IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
TWENTY-FOURTH JUDICIAL DISTRICT, BENTON COUNTY

TERRY RAINWATERS and HUNTER HOLLINGSWORTH,	)	
Plaintiffs,	)	
v.	)	**No. 20-CV-6**
TENNESSEE WILDLIFE RESOURCES AGENCY, BOBBY WILSON, Executive Director of the Tennessee Wildlife Resources Agency, in his individual Capacity, ED CARTER, former Execuive 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,	)	**Judge Donald E. Parish** **Chancellor Jerri S. Bryant** **Judge J. Russell Parkes**
Defendants.	)	

MEMORANDUM AND ORDER

This matter concerns the constitutional challenge of Plaintiffs Terry Rainwaters and Hunter Hollingsworth to subsections 70-1-305(1) and (7) of the Tennessee Code Annotated and to the actions of Defendants Tennessee Wildlife Resources Agency ("TWRA"), Bobby Wilson, Ed Carter, and Kevin Hoofman taken pursuant to those statutory provisions. Plaintiffs claim the challenged statute authorized the TWRA to establish a system whereby it sends its officers in unconstitutional, "roving patrols of private land" to enforce Tennessee hunting laws without regard for the property rights of individuals. Plaintiffs claim that under this system TWRA officers, as a matter of course, enter privately owned land to search for wildlife violations without a warrant or consent in violation of Article I, Section 7 of the Tennessee Constitution. Plaintiffs claim TWRA officers hide and observe Plaintiffs and their guests on their own land,

take pictures, and set up cameras to monitor Plaintiffs when the officers themselves are not present. As such, Plaintiffs seek a variety of injunctive and declaratory relief against Defendants, as well as nominal damages against Defendant Carter. Defendants do not dispute the vast majority of these factual allegations, at least for purposes of these motions, but maintain their actions and the statutory provisions authorizing them are constitutional.

Now before the Court are the parties' cross-motions for summary judgment. Plaintiffs assert the undisputed facts establish both facial and as-applied challenges to Tennessee Code Annotated subsections 70-1-305(1) and (7). Defendants, on the other hand, argue the undisputed facts demonstrate that Plaintiffs are entitled to no relief. First, Defendants argue Plaintiffs lack standing to bring this action. Second, Defendants maintain that no justiciable controversy exists that would entitle Plaintiffs to the declaratory or injunctive relief sought. And finally, Defendants argue on the merits that Plaintiffs cannot establish either a facial or an as-applied constitutional violation.

Standard of Law

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *Lemon v. Williamson Cnty. Schs.*, 618 S.W.3d 1, 12 (Tenn. 2021). "Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving

party.'" *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 889 (Tenn. 2019) (quoting *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015)) (alteration in original). As will be seen below, however, the parties have no genuine dispute of fact that is material to our decision today, and thus the Court finds this matter ripe for resolution on summary judgment. *See Green v. Green*, 293 S.W.3d 493, 514 (Tenn. 2009) ("Not all factual disputes require the denial of a motion for summary judgment. Many factual disputes are minor or are not germane to the grounds of the motion.").

Facts

The following material facts are undisputed by the parties unless otherwise noted.

Mr. Rainwaters's Properties[1]

1. Mr. Rainwaters farms the majority of the open areas on all of his properties for income.

2. These farming activities are regular and conspicuous.

3. On his Lower Big Sandy River Road farm, a 136-acre parcel, Mr. Rainwaters maintains a house where he and his son live, a second house that was rented to long-term tenants during these events, and a large farming shed near that second house where Mr. Rainwaters stores and repairs most of his farming equipment.

4. The northern part of the Lower Big Sandy River Road farm, where most of Mr. Rainwaters's farming activities (on that property) are conducted, is only accessible using a private gravel path that Mr. Rainwaters built himself.

[1] Mr. Rainwaters owns additional properties in Benton County, but they are not material to our decision today.

5. Mr. Rainwaters does not allow anyone other than his guests and a few neighbors to use his private gravel path.

6. To keep out intruders, Mr. Rainwaters has put up a chained gate at the entrance to his private gravel path and posted No Trespassing signs at both the gate and the northern end of the path.

7. Mr. Rainwaters's Liberty Road farm, a 69-acre parcel, is fenced all the way around and has a chained gate with a No Trespassing sign at the entrance.

8. Mr. Rainwaters's farm on Harmon Creek Road, a 123-acre parcel leased from his brother, has a chained gate with a No Trespassing sign at the entrance.

9. An additional 20-acre parcel immediately north of his Lower Big Sandy River Road farm, which Mr. Rainwaters leases from the Sandy River Hunting Club, is landlocked and only accessible by the private gravel path that runs through Mr. Rainwaters's main farm.

10. The Sandy River Hunting Club owns 150 acres immediately north of Mr. Rainwaters's Lower Big Sandy River Road farm and is also landlocked and only accessible by the private gravel path that runs through Mr. Rainwaters's main farm.

11. The 20-acre parcel is behind a locked gate with a posted No Trespassing sign and a dozen yards of fencing on either side.

12. Mr. Rainwaters occasionally hunts—alone, with his son, or with guests—on his properties.

13. Mr. Rainwaters occasionally allows his son, his nephew Justin Mathis, and other family members to hunt alone or with friends on his properties.

14. Mr. Rainwaters values and expects privacy from physical intruders, prying eyes, and digital surveillance on all of his properties.

15. Neither Mr. Rainwaters nor his guests have ever given consent for a TWRA officer to access any of Mr. Rainwaters's properties.

16. No TWRA officer has acquired a warrant to enter any of Mr. Rainwaters's properties.

17. On September 1, 2016, Defendant Hoofman entered Mr. Rainwaters's farm on Liberty Road to investigate what he believed was a potential dove-baiting offense, and he took several photos.

18. On November 7, 2017, Defendant Hoofman entered Mr. Rainwaters's farm on Harmon Creek Road to investigate what he believed was a potential deer-baiting offense, and he took several photos.

19. On November 14, 2017, Defendant Hoofman entered Mr. Rainwaters's farm on Harmon Creek Road to continue looking for evidence of deer baiting, and he took several photos.

20. On December 10, 2017, Defendant Hoofman entered Mr. Rainwaters's farm on Harmon Creek Road to investigate Mr. Rainwaters's nephew, Justin Mathis, while he was deer hunting, and took several photos.

21. On another day in 2017, Defendant Hoofman entered the 20-acre parcel that Mr. Rainwaters leases from the Sandy River Hunting Club, and he took several photos of Mr. Rainwaters's son and his friends while they were hunting.

22. A camera owned by U.S. Fish & Wildlife Service was installed on this property in November 2017.[2]

23. Mr. Rainwaters has not seen any cameras on his property since December 2017.

[2] Defendants maintain the camera was placed as part of a federal investigation. Plaintiffs dispute this fact, alleging Defendant Hoofman was also investigating state crimes.

24. Defendant Hoofman has entered Mr. Rainwaters's farm on Lower Big Sandy River Road.[3]

25. There is no evidence that any TWRA officer has entered Mr. Rainwaters's properties since December 10, 2017.

26. Mr. Rainwaters still farms and hunts on his properties, and his hunting activities have remained consistent since these events to the present day.

27. Mr. Rainwaters feels deeply unsettled by TWRA's warrantless entries and remains anxious that TWRA officers may be secretly observing him, his son, or his guests in their private activities.

28. Mr. Rainwaters is hesitant to invite guests over to his properties because he is unable to ensure them that they are not secretly being observed by the TWRA.

29. Mr. Rainwaters is also hesitant to hunt, fearing that TWRA officers may be hiding where he might be shooting.

Mr. Hollingsworth's Property

30. Mr. Hollingsworth's 92.5-acre farm is comprised of two parcels, a 71.1-acre parcel in Benton County with an adjoining 21.4-acre parcel in Henry County.[4]

31. Mr. Hollingsworth does not reside on his farm.

32. The farm has a mix of fields, woods, and waters that Hunter uses for a variety of recreational activities, including fishing, farming, camping, and hunting.[5]

---

[3] Specifically, Plaintiffs state that Defendant Hoofman entered this property "multiple times," while Defendants state that this occurred "not very many times."

[4] Mr. Hollingsworth owns more than one property in Benton County, but only his farm discussed in these facts is material to these motions.

33. Mr. Hollingsworth sometimes partakes in these activities alone, but other times he invites friends over to fish, camp, or hunt with him.

34. Mr. Hollingsworth's farm is landlocked, and the only way to enter is by using a private gravel path to cross over a neighbor's property and then through that neighbor's gate, which eventually leads to the southwestern portion of Mr. Hollingsworth's farm.

35. The private gravel path that leads into Mr. Hollingsworth's farm is not open to the public.

36. Additionally, Mr. Hollingsworth has put up a chained gate with a No Trespassing sign at the entrance to the farm.

37. Mr. Hollingsworth values and expects privacy from physical intruders, prying eyes, and digital surveillance on his farm.

38. Neither Mr. Hollingsworth nor his guests have ever given a TWRA officer consent to enter his properties.

39. No TWRA officer has obtained a warrant to enter Mr. Hollingsworth's properties.

40. Defendant Hoofman entered Mr. Hollingsworth's farm at least once prior to September 1, 2016.

41. On December 21, 2016, Defendant Hoofman entered Mr. Hollingsworth's farm "[i]n search of . . . any form of wildlife violations are potential wildlife violations," and he took several photos of what he believed to be deer bait.

42. On September 1, 2017, Defendant Hoofman and TWRA officer Billy LaGrange entered Mr. Hollingsworth's farm and checked a dove field that Mr. Hollingsworth was hunting.

43. On November 20, 2017, Defendant Hoofman entered Mr. Hollingsworth's farm while "working waterfowl enforcement," and he took several photos and videos that show him wading

[5] Plaintiffs additionally note that Mr. Hollingsworth uses the property to spend time alone with his girlfriend.

through water, using a net to sift corn to the surface, and peeling back dried corn husks with his hands.

44. Later that day, Defendant Hoofman contacted U.S Fish and Wildlife Service special agent Kyle Lock to see if he would be interested in opening a federal investigation.

45. Even though waterfowl baiting is both a state and federal crime, Lock decided to take the case because Mr. Hollingsworth's family supposedly had "influence" that would make "local court system State prosecution . . . unlikely."

46. On November 30, 2017, Defendant Hoofman entered Mr. Hollingsworth's farm and recorded another video of himself wading through water.

47. That evening, Defendant Hoofman installed "a camera . . . on a tree at Mr. Hollingsworth's property."[6]

48. To do so, Defendant Hoofman removed or a cut a branch from the tree.

49. That camera was owned by U.S. Fish & Wildlife Service.[7]

50. Since that date, however, there has been no evidence of any cameras being placed on property owned by Mr. Hollingsworth.

51. On December 12, 2017, Defendant Hoofman entered Mr. Hollingsworth's farm "to document bait," and he took several photos and videos that show him wading through water, sifting corn to the surface with a net, and using evidence bags to take samples from the property.[8]

---

[6] Defendants agree this occurred on or around this date but also state this event occurred as part of a federal wildlife investigation, in which Defendant Hoofman was acting as an agent of the U.S. Fish and Wildlife Service. Plaintiffs dispute this fact, alleging Defendant Hoofman was also investigating state crimes.

[7] Defendants maintain the camera was placed as part of a federal investigation. Plaintiffs dispute this fact because Defendant Hoofman was also investigating state crimes.

[8] Defendants state this event occurred as part of a federal wildlife investigation, in which Defendant Hoofman was acting as an agent of the U.S. Fish and Wildlife Service. Plaintiffs dispute this fact, alleging Defendant Hoofman was also investigating state crimes.

52. On December 15, 2017, Defendant Hoofman and TWRA office Brian Elkins entered Mr. Hollingsworth's farm to ask him questions about duck hunting.[9]

53. While on Mr. Hollingsworth's property, Defendant Hoofman searched the inside of Mr. Hollingsworth's parked vehicle—entering the back seat, picking up a coat, examining a shotgun, and opening an ammo box in the process—despite Mr. Hollingsworth's statements that Defendant Hoofman did not have permission to do so.

54. Later that morning, Defendant Hoofman recorded footage of Mr. Hollingsworth.[10]

55. On December 24, 2017, Defendant Hoofman returned to Mr. Hollingsworth's farm and used a net and evidence bags to collect more corn from the water.[11]

56. On January 5, 2018, a TWRA wildlife officer entered Mr. Hollingsworth's farm.[12]

57. On January 10, 2018, Defendant Hoofman entered Mr. Hollingsworth's farm in order to collect what he believed was evidence of a potential hunting violation.[13]

58. Sometime in early 2018,[14] a TWRA officer entered Mr. Hollingsworth's farm and took a photo of standing water.

---

[9] Defendants state this event occurred as part of a federal wildlife investigation, in which Defendant Hoofman was acting as an agent of the U.S. Fish and Wildlife Service. Plaintiffs dispute this fact, alleging Defendant Hoofman was also investigating state crimes.

[10] Plaintiffs contend Defendant Hoofman followed Hunter to his home, hid nearby, and recorded video footage of Hunter in his driveway. Defendants dispute this formulation of the event.

[11] Defendants state this event occurred as part of a federal wildlife investigation, in which Defendant Hoofman was acting as an agent of the U.S. Fish and Wildlife Service. Plaintiffs dispute this fact, alleging Defendant Hoofman was also investigating state crimes.

[12] Defendants state this event occurred as part of a federal wildlife investigation, in which Defendant Hoofman was acting as an agent of the U.S. Fish and Wildlife Service. Plaintiffs dispute this fact, alleging Defendant Hoofman was also investigating state crimes.

[13] Defendants state this event occurred as part of a federal wildlife investigation, in which Defendant Hoofman was acting as an agent of the U.S. Fish and Wildlife Service. Plaintiffs dispute this fact, alleging Defendant Hoofman was also investigating state crimes.

59. On September 2, 2018, Defendant Hoofman and TWRA officer Greg Barker entered Mr. Hollingsworth's farm because they "believed [a] field was baited."

60. During that entry, the officers hid nearby and recorded a video of Mr. Hollingsworth and his friends shooting at game.

61. There is no evidence that any TWRA officer has entered Mr. Hollingsworth's property since that date.

62. Mr. Hollingsworth continued to hunt on his property until his hunting privileges were suspended in November 2018 as the result of a federal dove baiting offense.

63. Mr. Hollingsworth has continued to fish on his property up to the present day.

64. Mr. Hollingsworth feels his privacy was invaded by the TWRA officers' warrantless entries of his farm.

65. Mr. Hollingsworth feels a constant sense of anxiety that TWRA officers might be secretly observing him, his girlfriend, and his guests in their private activities.

66. Mr. Hollingsworth has been more hesitant to use his farm since these warrantless entries occurred. For example, until January 2018, Mr. Hollingsworth used to camp on the farm about five times per year and fish there about ten times per year. Since January 2018, however, Mr. Hollingsworth has not camped on the farm at all and has only fished there twice.

67. Mr. Hollingsworth has made several trips[15] to his farm since January 2018 for the sole purpose of searching for hidden cameras.

---

[14] Plaintiffs state this occurred on March 7, 2018, while Defendants refer to the file information for the photograph as indicating that the event occurred on January 10, 2018.

[15] Defendants state this number is five.

68. On those few occasions Mr. Hollingsworth has used his farm since January 2018, he has kept a constant lookout for TWRA officers whom might be hiding nearby and observing him and his private activities.

69. Mr. Hollingsworth has been hesitant to invite guests to his farm because he is unable to assure them that they are not being secretly observed by the TWRA.

The TWRA

70. Defendant Carter is the former Executive Director of the TWRA and held that position during the events giving rise to his case.

71. Defendant Wilson is the current Executive Director of the TWRA.

72. In order to enforce state wildlife laws, TWRA officers patrol private land across the state, "basically all year," and as with Plaintiffs' properties, do so without consent or warrants.

73. It is the practice of the TWRA to only place trail cameras on private property at the request of the landowner or when assisting the U.S. Fish & Wildlife Service with a federal investigation.[16]

74. Since this case was filed, TWRA wildlife officers have entered private land without the owner's consent or a warrant multiple times in order to enforce Tennessee's hunting laws.

75. When asked by landowners to obtain a warrant before entering their land, TWRA officers sometimes respond that they do not need a warrant and enter the property anyway.

76. When denied consent to enter land by its owner, the TWRA allows its officers to enter the land anyway.

[16] Plaintiffs assert however that this practice did not begin until October 6, 2020, roughly three weeks after this Court denied Defendants' Motion to Dismiss.

77. TWRA officers are not required to create any record of having been on private land, making it impossible to know how many times they have entered a particular property.

78. TWRA officers do not typically provide notice to landowners they are about to enter private land.

79. When its officers are investigating dove-hunting offenses on private land, the TWRA instructs those officers to determine hot shooting spots and walk in and observe hunts from concealment.

80. When its officers are investigating deer-hunting and turkey-hunting offenses on private land, the TWRA instructs those officers to return to areas that may have been baited the season before and to start checking these places before the season begins.

81. TWRA officers sometimes enter private land, hide in close proximity to hunters who are actively shooting at game, and record video footage of the hunters.

82. Defendant Hoofman is a TWRA wildlife officer assigned to Benton County.

83. Defendant Hoofman believes he has the statutory authority to enter private land without consent or a warrant in order to enforce Tennessee's hunting laws.

84. In practice, Defendant Hoofman does enter private land without a warrant to enforce Tennessee's hunting laws.

85. Defendant Hoofman sometimes enters private land to enforce Tennessee's hunting laws when he believes that hunting is occurring or "that hunting activities may have been . . . going on."

86. In addition to learning of people hunting by listening for shots, Defendant Hoofman relies upon the word of mouth from the public or other hunters.

87. Defendant Hoofman believes that a landowner's mere possession of a hunting license authorizes him to enter that person's property without a warrant or consent in order to enforce Tennessee's hunting laws. As he told Mr. Hollingsworth on one occasion, "When you bought your hunting license, you invited me."

88. The TWRA does not require Defendant Hoofman to seek a supervisor's permission before entering private land without consent or warrant.

89. The TWRA does not impose any time constraints on how long Defendant Hoofman can remain on private land while investigating a potential state hunting offense.

Conclusions of Law

Defendants raise threshold issues in their motion for summary judgment—whether Plaintiffs have standing and whether the relief, declaratory and injunctive, sought by Plaintiffs is appropriate in this case—that would normally be resolved before examining the merits of this case. But, because the Court thinks it best to place those issues in the context of Plaintiffs' constitutional challenge, we first examine the claim of a facial violation.

1. Tennessee Code Annotated subsections 70-1-305(1) and (7) are facially unconstitutional because they authorize unreasonable warrantless searches of property protected by Article I, Section 7 of the Tennessee Constitution.

Plaintiffs seek relief from Tennessee Code Annotated subsections 70-1-305(1) and (7). Those provisions state as follows:

> The executive director of the wildlife resources agency has the power to
> (1) Enforce all laws relating to wildlife, and to go upon any property, outside of buildings, posted or otherwise, in the performance of the executive director's duties;

> . . .
> (7) Designate employees of the agency, officers of any other state or of the federal government who are full-time wildlife enforcement personnel, to perform the duties and have the powers as prescribed in this section except subdivision (9) . . . .

Tenn. Code Ann. § 70-1-305. Before examining the contested statute further, the Court would note that

> It is well-settled in Tennessee that "courts do not decide constitutional questions unless resolution is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties." Our charge is to uphold the constitutionality of a statute wherever possible. "In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional." The presumption of constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute. In such an instance, the challenger must establish that no set of circumstances exists under which the statute, as written, would be valid.

Waters v. Farr, 291 S.W.3d 873, 882 (Tenn. 2009) (citations omitted). Plaintiffs argue that Tennessee Code Annotated subsections 70-1-305(1) and (7) run afoul of the protections of Article I, Section 7 of the Tennessee Constitution by authorizing unreasonable searches of warrantless property. That constitutional provision states:

> 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.

Tenn. Const. art. I, § 7. To establish that Tennessee Code Annotated subsections 70-1-305(1) and (7) violate Article I, Section 7, Plaintiffs must establish that the statute implicates constitutionally protected property, it authorizes searches of that property, and the authorized searches are unreasonable. The Court will look at each issue to in turn.

A. Whether Tennessee Code Annotated subsections 70-1-305(1) and (7) implicate constitutionally protected property.

We begin with the question of whether the statute involves constitutionally protected property. Article I, Section 7 of the Tennessee Constitution and the Fourth Amendment to the United States Constitution "are identical in intent and purpose." *State v. Hamm*, 589 S.W.3d 765, 771 (Tenn. 2019) (quoting *State v. Christensen*, 517 S.W.3d 60, 68 (Tenn. 2017)) (internal quotation marks omitted). Nevertheless, Tennessee's prohibition on unreasonable searches offers a broader guarantee of security for an individual's real property than its federal counterpart. *See Planned Parenthood of Mid. Tenn. v. Sundquist*, 38 S.W.3d 1, 13 (Tenn. 2000) ("Identity in intent and purpose, however, does not necessarily correlate to coextensive degrees of protection."); *State v. Lakin*, 588 S.W.2d 544, 548–49 & n.2 (Tenn. 1979) ("Although the decisions in this state may be somewhat more restrictive than those in other states or than federal decisions, no compelling reason has been demonstrated in this case for modifying or overruling them."). *Compare Welch v. State*, 289 S.W. 510, 510 (Tenn. 1926) ("In our opinion, the word 'possessions' was added for a purpose, and means more than houses or mansions, [but] something in addition thereto. . . . In our opinion, it refers to property, real or personal, actually possessed or occupied."); *Peters v. State*, 215 S.W.2d 822, 823 (Tenn. 1948) (citing *Welch*, 289 S.W. at 510) ("We have expressly held that the word 'possessions,' as used in our Constitution, [A]rt. 1, § 7, includes more than the 'curtilage.'"), *with Hester v. United States*, 265 U.S. 57, 59 (1924) ("[I]t is enough to say that . . . the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields."); *Spann v. Carter*, 648 Fed. App'x 586, 588 (6th Cir. 2016) (citations, internal quotation marks, and alterations omitted) ("In contrast [to a home and its curtilage], no expectation of privacy

legitimately attaches to open fields, so officers do not need a warrant to search the undeveloped areas of a farm, even a highly secluded one. Here, Spann alleged that officers trespassed without a warrant on his private farms, where he purported to have an expectation of privacy. Yet he has failed to allege how the private farms he uses for hunting are any different from other open fields that fall outside the Fourth Amendment's protection. And turkey hunts typically do not take place within a home's curtilage.").[17]

As written, the contested statute allows for the TWRA's executive director, a designated TWRA employee, or any "full-time wildlife enforcement personnel" employed by another state or the federal government to enter *any* property, except "buildings," in the performance of the executive director's duties. Tenn. Code Ann. § 70-1-305(1), (7). The protections of the Article I, Section 7, however, extend to all "property, real or personal, actually possessed or occupied." Tenn. Const. art. I, § 7. Plaintiffs point back to the *Welch* case to explain the meaning of "actually possessed or occupied." There, the Tennessee Supreme Court defined the phrase as "the actual exercise by the owner of the present power to deal with the estate and exclude other persons from meddling with it." *Welch*, 289 S.W. at 510–11.[18] In contrast, "[t]he word

[17] This federal case also involved officers of the TWRA, in which the plaintiff sued the defendants over similar activities as described by Plaintiffs, but the plaintiff in that case did so under 42 U.S.C. § 1983 and the Fourth Amendment to the United States Constitution. *Spann*, 648 Fed. App'x at 587–88. There the federal court rejected the plaintiff's Fourth Amendment challenge because the plaintiff "failed to allege how 'private farms' he uses for hunting are any different from other open fields that fall outside the Fourth Amendment's protection." *Id.* at 588. This analysis is irrelevant to our own under the Tennessee Constitution because, as can be seen from the cases Plaintiffs have identified below, private farms have been the quintessential real property possession under Article I, Section 7.

[18] In full, the Supreme Court's discussion provided:

> The word "possession" is thus defined in Webster's Unabridged Dictionary:
>
> "The having, holding, or detention of property in one's power or command."
>
> "Actual possession" is thus defined in 31 Cyc. 926, to wit:
>
> "That possession which exists where the thing is in the immediate occupancy of the party. Applied to land, the actual exercise by the owner of the present power to deal with the estate and exclude other persons from meddling with it; and actual and continuous occupancy or exercise of full dominion, and this may be either, first, an occupancy in fact of the whole that is in possession, or, second, an occupancy of part thereof in the name of the whole; a subjection to the

'possessions' would not include wild or waste lands, or other lands that were unoccupied." *Id.* at 511. Thus the Tennessee Constitution, argue Plaintiffs, protects land with at least some evidence of private ownership and occupancy. Plaintiffs cite to a number of cases as examples of this low bar: *Welch*, 289 S.W. at 510–11 (fenced hog lot); *Allison v. State*, 222 S.W.2d 366, 366–67 (Tenn. 1949) (wood lot fenced for pasture); *Lakin*, 588 S.W.2d at 545–46, 549 (gardens and fields near barn); *State v. Harris*, 919 S.W.2d 619, 621–22, 624–25 (Tenn. Crim. App. 1995) (hog pen on fenced land posted with No Trespassing signs); *State v. Casteel*, No. E1999-00076-CCA-R3-CD, 2001 WL 329538, at *18 (Tenn. Crim. App. Apr. 5, 2001) (campsite on land posted with No Trespassing signs).

Defendants concede that Article I, Section 7 protects more than the home and its curtilage but argue that these searches occurred in unprotected areas. Plaintiffs contest this assertion vigorously in their argument for an as-applied challenge. Here, however, we are concerned with the statutory language, and by eschewing only buildings, that language undoubtedly reaches property that *is* constitutionally protected from unreasonable searches. Tennessee Code Annotated subsection 70-1-305(1) reaches "any property, outside of buildings." This encompasses a broad spectrum of property outside of "wild or waste lands," *Welch*, 289 S.W. at 510–11, including curtilage, *see Peters*, 215 S.W.2d at 823.

Defendants nevertheless argue that Tennessee Code Annotated subsections 70-1-305(1) and (7) cannot facially violate the Tennessee Constitution because there are situations where

---

> will and dominion of the claimant, usually evidenced by occupation, by a substantial inclosure, cultivation, or by appropriate use; and as much consists of a present power and right of dominion as an actual corporeal presence."
>
> In 3 Words and Phrases, Second Edition, 1100, it is said:
>
> "The ordinary meaning of the word 'possession' is the same as 'occupancy.'"
>
> In the same book, on page 1102, it is said:
>
> "That the words 'property, possessions, of estates' are sufficient if not qualified to carry real estate, is well settled by many decisions."

Welch, 289 S.W. at 510–11.

areas of private land are not constitutionally protected. As just discussed, the "wild or waste lands" mentioned by the Tennessee Supreme Court are not protected from searches by Article I, Section 7. *See Welch*, 289 S.W. at 511. Defendants also point to language from our Supreme Court's decision in *Lakin*, 588 S.W.2d at 548 ("[T]his Court has recognized that there are indeed areas of land which in particular circumstances may be beyond the protection of Article I, section 7 of the state constitution."), as well as language from the Supreme Court's decision in *Chico v. State*, 394 S.W.2d 648, 651 (Tenn. 1965) ("[W]hen the land on which the evidence is found is not possessed as a part of the curtilage or used in the daily operation of the premises."), in suggesting a smaller scope for Article I, Section 7. Despite this contrary language from *Chico*, however, the *Lakin* Court expressly declined to overrule its prior Article I, Section 7 jurisprudence as articulated in *Welch*, *Peters*, and *Allison*. *Lakin*, 588 S.W.2d at 548–49 & n.2. Indeed, Plaintiffs say Defendants misstate the test for facial challenges by arguing that the lack of protections for some properties justifies the authorization of other unconstitutional searches. The question is instead whether the challenged statute implicates constitutionally protected property. *See City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015). ("[T]he proper focus [in facial challenges] is [on] searches that the law actually authorizes, not those for which it is irrelevant."). Tennessee Code Annotated subsections 70-1-305(1) and (7) plainly do just that. At the hearing on these motions, counsel for Defendants acknowledged that curtilage is a constitutionally protected property. Defendants' counsel also acknowledged that the statute on its face authorized searches of the curtilage. Article I, Section 7 protects *more* than just the home and the curtilage. The fact that Defendants might permissibly search other privately-owned properties under the same statute such as "wild or waste lands" cannot provide access to search other properties that are protected by the Tennessee Constitution.

Accordingly, we hold that Tennessee Code Annotated subsections 70-1-305(1) and (7) implicate constitutionally protected property.

B. Whether Tennessee Code Annotated subsections 70-1-305(1) and (7) authorize searches of that constitutionally protected property.

The next question then is whether the statute authorizes *searches* of constitutionally protected property. A search occurs when an agent of the government commits either a "physical intrusion of a constitutionally protected area in order to obtain information," *United States v. Jones*, 565 U.S. 400, 407 (2012) (citation omitted), or when a government agent physically intrudes upon a "reasonable expectation of privacy," *Christensen*, 517 S.W.3d at 77 (citing *Katz v. United States*, 398 U.S. 347 (1967)). As this second test is individualized to the facts at hand, it is difficult to apply in a facial challenge. *Cf. id.* Regarding the first test, however, the statute undoubtedly authorizes TWRA officers to make entries for information-gathering purposes. The statute provides that they may "go upon any property . . . *in the performance of the executive director's duties*." Tenn. Code Ann. § 70-1-305(1) (emphasis added). In practice, the undisputed facts demonstrate that is precisely why the TWRA officers have gone on to Plaintiffs' properties. When examining the statutory language alone it is unclear how an officer, absent an intent to procure information, would otherwise "enforce all laws relating to wildlife" upon said property, particularly since the authority to execute search and arrest warrants and serve subpoenas is elsewhere prescribed in the statute. *See* Tenn. Code Ann. § 70-1-305(2), (3).

Defendants counter that their entries onto private properties pursuant to Tennessee Code Annotated subsections 70-1-305(1) and (7) do not constitute searches because Article XI, Section 13 of the Tennessee Constitution (recognizing a personal right, subject to reasonable regulation and restriction, to hunt and fish) provides sufficient constitutional authority for those entries. Every person participating in the privilege of taking or possessing wildlife, Defendants explain, is required to submit to inspection by TWRA officers to ensure compliance with wildlife laws. *See* Tenn. Code Ann. § 70-6-101(b)(1) ("It is the duty of every person participating in the privileges of taking or possessing such wildlife as permitted by this title to permit the executive director or officers of the agency to ascertain whether the requirements of this title are being faithfully complied with, including the possession of a proper license."). Plaintiffs respond that Article XI, Section 13's provision for reasonable regulations and restrictions does not include unconstitutional searches. We agree with Plaintiffs. As our Supreme Court has said, "No constitutional provision should be construed to impair or destroy another provision." *Est. of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010) (citing *Vollmer v. City of Memphis*, 792 S.W.2d 446, 448 (Tenn. 1990); *Patterson v. Washington Cnty.*, 188 S.W. 613, 614 (Tenn. 1916)).

Therefore we hold that Tennessee Code Annotated subsections 70-1-305(1) and (7) authorize searches of constitutionally protected property.

C. Whether the searches of constitutionally protected property authorized by Tennessee Code Annotated subsections 70-1-305(1) and (7) are unreasonable.

The final question is whether these statutorily authorized searches of constitutionally protected property are unreasonable. "Ordinarily officers searching occupied, fenced, private

property must first obtain consent or a warrant . . . ." *Lakin*, 588 S.W.2d at 549. Indeed, warrantless searches are presumptively unreasonable. *See Hamm*, 589 S.W.3d at 771 (citing *State v. McCormick*, 494 S.W.3d 673, 678–79 (Tenn. 2016)); *State v. Stanfield*, 554 S.W.3d 1, 9 (Tenn. 2018). While there are circumstances that excuse the requirement for a warrant, Defendants assert no such circumstance. The Court also, however, finds compelling Plaintiffs' comparison of the statute to a general warrant, which of course is also constitutionally prohibited.[19] *See* Tenn. Const., art. I, § 7 ("[G]eneral warrants . . . are dangerous to liberty and ought not to be granted."); *Anthony v. Carter*, 541 S.W.2d 157, 161 (Tenn. 1976) (holding unconstitutional a statute authorizing police officers to seize material deemed unlawful by the district attorney general or designee rather than an impartial magistrate). For these reasons, we hold the searches unreasonable.

Having now concluded that Tennessee Code Annotated subsections 70-1-305(1) and (7) authorize unreasonable warrantless searches in violation of Article I, Section 7 of the Tennessee Constitution, we must further hold that those statutory provisions are facially unconstitutional.

2. The Court does not reach Plaintiffs' as-applied challenge because that issue is pretermitted by our conclusion above.

Because we have already concluded that Tennessee Code Annotated subsections 70-1-305(1) and (7) are facially unconstitutional, we find no reason to examine Plaintiffs' as-applied challenges to those statutory provisions. Those issues are pretermitted.

[19] Plaintiffs further argue that the searches are unreasonable because they are left entirely to the discretion of the officers in the field and because landowners are offered no opportunity for precompliance review. We decline to delve into these additional arguments because they are now pretermitted.

3. Plaintiffs have standing to assert their facial challenge.

Defendants argue Plaintiffs lack standing to bring their claims because Defendants' actions took place and in conjunction with investigations by the United States Fish and Wildlife Service, meaning Defendant Hoofman was acting under a federal delegation. Because his actions were taken as part of a federal investigation, Defendants assert Plaintiffs cannot demonstrate any causal connection between Defendants' actions and the authority granted to the TWRA under Tennessee Code Annotated section 70-1-305. Therefore, Defendants continue, Plaintiffs lack standing *to make an as-applied challenge* to the statute based on the placement of surveillance cameras on or near their properties or the entries upon their properties during the federal investigation.

Plaintiffs respond first and foremost that Defendants do not dispute the many, additional entries onto Plaintiffs' properties without federal involvement. The TWRA entered Plaintiffs' properties multiple times searching for evidence of state hunting crimes. Plaintiffs point out as an example that deer baiting is not a federal crime but a state crime. *See* Tenn. Code Ann. § 70-4-113. Then they refer to three 2017 entries (November 7, November 14, and December 10) onto Mr. Rainwaters's Harmon Creek Road farm by Defendant Hoofman to look for evidence of deer baiting, as well as a general search at Mr. Hollingworth's farm in December 21, 2016, resulting in photos of what Defendant Hoofman believed to be deer bait. Plaintiffs argue these entries are sufficient to establish standing. The Court agrees. Indeed, because we have concluded Plaintiffs' successful facial challenge would pretermit their as-applied challenges, the Court does not reach any part of Defendants' argument as to federal investigations and Plaintiffs' standing other than to hold Defendants' entries onto Plaintiffs' properties for the purposes of investigating purely state crimes is sufficient to establish standing for their facial challenge.

4. A justiciable controversy exists sufficient to implicate declaratory relief.

Next, Defendants argue Plaintiffs are not entitled to a declaratory judgment because the alleged injury is merely speculative. Citing language from *Parks v. Alexander*, 608 S.W.2d 881 892 (Tenn. Ct. App. 1980), Defendants explain the Declaratory Judgment Act, Tenn. Code Ann. §§ 29-14-101 *et seq.*, requires a justiciable controversy:

> For a controversy to be justiciable, a real question rather than a theoretical one must be presented and a real legally protectable interest must be at stake on the part of plaintiff. If the controversy depends upon a future or contingent event or involves a theoretical or hypothetical state of facts, the controversy is not justiciable under the Tennessee Declaratory Judgments Act.

Parks, 608 S.W.2d at 891–92 (citing *Story v. Walker*, 404 S.W.2d 803, 804 (Tenn. 1966); *Cummings v. Beeler*, 223 S.W.3d 913, 915 (Tenn. 1949); *U.S. Fid. & Guar. Co. v. Askew*, 191 S.W.2d 533, 534–35 (Tenn. 1946)). The Declaratory Judgment Act "deals only with present rights that have accrued under presently existing facts. It gives the Court no power to determine future rights or possible controversies in anticipation of events that may not occur." *West v. Carr*, 370 S.W.2d 469, 475 (Tenn. 1963) (citations omitted); *see also Third Nat'l Bank v. Carver*, 218 S.W.2d 66, 69 (Tenn. Ct. App. 1948) (citations omitted) ("[The Declaratory Judgments Act] does not enable the courts to give advisory opinions upon what the law would be upon a theoretical or hypothetical state of facts.").

While Plaintiffs contend the TWRA entered their property on numerous occasions without their consent or search warrant, Defendants point out that Plaintiffs do not claim Defendants continue to do so. The undisputed facts demonstrate Defendants have not entered any of Terry's properties since December 10, 2017, or Hunter's properties since September 2, 2018. And because there is no evidence that Defendants are continuing to enter Plaintiffs'

properties, Defendants argue that no justiciable controversy exists. Plaintiffs note correctly, however, that the Tennessee Supreme Court has explained that declaratory relief is an appropriate avenue to prevent enforcement of an unconstitutional law. *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853 (Tenn. 2008). Moreover, the harm from which Plaintiffs seek relief is not simply an unconstitutional search that may or may not happen; Plaintiffs seek relief from the "intolerable risk" of abusive searches created by Tennessee Code Annotated subsections 70-1-305(1) and (7). *Patel*, 576 U.S. at 421. While that statute remains, so does Plaintiffs' injury. Accordingly, we hold that declaratory relief is appropriate in this case.

5. Plaintiffs are no longer entitled to injunctive relief.

Defendants next argue Plaintiffs seek relief solely based upon fears or apprehension. "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (citing Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956)). "Injunctions are issued to prevent irreparable injury and the injury must be actually threatened or imminent. To justify equitable relief on the ground that irreparable injury will result unless relief is granted, the irreparable injury must be real and practically unavoidable and certain." *State ex rel. Agee v. Chapman*, 922 S.W.2d 516, 519 (Tenn. Ct. App. 1995) (citing *State ex rel. Baird v. Wilson Cnty.*, 371 S.W.2d 434 (Tenn. 1963); *J.W. Kelly & Co. v. Conner*, 123 S.W. 622 (Tenn. 1909)); *see also Baird*, 371 S.W.2d at 439 (citing *N.C. & St. L. Ry. v. R.R. & Pub. Utils. Comm'n*, 32 S.W.2d 1043, 1045 (Tenn. 1930) ("An injunction, of course, will not

be granted unless the injury is threatened or imminent and, in all probability, about to be inflicted. The writ will not issue merely to relieve the fears or apprehensions of an applicant.").

Referring to Plaintiffs' assertions that—as a result of the warrantless entries and digital surveillance by the TWRA officers—they feel insecure on their own properties, have a constant sense of anxiety that a TWRA officer or camera may be watching them, monitoring their activities, or prying into their lives, and have suffered a reduced capability to enjoy their own properties in peace, Defendants again argue that no evidence shows that such entries continue or will occur again. As such, Defendants continue, Plaintiffs' request for injunctive relief is based on the potential occurrence of uncertain, future events. Defendants also argue that Plaintiffs cannot prove they will suffer irreparable harm if an injunction is not granted because Plaintiffs are still able to use and enjoy their land for the same purposes that they were before the disputed entries began.

The Court agrees that injunctive relief is inappropriate in this case—but not for the reasons argued. Defendants correctly assert that injunctive relief requires an imminent threat of injury. They were wrong, however, to suggest that none existed while Tennessee Code Annotated subsections 70-1-305(1) and (7) remained in effect. We explained above that the challenged statute created an "intolerable risk" of abusive searches. *See Patel*, 576 U.S. at 421. By declaring Tennessee Code Annotated subsection 70-1-305(1)[20] unconstitutional, which we do below, the Court has obviated that risk and thereby the imminent threat. *See Davison v. Rose*, 19 F.4th 626, 641 (4th Cir. 2021) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)) (alteration in original) ("'The purpose of an injunction is to prevent future violations,' and the party seeking such relief 'must satisfy the court that [prospective, injunctive] relief is

[20] We explain why Tennessee Code Annotated subsection 70-1-305(7) is constitutional without subsection 305(1) below.

needed.'"); *Ohio Valley Environmental Coalition, Inc. v. Hobet Min., LLC United States District Court*, 723 F. Supp. 2d 886, 923–24 (S.D.W. Va. 2010) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)) ("An injunction is an equitable remedy a court should issue only where such intervention 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'"). Here, an injunction is no longer necessary to protect Plaintiffs' property rights from the unconstitutional intrusions authorized by Tennessee Code Annotated subsections 70-1-305(1) and (7). Accordingly, we hold that Plaintiffs are not entitled to injunctive relief.

6. Plaintiffs are entitled to nominal damages.

Plaintiffs seek nominal damages in the amount of one dollar from Defendant Carter. "Nominal damages are given, not as an equivalent for the wrong, but in recognition of a technical injury and by way of declaring a right . . . ." *Womack v. Ward*, 186 S.W.2d 619, 620 (Tenn. Ct. App. 1944) (quoting 25 C.J.S., *Damages*, § 8). "Nominal damages may be recovered where a cause of action for a legal wrong is established, but there is no proof of actual damages." *Id.* (quoting 25 C.J.S., *Damages*, § 9). Here, from the undisputed facts before us and our conclusion that Tennessee Code Annotated subsections 70-1-305(1) and (7) are unconstitutional, the Court further concludes that Plaintiffs' rights were violated by Defendants. We also note that no compensatory damages have been sought. Accordingly, we hold that Plaintiffs are entitled to nominal damages in their requested form.

Summary of the Court's Conclusions of Law

We have held that (1) Tennessee Code Annotated subsections 70-1-305(1) and (7) are facially unconstitutional, (2) Plaintiffs have standing to bring their facial constitutional challenge, (3) Plaintiffs may seek declaratory relief, (4) Plaintiffs may not seek injunctive relief, and (5) Plaintiffs are entitled to nominal damages. Accordingly, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to the issue of injunctive relief but **DENIED** in all other respects, and Plaintiffs' Motion for Summary Judgment is **GRANTED** on the basis that Tennessee Code Annotated subsections 70-1-305(1) and (7) are facially unconstitutional.

Plaintiffs' Remedies

As decided above, Plaintiffs are entitled to declaratory relief and nominal damages. While we have held that Tennessee Code Annotated subsections 70-1-305(1) and (7) facially violate Article I, Section 7, of the Tennessee Constitution, subsection 305(7) is only unconstitutional to the extent it is used to effect subsection 305(1) through an individual other than the Executive Director of the TWRA. Absent the offending subsection 305(1), subsection 305(7) creates no issue.

Therefore, this Court hereby **DECLARES** Tennessee Code Annotated subsection 70-1-305(1) unconstitutional, unlawful, and unenforceable. The Court further **DECLARES** the TWRA's warrantless searches under Tennessee Code Annotated subsections 70-1-305(1) and (7) unconstitutional and unlawful. The Court additionally **DECLARES** that such searches of Plaintiffs' properties were unconstitutional and unlawful. And finally, Plaintiffs are awarded one

dollar ($1.00) in nominal damages for their constitutional injury, which Defendant Carter is **ORDERED** to pay.

s/ *Jerri S. Bryant*
CHANCELLOR JERRI S. BRYANT

s/ *J. Russell Parkes*
JUDGE J. RUSSELL PARKES

IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
TWENTY-FOURTH JUDICIAL DISTRICT, BENTON COUNTY

TERRY RAINWATERS and HUNTER HOLLINGSWORTH,	)	
Plaintiffs,	)	
v.	)	**No. 20-CV-6**
	)	**Judge Donald E. Parish**
TENNESSEE WILDLIFE RESOURCES AGENCY, BOBBY WILSON, Executive Director of the Tennessee Wildlife Resources Agency, in his individual Capacity, ED CARTER, former Execuive 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,	)	**Chancellor Jerri S. Bryant**
	)	**Judge J. Russell Parkes**
Defendants.	)	

PARTIAL CONCURRENCE AND DISSENT FROM THE COURT'S ORDER

Other than the Court's decision to forego an analysis of Plaintiffs' as-applied challenge and its analysis on the availability of injunctive relief, the undersigned judge joins the Court's order. I write separately to express my disagreement on those issues.

Analysis

1. Plaintiffs' As-Applied Challenge[1]

Though I agree Tennessee Code Annotated subsections 70-1-305(1) and (7) are facially unconstitutional, I would go further and additionally hold that Defendants' application of those provisions to Plaintiffs are unconstitutional under the specific, undisputed facts of this case. I

[1] As the Court's order details Article I, Section 7, the relevant case law, the challenged provisions, and the distinction between a facial and as-applied challenge, I do not repeat that discussion.

have concluded from this state's case law that in Tennessee the open fields doctrine is constitutionally limited to wilds and waste lands. "I shall not today attempt further to define the kinds of [properties] I understand to be embraced within that shorthand description; and perhaps I could never succeed intelligibly doing so. But I know it when I see it, and the [properties] involved in this case [are] not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Plaintiffs' properties are constitutionally protected possessions under Article I, Section 7. As pointed out by Plaintiffs and also this Court, Tennessee law has recognized the protected nature of a fenced hog lot in *Welch v. State*, 289 S.W. 510, 510–11 (Tenn. 1926), a wood lot fenced for pasture in *Allison v. State*, 222 S.W.2d 366, 366–67 (Tenn. 1949), gardens and fields near a barn in *State v. Lakin*, 588 S.W.2d 544, 545–46, 549 (Tenn. 1979), a hog pen on fenced land posted with No Trespassing signs in *State v. Harris*, 919 S.W.2d 619, 621–22, 624–25 (Tenn. Crim. App. 1995), and a campsite on land posted with No Trespassing signs in *State v. Casteel*, No. E1999-00076-CCA-R3-CD, 2001 WL 329538, at *18 (Tenn. Crim. App. Apr. 5, 2001). Indeed, today it is undisputed that the properties we are concerned with consist primarily of farms. Some of these properties are fenced, and those that are not have chained gates marked with No Trespassing signs accessible only by private, gravel paths. These lands are not the same as a "'wild and wasteland' which might be 'roamed at will without a search warrant.'" *Lakin*, 588 S.W.2d at 549.

TWRA officers, particularly Defendant Hoofman, have entered onto those properties on numerous occasions in order to obtain evidence of state wildlife violations, not just the ones Defendants claim were part of a federal investigation. Those entries constitute searches under either the property-based test or the reasonable-expectations test discussed by the Court's order.

With the respect to the first test, it is undisputed the TWRA officers entered Plaintiffs' properties in search of information. Alternatively, the undisputed facts demonstrate Plaintiffs had a subjective expectation of privacy on their properties. Such an expectation is shown by the second test's two elements: (1) an actual expectation of privacy, and (2) the reasonableness of that expectation. *See State v. Christensen*, 517 S.W.3d 60, 77–78 (Tenn. 2017) (citing *Katz v. United States*, 398 U.S. 347, 361 (1967); *State v. Talley*, 307 S.W.3d 723, 730 (Tenn. 2010)). An expectation of privacy is considered reasonable and justifiable when it has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (citation omitted). Plaintiffs' actual, subjective expectations of privacy is undisputed. And those properties' constitutional protection in light of Plaintiffs' efforts to exclude others and exercise their possession of said properties together demonstrate the reasonableness of their expectations. Notably, these are not the same as simply a No Trespassing sign marking the driveway to someone's home. *See Christensen*, 517 S.W.3d 64, 69–70 (quoting *Florida v. Jardines*, 133 S. Ct. 1409, 1415–16 (2013)) (internal quotation marks omitted) ("[T]he knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. . . . Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."). A so-called "knock-and-talk" is permissible, but crucially "if police enter a protected area not intending to speak with the occupant, but rather, solely to conduct a search, the line has been crossed." *People v. Frederick*, 886 N.W.2d 1, 9 (Mich. Ct. App. 2015) (cited

by *Christensen*, 517 S.W.3d at 70), *reversed on other grounds*, 895 N.W.2d 541 (Mich. 2017). The TWRA officers here were well outside any sort of implied license to knock on Plaintiffs' front doors.

Finally, the entries were universally warrantless, and the Court's order has already explained that such entries are presumptively unreasonable. Defendants offered no exception that would otherwise justify those entries. Therefore, they remain unreasonable. As I have concluded that Defendants' actions under Tennessee Code Annotated subsections 70-1-305(1) and (7) with respect to Plaintiffs constituted unreasonable searches of constitutionally protected property, I would take the additional step of granting Plaintiffs summary judgment on their as-applied challenge.

2. Availability of Injunctive Relief

As was the case in our discussion of declaratory relief, the Tennessee Supreme Court has stated that injunctive relief is also an appropriate mechanism to prevent the application of an allegedly unconstitutional law. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853 (Tenn. 2008) ("[T]he relief sought is a declaration of unconstitutionality. Thus, the Chancery Court may issue . . . injunctive relief against the Defendants in their individual capacity, so long as the court's judgment is tailored to prevent the implementation of unconstitutional legislation . . . ."). Also as with our discussion of declaratory relief, the real harm at issue in this case is the "intolerable risk" of abusive searches created by the statute authorizing the TWRA's entries on Plaintiffs' properties. *See City of Los Angeles v. Patel*, 576 U.S. 409, 421 (2015); *see also* Luke M. Milligan, *The Right "to Be Secure": Los Angeles v. Patel*, 2015 Cato Sup. Ct. Rev. 251, 269 (2015) ("*Patel*'s emphasis on 'relative power' hints at its unarticulated premise: that the Fourth

Amendment guarantees not simply a right to be spared unreasonable searches and seizures, but moreover a right to be confident against such government illegalities. In other words, the government does not fully comply with the Fourth Amendment by simply not undertaking intrusive searches or seizures (and providing remedies when it does). It must do more. It must not behave in a way that makes the people anxious or fearful about being subjected to such searches or seizures."). I reiterate that this injury to Plaintiffs is neither speculative nor something off in the future. Plaintiffs are subject to it at this moment.

The Court explains, however, that our order declaring the offending statute unconstitutional eliminates any need for an injunction. I disagree. Indeed, I am unpersuaded that the threat to Plaintiffs' rights to be free from unreasonable searches under Article I, Section 7, has been resolved. The undisputed facts in this case show that Defendant Hoofman articulated his belief that an individual's hunting license invited him onto a licensee's property. Defendants have also argued that their enforcement authority has a constitutional basis in Article XI, Section 13 of the Tennessee Constitution's recognition of a personal right to hunt or fish, subject to reasonable regulation. Absent the injunctive relief sought by Plaintiffs, I believe an "intolerable risk" of improper searches by the TWRA's officers persists.

Even were I to accept the Court's reasoning that the risk of harm had been eliminated, it would not necessarily follow that the granting of declaratory relief precludes the further granting of injunctive relief without an entirely different injury. For example, in *Metropolitan Government of Nashville & Davidson County v. Tennessee Department of Education*, No. 20-0143-II, 2020 WL 5875645, at *15 (Tenn. Ch. Ct. May 4, 2020), the Davidson County Chancery Court declared the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601, et seq., unconstitutional and then also entered a permanent injunction against

Tennessee officials from enforcing the program.[2] Here, the injunction serves the additional purpose of enforcement of Plaintiffs' declaratory relief. Absent an injunction, Plaintiffs would presumably have to sue Defendants for trespass and relitigate several of the same issues.

For the reasons articulated above, I would hold injunctive relief is appropriate in this case. I would issue a permanent injunction preventing the TWRA, Defendant Wilson, and Defendant Hoofman from taking any action pursuant to Tennessee Code Annotated subsection 70-1-305(1). I would also issue a permanent injunction preventing the TWRA, Defendant Wilson, and Defendant Hoofman from conducting searches of constitutionally-protected, private property without either a warrant or an exception to the warrant requirement. And, based upon the Court's analysis of Plaintiffs' constitutional challenge, I would clarify that, subject to exceptions in Tennessee law, such private property shall include homes, curtilage, and those lands bearing evidence of possession by their owners as recognized in Tennessee law—farms, gardens, campsites, and the like.

---

[2] As stated in the court's order:

> The Court finds that the State Defendants violated the Home Rule Amendment when they enacted the ESA Act because it is local in form and effect, not of general application but rather applicable and designed to be applicable to two particular counties, and involves matters of local government proprietary capacity. Metro and Shelby County Government's motion for summary judgment is granted and they are awarded a final judgment as to Count I of the complaint.
>
> . . .
>
> . . . . The Court declares the ESA Act unconstitutional, unlawful, and unenforceable. The Court further orders a permanent injunction preventing state officials from implementing and enforcing the ESA Act. . . .

Metro. Gov't of Nashville & Davidson Cnty., 2020 WL 5875645, at *15. That case was consolidated with another and is presently pending in an interlocutory appeal to re-examine the plaintiffs' standing and the substantive constitutional question. Order, No. 20-0143-II, No. M2020-00682-COA-R9-CV & No. M2020-00683-COA-R9-CV, at 2 (Tenn. Ct. App. May 19, 2020).

Conclusion

For the foregoing reasons, I would hold that Tennessee Code Annotated subsections 70-1-305(1) and (7) are unconstitutional as-applied in the instance of Plaintiffs, and I would grant them the injunctive relief they seek. Respectfully, I concur in part and dissent in part.

s/ *Donald E. Parish*
JUDGE DONALD E. PARISH, Chief Judge