

In The  
Supreme Court of Pennsylvania

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*

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*On Appeal from the Commonwealth Court of Pennsylvania  
by Order, dated September 29, 2023, No. 456 M.D. 2021*

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**BRIEF OF AMICI CURIAE**

Commonwealth Foundation for Public Policy Alternatives

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

Commonwealth Foundation for Public Policy Alternatives (“Commonwealth Foundation” or “Amicus Curiae”) respectfully submits this *amici curiae* brief<sup>1</sup> in support of Appellants, Punxsutawney Hunting Club, Inc., and Pitch Pine Hunting Club, Inc., and against the Pennsylvania Game Commission, and Mark Gritzer, in his official capacity (collectively “Appellees”).

The Commonwealth Foundation transforms free-market ideas into public policies so all Pennsylvanians can flourish. The Commonwealth Foundation’s vision is that Pennsylvania once again writes a new chapter in America's story by ensuring all people have equal opportunity to pursue their dreams and earn success. Since the Commonwealth Foundation began fighting for freedom in Pennsylvania in 1988, it has saved taxpayers billions of dollars, brought greater knowledge of free-market principles and happenings in Harrisburg to millions of fellow citizens, and helped safeguard the individual rights of the citizens of Pennsylvania.

The Commonwealth Foundation has studied the issues presented in this litigation, and has a history of scholarship on questions concerning individual rights, property rights and privacy interests. It believes that the Court will benefit from its perspective, concerning the protection of rights and privacy interests under the Pennsylvania Constitution.

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<sup>1</sup> The *Amicus Curiae* submit this Brief pursuant to Pa.R.A.P. 531(b)(1)(i).

The Commonwealth Foundation is deeply invested in the how this Court resolves the pending questions. As a nonpartisan public policy research and advocacy nonprofit organization, Commonwealth Foundation has authored articles and conducted scholarship on issues of privacy, individual rights and the effect of both on economic factors. The protection of privacy rights, and particularly whether safeguards exist against intrusive government overreach, are central policy interests that animate the Commonwealth Foundation. The Commonwealth Foundation routinely addresses the concern of increasing and unwanted government encroachment as it relates to all aspects of daily life. The issues presented in the instance case concerning privacy under the Pennsylvania Constitution and the application of that principle to the “open fields” throughout the Commonwealth touch on areas of the Commonwealth Foundation’s expertise.

No other person or entity other than the amicus curiae, its members, or counsel have (i) paid in whole or in part for the preparation of this amici curiae brief or (ii) authored in whole or in part this amici curiae brief. *See* Pa. R.A.P. 531(b)(2).

## ARGUMENT

### **I. The Open Fields Doctrine Offends the Guaranteed Right of Privacy Embedded in Article I, Section 8 of the Pennsylvania Constitution.**

Appellants are “member-owned hunting clubs” with “thousands of acres of private land in Clearfield County[,]” Pennsylvania. Op. at 2. They “posted their properties with no trespassing signs and [ ] installed gates at all entrances to exclude nonmembers and intruders.” *Id.* Despite the efforts of these property owners to exclude the public from their lands, Pennsylvania law does not currently recognize that they enjoy a reasonable expectation of privacy on their “open fields.” This state of affairs presents an affront to the Pennsylvania Constitution. Under Article I, Section 8, “the paramount concern for privacy first adopted as part of [Pennsylvania’s] organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.” *Com. v. Edmunds*, 586 A.2d 887, 897 (Pa. 1991). Pennsylvania citizens should be afforded “the right to be let alone” on *all* aspects of their private property. *Denoncourt v. Com., State Ethics Comm’n*, 470 A.2d 945, 949 (Pa. 1983) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

In *Com. v. Russo*, 934 A.2d 1199 (Pa. 2007), this Court chose to follow the U.S. Supreme Court and adopt the open fields doctrine in construing Article I, Section 8 of the Pennsylvania Constitution. “By adopting the open fields doctrine,” Chief Justice Cappy wrote in his dissent, “the Majority today holds that a property owner has no

constitutionally protected privacy interest in property outside his curtilage, regardless of whether he posted the property in a manner that unmistakably indicates that entry is not permitted.” *Id.* at 1213 (Cappy, C.J., dissenting). The instant case affords this Court with the opportunity to correct the error succinctly described by Chief Justice Cappy – an error that has fundamentally eroded the well-established constitutional right to privacy that this Court has long recognized. *See e.g., Com. v. Murray*, 223 A.2d 102, 109-110 (Pa. 1966) (opining, “one of the pursuits of happiness [as delineated in the Pennsylvania Constitution] is privacy”); *Com. v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979) (holding, *inter alia*, that Article I, Section 8 is a separate and independent guarantee of the right to privacy that, in some instances, grants protection broader than the Fourth Amendment).

The decision by the *Russo* Majority is antithetical to the history and jurisprudence of Article I, Section 8. *See* Louis A. Smith II, *Pennsylvania's Constitutional Right to Privacy: A Survey of Its Interpretation in the Context of Search and Seizure Electronic Surveillance*, 31 DUQ. L. REV. 557, 570 (1993) (indicating this Court has frequently interpreted the right to privacy under Article I, Section 8 “in the context of searches and seizures as providing broader coverage than that of the federal Fourth Amendment”). Chief Justice Cappy’s dissenting opinion maintained that the open fields doctrine must be rejected as abridging “[the] strong notion of privacy that has been carefully safeguarded in this Commonwealth for centuries.” *Russo*, 934 A.2d at 1216 (Cappy, C.J., dissenting) (citing *Com. v. Edmunds*, 586 A.2d 887, 896 (Pa. 1991)).

Hence, the *Russo* Majority wrongly decided to dispense with “[t]his Commonwealth’s respect of privacy” under Article I, Section 8 when it incorporated the open fields doctrine into Pennsylvania’s constitutional lexicon. *Id.*

*Russo*’s embrace of the open fields doctrine adheres to a flawed U.S. Supreme Court decision, which itself creates a bright line rule inconsistent with “the basic concept of post-*Katz* decisions that the [Fourth] Amendment protects a person’s privacy, not particular places[.]” *See People v. Scott*, 593 N.E.2d 1328, 1334 (N.Y. 1992). The *Russo* Majority applies faulty and inconsistent reasoning to counter the valid points raised by the dissenters. In deciding the constitutionality of Sections 303(c) and 901(a)(2) and (8) of the Game and Wildlife Code, this Court should therefore follow the analysis outlined in Chief Justice Cappy’s dissenting opinion and in other jurisdictions that have rejected the open fields doctrine. Parsing through the *Edmunds* four-factor analysis, Chief Justice Cappy concluded that each prong weighs against application of the open fields doctrine:

...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.

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

“A constitutional rule which permits State agents to invade private 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 [this Court] cannot accept as

adequately preserving fundamental rights of [Pennsylvania] citizens.” *See Scott*, 593 N.E.2d at 1335. “Such a rule is contrary to [Pennsylvania] decisions, particularly those adopting the *Katz* rationale in search and seizure cases.” *Id.*

A. The *Russo* Majority Did Not Reconcile the History of Article I, Section 8’s “Strong Notion of Privacy” with the Bright-Line Rule of the Open Fields Doctrine.

In *Russo*, the Majority recounts the two-part inquiry that Pennsylvania courts routinely apply in determining the scope of the privacy protection under the state constitution: “That test requires a person to demonstrate: (1) a subjective expectation of privacy; and (2) that the expectation is one ‘that society is prepared to recognize as reasonable and legitimate.’” *Russo*, 934 A.2d at 1211 (quoting *Com. v. Duncan*, 817 A.2d 455, 463 (Pa. 2003)). Yet the *Russo* Majority ignores that the established analytical framework of Article I, Section 8 is wholly at odds with application of the open fields doctrine, an unwavering bright-line rule that extinguishes the expectation of privacy on un-demarcated land in *all* circumstances. *Russo* refused to acknowledge that adopting the open fields doctrine, consequently, subverted the history of Article I, Section 8. ‘Two-hundred years’ of tradition and jurisprudence establish that this provision in Pennsylvania’s Constitution “afford[s] protection not to places, but to an individual’s legitimate expectation of privacy.” *See Scott*, 593 N.E.2d at 1336.

The history of this Court’s jurisprudence has “declar[ed] with increasing frequency that Article I, Section 8 of the Pennsylvania Constitution **embodied a strong notion of privacy, notwithstanding federal cases to the contrary.**”

*Edmunds*, 586 A.2d at 898 (emphasis added). Chief Justice Cappy discussed some examples of this rich history of Article I, Section 8 in his dissenting opinion in *Russo*. See *Russo*, 934 A.2d at 1215 (Cappy, C.J., dissenting). He identified several occasions where this Court recognized protected privacy interests in areas that “do not fall under a narrow construction of ‘persons, houses, papers and possessions,’” such as “[c]onversations, telephone numbers, and bank records[.]” *Id.* (citing *Com. v. Brion*, 652 A.2d 287 (Pa. 1994); *Com. v. Melilli*, 555 A.2d 1254 (Pa. 1989); and *Com. v. DeJohn*, 403 A.2d 1283 (Pa. 1979)).

*Edmunds* presented a similar discussion that highlighted the history of this Court’s construction of Article I, Section 8, which described the preeminence in Pennsylvania of safeguarding the individual’s right to privacy and not merely deterring misconduct by law enforcement. *Id.* at 898-899. In particular, the *Edmunds* Court cited the *Melilli* decision, which addressed whether Pennsylvania required a warrant to install a pen register. A pen register attaches to a telephone line and allows law enforcement to identify outgoing telephone numbers. See *Melilli*, 555 A.2d at 1256, n.1 (quoting 18 Pa. C.S.A § 5701–5726). The definition now includes devices monitoring internet communications. 18 Pa. C.S.A § 5702. The *Melilli* Court declined to follow the U.S. Supreme Court and instead “[held] that Article I, Section 8 of the Pennsylvania Constitution was offended by the installation of a pen register device without probable cause.” *Edmunds*, 586 A.2d at 899 (citing *Melilli*, 555 A.2d at 1258-59). The *Melilli* decision underscores that this Court has consistently interpreted the

privacy protection under Article I, Section 8 as far more expansive than its federal counterpart:

... Article 1, § 8 of the Pennsylvania Constitution ... may be employed to guard individual privacy rights against unreasonable searches and seizures more zealously than the federal government does under the Constitution of the United States by serving as an independent source of supplemental rights.

*Melilli*, 555 A.2d at 1258 (citation omitted).

The *Russo* Majority attempted to discount the storied history of Article I, Section 8 as inapposite to determining whether an individual enjoyed greater privacy rights in Pennsylvania with respect to so-called “open fields.” It observed that the warrantless search of private property, beyond the curtilage of one’s home, did “[not] implicate[] the heightened privacy interest recognized in [ ] other contexts[.]” *Russo*, 934 A.2d at 1206. Nor did the Majority discern “any case that is remotely analogous to the one at bar.” *Id.* at 1206-1207.

The Majority’s analysis focuses only on a narrow historical view of Article I, Section 8, in an apparent attempt to locate precedent directly controlling on the issue of open fields. In failing to locate anything that matched the parameters of the search, the *Russo* Majority concluded, “[Pennsylvania’s] unique history and caselaw simply do not reflect any ‘societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields.’” *Id.* at 1209 (citation omitted). This analysis, however, overlooks the broader history of Article I, Section 8, which the *Edmunds* framework requires.

Chief Justice Cappy aptly criticizes the *Russo* Majority’s reasoning and historical analysis of Article I, Section 8. The *Russo* decision fallaciously concludes that open fields are not areas where “[Pennsylvania] citizens would reasonably expect to be free from governmental surveillance” since – despite a two-hundred-year history – “there has never been any suggestion, in any Pennsylvania source, that would militate a contrary conclusion.” *Id.* at 1209. The Majority relies upon the *lack* of specific precedent to support its adoption of the open fields doctrine – even though the doctrine directly contradicts the framework that this Court applies to all cases involving searches and seizures under Article I, Section 8.

The “passage of time” and lack of direct precedent “[should] not affect a citizen’s ability to seek constitutional protection” of a privacy interest that had not yet been decided in Pennsylvania when *Russo* was issued. *Russo*, 934 A.2d at 1215 (Cappy, C.J., dissenting). “More important to the historical analysis[.]” Chief Justice Cappy countered, “is the fact that Article I, Section 8 is meant to embody a strong notion of privacy that has been carefully safeguarded in this Commonwealth for the past two centuries[.]” *Id.* It is this history that the *Russo* Majority attempts to ignore when possible, and to distinguish if necessary.

The second prong of *Edmunds* framework requires the Court to consider whether – in light of the history of Article I, Section 8 – a privacy right *may* exist “in property that is posted in a manner as to reasonably indicate that entry is not permitted.” *Id.* The historical analysis under *Edmunds* should not be mired by

whether past decisions citing Article I, Section 8 have already decided the question at issue. Like in *Edmunds*, the question in *Russo* – and in the instant case – is whether the open fields doctrine “would frustrate the guarantees embodied in Article I, Section 8 of our Commonwealth’s constitution.” *Edmunds*, 586 A.2d at 895. This should not be a narrow insular examination of how Pennsylvania courts have viewed situations involving open fields. The historical analysis requires a detailed review of the right to privacy under Article I, Section 8, and how that right is applied. Because the open fields doctrine disregards the tangible efforts of property owners to exclude the public from their private lands, the *Edmunds* analysis requires this Court to consider whether such a rule would frustrate the well-established history of Article I, Section 8. But this is not the analysis the *Russo* Majority offered.

Instead, the *Russo* Majority conducted a myopic and constricted view of the history and jurisprudence surrounding Article I, Section 8. The history of Article I, Section 8 – and the provision’s “strong notion of privacy” – militates strongly against imposing any bright-line rule that categorically strips Pennsylvania citizens of privacy rights, irrespective of specific circumstances. The *Russo* Majority sidesteps this nearly inescapable truth by distinguishing Pennsylvania precedent, which consistently holds that Pennsylvania’s right to privacy is vastly greater than the federal analog. While none pertain to open fields specifically, the general principal underlying Article I, Section 8 cannot be discounted with such ease.

“[I]t is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution.” *Edmunds*, 586 A.2d at 895. The analysis of the *Russo* Majority was not independent. It began with the premise that the open fields doctrine was consistent with this Commonwealth’s notions of privacy, and only asked whether Pennsylvania law contained explicit language or precedent disavowing the doctrine. When the question begins by evaluating the open fields doctrine through the lens of Article I, Section 8, only one conclusion is consistent with the history and text of the Pennsylvania Constitution. The open fields doctrine announces a categorical rule that frustrates the strong privacy guarantees in this Commonwealth.

*a. Edmunds and More Recent Decisions Demonstrate that Article I, Section 8 Affords Individuals with Greater Privacy Protections than the Open Fields Doctrine Allows.*

The *Edmunds* Court addressed whether to adopt, as a matter of Pennsylvania law, the federal “good faith” exception to the exclusionary rule. 586 A.2d at 898-899. The exception refrains from excluding evidence against a criminal defendant when the law enforcement officer inadvertently gathers the evidence by violating an individual’s privacy rights in “good faith.” *See id.* *Edmunds* refused to adopt the “good faith” exception in Pennsylvania, citing the dual rationale underlying the state exclusionary rule. “[T]he exclusionary rule in Pennsylvania has consistently served to bolster the twin aims of Article I, Section 8; to-wit, **the safeguarding of privacy and the fundamental requirement that warrants shall only be issued upon probable cause.**” *Id.* (emphasis added) (citing *Melilli*, 555 A.2d at 1259). Conversely, the

federal exclusionary rule “is not to redress the injury to the privacy of the search victim ...[but, rather] the rule’s prime purpose is to deter future unlawful police conduct[.]” *United States v. Calandra*, 414 U.S. 338, 347 (1974).

The *Edmunds* Court found this distinction in the two rationales decisive. It “disagree[d] with ... [the U.S. Supreme] Court’s suggestion ... that ... Pennsylvania ha[s] been employing the exclusionary rule all these years to deter police corruption.” *Edmunds*, 586 A.2d at 899. “[F]latly reject[ing] this notion[.]” the Court ruled that the “good faith” exception was not a component of Article I, Section 8. *Id.* “[A]dopt[ing] a ‘good faith’ exception to the exclusionary rule,” the *Edmunds* Court reasoned further, “would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years.” *Id.*

What is significant ... is that our Constitution has historically been interpreted to incorporate a strong right of privacy, and an equally strong adherence to the requirement of probable cause under Article 1, Section 8. Citizens in this Commonwealth possess such rights, even where a police officer in “good faith” carrying out his or her duties inadvertently invades the privacy or circumvents the strictures of probable cause.

*Id.* The *Edmunds* Court, thus, departed from the federal precedent because Article I, Section 8 demanded Pennsylvania courts protect the privacy interests of Pennsylvania citizens through more robust measures than the Fourth Amendment demands.

Similarly, in *Com. v. Alexander*, 243 A.3d 177 (Pa. 2020), this Court refused to adopt the federal automobile exception as the rule under Article 1, Section 8. The *Alexander* Court cited the broader and more expansive privacy protections under the

Pennsylvania Constitution as the basis for the decision. As noted previously, Pennsylvania applies the same language and the same two-part inquiry under Article I, Section 8 as the federal framework under the Fourth Amendment. Pennsylvania, nevertheless, applies different principles and societal expectations “to determine what our constitution would recognize as reasonable and legitimate [privacy interests].” *Id.* at 206. Moreover,

... our cases hold that the privacy expectations involved in addressing an Article I, Section 8 claim extend beyond textual similarities (or dissimilarities, as the case may be). **We must consider our charter as a whole in terms of establishing a set of normative values that limits the government’s authority to search without a warrant**, as opposed to the Dissent’s view, which attempts to divine the framers’ intent based solely on a textual comparison of Article I, Section 8 and the Fourth Amendment.

*Id.* (emphasis added). The *Alexander* Court further reiterated, “the degree of protection enjoyed by a Pennsylvania citizen rests on something more than the mere text of Article I, Section 8.” *Id.*

In declining to follow the federal automobile exception, the *Alexander* Court ultimately adopted the approach that Justice Todd advocated in her dissenting opinion from *Com. v. Gary*, 91 A.3d 102, 143 (Pa. 2014) (Todd, J., dissenting), overruled by *Alexander*, 243 A.3d 177. The Court, therefore, held that only a “limited automobile exception” exists under Article I, Section 8, wherein “warrantless vehicle searches require **both** probable cause and exigent circumstances; one without the

other is insufficient.” *Alexander*, 243 A.3d at 207 (citation and quotations omitted) (emphasis added).

In arguing for a more robust approach to protect the privacy rights under the Pennsylvania Constitution, Justice Todd noted only Article I, Section 8 “specifie[d] that no warrant to search ‘**any** place,’ or to seize ‘**any** ... things shall issue without ... probable cause.”” *Gary*, 91 A.3d at 143 (Todd, J., dissenting; emphasis in original) (quoting Pa. CONST. ART. I, § 8). The Fourth Amendment does not include this language. *Id.* “[T]his difference in language[,]” Justice Todd reasoned, “suggests that the warrant requirement of Article I, Section 8 was intended to protect an individual’s privacy interest in **all** of his or her possessions or things in **any** place they may be[.]” *Id.* (emphasis in original). Justice Todd was referring to the inside of an automobile, but the nature of the privacy right described – the one that the *Alexander* Court recognized – could easily extend to an individual’s private property posted with “no trespassing” signs.

Neither *Edmunds*, nor *Alexander*, is factually similar to the case presented – or to the facts confronted in *Russo*. Nonetheless, both decisions demonstrate concrete examples where this Court refused to adopt a federal precedent because it “would frustrate the guarantees embodied in Article I, Section 8 of our Commonwealth’s constitution.” *Edmunds*, 586 A.2d at 895. In both cases, this Court did not curtail the historical discussion of privacy rights in Pennsylvania and Article I, Section 8. Rather, this Court “consider[ed] [Pennsylvania’s] charter as a whole in terms of establishing a

set of normative values that limits the government's authority to search without a warrant[.]” *Alexander*, 243 A.3d at 206. The same type of analysis should be applied in considering whether the open fields doctrine offends the privacy rights protected by the Pennsylvania Constitution.

The U.S. Supreme Court ruled that no protectable privacy interest exists on open fields, in part, because it made the following conclusion: “It is not generally true that fences or ‘No Trespassing’ signs effectively bar the public from viewing open fields in rural areas.” *Oliver v. United States*, 466 U.S. 170, 178 (1984). Setting aside whether merely viewing land from afar equates to physically entering land and searching it, this proposition – on its face – offends the sanctity of privacy interests in Pennsylvania. Based upon any reading of *Edmunds* and *Alexander*, conducting a warrantless search on land that the owner undertook concrete measures to secure as private violates Article I, Section 8.

B. The *Russo* Decision Vitiates Pennsylvania’s Purple Paint Law and Other Statutes Criminalizing Trespass.

The appellant in *Russo* cited Pennsylvania’s statutory law criminalizing trespass across property, which visibly notifies the public that trespass is forbidden. *Russo*, 934 A.2d at 1212; see 8 Pa. C.S.A. § 3503. The Majority found the reference unpersuasive because it did not “pertain[ ] to ‘unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.’” *Id.* (quoting *Edmunds*, 586

A.2d at 895). The statutory text contradicts this conclusion. The *Russo* Majority failed to address Section 3503(b.2) defining the offense of “Agricultural trespasser” as:

(i) enter[ing] or remain[ing] on any agricultural or **other open lands when such lands are posted in a manner prescribed by law or reasonably likely to come to the person’s attention or are fenced or enclosed in a manner manifestly designed to exclude trespassers** or to confine domestic animals

18 Pa. C.S.A. § 3503(b.1)(i) (emphasis added). The open fields doctrine disregards this statutory law and whatever reasonable privacy expectations it likely creates. Not only does § 3503(b.1)(i) render entry onto “open lands” posted with signs or fences a criminal act, it also ostensibly authorizes the property owner have the trespasser dispelled from his property. “The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” *Scott*, 593 N.E.2d at 1336 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). Thus, as a policy consideration under *Edmunds*, § 3503(b.1)(i) provides strong evidence that Pennsylvania recognizes – at least – some privacy rights on open lands where the property owner takes concrete measures to exclude the public.

In 2019, Governor Wolf signed into a law the “Purple Paint Law,” which “gives landowners the option of using purple paint, rather than signs, to post their properties and alert others that lands are private and trespassing isn’t permitted.” *See Pennsylvania’s Purple Paint Law*, Pennsylvania Game Comm. (last visited Jan. 25, 2024)<sup>2</sup>

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<sup>2</sup> <https://www.pgc.pa.gov/HuntTrap/Law/Pages/Purple-Paint-Law.aspx#:~:text=A%20change%2C%20during%202020%2C%20in,but%20Philadelphia%20and%20Allegheny%20counties>

This law became effective on January 27, 2020, thereby bolstering the argument further. The “Purple Paint Law” appears under § 3503(1)(b)(vi) as follows:

**(b) Defiant trespasser.--**

(1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:

\* \* \* \* \*

(vi) subject to paragraph (3), **the placement of identifying purple paint marks on trees or posts on the property** which are:

(A) vertical lines of not less than eight inches in length and not less than one inch in width;

(B) placed so that the bottom of the mark is not less than three feet from the ground nor more than five feet from the ground; and

(C) placed at locations that are readily visible to a person approaching the property and no more than 100 feet apart.

18 Pa. C.S.A. § 3503(1)(b)(vi) (emphasis added). The offense of “Defiant trespasser” also occurs from entry onto property that displays “posting in a manner prescribed by law[.]” “fencing or other enclosure manifestly designed to exclude intruders[.]” or certain other notices. 18 Pa. C.S.A. § 3503(1)(b)(ii, iii and iv).

The “Purple Paint Law” cannot provide the function that the General Assembly and the Governor intended if the Pennsylvania Constitution does not recognize the creation of a protectable privacy interest. “[T]he rule that an owner can never have an expectation of privacy in open lands is repugnant to [Pennsylvania]’s acceptance of ‘the right to be let alone’ as a fundamental right deserving legal

protection[.]” *Scott*, 593 N.E.2d at 1337 (citation omitted); *see Denoncourt*, 470 A.2d at 949 (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)). Rather, adherence to the open fields doctrine would give “unbridled license ... to agents of the [Commonwealth] to roam at will without permission on private property in search of incriminating evidence is repugnant to the most basic notions of fairness in our criminal law.” *Scott*, 593 N.E.2d at 1337.

**II. Section 901(a)(8) of the Game and Wildlife Code is Unconstitutional even if this Court Continues to Recognize the Open Fields Doctrine.**

In *Russo*, once deciding that the open fields doctrine applied to Article I, Section 8 of the Pennsylvania Constitution, this Court did not make a determination as to the constitutionality of Section 901(a) of the Game and Wildlife Code, 34 Pa. C.S.A § 901(a). Before the Commonwealth Court, Appellants facially challenged Sections 303(c) and 901(a)(2) and (8). Under the plain language of Section 901(a)(8), the statute authorizes officers to “[c]onduct administrative inspections” that violate the Pennsylvania Constitution irrespective of whether the open fields doctrine applies.

Assuming *arguendo* that the open fields doctrine governs and officers may transverse private property throughout the Commonwealth, the so-called “open fields” would function – for privacy purposes – similar to streets and other public areas. Section 901(a)(8), however, grants an officer the power to conduct searches that are forbidden under normal search and seizure jurisprudence. *See e.g., Com. v.*

*Bowmaster*, 101 A.3d 789, 792 (Pa. Super. 2014) (recounting that warrantless searches and seizures in a private home – and the nearby curtilage – “violate both the Fourth Amendment and Article 1 § 8 of the Pennsylvania Constitution” unless both “probable cause and exigent circumstances” exist); *Com. v. Hicks*, 208 A.3d 916, 927 (Pa. 2019) (“We recognize only two types of lawful, warrantless seizures of the person, both of which require an appropriate showing of antecedent justification: first, an arrest based upon probable cause; second, a ‘stop and frisk’ based upon reasonable suspicion.”) (quotation and citation omitted).

Sections 303(c) and 901(a)(2) do not require officers to have ‘suspicion’ of criminal activity or misconduct before entering private property. 34 Pa. C.S.A §§ 303(c), 901(a)(2). Rather, an officer has “the power and duty to ... [g]o upon any land or water outside of buildings, except curtilage, posted or otherwise, in the performance of the officer’s duty.” 34 Pa. C.S.A § 901(a)(2). The statute, thus, empowers officers to travel anywhere they desire by virtue of their status as officers of the Game and Wildlife Commission. *Id.* While officers are performing their duties, Section 901(a)(8) authorizes them to “[c]onduct administrative inspections[,]” which are defined as follows:

(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.A. § 901(a)(8). The breadth of the search parameters is startling. The statute authorizes officers to conduct searches of, *inter alia*, “persons,” “clothing,” and “any means of transportation or its attachments used as blinds or as hunting locations, and any coolers or containers possessed at a hunting location[.]” *Id.* Section 901(a)(8) places only one limit upon these “administrative inspections” – that they be conducted “when prima facie evidence of hunting exists.” *Id.* Even this limitation, however, is unclear – leaving it uncertain whether it modifies the entire paragraph or only the last phrase.

Regardless, Section 901(a)(8) allows officers to search private individuals, their belongings and their vehicles *without reasonable suspicion, probable cause or exigent circumstances* – so long as the officer observes “prima facie evidence of hunting[.]” This type of search is impermissible anywhere in Pennsylvania under Article I, Section 8, irrespective of the open fields doctrine. It grants law enforcement officers nearly unbridled discretion to conduct endless searches of whomever they choose.<sup>3</sup> Section

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<sup>3</sup> The U.S. Supreme Court has addressed the issue of privacy interests and administrative inspections within the context of heavily regulated commercial businesses. See e.g., *New York v. Burger*, 482 U.S. 691 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981). The privacy interests in this setting are reduced, although not non-existent. This is not the correct analytical framework from which to view Section 901(a)(8)’s expansive “administrative inspections.” Section 901(a)(8) is not dealing with a commercial business setting, although hunting and gaming is a highly regulated activity in Pennsylvania. Regardless, even under this framework, the statutory grant would be unconstitutional. “[A] warrant may be necessary to protect the owner from the ‘unbridled discretion [of] executive and administrative officers,’ by assuring him that ‘reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment].’” *Dewey*, 452 U.S. at 599 (citation omitted).

901(a)(8) offends every notion of privacy guaranteed under Article I, Section 8 of the Pennsylvania Constitution, and should be struck down as unconstitutional.

### **CONCLUSION**

For all the foregoing reasons set forth fully above, the Amicus Curiae requests that this Honorable Court hold that the open fields doctrine is not applicable under Article I, Section 8 of the Pennsylvania Constitution, and/or that Sections 303(c) and 901(a)(2) and (8) of the Game and Wildlife Code violate the Pennsylvania Constitution under Article I, Section 8.

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## **CERTIFICATE OF SERVICE**

I, Shawn M. Rodgers, Esquire, hereby certify that I caused a true and correct copy of the foregoing Amicus Curiae Brief for to be served on or before day of January 25, 2024, via e-filing, e-mail, hand delivery and/or first-class mail, to all counsel of record, which service satisfies the requirements of Pa.R.A.P. 121.

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## **CERTIFICATE OF WORD COUNT**

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a)(1), I hereby certify that this brief complies with the type-volume limitation set forth in Rule 2135(a)(1) and contains 4,964 words.

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**CERTIFICATE OF COMPLIANCE WITH RULE 127**

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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