not refresh her memory because she failed to record the interviews and she destroyed her handwritten notes after she typed up her January 2015 report recommending that the MEC proceed to find probable cause. *Id*. at 111, *l* 9. The MEC failed to give even this report, abridged as it is, to Mr. Calzone until six months later, on June 18, 2015. *See* Br. Ex. C.

On January 8, 2015, Ms. Luaders spoke to Mr. Dallmeyer, who referred her to the cover letter for the first time. Br. Ex. A at 121, *l* 10. As Ms. Luaders recalls, the attorney told her "that his client was the Missouri Society of Governmental Consultants, and he had referenced that in his letter." *Id*. at 124, *l* 1. Ms. Luaders further testified that Mr. Dallmeyer referred her to the president and secretary of the Society for more information concerning the substance of the Society's complaint. *Id*. Mr. Calzone was finally given a copy of Mr. Dallmeyer's letter 13 days later, on January 21, 2015. *Id*. at *l* 20.

On April 21, 2015, four months later, the MEC accepted Ms. Luaders' findings and formally accused Mr. Calzone of being an unauthorized lobbyist. The only specific example of lobbying activity alleged was that Mr. Calzone often testified in front of committees of the Missouri General Assembly. *See* Ex. D at 255-257; *but see* § 105.470(5)(d)d, RSMo ("A 'legislative lobbyist' shall not include any . . . person solely due to such person's . . . [t]estifying as a witness before the general assembly or any committee thereof").

After Mr. Calzone finally obtained Ms. Luaders' report on June 18, 2015, he was granted a continuance of his scheduled hearing date while he sought to find counsel. In

August, Mr. Calzone acquired *pro bono* counsel. On August 31, 2015, Mr. Calzone's attorneys filed a motion to dismiss, arguing that the MEC's complaint failed to state a claim that Mr. Calzone lobbied within the meaning of section 105.470(c). Ans. Ex. 2.

The Ethics Commission's Hearing.

On September 3, 2015, the Ethics Commission held a hearing in Mr. Calzone's case. Counsel for the MEC provided the Ethics Commission's response to Mr. Calzone's motion to dismiss at the hearing itself.

The Commission argued, incorrectly, that section 105.961(3) gave the MEC no discretion to grant motions. MEC Tr. at 9, *l* 3; *but see* § 105.961(3), RSMo (Ethics Commission hearings "shall be conducted pursuant to the procedures provided by sections 536.063 to 536.090"); § 536.063(4), RSMo ("any motion shall state the name and address of the attorney, if any, filing it . . . "); 1 CSR 50-2.080(2) ("Only the commission may make a final disposition of the case. A presiding commissioner may be appointed by the commission, who shall have full power and authority to control the procedure of the hearing, to admit or exclude testimony or other evidence, or *rule upon all motions* . . . Any decision of the presiding commissioner may be overruled by a vote of at least four (4) members of the commission, upon either motion of any party or of any commissioner") (emphasis supplied). Mr. Calzone's motion was "overruled." *Id*. at 11, *l* 3.

The MEC called four witnesses (none of whom had been previously identified to Mr. Calzone) and introduced eight exhibits. Even though the person filing the complaint should presumably have personal knowledge relevant to determining probable cause, the

MEC did not call Mr. Dallmeyer. Instead, it chose to call the secretary of the Missouri Society of Governmental Consultants, Mr. Randy Scherr. Nor did the MEC introduce Mr. Dallmeyer's cover letter, which had to be introduced by Mr. Calzone.

At the hearing, the MEC argued that Mr. Calzone self-designated as a lobbyist for a third-party corporation, Missouri First, Inc., but it never demonstrated that "self-designation" was a valid theory. That purely legal question should have been decided when Mr. Calzone filed his motion to dismiss. In addition, the MEC failed to show how, as a factual matter, Mr. Calzone had designated himself as a lobbyist for Missouri First. What it did show was that Mr. Calzone testified in front of committees of the general assembly, which was undisputed—and which is not lobbying. *Cf.* § 105.470(5)(d)d, RSMo.

Counsel for Mr. Calzone objected on grounds of insufficient foundation and hearsay to evidence the MEC wished to enter against Mr. Calzone.[2] To patch this self-inflicted wound, the MEC called *Mr. Calzone* to authenticate *the MEC's* evidence. *But see* § 536.070(3), RSMo (respondent "may be called and examined as if under cross-examination"); § 491.070, RSMo (scope of cross-examination is the entire case). The Commission did not limit itself to the authentication of otherwise-admissible evidence, however, proceeding instead to ask Mr. Calzone if he had conducted activities constituting lobbying within the meaning of section 105.470(5). *See, e.g.* Br. Ex. A at

[2] The hearing actually began with substantial testimony from the MEC's lawyer himself, which was only stopped after Mr. Calzone's counsel objected. Br. Ex. A at 16, *l* 19: ("Commissioner I have to object . . . this is an opening statement, and it is assuming an enormous amount of information as evidence . . . " " . . . [the] objection is well taken").

141, *l* 3. Mr. Calzone continuously asserted his Fifth Amendment right not to be a witness against himself.

After the hearing, on September 11, 2015, the Ethics Commission found probable cause, fined Mr. Calzone $1,000, and prohibited Mr. Calzone from "acting to attempt to influence any pending or potential legislation on behalf of Missouri First, Inc., or any other person, until filing an annual lobbyist registration report and filing all necessary lobbyist expenditure disclosure reports pursuant" to state law. Pet. at 2, ¶ 5; Ans. Ex. 3 at 10, ¶ 33; *id*. at 11.

Mr. Calzone Seeks Review Before The Administrative Hearing Commission

The Administrative Hearing Commission has jurisdiction over appeals of probable cause findings by the Missouri Ethics Commission. On September 25, 2015, Mr. Calzone timely filed a petition for administrative review with the AHC, arguing, *inter alia*, that the MEC's ruling was in error because the Society's complaint "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." Pet. at 2, ¶ 6-7. Mr. Calzone's case was assigned to Respondent Commissioner Dandamudi and given Case No. 15-1450 EC. Pet. at 2, ¶ 6. The AHC scheduled a hearing for February 3, 2016. Writ Ex. G at 46.

The MEC had failed to request any discovery before it made its probable cause finding. But on December 28, 2015, three months after Mr. Calzone filed his motion challenging subject-matter jurisdiction, the MEC filed its first discovery requests. *Id*. Mr. Calzone timely objected, and the MEC did not respond to those objections. *Id*. However, the AHC limited the upcoming February 3, 2016 hearing to Mr. Calzone's December 18,

2015 motion for judgment on the pleadings. The Parties then met and conferred, agreeing to stay discovery pending the outcome of that hearing and specifically noting that discovery would be irrelevant if the MEC lacked jurisdiction. Calzone Sugg. in Supp. at 5; Writ Ex. G at 47.

At the February 3 hearing, Commissioner Dandamudi stated no fewer than four times that he intended to "agree" or "side with Petitioner" on Mr. Calzone's jurisdiction argument, citing the difference between natural and artificial persons. Br. Ex. B at 227, *l* 10-16, 235 *l* 14. He nevertheless "left the record open for the MEC to supplement an exhibit"—the Society's complaint including Mr. Dallmeyer's cover letter—but otherwise stated the AHC had "everything [it] need[ed" and would "wait for the transcript to be prepared" before ruling. Writ Ex. D at 21; AHC Tr. at 236, *l* 17.

"That evening, 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"). The next morning, Mr. Calzone moved to strike or, in the alternative, to limit the MEC's exhibit to only the Society's complaint. The AHC denied Mr. Calzone's motion to strike as moot, deciding that it could not grant a decision on the pleadings because the "parties continue[d] to provide exhibits and arguments." Writ Ex. D at 21.[3]

Nevertheless, the AHC stated that it believed a hearing was likely unnecessary, and ordered a summary decision briefing schedule on pure questions of law—including

[3] Mr. Calzone never introduced any new evidence beyond the pleadings, however, and only responded to the Ethics Commission's *post hoc* submissions.

the MEC's lack of jurisdiction. *Id*. at 21-22. The AHC ordered Mr. Calzone's opening brief to be filed on March 4, 2016. *Id*. at 22.

The Ethics Commission Derails All Briefing On Summary Decision

On February 24, 2016, the MEC filed a subpoena *duces tecum* against a non-party, Missouri First, Inc. Writ Ex. G at 44. The subpoena demanded, *inter alia*, every document put before that non-party's board of directors over a period going back three years, and private messages between any two Missouri First, Inc. board members—two of whom are husband and wife—including communications having nothing to do with Mr. Calzone. *Id*. at 55-62, 73. On March 1, 2016, Mr. Calzone moved for a protective order that discovery not be had, pursuant to Rule 56.01. Mr. Calzone's motion explicitly relied on *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) ("*Catholic Conference*"), for the proposition that discovery cannot be had until an adjudicative body establishes its jurisdiction. Writ Ex. G at 48-51.

On March 2, 2016, Mr. Paul Hamby, a member of the board of Missouri First, Inc., filed a letter with the AHC incorporating Mr. Calzone's arguments.

On March 4, 2016, Mr. Calzone timely filed his opening brief supporting his motion for summary decision.

On March 14, 2016, ten days after Mr. Calzone filed his opening brief according to the AHC's briefing schedule, the MEC moved to compel discovery against both Mr. Calzone, resurrecting its December 28, 2015 discovery requests, and against Missouri First. The MEC's motion did not address the *Catholic Conference* case, but it did seek a continuance to respond to Mr. Calzone's timely-filed motion for summary decision. The

MEC then formally requested a 30-day "extension of time until April 25, 2016 to respond to Petitioner's motion for summary decision." Br. Ex. E at 260. The AHC granted that motion on March 21, 2016. *Id*.

On April 8, the AHC granted the Ethics Commission's motion to compel against Mr. Calzone. Writ Ex. E at 25. In doing so, the Hearing Commission ignored Mr. Calzone's citation to binding U.S. Supreme Court authority—joining the MEC in completely ignoring that precedent—and mischaracterized Mr. Calzone's claim as being based entirely upon *State ex. rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602 (Mo. 2002). *Id*. at 25.

Relying on *Impey v. Missouri Ethics Commission*, 442 S.W.3d 42 (Mo. banc 2014), Commissioner Dandamudi appeared to argue that since the AHC must decide its case *de novo*, it is under no obligation to first determine whether subject-matter jurisdiction exists. *Id*. at 26. This approach confused jurisdiction with the standard of review. Jurisdiction cannot spring into being absent a proper complaint, and subpoenas cannot be enforced absent proper jurisdiction. *U.S. Catholic Conf.*, 487 U.S. at 80.

Accordingly, on April 14, 2016, Mr. Calzone requested a writ of prohibition to prevent further proceedings against him, including invasive and costly discovery, by an adjudicative body lacking proper jurisdiction. On April 19, 2016, this Court granted a preliminary writ to that effect. Mr. Calzone now seeks to make that writ absolute.

STANDARD OF REVIEW

1. Prohibition is an extraordinary remedy, but it is warranted given the extraordinary proceedings here. "[P]rohibition lies where a judicial or quasi-judicial body

. . . lacks jurisdiction over the subject matter the body is asked to adjudicate." *State ex rel. Riverside Joint Venture v. Mo. Gaming Comm'n*, 969 S.W.2d 218, 221 (Mo. banc 1998). Prohibition may be directed at administrative agencies, and this Court is specifically empowered "to issue a writ of prohibition to the AHC." *State ex rel. Mo. State Bd. of Pharm. v. Admin. Hearing Comm'n*, 220 S.W3d 822, 825 (Mo. App. W.D. 2007); *State ex rel. Carter v. City of Independence*, 272 S.W.3d 371, 374 (Mo. App. W.D. 2008). "Where 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, 919 (Mo. App. W.D. 2003) (internal citation and quotation marks omitted).

2. Additionally, "[p]rohibition is a proper remedy for an abuse of discretion or act in excess of jurisdiction in . . . denying . . . a protective order . . . " *State ex. rel Ford Motor Co. v. Manners*, 239 S.W.3d 583, 586 (Mo. banc 2007).

3. "Where . . . issuance of the writ depends on the interpretation of a statute, this Court reviews the statute's meaning *de novo*." *State ex rel. C.F. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008).

ARGUMENT

I. The Complaint In This Matter Was Brought By A Corporation, Not A Natural Person, And Therefore There Is No Jurisdiction.

The Parties are before this Court because the Administrative Hearing Commission ordered discovery despite lacking subject-matter jurisdiction. This was not Mr. Calzone's preference. The AHC has been asked twice to rule on its own subject-matter jurisdiction: in Mr. Calzone's motion for judgment on the pleadings and in his motion for summary decision. In addition, in his motion for a protective order, Mr. Calzone asked that the AHC not allow any discovery before determining whether it had jurisdiction. The Hearing Commission has thus chosen to abdicate its responsibility to determine jurisdiction, instead ordering extensive and burdensome discovery in a case already brimming with statutory and constitutional defects.

This harm is compounded by Respondent's public statements suggesting that it too doubts its jurisdiction. Br. Ex. B at 235, *l* 11 ("And I'd rather – unless you have actual case law to state otherwise on that specific issue that a corporation can be the same as a natural person, I'd rather let [MEC] do what you do on appeal, and I'm going to side with the Petitioner in this case"). That is to say, despite stating that it did not have jurisdiction, the AHC proceeded to order discovery as to the merits. This was improper. *U.S. Catholic Conf.*, 487 U.S. at 80. The Ethics Commission's Answer, which contains neither the word "discovery" nor "subpoena," completely ignores this context. Instead, the MEC's answer pretends that orderly briefing on the jurisdictional question was proceeding apace below, and that Relator jumped the gun by requesting this writ.

To the contrary, "[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.'" *Thompson*, 100 S.W.3d at 920 (quoting *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 79 (Mo. banc 1974); *compare* Ans. at 6 ("Relator Calzone has a direct appeal right from a decision of the Administrative Hearing Commission"). Here, where the lack of jurisdiction is so obvious—and the lower body has refused to exercise its responsibility to determine its own subject-matter jurisdiction—prohibition is an appropriate remedy. This Court ought to make the writ absolute and order the AHC to dismiss for lack of jurisdiction.

The MEC cites case law from the Supreme Court and the Eighth Circuit that merely note that typically administrative agencies get the first crack at determining their own jurisdiction. This is true, so far as it goes. But neither of those cases, one involving the Federal Power Commission and the other the late Interstate Commerce Commission, involves the question here—an adjudicative body that has *refused* to rule on jurisdiction, but generally proceeded as though it had by ordering onerous discovery.

In *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 621, 647 (1972), the agency in question "had exercised its primary jurisdiction and was conducting proceedings to determine whether [an outstanding issue] was subject to its jurisdiction." Were that the case here, prohibition would not lie. But the AHC is not "conducting proceedings to determine whether [the complaint is] . . . subject to its

jurisdiction." *Id*. It has avoided that question and ordered discovery as to the *merits*.[4] This is wholly improper. *State ex rel. Dep't of Soc. Servs. v. Tucker*, 413 S.W.3d 646, 647 (Mo. banc 2013) (Prohibition "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).

Likewise, the MEC's Eighth Circuit case (which involves a non-binding question of Federal procedure) concerned a body that *had* already ruled as to jurisdiction. There, the plaintiff sought to appeal that determination before the conclusion of the administrative proceedings. *Burlington Northern, Inc. v. North Western Transp. Co.*, 649 F.2d 556, 558 (8th Cir. 1981). That case merely stands for the proposition that "[a]s a general rule, judicial interference should be withheld until the administrative process has run its course." *Id*. Prohibition exists precisely for exceptions to "the general rule," and the AHC's extraordinary behavior here justifies the extraordinary relief Relator seeks. *U.S. Catholic Conf.*, 487 U.S. at 80 (where court or agency lacks subject-matter jurisdiction, subpoenas issued pursuant to that body's authority "are void").

Such intervention is all the more necessary here, where the answer to the question that the AHC has refused to answer is obvious.[5] The General Assembly's grant of

[4] Throughout this proceeding, Mr. Calzone has consistently stated that the AHC would be entitled to issue discovery only as it relates to the question of jurisdiction. Sugg. in Supp. at 2 ("At a minimum, until there has been a formal determination of the AHC's jurisdiction, any discovery should be limited to that question").

[5] Relator Calzone incorporates by reference all of his arguments in his Petition for a Writ of Prohibition and his Suggestions in Support of that Petition.

jurisdiction to the Ethics Commission is not an open-ended one, but rather pointedly limited to "[c]omplaints . . . in writing and filed only by a natural person." § 105.957(2), RSMo. "Corporations are not natural persons." *Naylor*, 423 S.W.3d at 243 (punctuation altered); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) ("[C]orporations . . . are not natural persons") (citation and internal quotation marks omitted); *Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993) ("Obviously corporations and limited partnerships are not natural persons"); William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK I at 455 ("We have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person . . . it has been found necessary . . . to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immorality . . . These artificial persons are called . . . corporations").[6]

But corporations cannot take an oath under penalty of perjury or offer testimony. § 105.957(2), RSMo ("The complaint shall contain all facts known by the complainant that have given rise to the complaint, and the complaint shall be sworn to, under penalty of perjury, by the complainant"). For such "'legal matters,'" corporations "'must act, *if at all*, through licensed attorneys.'" *Naylor*, 423 S.W.3d at 243 (quoting *Clark*, 101 S.W.2d at 982) (emphasis partially removed); *also Osborn v. Bank of the U.S.*, 22 U.S. 738, 830 (1824) (Marshall, C.J.) ("A corporation, it is true, can appear only by attorney, while a natural person may appear for himself"). That is precisely what happened here. Br. Ex. A at 64, *l* 13 (Testimony of Randy Scherr) ("Q. You understood the [S]ociety to be the

[6] *Available online at*: http://avalon.law.yale.edu/18th_century/blackstone_bk1ch18.asp

complainant in this case? A. The [S]ociety motivated the complaint and had it filed by Mr. Dallmeyer"). The Society contracted for Mr. Dallmeyer's representation, the filing was generated by a vote of the Society's board of directors, and the board directed the timing of that filing. And when Ms. Luaders called Mr. Dallmeyer regarding the case, he directed her to the Society's president and the Society's secretary—the same secretary, Mr. Scherr, that the MEC called at Mr. Calzone's probable cause hearing in September of 2015.

When human agents act on behalf of corporations, it is not assumed that the human agent has acted instead of, or concurrently with, the corporation, as the MEC insists. MEC Ans. at 10 ("A complaint cannot be filed by a natural person on behalf of another person unless the complaint is first filed by a natural person"). Adopting the MEC's reading of "natural person" would read all distinctions between natural and artificial persons out of the law. Under the MEC's unique theory of corporate personhood, for example, it would be the treasurer herself—in her personal capacity—paying the State when she signs a check paying a corporation's income tax.

Nor can we assume that attorneys representing a corporate client are the real party-in-interest. Rule 4-1.13 ("A lawyer employed or retained by an organization *represents the organization* acting through its duly authorized constituents") (emphasis supplied). Indeed, "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful." Rule 4-1.13, *Comment 3*. The MEC's understanding of the attorney-client relationship in the instant case would blow apart these carefully considered rules, and force lawyers for

corporate entities to become both attorney *and* client, in violation of the universal ethical canons, reflected in the Missouri Rules of Professional Conduct, against lawyers serving as witnesses in their own matters.[7] Rule 4-3.7. This is particularly troubling here, where Missouri law requires that complainants verify their statements under oath. § 105.957(2), RSMo ("…under penalty of perjury…").

The Ethics Commission's construction of the statute, then, would permit corporations to file complaints, but only by forcing the corporation's attorney to make sworn statements endorsing the veracity of the corporation's complaint. *Naylor*, 423 U.S. at 243 ("In legal matters, [a corporation] must act, if at all, through licensed attorneys") (emphasis omitted)). This does away entirely with yet another element of the Missouri Rules of Professional Conduct, that "[a] lawyer's representation of a client…does not constitute an endorsement of the client's political, economic, social or moral views or activities." Rule 4-1.2(b). It also raises troubling questions concerning the scope of the attorney-client privilege in these circumstances.

Indeed, these basic principles about corporate identity and the attorney-client relationship reveal fundamental flaws with the case here and the Society's complaint. The complaint requires the signing party to swear to facts under oath. *See* Writ Ex. B at 4. That is, the person signing is testifying, and by rules of evidence must be testifying about knowledge within his or her personal experience. *Cf. Karashin v. Haggard Hauling & Rigging, Inc.*, 653 S.W.2d 203, 206 (Mo. 1983) (affirming exclusion of testimony not

[7] Indeed, in this matter, Mr. Dallmeyer appears to have inadvertently appended his name to a document under penalty of perjury without actually having knowledge of the facts he was swearing to.

based on personal knowledge). Thus, for the MEC's arguments to work here, an attorney must be testifying on behalf of his or her client and must have personal knowledge, or the knowledge of the entire organization must be imputed to him or her.

Below, the AHC initially understood and agreed with these arguments. Br. Ex. B at 235, *l* 11 ("unless you have actual case law to state otherwise on that specific issue that a corporation can be the same as a natural person . . . I'm going to side with the Petitioner in this case"). The MEC then confused the proceedings, both by "attaching a number of documents beyond those requested by the AHC Commissioner" after the hearing on the motion for judgment on the pleadings, and by seeking to compel discovery on the merits and postpone AHC-ordered briefing on summary decision. Pet at 3, ¶ 10; MEC Ans. at 2, ¶ 4 ("The Ethics Commission admits paragraph[] . . . 10"). Because of this smoke in the air, the AHC lost sight of its first and most fundamental duty—to act only where the Legislature has given it jurisdiction to act. And, that lesson having been forgotten or ignored by the MEC and bypassed by the AHC, this Court is the only forum available to Mr. Calzone.

II. Without Established Subject-Matter Jurisdiction, The AHC Cannot Compel Discovery.

The Ethics Commission has never addressed the U.S. Supreme Court's binding precedent in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), not before the Administrative Hearing Commission and not in its

Answer.[8] In ordering discovery, the AHC also ignored that case law entirely. This omission is shocking, as *Catholic Conference* is directly on point.

In that case, Abortion Rights Mobilization ("ARM") filed suit "to revoke the tax-exempt status of the Roman Catholic Church in the United States." 487 U.S. at 74. As part of its case, ARM sought discovery against the United States Catholic Conference, "seeking extensive documentary evidence to support its claims." *Id*. at 75. Discovery was ordered, and the Conference filed suit, arguing that "the issuing court lack[ed] jurisdiction over the case." *Id*. at 76.

The Supreme Court observed that subject-matter jurisdiction "is not a mere nicety of legal metaphysics," but rather "rests . . . on the central principle of a free society that [adjudicative bodies] have finite bounds of authority, some of constitutional origin, which exist to protect citizens from . . . the excessive use of judicial power." *Id*. at 77. Accordingly, the Court emphatically reaffirmed the obvious notion that "the subpoena power of a court cannot be more extensive than its jurisdiction." *Id*. at 80. This was an unsurprising result. Adjudicative bodies "'created by statute can have no jurisdiction but such as the statute confers.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (quoting *Sheldon v. Sill*, 49 U.S. 441 (1850)). Thus, the Court ruled that if "subject-matter jurisdiction" does not lie "over the underlying action, and [if] the process

[8] The Ethics Commission's Answer is quite light on precedent, citing a mere four cases: two cases discussing the standard for granting a writ of prohibition, *State ex rel. Henley v. Bickel*, 285 S.W.3d 327 (Mo. banc 2009); *Derfelt v. Yocom*, 692 S.W.2d 300 (Mo. banc 1985); and two federal cases standing for the general proposition that agencies ought to get first opportunity to determine their own jurisdiction, both discussed above. For its only citation in the entirety of Section II of the Answer, the MEC relies on a dissenting opinion. Functionally, the rest of its Answer is conclusory.

[i]s not issued in aid of determining that jurisdiction, then the process is void . . . " *U.S. Catholic Conf.*, 487 U.S. at 76; *see also 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 had vested an administrative agency with jurisdiction); *Tovey v. Prudential Ins. Co. of Am.*, 42 F. Supp. 2d 919, 923 (W.D. Mo. 1999) ("Federal courts should not make [merits] determinations prior to ascertaining whether they have jurisdiction").

Catholic Conference's application here is plain. Jurisdiction cannot spring into being absent a proper complaint, and subpoenas cannot be enforced absent proper jurisdiction. 487 U.S. at 80; *Mo. Comm'n. on Human Rights*, 639 S.W.2d 902 (Mo. App. W.D. 1982) ("[N]evertheless, the subpoena was unauthorized because: (1) the Commission has no power to issue a discrimination complaint *sua sponte*; and (2) the Commission cannot issue a subpoena until after a valid . . . complaint is filed and a notice of hearing is issued upon that complaint"). The complaint in this matter was filed by a nonprofit corporation. Since valid complaints can only be filed by natural persons, and since corporations are not natural persons, the complaint was legally defective. § 105.957(2), RSMo.

"When a statute sets conditions for an agency's jurisdiction, the agency's jurisdiction does not exist until the fulfillment of all such conditions. The conditions for [the] Ethics [Commission's] jurisdiction, and therefore [the Administrative Hearing Commission's] jurisdiction, include 'a complaint as described by section 105.957.'" *Bauer*, 2008 Mo. Admin. Hearings LEXIS 287 at 3 (quoting § 105.961(1), RSMo); *J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20 (Mo. banc 1990) ("the

[Administrative Hearing] Commission is simply a hearing officer who exercises the same role as any administrative hearing officer authorized to hear contested cases within an agency") (citation omitted). This lack of subject-matter jurisdiction is fatal to the AHC's order compelling discovery, since the AHC's "subpoena power . . . cannot be more extensive than its jurisdiction." *U.S. Catholic Conf.*, 487 U.S. at 76.

None of the MEC's discovery requests go toward whether or not subject-matter jurisdiction exists, "even by implication," and so those requests are unlawful until such time as the MEC's, and therefore the AHC's, jurisdiction has been positively established. *U.S. Catholic Conf.*, 487 U.S. at 80. As discussed above, the jurisdictional question is of such import that it ought to be resolved via "a permanent writ of prohibition instructing the Respondents to enter an order ruling that both the MEC and the AHC lack jurisdiction to consider a complaint filed by the Society, a non-natural person." Pet. at 4.

At a bare minimum, however, *Catholic Conference* mandates a remand to the AHC requiring it to "determine whether [the MEC] had subject-matter jurisdiction in the underlying action" before it does anything else. 487 U.S. at 80. Additionally, prohibition should issue against any discovery that is not related "to a determination of jurisdictional matters." *Id*; *Manners*, 239 S.W.3d at 586 ("Prohibition is a proper remedy for an abuse of discretion or act in excess of jurisdiction in . . . denying . . . a protective order . . . ").

III. The Ethics Commission's Position Violates A Tribunal's Obligation To Ensure Underlying Jurisdiction.

A number of times in its Answer, the Ethics Commission makes the incredible claim that, by its mere assertion of jurisdiction, it has divested this Court and the

Administrative Hearing Commission of their obligation to ensure subject-matter jurisdiction. Ans. at 9 ("Mr. Dallmeyer filed a complaint with the Ethics Commission, and the Administrative Hearing Commission and this Court are obligated to assume this is true for purposes of a motion to dismiss"); *id*. at 7 ("the Administrative Hearing Commission and this Court are obligated to assume the Ethics Commission's allegations are true [regarding the provenance of the complaint] and make all inferences in favor of the Ethics Commission . . . ").

This is a neat trick for the government. It would also eliminate motions to dismiss on virtually any basis, which may in fact be the Ethics Commission's honest understanding of the law. Br. Ex. at 11 (denying Mr. Calzone's motion to dismiss on the theory that the Ethics Commission had no ability to grant a motion to dismiss after it has filed a complaint against a respondent).

But the Ethics Commission is wrong nonetheless. As a practical matter, it would permit the executive department to dictate terms to the judiciary, doing significant damage to the separation of powers. Mo. Const. art. V, § 1 ("The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts"); *see also* Mo. Const. art. II, § 1 ("The powers of government shall be divided into three distinct departments—the legislative, executive, and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.").

The MEC's argument also muddles the standards for motions to dismiss with those governing a court's independent obligation to satisfy itself that it has underlying jurisdiction in a case. With regard to the former, it is true that "all alleged facts are accepted as true and construed in a light most favorable to the pleader." *Weems v. Montgomery*, 126 S.W.3d 479, 484 (Mo. App. W.D. 2004) (internal citation and quotation marks omitted). But, with regard to jurisdiction, the standard is merely that a "court is not restricted to a mere consideration of the pleadings," *Golden Rule Ins. Co. v. Missouri Dep't of Ins.*, 56 S.W.3d 471 (Mo. App. W.D. 2001), because "[a] court shall dismiss the action whenever it 'appears' by suggestion of the parties or otherwise that the court lacks subject matter jurisdiction," *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. banc 2002) (*per curiam*) (quoting Rule 55.27(g)(3)). *See also James*, 85 S.W. 3d at 9 ("As the term 'appears' suggests, the quantum of proof is not high; it must appear by the preponderance of the evidence that the court is without jurisdiction" (quoting Rule 55.27(g)(3)); *McCoy v. Caldwell Cty.*, 145 S.W.3d 427, 428 (Mo. banc. 2004) ("The question of the circuit court's jurisdiction is solely an issue of law").

IV. The Ethics Commission's Policy Justifications For Investigating An Illegally Filed Complaint, Rather Than Dismissing The Complaint As Required By Law, Are Unavailing.

The MEC has advanced a number of arguments that purport to stand for the proposition that "Mr. Dallmeyer is a natural person who filed a complaint with the Ethics Commission." Ans. at 9. In reality, these arguments function not as legal arguments but as public policy rationales as to why the MEC need not have dismissed "a complaint clearly lacking any basis in . . . law." § 105.957(4), RSMo. Because the plain statutory

language controls, these arguments should be disregarded. *Parktown Imps., Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672-73 (Mo. banc 2009) ("This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue"). But they also fail on their own merits.

First, the MEC posits that there was no basis for dismissing the legally defective complaint: they argue that, even though "[t]he Society itself cannot file a complaint, . . . the individual members knew that someone had to file a complaint to trigger an Ethics Commission investigation, so they asked a natural person, Mr. Dallmeyer, to file one." Ans. at 10. But Mr. Dallmeyer was in an attorney-client relationship with the Society, and as its attorney he acted on behalf of his client, a corporation. He was, therefore, not a natural person filing a complaint, and the complaint was legally defective even under the Ethics Commission's own understanding. *See* § 105.957(2), RSMo.

The MEC also claims that, if the Society itself did not form an attorney-client relationship on behalf of its members, "the only remaining alternative" would be for the Society's members to "file dozens of complaints." Ans. at 10-11. There is quite literally no evidence in the record that this would happen. Unless the MEC's counsel has inside information as to the Society's deliberations in choosing to hire *pro bono* counsel to bring the complaint, he is simply making things up. In any event, were dozens of complaints filed, all relating to the same charge, surely the MEC would be capable of arranging for consolidation of those cases? It also ignores the fact that multiple members who wanted to file a complaint, if such members existed, could encourage just one member with personal knowledge to file the complaint.

Next, the MEC argues that "Relator Calzone can point to no prejudice as a result of the complaint," because "[h]ad the Ethics Commission rejected the complaint, Mr. Dallmeyer, or perhaps multiple members of the Society, would have re-filed the complaint." Ans. at 11. This is wrong for a number of reasons.

1. It confuses *prejudice* with *the independent harm* of being improperly brought before a state agency without jurisdiction. Rule 55.27(g)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action") (emphasis supplied).

2. Once again, in an effort to create an alternate history where jurisdiction is proper, the MEC assumes facts not in evidence as to what the Society's directors or *pro bono* counsel would do in the event of a dismissal. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment . . . "). That said, the MEC's suggestion that Mr. Dallmeyer, a contracted-for *pro bono* attorney, would independently file a new complaint "under penalty of perjury" is certainly interesting. Br. Ex. A at 68, *l* 21 ("Q. How often are you in the Capitol? A. Every day. Q. And at no point during any of those daily visits did you see Mr. Dallmeyer for the last two years? A. No, not – I don't think so. Q. So you never saw Mr. Dallmeyer in a conversation with Mr. Calzone with any legislator in the last two years? A. I didn't.").

3. It is wrong, as a matter of law, in any event. "The commission, its executive director or an investigator shall not investigate any complaint concerning conduct which is not criminal in nature which occurred more than two years prior to the date of the

complaint." § 105.957(3), RSMo. The statute of limitations would change if a complaint were re-filed, even if filed just the next day.

It is possible that "the Ethics Commission would have conducted the same investigation" even if another, natural party with personal knowledge had filed a valid complaint against Mr. Calzone (even though that party would presumably have based its complaint on different personal knowledge of the allegations against Mr. Calzone). Ans. at 11. Perhaps Ms. Luaders would still have been directed to Mr. Scherr, and spoken with Mr. Calzone without the benefit of counsel. Only one thing would actually be certain: we still would not have any understanding of what was said to Ms. Luaders, given that she apparently makes a practice of destroying her only contemporaneous recordings of those conversations. Br. Ex. A at 111, *l* 9.

Finally, the MEC argues that the law "requiring complaints to be filed in writing by a natural person with knowledge of the relevant facts" should be sidestepped because three asserted policy rationales for the law "have been achieved" here. Ans. at 11. These arguments are mistaken.

First, the MEC argues that this requirement "provide[s] transparency as to the identity of the actual complaining party" and that "Relator Calzone knows the identity of the person filing the complaint." Ans. at 11. This is Orwellian.[9] For much of this case,

[9] George Orwell, *Nineteen Eighty-Four* at 212 (Houghton Mifflin Harcourt, Kindle Edition) ("[The word] blackwhite…has two mutually contradictory meanings. Applied to an opponent, it means the habit of impudently claiming that black is white, in contradiction of the plain facts. Applied to a Party member, it means a loyal willingness to say that black is white when Party discipline demands this. But it means also the ability to believe that black is white, and more, to know that black is white, and to forget

precisely the opposite was true. The Ethics Commission did not provide the cover letter that demonstrated that the complaint had been brought by an attorney for his corporate client, as opposed to a person acting in his individual capacity, until January 21, 2015—the same month Ms. Luaders completed her investigation. And the Ethics Commission continued to try to conceal this defect, and the true identity of the complainant, even at the probable cause hearing, where it fell to Mr. Calzone's counsel to introduce the cover letter.

Second, the MEC argues that the natural person requirement "provide[s] the Ethics Commission with primary contact information for an individual with knowledge of the facts to begin an investigation," and that here, "the Ethics Commission contacted Mr. Dallmeyer as part of its investigation, confirmed the facts in the complaint, and obtained names of additional witnesses." Ans. at 11-12. It is noteworthy that the MEC does not have a citation for this assertion. As for the contents of the record, all Ms. Luaders testified is that when she was made aware of the cover letter, by Mr. Dallmeyer, he said "[t]hat [Ms. Luaders] should speak with" two officers of the Society, "and he had noted that his client was the Missouri Society of Governmental Consultants, and he had referenced that in his letter." Br. Ex. A at 122-123. The evidence on this point, which is limited by the MEC's decision not to call Mr. Dallmeyer as a witness, suggests that he *did not* "confirm[] the facts in the complaint," and that he *instead* referred the MEC's investigator to his client—the "additional witnesses" to whom the MEC obliquely refers.

---

that one has ever believed the contrary. This demands a continuous alteration of the past, made possible by the system of thought which really embraces all the rest, and which is known in Newspeak as doublethink.").

Third, the MEC notes that the requirement forces "an individual to assume the liability imposed under Section 105.957.4" for frivolous complaints, and that Mr. Dallmeyer "assumed [that] responsibility." Ans. at 11-12. Mr. Calzone does not disagree with that characterization, but notes that significant doubt as to the scope and veracity of Mr. Dallmeyer's certification has been raised in this case, and that the MEC—while studiously avoiding any reliance on his testimony—has given no indication that it is interested in verifying whether he was or was not personally aware of the facts to which he swore. The MEC did not treat Mr. Dallmeyer as a fact witness, but merely as the Society's attorney. Ms. Luaders followed his recommendation that she interview agents of his client, and the MEC then relied heavily on testimony from one of those agents, Mr. Scherr, at the September hearing. There is no "responsibility" where the state chooses to relentlessly pursue a target while completely ignoring the validity of the underlying complaint. That is in fact why we are here, and to the extent this policy rationale is valid, it cuts in favor of making the writ absolute.

V. The Ethics Commission's Allegation That Relator Has Used The Writ Process To Compound Litigation Expenses Is Baseless.

The Ethics Commission posits that "Relator Calzone has used the writ process to compound, rather than reduce litigation expenses." Ans. at 8. In particular, the MEC claims that Mr. Calzone is seeking "simultaneous[]" dismissal of its action before the AHC and before this Court. *Id*. ("Relator Calzone's Motion for Summary decision [*sic*] is still pending even as Relator Calzone pursues his Petition in Prohibition"). This is untrue.

The preliminary writ of prohibition has estopped all action below, and the "parties [do not] continue to file briefs related to Relator Calzone's Motion for Summary Decision." Ans. at 8. There is no "duplication of efforts in the Administrative Hearing Commission and this Court," precisely because the preliminary writ issued. Ans. Ex. 11 (" . . . we may take no action in this case until ordered by the Court"); *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).

If anything, it is the MEC, which has repeatedly sought to delay decision as to its own jurisdiction while simultaneously demanding extensive discovery from both Mr. Calzone and a non-party, that "has compounded, rather than reduced litigation expenses."

CONCLUSION

In the course of these proceedings, the Ethics Commission has regularly ignored its own statute, norms of due process, and the First, Fifth, and Fourteenth Amendments to the Constitution. Now, without any judicial support for the proposition, it seeks extensive, merits-based discovery, on the basis of a theory of jurisdiction violating the plain meaning of section 105.957(2), RSMo., on-point U.S. Supreme Court authority, the corporate attorney-client relationship, the historical difference between natural and artificial persons, decades of Missouri Supreme Court case law, and a court's independent ability and duty to determine its own jurisdiction. The MEC's reckless pursuit of Mr. Calzone cannot justify this wide-spread harm to Missouri law, and the preliminary writ of prohibition ought to be made absolute.

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: June 24, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 24th of June, 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: June 24, 2016