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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

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23 WAP 2023

PUNXSUTAWNEY HUNTING CLUB, INC., and PITCH PINE HUNTING CLUB, INC.,
Appellants,

v.

PENNSYLVANIA GAME COMMISSION, and MARK GRITZER, in his official capacity as an officer of the Pennsylvania Game Commission,
Appellees.

BRIEF FOR APPELLANTS

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JURISDICTION

The Commonwealth Court had original jurisdiction under 42 Pa. C.S. § 761(a)(1). This Court has jurisdiction under 42 Pa. C.S. § 723(a).

ORDER IN QUESTION

This appeal arises from the Commonwealth Court's decision on the parties' cross-applications for summary relief. The sole question below was whether three statutes, 34 Pa. C.S. §§ 303(c), 901(a)(2), 901(a)(8), which "empower game wardens with unfettered discretion to enter upon and roam private land," violate Article I, Section 8 of the Pennsylvania Constitution. *Punxsutawney Hunting Club, Inc. v. Pa. Game Comm'n*, No. 456 MD 2021, 2023 WL 6366772, at *1 (Pa. Cmwlth. Sept. 29, 2023) (unpublished).

The Commonwealth Court, in an opinion by Judge Wojcik, held it was bound by *Commonwealth v. Russo*, 934 A.2d 1199 (Pa. 2007)—which declared that Section 8 never protects private land beyond the curtilage—and upheld the statutes. *Punxsutawney Hunting Club*, 2023 WL 6366772, at *4 (en banc). The order reads: "Petitioners' application for summary relief is DENIED; Respondents' application for summary relief is GRANTED; and judgment is entered in favor of Respondents." *Id.*

SCOPE AND STANDARD OF REVIEW

This Court reviews summary relief decisions de novo, and its scope of review is plenary. *Pa. Env't Def. Found. v. Commonwealth*, 279 A.3d 1194, 1202 (Pa. 2022). Summary relief is proper "if no material questions of fact exist and the right to relief is clear." *Id.* (citing, in part, Pa. R.A.P. 1532(b)). Here, "the facts . . . are not in dispute." *Punxsutawney Hunting Club*, 2023 WL 6366772, at *1. This case turns on pure questions of law.

QUESTIONS PRESENTED

Appellants are private hunting clubs that do not want intruders. They use their land for private purposes and have posted their property lines. But three statutes, 34 Pa. C.S. §§ 303(c), 901(a)(2), 901(a)(8), authorize game wardens to enter private land without consent, warrants, or probable cause. The Clubs argue the statutes violate Article I, Section 8 of the Pennsylvania Constitution—but in *Commonwealth v. Russo*, 934 A.2d 1199 (Pa. 2007), this Court held that Section 8 never protects private land beyond the curtilage.

The questions presented are:

1. Was *Russo* wrongly decided? [*not decided below*]

2. Should *Russo* be overruled? [*not decided below*]

3. Do the entry statutes violate Section 8? [*held no below*]

STATEMENT OF CASE

Form of action

This is a constitutional challenge seeking declaratory and injunctive relief against the entry statutes.

Procedural history

Appellants Punxsutawney Hunting Club and Pitch Pine Hunting Club filed their petition for review in the Commonwealth Court on December 31, 2021. Appellees are the Pennsylvania Game Commission and Mark Gritzer, a game warden for the Commission. After discovery, the parties filed cross-applications for summary relief. The Commonwealth Court held that "*Russo* is binding precedent," granted the Commission's application for summary relief, and denied the Clubs' cross-application. *Punxsutawney Hunting Club*, 2023 WL 6366772, at *4. The Clubs timely appealed.

Summary of facts

The Commonwealth Court's short summary of the undisputed facts was accurate. *See id.* at *2–3. The Clubs elaborate on those facts as follows to provide the full context for this case.

I. The Clubs own private land and do not want intruders.

Punxsutawney Hunting Club and Pitch Pine Hunting Club are two private hunting clubs that own 4,400 acres and 1,100 acres, respectively, of contiguous land in Clearfield County. (R. 98a, 136a, 1033a). The Clubs both have houses (five for Punxsutawney, one for Pitch Pine) where members can stay overnight, farm plots throughout the properties, and ample woods and trail systems that members maintain. (R. 99a–100a, 137a–138a). The Clubs' members use them as sanctuaries to escape the clamor of daily life. (R. 100a–101a, 148a). Members hunt, hike, ski, target shoot, vacation with friends and family, and find solitude in nature. (R. 99a, 116a–118a, 123a–125a, 129a–131a, 136a–137a, 149a–151a, 155a–156a).

The Clubs value and expect privacy on the properties. (R. 101a, 138a). That's why members join—to access a private place where they can hunt and enjoy nature in peace. (R. 100a–101a, 138a). Hunting typically involves walking in the woods, finding a quiet spot, and sitting for hours looking for wildlife. (R. 101a, 138a). Members prefer hunting on the Clubs' properties because they know strangers will not spook nearby wildlife—or worse, step into their line of fire. (R. 102a, 138a). Members also discuss personal topics during hunts—family, marriage, work, health, faith—that they would never

discuss where strangers could overhear them. (R. 101a–102a, 118a, 125a, 130a–131a, 138a–139a, 150a–151a, 156a).

To ensure members the privacy they expect, the Clubs have taken steps to exclude intruders. (R. 103a, 139a). They have posted clearly visible "no trespassing" signs and purple paint along their property lines. (R. 103a–104a, 139a–140a). They have installed locked gates at every entrance. (R. 103a, 139a). And they have waist-high metal wires around their boundaries, though they do not actively maintain the wires given that "no trespassing" signs and purple paint are a legally sufficient way to exclude intruders. (R. 104a–105a, 140a–141a (citing 18 Pa. C.S. § 3503(b)(1)(ii), (vi))).

The Clubs control access to their land in other ways too. The Clubs allow only certain people to enter—members, guests, and contractors who help maintain their properties. (R. 105a, 141a). Pitch Pine has not had issues with trespassers, but when trespassers venture onto Punxsutawney's land, the club orders them to leave. (R. 220a–223a (president testifying "we shoo them off," "we just ask them to leave, private property, you had to see the signs")). Once, the Clubs' members were confused about who owned a five-foot part of their shared border—so the Clubs' presidents met and cleared it up. (R. 327a–329a, 359a–360a).

Finally, a company called Seneca owns mineral rights under the Clubs. (R. 105a, 141a). Seneca runs a group of gas pads on Punxsutawney's land. (R. 105a). But Seneca's access rights are narrow: Seneca uses its own trails and does not stray from its areas or disturb Punxsutawney's members. (R. 105a–107a). Seneca used to run a pad on Pitch Pine in similar fashion—but Seneca abandoned the pad in 2021 and no longer enters. (R. 141a–142a). The Clubs have a good relationship with Seneca. (R. 107a, 142a).

II. Game wardens' unfettered power to search private land.

Pennsylvania Game Commission officers enforce state hunting laws. 34 Pa. C.S. § 322(a); *see generally* PGC, *Hunting & Trapping Digest* 16–17, https://tinyurl.com/4rsah3za (collecting laws). These officers—called game wardens—have statutory power to enter private land. (R. 439a). First, they have "the right and authority to go upon or enter any property, posted or otherwise, outside of buildings." 34 Pa. C.S. § 303(c). Second, they have "the power and duty to . . . [g]o upon any land or water outside of buildings, except curtilage, posted or otherwise[.]" *Id.* § 901(a)(2). Third, they have "the power and duty to . . . inspect[] . . . persons . . . [and their] immediate hunting locations." *Id.* § 901(a)(8). Refusing entry is a crime that can trigger a $1,500 fine and three months in jail. *Id.* §§ 904(a), 925(b)(5).

The Commission's official policy is that game wardens don't need consent, warrants, or probable cause to enter private land. (R. 498a–499a; *see also* R. 905a–906a ("There are no specific steps an officer must take before performing his or her duties on . . . private land.")). Appellee Gritzer—a game warden and the Commission's entity witness—testified that wardens can enter private land at will:

> Q: Is it fair to say that for game wardens out in the field, it's up to each officer's discretion when they enter private land, outside of curtilage, and how they conduct their activities as well on that land?
>
> A: Yes.

(R. 507a; *accord* R. 757a–759a). Indeed, when asked to identify *any* limits on game wardens' discretion, Gritzer replied: "There's zero." (R. 433a).

Game wardens use their statutory power to "patrol[]" private land "every day." (R. 630a). Sometimes they walk, other times they ride bikes, trucks, ATVs—even horses. (R. 445a–447a). During these patrols, game wardens treat private land like public property:

> Q: [W]hen wildlife officers are patrolling for hunting violations, do they treat public and private land any different except for the curtilage aspect that you talked about?
>
> A: No.

(R. 439a). So, the fact that land is fenced, farmed, occupied, or posted with "no trespassing" signs and purple paint would not stop a game warden from entering. (R. 439a–443a). Even a landowner standing at her front gate and refusing entry would not stop a warden from entering. (R. 444a–445a).

After game wardens enter private land, they roam around "to make sure that [people are] complying with the law." (R. 449a). They stop hunters and check their licenses, like "traffic police." (R. 449a, 742a–743a). They take photos and videos of "[a]ny type of suspicious activity" they think they see. (R. 464a–465a). They use shovels to dig up soil samples for lab testing. (R. 501a–503a). And, when they want to surveil a property over time, they place spy cameras that take photos after they leave. (R. 475a, 492a).

The Commission does not monitor game wardens' patrols. Wardens are not required to tell anybody when they enter private land. (R. 452a–455a; *see also* R. 450a–451a ("I'm not going to knock on a landowner's door and say I'm going to go patrol your property.")). Wardens are not even required to keep records of their entries. (R. 513a–514a). Thus, there is no way to be sure how many times a warden has entered a property. (R. 514a–515a). And the same goes for placing cameras on private land: The Commission "just do[es]n't have a tracking system in place for that." (R. 493a).

III. Game wardens' warrantless searches of the Clubs' land.

Appellee Gritzer is the game warden assigned to the Clubs' district. (R. 395a–396a, 518a). At all times relevant here, Gritzer knew the Clubs were posted, gated, and occupied. (R. 579a–581a, 611a–612a). Yet the Commission admits that Gritzer has entered the Clubs' properties at least 15 times (11 for Punxsutawney, four for Pitch Pine) to look for evidence of hunting offenses. (R. 875a–876a, 878a–882a). When pressed, Grizer remembered seven more patrols (six for Punxsutawney, one for Pitch Pine) not on the Commission's initial list. (R. 556a–576a, 699a, 703a–705a, 1035a–1039a).

All 22 known entries are compiled in a table at the end of this brief. *See* Appendix 1, *infra* pp 54–55. While the entries vary in their details, they share a few crucial features: The Clubs did not consent. (R. 108a, 112a–114a, 143a, 146a–148a). Every entry was warrantless. (R. 520a–523a, 589a–591a, 897a). And Gritzer largely lacked probable cause to suspect a hunting violation. (R. 522a–526a, 591a–592a (noting only three dates on which he contends he had probable cause); *see also* R. 922a (Commission noting it "has no record of a report of a potential wildlife and/or hunting violation associated with PHC" or "Pitch Pine")).

The Clubs find Gritzer's warrantless entries intrusive. They're tired of seeing Gritzer roaming their land—by foot, by bike, by truck—hoping to catch them doing something wrong. (R. 108a, 143a, 146a). They're tired of Gritzer following, watching, stopping, and interrogating club members. (R. 108a–113a, 143a–147a). And they're tired of Gritzer entering without notice, which makes it hard for members to follow the basic safety rule that hunters should always know who is around so that nobody accidentally gets shot. (R. 113a, 147a–148a).

On top of all that, Punxsutawney has a unique concern. In discovery, the Commission admitted Gritzer had installed a camera on the club's land —without a warrant—that took hundreds of photos of the club's land and members in an effort to establish probable cause. (R. 572a–573a, 868a, 978a–980a (example photos)). Club members were "outraged" when they learned of the camera and "fear that there may be additional cameras on the property watching them as they go about their private business." (R. 112a).

The Clubs filed this case because they want the warrantless intrusions to stop. (R. 112a–114a, 146a–148a). But the entry statutes remain in force, 34 Pa. C.S. §§ 303(c), 901(a)(2), 901(a)(8), and Gritzer "absolutely" intends to patrol the Clubs' properties in the future. (R. 581a, 615a).

Order under review

The Commonwealth Court—bound by *Russo*'s holding that Article I, Section 8 never protects private land beyond the curtilage from unreasonable searches—upheld the entry statutes. *Punxsutawney Hunting Club*, 2023 WL 6366772, at *4 ("*Russo* is binding"). Two judges noted their belief that *Russo* was wrongly decided. *Id.* (McCullough, J., joined by Wallace, J., concurring).

CONSTITUTIONAL CONSTRUCTION

This Court has a duty to "undertake an independent analysis under the Pennsylvania Constitution." *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991). The Court's "ultimate touchstone is the actual language of the Constitution itself," "as understood by the people when they voted on its adoption." *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006) (cleaned up). Where, as here, a party argues that a state provision provides stronger protection than a federal counterpart, "it is important that litigants brief and analyze at least the following four factors"—text, history, other state cases, and policy—to aid the Court's construction of the text. *Edmunds*, 586 A.2d at 895. In *Russo*, the parties failed to properly brief the *Edmunds* factors. The Clubs correct that error below.

SUMMARY OF ARGUMENT

This Court has an opportunity to correct a grave constitutional error. In *Commonwealth v. Russo*, 934 A.2d 1199 (Pa. 2007), the Court adopted the Fourth Amendment "open fields" doctrine and held that Article I, Section 8 never protects private land beyond the curtilage from arbitrary searches. As a result, state officials hold vast power to invade private land, roam around as they please, and even spy on people with cameras—no consent, warrants, or probable cause required. That vast power "offends the fundamental rights of Pennsylvania citizens." *Russo*, 934 A.2d at 1214 (Cappy, C.J., joined by Baer and Baldwin, JJ., dissenting). *Russo* was wrong, should be overruled, and the entry statutes—which depend on *Russo*—should be struck down.

First, all four *Edmunds* factors for state constitutional interpretation show that Section 8 protects private land. On text: There is overwhelming evidence that the original meaning of "possessions" includes private land. On history: Section 8's abiding concern for privacy shows that landowners' historical right to exclude intruders deserves protection. On state cases: The states whose constitutions most closely align with Section 8 protect private land. On state policy: Rejecting the open fields doctrine is the only way to harmonize the host of important state policies that converge on private land.

Second, stare decisis does not require fealty to *Russo*'s errors. As this Court recently explained, "stare decisis is at its weakest when we interpret the Constitution." *Commonwealth v. Alexander*, 243 A.3d 177, 197 (Pa. 2020) (cleaned up). Moreover, none of the stare decisis factors support retaining *Russo*. *Russo* was poorly reasoned—the product of deficient *Edmunds* briefing on both sides. *Russo* is unworkable, authorizing rampant invasions of privacy statewide. *Russo* was an anomaly that broke with this Court's longstanding respect for Pennsylvanians' right to privacy on their property. Finally, *Russo* has produced no valid reliance interests: It's recent, no published decisions apply it, and officials have no right to violate Section 8.

Third, if the Court overrules *Russo*, the entry statutes cannot stand. "[S]tatute[s] cannot authorize what . . . Article I, Section 8 would prohibit." *Commonwealth v. Myers*, 164 A.3d 1162, 1173 (Pa. 2017). The entry statutes do precisely that. Read properly, Section 8 protects landed "possessions"—including the Clubs' properties—from warrantless searches. Yet the entry statutes "empower game wardens with unfettered discretion to enter upon and roam private land." *Punxsutawney Hunting Club*, 2023 WL 6366772, at *1. That's unconstitutional, the entry statutes should be struck down, and the decision below should be reversed.

ARGUMENT

I. *Russo* was wrongly decided.

Russo held that Article I, Section 8 never protects private land beyond the curtilage from arbitrary searches. *Russo*, 934 A.2d at 1213. *Russo* saw no reason to reject the Fourth Amendment "open fields" doctrine, which treats most private land like a "public place" that government officials can invade at will. *United States v. Dunn*, 480 U.S. 294, 304 (1987). That was error. All four *Edmunds* factors—text, history, state cases, and policy—show that the open fields doctrine has no place in Pennsylvania. As discussed in Section II below, the *Russo* parties' *Edmunds* briefing was woefully deficient. Section I, then, will present the *Edmunds* briefing this Court should have received the first time around.[1]

[1] To be clear, the Clubs do not concede that the federal open fields doctrine—entrenched as it is under the Fourth Amendment—is correct. After *Katz* reoriented Fourth Amendment law around "reasonable expectations of privacy," a majority of federal circuits and state supreme courts rejected the open fields doctrine. *United States v. Oliver*, 686 F.2d 356, 361 (6th Cir. 1982) (en banc) (Keith, J., dissenting). And that made sense. *Katz* was focused "on whether an individual seeks to keep private and unexposed the things that are his." Stephen Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. Pitt. L. Rev. 1, 12 (1986). Thus, "[p]rivate land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies" deserves protection. *Oliver v. United States*, 466 U.S. 170, 188–96 (1984) (Marshall, J., joined by Brennan and Stevens, JJ., dissenting). Of course, *Edmunds* does not require this Court to question the federal doctrine to reject it under Section 8. But the Clubs do not want this Court to mistake their focus on state law as a concession that the federal doctrine is correct. It isn't.

A. The open fields doctrine flouts Section 8's plain text.

The first factor asks whether Section 8 provides a textual reason to reject the open fields doctrine. *See Edmunds*, 586 A.2d at 895. It does. The Fourth Amendment protects "persons, houses, papers, and **effects**." The open fields doctrine's premise is that land is not "enumerated in the Fourth Amendment." *United States v. Jones*, 565 U.S. 400, 411 (2012) (citing *Hester v. United States*, 265 U.S. 57, 59 (1924), and *Oliver v. United States*, 466 U.S. 170, 176–77 (1984)). But Section 8 protects "persons, houses, papers and **possessions**." And that changes everything, because there is vast evidence that the original meaning of "possessions" includes land.

1. Historical sources show that land is a "possession."

Popular founding-era dictionaries defined "possession" in a way that included land. *See* Appendix 2, *infra* pp 56–57 (nine dictionaries published from 1756–1828). For example, Nathan Bailey (1756) defined it as "actual and effectual enjoyment" or "the title or prescription that gives a right to hold any thing," and specifically used land as an example. *Infra* p 56. Samuel Johnson (1773) defined it as "[t]he state of owning or having in one's own hands or power; property." *Infra* p 56. Dyche and Pardon (1781) defined it as "having any thing in our own keeping or power," like the "right to any land,

house, &c. against all others." *Infra* p 56. Webster (1828) defined it as "[t]he thing possessed; land, estate or goods owned." *Infra* p 57. The list goes on. *Infra* pp 56–57.

Founding-era statutes were in accord. Pennsylvania lawmakers often used the term "possessions" to denote rights in land. *See* Appendix 3, *infra* pp 58–60 (17 statutes to that effect from 1682–1800). One of Pennsylvania's first statutes—part of the Great Law enacted under William Penn—made it a crime to "forceably Enter the house or possessions of any Other Being." *Infra* p 58.[2] Several later statutes secured title in landed "possessions." *Infra* pp 58–60. Tellingly, some statutes even used "possessions" to mean land but used "effects"—the Fourth Amendment term—to mean personal property. *Infra* pp 58, 60.

Legal decisions, too, described lands as "possessions" or referred to "possession" of land. *See* Appendix 4, *infra* p 61 (22 cases to that effect from 1763–1794). This Court explained how laws secured landed "possessions." *See, e.g.*, *Peaceable v. Nicholls*, 1 Yeates 293, 294 (Pa. 1793) (noting a statute was "an excellent safeguard to landed possessions"); *Respublica v. Sloane*, 2

[2] Speaking of Penn, the Crown's original charter granted the right to "possess, and enjoy the . . . Land . . . and other the premises unto the said William Penn." *Charter for the Province of Pennsylvania* (1681), http://tinyurl.com/2e2r8axe.

Yeates 229, 229–30 (Pa. 1797) (noting, in dispute over land, that statutes were adopted "to punish lawless persons for forcibly dispossessing their peaceable neighbours from their quiet possessions"). And the Court used the common law concept of "possession" to resolve land disputes (as it still does today, *infra* p 35 n.5). For example, the Court ruled for a plaintiff in a trespass action because he "entered, and enjoyed, for a length of time, a peaceable possession" and "improved" the land with structures and by "cultivating 2 acres of meadow, 40 acres of arable land, and an Orchard," which showed "not only an actual, but a legal possession." *McCurdy v. Potts*, 2 Dall. 98, 98–99 (Pa. 1788). Such cases were ubiquitous. *Infra* p 61.

Finally, writings from major founding-era thinkers referenced landed "possessions." *See* Appendix 5, *infra* pp 62–64 (writings from 11 thinkers from 1675–1833). John Locke wrote about how people claim title to landed "possessions" and about how "in governments . . . the possession of land is determined by positive constitutions." *Infra* p 62. Blackstone explained how people gain "possession" of land and noted that "possession, or occupancy, confirms that right against all the world." *Id.* William Penn wrote that one of the "Ancient and Undoubted Rights of *English* men" was "*Ownership and Undisturbed Possession*" of "Title and Security of *Estate*." *Id.* And Benjamin

Franklin—editor of the Constitution of 1776—discussed "possession of lands." *Infra* p 63.

2. A new study shows that "possessions" meant land.

A new corpus linguistics study confirms that when founding-era Americans used the term "possessions," they typically meant land. *See* James Phillips, *A Corpus Linguistics Analysis of "Possessions" in American English, 1760–1776*, Chap. L. Rev. (2024 forthcoming), https://tinyurl.com/36yfe58z. Corpus linguistics involves the use of large databases to collect "examples of everyday usage of a given word or phrase in a particular time period" that "shed light on what the public would have understood a constitutional provision or statute to mean at the time it was ratified." *Gulf Shores City Bd. of Educ. v. Mackey*, No. 1210353, 2022 WL 17843037, at *20 (Ala. Dec. 22, 2022) (Mitchell, J., concurring in part).

James Phillips is a law professor at BYU who helped develop the Corpus of Founding Era American English—a public database containing over 127,000 founding-era texts written from 1760–1799. *Corpus of Founding Era American English*, BYU, https://tinyurl.com/54f7ejv2. Last year, he conducted a random sample of his database and published the first corpus linguistics analysis of how Americans used the term "possessions" from

1760–1776. Phillips, *supra*, at 11–20. His core finding is devastating for *Russo*: "86% of the time *possessions* likely or clearly included land." *Id.* at 19–20. Based on that finding, Professor Phillips concludes that "the Pennsylvania Constitution, and likely other state constitutions, were originally understood to protect against unreasonable searches of one's land[.]" *Id.* at 20.

3. Nearby text shows that "possessions" meant land.

Nearby constitutional text provides further evidence that the term "possessions" includes land. To begin, Section 8's warrant clause is broader than its Fourth Amendment counterpart. The Fourth Amendment restricts warrants to search "the place," which maps neatly onto the term "houses" in the first clause. But Section 8's warrant clause says "**any** place," which implies that "houses" are not only the protected place. The only other term in Section 8's first clause that could cover places is "possessions." Reading that term to include land thus integrates Section 8's whole text. *See Russo*, 934 A.2d at 1215 (Cappy, C.J., dissenting) (arguing the "any place" phrasing "suggests that a property owner may possess a privacy interest in his land").

Zooming out, this Court reads Section 8 "in conjunction" with the "normative values" in Article I, Section 1. *Alexander*, 243 A.3d at 206–07. That's helpful because Section 1 uses the same root term—"possess"—as

Section 8. *Cf. Jubilerer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) ("because the Constitution is an integrated whole," similar terms should be read "*in pari materia*" (cleaned up)). Section 1 protects the right to "**possess** and protect property," a phrase that secures the "right[s] of landowners." *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 727 (Pa. 2003). If people have a right to "possess" land under Section 1, it makes sense to treat land as a "possession" under Section 8.

This Court has also relied on Section 8's protection of "possessions" to resolve other constitutional issues concerning land. *See In re Washington Ave.*, 69 Pa. 352, 363 (1871). There, the Court struck down a tax that placed a greater burden on "large farms with single occupants or owners, or wild or untenanted land, in the country" than on urban properties. *Id.* at 362. At the time, the Constitution did not expressly limit the Commonwealth's power to tax. Even so, the Court read the Constitution to forbid arbitrary treatment of landowners—relying in part on Section 8's promise "that the people shall be secure in their *possessions*" as evidence that landowners have "inviolate" rights "which cannot be frittered away." *Id.* at 363.

B. The open fields doctrine flouts Section 8's history.

The next factor asks whether the open fields doctrine honors Section 8's history. *Edmunds*, 586 A.2d at 895. Not at all. The doctrine gives officials unfettered power to invade private land—no consent, warrants, or probable cause required. That vast power is a historical outlier. It conflicts with early Pennsylvanians' disdain for arbitrary searches. It conflicts with common law protections for private land. And it conflicts with this Court's cases securing privacy—a principle that covers landowners' right to exclude intruders. The second *Edmunds* factor strongly disfavors the open fields doctrine.

1. Section 8 was adopted to prevent arbitrary searches.

Section 8 was a direct response to arbitrary searches by government officials. *Commonwealth v. Gary*, 91 A.3d 102, 143–47 (Pa. 2014) (Todd, J., dissenting), *overruled by Commonwealth v. Alexander*, 243 A.3d 177, 202 (Pa. 2020) (endorsing Justice Todd's "scholarly analysis" of Section 8's origins). With few exceptions, English common law required officials to get a specific warrant—one issued by a judge, based on probable cause, and that limited the scope of the search—before invading private property. Laura Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1220, 1235 (2016). But in the years before the Revolution, officials increasingly used general

warrants. *Id.* at 1195–1207, 1240–64. The infamous Townshend Act of 1767, for example, allowed customs officers to use general warrants called "writs of assistance" to search colonial homes and any "other place" for smuggled goods. *Id.* at 1240–64 & n.460.

The colonists abhorred that general warrants gave officials "blanket authority to search where they pleased." *Gary*, 91 A.3d at 145 (Todd, J., dissenting) (cite omitted). As a seminal English case rejecting a general warrant put it: "a discretionary power given to [officers] to search wherever their suspicions may chance to fall . . . is totally subversive to the liberty of the subject." Donohue, *supra*, at 1319 (citing *Leach v. Money*, 19 How. St. Tr. 1153, 1167 (C.P. 1763)). Likewise, James Otis—whose advocacy in *Paxton's Case* sparked the colonists' disdain for general warrants—called writs of assistance "the worst instrument[s] of arbitrary power" because they placed "the liberty of every man in the hands of every petty officer." *Gary*, 91 A.3d at 145 (Todd, J., dissenting) (cite omitted).

Pennsylvanians shared these concerns with "arbitrariness." *Id.* at 146. In 1767, John Dickinson's *Letters of a Pennsylvania Farmer* decried writs of assistance as "dangerous to freedom and expressly contrary to the common law." *Id.* at 146 (cite omitted). In 1771, this Court refused to grant a general

warrant because the officer didn't have a reason to suspect smuggled goods "in any particular place." *Id.* (cite omitted). And in 1774, this Court again refused to grant a general warrant because "arming officers of the customs with so extreme a power to be exercised totally at their own discretion would be of dangerous consequences [and] was not warranted by Law." *Id.* (cite omitted). Thus, when Pennsylvanians convened to draft Section 8, their goal was clear: "freedom from arbitrary search." *Id.* (cites omitted).

2. English common law forbade intrusions onto land.

Early Pennsylvanians' disdain for arbitrary searches aligned with the common law's protections for private land. Oddly, the U.S. Supreme Court has cited Blackstone's *Commentaries* for the proposition that only the home and its curtilage, "not the neighboring open fields," deserve protection from arbitrary searches. *Oliver*, 466 U.S. at 180 (citing 4 *Commentaries*, *225); *see also Hester*, 265 U.S. at 59 (citing 4 *Commentaries*, *223, *225, *226); *Dunn*, 480 U.S. at 300 n.3 (citing 4 *Commentaries*, *223, *225). But the Court got it exactly backward: English common law forbade intrusions of private land.

The Court relied on a part of Blackstone's *Commentaries* that limited burglary to the home and its curtilage. 4 *Commentaries*, *223, *225, *226. But the common law protected land in other ways—namely "the tort of trespass

to land." *State v. Dixson*, 766 P.2d 1016, 1022–23 (Or. 1988) (noting *Hester*'s error). As Blackstone himself explained:

> EVERY unwarrantable entry on another's soil the law entitles a trespass by breaking his close; . . . For every man's land is in the eye of the law enclosed and set apart from his neighbor's: and that either by a visible material fence, as one field is divided from another by a hedge; or, by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field.

3 *Commentaries*, *209–10. *Entick*—an influential case rejecting general warrants, *Boyd v. United States*, 116 U.S. 616, 626 (1886)—made the same point:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.

Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (C.P. 1765).

At the time Section 8 was adopted, then, the common law was clear: Invading private land was a trespass. Pennsylvanians promptly retained that rule with a statute adopting "[t]he common law." 1 Pa. C.S. § 1503(a). They also adapted trespass law to their circumstances. Most people were farmers who lived and worked on their land. *See* Dickinson, *Letters of a Pennsylvania Farmer* (1767), Letter II, at 21 ("This continent is a country of planters,

farmers, and fisherman . . . ."), http://tinyurl.com/27ubbbsp. At the same time, people were quickly settling new territory and needed room to roam. *See* Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 Temp. L. Rev. 665, 678 (2011).

Lawmakers therefore struck a balance between landowners' rights and the demands of settlement. Untouched lands—called wilds or wastelands—were open to roaming. *See id*. But the moment a person fenced or cultivated his land—creating what *Entick* called a "close"—intruders were trespassers. *See* Appendix 6, *infra* pp 65–66 (seven Pennsylvania statutes to that effect from 1700–1905); *see also Buford v. Houtz*, 133 U.S. 320, 328 (1890) (noting that "[n]early all the states in the early days had what was called [a] 'Fence Law,'" which specified how landowners could exclude intruders).

This distinction between open and closed lands was so basic to early Pennsylvanian life that it even framed the constitutional right to hunt. *See* Pa. Const. (1776), Frame of Gov. § 43 (recognizing people's right to hunt "on the lands they hold, and on all other lands therein not inclosed").

Because land was their livelihood, Pennsylvanians enclosed "[e]very field, whether meadow, wheat, or orchard" with fences. Frederic Miller, *The Farmer at Work in Colonial Pennsylvania*, 3 Pa. Hist.: J. Mid-Atl. Stud. 115,

117 (1936). Fences were so common, in fact, that they were "[l]ikely the first thing to attract the eye of a traveler as he approached a clearing." *Id.* at 116. This history—the common law of trespass and early Pennsylvanians' efforts to retain its protections during a period of rapid settlement—shows that the founding generation would not have allowed arbitrary searches of their land.

3. Privacy covers the right to exclude intruders.

This Court has repeatedly held that Section 8 secures "an enhanced privacy right" beyond what the Fourth Amendment protects. *Alexander*, 243 A.3d at 205–08.[3] This robust privacy right covers property owners' right to exclude intruders. Recall that Section 8 protects Pennsylvanians' right to be "**secure** . . . in their possessions." The term "secure" was no accident—it was tied to property rights. As *Entick* explained, "[t]he great end for which men entered society, was to secure their property." 19 How. St. Tr. at 1066.

[3] This Court has held that Section 8 provides greater protection than the Fourth Amendment at least 17 times. *See Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020); *Commonwealth v. Arter*, 151 A.3d 149 (Pa. 2016); *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76 (Pa. 2003); *Commonwealth v. Shaw*, 770 A.2d 295 (Pa. 2001); *Commonwealth v. Hawkins*, 692 A.2d 1068 (Pa. 1997); *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996); *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996); *Commonwealth v. Brion*, 652 A.2d 287 (1994); *Commonwealth v. White*, 669 A.2d 896 (Pa. 1995); *Commonwealth v. Mason*, 637 A.2d 251 (Pa. 1993); *Commonwealth v. Martin*, 626 A.2d 556 (Pa. 1993); *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991); *Commonwealth v. Melili*, 555 A.2d 1254 (Pa. 1989); *Commonwealth v. Grossman*, 555 A.2d 896 (Pa. 1989); *Commonwealth v. Johnston*, 530 A.2d 74 (Pa. 1987); *Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983); *Commonwealth v. DeJohn*, 403 A.2d 1283 (Pa. 1979).

Locke agreed, writing that because property is "very unsecure" in a state of nature, people form governments to "secure enjoyment of their properties." John Locke, *Second Treatise of Civil Government* §§ 95, 123 (1690).

Section 8's right to privacy thus has deep historical roots in people's right to be secure in their property. *See* Morgan Cloud, *Property Is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 Am. Crim. L. Rev. 37, 42–43 (2018) (explaining that, at the founding, "liberty and privacy rights were largely understood in terms of property rights" because "[p]roperty stood as a primary bulwark against improper government intrusions into the lives of the people").

This Court, in turn, has held that Section 8 protects property owners' right to exclude intruders. *Commonwealth v. Gordon*, 683 A.2d 253, 257–58 (Pa. 1996). *Gordon* was about whether a squatter had Section 8 privacy rights in a house. *Id.* at 255. The Court held that the clearest way to show a privacy right is with "a common-law interest in the real property." *Id.* at 258. Even without a property interest, though, a party can establish privacy by showing "characteristics of ownership," like the "critical . . . right to exclude others from the premises in question." *Id.* (citing *Rakas v. Illinois*, 439 U.S. 128, 143

n.12 (1978)). The Court held that the squatter lacked a privacy right because he had not made clear efforts to exclude intruders. *Id*.

Note the stark contrast with *Oliver*. There, the U.S. Supreme Court held that landowners' right to exclude the public had "little or no relevance to the applicability of the Fourth Amendment." *Oliver*, 466 U.S. at 183–84. *Gordon* took the opposite approach under Section 8—it treated the right to exclude as the *floor* for privacy. Applying that floor here is easy: Just as early Pennsylvanians were entitled to privacy when they closed their land, today's landowners deserve privacy when they take lawful steps to exclude intruders. *See* 18 Pa. C.S. § 3503(b)(1) (allowing landowners to give "notice against trespass" by posting, fencing, or refusing entry).[4]

C. States with similar constitutions reject the open fields doctrine.

The third *Edmunds* factor asks whether related cases from other states reject the open fields doctrine. *See Edmunds*, 586 A.2d at 895. The task here

[4] After *Russo*, the U.S. Supreme Court reembraced a "property-rights baseline" under the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 11 (2013). That baseline "protects against trespassory searches" for items listed in the Fourth Amendment. *Jones*, 565 U.S. at 411 n.8. Thus, the only reason the U.S. Supreme Court still follows the open fields doctrine today is that "fields are not enumerated in the [Fourth] Amendment's text." *Jardines*, 569 U.S. at 6 (citing *Hester*, 265 U.S. 57). But Section 8 doesn't have that problem—it protects landed "possessions." That textual hook is reason enough to apply the property baseline to land under Section 8. *See Edmunds*, 586 A.2d at 894 ("[T]he federal constitution establishes certain minimum [protections] which are equally applicable to the analogous state constitutional provision." (cleaned up)).

is not to compile "[a] mere scorecard of those states which have accepted and rejected" the doctrine. *Id.* at 900. Rather, the task is to consider other state cases whose "logic . . . bears upon our analysis under the Pennsylvania Constitution." *Id.* As discussed below, seven states have rejected the open fields doctrine under provisions similar to Section 8—either because their provisions protect "possessions" or because they protect more privacy than the Fourth Amendment. This Court should join them.

1. Three states that protect "possessions" reject the open fields doctrine.

When interpreting the Pennsylvania Constitution, "[o]ur ultimate touchstone is the actual language." *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006). Thus, state cases decided under search provisions that protect "possessions," and that really dig into what that term means, are especially persuasive. The Mississippi, Tennessee, and Vermont supreme courts have analyzed the term "possessions" in their search provisions and held that it protects land. These cases bear directly on how this Court reads Section 8.

In 1924, the Mississippi Supreme Court considered a challenge to a warrantless search of wooded land about 300 yards from a home. *Falkner v. State*, 98 So. 691, 691 (Miss. 1924). The case turned on whether Article III, Section 3 of the Mississippi Constitution—which protects "possessions"—

applied to private land. *Id.* at 692. The court consulted several dictionaries and concluded that "possessions" is "broader than the words 'papers or effects'" in the Fourth Amendment. *Id.* at 693. Specifically, "'possessions' is a very comprehensive term, and includes everything which may be owned, and over which a person may exercise control." *Id.* at 692–93. The court declared the warrantless search unconstitutional.

In 1926, the Tennessee Supreme Court conducted a similar analysis and held that Article I, Section 7 of the Tennessee Constitution—which protects "possessions"—applies to private land. *Welch v. State*, 289 S.W. 510, 511 (Tenn. 1926). There, police searched a fenced lot more than 300 yards from a home without a warrant. *Id.* at 510. Like the *Falkner* court, the Tennessee Supreme Court looked at dictionaries and saw "no reason why this word [possessions] should not be given the ordinary meaning ascribed to it by lexicographers. In our opinion, it refers to property, real or personal, actually possessed or occupied." *Id.* at 510. The officers were not entitled to enter land and "promiscuously search about with the hope or expectation of finding contraband goods." *Id.* at 511.

In 1991, likewise, the Vermont Supreme Court held that a warrantless search of posted private land violated Chapter I, Article 11 of the Vermont

Constitution. *State v. Kirchoff*, 587 A.2d 988, 990, 996–97 (Vt. 1991). The court relied in part on the term "possessions," which "our research suggests . . . would have included all real estate over which an individual exercised a certain degree of control." *Id.* at 991 (citing Neil McCabe, *State Constitutions and the 'Open Fields' Doctrine: A Historical-Definitional Analysis of the Scope of Protections Against Warrantless Searches of 'Possessions,'* 13 Vt. L. Rev. 179 (1988)). So too for the term "possessions" in Section 8.

Notably, courts in Tennessee and Vermont have rejected warrantless searches of land by the same officials at issue here: game wardens. In 2018, the Vermont Supreme Court applied *Kirchoff* and declared a game warden's warrantless search of posted land unconstitutional. *State v. Dupuis*, 197 A.3d 343, 348 (Vt. 2018). And in 2022, a three-judge panel in Tennessee struck down a statute nearly identical to the ones challenged here because it allowed game wardens to search posted land without a warrant. *Rainwaters v. Tenn. Wildlife Res. Agency*, No. 20-CV-6, 2022 WL 17491794, at *8–11 (Tenn. Cir. Ct. Mar. 22, 2022). These cases are squarely on point.

2. Four states that prioritize privacy reject the open fields doctrine.

Moving beyond the term "possessions," this Court also finds state cases "more persuasive" when they were decided under search provisions

that protect more privacy than the Fourth Amendment. *Alexander*, 243 A.3d at 190. The Court has recently relied on cases decided under the Montana, Oregon, and Washington constitutions. *See Gary*, 91 A.3d at 155–57 & n.15 (Todd, J., dissenting) (citing these states under *Edmunds*); *Alexander*, 243 A.3d at 202 ("[W]e adopt Justice Todd's compelling [*Edmunds*] analysis as our own."). So it's especially persuasive that the Montana, Oregon, and Washington supreme courts, plus the New York high court, have all rejected the open fields doctrine under their states' robust privacy protections.

In 1984, the Washington Supreme Court considered a challenge to a warrantless search of posted private land under Article I, Section 7 of the Washington Constitution. *State v. Myrick*, 688 P.2d 151, 152 (Wash. 1984). The court held that the Washington Constitution has an enhanced respect for privacy that affords more protection for private land than the open fields doctrine. *Id.* at 154–55; *see also State v. Johnson*, 879 P.2d 984, 992–93 (Wash. Ct. App. 1994) (citing *Myrick* and holding that landowners can preserve their privacy under Article I, Section 7 with fences, gates, or posted signs).

In 1988, the Oregon Supreme Court considered whether private land beyond the curtilage is ever protected by Article I, Section 9 of the Oregon Constitution. *State v. Dixson*, 766 P.2d 1015, 1021 (Or. 1988). The court held

yes. Though Section 9 has similar text to the Fourth Amendment, the court explained that "the scope of [our] section is broader than a literal reading of its terms" and "protects the privacy of the individual from certain kinds of governmental scrutiny." *Id.* at 1022. And that privacy deserves respect, the court held, when there are clear "indications that the possessor [of the land] wishes to have his privacy respected." *Id.* at 1024.

In 1992, the New York Court of Appeals considered a challenge to a warrantless search of posted land under Article I, Section 12 of the New York Constitution. *People v. Scott*, 593 N.E.2d 1328, 1330–31 (N.Y. 1992). Relying on prior cases securing a right to privacy, the court rejected the open fields doctrine and held that New York "citizens are entitled to more protection." *Id.* at 1335. The court explained that landowners who assert their right to exclude under state law deserve privacy. *Id.* at 1335–36. Thus, "[a] constitutional rule which permits State agents to invade lands for no reason at all—without permission and in outright disregard of the owner's efforts to maintain privacy by fencing or posting signs—is one that we cannot accept." *Id.* at 1335.

In 1995, the Montana Supreme Court reached the same conclusion in a case involving a warrantless search of posted land by a game warden. *State*

v. Bullock, 901 P.2d 61, 75 (Mont. 1995). The court relied on *Johnson*, *Dixson*, and *Scott*, and explained that "[l]ike our sister states, Montana has a strong tradition of respect for the right to individual privacy." *Id.* at 70, 72–75. The court held that landowners' privacy deserves respect when they erect fences, post "no trespassing" signs, or otherwise signal against intruders. *Id.* at 75–76. Because the landowner in *Bullock* did so, the game warden's warrantless entry was unconstitutional. *Id.* at 76.

Section 8, which this Court has repeatedly held protects more privacy than the Fourth Amendment, surely has no less regard for privacy than the Montana, New York, Oregon, and Washington constitutions.

D. Rejecting the open fields doctrine harmonizes the state policies that converge on private land.

The last *Edmunds* factor asks whether the open fields doctrine coheres with state policy. *See Edmunds*, 586 A.2d at 895. It does not. For one, reading the term "possessions" to exclude land conflicts with modern state property claims—trespass, adverse possession, ejectment, quiet title—that treat land

as a "possession."[5] For another, allowing state officials to enter private land whenever and however they please would seriously undermine at least three state constitutional rights: landowners' privacy, associational freedom, and right to bear arms.

First, the open fields doctrine destroys landowners' Section 8 privacy rights. It treats private land like a "public place" that officials can invade at will. *Dunn*, 480 U.S. at 304. In turn, landowners like the Clubs—who have posted "no trespassing" signs and purple paint as 18 Pa. C.S. § 3503(b)(1) instructs (R. 103a–105a, 139a–141a)—are powerless. Officials can invade their land without warrants or probable cause, roam around for hours, place cameras on their land, and there's nothing the Clubs can do to stop it. This Court recently drew a line in the sand: It's wrong to "ignore [Section 8] simply because it makes law enforcement more difficult." *Alexander*, 243 A.3d at 198, 204. The open fields doctrine crosses that line.

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[5] *See, e.g.*, *Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334, 346 (Pa. 2020) (trespass: "when a person not privileged to do so intrudes upon land in possession of another"); *City of Philadelphia v. Galdo*, 217 A.3d 811, 820 (Pa. 2019) (adverse possession: requires "actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for a period of twenty-one years"); *Siskos v. Britz*, 790 A.2d 1000, 1006 (Pa. 2002) (ejectment: "an action filed by a plaintiff who does not possess the land but has the right to possess it, against a defendant who has actual possession"); *Grossman v. Hill*, 122 A.2d 69, 71 (Pa. 1956) (suit to quiet title: "ordinarily the plaintiff in such an action must be in possession of the land in controversy").

Second, allowing officials to secretly roam around private land flouts landowners' freedom of association under Article I, Section 7. The Clubs' members cherish the ability to discuss private topics—family, faith, health—on their land that they would not want strangers overhearing. But if officials can enter the Clubs without notice (R. 450a–455a), members can't be sure their conversations are private. That's a problem. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (noting that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association").

Third, allowing officials to invade private land without notice while people are hunting makes it tough to safely and responsibly bear arms under Article I, Section 21. Hunting-related shooting accidents happen every year. PGC, *Hunting-Related Shooting Incidents*, https://tinyurl.com/ud5apvxn. To avoid these accidents, the Commission instructs hunters to keep a "zone-of-fire" by "remain[ing] alert and aware of [their] companions' locations at all times." Hunter-Ed, *What Is a Zone-of-Fire?*, https://tinyurl.com/3r8yncry. The Clubs' members take this rule seriously and try to follow it—but that's hard to do when officials are hiding in the bushes. (R. 114a, 147a–148a).

The right to exclude under Section 8 (and 18 Pa. C.S. § 3503(b)(1)) thus secures landowners' privacy and facilitates the exercise of other rights.

Of course, the Clubs don't dispute that Article I, Section 27—which protects Pennsylvanians' right to "public natural resources"—allows game wardens to enforce reasonable hunting laws. *Russo*, 934 A.2d at 1212–13. But Section 27 was adopted to place the people's environmental rights "*on par with* their political rights." *Robinson Township v. Commonwealth*, 83 A.3d 901, 960–65 (Pa. 2013) (emphasis added). So game wardens' power to enforce hunting laws must honor—not displace—other state constitutional rights. *See id.* at 946 ("[B]ecause the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible.").

The solution here is simple. Rather than give officials unlimited power to invade private land at the expense of other rights, this Court should follow the path charted in Montana, Tennessee, and Vermont. Like Pennsylvania, Montana has a provision securing environmental rights, and the other two states have clauses authorizing hunting regulations. Mt. Const. art. II, § 3; Vt. Const. ch. II, § 67; Tenn. Const. art. XI, § 13. Yet none of these states follow the open fields doctrine. Instead, game wardens must get consent, a warrant, or prove an exception to the warrant requirement before searching

posted land. *Bullock*, 901 P.2d at 76; *Dupuis*, 197 A.3d at 353–54; *Rainwaters*, 2022 WL 17491794, at *10. That approach harmonizes the important state policies that converge on private land.

II. *Russo* should be overruled.

Russo was wrong the day it was decided, and stare decisis provides it no shield today. Not only is stare decisis "at its weakest when we interpret the Constitution," *Alexander*, 243 A.3d at 197 (cite omitted), but all four stare decisis factors—(1) quality of reasoning, (2) workability, (3) coherence with precedent, and (4) reliance interests—support overruling *Russo*. It was poorly reasoned, largely because the parties failed to properly brief *Edmunds*. It's unworkable because it allows rampant violations of landowners' privacy. It's an anomaly that broke with precedent securing privacy rights over law enforcement needs. And it has produced no valid reliance interests: *Russo* is recent, no published decisions apply it, and officials have no right to violate Section 8. *Russo* should be overruled.

A. *Russo* was poorly reasoned because the parties failed to properly brief the *Edmunds* factors.

Russo was poorly reasoned for all the reasons discussed in Section I. The Clubs will not rehash their *Edmunds* argument here. Instead, the Clubs want to make two points: The *Russo* parties' *Edmunds* briefing was woefully

deficient. And that deficient briefing plainly affected *Russo*'s ability to reach the right result. Here, then, the Clubs are not really asking the Court to take a second look at the open fields doctrine. They're asking the Court to take its *first* complete look at the doctrine—and to reject it.

1. The *Russo* parties' *Edmunds* briefing was woefully deficient.

Edmunds made clear "it is important that litigants brief and analyze" all four of its factors. *Edmunds*, 586 A.2d at 895. But the *Russo* parties failed to do that. The Commonwealth's brief consisted almost entirely of bullet-point facts and offered zero *Edmunds* analysis. *See* Appellee's Br., 2006 WL 2644575. Russo's brief, meanwhile, was sparse. *See* Appellant's Br., 2005 WL 4720819. Russo "fail[ed] to make any textually based arguments for departing from the federal open fields doctrine." *Russo*, 934 A.2d at 1205. Russo failed to show how Section 8's history supports a right to "privacy in one's open fields." *Id.* at 1210. And Russo failed to discuss how other states whose constitutions protect "possessions" define that term. *See* Appellant's Br., 2005 WL 4720819, at *12–17.

These briefing errors short-circuited *Russo*'s analysis. Look at *District of Columbia v. Heller*, 554 U.S. 570 (2008). A central issue there was whether *United States v. Miller*, 307 U.S. 174 (1939)—which recognized a right to bear

arms for military purposes—should be read as binding precedent on the full scope of Second Amendment rights. *Heller*, 554 U.S. at 621–25. The Court held no, in part because *Miller* did not weigh all the relevant authorities. *Id.* at 623. But that "was not entirely the Court's fault," *Heller* explained, since "[t]he defendants made no appearance in the case" and the government's brief "provided scant discussion of the history of the Second Amendment." *Id.* at 623–24.

Russo faced an identical problem. The Court acknowledged that "state constitutional decisions are more secure when they proceed from a searching inquiry." *Russo*, 934 A.2d at 1208 n.11. Yet the *Russo* parties failed to provide the *Edmunds* briefing the Court needed to conduct that inquiry—"reason enough, one would think, not to make that case the beginning and the end of this Court's consideration of [Section 8]." *Heller*, 554 U.S. at 623.

2. Deficient briefing prevented *Russo* from reaching the right result.

The parties' deficient *Edmunds* briefing led directly to the result in *Russo*. The parties failed to explain how Section 8's historical concern for privacy—a concern rooted in early Pennsylvanians' fear of arbitrary searches and respect for property owners' right to exclude—bears on the open fields doctrine. So *Russo* never engaged with that history. *See Russo*, 934 A.2d at

1206–08. The parties failed to discuss how other state cases define the term "possessions." So *Russo* did not discuss those definitions. *See id.* at 1210–12. But the most telling effect of the parties' deficient briefing appears in *Russo*'s textual analysis.

Because the parties presented no evidence about the original meaning of the term "possessions," *Russo* did not even attempt to provide a historical definition. Instead, the Court invoked ejusdem generis—a canon of statutory construction that favors limiting general terms at the end of lists to items in the same "class as those enumerated," *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 888 (Pa. 2020) (cleaned up)—to read "possessions" in a way that excludes land. *Russo*, 934 A.2d at 1206. But that was mistaken.

There's no need to invoke ejusdem generis—or any statutory canon—to construe the word "possessions." This Court applies statutory canons to state constitutional text *only* to resolve "ambiguity . . . in the plain language of the provision." *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018); *see also In re Kulig*, 175 A.3d 222, 230 (Pa. 2017) ("[W]e may not rely on our various tools of statutory construction when the text of the statute, itself, is plain."). The term "possessions" is not ambiguous—

there is overwhelming evidence that it includes land—and that's where *Russo*'s textual analysis should have ended.

Russo's misuse of ejusdem generis produced a slew of downstream issues that could have been avoided entirely:

First, using ejusdem generis to narrow the meaning of "possessions" violates the canon that "constitutional provisions for the security of person and property should be liberally construed." *Commonwealth v. Taylor*, 230 A.3d 1050, 1064 (Pa. 2020) (quoting *Boyd*, 116 U.S. at 635). Proper as it may be to read statutes narrowly, constitutions are "unusual text[s]" that secure core liberties, and their "phrases [deserve] an expansive rather than narrow interpretation." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 37 (1997) (citing *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819)). *Russo* did the opposite.

Second, *Russo* held that the items in Section 8's first clause are all "intimate things about one's person." *Russo*, 934 A.2d at 1206. But *Russo* did not explain why "intimacy"—and not, say, the right to be "secure" in property—is what matters. *Russo* did not explain why items must be "about

one's person" when prior cases have not required proximity.[6] Nor did *Russo* grapple with the countless intimate activities that occur on private land. *See Oliver*, 466 U.S. at 192 (Marshall, J., dissenting) (listing examples including solitary walks, meeting lovers, creative endeavors, and worshipping God).

Third, ejusdem generis is supposed to "ensure that a general word will not render specific words meaningless." *CSX Transp., Inc. v. Ala. Dep't of Rev.*, 562 U.S. 277, 295 (2011). But reading "possessions" to include land would not render "persons, houses, [or] papers" meaningless; none of those terms cover land. Odder still, *Russo*'s solution of limiting "possessions" to personal property leaves semantic overlap with the term "papers," a form of personal property.

All these issues confirm that ejusdem generis was a solution in search of a problem. The term "possessions" was never ambiguous—it includes land—and the Court would have been better positioned to see that in *Russo* had the parties properly briefed it.

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[6] *See, e.g.*, *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979) (defendant could challenge seizure of records even though they were held by bank); *Commonwealth v. White*, 327 A.2d 40, 42 (Pa. 1974) (defendant could challenge search of home even though he was away when search occurred).

B. *Russo* is unworkable because it allows officials to violate Section 8 statewide.

Russo is also unworkable. Precedent is "workable" under Section 8 when it secures Pennsylvanians' privacy. *Alexander* is on point. The question there was whether *Gary*—which applied the federal automobile exception to the warrant requirement under Section 8—should be overruled. *Alexander*, 243 A.3d at 180. The government urged the Court to reaffirm *Gary* because the federal rule made it easier for police to search cars for evidence of crime. *See id.* at 198. But this Court rejected that argument, which "presumes that we are free to ignore [Section 8] simply because it makes law enforcement more difficult." *Id.* Workability, the Court held, means honoring "constitutional commands even if they make the work of police or prosecutors harder." *Id.*

The same is true here. Right now, game wardens use the open fields doctrine to treat all private land like public property. (R. 439a). Does that make their lives easier? Of course. But that's "irrelevant." *Alexander*, 243 A.3d at 199. Section 8 was adopted to secure privacy, and the best way to secure privacy here is to respect landowners' efforts to exclude intruders. State law explains how: Landowners must post fences, signs, or paint "in a manner . . . reasonably likely to come to the attention of intruders." 18 Pa.

C.S. § 3503(b)(1)(ii), (vi). In seven other states, officials who see clear signs of ownership must seek consent, a warrant, or prove an exception to the warrant requirement. Section I(C) *supra*. That's a workable rule. The open fields doctrine—which gives state officials unlimited power to invade private land—is not.

C. *Russo* is an anomaly that broke with precedent and conflicts with recent precedent.

Stare decisis also has less force when the decision at issue did not respect precedent. *Alexander*, 243 A.3d at 200; *see also id.* at 209 (Baer, J., concurring) ("[A]s cogently explained by the majority, *stare decisis* does not compel adherence to this Court's decision in *Gary* as *Gary* itself did not comport with precedent."). That's *Russo*. It both broke with precedent and conflicts with a more recent decision.

Before *Russo*, this Court followed a baseline rule: Section 8 protects property owners' right to privacy when they have "a common-law interest" or the "right to exclude others from the premises." *Gordon*, 683 A.2d at 258. *Russo* should have applied that rule to private land under Section 8. If it had, landowners who have made efforts to exclude intruders would have a right to privacy on their land today. *See Commonwealth v. Sweeley*, 29 Pa. D. & C.4th 426, 429–33 & n.2 (C.P. 1995) (conducting *Edmunds* analysis before *Russo*

and holding, in case of "first impression," that land is a "possession" that deserves privacy when posted under 18 Pa. C.S. § 3503(b)).

Russo also broke with this Court's decision in *Commonwealth v. Ickes*, 873 A.2d 698 (Pa. 2005). *Ickes* was a Fourth Amendment challenge to 34 Pa. C.S. § 904, which allowed game wardens to stop any person at any time and demand identification "without a standard of suspicion." *Ickes*, 873 A.2d at 703. This Court held that "Game Officers must . . . adhere to the minimum [constitutional] standards applicable to all law enforcement officers" and that compliance with those standards "will have no effect on the ability of Game Officers to effectively police the activities of hunters." *Id.* But just two years later, *Russo* reversed course and held that the very existence of hunting laws exempts game wardens from scrutiny when searching private land. *See Russo*, 934 A.2d at 1213.

For the same reason, *Russo* conflicts with this Court's recent decision in *Alexander*. Time and again, *Alexander* emphasized that "our constitution prioritizes the protection of privacy rights caused by the unreasonable search above the need . . . to assist law enforcement efforts." *Alexander*, 243 A.3d at 204. *Russo* went the other way: It held that game wardens deserve unfettered power to invade private land, and therefore landowners deserve zero privacy.

Russo, 934 A.2d at 1213. *Russo*'s tension with *Alexander* and departure from earlier precedent supplies yet another reason not to apply stare decisis.

D. *Russo* is a recent decision that has produced no valid reliance interests.

Finally, stare decisis carries less weight when the challenged decision is recent—meaning it lacks "a long lineage" of "precedents to overcome"—and when the decision has produced few reliance interests. *Alexander*, 243 A.3d at 196–97. *Russo* fails on both scores. It was decided just 17 years ago. This Court has not applied the open fields doctrine under Section 8 since. Nor has any other Pennsylvania court in any published decision. Yes, game wardens use *Russo* to invade private land. But they have no valid interest in doing so. "If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence." *Id.* at 200 (emphasis omitted) (quoting *Arizona v. Gant*, 556 U.S. 332, 349 (2009)). The same holds true here.

III. The entry statutes violate Section 8.

Because *Russo* is not entitled to stare decisis, the last issue is whether the entry statutes violate Section 8. After all, "[s]tatutes cannot authorize what . . . Section 8 would prohibit." *Commonwealth v. Myers*, 164 A.3d 1162, 1173 (Pa. 2017). The entry statutes do just that. Section 8 protects landed

"possessions . . . from unreasonable searches." Yet the entry statutes allow searches of all land in Pennsylvania—including the Clubs' properties. These searches are "unreasonable" because they are warrantless. And, even if the Commission could raise an exception to the warrant requirement after failing to do so below, no exception would allow government officials to wield the unfettered discretion the entry statutes confer. The Court should declare all three entry statutes unconstitutional.

A. The entry statutes allow "searches" of "possessions."

As shown above, private land is a "possession" in the original sense of that term. Section I(A) *supra*. So, like any other property listed in Section 8, officials "search" land when they enter despite the owner's right to exclude intruders. *See Gordon*, 683 A.2d at 258 (Section 8 covers intrusions of "real property" when the owner has a "right to exclude others from the premises in question"); *Commonwealth v. Sell*, 470 A.2d 457, 469 (Pa. 1983) (Section 8 covers intrusions of "personal possessions" "until their owner meaningfully abdicates his control, ownership or possessory interest").[7]

[7] The Fourth Amendment's property baseline treats searches the same way. *See Jones*, 565 U.S. at 411 n.8 (Fourth Amendment "protects against trespassory searches . . . with regard to those items . . . that it enumerates").

Today, as at the founding, the simplest way for landowners to show a right to exclude is by posting or fencing land under Pennsylvania's trespass statute. *See* 18 Pa. C.S. § 3503(b)(1). The Clubs—who have enclosed their land by posting "no trespassing" signs and purple paint and installing gates at every entrance (R. 103a–105a, 139a–141a)—easily meet that test.

The entry statutes defy all that. They allow game wardens to enter "any land . . . outside of buildings, except curtilage, posted or otherwise[.]" 34 Pa. C.S. § 901(a)(2); *see also id.* §§ 303(c), 901(a)(8) (similar). That sweeping language covers all landed "possessions" that Section 8 protects—including the Clubs' properties. And game wardens know it: They walk past "no trespassing" signs, ignore purple paint, jump fences, defy landowners who refuse entry, and roam around looking for hunting violations. (R. 439a–445a, 464a–465). These are classic "searches."

B. The entry statutes allow "unreasonable searches."

Game wardens' searches are also "unreasonable." It's blackletter law that "prior to conducting a search of . . . property, the police must obtain a warrant, supported by probable cause and issued by a neutral magistrate." *Commonwealth v. Arter*, 151 A.3d 149, 153 (Pa. 2016). The entry statutes do not require a warrant or probable cause. To quote the Commission: "There

are no specific steps an officer must take before performing his or her duties on . . . private land." (R. 905a–906a). That power is patently unreasonable.

Of course, there are a handful of "limited exceptions" to the warrant requirement. *Arter*, 151 A.3d at 153. But the Commission bears the burden of proving that an exception applies. *See Commonwealth v. Timko*, 417 A.2d 620, 623 (Pa. 1980). The Commission failed to do that below. The Commission did not clearly invoke any exception to the warrant requirement, much less provide the sort of "developed argument" that this Court requires to avoid waiver. *Commonwealth v. Perez*, 93 A.3d 829, 841 (Pa. 2014). The closest the Commission came to invoking an exception was with fleeting references to hunting being "highly regulated" and to one of the entry statutes allowing "administrative inspections." PGC Br. Supp. Summ. Relief 34, 37. But these references only underscore the Commission's failure to brief the issue.

Presumably, the Commission was gesturing at the "closely regulated industries" exception to the warrant requirement. *City of Los Angeles v. Patel*, 576 U.S. 409, 424 (2015). But that exception applies only to "commercial premises or services" that are "intrinsically dangerous." *Id.* at 424 n.5. And even then, the exception applies only when the government proves that three factors—(1) substantial interest, (2) necessity of warrantless inspections, and

(3) adequate substitute for a warrant—are met. *Commonwealth v. Petroll*, 738 A.2d 993, 1000–01 (Pa. 1999). The Commission did not brief any of that.

Finally, even if the Commission could somehow raise an exception for the first time on appeal, there is no exception that would allow game wardens the vast discretion the entry statutes confer. Section 8 was adopted to forbid arbitrary searches. Section I(B)(1) *supra*. Thus, even when this Court applies a warrant exception, it still strives to protect people from "invasions solely at the unfettered discretion of officers in the field." *Commonwealth v. Maguire*, 215 A.3d 566, 575–76 (Pa. 2019) (cite omitted) (making point in context of warrantless business inspections and traffic checkpoints).

But the entry statutes do not constrain game wardens' discretion at all. Again, the Commission concedes that game wardens do not have to take any "specific steps" before entering "private land." (R. 905a–906a). And when Appellee Gritzer was asked to identify limits on game wardens' ability to enter private land, he agreed: "There's zero." (R. 433a). In practice, then, the entry statutes function like general warrants: They allow game wardens to invade property at will, to roam around fishing for evidence, to place spy cameras as they go—answerable to nobody but themselves. (R. 475a, 492a). If that's not "unreasonable," it's hard to see what would be.

* * *

Chief Justice Cappy was right all along. A law that allows officials "to enter onto posted private property *without any level of suspicion and without a warrant* . . . in outright disregard of the property owner's efforts to maintain privacy is one that offends the fundamental rights of Pennsylvania citizens." *Russo*, 934 A.2d at 1213–14 (Cappy, C.J., joined by Baer and Baldwin, JJ., dissenting). Two judges agreed below. *Punxsutawney*, 2023 WL 6366772, at *4 (McCullough, J., joined by Wallace, J., concurring). The time has come for this Court to overrule *Russo* and afford landowners the security Section 8 has always promised.

CONCLUSION

Russo should be overruled and the Commonwealth Court's decision should be reversed with instructions to enter summary relief for the Clubs.

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Appendix 1

Known Warrantless Searches (2013–2021)

Property	Date	Purpose	Cite
Punxsutawney	April 19, 2013	Look for hunting violations	R. 875a–876a, 879a
Punxsutawney	April 20, 2013	Look for hunting violations	R. 875a–876a, 879a
Punxsutawney	March 3, 2014	Look for hunting violations	R. 556a–561a, 699a
Punxsutawney	March 19, 2014	Look for elk feeding	R. 564a–567a, 703a
Punxsutawney	March 11, 2015	Look for elk feeding	R. 875a–876a, 880a
Punxsutawney	February 25, 2016	Look for elk feeding; place camera	R. 875a–876a, 880a, 978a–990a
Punxsutawney	February 28, 2016	Check on camera	R. 574a–575a
Punxsutawney	March 3, 2016	Remove camera	R. 574a–575a, 989a
Punxsutawney	December 3, 2016	Look for hunting violations	R. 875a–876a, 880a
Punxsutawney	February 2, 2017	Look for hunting violations	R. 567a–569a, 705a
Punxsutawney	May 2018	Look for hunting violations	R. 875a–876a, 880a
Punxsutawney	May 19, 2019	Look for hunting violations	R. 875a–876a, 881a
Punxsutawney	December 2, 2019	Look for hunting violations	R. 875a–876a, 881a

Property	Date	Purpose	Cite
Punxsutawney	December 7, 2019	Look for hunting violations	R. 875a–876a, 881a
Punxsutawney	December 9, 2020	Look for hunting violations	R. 875a–876a, 882a
Punxsutawney	October 21, 2021	Look for hunting violations	R. 875a–876a, 882a
Punxsutawney	Unknown	Unknown	R. 1035a–1039a
Pitch Pine	June 18, 2013	Look for bear feeding	R. 595a–602a, 612a–614a, 707a, 798a–801a, 878a–879a
Pitch Pine	July 2013	Confront members about suspected bear feeding	R. 878a, 880a
Pitch Pine	April 22, 2017	Look for littering	R. 878a, 880a
Pitch Pine	December 8, 2018	Look for hunting violations	R. 157a–158a, 603a–605a, 878a, 881a
Pitch Pine	December 8, 2019	Unknown	R. 614a–615a

Appendix 2

Historical Possessions Definitions (1756–1828)

Dictionary	Excerpt
Nathan Bailey, *The New Universal Etymological English Dictionary* (4th ed. 1756), http://tinyurl.com/5n6f3pj5	"*Actual* POSSESSION, is when a man, actually enters into lands or tenements descended to him. POSSESSION *de facto* (in *Law*) is when there is an actual and effectual enjoyment of a thing, *L.* POSSESSION *de jure* (in *Law*) is the title a man has to enjoy a thing . . . . POSSESSION, is also used for the title or prescription that gives a right to hold any thing."
2 Samuel Johnson, *A Dictionary of the English Language* (4th ed. 1773), http://tinyurl.com/566cb8f7	"POSSE'SSION. n. . . . 1. The state of owning or having in one's own hand or power; property. . . . 2. The thing possessed."
William Perry, *The Royal Standard English Dictionary to which is Fixed a Comprehensive Grammar of the English Language* (1775), http://tinyurl.com/bddkj8ft	"[Possession], *s.* property; a having in one's power"
2 John Ash, *The New and Complete Dictionary of the English Language* (1775), http://tinyurl.com/bdfdzwke	"POSSE'SS (*v. t. from the* Lat. possideo) To have as an owner, to occupy . . . . Posses'ion (*s. from* possess) The state of occupation, the thing possessed."
Thomas Dyche & William Pardon, *A New General English Dictionary* (1781), http://tinyurl.com/2stz8zxa	"POSSESSION (S.) the having any thing in our own keeping or power; in *Law*, he that is the present occupier, though it by disseisin, hath right to any land, house, &c. against all others . . . ."

Dictionary	Excerpt
2 Thomas Sheridan, *A Complete Dictionary of the English Language* (3d ed. 1790), http://tinyurl.com/2wmtxft8	"POSSESSION, . . . *s.* The state of owning or having in one's own hands or power."
James Barclay, *A Complete and Universal English Dictionary* (1792), http://tinyurl.com/34zrcckn	"To POSSE'SS, . . . to have as an owner; to enjoy or occupy actually. To seize or obtain. To give possession of or command of any thing, with *of* before the thing possessed. . . . POSSE'SSION, . . . *s.* the state of having in one's hands or power. The thing enjoyed by a person."
John Walker, *A Critical Pronouncing Dictionary* (2d ed. 1797), http://tinyurl.com/2yc4n67j	"To POSSESS . . . To have as an owner, to be master of; to enjoy, or occupy actually; to seize, to obtain . . . . POSSESSION . . . The state of owning or having in one's own hands or power."
2 Noah Webster, *An American Dictionary of the English Language* (1828), http://tinyurl.com/bneksd6s	"POSSES'SION, *n.* The having, holding or detention of property in own's power or command; actual seizin or occupancy, either rightful or wrongful. One man may have *possession* of a thing, and another may have the right of possession or property. . . . The thing possessed; land, estate or goods owned; as foreign *possessions*."

Appendix 3

Historical Possessions Statutes (1682–1800)

Statute	Excerpt
Act of November 27, 1700 (2 St.L. 12, 12–13, Ch. 11, § 1), http://tinyurl.com/ancabva2 *Nearly identical text in the Great Law (1682), http://tinyurl.com/yuhvt6xk	"whosoever shall violently or forcibly enter in to the house or **possessions** of any other person within this province or territories, being duly convicted thereof, shall be punished as a breaker of the peace"
Act of January 12, 1705–06 (2 St.L. 171, 191, Ch. 132, § 1), http://tinyurl.com/yr3z335f	"for the better confirmation of the owners of lands, and inhabitants of this province, in their just rights and **possessions**"
Act of June 7, 1712 (2 St.L. 400, 406, Ch. 183, § 7), http://tinyurl.com/3ra5c56s	"all the estate and estates, rights, interests and **possessions** of any person or persons of, in or to the said overplus lands"
Act of June 20, 1759 (5 St.L. 427, 429, Ch. 444, Preamble), http://tinyurl.com/mr3e3sxs	"that the poor, unhappy people who have suffered as aforesaid by the calamities of war . . . may be restored to their freeholds and **possessions**"
Act of March 26, 1762 (6 St.L. 196, 199, Ch. 480, § 6), http://tinyurl.com/24yfh6b6	"authority to enter upon the lots, grounds and **possessions** of any persons or persons [to maintain city sewers]"
Act of February 18, 1769 (7 St.L. Ch. 594, 277, 280–281, §§ 4, 6) http://tinyurl.com/ynner8ez	"having regard to the streets that are most used by the country in bringing their produce and **effects** to market" . . . "authority to enter upon the lots, grounds and **possessions** of any person or persons [to maintain city sewers]"

Statute	Excerpt
Resolve of October 27, 1775 (8 St.L. 491–92, Appendix), http://tinyurl.com/3shnthvs	"intruders having, in a forcible and hostile manner, obtained their **possessions** in this province"
Act of October 6, 1779 (9 St.L. 409–10, Ch. 754, § 1), http://tinyurl.com/48h23w9p	"the estate and estates, rights, titles, interest and **possessions** real and personal"
Act of November 27, 1779 (10 St.L. 33, 34, Ch. 874, Preamble), http://tinyurl.com/93pfs5y3	"all the grants of lands within the said limits, cannot longer consist with the safety, liberty and happiness of the good people of this commonwealth, who, at the expense and much blood and treasure have bravely rescued themselves and their **possessions** from the tyranny of Great Britain"
Act of December 21, 1784 (11 St.L. 398, 400–01, Ch. 1122, § 5), http://tinyurl.com/ymtcnfuc	"persons and their legal representatives who has or have heretofore settled . . . shall be allowed a right of pre-emption to their respective **possessions**"
Act of March 26, 1785 (11 St.L. 519, 520, Ch. 1145, § 4), http://tinyurl.com/5274cfm2	"no person or persons that now hath or have any claim to the **possession** of any lands, tenements or hereditaments . . . Provided always, That if any person or persons so claiming as aforesaid hath been driven away from his, her or their **possessions** by the savages"
Act of April 4, 1785 (11 St. L. 560, Ch. 1159, Preamble), http://tinyurl.com/y4s56992	"by the happy termination of the late war the people of this state are in quiet **possession** of very extensive and valuable tracts of land, which require cultivation and improvement"

Statute	Excerpt
Act of March 28, 1786 (12 St.L.216, Ch. 1221, Preamble), http://tinyurl.com/47ycm2j2	"many persons have lost their deeds, conveyances and writings relating to their lands, tenements, hereditaments and **possessions** within this state "
Act of February 23, 1791 (14 St.L. 4, Ch. 1517, Preamble, § 2), http://tinyurl.com/5n8ht4m3	"persons purchasing lands in this state may transmit their **possessions** to their children, relations, or friends" . . . "all such persons shall be able and capable in law to dispose of any goods and **effects**, to which they may be entitled"
Act of January 19, 1793 (14 St.L.331, 332, Ch. 1650, § 3), http://tinyurl.com/nhkchbvs	"any trial or controversy respecting the lands, tenements, hereditaments or **possessions**"
Act of April 5, 1799 (16 St.L. 255, Ch. 2057, Preamble), http://tinyurl.com/mksabd4t	"[people] holding or **possessing** land within the said district and townships, are much aggrieved by the restrictions laid on the transportation of produce and manure from or to their respective **possessions**"
Act of March 11, 1800 (16 St.L. 453–44, Ch. 2129), http://tinyurl.com/yc2m3czj	Repealing "An act for the limitation of actions to be brought for the inheritance or **possession** of real property"

Appendix 4

Historical Possessions Cases (1763–1794)

Case	Case
Fothergill's Lessee v. Stover, 1 Dall. 6, 7 (Pa. 1763)	*Campbell v. Sproat*, 1 Yeates 196, 196–97 (Pa. 1792)
Richardson's Lessee v. Campbell, 1 Dall. 10, 10 (Pa. 1764)	*Fitzalden v. Lee*, 2 Dall. 205, 205–06 (Pa. 1793)
Thomas' Lessee v. Horlocker, 1 Dall. 14, 14 (Pa. 1766)	*Calhoun's Lessee v. Dunning*, 4 Dall. 120, 120–22 (Pa. 1792)
Morris' Lessee v. Vanderen, 1 Dall. 64, 64–67 (Pa. 1782)	*Cox's Lessee v. Grant*, 1 Yeates 164, 164–65 (Pa. 1792)
Andrew's Lessee v. Fleming, 2 Dall. 93, 93 (Pa. 1786)	*Todd's Lessee v. Ockerman*, 1 Yeates 295, 299 (Pa. 1793)
Kerlin's Lessee v. Bull, 1 Dall. 175, 176–77 (Pa. 1786)	*Goodright v. Miller*, 1 Yeates 305, 305 (Pa. 1793)
McCurdy v. Potts, 2 Dall. 98, 99 (Pa. 1788)	*Griffith's Lessee v. Woodward*, 1 Yeates 316, 316–18 (Pa. 1793)
Mitchell v. Deroche, 1 Yeates 12, 12–13 (Pa. 1791)	*Peaceable v. Nicholls*, 1 Yeates 293, 294 (Pa. 1793)
Lilly v. Kitzmiller, 1 Yeates 28, 28 (Pa. 1791)	*McConnel's Lessee v. Porter*, 1 Yeates 405, 405 (Pa. 1794)
Bowman v. Fry, 1 Yeates 21, 22 (Pa. 1791)	*Boyd's Lessee v. Cowan*, 4 Dall. 138, 140 (Pa. 1794)
Sweeney's Lessee v. Toner, 1 Yeates 499 (Pa. 1791)	*Stouffer's Lessee v. Coleman*, 1 Yeates 393, 399 (Pa. 1794)

Appendix 5

Historical Possessions Writings (1675–1833)

Author	Source	Excerpt
William Penn	*England's Present Interest Discover'd* 6 (1675), http://tinyurl.com/4v94sww5	One of the "Ancient and Undoubted Rights of *English* men" was "*Ownership, and Undisturbed* ***Possession****: That what they have, is rightly theirs, and no Body's else*," which means "Title and Security of *Estate* . . . from the Violence of Arbitrary Power"
John Locke	*Second Treatise of Civil Government*, Ch. V (Of Property) §§ 25–51 (1689), https://tinyurl.com/x3h3zhtd	Explaining how people can claim title to landed "**possessions**" and of how "in governments, the laws regulate the right of property, and the **possession** of land is determined by positive constitutions"
William Blackstone	2 *Commentaries on the Laws of England*, Ch. 1 (Of Property, in General) (1765), https://tinyurl.com/jdbry3pu	Describing how people gain "**possession**" of land and noting that "**possession**, or occupancy, confirms that right against all the world"
Edmund Burke	*Speech of Edmund Burke* (Mar. 22, 1775), http://tinyurl.com/mpjsuuh8	Discussing "the value of the **possessions**" conveyed by royal "grants of land"

Author	Source	Excerpt
Benjamin Franklin	*To the Honorable, the Representatives of the United States of North America in Congress Assembled* (1780), http://tinyurl.com/272pxfww	Referencing "claims of those bona fide settlers, whose **possessions** were derived from the Grants made to the Ohio Company in 1754" and "persons, who had already **possession** of lands in that part of the country"
John Adams	*Discourses on Davila*, Ch. XXIII (1790), http://tinyurl.com/7va3ejup	"[The Queen] published new declarations . . . to restore the goods, houses, and **possessions** to all those, who, in times past, had been deprived of them on suspicion of heresy"
Thomas Paine	*Agrarian Justice* (1797), http://tinyurl.com/yahpr6xn	Noting that "Liberty and Property are words expressing all those of our **possessions** which are not of an intellectual nature" and making repeated references to "**possession**" of land or being a "**possessor**" of land
James Madison	*Property* (Mar. 29, 1792), https://tinyurl.com/48xb9h7a	"a man's land . . . is called his property" and "[w]here an excess of power prevails, property of no sort is duly respected. No man is safe in . . . his **possessions**"

Author	Source	Excerpt
Nathan Dane	*A General Abridgment and Digest of American Law*, Vol. I, at 132 (1823), http://tinyurl.com/2598rwme	"If one, unlawfully, or without right take **possession** of my lands, I may peaceably enter upon them, and regain **p[o]ssession**"
James Kent	*Commentaries on American Law*, Vol. II, at 142 (1827), https://tinyurl.com/fv35xa4p	Noting in discussion of land that "[g]overnment is bound to assist the rightful owner of property, in the recovery of **possession** of it, when it has been unjustly lost"
Joseph Story	*Commentaries on the Constitution of the United States* § 1390 (1833), https://tinyurl.com/2f8xmuny	"a law, which denies to the owner of the land a remedy to secure the **possession** of it . . . impairs his right to, and interest in, the property"

Appendix 6

Historical Fencing Statutes (1700–1905)

Statute	Excerpt
Act of November 27, 1700 (2 St.L. 70, 70–71, Ch. 56, § 1), http://tinyurl.com/yxub4aak	"all corn fields and grounds kept for inclosures . . . shall be well fenced" according to certain specifications, and animal owners must take care "to restrain the same from trespassing on their neighbors' inclosures"
Act of October 28, 1701 (2 St.L. 164, 166, Ch. 111, § 3), http://tinyurl.com/4bcxfed3	Trespass when "any swine, hogs, shoats, sows or pigs . . . be found in any person's inclosure or fenced field"
Act of August 26, 1721 (3 St.L. 254, 256, Ch. 246, § 3), http://tinyurl.com/623jn8uk	Trespass when "any person or persons shall presume . . . to carry any gun or hunt on the improved or inclosed lands of any plantation other than his own, unless he have license or permission from the owner of such lands or plantation"
Act of April 9, 1760 (1 St.L. 227, 229, Ch. 456, § 6), http://tinyurl.com/29p3z6nt	Trespass when "any person or persons shall presume . . . to carry any gun, or hunt on any inclosed or improved lands of any of the inhabitants of this province, other than his own, unless he shall have licence or permission from the owner of such lands"
Act of March 4, 1797 (15 St.L. 486, 489, Ch. 1922, § 7), http://tinyurl.com/5n6k3hmd	"all creeks and thoroughfares in the aforesaid tract of meadows . . . shall be deemed and considered as lawful fences and enclosures"

Statute	Excerpt
Act of April 5, 1779 (9 St.L. 378, Ch. 842), http://tinyurl.com/bdnu4w8b	Trespass for entry onto "unenclosed grounds" after the war caused "the loss of their fences and other enclosures"
Act of April 14, 1905 (P.L. 169, § 1), http://tinyurl.com/46wfftmm	"it shall be unlawful for any person wilfully to enter upon any land, within the limits of this commonwealth, where the owner or owners of said land has caused to be prominently posted upon said land printed notices that the said land is private property, and warning all persons from trespassing thereon"

Appendix 7

Opinion and Order of the Commonwealth Court by Judge Wojcik (May 10, 2023)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Punxsutawney Hunting Club, Inc., and Pitch Pine Hunting Club, Inc.,	:	
Petitioners	:	
v.	:	No. 456 M.D. 2021
	:	Submitted: May 10, 2023
Pennsylvania Game Commission, and Mark Gritzer, in his official capacity as an officer of the Pennsylvania Game Commission,	:	
Respondents	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE STACY WALLACE, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WOJCIK FILED: September 29, 2023

Before this Court, in our original jurisdiction, are the cross-applications for summary relief[1] filed by Petitioners Punxsutawney Hunting Club, Inc., and Pitch

[1] Pa.R.A.P. 1532(b) provides that "[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear." Pa.R.A.P. 1532(b); *see also Summit School, Inc. v. Department of Education*, 108 A.3d 192, 195 (Pa. Cmwlth. 2015). In deciding a request for summary relief, "this [C]ourt must determine whether it is clear from the undisputed facts that either party has a clear right to the relief requested." *Bell Atlantic-Pennsylvania, Inc. v. Turnpike Commission*, 703 A.2d 589, 590 (Pa. Cmwlth. 1997), *aff'd*, 713 A.2d 96 (Pa. 1998). Determinations as to whether an agency lacks statutory authority or whether an agency's particular statement of policy is an unpromulgated regulation are questions of law. *Markham v. Wolf*, 136 A.3d 134, 138 (Pa. 2016).

Pine Hunting Club, Inc. (collectively, Hunting Clubs), and Respondents Pennsylvania Game Commission, and Mark Gritzer, in his official capacity as an officer of the Pennsylvania Game Commission (collectively, Commission). The issues before us are whether *Commonwealth v. Russo*, 934 A.2d 1199 (Pa. 2007), was wrongly decided, and whether, barring *Russo*, Sections 303(c) and 901(a)(2) and (8) of the Game and Wildlife Code, 34 Pa. C.S. §§303(c) and 901(a)(2) and (8) (Entry Statutes), are unconstitutional under article I, section 8 of the Pennsylvania Constitution, Pa. Const. art. I, §8 (Section 8). As we are bound by *Russo*, we grant the Commission's application for summary relief, deny the Hunting Clubs' application, and enter judgment in the Commission's favor.

I. Background

The facts of this case are not in dispute. The Hunting Clubs are member-owned hunting clubs that own thousands of acres of private land in Clearfield County. Members use the properties to hunt, vacation, and enjoy nature. To ensure their members' privacy, the Hunting Clubs have posted their properties with no trespassing signs and have installed gates at all entrances to exclude nonmembers and intruders. However, the Entry Statutes empower game wardens with unfettered discretion to enter upon and roam private land without consent, warrants, or probable cause.

The Hunting Clubs filed the present action to challenge the constitutionality of the Entry Statutes as violative of Section 8, which forbids warrantless searches of "possessions." The Hunting Clubs argue that private land is a "possession" within the purview of constitutional protection. However, the Hunting Clubs recognize that the Pennsylvania Supreme Court previously rejected similar constitutional claims in *Russo*. The Hunting Clubs further recognize that this

Court is bound by, and may not overturn, this binding precedent. Both parties have filed cross-applications for summary relief, which are now before us.

II. Cross-Applications

The parties' cross-applications for summary relief present two issues for our review. First, whether *Russo*, which held that private land is not a "possession" and can never receive protection from "unreasonable searches" under Section 8, was wrongly decided. Second, barring *Russo*, whether the Entry Statutes, which grant game wardens unfettered power to enter and roam posted private land in order to look for evidence of potential game offenses, violate Section 8.

III. Discussion

A. Contentions

The Hunting Clubs recognize that *Russo* constitutes binding precedent that forecloses their constitutional challenge of the Entry Statutes. However, they believe that *Russo* was wrongly decided. According to the Hunting Clubs, the term "possessions" in Section 8 should be construed to include private land. Indeed, article I, section 1 of the Pennsylvania Constitution, Pa. Const. art. I, §1 (Section 1), recognizes the right of possessing property. The Hunting Clubs argue that it is illogical to say that Section 1 of the Pennsylvania Constitution protects the right to "possess" land, but that land is not a "possession" for purposes of Section 8.

The Hunting Clubs further argue that, barring *Russo*, the Entry Statutes are unconstitutional under Section 8. Landowners who signal that their land is not open to the public have a reasonable expectation of privacy and must be entitled to protection under Section 8. If the land is protected, then game wardens who want to search it must obtain consent or a warrant, or show a warrant exception. Because

the Entry Statutes authorize warrantless searches of land that is used and marked as private, they violate Section 8.

The Commission counters that *Russo* is binding precedent and controls the outcome here. Contrary to the Hunting Clubs' assertions, *Russo* was properly decided. No Pennsylvania court has ever held that possession or ownership alone creates a right to privacy that is protected by Section 8. *Russo* properly applied the factors for deciding the scope of state constitutional protection. It thoroughly and accurately analyzed the text of Section 8, its history under Pennsylvania law, the majority of sister states that support the current interpretation of the open fields doctrine, and the public policy issues involved. Under *Russo*, the Entry Statutes are indisputably constitutional, and this precedent should not be overturned.

Even barring *Russo*, the Commission argues that the Entry Statutes are valid exercises of the Commonwealth's constitutional obligations as trustee of wildlife under article I, section 27 of the Pennsylvania Constitution, Pa. Const. art. I, §27, commonly known as the Environmental Rights Amendment (ERA). The Commission, as designated by the Commonwealth, is constitutionally responsible for managing and protecting wildlife in the state. In order to execute this authority, the Commission employees need to enter private property where wildlife may be present and hunting may be occurring. Hunters have surrendered their reasonable expectation of privacy by choosing to participate in a highly regulated activity. Thus, the Commission argues that the Hunting Clubs do not present a case that might implicate privacy rights under Section 8.

B. Analysis

The Entry Statutes authorize wildlife enforcement officers to enter and inspect property for violations. Specifically, Section 303(c) of the Game and Wildlife Code provides:

> (c) **Power and authority**.--
>
> Every officer, employee or representative of the [C]ommission in the exercise of their powers and duties shall have the right and authority to go upon or enter any property, posted or otherwise, outside of buildings.

34 Pa. C.S. §303(c). Section 901(a)(2) and (8) of the Game and Wildlife Code provides:

> (a) **Powers**.--
>
> Any officer whose duty it is to enforce this title or any officer investigating any alleged violation of this title shall have the power and duty to:
>
> * * *
>
> (2) Go upon any land or water outside of buildings, except curtilage, posted or otherwise, in the performance of the officer's duty.
>
> * * *
>
> (8) Conduct administrative inspections of persons, licenses and permits, firearms, ammunition and other implements of taking, game bags, game, meat poles, tags, clothing, waterfowl blinds, decoys, tree stands, immediate hunting locations, or any means of transportation or its attachments used as blinds or as hunting locations, and any coolers or containers possessed at a hunting location when prima facie evidence of hunting exists. Any officer conducting an administrative inspection shall, if any person is present, present a badge or other means of

> official identification and state the purpose of the inspection.

34 Pa. C.S. §901(a)(2), (8).

The Hunting Clubs challenge the Entry Statutes as unconstitutional. The relevant constitutional provisions are the Fourth Amendment to the United States (U.S.) Constitution, U.S. Const. amend. IV (Fourth Amendment), and its analogous state counterpart, Section 8.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Section 8 provides:

> The people shall be secure in their persons, houses, papers ***and possessions*** from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. art. I, §8 (emphasis added).

In *Russo*, the Pennsylvania Supreme Court examined whether a landowner has a reasonable expectation of privacy against enforcement of the Game and Wildlife Code in his open fields under the Fourth Amendment and Section 8. *Russo* involved an appeal from a conviction for violation of the Game and Wildlife Code's prohibition against certain types of baiting in bear hunting. *Russo*, 934 A.2d at 1200; *see* Section 2308(a)(8) of the Game and Wildlife Code, 34 Pa. C.S. §2308(a)(8). The conviction was based on evidence that wildlife conservation officers gathered when they entered the landowner's hunting camp,

which was posted with "No Trespassing" signs, without a warrant. *Russo*, 934 A.2d at 1201. The landowner filed a motion to suppress the seized evidence, which was denied. *Id*. at 1202.

On appeal, the Supreme Court noted that both the Fourth Amendment and Section 8 protect the reasonable expectations of privacy of those legitimately occupying a certain space, relative to searches and seizures of law enforcement personnel. *Russo*, 934 A.2d at 1208. However, the Supreme Court determined that this reasonable expectation of privacy did not extend to open fields. *Id*. at 1209. Under the interpretative doctrine of *ejusdem generis*,[2] the Court construed Section 8's use of the term "possessions" in the light of the particular words preceding it – all of which refer to intimate things about one's person. *Russo*, 934 A.2d at 1205-06. Given the textual similarity between the two constitutional provisions, the Court held that the Fourth Amendment's open fields doctrine, as enunciated by the U.S. Supreme Court in *Oliver v. United States*, 466 U.S. 170 (1984),[3] applied equally

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[2] The interpretative doctrine of *ejusdem generis* refers to "the same kind or class." *Department of Environmental Protection v. Cumberland Coal Resources, LP*, 102 A.3d 962, 976 (Pa. 2014). However, the Supreme Court recently cast doubt on the application of this doctrine in statutory construction. *Marcellus Shale Coalition v. Department of Environmental Protection*, 292 A.3d 921, 943 (Pa. 2023) (plurality) ("We find that *ejusdem generis* plays no role in the statutory analysis.").

[3] As our Supreme Court explained: "[T]he *Oliver* Court noted that open fields are not 'effects' within the meaning of the Fourth Amendment. Indeed, the [*Oliver*] Court observed, "[t]he Framers would have understood the term 'effects' to be limited to personal, rather than real, property." *Russo*, 934 A.2d at 1204 (citing *Oliver*, 466 U.S. at 177 n.7). The Supreme Court continued:

> Even assuming one had a subjective expectation of privacy in his open fields, the *Oliver* Court went on to reason, such an expectation is not one that society would be prepared to recognize as reasonable:

(Footnote continued on next page…)

under the Pennsylvania Constitution. *Russo*, 934 A.2d at 1208-09. The Supreme Court also opined that the open fields doctrine is consistent with the ERA, which enshrines the Commonwealth's interest in protecting and conserving public natural resources, including wildlife within its fields and forests. *Russo*, 934 A.2d at 1212-13. Thus, the Court concluded that the landowner had "no reasonable expectation of privacy" under either the Fourth Amendment or Section 8, arising from posting "No Trespassing" signs at his hunting camp where Section 901(a)(2) of the Game and Wildlife Code, 34 Pa. C.S. §901(a)(2), specifically authorizes an officer to "go upon any land or water outside of buildings, posted or otherwise, in the performance of the officer's duty." *Russo*, 934 A.2d at 1203. The Supreme Court held that "the guarantees of . . . Section 8 . . . do not extend to open fields." *Id*. at 1213. Thus, the Supreme Court affirmed the determination that the wildlife conservation officers did not violate the landowner's right to be free from unreasonable searches and seizures. *Id*.

> [O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And both petitioner . . . and respondent . . . concede that the public and police lawfully may survey lands from the air.

Russo, 934 A.2d at 1204 (quoting *Oliver*, 466 U.S. at 178).

The Supreme Court's opinion in *Russo* is binding precedent. *See Commonwealth v. Tilghman*, 673 A.2d 898, 903 (Pa. 1996) (holding that an opinion decided by a majority of our Supreme Court "becomes binding precedent on the courts of this Commonwealth"). As an intermediate appellate court, we have no authority to refuse to apply Supreme Court precedent, much less overturn it. *Zauflik v. Pennsbury School District*, 72 A.3d 773, 783-84 (Pa. Cmwlth. 2013), *aff'd*, 104 A.3d 1096 (Pa. 2014). Based on *Russo*, the Entry Statutes are constitutional. We decline to express an advisory opinion on whether, barring *Russo*, these statutes violate Section 8 or are in accord with the Commission's trustee duties under the ERA. *See Assalita v. Chestnut Ridge Homeowners Association*, 866 A.2d 1214, 1220 (Pa. Cmwlth. 2005) (holding courts should not issue advisory opinions). Therefore, in accordance with *Russo*, we conclude that the Hunting Clubs are not entitled to summary relief, but that the Commission is.

IV. Conclusion

For these reasons, we grant the Commission's application for summary relief; we deny the Hunting Clubs' application for summary relief; and we enter judgment in the Commission's favor.

MICHAEL H. WOJCIK, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Punxsutawney Hunting Club, Inc., and Pitch Pine Hunting Club, Inc.,	:	
Petitioners	:	
v.	:	No. 456 M.D. 2021
Pennsylvania Game Commission, and Mark Gritzer, in his official capacity as an officer of the Pennsylvania Game Commission,	:	
Respondents	:	

O R D E R

AND NOW, this 29th day of September, 2023, Petitioners' application for summary relief is DENIED; Respondents' application for summary relief is GRANTED; and judgment is entered in favor of Respondents.

MICHAEL H. WOJCIK, Judge

Order Exit
09/29/2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Punxsutawney Hunting Club, Inc., and Pitch Pine Hunting Club, Inc., Petitioners	:	
v.	:	No. 456 M.D. 2021
Pennsylvania Game Commission, and Mark Gritzer, in his official capacity as an officer of the Pennsylvania Game Commission, Respondents	:	Submitted: May 10, 2023

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE STACY WALLACE, Judge

OPINION NOT REPORTED

CONCURRING OPINION
BY JUDGE McCULLOUGH FILED: September 29, 2023

I concur in the decision because we are bound by the Supreme Court's decision in *Commonwealth v. Russo*, 934 A.2d 1199 (Pa. 2007), to reach this result. However, I write separately to emphasize my agreement with Justice Cappy's Dissenting Opinion in *Russo* wherein he opined that Section 901(a)(2) of the Game and Wildlife Code, 34 Pa. C.S. § 901(a)(2), is inconsistent with the protections afforded by article I, section 8 of the Pennsylvania Constitution, Pa. Const. art. I, § 8 to the extent that it authorizes entry onto posted private property without any level of suspicion of illegal activity. In this regard, I believe Justice Cappy, evaluating

the four factors set forth in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), correctly observed that

> the text of article I, section 8, its history in this Commonwealth, the related case law of other states, and the relevant policy considerations support constitutional protection of a Pennsylvania landowner's right to privacy when he or she has posted the property in a manner that indicates that entry is not permitted. Accordingly, I would hold that a citizen may claim privacy in an open field under [a]rticle I, [s]ection 8 of the Pennsylvania Constitution when indicia would lead a reasonable person to conclude that the area is private.

Russo, 934 A.2d at 1217 (Cappy, J., dissenting).

I must adhere to the caution of former Justice Cappy in his Dissenting Opinion that a "constitutional rule which permits state agents to enter private land in outright disregard of the property owner's efforts to maintain privacy is one that offends the fundamental rights of Pennsylvania citizens." *Id.* at 1214.

Nevertheless, the fact remains that the view of Justice Cappy in *Russo* is a minority view. Accordingly, although I fundamentally disagree that Punxsutawney Hunt Club, Inc., and Pitch Pine Hunting Club had no constitutionally protected privacy interest in their posted private land, I must nevertheless concur in the result reached by the Majority.

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

Judge Wallace joined in the Concurring Opinion.

CERTIFICATES OF COMPLIANCE

I certify that this brief complies with the word limit of Pa. R.A.P. 2135 because it contains 13,987 words, including footnotes and appendices, based on the count of the processing system used to prepare it. I further certify that this brief complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellee and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: January 25, 2024

/s/ John DeSantis
John DeSantis
Counsel for Appellants

CERTIFICATE OF SERVICE

I certify that on this 25th day of January, 2024, I electronically served this brief to the persons listed below via PACFile:

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