IN THE SUPREME COURT OF MISSOURI

DONALD HILL, et al.,	)	
	)	
Respondents,	)	No. SC96739
	)	
vs.	)	
	)	
MISSOURI DEPARTMENT OF CONSERVATION, et al.,	)	
	)	
Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF GASCONADE COUNTY
THE HONORABLE ROBERT D. SCHOLLMEYER
CASE NO. 15OS-CC00005-01

SUBSTITUTE BRIEF OF RESPONDENTS

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RESPONDENTS' STATEMENT OF FACTS

Respondents all are participants in Missouri's farmed-cervid industry. LF2701. Cervids are hoofed animals of the family *Cervidae*, whose males annually shed their antlers. LF2701. White-tailed deer and elk are examples of cervids that are native to Missouri. LF2701

Respondent Don Hill co-owns Respondent Oak Creek Whitetail Ranch, LLC ("Oak Creek"). LF2702. Oak Creek is a 1,300-acree hunting preserve and white-tailed deer breeding operation in Bland, Missouri. LF2702. Hill has about 500 deer in his breeding operation and 300 deer (100 does and 200 bucks) within his fenced hunting preserve. LF2702.

Respondent Travis Broadway is owner of Respondent Winter Quarters Wildlife Ranch LLC ("Winter Quarters"), a private, 3,000-acre hunting preserve and lodge in Ethel, Missouri. LF2702. Winter Quarters offers three-day guided hunts of animals including elk. LF2702.

Respondent Kevin Grace owns Respondent Whitetail Sales and Service, LLC ("Whitetail Sales"). LF2703. Through Whitetail Sales, Grace conducts a variety of brokering, sales and breeding operations involving white-tailed deer, red deer and sika deer. LF2703.

In October 2014, the Missouri Conservation Commission (the "Commission") adopted new regulations regarding captive cervid breeding and hunting operations, including:

- a change to 3 CSR 10-4.110(1), which attempts to expand on the classifications of animals which the Commission is authorized to regulate by adding the phrase, "wildlife raised or held in captivity";
- a prohibition on white-tailed deer being shipped from out-of-state sources to breeding facilities inside Missouri, 3 CSR 10-9.353(2) & (9);
- a prohibition on imported cervids of any kind being held on hunting preserves, 3 CSR 10-9.565(1)(B)(9);
- the imposition of a new fencing and confinement standards for facilities that hold cervids, 3 CSR 10-9.220(3); and
- increased permitting, documentation, testing and paperwork requirements, 3 CSR 10-9.353, 3 CSR 10-9.359, 3 CSR 10-9.565(1)(B) and 3 CSR 10-9.566.

LF2713-14; Appellants' App. at A54-A66.

The Commission claimed these regulations are necessary to manage the threat of Chronic Wasting Disease ("CWD") in Missouri. LF52, LF60-61, LF67, LF71-72, LF75.

Respondents challenged these new regulations as being beyond the Commission's authority. LF888. Specifically, Respondents claimed that their breeding and hunting stocks are not "game … [or] wildlife resources of the state" (Count I), and that the regulations interfere with Respondents' fundamental right to engage in farming and ranching practices (Count II).[1] LF894-98. The trial court agreed, finding for

[1] Grace and Whitetail Sales were not plaintiffs as to Count II.

Respondents on both counts and enjoining the enforcement of these regulations. LF2746-47.

I. Chronic Wasting Disease in Missouri

CWD is a central-nervous system affliction that affects *Cervidae*. LF2704. It was first observed in Colorado in 1967. [FF16] No one knows the origin of CWD. LF2704.

There is no USDA-approved live test for CWD. LF2704. The USDA-approved test is post-mortem, most typically utilizing laboratory sampling of lymph nodes for the disease-causing agent. LF2704.

CWD was first detected in Missouri in 2010. LF2707. It is unknown whether CWD's presence in Missouri originated in its wild populations or in captive cervids. LF2707. The first reported case of CWD in Missouri was detected in February 2010 at a private hunting ranch in Linn County owned by Heartland Wildlife Ranches, LLC ("Heartland"). LF2707; Tr. at 5-10.

Because of the CWD detections, the remainder of Heartland's herd was "depopulated," or killed, in 2011 and 2012, including the herd at a facility in Macon County that was also owned by Heartland. LF2707-08. Ten white-tailed deer out of 356 were found to be CWD-positive. LF2707. There was no evidence presented that any of the deer that tested positive at Heartland's facilities were imported to Missouri from other states. LF2707. In fact, an MDC witness could not even say whether Heartland Ranch had imported deer on it. Tr. at 664:12-15. Further, if there had been deer imported to Heartland, the state would have had records reflecting that fact. [FF15] LF2704.

Heartland entered into a herd management program in conjunction with the state's Departments of Agriculture, Conservation and Health and Senior Services, which imposed various cleaning and decontamination requirements and set guidelines for the gradual restocking of the property with farmed deer. LF2707-08.

Respondent Broadway later purchased some of the assets of Heartland through his business and agreed to continue the herd-management plan. LF2707-08. Broadway renamed the property Winter Quarters Wildlife Ranch. LF2707-08. The ranch in Linn County where the original CWD positive was detected was not part of the acquisition and is not part of Winter Quarters. Tr. at 328:8-19.

These Respondents have never had a CWD detection in the cervid populations at their facilities. LF2709. In fact, there has not been a single detection of CWD in a privately owned cervid in Missouri since the last detection at Heartland in spring of 2012. LF2708; Tr. at 329:24-330:3.

During that time, the Missouri Department of Agriculture has required all cervids over the age of one year to be enrolled in a CWD program. 2 CSR 30-2.020(6). Pursuant to these regulations, a much higher percentage of captive than free-ranging cervid mortalities have been CWD tested. Tr. at 382:507; Tr. at 633:9-11. For example, Respondent Grace tests 100% of all animal mortalities in his breeding operation. Tr. at 579:7-11.

Respondent Hill is also required to test 100% of the mortalities in his breeding operation, and he is required to test any harvested deer that he's imported and put in his hunting preserve – or about 50% of the deer harvested each year. Tr. at 512:24-513:7.

At the time of the permanent injunction hearing, the only mandatory CWD testing imposed by the MDC for free-ranging deer was for those deer taken in the containment zone during the first two days of the hunting season. Tr. at 731:25-732:3.

Since 2010, there have been 42 cases of CWD detected in Missouri's free-ranging deer population. LF2708; *see* A39-40. It is not known whether these instances of CWD in wild populations are related to the CWD detections at the Heartland property. LF2708.

In the year preceding the permanent injunction trial, the prevalence rate of CWD in free-ranging white-tailed deer sampled in Missouri was approximately 1/10th of one percent. LF2709.

II. Missouri Department of Agriculture's Regulations

The Missouri Livestock Disease Control and Eradication Law was enacted in 1959. *See* §§ 267.560 – 267.660, RSMo. Pursuant to that statute, the Missouri Department of Agriculture was granted the power to promulgate rules to regulate the entry and movement of "animals" in Missouri, including captive cervids. LF2704. The term "animal" is defined in statute as "an animal of the equine, bovine, porcine, ovine, caprine, or species domesticated or semidomesticated." Section 267.565(2), RSMo. The Missouri Department of Agriculture has various regulations regarding "captive cervids," including rules for cervids' interstate and intrastate movement and disease-testing requirements. 2 CSR 30-2.010 & 2 CSR 30-2.020.

Pursuant to the Missouri Department of Agriculture's rules any captive cervid brought into the state:

- must have an entry permit, undergo a certified veterinary inspection, be individually identified by an ear tag, and have various health-related documentation regarding diseases such as CWD, 2 CSR 30-2.010(10);
- may not enter if they originate from a herd that has tested positive for CWD within the last five years or an area that has been reported as a CWD-endemic area in the past five years, 2 CSR 30-2.010(10)(E)(1).;
- must have participated in a CWD certification program for five consecutive years, 2 CSR 30-2.010(10)(E)(2).

The Missouri Department of Agriculture's rules also require ear tags and movement certificates for cervids sold or bartered within Missouri. 2 CSR 30-2.020(6)(A). Intrastate movement also requires a cervid to have a specified CWD "Status Level", and all suspected or confirmed cases of CWD must be reported to the state veterinarian (who is part of the Missouri Department of Agriculture). 2 CSR 30-2.020(6)(D).

All cervids over one (1) year of age within the state must be enrolled in a CWD program sponsored by the Department. 2 CSR 30-2.020(6)(D).

In 2013, Grace's "livestock" (a term used by the Department in its quarantine order) was quarantined by the Missouri Department of Agriculture in 2013 due to a possible trace back. LF2709. After further investigation by the Department, that quarantine was lifted. LF2709.

Hunting preserves must maintain records of all purchased and harvested cervids for five years, including the name and address of the individual harvesting the animal,

identification and origin of the harvested animal, and the necessary movement certificates. 2 CSR 30-2.020(6)(E).

Appellants' expert witness, Dr. Colin Gillin, acknowledged that the Missouri Department of Agriculture representatives who oversee Missouri's CWD herd certification program are "very good scientists," even though their program allows for controlled interstate movement of deer. LF2706. Another expert witness called by Appellants, Bryan Richards, testified that the USDA herd-certification program was based on good science and minimizes risk of transmission of CWD. LF2706.

The only Commissioner to testify on behalf of the Commission admitted that he was not aware of the Missouri Department of Agriculture's regulations regarding the movement of cervids into Missouri when he voted to approve the regulations being challenged in this case. LF2713.

Dr. Fischer admitted that there have been only four instances nationwide of a USDA-certified herd later being determined to have a case of CWD following exportation of cervids to other states. LF2709; LF1184. Appellants provided no evidence that any of these four instances resulted in importation of a known CWD-positive cervid into Missouri. LF2709.

Dr. Fisher also testified that in "maybe one" one of these cases, it is suspected that a CWD-positive cervid was exported to another state. LF2709. He admitted that it is unclear when that animal was exposed to the disease – before it was exported from Pennsylvania to Ohio or once it arrived in Ohio. Tr. at 432:13-25.

Appellants' other expert witnesses, Richards and Dr. Gillin, also testified that they only knew of "at most" one instance where a CWD-positive cervid was exported from a USDA-certified herd to another state. LF2710-11.

A documented and present threat of CWD transmission across state lines is occurring along Missouri's border with Arkansas. LF2709. Arkansas detected CWD in free-ranging elk in February 2016 and in a free-ranging white-tailed doe in March 2016. A43. Subsequent testing found a CWD prevalence rate of more than 20 percent in a core area, with 62 of 266 randomly collected wild deer testing positive. LF2709; A43.

An MDC employee admitted it is "highly likely" that CWD has been present in Arkansas longer than it has been in Missouri and that it is possible CWD has been spread into Missouri from Arkansas by free-ranging cervids. Tr. at 725:22-726:6

None of the detections in Arkansas have been in captive herds. LF2710. Arkansas has banned the importation of live cervids since 2002. Tr. at 323:5-12; LF1393.

MDC officials admit that the Arkansas outbreak may have already introduced CWD into Missouri across the Arkansas-Missouri border by free-ranging animals. LF2710. But MDC did **not** impose mandatory testing of hunter-killed cervids in the counties near the Arkansas-Missouri border for any time period during the 2015-2016 hunting season. LF2710.

III. Appellants' Response to CWD Detections in Missouri

The Missouri Department of Conservation responded to the state's first CWD detections by issuing, approximately two years after the first detection, a CWD

"Surveillance and Management Plan." LF2711. The Plan employs a strategy similar to that used by Illinois: targeted, population-thinning in the immediate area surrounding CWD detections, including increased surveillance, aerial surveys, and sampling of vehicle-killed deer, as well as a ban on feeding and placement of salt and minerals for wildlife. LF2711.

CWD was first detected in Illinois in 2002. LF2708. In the 10 years following the first detection, the prevalence rate of CWD in white-tailed deer in Illinois remained at approximately one percent.[2] LF2708-09. Throughout that time, Illinois has allowed importation of privately owned deer for farming and hunting. LF2709.

Appellants presented no evidence at trial that Missouri's deer herd has declined significantly in the six years since CWD was first detected in the state and there has also been no perceptible change in hunting patterns in Missouri in the years since the disease was detected in the state, except for in some target areas. LF2711.

In the fall of 2014, the MDC found seven CWD positive free-ranging deer, including one in Cole County. Tr. at 310-11; LF2066.

During the 2015-2016 hunting season, approximately 280,000 free-ranging white-tailed deer were killed by hunting in Missouri, an increase of more than 25,000 deer over the prior year. LF2712. The MDC tested 7,687 of these harvested deer for CWD. LF2712; LF2067. Seven tested positive for CWD – or less than 1/10th of 1 percent of

[2] On July 25, 2016, the Illinois Department of Natural Resources reported the CWD prevalence rate for 2015-2016 was 1.09% A50.

those deer tested. LF2712; LF2067. One positive test was from a deer harvested in Franklin County. LF2068.

Appellants state that the CWD positives from Cole and Franklin counties were "near closed or currently operating captive facilities." (Appellants' Br. at 13). CWD has never been detected in those facilities. *See* Tr. at 439:6-14; Tr. at 723:12-724:4.

Based on statistics recently published by the MDC, 25,603 free-ranging white-tailed deer harvested during the 2016-2017 hunting season have been tested for CWD – over three times more than the year before. A39. MDC found just two more CWD positives than the year before, despite testing over three times as many harvested deer. *See* A39-40.

Appellants' witnesses admitted that there has been no mass-mortality event in Missouri as a result of CWD since the July 2015 hearing. LF2712.

At least 10,000 deer in Missouri, both captive and free-ranging, have been killed in recent years by a different disease, EHD, a viral disease transmitted by the midge fly. LF2712. EHD creates the potential for further mass mortalities within Respondents' herds. LF2712.

IV. Conservation's Elk Restoration Efforts

Since 2010, the MDC has imported approximately 110 elk from Kentucky – a state that has not had a cervid test positive for CWD. LF2715. The imported elk came from a herd of free-ranging elk that have been designated as "low risk" by the USDA. LF2715. A "low risk" herd status as the free-range equivalent of CWD-certification for a privately owned cervid herd. LF2715.

The elk imported by the MDC are free-ranging. LF2715. Free-ranging cervids pose a greater risk of spreading CWD-causing prions. LF2715. Appellants' expert witness, Dr. Fischer, admitted that there is less risk of an imported cervid spreading CWD-causing prions if that cervid lives in an enclosed facility and is only alive for approximately two weeks after it is imported. LF2716.

V. Respondents' Ownership of Captive Cervids for Breeding and Hunting

Respondents' cervids (and the cervids they import) are born and bred on private property, remain on private property throughout their lives, and are bought, sold and auctioned by Respondents on private property. LF2716.

Other than cervids bred on Respondents' property through either artificial insemination or natural means, any new cervids that come onto the properties are purchased from other private owners located both inside and outside the State of Missouri. LF2717.

Whether they are hunting stock or breeding stock, Respondents' cervids are required to be enclosed in fenced, private hunting preserves or breeding facilities from birth until death, without ever entering public lands. LF2717.

Respondents expend hundreds of thousands of dollars each year on feed and veterinary care for both their breeding stock and hunting stock. LF2718. The State of Missouri does not share in any of these expenses. LF2718.

Appellant's expert, Mr. Richards, admitted that because of how they are raised, captive deer are reliant on humans for food and protection, and that those animals would be less fit to be successful outside of the fence. LF2718; LF1890. For example, the five

or six deer that have escaped from Oak Creek have been recovered because they are hungry and have come home. Tr. at 516:20-517:10.

In a recent criminal case involving the alleged poaching of a white-tailed deer being held on a hunting preserve, Officer Caldwell of the Howell County Sheriff's Department stated as follows in his sworn probable cause statement: "The Missouri Department of Conservation states that any Whitetail Deer bought by and maintained by a private big game hunting preserve is considered by them to be the same as a domestic animal so the deer in question is the sole property of Vincent Wilson and Rack Attack Outfitters." LF2718-19. MDC Protection Division Chief Larry Yamnitz admitted that the MDC has taken this position in other poaching cases. LF2719.

VI. Impact of Importation Ban

Respondents face a loss of business and goodwill from the proposed importation ban. LF2719. This economic harm includes cancellation of scheduled hunts and an inability to meet customer demand both for breeding operations and private hunting events. LF2719.

In both the 2013-2014 and 2014-2015 hunting seasons, Hill imported about 100 white-tailed deer in for Oak Creek's hunting preserve — or roughly half of the stock that he purchases each year strictly for his hunting preserve. LF2719. Hills documents each import with certificates of veterinary inspection mandated by the Missouri Department of Agriculture. *See* LF2719-20. Almost all of the deer that Hill imports in a given year die during the hunting "season" on his hunting preserve. LF2720.

Although Hill has a breeding operation that he uses to stock his hunting preserve and attempts to purchase deer in-state to suit his needs, those sources are not enough to sustain his operations, making importing deer from out of state is necessary for the survival of his business. LF2720. Hill faces competition from other hunting preserves for the available supply of white-tailed deer within Missouri. LF2720.

If Hill is unable to purchase animals from out of state and import them to his preserve, Hill will be forced to cancel some planned hunts. LF2720. Canceling planned hunts would, in turn, cause Hill to lose the goodwill and repeat customers he has cultivated for years. LF2720.

If Hill is unable to import cervids and conduct business as usual, Oak Creek will not have sufficient cash flow to repay its loans or maintain sufficient cash flow to get the business through the season. LF2721. Hill will likely go bankrupt if he cannot import deer. LF2721.

Respondent Grace relies on the interstate market in cervids to support his business and ability to make a profit. LF2721. He often brokers transactions for buyers, such as Hill, who are looking to import cervids from elsewhere in the United States into Missouri. LF2721. Grace receives a commission upon the closing of the sale. LF2721. If Grace is unable to continue arranging these private transactions, he will miss out on unique and fleeting business opportunities, and he will lose customer goodwill he has worked for years to cultivate. LF2721.

The fact that the new regulations would not prohibit importation of semen taken from male deer will not prevent Grace or others from suffering irreparable harm because

the ability to obtain genetically desirable does from the interstate market is just as important as obtaining semen from genetically desirable bucks, if not more important. LF2721. Moreover, the import ban would prevent Grace from rebuilding his herd should EHD hits Missouri again. Tr. at 582:23-583:4.

If the importation ban is implemented, Respondents Broadway and Winter Quarters will not be able to locate a sufficient supply of elk for upcoming hunting seasons. LF2721-22. Winter Quarters has not identified a viable in-state source of cervids to meet the anticipated customer demand for hunts on its property. LF2722.

VII. Impact of Proposed Fencing Regulations

All Respondents are existing permit holders whose fencing enclosures, both for breeding and hunting operations, have previously been deemed sufficient to prevent escape after inspection by MDC agents. LF2722.

Winter Quarters' director of operations, Jacques deMoss, testified that the cost to bring Winter Quarters' fencing into compliance with the new 6 1/2-inch spacing standard for vertical wires, as opposed to the 10-inch spacing previously approved by MDC, would be approximately $450,000. LF2722.

The eight-foot tensile wire fence around Hill's main hunting preserve (Oak Creek I) has been in place since 1992. Tr. at 515:23-516:9. Oak Creek I has been permitted as a hunting preserve since *at least* 2004, when Hill acquired it. Tr. at 522:20-22.

Hill recently acquired a second hunting preserve (Oak Creek II), and he put an eight-foot tensile wire fence around it. Tr. at 517:23-518:9. Not including supplies that Hill supplied himself, Hill paid about $84,000 to have this fence built around Oak Creek

II. Tr. at 519:16-24. When the new fence was built, Hill drove all wild deer out of the enclosure. Tr. at 520:9-521:6.

Hill's new fence was inspected by MDC and was found to not fully comply with the new regulations. Tr. at 521:12-522:11.

MDC officials claim that the new fencing regulations are necessary because of the reported escape of 150 cervids in the past three years, but there is no evidence that the escapes were caused by fencing deficiencies that would be remedied by the proposed regulations. LF2722.

Respondents Hill and Broadway purchased and/or developed their current properties with the assurance from the Missouri Department of Conservation that the fences used to contain their properties were sufficient to prevent escape and therefore compliant with MDC regulations. LF2723.

Prior to proposing the disputed regulations, MDC did not conduct any formal training of agents on how to ascertain whether a fence meets the current standard of "sufficient to prevent escape," nor did MDC discuss the possibility of being more stringent in enforcement of the existing standard. LF2723.

Despite initially proposing to "grandfather" existing permit holders who built their existing fences to be "sufficient to prevent escape" in reliance on the previous regulations, the Commission ultimately eliminated the proposed "grandfathering" of existing permit holders and shortened the time for existing permit holders to achieve compliance with the new, detailed fencing standards. LF2723.

ARGUMENT

RESPONSE TO APPELLANTS' POINT I

I. The Trial Court Properly Found for Respondents on Count I.

A. Standard of Review

Although this Court reviews legal questions *de novo*, in a court-tried case, the Court must still defer to the trial court's factual findings to the extent those findings are supported by substantial evidence. *Royal Forest Condo. Owners's Ass'n v. Kilgore*, 416 S.W.3d 370, 373 (Mo. Ct. App. 2013). The trial court made substantial findings of fact regarding the Plaintiffs-Respondents' business, Chronic Wasting Disease ("CWD"), and the actions taken by Defendants-Appellants. Appellants *have not challenged* those findings of fact as lacking support; therefore, the Court must defer to those findings.

Regarding the legal question at the heart of Count I – the scope of the Commission's authority under Article IV, Section 40(a) of the Missouri Constitution – Respondents have the burden to show the regulations at issue "bear[] no reasonable relationship to the legislative objective." *Termini v. Mo. Gaming Comm'n*, 921 S.W.2d 159, 161 (Mo. App. W.D. 1996). But "[a]n administrative agency enjoys no more authority than that granted by statute." *Id.* "Regulations may be promulgated only to the extent of and within the delegated authority of the statute involved." *Id.* "An administrative agency cannot infer a power from the statute simply because that power would facilitate the accomplishment of an end deemed beneficial." *Dishon v. Rice*, 871 S.W.2d 126, 128 (Mo. App. E.D. 1994) (citing *Brooks v. Pool–Leffler*, 636 S.W.2d 113,

119 (Mo. App. 1982)). Implication of a power is properly found only if the power necessarily follows from the language of the statute. *Brooks*, 636 S.W.2d at 119.

B. The Commission's Authority under Section 40(a) is Limited.

The Commission purports to have authority to enact and enforce the regulations at issue pursuant to Article IV, Section 40(a) of the Missouri Constitution ("Section 40(a)"), which vests in the Commission:

> 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 . . .

The intent of the voters who adopted Article IV, Section 40(a) of the Missouri Constitution is clear—the authority of the Commission extends only to the bird, fish, game, forestry and wildlife resources of the state. Respondents' captive cervids are privately owned, domesticated or semidomesticated animals; they have never been and are not wildlife or game resources of the state.

That the Commission has regulated Respondents' animals and activities to some extent in the past is irrelevant. The Commission's authority cannot be enlarged or extended by waiver, estoppel, contract, or consent. *Soars v. Soars-Lovelace, Inc*. 346 Mo. 710, 719 (Mo. banc 1940); *Livingston Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs*., 809 S.W.2d 153, 156 (Mo. App. S.D. 1991) ("The agency's subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.").

C. Captive Cervids are Domesticated or Semidomesticated Animals.

Respondents' captive cervids are regulated by the Missouri Department of Agriculture as domesticated or semidomesticated animals. The Missouri Legislature has enacted the Missouri Livestock Disease Control and Eradication Law, which delegates to the Missouri Department of Agriculture the authority to regulate the entry, movement, and quarantine of "animals" into and within the State. *See* §§ 267.560 – 267.660, RSMo. "[A]nimal" is defined in the statute to mean "an animal of the equine, bovine, porcine, ovine, caprine, or species domesticated or semidomesticated." 267.565(2), RSMo.

Pursuant to the Missouri Department of Agriculture's rules, any captive cervid brought into the state must have an entry permit, undergo a certified veterinary inspection, be individually identified by an ear tag that conforms to Title 9 of the Code of Federal Regulations, and have various health-related documentation regarding diseases, including brucellosis and tuberculosis, as well as CWD. 2 CSR 30-2.010(10).

Respondents have been subjected to the Missouri Department of Agriculture's regulations regarding captive cervids for many years. For instance, Hill must have movement certificates to import deer from other states. LF2719; *see also* Tr. at 73:7-15, Tr. at 509:24-511:1, LF2224-27; *see, e.g.*, LF2242-2304 . Grace's breeding operation was subject to a temporary quarantine by the Missouri Department of Agriculture while a "trace back" was investigated. LF2709; LF2403. All Respondents are subject to a variety of other regulations issued by the Missouri Department of Agriculture, including the requirements to keep herd inventories and submit CWD test results to the Department. 2 CSR 30-2.020(6); *see* Tr. at 161:11-163:12; LF2413-19; LF2404-05;

LF2430-35.

Respondents' deer are subjected to these regulations because they are domesticated or semidomesticated animals. This Court has already found Hill/Oak Creek's breeder deer to be domestic animals in *Oak Creek Whitetail Ranch, L.L.C. v. Lange*, 326 S.W.3d 549, 550 (Mo. Ct. App. 2010). In *Oak Creek*, the defendants' dogs allegedly entered Oak Creek's property and killed 21 breeder deer. Oak Creek sued the defendants under Section 273.020 RSMo, which places liability on the dog owner when that dog kills or maims a domestic animal. The trial court concluded that "domestic animal" refers to only traditional domestic farm animals. This Court disagreed based on the plain meaning of the word "domestic." Specifically, the Court found:

> Webster's Dictionary defines the word 'Domestic,' as related to animals, to mean "[l]iving in or near the habitation of man; domesticated; tame; as, domestic animals." *Webster's New International Dictionary* (2nd Ed.). 'Domestic Animal' is in turn defined as '[a]ny of 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.*
>
> This plain language definition of 'domestic' describes Oak Creek's breeder deer. The deer killed have never been in the wild. They were all penned and hand-fed, raised in an environment that did not allow them to move freely beyond their confined area.
>
> Based on the plain language definition of 'domestic', we find that the 'domestic animals' referred to in Section 273.020 are not limited to solely

> 'traditional domestic farm animals', and would include Oak Creek's breeder deer which had been domesticated and lived and bred in a tame condition.

Id. at 550.

Nothing has changed about Hill's breeder deer; they are domestic animals, as are all of the captive cervids owned by Respondents. None of these deer have ever been in the wild or lived beyond the confines of a fenced breeding or hunting facility. LF2716-17. Other than the deer that may result from natural breeding within the hunting preserves, all of Respondents' captive cervids are the result of controlled breeding, hand feeding, and have been raised and live in "an environment that did not allow them to move freely beyond their confined area," *Oak Creek*, 326 S.W.3d at 549. LF2716-17. One of Appellants' own expert witnesses admitted that because of how they are raised, captive deer are reliant on humans for food and protection, and that those animals would be less fit to be successful outside of the fence. LF2718; LF1890. Moreover, the MDC itself has taken the position in mulitiple criminal cases that captive cervids are domesticated animals and the sole property of their owners in poaching cases. LF2718-19; LF2444-46. This is not a position taken by a rogue conservation agent, but rather is the position espoused by the head of the MDC's Protection Division. LF2719. One presumes that a state agency would not take a position that it believes is false when a person's liberty is at stake.

Even if they are not domesticated animals, the Respondents' hunting stock are, at the very least, "semi-domesticated" animals. The term "semidomesticated" means "of or

living in semi-domestication," i.e., "a captive state (¬as on a fur or game farm or in a zoo) of a wild animal in which its living conditions and often its breeding are controlled and its products or services used by man[.]" Webster's *Third New Int'l Dictionary* 2063 (2002); LF2521-23. Respondents' hunting stock live in a captive state, as on a "fur or game farm," with their living conditions controlled by man, and are kept solely for the purpose of being hunted in Respondents' business operations. Respondents alone bear the cost of importing, feeding and caring for these animals. *See* LF2716-18,

The position taken by the MDC in poaching cases is not the only time it has taken a position opposite that which it advocates in this case. The Commission's own regulations regarding hunting preserves acknowledge that the privately owned cervids that occupy the preserves do not belong to the state. Specifically, the MDC requires that hunting preserves be fenced so as to "exclude all hoofed *wildlife of the state* from becoming a part of the enterprise." *See* 3 CSR 10-9.565(1)(B)(1) (emphasis added); LF2458. Hill did this when he built a new fence around Oak Creek II, driving all wild deer off the property. Tr. at 520:9-521:6. If Commission truly believes that the captive cervics are "wildlife of the state", then its regulatory requirement would be nonsensical.

Respondents' animals cannot be both domesticated or semidomesticated animals and wildlife or game resources of the state; to so hold would only sew confusion now and in the future and subject Respondents to duplicative and potentially conflicting regulations from two separate state agencies.

D. Respondents' Captive Cervids are Not Wildlife or Game Resources of the State.

Appellants' argument that Respondents' deer must be classified as "wildlife" or "game" is a circular and conclusory one: the Commission has the authority to regulate "game" and "wildlife," and this authority extends to Respondents' animals because all white-tailed deer categorically are "game" and "wildlife" and thus property of the State, even if they are privately owned and raised on enclosed private property.

The Commission's authority derives from Section 40(a). This Court set forth the rules of construction for constitutional provisions in *Boone Cty. Court v. State*, 631 S.W.2d 321 (Mo. banc 1982):

> Rules applicable to constitutional construction are the same as those applied to statutory construction, except that the former are given a broader construction, due to their more permanent character. In determining the meaning of a constitutional provision the court must first undertake to ascribe to the words the meaning which the people understood them to have when the provision was adopted. The meaning conveyed to the voters is presumptively equated with the ordinary and usual meaning given thereto. The ordinary, usual and commonly understood meaning is, in turn, derived from the dictionary. The grammatical order and selection of the associated words as arranged by the drafters is also indicative of the natural significance of the words employed. To this extent the intent of the amendment's drafters is influential. Finally, due regard is given to the primary objectives of the

> provision in issue as viewed in harmony with all related provisions, considered as a whole. By following these rules, the fundamental purpose of constitutional construction is accomplished, to give effect to the intent of the voters who adopted the amendment.

Id. at 324 (internal citations omitted). In the constitutional context, "[a] constitutional provision should never be construed to work confusion and mischief unless no other reasonable construction is possible." *Theodoro v. Dept. of Liquor Control*, 527 S.W.2d 350, 353 (Mo. banc 1975).

The state's right to claim sovereign title to "wildlife" or "wild game" derives from animals' transitory nature, which is not applicable here. Moreover, Appellants' argument misreads Missouri case law regarding "wildlife" and "game," overlooks the factual circumstances of Respondents' cervids, and seeks to nullify concepts of private property. Finally, even if a class of animals could be deemed "game and wildlife," that does not make them "the . . . resources of the state."

1. The doctrine of kingly ownership by the sovereign of "wild animals" or "wild game" is wholly inapplicable to Respondents' privately bred, raised and kept animals.

There is a firm historical base for finding that captive cervids like those at issue in this case are not wildlife resources of the state. The prerogative to pursue, take and destroy wild animals historically was "vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery." *State v. Heger*, 93 S.W. 252, 253 (Mo. 1906) (quoting Blackstone). Because

animals in the wild were "the property of nobody, but liable to be seized by the first occupant," society enacted laws to restrain citizens' rights to pursue and capture them. *Id.* (emphasis added). As further stated by this Court in *Heger*:

> This prerogative of the king as an attribute of government, recognized and enforced by the common law of England by appropriate, and oftentimes by severe, penalties and forfeitures, was vested in the colonial governments of this country, and when those governments threw off the yoke of the mother country that right of sovereignty passed to and was vested in the respective states… In such cases, the common ownership of game, which otherwise would remain in the body of the people, is lodged in the state[.]

93 S.W. at 253 (emphasis added). Like any property that belongs to the whole public and not any person individually, the control is placed in government.

Common, public ownership of wild animals is justified only where the animals can move from one private property to another without constraint. *Gratz v. McKee*, 270 F. 713, 718 (8th Cir. 1920) ("The transitory nature of the property renders the benefits so diffusive that all may join in the enjoyment thereof, and for that reason the sovereign holds as the representative of the public, so as to regulate and protect the common use."). Thus, a trespasser who pursues a wild animal onto another's privately owned property cannot gain any ownership interest in the animal. *Id.*; *see also* The Hon. Hugh P. Williamson, *Restrictions and Rights of the Missouri Sportsman*, 18 J. Mo. B. 317 (1962) ("John Roe, as an individual, has no scintilla of ownership in the wild rabbit that gambols across his land or in the fish that swim in the creek below his barn. And neither does the

sportsman who seeks to take that game with rod or gun.").

Respondents' cervids are contained within high-fence enclosures and cannot move from one private property to another. LF2716-17. They are privately bred, raised and kept. LF2716-17. They are not and have never been subject to sovereign ownership.

2. Respondents' captive cervids are not wildlife or game.

This Court's decision in *Schley v. Conservation Commission of Missouri*, 329 S.W.2d 736 (Mo. 1959), supports the conclusion that Respondents' captive cervids are not wildlife. The fish at issue in *Schley* shared characteristics with the deer at issue in this matter, having been "purchased out of the State of Missouri and transported into the State in specially built transport trucks and deposited in the lakes that are wholly owned and controlled by [respondents], upon premises of [respondents], and waters in which fish are held in captivity," with none of the expenses shared by the State. 329 S.W.2d at 737-738. In reaching its decision that the Conservation Commission lacked authority to regulate the fish, the court pointed out inconsistencies in the Commission's own rulemaking on the subject, which signaled that the Commission did not truly consider the fish to be "wildlife." *Id.* at 740.

Appellants ignore *Schley* and instead rely on a single Missouri decision to support their argument that Respondents' captive cervids are "game" or "wildlife" — *State v. Weber,* 102 S.W. 955 (Mo. 1907). Unlike *Schley*, the *Weber* decision predates the enactment of the Constitutional provision at issue in this action and thus did not interpret its scope.

Moreover, *Weber* supports Respondents' position. The sole issue in *Weber* was

whether a statute that made it unlawful "to have in possession or transport at any time the carcass of *any* deer, or any portion of such carcass, unless the same has thereon the natural evidence of its sex" encompassed the deer carcasses possessed by the defendant. 102 S.W. at 955-956 (emphasis added). These carcasses from deer raised in captivity that were "held by private ownership, legally acquired" and thus not owned by the state. *Id*. The defendant argued that the act's title "relating to the preservation, propagation and protection of game animals, birds and fish" signaled that the legislature did not intend to regulate his deer carcasses, an argument the Court rejected in part because the statute expressly spoke to "any deer." *Id.* at 957. The regulations at issue in *Weber* (unlike here) did "not interfere in any way with his property rights in and use of the deer by the private owner." *Id.* at 957. And even if animals historically considered "game" and "wildlife" may be subject to private ownership: "There is no property in wild animals until they have been subjected to the control of man. If one secures and tames them, they are his property; [even] if he does not tame them, they are still his so long as they are kept confined and under his control." *Weber*, 102 S.W. at 957 (citation omitted).

Regarding the term "wild animal," Appellants rely on *Hudson v. Janesville Conservation Club*, 484 N.W.2d 132 (Wisc. 1992). That decision also supports the conclusion that Respondents' captive cervids are not wildlife. In *Hudson*, the Wisconsin Supreme Court considered whether a statute granting immunity to property owners for injuries on their property for an "attack by a wild animal" encompassed a captive buck that attacked a man armed with a shovel. 484 N.W.2d at 136. Although it held that a

captive buck is a wild animal within the meaning of that statute, it expressly declined to address the issue of ownership of the attacking buck. Specifically, the *Hudson* court distinguished the facts from a prior Wisconsin Supreme Court decision, *State v. Lipinske*, 249 N.W. 289 (Wis. 1933). In *Lipinske*, the Wisconsin Supreme Court concluded:

> When... a wild animal or fish has been legally appropriated and reduced to possession, **it ceases to be a wild animal in the legal sense**. The fox farmer has the same title to the foxes held in captivity upon his premises that he has to the horse standing in his stable or that the circus exhibitor has to the animals confined in cages.

249 N.W. at 291 (emphasis added). The *Lipinske* court further held that "When [an] animal or fish ceases to be wild in the legal sense, the power of the state over it ceases except such power as the state has with respect to the general property of its citizens. **This seems elementary**." *Id.* (emphasis added).

As in *Lipinske*, it is "elementary" that Respondents' captive cervids are not wild animals within the meaning of the Missouri Constitution or any of the statutes upon which Appellants rely. Respondents' captive cervids are bred in captivity, raised in captivity, and must die in captivity.

Appellants' reliance on another out-of-state case, *Briley v. Mitchell*, 115 So. 2d 851 (La. 1959) is also misplaced. In *Briley*, the court did not discuss whether the escaped deer was wild – the court describes the animal as a "wild deer" throughout. Moreover, as in *Hudson*, the court did not question the ownership of the attacking deer.

That Respondents' captive cervids are not "wildlife" is confirmed by the

Missouri Legislature's decision to enact statutes that vindicate Respondents' private-property interests in these animals. *See Lange*, 326 S.W.3d at 550 (holding breeder deer to be "domestic" animals under Section 273.020 RSMo); § 267.565(2), RSMo.

Appellants also argue that Respondents' animals are "game," emphasizing that the dictionary definition of "game" includes "wild animals . . . hunted for food or sport." (Appellants' Br. at 32.) But in *State v. Willers*, 130 S.W.2d 256 (St. Louis Ct. App. 1939) (unreported), the appellate court acknowledged that a statute protecting "game birds" only protected those "wild birds" which were "not subject to private ownership." *Id*. at 257. The jury found the defendant guilty under a statute making it a crime to kill certain birds without a permit from the game commissioner. *Id*. at 256. On appeal, the defendant argued that that the statute "protects only game birds and has no application whatever to the common pigeons of this region." *Id.* at 257. The appellate court acknowledged that "[o]f course, the statute protects only wild birds" whose "absolute ownership . . . is in the State" and are "not subject to private ownership." *Id.* It drew a distinction between such birds and "domesticated pigeons, such as are bred and raised in the lofts of farmers, for table consumption." *Id.* Because the pigeons at issue were "in the feral state that the statute protects," the court affirmed the jury's verdict. *Willers*, 130 S.W.2d at 257.

Moreover, *Weber* does not support Appellants' conclusion regarding the scope of the term "game" in a section of the Missouri Constitution that was adopted decades after that decision. The court recognized that even animals historically considered "game" or wildlife" may be subject to private ownership. "If one secures and tames them, they are

his property; [even] if he does not tame them, they are still his so long as they are kept confined and under his control." 102 S.W. at 957.

3. Respondents' cervids are not "the . . . resources of the state."

Even if Plaintiffs' animals could be deemed to be "wildlife" or "game," they are not part of "the . . . resources of the state" or in any way the property of the state. The Commission's authority to control, manage, restore, conserve and regulate is limited to "*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) (emphasis added). It is a "norm of statutory construction that every word, clause, sentence, and provision of a statute must have effect." *Civil Serv. Comm'n of City of St. Louis v. Members of Bd. of Aldermen of City of St. Louis*, 92 S.W.3d 785, 788 (Mo. banc 2003) (internal quotations omitted).

The phrase "resources of the state" modifies all the preceding categories – bird, fish, game forestry and wildlife. "Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all." *Norberg v. Montgomergy*, 173 S.W.2d 387, 390 (Mo. banc 1943) (quoting 59 C.J. 985 § 583). In *Norberg*, this Court construed the term "accounting officer," which was defined in the statute at issue as "the county clerk, country comptroller, county auditor, accountant or other officer or employee keeping the principal records of the county." *Id.* at 389. The Court held that the phrase "keeping the principal records of the county modified all preceding positions named, not just the word "employee." *Id.* at 390. Likewise, here, the Commission's authority extends only

to the bird, fish, game, forestry or wildlife that are "resources of the state."

Under the Appellants' view, the terms "wildlife" and "game," on their own, include Respondents' captive cervids. But if that was the case, then the phrase "resources of the state" would be redundant. This Court must presume "that the legislature did not insert idle verbiage or superfluous language in a statute." The same presumption applies to the state constitution. *Missouri Prosecuting Attorneys v. Barton Cty.*, 311 S.W.3d 737, 751 (Mo. banc 2010) (J. Teitelman, dissenting). Under Appellants' view, when any animal is being pursued by man, it automatically becomes a game resource of the state. But in *Willers*, the appellate court recognized the distinction between wild game birds whose "absolute ownership . . . is in the State" and those that are bred and raised on private property. 130 S.W.2d at 2575. A permit from the game commissioner was required to hunt the former, but not the latter.

The use of "the" before the listed categories also makes it clear that "resources of the state" modifies all the listed categories. "Grammatically, 'the' is a definite article and its function is to confine or restrict the meaning of the noun that follows it to a particular thing or set of things." *Kentucky Unemployment Ins. Com'n v. Hamilton*, 364 S.W.3d 450, 453 (Ky. 2011); *see also Russell v. Terminal R. R. Ass'n of St. Louis*, 501 S.W.2d 843, 849 (Mo. 1973) (noting that use of the definite article "the" before "occurrence" limited the latter to a specific, particular, single occurrence).

The word "of" before "the state" also indicates that the Commission's authority does not extend to privately owned cervids. "Of" means "belonging to" or "possessing." A28 (Webster's New World *College Dictionary* 1000 (4th ed. 2008)).

These animals exist because of breeding paid for and done by private owners; their continued existence must be on private property and is paid for entirely by private owners; and their existence must end on private property. At no point during the life of these animals does the Commission or MDC possess them.

The preposition "of" before "the state" in Section 40(a) was a deliberate word choice. Another word, such as "within," would perhaps have the broad scope the Appellants argue for. "Within" means "inside the limits of." A30-31 (Webster's New World *College Dictionary* 1644-45 (4th ed. 2008)). But Section 40(a) does not extend the Commission's authority to all wildlife or game inside the borders of the state of Missouri, only that "of the state." This distinction clearly means something in this context. *See, e.g.*, 252.030 ("The ownership of and title to all wildlife *of* and *within* the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri.) (emphasis added)).

The "including" in Section 40(a) is also indicative of the voters' intent. The Commission has regulatory authority over "the . . . . resources of the state, including hatcheries, sanctuaries, refuges, reservations *and all other property owned, acquired or used for such purposes*." (Emphasis added.) The plain meaning is clear – the Commission can utilize those resources is owns, acquires or uses to manage game or wildlife. But neither Respondents' land nor their captive cervids are owned or used by the Commission; they have not been acquired by the Commission; and they have never been used by the Commission in any way. Only Respondents breed, feed, provide care for, transport, confine, and harvest – or allow others to harvest – the cervids on their

property. LF2716-18. Moreover, in poaching cases, the MDC has acknowledged that these cervids are the sole property of outfits like those owned and operated by Respondents. LF2718-19; LF2444-46.

Appellants' only authority on this point is from *Weber* – a decision that does not address the language of Section 40(a) because it predates that provision by over thirty years. The Commission itself has adopted regulations that recognize this distinction. *See* 3 CSR 10-9.565(1)(B)(1) (requiring hunting preserves be fenced so as to "exclude all hoofed wildlife *of the state* from becoming a part of the enterprise" (emphasis added).

Appellants' suggestion that the term "resource" in this context extends to anything that "a country, state, etc. has and can use to its advantage" is without merit. (Appellants' Br. at 34). This interpretation implies that Respondents' privately owned, captive cervids can be "used" by the State of Missouri to the State's advantage. The idea that the state could make "use" of privately bred animals for the state's advantage would likely be news to the voters who adopted Section 40(a) in 1936. Moreover, "resources" modified by "of the state," which makes it clear that the state can only use its own resources, not those privately owned.

In their brief, Appellants cite two cases that the construe the same statute, which made it unlawful to take fish "in any waters of this state" by means other than that permitted by law – *Reid v. Ross*, 46 S.W.2d 567 (Mo. banc 1932), and *State v. Taylor*, 214 S.W.2d 34 (Mo. banc 1948). In broadly construing the statute, the courts looked to the purpose of the whole statute, noting specific carve outs for fish taken from private ponds and fish propagated in captivity. *Reid*, 46 S.W.2d at 569, *Taylor*, 214

S.W.2d at 283-84 (quoting *Reid*). *Reid* was decided years before *Schley*, was based, in part, on *State v. Weber*, and the lake at issue was frequently connected to the Missouri river after flooding 46 S.W.2d at 568. *Taylor* simply followed *Reid* without any discussion of the scope of Section 40(a). Not until *Schley* was decided in 1959 did the this Court opine on the scope of Section 40(a).

Lacking in helpful, relevant Missouri authority on the meaning of "the . . . resources of the state," Appellants point to cases from other jurisdictions. But none of these cases support the issue at hand, whether the phrase "the. . . .resources of the state" as used in the Missouri Constitution includes both public and private property.

In *Briere v. Tusia*, 2011 WL 4509502 (Conn. May 16, 2011), the court considered a jurisdictional question, i.e., whether plaintiff could bring suit under a statute against a neighbor who had a beaver dam on their property, causing flooding on plaintiff's property. The court looked to the entire chapter in which that statute was contained for the meaning of the term natural resources "of the state." It concluded that the statute was meant to include the entire "natural environment" located in the state, not just governmental property.

Section 40(a) of Article IV of the Missouri Constitution stands alone. And by its plain language, Section 40(a) grants the Commission the authority over only the game and wildlife resources of the state. The captive cervids at issue have never been the resources of the State of Missouri or any other state. They exist only due to human intervention. They have been bred in captivity on private lands, bought and sold between private owners, and must be harvested on private lands.

In *Cherenzia v. Lynch*, 847 A.2d 818 (R.I. 2004), at issue was a statute pertaining to fishing methods that could be used to harvest shellfish from public, coastal ponds. Plaintiff claimed this statute violated her constitutional "rights of fishery" as guaranteed by art. 1, Section 17 of the state constitution. *Id.* at 821-22. The phrase "natural resources of the state" is included in that constitutional provision, but the Rhode Island constitution also specifies that "the power of the state to regulate and control the use of land and waters in furtherance of the preservation . . . of the natural environment . . . shall be an exercise of the police powers of the state . . . and shall not be deemed to be a public use of private property." R.I. Const. art. 1, § 16. This is clearly a broader grant of authority to the Rhode Island legislature than is granted to the Commission in Section 40(a). Nothing in that provision suggests the Commission has powers over private property or can use private property. Moreover, the public, coastal ponds at issue in *Cherenzia*, and shellfish therein, cannot be compared to the private lands owned by Respondents or the privately bred and purchased cervids.

Finally, in *State v. Hansen*, 189 Cal. App. 2d 604, 608 (Cal. Ct. App. 1961), the issue was a constitutional provision declaring that "the water resources of the State be put to beneficial use." The appellate court deemed this phrase nothing more than an "expression in general terms of the need to put water to beneficial use and prevent its waste." *Id.* at 608-09. The defendant admitted such a declaration did not give him the right to go upon privately owned land and appropriate its water. *Id.* at 609.

E. The Commission's regulation cannot control the introduction or spread of CWD and it does not have unlimited power over anything it deems a threat to wildlife.

For the first time in this litigation, Appellants argue that the Commission's authority "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." (Appellants' Br. at 41.) They threaten that to hold otherwise would allow individuals "to import and possess all manner of creates regardless of the consequences to Missouri's native wildlife." (*Id.*) This unfounded parade of horribles does not justify the Commission's overreach. While CWD may exist in the State of Missouri, no one knows the origin or cause of CWD in the state. Regardless of the source, as Appellants admit, once introduced, it is *impossible* to eradicate CWD in free-ranging cervids. (Appellants' Br. at 18.) Unfortunately, that means that CWD will remain an issue for Missouri's free-ranging cervid population.

Given that reality, the Commission's new regulations bear no reasonable relationship to the objective to prevent the introduction or spread of CWD in Missouri. *See Termini*, 921 S.W.2d at 161. There have been no CWD-positive deer found in a Missouri captive facility in over five years; during that same time, there have been 42 CWD positives in free-ranging deer. LF2708; LF2708; A39-40. A ban on importation of captive cervids, greater fencing standards, and increased inventory, testing, and documentation requirements will not keep free-ranging cervids from spreading CWD amongst themselves or infected cervids from crossing the border from Arkansas into

Missouri. Respondents have every incentive to keep their facilities CWD-free so that they can avoid quarantine, depopulation, and destruction of their businesses. The regulations of the Missouri Department of Agriculture to which their animals are already subject insure that the state has oversight of movement and disease testing that complies with USDA standards, require recordkeeping that helps the state track cervids moving within and into the state and that die in breeding operations and on hunting preserves, and mandate fencing standards are sufficient to prevent escape.

If the Commission is free to regulate any activity that could pose a threat to wildlife opens the door to power that is almost unlimited in its breadth. For example, one of Appellants' witnesses testified that there is some thought that CWD mutated from a disease called scrapie in sheep. Tr. at 488-89. He acknowledged that it was possible that it could mutate someplace else where sheep had been before. Tr. at 489. Based upon this, does the Commission have the power to ban the sheep industry from Missouri? There are any number of risks out there for all kinds of wildlife, including cars and livestock. The Commission claims to have power over all of them.

RESPONSE TO APPELLANTS' POINT II

I. The Trial Court Properly Found for Respondents on Point II.

The trial court's judgment on Count II should be upheld because Respondents' captive cervid breeding and hunting operations are protected by Article I, Section 35 of the Missouri Constitution ("Section 35"). Accordingly, the challenged regulations are subject to strict scrutiny, but they do not survive such scrutiny because they are not

narrowly tailored to achieve a compelling state interest. Even if only the rational basis standard of review applies, they challenged regulations do not pass muster.

Appellants spend three pages arguing against a point that Respondents have never made – that their "right to farm" is completely free from regulation. (Appellants' Br. at 45-47.) For instance, Respondents have repeatedly acknowledged that they are subject to the regulations promulgated by the Missouri Department of Agriculture. *See* pp. 5-6 [Fact Section II]. But the interplay between constitutional provisions does not alter the fact that the Commission's regulations impinge upon a fundamental right and are, therefore, subject to strict scrutiny.

Appellants argue that there is no indication in the right to farm amendment that voters intended to repeal "the Commission's conceded regulatory authority over captive cervids." At the time of the passage of the amendment, the Missouri Department of Agriculture exercised regulatory authority over captive cervids, citing authority under the Missouri Livestock Disease Control and Eradication Law. LF 2704-2707. Activities related to "livestock" and regulated by the Department of Agriculture are likely to be considered by most citizens as farming.

Moreover, the issue in *Shoemeyer v. Missouri Secretary of State*, 464 S.W.3d 171 (Mo. banc 2015), was the interplay between the right to farm amendment and local government powers in article VI, not article IV. The issue before this Court – the impact of Section 35 on regulations passed pursuant to Section 40(a) – is one of first impression.

A. The Right to Farm is a Fundamental Right under the Missouri Constitution.

"The fundamental rights requiring strict scrutiny are the rights to interstate travel, to vote, free speech, and other rights explicitly or implicitly guaranteed by the constitution." *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 331-32 (Mo. banc 2015). Article I, Section 35 of the Missouri Constitution ("Section 35") provides that "the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state." Thus, the "right of farmers and ranchers to engagement in farming and ranching practices" is a fundamental right in the State of Missouri.

The types of activities in which Respondents' are engaged fall within the plain and ordinary meaning of "farming and ranching." Unless otherwise defined in the text, "words used in the constitution are given their plain and ordinary meaning," so as to effect the intent of the relevant provision. *E.g., Heidbrink v. Swope*, 170 S.W.3d 13, 15 (Mo. App. E.D. 2005) (citing *City of Jefferson v. Mo. Dep't of Nat. Resources*, 863 S.W.2d 844, 850 (Mo. banc 1993)).

Premium Standard Farms, Inc. v. Lincoln Township of Putnam County, 946 S.W.2d 234 (Mo. banc 1997), is instructive on the scope of the term farm in Missouri. In that case, this Court considered the meaning of "farm structures" and "farm buildings" in a zoning statute. It noted that "[t]he plain and ordinary meaning of 'farm' includes the raising of livestock" and cited a definition that defined the term to mean "a plot of land devoted to the raising of domestic or other animals." *Id.* at 239 (citing Webster's *Third New International Dictionary* 824 (1981)); *see also* Webster's New World *College*

Dictionary 514 (4th ed. 2008) (a farm is "a piece of land (with house, barns, etc.) on which crops or animals are raised."). The *Premium Standard Farms* court did not, as Appellants suggest, limit the meaning of farming to only the raising of livestock "traditionally associated with farms." (Appellants' Br. at 49.) The case contains no such language or limitation when discussion the meaning of the term "farm."

Appellants also incorrectly argue that Missouri statutes define livestock so as to specifically exclude captive wildlife for hunting purposes. (Appellants' Br. at 49.) The statutes cited explicitly exclude only elk obtained "not from the wild and raised in confinement for human consumption." Sections 267.565(13), 144.040.1(3) & 277.020(1), RSMo. As stated in the plain language of those statutes, that "exclusion" explicitly applies only to elk, not animals nor even all "captive wildlife."

The plain and ordinary meaning of the term "ranching" also covers Hill's and Broadway's activities. Ranching involves working on or managing a ranch, which is "any large farm devoted to the raising of a particular crop or livestock," A29 (Webster's *New World College Dictionary* 1186 (4th ed. 2008)), or "a large farm . . . for raising horses, beef cattle or sheep," A34 (Merriam Webster's *Collegiate Dictionary* 1029 (11th ed. 2008)). Respondents' white-tailed deer are regulated by the Missouri Department of Agriculture as livestock because, as discussed above, they are domesticated animals. *See* § 267.565(13), RSMo (including "other domesticated animals" in definition of "livestock").

The activities of Respondents Hill and Broadway are farming and ranching. They are engaged in keeping, feeding and caring for herds of privately owned, captive cervids,

including white-tailed deer, on their property; breeding these animals for desired traits through artificial insemination or controlled breeding; and building and maintaining appropriate fences and other facilities to contain these animals. They participate in the USDA's "herd" certification programs for captive white-tailed deer and are regulated by the Missouri Department of Agriculture. That Department's authority over Respondents' operations derives from its entitlement to regulate "animals," a term defined in statute as "an animal of the equine, bovine, porcine, ovine, caprine, or species *domesticated or semidomesticated*." Section 267.565(2), RSMo (emphasis added). The term "semi-domesticated" is defined by Webster's as an animal living in semi-domestication, to include "a captive state (*as on a fur or game farm* or in a zoo) of a wild animal in which its living conditions and often its breeding are controlled and its products or services used by man." Webster's *Third New Int'l Dictionary* 2063 (2002). (emphasis added).

Appellants emphasize that Respondents' animals are not sold for food. (Appellants' Br. at 49.) But if the use of the animals for food was determinative of whether they come from a "farm" or "ranch," there could be no such thing as a horse "farm" or "ranch." Likewise, there could not be a "farm" used to raise animals for fur or for game. Whether the animals being bred and raised are sold for food is simply not determinative as to whether their breeding and keeping implicates "farming and ranching" practices.

For example, in *State ex inf. Ashcroft, ex rel. Curators of Univ. of Missouri v. Town of Weldon Springs Heights,* 582 S.W.2d 661 (Mo. banc 1979), the town attempted to annex 2000 acres of land in St. Charles County wholly owned by the University of

Missouri. *Id*. at 661. The University challenged the annexation based on 80.030, RSMo, which barred the annexation of land used "for farming, gardening, horticultural or dairying purposes." The university presented evidence that the land was used to cut and bale hay, for wheat, and to "pasture horses and cattle." *Id*. at 662. This Court concluded that the land could not be annexed because it was being used for farming purposes – including the pasturing of *horses*.

The "preamble" in Section 35 does not change this conclusion. It reads: "That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy." "Agriculture" is a broad industry that includes the "work or business of cultivating the soil, producing crops, and raising livestock. A26 (Webster's New World *College Dictionary* 28 (4th ed. 2008)). Respondents' captive cervids are regulated by the Missouri Department of Agriculture as livestock because, as discussed above, they are domesticated animals. *See* § 267.565(13), RSMo. (including "other domesticated animals" in definition of "livestock"). For example, the Missouri Department of Agriculture quarantined Kevin Grace's deer breeding operation pursuant to a livestock quarantine order. The Court should reject Appellants' attempt to read Section 35 in such a narrow way so to as to exclude Respondents' activities.

Furthermore, because the Commission's authority does not extend to captive cervid breeding or hunting facilities, there is no need to "harmonize" Section 40(a) and Section 35, as suggested by Appellants. (Appellants' Br. at 51-52.) But even if Section 40(a) allows the Commission some level of authority over such facilities, construing the

latter as applying only "to raising of crops and livestock traditionally associated with farms" would not be appropriate. (Appellants' Br. at 50-51.)

Finally, Appellants are wrong to suggest that the regulations would impose only "minimal interference . . . on the businesses of Hill and Broadway." (Appellants' Br. at 52.) The trial court made findings of fact, unchallenged in this appeal, that prove otherwise. For example, Hill imports about 100 white-tailed deer and elk a year from out-of-state for hunts on his hunting preserve. If he cannot import cervids for hunts, Hill will go bankrupt. To call a regulation that would drive Hill out of business "minimal interference" is laughable. Likewise, the new fencing regulations would cost Hill and Broadway ten of thousands or even hundreds of thousands of dollars to come into compliance, even though their fences have been found by the MDC to be "sufficient to prevent escape" for *years*. If that is a *minimal* imposition, then perhaps the MDC could pay for Respondents' new fences.

B. The New Regulations Do Not Survive Strict Scrutiny.

Strict scrutiny is the "most rigorous and exacting standard of constitutional review" and is generally satisfied only if the law at issue is "narrowly tailored to achieve a compelling interest." *Dotson v. Kander*, 464 S.W.3d 190, 197 (Mo. 2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 920 (1995)). "Where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement." *See Weinschenk v. State of Mo.,* 203 S.W.3d 201, 218 (Mo. 2006). Moreover, a regulation is not necessary to accomplish a compelling state interest" when existing regulations are sufficient. *Id*. at 217.

1. The importation ban

Appellants' proposed changes to 3 CSR 10-9.353(2) & (9) would ban the importation of out-of-state white-tailed deer into Missouri breeding facilities, and the changes to 3 CSR 10-9.359(1)(B)(9) would ban the importation of all cervids into hunting preserves. These changes are not narrowly tailored to achieve a compelling state interest because Hill and Broadway's importation of captive cervids into their facilities is already subject to the Missouri Department of Agriculture's regulations. These regulations are sufficient to achieve the state's stated interest in this case, i.e., to prevent the introduction and spread of CWD. *See Weinschenk*, 203 S.W.3d at 217.

Hill and Broadway can only import cervids into the state pursuant to the Missouri Department of Agriculture's CWD monitoring program, which is *the* USDA-approved Chronic Wasting Disease Herd Certification Program for the State of Missouri. 2 CSR 30-2.010(10)(E)(1); LF2706. Appellants' own experts acknowledged that the USDA program is based on good science, and that those who administer it in Missouri are good scientists. LF2706. Appellants cannot explain why Respondents' participation in this program is not sufficient to monitor for Chronic Wasting Disease.

All three of Appellants' own experts claimed to know of, *at most*, only a single instance of a deer from a CWD-certified herd shipped interstate and later found to have had CWD. *See* LF2709-11. A single instance represents an extraordinarily small percentage of all deer shipped from USDA certified herds. Tr. at 477:13-20. Appellants' expert witness Dr. Gillin also conceded that the USDA program has the valuable ability to "trace back" any potential CWD-positive animals, which is the only method to trace

back an epidemiological event. LF2745-46. He acknowledged that, unlike in cases of CWD detections in the wild, the USDA program creates a situation where following a CWD-positive test, there can be 100 percent testing performed inside the fence in connection with depopulation of the affected herd. LF2746.

This Missouri Department of Agriculture's CWD monitoring program is sufficient to prevent the introduction and spread of CWD in the state. Under that program, only 11 captive cervids in Missouri have *ever* tested positive for CWD, all of which were at Heartland Ranch, and none since 2012. LF2707-08, Tr. at 329:24-330:3. Moreover, Appellants presented no evidence at trial that any of the deer that tested positive at Heartland's facilities were imported into Missouri. LF2707.

As Appellants note, CWD cannot be eradicated from a free-ranging deer population. (Appellants' Br. at 18.) Unfortunately, that means CWD is here to stay. But an importation ban is not necessary to manage CWD. Illinois allows importation of privately owned deer for farming and hunting. LF2709. Since the first detection of CWD in Illinois in 2002, Illinois has used a strategy of increased hunting, or culling, in high-risk areas. LF2708-09. In that time, the prevalence rate of CWD in white-tailed deer in Illinois has remained at approximately one percent. LF2708-09. The Illinois style of CWD management has been employed in Missouri by the MDC with regard to free-ranging white-tailed deer since the CWD was detected in the state. LF2711. This strategy has yielding a prevalence rate of approximately 1/10th of one percent, with no discernible decline in the free-ranging population or the number of harvested deer. LF2711-12; LF2067. Respondents and other permitted facilities have continued to

import captive cervids during that time pursuant to the Missouri Department of Agriculture's USDA-approved program. An import ban is clearly not necessary.

The CWD "outbreak" in Arkansas also undermines Appellants' argument that the importation ban is narrowly tailored to prevent the spread of CWD. Arkansas has not allow importation of captive cervids since 2002. Tr. at 323:5-12; LF1393. Yet over 200 free-ranging cervids have tested positive for CWD since February 2016. A43.

The importation ban is also under-inclusive. Appellants claim that eliminating interstate movement of cervids is essential to managing CWD. But the MDC imported over 100 free-ranging elk in the state as part of its elk restoration program. LF2715. These elk came from a "low risk" free-ranging herd, which is the free-range equivalent of a USDA certified herd of privately owned cervids. LF2715. And unlike Respondents' cervids, these elk are free to roam throughout Missouri. LF2715. It is hard to take Appellants' argument seriously that the import ban is necessary because "***[h]uman transportation of cervids across state lines is how CWD is spread***" (Appellants' Br. at 62 (emphasis is original)), when they imported cervids pursuant to regulations similar to those already in place.

One of Appellants' witnesses now says that she would not recommend a project "similar" to the elk restoration project "based on current knowledge." (Appellants' Br. at 21.) But even after CWD was detected in Missouri, the State went forward with its elk restoration plans. Specifically, the first CWD positive deer in Missouri – from the Heartland Ranch – was reported to the MDC in February 2010. LF2707. But in October 2010, the MDC went forward with its elk restoration project, in which it imported

approximately 110 elk from Kentucky over a three-year period. LF2715; LF2436. If the MDC was truly trying to prevent "the introduction and spread of CWD in Missouri to the greatest extent practicable" (Appellants' Br. at 61), it should have never imported its cervids into the state.

Appellants claim to have exhibited mercy with the importation ban because they could have banned Respondents from possessing their cervids at all. (Appellants' Br. at 61.) But Appellants assume that the Commission's authority under Section 40(a) would allow a total ban on captive cervids. As established under Point I, Respondents' captive cervids are not subject to the Commission's authority.

Appellants' argument that the importation ban "leaves the plaintiffs ample ways to continue running their businesses" is belied by the facts established at trial. (Appellants' Br. at 62.) As noted, Hill would go bankrupt if he is not able to import deer and elk for trophy hunts. LF2721. There is not a sufficient supply of trophy bucks in the state to supply Oak Creek. LF2720. Likewise, if the ban is implemented, Broadway will not be able to re-stock Winter Quarters with white-tailed deer now that the herd plan has expired. LF2721-22. Hill and Broadway will become competitors for the limited supply of trophy bucks in the state, along with every other hunting preserve in the state. LF2720. Despite the numbers thrown around by Appellants – 200 permitted white-tailed breeding facilities and 46 hunting preserves holding more than 10,000 captive deer (Appellants Br. at 61) – there is not enough in-state inventory to sustain Hill or Broadway. Even Hill, with over 500 deer in his own breeding operation, is not self-sufficient, relying on Grace to supply a large number of hunting bucks every year.

LF2702, LF2720.

2. The fencing regulations

Appellants claim the proposed fencing regulations in 3 CSR 10-9.220 are narrowly tailored because they "address problems with the former fencing standards" and "minimize the risk of captive cervids escaping and interacting with free-ranging cervids." (Appellants' Br. at 62.) This is without merit.

Pursuant to the previous version of 3 CSR 10-9.220, Respondents' facilities must have fencing that is eight feet tall and of sufficient to prevent escape. If there was a problem with this regulation, it was created by the MDC. For many years, MDC agents have approved Hill and Broadway's fences as meeting the "sufficient to prevent escape" standard. LF2722. But the MDC did not conduct any formal training of agents on how to ascertain whether a fence meets that standard nor did MDC ever discuss being more stringent in enforcement. LF2723. Regarding escapes, Appellants claim, based on anecdotal, second-hand reports from field agents, that a total of 150 deer have escaped from captivity in Missouri in the three years prior to the proposal of the new regulations in 2014. LF2722, Appellants admit they have no idea how many of these escapes, if any, were caused by, for example, a lack of 6 and 1/2-inch spacing in vertical wiring or by posts not being set in concrete, as required by the new regulations. LF2722. In other words, Appellants do not know whether the new fencing regulations will do anything to "minimize the risk of captive cervids escaping" any more than the current regulations.

Appellants claim that Respondents did not provide sufficient evidence of the impact of the new fencing standards on Hill, Broadway or non-parties. (Appellants' Br.

at 56.) But the impact is clear for all permitted breeding and hunting facilities – what the MDC itself has previously found to be "sufficient to prevent escape" may not (and likely does not) meet the new, detailed fencing standards. Both Hill and Winter Quarters' director of operations testified that their current fences do not meet these standards.[3] Tr. at 523-24; LF2722. Imposing these fencing regulations on existing, permitted facilities is arbitrary and unreasonable.

At trial, Appellants asserted that the new fencing standards are merely guidelines that may be nullified with a variance. LF921. If that is the case, then the new regulations do not add anything. Respondents will be under constant threat of strict enforcement and the need to apply for a variance with the MDC director, who has the discretion to grant to reject such requests.

Moreover, the possibility of a variance from these fencing regulations undermines the idea that they are narrowly tailored to achieve a compelling state interest. In their trial brief to the court below, the MDC claimed that the new fencing regulations placed "no greater burden on Plaintiffs than did the previous regulations" and which are "largely just an explanation about how to make a fence escape proof, *which is already required*." LF921 (emphasis in original). A regulation cannot be strictly necessary to achieve a compelling governmental interest when even the agency promulgating the regulation

[3] Grace also testified that the fences of his breeding facility do not meet all the new regulations. As Grace is not a party to Count II, this constitutes evidence of the impact on non-parties.

claims that following the regulation is not necessary because existing rules already address the issue.

Because of the existing regulations are sufficient, the new fencing regulations are not necessary to accomplish the state purported interest in preventing the introduction and spread of CWD. *See Weinschenk*, 203 S.W.3d at 217.

3. The recordkeeping and permitting requirements

The proposed regulations regarding recordkeeping and permitting are also not narrowly tailored to achieve a compelling state interest. Even if they are subject to a lower level of scrutiny – rational basis review – they do not pass muster.

Hill and Broadway are already subjected to the Missouri Department of Agriculture's CWD Herd Certification Program regulations. Pursuant to those regulations, Hill and Broadway must enroll all cervids over 12 months of age in the program and report those test results to the state veterinarian. 2 CSR 30-2.020(6)(D). Hunting preserves and breeding operations must maintain records of all purchased and harvested cervids, maintain those records for five years and provide those records to the MDA or MDC for inspection as requested. 2 CSR 30-2.020(6)(D) & (E). Those records must include the name and address of the person who harvested the animal, identification and origin of the harvested animal, and veterinary and movement certificates. *Id.* *See, e.g.*, LF2242-2304; LF2324-2390; LF2413-19; LF2430-35.

The Commission's proposed regulations would expand on those requirements for no compelling or rational reason. For instance, CWD testing would now be required for all mortalities for cervids over six (6) months pursuant to 3 CSR 10-9.353(17) and 3 CSR

10-9.565(1)(B)(4); CWD test results would have to be reported directly to the MDC pursuant to 3 CSR 10-9.353(18) and 10-9.565(1)(B)(6); and breeding and hunting facilities would have to keep inventory records for each cervid for fifteen years and available for inspection by the MDC pursuant to 3 CSR 10-9.353(19), 3 CSR 10-9.359(2), 3 CSR 10-9.565(1)(B)(7)), and 3 CSR 10-9.566(1).

Appellants provide no reason why these new MDC regulations are necessary to prevent the introduction or spread of CWD in Missouri, when the Missouri Department of Agriculture already has a USDA-certified program in place. There is simply no rational reason to impose another, more stringent, set of recordkeeping and permitting requirements on Hill and Broadway when there has been "maybe one" CWD-positive cervid that has *ever* been exported from one state to another (and not into Missouri). The Court should uphold the lower court's decision to enjoin the duplicative and arbitrary regulations.

C. There is No Rational Basis for the New Regulations.

According to Appellants, the evidence at trial demonstrated that CWD is a serious and deadly threat to Missouri's cervid herds." (Appellants' Br. at 59.) They claim that "the importation of captive cervids increases the risk that CWD will be further introduced and spread to Missouri." (*Id.*) But their claim that the import ban is a "plainly reasonable" way to address this issue is without merit. Appellants' own experts can trace "maybe one" CWD-positive deer from one state to another. LF2709. There's been no mass mortality of white-tailed deer in Missouri since CWD was detected. LF2712. Appellants claim "outbreaks" in the vicinity of captive cervid facilities in Missouri, but

there's no evidence that the CWD originated in those facilities. And what about states like Arkansas and Texas that have CWD but do not allow white-tailed deer to be imported?

There's simply no evidence that banning importation of captive cervids will prevent the introduction and spread of CWD in Missouri, particularly among the free-ranging deer populations. Although the disease is present in the state, there's not been an "outbreak" and no perceptible effect on the free-ranging population or hunting. LF2711. And there's not been a single positive CWD from captive facilities in the state since 2012, despite much higher testing requirements. LF2708; see Tr. at 382, 512, 579, 633. But if zero tolerance, i.e., stopping humans from moving these animals from one state to another, is the standard that should be followed, then the state should not have pursued its elk restoration plan. *See* LF2715-16.

Similarly, the new fencing regulations are not a "plainly reasonable" way to prevent the spread of CWD in Missouri. Hundreds of thousands of white-tailed deer move freely across the Missouri landscape, including deer infected with CWD. There is no evidence a deer has escaped from a Missouri captive facility and spread CWD to a free-ranging deer. Even if there was, there's no evidence any escapes would be prevented by the new regulations and the new regulations still allow nose-to-nose contact. *See* LF2722.

RESPONSE TO APPELLANTS' POINT III

Appellants concede that Respondents' challenge to the Commission's regulations in Count I is a facial challenge , i.e., "[i]f the Commission lacked authority to enact the regulations, it would be without authority to enforce them under any circumstances." (Appellants' Br. at 66.) Respondents agree.

However, Respondents do not agree that the trial court's injunction was overbroad regarding Count II because that challenge was only an as-applied challenge to those regulations. When making a facial challenge to a statute, a party must establish "that no set of circumstances exists under which the Act would be valid." *Artman v. State Bd. of Registration for Healing Arts*, 918 S.W.2d 247, 251 (Mo. banc 1996). There are no set of circumstances under which the regulations at issue are valid under Article I, Section 35 of the Missouri Constitution because Hill and Broadway's captive cervid farming and ranching activities are not unique to them.

There are about 46 big game hunting preserves and 200 captive cervid breeding facilities in Missouri. Tr. at 345-46. These facilities are all subject to the same Missouri Department of Agriculture regulations for keeping, moving, and importing captive cervids. And to the extent such regulations are valid, they are all subject to the same Missouri Department of Conservation regulations for breeders and big game preserves. These facilities must rely solely on privately owned cervids for breeding and hunting and must keep those cervids confined. The State of Missouri does not share in any of the expenses to feed and care for those animals. LF2718. If Hill and Broadway's activities

are constitutionally protected farming and ranching, then the activities of these other captive cervids owners are as well.

Moreover, it is not "impossible to determine whether the importation ban unconstitutionally burdens" the operations of hunting preserves operated by other captive cervid owners just because it is unknown what other facilities rely on importation. (Appellants' Br. at 68.) Even if other hunting preserves may not have needed to import deer or elk in the past, they may need to do so in the future if their herds are devastated by an infectious disease such as EHD, predators, or a natural disaster. *See* LF2712. Under Appellants' approach, these facilities would not be able to challenge the regulations until they are, in fact, faced with this situation. Requiring each individual facility to mount its own separate challenge to the enforcement of the importation ban is simply ridiculous.

Similarly, Respondents are not required to show that every breeding facility is impacted in the same way as Hill and Broadway by the ban. Their claim that all breeders could simply switch to artificial insemination ignores the evidence that genetically desirable does are just as important as semen from genetically desirable bucks. LF2721. Again, if any breeder's herd was devastated by disease, predators, or a natural disaster, the unavailability of the option to import does would substantially burden that operation.

Finally, the new fencing standards would clearly have an unconstitutional burden on existing facilities, whose fences have been previously approved by the MDC as sufficient to prevent escape. Both Hill and Broadway presented evidence that their current fencing, though previously approved by the MDC, would not meet the new

standards. LF2722; Tr. at 517-18. Regarding new facilities, there's no evidence that the new standards would prevent any of the escapes the MDC claims to have "documented."

Accordingly, the scope of the injunction entered by the trial court on Count II was appropriate and should be upheld.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 14,954 words, exclusive of the sections exempted by Rule 84.06(b), based on the word count that is part of Microsoft Word 2010. The undersigned counsel further certifies that the electronic version of this brief has been scanned and is free of viruses.

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing SUBSTITUTE BRIEF OF RESPONDENTS was served via the Court's electronic filing system, on this 20th day of November, 2017.

/s/ Jean Paul Bradshaw II