

**IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN DIVISION AT JACKSON**

**TERRY RAINWATERS and  
HUNTER HOLLINGSWORTH,**

**Plaintiffs-Appellees,**

**v.**

**No. W2022-00514-  
COA-R3-CV**

**The TENNESSEE WILDLIFE  
RESOURCES AGENCY, BOBBY  
WILSON, Executive Director of the  
Tennessee Wildlife Resources Agency, in  
his individual capacity, ED CARTER,  
former Executive Director of the  
Tennessee Wildlife Resources Agency, in  
his individual capacity, and KEVIN  
HOOFMAN, an officer of the Tennessee  
Wildlife Resources Agency, in his  
individual capacity,**

**On Appeal From The  
Circuit Court of  
Benton County,  
Tennessee  
No. 20-CV-6**

**Defendants-Appellants.**

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**BRIEF OF AMICUS CURIAE  
TENNESSEE FIREARMS ASSOCIATION  
&  
GUN OWNERS OF AMERICA  
IN SUPPORT OF APPELLEES  
TERRY RAINWATERS and HUNTER HOLLINGSWORTH**

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## TABLE OF CONTENTS

### Contents

|  |    |
|--|----|
| TABLE OF CONTENTS .....  | 2  |
| TABLE OF AUTHORITIES.....  | 3  |
| STATEMENT OF FACTS.....  | 4  |
| ARGUMENT .....   | 5  |
| The TWRA Policies and Actions Violate The Constitutions .....                                    | 5  |
| The Fourth Amendment Protects Property Rights .....  | 6  |
| The Tennessee Constitution Protects Property Rights Even More<br>Than The Fourth Amendment ..... | 8  |
| TWRA’s Trespass Violated Plaintiffs’ Constitutionally Protected<br>Rights.....                   | 9  |
| TWRA’s Policy Is Dangerous .....   | 11 |
| CONCLUSION .....   | 14 |
| CERTIFICATE OF COMPLIANCE.....   | 16 |
| CERTIFICATE OF SERVICE .....   | 17 |

## TABLE OF AUTHORITIES

### **Cases**

|   |      |
|---|------|
| <i>Boyd v. United States</i> , 116 U.S. 616 (1886).....         | 6    |
| <i>Entick v Carrington</i> , EWHC KB J98 (1765).....            | 6, 9 |
| <i>Florida v. Jardines</i> , 569 U.S. 1 (2013) .....            | 8    |
| <i>Katz v. United States</i> , 389 U.S. 347 (1967) .....        | 7    |
| <i>Peters v. State</i> , 215 S.W.2d 822, 823 (Term. 1948) ..... | 8    |
| <i>State v. Hamm</i> , 589 S.W.3d 765 (Tenn. 2019).....         | 10   |
| <i>State v. Lakin</i> , 588 S.W.2d 544 (Tenn. 1979) .....       | 9    |
| <i>State v. Stanfield</i> , 554 S.W.3d 1 (Tenn. 2018).....      | 10   |
| <i>United States v. Jones</i> , 565 U.S. 400 (2012).....        | 7    |

### **Statutes**

|  |   |
|--|---|
| Tenn. Code Ann. § 70-1-305(1).....       | 5 |
| Tenn. Code Ann. § 70-1-305(7)(c)(2)..... | 5 |

### **Constitutional Provisions**

|  |             |
|--|-------------|
| Tennessee Constitution Article I § 1.....                  | 10, 11      |
| Tennessee Constitution, Article I § 7.....                 | 5, 8, 9, 10 |
| Tennessee Constitution, Article XI § 13 .....              | 10          |
| United States Constitution, 4 <sup>th</sup> Amendment..... | passim      |

## **STATEMENT OF FACTS**

As articulated by the trial court's list of undisputed facts,<sup>1</sup> Rainwaters lives on and farms certain gated, posted, private properties on which there are located multiple buildings. Hollingsworth owns real property on which he conducts a number of activities including recreational hunting, but on which he does not reside. Neither property is open to the public. Neither landowner has ever consented to the TWRA's entry on the properties. The TRWA has never obtained a warrant authorizing non-consensual entry onto the properties for any purpose.

Despite these facts, agents of the TWRA entered the properties on multiple occasions for the purpose of criminal investigation. During their entry, agents conducted searches for evidence, emplaced remote surveillance cameras to assist with evidence gathering, and even went to so far as to damage Hollingworth's property by cutting a tree branch so a camera could be surreptitiously installed. Defendant Hoofman seized property of Hollingsworth on several occasions.

Officers, pursuant to official TWRA policy, routinely enter private lands without consent or a warrant for law enforcement purposes. TWRA policy does not even require supervisory permission to enter lands without consent or a warrant. "TWRA officers are not required to

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<sup>1</sup> Volume IX, pp. 1303-1313.

create any record of having been on private land” and typically do not inform landowners of their entry.

TWRA policy directs officers to approach dove hunters on foot and to “observe hunts from concealment.” As part of their investigation, officers in this case “hid” themselves on the property to observe hunting activities. When investigating other hunting activities which utilize more lethal arms and ammunition, including specifically deer and turkey hunting, officers routinely conceal their presence from the hunters.

## **ARGUMENT**

### **THE TWRA POLICIES AND ACTIONS VIOLATE THE CONSTITUTIONS**

The actions and policies of the TWRA are offensive to both Article I § 7 of the Tennessee Constitution and the 4<sup>th</sup> Amendment to the United States Constitution. The trial court properly determined that T.C.A. §§ 70-1-305(1) and 70-1-305(7) are facially unconstitutional and the Defendants are liable to Plaintiffs for damages for violations of their constitutionally-protected rights against unreasonable search and seizure.

Additionally, the actions and policies of the TWRA are dangerous, resulting in an unsupportable risk of injury or liability to private citizens on private lands as well as to TWRA agents who are unlawfully present on those same private lands.

## THE FOURTH AMENDMENT PROTECTS PROPERTY RIGHTS

The Fourth Amendment establishes that when the government physically intrudes “in a constitutionally protected area,” a Fourth Amendment “search” has occurred. This situation is even more acute when the “search” is accompanied by a “seizure.”

Claimed violations of the Fourth Amendment are to be measured against those rights recognized and those protections existing when the Fourth Amendment was adopted. In *Boyd v. United States*, 116 U.S. 746 (1886) the United States Supreme Court held the Fourth Amendment protects the people from any search for or seizure of any private property to which Government could not affirmatively demonstrate that it had a superior right. Witness:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; *but it is the invasion of his indefeasible right of* personal security, personal liberty, and *private property*, where that right has never been forfeited by his conviction of some public offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

*Boyd*, 116 U.S. at 630 citing *Entick v Carrington*, EWHC KB J98 (1765) (emphasis supplied).

For a while, it became commonplace to address constitutional issues with only passing reference to the text, history, and purpose of the relevant constitutional text. This was especially pronounced in Fourth Amendment litigation beginning with *Katz v. United States*, 389 U.S. 347 (1967), when the analysis was dominated by a standard of “reasonable expectation of privacy.” But, “privacy” is not found anywhere in the Fourth Amendment text, while the right to be “secure” against “unreasonable searches and seizures” in “persons, houses, papers, and effects” is in the plain text.

On January 23, 2012, the Supreme Court worked toward restoring the Fourth Amendment’s protection of the people’s property rights in their houses, persons, papers, and effects with the release of *United States v. Jones*, 565 U.S. 400 (2012). Acknowledging that its “Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20<sup>th</sup> century,” the Supreme Court declined to even consider the government’s contention that no Fourth Amendment search had occurred in the planting of a GPS device on Jones’ automobile underbody because Jones supposedly had no reasonable expectation of privacy. *See Jones* at 404-05. The question was not one of “expectation of privacy” but rather property rights.

With *Jones*, the Supreme Court ruled that a Fourth Amendment-based property claim cannot be diminished by any government counterclaim based on an expectation of privacy, or lack thereof. The property right is the “baseline” by which the search or seizure is to be measured, and below which the government cannot go.

Just a year later, in *Florida v. Jardines*, 569 U.S. 1 (2013) at 5-6, the Supreme Court made clear that property rights matter. In *Jardines*, the DEA's use of a drug sniffing dog on the exterior of the home was a search for Fourth Amendment purposes. Notable for our purposes, *Jardines* makes clear that any physical intrusion on persons, houses, papers, and effects for the purpose of obtaining information is a search to be weighed against the common law doctrines of trespass.

### **THE TENNESSEE CONSTITUTION PROTECTS PROPERTY RIGHTS EVEN MORE THAN THE FOURTH AMENDMENT**

The trial court correctly noted “Tennessee's prohibition on unreasonable searches offers a broader guarantee of security for an individual's real property than its federal counterpart.”<sup>2</sup> This includes real property beyond the curtilage of the home which is short of “wild or waste lands.” *Peters v. State*, 215 S.W.2d 822, 823 (Term. 1948).

The Tennessee Constitution, Article I § 7, provides:

That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

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<sup>2</sup> Volume IX, Page 1315, internal citations omitted.



Going farther than the Fourth Amendment, Article I § 7 makes clear that the TWRA’s policy of searching places without a warrant, or even probable cause to believe a violation is occurring, is “dangerous to liberty.” These are not words to be trifled with. The Constitution guarantees the right to be “secure” from exactly what TWRA is doing and “ought not to be granted.”

### **TWRA’S TRESPASS VIOLATED PLAINTIFFS’ CONSTITUTIONALLY PROTECTED RIGHTS**

At the common law, as recognized in *Entick*, property rights were so guarded that “no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.”

If the implicit license of the public to approach the front door of the home to deliver mail, sell goods, solicit for charities, etc. is limited “to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave,”<sup>3</sup> TWRA’s repeated non-consensual warrantless entries on Plaintiffs’ property to take photos, sift with nets, place cameras, and surreptitiously surveil their activities was a trespass regardless of whether it happened in the curtilage of the home or other parts of the property. See *State v. Lakin*, 588 S.W.2d 544, 549 (Tenn. 1979); *State v. Hamm*, 589 S.W.3d 765, 771

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<sup>3</sup> *Jardines*, 569 U.S. at 8.

(Tenn. 2019); and *State v. Stanfield*, 554 S.W.3d 1, 9 (Tenn. 2018), all cited by the trial court.<sup>4</sup>

To the extent there is any remaining doubt that the areas of the Plaintiffs’ private property are constitutionally protected, the Court should also note that:

The citizens of this state shall have the personal right to hunt and fish, subject to reasonable regulations and restrictions prescribed by law. The recognition of this right does not abrogate any private or public property rights, nor does it limit the state's power to regulate commercial activity.

Tennessee Constitution, Article XI § 13. Like the federal government, the Tennessee government derives its authority from the consent of the governed and “all power is inherent in the people.”<sup>5</sup> A state statute may not give the executive director of TWRA authority to do that which the constitution forbids.

The common law of trespass existing when the Fourth Amendment based the reasonableness of searches on property rights is clear that the TWRA’s trespass onto private property is a violation of both Article I § 7

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<sup>4</sup> Volume IX, p. 1315.

<sup>5</sup> Tennessee Constitution Article I § 1 provides:

That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.

of the Tennessee Constitution and the 4<sup>th</sup> Amendment to the United States Constitution.

### **TWRA'S POLICY IS DANGEROUS**

Besides just being obnoxious to our protected rights of liberty, property, and security, TWRA's policy poses an unreasonable risk of loss of life or property antithetical to the goal of protecting the people's peace, safety, and happiness.<sup>6</sup>

TWRA policies draw "no distinction between public and private land." TWRA "does not have any written policy, rule, guideline or procedure for officers to follow while they're on private land without the landowner's consent or a warrant." (Taylor Dep. 92). The TWRA takes the position that it "can go across private property to inspect somebody on another property that is engaging in hunting or fishing activities...." (Taylor Dep. 58).

TWRA agents enter private property unannounced, wearing camouflage or muted, earth-tone pants and forest-foliage-tone shirts<sup>7</sup>

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<sup>6</sup> Tennessee Constitution Article I § 1.

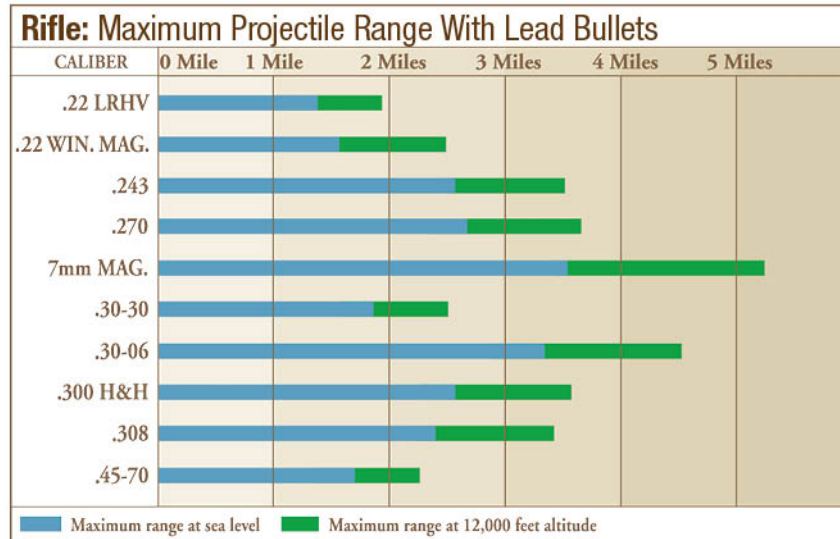
<sup>7</sup> This specific color pattern encompasses colors that the USFS specifically cautions people against wearing in its parks. "Wear bright clothing. *Make yourself more visible*. Choose colors that stand out, like red, orange or green, and *avoid white, blacks, browns, earth-toned greens and animal-colored clothing*. Orange vests and hats are advisable. See, [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5330495.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5330495.pdf)

with the design and effect of being difficult to recognize. Agents are encouraged to park away from hunts and walk to the hunting area so that the size and noise of the vehicles do not give away their presence. Even more dangerously, agents are told to “hide” themselves against observation. In other words, agents are instructed to make affirmative efforts to avoid being discovered.

Meanwhile, hunters are armed with rifles and ammunition specifically designed to kill large animals at a distance. The website [www.Hunter-ed.com](http://www.Hunter-ed.com) acknowledges that projectiles can travel for long distances. A .22-caliber bullet can travel over 1½ miles. Modern centerfire rifle rounds can exceed 3 miles. Small shot can travel over five hundred feet and larger shot can travel almost 2000 feet. Shotgun slugs can travel over 3500 feet. For reference, [www.hunter-ed.com](http://www.hunter-ed.com) uses this and similar charts to educate hunters on the ballistics of ten of the most popular hunting rounds.<sup>8</sup>

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<sup>8</sup> [https://www.hunter-ed.com/tennessee/studyGuide/Maximum-Projectile-Range-Rifle/20204401\\_58082/](https://www.hunter-ed.com/tennessee/studyGuide/Maximum-Projectile-Range-Rifle/20204401_58082/)



“Preventing hunting incidents depends on knowing and understanding firearms and handling them skillfully and safely.” The TWRA approved training site, [www.hunter-ed.com](http://www.hunter-ed.com), cautions: “Only shoot when you know the target is legal game and that no people, domestic animals, buildings, or equipment are in the zone-of-fire—remember that bullets can pass through game and continue on for some distance with deadly force.”<sup>9</sup> The site warns that “some hunters may become overly anxious or excited on a hunt, which can lead to careless behavior. They may fire at sounds, colors, movements, or unidentified shapes, or simply shoot too quickly.” *Id.* Indeed, the most common hunting incident (including near misses) result from hunter judgment mistakes.<sup>10</sup> According to the National Shooting Sports Foundation

<sup>9</sup> [https://www.hunter-ed.com/tennessee/studyGuide/Self-Control-and-Target-Identification/20204401\\_58247/](https://www.hunter-ed.com/tennessee/studyGuide/Self-Control-and-Target-Identification/20204401_58247/)

<sup>10</sup> [https://www.hunter-ed.com/tennessee/studyGuide/Hunting-Incidents/20204401\\_58220/](https://www.hunter-ed.com/tennessee/studyGuide/Hunting-Incidents/20204401_58220/)

(NSSF) 2007 Industry Intelligence reports, “failure to identify the target” accounted for 15.5% of hunting incidents, while “victim out of sight of the shooter” accounted for 8.3%.<sup>11</sup>

In combination, we have TWRA's agents wearing clothing designed to conceal their presence and employing methods to avoid detection on the very same (private) lands simultaneously occupied by sometimes “overly anxious or excited” armed with firearms capable of killing from potentially miles away.

The TWRA repudiates general hunting safety guidelines and common sense by wearing camouflage while conducting activities on private property without ever notifying the landowner-hunter. While a hunter is obligated to know what is behind his or her target before taking a shot, that task changes from arduous to impossible when government trespassers are intentionally and actively taking steps to conceal themselves. Against such clandestine tactics, the lawful hunter, landowner, and/or marksman is endangered every time they pull the trigger.

## CONCLUSION

The holding of the trial court should be affirmed.

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<sup>11</sup> [https://www.hunter-ed.com/tennessee/studyGuide/Main-Causes-of-Hunting-Incidents/20204401\\_58221/](https://www.hunter-ed.com/tennessee/studyGuide/Main-Causes-of-Hunting-Incidents/20204401_58221/)

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## **CERTIFICATE OF COMPLIANCE**

As required by Tennessee Rule of Appellate Procedure 30(e) and Tennessee Supreme Court Rule 46 Section 3.2(c), I hereby certify that this Amicus Brief contains 2888 words of the 7500-word limit. This word count *includes* the Cover Page, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service and was calculated using word processing software.

/s/ John I. Harris III



## **CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing has been served upon counsel for parties in interest by e-filing the document with the Court's E-Filing System which will automatically generate and send by e-mail a notice of filing along with the document to all registered users participating in the case and shall have the same legal effect as service of a paper document under Tenn. R. App. P. 20:

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On February 14, 2023.

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