IN THE ADMINISTRATIVE HEARING COMMISSION

RON CALZONE,	)	
Petitioner,	)	
vs.	)	Case No. 15-1450
	)	
MISSOURI ETHICS COMMISSION,	)	Division ____
Respondent.	)	
	)	

The Missouri Ethics Commission's ("MEC" or "Ethics Commission") finding of probable cause against Petitioner Ron Calzone is the product of an illegal complaint and a strained and improper reading of state law. For those reasons alone, Mr. Calzone is entitled to immediate judgment in his favor and an end to the Commission's unlawful proceedings.

But the MEC's hearing below was also fatally flawed. It violated Mr. Calzone's constitutional rights while failing to produce any evidence that he acted as a legislative lobbyist or was at any point "designated" as such by Missouri First, Inc. Having failed to develop any record justifying its finding of probable cause, a determination it had no jurisdiction to make, the Commission now seeks a second bite at the apple. It is not entitled to one.

No facts in the record support the Commission's determination, which is contrary to law in any event. Judgment should be entered for Mr. Calzone on the pleadings.[1]

STATEMENT OF THE CASE

[1] The Commission's Answer does correctly note that this body lacks jurisdiction to determine the constitutionality of Missouri law. Ans. at 11, ¶ 35. Nevertheless, Petitioner realleges Counts 8 and 9, and this Commission may wish to note these constitutional objections when judging the MEC's statutory arguments.

A. The Ethics Commission's Finding of Probable Cause

On November 4, 2014, Michael A. Dallmeyer, an attorney representing the Missouri Society of Governmental Consultants ("Society"), filed a complaint initiating this action. The Society's complaint alleged that Mr. Calzone had acted as a lobbyist while failing to properly register with and report to the State. Pet. at 6, ¶ 33 ("Mr. Dallmeyer's complaint included a cover sheet that specifically stated that he was filing on behalf of the Society, and not in a personal capacity"). Moreover, as was proven before the MEC, "[t]he Society's board… voted to authorize the bringing of [the] complaint against Mr. Calzone."[2] Pet. at 4, ¶ 20. It did so because a number of incumbent officeholders who personally disagreed with Mr. Calzone's views specifically asked the Society to file a complaint. Pet. at 4, ¶ 19.

As the MEC has admitted, "Mr. Dallmeyer's complaint on behalf of a non-natural person triggered an investigation by the Commission." Pet. at 6, ¶ 34, Ans. at 8, ¶ 23. Investigator Della Luaders was tasked with investigating the Society's Complaint, and Mr. Dallmeyer directed her to speak with Society officials concerning the Society's charges. Pet. at 7, ¶ 43. She also spoke with a number of members of the Missouri General Assembly, *id*. at ¶ 44, including at least one of the legislators who had encouraged the Society to file a complaint in the first instance. *Id*. at 4, ¶ 19. She also spoke with Mr. Calzone, browsed the Missouri First, Inc. website, and "requested and obtained documents from Missouri governmental bodies." *Id*. at 7, ¶ 47; *id*. at 8, ¶¶ 48,

[2] This enormously salient fact was never disclosed to Mr. Calzone by the MEC, which had to have been aware of it when choosing to call the Society's secretary as one of its chief witnesses.

49. While she took notes during her conversations, she destroyed them, *id*. at 6, ¶ 36 and her seven page Report with accompanying documents, as admitted as part of Exhibit 1, *id*. at 8, ¶ 50, failed to provide even summaries of her interviews. Nevertheless, despite personal knowledge that the Complaint was brought by a non-natural person and not by Mr. Dallmeyer, she recommended finding "reasonable grounds" that Mr. Calzone violated Missouri's legislative lobbyist statute. *Id*. at 10, ¶ 61.

The Commission accepted the Report's recommendation. *Id*. at 8, ¶¶ 62-63. Mr. Calzone filed a Motion to Dismiss in response to the Ethics Commission's Complaint, which has been provided to this body as Exhibit A. This Motion to Dismiss was "overruled" at the MEC's September 3, 2015 hearing. *Id*. at 12, ¶¶ 79-80.[3]

The MEC's hearing, which is thoroughly recounted in Mr. Calzone's Petition, led the Ethics Commission to vote to find probable cause that Mr. Calzone violated the law. *Id*. at 22, ¶ 168. That ruling also levied a fine of $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. *Id*. at 22, ¶

[3] Dismissal of Petitioner's Motion to Dismiss was improper, as the face of that document amply demonstrates. The Commission's response, presented for the first time at the hearing itself, simply asserted that the MEC did not have the power to grant motions to dismiss. Hearing Tr. at 8, *l* 3-7. This was legal error and alone necessitates the entry of judgment on the pleadings. 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).

169-170.[4] The MEC issued Findings of Fact, Conclusions of Law, and an Order ("Findings") on September 11, 2015, which the Commission attached to its Answer as Exhibit 4. Those Findings did not explain the mechanism by which Mr. Calzone was designated as a lobbyist by Missouri First, Inc. and relied upon Mr. Calzone's testimony before the Missouri General Assembly as indicative of his alleged lobbying activity. Ex. 4 at 5, ¶¶ 16-20, *id.* ("Appendix 2"). Indeed, the MEC's initial order merely asserted that "[s]ince 2013, Respondent Calzone has been designated by the actions of Missouri First, Inc., and its constituent members," but provided no explanation or example of precisely what action did so. Ex. 4 at 3, ¶ 10.

The MEC's finding was published on its website, and Missouri law grants the Ethics Commission the right to enforce its order at any point by "initat[ing] formal judicial proceedings." RSMo § 105.961(5). Only Mr. Calzone's Petition here prevented the MEC from taking further action against him. RSMo § 105.961(3).

B. Missouri's Legislative Lobbyist Statute and Reporting Requirements

Missouri regulates several categories of lobbyist, depending upon the branch or form of government a person seeks to influence. *E.g.* Mo. Rev. Stat. §§ 105.470(1) (defining "[e]lected local government official lobbyist"); 105.470(4) (defining "[j]udicial lobbyist"). Mr. Calzone is accused of being a "legislative lobbyist."

[4] The MEC's Answer has pointed to Missouri law suggesting that when a statute is struck down by a court, any preceding version of that statute automatically comes back into force, and accordingly, the MEC was not repealed. Ans. at 11, ¶ 34; Pet. at 27-28 ("Count VII: The Commission's Order Was *Ultra Vires*"). Petitioner does not waive this claim or any constitutional objections to this understanding of state law, but will, *arguendo*, presume that the Ethics Commission continues to exist under state law.

Pursuant to Mo. Rev. Stat. § 105.470(5), a legislative lobbyist is:

> any natural person who acts for the purpose of attempting to influence the taking, passage, amendment, delay or defeat of any official action on any bill, resolution, amendment, nomination, appointment, report or any other action 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 and in connection with such activity, meets the requirements of any one or more of the following:
>
> **(a)** Is 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, except that this shall not apply to any person who engages in lobbying on an occasional basis only and not as a regular pattern of conduct; or
>
> **(b)** Is engaged for pay or for any valuable consideration for the purpose of performing such activity; or
>
> **(c)** Is designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity; or
>
> **(d)** Makes 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.

Missouri law also includes a number of relevant exceptions protecting common civic engagement from triggering lobbying registration. A member of the general assembly or an elected state official may not be converted into a "legislative lobbyist." RSMo § 105.470(5)(d). Nor may "any other person" be converted into a lobbyist "solely due to such person's participation in…[p]reparing or publication of an editorial, newsletter, newspaper, magazine, radio or television broadcast, or similar news medium,

whether print or electronic…[or in t]estifying as a witness before the general assembly or any committee thereof." RSMo § 105.470(5)(d)b, d.

Lobbyist registration requires a written declaration under penalty of perjury, the payment of a $10 fee, and publication of "the lobbyist's name and business address, the name and address of all persons such lobbyist employs for lobbying purposes, the name and address of each lobbyist principal by whom such lobbyist is employed or in whose interest such lobbyist appears or works." RSMo § 105.473(1). These files "shall be open to the public." *Id.*

Lobbyist reports are monthly filings, also made under penalty of perjury. RSMo § 105.472(3)1-2. These reports must, *inter alia,* itemize expenditures made on behalf of public officials and their families and staffs, and "any direct business relationship or association or partnership the lobbyist has with any public official or elected local governmental official." RSMo § 105.472(3)2. The information in these reports must "be kept available by the executive director of the commission at all times open to the public for inspection and copying for a reasonable fee for a period of five years from the date when such information was filed." RSMo § § 105.473(6). Lobbyists must inform the MEC of their lobbyist principals. RSMo § 105.473(12)(a); Ans. at 4-5, ¶ 16. Missouri law also requires the filing, twice a year, "shall provide a general description of the proposed legislation or action which the lobbyist or lobbyist principal supported or opposed. RSMo § 105.473(12)(c); Ans. at 5, ¶ 16. Such filings would undoubtedly be lengthy for Mr. Calzone, given that the MEC has chosen to attribute all of Mr. Calzone's personal activities in the Capitol to Missouri First, Inc. Ans. at 2, ¶ 8.

The Commission's case and order against Mr. Calzone was, pursuant to the MEC's Answer, apparently predicated on the theory that he "designated" himself as Missouri First's lobbyist under RSMo § 105.470(5)(c), although the Findings themselves did not state that theory explicitly. Ans. at 2, ¶ 7 ("In 2013 and 2014, Calzone, as the President and Founder of Missouri First, Inc., was authorized to, and did, designate himself as the lobbyist for Missouri First, Inc. and went to the Missouri Capitol to attempt to influence potential and pending legislation on behalf of Missouri First, Inc., and its members"); Pet. at 12-13, ¶ 84 ("The Commission's counsel argued that Mr. Calzone designated himself as a legislative lobbyist simply by appearing as president and secretary of Missouri First, and noting affiliation with Missouri First, when testifying before committees of the legislature") (citation omitted, punctuation altered).

No other provision is at issue, and it is undisputed that Mr. Calzone does not meet any of the other definitions of "legislative lobbyist."

ARGUMENT

Standard of Review

This Commission grants motions for a decision without a hearing "when the adverse party's pleadings establish facts that entitle any party to a favorable decision and no party raises a genuine issue as to such facts." *Director of Public Safety v. Hernandez*, 2007 Mo. Admin. Hearings LEXIS 116 at 2 (Mo. Admin. Hearings 2007); *see also Harrison v. Director of Public Safety*, 2011 Mo. Admin. Hearings LEXIS 45 at 1 (Mo. Admin. Hearings 2011) ("We may decide a case on the pleadings if a party's pleading, taken as true, entitles another party to a favorable decision").

I. The Missouri Ethics Commission Lacked Jurisdiction To Find Probable Cause.

The Missouri Ethics Commission only has jurisdiction over cases brought by natural persons. RSMo § 105.957(2) ("Complaints filed with the commission shall be in writing and filed *only* by a natural person") (emphasis supplied); *Bauer v. Missouri Ethics Commission*, 2008 Mo. Admin. Hearings LEXIS 287 at 6 (Mo. Admin. Hearings 2008) ("'Shall' signifies a mandates and means 'must' in the present tense"). If the Ethics Commission cannot "show[] that the complaint it received met the conditions of the statute," neither the MEC nor this body "ha[s]…jurisdiction to sanction" Mr. Calzone and dismissal is mandatory. *Bauer*, 2008 Mo. Admin. Hearings LEXIS 287 at 3-4.

The Complaint in this instance was filed by the Missouri Society of Governmental Consultants, and was not initiated by a natural person. The Society's Complaint was generated by a unanimous vote of the board of directors for the Society, and the timing of that filing was set by the Society. Pet. at 4-5, ¶¶ 20-21. The cover letter provided by the Society's *pro bono* legal counsel, Mr. Dallmeyer, explicitly noted that the Complaint was filed by the Society. Hearing Ex. 9 ("Enclosed herewith for filing and action by MEC is the complaint…I am submitting *on behalf of our client*, Missouri Society of Governmental Consultants") (emphasis supplied); Hearing Tr. at 63, *l* 13-16 ("Q. You understood the society to be the complainant in this case? A. The society motivated the complaint and had it filed by Mr. Dallmeyer").[5] The MEC was aware of these facts, none

[5] For whatever reason, this cover sheet was not initially provided to Mr. Calzone as required by law. RSMo § 105.957(2) ("Within five days after receipt of a complaint by the commission, a copy of the complaint, including the name of the complainant, shall be

of which is contested, when it chose to proceed against Mr. Calzone. Hearing Tr. at 121, *l* 22-25; *id.* at 122, *l* 1-3 ("Q. And at the time of that conversation did [Mr. Dallmeyer] reference it – what was the content of his reference to the [cover] letter? A. That I should speak with his clients, Mr. Licklider and Mr. Scherr, and he had noted that his client was the Missouri Society of Governmental Consultants, and he had referenced that in his letter.").

During the hearing, the MEC's investigator into this matter testified that Mr. Dallmeyer directed her to members of the Society as to the truth of the matters asserted in the Society's Complaint, which she proceeded to do even though those conversations decisively proved that Mr. Dallmeyer could not and did not properly swear to the truth of the facts contained in the Complaint. Pet. at 7, ¶¶ 43-44. Perhaps recognizing that the Complaint was improper, the Ethics Commission did not even call Mr. Dallmeyer as a witness at its evidentiary hearing, instead relying on the Society's secretary to supply evidence supporting the Complaint's charges. *E.g.* Hearing Tr. at 67, *l* 21-25 ("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.").

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delivered to the alleged violator"); Hearing Tr. at 122, *l* 18-20 ("Q. Now, what time was this letter first provided to Mr. Calzone? A. January 21st, 2015") Nor did the MEC initially provide it to Della Luaders, the Commission employee tasked with reviewing the Complaint. Pet. at 6; ¶ 35, 39.

In defense of its decision to proceed despite these numerous jurisdictional defects, the Commission argues that the Society's complaint was technically filed by a natural person, and this is enough. Ans. at 9, ¶ 31. That post hoc justification turns the statute's meaning on its head. Corporations, after all, "can only act through the agency of natural persons." *Naylor Senior Citizens Hous., LP v. Sides Constr. Co.*, 423 S.W. 3d 238 (Mo. 2014) ("'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*'") (emphasis supplied, quoting *Clark v. Austin*, 101 S.W.2d 977, 982 (Mo. 1937) (quotation marks and citations omitted). But the MEC complaint process was clearly, and statutorily, designed to ensure that complaints were brought only by those with actual knowledge of potential violations. RSMo § 105.957(2) ("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"). Adopting the MEC's strained understanding of the statute, then, would effectively read the "natural person" requirement out of existence. That is precisely what happened here: a non-natural person filed a complaint on behalf of a corporation, and then personally swore to facts about which he had no knowledge.

Nevertheless, the MEC contends that once it receives a complaint, even if filed by a natural person only in his capacity as legal counsel for a corporation, it must initiate an investigation. Ans. at 9, ¶ 31. ("Section 105.957, RSMo, says the Missouri Ethics Commission 'shall' investigate a complaint if it is: a) in writing, b) filed by a natural

person, c) stating facts known by the complainant, and d) sworn to under penalty of perjury.")

This position gravely misstates (and misquotes) Missouri law, which only requires that the MEC "shall *receive* any complaints alleging violation of the provisions." RSMo § 105.957(1) (emphasis supplied). But that statute does not strip the Commission of discretion to dismiss improperly filed complaints. RSMo § 105.957(2) ("Complaints filed with the [ethics] commission shall be in writing and filed by a natural person"). Quite the contrary: it *requires* the Commission to dismiss frivolous complaints, and does so explicitly. "If the commission finds that any complaint is frivolous in nature…the commission *shall* dismiss the case." RSMo § 105.957(4) (emphasis supplied). The statute further notes that "[f]or purposes of this subsection, 'frivolous' shall mean a complaint clearly lacking any basis in fact or law." *Id.* Plainly, a complaint filed by a non-natural person is "clearly lacking any basis in…law," as the Commission lacks jurisdiction over illegally filed complaints. *Bauer*, 2008 Mo. Admin. Hearings LEXIS 287 at 3-4. Moreover, the Commission has long been aware that the attorney who swore out the Complaint had no personal knowledge of the facts.[6] So the Complaint *also* lacked "any basis in fact."

[6] "A. … The copy [of the Complaint] that I received did not include this [cover] letter. I spoke with Mr. Dallmeyer on January 8th, 2015, at which time he referenced this letter. Q. And…what was the content of his reference to the letter. A. That I should speak with his clients Mr. Licklider and Mr. Scherr, and he had noted that his client was the Missouri Society of Governmental Consultants, and he had referenced that in his letter." Hearing Tr. at 121-122, *l* 22-25, 1-3 (Testimony of Della Luaders).

The Commission protests that, despite the mandatory nature of RSMo § 105.957(4) ("shall dismiss the case"), it was obligated to investigate the Society's Complaint because it "has no authority to examine the subjective motivation of the person filing the complaint." Ans. at 10, ¶ 31. But of course, Mr. Dallmeyer's cover letter made *objectively* clear that he was merely acting as a functionary on behalf of the Society, as he also made plain to Special Investigator Della Luaders when she called him. *See Naylor*, 423 S.W.3d at 243 ("In legal matters, [a corporation] must act, if at all, through licensed attorneys"). Consequently, the Commission was aware both at the initiation of these events and early in its investigation that it lacked jurisdiction to proceed. It failed to dismiss the Complaint as required by law, or even inform Mr. Calzone of any of these relevant facts, preferring to proceed by ambush at its evidentiary hearing.

Indeed, the Commission's Answer has *conceded* that the Society's Complaint was filed by a non-natural person.[7] Ans. at 8, ¶ 23 ("Respondent Missouri Ethics Commission admits the allegations in paragraph[] 34"); Pet. a 6, ¶ 34 ("Mr. Dallmeyer's complaint *on behalf of a non-natural person* triggered an investigation by the Commission") (emphasis supplied); *also Hernandez*, 2007 Mo. Admin. Hearings LEXIS 116 at 3 ("[a] motion for a decision without a hearing may rely on facts established by the pleadings of an adverse party").

[7] There can be no factual dispute on these points given the Society's Answer and the hearing below, where testimony of the Society's Secretary and the Commission's Investigator both testified independently to their truth, albeit as a result of cross-examination.

"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 Ethics' jurisdiction, and therefore our jurisdiction, include 'a complaint as described by section 105.957.'" *Bauer*, 2008 Mo. Admin. Hearings LEXIS 287 at 3 (quoting RSMo § 105.961(1). Given the facts presented in the pleadings, including the Ethics Commission's admission that a non-natural person filed the Complaint initiating these proceedings, this body ought to enter judgment for Mr. Calzone. *J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20 (Mo. 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"). Jurisdiction cannot spring into existence now, at this late date, merely because the MEC chose to proceed on the basis of a plainly improper complaint.

II. The Ethics Commission Relied Upon An Erroneous Interpretation Of The Lobbyist Registration Statute.

The MEC compounded its error by contorting the plain language of Missouri law in order to force the lobbyist registration statute to fit Mr. Calzone's activities. These readings were impermissible, and judgment on the pleadings is appropriate.

a. The Ethics Commission apparently found that Mr. Calzone "self-designated" as a lobbyist, in contrivance to the plain language of the statute.

Under Missouri law, the Ethics Commission was required to demonstrate probable cause that Mr. Calzone was "designated to act as a lobbyist by any person, business entity…or other entity." RSMo § 105.470(5)(c). But the MEC never explained the act by which Missouri First, Inc. designated Mr. Calzone as a lobbyist, and never demonstrated

probable cause that such a designation ever occurred. Pet. at 15, ¶ 104; *id.* at 16, ¶ 120; *id*. at 19, ¶ 145.

Instead, MEC insists that "[i]n 2013 and 2014, Calzone, as the President and Founder of Missouri First, Inc., was authorized to, and did, designate himself as the lobbyist for Missouri First, Inc. and went to the Missouri Capitol to attempt to influence potential and pending legislation on behalf of Missouri First, Inc., and its members." Ans. at 2, ¶ 7; Pet. at 12-13, ¶ 84 ("The Commission's counsel argued that Mr. Calzone designated himself as a legislative lobbyist simply by appearing as president and secretary of Missouri First, and noting affiliation with Missouri First, when testifying before committees of the legislature") (citation omitted, punctuation altered).

Of course, Missouri law requires a corporation to designate a person as its lobbyist, and not the other way around. It would be absurd for a person to become the lobbyist for, say, the Boy Scouts of America merely because he or she claimed some affiliation with that organization. While the MEC's Answer places much weight on Mr. Calzone's status as an officer of the corporation, it would be an unusual reading of Missouri corporate law for a single officer to bind a corporation to a certain status with the state government—here, as a lobbyist principal—solely because that officer mentions his status with that corporation publicly at a legislative hearing. RSMo § 105.473.12(c); Ans. at 5, ¶ 16 (reporting requirements for lobbyist principals).

In any event, self-designation is plainly barred by the statutory language. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (We "must presume that a legislature says in a statute what it means and means in a statute what it says there. When

the words of a statute are unambiguous…inquiry is complete") (quotation marks and citations omitted). The statute clearly states that designation occurs when a person is "designated to act as a lobbyist *by any…other entity*." RSMo § 105.470(5)(c) (emphasis supplied). This fact alone, as articulated in the MEC's own Answer, demonstrates that the finding of probable cause below was erroneous and ought to be reversed on the pleadings. Ans. at 6, ¶ 17 (quoting statute).

Only if the Ethics Commission could point to some act by which Missouri First, Inc. designated Mr. Calzone as its lobbyist should this case go any further. But the MEC has no such fact, because none exists, and it has failed to present any more than the inchoate suggestion of MEC's counsel that noting affiliation with Missouri First while testifying constitutes designation—which directly contradicts the statute—and a number of definitions for the word "designate" from the Webster's Third International Dictionary. Ans. at 7-8, ¶ 22. Yet, nowhere in the Commission's initial charge against Mr. Calzone, in any of the testimony offered at the hearing, in the Commission's Findings of Fact and Conclusions of Law, or in the MEC's Answer, has *any* theory been articulated as to precisely how the corporate entity Missouri First, Inc. designated Mr. Calzone as its lobbyist.

Worse, even if the Ethics Commission's theory were grounded in statute, the MEC's *own evidence* demonstrates that Mr. Calzone was not designated as a lobbyist by Missouri First, Inc. The MEC appended Missouri First's charter to both its Findings and its Answer. MEC's Ex. 1 ("Charter") i-iv. Indeed, that Charter is relied upon as a "Fact[] Supporting Missouri Ethics Commission's Action" in the MEC's Answer. Ans. at 1, ¶¶

2-3. But that Charter explicitly stated that "Missouri First will be governed by the Board of Directors" and that "[n]ormal operational decisions will be decided upon by a simple majority vote, but a conviction objection by one or more board members will nullify the decision." Charter at iii. Consequently, no officer may unilaterally bind Missouri First according to the terms of its own governing document, a document familiar to—and relied upon by—the Ethics Commission.

Similarly, according to the Commission's own proffered definition of the word "designate," that terms means "to make known directly…to declare to be; to name esp. to a post or function" and that "[d]esignate may apply to choosing or detailing a person or group for a certain post by a person or group having the power or right to choose." Ans. at 7, ¶ 22. Yet, under the "confines of the [Missouri First, Inc.] charter," only a majority vote by the Board of Directors could have declared, named, specified, stipulated, or made known that Mr. Calzone was the corporation's lobbyist. The Board of Directors, not the corporation's president, secretary, or any other single officer, exclusively "ha[s] the power or right to choose" who is a lobbyist for Missouri First, Inc.

Under the MEC's reading of the statute, however, a board of directors' powers or a corporation's charter and bylaws may be thrown out the window by a single officer acting alone. *But see* RSMo § 355.316 (1-2) ("Each corporation *shall* have a board of directors…Except as provided in this chapter, all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board") (emphasis supplied). Corporations are governed by their boards of

directors, and solitary officers may not govern the corporation's actions alone. This misreading of the statute therefore merits a decision on the pleadings.

b. The Ethics Commission improperly determined that the lobbyist registration statute reaches uncompensated persons.

For present purposes, a person becomes a legislative lobbyist in Missouri when he or she seeks to influence legislative action, not including testimony before legislative committees, after having been designated as a lobbyist by a particular organization. There are four ways in which such a designation can occur, but in no case is it enough simply to be a concerned and engaged citizen.

A brief review of the four types of legislative lobbyist is in order. None of these provisions contemplates an uncompensated person.

The first are those persons "acting in the ordinary course of employment, which primary purpose is to influence legislation on a regular basis, on behalf of and for the benefit of such person's employer," with the exception that "this shall not apply to any person who engages in lobbying on an occasional basis only and not as a regular pattern of conduct." RSMo § 105.470(5)(a). This provision covers those persons whose primary employment duties are, explicitly, to act as a lobbyist on behalf of an employer.

The second category encompasses those "engaged for pay or for valuable consideration for the purpose" of lobbying. RSMo § 105.470(5)(b). This involves the hiring of a professional lobbyist on a contractual basis, a person who may also lobby on behalf of a range of other groups.

The third category involves those that are "designated" "to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association[,] or other entity." RSMo § 105.470(5)(c). This is the provision under which the MEC has proceeded in this case. But this provision's purpose is clear: it concerns employees of an entity that are designated as a lobbyist for a specific purpose, although lobbying is not their primary duty. For instance, Part C would address sending a charity's vice president or a corporation's expert on a particular matter, such as a scientist or historian, to meet with a legislator and discuss a piece of pending legislation. Such persons are lobbying, but not doing so as the "primary purpose" of their employment, nor are they hired guns. This third category, then, addresses what would otherwise be a gap in the statute: individuals employed by a lobbying principal who occasionally assist in lobbying efforts although that is not their primary job. RSM § 105.470(5)(a)-(b).

The fourth category captures lobbyists that, in the course of influencing legislative action, spend more than fifty dollars "for the benefit of…public officials or one or more employees of the legislative branch of state government in connection with such activity." RSMo § 105.470(5)(d).

Thus, part A covers persons hired solely as lobbyists for a specific employer, in the ordinary course of their employment; part B covers contractual, hired gun lobbying; part C covers the use of a corporation or other entity's employees to influence the legislature; and part D covers those who expend money directly to benefit legislators or staff.

The first, second, and fourth categories quite clearly involve the expenditure of money to influence elected officials. It is proper for the state government to require this information to be recorded and disclosed because the public has an interest in such matters. *United States v. Harriss*, 347 U.S. 612, 625 (1954) (governmental interest in regulating lobbying premised on knowing "who is being hired, who is putting up the money, and how much"). But the MEC erroneously construed the third category of legislative lobbyist, those "designated to act as a lobbyist by any person, business entity…or other entity," as covering volunteers who are not paid in any way to influence legislators. Ans. at 7, ¶¶ 20-21, Ex. 4 at 8, ¶ 32. This was error.

This is especially clear since the definition of a "designated" lobbyist, RSMo § 105.470(5)(c), cannot be read separately from the definition of a lobbyist principal, and under Missouri law, a lobbyist principal compensates its lobbyists. As defined at RSMo § 105.470(7) as "any person, business entity, governmental entity, religious organization, nonprofit corporation or association who employs, contracts for pay or otherwise compensates a lobbyist." *Crum v. Vincent*, 493 F.3d 988, 996 (8th Cir. 2007) ("Missouri law requires courts to read statutes *in pari materia*, harmonizing sections covering the same subject matter if possible"). The concept that a person could be designated as a lobbyist by a "person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity", RSMo § 105.470(5)(d), and yet that designating entity would be not be regulated as its lobbyist principal ("person, business entity, religious organization nonprofit corporation or association"), creates an absurd reading of the statute. *Crum*, 493 F.3d at 996 ("…are not to interpret statutes in a hyper-

technical manner, but rather in a manner that is reasonable, logical, and gives meaning to the statutes") (citations omitted, punctuation altered). The MEC's suggestion to the contrary in its Answer, then, must be disregarded as clearly erroneous and contrary to law.

Consequently, an individual may only be designated as a legislative lobbyist by an entity that "employs, contracts for pay or otherwise compensates" that person. RSMo § 105.470(7). The MEC, in its Findings, suggested that this definition can cover unpaid or uncompensated persons relying upon select definitions from Webster's Third New International Dictionary and *dicta* from a Missouri Supreme Court case interpreting the Missouri Constitution's prohibition against nepotism at MO. CONST. art. VII, § 6. Ex. 4 at 8 ¶ 32 (citing *State v. Rhoads*, 399 S.W. 3d 905 (Mo. 2013)

Of course, when interpreting statutes, definitions may not be cherry-picked to arrive at a statutory meaning of one's own choosing. Rather, "context is important 'in determining the scope and extent of more general words.'" *Circuit City Stores, Inc. v. Director of Revenue,* 438 S.W.3d 397, 401 (Mo. 2014) (quoting *Standard Operations, Inc. v. Montague,* 758 S.W.2d 442, 444 (Mo. 1988) (*en banc*); *also Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of" a legislature). Here, the key phrase is "employs, contracts for pay or otherwise compensates." RSMo § 105.470(7). "Contracts for pay" plainly indicates a transfer of money, as does the general catch-all term "or otherwise compensates." Indeed,

compensation unambiguously refers to *quid pro quo* scenarios, and is accordingly indicative of the general class of activity being regulated in RSMo § 105.470(7); MERRIAM-WEBSTER ONLINE[8]) **(**definition of compensate as "to be equivalent to; to make an appropriate and usually counterbalancing payment to…; to provide with means of counteracting variation, to neutralize the effect of (variations)").[9] "When the legislature placed the words 'or otherwise' in the statute it must have had a purpose for doing so." *State ex rel. Schwab v. Riley*, 417 S.W.2d 1, 5 (Mo. 1967). Here, "or otherwise" obviously means that the previous terms, "contracts for pay" and "employ" *must* also involve compensation. Thus, to be a lobbyist designated by a lobbyist principal, one must be paid, directly or indirectly, to lobby.[10]

Accordingly, because no party suggests that Mr. Calzone was ever paid to lobby, and because it cannot be seriously contested that Mr. Calzone was ever designated by

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[8] Petitioner does not own a copy of the 1986 Webster's Third New International Dictionary, the MEC's preferred volume. The English language, however, is not ambiguous on this point.

[9] In its Answer, the Commission quotes RSMo § 105.473(1), which requires lobbyists to "disclose the identity of lobbyist principals by whom such lobbyist is employed or in whose interest such lobbyist appears or works", to suggest that the phrase "or in whose interest such lobbyist appears or works" implies that the statute reaches unpaid lobbyists. Ans. at 4, ¶ 16. Under the MEC's reading then, in RSMo § 105.473.1, "employed" means "paid"—but not in RSMo § 105.470(7). This is another example of the Commission's strained and unconvincing approach to statutory interpretation.

[10] As Petitioner presented in both his Motion to Dismiss and his Petition, there are significant constitutional concerns with mandating the reporting and registration of persons not paid to lobby members of the legislature. Ex. A at 13-18. This is ""[s]till another reason for rejecting the statutory construction argued for by" the Ethics Commission, because "to do otherwise would raise serious constitutional problems." *State Bd. of Registration for Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. Ct. App. 1974).

Missouri First, Inc. as a lobbyist by any action of that corporation, Mr. Calzone's activity falls outside of the scope of the statute.

III. The Commission's Finding Of Probable Cause Is Predicated Upon A Number Of Procedural And Constitutional Deficiencies.

The Ethics Commission found that Mr. Calzone was operating as an unregistered lobbyist only after consistently disregarding norms of process, procedure, and the United States Constitution. MEC never demonstrated how Missouri First, Inc. had designated Mr. Calzone as its lobbyist, never demonstrated how any of Mr. Calzone's introduced activities triggered Missouri's definition of lobbying, drew material conclusions based solely upon an adverse inference taken from the invocation of his Fifth Amendment right not to be called upon to give testimony against himself, and never bothered to provide Mr. Calzone sufficient notice of its theory of the case before its evidentiary hearing. There is virtually nothing below that is not tainted by the MEC's abuses of process and procedure.

The Commission's Answer does not provide any substantive reply to these claims. Rather, it ignores them, suggesting that this body ought to disregard these defects "because the hearing before the Administrative Hearing Commission is a *de novo* review. The Administrative Hearing Commission should rest its decision on the evidence presented to it." Ans. at 10, ¶ 32. This is a tortured understanding of this body's role, and a clear attempt to cure its own violations of due process by seeking a "do over" here. But merely because *de novo* review is available does not give the MEC license to dispense with basic understandings of law and process. For instance, this body would not be

obligated to hear this case if the Ethics Commission had found probable cause only after barring Mr. Calzone's attorneys from the hearing room, or had chosen to find probable cause without notifying Mr. Calzone of the date of the hearing. *See* 1 CSR 50-2.015(2).

A finding of probable cause by the Ethics Commission is not an empty reprimand. Such findings entitle the MEC to, at any time, take its probable cause determination to court and demand that a respondent pay a financial penalty and cease, in this instance, activity at the core of the First Amendment's protections. RSMo § 105.961(5); *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 9 (D.C. Cir. 2010) (noting the "substantial First Amendment interest[]"implicated by lobbyist registration and reporting statutes). Here, Mr. Calzone was ordered to register as a lobbyist with the government, pay a fine of $1,000, and "cease and desist" speaking to elected officials about policy. Ex. 4 at 10 ("Order").

The Ethics Commission's Answer's logic, if accepted by this body, denies future MEC respondents any recourse for constitutional deprivations at the probable cause stage. Either they may quietly wait for the MEC to decide whether or not to bring an enforcement action against them in state court, and presumably be barred from introducing evidence of procedural defects in the MEC's probable cause hearing at that proceeding, *Impey v. Missouri Ethics Comm'n*, 442 S.W.3d 42, 48 (Mo. 2014) ("…the MEC's only mechanism for enforcement of that fee is to file a civil action with the circuit court…While Impey no longer may challenge the MEC's probable cause determination…") or they may appeal the improper finding here—but waive the right to complain about procedural and constitutional violations that took place in front of MEC.

The MEC cannot possibly be permitted to deprive Respondents of a remedy for these violations. *See, e.g. Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397-398 (1971) (rejecting state proffer to limit remedy for an unconstitutional search and seizure to tort claims in state court); *id.* at 397 ("'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury'") (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803)).

a. The Commission relied upon Mr. Calzone's testimony before the Missouri legislature as evidence of lobbying, in clear contravention of the relevant statute.

In its Answer, the Ethics Commission introduced new facts in a futile attempt to demonstrate that Mr. Calzone lobbies legislators on behalf of Missouri First, Inc. Ans. at 2, ¶ 8. The Commission's evidence, a complaint filed in state court by Mr. Calzone, states that "Plaintiff Ron Calzone is a taxpayer and citizen of Missouri…Plaintiff is regularly engaged as an uncompensated citizen activist in an effort to promote constitutional governance, including efforts to ensure that legislation passed by the General Assembly adheres to constitutional requirements both substantively and procedurally." Ex. 3 at 2, ¶¶ 2-3. The Ethics Commission's Answer quotes from paragraph 5 of that complaint, which states that "[t]he Plaintiff is particularly impacted by the unconstitutional passage of HB 672 in light of the many hours he spends virtually every week of the legislative session in an effort to keep legislation constitutional—he is much more than a casual observer of the legislative process." MEC Ex. at 3, ¶ 5.

Nowhere in Mr. Calzone's state court complaint does he state that his uncompensated citizen activism is on behalf of Missouri First, Inc. Indeed, the complaint never mentions the existence of Missouri First, Inc. Nonetheless, the Ethics Commission's Answer characterizes Mr. Calzone's complaint as stating "Petitioner Calzone spends 'many hours…virtually every week of the legislative session,' speaking with Missouri legislators *on behalf of Missouri First, Inc.*" Ans. at 2, ¶ 8 (emphasis supplied). This misleading quotation from Mr. Calzone's court filings is indicative of the MEC's cavalier approach to both the law and facts, and is especially surprising coming from the Ethics Commission, which regulates lobbying, and certainly must be aware that many individuals may speak with legislators under differing circumstances and on behalf of differing groups—or even solely on their own behalf, as was often the case here.[11] This mischaracterization of Mr. Calzone's conduct is of a piece with the facts used below, in the Commission's Findings, and in the remainder of its Answer to bolster the MEC's finding of probable cause.

The most egregious of these errors was the MEC's insistence on using Mr. Calzone's legislative testimony as evidence that he was a legislative lobbyist. Missouri law explicitly bars anyone from being designated as a lobbyist on the basis of their testimony before the General Assembly or any of its committees. RSMo §

[11] This is an elementary and obvious point. To take an example from the legal context, Mr. Calzone's attorneys represent only Mr. Calzone in this matter, not Mr. Calzone and all of the other clients they represent before other tribunals or administrative agencies.

105.470(5)(d)d.[12] Yet, the only particularized fact in the MEC's finding of probable cause was that Mr. Calzone testified as a witness before four different committees of the Missouri General Assembly during 2013 and 2014. Pet. at 21, ¶ 163, Findings at 5, ¶¶ 17-20, Ans. at 2-3, ¶¶ 8-10 (describing examples of Mr. Calzone's testimony before committees of the General Assembly, including prepared visual exhibits he creates).

The Commission combined the fact that Mr. Calzone testified as a witness in front of committees of the Missouri General Assembly with a finding that "[t]he Commission heard testimony that Respondent Calzone has been seen in the Missouri House and Missouri Senate, particularly on the third and fourth floors of the Missouri Capitol, where most legislators' offices are located and has been seen meeting with legislators individually in their offices." Ex. 4 at 4, ¶ 11. The evidence that the Commission heard on this point is, at best, sparse and unreliable, relying predominantly on information admitted on the basis of a Fifth Amendment adverse inference. However, even taking this finding as true, it does not rise to probable cause that Mr. Calzone lobbied. The mere act

[12] The Ethics Commission's counsel suggested at the MEC hearing that Mr. Calzone was attempting to create a loophole that would immunize any lobbyist from registration and reporting merely by the act of testifying before the Missouri General Assembly. Hearing Tr. at 26 *l* 3-9 ("I can tell you that if the Ethics Commission were to adopt Respondent's proposed construction of the statute, the first thing that every registered lobbyist is going to do is go down and testify in front of a committee and say, oh, I testified in front of a committee. I'm not a lobbyist anymore."). That is, of course, silly. If the MEC could muster up actual evidence, such as a signed contract between Mr. Calzone and Missouri First, Inc. providing Mr. Calzone with consideration in exchange for lobbying members of the legislature, or a resolution of Missouri First Board of Directors designating him as a lobbyist, the mere fact that Mr. Calzone also testified in front of committees of the General Assembly would be irrelevant. Instead, the MEC is engaging in transparent bootstrapping precisely because it does not have such evidence.

of talking to a legislator is not lobbying, as a matter of law, and the specific content of any of Mr. Calzone's conversations was never introduced.[13] And, of course, the mere act of being on the third or fourth floor of the Missouri Capitol is not lobbying.

Nevertheless, the MEC's probable cause finding was predicated on the merging of these two independent facts, neither of which amounts to lobbying, in order to find probable cause that Mr. Calzone's activity constituted lobbying. This was improper, and, accordingly merits judgment on the pleadings.

b. The Commission improperly used an adverse inference from Petitioner's invocation of his Fifth Amendment rights as a conclusive admission that his activity implicated the legislative lobbyist statute.

The Commission's finding of probable cause was based on a violation of Mr. Calzone's Fifth Amendment rights. During the proceeding, the Commission's counsel attempted to introduce evidence that was not properly authenticated. Hearing Tr. at 130, *l* 3-5 ("CHAIR WEEDMAN: Mr. Stokes, are these documents that were obtained off the [I]nternet off a website?"). To cure this issue, rather than asking the Commission's own investigator (who was still on the stand) to authenticate documents purportedly from her own investigation, the Ethics Commission called Mr. Calzone. Hearing Tr. at 132, *l* 20-22 ("MR. STOKES: I don't want to waste anymore [*sic*] time. I'll just have Mr. Calzone testify very briefly to the authenticity of the website").

By calling Mr. Calzone to testify, however, the MEC's counsel was free, under Missouri law, to "ask Mr. Calzone any question regarding the charges against him." Pet.

[13] Another exemption to lobbying activity is the act of "[r]esponding to any request for information made by any public official or employee of the legislative branch of government." RSMo § 105.470(d)a.

at 17, ¶ 127, RSMo §§ 491.070, 536.070(3). Accordingly, Petitioner's counsel announced that "in light of the fact that criminal penalties do attach under certain circumstances and given again that we believe it improper for the Commission to prove its case with the Respondent's own testimony, I am advising Mr. Calzone to exercise his Fifth Amendment right not to testify." Hearing Tr. at 134, *l* 10-15. Once put on notice of a Fifth Amendment invocation, Commission's counsel chose not to voluntarily limit the scope of Mr. Calzone's testimony to the hearsay and foundation issues with the MEC's evidence,[14] but rather proceeded to directly ask Mr. Calzone if he conducted lobbying activity. *See Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013) ("[Once] the Government is put on notice when a witness intends to rely on the privilege…it may either argue that the testimony sought could not be self-incriminating, or cure any potential self-incrimination through a grant of immunity") (citations omitted); Pet. at 18, ¶¶ 136-137. To whit, Mr. Calzone was asked whether, during 2013 and 2014, he "met with legislators in their offices about legislation pending before the Missouri Legislature" and whether he "went to the side gallery of the Missouri Senate and requested the doorperson for the Missouri Senate to contact senators to come and speak with him outside of the Senate about legislation in 2013, [and whether] he did the same thing in 2014." Pet. at 18, ¶¶ 135-137.

[14] This evidence, for which the MEC's counsel failed to provide proper foundation and which constituted otherwise inadmissible hearsay, was admitted over objections raised by Mr. Calzone's counsel prior to Mr. Calzone's testimony. Accordingly, the necessary implication is that this evidence was admitted on the basis of an adverse inference. This decision was improper, and the use of an adverse inference was itself a constitutional violation.

No other persuasive evidence was introduced suggesting that Mr. Calzone discussed legislation with members of the legislature in their office or outside the Senate floor. *See* Pet. at 14, ¶¶ 96-97. Investigator Della Luaders testified that Mr. Calzone had "mention[ed] talking about legislation or policy during those meetings"; but did not "mention when those meetings occurred." Hearing Tr. at 88, *l* 9-19. Investigator Luaders also testified as to Mr. Calzone's understanding of Missouri lobbyist law, which was that "he did not fall within the definition of a legislative lobbyist."[15] *Id*. at 88, *l* 24; *id*. at 89, *l* 1. Of course, as discussed *supra*, Ms. Luaders destroyed her contemporaneous notes of this conversation, which were not included in the Luaders Report or any exhibit introduced at the Ethics Commission hearing. *See* Pet. at 16, ¶ 116.

As established *supra*, the MEC never demonstrated that Mr. Calzone's activity implicated the legislative lobbyist statute, nor provided the mechanism by which Missouri First designated Mr. Calzone as its lobbyist. In the absence of such evidence, the MEC could only have relied upon a Fifth Amendment adverse inference to conclude that Mr. Calzone engaged in legislative lobbying. As mentioned, "Ms. Luaders, the Ethics Commission's investigator, testified that that he met with legislators individually,

[15] The Commission's Findings note that Ms. Luaders reported that Mr. Calzone mentioned that he "clearly lobbied". But MEC never demonstrated that Mr. Calzone meant that statement in a legalistic manner, and that but for his personal views on the statute's constitutionality, he would have considered himself a legislative lobbyist. Moreover, given that Ms. Luaders destroyed her contemporaneous record of her conversation with Mr. Calzone, there is little reason to rely on her recollections. *See United States v. Riley*, 189 F.3d 802, 807 (9th Cir. 1993) ("But we cannot say that Dufriend's testimony was superfluous given Riley's defense. We simply cannot tell without the notes. This is the Catch-22 caused by the destruction of the notes. But since it was of the government's doing, it must live with the consequences").

outside of committee hearings, to discuss legislation and policy," Ex. 4 at 4 ¶ 12, but she provided *no* additional information about these meetings, including whether or not they occurred at the invitation of the unnamed legislators themselves, an exception to lobbying under Missouri law. RSMo § 105.470(d)(a). Only an adverse inference from Mr. Calzone's privileged refusal to answer questions could have allowed the MEC to draw such a conclusion. Relying solely on Mr. Calzone's decision not to answer potentially self-incriminatory questions was unconstitutional and necessitates entry of judgment on the pleadings for Mr. Calzone. *Johnson v. Mo. Bd. of Nursing Administrators*, 130 S.W.3d 619, 631 (Mo. Ct. App. 2004) ("a civil defendant's privileged refusal to respond to a particular discovery request cannot, without more, be considered a *conclusive* judicial admission of the truth of the matters asserted therein") (emphasis in original); *id.* ("'[A]lthough inferences based on the assertion of the privilege are permissible, the entry of judgment based only on the invocation of the privilege and without regard to the other evidence exceeds constitutional bounds'") (quoting *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 390 (7th Cir. 1995) (punctuation altered, further citation omitted).

c. The Commission's found probable cause after failing to provide sufficient notice of its theory of the case to Mr. Calzone.

The procedural and constitutional errors propounded at the MEC's hearing were derivative of another significant deprivation: the Commission's initial complaint to Mr. Calzone provided no indication of the MEC's theory of the case. This, of course, is still part of the problem in defending this matter—the MEC's own Findings did not explicitly argue the self-designation theory presented in the Commission's Answer and they have

yet to provide a specific act constituting designation by Missouri First, Inc. *Compare* Ex. 4 at 3, ¶ 10 ("Since 2013, Respondent Calzone has been designated *by the actions of Missouri First, Inc. and its constituent members*…") (emphasis supplied) *with* Ans. at 2, ¶ 7 ("In 2013 and 2014, Calzone, as the President and Founder of Missouri First, Inc., was authorized to, and did, designate himself as the lobbyist for Missouri First, Inc. and went to the Missouri Capitol to attempt to influence potential and pending legislation on behalf of Missouri First, Inc., and its members").

Nonetheless, the Commission's Answer does not contest that it failed to provide Mr. Calzone with its theory of the case, but rather invokes the *de novo* nature of review before thus body. Ans. at 10, ¶ 32. Essentially, the Ethics Commission holds that it was under no obligation to provide adequate notice of the charge against Mr. Calzone, merely because an administrative appeal exists where the State may correct that error. But we do not permit trials to commence merely because a prosecutor may cure the improper grant of an indictment at that later proceeding by providing further evidence. *See State v. Honig*, 78 Mo. 249, 251 (Mo. 1883) ("…it is unfortunate to the public that justice should fail through an improper indictment. But it is of more general importance that one criminal should escape than the safeguards of legal forms and constituted methods of legal procedure should be broken down and disregarded in his trial").

This Commission is in possession of Petitioner's Motion to Dismiss, which was "overruled" by the MEC below. Petitioner fully incorporates the argument from that

Motion here. Ex. A at 6-9.[16] The MEC's initial Complaint against Mr. Calzone merely contained "a statement that the accused has violated one or more of the statutory grounds for discipline without further elaboration." *Duncan v. Mo. Bd. for Architects, Prof'l Eng'rs & Land Surveyors*, 744 S.W.2d 524, 539 (Mo. App. 1988). Indeed, the Commission's Complaint contained no information indicative of Commission counsel's unusual and legally-foreclosed theory that Mr. Calzone self-designated as a lobbyist. *Moheet v. State Bd. of Registration for the Healing Arts*, 154 S.W.3d 393, 398 (Mo. App. 2004) ("The purpose of the complaint is to inform the [respondent] of the allegations with which he is charged and to provide sufficient notice to enable him to prepare an adequate defense").

At a new hearing, there is no additional fact that could be offered to demonstrate that the four corners of the Commission's Complaint adequately provided Mr. Calzone with proper notice of the charge. *See* MEC Complaint at 5-6, 18 ¶¶ 18, 19 ("Respondent Calzone has been designated by the actions of Missouri First, Inc. and its constituent members for the purpose of attempting to influence official action…"); *see Schad v. Arizona*, 501 U.S. 624, 632 (1991) ("The axiomatic requirement of due process…carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge against him"); *see also Honig*, 78 Mo. at 255 ("He declined and refused to argue the case for the State in the opening, but reserved his fire for the close, thus leaving defendant's counsel, in a matter of personal liberty, to grope in darkness as to the ultimate theory of the

[16] The Commission's Complaint is attached to this motion as Petitioner's Exhibit B.

prosecution, or to waste his effort and time in assailing positions not designed by the prosecution to be maintained"). This bell cannot be unrung by a *de novo* review on administrative appeal.

CONCLUSION

There is no need for these proceedings to go any further. The Ethics Commission's finding of probable cause was plainly erroneous. The initial complaint against Mr. Calzone was likely politically motivated, was investigated despite being filed by a non-natural person, and probable cause was found based upon a clearly incorrect reading of the relevant statute and a factual record built upon repeated abuses of process and procedure. Particularly in light of the dubious constitutionality of the MEC's interpretation of the underlying statute, this body ought to grant Mr. Calzone's motion for judgment on the pleadings.

Respectfully submitted,

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Dated: December 18, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 18th of December, I caused a copy of the forgoing to be delivered to the Administrative Hearing Commission and counsel for the Missouri Ethics Commission:

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