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.

Appeal from the Order of the Commonwealth Court
Dated September 29, 2023 (456 MD 2021)

REPLY BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

"*if it was our fault, let it be so no more*"[1]

INTRODUCTION

The Commission's brief is an ode to error. And not just any error—a glaring one that defies the plain text of Article I, Section 8 and exposes over 90% of private land in Pennsylvania to warrantless searches.[2] Because of that error, landowners like the Clubs and countless others must live in fear that state officials will invade their farms and forests at will. *Cf.* Farm Bureau & NFIB Amicus Br. Because of that error, officials of every stripe see private land as public property. *Cf.* State Police & Fish and Boat Comm'n Amicus Brs. Boots on every trail, cameras on every tree. This is what *Russo* allows—and will forever allow—unless this Court corrects the error.

And it should. In their opening brief, the Clubs showed that *Russo* was wrongly decided because all four *Edmunds* factors favor reading Section 8 to protect landed "possessions" from "unreasonable searches." Clubs' Br. 14–38. The Clubs also showed that none of the stare decisis factors shield *Russo*. Clubs' Br. 38–47. Rather than repeat all those arguments here, the Clubs will address the Commission's core points—all of which lack merit.

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[1] William Penn, *Fruits of Solitude* (1682), https://tinyurl.com/5289aw99.

[2] Joshua Windham & David Warren, *Good Fences? Good Luck*, 47 Regulation 1, 12 (Spring 2024), https://tinyurl.com/ycxnsdd4 (measuring open fields by state).

First, the Commission's argument that Section 8 "possessions" do not include land fails to apply basic rules of constitutional construction. The "fundamental rule" is that constitutional text must be read "in its popular sense, as understood by the people when they voted on its adoption." *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006) (cleaned up). The *Russo* parties offered zero evidence on that score. So, in this case, the Clubs corrected the error by offering overwhelming evidence—from dictionaries to statutes to cases to political writings—that in 1776, the term "possessions" was widely understood to include land. The Commission, even now, offers no evidence to the contrary. That silence says more than anything the Clubs could write.

Second, the Commission argues that nobody deserves privacy on their land. But history, text, and this Court's precedents cut the other way. At the founding, private land was secure from physical trespass. Section 8 protects at least that much privacy by forbidding "unreasonable searches" of landed "possessions." And this Court has always held that the owners of property listed in Section 8 deserve privacy unless they give it up—which the Clubs plainly have not done given their efforts to exclude intruders. (R. 103a–105a, 139a–141a). The Commission can't point to a single case, besides *Russo*, that holds otherwise.

Third, the Commission says Article I, Section 27, which requires the Commonwealth to protect "public natural resources," allows game wardens to ignore Section 8 on land where people hunt. "[B]ecause the Constitution is an integrated whole," though, "effect must be given to all of its provisions whenever possible." *Robinson Township v. Commonwealth*, 83 A.3d 901, 945 (Pa. 2013) (citing *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008)). The Commission's "pick one" approach does not harmonize Sections 8 and 27—it sacrifices one to the other. But that's unnecessary. Vermont, Montana, and Tennessee have either environmental rights clauses or clauses that allow hunting regulations. Yet all three states reject the open fields doctrine under their constitutions. The Commission fails to explain why game wardens here are any less capable of doing their jobs in a way that respects Pennsylvanians' right to be secure in their landed "possessions."

Fourth, if the Court overrules *Russo*, the entry statutes cannot stand. *See* 34 Pa. C.S. §§ 303(c), 901(a)(2), 901(a)(8). All three statutes grant game wardens "unfettered discretion to enter upon and roam private land"—no warrants required. *Punxsutawney Hunting Club, Inc. v. Pa. Game Comm'n*, No. 456 MD 2021, 2023 WL 6366772, at *1 (Pa. Cmwlth. Sept. 29, 2023) (unpublished). That violates the settled rule that warrantless searches are

presumptively unreasonable—and worse, looks just like the general searches that prompted Section 8 in the first place. The Court should overrule *Russo*, strike down the entry statutes, and reverse the decision below.

ARGUMENT

I. The Commission repeats *Russo*'s textual errors.

Russo committed a clear textual error. When reading the Constitution, the "fundamental rule of construction . . . is that the Constitution's language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006) (cleaned up). *Russo*—hamstrung by deficient briefing—never asked how the founding generation would have understood the term "possessions." *See Commonwealth v. Russo*, 934 A.2d 1119, 1205–06 (Pa. 2007). The Clubs have worked to cure that error, offering overwhelming evidence that in 1776, "possessions" meant land. Clubs' Br. 15–20. The Commission has not returned the favor. Rather than offer any competing evidence, the Commission merely asks the Court to repeat the errors of the past. The Court should decline.

A. The text is clear—"possessions" includes private land.

Again, constitutional construction starts with the original meaning of the text. *Stilp*, 905 A.2d at 939. That's because the text "embodi[es] . . . the will of the voters who adopted it." *Washington v. Dep't of Pub. Welfare*, 188 A.3d 1135, 1143 (Pa. 2018) (citing *Stilp*, 905 A.2d at 939). By reading the text "in accordance with its common and approved usage" when it was ratified, the Court honors the people's will rather than inserting its own. *McLinko v. Dep't of State*, 279 A.3d 539, 577 (Pa. 2022), *cert. denied sub nom. Bonner v. Chapman*, 143 S. Ct. 573 (2023); *see also Monongahela Navigation Co. v. Coons*, 6 Watts & Serg. 101, 114 (Pa. 1843) (constitutional terms must be given "their plain, popular, obvious, and natural meaning").

Because the original meaning of the text is key, the Clubs presented overwhelming evidence that the term "possessions" in Section 8 includes land. They cited a host of sources—none of which were cited in *Russo*—that used "possessions" or a variant to refer to land: nine dictionaries from 1756 to 1828; 17 statutes from 1682 to 1800; 22 Pennsylvania Supreme Court decisions from 1763 to 1794; and writings by 11 thinkers—from Locke and Blackstone to Penn and Franklin—from 1675 to 1833. Clubs' Br. 56–64. To assure the Court they were not cherry-picking, the Clubs also cited a new

study that sampled American texts from 1760 to 1776 and found that "86% of the time, *possessions* likely or clearly included land." Clubs' Br. 18–19 (citing James Phillips, *A Corpus Linguistics Analysis of "Possessions" in American English, 1760–1776*, Chap. L. Rev. (2024 forthcoming), https://tinyurl.com/36yfe58z).

Perhaps, if the Commission had offered even a shred of evidence that the original meaning of "possessions" did *not* include land, the Clubs would have spent the next part of this brief discussing the weight of that evidence. But the Commission has given the Clubs nothing to work with. It cites zero founding-era dictionaries, statutes, cases, or writings. It has no response to Professor Phillips's finding that "86% of the time, *possessions* likely or clearly included land." Phillips, *supra*, at 18–19. When it comes to original meaning, the Commission—like the *Russo* parties before it—simply has nothing to say.

B. Because the text is clear, ejusdem generis does not apply.

Lacking evidence of Section 8's original meaning, the Commission repeats *Russo*'s error by applying a statutory canon in a way that *erases* its original meaning. Specifically, the Commission argues that ejusdem generis requires reading "possessions" "in light of the particular words preceding it, all of which refer to intimate things about one's person," not land. Comm'n

Br. 23 (quoting *Russo*, 934 A.2d at 1205–06). But as the Clubs have explained (Clubs' Br. 39–43), ejusdem generis does not apply here.

The goal of constitutional construction is to honor the people's intent. *Stilp*, 905 A.2d at 939. The original meaning of the plain text is the "ultimate touchstone" of that intent. *Id.* Thus, when the original meaning is clear, this Court does not use the canons "applicable when construing statutes" to look for different meanings. *Robinson Township v. Commonwealth*, 83 A.3d 901, 945 (Pa. 2013). Those canons apply *only* when they can resolve "ambiguity . . . in the plain language of the [constitutional] provision." *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018).[3]

Section 8 is not ambiguous. It lists "possessions," that term includes land (Clubs' Br. 15–20, 56–66), and neither *Russo* nor the Commission cites any evidence to the contrary. Because the original meaning of "possessions" is clear, ejusdem generis does not apply—just as it wouldn't in any ordinary statutory interpretation case. *See Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 889 (Pa. 2020) ("Ejusdem generis must yield in any instance in which

[3] This is the rule for statutory canons across the board. They are meant to clarify muddy text—not to muddy clear text. *See, e.g.*, *Woodford v. Ins. Dep't*, 243 A.3d 60, 73 (Pa. 2020) ("When the text of the statute is ambiguous, then—and only then—do we advance beyond its plain language and look to other considerations to discern the General Assembly's intent."); *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.").

its effect would be to confine the operation of a statute within narrower limits than those intended by the General Assembly.").

Russo also failed to apply ejusdem generis correctly even on its own terms. That canon "ensure[s] 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 any of its preceding terms meaningless. None of those terms ("persons, houses, papers") cover land. What's more, ejusdem generis merely requires limiting a general term to the same nature or class as its preceding terms. *Friends of Danny DeVito*, 227 A.3d at 888. Because its preceding terms are all types of property, reading "possessions" to include land would honor the canon.[4]

The Kentucky high court's decision in *Brent v. Commonwealth*, 240 S.W. 45 (Ky. 1922), made the same errors as *Russo*. *Contra* Comm'n Br. 24–25. *Brent*, like *Russo*, applied ejusdem generis to Kentucky's search clause without first defining the original meaning of "possessions." *See Brent*, 240

[4] It's unclear why *Russo* chose "intimate things about one's person" as the idea that binds Section 8's terms together. *Russo* cited no authority for it. *See Russo*, 934 A.2d at 1206. Worse, *Russo* broke from precedent protecting items that are neither intimate nor near a person. *See, e.g.*, *Commonwealth v. Petroll*, 738 A.2d 993, 1005 (Pa. 1999) (trucking records); *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979) (bank records). To the extent "intimacy" overlaps with "privacy," though, the Clubs deserve protection for the reasons discussed *infra* pp. 11–15.

S.W. at 47 (noting the scope of "possessions" "has not been decided"), 48 (noting that beyond saying "possessions" does not include land, "we would not attempt to define its meaning"). And *Brent*, like *Russo*, rejected a reading of "possessions" that included land even though none of its preceding terms ("persons, houses, papers") described land. The mere fact that *Brent* made *Russo*'s errors first does not justify repeating them.

The Commission's only real argument for following *Brent* is that the Kentucky Bill of Rights was inspired by Pennsylvania's. *See* Comm'n Br. 24–25. But this case is about how *Pennsylvanians* understood *their Constitution* "when they voted on its adoption," *Stilp*, 905 A.2d at 939 (cleaned up)—not how Kentucky courts understood theirs 146 years later. Also, the Tennessee and Vermont constitutions were inspired by Pennsylvania's,[5] yet their courts have avoided *Brent*'s error by giving "possessions" its ordinary meaning: It includes land. *See, e.g.*, *Welch v. State*, 289 S.W. 510, 510 (Tenn. 1926) (using "the ordinary meaning ascribed to it by lexicographers"); *State v. Kirchoff*, 587 A.2d 988, 991 (Vt. 1991) (using the definition "at the time the Vermont

[5] *Ferry v. City of Montpelier*, 296 A.3d 749, 760 (Vt. 2023) (Vermont Constitution was "substantially modeled after the Pennsylvania Constitution of 1776"); *State ex rel. Haynes v. Daugherty*, No. M2018-01394-COA-R10-CV, 2019 WL 4277604, at *6 (Tenn. Ct. App. Sept. 10, 2019) ("Sixteen of the 32 sections that comprised Tennessee's Bill of Rights were derived in whole or in part from the Pennsylvania Constitution.").

Constitution was adopted"). This Court, like its sister courts in Tennessee and Vermont, should stick to the original meaning of the plain text.

C. Stare decisis cannot justify misreading the Constitution.

Rather than defend *Russo*'s mistaken reading of "possessions" with historical evidence, the Commission asks the Court to apply stare decisis and repeat *Russo*'s error. *See* Comm'n Br. 15–19. But stare decisis should not be "followed blindly when such adherence leads to perpetuating error," *Stilp*, 905 A.2d at 967—like retaining precedent that by "rules of constitutional construction . . . is patently flawed," *McLinko*, 279 A.3d at 572. As discussed above, *Russo* was patently flawed. It demonstrably misread Section 8's text in a way that exposed the vast majority of private land to warrantless searches. That's the kind of "special justification," *Commonwealth v. Alexander*, 243 A.3d 177, 196 (Pa. 2020), that justifies revisiting *Russo*.

The Commission's contrary arguments fail. It insists that stare decisis should apply because *Russo*'s textual holding did not "result[] from deficient briefing." Comm'n Br. 25–26. That is just false. The *Russo* briefing was thin. *See* Clubs' Br. 39. Especially on the text, where the Court flagged Russo for "fail[ing] to make *any* textually based arguments." *Russo*, 934 A.2d at 1205–06 (emphasis added). In our adversarial system, courts depend on the parties

to make their best points. *See Commonwealth v. Reid*, 235 A.3d 1124, 1159 (Pa. 2020). By failing to do that, Russo undermined the "quality of [the Court's] reasoning." *Alexander*, 243 A.3d at 196 (cleaned up).

The Commission's claim that it has a strong reliance interest because it has deployed the open fields doctrine "for almost a century" (Comm'n Br. 18–19) fares no better. The Commission has no valid "interest" in following a doctrine that violates Section 8. *Alexander* made that plain: "If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence." *Alexander*, 243 A.3d at 200 (cleaned up). Far from supporting stare decisis, then, the Commission's historical use of the open fields doctrine merely shows that it has been violating Section 8 for far too long.

II. The Clubs deserve privacy in their "possessions."

The Commission next argues that Section 8 does not protect private land because it carries no "legitimate expectation of privacy." Comm'n Br. 33. History, text, and precedent cut the other way. At the founding, closed land was entitled to privacy from physical intrusions. Section 8 secured at least that much privacy by forbidding "unreasonable searches" of landed "possessions." And this Court has always held that the owners of textually

enumerated property have a valid privacy expectation unless they give it up. The Commission can't cite a single case, besides *Russo*, holding otherwise.

A. At the founding, closed land was entitled to privacy.

The historical context in which Section 8 was adopted sheds light on its meaning and scope. *Commonwealth v. Edmunds*, 586 A.2d 887, 896 (Pa. 1991). In their opening brief, the Clubs showed that when Section 8 was adopted, private land was entitled to privacy from physical intrusions. As Blackstone's *Commentaries* and *Entick v. Carrington* made clear, English common law forbade trespassing. Clubs' Br. 23–24. Early Pennsylvanians then preserved and adapted that rule with fence statutes that empowered landowners to exclude intruders. Clubs' Br. 24–25, 65–66. And, because most people were farmers who lived off the land, fences were widespread. Clubs' Br. 25–26. Taking all that history together—none of which the Commission disputes—Section 8's historical context supports landowners' right to privacy.

B. Security in "possessions" is a textual privacy right.

Landowners' historical right to privacy is reflected in Section 8's text. At the founding, "liberty and privacy rights were understood largely in terms of property rights." Morgan Cloud, *Property Is Privacy: Locke and Brandeis in*

the Twenty-First Century, 55 Am. Crim. L. Rev. 37, 42–43 (2018). In 1776, the government had no way to invade a person's privacy without invading his property. *Cf. Commonwealth v. Gary*, 91 A.3d 102, 144–45 (Pa. 2014) (Todd, J., dissenting) ("officers claimed the plenary power to forcibly enter homes, warehouses, and other places to search for smuggled goods"). By forbidding "unreasonable searches" of "possessions," Section 8 promised landowners at least as much privacy from intruders as they enjoyed at the founding.

This Court has always held that the owner of property enumerated in Section 8 can legitimately expect privacy from physical intrusions *unless* he fails to preserve it. *Compare Commonwealth v. Petroll*, 738 A.2d 993, 1005 (Pa. 1999) (owner's privacy in bags), *with Commonwealth v. Mack*, 796 A.2d 967, 972 (Pa. 2002) (no privacy in bag following consent), *and Commonwealth v. Dowds*, 761 A.2d 1125, 1130–32 (Pa. 2000) (no privacy in abandoned bag). The Commission, by contrast, fails to cite any case besides *Russo* where a person who owned property listed in Section 8 took steps to preserve his privacy and did *not* receive protection.

Treftz does not count. *Contra* Comm'n Br. 18 (citing *Commonwealth v. Treftz*, 351 A.2d 265 (Pa. 1976)). First, the officers entered a field "beyond the fenced area" and "freely open" to the public. *Treftz*, 351 A.2d at 267.

Second, even if the public had been excluded, the Court's lead holding was that the defendant lacked standing because he did not own the land and did not visit often. *Id.* at 267, 270. Third, to the extent the Court discussed open fields, it was in dicta, cited only Fourth Amendment cases, and offered no distinct Section 8 analysis. *Id.* at 270–71. If *Treftz* is the Commission's best case, *Russo* is truly an outlier.[6]

C. Text aside, the Clubs can reasonably expect privacy.

Section 8 also protects "reasonable expectation[s] of privacy" beyond the items it lists. *See Commonwealth v. Sell*, 470 A.2d 457, 463–64 (Pa. 1983). Because the Commission misreads the term "possessions," it spends much of its time on this point. The Commission says the Clubs can't reasonably expect privacy because "[o]pen fields cannot be equated with an individual's home or curtilage." Comm'n Br. 32 (citing *Commonwealth v. Oglialoro*, 579 A.2d 1288, 1292 (Pa. 1990)—a Fourth Amendment case). The Commission is mistaken.

For starters, people can use their land for just about every private end they seek at home. They can create art, make love, and worship. *See Oliver v.*

[6] Even in *Brent*, on which the Commission relies so heavily, it did "not appear that [officers] broke any close or that it was necessary for them to surmount any fence." *Brent*, 240 S.W. at 46.

United States, 466 U.S. 170, 192 (1984) (Marshall, J., dissenting). Or look at the Clubs: Besides hunting, members visit to find solitude, relax with friends and family, and have private talks (R. 99a, 116a–118a, 123a–125a, 129a–131a, 136a–137a, 149a–151a, 155a–156a)—things we all do in our homes every day. The Commission fails to explain why it's "legitimate" to expect privacy for these activities at home but "illegitimate" to expect them on private land.

Valid privacy expectations can take other forms too. In *Commonwealth v. Gordon*—a Section 8 case—the Court reaffirmed that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of th[e] right to exclude." 683 A.2d 253, 258 (Pa. 1996) (cite omitted). The Clubs have a right to exclude: Their properties are posted as required by Pennsylvania's trespass law. (R. 104a–105a, 140a–141a (citing 18 Pa. C.S. § 3503(b)(1)(ii), (vi))); *see also* Farm Bureau & NFIB Amicus Br. 6–9 (citing more statutes securing the Clubs' right to exclude). It's entirely reasonable for the Clubs to expect privacy from intruders when they have taken the steps required by law to exclude intruders.

III. The Commission fails to harmonize Sections 8 and 27.

The Commission also defends *Russo* in the context presented here—land where people hunt—by invoking Section 27 (the Environmental Rights

Amendment). *See* Comm'n Br. 36–41. The Clubs do not dispute that Section 27's protection for "public natural resources" allows the legislature to adopt hunting regulations. *See* Clubs' Br. 37. The problem with the Commission's argument, though, is that it treats Section 8 as irrelevant when Section 27 is involved. The Constitution does not require this Court to make a Sophie's Choice about which parts to enforce and which to ignore. Instead, the whole Constitution works in harmony. Sections 8 and 27 are no different.

A. The Court should read Sections 8 and 27 in harmony.

Start with this Court's usual approach. "[B]ecause the Constitution is an integrated whole . . . effect must be given to all of its provisions whenever possible." *Robinson Township*, 83 A.3d at 946 (citing *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008)). The Court "must favor a natural reading which avoids contradictions and difficulties" and honors "the intent of the framers and . . . the views of the ratifying voter." *Robinson Township*, 83 A.3d at 943–44 (quoting *Commonwealth ex rel. Paulinski v. Isaac*, 397 A.2d 760, 766 (Pa. 1979)).[7] These principles apply with equal force here too.

[7] If two provisions conflict, then "the specific must prevail over the general." *Jubelirer*, 953 A.2d at 528 (cite omitted). As explained below, the Court need not apply that rule because Sections 8 and 27 can be harmonized. But if the Court disagrees, then Section 8's specific ban on "unreasonable searches" of "possessions" must prevail over Section 27's general rule that "the Commonwealth shall conserve and maintain [public natural resources] for the benefit of all the people." Pa. Const. art. I, §§ 8, 27.

Section 27 was not intended to displace other constitutional rights. Rather, it was adopted to put environmental rights "on par with" political rights. *Robinson Township*, 83 A.3d at 953. As Rep. Kury, who wrote Section 27, explained in a statement to voters, Section 27 "broaden[ed]" property rights in order to give environmental rights "at least an even chance." John Dernbach & Edmund Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 Widener L.J. 181, 272 (2015). That is not the language of somebody who sought to nix Section 8's longstanding protections.

Section 27's text confirms as much. It appoints the Commonwealth as "trustee" of "public natural resources." Pa. Const. art. I, § 27. That means the Commonwealth, like any trustee (and unlike a "proprietor"), must serve the interests of its beneficiaries. *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 932–33 (Pa. 2017). Indeed, a foundational principle of trust law is that "[a]lthough a power is conferred upon the trustee, he cannot properly exercise the power . . . in such manner as will involve a violation of any of his duties to the beneficiary." Restatement (Second) of Trusts § 186(f). That is exactly what the Commission claims the power to do here: Enforce Section 27 in a way that violates Section 8.

Not only is that wrong—it's unnecessary. In their opening brief, the Clubs noted that Vermont, Montana, and Tennessee all have constitutional provisions that either secure environmental rights or authorize reasonable hunting regulations. Clubs' Br. 37 (citing Vt. Const. ch. II, § 67, Mt. Const. art. II, § 3, and Tenn. Const. art. XI, § 13). Yet none of these states follow the open fields doctrine. Instead, they all require game wardens to obtain a warrant or prove an exception to the warrant requirement before searching closed private land. *See State v. DuPuis*, 197 A.3d 343, 353–54 (Vt. 2018); *State v. Bullock*, 901 P.2d 61, 76 (Mont. 1995); *Rainwaters v. Tenn. Wildlife Res. Agency*, No. 20-CV-6, 2022 WL 17491794, at *10 (Tenn. Cir. Ct. Mar. 22, 2022). The Commission has no evidence that game wardens in these other states struggle to do their jobs (R. 921a), which underscores that Sections 8 and 27 can work in harmony.

This Court's decision in *Commonwealth v. Blosenski Disposal Service*, 566 A.2d 845 (Pa. 1989), does not suggest otherwise. *Contra* Comm'n Br. 39–40. There, the Court applied the familiar "closely regulated industries" exception to Section 8's warrant requirement to uphold inspections of waste facilities. *Blosenski*, 566 A.2d at 848. While the Court went on to note that the inspection statute was adopted to further Section 27's environmental

goals, that was unnecessary to the holding and therefore dicta. *See id.* at 849. Indeed, if the mere fact that the statute furthered Section 27 was enough to resolve the case, there would have been no need for the Court to apply the "closely regulated industries" exception at all—it could have skipped past Section 8 entirely. But the Court did not do that, because the Commission's sweeping theory of Section 27 is not the law.

B. The Commission's approach lacks a limiting principle.

The Commission's theory—that game wardens can ignore Section 8 when they are enforcing hunting laws under Section 27—would have grave implications for other rights. For example, following the Commission's logic, the legislature could forbid hunters from posting on social media in order to discourage interest in hunting. That would surely violate Section 7's speech protections—but under the Commission's theory, this Court would have to uphold the law because it was designed to conserve natural resources under Section 27.

The Court rejected that logic in a case involving the Constitution's other major positive right: an "efficient system of public education." Pa. Const. art. III, § 14. In *West Mifflin Area School District v. Zachorchak*, the Court struck down a law that applied only to one school as a "special law"

under Article III, Section 32. 4 A.3d 1042, 1049 (Pa. 2010). The appellees urged the Court to uphold the law because it was "designed to protect job security for teachers" under Article III, Section 14. *Id.* at 1048 n.8. But the Court declined. While the law was "consistent with" the Commonwealth's duty to provide education, "[n]evertheless, the constitutional prohibition of special legislation applies," and the law violated it. *Id.* at 1049.

There is no reason why Section 27 should work any differently. Just as the legislature has the right to pass laws that promote public education, it has the right to pass laws that conserve public natural resources. But none of that gives the legislature carte blanche to violate other constitutional provisions. The Clubs are the only ones who have offered a reading that puts Section 27 "on par with," *Robinson Township*, 83 A.3d at 953—not above—the rest of the Declaration of Rights. Because that reading treats the Constitution as an "integrated whole," *id.* at 946, it's the best reading here.

IV. The entry statutes allow classic "unreasonable searches."

If *Russo* is overruled, the entry statutes cannot stand. Overruling *Russo* would mean the Clubs' lands are "possessions" that Section 8 protects from "unreasonable searches." It's undisputed that the statutes allow wardens to invade the Clubs without warrants or any other limits on their discretion. *See*

Clubs' Br. 7–8 (collecting evidence). As the Commonwealth Court held, the statutes give wardens "unfettered discretion to enter upon and roam private land." *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 only question left to decide is whether that power is "unreasonable."

It is. Warrantless searches are per se "unreasonable" under Section 8, *Commonwealth v. Arter*, 151 A.3d 149, 153 (Pa. 2016), unless the government can prove that a recognized exception to the warrant requirement applies, *see Commonwealth v. Timko*, 417 A.2d 620, 623 (Pa. 1980). The Commission did not raise any warrant exceptions below; it argued Section 8 does not apply *at all*. (R. 1488a–1489a). The Commission's failure to invoke any exceptions to the warrant requirement should be the end of the matter. Even so, the Clubs will address a few final points that should not change the outcome here:

First, in a single line, the Commission suggests that the Clubs "tacitly consent[ed]" to warrantless inspections when their members bought hunting licenses. Comm'n Br. 47. But the Commission did not raise this point below. The phrase "tacit consent" did not appear in the Commission's brief before the Commonwealth Court. *See* Clubs' Br. 50–51 (showing that, at most, the Commission mentioned but failed to brief the "closely regulated industries"

exception). That's waiver. *See Commonwealth v. Perez*, 93 A.3d 829, 841 (Pa. 2014). To the extent the Court considers this point, though, it lacks merit.

The Commission cites no Pennsylvania precedent for the idea that the decision to engage in a regulated activity provides consent for unreasonable searches. Nor could it, because this Court's decisions point the other way. *See, e.g.*, *Commonwealth v. Maguire*, 215 A.3d 566, 576 (Pa. 2019) (warrantless inspections of licensed truckers must meet Section 8 standards); *Alexander*, 243 A.3d at 192 (same for warrantless searches of "heavily regulated" cars on public roads). That the Commission's searches are authorized by statute does not cure the problem. "Statutes cannot authorize what . . . Section 8 would prohibit." *Commonwealth v. Myers*, 164 A.3d 1162, 1173 (Pa. 2017).

Second, the Commission says the Clubs have "waived any separate or distinct challenge to § 901(a)(8)." Comm'n Br. 43. The Clubs do not know what this means. They challenged § 901(a)(8) (R. 15a, 24a, 42a) for the same reason they challenged §§ 303(c) and 901(a)(2): All three statutes authorize warrantless searches, and that violates Section 8. The Commonwealth Court understood the case that way. *See Punxsutawney*, 2023 WL 6366772, at *1. What more is there to say?

Of course, if the Commission is willing to enter into a binding consent decree stating that § 901(a)(8) does not allow warrantless searches of landed "possessions" and that the Commission will not use § 901(a)(8) to conduct any future warrantless searches, that might resolve the Clubs' challenge to this provision. As written, though, § 901(a)(8) allows wardens to perform "inspections" (searches) of "immediate hunting locations" (the Clubs) and does not require a warrant or any other process. If § 901(a)(8) means what it says, it's just as unconstitutional as §§ 303(c) and 901(a)(2).

Third, in an amicus brief, the State Police argue that game wardens do not have "unfettered" access to the Clubs because they must operate within the scope of their statutory authority. State Police Amicus Br. 11–12. This is senseless. Game wardens' statutory powers—like customs officers' general search powers under the Townshend Act, *see* Laura Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1260 (2016)—do not require a specific warrant or otherwise limit game wardens' discretion. Clubs' Br. 51. Indeed, when asked to identify *any* limits on game wardens' power to invade private land, Appellee Gritzer (the Commission's entity witness) testified: "There's zero." (R. 433a). That's why Gritzer felt free to install a camera on Punxsutawney's land without a warrant. (R. 475a, 492a). As wardens see it,

private land deserves no more respect than public property. (R. 439a). *That*, more than anything else, is why *Russo* should be overruled.

CONCLUSION

The Commission's attempts to defend *Russo* and the entry statutes fail. *Russo* should be overruled, the entry statutes should be struck down, and the Commonwealth Court's decision should be reversed with instructions to enter summary relief for the Clubs.

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CERTIFICATES OF COMPLIANCE

I certify that this brief complies with the word limit of Pa. R.A.P. 2135 because it contains 5,317 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.

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I certify that on this 1st day of May, 2024, I electronically served this brief to the persons listed below via PACFile:

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