IN THE SUPREME COURT OF MISSOURI

No. SC96739

DONALD HILL, et al.,

Plaintiffs/Respondents,

v.

MISSOURI DEPARTMENT OF CONSERVATION, et al.,

Defendants/Appellants.

Appeal from the Circuit Court of Gasconade County
The Honorable Robert Schollmeyer, Associate Circuit Judge

SUBSTITUTE BRIEF OF APPELLANTS MISSOURI CONSERVATION COMMISSION, MISSOURI DEPARTMENT OF CONSERVATION, JAMES BLAIR, DAVID MURPHY, MARILYNN BRADFORD, AND DON BEDELL

J. Kent Lowry #26564
William Ray Price, Jr. #29142
Jeffery T. McPherson #42825
Alexander C. Barrett #68695
ARMSTRONG TEASDALE LLP
7700 Forsyth Boulevard, Suite 1800
St. Louis, Missouri 63105
314.621.5070 FAX 314.621.5065

Attorneys for Appellants

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JURISDICTIONAL STATEMENT

On November 18, 2014, this action for declaratory and injunctive relief was initiated in the Circuit Court of Gentry County against the Missouri Conservation Commission, its individual members, and the Missouri Department of Conservation (collectively, "the Commission"). The case was eventually transferred to the Circuit Court of Gasconade County.

On September 15, 2016, following a bench trial, the court entered judgment in favor of the plaintiffs and against the Commission, and permanently enjoined the Commission from enforcing the amended regulations at issue.

On October 14, 2016, the Commission filed an authorized after-trial motion.

On November 17, 2016, the court entered an amended judgment.

On November 21, 2016, the Commission filed an after-trial motion regarding the amended judgment.

On November 22, 2016, the court denied the second after-trial motion.

On November 23, 2016, the Commission filed a notice of appeal to the Missouri Court of Appeals, Eastern District, which issued an opinion transferring the appeal to this Court. This Court has jurisdiction to entertain appeals on transfer from the Court of appeals under Article V, Section 10, of the Missouri Constitution.

STATEMENT OF FACTS

On November 18, 2014, the plaintiffs filed a petition against the Missouri Conservation Commission and its individual members as well as the Missouri Department of Conservation. L.F. 1, 31. The plaintiffs challenged certain regulatory amendments enacted by the Commission pertaining to the importation and possession of deer that took effect in January of 2015. L.F. 31-38.

The Commission

The Commission is a constitutional entity, created by Missouri voters through a ballot initiative in 1936. Tr. 642-643. The Missouri Constitution tasks the Commission with the "control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto." Mo. Const. art. IV, § 40(a). That grant of authority is self-enforcing, and the legislature is prohibited from enacting laws inconsistent with it. Mo. Const. art. IV, § 44.

The Missouri Department of Conservation is the agency through which the Commission now acts. *See* § 252.002, RSMo; L.F. 1682-1710.

Captive cervids

Elk and white-tailed deer are species in the family *cervidae*, commonly called cervids. Tr. 269; L.F. 2701. Both species are native to Missouri. Tr. 298; L.F. 2701.

The "captive cervid industry" consists of individuals and businesses engaged in several activities. One activity is the selective breeding of cervids for desired genetic traits like large antlers. L.F. 2701. Some industry participants breed cervids to sell to other breeders or hunting preserve owners. Tr. 158-160. Others breed cervids to stock their own hunting preserves. Tr. 507.

Another aspect of the industry is the operation of hunting preserves. L.F. 2701-2702. Known also as high-fence hunting preserves, these facilities are private land where owners offer lodging and hunting of deer, elk, and other species. Tr. 12-13, 15-16, 56, 212. Hunters pay thousands of dollars to hunt trophy bucks on such preserves. Tr. 56; L.F. 1134-1135, 2701-2702. Others in the industry broker sales between those who have trophy animals and those looking to buy them. Tr. 174, 177-179.

The Commission has regulated private possession of wildlife since its inception. Tr. 342, 346-347, 642-645; L.F. 1682-1710. The Commission did not permit big game hunting preserves to exist until 1973 and did not permit such preserves to hold white-tailed deer until 1985. Tr. 649-650; L.F. 1703-1710. Everyone who hunts at a hunting preserve must have a hunting permit issued by the Department of Conservation. Tr. 112-113, 222; L.F. 1160-1162; *see* 3 CSR 10-9.565(1)(B)(3).

There are more than 200 captive cervid breeding facilities and 46 big game hunting preserves in Missouri. Tr. 345-346. These facilities and preserves hold more than 10,000 white-tailed deer. *Id.*

Missouri's captive cervid industry does not include the sale of deer meat; Missouri prohibits the sale of white-tailed deer meat for human consumption. Tr. 348, 551.

The plaintiffs

There were six plaintiffs at the time of trial: Donald Hill and Oak Creek Whitetail Ranch, LLC; Travis Broadway and Winter Quarters Wildlife Ranch, LLC; and Kevin Grace and Whitetail Sales and Service, LLC. L.F. 888.

Hill is the co-owner of Oak Creek Whitetail Ranch, a 1,300-acre hunting preserve located in Bland, Missouri, with breeding and hunting operations. Tr. 12-14, 506. He holds approximately 300 deer (100 does and 200 bucks) on his hunting preserve and about 500 deer in his breeding facilities. Tr. 108-110; L.F. 1163-1164. A 2015 appraisal by Hill's bank valued his deer at around $6.45 million. Tr. 106-107, L.F. 1164. At trial, Hill alleged that he had approximately 850 deer valued at nearly $9 million. L.F. 889. Hill's land and hunting lodge are also worth several million dollars. Tr. 554-556.

Travis Broadway is a businessman from Alexandria, Louisiana. L.F. 1083-1084. In 2013, Broadway purchased the property and hunting lodge formerly known as Heartland Ranch in Macon County and renamed it Winter Quarters Wildlife Ranch, a 3,000-acre hunting preserve and luxury lodge. Tr. 209-210; L.F. 2702. When Broadway purchased Winter Quarters, it was under a "herd plan" jointly administered by the Missouri Department of Conservation and Missouri Department of Agriculture after an outbreak of chronic wasting disease at the preserve in 2010. Tr. 210-211; L.F. 1105, 2406-2411.

Broadway purchased Winter Quarters because he was "looking for an investment in Missouri" and "a place to basically retire" and for entertaining employees, clients, and family. L.F. 1086-1088. He did not intend to operate Winter Quarters for profit, but to entertain. *Id.* He later began selling hunts to offset the cost of feeding the animals on the property. L.F. 1089-1090. The value of Winter Quarters is around $9 million. Tr. 601.

Winter Quarters consists of three separately fenced sections. Tr. 594. Broadway keeps some cattle and "shooting goats" on approximately 1,750 acres. Tr. 660. He also keeps bison, rams and other exotic animals on approximately 600 acres. L.F. 1092. The hunting lodge and hunting preserve are on the remaining 680 acres. Tr. 596, 606-607. Winter Quarters also maintains a small elk and red deer breeding operation to stock its hunting preserve. Tr. 212, 215.

At the time of trial, Broadway had only four cervids on his hunting preserve and was prohibited by the herd plan from introducing new cervids until July of 2017. Tr. 218-219, 603-604; L.F. 2407-2410. There has not been a successful white-tailed deer hunt on the property during Broadway's ownership. Tr. 217-218, 595; L.F. 1093, 1100. It is currently prohibited from breeding white-tailed deer. Tr. 602, 604.

Kevin Grace runs a breeding facility for white-tailed, sika, and red deer in Miller County. Tr. 158; L.F. 888, 2703. Grace sells approximately 95% of the white-tailed bucks he breeds to Hill to stock Hill's hunting preserve. Tr. 160. Grace testified that he has one of the top six white-tailed breeding lines in the country. Tr. 200, 587-588.

Hunting preserves and wildlife breeding facilities must have permits from the Missouri Department of Conservation. *See* 252.040, RSMo; 3 CSR 10-9.350, 10-9.351,

10-9.560. Hill and Broadway maintain separate permits for their breeding and hunting activities. *See* Tr. 506, 508. Grace maintains a breeder's permit from the Department of Conservation. Tr. 573-574; L.F. 2518.

Chronic wasting disease

Chronic wasting disease is a fatal neurodegenerative disease that infects cervids. Tr. 270, 398; L.F. 1350, 1440. Diseases in this family include mad cow disease in cattle and Creutzfeldt-Jakob disease in humans. Tr. 271; L.F. 1909-1910. CWD is known to exist in 24 states, two Canadian provinces, South Korea, and Norway. L.F. 1862, 1948. CWD is caused by proteins called prions. Tr. 270; L.F. 1350. CWD is passed directly through animal-to-animal contact, as well as indirectly when animals pick up prions that have been shed into the environment. Tr. 274, 402-403; L.F. 1880-1882.

Between 2001 and 2009, the Commission sampled nearly 26,000 deer statewide and did not detect CWD in any free-ranging deer. *Id.*

In 2010, CWD was first detected in Missouri in a white-tailed deer at a private hunting preserve in Linn County owned by Heartland Wildlife Ranches. Tr. 210, 690; L.F. 2707. In 2010, the Commission created a "CWD Surveillance Zone" within 25 miles of the facilities where CWD was first detected. *Id.* In 2010 and 2011, the Commission tested over 7,400 deer and detected 5 infected deer near the Heartland properties. L.F. 1378-1379. In 2012 and 2013, the Commission sampled over 6,800 deer, and found another 5 free-ranging deer infected with CWD. *Id.*

In the subsequent response effort, approximately 356 deer were culled at a second captive facility in Macon County that was also owned by Heartland (and is now owned

by Broadway). Tr. 210; L.F. 1378, 2707. Testing confirmed that 10 white-tailed deer at the Macon County property were infected. *Id.* A neighboring landowner witnessed a deer jump over the Heartland Ranch fence and escape in January of 2012 and has seen privately held deer with ear tags on his property. Tr. 738-741; L.F. 2034.

By 2014, the Commission had detected 21 CWD-positive deer in Missouri: 11 on the Heartland properties and 10 free-ranging deer within two miles of the Macon County facility. *Id.* The Commission estimated the costs of its CWD surveillance efforts between June 1999 and July 2014 to be approximately $2,000,000. L.F. 1381.

In the fall of 2014, two CWD-positive free-ranging deer were found in Adair County, four were found in Macon County, and one was found in Cole County. Tr. 310-311. In the 2015-2016 CWD surveillance season, seven more infected free-ranging deer were detected: three in Adair County, one in the Linn County sampling area, two in the Linn-Macon "core area," and one in Franklin County. L.F. 2068. The infected deer in Cole and Franklin Counties were found near closed or currently operating captive facilities. Tr. 311, 673-674; L.F. 2010.

The Department of Conservation has projected that its CWD-management expenditures for fiscal year 2017 will reach $1.7 million. Tr. 752-753.

The amended regulations

To combat CWD, the Commission developed and enacted a series of regulatory amendments, which the plaintiffs challenged in this litigation. Tr. 281-282; L.F. 892-894, 2746. The amended regulations are included in the appendix to this brief. These include 3 CSR 10-4.110(1), which prohibits the possession of wildlife except as

permitted by the Commission's regulations. The only relevant change to that provision was to clarify that it applies to "wildlife raised or held in captivity." L.F. 51, 2447.

The Commission amended its regulations to prohibit the importation of cervids into Missouri captive facilities. *See* 3 CSR 10-9.353(2), (9); 3 CSR 10-9.565(1)(B)(9).

The Commission amended the standards for fences surrounding areas where captive cervids are kept. Under prior regulations, fences had to be eight feet tall and "sufficient to prevent escape" or "escape proof." Tr. 630-631; L.F. 1658. The amended regulations specified materials, spacing, and clearance requirements. *See* 3 CSR 10-9.220(2), (3); L.F. 52-54; *see also* 3 CSR 10-9.353(3), 3 CSR 10-9.565(1)(B)(1).

Finally, the Commission imposed a variety of recordkeeping and veterinary inspection requirements on confined wildlife permit holders. *See* 3 CSR 10-9.353(3), (17). Breeders must also comply with other state and federal regulations pertaining to the movement of cervids and participate in a United States Department of Agriculture ("USDA") approved herd certification program. *Id.*

Cervid breeders must submit positive results for any disease test to the Department of Conservation and, if CWD is detected, comply with a herd disease response plan. 3 CSR 10-9.353(18). Breeders must complete and maintain certain documents when acquiring cervids. 3 CSR 10-9.353(19). The source herd from which a breeder acquires cervids must be enrolled in a USDA CWD-certification program. *Id.* Breeders must also complete an annual herd inventory and retain records for 5 years. 3 CSR 10-9.359(2). All animals over the age of six months at breeding facilities must be identified with an official ear tag or other USDA-approved identification device. *Id.*

Comparable recordkeeping and veterinary inspection requirements were imposed on hunting preserves. 3 CSR 10-9.565(1)(B); 3 CSR 10-9.566.

The Missouri Department of Agriculture also maintains regulations concerning the movement of captive cervids within Missouri. Those regulations require that cervids entering Missouri be inspected by a veterinarian, identified by an ear tag, accompanied by an entry permit, be free of brucellosis and tuberculosis, and come from a herd that has participated in a CWD-certification program for at least 5 years. 2 CSR 30-2.010(10); 2 CSR 30-2.020(6). Department of Agriculture regulations also require all cervids within Missouri over one year of age to be enrolled in a CWD program sponsored by the Department. 2 CSR 30-2.020(6). The Department of Agriculture's regulations provide that hunting preserves "must be permitted with the Missouri Department of Conservation (MDC) and comply with all regulations of the Wildlife Code." 2 CSR 30-2.020(6)(E).

Pre-trial proceedings

The plaintiffs sought a preliminary injunction only on the ground that the Commission lacked authority to enact the challenged regulations. *See* L.F. 286, 307-316, 369-370. The trial court adopted and entered the plaintiffs' proposed findings and conclusions. L.F. 371-434, 400-466. The court later amended the preliminary injunction to clarify that the Commission could continue enforcing regulations not challenged, including the regulations at issue as they existed before January of 2015. L.F. 494, 525.

Shortly before trial, the plaintiffs sought leave to file a Second Amended Petition adding Kevin Grace and Whitetail Sales and Service, LLC as plaintiffs. L.F. 841-845.

On June 6, the court entered an order permitting the addition of Grace and Whitetail Sales and Service, LLC as plaintiffs to Count 1, but not to Count 2. L.F. 886.

The trial evidence

The plaintiffs' evidence consisted largely of business records, certified copies of statutes and regulations, and their own testimony about their businesses and the impact of the challenged amendments. *See* L.F. 2216-2221, L.F. 2444-2446, 2460. The plaintiffs did not present any expert witnesses to address the threat posed by CWD, appropriate techniques for managing animal diseases, or suitable methods for constructing escape-proof fences; rather, the plaintiffs' only evidence about CWD or the necessity of the regulations concerned the Department of Conservation's elk restoration efforts, a section of the USDA website discussing ways to test for CWD, and a newspaper article discussing CWD. L.F. 2436-2443, 2519-2520.

Essentially all evidence concerning CWD came from the Commission's experts and the peer-reviewed materials on which they relied. The undisputed evidence showed that CWD affects cervids' brains and spinal cords, leading to disorientation and extreme emaciation. Tr. 273-274, 461. CWD is uniformly fatal. Tr. 275, 393, 399, 438, 460; L.F. 813, 1465, 1502, 2084, 2441. There is no cure or vaccination. Tr. 276; L.F. 2084. CWD has an incubation period of at least 18 months between the time an animal is infected and when it begins displaying symptoms. Tr. 274, 400-401, 461; L.F. 1168.

There is no approved live-animal test for CWD. Tr. 275; L.F. 1169. The only way to know an animal has CWD is post-mortem testing. Tr. 198-199, 275. Live-animal tests that exist can lead to false-negatives. Tr. 275, 404-405, 457-458; L.F. 1907-1908.

CWD can be spread directly through deer-to-deer contact or indirectly through environmental contamination. Tr. 274; L.F. 1880-1881. Although animals do not display symptoms for about 18 months, they begin shedding prions into the environment before that time. Tr. 274, 461. Prions can be taken up by plants and other matter in the environment and then passed to other cervids. Tr. 462; L.F. 1877-1879. Prions can also be spread by scavengers that consume infected cervid carcasses as well as by rainwater run-off (including from captive facilities). Tr. 493-494.

It is unknown how long prions can remain in the environment and infectious, but it has proven to be longer than five years. Tr. 470-471. Prions may remain in the environment more than a decade. L.F. 1875-1876, 1887-1888. Prions are extremely difficult to remove from the environment and are highly resistant to removal through chemicals. Tr. 463; L.F. 1880-1882.

CWD leads to dramatically decreased life expectancies. L.F. 2059. One study documented an average remaining life expectancy of 1.6 years for CWD-positive deer compared to 5.2 years for uninfected deer. Tr. 688; L.F. 2059. CWD does not immediately lead to mass mortalities among deer herds. Tr. 273-274. Because the disease is highly contagious and uniformly fatal, prevalence will eventually outpace reproduction, potentially leading to population decline. Tr. 277, 313-314, 685-686; L.F. 1919-1926, 2060, 2087.

In just over a decade, CWD prevalence rates in Wisconsin more than tripled to 30% in bucks and nearly 15% in does. L.F. 1177, 2020. In parts of Wisconsin, prevalence rates have reached nearly 50%. L.F. 1913. Prevalence rates of 50-80% have been detected in captive herds. L.F. 1178, 1884, 1886, 1962-1963.

There are no proven methods to eradicate CWD from free-ranging populations. Tr. 411, 438, 764; L.F. 1173. Nor are there any known methods to limit the risk of indirect transmission from environmental contamination. L.F. 1352. The only viable management mechanism once CWD is established is repeated culling of deer in the area. Tr. 283-284, 468-469, 680-683.

Controlling the spread of CWD is difficult and expensive. L.F. 1173. States have spent millions of dollars attempting to control CWD. L.F. 1180. Preventing CWD's introduction is the only effective management strategy. Tr. 314, 409-410; L.F. 1173.

There is no other disease like CWD because other diseases are not uniformly fatal, do not leave environmental contamination, and can be controlled or eliminated. Tr. 460-463. CWD constitutes a risk to the viability of deer in North America. L.F. 1948.

Human transportation of cervids across state lines is the most commonly cited way CWD is spread. Tr. 468, 757-761; L.F. 1174, 1867, 1964-1965, 2091, 2103. Movement of live animals increases the risk of spreading disease, and it is common disease management not to transport potential disease carriers. Tr. 471. CWD was spread to Saskatchewan by a shipment of elk from South Dakota. L.F. 1870-1871. It was spread to the Toronto Zoo by a shipment from the Denver Zoo. L.F. 1926-1928. It was spread

to South Korea by a shipment of elk from Canada. L.F. 1868-1870. CWD-positive animals have also been moved between captive facilities in the same state. L.F. 1928.

A white-tailed deer's dispersal distance is approximately 25 miles. Tr. 315-316. Before 2011, CWD had not been detected within 25 miles of Missouri. *Id.*; L.F. 1116.

The increased density of animals in captive cervid facilities increases the risk of disease transmission, including the spread of CWD. Tr. 281, 754; L.F. 2077-2081.

The USDA maintains a program through which captive cervid herds can become "CWD-certified." Tr. 42; L.F. 1968-1969. This is not a "CWD-free" certification; no such certification exists. Tr. 91, 320, 415; L.F. 1182, 1968-1969. The USDA program was developed before recent developments in the scientific community's understanding of CWD. L.F. 1977-1978. CWD-certified herds have been found to contain cervids infected with CWD long after being certified. Tr. 320; L.F. 1184-1188, 1969-1970.

There are documented instances of CWD-positive animals from CWD-certified herds being shipped interstate. Tr. 424, 476-477; L.F. 1184, 1979-1980. There are documented instances of animals from herds later found to have CWD being shipped interstate. L.F. 1184-1188. CWD-positive cervids can leave behind prions in trailers, which can later infect other animals. Tr. 472-473; L.F. 1930.

Every wildlife expert who appeared at trial testified that a restriction on the importation of cervids is an appropriate response to CWD. Tr. 282, 764-765 (Straka), 718 (Sumners), 430 (Fischer), 466-467 (Gillin); L.F. 1929, 1931, 2004 (Richards). Expert analysis in peer-reviewed articles similarly supports restricting importation of cervids. L.F. 2090, 2101-2105. Numerous states have banned either the importation of

cervids or private ownership of cervids altogether. Tr. 320-323; L.F. 1384-1402. An article introduced by the plaintiffs remarked that Missouri is the 25th state to ban the importation of white-tailed deer. L.F. 2442. Grace stated that Missouri is one of only 25 states where white-tailed deer can be raised. Tr. 187.

CWD has not yet spread to humans. Tr. 287. Lab tests, however, have shown that CWD can be pushed into human models of disease. L.F. 1911. Mad cow disease was incorrectly thought to be incapable of transmission to humans. Tr. 296-297, 398-399; L.F. 1908-1911. The federal Centers for Disease Control have expressed concern with the possibility that CWD may prove capable of infecting humans. Tr. 464-465.

One of the leading theories is that CWD originated when scrapie (a sheep disease) jumped the species barrier to deer at a research facility. Tr. 464; L.F. 1981. Primates have proven susceptible to CWD. L.F. 2089-2090. CWD has been experimentally transmitted to cattle, sheep, goats, mink, ferrets, voles, and mice. L.F. 2090.

CWD in other states

CWD was detected in Wisconsin during the fall 2001 hunting season. L.F. 1857. It is unknown where CWD in Wisconsin came from. L.F. 1989. CWD was discovered in Illinois just after it was discovered in Wisconsin. Tr. 444, L.F. 1943.

Colorado and Wyoming have had CWD in their free-ranging cervid populations far longer than other states. Tr. 497; L.F. 1991-1992. Their deer herds are currently undergoing significant population decline linked to CWD. Tr. 277, 314; L.F. 2103. In Wyoming, the increase in prevalence of CWD in the South Converse mule deer herd from 15% to 47% between 2001 and 2010 coincided with an estimated 56% decline in

herd population. L.F. 1352. Modeling has indicated that the herd will go extinct within 41 years without proper management. L.F. 1924-1926. Colorado's mule deer herd has declined by 45% over the last two decades as CWD prevalence rates have increased. *Id.*

In parts of Wisconsin, CWD prevalence has reached 50%. L.F. 1913. Prevalence of CWD in Wisconsin has increased dramatically over the last 15 years. Tr. 277, 683-685; L.F. 1933. Between 2002 and 2014, prevalence rates in Wisconsin increased from 8-10% to 30% in bucks and 3-4% to nearly 15% in does. L.F. 1177, 2020.

Elk restoration in Missouri

In 2010, the Department of Conservation began efforts to restore elk to three southeastern counties as part of the Commission's constitutional duty to restore Missouri wildlife. Tr. 368-369; L.F. 2436. At that time, there were no free-ranging elk in Missouri. Tr. 298. Between 2011 and 2013, 110 elk were imported to Missouri. Tr. 287-288; L.F. 2436. Dr. Straka testified that the elk restoration project was largely developed before she joined the Department of Conservation, and that she would not recommend a similar project based on current knowledge of CWD. Tr. 287-288, 771.

As part of the effort, the Commission developed stringent protocols to prevent diseased elk from being introduced. Tr. 289, 301-302; L.F. 2437. Elk had to come from states with no CWD detections and from herds participating in a free-range equivalent of the USDA's herd certification program. Tr. 291-292; L.F. 2437. Before importation, all elk were tested for numerous diseases, including CWD. Tr. 289; L.F. 2437. While the test cannot conclusively determine whether an animal is CWD-free, it can conclusively determine that an animal has CWD. Tr. 301. Under the restoration protocol, the

Commission determined that if a single animal tested positive for CWD, the project would be called off. *Id.* The elk were quarantined for approximately 100 days before importation and for several weeks after they arrived. Tr. 301-302, 771.

The Hill and Broadway businesses and the amended regulations

Hill uses the deer he breeds to stock his hunting preserve. Tr. 507. He testified that nearly every deer in his breeding operation is destined for the hunting preserve at some point in its life. Tr. 77-78, 528. While Hill sometimes sells deer to others, it is not a major component of his business. *See* Tr. 42-43; L.F. 1154-1157, 1637-1640. He cannot and does not sell white-tailed deer meat commercially. Tr. 551.

At his hunting business, Hill provides lodging, food, drink, and guides to his customers. Tr. 56, 129-130; L.F. 1132-1133. He generates income from the sale of hunts and Oak Creek merchandise, but not from the sale of crops, livestock, or farm products. L.F. 1154-1157, 1637-1640. Hill's customers pay up to $40,000 for a hunt, based on the type of antlers they desire. Tr. 56; L.F. 1134-1135. Hill earned more than $2,000,000 from hunts in both 2014 and 2015. L.F. 2720, 1637-1640, 2391-2394.

Hill only imports bucks from out of state to place them on his hunting preserve. Tr. 84-85. He does not import does. *Id.* Imported bucks placed on the hunting preserve are typically shot within two weeks. Tr. 85-86, 538. Deer released onto the preserve from Hill's breeding facility are often shot within a similar time frame. Tr. 538. Hill does virtually all his breeding through artificial insemination. Tr. 132, 529-530. He has not imported a deer to use in his breeding operation in recent memory. Tr. 19.

Hill testified that he would go bankrupt if the importation ban went into effect. Tr. 72-73. In 2014, approximately half the deer Hill purchased for hunts on his property came from out of state. Tr. 98-99. He opined that he could not acquire enough deer to meet customer demand from within Missouri and that he tries to purchase everything he can in-state. Tr. 62. He also testified, however, that he was not familiar with the deer kept at all of Missouri's captive cervid facilities. Tr. 128-129. Hill testified that he will lose repeat customers if he is unable to supply the trophy animals they want and that he would have to return deposits he needs to meet expenses. Tr. 55-56, 71-72.

Hill did not introduce any evidence concerning what it would cost him to comply with the new fencing standards. The only evidence he submitted related to fencing costs was an invoice documenting expenses of $84,000 to install fencing under the prior standard, which was not challenged. L.F. 2514.

Broadway did not introduce any evidence that he earns any income from the sale of crops, livestock or farm products. He offers three-day hunts including lodging, meals, and processing services. Tr. 212. Broadway also operates a "very limited" elk breeding program. Tr. 215. Broadway's son-in-law Jacques deMoss, who manages the business, testified that if the importation ban goes into effect, Winter Quarters would be unable to obtain sufficient elk for upcoming hunts. *Id.*

All of the white-tailed deer Broadway purchased in 2014 came from within Missouri. L.F. 1099. deMoss testified that Winter Quarters had fewer than five trophy animals, and that it had been selling 8-10 elk hunts per year. *Id.*

deMoss testified that Winter Quarters' elk breeding operation had recently failed to result in any offspring, due to either birth complications or predation. Tr. 776-777; L.F. 2110. While Winter Quarters could have imported elk for its breeding program after acquiring the Heartland Ranch property, it chose not to do so, and instead purchased animals to be hunted. Tr. 219-220. Winter Quarters currently uses natural breeding, but could switch to artificial insemination if necessary. Tr. 220. deMoss testified that there were only six or seven elk harvested from the property in 2014. Tr. 221-222. At trial, deMoss testified that there was no hunting activity on Winter Quarters in the previous season, but that it had continued its breeding operations. Tr. 595.

deMoss testified that Winter Quarters was going to spend "a good deal of money" to re-brand once the herd plan expires but was unable to quantify what he meant by "a good deal of money." Tr. 610-611. He testified that it had held off on re-branding due to uncertainty about whether it would have to replace its fences. *Id.*

Broadway introduced no evidence about what it cost him to comply with existing fencing standards. The only evidence he introduced concerning the cost to comply with the new fencing standards was the estimation of Jacques deMoss that it would cost $450,000 to re-fence the entire property, including property not used for permitted purposes. Tr. 598-599, 606-607.

Fencing standards

Under the Commission's regulations, wildlife breeders and hunting preserve owners must report all escapes to the Department of Conservation. Tr. 636; *see* 3 CSR 10-9.353(15), 3 CSR 10-9.565(1)(B)(5). When the Commission proposed the regulatory

amendments at issue, it had documented the escape of approximately 150 captive cervids in the previous three years. Tr. 628-629, 636-637; L.F. 52. The Commission documented 120 additional escapes by the time of trial. Tr. 637-639, L.F. 1671-1672.

The plaintiffs have had problems with deer escaping or animals entering their facilities. Tr. 516-517 (Hill), 575, 584-585 (Grace), 739-740, 777 (Heartland Ranch/Winter Quarters). Deer have also escaped from the facility of former plaintiff Troy Popielarz. Tr. 639-641; L.F. 1673-1674. A deer was seen escaping from the Heartland Ranch property after CWD was discovered there. Tr. 739-740. The vast majority of free-ranging deer discovered to have CWD in Missouri have been found near active or closed captive facilities. Tr. 311, 673-674. Other states have experienced CWD outbreaks near captive cervid facilities. L.F. 1888, 1962-1964, 2049-2050.

Under the prior regulations, approval of fences was ultimately left to local conservation agents. Tr. 630-631, 654. The Commission decided to enact new fencing standards because the prior regulations were deemed too vague and because deer continued to escape from captive facilities. Tr. 631-632; L.F. 52. In drafting the new standards, the Commission considered peer-reviewed sources addressing the types of fencing adequate to prevent escape, as well as standards used in other states. Tr. 659-660, 692-705, 719; L.F. 52, 2035-2052.

Before issuing fencing regulations, the Commission held public meetings attended by the captive cervid industry. L.F. 52. The first proposed amended fencing standards called for double-fencing around captive cervid facilities. L.F. 52-54. Existing facilities were exempted in response to concerns from the captive cervid industry. L.F. 52.

In response to comments, the Commission chose to subject all existing facilities to the regulations and to require them to come into compliance by June 30, 2016. L.F. 1652-1653. However, the Commission also determined that improved fencing standards, in conjunction with an importation ban and enhanced testing requirements, would adequately protect against CWD. L.F. 1652. Accordingly, it removed the double-fencing requirement. L.F. 1652-1653. The plaintiffs were aware of the Commission's proposed rulemaking. Tr. 86-87. The Commission estimated the combined maximum economic impact on all private individuals to be approximately $2,239,000 for hunting preserves and $231,000 for breeding facilities. L.F. 1654-1658.

The judgment

Following trial, the parties submitted proposed findings of fact and conclusions of law. L.F. 957-1040. On September 15, 2016, the court adopted and entered the plaintiffs' proposed findings and conclusions. L.F. 2524-2568. Aside from the removal of footnotes, the court's judgment was essentially identical to the plaintiffs' proposal. *See* L.F. 995-1040, 2524-2568.

The court's judgment contained the same language regarding the Commission's ability to continue enforcing unchallenged regulations that was present in the preliminary injunction order. *See* L.F. 466, 2567-2568. Following entry of the judgment, the Commission filed a motion to amend the judgment or to stay the injunction pending appeal. L.F. 2677-2694. The court entered an amended judgment clarifying that the Commission could enforce any regulations not challenged by the plaintiffs, but otherwise denied the motion. L.F. 2701-2748.

The Court of Appeals

The Commission filed a notice of appeal, and the Missouri Court of Appeals issued an opinion transferring the appeal to this Court: "We would reverse the judgment of the trial court. However, because of the general interest and importance of the questions involved here, we transfer this case to the Missouri Supreme Court under Rule 83.02." No. ED105042, Opinion at 1.

The opinion of the Court of Appeals explained that the Commission had the authority to issue the amended regulations, stating: "we would find Respondents' captive cervids to be 'game resources of the state,' and as such, subject to regulation by the Commission." *Id.* at 13. The Court of Appeals also stated: "Given the highly communicable nature of CWD in that it can be spread both directly and indirectly through environmental contamination, the Commission's efforts to restore and conserve free-ranging cervids would be threatened without the authority to regulate all cervids capable of infecting free-ranging cervids with this fatal disease. We would find the Commission's authority to regulate free-ranging cervids, therefore, to include the authority to regulate importation and possession of other cervids, which could pose a serious and fatal threat to those free-ranging cervids." *Id.* at 13-14.

The opinion of the Court of Appeals concluded that the amended regulations did not violate the plaintiffs' "right to farm," stating that the plaintiffs "failed to establish that the challenged regulations violated their constitutional rights." *Id.* at 17.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR THE PLAINTIFFS ON COUNT 1 AND DENYING THE COMMISSION'S MOTIONS TO AMEND THE JUDGMENT BECAUSE THE COURT ERRONEOUSLY DECLARED AND APPLIED THE LAW IN THAT CAPTIVE CERVIDS ARE GAME AND WILDLIFE RESOURCES OF THE STATE UNDER THE MISSOURI CONSTITUTION, AND THE COMMISSION HAS AUTHORITY TO ENACT REGULATIONS CONCERNING CAPTIVE CERVIDS BECAUSE THEY CAN PASS CWD AND OTHER DISEASES TO MISSOURI'S FREE-RANGING CERVIDS.

Mo. Const. art IV, § 40(a).

State v. Weber, 102 S.W. 955 (Mo. 1907).

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR THE PLAINTIFFS ON COUNT 2 AND DENYING THE COMMISSION'S MOTIONS TO AMEND THE JUDGMENT BECAUSE THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED THE LAW IN THAT: (A) THE RIGHT TO FARM IS SUBJECT TO THE COMMISSION'S CONSTITUTIONAL POWERS; (B) THE PLAINTIFFS ARE NOT ENGAGED IN FARMING OR RANCHING PRACTICES; (C) THE COURT GAVE INSUFFICIENT WEIGHT TO THE COMMISSION'S CONSTITUTIONAL AUTHORITY; (D) THE CHALLENGED REGULATIONS DO NOT HEAVILY BURDEN ANY RIGHT TO FARM THE PLAINTIFFS MAY HAVE; (E) THE CHALLENGED REGULATIONS ARE RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST; AND (F) THE CHALLENGED REGULATIONS ARE NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST.

Mo. Const. art IV, § 40(a).

State ex rel. Gordon v. Becker, 49 S.W.2d 146 (Mo. 1932).

Shoemyer v. Missouri Secretary of State, 464 S.W.3d 171 (Mo. banc 2015).

III. IN THE ALTERNATIVE, THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ENJOINING THE ENFORCEMENT OF THE AMENDED REGULATIONS UNDER COUNT 2 AS TO ALL PERSONS BECAUSE THE INJUNCTION IS OVERBROAD AND VOID AS TO NON-PARTIES IN THAT THE INJUNCTION PURPORTS TO ENJOIN ENFORCEMENT OF THE CHALLENGED REGULATIONS STATE-WIDE AS TO ALL PERSONS, EVEN THOUGH THIS CASE WAS NOT TRIED AS A CLASS ACTION, THE PLAINTIFFS DID NOT FACIALLY CHALLENGE THE CONSTITUTIONALITY OF THE REGULATIONS UNDER COUNT 2, AND THE INJUNCTION IS NOT SUPPORTED BY EVIDENCE AS TO NON-PARTIES.

Mo. Const. art IV, § 40(a).

Doe v. Phillips, 259 S.W.3d 34 (Mo. App. 2008).

Blando v. Reid, 886 S.W.2d 60 (Mo. App. 1994).

City of Greenwood v. Martin Marietta Materials, 311 S.W.3d 258 (Mo. App. 2010).

ARGUMENT

The Missouri Constitution empowers the Commission to protect the people's interest in Missouri's fish, game, and wildlife. The record establishes the clear threat of chronic wasting disease to white-tailed deer in Missouri. The plaintiffs' self-serving claim to the contrary is unsupported by any expert testimony. CWD's danger to the deer population and its ability to jump to new species cannot be denied or wished away. The Commission acted well within its powers in taking steps to alleviate the threat of CWD and protect the people and resources of Missouri.

The "right to farm" is not implicated by the plaintiffs' activities. Importing white-tailed deer with huge antler racks from out of state to facilitate $5,000 to $40,000 hunts in private hunting areas does not constitute farming, and it does not insulate the captive cervid industry from the meaningful regulation necessary to protect ordinary Missouri citizens' ability to enjoy wildlife within this state.

The Court of Appeals correctly decided that the Commission had the authority to issue the amended regulations and that the amended regulations did not violate the "right to farm." The judgment of the trial court should be reversed.

All of the issues set forth below were preserved for review in the trial court in the Commission's answers, trial briefing, motion for judgment, post-judgment motions, and notice of appeal. L.F. at 79, 142, 243, 469, 912, 925, 934, 2677, 2749, 2765.

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR THE PLAINTIFFS ON COUNT 1 AND DENYING THE COMMISSION'S MOTIONS TO AMEND THE JUDGMENT BECAUSE THE COURT ERRONEOUSLY DECLARED AND APPLIED THE LAW IN THAT CAPTIVE CERVIDS ARE GAME AND WILDLIFE RESOURCES OF THE STATE UNDER THE MISSOURI CONSTITUTION, AND THE COMMISSION HAS AUTHORITY TO ENACT REGULATIONS CONCERNING CAPTIVE CERVIDS BECAUSE THEY CAN PASS CWD AND OTHER DISEASES TO MISSOURI'S FREE-RANGING CERVIDS.

The trial court's judgment is based on the erroneous conclusion that, as a matter of law, privately held animals of any species are not game or wildlife. L.F. 2725-2732. The court alternatively ruled that privately held wildlife is not a "resource of the state." L.F. 2732-2733. The Court should reverse this erroneous judgment.

The validity of the amended regulations is a question of law that is reviewed de novo. *See St. Louis Ass'n of Realtors v. City of Ferguson*, 499 S.W.3d 395, 398 (Mo. App. 2016). On review of a court-tried case, this Court will affirm unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Doe v. St. Louis Cty. Police Dep't*, 505 S.W.3d 450, 453 (Mo. App. 2016). The trial court's application of statutory requirements is a question of law rather than fact; therefore, this Court reviews the trial court's application of statutory requirements de novo. *Id.*

Regulations will be sustained unless unreasonable and plainly inconsistent with the enabling authority "and are not to be overturned except for weighty reasons." *Termini v. Missouri Gaming Comm'n*, 921 S.W.2d 159, 161 (Mo. App. 1996). The burden is upon the challenger of a regulation "to show the regulation bears no reasonable relationship to the legislative objective." *Id.* An administrative agency may exercise only the authority granted to it. *See Pen-Yan Inv., Inc. v. Boyd Kansas City, Inc.*, 952 S.W.2d 299, 303-04 (Mo. App. 1997). Regulations that exceed an agency's authority are void. *Id.* at 304. The grant of authority can be either express or implied. *Id.* An agency's power may be implied where it necessarily follows from the language of the statute or constitutional provision. *Id.*

A. Captive cervids are wildlife and game resources of the state.

The Commission's authority to issue these amended regulations comes directly from the Missouri Constitution. Article IV, Section 40(a) provides:

> The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission . . . .

1. Captive cervids are wild game animals.

"Game" and "wildlife" are not defined and must be construed as they would have been understood by the voters who adopted the provision, which is presumptively their ordinary and usual meaning. *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002).

The term game "means animals feræ naturæ, or wild by nature." *State v. Weber*, 102 S.W. 955, 957 (Mo. 1907). As to whether deer were "game" under Missouri law, this Court in *Weber* stated: "It makes no difference that said deer were raised in captivity, and had become tame. They are naturally wild." *Id.* The Court held that the term "game animals" was "broad and comprehensive enough to embrace within its meaning all kinds of deer, whether tame or wild." *Id.* at 956.

Weber is dispositive of this case. Deer are game even if they are privately held and raised in captivity because, as a species, they are naturally wild. Neither the plaintiffs nor the trial court identified any reason the voters who adopted Article IV, Section 40(a) would have understood the term "game" differently.

Unlike the deer in *Weber*, the plaintiffs' deer are routinely hunted and are bred for the ultimate purpose of being hunted. Tr. 77-78, 85-86, 160, 507, 528. This puts them squarely within dictionary definitions of game, which include animals commonly hunted for food or sport. *See American Heritage College Dictionary* 559 (3d ed. 1993); *Concise Oxford American Dictionary* 370 (2006); *Black's Law Dictionary* 793 (10th ed. 2014).

"Wild animal" is similarly defined. It is not a technical term. *Hudson v. Janesville Conservation Club*, 484 N.W.2d 132, 136 (Wis. 1992). Quoting several dictionaries, the Wisconsin Supreme Court held that wild animals, or animals feræ naturæ

include: "Animals of an untameable disposition, animals in a state of nature" or "living in a state of nature and ***not ordinarily tame or domesticated***." *Id.* (emphasis added) (internal quotation marks omitted). Applying these definitions, the court held that a captive deer was a wild animal. *Id.* at 136-37. The Supreme Court of Louisiana reached the same conclusion. *See Briley v. Mitchell*, 115 So. 2d 851, 854 (La. 1959).

As these authorities make clear, the plain and ordinary meaning of the terms "game" and "wildlife" (which is indistinguishable from "wild animal") include animal species that are wild by nature. Deer and elk plainly belong to that category of animals. Nothing in the ordinary definitions of those terms restricts their meaning to free-ranging animals. The trial court's holding that the plaintiffs' cervids are not wildlife or game because they are privately held was wrong as a matter of law.

These plaintiffs have conceded that their animals are indistinguishable from free-ranging cervids. L.F. 785-788. Hill, for example, repeatedly admitted his deer are "wild" and "game." Tr. 115-116, 539-542, 559-560. And a video of bucks fighting on Hill's property (which he uses to show his customers that his deer are wild and his hunts are real) demonstrates that they are exactly like free-ranging deer. *See* Tr. 540-542; Def. Ex. FFF. These wild game animals are subject to the Commission's regulations.

The plaintiffs' suggestion in the trial court and in the Court of Appeals that the deer they offer for hunting purposes are not wildlife or game is nonsense. Any question about whether captive cervids are "wild" is refuted by Mr. Hill's promotional video, Exhibit FFF, filed with the Court. These captive cervids are wild, as Mr. Hill emphasizes to his customers when charging them to hunt.

2. Captive cervids are resources of the state.

The Constitution gives the Commission authority to control, regulate, and conserve the game and wildlife resources of the state. As with the terms game and wildlife, the phrase "resources of the state" is not defined, and its ordinary meaning controls. *Farmer*, 89 S.W.3d at 452.

"Resource," in this context, means "something that a country, state, etc. has and can use to its advantage." *Webster's New World College Dictionary* 1237 (5th ed. 2014). This does not mean the state must "own" the entirety of the resource. Coal, minerals, and oil are, in common parlance, considered resources a state and its citizens can use to increase their wealth, regardless of ownership. A state's human resources include its citizenry, which the state obviously does not own. Courts have interpreted the phrase "resources of the state" to apply to both publicly and privately owned resources and property. *See, e.g.*, *Cherenzia v. Lynch*, 847 A.2d 818, 822-23 (R.I. 2004); *State v. Hansen*, 11 Cal. Rprt. 335, 338 (Cal. Ct. App. 1961); *Briere v. Tusia*, 2011 WL 4509502, at *2-4 (Conn. Sup. Ct. May 16, 2011).

This Court has broadly interpreted similar language in the conservation context. In *Reid v. Ross*, 46 S.W.2d 567 (Mo. banc 1932), the Court interpreted the phrase "any of the waters of this state" in a statute prohibiting certain fishing methods. The Court reasoned that the "words employed are broad and all-inclusive in their purport." *Id.* at 569. Their breadth was demonstrated by the fact that the legislature expressly excluded certain privately owned waters. *Id.* The Court thus concluded the phrase meant "any of the waters in this state in which fish do, or may, have a habitat," except those specifically

excluded. *Id.* In *State v. Taylor*, 214 S.W.2d 34 (Mo. banc 1948), the Court concluded a similar statute prohibited fishing with explosives in a privately owned pond, reasoning that "any waters of this State" should be given broad meaning. *Id.* at 284.

The phrase "resources of the state" in Article IV, Section 40(a) is similarly broad, and – unlike the statute in *Reid* – contains no exceptions. While construction of constitutional provisions should be neither liberal nor broad, "in arriving at the intent and purpose the construction should be broad and liberal rather than technical, and the constitutional provision should receive a broader and more liberal construction than statutes." *State Highway Comm'n v. Spainhower*, 504 S.W.2d 121, 125 (Mo. 1973). Under basic constitutional interpretation principles, the wildlife and game resources of Missouri include both free-ranging and privately possessed animals.

The Constitution likewise gives the Commission authority over all property used for game and wildlife purposes. Mo. Const. art. IV, § 40(a). The plaintiffs' cervid breeding facilities and hunting preserves are plainly property used for game and wildlife purposes; thus, they are subject to these amended regulations.

B. Missouri statutes confirm the Commission's authority.

Where a constitutional provision is ambiguous, the legislature's interpretation is persuasive, particularly where the legislature construes the provision soon after its adoption. *Rathjen v. Reorganized Sch. Dist. R-II of Shelby Cty.*, 284 S.W.2d 516, 534 (Mo. banc 1955); *Gantt v. Brown*, 149 S.W. 644, 646 (Mo. banc 1912). The legislature may enact laws consistent with the Constitution's grant of authority to the Commission. Mo. Const. art. IV, § 44; *Marsh v. Bartlett*, 121 S.W.2d 737, 744 (Mo. banc 1938).

Voters adopted Article IV, Section 40(a) in 1936, and the legislature enacted the Wildlife and Forestry Law in 1945. *See, e.g.*, § 252.020, RSMo. The Wildlife and Forestry Law codifies the Commission's creation, recognizes its authority, and provides a definition of "wildlife." *See Miller v. City of Manchester*, 834 S.W.2d 904, 907 (Mo. App. 1992). "Wildlife" is defined as:

> [A]ll wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification, whether resident migratory or imported, protected or unprotected, dead or alive, ***and shall extend to and include any and every part of any individual species of wildlife***.

§ 252.020(3), RSMo (emphasis added).

Thus, whether a species is "wildlife" does not depend on whether it is free or captive; it depends on the nature of the species. Wildlife includes species in any condition that are of an untamable disposition and typically capable of surviving without human assistance. *See Hudson*, 484 N.W.2d at 447. If Missouri species like rattlesnakes or bobcats were held in captivity, they would still be wildlife. White-tailed deer and elk are such species. The species-based approach to wildlife classification used in the statute is consistent with the Commission's interpretation of Article IV, Section 40(a).

The state has "ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive." § 252.030, RSMo. Thus, while individuals may possess and own wildlife, an individual's ownership interest is subject to

the regulatory power of the state. Under the Missouri Constitution and the Wildlife and Forestry Law, that regulatory power is exercised by the Commission. *Marsh*, 121 S.W.2d at 744; § 252.020(1), RSMo; *see Taylor*, 214 S.W.2d at 36.

Section 252.040, RSMo, makes clear the legislature's understanding that the Commission has authority to set restrictions on the private possession of wildlife, or to ban it altogether: "No wildlife shall be pursued, taken, killed, possessed or disposed of except in the manner, to the extent and at the time or times permitted by [the Commission's] rules and regulations." Possession of wildlife on any other terms is a misdemeanor. §§ 252.040, 252.190, RSMo. This is wholly inconsistent with the notion that the Commission lacks authority over captive cervids.

The trial court's interpretation also conflicts with Missouri tax statutes, which define "captive wildlife" to include "captive white-tailed deer, captive elk, and captive furbearers held under permit issued by the Missouri department of conservation for hunting purposes." § 144.010.1(3), RSMo. If captive animals were not wildlife, the designation of such animals as "captive wildlife" requiring a permit from the Department of Conservation would be nonsensical. *See Seeton v. Pennsylvania Game Comm'n*, 937 A.2d 1028 (Pa. 2007) (captive boar at a private shooting preserve were wild mammals).

The trial court cited *Indiana Department of Natural Resources v. Whitetail Bluff, LLC*, 25 N.E.3d 218 (Ind. Ct. App. 2015), as a "comparable case" holding that a state agency exceeded its authority by regulating captive cervids. L.F. 2719. That case is not comparable because it was based on a statute ***excluding from the authority of the state***

agency wild animals "legally owned or being held in captivity under a license or permit." *Whitetail Bluff*, 25 N.E.3d at 225-27. Missouri law contains no such exclusion.

C. *Oak Creek* does not aid the plaintiffs.

The trial court's reliance on *Oak Creek Whitetail Ranch, LLC v. Lange*, 326 S.W.3d 549 (Mo. App. 2010), is also misplaced. In *Oak Creek*, a panel of the Court of Appeals held that Hill's breeder deer were "domestic animals" for the purposes of section 273.020, RSMo, which provides a cause of action for owners of "sheep or other domestic animals" whose animals are injured by dogs. In *Oak Creek*, dogs entered Hill's property and killed several deer. 326 S.W.3d at 549. The record in that case showed the deer had "never been in the wild," were "all penned and hand-fed," and "raised in an environment that did not allow them to move freely beyond their confined area." *Id.* at 550.

Because section 273.020 did not define "domestic," the plain meaning controlled. *Id.* The *Oak Creek* panel reasoned that "domestic" meant "[l]iving in or near the habitation of man; domesticated; tame," and that "domestic animal" meant "[a]ny of the various animals, as the horse, ox, or sheep, which have been domesticated by man so as to live and breed in a tame condition." *Id.* The Court of Appeals held that this definition covered the deer at issue in *Oak Creek*.

Oak Creek does not control this case. *Oak Creek* did not require the Court of Appeals to interpret the terms "wildlife" or "game" under the Missouri Constitution and the Wildlife and Forestry Law, or to consider the scope of the Commission's authority. The term "domestic" does not appear anywhere in Article IV, Section 40(a) or the

Wildlife and Forestry Law. *Oak Creek* simply does not stand for the proposition that captive white-tailed deer and elk are "domestic" and therefore not "wildlife" or "game."

This Court held that the deer in *Weber* were game animals ***even though*** they were "part of a herd of tame or domesticated deer which were . . . [not] permitted to run at large, or to be hunted as game" because deer are naturally wild. 102 S.W. at 955-57. *Oak Creek* cannot and did not overrule *Weber*, which makes clear that the terms "game" and "domesticated" are not mutually exclusive.

D. The Commission has authority to prevent the spread of CWD.

Further, the Commission's authority to enact the challenged regulations need not depend on whether captive cervids are game, wildlife, or resources of the state. Regardless of how ***captive*** cervids are classified, Missouri's ***free-ranging*** cervids are unquestionably wildlife resources of the state. The Commission is constitutionally vested with the "control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes." Mo. Const. Art. IV, § 40(a). Conserve means to "to keep from being damaged, lost, or wasted." *Webster's New World College Dictionary* 317 (5th ed. 2014). The Commission could not fulfil this obligation if it lacked authority to regulate the possession and importation of captive animals ***of the same species*** that are capable of infecting free-ranging wildlife with deadly diseases like CWD.

Courts routinely hold that state agencies tasked with protecting wildlife would be powerless to do so effectively if they could not regulate privately held animals. *See*

Farris v. Ark. State Game & Fish Comm'n, 310 S.W.2d 231, 235 (Ark. 1958); *Draffen v. Black*, 192 S.W.2d 362, 363-64 (Ky. Ct. App. 1946); *State v. Heard*, 151 So. 2d 417, 421-23 (Miss. 1963); *see also Weber*, 102 S.W. at 957-58. Regulation of privately held animals is justified where "there is a disease common to the native as well as the [imported animals]," making it necessary "to regulate the latter for the purpose of protection of the native." *State v. Miller*, 271 P. 826, 828-29 (Wash. 1928).

The undisputed trial evidence amply demonstrates that CWD is a grave threat to Missouri's free-ranging cervids. CWD is always fatal. Tr. 275, 393, 399, 438, 460, L.F. 813, 1465, 1502, 2084, 2441. CWD has no cure. Tr. 276, L.F. 2084. It has a minimum incubation period of 18 months. Tr. 274, 400-401, 461; L.F. 1168. CWD leads to dramatically decreased life expectancies and eventually population decline. Tr. 688, L.F. 1351-1352, 1919-1926, 2059-2060, 2087, 2103. Cervids can carry CWD and infect other animals for extended periods of time before displaying symptoms. Tr. 274, 461. The prions that carry CWD can be shed into the environment, taken up by plants, and remain there for ***decades***, infecting other animals. Tr. 462, 470-471; L.F. 1172, 1875-1879. It is practically impossible to sanitize an area where prions have been shed, and the only viable management mechanism is repeated mass culling of free-ranging cervids. Tr. 463, 283-284, 468-469, 680-683; L.F. 1880-1882. The plaintiffs introduced zero evidence refuting any of these facts.

"When faced with a threat such as CWD, the states are not required to wait until potentially irreversible damage has occurred" to address it. *Bean v. Bredesen*, 2005 WL 1025767, at *4 (Tenn. Ct. App. 2005). States have "a legitimate interest in guarding

against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." *Maine v. Taylor*, 477 U.S. 131, 148 (1986). The trial court erroneously declared and applied the law by effectively holding the Commission lacks authority to enact regulations to prevent the spread of CWD until the disease actually ravages Missouri's free-ranging cervid populations, by which time such regulations will be too late.

E. The judgment should be reversed.

It is the plaintiffs' burden to demonstrate that the amended regulations have no reasonable relationship to the Commission's constitutional objective. *See Termini*, 921 S.W.2d at 161. They have failed to do so. Whatever the plaintiffs and the trial court may think of the extent of the threat posed by CWD, the ***existence*** of that threat is undisputed. Section 40(a) therefore empowered the Commission to enact the challenged regulations.

The power to conserve Missouri's wildlife necessarily includes the power to prevent the importation, possession, and escape of animals that pose a threat to that wildlife. For example, the Commission maintains regulations prohibiting the importation and possession of invasive wildlife species that are injurious to other wildlife. *See* 3 CSR 10-4.117. Under the trial court's erroneous reasoning, those regulations would be beyond the Commission's authority because privately held animals would not be wildlife resources of the state. Individuals would be free to import and possess all manner of creatures regardless of the consequences to Missouri's native wildlife. This is not and cannot be the law.

Notably, the plaintiffs have only claimed that the Commission lacked authority to amend existing regulations – the plaintiffs have not challenged the regulations relating to captive cervids and private hunting preserves as they existed before amendment. For example, the plaintiffs do not argue the Commission lacks authority to require them to obtain appropriate permits as required by existing regulations. *See*, *e.g.*, 3 CSR 10-9.105; 3 CSR 10-9.353; 3 CSR 10-9.560. ***Thus, under the trial court's judgment, the Commission continues to enforce the pre-amendment regulations of captive cervids in general and of these plaintiffs in particular.***

If the Commission truly lacked authority over captive wildlife, any regulation of the plaintiffs' operations by the Commission would be invalid. The plaintiffs' acceptance of regulation in the form of existing permitting requirements is impossible to square with their argument that the Commission entirely lacks authority over privately held animals. By declining to challenge the existing regulations, the plaintiffs effectively concede that the Commission has authority over captive wildlife.

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR THE PLAINTIFFS ON COUNT 2 AND DENYING THE COMMISSION'S MOTIONS TO AMEND THE JUDGMENT BECAUSE THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED THE LAW IN THAT: (A) THE RIGHT TO FARM IS SUBJECT TO THE COMMISSION'S CONSTITUTIONAL POWERS; (B) THE PLAINTIFFS ARE NOT ENGAGED IN FARMING OR RANCHING PRACTICES; (C) THE COURT GAVE INSUFFICIENT WEIGHT TO THE COMMISSION'S CONSTITUTIONAL AUTHORITY; (D) THE CHALLENGED REGULATIONS DO NOT HEAVILY BURDEN ANY RIGHT TO FARM THE PLAINTIFFS MAY HAVE; (E) THE CHALLENGED REGULATIONS ARE RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST; AND (F) THE CHALLENGED REGULATIONS ARE NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST.

The plaintiffs claim that the "right to farm" amendment is a get-out-of-jail-free card that somehow exempts them from regulation. The judgment as to Count 2 should be reversed because plaintiffs Hill and Broadway do not engage in "farming and ranching practices" under Article I, Section 35 of the Missouri Constitution, and the challenged regulations do not heavily burden any farming or ranching practices in which they could conceivably be engaged. Therefore, the challenged regulations are subject to, at most,

rational basis review, which they easily satisfy. Even if the challenged regulations were subject to strict scrutiny, they are narrowly tailored to achieve a compelling state interest.

The Commission's constitutional authority, and the Commission's existing regulation of both captive cervids and the operations of these plaintiffs, were in place long before the "right to farm" amendment was passed in 2014. The amendment does not give any indication that Missouri voters intended to invalidate existing authority to regulate game and wildlife. The plain language of the amendment does not support the plaintiffs' argument that voters passed the amendment with the intent to repeal the Commission's conceded regulatory authority over captive cervids.

A statute's constitutionality is a question of law subject to de novo review. *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. banc 2006). Agency rules have the force and effect of law, *Woodall v. Director of Revenue*, 795 S.W.2d 419, 419 (Mo. App. 1990), and their constitutionality is reviewed in the same manner as that of statutes, *see Gray v. City of Florissant*, 588 S.W.2d 722, 724-25 (Mo. App. 1979). Constitutionality is presumed, and the plaintiff must prove the enactment "clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *Pearson v. Koster*, 367 S.W.3d 26, 43 (Mo. banc 2012) (internal quotation marks and alterations omitted). All doubts are resolved in favor of constitutionality. *Id.*

Constitutionality is evaluated in two steps. First, the court determines the applicable level of scrutiny. *Amick v. Director of Revenue*, 428 S.W.3d 638, 640 (Mo. banc 2014); *Weinschenk*, 203 S.W.3d at 210. To do so, it asks whether the regulation

impinges on a fundamental right or targets a suspect class. *Weinschenk*, 203 S.W.3d at 211. Fundamental rights include those "explicitly or implicitly guaranteed by the constitution." *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 331-32 (Mo. banc 2014). If a fundamental right is involved, the court then considers the degree to which the right is burdened. *Weinschenk*, 203 S.W.3d at 212, 215-16; *see also Peters v. Johns*, 489 S.W.3d 262, 273-74 (Mo. banc 2016). Where no fundamental right is involved or the regulation does not heavily burden the right, rational basis review applies. *Weinschenk*, 203 S.W.3d at 211, 215-16. If the regulation heavily burdens a fundamental right, it is subject to strict scrutiny. *Id.* at 215-16. Second, the court applies the appropriate level of scrutiny. *Id.* at 211.

A. The right to farm is subject to the Commission's constitutional powers.

Hill and Broadway mistakenly claim the challenged regulations burden their "right to farm" under the recently enacted Article I, Section 35 of the Missouri Constitution. This is the entire text of the "right to farm" amendment:

> That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

This amendment, enacted in 2014, is subject to the regulatory powers of the Commission, which are also created by the Missouri Constitution. It has long been settled that a constitutional amendment does not repeal the remainder of the constitution, but rather is "subject to all the limitations, express or implied, contained in the Constitution." *See State ex rel. Gordon v. Becker*, 49 S.W.2d 146, 147 (Mo. 1932). To hold otherwise would mean that an amendment "repealed practically the whole of the Constitution as it then stood, which of course is unthinkable." *Id.*

This Court has already considered the "right to farm" amendment and concluded that it is subject to the other powers set forth in the Missouri Constitution. In *Shoemyer v. Missouri Secretary of State*, 464 S.W.3d 171 (Mo. banc 2015), opponents argued that the ballot summary for the amendment was insufficient because it did not mention that the "right to farm" was subject to article VI of the constitution (relating to the powers of local governments).

The Court rejected this contention because "each section of the constitution is subject to limitations that may be found elsewhere in the constitution." *Id.* at 175. Regardless of the ballot summary, the "right to farm" was already subject to article VI and the other provisions of the Missouri Constitution:

> In this context, local governments have always had the powers enumerated in article VI, and the addition of this amendment does not alter or change article VI in any way. Nor, conversely, does article VI limit the 'right to farm' in such a way that it was necessary to include this limitation in

> the summary statement because local governments have always had the authority granted to them under article VI. As there was no change in the law, this omission did not render the ballot title insufficient or unfair.

Id.

For the same reason, the "right to farm" is subject to the constitutional powers of the Commission set forth in detail in Point I, above.

Contrary to the plaintiffs' claims in this case, the "right to farm" amendment "does not imply that the right would be unlimited or completely free from regulation, as no constitutional right is so broad as to prohibit all regulation." *Id.*; *see Dotson v. Kander*, 464 S.W.3d 190, 198 (Mo. banc 2015) (noting restrictions on the right to bear arms).

The Court is currently considering a criminal case in which the defendant is claiming that his marijuana "farming" is protected by the "right to farm" amendment. *See State v. Shanklin*, No. SC96008. *Shanklin* is docketed for oral argument on November 7, 2017. The issue raised by the defendant in *Shanklin* is whether section 195.211, RSMo, violates the "right to farm." Section 195.211 makes it a felony "for any person to distribute, deliver, manufacture, [or] produce" marijuana. In prior cases, the "right to farm" has been held not to bar the General Assembly's power to bar the "farming" of marijuana under article III (vesting legislative power in the General Assembly). *See State v. Loesch*, No. 12AC-CR02624-01 (Cole County Cir. Court Sept. 1, 2015) (denying motion to dismiss charges of growing, planting, cultivating, and harvesting marijuana); *State ex rel. Loesch v. Green*, No. WD79012 (Mo. App. Sept. 21,

2015) (denying prohibition); *United States v. White*, 2016 WL 4473803 (W.D. Mo. Aug. 23, 2016) (denying motion to dismiss marijuana charges).

B. The plaintiffs are not engaged in farming and ranching practices.

Further, the activities of these plaintiffs are not within the scope of the "right to farm" amendment, which protects the right to engage in "farming and ranching practices." These are not defined. Thus, the plain and ordinary meaning of the phrase controls. *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002).

Hill and Broadway operate hunting preserves and breed cervids to stock those preserves. They hold different permits from the Department of Conservation for their breeding facilities and hunting preserves. *See* Tr. 506, 508. While Hill sometimes sells deer to others, it is not a major component of his business. *See* Tr. 42-43; L.F. 1154-1157, 1637-1640. Virtually all of Hill's deer are destined for the shooting preserve. Tr. 77-78, 528. Bucks that Hill imports are generally shot within two weeks. Tr. 85-86, 538. He earns essentially all his income from selling hunts and lodging. Tr. 129-130; L.F. 1134-1135, 1154-1159, 1637-1640, 2391-2394. The plaintiffs are not permitted to sell white-tailed deer meat for human consumption. Tr. 348, 551.

Hill and Broadway's chief complaint about the importation ban is that it would prevent them from importing trophy bucks on short notice to satisfy customer demand. The activities that take place on the hunting preserves are, as the name suggests, hunting and entertainment. Those are not farming and ranching practices. *Compare Premium Standard Farms, Inc. v. Lincoln Twp. of Putnam Cty.*, 946 S.W.2d 234, 239 (Mo. banc 1997) (discussing definitions of "farm" and "farming"), *with Orion Sporting Grp., LLC v.*

Bd. of Supervisors of Nelson Cty., 68 Va. Cir. 195, at *3 (Va. Cir. Ct. 2005) (discussing numerous definitions of hunting). Whatever "farming and ranching practices" might include, it certainly does not include temporarily releasing an animal on one's property so that a customer can shoot it. These aspects of Hill and Broadway's business do not fall within any definition of farming or ranching practices.

The breeding operations run by Hill and Broadway are not farming either. Under the trial court's erroneous reasoning, raising practically any animal for any purpose would constitute farming or ranching. The plain and ordinary meaning of "farming" includes the raising of crops and livestock traditionally associated with farms, typically for human consumption, but also for other useful products such as fiber or fuel. *See Premium Standard Farms*, 946 S.W.2d at 239. It does not include the rearing of any animal a person may choose to breed for any purpose.

Raising animals and crops other than those traditionally associated with farms does not fall within the plain and ordinary meaning of farming. *See Dost v. Pevely Dairy Co.*, 273 S.W.2d 242, 245 (Mo. banc 1954). Under Missouri law, "farming" includes raising agricultural crops, livestock, and poultry. *See* § 350.010(6), RSMo; § 262.801, RSMo ("farming purposes" includes raising crops, poultry, livestock, and equines or mules). Thus, the common understanding of "farming," as reflected in Missouri statutes, did not include the raising of all animals, but rather only livestock and poultry. Missouri statutes generally define livestock as traditional farm animals raised for food or other useful products, ***and exclude the raising of captive wildlife for hunting purposes***. *See* § 267.565(13), RSMo; *see also* §§ 144.010.1(3), (6), 265.300(6), 277.020(1).

Regardless of how plaintiffs Hill and Broadway label their operations, their activities are not farming or ranching. Neither plaintiff raises cervids for food (which would be unlawful) or any other useful product. Instead, they raise cervids to stock their hunting preserves. The voters who adopted Article I, Section 35 would not have understood the provision to encompass private shooting preserves and the breeding of cervids to stock them.

If there were any ambiguity about the meaning of farming and ranching practices, Article I, Section 35's preamble further demonstrates that the phrase does not cover the activities of Hill and Broadway. The preamble shows that the provision is intended to protect agricultural activities that provide "food, energy, health benefits, and security." Hill and Broadway provide none of these. Rather, they provide recreational hunting.

C. If necessary, the constitutional provisions should be harmonized.

Where two provisions of the Constitution are alleged to conflict, courts must undertake to harmonize them. *See Herschel v. Nixon*, 332 S.W.3d 129, 137 n.8 (Mo. App. 2010).

Like the "right to farm," the Commission's authority and obligation to protect the state's wildlife are established by the Constitution. Article IV, Section 40(a) directly gives the Commission authority to control, manage, restore, conserve and regulate the state's wildlife resources. The Commission's grant of authority is self-enforcing, and the legislature may enact only laws consistent therewith. Mo. Const.art. IV, § 44.

Should the Court perceive some conflict between Article IV, Section 40(a), and Article I, Section 35, it must undertake to harmonize the two provisions. The most

straightforward way to harmonize the two provisions is to interpret Article I, Section 35, consistent with its plain language, as applying to the raising of crops and livestock traditionally associated with farms.

But even if the Court rejects that approach, the Commission's regulations are entirely consistent with whatever rights Article I, Section 35, may afford Hill and Broadway. The challenged regulations simply do not affect the vast majority of Hill's and Broadway's activities.

In general, the people's interest in protecting the state's wildlife resources is at least equal to individuals' interest in engaging in farming and ranching practices. In particular, the people's interest in conserving Missouri's native wildlife vastly outweighs the minimal interference the challenged regulations impose on the businesses of Hill and Broadway. For the reasons discussed in Point I, CWD is unquestionably a serious threat to Missouri's native cervids that cannot be allowed to become established. The regulations do not prohibit Hill and Broadway from running their breeding facilities and hunting preserves. The only restrictions are that they obtain animals from within Missouri and comply with new fencing standards and veterinary and recordkeeping requirements. Their right to engage in farming and ranching practices remains "guaranteed." Mo. Const. art. I, § 35.

D. The regulations do not heavily burden farming and ranching.

If the Court concludes some of the activities of Hill and Broadway constitute "farming and ranching practices" and that traditional fundamental rights analysis is appropriate, the challenged regulations are subject to strict scrutiny only if they heavily burden the ability to engage in those activities. *Peters*, 489 S.W.3d at 273-74; *Weinschenk*, 203 S.W.3d at 212, 215-16.

It is "the *severity of the burden* on the asserted constitutional right that produces the level of scrutiny, and not the nature of the burdened right itself." *Peters*, 489 S.W.3d at 273-74 (emphasis in original). Reasonable regulations that do not significantly interfere with a fundamental right are not subject to strict scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). Some regulation of a constitutional right is often necessary to protect the right itself. *Weinschenk*, 203 S.W.3d at 212.

Heavy burdens include onerous procedural requirements that effectively handicap exercise of a right. *Id.* at 215. Courts must ask whether a regulation "places into jeopardy" the ability to exercise the right. *Id.* at 213. The imposition of monetary costs on exercise of a right can sometimes satisfy this standard. *Id.* In evaluating the burden imposed by monetary costs, however, courts consider the costs in context. Thus, the *Weinschenk* court looked to the impact of a voter identification law on those Missourians who lacked photo identification and lived beneath the poverty line because those were the people most affected. *Id.* at 213-14.

The nature of the right and actual effect of the costs imposed are relevant considerations. In the case of voting—one of the most precious rights—it is difficult to justify burdening exercise of the right with any costs. *See Harper v. Virginia State Board*

of Elections, 383 U.S. 663, 668 (1966); *Weinschenk*, 203 S.W.3d at 206. In other contexts, the fact that a regulation incidentally increases the cost of exercising a right does not mean the costs are a heavy burden. *See Kwong v. Bloomberg*, 723 F.3d 160, 167-68 (2d Cir. 2013) (firearm ownership).

A regulation's impact on activities not protected by the constitution does not warrant strict scrutiny. *Amick*, 428 S.W.3d at 640. The trial court improperly applied strict scrutiny based on the challenged regulations' impact on portions of the plaintiffs' businesses that cannot be said to fall within any definition of farming or ranching practices. The trial court concluded the regulations heavily burdened Hill and Broadway's right to farm because: (1) they would lose business and customer goodwill (and potentially go bankrupt) if they are not allowed to import trophy bucks to satisfy customer demand, and (2) it would cost Broadway an estimated $450,000 to re-fence his entire property to meet the new fencing standards. L.F. 2719-2722, 2741-2742.[1]

But the only activities of Hill and Broadway that might remotely be considered farming or ranching are their breeding operations. Hill imports deer for one reason: to place them on his property so that customers can shoot them. Tr. 84-85. When he imports a deer for this purpose, it is typically shot within two weeks. Tr. 85-86, 538.

[1] The court's findings of fact, as drafted by the plaintiffs, also discussed the impact of the regulations on plaintiff Kevin Grace. *See* L.F. 2721. Grace was not a plaintiff on Count 2. L.F. 886. Grace's testimony was not being offered in support of Count 2. Tr. 573. The constitutionality of the challenged regulations as applied to him is not at issue.

The court's stated concern with the effect of the importation ban on Broadway was that he would be unable to secure enough elk from within Missouri to satisfy demand for upcoming hunts, not his ability to obtain breeding stock. L.F. 2721-2722. Hill and Broadway's entire basis for arguing that the importation ban heavily burdened them was their inability to import animals to be shot immediately. L.F. 995, 997, 1014-1016.

1. The importation ban.

The trial court erroneously declared and applied the law when it concluded that the importation ban's impact justified strict scrutiny. The hunting businesses of Hill and Broadway are not "farming and ranching." Thus, even if Hill and Broadway would lose customers due to a lack of trophy animals, that fact would not warrant strict scrutiny.

The court suggested the regulations would prevent the plaintiffs "from using live white-tailed deer in their breeding operations to continue developing the valuable bloodlines of their breeding stock." L.F. 2703. This is inaccurate. The regulations permit the use of live deer in breeding operations; they simply must be obtained from Missouri. The court could not and did not conclude the inability to import live deer for the breeding operations was a heavy burden. The regulations permit Hill and Broadway to import semen for breeding purposes. Hill does virtually all breeding by artificial insemination, Tr. 132, 529-530, and Broadway could easily switch his breeding operations to use artificial insemination, Tr. 220.[2]

[2] The trial court referred to the importance of importing live does to plaintiff Grace. L.F. 2721. Grace was not a plaintiff to Count 2.

2. The fencing requirements.

The trial court also committed legal error in the way it handled the impact of the new fencing standards. Broadway's director of operations testified it would cost approximately $450,000 to bring all of Winter Quarters' fences into compliance. Tr. 598-599, 606-607. That figure represented what it would cost Broadway to re-fence his entire 3000-acre property, which is permitted as a hunting preserve. *Id.* Broadway's breeding facilities are not located on that property, but rather on a much smaller tract of land. Tr. 603-605. The court erred by evaluating the degree of burden on Broadway's right to farm by reference to the cost to re-fence the portions of his property unrelated to his breeding operations. Those costs have nothing to do with farming or ranching.

Even if the $450,000 figure cited by Broadway were accurate, the court was also required to assess the effect of that cost on Broadway's right to farm. Its failure to do so was legal error.

When Broadway purchased Winter Quarters in 2013, he was fully aware the property was under a herd plan. Tr. 210-211; L.F. 1089-1090. Under that plan, Broadway is not permitted to introduce new deer to the property so long as deer from previous hunting seasons remain on the property. L.F. 2407-2408. He was thus aware that his ability to operate the land profitably would be limited. There has never been a successful white-tailed deer hunt on the property. Tr. 217-218, 595; L.F. 1093, 1100.

Jacques deMoss agreed that deer hunting land in that part of Missouri costs between $2000 and $3500 per acre, putting the value of Broadway's property at around $9 million. Tr. 601. Broadway has spent approximately $250,000 per year to feed the

cervids on his property. L.F. 1090. He may spend "a good deal" of money to re-brand his business after the herd plan expires. Tr. 610. Broadway purchased Winter Quarters as a retirement and leisure destination for his family, not as a business opportunity. L.F. 1086-1088. He began selling hunts primarily to defray the cost of maintaining the property. L.F. 1089-1090. He conceded, however, that people do not want to hunt at Winter Quarters due to concerns about CWD. L.F. 1102-1105.

Broadway has spent vast sums of money on what amounts to a leisure destination he never intended to be a profitable business. The trial court committed legal error in considering the cost to re-fence Broadway's hunting preserve at all. But even if some consideration of those costs is proper, they do not "effectively handicap" or "place into jeopardy" Broadway's ability to continue operating his hunting preserve. *Weinschenk*, 203 S.W.3d at 213, 215. The cost to re-fence his property is but a tiny fraction of the sums he has expended to acquire the land and feed his cervids.

In *Weinschenk*, the costs imposed by the challenged law fell on individuals ill-equipped to bear them, effectively denying them voting rights. *Id.* at 213-15. Broadway made no effort to establish that the costs of re-fencing his property were ***prohibitively*** expensive. The trial court did not explain how those costs threatened Broadway's right to farm. It merely observed that Broadway has "held off on re-branding and re-marketing the lodge for the past two years because of uncertainty as to whether this expenditure would be required." L.F. 2742.

The court did not find that Broadway could not afford to both re-fence and re-brand. Further, the inability to re-brand a hunting lodge is vastly different than being

unable to engage in farming and ranching practices. Because the costs about which Broadway complains do not threaten his ability to engage in farming and ranching practices, they do not constitute a heavy burden on a fundamental right. *See Kwong*, 723 F.3d at 167 (noting plaintiff failed to submit any evidence supporting argument that firearm licensing fee was prohibitively expensive).

The trial court also erred to the extent it may have held that the fencing costs cited by Broadway supported a conclusion that the new fencing standards heavily burdened the right to farm of plaintiff Hill or anyone else. *See* L.F. 2742. Hill did not submit any evidence about what it would cost him to bring his fences into compliance. Nor was there evidence concerning the impact of the new fencing standards on non-parties.

3. The recordkeeping and permitting requirements.

In addition to challenging the importation ban and new fencing standards, the plaintiffs also challenged the constitutionality of various recordkeeping and permitting requirements contained in the amended regulations. *See* L.F. 896-899. The trial court's findings of fact and conclusions of law are devoid of any analysis as to how those regulations heavily burden plaintiff Hill and Broadway's right to farm. The trial court's strict scrutiny analysis likewise addressed only the fencing and importation regulations. *See* L.F. 2741-2746. The plaintiffs failed to submit any evidence demonstrating how the recordkeeping and veterinary inspection regulations contained in 3 CSR 10-9.353, 3 CSR 10-9.359, 3 CSR 10-9.565(1)(B), and 3 CSR 10-9.566 threaten their ability to engage in farming and ranching practices. Nevertheless, the trial court ruled in the plaintiffs' favor on the entirety of Count 2, L.F. 2746, which challenged the constitutionality of all those

regulations, L.F. 896-899. Absent any evidence concerning how these regulations affect Hill and Broadway's right to farm, they failed to establish that those regulations heavily burden a fundamental right, and they are subject to rational basis review. *Weinschenk*, 203 S.W.3d at 211, 215-16.

E. The regulations are rationally related to the state's interest.

Hill and Broadway are not engaged in farming and ranching practices, and the challenged regulations do not heavily burden any activity that could plausibly be considered a farming or ranching practice. The regulations are therefore subject to, at most, rational basis review. *Id.*

Under that standard, a regulation need only be a reasonable way to further a legitimate state interest. *Peters*, 489 S.W.3d at 273. Regulations are presumed to have a rational basis, and the plaintiff must overcome that presumption "by a clear showing of arbitrariness and irrationality." *Amick*, 428 S.W.3d at 640 (internal quotation marks omitted). The regulation will be upheld "if any state of facts reasonably may be conceived to justify it." *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. banc 2006) (internal quotation marks omitted).

The challenged regulations easily satisfy rational basis review because they are rationally related to the state's legitimate interest in protecting its wildlife resources. Plaintiffs Hill and Broadway did not attempt to and cannot establish that the regulations are "wholly irrational." *Amick*, 428 S.W.3d at 640.

The state has a legitimate interest in protecting its wildlife resources. *See Marsh*, 121 S.W.2d at 743-44; *Harris v. Mo. Dep't of Conservation*, 895 S.W.2d 66, 72 (Mo.

App. 1995). As discussed in Point I, the evidence presented at trial demonstrated that CWD is a serious and deadly threat to Missouri's cervid herds, that the importation of captive cervids increases the risk that CWD will be further introduced and spread to Missouri, and that it is basic disease management to avoid transporting potential disease carriers. The evidence further demonstrated that numerous states, including Missouri, have experienced CWD outbreaks in the vicinity of captive cervid facilities. L.F. 2049-2050. The ban on importation and private possession of captive cervids from outside Missouri and the requirement that holders of captive cervids must erect fences meeting standards designed to prevent escape are plainly reasonable ways to address these concerns. Requiring that captive cervids undergo veterinary inspections and be appropriately documented, and requiring that all captive cervids be tested upon death are likewise reasonable methods to ensure CWD is quickly detected and dealt with.

Because the challenged regulations are subject to only rational basis review and are rationally related to the state's legitimate interest in protecting its wildlife resources, the trial court erroneously declared and applied the law in concluding that those regulations are unconstitutional. The Court should reverse and direct the trial court to enter judgment in favor of the Commission.

F. The regulations would also satisfy strict scrutiny.

The trial court erred in applying strict scrutiny to the challenged regulations. But even if this Court concludes that standard applies, the trial court erroneously declared and applied the law in concluding that the regulations do not satisfy it.

Under strict scrutiny, the state must demonstrate that the regulation is narrowly tailored to achieve a compelling government interest. *Peters*, 489 S.W.3d at 273; *Weinschenk*, 203 S.W.3d at 211. "[T]he application of strict scrutiny depends on context, including the controlling facts, the reasons advanced by the government, relevant differences, and the fundamental right involved." *State v. McCoy*, 468 S.W.3d 892, 897 (Mo. banc 2015).

The fact that strict scrutiny is held to apply says little about the ultimate validity of an enactment. *Dotson v. Kander*, 464 S.W.3d 190, 197 (Mo. banc 2015). Provisions are routinely upheld under strict scrutiny, *State v. Merritt*, 467 S.W.3d 808, 814 (Mo. banc 2015), and "no constitutional right is so broad as to prohibit all regulation," *Shoemyer*, 464 S.W.3d at 175 (discussing right to farm). Where an activity has historically been subject to substantial state regulation, strict scrutiny tends to accommodate greater regulation. *See Merritt*, 467 S.W.3d at 814-16 (right to bear arms).

While a regulation must be narrowly tailored to achieve the state's compelling interest, strict scrutiny "does not require exhaustion of every conceivable . . . alternative." *Id.* at 815 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)). Narrow tailoring merely requires "serious, good faith consideration of workable" alternative regulations that will achieve the state's compelling interest. *Grutter*, 539 U.S. at 339. Where a conceivably less-burdensome alternative will not achieve the state's compelling interest, narrow tailoring does not require its use. *Id.* at 340.

The state clearly has a compelling interest in protecting its wildlife resources, including its native cervid populations. Missouri courts have recognized wildlife

protection as a legitimate state interest. *See Marsh*, 121 S.W.2d at 743-44; *Harris*, 895 S.W.2d at 72. Missourians enacted Article IV, Section 40(a) to advance that interest. And wildlife protection is routinely deemed a compelling state interest. *See, e.g.*, *People v. Maikhio*, 253 P.3d 247, 260 (Cal. 2011); *State v. Medley*, 898 P.2d 1093, 1097 (Idaho 1995); *State v. Albaugh*, 571 N.W.2d 345, 347-48 (N.D. 1997). Thus, the sole question is whether the challenged regulations are narrowly tailored to achieve that interest.

Given the virtual impossibility of eliminating CWD once it becomes established, the high costs of attempting to control its spread, and the devastating consequences on cervid populations, the state plainly has a compelling interest in preventing the introduction and spread of CWD in Missouri to the greatest extent practicable.

The importation ban is narrowly tailored to achieve that interest. As noted in Point I, the Commission can regulate whether wildlife may be possessed ***at all***. *See, e.g.*, § 252.040, RSMo. The Commission did not permit white-tailed deer to be held on hunting preserves until 1985. Tr. 649-650; L.F. 1703-1710. The Commission has the authority to ban the private possession of cervids altogether, but it chose not to do so, instead limiting private possession of cervids to those already in Missouri.

Even assuming ***all*** of the activities of Hill and Broadway were farming and ranching practices, the importation ban is narrowly tailored. The only issue they have with the importation ban is that it prevents them from importing trophy bucks on short notice. It does not prevent them from locating and purchasing trophy animals within Missouri. There are over 200 white-tailed deer breeding facilities and 46 big game hunting preserves in Missouri, which hold more than 10,000 deer. Tr. 345-346.

The importation ban has minimal impact on Hill and Broadway's breeding operations. It is undisputed that the regulations allow cervid breeders to import semen for use in artificial insemination. Hill already breeds through artificial insemination and Broadway can easily switch. Tr. 132, 220, 529-530.

The importation ban thus leaves the plaintiffs ample ways to continue running their businesses. While they might lose some customers due to an inability to import trophy animals, the importation ban otherwise has minimal effect on their operations. The ban sweeps no more broadly than is necessary to minimize the possibility of CWD being further spread to Missouri. ***Human transportation of cervids across state lines is how CWD is spread.*** Tr. 468, 757-761; L.F. 1174, 1867, 1964-1965, 2091, 2103. When weighed against the state's compelling interest in preventing the spread of CWD, the importation ban is sufficiently narrowly tailored to minimize the spread of CWD and would satisfy even strict scrutiny.

The Commission's amended fencing regulations are also narrowly tailored to serve the state's compelling interest in minimizing the spread of CWD. The standards were enacted to address problems with the former fencing standards and to minimize the risk of captive cervids escaping and interacting with free-ranging cervids. This is especially important because of the greater risk of CWD being transported into captive facilities and the greater risk of the spread of CWD inside a captive facility due to increased population density.

When the Commission proposed amendments to the fencing standards in 2014, it had documented 150 escapes from captive cervid facilities in the previous three years, Tr.

628-629, 636-637; L.F. 2482, or nearly one escape per week. Of course, this does not include unknown or unreported escapes. Initially, the Commission proposed a regulation that would require all new captive cervid facilities to maintain double fencing, with a ten-foot tall outer fence. L.F. 52-54, 2482. Existing facilities were exempted. L.F. 52, 2482-2483. In response to comments, L.F. 2481-2482, the Commission again revised 3 CSR 10-9.220(3). The version of the regulation that took effect in January of 2015 subjected all captive cervid facilities to the new standards and gave existing facilities until June 30, 2016 to come into compliance. L.F. 2483. However, the Commission altered the regulations to require only a single, eight-foot fence in response to comments submitted by the captive cervid industry. L.F. 2482-2483. It determined that a single, eight-foot fence would sufficiently minimize risk in conjunction with the importation ban. *Id.*

The new fencing standards are clearly related to the state's interest in preventing the spread of CWD. The increased animal density at captive cervid facilities increases the risk of disease transmission. Tr. 281, 754; L.F. 2077-2081. Because prions can remain in the environment and infect other animals for years (possibly decades), L.F. 1875-1876, the state has a strong interest in ensuring that potentially infected cervids do not escape from captive facilities. If CWD is detected at a captive facility, herd plans typically require maintenance of the facility's fence to prevent free-ranging animals from entering while prions remain. L.F. 1875, 1885-1886. The state has an interest in ensuring that such fences meet basic criteria in the event an outbreak occurs.

The new standards are also narrowly tailored. The Commission eliminated the double-fencing requirement. Aside from requiring that fences be eight feet tall, the

regulation specifies materials that may be used, the amount of spacing that may exist, how fence posts should be installed, and requires that the areas around the fence be cleared of dead trees. *See* 3 CSR 10-9.220(3). In developing these standards, the Commission considered peer-reviewed articles addressing the types of fencing adequate to prevent escape and deer-to-deer contact, as well as regulations from other states. Tr. 659-660, 692-705, 719; L.F. 52, 2035-2052.

More precise fencing standards were clearly warranted. By the time of trial, the Commission had documented at least 270 escapes. The plaintiffs identified no aspect of the new standards that was allegedly more burdensome than necessary to achieve the state's interest. The only aspect of the regulations the plaintiffs took issue with was the requirement that corner posts be set in concrete, *see* Tr. 523, 597, but they failed to introduce any evidence that this requirement was unsupported by best practices. Notably, deMoss testified that Winter Quarters' corner posts are already set in concrete. Tr. 597.

III. IN THE ALTERNATIVE, THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ENJOINING THE ENFORCEMENT OF THE AMENDED REGULATIONS UNDER COUNT 2 AS TO ALL PERSONS BECAUSE THE INJUNCTION IS OVERBROAD AND VOID AS TO NON-PARTIES IN THAT THE INJUNCTION PURPORTS TO ENJOIN ENFORCEMENT OF THE CHALLENGED REGULATIONS STATE-WIDE AS TO ALL PERSONS, EVEN THOUGH THIS CASE WAS NOT TRIED AS A CLASS ACTION, THE PLAINTIFFS DID NOT FACIALLY CHALLENGE THE CONSTITUTIONALITY OF THE REGULATIONS UNDER COUNT 2, AND THE INJUNCTION IS NOT SUPPORTED BY EVIDENCE AS TO NON-PARTIES.

Whether to grant an injunction and the terms of any such relief are matters within the trial court's discretion. *Southern Star Cent. Gas Pipeline, Inc. v. Murray*, 190 S.W.3d 423, 432 (Mo. App. 2006). While a trial court enjoys broad discretion, it may not exercise that discretion to impede the proper action of those against whom relief is sought. *Doe v. Phillips*, 259 S.W.3d 34, 38 (Mo. App. 2008). Further, a court may not exercise its broad equitable powers to adjudicate matters not raised by the pleadings. *Blando v. Reid*, 886 S.W.2d 60, 67 (Mo. App. 1994). A judgment that goes beyond the pleadings is void. *City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 264 (Mo. App. 2010); *Blando*, 886 S.W.2d at 67.

The trial court enjoined the Commission from enforcing its regulations against ***anyone***. L.F. 2746. The judgment provided that the plaintiffs "and others affected by the

regulations" may import and hold cervids from outside Missouri. *Id.* In its after-trial motions, the Commission noted that the injunction should apply only to the plaintiffs. L.F. 2677-2680, 2749-2750. The trial court denied those motions.

The operative pleading at trial raised two distinct claims. Count 1 challenged the authority of the Commission to enact the challenged regulations at all. That claim was, in essence, a facial attack on the validity of the regulations. If the Commission lacked authority to enact the regulations, it would be without authority to enforce them under any circumstances.

But Count 2 contended that the amended regulations violated Article I, Section 35. Count 2 does not expressly state whether it was a facial challenge or merely a challenge to the regulations as applied to Hill and Broadway. The plaintiffs' arguments and proof, however, demonstrate that they brought an as-applied challenge. *See Boot Heel Nursing Ctr., Inc. v. Mo. Dep't of Social Servs.*, 826 S.W.2d 14, 15-16 (Mo. App. 1992). In determining whether a constitutional challenge is facial or as-applied, what matters is the reach of a plaintiff's claim and the relief sought. *Doe v. Reed*, 561 U.S. 186, 194 (2010). To succeed on a facial challenge, a plaintiff must establish that no set of circumstances exists under which the regulation would be valid, or that the regulation lacks any plainly legitimate sweep. *United States v. Stevens*, 559 U.S. 460, 473 (2010). This is not what the plaintiffs attempted to prove.

The plaintiffs did not plead or attempt to establish representational standing. They did not plead this matter as a class action. Indeed, they objected to discovery seeking information concerning the Missouri Deer Association, an entity to which the individual

plaintiffs belong and which they admitted is funding the litigation. L.F. 470. The trial court partially sustained the plaintiffs' objection to discovery on this basis. L.F. 240-241. At trial, the plaintiffs submitted zero evidence about how the importation ban and fencing standards affected anyone other than Hill and Broadway.[3] The plaintiffs' actions thus demonstrate they were only challenging the constitutionality of the regulations as applied to their operations.

As discussed in Points I and II, the Commission had authority to enact the challenged regulations, and those regulations are constitutional. However, if the Court concludes the Commission had authority to enact the regulations but that they impermissibly burden any right to farm Hill and Broadway may have, it should reverse the judgment and narrow the scope of the injunction to the application of the regulations to only Hill and Broadway. A broader injunction would exceed the scope of the pleadings and proof. *City of Greenwood*, 311 S.W.3d at 264; *Blando*, 886 S.W.2d at 67.

Alternatively, if the Court views Count 2 as a facial attack on the constitutionality of the challenged regulations, it should still reverse with instructions to narrow the injunction due to a failure of proof. Hill and Broadway submitted no evidence concerning the impact of the challenged regulations on anyone else. They therefore

[3] Limited evidence was introduced at the preliminary injunction hearing concerning the effect of the regulations on plaintiff Grace. As noted in Point II, the court excluded Grace as a plaintiff on Count 2 shortly before trial, and the plaintiffs stipulated they were not offering evidence pertaining to Grace in support of Count 2.

failed to demonstrate that the regulations cannot be constitutionally enforced under any set of circumstances, or lack any legitimate sweep. *See Stevens*, 559 U.S. at 473.

With respect to the importation ban, the trial court's constitutional analysis rested on the purported inability of Hill and Broadway to import sufficient trophy animals for upcoming hunts. L.F. 2719-2722, 2742. There are approximately 46 big game hunting preserves in Missouri. Tr. 345-346. There is no evidence as to whether those hunting preserves rely on the importation of trophy bucks, or whether they import animals at all. In the absence of such evidence, it is impossible to determine whether the importation ban unconstitutionally burdens their operations.

Similarly, there are about 200 captive cervid breeding facilities in Missouri. *Id.* The challenged regulations permit those facilities to import semen for use in artificial insemination. There is no evidence as to how many breeding facilities currently use live-animal breeding, or whether it would be prohibitively expensive for them to switch to artificial insemination. On this record, there is no evidence to demonstrate that the importation ban lacks any constitutional applications.

The record with respect to the new fencing standards is equally inadequate. Hill himself failed to introduce any evidence about what compliance with the new fencing standards would cost. There was no evidence about the condition of the fences at the other 250 or so captive cervid facilities in Missouri, what it would cost to come into compliance, or how those costs compare to their earnings. And the plaintiffs' only complaint about the new fencing standards is the cost to upgrade them; there is no reason why the injunction should extend to ***new*** captive cervid facilities that may open in the

future, which will need to construct fences to even begin operating. For these reasons, Count 2 cannot support the breadth of the injunction the trial court entered.

CONCLUSION

For the foregoing reasons, the circuit court's judgment should be reversed.

Respectfully submitted,

/s/ *Jeffery T. McPherson*
J. Kent Lowry #26564
William Ray Price, Jr. #29142
Jeffery T. McPherson #42825
Alexander C. Barrett #68695
ARMSTRONG TEASDALE LLP
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
314.621.5070 FAX 314.621.5065
klowry@armstrongteasdale.com
wprice@armstrongteasdale.com
jmcpherson@armstrongteasdale.com
abarrett@armstrongteasdale.com

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document and the appendix were served on counsel of record through the Court's electronic notice system on October 30, 2017.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 17,110, excluding the cover, signature block, appendix, and this certificate.

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/s/ *Jeffery T. McPherson*