WD80176

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MISSOURI ETHICS COMMISSION,

Appellant,

v.

RON CALZONE

Respondent.

APPEAL FROM THE NINETEENTH CIRCUIT COURT
The Honorable Jon Beetem, Circuit Judge

BRIEF OF RESPONDENT

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INTRODUCTION

Ron Calzone is an engaged citizen who, on his own initiative and at his own expense, travels to Jefferson City to advocate for legislative changes he believes in. For reasons that are unclear from the record below, this activity, normally recognized as evidence of civic virtue, has made Mr. Calzone certain political enemies. As a result, some members of the General Assembly approached the Missouri Society of Governmental Consultants and asked that it file an ethics complaint asserting that Mr. Calzone is an unregistered lobbyist who has been petitioning his government illegally.

That Complaint was filed, and is the subject of the writ of prohibition below. While there is much about this case that raises concerns, especially given the core First Amendment activity implicated here, the writ was premised upon an elementary legal principle: when an administrative agency has been instructed by the General Assembly to act only on complaints filed by natural persons, it may not act on a complaint filed by a corporation through counsel.

There is no serious disagreement as to the relevant facts. The Society is a corporation. It held a formal board vote to file the Complaint, hired Michael A. Dallmeyer as its counsel in the matter, and dictated the date on which he would file the Complaint. Mr. Dallmeyer, in turn, explicitly stated that he was filing on behalf of a corporation. He appended a cover sheet to the Complaint saying precisely that, and reiterated it when approached during the Ethics Commission's investigation. And when the Commission finally held its probable cause hearing, it called as its fact witness not Mr. Dallmeyer, but the Society's secretary.

The Ethics Commission's decision to proceed despite these facts may, at first, have stemmed from a good-faith mistake as to the scope of its jurisdiction. But we are beyond that point. Mr. Calzone has noted that the initiating Complaint was filed by a corporation, and has raised his jurisdictional objection at every step of these proceedings. He has been consistently ignored. And when the Administrative Hearings Commission chose to order far-reaching discovery, without first determining its own jurisdiction, he had no option left other than to seek a writ barring further *ultra vires* action on the Society's unlawful complaint.

The legal question presented here is simple, and the Ethics Commission's attempts to obscure it are unavailing. The circuit court correctly exercised its judgment, and should be affirmed.

STATEMENT OF FACTS

Pursuant to Rule 84.04(f) of the Missouri Supreme Court Rules, submits the following Statement of Facts.

A. The Missouri Society Of Governmental Consultants, Pursuant To A Vote Of Its Board Of Directors, Hired An Attorney To File The Initiating Complaint Against Mr. Calzone.

Ron Calzone, Respondent here, is a private citizen who advocates for legislative action on issues of public policy. LF 962. He is the subject of a complaint filed against him before the Missouri Ethics Commission, Appellant here, on November 4, 2014. LF 129. That complaint alleges that Mr. Calzone has operated as an unregistered lobbyist for Missouri First, Inc., a Missouri nonprofit corporation. LF 40.

Sometime before November 2014, Missouri legislators, including Senator Ron Richard and Representative Kevin Engler, approached the Missouri Society of Governmental Consultants about filing a complaint against Mr. Calzone. LF 796, 798. The Society's board "met in August [2014] and – authorized the complaint to be filed." LF 804. The Society took a formal vote on the question, which was unanimous. LF 807. As Secretary to the Society, Mr. Randy Scherr recorded the deliberations and vote. LF 795.

The Society's officers and board directed that the Complaint not be filed until election day, so as not to interfere with the election of Representative John Diehl. LF 803. Having set those parameters, the Society "had [the Complaint] filed by Mr. [Michael A.] Dallmeyer." LF 795. The Society did not report any expenses related to the Complaint because Mr. Dallmeyer represented the Society pro bono. LF 806.

On November 4, 2014, Mr. Dallmeyer filed the Complaint with the Ethics Commission. LF 129. The MEC stamped the Complaint's cover letter, noting the filing date and the fact that it was hand-delivered. LF 129. In that cover letter, Mr. Dallmeyer explained to the MEC that he was "submitting [the Complaint] on behalf of our"—the law firm Carver & Michael's—"client, Missouri Society of Governmental Consultants." LF 129. He further explained that the Society was "organized as a nonpartisan, not for profit entity" that was "headed by Sam Licklider, president, and Randy Scherr, secretary." LF 129. He then requested that media questions be addressed directly to the client, while questions from the MEC be directed to him, the Society's lawyer. LF 129.

The Complaint form's instructions are directed "to the person bringing the complaint," LF 131, and the form provides no place to provide client information or explain

any attorney-client relationship. In filling out the complainant information on the MEC's Complaint form, the Society's lawyer listed himself as "Michael A. Dallmeyer, Attorney." LF 131. Mr. Dallmeyer then listed his law firm and its address, and provided only a work telephone number. LF 131. As the person signing a complaint, Mr. Dallmeyer swore "upon oath and affirmation . . . under penalty of perjury," that the complaint "contain[s] all the facts known to the person bringing the complaint." LF 131.

Mr. Dallmeyer was once a lobbyist, but he subsequently changed his practice. LF 799. The MEC's witness, who testified that he had been in the Capitol building "[e]very day," testified that he had not seen Mr. Dallmeyer in the Capitol building in the previous two years, during the period Mr. Dallmeyer alleged knowledge of Mr. Calzone's supposed lobbying activities. LF 799.

B. The MEC Investigation Uncovered Further Evidence That The Initiating Complaint Was Filed By An Attorney On Behalf Of His Client.

The MEC's investigator, Ms. Luaders, testified that she spoke with Mr. Dallmeyer on January 8, 2015. LF 815, 818, 850, 853. Ms. Luaders further testified that, when she called Mr. Dallmeyer as part of her investigation, he told her that she "should speak with his clients," referring to representatives of the Society. LF 853-54.

Ms. Luaders testified that, although the MEC typically photocopies complaints and gives them to investigators, she did not learn of the existence of the cover letter to the Complaint until she spoke with Mr. Dallmeyer on January 8, 2015. LF 853. Ms. Luaders testified that, after Mr. Dallmeyer told her to speak with representatives of his client, he stated that "his client was the Missouri Society of Governmental Consultants, and he had

referenced that in his letter." LF 854. Ms. Luaders further testified that Mr. Dallmeyer told her that he "filed [the Complaint] on behalf of his client, Missouri Society of Governmental Consultants." LF 816.

On January 20, 2015, Ms. Luaders spoke with Mr. Calzone and learned that he had never been given the cover letter. LF 854-55. Ms. Luaders testified that she "spoke with management" and "confirmed [that the cover letter] should have been contained" with the copy of the Complaint given to Mr. Calzone, and she was instructed to call him on January 21, 2015, "and have staff send a copy to him." LF 855.

In her report, Ms. Luaders noted that Mr. Dallmeyer made the allegations in the Complaint "on behalf of his client, Missouri Society of Governmental Consultants." LF 973.

C. The Commission Charged Mr. Calzone, Held A Hearing, And Found Probable Cause Based On The Complaint

Based on Ms. Luaders' report, the MEC formally charged Mr. Calzone on April 21, 2015. LF 981-989. Mr. Calzone obtained pro bono counsel in August 2015. LF 702-03. On August 31, 2015, four days before the MEC's September 3, 2015 probable cause hearing, Mr. Calzone's attorneys filed a motion to dismiss. LF 703, 1119.

Based on the information the Commission had then disclosed to Mr. Calzone, and giving the benefit of the doubt to the MEC, Mr. Calzone presumed that "Mr. Dallmeyer had direct personal knowledge of the facts alleged" in the Complaint and "that the Commission fully investigated the basis for Mr. Dallmeyer's sworn statement." LF 166. Mr. Calzone thus proceeded under the assumption that "[t]he initiating complaint was

brought by Mr. Dallmeyer individually, as required by state law, and not by the Society." *Id*. But, Mr. Calzone "preserve[d] the right to raise [the] issue should that belief prove to be misplaced." *Id*.

At the September 3 hearing, the MEC stated that it had "no authority or power to rule on the constitutionality of Missouri statutes," and that any constitutional issues raised in the motion to dismiss had to wait for Missouri circuit court. LF 462. The Commission also stated that its rules did not "provide for a motion for any decision on the pleadings or for a summary decision," and that it was compelled "to hold a hearing." LF 462. The Commission therefore "overruled" the motion and "proceed[ed] to hear the case." LF 464.

The Commission introduced eight exhibits and called four witnesses. LF 229, 703. The MEC provided no notice of the witnesses. LF 229. One of those witnesses was the secretary to the Society, Mr. Scherr. LF 763, 765. Although Mr. Dallmeyer swore to present "the facts known to [him in] bringing the complaint," LF 131, he was not called as a witness. LF 229. Moreover, the MEC failed to introduce the Complaint's cover letter, which was introduced by Mr. Calzone. LF 574, 578.

Mr. Scherr acknowledged that he had been subpoenaed because he was the Society's secretary. LF 811; *see also id*. at 812 ("I don't know any other reason why"). As Secretary, Mr. Scherr testified that "[t]he Complaint was filed . . . by the association." LF 794-95. And, when asked if he understood "the association and not Mr. [Dallmeyer] to have been complaining," Mr. Scherr responded, "[h]e's the attorney." *Id*. at 795. In response to the MEC's relevance objection to this testimony, Mr. Calzone's counsel responded, "The relevance is it's an unlawful complaint. It's not filed by a natural person." LF 795.

Similarly, Ms. Luaders testified that when she called Mr. Scherr about the Complaint, he told her "that his client was the Missouri Society of Governmental Consultants" and told her to call the Society's president and secretary with questions about the facts of the case. LF 853-54.

After learning the basis for the Complaint through Mr. Scherr's and Ms. Luader's testimony, counsel for Mr. Calzone objected to the admission of the Complaint as follows:

> 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.

LF 814.

After further testimony, the state again moved to admit the Complaint, but "solely for the purposes of establishing the Missouri Ethics Commission authority to act as proof that we did receive a Complaint signed and verified." LF 875. Counsel for Mr. Calzone again objected to the Complaint's admission: "I do object to any legal conclusions, such as the Commission being legally permitted to act upon that Complaint." LF 876.

After the conclusion of testimony, counsel for Mr. Calzone asked the Commission to incorporate the constitutional arguments made in the motion to dismiss. LF 892. He then began his closing remarks by disputing the validity of the Complaint on which the

proceeding was predicated: "This is a case where on the face of the Complaint a nonnatural person filed a Complaint in clear violation of the statute." LF 892.

The Commission filed its Findings of Fact, Conclusions of Law and Order on September 11, 2015. LF 195. The Commission failed to address the challenge to the validity of the Complaint, and thus to its jurisdiction. Rather, it found probable cause that Mr. Calzone knowingly violated Sections 105.473.1 and 105.473.2, RSMo., ordered Mr. Calzone to register as a lobbyist, ordered him to cease all attempts to influence legislation until he registered, and fined him $1,000. LF 204.

D. Review Proceedings Before The Administrative Hearing Commission

Mr. Calzone filed a Petition for Review in the Administrative Hearing Commission on September 25, 2015. LF 217. Mr. Calzone's Petition challenged the Commission's jurisdiction because of the invalid Complaint. LF 220-22, 238-39.

On October 28, 2015, the Commission sent its answer to Mr. Calzone. LF 299. The Commission denied any jurisdictional problems arising from an attorney filing the Complaint on behalf of his client because it was "filed by a natural person" and because the MEC lacked "authority to examine the subjective motivation of the person filing the complaint." LF 308-09.

On December 18, 2015, Mr. Calzone filed a motion for judgment on the pleadings, arguing in part that the Commission lacked jurisdiction. LF 360, 367-72. On December 28, 2015, over a year after the Society filed the Complaint and three months after the Commission set a hearing date for February 3, the Commission served discovery requests

on Mr. Calzone. LF 80. Mr. Calzone filed objections to the discovery requests, to which the Commission did not respond. *Id.*

The Parties conferred and agreed to a stay of discovery "until the resolution of [the] motion" for judgment on the pleadings. LF 941. At the February 3, 2016 hearing, Commissioner Dandamudi stated, "On that jurisdiction requirement, . . . unless there's some case law that I did not see, I'm going to side with the Petitioner. A corporate officer or an attorney acts on behalf of his or her client or the entity in which they're an officer. Here the client is clearly an organization. So I am going to side with the Petitioner on that." LF 958.

The Commission requested, "before [the AHC] issue[d] a ruling, an opportunity to brief the jurisdictional issue a little bit further, in-depth. I do want to provide the Commission with a little bit of case law on that." LF 964. The AHC rejected the Commission's argument for further briefing, stating, "he is acting on behalf of his client. If his client was a natural person, then I'd be inclined to agree with you. But here the client is not a natural person, and therefore I'm inclined to agree with the Petitioner." LF 965-66. The AHC told the Commission that, "unless [it had] actual case law . . . [the AHC would] rather let you do [that] on appeal." LF 966.

The AHC then said that it "ha[d] everything [it] needed," but asked if there was anything either party would like to add. LF 967. The Commission requested permission to enter a copy of the Complaint, with the cover letter, into the record. *Id*. at 967-68. Later that evening, in addition to filing a deficient copy of the Complaint, the Commission filed

a sur-reply, an amended answer, and a motion to file an amended answer. LF 55. The next day, Mr. Calzone responded to these filings.

On February 5, 2016, the AHC held that, because "the parties continue to provide exhibits and arguments," it was denying Mr. "Calzone's motion for decision on the pleadings." LF 55 (footnote omitted). It also granted the MEC's motion to file an amended answer and denied Mr. Calzone's motion to strike. *Id*. The AHC ordered the parties to file motions for summary decision and provided a scheduling order: Mr. Calzone was to file his motion by March 4, 2016, the Commission to file its opposition by March 25, 2016, and Mr. Calzone his reply by April 8, 2016. LF 54, 56.

On February 24, 2016, the Commission sought discovery from a non-party, Missouri First, Inc. LF 78. On March 1, 2016, Mr. Calzone objected to the discovery requests and filed a motion for protective order, in part because the Commission lacked jurisdiction to issue a subpoena given the invalid Complaint. LF 58, 78, 82.

On March 4, 2016, Mr. Calzone filed his motion for summary decision. LF 58-59. The motion again argued that the MEC and AHC lacked jurisdiction because the Complaint was invalid. LF 408. On March 14, 2016, the Commission filed a motion to compel and a response to Mr. Calzone's motion for a protective order. LF 59. On March 18, 2016, Mr. Calzone filed his opposition to the Commission's motion to compel. LF 59.

On April 8, 2016, the AHC denied Mr. Calzone's motion for protective order and granted in part the MEC's motion to compel. LF 58. The AHC rejected Mr. Calzone's argument that discovery could not be had without jurisdiction, stating that this and two other arguments misinterpreted the AHC's role in the case. LF 60.

E. Circuit Court Petition For Writ Of Prohibition

On April 14, 2016, Mr. Calzone filed a petition for a writ of prohibition in Cole County Circuit Court. LF 12. The Petition asked the court to enter an order declaring that the AHC, and by extension the MEC, lacked jurisdiction to consider a complaint not filed by a natural person. LF 15. In the alternative, Mr. Calzone asked that the court order a stay of proceedings until the MEC and AHC had ruled on the jurisdictional question, *id.*, and that unrelated discovery be stayed because "[t]he ordering of discovery is contingent upon the existence of jurisdiction," LF 16, 18.

On April 19, 2016, the court issued preliminary orders in prohibition to Commissioner Sreenvasa Dandamudi and the AHC, directing them to respond by May 25, 2016. LF 112, 114. The MEC, as real party in interest, responded, requesting that the court quash the preliminary writ of prohibition and deny a permanent writ on various grounds, including that the Complaint was filed by a natural person. LF 116-17. It repeated that and other arguments in its brief in opposition to the writ, filed on July 14, 2016. LF 992.

On August 23, 2016, after full briefing, the Circuit Court held a hearing on the writ of prohibition. LF 1148.

One month later, on September 23, 2016, the Cole County Circuit Court entered judgment making "permanent its preliminary writs of prohibition." LF 1157. The court held that, "Because the complaint filed with the Missouri Ethics Commission was not filed by a natural person, but by an entity by its agent(notwithstanding [sic] the fact that the agent was a natural person) all actions taken on the complaint are and were void." *Id*. The

court further ordered that "[t]he respondents are further prohibited from taking any further action on that complaint." *Id.*

On October 31, 2016, the MEC filed this appeal from the writ of prohibition. LF 1158.

STANDARD OF REVIEW

The Commission's brief violates Rule 84.04(e) "in that it fails to include a concise statement of the applicable standard of review for each claim of error and to analyze the error in the context of that review standard." *Rainey v. Express Med. Transporters, Inc.*, 254 S.W.3d 905, 907 (Mo. App. E.D. 2008); *see also* Mo. Sup. Ct. R. 84.04(e). "The standard of review is an essential portion of all appellate arguments; it outlines [the] court's role in disposing of the matter before [it.]" *Steele v. Schnuck Mkts., Inc.*, 485 S.W.3d 823, 824 (Mo. App. E.D. 2016). "[O]mitting the standard of review is itself a deficiency worthy of dismissal." *Id.*

The Commission's appeal challenges the Circuit Court's issuance of a writ of prohibition, which the Circuit Court based on its determination that the AHC lacked jurisdiction over the matter before it. An appellate court reviews the issuance of a writ of prohibition for abuse of discretion. *State ex. rel. Cass Cty. v. Mollenkamp*, 481 S.W.3d 26, 29 (Mo. App. W.D. 2015). A court's determination as to a lack of jurisdiction is also considered discretionary and will not be reversed on appeal absent an abuse of that discretion. *Preston v. State*, 33 S.W.3d 574, 578 (Mo. App. W.D. 2000).

Under the abuse of discretion standard thus doubly applicable here, a trial court abuses its discretion only when its decision is so "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. Johns*, 34 S.W.3d 93, 111 (Mo. banc 2000); *accord Steele v. Steele*, 978 S.W.2d 835, 839 (Mo. App. W.D. 1998); *see also Beckman v. Beckman*, 545 S.W.2d 300, 301 (Mo. App. S.L.D. 1976) (noting abuse

of discretion restricted to "a judicial act which is untenable and clearly against reason and which works an injustice." (internal quotation marks omitted)). Moreover, there is no abuse of discretion "[i]f reasonable minds can differ about [the] propriety of the trial court's ruling." *Hatchette v. Hatchette*, 57 S.W.3d 884, 888 (Mo. App. W.D. 2001); *see also Anglim v. Mo. P. R. Co.*, 832 S.W.2d 298, 303 (Mo. banc 1992).

Thus, Missouri law places a heavy burden on establishing abuse of discretion, and "[t]he burden of establishing abuse of discretion is on the appellant." *Aliff v. Cody*, 26 S.W.3d 309, 315 (Mo. App. W.D. 2000); *see also Anglim*, 832 S.W.2d at 303. The MEC has not carried this burden. Rather, as discussed below, the record establishes that the trial court correctly granted the writ of prohibition.

The Commission has also challenged the Circuit Court's conclusion that when Attorney Dallmeyer filed the complaint with the Ethics Commission he was acting as an agent of a corporation, the Society of Governmental Consultants, rather than as an individual natural person. Whether an agency relationship exists is a question of fact. *See W. v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7, 11 (Mo. App. W.D. 2010). On appeal, Missouri courts "defer to . . . the trial court's findings of fact." *State v. Wilson*, 449 S.W.3d 803, 807 (Mo. App. E.D. 2014).

ARGUMENT

A. Neither the Missouri Ethics Commission, Nor The Administrative Hearing Commission, Has Jurisdiction. (Responding to Point Relied On No. II, That The Complaint Was Valid)

The Parties are before this Court because the Administrative Hearing Commission ordered discovery despite plainly lacking subject-matter jurisdiction.[1] Missouri law permits the Missouri Ethics Commission to act only on complaints filed by a natural person, and the Complaint in this case was filed by a corporation. This simple fact has been obvious since this matter's inception. Yet, rather than executing their duty to dismiss a flawed complaint, and despite numerous opportunities to do so, the MEC and AHC have insisted upon engaging in lengthy and costly proceedings against Mr. Calzone.

This point has been repeatedly raised. Before the Ethics Commission, he urged the MEC against finding probable cause because such a ruling would be extrajurisdictional. LF 614 ll.6-8 ("This is a case where on the face of the Complaint[,] a nonnatural person

[1] Occasionally in its briefing, the MEC refers to an agency's "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.").

filed a Complaint in clear violation of the statute."). He did the same in not one, but two, properly filed motions before the AHC—in his motion for judgment on the pleadings, and in his motion for summary decision. *See* LF 360, 366-72, 408, 417-22. 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. *See* LF 78, 82-85. Mr. Calzone sought the writ only after all of these efforts had failed.

The Ethics Commission's brief completely ignores this critical context, and implies that matters were proceeding perfectly normally below until Mr. Calzone jumped the gun. MEC Br. at 15 ("The issues raised in Relator Calzone's Petition for Writ of Prohibition were not outside the scope of authority of the AHC, and upon completion would have been subject to appeal to the circuit court."). But, as is black letter law in Missouri, "[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, 919 (Mo. App. W.D. 2003) (quoting *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 79 (Mo. banc 1974)).[2]

[2] Given how blatant the Ethics Commission's lack of subject-matter jurisdiction is in the instant matter, the MEC's insinuation that it is *Respondent*'s action that is costing "the parties and the state's taxpayers litigation expenses" is risible. MEC Br. at 17. Indeed, Respondent notes that the Commission was under no obligation to appeal this matter.

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 not merely appropriate, but necessary. *State ex rel. Southers v. Stuckey*, 867 S.W.2d 579, 581 (Mo. App. W.D. 1993) (requiring that "cease from exercising *any* further jurisdiction over the case" (emphasis supplied)); *State ex rel. Sch. Dist. v. Williamson*, 141 S.W.3d 418, 423, 428 (Mo. App. W.D. 2004) (issuing writ of prohibition for want of jurisdiction and ordering dismissal of petition for judicial review). A "lack of jurisdiction" is "the foundational ground for a writ of prohibition." *State ex rel. Goodson v. Hall*, 228 Mo. App. 766, 770 (Mo. App. K.C. 1934); *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171, 175 (Mo. App. W.D. 2000) (noting that prohibition is 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.").

There are no grounds for reversing the circuit court, which merely acted, in keeping with a long line of precedent, to prevent further *ultra vires* action by Missouri's administrative agencies.

1. The Society's Complaint plainly failed to vest either the MEC or AHC with subject-matter jurisdiction.

The Commission erroneously argues that the circuit court "usurp[ed] the AHC of its administrative power." MEC Br. at 16. But, to the contrary, 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 & Senior Servs.*, 248 S.W.3d 52, 54 (Mo. App. W.D. 2008)); *see 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; *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (holding that adjudicative bodies "'created by statute can have no jurisdiction but such as the statute confers'" (quoting *Sheldon v. Sill*, 49 U.S. 441 (1850))).

Moreover, where a court or state agency lacks subject-matter jurisdiction, any subpoenas issued pursuant to its authority "are void." *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 80 (1988). This is no "nicety of legal metaphysics"; the U.S. Supreme Court has declared that this rule stems from the "finite bounds" of adjudicative authority, a "central principle of a free society." *Id.* at 77.

Here, the Missouri General Assembly unambiguously limited the Ethics Commission's jurisdiction to complaints brought by natural persons. § 105.957(2), RSMo. ("Complaints filed with the [C]omission shall be in writing and filed *only* by a natural person." (emphasis added)). And the Hearing Commission's jurisdiction is coterminous with that of the MEC. *See J.C. Nichols Co. v. Dir. of Revenue*, 796 S.W.2d 16, 20 (Mo. banc 1990) (noting that "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" (internal quotation marks omitted)). "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 v. Mo. Ethics Comm'n*, 2008 Mo. Admin. Hearings LEXIS 287 at *3 (Mo. Admin Hearings 2008) (footnote omitted) (quoting § 105.961(1), RSMo.).

Thus, because a non-natural person filed the Complaint, the MEC and the AHC *never* had subject-matter jurisdiction. *See* LF 794 l.23-795 l.1 (Randy Scherr, Secretary of the Missouri Society of Governmental Consultants, testifying that "[t]he Complaint was filed . . . by the association"). There is no room for factual dispute on this point. The Society contracted for Mr. Dallmeyer's representation, the filing was generated by a formal 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. The MEC's contention that this simply means a corporation "asked a natural person to" file a complaint, MEC Br. at 21, is a colossal misrepresentation of fact.

Moreover, the objective fact that a corporation filed the Complaint has been known to the MEC since the moment it was filed. The Complaint form bore the name of "Mr. Michael A. Dallmeyer, Attorney," who listed his address as that of his law firm ("Carver & Michael LLC, 712 East Capitol Ave."), and did not list a home or cell number, but

merely a work number ("573-636-4215"). LF 38. In addition, and more to the point, the Society's attorney also included a cover letter stating, "Enclosed 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." LF 36.[3] Before the circuit court, the Ethics Commission even conceded that "Mr. Dallmeyer stated that his motivation for filing the complaint was to do so on 'behalf of' a client," LF 1002, although it now seeks to downplay the obvious import of that admission. *See also* LF 1003 (MEC noting "the fact" of Mr. Dallmeyer's statement).

Quite aside from the Complaint itself, the MEC's investigation uncovered substantial evidence that Mr. Dallmeyer had filed the Complaint as the Society's lawyer. The MEC's investigator, Ms. Luaders, testified that when she called Mr. Dallmeyer as part of her investigation, he explicitly told her that he "filed [the Complaint] on behalf of his client, Missouri Society of Governmental Consultants." LF 816. He could not have been clearer in informing the MEC's agent that "his client was the Missouri Society of

[3] The Ethics Commission failed to give this cover letter to the special investigator tasked with investigating the Society's complaint until January 2015, the same month that it provided that information to Mr. Calzone. LF 853. This may be a coincidence; perhaps the cover letter was genuinely lost during that time. That does not explain the Commission's odd decision not to introduce it at the September 3, 2015 probable cause hearing, instead leaving that duty to Mr. Calzone's counsel. LF 574, 578.

Governmental Consultants," LF 854, and that she "should speak with his clients," not him. LF 853-54. Perhaps that is why, in preparing for its hearing, the MEC called the Society's secretary to testify, rather than Mr. Dallmeyer. Indeed, Mr. Scherr testified that he believed he was "subpoenaed because [he was the] secretary of the organization [and that he did not] know any other reason why." LF 811-812.

There is, frankly, no serious dispute that the Complaint was filed by a corporation, acting through counsel.[4] This fact ought to have disposed of the case. § 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."); *Bauer*, 2008 Mo. Admin. Hearings LEXIS 287 at *6 ("'Shall' signifies a mandate and means 'must' . . . ."). After all, "corporations[] are not natural persons." *Naylor Senior Citizens Hous., LP v. Sides Constr. Co.*, 423 S.W.3d 238, 243 (Mo. banc 2014); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (noting "corporations . . . are not natural persons" (internal quotation marks omitted)); *Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33, 37 (2d Cir. 1993) (Altimari, J., dissenting) ("Obviously corporations and limited partnerships are not natural persons . . . ."); William

[4] The Ethics Commission, while ignoring all of the facts demonstrating that the Society hired Mr. Dallmeyer as counsel with a *pro bono* arrangement, pursuant to a board vote, and that he represented the Society as its attorney, even concedes that Mr. Dallmeyer filed on behalf of his client. LF 124-25; *see also* LF 1003 (noting "the fact" of Mr. Dallmeyer's statement).

Blackstone, *Commentaries on the Laws of England, Book I, Ch. 18: Of Corporations* 455, http://avalon.law.yale.edu/18th_century/blackstone_bk1ch18.asp. ("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 immortality. . . . These artificial persons are called . . . corporations." (spelling altered)).

Yet the MEC continues to insist that when a human agent—an attorney no less—acts on behalf of a corporation, the corporation has not acted. Adopting the Ethics Commission'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. Just as the MEC is the actual Respondent here even though one of its attorneys files the relevant legal documents on its behalf, the Society filed the Complaint against Mr. Calzone, through its counsel, Mr. Dallmeyer. *Naylor,* 423 S.W.3d at 243.

2. Without established subject-matter jurisdiction, an administrative agency cannot compel discovery.

The AHC ignored binding and undisputed U.S. Supreme Court precedent foreclosing discovery where the Commission has no authority to act. That precedent, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), was presented to the AHC, but was not addressed when it granted the MEC's

motion to compel. The case was also briefed before the circuit court, but the Ethics Commission's brief on appeal declines to even mention it.[5] These omissions are surprising, 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." *Id*. 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.

[5] The MEC also did not address *Catholic Conference* before the AHC. Before the circuit court, it sought to distinguish *Catholic Conference* by arguing that the U.S. Supreme Court there simply "ruled on a U.S. District Court's jurisdiction." LF 999. That characterization is inaccurate: The Supreme 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. *Catholic Conference,* 487 U.S. at 80. For that proposition, *Catholic Conference* has obvious application here.

Accordingly, the Court emphatically reaffirmed the obvious notion that "the subpoena power of a court cannot be more extensive than its jurisdiction." *Id.* at 76. *Catholic Conference* clearly controls here, and while that alone is sufficient, case law from this very Court anticipated the *Catholic Conference* outcome. *See Mo. Comm'n on Human Rights v. Cooper*, 639 S.W.2d 902, 902 (Mo. App. W.D. 1982) ("Nevertheless, the subpoena was unauthorized because: (1) the Commission has no power to issue a discrimination complaint; 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, and neither the MEC nor the AHC have the power to initiate a complaint on their own. *See* § 105.957(2), RSMo. ("[S]hall be . . . filed only by a natural person."); *Mo. Comm'n on Human Rights*, 639 S.W.2d at 902 ("no power to issue").

The lack of subject-matter jurisdiction already described above is thus fatal to the AHC's order compelling discovery, since the AHC's "subpoena power . . . cannot be more extensive than its jurisdiction." *Catholic Conference*, 487 U.S. at 76. None of the MEC's discovery requests went toward whether or not subject-matter jurisdiction existed, "even by implication," and so those requests are unlawful absent proof of jurisdiction. *Catholic Conference*, 487 U.S. at 80. Thus, "[t]he facts and circumstances in this case" clearly support the Circuit Court's decision to "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, 376 (Mo. banc 2016).

B. The MEC's Policy Arguments Cannot Manufacture Jurisdiction Where None Has Been Created By The General Assembly (Responding to Point Relied On No. II, That The Complaint Was Valid)

The Missouri legislature set the conditions for jurisdiction: "Complaints filed with the commission shall be in writing and filed only by a natural person." § 105.957(2), RSMo. To defeat this clear command, the Commission offers several policy arguments justifying its extrajurisdictional proceedings. None are availing, for "[w]hen a statute sets conditions for an agency's jurisdiction, the agency's jurisdiction does not exist until the fulfillment of all such conditions." *Bauer,* 2008 Mo. Admin. Hearings LEXIS 287 at *3. No policy justification can fill the gap left by a lack of jurisdiction; such arguments should be addressed to the General Assembly, not this Court.

1. Mr. Dallmeyer, as an attorney, is more than an "associate" of an organization: he is an agent of and advocate for the Society.

First, the state argues that Mr. Dallmeyer's cover letter served only to note association, and fears such notation would hamper future investigations. MEC Br. at 21. The state acknowledges that the Society could not "file a complaint with the Missouri Ethics Commission . . . due to the statute." *Id*. But the state argues the phrase "on behalf of" indicates mere association, and speculates that a "person's intent is to step forward as a natural person and take responsibility for filing the complaint." *Id*. The state argues Mr. Dallmeyer's cover letter was "merely an acknowledgment that the Society of

Governmental Consultants wanted to file the complaint, but could not, so it asked a natural person to do so," *id*. at 21, and "[t]he fact that Mr. Dallmeyer had been hired or encouraged by a nonnatural [sic] person or that a non-natural association supported his complaint is irrelevant," *id*. at 24.

Thus, the MEC claims that Mr. Dallmeyer's filing the Complaint and noting his affiliation fulfilled the "purposes" of the natural person requirement by making clear "the true identity of the real party in interest." *Id*. at 23. This is Orwellian.[6] For much of this case, *precisely the opposite was true*. The MEC 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—months after the Complaint was filed, and the same month Ms. Luaders completed her

[6] George Orwell, *Nineteen Eighty-Four* 212 (Houghton Mifflin Harcourt, Kindle Edition) (1949) ("[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 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.").

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.

There is a fundamental difference between a *member* of an association noting that association and the association's *agent* doing so. The former merely notes those whom she agrees with, the latter notes whom she is working for and on behalf of whom she conducts business. If a member of an association complains, she does so in her personal capacity. The same cannot be said for an attorney hired as an agent of the association.[7]

In this case, the Society took official, corporate action, voting to file the Complaint, and hiring an agent to carry out the task. LF 517 ll.15-16 ("The Society motivated the Complaint and had it filed by Mr. Dallmeyer."). The Society was the "real party in interest" and it hired a lawyer to draft and file a complaint, as noted by that attorney's own cover letter. Mr. Dallmeyer does not merely note that he is a "member" of the Society or even an elected officer of that body: he indicates that he is the organization's *attorney*. To suggest that anyone but the Society was the real party in interest simply blinks reality, and attempting to use an attorney to hide the real party in interest in order to maintain jurisdiction violates the letter and intent of the natural person requirement.

The state's novel policy arguments cannot undo an objective attorney-client relationship, and they contravene Missouri Rule of Professional Conduct 4-1.2(a), which

[7] Indeed, if it were so, briefing in this case would not refer to Mr. Calzone or the MEC, but instead to counsels' individual names.

provides that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." Comment 1 to that rule clarifies that "[t]he client has ultimate authority to determine the purposes to be served by legal representation." Comment 1, Mo.R.P.C. 4-1.2. The lawyer—whether before a court or administrative agency, or merely engaged in a negotiation—stands in the shoes of the client when pursuing the client's objectives. *See* Mo.R.P.C. 4-1.2 (scope of representation). As attorney, it was Mr. Dallmeyer's role to file on behalf of the corporation. *Naylor*, 423 S.W.3d at 243 ("In legal matters, [a corporation] must act, if at all, through licensed attorneys." (emphasis omitted) (internal quotation marks omitted)); LF 516 l.23-517 l.1 (Testimony of Randy Scherr) ("The Complaint was filed . . . by the association.").

And Mr. Dallmeyer simply played that role. That is to say, his work for the Society bears all the hallmarks of an attorney-client relationship. Mr. Dallmeyer did not serve as a witness at the probable cause hearing. The MEC's investigator, Ms. Luaders, testified that when she was made aware of the cover letter by Mr. Dallmeyer, who told her "[t]hat [she] 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." LF 575 l.25-576 l.3. This suggests that Mr. Dallmeyer could *not* act as a witness or otherwise "confirm[] the facts in the complaint," as the MEC insists, but that he *instead* referred the MEC's investigator to his client—the "additional witnesses" to whom the MEC obliquely refers. MEC Br. at 24; *see* LF 575-76. This raises significant doubt as to the scope and veracity of Mr. Dallmeyer's certification, yet the MEC—while studiously

avoiding any reliance on his testimony—has given no indication that it is interested in verifying whether he or any complainant is personally aware of the facts to which he swears.

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 his client's officers, and the MEC then relied heavily on testimony from one of those agents, Mr. Scherr, at the September hearing. There is no "responsibility," MEC Br. at 19, 20, 21, 22, 24, 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 affirming the writ.

2. Having an attorney sign a corporation's complaint under penalty of perjury does nothing to endow the MEC with jurisdiction.

Unable to muster any legal authority for its position, the MEC substitutes an equally unsupported policy argument related to Mr. Dallmeyer filing under penalty of perjury. MEC Br. at 23. To support this claim, the MEC engages in a lengthy discussion of the probative weight of a statement signed under perjury versus an affidavit. *Id*. at 23-24 (discussing *Warner v. Berg*, 679 S.W.2d 913, 915 (Mo. App. W.D. 1984)). This is a *non sequitur*, for the jurisdictional deficiency is not only a lack of personal knowledge, but that Mr. Dallmeyer was acting on behalf of his *corporate* client—and corporations cannot initiate such claims under the statute. § 105.973(2), RSMo.

Again, the Ethics Commission misunderstands the role of an attorney. Under Missouri Rule of Professional Conduct 4-3.7(a), "[a] lawyer shall not act as advocate at a

trial in which the lawyer is likely to be a necessary witness."[8] Again, the rule's comments make clear why an attorney should not be generally assumed to be a witness, because a "witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." Comment 2, Mo.R.P.C. 4-3.7. Simply put, Mr. Dallmeyer's role is as an advocate for the Society, not a personal witness to the events giving rise to the facts and issues in the Complaint.

In suggesting otherwise, the MEC's reliance on *Warner v. Berg* is inapplicable, because that case deals with evidence proffered after litigation is complete, 679 S.W.2d at 914, and where jurisdiction was established. There, Berg failed to "respond with his own affidavits" to counter the claims of Warner. *Id*. *After* summary judgment was granted, Berg filed a motion for a new trial and sought to include his affidavit. *Id*. It was only then, after summary judgment was entered and his motion failed, that he asserted that "his proposed amended verified answer, which was denied [*sic*] a late filing, would have raised a question of material fact." *Id*. at 915. *Warner v. Berg* stands for the proposition that "*post-trial motions* . . . are not authorized and information alleged in them cannot be considered by the trial court in determining the propriety of a summary judgment." *R.J. v. S.J.*, 845

[8] While that rule does list exceptions, none are applicable here. *See* Mo.R.P.C. 4-3.7(a)(1)-(3).

S.W.2d 633, 635 (Mo. App. E.D. 1992) (emphasis added) (collecting cases, including *Warner*).[9] *Warner* is about the weight and probative value of evidence and when that evidence may be submitted, not whether an attorney can testify, without personal knowledge or belief, on behalf of his client. *Warner* did not explore the legal ethics implications of an attorney testifying for a client, nor did it examine the level of personal knowledge needed in a complaint. The case is inapposite, and, at best, should make the MEC question the veracity of the complaint if it cannot carry, *arguendo,* the weight of an affidavit. In other words, an attorney's mere assertion on behalf of his client does not give rise to probative evidence.

It is telling that the MEC relies upon Mr. Dallmeyer's ability to swear to the "best of [his] knowledge and belief," MEC Br. at 24 (brackets in original), but did not bring Mr. Dallmeyer to the witness stand. Instead, it sought the testimony of the Society's secretary and others with alleged personal knowledge of the facts giving rise to the claim. Mr. Dallmeyer not only lacked personal knowledge, he was not the real complainant—the

[9] *Cf. Estate of Heidt*, 785 S.W.2d 668, 671 (Mo. App. W.D. 1990) (same); *Landmark N. Cty. Bank & Tr. Co. v. Nat'l Cable Training Ctrs., Inc.*, 738 S.W.2d 886, 890 (Mo. App. E.D. 1987) (same); *Am. Bank of Princeton v. Stiles*, 731 S.W.2d 332, 338-339 (Mo. App. W.D. 1987) ("When a motion for summary judgment is made and supported by affidavits and/or depositions, an adverse party may not rest upon mere allegations or denials in his pleadings but must, in order to overcome the motion, by affidavits or otherwise, set forth specific facts showing a genuine issue for trial." (citing *Warner*, 679 S.W.2d at 914)).

corporation was. To rely upon the protections afforded by verification under penalty of perjury, while still prosecuting this case when jurisdiction is plainly lacking, is to give no comfort to those illegally hauled before the MEC.

3. Prohibition, not further litigation, is the proper remedy for extrajurisdictional action by the Commission.

Finally, the MEC claims that *ultra vires* use of state authority can only be cured by a private claim against a private individual. MEC Br. at 25-26. Perhaps the problem lies with the MEC's misunderstanding of the need for the writ, for it claims, "Relator Calzone's remedy for a frivolous complaint is not an injunction against an investigation or an injunction against an action being brought against him." *Id*. at 25 (referencing §§ 105.957(4) and 536.087(4), RSMo.). But Mr. Calzone is arguing the Complaint is not only meritless and frivolous, but that the MEC and AHC[10] do not have jurisdiction over the matter—which was also the finding of the circuit court below. That is, Mr. Calzone's claims lie not in § 105.957(4), but with the very grant of investigative power in § 105.957(2), RSMo. This lack of subject-matter jurisdiction is fatal to the AHC's order compelling discovery, and to any other activity, since the AHC's "subpoena power . . . cannot be more extensive than its jurisdiction." *Catholic Conference*, 487 U.S. at 76.

[10] *J.C. Nichols Co.*, 796 S.W.2d at 20 ("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)).

Indeed, if anything, the statute contemplates that the Commission must first ascertain if it has proper jurisdiction—by making sure the conditions in § 105.957(2), RSMo. are met. The statute provides that "[n]o complaint shall be investigated unless the complaint alleges facts which, if true, fall within the jurisdiction of the commission." § 105.957(2), RSMo. Part of the conditions needed for the action to fall within the jurisdiction of the commission is that the Complaint must be "in writing and filed only by a natural person." *Id*. The Commission, in a sophistic twist, argues that Mr. Dallmeyer is a natural person. Of course he is a natural person. But he is one acting only at the behest of a corporation. It would be a strange world were corporations able to come to life and act without human agents. *Clark v. Austin*, 101 S.W.2d 977, 982 (Mo. banc 1937) ("A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys.").

Aside from ignoring the long history of the use of prohibition to prevent extrajurisdictional action, it is patently absurd to tell a citizen that a tribunal, without jurisdiction, may only be corrected by suing *a private party* for damages and attorney's fees years later and after invasive discovery—an invasion of privacy for which there is no adequate remedy. Once the MEC learned the complainant was a corporation, it should have ended the process. Instead, the MEC pressed the matter, ultimately succeeding even in having the AHC order invasive discovery despite the lack of jurisdiction from the beginning.

The heart of the case—the very reason why the circuit court granted the writ—is that a non-natural person, the Society, filed the Complaint against Mr. Calzone. The Ethics Commission's arguments all evade one obvious point: were corporations permitted to file ethics complaints, then the Society would have taken precisely the actions it took here. It would hold a board vote on the question, secure representation, and direct the filing of the Complaint through counsel. But corporations are prohibited from filing ethics complaints, and consequently all actions taken by the MEC and AHC pursuant to the Society's Complaint are void.

C. The MEC's Exhaustion Argument is Meritless, But It Demonstrates the Harm of Allowing Extrajurisdictional Action (Responding to Point Relied On No. I, That The Writ Was An Improper Disruption)

Unable to establish its jurisdiction, the MEC attempts to bypass that obligation by insisting that Mr. Calzone has not exhausted his remedies before the AHC. Consequently, in the MEC's view, the circuit court erred when it "disrupt[ed] a proper appeal of an administrative action to the AHC." MEC Br. at 15. This gets things precisely backwards: there cannot be an exhaustion requirement because both the MEC and the AHC lack jurisdiction. *Midwest Div.-OPRMC, LLC v. Dep't of Soc. Servs.*, 241 S.W.3d 371, 382 (Mo. App. W.D. 2007) ("If the AHC [lacks] jurisdiction, . . . there [is] no exhaustion requirement."). Moreover, the MEC ignores that "[a] party may assert the lack of jurisdiction at any stage of the proceedings." *State ex rel. Kinder v. Dandurand*, 261 S.W.3d 667, 669 (Mo. App. W.D. 2008) (holding that party may raise jurisdiction by extraordinary writ even after waiving right to appeal by missing deadline); *see also State*

Tax Comm'n v. Admin. Hearing Comm'n, 641 S.W.2d 69, 72 (Mo. banc 1982) (holding that a party may raise "lack of subject matter jurisdiction . . . even for the first time" before the Supreme Court because it goes to the court's "right to proceed" (citation omitted) (internal quotation marks omitted)).

The MEC's attempt to sidestep the foundational question of jurisdiction is of a piece with the MEC's prior litigation efforts. This not the first time that Mr. Calzone has raised the jurisdictional issue and tried, unsuccessfully, to get both the MEC and the AHC to address it. He raised the issue repeatedly in the first, September 3, 2015 hearing before the MEC. *See, e.g.*, LF 1120-28 (discussing repeated attempts by Mr. Calzone to raise the issue in the September 3, 2015 hearing). Before the AHC, he raised it in both his motion for judgment on the pleadings, LF 367-371, and for summary decision, LF 417-422. And, importantly, he explicitly raised the issue in his Motion for a Protective Order before the AHC, requesting that no discovery take place until the jurisdictional issues had been addressed. LF 82-85. The AHC denied the protective order and granted the MEC's motion to compel. LF 58-63. In doing so, the Commission failed to address the jurisdictional issues, much less ascertain its subject-matter jurisdiction. It simply held that this and other "arguments misinterpret[ed] [the AHC's] role in this case." LF 59-60; *see also* LF 29-31 (noting binding authority Mr. Calzone had raised that the AHC ignored).[11] Thus, this is not

[11] As to two other arguments, regarding the burdens of the expansive discovery requests on a non-party, the AHC held that it would not address them because Mr. Calzone

a situation where "prohibition will not lie" because the MEC and the AHC have not had "the opportunity to render a decision on these matters." *Mo. Dep't of Soc. Servs. v. Admin. Hearing Comm'n*, 826 S.W.2d 871, 874-875 (Mo. App. W.D. 1992). Rather, the MEC and the AHC have refused multiple "opportunit[ies] to render a decision on th[e] matter[]." *Id.*[12]

Moreover, there is no exhaustion requirement because the MEC and AHC have demonstrated that the administrative process will "not provide an adequate remedy." *Gray v. White*, 26 S.W.3d 806, 822 (Mo. App. E.D. 1999); *see also State ex rel. Whiteco Indus. v. Bowers*, 965 S.W.2d 203, 206 (Mo. App. E.D. 1998) ("A party is not required to exhaust administrative procedures where: (1) no adequate remedy lies through the administrative process, (2) the authority of the political subdivision . . . is challenged . . . ." (citing *Premium Standard Farms, Inc. v. Lincoln Twp.*, 946 S.W.2d 234, 237 (Mo. banc 1997))). Mr. Calzone has repeatedly "argued that the complaint the Society filed against

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could renew them in the circuit court should the "MEC attempt[] to obtain an order of enforcement of the subpoena" on the non-party. LF 61. The AHC thus invited interlocutory action in the circuit court, which the MEC now opposes.

[12] The other limitation on writs of prohibition, that "[a]n adequate remedy on appeal exist[]," *Mo. Dep't of Soc. Servs.*, 826 S.W.2d at 874, is also not relevant here, as the failure of the MEC and AHC to rule on jurisdiction, and the AHC's decision to grant a motion to compel are not "final judgment[s] from which an appeal will lie," *State ex rel. Degeere v. Appelquist*, 748 S.W.2d 855, 857 (Mo. App. S.D. 1988).

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." LF 13; *see also* LF 14 (noting argument regarding jurisdiction in motion for protective order).

The MEC's arguments would, contrary to binding authority, leave parties with no adequate remedy to stop burdensome investigations, even when the MEC lacked any authority to conduct one. Parties would be forced to comply with extradjurisdictional proceedings, including orders compelling discovery *on the merits* rather than directed to the prerequisite jurisdictional determination. The only other option, the one the MEC would deny here, is to petition for a writ of prohibition. Extraordinary writs exist precisely for such circumstances. *See Williamson*, 141 S.W.3d at 423 (issuing writ of prohibition for want of jurisdiction and ordering dismissal of petition for judicial review).

Indeed, on similar facts, this Court has held that a writ of prohibition was proper. *See State ex rel. Southers v. Stuckey*, 867 S.W.2d 579 (Mo. App. W.D. 1993). In *Stuckey*, as here, the parties presented arguments "on [a] motion to dismiss and [on] discovery motions." *Id*. at 581. 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 a writ, arguing that the lower body "lacked jurisdiction in ordering the parties to proceed with discovery without deciding" a jurisdictional question of law—there, whether the relator enjoyed official immunity. *Id*. And here, as there, the precondition for continued jurisdiction is absent "[b]ased upon . . . clear" law. *Id*. at 581-83. Accordingly, a permanent writ of prohibition "to cease from exercising any further jurisdiction over the case" is just as necessary here. *Id*. at 581.

Finally, the MEC's tortuous treatment of Mr. Calzone's arguments demonstrates the dangers of an administrative agency endowed with limited powers heedlessly acting beyond its jurisdiction. As noted above, the MEC and AHC ignored the issue when they had the opportunity to address jurisdiction. Then, for the first time in any briefing or proceeding, it argued in its brief against a permanent writ of prohibition that Mr. Calzone waived the argument, *see* LF 992-93, 996-99, despite having admitted in its answer that Mr. Calzone "ha[d] 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." LF 13; *see* LF 117 (admitting as judicial fact); *see also Holdredge v. Mo. Dental Bd.*, 261 S.W.3d 690, 693 (Mo. App. W.D. 2008) ("Allegations in a petition which are admitted in an answer constitute 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.'" (quoting *Bachman v. City of St. Louis*, 868 S.W.2d 199, 201 (Mo. App. E.D. 1994))); *Creech v. MBNA Am. Bank, N.A.*, 250 S.W.3d 715, 717 (Mo. App. S.D. 2008) (same). Now, for the first time, the MEC argues that Mr. Calzone failed to exhaust his remedies.[13]

The common denominator to the MEC's ever-changing treatment of its jurisdictional defect is its assertion that Mr. Calzone will not be harmed if he were forced

[13] *See Watson v. Wells Fargo Home Mortg., Inc.*, 438 S.W.3d 404, 407 n.2 (Mo. banc 2014) (refusing to consider point because "litigants may not raise an argument for the first time on appeal").

to undergo invasive discovery and await an uncertain decision by the AHC, before finally being able to seek from the Missouri courts a determination that the MEC and AHC had no jurisdiction to act in the first place. *See* LF 999-1001; MEC Br. at 15-17.

But this argument is flawed, and the MEC's own behavior demonstrates the harm of permitting extrajurisdictional action. "Extrajurisdictional administrative acts are void. There cannot be 'delegation running riot.'" *Swede v. Clifton*, 125 A.2d 865, 869 (N.J. 1956). Here, the MEC insists that, when a state legislator or some political enemy dislikes someone and gets a deficient complaint filed, the MEC can then compel that person to endure repeated, plenary investigations and rounds of invasive discovery both before the MEC and the AHC, drag one's reputation through the mud, impose the expense of attorneys and other defense costs, and keep citizens bewildered and in trepidation because of the MEC's continual failures to preserve and/or share material documents from its investigations and give proper notice of charges, witnesses, and evidence. Only after enduring all of this, according to the MEC, can there be an appeal to the courts arguing that the MEC was not allowed to start the process in the first place.

This case should have ended shortly after the facially deficient Complaint was filed, but instead Mr. Calzone's constitutionally protected activity has been overshadowed by the lingering legal threat of MEC enforcement proceedings. The MEC's attempt to change the subject, and argue a lack of exhaustion, is foreclosed by the facts and the law.

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

federal Constitution. Its arguments here contradict on-point U.S. Supreme Court authority, the basic requirements of the corporate attorney-client relationship, the historical difference between natural and artificial persons, decades of Missouri Supreme Court case law, and a tribunal'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 writ of prohibition ought to be affirmed.

Respectfully submitted May 15, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court on May 15, 2017, to be served by operation of the Court's electronic filing system on the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the limitations contained in Rule 84.06(b), that the brief contains 10,768 words (as tracked by Microsoft Office), and that the brief contains the information required by Rule 55.03.

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