

**IN THE SUPREME COURT OF PENNSYLVANIA
Western District**

NO. 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 OF *AMICI CURIAE* PENNSYLVANIA FARM BUREAU AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF APPELLANTS PUNXSUTAWNEY HUNTING CLUB, INC. AND PITCH PINE HUNTING CLUB, INC.

**Appeal from the Order Entered September 29, 2023
in the Commonwealth Court of Pennsylvania
under Case No. 456 MD 2021**

/s/ Joe D. Montenegro

Joe D. Montenegro

Attorney I.D. No. 318790

P.O. Box 8736

Camp Hill, PA 17001-8736

Telephone: (717) 761-2740

jdmontenegro@pfb.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Pennsylvania Farm Bureau (Farm Bureau) is a Pennsylvania nonprofit agricultural trade organization whose purpose is to promote, facilitate, and sustain the vitality of farms, rural families, and agriculture generally in the Commonwealth. Farm Bureau accomplishes its mission primarily through public policy advocacy before all levels and branches of government. As the largest general farm organization in Pennsylvania, its membership is comprised of nearly 30,000 farm and rural families. Our organization includes 54 local organizations (county Farm Bureaus) that actively operate in 65 of Pennsylvania's 67 counties. Farm Bureau is a state affiliate of the American Farm Bureau Federation, an organization representing nearly six-million member families throughout the United States.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the Nation's leading small business association. NFIB's mission is to promote and

protect the rights of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members. To fulfill its role as their voice, NFIB Legal Center frequently files *amicus curiae* briefs in cases that will impact small businesses.

Pennsylvania is home to approximately 53,000 farms,¹ representing approximately one-fourth of Pennsylvania's total land mass.² Additionally, approximately, 57% of all land in Pennsylvania is considered forestland.³ Consequently, numerous farmers and landowners generally will be affected by this Court's decision concerning the "open fields" doctrine.

Farm Bureau and NFIB Legal Center have a strong interest in preserving the rights of farm families, landowners, and rural businesses in the Commonwealth. It is vital to Pennsylvania's farm and rural families that the Commonwealth's overall policy trend of encouraging and guarding

¹ Penn State Center for Economic and Community Development and Penn State Extension, Understanding Pennsylvania Agriculture: 2017 Update, at 3, https://aese.psu.edu/research/centers/cecd/publications/pa-agriculture-analysis/understanding-pa-ag_2017-update_psu-cecd_dec2020.pdf.

² Penn State Center for Economic and Community Development and Penn State Extension, Where the Soybeans Grow: An Exploration of Agricultural Land Use in Pennsylvania, 2017, at 1, https://aese.psu.edu/research/centers/cecd/publications/pa-agriculture-analysis/land-use-in-pa-ag-in-2017_psu-cecd_dec2020.pdf.

³ USDA Forest Service, Forests of Pennsylvania, 2020, https://www.fs.usda.gov/nrs/pubs/ru/ru_fs345.pdf.

property and privacy rights, as established and fortified in a multitude of state statutes, is protected.

Other than *amici curiae* and their counsel, no part of this brief has been prepared for or paid for by any other entity.

SUMMARY OF ARGUMENT

Pennsylvania has a strong history of safeguarding privacy and property rights through numerous state statutes, particularly those related to agricultural and rural areas. Given the General Assembly's longstanding efforts to recognize and protect its rich agricultural tradition, which explicitly includes forestland,⁴ allowing warrantless searches of private lands is at odds with the Commonwealth's public policy preferences regarding privacy and property rights. As a result, the "open fields" doctrine should be discarded in Pennsylvania.

⁴ A multitude of state statutes explicitly recognize forestry, forestry products, and silviculture as agriculture. See, e.g., 3 P.S. § 903 (defining "crops, livestock and livestock products"); *id.* § 952 (defining "agricultural commodity" and "normal agricultural operation"); 53 P.S. § 10107 (defining "agricultural operation"); 72 P.S. § 5490.2 (defining "agricultural commodity").

ARGUMENT

Policy considerations unique to Pennsylvania support discarding the “open fields” doctrine.

As this Court has previously articulated, any State-based Constitutional departure from a federal application of a Constitutional provision must rest on adequate and independent state grounds. See *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (citing *Michigan v. Long*, 463 U.S. 1032 (1983)). In *Edmunds*, this Court laid out four factors to consider in making such a determination: (1) the text of the Pennsylvania constitutional provision; (2) history of the provision, including case law; (3) related case law from other states; and (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence. *Id.* This brief will primarily focus on the fourth factor—policy considerations, particularly as evinced by agriculturally related state statutes.

Given the Commonwealth’s rich agricultural history and tradition, the General Assembly has unsurprisingly enacted numerous agricultural statutes aimed at protecting privacy and property rights within such context. While this Court previously addressed the “open fields” doctrine and

analyzed policy interests under *Edmunds* in *Commonwealth v. Russo*, 934 A.2d 1199, 1212-13 (Pa. 2007), in just the short time since *Russo*, the General Assembly has enacted several property protective statutes relating to open spaces and farmland.

In 2010, the General Assembly passed Act 125 of 2010, which created a new category of trespassing related to agricultural biosecurity areas. See 18 Pa.C.S. § 3503(b.3). Notably, the term “agricultural biosecurity area”⁵ includes “agricultural or other open lands,” which is defined remarkably broadly as:

[A]ny land on which agricultural activity or farming as defined in section 3309 (relating to agricultural vandalism) is conducted or *any land populated by forest trees of any size and capable of producing timber or other wood products or any other land in an agricultural security area ... or any area zoned for agricultural use.*

18 Pa.C.S. § 3503(b.2)(3) (emphasis added).

Although the term “agricultural or other open lands” was first enacted as part of the general agricultural trespassing category created by Act 121 of 1998 (codified at 18 Pa.C.S. § 3503(b.2)), the General Assembly specifically chose to include the expansive definition of farmland and other

⁵ 3 Pa.C.S. § 2303 (defining agricultural biosecurity area)

open lands when enacting the more-recent agricultural biosecurity trespassing category. And, when considering the definition's breadth, even simply from a land-scale perspective, it is difficult to view that decision as a legislative afterthought.

To that end, the definition includes three additional categories of land: forestland, agricultural security areas, and areas zoned for agricultural use. Regarding the first category, the law subjects virtually all forestland⁶ for potential inclusion by its text, providing that "any land populated by forest trees of any size and capable of producing timber or other wood products." *Id.* § 3503(b.2)(3). Concerning the second category, as of 2019, over 4 million acres⁷ were enrolled in agricultural security areas. As established under the Agricultural Area Security Law, 3 P.S. §§ 901-916, agricultural security areas are areas that, among other benefits, receive special protections from eminent domain proceedings, establish eligibility to be considered for the state easement purchase program, and protect

⁶ As previously discussed, *supra* note 3, forestland makes up the majority of Pennsylvania's total land mass.

⁷ See Pennsylvania Department of Agriculture, 2019 Bureau of Farmland Preservation Annual Report, Table 1, <https://www.centrecountypa.gov/DocumentCenter/View/13865/2019-Annual-Report-Final?bidId=>.

landowners from municipal and nuisance actions. See *id.* §§ 911, 913, 914.1. As to the last definitional category, while statistics regarding municipally zoned agricultural areas are not as readily available as agricultural security areas, the number is likely even larger, as such zoning classification is generally a prerequisite to be in an agricultural security area. See *id.* § 907(a)(2). Consequently, both from a property protective posture and scope of affected land mass, the General Assembly has determined that agricultural lands and open spaces are entitled to unique and increased protections.

Relatedly, Section 3309 of the Crime Codes, which is referenced in the previously discussed general agricultural trespassing category,⁸ and establishes the crime of agricultural vandalism, defines “agricultural activity or farming” as including “data and data-gathering equipment related to agricultural products as well as the commercial production of agricultural crops ... [and] trees and timber products” *Id.* § 3309(c). In other words, the General Assembly has decided to give specific statutory protection to equipment used for monitoring or collecting data related to agricultural

⁸ 18 Pa.C.S. § 3503(b.2)(3)

production and which would commonly be located in open-spaces areas. Thus, within the context of farmland and open spaces, the General Assembly has plainly indicated a concern for privacy rights by making it a specific criminal offense to damage or alter property and equipment used for data and data gathering in areas that would typically fall under the “open fields” doctrine.

Finally, further examining the agricultural biosecurity trespassing provision demonstrates that the General Assembly was aware of the potential for law enforcement to enter such areas under “exigent circumstances.” See *id.* § 3503(b.3)(2)(iii) (providing a defense to prosecution for law enforcement officers acting under exigent circumstances). While the exigent circumstances doctrine is a well-known exception to warrant requirements, see *Commonwealth v. Alexander*, 243 A.3d 177, 207-09 (Pa. 2020) (discussing exigent circumstances doctrine), its specific inclusion in a statute related to farmland and other open spaces supports the notion that the legislature did not want to grant law enforcement officers free reign to enter such spaces since the granting of a specific exception would be interpreted to exclude others. See 1 Pa.C.S. §

1924 (providing that “[e]xceptions expressed in a statute shall be construed to exclude all others”).

In 2018, the General Assembly again demonstrated its commitment to private property rights for open spaces, further restricting the abilities of local governments and entities with eminent domain authority to condemn open spaces. In Act 45 of 2018, the Commonwealth restricted the ability of such entities to condemn land subject to a conservation easement unless prior approval and determination was obtained by an Orphan’s Court that no reasonable and prudent alternative was available. See 26 Pa.C.S. § 208(a), (d). In defining “open space benefits,” the Act specifically noted both the protection and conservation of forests and land used in producing timber crops, as well as farmland. See *id.* § 202 (defining “open space benefits” as including “the protection and conservation of forests and land being used to produce timber crops” and “the protection and conservation of farmland”).

Just one year later, the Commonwealth enacted what is commonly referred to as the “Purple Paint Law.” See 18 Pa.C.S. § 3503(b)(vi). The law allows property owners to post their land for trespassing purposes by painting vertical lines of purple paint on trees or posts spaced no more than

100 feet apart. See *id.* The Purple Paint Law is thus another recent example of the Legislature demonstrating its commitment to property rights by easing the methods by which open space and farmland can be legally posted and protected.

While this brief primarily focuses on *Edmunds* policy considerations in the context of agricultural matters, it's also evident that many of the policy considerations concerning technological advancements for securing a warrant and Pennsylvania's judicial rules encouraging such use, apply similarly here. See *Commonwealth v. Gary*, 91 A.3d 102, 157-60 (Pa. 2014) (Todd., J., dissenting) (discussing criminal procedure rules intended to encourage use of warrants through technological means). As noted by then-Justice Todd, this Court, in 2002, amended Pennsylvania Rule of Criminal Procedure 203 to allow officers to obtain warrants using advanced communication technology, noting that the technology amendments "were made with the purposeful goal of reducing the number of warrantless searches, because searches with a warrant are so strongly favored in this Commonwealth." *Id.* at 158. And, notably, in *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020), this Court overruled *Gary* and explicitly adopted

then-Justice's Todd's dissent and discussion of policy considerations. See *id.* at 202-06.

Relatedly, in 2017, this Court once again adopted an amendment to Rule of Criminal Procedure 203 that similarly sought to better facilitate and ease the use of warrants by eliminating the "face-to-face" warrant verification requirement. See Pa. Bull. vol. 47, no. 47 at 7177 (11/25/17). Instead, the amendment allowed telephonic verification as an alternate verification means but still allowed for a visual requirement if the issuing authority had concerns about the affiant's identity. See *id.* ("In any telephonic communication, if the issuing authority has a concern regarding the identity of the affiant, the issuing authority may require the affiant to communicate by a device allowing for two-way simultaneous audio-visual communication or may require the affiant to appear in person."). In their report on the proposed amendment, the Criminal Procedural Rules Committee noted that the amendment arose due to "significant impediments" caused by the face-to-face requirement in matters such as DUI cases, nighttime situations, and cases in remote areas. See Pennsylvania Criminal Procedural Rules Committee Report, Face-to-Face Requirement for Verification of Affidavits, 1/4/17, at 12-15,

<https://www.pacourts.us/storage/rules/Proposed%20Amendment%20of%20PaRsCrimP%20203%20and%20513%20-%20005854.pdf>. The 2017

amendment is yet another recent example of this Court seeking to encourage and facilitate the use of warrants, which arose, in part, due to difficulties in rural areas.

In previously considering the public policy factor under *Edmunds*, this Court in *Russo* based its decision, in part, on its determination that the appellant offered no specific issues of public policy unique to Pennsylvania supporting a departure from the doctrine. See *Russo* at 1212 (“This argument falls short of the kind of searching inquiry required to determine that public policy considerations unique to Pennsylvania suggest that the federal open fields doctrine is inconsistent with Article I, Section 8 of our Constitution.”). While no issues of farmland and open spaces were directly discussed in *Russo*, the actions of General Assembly since,⁹ and prior to,¹⁰

⁹ While more limited in scope than the previously discussed statutes, in 2021, the General Assembly passed the Agritourism Activity Protection Act, 3 P.S. §§ 2601-07. The Act provides for limited civil liability for injuries or damages related to agritourism activities occurring on agricultural land. See *id.* § 2603.

¹⁰ In addition to the Agricultural Area Security Law previously discussed, the General Assembly has consistently adopted special property protections for agricultural operations. See, e.g., 3 Pa.C.S. §§ 311-18 (prohibiting municipalities from adopting unauthorized local ordinances related to agricultural operations and providing for review

Russo have demonstrated the Commonwealth's pronounced public policy preference of increasing rights and privileges regarding farmland, forest land, and open spaces generally. Additionally, for over two decades now, this Court has specifically sought to encourage the use of warrants through technological means and codifying those processes in its judicial rules. Consequently, on public policy grounds specific to Pennsylvania, granting law enforcement officers unfettered access to open lands with no level of suspicion is at tangible tension with relevant state statutes and judicial rules.

by the Attorney General); 3 P.S. §§ 951-58 (providing protection from nuisance suits); 18 Pa.C.S. § 3310 (relating to agricultural crop destruction); *id.* § 3311 (relating to ecoterrorism).

CONCLUSION

Amici Curiae, Pennsylvania Farm Bureau and National Federation of Independent Business Small Business Legal Center, Inc., respectfully request that this Court reverse the decision of the Commonwealth Court in this case, and overrule its prior decision in *Commonwealth v. Russo*, 934 A.2d 1199 (Pa. 2007).

Respectfully submitted,

Pennsylvania Farm Bureau and
National Federation of Independent Business
Small Business Legal Center, Inc.,
Amici Curiae

BY:

/s/ Joe D. Montenegro
Joe D. Montenegro
Attorney I.D. No. 318790
P.O. Box 8736
Camp Hill, PA 17001-8736
(717) 761-2740
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 531(b)(3)

I, Joe D. Montenegro, pursuant to Pa.R.A.P. 2135 and 531, certify that the length of the *Amici Curiae* Brief filed on behalf of Pennsylvania Farm Bureau and National Federation of Independent Business Small Business Legal Center, Inc. in the above-captioned case does not exceed 7,000 words, as required under Pa.R.A.P. 531(b)(3).

Date: January 18, 2024

/s/ Joe D. Montenegro
Joe D. Montenegro
Attorney I.D. No. 318790
P.O. Box 8736
Camp Hill, PA 17001-8736
(717) 761-2740

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

I, Joe D. Montenegro, pursuant to Pa.R.A.P 127, certify that the filing of the *Amici Curiae* Brief on behalf of Pennsylvania Farm Bureau and National Federation of Independent Business Small Business Legal Center, Inc. in the above-captioned case 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.

Date: January 18, 2024

/s/ Joe D. Montenegro
Joe D. Montenegro
Attorney I.D. No. 318790
P.O. Box 8736
Camp Hill, PA 17001-8736
(717) 761-2740

PROOF OF SERVICE

I, Joe D. Montenegro, certify that a true and correct copy of the foregoing Brief of *Amici Curiae* was served upon all parties via PACFile.

Date: January 18, 2024

/s/ Joe D. Montenegro
Joe D. Montenegro
Attorney I.D. No. 318790
P.O. Box 8736
Camp Hill, PA 17001-8736
(717) 761-2740