

MOTION

Relators, the Ohio Civil Rights Commission and Commission Investigator Ricky Boggs (collectively, "Commission"), hereby move the Court, pursuant to Supreme Court Practice Rule 12, to grant an extraordinary writ to prohibit any proceedings in the Cuyahoga County Court of Common Pleas in the case *GMS Management Co., Inc. v. Ohio Civil Rights Commission*, Case No. 820282. The Commission asks the Court to act immediately, without awaiting response, whether by issuing an immediate peremptory writ, or an alternative writ under Rule 12.05. Alternatively, the Commission asks the Court to order Respondent to answer within a few days for immediate resolution as to temporary relief. Such immediacy is needed to avoid pending discovery, which would interfere fundamentally with the Commission's exclusive jurisdiction to administer a special statutory proceeding. Reasons are more fully outlined in the attached Memorandum in Support, as well as in the Commission's Complaint.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

INTRODUCTION

The Ohio Civil Rights Commission urgently seeks this Court's aid in enforcing the undisputed rules set down by this Court and by the General Assembly, and in preventing a trial court from exceeding its jurisdiction by interfering with the Commission's special statutory proceeding. This Court has explained repeatedly that common pleas courts lack jurisdiction to interfere with "special statutory proceedings" that the General Assembly has committed to administrative agencies or other bodies. The Court has held that "actions for declaratory judgment and injunction are inappropriate where special statutory proceedings would be bypassed," that "courts have no jurisdiction to hear such actions in the first place," and that writs of prohibition are justified to enforce that limit. *State ex rel. Albright v. Delaware Cnty. Ct. of Common Pleas*, 60 Ohio St. 3d 40, 42 (1991); *see also State ex rel. Taft-O'Connor '98 v. Franklin Cnty. Ct. of Common Pleas*, 83 Ohio St. 3d 487, 489 (1998); *State ex rel. Wilkinson v. Reed*, 99 Ohio St. 3d 106, 2003-Ohio-2506. This is another such case, and action is needed now.

This case is just like those in which the Court has granted prohibition. A trial court refused to dismiss a case that indisputably is an attempted end-run around the Commission's statutory authority to investigate discrimination charges. A party charged with discrimination did not like the Commission's ongoing proceeding, so it asked a common pleas court to enjoin the proceeding. That court has denied a motion to dismiss on jurisdictional grounds, and continues to move forward with the case. Prohibition is justified, and equally important, the Commission respectfully asks the Court to act *now*, because an upcoming hearing and pending discovery demands threaten the integrity of the Commission's jurisdiction—along with that of virtually every state agency.

First, the Commission asks the Court to act *this week*, if it can, or as soon as possible, before ongoing proceedings in the trial court interfere further with the Commission's functioning. The Court has several options for immediate action. The Commission urges that a peremptory writ is justified now, as the case is so clear. Nevertheless, the Court could issue an alternative writ first, to preserve the status quo and stop the proceedings in the trial court while the Court considers further action. The Court could also order a faster response from the Respondent trial court, as well as from the underlying plaintiff if it wishes to intervene. Whatever path is chosen, the Commission urges the Court to act quickly, because the plaintiff in the underlying case seeks broad discovery aimed at every aspect of the Commission's functions, seeking to depose state officers soon about how the Commission works. That interference not only harms the Commission, but encourages *every* party before the Commission, and before *any* state agency, to do the same. And the time consumed is using up the one-year deadline that the statute imposes upon the Commission to resolve the claim, prejudicing the party charging discrimination.

Second, the need for relief here is plain, as the trial court patently and unambiguously lacks jurisdiction to hear a case seeking to enjoin the Commission's special statutory proceedings. The General Assembly has directed the Commission to investigate discrimination charges, under Chapter 4112, and it gives parties the right to *appeal* any final Commission order to the common pleas court later, under R.C. 4112.06. A party has no right to ask a court to enjoin that proceeding on the front end, and a common pleas court has no jurisdiction to hear such a case. The complaint here indisputably seeks such end-run relief, and the trial court has said it will proceed to consider it. That is enough to justify prohibition.

Consequently, the need for prohibition is plain, and so is the need for immediate action. In particular, a writ of prohibition is specifically meant for cases such as this, where the lower court's lack of jurisdiction is patent and unambiguous, and no other remedy will work. This Court has repeatedly acted, as overseer of the judicial branch, to stop lower courts from overreaching their jurisdiction, and the Commission asks the Court to do so again now.

FACTS

A. GMS Management, the subject of a discrimination charge filed with the Commission, sued in common pleas court to have the Commission's administrative proceeding enjoined.

GMS Management, Inc. ("GMS"), a real property management company, denied an application by Thomas Fasanaro to rent an apartment from GMS. Fasanaro believed that GMS rejected his housing application, at least in part, because of his disability, so he filed a charge of discrimination with the Commission. *See* GMS First Am. Compl. ("FAC"), filed in *GMS Management Co., Inc. v. Ohio Civil Rights Commission*, Cuyahoga County Court of Common Pleas, Case No. 820282, assigned to the Honorable Richard J. McMonagle. ¶ 24 (attached as Ex. 1 to Tassie Affidavit, in turn attached to Commission Complaint in this case as Ex. A). Based on Fasanaro's charge, Commission staff began to investigate GMS. *Id.* ¶ 33. The Commission sought documents regarding GMS's rental practices and residents. *Id.* The investigation continues, and the Commission has not yet decided whether to file an administrative complaint against GMS. An administrative complaint, if filed, would then trigger a hearing process before the Commission (or either party can elect to have the complaint heard in a common pleas court under R.C. 4112.051(A)(2)) and could lead to a final order against GMS.

Even though the investigation remains ongoing, GMS preemptively sued in Cuyahoga Common Pleas Court to stop that Commission process. GMS sued on January 16, 2014, and on January 20, it amended its complaint. *See* FAC. GMS alleges a wide range of problems with the

Commission's continuing investigation, which reflects the Commission's routine practice for all similar investigations. GMS alleges that the complainant's underlying charge was defective for not including an oath or a proper statement of the facts, *id.* ¶ 5; that the charge fails to state a claim of housing discrimination, *id.*; that the Commission's investigation "is just another indiscriminate abuse of [GMS's] statutory and constitutional rights" because, according to the complaint, only about four percent of all charges of discrimination result in a finding of probable cause by the Commission, *id.* ¶ 8-9; that the Commission "failed to initiate a fact finding conference . . . to examine the factual basis behind the charge," *id.* ¶ 28; that the Commission "did not internally vet the unsworn charge to determine if Fasanaro was financially qualified to rent [GMS's] apartment suite in the first instance," *id.* ¶ 29; that the notification of the investigation that [GMS] received did not adequately include a notice of its procedural rights, *id.* ¶ 33; that the Commission requested "voluminous documentation under the threat of punitive damages," *id.* ¶ 34; and that the Commission did not timely complete its investigation of GMS, *id.* ¶ 35. GMS named as Defendants the Commission and Ricky J. Boggs, a Commission investigator.

GMS's Complaint seeks six declarations that the Commission's process generally, and as to its investigation of GMS specifically, is defective, and it asks the court to enjoin the Commission. *Id.* ¶¶ 43, 45-48. GMS seeks injunctive relief beyond stopping the proceeding against it, seeking to reshape how the Commission operates. For example, it "seeks a mandatory permanent injunction to the effect that [the Commission] and its employees undergo further training, under the supervisions of plaintiff's counsel," to ensure that the Commission and its staff "respect the civil rights of respondents and otherwise conform to the statutes as written and to the applicable constitutional provisions." *Id.* ¶ 49. GMS also included a jury demand, but it

seeks only declaratory and injunctive relief, not damages. *See id.* ¶¶ 48-50; *see also* GMS Motion for Sanctions at 4 (arguing that no damages are sought). And GMS’s Motion for Preliminary Injunction expands what it seeks, attacking mediation or other alternative dispute resolution and objecting to any possible amendments to pending discrimination charges.

B. The Commission moved to dismiss on jurisdictional grounds, but the trial court denied the motion, and GMS now seeks broad discovery.

The Commission moved to dismiss for lack of subject-matter jurisdiction. The Commission argued that GMS sought improperly to use a declaratory and injunctive action as a collateral attack on an investigation governed by special statutory procedures. *See* Comm’n Mot. to Dismiss at 4-5 (Ohio Ct. Com. Pleas Jan. 30, 2014). The Commission cited this Court’s cases granting prohibition in similar situations. *Id.* (citing, e.g., *Albright*, 60 Ohio St. 3d at 42; *Taft-O’Connor ’98*, 83 Ohio St. 3d at 489). The Commission also cited cases in which the lower courts had dismissed cases on similar grounds. *Id.* (citing, e.g., *State ex rel. Gelesh v. State Med. Bd. of Ohio*, 172 Ohio App. 3d 365, 2007-Ohio-3328 (10th Dist.) (affirming dismissal of declaratory-judgment case seeking to address physician disciplinary proceedings because Medical Board has jurisdiction to hear such cases). The Commission also sought dismissal on other grounds not at issue here, such as the immunity of Investigator Boggs from suit against him individually and for failure to state a claim on the merits.

In response, GMS acknowledged the general rule that special statutory proceedings may not be bypassed, but argued that a “special statutory proceeding must involve *an adjudicatory hearing*,” so the Commission’s pre-adjudication investigation did not trigger the rule, as “there is no special statutory proceeding to bypass.” *See* GMS Brief in Opp. at 1 (Ohio Ct. Com. Pleas Feb. 5, 2014) (emphasis in original). GMS also argued that the Commission’s own jurisdiction to investigate was flawed because it can investigate only upon written charges under oath, and

the declaration “under penalty of perjury” did not suffice. *Id.* at 2. And it argued that even if the initiation were proper, the Commission process is illegal in several ways. *Id.* at 3. GMS acknowledged that it sought to enjoin the Commission proceeding against it, but said it did not ask the common pleas court to resolve whether GMS discriminated against Fasanaro. *Id.* at 4.

The common pleas court (through Respondent Judge McMonagle) denied the motion in a summary order—without explanation—on February 18, 2014. *See* Order of Feb. 18, 2014 (attached as Ex. 2 to Tassie Affidavit, in turn attached to Commission Complaint as Ex. A). The order simply states the denial, along with resolving several other motions. The trial court granted a “motion for judicial estoppel,” agreeing with GMS that an “oath” requirement is not satisfied by a declaration under penalty of perjury. *Id.* It also lifted an earlier stay of discovery, allowing it to proceed. The court had granted, on February 13, a stay of discovery, but said in that earlier order that the stay would automatically lift if the motion to dismiss were denied, and it was. The court scheduled a preliminary injunction hearing for March 20, so discovery will precede that date.

GMS has now sought depositions of several Commission officers and employees, including Investigator Boggs and Rule 30(B)(5) deponents to testify about Commission personnel, policies, practices, and the law. GMS’s counsel has also suggested that he may seek testimony from Assistant Attorneys General who represent the Commission, including the ones representing the Commission in GMS’s case against the Commission.

ARGUMENT

The State asks this Court to do two things: (1) to prohibit the trial court from continuing its unauthorized proceedings, and (2) to act *immediately*, because the trial court’s unwarranted exercise of jurisdiction injects uncertainty into every Commission proceeding and into every

agency's special statutory proceedings. Because the urgency is important now, the Commission discusses that first below, and then shows why this case justifies prohibition

A. The Court should act now to prevent an improper exercise of jurisdiction.

The State respectfully and strongly urges the Court to act quickly, before the Commission is forced to submit to discovery that amounts to a broad attack on everything about its special statutory proceedings. The Court has several options to prevent harm, and the bottom line is this: Acting now is needed not only for the Commission's sake, but also for every agency's sake, while conversely, stopping the trial court now does not harm GMS in any way.

First, the Court has several options, and while the Commission urges the strongest medicine in light of the clear law and facts here, its most urgent request is for the Court to do something immediately to stop the improper proceedings. The Court can and should issue a peremptory writ of prohibition now, as the lack of jurisdiction is so straightforward. *See Taft-O'Connor '98*, 83 Ohio St. 3d at 489 (holding that "where, as here, it appears beyond doubt that relator is entitled to the requested extraordinary relief, a peremptory writ should issue."). Indeed, the Court has acted within days before, *see id.* (writ two days after filing), or within weeks, *see Albright*, 60 Ohio St. 3d at 42 (alternative writ eleven days after filing); *Wilkinson*, 2003-Ohio-2506 (three weeks). Or the Court may, under S. Ct. Prac. R. 12.05, issue an alternative writ to halt the trial proceedings now, while giving this Court whatever time it needs to resolve whether to issue a peremptory writ. The Court may also choose to accelerate the schedule for a response.

Second, however the Court acts, some urgent step is needed any day now. For starters, the trial court has allowed discovery to proceed. GMS has issued interrogatories, requests for admissions, requests for production of documents, and demands for depositions of Boggs and Rule 30(B)(5) deponents who can testify about over a dozen topics, including the law, Commission personnel, policies, and practices. In other words, GMS does not wish to

participate in the Commission's special statutory proceeding, so it seeks instead to put the Commission's process on trial. GMS seeks to hold depositions within the next two weeks. Thus, waiting for the normal ten-day response period for motions, *see* S. Ct. Prac. R. 4.01(B), and adding even a few days for decision after, would force the Commission to submit to the depositions, or, at a minimum, to prepare for them.

In addition, the time spent in this collateral litigation eats away at the one-year time limit that the statute imposes on the Commission to finish its investigations. R.C. 4112.05(B)(7); *Ohio Civil Rights Comm'n v. Countrywide Home Loans, Inc.*, 99 Ohio St. 3d 522, 2003-Ohio-4358, ¶¶ 6-9 ("*Countrywide*"). If the trial court does enjoin the Commission, even preliminarily, that will cost valuable time, and the party charging discrimination will lose his rights.

While the burden of discovery and the loss of time are bad enough, the worst part is the roadmap that this case would provide to other dissatisfied parties before the Commission and other administrative agencies. At a minimum, anyone now before the Commission is encouraged to file a collateral attack. In fact, GMS's counsel has already filed the order in the underlying case as supplemental authority in a separate case for another party seeking to circumvent the Commission. In that case, a respondent before the Commission has sued not the Commission, but the party charging discrimination, and asks a common pleas court to use declaratory relief to bypass the Commission. *See Hillcrest Trailer Court Ltd. v. Burke, Mahoning Cnty.* Case No. 13-CV-0285. Other parties might follow suit, and parties before any other state agency—at least in Cuyahoga County—are now encouraged to do likewise. This Court's immediate action, following the path in the many cases cited above, can and should prevent that.

Third and finally, stopping the trial court now does not harm GMS. Its remedies before the Commission are enough to protect its rights, as shown by the many parties who routinely appeal Commission findings. Indeed, as noted below (at 16), some parties are properly pursuing, in the ordinary course, the same issues that GMS raises regarding the “oath” requirement and regarding the adequacy of the process. Those and all other issues can be raised and argued in a Commission proceeding and in an administrative appeal. At a minimum, if this Court issues an alternative writ, while further considering this case, GMS will not be harmed by waiting to proceed in the common pleas court.

For all these reasons, the Court should act now.

B. Prohibition is needed here because the trial court has no jurisdiction to hear a collateral attack on the Commission’s special statutory proceedings.

Prohibition is warranted because the State meets all of the elements required for such a writ. This Court grants prohibition where: (1) a trial court has undoubtedly exercised judicial power; (2) the court’s lack of jurisdiction is patent and unambiguous, and (3) the relator has no adequate remedy at law. *See State ex rel. Ohio Dep’t of Mental Health v. Nadel*, 98 Ohio St. 3d 405, 2003-Ohio-1632, ¶ 19. Moreover, the Court does not require a relator to show “no adequate remedy at law” when the lack of jurisdiction is plain in a special-statutory-proceedings case. *See Albright*, 60 Ohio St. 3d at 43 (“To permit intervening respondent to go forward with its action in the respondent court would allow it to intrude into this statutory process. Accordingly, we find that . . . the adequacy of appeal as a remedy is irrelevant.”). Further, where a lower court’s lack of jurisdiction is “patent and unambiguous,” the Court will undo past acts by a trial court as well as prevent future ones. *Nadel*, 2003-Ohio-1632 ¶ 19 (citing *State ex rel. Sartini v. Yost*, 96 Ohio St. 3d 37, 2002-Ohio-3317, ¶ 24).

Here, all three elements are satisfied, so even if the third is required, it is met.

1. The State meets the first and third elements, as the trial court is indisputably exercising jurisdiction, and a later appeal would not be adequate.

The sole issue to be disputed (and even that leaves no real dispute) is the trial court's jurisdiction, as showing the other two elements is simple. *First*, the trial court is exercising judicial power and intends to continue doing so. It has denied the Commission's motion to dismiss for lack of jurisdiction, considered and denied a motion for sanctions, and, without offering the Commission the opportunity to respond, granted a motion asking to "apply[] judicial estoppel and/or collateral estoppel" against the Commission, precluding it from arguing the substantive issue—over which the common pleas court lacks jurisdiction—of whether the charge in this case satisfies the "under oath" requirement of the revised code. *See* Order of Feb. 18 (taking "judicial notice" that issue is settled against . Notably, the court has not limited its jurisdiction in any way, so its denial of the motion to dismiss leaves open everything in GMS's First Amended Complaint. That is, the court is not looking "merely" at the oath issue—which on its own violates the Commission's power to determine its own jurisdiction, *see* below at 15—as it is also allowing the Commission's entire process to be tried.

Second, while the State need not show a lack of adequate remedy at law, it has none. As noted above, this Court has dispensed with the requirement in cases such as this, for the intrusion into special statutory proceedings per se justifies prohibition. *Albright*, 60 Ohio St. 3d at 43; *see State ex rel. Willacy v. Smith*, 78 Ohio St. 3d 47, 51 (1997). But even if the requirement is revived, it is met. Not only is the lost time and money gone forever, but the underlying discrimination claim could be lost in the meantime. As noted above, the Commission has a one-year deadline for resolving claims administratively, and this Court has applied it firmly—even counting against the deadline the time in which the charge was being processed by the federal government before being handed over to the State Commission. *Countrywide*, 2003-Ohio-4358,

¶¶ 6-9. That deadline cannot be tolled, so a later reversal of this injunction could be too late. The fact that the time limit does not provide for such tolling further shows that the scheme does not contemplate such interruptions. Also, a later reversal would not remedy the massive harm that would be caused if other parties jump on the bandwagon, stalling the Commission's work on all discrimination cases.

Thus, the first and third elements are met, and the sole question is whether the trial court's lack of jurisdiction is "patent and unambiguous," and as shown below, it is.

2. A common pleas court has no jurisdiction to hear a declaratory-judgment action that seeks to circumvent and enjoin the Commission's special statutory proceedings for investigating and resolving discrimination charges.

GMS's underlying case against the Commission is an improper collateral attack on the Commission's special statutory proceedings, so the common pleas court lacks jurisdiction and prohibition is warranted. The rule is well-established; the case below is such an improper attack; and none of the possible arguments for jurisdiction are viable.

First, the Court has repeatedly explained that common pleas courts have no jurisdiction to hear declaratory and injunctive actions that seek to circumvent a special statutory proceeding. *Wilkinson*, 2003-Ohio-2506, ¶¶ 15-16; *Taft-O'Connor '98*, 83 Ohio St. 3d at 489; *Albright*, 60 Ohio St. 3d at 42. The General Assembly's specific commitment of an issue to a special statutory proceeding prevails, and "courts have no jurisdiction to hear" actions for declaratory judgment. *Albright*, 60 Ohio St. 3d at 42.

Indeed, this lack of jurisdiction is so well-settled that most lower courts routinely enforce it by refusing to hear cases that violate the rule, so that this Court does not need to step in and enforce the limit. For example, when a doctor tried to bypass the Medical Board and have a common pleas court examine a professional-discipline matter, the trial court declined to exercise jurisdiction, and the Tenth District affirmed. *Gelesh*, 2007-Ohio-3328. Other courts have done

likewise. *Aust v. Ohio State Dental Bd.*, 136 Ohio App. 3d 677 (10th Dist. 2000) (declaratory judgment is not available where another equally serviceable remedy has been provided); *Tri-State Grp., Inc. v. Ohio Edison Co.*, 151 Ohio App. 3d 1, 2002-Ohio-7297 (7th Dist.) (operator of fly ash disposal site could not use declaratory judgment to circumvent regulatory schemes governing fly ash disposal); *Dayton Street Transit Co. v. Dayton Power & Light Co.*, 57 Ohio App. 299 (2d Dist. 1937) (common pleas court does not have jurisdiction to entertain an action for a declaratory judgment on questions in which the Public Utilities Commission has exclusive jurisdiction). And this Court has affirmed that principle on direct review as well as by prohibition. See *City of Galion v. Am. Fed'n of State Cnty. & Mun. Emps., Local No. 2243*, 71 Ohio St. 3d 620, 623 (1955) (“We have held that if there is a special statutory procedure which a party must use, an action for declaratory judgment is inappropriate.”)

Second, this case involves both a legislative commitment to the Commission and a case that seeks to undermine it. The General Assembly, in enacting R.C. Chapter 4112, created a comprehensive procedure for having the Commission process charges of discrimination. That process provides for an administrative appeal *after* the Commission acts, not for interrupting it midway or at the outset. See R.C. 4112.06. The statutory process even imposes on the Commission a one-year deadline for resolving claims administratively, and this Court has applied it firmly. *Countrywide*, 2003-Ohio-4358, ¶¶ 6-9. An interim declaratory lawsuit is incompatible with this system, especially with the deadline, as the Commission could be unable to fulfill its mandated duty to process a claim while it is being dragged into court before it could conduct an investigation. Any alleged discriminator could file a declaratory-judgment action, taking the case out of the Commission’s hands, controlling the course and perhaps the outcome

of the investigation. This is not what the General Assembly intended, and not what this Court permits under its precedent guarding the primacy of special statutory proceedings.

GMS's lawsuit against the Commission is indisputably the type of case that violates the rule. Although the complaint did not identify the Declaratory Judgment Act as the basis for jurisdiction, that is the relief that GMS seeks, and it used that description in its briefing on the motion to dismiss. *See* GMS Br. in Opp. at 1, 4, 9-11. And no other basis for jurisdiction in the trial court exists. GMS plainly seeks to block the Commission proceeding pending against it; it asks for an injunction against the proceeding. *See* FAC ¶ 48 ("Plaintiff is entitled to preliminary and permanent prohibitory relief enjoining defendants from further pursuit of this . . . investigation"); *see* GMS Br. in Opp. at 5 ("Given that the Fasanaro charge is not made under oath . . . defendants' investigation . . . must be declared illegal and enjoined"). It does not matter that GMS concedes that it does not ask the common pleas court to resolve the ultimate dispute over whether GMS discriminated, *id.* at 4, as the relief it seeks—enjoining the Commission's proceeding—interferes with the Commission's authority. Indeed, an outright injunction does not just "interfere with" that authority; it nullifies it.

3. GMS cannot offer any rationale for allowing the common pleas court to maintain jurisdiction over its declaratory-judgment case.

Neither GMS nor the trial court has offered, nor can either offer, any legitimate justification for maintaining jurisdiction over GMS's case against the Commission. Unfortunately, the trial court's lack of an opinion leaves the parties and this Court unsure of its basis, so we can look only to what GMS offered. GMS argued two basic points: (1) this involves only a pre-adjudication investigation, not an actual adjudicatory proceeding, and only adjudications are protected by the special-statutory-proceeding rule, and (2) GMS's attack is on the Commission's own jurisdiction, and if the Commission did not properly acquire jurisdiction,

it has no predicate jurisdiction with which it can preclude competing jurisdiction by the trial court. Neither theory works, as a matter of precedent, principle, or practice.

First, GMS’s “investigation” distinction has already been rejected by this Court implicitly, by other courts explicitly, and is unworkable. In *Taft-O’Connor* ’98, this Court granted a writ of prohibition to protect against interference with the Ohio Elections Commission’s authority over Ohio’s law against false statements made in elections. 83 Ohio St. 3d at 489. The Elections Commission process, like the Civil Rights Commission, involves an initial investigation, a probable-cause finding, then adjudication. Most important, in *Taft-O’Connor*, no process at all had been instigated at the Elections Commission, not even an investigation. If GMS’s view were right, the Court should have denied prohibition, because no adjudication was in process or even on the horizon.

The Tenth District in *Aust* expressly rejected the view GMS advances. The party there “attempt[ed] to make the distinction that the board’s actions cannot be considered a ‘proceeding’ because the board had only begun an investigation and no formal administrative proceeding was actually pending.” *Aust*, 136 Ohio App. 3d at 683. But the Tenth District rejected that argument, noting that “nowhere in *Albright* does [this Court] require that the administrative proceeding be currently pending. . . . [T]he issue is whether a special statutory proceeding has been set forth by the legislature to address a particular type of case, not whether a ‘proceeding’ has actually commenced.” *Id.* Other courts have likewise dismissed declaratory-judgment attempts in favor of special statutory proceedings, even when no adjudication was pending. See *Tri-State Grp.*, 151 Ohio App. 3d 1; *Arbor Health Care v. Jackson*, 39 Ohio App. 3d 183 (10th Dist. 1987); *Dayton Street*, 57 Ohio App. 299.

GMS's "pre-adjudication" distinction makes no sense in principle and practice. It would mean, as a practical matter, that anyone wanting to interfere with an adjudication simply needs to file early enough to "beat the clock" and get its case in before an agency acts. If a doctor just committed a disciplinary violation, or a liquor licensee just committed an underage sale, he simply needs to file a declaratory action to claim jurisdictional first dibs while the agency investigates but before it files a formal complaint. And that would, of course, be easy enough, given that a regulated party routinely will know of its acts before an agency does, and most agencies are governed by rules permitting or even requiring a preliminary investigation before jumping straight into an adjudication.

Second, GMS cannot justify common-pleas-court jurisdiction by claiming that the Commission's own proceeding is itself without proper jurisdiction, because this Court rejected that notion in *Albright*. There, a party sued in a common pleas court to challenge the *jurisdiction* of the Franklin County Board of Commissioners over certain annexation proceedings, arguing that the proceedings belonged in Delaware County's Board instead. This Court explained that because the issue was statutorily committed to the Franklin County Board, that Board had the right to review the facts and assess its own jurisdiction, with appeal from that body as the proper route for review: "[T]he Franklin County Board of Commissioners has determined its own jurisdiction, and the Franklin County Court of Common Pleas . . . will rule on the correctness of that determination if it is challenged by injunction after the hearing." 60 Ohio St. 3d at 43. The Court explained that "To permit intervening respondent to go forward with its action in the respondent court would allow it to intrude into this statutory process," and that was so *even though* the argument below was, as here, premised upon a lack of *proper* administrative jurisdiction. *Id.* Consequently, GMS cannot succeed on that already-rejected distinction.

Moreover, that distinction, too, would be unworkable in practice, and would eviscerate the principle of protecting the primacy of special statutory proceedings. A party seeking to evade an agency's process could merely allege that the agency did not properly acquire jurisdiction, claiming that whatever procedural objection it has amounts to a jurisdictional flaw. Even if a court rejects the characterization of the alleged flaw as jurisdictional in the end, the interference with a proceeding is already largely achieved if the court even hears the case on the merits. The only way to protect against interference is to insist, as this Court did in *Albright*, on following an agency's own process for review of a proceeding.

Furthermore, GMS's attempted interference with the proper process is not only unwarranted, but also unnecessary. GMS has an adequate remedy in the ordinary course. Not only could GMS appeal anything the Commission might do, but other parties, in fact, have already raised, in administrative appeals, the same issues that GMS raises here. For example, one party challenges the oath issue in a pending case. *Grybosky v. Ohio Civil Rights Comm.*, Ashtabula Common Pleas Court Case No. 2013-CV-0823. Another party claimed, on administrative appeal, that the Commission had not met its statutory duty to conciliate, and thus did not have jurisdiction to file an administrative complaint. *Ohio Civil Rights Comm. v. Triangle Investment Co.*, 2012-Ohio-1069 (10th Dist.). Similarly, errors alleged regarding non-charge processes, such as whether a Commission subpoena should be modified or quashed may be, and should be, raised before the Commission, and reviewed on appeal.

Finally, because the sole issue here is the Commission's special jurisdiction, and the trial court's corresponding lack of jurisdiction, the merits of GMS's objection about the "oath" requirement, or its other complaints about the Commission's process, are not at issue, so the Commission does not brief those issues here. The important point is that those issues cannot be

reviewed outside the administrative process without interfering with that process. For example, GMS argues that the factual allegations here, and in many Commission cases, are not adequate to support even a preliminary investigation. That cannot be assessed without looking at those factual allegations and assessing them—which is the Commission’s job.

Thus, GMS’s merits arguments await another day, as they should be reviewed by the Commission itself, and by a common pleas court hearing an *appeal* from a Commission order, not by a common pleas court that is asked to enjoin the Commission’s proceedings midway.

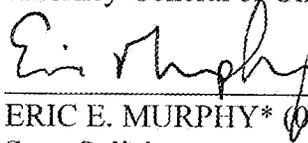
In sum, the common pleas court patently lacks jurisdiction, and the Court should issue a writ of prohibition.

CONCLUSION

For the above reasons, the Commission asks the Court to issue a peremptory or alternate writ of prohibition, and/or an order to expedite response, ultimately directing the trial court to dismiss the case of *GMS Management Co., Inc. v. The Ohio Civil Rights Commission, et al.*

Respectfully submitted,

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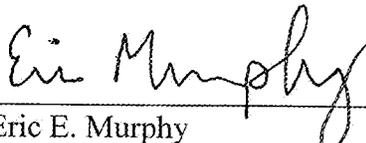
Ohio Civil Rights Commission, et al.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Emergency Motion for Peremptory or Alternative Writ of Prohibition and Combined Memorandum in Support of Relators' Complaint and in Support of Emergency Motion was sent by regular U.S. mail and by e-mail, this 26 day of February, 2014, to the following:

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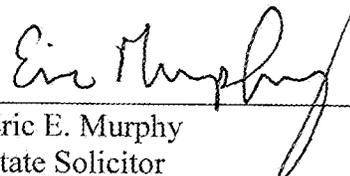
The Hon. Richard J. McMonagle
Cuyahoga County Court of Common Pleas
1200 Ontario Street
Cleveland, Ohio 44113
clerk_of_courts@cuyahogacounty.us



Eric E. Murphy
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A courtesy copy was also served by regular U.S. mail and by e-mail to counsel for the plaintiffs in the underlying common pleas court case:

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