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

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The Commission exercised its constitutional authority when it enacted regulations to combat the threat posed to Missouri's native cervids by CWD. The plaintiffs' suggestion that the deer they offer for hunting purposes are not wildlife or game, and thus beyond the Commission's authority, is nonsense. Any question about whether captive cervids are "wild" is refuted by Respondent Hill's promotional video, Exhibit FFF, filed with the Court. The deer fighting in the video are wild, as Hill emphasizes to his customers in soliciting hunting business.

Nor is there any merit to the plaintiffs' unsupported contention that the Commission may take action to combat a threat to Missouri's native wildlife only if it is possible to eliminate that threat fully, or if the threat has already caused catastrophic consequences. The people of Missouri constitutionally empowered the Commission to take preventative measures to ensure the preservation of the state's wildlife, and the challenged regulations were well within that grant of authority.

The plaintiffs do not explain how their hunting businesses could implicate the "right to farm" under Article I, Section 35. Instead, they cling to the argument that the Department of Agriculture has enacted captive cervid regulations, which they happen to prefer. But such regulations—even if valid—cannot override the Missouri Constitution, and they shed no light on the meaning of the language used in Article I, Section 35. That language is unambiguous, and it does not insulate the plaintiffs' hunting operations from regulation by the Commission.

The judgment of the trial court should be reversed.

1. The Commission had authority to enact these regulations.

The plaintiffs are mistaken in attempting to seek refuge in the Department of Agriculture's regulations. The issue in this appeal is whether the Conservation Commission had authority to enact the challenged regulations. Whether the Department of Agriculture can also regulate captive cervids is irrelevant. The plaintiffs wholly fail to explain why both agencies cannot enact regulations pertaining to captive cervids.

A. The Department of Agriculture regulations are irrelevant.

The plaintiffs assert that captive cervids cannot be game or wildlife resources of the state as a matter of law on the theory that they are "domesticated" or "semi-domesticated" animals subject to regulation by the Department of Agriculture under section 267.560, RSMo.

But this Court long ago made clear that the terms "game," "wildlife," and "domesticated" are not mutually exclusive. In *State v. Weber*, 102 S.W. 955 (Mo. 1907), the Court held that deer were game animals because deer are naturally wild, 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." *Weber* pre-dates Article IV, Section 40(a), and the plaintiffs do not explain why "game" would have a different meaning in that provision.

The plaintiffs' position is unsound for other reasons as well. The statute they cite as the source of the Department's authority governs the movement of "livestock" and "animals" in Missouri. § 267.570, RSMo. Both terms are statutorily defined. The plaintiffs declare that captive cervids are "animals." "Animal" means "an animal of the equine, bovine, porcine, ovine, caprine or ***species*** domesticated or semidomesticated."

§ 267.565(2) (emphasis added). As explained at length in the Commission's substitute brief, cervids are not a domesticated species – they are wild game animals.

The plaintiffs' claim that captive cervids are other "domestic" or "semi-domesticated" animals relies on a misreading of the statute. The phrase "species domesticated or semi-domesticated" follows five enumerated species of traditional farm animals – horses, cattle, swine, and the like. The plaintiffs' effort to expand this definition beyond species of the same kind ignores settled rules of statutory construction: "Under the rule of ejusdem generis, a general term in a statute that follows an enumeration of specific things is not to be construed broadly but is to be held to apply to other things of the same kind or class as those specifically mentioned." *Schuettenberg v. Board of Police Comm'rs*, 935 S.W.2d 712, 714 (Mo. App. 1996).

Applying that rule, this Court has held that the statutory term "domestic animal" did not include dogs where the statute otherwise identified farm animals. *State v. Getty*, 273 S.W.2d 170, 172-73 (Mo. 1954). The statute at issue in *Getty* applied to "any cattle, hog, sheep, goat, horse, mule, ass or other domestic animal or domestic fowl." *Id.* This Court held that the statute did not apply to dogs—despite the fact that dogs are domesticated animals—because dogs were not of the same type as the listed species: "It is true that dogs have extensively become domesticated, so that it is usual and perhaps not an improper use of language to call them 'domestic animals.' However, we do not think that the Legislature by the 1919 amendment intended to include them within the term 'other domestic animals.'" *Id.* For the same reason, captive cervids are not within the meaning of the term "animal" under section 267.565(2).

Legislative history confirms this interpretation. In recent years, legislation has been proposed to redefine "livestock" in Missouri statutes in an attempt to confer authority over captive cervids on the Department of Agriculture. L.F. at 2128-2162, 2170-2191. Those efforts all failed. L.F. at 2163-2169; *see also* A1-A18. Such legislation would have been wholly unnecessary if the plaintiffs' reading of section 267.565 were correct.

And, of course, statutes cannot trump the Constitution, which expressly forbids laws inconsistent with the Commission's authority. Mo. Const. art. IV, § 44. Statutes must be interpreted consistently with the Constitution. *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 599 (Mo. banc 2012). The legislature cannot convey the Commission's authority to the Department of Agriculture. Thus, any conflict between the terms "game," "wildlife," and "domesticated," must be resolved in favor of the Constitution.

The plaintiffs' reliance on the Court of Appeals' decision in *Oak Creek Whitetail Ranch LLC v. Lange*, 326 S.W.3d 549 (Mo. App. 2010), is likewise misplaced. As explained in the Commission's substitute brief, *Lange* is entirely inapposite and, in any event, cannot and did not overrule *Weber*. Notably, the Court of Appeals—which authored *Lange*—indicated in this appeal that it would have reversed the trial court's judgment without even addressing its prior decision. *See Hill v. Dep't of Conservation*, ED105042.

B. The Commission's authority is not limited to free-range animals.

The plaintiffs are mistaken in claiming that an animal's "transitory nature" or ownership status can determine whether it is game or wildlife. The fact that mountain lions and bears can be owned and held captive in zoos does not make them anything other than wild animals. Whether wild animals can be privately owned is a separate issue from whether an animal constitutes game or wildlife. No one disputes that the plaintiffs own and have a property interest in their cervids, but that fact has no bearing on the Commission's authority. Contrary to the plaintiffs' suggestion, there is nothing inconsistent about the position the Department of Conservation takes on ownership issues in poaching cases. The plain language of Article IV, Section 40(a) gives the Commission authority to regulate captive cervids.

In *Hudson v. Janesville Conservation Club*, 484 N.W.2d 132 (Wis. 1992), for example, the Wisconsin Supreme Court held that a captive buck was a wild animal, relying on the ordinary meaning of the term "wild animal." *Id.* at 136-37. Attempting to downplay this authority, the plaintiffs note language in *Hudson* discussing a ***prior decision*** which held that when a wild animal has been "legally appropriated and reduced to possession, it ceases to be a wild animal in the legal sense.'" *Id.* (quoting *State v. Lipinske*, 249 N.W. 289, 289 (Wis. 1933)). But the plaintiffs omit what *Hudson* said next: "The *Lipinske* decision discussed the ability of a person to own a wild animal. It is not relevant to the issue we are confronted with today, whether a captive animal is a wild animal for purposes of [a state statute]." *Id.*

The plaintiffs similarly attempt to suggest that the Louisiana Supreme Court simply assumed that the deer at issue in *Briley v. Mitchell*, 115 So. 2d 851 (La. 1959), was wild. But, quoting a prior decision, the *Briley* court rejected an argument similar to the one pressed by the plaintiffs here, explaining that deer are wild animals even though they may have to some extent become tame or domesticated. *Id.* at 559-60 (quoting *Vredenburg v. Behan*, 33 La. Ann. 627, 635 (La. 1881)). *Hudson* and *Briley* are persuasive authority supporting the Commission.

Notably, the plaintiffs do not even address the Wildlife and Forestry Law, which refutes their arguments and fully supports the Commission. The Commission's statutory powers extend to "all wildlife of and within the state, whether resident, migratory or imported, dead or alive." § 252.030, RSMo. "Wildlife" subject to the Commission's regulatory power is defined to include all wild animals. § 252.020(3), RSMo. The Commission has authority to restrict or ban private possession of wildlife, which it has done for white-tailed deer, skunks, possums, bears, snakes, and a myriad of other wildlife for 80 years. § 252.040, RSMo.

State v. Willers, 130 S.W.2d 256 (Mo. App. 1939) (unpublished), does not aid the plaintiffs. *Willers* held that a particular statute protected only "wild pigeons." Because the pigeons at issue were "in a feral state," any discussion of the statute's applicability to "domesticated" pigeons was dictum. *Id.* at 257. And, importantly, the court cited no legal authority supporting its assertion that privately owned pigeons were not "wild."

The plaintiffs place much reliance on this Court's decision in *Schley v. Conservation Commission of Missouri*, 329 S.W.2d 736 (Mo. 1959). But *Schley* merely

held that the Commission could not enforce an unwritten policy contrary to written regulations. *Id.* at 740. At most, *Schley* noted—but did not decide—a question about the meaning of "resources of the state," which neither party had briefed. *Id.* at 740-41.

The "resources of the state" include captive cervids. The plaintiffs contend the word "of" connotes an element of state ownership, but the common meaning of "of" may also refer to something ***within*** a state. *See Briere v. Tusia*, 2011 WL 4509502, at *3 (Conn. Sup. Ct. May 16, 2011) ("natural resources of the state" means "the 'natural environment' located in Connecticut, not government property"). Section 252.030 demonstrates this point, referring to "all wildlife of and within the state." Use of this language to describe the Commission's authority illustrates that the Commission's interpretation is correct. The legislature likewise recognized the Commission's authority over privately owned wildlife by defining "captive wildlife" to include captive cervids "held under permit issued by the Missouri department of conservation for hunting purposes" in Missouri's tax statutes. *See* § 144.010.1(3), RSMo.

For the reasons explained in the Commission's substitute brief, this Court's decisions in *Reid v. Ross*, 46 S.W.2d 567 (Mo. banc 1932), and *State v. Taylor*, 214 S.W.2d 34 (Mo. 1948), also support the Commission's interpretation. The plaintiffs criticize *Reid* and *Taylor* for relying on *Weber*. But rather than supporting the plaintiffs' position, this reliance simply demonstrates that the plaintiffs' interpretation of *Weber* is wrong. The plaintiffs also argue that *Reid* and *Taylor* pre-date *Schley*. But *Schley* did not even reach the issue now before the Court. *Reid* and *Taylor* both demonstrate that language like that in Article IV, Section 40(a) includes privately owned animals.

C. The Commission can act to limit the spread of CWD.

The Commission has authority to regulate the possession and importation of captive wildlife capable of spreading CWD to Missouri's native cervids. Contrary to the plaintiffs' assertion, the Commission repeatedly raised this argument in the trial court. *See* L.F. at 771, 975-976, 2683-2684, 2753-2754.

The plaintiffs concede that it is impossible to eradicate CWD once it becomes established and point out that CWD has not yet spiraled out of control in Missouri. From there, they contend the Commission cannot enact regulations designed to limit the spread of CWD by imported cervids because it is impossible to prevent free-ranging cervids from spreading the disease, and that the challenged regulations bear no reasonable relationship to the objective to prevent the introduction or spread of CWD in Missouri. The unsupported argument that a state agency can never enact regulations to address a problem unless it is possible to entirely eliminate the problem is patently absurd.

The Commission's regulations need only bear a "reasonable relationship to the legislative objective." *Termini v. Missouri Gaming Comm'n*, 921 S.W.2d 159, 161 (Mo. App. 1996). The objective of Article IV, Section 40(a) is conservation of the game and wildlife resources of the state. The plaintiffs do not even attempt to contradict the undisputed trial evidence that the importation of captive cervids and the high density of captive facilities increase the risk of spreading CWD, a highly infectious and uniformly fatal disease, to greater numbers of Missouri's free-ranging cervids.

The contention that the Commission cannot enact regulations to combat CWD until it is too late to make a difference is not the law. Rather, states have an interest in

and are permitted to enact sensible regulations to inhibit the spread of imperfectly understood environmental threats. *See Maine v. Taylor*, 477 U.S. 131, 148 (1986); *Bean v. Bredesen*, 2005 WL 1025767, at *4 (Tenn. Ct. App. May 2, 2005). While it may be impossible to fully control the spread of CWD in Missouri with existing methods, that fact cannot possibly justify forbidding the Commission from enacting regulations to prevent continued importation of captive cervids from exacerbating the problem.[1]

The plaintiffs argue that interpreting Article IV, Section 40(a) to grant the Commission authority to regulate the importation of privately owned wildlife in order to protect free-ranging wildlife would confer "unlimited" authority to regulate any animal or activity that might endanger native wildlife. This is simply not so and, in any event, is not a question before the Court. The plaintiffs have not pointed to any existing or prior regulations in which the Commission has sought to exercise such authority. Interpreting the Constitution, consistent with its plain language, to authorize the Commission to regulate the importation of animals ***of the same species*** as those found natively in Missouri would not lead to the sort of regulatory overreach the plaintiffs envision.

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[1] As the undisputed trial evidence makes clear, while scientific understanding of CWD is incomplete, scientists know enough to conclude that the disease is a severe threat to cervids in North America. For more information on the developing understanding of CWD, *see* Greg Cima, *Chronic Wasting Disease Continues to Spread*, American Veterinary Medical Association (July 26, 2017), https://www.avma.org/news/javmanews/pages/170815a.aspx.

2. The regulations do not violate the "right to farm."

In its substitute brief, and in the Court of Appeals, the Commission noted the constitutional basis for its authority and explained that constitutional provisions must be harmonized. It also identified significant legal errors in the trial court's analysis based on its failure to identify which aspects of Hill and Broadway's operations are farming or ranching. The plaintiffs do not meaningfully address those arguments. They simply assert that there is no conflict based on their mistaken assertion that the Commission does not have authority over captive cervids.

A. Hill and Broadway are not engaged in "farming and ranching."

The plaintiffs argue that Hill and Broadway engage in farming or ranching practices based on the assumption that captive cervids are "livestock" regulated by the Department of Agriculture. They maintain that Missouri voters would have understood the right to farm amendment to include the captive cervid industry because when the amendment was adopted the Department of Agriculture had captive cervid regulations. For the reasons discussed above, these arguments are erroneous.

Moreover, the right to farm amendment was presented to voters in August of 2014. *Shoemyer v. Mo. Sec'y of State*, 464 S.W.3d 171, 173 (Mo. banc 2015). The first legislative effort to redefine "livestock" had been vetoed approximately one month earlier. *See* LF2133-2168. And, even if these legislative efforts had been successful, the plain and ordinary meaning of "farming and ranching practices" would still not include the rearing of animals other than traditional farm animals. *See Dost v. Pevely Dairy Co.*, 273 S.W.2d 242, 245 (Mo. 1954).

Missouri statutes support this conclusion. "Farming" is defined as the production of agricultural crops, raising of livestock and poultry, and production of milk, dairy products, fruit, and horticultural products, as well as the raising of equines and mules. §§ 262.801, 350.010(6), RSMo. Missouri statutes generally define livestock to include species traditionally associated with farms. *See* §§ 267.565(13), 265.300(6), 277.020(1), RSMo. The legislature has expressly identified captive cervids held for hunting as captive wildlife, not livestock. § 144.010(3), (6), RSMo.

This Court recently examined Article I, Section 35 as it related to criminal charges for possessing and cultivating marijuana. *State v. Shanklin*, No. SC96008 (Mo. banc Dec. 5, 2017). *Shanklin* explained that the provision "does not provide a constitutional right to engage in unregulated 'agriculture.'" *Shanklin*, slip op. at 4. The Court concluded that the "right to farm" did not include a right to grow marijuana because the amendment contained no language suggesting an intent to repeal longstanding laws prohibiting such activity. *Id.* at 4-5. Similarly, as to this case, the Commission has long exercised the authority to regulate and prohibit the private possession of wildlife. *See* § 252.040, RSMo. As in *Shanklin*, there is nothing in Article I, Section 35 suggesting that Missouri voters intended to strip the Commission of its longstanding authority to regulate the possession of wildlife. The right to farm amendment does not purport to affect the Commission's powers.

The plain meaning of "farming and ranching practices" does not include the raising of captive cervids to be hunted. The plaintiffs' cited cases are not to the contrary, as both concerned traditional farm animals. *See Premium Standard Farms, Inc. v.*

Lincoln Twp., 946 S.W.2d 234 (Mo. banc 1997) (hogs); *State ex inf. Ashcroft v. Town of Weldon Springs Heights*, 582 S.W.2d 661 (Mo. banc 1979) (horses and cattle).

All of the plaintiffs' complaints about the challenged regulations relate to their effect on the plaintiffs' hunting businesses. Respondent Hill characterizes his chief complaint about the regulations as being that "he cannot import cervids for hunts." Res. Br. at 50. Importing animals to be shot on short notice in a restricted area, and providing a place to shoot them, are not farming or ranching. Nor is the breeding of animals for the sole purpose of hunting them.

B. The regulations satisfy rational basis review.

Because Hill and Broadway neither farm nor ranch (and because the challenged regulations do not heavily burden anything that can plausibly constitute farming or ranching), rational basis review applies. Such review is exceedingly deferential. Any set of conceivable facts may justify the regulations, and the Court must presume a rational basis exists. *Amick v. Director of Revenue*, 428 S.W.3d 638, 640 (Mo. banc. 2014); *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. banc. 2006). The plaintiffs nevertheless contend that there is no rational basis for the regulations because there have been few documented instances of CWD-positive deer being transported interstate from a USDA-certified herd, CWD is already present in Missouri, and there have been no mass-mortality events. They essentially contend the regulations lack a rational basis because they cannot totally eliminate the spread of CWD.

These regulations are rationally related to the state's interest in protecting its wildlife. Interstate transportation of cervids is ***the most common way*** CWD is spread.

Tr. at 468, 757-761; L.F. at 1174, 1867, 1964-1965, 2091, 2103. Every expert testified that an importation ban was an appropriate response to the threat posed by CWD. Tr. at 282, 764-765, 718, 430, 466-467; L.F. at 1929, 1931, 2004. Approximately half the states partially or completely ban the importation of cervids. As explained in the Commission's substitute brief, there are many reasons that fences surrounding captive cervid facilities need to be adequate, and prior fencing regulations did not ensure the construction of adequate fences. The record permits no conclusion but that the regulations have a rational basis.

C. The regulations would also satisfy strict scrutiny.

For the reasons set forth above and in the Commission's opening brief, the Court should reject the plaintiffs' baseless argument that the importation ban is not necessary to achieve the state's compelling interest in preventing the introduction and spread of CWD because Hill and Broadway's activities are regulated by the Department of Agriculture.

i. The importation ban.

Even if the Department of Agriculture regulations are valid, they are not a suitable alternative to the importation ban. Those regulations permit cervids to be imported under the USDA herd-certification program, which was developed before more recent developments in the understanding of CWD, and certified herds have been found to contain CWD-positive animals up to a decade after certification. Tr. at 320; L.F. at 1184-1188, 1969-1970. The Commission's interest is in preventing further introduction of CWD into Missouri, which the Department of Agriculture regulations do not adequately ensure.

The plaintiffs focus on the fact that there are few documented instances of CWD-positive animals being transported interstate from certified herds. As explained at length in the Commission's substitute brief, certified herds have been documented to contain CWD-positive animals, and interstate transportation is the most common way CWD is spread. The plaintiffs simply ignore the disastrous consequences of importing CWD-positive animals. The increased density among captive deer facilitates disease transmission. CWD-causing prions remain in the environment for decades. Infected facilities must be depopulated and quarantined, and the surrounding area repeatedly culled. Rainwater can spread prions beyond the confines of a contaminated facility.

The fact that CWD may be "here to stay" does not alter the state's interest in preventing its further introduction and controlling its spread. CWD was first detected in Missouri at a captive facility. Tr. at 210, 690; L.F. at 2707. Since then, most CWD detections have occurred within close proximity of that facility. While the plaintiffs question whether CWD ***originated*** in the facility or outside of it, the facts are that: (1) the first deer discovered with CWD in Missouri was found in the facility; (2) the largest concentration of CWD-positive deer was found in the facility; (3) a deer was seen escaping from the facility; and (4) findings of CWD in free-ranging Missouri deer began immediately around the facility.

The plaintiffs also contend that Missouri should simply employ Illinois's approach and continue to allow importation. They focus on the fact that Illinois has managed to keep the overall prevalence of CWD relatively low through sharpshooting. But the extra-record evidence they cite demonstrates the insufficiency of the Illinois approach.

According to that evidence, CWD prevalence rates in Illinois have been ***increasing*** in recent years. A20 & A25. Most CWD-positives are now reported in counties other than those where the disease was initially detected. A25. "This shift in CWD distribution has posed significant challenges for management, [which] must now be directed over a far larger area, spreading resources very thin." A27. This is ***precisely*** what the Commission wants to avoid, and why the importation ban is so important. As the wildlife experts who testified at trial explained, Illinois has not succeeded in controlling CWD's spread. Tr. at 680-683; L.F. at 1942-1947.

The plaintiffs suggest that the fact that Arkansas has banned cervid importation since 2002 but still has CWD somehow demonstrates that the importation ban is unnecessary. But they cite nothing in the record demonstrating where CWD in Arkansas came from, or how long it has been there.

Contrary to the plaintiffs' assertions, the Department of Conservation's elk restoration efforts have nothing to do with this case. Before its current understanding of CWD, the Commission imported approximately 110 elk between 2011 and 2013. Hill alone imports approximately as many cervids ***every hunting season***. Res. Br. at 20. The Department of Conservation's Wildlife Veterinarian would not recommend a similar project, given current knowledge. Tr. at 287-288, 771. There is no evidence that the Commission intends to import elk in the future, and it does not need a regulation to prohibit itself from doing so.

ii. The fencing standards.

The plaintiffs do not seriously dispute that the prior fencing regulations were vague and problematic. Instead, they contend that any problems were attributable to the way the Commission drafted the prior regulations. This is irrelevant. The fact is, the old regulations gave neither conservation agents nor landowners sufficient guidance, and more precise standards were plainly appropriate. The plaintiffs' suggestion that the Commission should simply have trained its agents how to better enforce existing regulations is meritless. As this Court held in *Schley*—on which the plaintiffs place such great reliance—enforcing unwritten standards is not an appropriate substitute for the statutory rulemaking process. 329 S.W.2d at 740.

The plaintiffs do not dispute that the Commission relied on peer-reviewed articles and regulations from other states in drafting the new standards. Instead, they complain that the Commission does not know precisely how many escapes are attributable to each aspect of the new standards. Such evidence would be practically impossible to gather. Escapes are largely self-reported by landowners. Tr. at 628. Escapes were a recurring problem under the old standard, and the relation of these escapes to inadequate fencing is self-evident, as shown by the evidence recited in the Commission's substitute brief at 25-26. Each plaintiff admitted experiencing problems with deer escaping or animals entering facilities. Tr. at 516-517, 575, 584-585, 739-740. And a deer was seen escaping the infected Heartland Ranch facility before it was depopulated. Tr. at 739-740.

The plaintiffs fail to identify any aspect of the fencing regulations that is broader than necessary to achieve the state's compelling interest. Their argument is simply that

the new criteria are arbitrary because their fences were previously approved under the old standard. There is no legal basis for this contention, and the Court should reject it.

Contrary to the plaintiffs' assertion, the Commission never suggested that the new standards were "merely guidelines." Res. Br. at 56. The regulations permit the Commission to grant variances for actual, demonstrable hardship, which is a mechanism to tailor the regulations should circumstances warrant. L.F. at 921, 993, 2689. Neither Hill nor Broadway requested a variance, so it is unknown whether one would be granted.

The Commission did not imply that existing fencing regulations were sufficient. Ample evidence demonstrates that they were not. The Commission simply pointed out that Hill and Broadway's fences were already supposed to be escape-proof, and the only burden imposed by the new regulations is monetary cost. L.F. at 921, 2688. Cost is still the only complaint that the plaintiffs have raised, and they have not identified any particular aspect of the fencing standards that is more burdensome than necessary.

iii. The recordkeeping and permitting requirements.

The proposed judgment the plaintiffs submitted did not even address the recordkeeping and permitting regulations. And yet, they now argue that those regulations lack even a rational basis. Res. Br. at 57-58. Even now, however, the plaintiffs fail to identify any way in which those regulations are broader than necessary to achieve the state's compelling interest. They simply prefer the Department of Agriculture's regulations. *Id.* That is not a basis for deeming regulations unconstitutional.

3. The injunction is overbroad.

The plaintiffs contend for the first time that there are no circumstances under which the challenged regulations could be constitutional "because Hill and Broadway's captive cervid farming and ranching activities are not unique to them." Res. Br. at 60. There is no support for this new argument. The plaintiffs concede that it is unknown how other captive cervid facilities actually operate. *Id.* at 61. Attempting to sidestep the inadequate record, they declare that other facilities ***must*** operate in a similar manner. The Commission was precluded from taking discovery related to other captive cervid facilities, and the trial evidence was that even Hill and Broadway had different business models. *See, e.g.*, Tr. at 607-608 (Jacques deMoss testifying that comparing Winter Quarters to Oak Creek is like comparing apples to oranges).

The plaintiffs also improperly suggest that evidence concerning Respondent Grace constitutes evidence of how non-party captive cervid facilities would be impacted. Res. Br. at 56 n.3. Grace was not a plaintiff as to Count 2. When the Commission objected to testimony concerning the impact of the challenged regulations on Grace's business, the plaintiffs stipulated they would not rely on his testimony with respect to Count 2. Tr. at 571-573. The plaintiffs cannot go back on that stipulation now, and the Court should reject their attempt to do so.

The plaintiffs did not plead representative capacity and successfully resisted discovery about their activities in conjunction with the Missouri Deer Association—the entity funding this litigation—on that basis. Having prevailed on that issue, it was improper for plaintiffs to request, and the trial court to grant, representative relief.

Nor did the plaintiffs plead or try this case as a class action, or offer any evidence about the regulations' impact on non-parties. They failed to establish the absence of circumstances under which the regulations can be constitutionally applied. If the Court concludes the Commission had authority to enact the regulations but that the regulations violate Article I, Section 35 as applied to Hill and Broadway, the trial court's injunction exceeds the scope of the pleadings and proof, and the Court should remand with instructions to limit the scope of the injunction to Hill and Broadway. *See City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 264 (Mo. App. 2010).

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted,

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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 December 11, 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 4,904, excluding the cover, table of contents, table of authorities, signature block, appendix, and this certificate.

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/s/ Jeffery T. McPherson