**NO. SC99092**

**IN THE SUPREME COURT OF MISSOURI**

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**CONSERVATION COMMISSION, *et al.*,**

**Respondents,**

**v.**

**ERIC SCHMITT, *et al.*,**

**Appellants.**

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**Appeal from the Circuit Court of Cole County, Missouri**
**The Honorable S. Cotton Walker, Circuit Judge**
**Case No. 20AC-CC00342**

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# Brief of Amicus Curiae Conservation Federation of Missouri in Support of Respondents

***This brief is being filed with the consent of all parties.***

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Pursuant to Rule 84.05(f)(2), the Conservation Federation of Missouri received the consent of all parties to file this brief.

## INTEREST OF AMICUS CURIAE

The Conservation Federation of Missouri and its more than 95 affiliate organizations represent over 85,000 committed outdoor advocates and participants.

## INTRODUCTION

Mother nature does not have term limits. The Missouri Legislature does. Our air, water, and habitat are not depreciable assets. They are gifts given by our forebearers. Our mission to responsibly conserve them is now more important than ever.

Time and again, special interests have aligned against conserving our land and wildlife. The General Assembly's attempt to dictate what the Missouri Department of Conservation (the "Department") can and cannot spend conservation funds on is the latest attack. In the course of these challenges to the Department and the Conservation Commission (the "Commission") that directs it, Missouri courts consistently have re-affirmed the Commission's constitutionally-vested authority to manage conservation matters, as specifically approved by Missouri voters in 1936. The Conservation Federation of Missouri (CFM) has stood with Missouri Conservation in many of those battles. This trust, given by the people and enforced by the courts, is not to be diminished by the legislature.

Since 1935, the CFM has been a prominent and successful advocate for the future of Missouri's outdoors. Founded by sportsmen with the purpose of taking politics out of

conservation, the CFM has waged and won numerous battles to secure Missouri's place as a leader in conservation policies and funding. The members of the CFM are the conscience of hunters, fisherman, foresters, campers, trappers, hikers, paddlers, birdwatchers, and more. The CFM speaks for sportsmen and sportswomen whenever and wherever it is necessary, to support their collective opinions on the future of Missouri outdoors.

The CFM's work over nearly a century is informed by the foundational understanding that long-term habitat decisions cannot be made in accordance with shifting political tides. Nor should these decisions be subject to being skewed by regional or local influences or narrowly and often poorly informed, local individuals or entities. We respect the history and share the view of Missourians that conservation is a shared value – not a momentary "position." And to help guarantee the wise stewardship of our lands and wildlife, a longer and broader horizon of analysis and action is necessary. This has allowed Missouri to recover and manage whitetail deer, turkey, elk, and many other natural species that were decimated by loss of habitat. The people understood when they created the Commission as an independent, apolitical body that micromanagement by part-time, term-limited politicians from a basement hearing room deep inside the Capitol, often providing barely 24 hours' notice to interested citizens, is not conducive to effective conservation. Rather, this responsibility must be carried out by thoughtful, trained conservation professionals managed by the Commission free from short-term pressure with the long-term view necessary to succeed in their statewide mission.

The CFM's interest here is especially strong. The 1936 ballot measure that ultimately resulted in the creation of the Commission and the Department through

amendment to the Constitution was initiated by the CFM. Now, through HB 2019, the General Assembly, with the assistance of Appellants, seeks to gut that effort by assuming control over Department spending, in direct contravention of the Missouri Constitution and the people's will.

The legislature has ignored the Missouri Constitution, ignored the will of the people who established an independent Commission and gave it sole authority over these resources, and disregarded our state motto, which is carved in the Capitol: "The welfare of the people shall be the supreme law."

For these reasons, the CFM, as amicus curiae, urges the Court to affirm the judgment below and continue to protect the independent authority of the Commission.

## ARGUMENT

The issue in this case is who controls how direct expenditures of monies from the Conservation Commission Fund (the "Conservation Fund") are authorized and spent. The Constitution says this authority and great responsibility rests with the Commission. Appellants claim the legislature has the final word to micromanage conservation policy.

This case was provoked by the General Assembly's decision to leave out certain language from its 2020 appropriation bill, HB 2019, relating to the appropriation of monies from the Conservation Fund. Left out of the bill was language approving the use of Conservation Fund monies to cover two items that had been specifically included in the Commission's list of purposes that was sent to the General Assembly: the purchase of 510 acres of threatened prairie habitat, and the voter required payment in lieu of taxes (PILT) payments for 2020. Based on the intentional deletion of language approving the use of

Conservation Funds for these purposes, the Office of Administration refused to certify the Commission's request for payment to cover the property purchase and the PILT payments, improperly stripping the Commission of the authority to acquire the threatened prairie habitat and meet its obligations to local political subdivisions. This lawsuit ensued.

The stakes of this case are higher than the two items the General Assembly attempted to carve out of the Commission's budget. The Commission and Department as we know them are at risk. As are the forests, habitats, and wildlife they oversee. Decades of progress for Missouri's outdoors are on the line.

## I. The Constitution Grants The Commission Exclusive Authority Over The Conservation Fund.

Article IV, § 43 of the Missouri Constitution establishes the Conservation Fund and states that it "shall be expended and used by the [C]onservation [C]ommission, [D]epartment of [C]onservation, for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wildlife resources of the state, including the purchase or other acquisition of property for said purposes." § 43(a)-(b). As approved by the people, the Constitution grants the Commission exclusive authority over the Conservation Fund and how conservations funds are spent. And, in a reflection of the people's will that the Commission take affirmative steps to conserve our natural resources, the Constitution does not merely authorize expenditures for conservation purposes, it *mandates* them. Mo. Const. art. IV, § 43(b) ("The moneys arising . . . ***shall be expended and used*** by the [C]onservation [C]ommission . . . for [conservation purposes], including the purchase or other acquisition of property for said purposes, and for the administration

of the laws pertaining thereto, and for no other purpose.") (emphasis added). The Supreme Court repeatedly has affirmed that § 43 means what it says: on matters involving the conservation of Missouri's forests, fish, and wildlife, and the expenditure of conservation funds to advance that mission, the authority and responsibility rests with the Commission. See, e.g., Marsh v. Bartlett, 121 S.W.2d 737, 740, 742, 744 (Mo. 1938); Walsh v. St. Louis Cty., 353 S.W.2d 779, 782 (Mo. 1962) (citing Marsh at 740, 742, 744) ("It is conceded that the Rules and Regulations of the Conservation Commission are controlling on the constitutionally provided subjects.").

The Commission first was established by the voters in 1936, following decades of overlogging and overhunting in Missouri which, by that time, largely had cleared the State's forests, degraded wildlife habitats, and nearly extirpated many species, such as deer, beaver, and elk, out of the State. The Commission replaced the Fish and Game Department, an agency without the independent constitutional protections, under whose watch this destruction had occurred. Unlike other departments within the executive branch, which are funded primarily with money from the state's General Revenue, the Commission and its funds were insulated from micromanagement and the narrow agendas and pressures so often seen in politics. The Commission is comprised of four appointed Missourians required to have knowledge and interest in wildlife conservation with no more than two being from any single political party. The Commissioners serve 6-year terms. And the Commission does not depend on appropriations from the State's General Revenues for funding. The Commission and the Department were designed to carry out their functions based on science, not politics. The success of this independent model truly is impressive.

Voters further defined the Commission and its mission in subsequent ballot proposals over the years. In 1976, voters approved a sales tax funding source to greatly enhance the Commission's ability to carry out its mission. And in 1980, voters overwhelmingly supported the ability of the Commission to make PILT payments to local political jurisdictions so that the conservation of public lands would not adversely affect other local or regional services. See Conservation Fed'n of Mo. v. Hanson, 994 S.W.2d 27, 30 (Mo. banc 1999) (noting that the 1980 amendment controls when in conflict with the provisions of the Hancock Amendment because they "were adopted at the same general election on November 4, 1980 and [the 1980 Conservation amendment] received a larger number of affirmative votes.").

## II. Missouri Courts Consistently Have Enforced § 43, and Its Predecessor, to Defeat Challenges to the Commission's Authority and Discretion.

Despite strong popular support among voters for both the Commission and conservation generally, the Commission is a frequent target of attacks animated by special interests, whether by lawsuit, legislation, or otherwise, seeking to erode its authority, divert its funds, and restrict its activity. When called upon, Missouri courts consistently have stood strong and re-affirmed the Commission's constitutionally-vested primacy in this field. See, e.g., Marsh, 121 S.W.2d at 740 (describing the Commission's plenary authority over the "control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State"); State ex inf. McKittrick v. Bode, 113 S.W.2d 805, 808 (Mo. 1938) (rejecting challenge to Commission's appointment for Director of the Department of Conservation); Hanson, 994 S.W.2d at 30 (rejecting the

legislature's attempt to divert Commission funds for tax refund because § 43 "is written as a positive command" that Commission funds "must be used and expended by the [C]ommission for the specified, permissible conservation purposes."); Hill v. Missouri Dep't of Conservation, 550 S.W.3d 463, 467, 472-73 (Mo. banc 2018) (rejecting challenge to Department's authority to regulate deer and elk on private land).

Increasingly, these attacks have come from multiple fronts. In 2018, the Supreme Court saw firsthand how far the anti-conservation interests will go in Hill, which involved a challenge to the enforceability of Department regulations targeted at preventing the spread of Chronic Wasting Disease among deer. The enforceability of these regulations was just part of the story. Litigation only commenced after the legislature passed a bill, later vetoed, that would have prevented the Commission from regulating deer populations on private land – or on any land within the State – by taking the drastic step of removing deer and elk from the Commission's jurisdiction entirely. Specifically, the bill sought to reclassify deer from "wildlife or game," which are managed by the Commission, to "livestock," which is regulated by the Department of Agriculture. Of course, there was no scientific basis for this attempted re-classification, and the only parties that stood to benefit were the few exclusive, high-fence large private ranches. But for the bill being vetoed, deer and elk – two species that helped inspire the creation of the Commission and remain a core focus of the Commission's day-to-day work – would have been swept outside of the Commission's control and the protections the Commission provides.

Because the veto preserved deer and elk as "wildlife or game," and thus subject to regulation by the Commission, the fight was taken to the courts. There, private-fenced

hunting ranches, backed in large part by out-of-state interests, challenged the Commission's authority to regulate deer and elk on private land. The ranchers initially succeeded at the trial level, but, on appeal, the Supreme Court reversed, holding that the Commission's authority to regulate wildlife covered all wildlife within the State, including wildlife on private land. Hill, 550 S.W.3d at 467, 472-73.

As another example especially relevant here, the legislature previously has tried – and failed – to interfere with the Conservation Fund. In the mid-1990s, the General Assembly appropriated millions of dollars from the dedicated Fund to go towards taxpayer refunds owed by the State under the Hancock Amendment, which requires the state to refund money to taxpayers when state revenues exceed a certain level. The CFM challenged the action of the legislature in court and, on appeal, the Supreme Court of Missouri held the appropriations unconstitutional. Hanson, 994 S.W.2d at 30. The upshot of Hanson is that conservation funds are untouchable for the legislature, even if, hypothetically, the State needed this money to meet other obligations under the Constitution. And, of course, such "need" is purely hypothetical, as the Conservation Fund is microscopic (approximately $21 million) compared to the State's General Revenues and annual budget (approximately $30 billion). This is just further confirmation that the legislature's real interest in the Fund is not the money: it is control.

## III. The General Assembly's Interference With The Commission's Budget And Expenditures Is An Attempted Power Grab.

The General Assembly's attempt, through HB 2019, to manage the Commission's budget and spending is the latest in this long history of attacks. It also presents perhaps the most direct existential threat to the Commission to date.

As the voters recognized when they created the Commission and established the Conservation Fund, the Commission's complex and delicate but essential mission presents unique needs that require the Commission to be independent and apolitical. Consider its work: the Commission and the Department manage hundreds of thousands of acres of forest; renew threatened habitats; restore imperiled species; regulate hunting and fishing; educate hunters and the public; manage fisheries; protect against wildfires; conduct research; enforce regulations; advise private landowners on matters such as harvesting timber, planting crops, and managing invasive species; and perform a number of additional functions.

A recent example of successful long-term habitat management is the reintroduction of the brown-headed nuthatch to Missouri. The nuthatch had been extirpated in the state for as long as a century, after loggers clear cut its pine woodland habitat. The pine largely did not grow back and was replaced by faster growing trees like oak and hickory. Alongside a separate, decades-long effort to regrow and expand the pineries, the Commission, in partnership with the U.S. Forest Service ("USFS"), mapped out a plan to recolonize the nuthatch. In 2020, after years of planning and research, and with the habitat finally sizable enough to support a nuthatch population, the Commission and USFS

successfully reintroduced wild nuthatches to Missouri. The Commission is monitoring the birds and their nest survival, with the plan to release new birds again this fall and further grow the population.

Habitat and species restoration under the Commission has been impressive. As former CFM executive director Dave Murphy in 2011 put it: "Not in their wildest imaginations could those early sportsmen have imagined what has been achieved. . . . On the same landscape, at the same time that our human population has doubled, we've seen the restoration of wild turkey, deer, geese, river otters, raccoons, black bass, elk and so much more." Joe Jerek, *MDC celebrating 75 years of conservation in Missouri*, MISSOURI DEP'T OF CONSERVATION (Nov. 15, 2011), https://mdc.mo.gov/newsroom/mdc-celebrating-75-years-conservation-missouri.

This kind of work necessarily takes time. In matters of conservation, progress occurs in increments like succession stages and breeding cycles, not fiscal years or election cycles. An initiative may take decades to complete. Continuity of vision and reliable access to the funding and other resources needed to support the plan along the way are imperative.

The Commission's work does not stop once any single objective is achieved. After the Commission restored Missouri's white-tail deer population to sustainable levels, for example, the Commission's priorities shifted to managing and preserving that population. Conservation work is perpetual, by nature.

Given the necessarily long horizon on conservation initiatives and the fragile and, sometimes, irreplaceable wildlife and habitats at issue, long-term decisions are properly vested in an apolitical department not controlled by more short-term thinking.

The Commission, informed by a team with broad and deep understanding, considers additional conservation properties for addition to the Department's holdings. With interest in traveling into nature close to home at an all-time high over the last year, it is patently ridiculous for a group of legislators with little ecological understanding to determine that Missouri has somehow reached the legislators' definition of enough without any clear examination of the will or the welfare of Missouri citizens.

The legislature's attack on the Commission's ability to meet its PILT obligation to local governments is especially insidious. This program requiring the Commission to remit tax payments to local jurisdictions took head-on the concern that Commission land did not pay its fair share of local taxes. To undermine the relationships built since the overwhelming passage of this provision by Missouri voters, the legislature's action, for no good reason, puts the Commission in a position of "not paying bills" to local governments. This can clearly be seen as an effort to diminish the Commission's overwhelming support by Missouri voters and citizens and is further evidence of a concerted effort to amass control.

PILT provides support for schools and other critical services in communities where the Commission owns land that supports the conservation goals of the people of Missouri. The legislature's decision to eliminate this funding can only be seen as an attempt to harm the relationship between the Commission with the people of those communities. How can

a legislature or court determine that removing that financial support of communities serves the welfare of Missouri citizens? Representative and senators have voted to reduce funding for these communities in their own districts in clear contravention of the Constitution and the interests of Missourians.

For these reasons, the Commission's independent control over conservation funds is not just constitutionally-mandated, it is ecologically vital.

## CONCLUSION

At first look this budget fight may seem insignificant, as it covers less than only ¼ of 1% of the State budget. But the legislature's deliberate purported non-appropriation of a portion of the Commission's budget is a clear and somewhat clever obfuscation of the legislature's real intent: control. Preventing the Department from making necessary and timely land investments and payments to local jurisdictions would pass control over those vital choices to the legislature: something the voters specifically prohibited when they amended the Constitution to create the Commission as a professional department with its own funding source, independent from the legislature and its perpetual budget fights. In the end, if the legislature is permitted to prevent the Commission from spending conservation funds on items the Commission and its teams of scientists have determined are state and conservation priorities, is there any Department function that the legislature would not also be able to control?

Allowing the legislature to hijack the Department in this way, if allowed to stand, likely would set in motion the Department's descent into politically-driven ineffectiveness. As the Commission's achievements over the past 80 years make clear, the people got it

right when they decided that matters of conservation should be made by the experts, not term-limited legislators.

The legislature has failed to obey the Constitution, has failed to follow the clear will of the people, and has apparently forgotten to serve the people by attempting to usurp the Commission's authority over the Fund. Should the legislature desire to gain this authority, they should do what the citizens have done repeatedly to establish the current system: Create language, collect the required signatures, and put the proposed change before the voters through the initiative petition process.

The Conservation Federation of Missouri thus calls on the Court to once again enforce § 43 and protect the Commission, and the invaluable resources it is charged with conserving, from the legislature's latest attempted power-grab.

For these reasons, and those set forth in Respondent's brief, the judgment below should be affirmed.

Dated: September 2, 2021

Respectfully submitted,

By: /s/ Jeremiah W. (Jay) Nixon

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## CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULES 55.03, 81.18, AND 84.06

This brief complies with the requirements of Rules 55.03, 81.18, and 84.06. This brief complies with the type-volume limitations of Missouri Supreme Court Rule 84.06 because this brief contains 3,267 words, excluding parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and the type style requirements of Rule 84.06 because this brief has been prepared in a proportionally styled typeface using Microsoft Word in 13-point font size and Times New Roman type style.

## CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2021, a true and correct copy of the foregoing amicus brief was served via the Court's electronic filing system to all counsel of record.

/s/ Jeremiah W. (Jay) Nixon