

Fourth Amendment and No Trespassing Signs—*State v. Christensen*: An Unreasonable, Reasonable Expectation

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I. INTRODUCTION

The right to be free from unreasonable governmental intrusions has long been an area of debate within American jurisprudence that continues to evolve through the application and scope of the Fourth Amendment of the United States Constitution as society progresses in technological advancements. But a recent topic debated by courts in multiple jurisdictions reverts to the days before mass technological advancements and involves entrances onto private property by police officers through knock-and-talk investigations. Knock-and-talk investigations are conducted by police officers who do not have a warrant to

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enter private property.¹ Instead, police officers have an implied license to enter private property to speak with a homeowner about suspected criminal activity.² Though this implied license has its roots in common law and is enjoyed by all members of the public, the license is not unlimited, and it may be revoked by the homeowner's "express orders."³ The center of debate surrounding knock-and-talk investigations is what constitutes an express order to sufficiently revoke police officers' implied license—and to trigger Fourth Amendment protections—to enter private property without a warrant.

Citizens in rural areas across the United States may find it unreasonable that "no trespassing" signs—bought and placed at the entrance of their property for the sole purpose of informing the public that entry beyond the signs is not permitted—are insufficient to convey an express intent to bar entry. To the majority of courts, the presence of a "no trespassing" sign means only illegitimate reasons bar entry. This Comment explores this majority precedent the Tennessee Supreme Court relied on in a recent case involving police investigators entering private property without a warrant despite multiple "no trespassing" signs posted at the entrance of a driveway.

Part II of this Comment gives a brief overview of the essential facts and the holding reached by the Tennessee Supreme Court majority in *State v. Christensen* and outlines the problems Justice Sharon Lee advanced in her dissent. After outlining the facts and holding, Part III provides the reader with an overview of the Fourth Amendment case law that covers the implied license, knock-and-talk investigations, and the impact that a "no trespassing" sign has on the Fourth Amendment. Part IV narrows in on the analysis and reasoning the Tennessee Supreme Court used to reach its conclusion. Part V of this Comment offers a critique of the rationales advanced by the Tennessee Supreme Court when answering the question of what a reasonable person would

1. See *United States v. Shuck*, 713 F.3d 563, 567 (10th Cir. 2013) (defining a knock-and-talk investigation as a "consensual encounter" between a police officer and a homeowner).

2. See *Kentucky v. King*, 563 U.S. 452, 469 (2011) (holding that police officers, like the public at large, hold an implied license to enter property to speak with the homeowner because they do no more than any member of the public may do); *Breard v. Alexandria*, 341 U.S. 622, 624 (1951) (holding that members of the public have an implied license to enter private property for knock-and-talk purposes).

3. *United States v. Holmes*, 143 F. Supp. 3d 1252, 1259 (M.D. Fla. 2015).

conclude a “no trespassing” sign means under the totality of the circumstances. Lastly, Part VI concludes this Comment by giving the reader insight into the confusions, ambiguities, and dangers the Tennessee Supreme Court’s holding is susceptible to. Altogether, the majority of courts—including the Tennessee Supreme Court—that have reasoned a “no trespassing” sign is little more than lawn art and provides an unreasonable rationale—reached through legal nuances instead of reasonableness—that is likely to surprise citizens in rural areas who continue to buy and post “no trespassing” signs along their property.

II. THE CASE

In 2017, the Tennessee Supreme Court analyzed whether the presence of “no trespassing” signs alone is sufficient to revoke investigators’ implied license to enter a homeowner’s private property to conduct a knock-and-talk investigation.⁴ Despite James Christensen, Jr. (“Christensen”) posting “no trespassing” signs at the entrance of his unobstructed driveway, two investigators proceeded down his driveway in an attempt to question him about the suspicious purchase of pseudoephedrine, which is commonly used in the manufacturing of methamphetamine.⁵ Though Christensen refused consent to a search, the investigators entered his residence because of an overwhelming smell of methamphetamine being manufactured and the investigators’ fear it would explode.⁶ The investigators’ entry led to Christensen’s multiple-count conviction based on the evidence seized inside his home.⁷ Christensen argued the investigators obtained this evidence through an illegal search that violated the Fourth Amendment because of the investigators’ warrantless entry onto his property despite multiple “no trespassing” signs at the entrance of his driveway.⁸

4. State v. Christensen, 517 S.W.3d 60, 64 (Tenn. 2017).

5. *Id.*

6. *Id.* at 65–67.

7. *Id.* at 63–64.

8. *Id.* The Court noted that the actual entry into Christensen’s residence was not at issue because at trial “defense counsel acknowledged” the investigators’ entry into the “residence after smelling the odor associated with the active manufacture of methamphetamine was supported by exigent circumstances and probable cause.” *Id.*

On appeal, the Tennessee Supreme Court *held* that the investigators' entry onto the curtilage of Christensen's property—his unobstructed driveway—was not a search within the Fourth Amendment because Christensen's "no trespassing" signs *alone* were insufficient to revoke the investigators' implied license to conduct a knock-and-talk investigation, and the investigators' conduct did not violate Christensen's "reasonable expectation of privacy" because his expectation was not one society is willing to justify. *State v. Christensen*, 517 S.W.3d 60, 77 (Tenn. 2017). Yet the Court emphasized its view that under the "right circumstances" a "no trespassing" sign alone "*could* be sufficient to revoke the implied license."⁹ The majority opinion, however, did not capture all the justices' views. The sole dissenter, Justice Sharon Lee, voiced her opinion regarding the majority's faulty reasoning. Justice Lee's main contention with the majority opinion was that she disagreed that citizens "must barricade [their] homes with a fence and a closed gate, and perhaps even a locked gate, to protect [their] constitutional rights against warrantless searches."¹⁰ As Justice Lee passionately stated, "[a] person need not have a law degree or an understanding of the various legal nuances of 'trespass' . . . to know that [no trespassing] signs [mean] visitors [are] not welcome."¹¹

Although the Court's holding is in line with the majority of jurisdictions that have taken up this issue, the Court's reasoning poses a few problems. First, the Court failed to analyze the specific circumstances spelled out in the authority it relied upon in finding Christensen's signs insufficient under the circumstances to revoke the investigators' implied license.¹² Secondly, the Court's reasoning

at 78 n.12. Therefore, the Court was only deciding whether the entry onto the curtilage of Christensen's property—the driveway—constituted an illegal search. *Id.* at 78. As the majority opinion noted, the Court conceded that the curtilage of Christensen's residence included the driveway because it did "not impact [its] resolution of the issues before [it]." *Id.* at 69.

9. *Id.* at 75 n.9.

10. *Id.* at 79 (Lee, J., dissenting).

11. *Id.* at 80 (Lee, J., dissenting).

12. *See United States v. Carloss*, 818 F.3d 988, 999 (10th Cir. 2016) (Tymkovich, C.J., concurring) (advocating for an objective test under the totality of the circumstances, including the context of "time, place, manner, and circumstance[s] of the encounter"). To be clear, the argument is that the rationales advanced by the Tennessee Supreme Court, specifically that a reasonable person under the circumstances would not conclude that entry was barred, is not likely to garner support by

significantly undermines the difference between the meaning a reasonable person attaches to a “no trespassing” sign in an urban location and one in a vastly rural area. Because of the Court’s rationales, its ruling is likely to create ambiguity for police officers on whether they may enter private property despite the presence of “no trespassing” signs, while also causing confusion for citizens in Tennessee’s rural areas who reasonably believe their “no trespassing” signs provide sufficient notice of their intent to prohibit entry for any reason.

III. FOURTH AMENDMENT JURISPRUDENCE AND THE EVOLUTION OF KNOCK-AND-TALK INVESTIGATIONS

The Fourth Amendment provides citizens with a constitutional right to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹³ Today, there are two approaches to determine whether a search within the Fourth Amendment has occurred: (1) the traditional property-based approach where the government obtains information by “physically intruding” into a constitutionally protected area,¹⁴ and (2) the “reasonable expectation of privacy” test that has added to, but not replaced, the traditional approach.¹⁵ Both of these tests have been used to analyze the effect a homeowner’s “no trespassing” sign has on the implied license to enter. Under either test, the analysis turns on the meaning that a reasonable person would attach to the “no trespassing” sign in determining whether the implied license has been sufficiently revoked to prohibit entry or whether the homeowner has a subjective expectation of privacy that society is willing to recognize.¹⁶ Nevertheless, the case law

Tennesseans in rural areas nor is it in line with the precedent the Tennessee Supreme Court relied upon. *See infra* Part IV.

13. U.S. CONST. amend. IV.

14. *See Florida v. Jardines*, 569 U.S. 1, 5 (2013) (describing the property-based understanding of the Fourth Amendment as the traditional analysis).

15. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *see also United States v. Jones*, 565 U.S. 400, 406 (2012) (noting Fourth Amendment protections “do not rise or fall with the *Katz* formulation”); *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) (explaining that *Katz* is not a substitute for when the government “does engage in physical intrusion of a constitutionally protected area in order to obtain information”).

16. *See State v. Christensen*, 517 S.W.3d 60, 74, 77–78 (Tenn. 2017) (analyzing the meaning of Christensen’s “no trespassing” signs first under the property-based

varies on whether the presence of “no trespassing” signs alone is enough to trigger Fourth Amendment protections when police officers enter private property to conduct a knock-and-talk investigation, with the majority view being that the signs are insufficient by themselves to convey a homeowner’s express order to prohibit entry for legitimate reasons.¹⁷ To understand how courts have arrived at this conclusion, it is important to highlight the applicable Fourth Amendment jurisprudence regarding the implied license, the evolution of knock-and-talk investigations, and the impact “no trespassing” signs have on Fourth Amendment protections.

A. *The Implied License and Knock-and-Talk Investigations*

In 1951, the United States Supreme Court recognized what has come to be known as the public’s implied license to enter private property to speak with a homeowner in *Breard v. Alexandria*.¹⁸ Although

approach to determine whether the “no trespassing” signs were sufficient to convey to a reasonable person that the implied license was revoked and next whether society was willing to justify the subjective expectation of privacy Christensen attached to his “no trespassing” signs). The Court held that under the “reasonable expectation of privacy” test, “a reasonable member of society would view [Christensen’s] ‘No Trespassing’ signs as simply forbidding any unauthorized or illegitimate entry onto his property” for the same reasons set forth under the property-based analysis. *Id.* at 78. As the Court noted, the analysis under either test turned on the meaning a reasonable person attached to a “no trespassing” sign. *Id.*

17. See *United States v. Carloss*, 818 F.3d 988, 997 (10th Cir. 2016) (holding that under the circumstances, the sign was not sufficient because a reasonable officer would not believe it prohibited his entry); *United States v. Bearden*, 780 F.3d 887, 894 (8th Cir. 2015) (holding that “no trespassing” signs placed by the driveway did not invalidate the officers’ implied license for knock-and-talk purposes); *United States v. Hopper*, 58 F. App’x. 619, 623 (6th Cir. 2003) (upholding officer’s implied license to enter for a knock-and-talk investigation despite no trespassing signs near the driveway). *But see* *United States v. French*, 291 F.3d 945, 953 (7th Cir. 2002) (stating absent the homeowner taking steps like posting signs or erecting barriers, the officers’ license to enter for knock-and-talk purposes was not revoked); *State v. Blackwell*, No. E2009-00043-CCA-R3-CD, 2010 WL 454864, at *7 (Tenn. Crim. App. Feb. 10, 2010) (stating that no trespassing signs showed the homeowner’s subjective intent to revoke the implied license).

18. 341 U.S. 622, 626 (1951) (noting a common law principle of the public holding a license to approach the front door, unless they are “barred from [the] premises by notice or order”); see also RESTATEMENT (FIRST) OF TORTS § 167 (AM. LAW INST. 1934).

the Supreme Court was conducting an analysis under the Fourteenth Amendment and the Commerce Clause, it noted “the 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.”¹⁹ It was lower federal courts and various state courts that took this language and applied it to the Fourth Amendment, specifically noting that “[a]bsent express orders . . . there is no rule of private or public conduct which makes it illegal per se . . . for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door . . . with the honest intent of asking questions.”²⁰ But it was the United States Supreme Court that validated the constitutionality of law enforcement’s use of knock-and-talk investigations on owners of private residences, reasoning that when done, officers “do no more than any private citizen might do.”²¹

B. “No Trespassing” Signs and the Fourth Amendment

At the same time the validity of knock-and-talk encounters was evolving under the Fourth Amendment, a separate line of cases dealt with the presence of “no trespassing” signs and whether their posting granted Fourth Amendment protections. In *Oliver v. United States*, upholding the search of “open fields” despite the posting of “no trespassing” signs, the United States Supreme Court provided an in-depth distinction between the property rights embodied by trespass law and the rights the Fourth Amendment seeks to protect.²² In doing so, the United States Supreme Court noted that the law of trespass “protect[s] against intruders who poach, steal . . . or vandalize property,” which is “far broader than those” intrusions the Fourth Amendment protects

19. *Breard*, 341 U.S. at 626.

20. *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964).

21. *Kentucky v. King*, 563 U.S. 452, 469 (2011); *see also* *Florida v. Jardines*, 569 U.S. 1, 8–9 (2013) (reaffirming that a search within the Fourth Amendment does not occur when police enter property for the purposes of a knock-and-talk encounter but may be exceeded by officers engaging in conduct not compatible with the “social norms that invite a visitor to the front door”).

22. *See* *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984) (discussing the privacy interests protected by the Fourth Amendment and the land and property rights protected by trespass law).

against.²³ Since the Supreme Court's decision in *Oliver*, lower courts have relied on the distinction between the protections of trespass law and the Fourth Amendment to determine that "no trespassing" signs alone are insufficient to revoke officers' implied right to approach the residence and speak with the owner.²⁴

Two particular cases warranting discussion are *United States v. Holmes* and *United States v. Carloss*. These cases dealt with law enforcement officers seeking to conduct knock-and-talk investigations with homeowners after receiving tips of criminal activity in which the officers entered the property despite "no trespassing" signs.²⁵ In *Holmes*, the defendant refused to consent to a warrantless search, and while officers were drafting a warrant, another officer escorted the defendant into the home to get a shirt and noticed drug paraphernalia.²⁶ In determining that the defendant's "no trespassing" signs were not sufficient to revoke the officers' implied license to enter the property, the court heavily relied on the distinction in *Oliver* that "no trespassing" signs "do[] not alter the character of an entry that one would not otherwise think to be a trespass, such as the implied license to . . . knock and talk."²⁷ While the court noted the insufficiency of "no trespassing" signs alone, it pointed out that signs situated at the point of entry combined with other "measures to prevent entry," like a locked gate, may be sufficient to revoke the implied license.²⁸ But the court

23. *Id.*

24. *See* *United States v. Carloss*, 818 F.3d 988, 995–96 (10th Cir. 2016) (drawing heavily on the distinction of property rights embedded in trespass law and the narrow interests the Fourth Amendment protects); *United States v. Holmes*, 143 F. Supp. 3d 1252, 1264–65 (M.D. Fla. 2015) (same). However, it is important to note that the Court in *Oliver* was dealing with property that was not considered part of the curtilage, unlike the majority of cases that have taken the reasoning from *Oliver* and applied it to the curtilage. *See Oliver*, 466 U.S. at 180 (explaining the area in question was not included in the curtilage of the home).

25. *See generally Carloss*, 818 F.3d at 990–91 (10th Cir. 2016) (stating the facts of the case); *Holmes*, 143 F. Supp. 3d 1252, 1254–57 (M.D. Fla. 2015) (stating the facts of the case).

26. *Holmes*, 143 F. Supp. 3d at 1256–57.

27. *Id.* at 1265.

28. *Id.* at 1267–68. *See generally* Philip D. Mayer, *The Fourth Amendment's De Facto Physical Barrier Requirement: A Movement Toward a True Totality of the Circumstances Test After United States v. Carloss*, 96 N.C. L. REV. 546, 564–65

declined to analyze the issue under the “totality of the circumstances” approach because the court believed the approach did not provide clear guidance to police officers or homeowners given the laundry list of inquiries mandated by the approach.²⁹

Likewise, in *Carloss*, the Tenth Circuit rejected the argument that the presence of “no trespassing” signs alone is sufficient to revoke an officer’s implied right to conduct a knock-and-talk investigation but for different reasons than put forth in *Holmes*. In *Carloss*, the officers entered the curtilage of the property despite multiple “no trespassing” signs and, while engaging with the defendant, never received word of the signs nor were they asked to leave.³⁰ The court noted that the Supreme Court in *Florida v. Jardines* “reiterated that a knock-and-talk itself is not a search for Fourth Amendment purposes,” but distinguished the case from *Jardines* on the basis that the officers did not “intend[] to conduct[] a search from the front porch when they went” to the front door.³¹ More importantly, the court held the signs were insufficient because under the *circumstances* a reasonable person, or an “objective officer,” would not believe the signs prohibited him or her from going to the front door to knock.³² In deploying this objective test, the court grounded its reasoning in the ambiguous language of the sign and not so much in the absence of a physical barrier.³³

(2018) (noting that even if courts are applying the totality of the circumstances approach, there is an “unspoken requirement [that] [f]or effective revocation, there generally must be a physical barrier between the homeowner and the public”).

29. *Holmes*, 143 F. Supp. 3d at 1268. The court noted that the totality of the circumstances approach that other jurisdictions applied was a misguided approach offering little to no help in deciding cases in the future. *Id.* The court emphasized that there must be some guidance provided to officers, otherwise the risk of increased Fourth Amendment violations on lawful homeowners may result. *Id.*

30. *Carloss*, 818 F.3d at 991.

31. *Id.* at 993; *see also* *Florida v. Jardines*, 569 U.S. 1, 8–9 (2013) (explaining that if the purpose of the officer’s entrance is to conduct a search, this exceeds the scope of the implied license).

32. *Carloss*, 818 F.3d at 995. Here, the court applied the totality of the circumstances approach, which the court in *Holmes* rejected. *See id.* at 995–97; *Holmes* 143 F. Supp. 3d at 1268. Furthermore, the court noted that the sign on the front door was ambiguous because the wording only alluded to conduct that would be prohibited through trespass laws like hunting, fishing, etc. *See Carloss*, 818 F.3d at 995.

33. *See Carloss*, 818 F.3d at 996–97 (explaining the sign on the front door “referenced activities that ordinarily do not take place within a home or its curtilage” and therefore “does not appear to be directed to people who desire to approach and

Nevertheless, *Carloss* is important because the case produced a concurrence by Chief Judge Tymkovich and a passionate dissent by then Judge Gorsuch. While the majority opinion focused heavily on the ambiguity of the defendant's sign on his front door, the concurrence advocated for a more thorough, objective analysis.³⁴ Conversely, Judge Gorsuch's dissent is highly illustrative of the strong sentiments regarding the Fourth Amendment's protection of citizens from unreasonable searches.³⁵ Judge Gorsuch criticized the majority opinion by drawing heavily on common law trespass jurisprudence.³⁶ He particularly found it troublesome that the license was revocable by "word or deed" at common law, but somehow the same license was not revocable by "no trespassing" signs alone.³⁷

IV. TENNESSEE SUPREME COURT'S ANALYSIS

Armed with this legal precedent, the Tennessee Supreme Court granted an appeal to determine whether "no trespassing" signs at the entrance of an unobstructed driveway revoked the investigators' implied license to enter the curtilage of the property to speak with Christensen. Applying the property-based understanding of the Fourth Amendment articulated in *Jardines*, the Court held that the investigators' entry did not constitute a search within the Fourth Amendment.³⁸ Furthermore, the Court held that Christensen failed the second prong of the "reasonable expectation of privacy" test articulated by the United States Supreme Court in *Katz v. United States* because Chris-

speaking directly with the occupants"). However, the court noted the majority approach has been that signs alone are generally insufficient. *See, e.g., id.*

34. *See Carloss*, 818 F.3d at 999 (Tymkovich, C.J., concurring) (advocating for the court to "look to each case's facts to determine whether the reasonable person would think the license had been revoked" by the circumstances presented).

35. *See id.* at 1006 (Gorsuch, J., dissenting) (explaining the fundamental protections embodied by the Fourth Amendment).

36. *See id.* (highlighting the inconsistencies of the majority opinion's rationales based on the common law).

37. *Id.*

38. *State v. Christensen*, 517 S.W.3d 60, 77 (Tenn. 2017); *see also Florida v. Jardines*, 569 U.S. 1, 8–10 (2013) (holding the entry onto the defendant's property was lawful through the implied license to do so, but the use of a drug dog exceeded the scope of the license).

tensen's expectation of privacy was not one society is willing to recognize.³⁹ The Court concluded the "no trespassing" signs alone were insufficient to revoke the investigators' implied license to enter because of the meaning a reasonable person would attach to the signs.⁴⁰ Like the many courts before it, the Tennessee Supreme Court highlighted that a "no trespassing" sign "simply mak[es] explicit what the law already recognizes: that persons entering . . . must have a legitimate reason for doing so or risk being held . . . liable for trespass."⁴¹

In reaching its decision that Christensen's "no trespassing" signs alone were insufficient, the Court relied heavily on the concurring opinion from *Carloss*, which advocated for using an objective test asking "whether a reasonable person would conclude that entry onto the curtilage . . . was *categorically* barred" by the signs under the circumstances.⁴² The Tennessee Supreme Court held "under the totality of the circumstances . . . an objectively reasonable person" would not conclude that "entry onto [Christensen's] driveway was categorically barred" by posting "no trespassing" signs alone.⁴³ The Court noted the majority rule throughout the country is that some type of "barrier" is needed to clearly express revocation of the implied license held by police officers "attempting to conduct legitimate police business."⁴⁴ As one scholar recently noted, the analysis regarding a "no trespassing"

39. *Christensen*, 517 S.W.3d at 78; see *Katz v. United States*, 389 U.S. 347, 351–54 (1967) (holding that a reasonable expectation of privacy may trigger Fourth Amendment protections absent a physical intrusion); *State v. Munn*, 56 S.W.3d 486, 494 (Tenn. 2001) (stating the two-prong test of *Katz* as whether the defendant had a subjective expectation of privacy and whether that expectation is one society is willing to justify as reasonable). The Court's reasoning here was based on the same rationales put forth in analyzing the issue under the property-based approach.

40. See *Christensen*, 517 S.W.3d at 76 (noting a "no trespassing" sign makes explicit what the law already recognizes and that a reasonable person would not believe a sign alone altered such meaning).

41. *Id.*

42. *Id.* at 74; see also *United States v. Carloss*, 818 F.3d 988, 999 (10th Cir. 2016) (Tymkovich, C.J., concurring) (advocating for the court to use an objective test in determining whether the presence of "no trespassing" signs categorically barred entry).

43. *Christensen*, 517 S.W.3d at 75–76.

44. *Id.* at 75 n.9; see *United States v. Bearden*, 780 F.3d 887, 894 (8th Cir. 2015); *United States v. Hopper*, 58 F. App'x. 619, 623 (6th Cir. 2003); *State v. Smith*, 783 S.E.2d 504, 510 (N.C. Ct. App. 2016); *Jones v. State*, 943 A.2d 1, 13 (Md. Ct. Spec. App. 2008).

sign's sufficiency to revoke the implied license to enter turns on the "de facto requirement" of a physical barrier preventing entry coupled with a "no trespassing" sign.⁴⁵

Although the Tennessee Supreme Court's analysis sought to mirror the approach Chief Judge Tymkovich advocated for, Chief Judge Tymkovich envisioned a much deeper analysis into the totality of the circumstances than the Court employed here. In his concurrence in *Carloss*, Chief Judge Tymkovich advocated that under the totality of the circumstances the determination turns on many factors including whether "the home" is located on a "suburban residential street" or in a more rural area.⁴⁶ When analyzing the circumstances of the case, the Tennessee Supreme Court strayed away from the test it purported to use.⁴⁷ In finding that a reasonable person would not conclude that Christensen's "no trespassing" signs alone "categorically barred" entry under the circumstances, the Court focused on the absence of a physical barrier and the impact this absence had on a "reasonable" person's understanding of the "no trespassing" signs.⁴⁸ On this point, the Tennessee Supreme Court echoed the rationales of prior courts distinguishing the property interests protected by trespass law from the more narrow privacy interest the Fourth Amendment protects in justifying the meaning a reasonable person attaches to a "no trespassing" sign.⁴⁹ It is this reasoning—the analysis of the meaning a reasonable person attributes to a "no trespassing" sign—that does not mirror the totality of the circumstances test the Court sought to use. Furthermore, the

45. See Mayer, *supra* note 28, at 546 (highlighting that the totality of the circumstances really turns on whether the property has a sufficient barrier).

46. *United States v. Carloss*, 818 F.3d 988, 1000 (10th Cir. 2016) (Tymkovich, C.J., concurring). Chief Judge Tymkovich heavily emphasized that the location of the property in question is key under the totality of the circumstances in determining the meaning a reasonable person would attach to a "no trespassing" sign. See *id.*

47. See *Christensen*, 517 S.W.3d at 75–76 (failing to analyze the circumstances in the case and instead relying on common definitions of trespass and the absence of a barrier).

48. See *id.* at 76 (highlighting "the lack of a pathway to [Christensen's] house, and debris blocking any possible route from the driveway to the front porch," as the only analyzed circumstances of the property).

49. See *id.* at 75 (highlighting that trespass laws protect against "unwanted intruders, such as vandals, thieves, and squatters" while the Fourth Amendment "implicate[s] the privacy interests in 'persons, houses, papers, and effects.'" (quoting *United States v. Holmes*, 143 F. Supp. 3d 1252, 1264 (M.D. Fla. 2015))).

Court's opinion and rationale will likely not sit well with the vast majority of Tennesseans.

V. CRITIQUE

The Tennessee Supreme Court's analysis sought to answer one primary question: what would a reasonable person or objective officer believe the "no trespassing" sign meant under the circumstances?⁵⁰ Yet the Court's answer to this question, based on the circumstances provided, is not one grounded in what the reasonable person would attribute to the "no trespassing" sign. Looking at the facts of the case, the Court's inquiry should have focused on the totality of the circumstances presented by the "no trespassing" signs, Christensen's property, and altogether what this meant in the eyes of a neutral, reasonable observer. Instead, the Court grounded its analysis in the legal nuances of common law trespass juxtaposed against the complexities of the Fourth Amendment that the "reasonable person" is often not aware of. This anomaly concerning the standard of reasonableness used in Fourth Amendment analysis has been subject to much criticism by commentators, and the Tennessee Supreme Court's rationales regarding the reasonable person serve as a prime example of why critics feel the way they do.⁵¹

Christensen's "no trespassing" signs were not filled with ambiguous language,⁵² they were clearly posted at the entrance of his property;⁵³ and the property was not situated in an urban, suburban, or

50. See *id.* at 75 (highlighting the question asked as "under the totality of the circumstances, would an objectively reasonable person conclude that entry onto [Christensen's] driveway was categorically barred?").

51. See generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment from the Supreme Court*, 59 CASE W. RES. L. REV. 1 (2008) (highlighting that Fourth Amendment jurisprudence involving the reasonableness standard often results in complex opinions upholding conduct that is anything but reasonable).

52. See *State v. Hiebert*, 329 P.3d 1085, 1090 (Idaho Ct. App. 2014), for an example of a court finding that a "no trespassing" sign was ambiguous and, when not clearly posted, did not revoke the implied license, as compared with the sign in *Christensen*.

53. *Id.*

even populated area.⁵⁴ This type of inquiry was mandated by the analysis Chief Judge Tymkovich advocated for and was the test the Court sought to use because it directly contributes to the meaning a reasonable person would attribute to a “no trespassing” sign, and thus whether the person believed entry was categorically barred.⁵⁵ In analyzing the meaning a reasonable person would attribute to a “no trespassing” sign, the Tennessee Supreme Court significantly failed to recognize the differences between urban, suburban, and rural areas, and the meaning a reasonable person would attach to a “no trespassing” sign in each setting.⁵⁶

In areas that are highly populated, or situated in neighborhoods, it is a reasonable conclusion that a person would not believe a “no trespassing” sign alone barred permissive entry to go onto the homeowner’s property to speak with the homeowner. This is mainly because in such settings unannounced guests are very common. In fact, the Fourth Amendment jurisprudence in this area highlights visits by pizza deliverers, Girl Scouts, and mail carriers as common entrances exercised through the implied license.⁵⁷ Yet when that same sign is placed in a rural area, where unannounced guests are a rarity—or at least less expected—it is less reasonable to conclude that a person would attach the same meaning and understanding to such sign.⁵⁸ In

54. Christensen’s property is located on Beaver Creek Lane in Tipton County, Tennessee. See *Christensen*, 517 S.W.3d at 64. A simple search of this road reveals that Christensen’s property was located on a dead-end road, in a very rural area, and in an “unincorporated” portion of Tipton County, Tennessee. See Directions to Beaver Creek Lane, Tipton County, TN, GOOGLE MAPS, <http://maps.google.com> (follow “Directions” hyperlink; then search “Beaver Creek Lane, Tipton County, Tennessee”).

55. See *United States v. Carloss*, 818 F.3d 988, 999 (10th Cir. 2016) (Tymkovich, C.J., concurring) (advocating for his test to determine whether a reasonable person would conclude entry was not permitted).

56. See *Christensen*, 517 S.W.3d at 76 (noting the definition of “no trespassing” and what it means as opposed to what someone in a rural area would think it means).

57. See *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (highlighting that the use of the implied license is “generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters”).

58. See *Christensen*, 517 S.W.3d at 67 (recognizing that Tammy Atkins, a local resident of Tipton County, knew of Christensen’s property and his signs and was not allowed “to go on properties with ‘No Trespassing’ signs”). This directly shows

rural areas, where houses are not in close proximity to one another as in neighborhoods, there seems to be some heightened sense of privacy by the homeowner because of the location and the fact that casual visitors are not expected. Altogether, the Tennessee Supreme Court's rationale on this point seems to go against the meaning a reasonable person would attach to Christensen's sign under these specific circumstances.

Nevertheless, the Tennessee Supreme Court made it a point to emphasize that under the right circumstances it is possible for a "no trespassing" sign alone to sufficiently revoke the implied license.⁵⁹ Yet given the circumstances presented by this case and the Court's main rationales, it is hard to imagine a scenario where a "no trespassing" sign alone would be sufficient, especially since the Court failed to elaborate on what was missing besides the absence of a barrier.⁶⁰ The emphasis on the possibility that "no trespassing" signs alone may, under the right circumstances, be sufficient is likely because of the judicial preference for flexibility and the dislike for bright-line rules. But when it comes to the constitutional protections citizens should enjoy, courts need to provide clear guidance on when such protections are triggered and when they are not.

VI. CONCLUSION

The Tennessee Supreme Court's ruling is likely to create ambiguity for police officers on whether they may enter private property despite the presence of "no trespassing" signs, while also causing confusion for citizens in rural areas of the state who reasonably believe their "no trespassing" signs provide sufficient notice of their intent to

the meaning a reasonable person may attach to a "no trespassing" sign located in a rural setting. The fact that the Court downplayed this is significant, and the dissent makes a point to show the unreasonableness of the majority's belief regarding the understanding of a "no trespassing" sign. *See id.* at 79 (Lee, J., dissenting). *But see* Michel v. State, 961 P.2d 436, 437 (Alaska Ct. App. 1998) (finding "no trespassing" signs at the entrance of the defendant's property insufficient to revoke the implied license to enter despite the home not being visible from the public road and the driveway being 300 yards long); State v. Rigoulot, 846 P.2d 918, 920 (Idaho Ct. App. 1992) (holding defendant's "no trespassing" sign insufficient to exclude legitimate police business even though his property was located in rural mountains).

59. *Christensen*, 517 S.W.3d at 75 n.9.

60. *Id.* at 76–77.

prohibit entry for any reason. The Court's opinion is likely to be ambiguous to officers and citizens because the Court highlighted several times that it was not concluding a sign alone would always be insufficient. As the court in *Holmes* correctly highlighted, a "post hoc totality of the circumstances" approach—like the one used by the Tennessee Supreme Court—is insufficient: "property owner[s] and the police should know beforehand what measures are sufficient to revoke the implied license"; otherwise, there is a "danger that constitutional rights will be arbitrarily and inequitably enforced."⁶¹ Only time will tell if a sign alone will ever be sufficient in the eyes of the Tennessee courts, which heightens the risk and danger of constitutional rights being arbitrarily enforced, as warned in *Holmes*. It is clear that citizens have no clear guidance on what constitutes an express order to sufficiently revoke the implied license. Flexibility in the law is one thing, but when it comes to citizens' constitutional rights and protections, there needs to be ample guidance of when those rights will adequately protect the citizens of this nation.

The biggest take away from *State v. Christensen* is that homeowners should barricade their property with fences, a locked gate, and "no trespassing" signs at every possible location if they want to sufficiently revoke government agents' implied license to enter for knock-and-talk purposes—a point that the dissent doubts society must do to protect their "constitutional rights against warrantless searches."⁶² It does not go unrecognized that the Tennessee Supreme Court's holding is in line with the majority of jurisdictions that have decided this issue, and therefore likely correct. But the Court should have provided clearer guidance, with simplistic rationales on the reasonableness standard, for what a homeowner must do to sufficiently revoke the implied license without having to barricade their property, if that is what the Court meant. It is important for future courts not to lose sight of the rationale behind extending the implied license to police officers in that when officers exercise it they do "no more than any private citizen might do."⁶³ If a private citizen, or reasonable person, in the area or

61. *United States v. Holmes*, 143 F. Supp. 3d 1252, 1268 (M.D. Fla. 2015) (citing *Oliver v. United States*, 466 U.S. 170, 181 (1984)).

62. *Christensen*, 517 S.W.3d at 79 (Lee J., dissenting).

63. *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (citing *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

locale would conclude that entry onto private property is not permitted, a police officer's entry onto the same property should not be held as a reasonable one under the guise of legitimate police business when officers already have many tools at their disposal to get around the Fourth Amendment.