No. 02-371

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF PETITIONER

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

MAUREEN RILEY MATSEN
WILLIAM E. THRO
Deputy State Solicitors

CHRISTY A. MCCORMICK
A. CAMERON O'BRION
Assistant Attorneys General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (voice)
(804) 371-0200 (facsimile)

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. May a criminal defendant escape conviction by invoking the overbreadth doctrine even though (i) his own offense did not involve any expressive conduct, and (ii) his conduct was not proscribed by that portion of the government statute, regulation or policy he challenges as overbroad?

2. In the context of government's attempts to exclude some non-residents from a public housing complex, does the Constitution recognize a distinction between actions taken by government as landlord and actions taken by government as sovereign?

LIST OF PARTIES

The petitioner is the Commonwealth of Virginia. The respondent is Kevin Lamont Hicks, who was convicted for trespass, under Virginia Code § 18.2-119, for returning to the property of a public housing project after being notified in writing not to do so.

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BRIEF OF PETITIONER

The Commonwealth of Virginia respectfully petitions this Court to reverse the judgment of the Supreme Court of Virginia, which held that portions of the trespass policy of a public housing authority violate the First Amendment and, on this basis, vacated the conviction of a criminal trespasser even though he was not engaged in any expressive conduct.

OPINIONS BELOW

The Supreme Court of Virginia held that portions of the trespass policy of the Richmond Redevelopment and Housing Authority ("Housing Authority") are overbroad and, thus, unconstitutional. On this basis, it affirmed the judgment by which the Court of Appeals of Virginia, sitting *en banc*, reversed the trespass conviction of the respondent, Kevin Lamont Hicks. The decision by the Supreme Court of Virginia is published as *Virginia v. Hicks,* 563 S.E.2d 674 (Va. 2002), and is reprinted in the Joint Appendix at J.A. 152. The *en banc* opinion of the Court of Appeals of Virginia is published as *Hicks v. Virginia,* 548 S.E.2d 249 (Va. App. 2001). It is reprinted at J.A. 121. The three-judge panel opinion of the Court of Appeals of Virginia, affirming the conviction of Hicks, is published as *Hicks v. Virginia,* 535 S.E.2d 678 (Va. App. 2000). It is reprinted at J.A. 98. The ruling whereby the Circuit Court of the City of Richmond denied Hicks' motion to dismiss is found at J.A. 48.

JURISDICTION

The opinion of the Supreme Court of Virginia was entered on June 7, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. A petition for writ of certiorari was filed on September 5, 2002. The writ of certiorari was granted on January 24, 2003.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . . . "

2. The Fourteenth Amendment provides that " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

3. The trespass statute implicated here, Virginia Code § 18.2-119, provides in pertinent part:

> Trespass after having been forbidden to do so; penalties. – If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons . . . on such lands, buildings, premises or portion of area thereof at a place or places where it or they may be reasonably seen . . . he shall be guilty of a Class 1 misdemeanor.

4. A copy of the ordinance by which the City of Richmond closed the streets inside the Whitcomb Court housing project and transferred ownership to the Housing Authority is found at J.A. 75.

5. The Housing Authority trespass policy, which is applicable to Whitcomb Court, provides in pertinent part:

> Richmond Redevelopment and Housing Authority hereby authorizes each and every sworn officer of the Richmond Police Department to enforce the trespass laws of the Commonwealth of Virginia as stated in Virginia Code § 18.2-119 upon Richmond Redevelopment and Housing Authority public housing property. Said property is that property located at and commonly known as . . . Whitcomb Court . . . [other Housing Authority properties are also listed].
>
> Richmond Redevelopment and Housing Authority further authorizes each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property.

J.A. 84.

STATEMENT OF THE CASE

"An open-air drug market. . . . "

Before the events giving rise to this case, this disturbing epithet fairly described the area known as Whitcomb Court. J.A. 45. A public housing project in Richmond, Virginia, Whitcomb Court suffered from the same crime epidemic that has plagued many housing projects across the country. The root of the problem was not the people living there, but those who came from the outside.[1]

Determined to provide greater protection to the residents of Whitcomb Court, the City of Richmond passed an ordinance in June of 1997, declaring that the streets *inside* the housing project were "no longer needed for the public convenience." The ordinance not only "closed" these streets to "public use and travel" but "abandoned" them as city streets. J.A. 76, 79 (street plan). The City then deeded the streets to the Housing Authority, the government entity that owns and operates this housing project.[2] J.A.

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[1] As noted by the state supreme court, "[t]he majority of persons who had been arrested for drug crimes at the Whitcomb Court housing development were individuals who did not reside there." J.A. 154.

[2] The purposes of this action were explained in a brochure provided by the Housing Authority to residents of Whitcomb Court:

> To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents.
>
> To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity.
>
> To provide an opportunity for residents to develop safety initiatives in their community, such as resident patrols, social security number property identification, neighborhood watch, etc.

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81. The sidewalks that run adjacent to these streets were conveyed as part of the same transaction. The closed streets were those with no use other than to provide entrance and egress to the residential units on the property. None are through streets that continue beyond the Housing Authority property to other parts of the city. J.A. 79-80 (street plan).

The deed required the Housing Authority to give notice that it was now the owner, by "mak[ing] provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets and that they are in fact private streets." J.A. 81, 82. Accordingly, the Housing Authority erected signs every 100 feet along the streets of Whitcomb Court and affixed them to each apartment building. J.A. 55-56, 154-55. Measuring one foot wide and one-and-a-half to two feet tall, the clearly visible red and white signs gave this warning:

NO TRESPASSING

PRIVATE PROPERTY

YOU ARE NOW ENTERING
PRIVATE PROPERTY AND
STREETS OWNED BY RRHA.

UNAUTHORIZED PERSONS
WILL BE SUBJECT TO
ARREST AND PROSECUTION.

To hold households who knowingly harbor persons who engage in criminal activity accountable.

J.A. 87.

UNAUTHORIZED
VEHICLES WILL BE TOWED
AT OWNERS EXPENSE.

As the landlord of Whitcomb Court – and owner of the newly privatized streets and sidewalks – the Housing Authority then implemented a written policy aimed at preventing trespass on the premises. This written policy embodies two rules. The first rule (herein, "the Legitimate Purpose rule") states that persons who wish to visit Whitcomb Court must have a legitimate social or business purpose in order to do so.[3] Those who do not have a legitimate purpose are not charged with criminal trespass based on the first incident, but are told to leave and may be barred from returning. J.A. 23, 26-27, 84.

The second rule (herein, "the Trespass-After-Warning rule") states that an individual who has received notice that he is barred from Whitcomb Court, and who returns without permission, will be charged with criminal trespass.[4] Individuals who have been barred may seek permission to return by applying in writing to the Housing

[3] The pertinent text of the policy reads: "Richmond Redevelopment and Housing Authority further authorizes each and every Richmond Police Department officer to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate *a legitimate business or social purpose for being on the premises*. Such notice shall forbid the person from returning to the property." J.A. 84 (emphasis added).

[4] The pertinent text of the policy reads: "Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, *having been duly notified*, either stays upon or returns to Richmond Redevelopment and Housing Authority property." J.A. 84 (emphasis added).

Authority's director of housing operations. J.A. 34. In the absence of such permission, such individuals are prohibited from returning for *any* purpose. Residents remain free to invite visitors so long as the invitee is not someone who has been barred. J.A. 22, 87-88.

In addition to these two written rules, Gloria Rogers, the housing manager at Whitcomb Court, described an *unwritten addendum* that she followed in implementing the Legitimate Purpose rule. Under this unwritten addendum, visitors who wish to engage in leafleting must obtain her permission before doing so.[5] The obvious value of such an approach is that it prevents the written rule from being circumvented by those using leaflets as a ruse to gain access to the property for illegitimate purposes; however, there is no evidence that the managers at other Housing Authority properties follow a similar approach. As Ms. Rogers explained in her testimony, she has never turned down anyone wanting to pass out leaflets. She also explained that, if she saw something she was not comfortable in approving, she would refer it to her supervisor. J.A. 38. There is no evidence that her supervisor ever turned down anyone. There is likewise no evidence that either Ms. Rogers or her supervisor imposed any condition on

[5] Ms. Rogers also testified that non-residents wishing to hold meetings on the premises also must obtain permission in advance. J.A. 37. She said that such requests were sometimes referred to a "community council." J.A. 37. The meetings to which Ms. Rogers referred were apparently gatherings held in the Whitcomb Court common space. In any event, it was leafleting – not meetings – that the state supreme court thought was improperly subject to Ms. Rogers' discretion. *See* J.A. 165-166.

approval, or that they failed to give prompt consideration to any request.

Crucial to this case is the Virginia criminal trespass statute, Virginia Code § 18.2-119. A broad statute of general application, this law makes it a crime for "any person without authority of law [to go] . . . upon the lands . . . or premises of another . . . after having been forbidden to do so, either orally or in writing, by the owner . . . or other person lawfully in charge thereof."

The respondent, Hicks, has a record of criminal misconduct at Whitcomb Court reaching back a year before the offense that is the subject of this case. Twice in 1998 – once on February 10 and, again, on June 26 – he was convicted of trespassing at the housing project. In addition, on April 27, 1998, he was convicted of damaging property at Whitcomb Court. J.A. 99, 124-125. While the property damage charge was pending, the Housing Authority gave Hicks written notice barring him from the premises, thereby documenting what his previous convictions should have already taught him: that his return to Whitcomb Court would subject him to criminal liability. The notice was hand-delivered to him outside the courtroom on April 14, 1998. J.A. 63, 90. There is no question about his receipt of notice. Hicks signed an acknowledgment in the presence of a police officer. J.A. 23, 63.[6]

[6] The letter provided, in part: "This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. *If you are seen or caught on the premises, you will be subject to arrest by the police.*" J.A. 90 (emphasis added).

While Hicks twice asked for permission to return, his requests were oral and were made only to Ms. Rogers, the Whitcomb Court housing manager. J.A. 39-40. On both occasions, she turned him down, thereby leaving in place the notice not to return and the expectation of arrest if he should do so. There is no evidence that Hicks ever availed himself of the written procedures by which such a request might be properly considered by the Housing Authority official charged with such decisions. Nor did he otherwise seek to challenge his status as *persona non grata*. Instead, in direct defiance of the notice, he simply went back to the property.

In January of 1998, a Richmond police officer who knew Hicks – and knew he was barred – saw him walking along the sidewalk adjacent to Bethel Street, one of the streets closed to public traffic and conveyed to the Housing Authority. Thus, he was *inside* Whitcomb Court, on property owned by the Housing Authority, where he had been told not to return.[7] Pursuant to the Trespass-After-Warning provision of the written policy, the officer gave Hicks a summons for trespass.[8] J.A. 3, 55.

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[7] The fact that Hicks was *inside* of Whitcomb Court is shown by the opinion of the state supreme court, which noted: "Bethel Street is one of the streets that the City conveyed to the Housing Authority and that *street is located entirely within Whitcomb Court*." J.A. 156 (emphasis added). The fact is further demonstrated by the street plan attached to the ordinance and deed. J.A. 79. As this plan shows, Bethel Street begins and ends within Whitcomb Court. Full-size copies of the street plan have been lodged with the Court.

[8] When confronted by the officer, Hicks claimed that he was there "bringing pampers [*i.e.* diapers] to his baby." J.A. 57. Yet, there is no evidence that the officer saw any diapers. No witnesses testified that Hicks delivered any diapers, or that he had been invited on the

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Hicks was tried and convicted of criminal trespass in the General District Court of the City of Richmond on April 12, 1999.[9] He appealed this conviction to the Circuit Court of the City of Richmond where, pursuant to Virginia law, he received a trial *de novo*. Va. Code §§ 16.1-132, 17.1-513. Before his trial in the circuit court, Hicks moved to dismiss the charge on the grounds that the Legitimate Purpose rule in the written policy violated the federal and state constitutions, listing as his federal constitutional claims the First and Fourteenth Amendments. Hicks challenged the Legitimate Purpose rule on three grounds. First, in his written motion to dismiss, he asserted that he had a constitutional right to be present on the property regardless of his purpose. J.A. 6, ¶¶ 13-14.[10] Second, also in his written motion to dismiss, he contended that he had a constitutional right to visit his friends and relatives who were residents of Whitcomb Court. J.A. 6, ¶¶ 13-14. Third, at the hearing, he attacked the unwritten addendum that his counsel discovered through the in-court examination of

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premises, or even that he was welcome there. In short, there is no evidence corroborating his unsworn claim that he was "bringing pampers" or suggesting that he had any other reason to be on the premises. Moreover, there is nothing in the trespass policy that would allow such an excuse – even if true – to override a notice not to return.

[9] In Virginia, a general district court is a court not of record in which misdemeanors are tried in bench trials. Va. Code § 16.1-123-1.

[10] In his written motion, Hicks asserts violations of the "fundamental rights to freedom of association, speech, and assembly," J.A. 6, ¶ 13, as well as violations of the "Due Process, Equal Protection and Privileges [or] Immunities Clauses of the Fourteenth Amendment." J.A. 6, ¶ 14. Basically, Hicks is arguing that he has a right to be present on the sidewalks and a right to visit with his friends and relatives who are residents of Whitcomb Court.

Ms. Rogers, the Whitcomb Court housing manager. Notably, he did *not* challenge the decision by the Housing Authority to bar him from Whitcomb Court. The circuit court denied the motion to dismiss without elaboration. J.A. 48. On July 29, 1999, a bench trial was held and Hicks was again convicted of trespassing. He was sentenced to 12 months in jail and a $1,000 fine, both of which were suspended.[11] J.A. 68.

Hicks appealed his conviction to the Court of Appeals of Virginia, where he repeated his challenges to the Legitimate Purpose rule. Hicks argued: (1) that he had a constitutional right to be present at Whitcomb Court, (2) that he had a constitutional right to visit his friends and relatives who were residents of Whitcomb Court, and (3) that Ms. Rogers' unwritten addendum was unconstitutional. A divided three-judge panel of the Court of Appeals rejected all of his constitutional claims and affirmed the decision of the trial court. J.A. 98. Hicks then sought and obtained a rehearing *en banc* by the Court of Appeals, which, in a 6-5 decision, agreed with Hicks that he had a constitutional right to be present at Whitcomb Court. J.A. 121. Specifically, the *en banc* court held that, notwithstanding the ordinance and deed, the streets in Whitcomb Court remained a public forum, and that the Housing Authority's efforts to regulate speech in that forum failed

[11] Based on the same evidence, Hicks was also found to have violated the terms of the suspended sentences imposed as a result of his previous three convictions.

strict scrutiny and thus violated the First Amendment. The trespass conviction was overturned.[12]

The Commonwealth then sought and obtained review by the Supreme Court of Virginia, which affirmed the *en banc* decision of the Court of Appeals, but on completely different grounds. The state supreme court refrained from deciding whether Hicks had a constitutional right to be present at Whitcomb Court. J.A. 166-67. Instead, it held that Ms. Rogers' unwritten addendum to the Legitimate Purpose rule was unconstitutional and, on that basis, vacated Hicks' conviction.[13] The court reached this result despite the fact that: (1) there was no evidence that Hicks was ever engaged in – or ever sought to engage in – any expressive conduct at Whitcomb Court, and (2) Hicks was prosecuted under the criminal trespass statute because he violated the barment notice, not the Legitimate Purpose rule or Ms. Rogers' addendum. Nevertheless, the Supreme Court of Virginia held that – under this Court's over-breadth doctrine – Hicks was entitled to complain that the Legitimate Purpose rule was unconstitutional and that he was entitled to attack Ms. Rogers' unwritten addendum as a means of demonstrating the alleged invalidity. In so ruling, the court rejected the Commonwealth's argument that Hicks was not entitled to challenge the constitutional validity of the Housing Authority's policies in the

[12] The trial court order revoking suspension of his three previous sentences was not set aside. Instead, the Court of Appeals remanded the issue to the trial court to reconsider the revocation in light of its opinion. J.A. 136 n.4.

[13] The grounds on which the Court of Appeals had ruled for Hicks were expressly vacated. J.A. 166-67. Hicks' state law claims were not addressed.

prosecution for trespass. It also ignored the decisions of other state and federal courts upholding the constitutionality of trespass-after-warning statutes.

Two members of the Supreme Court of Virginia dissented, noting "the majority does not separate the question of standing from its substantive First Amendment analysis." J.A. 168. The dissenting Justices found that Hicks lacked standing to assert a facial challenge to the trespass policy under the overbreadth doctrine, that he may only challenge the policy as it was applied to him, and that, as so applied, it was constitutional. The dissent also relied on this Court's decision in *Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002), and explicitly noted the special concerns that arise when government acts as landlord of a public housing project:

> The policy of banning individuals who are not residents or employees of the Authority, or who cannot demonstrate a legitimate business or social purpose for coming onto the premises, is rationally related to, and advances, the legitimate governmental goal of preventing crime in public housing. Charging individuals with trespass when they enter upon the Authority's property after having been banned, as in the case of the defendant, also advances that goal. It must be remembered that the defendant is challenging his conviction for trespass in this appeal, not his barment from the Authority's property.

J.A. 176.

The Commonwealth then petitioned for certiorari, asking this Court (1) to establish a bright line limiting the use of overbreadth standing, and (2) to recognize a constitutional distinction between government acting as

landlord and government acting as sovereign, a distinction that is necessary to protect residents of public housing from the criminals under whose sway those at Whitcomb Court and elsewhere often have been forced to live. Certiorari was granted.

SUMMARY OF ARGUMENT

First, this Court should announce limits on overbreadth standing. The state supreme court's decision demonstrates the need for such limits. Although this Court created the overbreadth doctrine as an exception to the general rules of standing, it has never expressly articulated a bright line beyond which the overbreadth rationale is so attenuated that a criminal defendant will not be able to avail himself of the doctrine. Without a clear outer limit, the state supreme court went astray in a radical expansion of the overbreadth doctrine. Specifically, Hicks was allowed to bring an overbreadth challenge even though (1) he was not engaged in expressive activity, and (2) his conduct was not prohibited by that portion of the policy that he challenged as overbroad. Such an expansion of the overbreadth doctrine leads to extreme results and will frustrate the ability of government agencies to prevent trespass on their premises.

This Court should adopt a bright-line rule limiting the overbreadth doctrine to those situations where: (1) the defendant was engaged in expressive conduct, and (2) his conduct was prohibited by that portion of the statute, regulation, or policy that the defendant challenges. Adopting such a limitation reflects the traditional principles of Article III standing and is consistent with this Court's

previous overbreadth decisions. The adoption of either part of the Commonwealth's proposed bright-line rule will require reversal of the decision below.

Second, the Constitution recognizes a distinction between government acting as landlord and government acting as sovereign. As landlord, government may take measures that it could not take as sovereign. The need to protect the safety of public housing tenants justifies such a distinction. In *Rucker*, this Court recognized such a distinction, though without defining its contours. Such a distinction does not imperil constitutional rights.

The distinction between sovereign and landlord provides additional reasons why the decision below must be reversed. The unwritten addendum to the Legitimate Purpose rule is constitutional. This is so because (1) the overbreadth doctrine may not be used to challenge a policy adopted by government as landlord, and (2) even if the overbreadth doctrine is applicable to the policy at issue here, the alleged overbreadth is neither real nor substantial. Moreover, there is no constitutional right to be present on the sidewalks or streets within Whitcomb Court, and freedom of association does not include visiting residents after being barred.

ARGUMENT

I. THE COURT SHOULD PLACE LIMITS ON THE USE OF OVERBREADTH STANDING.

A. Overview of Overbreadth Standing.

Under the traditional rule, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber,* 458 U.S. 747, 767 (1982) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973)). The rule is based on three fundamental principles. First, "constitutional rights are personal and may not be asserted vicariously." *Broadrick,* 413 U.S. at 610 (citing *McGowan v. Maryland,* 366 U.S. 420, 429-30 (1961)); *see also Ferber,* 458 U.S. at 767. Second, the rule reflects "prudential limitations on constitutional adjudication." *Ferber,* 458 U.S. at 767. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Id.* at 768 (internal quotation marks and citations omitted). Third, the rule is "grounded in Art. III limits on the jurisdiction of federal courts to actual cases and controversies." *Id.* at 768 n.20.

Notwithstanding the first two principles – and acting within the limits imposed by the third – this Court created the overbreadth doctrine in order to expand the ability of courts to protect the First Amendment, a constitutional principle of paramount importance:

> [T]he Court has altered its traditional rules of standing to permit – in the First Amendment area – "attacks on overly broad statutes with no requirement that the person making the attack

> demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick, 413 U.S. at 612 (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965)). In other words, when First Amendment values are implicated, the constitutional barriers to standing are lower. Under the overbreadth doctrine, a criminal defendant may sometimes – though not always – escape conviction by showing that the statute under which he is prosecuted unconstitutionally restricts the expression of third parties.[14] *See, e.g., Schaumburg v.*

[14] For a variety of reasons, individual members of this Court have expressed serious doubts about the legitimacy of the overbreadth doctrine. *See Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 976 (1984) (Rehnquist, J., joined by Burger, C.J., Powell, and O'Connor, J.J., dissenting) ("Musings as to possible applications of a statute to third parties in hypothetical situations may be fitting for the classroom and the statehouse, but they are neither wise nor permissible in the courtroom."); *Ferber,* 458 U.S. at 780-781 (Stevens, J., concurring in the judgment) ("When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication."); *Lewis v. New Orleans,* 415 U.S. 130, 136-37 (1974) (Blackmun, J., joined by Burger, C.J., and Rehnquist, J., dissenting) (noting that the overbreadth doctrine is "being invoked indiscriminately without regard to the nature of the speech in question, the possible effect the statute or ordinance has upon such speech, the importance of the speech in relation to the exposition

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Citizens for a Better Env't, 444 U.S. 620, 634 (1980) (noting that, in First Amendment context, "courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others . . . ").

Although this Court has stepped beyond traditional rules of standing for the sake of the First Amendment, it has nonetheless reaffirmed that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick,* 413 U.S. at 610-11 (citing *Younger v. Harris,* 401 U.S. 37, 52 (1971)). Thus, *Broadrick* did not go so far as to say that an allegedly unconstitutional provision may be challenged by *anyone* at all. This Court still requires a sufficient nexus between a litigant and the statute he attacks. Without such a nexus, the litigant has no standing. Under *Broadrick,* how close the nexus must be in order to provide standing varies, depending on the circumstances. The ability of a criminal defendant to invoke the overbreadth doctrine "*attenuates* as the otherwise unprotected behavior that [the First Amendment] forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws. . . ." *Broadrick,* 413 U.S. at 615 (emphasis added). In other words, this Court has left no doubt that there are limits on overbreadth standing.

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of ideas, or the purported or asserted community interest in preventing that speech."). Even so, the Commonwealth does not ask the Court to abolish the overbreadth doctrine, only to place meaningful limits on its use.

B. The Decision Below Represents a Radical Expansion of the Overbreadth Doctrine and Leads to Extreme Results.

Although this Court has made it clear that overbreadth standing operates within a fairly confined area, the Supreme Court of Virginia treated the doctrine as if it were virtually unbounded. Its ruling expands the doctrine beyond anything contemplated by this Court's decisions and leads to extreme results.

1. The State Supreme Court's Decision Radically Expands the Overbreadth Doctrine.

The decision below expands the overbreadth doctrine in two fundamental ways. First, the state supreme court allowed Hicks to raise an overbreadth challenge even though he was not engaged in *any* expressive activity at the time of his offense.[15] Moreover, there is nothing to suggest that expressive activity was involved in his barment from Whitcomb Court, nor is there any suggestion that his previous convictions for misconduct at Whitcomb Court – two for trespass and one for damaging property – were related to any expressive activity. Indeed, there is no evidence that he was *ever* involved in any expressive activity at Whitcomb Court. Hicks is simply a common trespasser and an incorrigible one.

Second, the state supreme court allowed Hicks to bring an overbreadth challenge against a Housing

[15] Indeed, Hicks did not even *claim* to be involved in any expressive activity, but told the police officer that he was delivering diapers.

Authority rule that was completely different from the one he violated – and separate from the criminal statute under which he was prosecuted. Hicks prevailed on that challenge, not based on the face of the challenged rule, but on the unwritten addendum. In order to understand this second aspect of the decision below, it is necessary to bear in mind the nature of the trespass policy – and statute – at issue. The Housing Authority's written policy embodies two rules: (1) the Legitimate Purpose rule, which says that persons who wish to visit Whitcomb Court must have a legitimate social or business purpose in order to do so. *Supra* at 6, n.3; (2) the Trespass-After-Warning rule, which says that an individual who has received notice that he is barred from Whitcomb Court, and who returns without permission, will be charged with criminal trespass. *Supra* at 6, n.4. In addition to these two written rules, there is the unwritten addendum implemented by Ms. Rogers, the housing manager at Whitcomb Court, which requires visitors who wish to engage in leafleting to obtain her permission before doing so. *Supra* at 7. Finally, there is the criminal trespass statue, Virginia Code § 18.2-119, which is a statute of general application, existing separate and apart from policies of the Housing Authority.

Hicks was not convicted because he violated the Legitimate Purpose rule nor its unwritten addendum. That is to say, he was not convicted because his stated purpose – "bringing pampers" – was adjudged illegitimate, nor was he convicted because he sought to engage in leafleting without obtaining permission under Ms. Rogers' unwritten addendum. He was convicted of criminal trespass under § 18.2-119 because he was found on the

premises of Whitcomb Court after being informed, repeatedly, that he was not to return.[16]

Although Hicks violated the Trespass-After-Warning rule – and the criminal trespass statute – the state supreme court believed the overbreadth doctrine gave him standing to challenge the Legitimate Purpose rule. Concluding that Ms. Rogers' unwritten addendum was unconstitutional, it struck down the entire trespass policy – not just the problematic addendum. Having thus struck down the policy, the state supreme court then allowed Hicks to escape conviction for criminal trespass even though the statute he violated was left undisturbed.

In sum, it was only by the state supreme court's twofold expansion of the overbreadth doctrine that Hicks was able to prevail. He was not engaged in any expressive activity, and his own activity was not governed by the rule he challenged. Yet, he was still able to escape conviction for a crime for which he was clearly guilty. Such a result has no precedent in this Court's jurisprudence and, if adopted, would lead to extreme results.

[16] Indeed, the right of the Housing Authority to tell Hicks not to return – and to prosecute him if he does return – does not depend on there being a pre-existing formal policy governing access to the premises. *See Adderley v. Florida*, 385 U.S. 39 (1966) (upholding trespass conviction of protestors refusing to leave premises of county jail where their arrest occurred without benefit of any formal access policy).

2. The State Supreme Court's Decision Will Lead to Extreme Results.

The state supreme court's two-fold expansion of the overbreadth doctrine opens the door to extreme results. If adopted by this Court, it would effectively prevent any government agency from protecting its property against trespass – and related threats – unless the agency could demonstrate a "speech policy" that is constitutionally pristine.

Each of the two ways that the court expanded the doctrine will generate its own set of extreme results. An example of each will suffice to illustrate the magnitude of the problem. First, a state university might reasonably prohibit non-students from being present in a women's dormitory after a certain hour without permission from the dorm counselor, and post signs warning that violators of the rule will be prosecuted. A vagrant is found lurking in the dormitory late at night and is charged with trespassing. He is not there to pass out leaflets, or to engage in any other activity protected by the First Amendment. Yet, under the state supreme court's view of overbreadth, this trespasser could escape conviction simply by showing that the dorm counselor did not have a constitutionally acceptable set of standards by which she granted or denied permission to non-students to engage in after-hours leafleting. By allowing those not engaged in expressive activity to raise a First Amendment challenge, the state supreme court invites precisely such an extreme result.

Second, the decision below goes even further in that it allows a trespasser to escape conviction by challenging a rule not implicated by his own conduct. Here, too, the

extreme results are easily foreseen. A municipality operating a baseball stadium might promulgate a set of rules governing spectator conduct and provide that failure to comply would result in being expelled from the stadium. One rule – surely constitutional – prohibits fighting and drunkenness. Another rule – surely *un*constitutional – prohibits fans from displaying signs critical of the home team.[17] Under the state supreme court's approach, a drunken and belligerent spectator who refused to leave could escape conviction for trespass by challenging the sign restriction, even though he never sought to display any sign. This Court ought not countenance such a result. The trespasser who has been barred should not be allowed to escape conviction by challenging rules not implicated by his own conduct.

It is, of course, not just state universities or baseball stadiums where the ability to ban trespassers would be undermined by the state supreme court's two-fold expansion of overbreadth standing. Public schools, military bases, courts, post offices and government property of every sort would also be affected. Government certainly should be encouraged to use care in drafting policies that seek to regulate expressive activities, *see Board of Regents of the Univ. of Wis. v. Southworth,* 529 U.S. 217, 233 (2000), but government also must have the authority to exclude unauthorized persons from government property

[17] Such a scenario is not far-fetched. *See, e.g., Aubrey v. Cincinnati Reds*, 841 F. Supp. 229 (S.D. Ohio. 1993); *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100 (S.D. Ohio 1993) (describing constitutionally problematic sign regulations at the former Riverfront Stadium, home of the Cincinnati Reds).

that is not open to the general public. "Government, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985) (internal quotation marks and citations omitted). The state supreme court's expansion of overbreadth standing effectively conditions the right to enforce trespass laws on absolute compliance with the complex nuances of First Amendment law in all situations that may arise on the premises. Such a linkage has no basis in the Constitution's text or this Court's jurisprudence.[18]

C. The Overbreadth Doctrine Should Be Limited to Cases Where the Challenger Was Engaged in Expressive Conduct and Where His Conduct Was Prohibited by the Statute, Regulation, or Policy Challenged.

This Court's previous overbreadth decisions do not expressly establish a line beyond which the overbreadth

[18] The two examples used by the Commonwealth deal with the expanded use of overbreadth by criminal defendants. However, overbreadth claims often are brought by civil plaintiffs who seek to enjoin a statute regulating expressive activities in which they desire to engage. In affording litigants overbreadth standing, this Court's decisions have not distinguished between criminal defendants and civil plaintiffs. Thus, if criminal defendants need not engage in expressive conduct in order to raise an overbreadth challenge, then it is difficult to see how such a requirement could be imposed on civil plaintiffs. The result would be that *anyone* could challenge *any* statute regulating speech, even where that statute has no relevance for the plaintiff other than offending his notions of sound public policy.

rationale is clearly so attenuated that the criminal defendant may not avail himself of the doctrine. It is the lack of a bright line that allowed the state supreme court to go astray in the case at bar. In order to correct this error – and prevent similar errors by other courts – this Court should now mark an outer boundary beyond which the overbreadth doctrine does not apply.[19]

The bright line sought by the Commonwealth is simply this: before a criminal defendant may be allowed to escape conviction by vindicating the First Amendment rights of others, he must at least show (1) that *his own* conduct involved some sort of expressive activity, and (2) that his conduct falls within the particular prohibition he challenges as overbroad. Where he cannot make such a showing, the traditional rules of standing should apply. Such a bright line would reflect Article III standing principles and would help to reconcile the traditional rule with the overbreadth exception. The proposed bright line is fully consistent with this Court's previous pronouncements on overbreadth. Adoption of such a bright line would not break new ground; it would merely tend to ground that has already been plowed.

[19] This is not to say that all cases *within* the outer boundary must qualify for overbreadth standing. The Court may prefer to address the interstices in future cases. What is important here is for the Court to establish a boundary beyond which overbreadth standing is clearly unavailable.

1. The Proposed Bright-Line Rule Reflects Traditional Principles of Article III Standing.

There are three general principles that underlie traditional Article III standing. *See Ferber*, 458 U.S. at 767-68; *supra* at 16. Although the overbreadth doctrine has limited the influence of these principles, it has not repudiated them. The Commonwealth's proposed bright-line rule respects those principles while preserving the availability of the overbreadth doctrine in protection of the First Amendment.

In the overbreadth context, the traditional rule that constitutional rights may not be asserted vicariously requires that there must be a meaningful nexus between a party's conduct and the free speech rights he seeks to vindicate. The proposed rule would assure such nexus by requiring the challenger to be engaged in *some* form of expressive conduct and by requiring his conduct to be prohibited by the statute, regulation or policy he challenges. Absent such a rule, it is difficult to see where a principled line could be drawn. Indeed, without such a line, the principle that constitutional rights may not be asserted vicariously would be wholly discarded.

Second, the proposed rule reflects the principle of "prudential limitations on constitutional adjudication." *Ferber*, 458 U.S. at 767. This Court does not "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Id.* at 768 (internal quotation marks and citations omitted). Thus, before a statute will be invalidated for overbreadth, the Court must conclude that overbreadth "must not only be real, but substantial as well, judged in

relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Making such an assessment involves a comparison between the legitimate and illegitimate applications of the statute in question. This can be difficult enough in the classic overbreadth challenge where the challenger's own conduct involves expression and where he challenges a statute prohibiting that conduct. But where, as here, a court has before it *no* expressive activity by the challenger, and where he attacks a provision *different* from the one regulating his conduct, there are even fewer facts on which to base the necessary judicial balancing. Analysis dissolves into pure speculation. By contrast, the proposed rule would limit overbreadth standing in a way that recognizes the relevant prudential considerations and thereby promotes sound judicial decision-making.

Finally, the proposed rule reflects the principle, embodied in the text of Article III, that there be an "actual case or controversy." Neither this Court nor the lower federal courts issue advisory opinions on the constitutionality of a statute, regulation or policy. *See Broadrick,* 413 U.S. at 611. Nor do the state courts do so in carrying out their duty to apply federal law. Rather, any judicial pronouncement on constitutionality requires that a party be subject to the application – or at least the potential application – of the statute, regulation, or policy he challenges. *See Younger*, 401 U.S. at 52 (federal courts should not "survey the statute books and pass judgment on laws before the courts are called upon to enforce them."). In the typical overbreadth case, this requirement is satisfied by the fact that the party making the challenge has engaged – or seeks to engage – in expressive conduct that is prohibited by the provision he attacks. *See Ferber*, 458 U.S. at

768 n.20. However, where, as here, the defendant's conduct is not expressive – and does not violate the policy that he seeks to challenge – there is no case or controversy. Allowing a challenge in such a situation would convert the judiciary into the sort of "roving commissions" this Court has scorned as alien to our constitutional system. *Broadrick*, 413 U.S. at 611.

2. The Proposed Bright-Line Rule Is Consistent with This Court's Previous Overbreadth Decisions.

Both elements of the Commonwealth's proposed bright-line rule are consistent with this Court's previous overbreadth decisions. This consistency is reflected in three ways.

First, language in the seminal overbreadth cases – *Dombrowski* and *Broadrick* – signals an intention that the overbreadth doctrine be limited to parties who are engaged in expressive conduct. As *Broadrick* said, "the Court has altered its traditional rules of standing to permit – in the First Amendment area – 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with *the requisite narrow specificity*.'" 413 U.S. at 612 (emphasis added) (quoting *Dombrowski*, 380 U.S. at 486). Strongly implied is the idea that the conduct of the challenger be *expressive* conduct, for it is in the area of expressive conduct – not conduct generally – that "narrow specificity" is required. *See, e.g., Broadrick*, 413 U.S. at 611 ("[S]tatutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn. . . . "); *Shelton v. Tucker*, 364

U.S. 479, 488 n.8 (1960) (noting that, in areas not involving fundamental personal liberties, "more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose.") It is not necessary, of course, that the expressive conduct be protected by the First Amendment, but it must, at least, be expressive.

Second, in actual practice, this Court's recognition of overbreadth standing has been limited to cases where the challenger was engaged – or sought to engage – in some sort of expressive conduct. This is true in all six overbreadth cases cited by the Supreme Court of Virginia.[20] It is also true in other cases where this Court sustained overbreadth challenges.[21] Thus, this Court's jurisprudence

[20] *See Los Angeles Police Dep't v. United Reporting Publ'g Corp.,* 528 U.S. 32 (1999) (upholding statute regulating *publisher's* access to arrestees' addresses held by police); *Ferber* (upholding conviction of *bookseller* who sold films depicting sexual activities of young boys in violation of statute); *Broadrick* (upholding statute limiting *partisan political activity* by state employees); *Gooding v. Wilson*, 405 U.S. 518 (1972); (affirming habeas relief for *war protestor* convicted of using opprobrious words and abusive language tending to cause breach of the peace, based on overbreadth of statute); *Dombrowski* (allowing *civil rights organizations* to bring suit to enjoin prosecution under subversive activities statute); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (overturning conviction of *picketer* under statute found to be overbroad).

[21] *See, e.g., Houston v. Hill,* 482 U.S. 451 (1987) (striking down a statute prohibiting interruption of police officer in performance of his duties; criminal defendant shouted at police officers); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569 (1987) (striking down regulation banning "all First Amendment activities" at Los Angeles airport; plaintiff was seeking to distribute religious literature); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (holding invalid ordinance regulating solicitation of contributions; plaintiff was denied permit to solicit contributions); *Secretary of State of Md. v. Joseph H. Munson Co*., 467 U.S. 947 (1984)

(Continued on following page)

consistently – if implicitly – reflects the first element of the Commonwealth's proposed bright-line rule.[22] Likewise, the Commonwealth's research reveals no case in which a criminal defendant was permitted to raise an overbreadth challenge when his own conduct did not implicate a statute, regulation or policy being challenged. Thus, the second element of the proposed bright-line rule is likewise consistent with this Court's jurisprudence. In short, adoption of the proposed bright-line rule would not cast doubt on the result of any case previously decided by this Court.

Third, the proposed bright-line rule is in keeping with this Court's history of treating overbreadth as "strong medicine" to be employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. It is also consistent with the Court's observation that "[o]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be

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(striking down restrictions on expenditures charities may devote to solicitation; plaintiff was fundraising corporation); *Schard v. Mount Ephraim*, 452 U.S. 61 (1981) (reversing conviction of adult bookstore owner for violation of statute banning all live entertainment; criminal defendant operated booth that displayed live nude dancers); *Coates v. Cincinnati,* 402 U.S. 611 (1971) (striking down ordinance prohibiting "three or more persons to assemble . . . on any of the sidewalks" and "conduct themselves in a manner annoying to persons passing by;" criminal defendants were picketers in labor dispute).

[22] Academic commentators have also suggested that a party must be engaged in expressive activity before he may invoke the overbreadth doctrine. *See, e.g.,* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 896 (1991) (arguing that "courts should hesitate to find substantial overbreadth" where a statute "aims to promote state interests unrelated to the content of expression and that infringes First Amendment interests only incidentally").

applied to protected conduct." *Id.* Because the overbreadth doctrine applies only in exceptional circumstances, a criminal defendant should not be allowed to raise it where he has not engaged in expressive conduct or where he is not challenging the provision he is charged with violating.

D. The State Supreme Court's Judgment Must Be Overturned.

If this Court adopts either or both elements of the proposed bright-line rule – or some similar limitation on the overbreadth doctrine – then the judgment of the state supreme court must be reversed. Hicks was not engaged in expressive activity, and the Trespass-After-Warning rule and criminal statue that Hicks violated are fundamentally different from the unwritten addendum that the court found was unconstitutional. The addendum did not apply to his conduct. *See supra* at 19.

Even if this Court declines to announce the proposed bright-line rule, the judgment below still must be reversed. When government acts as landlord – rather than as sovereign – the overbreadth doctrine should not apply. *See infra* at 45. Even if it does apply, government as landlord should be afforded a larger measure of discretion, and the overbreadth alleged by Hicks is neither real nor substantial. *See infra* at 47.

II. THE CONSTITUTIONAL DISTINCTION BETWEEN SOVEREIGN AND LANDLORD REQUIRES REINSTATEMENT OF HICKS' CONVICTION.

A. There Is a Constitutional Distinction Between Government as Sovereign and Government as Landlord.

As this Court has recognized, there is a constitutional distinction between government acting as sovereign and government acting as landlord. As landlord, government may take measures the Constitution would forbid if imposed by the sovereign. This distinction provides yet another basis for rejecting Hicks' overbreadth challenge and wholly undermines his argument that he has a constitutionally protected right to be present at Whitcomb Court. For these additional reasons, the judgment of the state supreme court must be reversed.

1. *Rucker* Recognizes a Distinction Between Sovereign and Landlord in the Context of Public Housing.

In *Rucker*, this Court, without dissent, recognized that there is a constitutional distinction between government acting as sovereign and government acting as landlord.[23] At issue in *Rucker* was whether the eviction policy of a public housing project violated due process. Mandated by Congress, the policy required the eviction of a tenant if

[23] Justice Breyer did not participate in *Rucker*. The other eight members of this Court joined the Chief Justice's Opinion. *See Rucker*, 535 U.S. at 126.

illegal drugs were found in his residence, whether or not he knew about them. Reversing the Ninth Circuit, this Court explained:

> The en banc Court of Appeals held that HUD's interpretation "raise[s] serious questions under the Due Process Clause of the Fourteenth Amendment," because it permits "tenants to be deprived of their property interest without any relationship to individual wrongdoing." 237 F.3d at 1124-25 (citing *Scales v. United States,* 367 U.S. 203, 224-225 (1961)); *Southwestern Telegraph & Telephone Co. v. Danaher,* 238 U.S. 482 (1915)). *But both of these cases deal with the acts of government as sovereign.* In *Scales*, the United States criminally charged the defendant with knowing membership in an organization that advocated the overthrow of the United States Government. In *Danaher*, an Arkansas statute forbade discrimination among customers of a telephone company. The situation in the present cases is entirely different. *The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required. Scales and Danaher cast no constitutional doubt on such actions*.

Id. at 135 (emphasis added) (citations original). In other words, this Court recognized that, when government acts as landlord, it may take measures that the Constitution would forbid if it were acting as sovereign. Although *Rucker* involved the eviction of tenants rather than the exclusion of non-residents, there is no principled reason for the distinction between sovereign and landlord to apply

in the context of one public housing regulation but not the other. *Rucker* allows government, acting as landlord, to evict a *tenant* because one of the tenant's friends or relatives has engaged in misconduct on the premises. *Rucker*, 535 U.S. at 136. Surely, that same landlord may exclude *non-residents* who have engaged in misconduct on the premises, and it may also *deter* such misconduct by requiring non-residents to have a legitimate purpose in order to be on the premises. This is especially so when, as here, there is a clear record of drug-dealing and related violence on the premises by outsiders. J.A. 45-46, 154.

The prevalence of drug-dealing and related crimes at public housing projects is beyond dispute, not only at Whitcomb Court, but nationwide. Indeed, Congress explicitly found:

> [D]rug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants.
>
> [T]he increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures.

42 U.S.C. § 11901(3) and (4) (Congressional findings) (quoted in *Rucker*, 535 U.S. at 127).

In the private sector, landlords of apartment projects have strong incentives to protect their property – and their tenants – from such criminal activities. Their vigilance is not just the product of civic mindedness. It is spurred by

the forces of competition and, often, by the legal liability landlords risk if they do not take steps to protect the safety of their tenants.[24]

As a result, private sector landlords often take a variety of precautions. They may require visitors to have a legitimate purpose for coming on the property and may forbid outsiders from simply wandering onto their streets and sidewalks. They may tell those who have no legitimate purpose to leave, and they may call upon the police to arrest those who refuse to leave or who persist in returning without permission. They may require those who wish to solicit or to leaflet to get prior approval from management. There is nothing extraordinary about these measures. They are all very basic.[25] But, the low-income tenants in public housing often have few choices about where they

[24] *See, e.g., Doe v. Dominion Bank, N.A.,* 963 F.2d 1552, 1553 (D.C. Cir. 1992) (Ginsburg, J.) ("[A] commercial landlord has a duty to take reasonable measures to safeguard tenants from foreseeable criminal conduct in the common areas of the leased premises."); *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 483 (D.C. Cir. 1970) ("[W]e find that there is a duty of protection owed by the landlord to the tenant in an urban multiple unit apartment dwelling."); *Lay v. Dworman,* 732 P.2d 455 (Okla. 1986) (holding that landlord has duty to use reasonable care to maintain common areas of the premises in such a manner as to insure that the likelihood of criminal activity was not unreasonably enhanced by the condition of those common premises); *Scott v. Watson,* 359 A.2d 548, 554 (Md. 1976) (holding that increased criminal activity in common areas imposes duty on landlord to take reasonable measures "to eliminate the conditions contributing to the criminal activity."); *Sharp v. W.H. Moore, Inc.*, 796 P.2d 506 (Idaho 1990) (holding landlord is under duty to exercise reasonable care to guard against criminal activity).

[25] *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980) ("[O]ne of the essential sticks in the bundle of property rights is the right to exclude others.").

live. It would be a perverse result if the Constitution forbade government as landlord from providing its tenants the same basic protections that tenants in the private sector often take for granted.[26]

As sovereign, government generally may not ban persons from public streets and sidewalks. *See City of Chicago v. Morales*, 527 U.S. 41, 64 (1999). However, as landlord, government may ban the general public from streets and sidewalks wholly within the housing complex, and it may exclude individuals who have engaged in misconduct in the past. As one federal circuit noted:

> The official mission of the Housing Authority is to provide safe housing for its residents, not to supply non-residents with a place to disseminate ideas. Further, in practice, access to Housing Authority property is carefully limited to lawful residents, their invited guests, and those conducting official business. We therefore have little difficulty concluding that the Housing Authority property is a nonpublic forum.

Daniel v. City of Tampa, 38 F.3d 546, 550 (11th Cir. 1994). *See also International Soc'y for Krishna Consciousness v. Lee,* 505 U.S. 672, 678 (1992) ("the government need not permit all forms of speech on property that it owns and controls.").

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[26] As the Supreme Court of Virginia has stated "[I]n operating and maintaining its housing project, the Authority assumes the role ordinarily occupied by a private landlord. . . . " *Virginia Elec. and Power Co. v. Hampton Redevelopment and Hous. Auth.*, 225 S.E.2d 364, 369 (Va. 1976) (holding that, in the operation and maintenance of a housing project, the Authority is not immune from liability for negligence).

As sovereign, government may not require prior approval of door-to-door solicitors. *See Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton,* 536 U.S. 150 (2002). Yet, as landlord, government may require solicitors to obtain permission before beginning their activities, as private landlords might in order to protect the safety of their tenants. *See City of Bremerton v. Widell*, 51 P.3d 733 (Wash.), *cert. denied*, 123 S.Ct. 497 (2002) (upholding conviction of persons barred from public housing project in absence of evidence showing invitation).

2. The Constitutional Distinction Between Sovereign and Landlord Does Not Imperil Individual Constitutional Rights.

Recognizing a distinction between sovereign and landlord need not mean that government as landlord has *carte blanche*, or that it may act in *all* respects like a landlord in the private sector. The restrictions imposed by the Constitution still have substantive meaning. The point is illustrated by *Southworth*, where a state university used a mandatory student fee to subsidize expression by private student groups.

Acting as sovereign, government may not force individuals to subsidize viewpoints with which they disagree. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990). However, in *Southworth,* this Court concluded that, when acting as educator, government may require such a subsidy in order to advance its educational mission. As the Court explained:

> The University may determine that its mission is well served if students have the means to engage

> in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

Southworth, 529 U.S. at 233. While government, acting as educator, has more discretion, this Court emphasized that government still "must provide some protection to its students' First Amendment interests." *Id.* at 234. Specifically, this Court required that the subsidy be distributed among student organizations "with viewpoint neutrality as the operational principle". *Id.* Thus, even though the government as educator is given broader discretion, the First Amendment rights of individuals are protected.

When government acts as landlord, a similar approach should be followed. A public housing authority may determine that its mission is well-served if its tenants have protections analogous to those enjoyed by tenants in the private sector. Thus, it may require visitors to have a legitimate purpose; it may prohibit outsiders from wandering on its streets and sidewalks; and it may exclude individuals who have engaged in misconduct. It also may require outsiders wishing to leaflet to obtain permission "with viewpoint neutrality as the operational principle." *Id.* Such viewpoint neutrality means, for example, that it may not allow leafleting by Republicans, but prohibit leafleting by Democrats, nor may it allow leafleting by Christians, but not by Muslims. In the case at bar, there is no evidence that Ms. Rogers – or any other Housing Authority official – violated viewpoint neutrality. Nor is there any evidence that any request to leaflet was denied, delayed or subject to unreasonable conditions. As a

government landlord, the Housing Authority conducted itself in a manner that was entirely reasonable – and consistent with First Amendment rights.

3. The Streets and Sidewalks of Whitcomb Court Are Not a Traditional Public Forum.

The state supreme court expressly declined to decide whether the streets and sidewalks in Whitcomb Court are a traditional public forum. J.A. 166-67. Yet, it nevertheless used a mode of analysis that is reserved for traditional public fora, and thereby decided the issue implicitly – and incorrectly. Public forum analysis yields a result consistent with the distinction between sovereign and landlord, and confirms the Commonwealth's position that, as landlord, the Housing Authority's trespass policies are reasonable and constitutional.

For purposes of the First Amendment, this Court has recognized three distinct categories of government property: (1) traditional public fora, (2) designated public fora and (3) non-public fora. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). "Traditional" public fora include those places which "by long tradition or by government fiat have been devoted to assembly and debate." *Id.* at 45. A "designated" public forum "consists of public property which the State has opened for use *by the public* as a place for expressive activity." *Id.* at 45 (emphasis added). In order to be a designated public forum, the property must be open to "*indiscriminate* use by the general public." *Id.* at 47 (emphasis added). As the *Perry* Court explained:

> The mere fact that an instrumentality is used for the communication of ideas does not make a public forum. . . . Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

Perry, 460 U.S. at 49 n.9 (internal quotation marks and citations omitted). Finally, "non-public fora" include all other public property, that is to say all "[p]ublic property which is *not* by tradition or designation a forum for public communication. . . . " *Id.* at 46 (emphasis added).

In both traditional fora and designated fora, content-based regulations of citizen speech are subject to strict scrutiny. They will survive challenge only if "narrowly drawn to achieve a compelling state interest." *International Soc'y for Krishna Consciousness,* 505 U.S. at 678. By contrast, in a non-public forum, the strict scrutiny standard does not apply. Instead, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

While this Court has described streets and sidewalks as examples of traditional public fora, *id*., it has also made it plain that there are exceptions. As the property of a public housing landlord, the streets and sidewalks of Whitcomb Court are akin to the postal sidewalks at issue in *United States v. Kokinda,* 497 U.S. 720 (1990), which the Court declined to treat as public fora. At issue in *Kokinda* was the validity of a regulation prohibiting solicitation of contributions and campaigning for election

on postal premises. Four Justices decided that a sidewalk leading from the post office parking lot to the door of the post office was not a public forum open to expressive activities. A fifth Justice decided that the public forum issue need not be reached and upheld the regulation on other grounds. All five agreed that not all sidewalks are public fora, even when they are open to the public. *Id.* at 728 (plurality); 497 U.S. at 738 (Kennedy, J., concurring in judgment). The plurality said that, "the *location* and *purpose* of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum." *Id.* at 729-30 (emphasis added).

In Whitcomb Court, both the location and purpose of the sidewalk where Hicks was found trespassing make it clear that it is *not* a public forum. First, the sidewalk is located entirely *within* Whitcomb Court. Second, the purpose of the sidewalk is not to serve the general public. Under the ordinance adopted by the City of Richmond, the streets within Whitcomb Court are "closed to public use and travel and abandoned" because they are "no longer needed for public convenience." J.A. 76. They exist for the convenience of Whitcomb Court residents, permitting easy access to and from the apartments by tenants and their guests. Unless someone is traveling to or from a location within Whitcomb Court – which is what Hicks said he was doing – there is simply no need to be there. Thus, using the *Kokinda* analysis, the street where Hicks was trespassing is not a public forum.

This result is strengthened by the factual analogies between *Kokinda* and the case at bar. In *Kokinda*, the sidewalks at issue were proprietary. They were part of a facility dedicated to providing an efficient and effective postal delivery system, and the expressive activities that

respondents proposed to conduct there – distributing political material and soliciting contributions – were found to be inherently disruptive of that purpose. Similarly, the sidewalks at Whitcomb Court are proprietary. They are part of a facility dedicated to providing safe and affordable housing to its tenants. Allowing the general public unregulated access to the streets and sidewalks of the apartment complex is disruptive of that purpose, especially given the real danger of violent crime, property damage and drug dealing that makes the quiet enjoyment of one's residence impossible. Just as the sidewalks in *Kokinda* are not a public forum, neither are the sidewalks at Whitcomb Court. Indeed, as a landlord of residential housing, the Housing Authority performs a role resembling the role of private entities, thereby making its property even less "public" in nature than property held by an agency performing the decidedly governmental function of providing postal service. *See* U.S. Const. Art. I, § 8.

Similarly, in *Greer v. Spock*, 424 U.S. 828 (1976), the Court upheld limitations on speech imposed on a military base, Fort Dix, New Jersey. This was not a base closed to the general public. Streets and footpaths running through the base were open to civilian traffic and commence. Even so, this Court ruled that there is no constitutional right to distribute political leaflets in areas open to the general public. The Court said it was "the business of a military installation like Fort Dix to train soldiers, not to provide a public forum." *Greer*, 424 U.S. at 838. By analogy, it is the business of a public housing complex to provide safe and affordable housing to its residents, not a forum for public debate. The political activists in *Greer* "had no generalized constitutional right to make political speeches or distribute leaflets at Fort Dix." *Id.* at 838. There is likewise no

generalized constitutional right to use the sidewalks inside Whitcomb Court as a public forum – either traditional or designated.

Whitcomb Court falls into the third category of government property. There is no evidence that the Housing Authority ever had a policy of making its property available to the public at large for purposes of particular speech. The property is dedicated to the limited purpose of providing safe and affordable housing to low income individuals and families. Its purpose is not to facilitate public discussion or debate of ideas and issues. Whitcomb Court is a non-public forum. And, therefore, it is the reasonableness standard – not strict scrutiny – that must be applied to determine whether its policies are constitutional. While the unwritten addendum deals with expressive conduct, that addendum is only an incidental part of a much broader trespass policy aimed at regulating conduct – not speech. The fact is that the Housing Authority's limited access policy, both the Legitimate Purpose rule and the Trespass-After-Warning rule, seek to regulate conduct – trespass by non-residents. In any event, the Authority's policy is constitutional because it is reasonable and, indeed, viewpoint neutral.

B. The Distinction Between Sovereign and Landlord Means That the State Supreme Court's Decision Must Be Reversed.

The constitutional distinction between sovereign and landlord provides additional reasons why the decision of the state supreme court must be reversed. In light of this distinction, none of the arguments advanced by Hicks can withstand scrutiny.

1. Banning Hicks from Whitcomb Court Does Not Violate His "Right to Wander" or "Right to Visit."

Although the state supreme court did not address the issue, Hicks argued below – and is likely to argue again – that he has a constitutional right to be present on the streets and sidewalks of Whitcomb Court, asserting in effect a "right to wander." It is an argument based on his mistaken view that the Housing Authority's streets and sidewalks are a traditional public forum. Whatever the right to wander may entail, it does not include wandering about a public housing project in defiance of the landlord.

Hicks also argued below that he has a right to enter Whitcomb Court in order to visit friends and relatives residing there, and that the Housing Authority may not tell him otherwise.[27] He is again mistaken. This Court has recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 545 (1987). But those results were reached in a different context. In the context of public housing, "[t]he Court has not extended constitutional protection to mere visitation with family members. . . . [An individual] has no fundamental right to visit his family members on [housing project] property." *Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001). Moreover, there is ample room for Hicks to

[27] Such visits would take him off Whitcomb Court's streets and sidewalks and into the yards and buildings of the housing project, which are certainly not a traditional public forum – even under Hicks' exaggerated view.

visit with friends and family in venues other than Whitcomb Court, and it is the landlord – not the sovereign – who has told Hicks he must stay away from the premises. Hicks' so-called "right to visit" – if any such right exists – must give way to reasonable regulations adopted by the Housing Authority for the protection of its tenants and property.

2. The Housing Authority Trespass Policy Does Not Violate the Overbreadth Doctrine.

a. The Overbreadth Doctrine Is Inapplicable When Government Acts as Landlord.

One consequence of the constitutional distinction between sovereign and landlord is that the overbreadth doctrine should not be available to challenge regulations and policies adopted by government as landlord. *See LeBaron v. Amtrak*, 69 F.3d 650, 659 (2nd Cir. 1995) (the overbreadth doctrine "has only been applied to the conduct of the government in its role as a regulator, not as a proprietor."). This is true for two reasons.

First, when government acts as landlord, it is unable to enact criminal statutes. All criminal statutes are the result of government acting as sovereign. The overbreadth doctrine exists largely because of the concern that individuals will refrain from constitutionally protected expression, due to a fear of prosecution. *Dombrowski*, 380 U.S. at 486. In other words, its purpose is to facilitate attacks on invalid legislation enacted by government acting as sovereign. Yet, if the enactment of a criminal statute is not at issue, then this justification for the overbreadth

doctrine disappears. It is true that the Housing Authority's policy ultimately depends on the ability of government as sovereign to enforce its criminal trespass statute. However, the trespass statute bans conduct – not speech – and the need for the Housing Authority to invoke the law is no different than the need for private landlords to do so in connection with their own trespass policies.

Second, when government acts as landlord, the reach of any policy is necessarily limited to the physical confines of the government's property. In contrast, statutes enacted by government as sovereign apply throughout the territory under the sovereign's control. Because a policy enacted by government as landlord is so limited in its reach, an individual can easily avoid the restriction by the simple expedient of avoiding the premises. Ample alternative means of communication are readily available. There is no need to invoke the overbreadth doctrine when the sweep of the policy is so limited.

To say that the overbreadth doctrine does not apply is not to say that government as landlord need not adhere to the First Amendment. "As applied" challenges remain available; however, it is inappropriate that a criminal trespasser be allowed to return defiantly to the property of a public housing project by purporting to vindicate the First Amendment rights of hypothetical third parties not before the Court.

b. The Unwritten Addendum Is Not Overbroad.

The overbreadth doctrine has *two* parts. One part addresses standing, while the other provides substantive rules for evaluating the constitutionality of a statute,

regulation or policy. Even if Hicks had standing to challenge the Housing Authority's policy, the substantive rules of overbreadth would not condemn it. In order for a policy to be invalid under the overbreadth doctrine, "the overbreadth . . . must not only be *real*, but *substantial* as well, judged in relation to the [policy's] plainly legitimate sweep." *Broadrick*, 413 U.S. at 615 (emphasis added). On both of these issues – whether overbreadth is real and whether it is substantial – the state supreme court erred.[28]

First, there is no real overbreadth. If the Whitcomb Court housing manager were acting as an agent for the government as sovereign, then her unwritten addendum requiring permission before leafleting would undoubtedly be invalid. *See Watchtower*, 122 S. Ct. at 2089. But, she was not acting for the sovereign. She was acting for the government in its capacity as a residential landlord, and therefore a different constitutional analysis applies.

The requirement that visitors wishing to leaflet obtain permission in advance is a reasonable precaution. It protects Whitcomb Court and its residents from drug dealers and other criminals seeking to circumvent the trespass policy by the convenient ruse of carrying a stack of leaflets onto the premises. So long as there is no showing of viewpoint discrimination, undue delay or burdensome conditions, the requirement that visitors seek

[28] Even if real and substantial overbreadth were found, the unwritten addendum should be severed, an analytical step the state supreme court overlooked. The overbreadth doctrine ought not be used to invalidate a law where the offending portion can be readily severed. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

permission before leafleting should be deemed constitutional. This Court has approved permit requirements for those engaging in protected First Amendment activity when it can be shown that the permit requirements deter wrongdoing. *See, e.g., Thomas v. Chicago Park Dist.,* 534 U.S. 316, 323 (2002) (upholding a permit requirement aimed, in part, at preventing unlawful uses of a park and assuring financial accountability for damage caused by the event). In short, when the government acts as landlord, it can require non-residents who wish to leaflet to obtain permission before doing so. Therefore there is no real overbreadth. The unwritten addendum is constitutional.

Second, if there is real overbreadth, it is not substantial. Not every case of overbreadth is fatal. Before a policy can be invalidated under the overbreadth doctrine, any overbreadth must be *substantial*. *Broadrick*, 413 U.S. at 615. This rule applies with particular force where, as here, "conduct and not merely speech is involved." *Id.* Here, the state supreme court did not explain why it thought any perceived overbreadth met this criterion. Indeed, there is no basis for any such conclusion. The trespass policy was adopted because drug dealers were running rampant through the housing project. It is their activities – and the activities of others bent on illegitimate purposes – that the policy chiefly curtails. In contrast, any impact upon visitors who come to leaflet is minimal. As observed by the dissenting Justices below:

> [T]his is "the paradigmatic case of a [policy] whose legitimate reach dwarfs its arguably impermissible applications." *Ferber*, 458 U.S. at 773. "Whatever overbreadth may exist should be cured through case-by-case analysis of the fact

> situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16.

J.A. at 172 (Kinser, J., joined by Lemons, J., dissenting) (emendation in opinion below). To say that the Housing Authority's trespass policy is substantially overbroad is without merit. For this reason, too, the decision of the state supreme court represents a misguided application of the overbreadth doctrine. It should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

MAUREEN RILEY MATSEN
WILLIAM E. THRO
Deputy State Solicitors

CHRISTY A. MCCORMICK
A. CAMERON O'BRION
Assistant Attorneys General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (voice)
(804) 371-0200 (facsimile)

Counsel for Petitioner

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