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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The Commonwealth of Virginia submits this brief in reply to the arguments of Respondent.

ARGUMENT

I. HICKS MISREADS THE RECORD.

The respondent, Kevin Lamont Hicks, bases much of his case on assertions not supported by the record, including the following misstatements:

A. Hicks misunderstands the legal status of the Housing Authority, erroneously describing it as an "arm" and "agency" of the City of Richmond and attributing to the City actions by the Housing Authority. *See*, *e.g.,* Resp. Br. at 1, 2. The Housing Authority – like other housing authorities in Virginia – is a separate political subdivision of the Commonwealth. Va. Code § 36-19. Housing authorities have narrow powers. They are authorized to "operate housing projects" and perform other housing and redevelopment functions. *Id*. They have no authority to enact laws regulating the general populace.

B. Hicks mischaracterizes the location of the streets and sidewalks at issue, describing them as "around" or "adjacent to" Whitcomb Court. *See, e.g.,* Resp. Br. at 1. Such descriptions are inaccurate. As the Supreme Court of Virginia explained, "Bethel Street [where Hicks trespassed] . . . is located *entirely within* Whitcomb Court." J.A. 156 (emphasis added). Elsewhere, the court describes the privatized streets as being "in" Whitcomb Court. J.A. 154; *see also* J.A. 79 and 80 (street plan).

C. As Hicks notes, two streets (Sussex and Magnolia) enter Whitcomb Court from the outside. Resp. Br. at 2. But he misses the point. They do not come out on the other side and cannot be used as thoroughfares. He also notes that the closed streets were designated by the City as "highways for law enforcement purposes." Resp. Br. at 3. But he ignores the state statute under which the City acted. *See* J.A. 78. Intended to promote traffic safety, the

statute applies only to "private roads, within any [large] residential development." Va. Code § 46.2-1307.

D. Hicks says the streets of Whitcomb Court "lead to a public school." Resp. Br. at 27. This is misleading. There is a public school at the corner of Sussex Street (which is closed) and Whitcomb Street (which remains open).[1] Surely, the City may regulate access to one of its schools by closing a side street bordering its premises. The school remains accessible from Whitcomb Street.

E. Hicks goes outside the record to contend that the privatized streets lead to a Boys and Girls Club that meets in the "Whitcomb Court Recreation Center." Resp. Br. at 4, 27. But there is no allegation that the club serves anyone other than children living in this public housing complex. *Id.* In any event, the Housing Authority's role as host to a group of children – and its interest in their safety – make it *more* important to exclude outsiders with no legitimate purpose.

F. Hicks again goes outside the record to argue that the Whitcomb Court Recreation Center serves as a polling place. The point is irrelevant. Many polling places in Virginia are located in privately owned buildings, but that does not transform their premises into public fora.[2]

G. Hicks misstates the nature of the Housing Authority trespass policy, grossly exaggerating its scope and failing to distinguish between its various parts. For example, Hicks says "[the] trespass-barment policy threatens with arrest *anyone* who does not *first obtain* the government's approval for using streets and sidewalks around public

[1] The map Hicks lodged with the Court shows a park bordering Whitcomb Court just north of the school; however, as he apparently concedes, the map is wrong. Resp. Br. at 4, n.1. There is no park there and Hicks' arguments do not mention it. Tiwari Aff. ¶5 (lodged April 21, 2003).

[2] Polling places in Richmond include eighteen houses of worship, three nursing homes, a Masonic lodge, and two privately owned apartment complexes. *See* http://www.sbe.state.va.us (selecting "Voter Registration," then "Voter Registration again, then "Precinct Statistics and Polling Places Locations").

housing . . .” Resp. Br. at 14 (emphasis added). This is simply not so. First, the policy does not restrict *residents* at all. It affects only outsiders. J.A. 84, 86. Second, *visitors* are also unaffected if they are invited by a resident (and have not been barred). J.A. 87. *No one* is barred unless he has come to Whitcomb Court without a legitimate purpose. *See* Commonwealth’s Brief (“Com. Br.”) at 20 (explaining Legitimate Purpose rule); J.A. 27-28 (explaining that illegal drugs and domestic violence are reasons for barment). *No one* is arrested unless he returns (or refuses to leave) after having been previously barred. *See* Com. Br. at 20 (explaining Trespass-After-Warning rule).

H. The Whitcomb Court housing manager, Gloria Rogers, has applied an unwritten addendum in order to ascertain in advance whether leafleting by a visitor is legitimate. *See* Com. Br. at 7. Hicks exaggerates her role.[3] Ms. Rogers said she sometimes does not give permission to people wanting to pass out flyers. Resp. Br. at 7 (quoting J.A. 36-37). But, this must be read in context. As Ms. Rogers also explained, she has *never* turned anyone down. J.A. 38. If she sees something she is not comfortable approving, *she* does not give permission, but refers the matter to her supervisor. *Id.* There is no evidence that her supervisor ever turned anyone down.

I. Hicks insinuates that he did not know about the written procedures for appealing a barment notice. J.A. 36. Yet, as Ms. Rogers testified, she explains that procedure when someone comes to her seeking permission to return. *Id.* At trial, Hicks complained about wanting to see his child, but there is no evidence he said anything about the child when he asked Ms. Rogers to lift his barment, never mentioning that the mother lives in Whitcomb Court. J.A. 40.

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[3] In discussing who may enter Whitcomb Court, Hicks says that Ms. Rogers is “unaware of any guidelines that limit her discretion.” Resp. Br. at 5 (citing J.A. 35). This misreads the record. Ms. Rogers’ comments at J.A. 35 refer to *lifting* a barment, not imposing one. *See* J.A. 34.

J. Hicks says the record does not reveal *where* he was or *what* he was doing in the two previous trespass offenses. Resp. Br. at 8.[4] He is mistaken. Although Hicks did not challenge the individual basis for his barment,[5] the summonses for these two offenses are in the trial court record. *See* Record, pp. 1 and 2. He was charged with "Trespassing of RRHA property" – at 2341 Carmine Street and at 2200 Deforrest Street. Both addresses are inside Whitcomb Court. *See* J.A. 75, 79. The summonses also show he pleaded *guilty* to each charge, thereby precluding any argument that the previous charges were ill-founded. Record, pp. 1 and 2. Hicks also ignores his 1998 conviction for damaging property at Whitcomb Court. J.A. at 124-25.

II. THE COURT SHOULD PLACE LIMITS ON OVERBREADTH STANDING.

The first issue here is whether the state supreme court erred by allowing Hicks to invoke the First Amendment overbreadth doctrine. Yet, Hicks gives the issue scant attention, failing to address key points made by the Commonwealth.

First, Hicks does not cite a single case – from any court – where an individual not engaged in expressive activity was allowed to pursue an overbreadth challenge.[6]

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[4] Hicks says the Commonwealth objected when his counsel "attempted to obtain information about why [he] was [previously] arrested and barred." Resp. Br. at 41. This is misleading. The objection was not raised by the Commonwealth at trial, but by counsel for the Housing Authority in a pre-trial discovery proceeding. The objection was not sustained. Hicks' discovery request was granted. J.A. at 13-14.

[5] The point is *not* that Hicks did not challenge his individual barment in a "separate, civil proceeding." Resp. Br. at 40. The point is that he did not challenge it *at all*, not in a separate proceeding, and not as a defense to the trespass charge.

[6] Hicks asserts that, in *City of Chicago v. Morales*, 527 U.S. 41 (1999), a plurality of this Court allowed individuals to bring an overbreadth challenge even though they had not engaged in expressive conduct. *See* Resp. Br. at 42. The assertion is incorrect. The plurality stated "we do not rely on the overbreadth doctrine." *Id.* at 53 (plurality

(Continued on following page)

See Com. Br. at 28-31 (showing that the Commonwealth's proposed bright-line rule is consistent with this Court's previous overbreadth decisions); United States Br. at 14 ("All of this Court's overbreadth cases have involved parties who engaged in, or who sought to engage in, expressive activity subject to the challenged regulation.").

Second, Hicks does not challenge the Commonwealth's view that the state supreme court's expansion of the overbreadth doctrine leads to extreme results and effectively prevents government agencies from protecting their property against trespass and related threats. *See* Com. Br. at 22-24; Amici States Br. at 12-19.

Third, Hicks does not address the Commonwealth's position that a defendant charged with violating one provision of a statute, regulation, or policy should not be permitted to challenge the constitutionality of a different provision. *See* Com. Br. at 24-25, 30. The Trespass-After-Warning rule and criminal statute that Hicks violated are fundamentally different from the unwritten "leafleting" addendum that he successfully challenged as unconstitutional. Hicks glosses over this discrepancy and fails to address the issue of severability. *See* Com. Br. at 47 n.28.

A. There Must Be Limitations on Overbreadth Standing.

The Commonwealth and United States have explained why overbreadth standing should be limited to persons engaged in expressive conduct. *See* Com. Br. at 16-25; United States Br. at 17-21.[7] Hicks apparently believes that

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opinion). Since the plurality invalidated the measure on grounds other than overbreadth, *Morales* did not hold, even implicitly, that persons not engaging in expression may bring overbreadth challenges.

[7] In a variation on this theme, the United States also argues that overbreadth challenges may not be brought to statutes of general applicability absent a claim of actual misuse in a given case. United

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the doctrine's "prophylactic purpose" precludes the imposition of any limit on overbreadth standing. Resp. Br. at 44. He is mistaken. By establishing the overbreadth doctrine, this Court has relaxed the standards for standing, but it has not abandoned them.[8] It is still necessary to satisfy the Article III requirement for an actual case or controversy, as well as prudential concerns.

1. Hicks argues that the requirement that overbreadth be "substantial" serves as a significant limitation on the doctrine and that no further limitation is necessary. *See Id.* But the "substantial" requirement is a *substantive* limitation, not a *standing* limitation. It affects whether a party will be successful in his overbreadth challenge, not whether he can bring the challenge in the first place. If substantive rules of judicial decision-making are allowed to displace rules of standing, then courts will become the sort of "roving commissions" that this Court has found unacceptable. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

2. Hicks complains that imposing limitations on overbreadth standing would require courts to decide the "complicated factual question" of whether the party's conduct was expressive, an issue unrelated to whether the

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States Br. at 17-21. The Commonwealth adopts this argument as an alternative to its proposed bright-line rule.

[8] This Court has sometimes spoken in terms which, if considered in isolation, may seem broad enough to permit overbreadth challenges without regard to whether the litigant was engaged in expressive activity. *See* Resp. Br. at 42-44. However, this question has not been previously presented and use of such broad language has not resolved it. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned."); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 65 (1976) ("Broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached.").

challenged law is overbroad. *See* Resp. Br. at 45. Exactly so. The issue of standing is separate and distinct from the substantive issue. It must be treated separately. Moreover, deciding factual questions about a party's conduct is not so daunting; courts do it all the time.

3. Hicks contends that, by delivering diapers, he was engaged in expressive conduct, quoting the proposition that one can conceive of "some kernel of expression in almost every activity a person undertakes. . . . " *Id.* (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)). But he ignores the rest of the statement: "such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas*, 490 U.S. at 25.

4. Hicks attributes to the Commonwealth the view that he would have standing in this case if only he had carried a sign or worn a T-shirt with a message objecting to the trespass policy. Resp. Br. at 45. He is mistaken. Expressive activity is *necessary* to invoke the overbreadth doctrine, but it is not *sufficient*. It is also necessary for the criminal defendant to be challenging that portion of the statute, regulation or policy he is charged with violating. *See* Com. Br. at 18. Hicks was prosecuted because he violated the Trespass-After-Warning rule. He cannot evade that barment by coming back to dispute some other portion of the policy.

5. Hicks claims the Commonwealth's approach would limit overbreadth challenges to the "odd category of cases" where the person was engaged in "expressive conduct that is not protected by the First Amendment." Resp. Br. at 44. But there is nothing "odd" about such cases. They are precisely the cases for which the overbreadth doctrine was developed. "[O]verbreadth analysis reflects the conclusion that the possible harm to society from allowing *unprotected speech* to go unpunished is outweighed by the possibility that protected speech will be muted." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) (emphasis added). Where litigants are engaged in protected expression, they have standing under the traditional rule and overbreadth standing is not necessary.

6. Finally, Hicks argues that there is no constitutional distinction between "expressive conduct that is *not* protected by the First Amendment" and "conduct that is simply not expressive." Resp. Br. at 44 (emphasis in original) (citing *Chaplinski v. New Hampshire*, 315 U.S. 568, 572 (1942)). Yet, *Chaplinski* does not deal with overbreadth standing, and not even by analogy does it support the proposition urged by Hicks. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-85 (1992) (explaining *Chaplinski*).

B. The Issue of Overbreadth Standing Is Properly Before This Court.

Hicks tries to short circuit the standing issue by recycling two arguments he advanced unsuccessfully in opposing certiorari. He claims that (i) the Commonwealth "waived" its right to question his standing, and (ii) this Court has no power to review "prudential limitations on standing established by the Virginia Supreme Court." Resp. Br. at 38. The Commonwealth argued these arguments in its reply brief at the certiorari stage. *See* Reply Brief of Petitioner ("Cert. Reply Br.") at 2, 6-8. These arguments had no merit when Hicks first raised them, and they have no merit now.

Additionally, Hicks' argument that this Court is precluded from reviewing the issue of standing misunderstands this Court's standards. The standard is not whether the Commonwealth argued the issue below, but whether the issue was "pressed or passed upon" by the lower court. *United States v. Williams*, 504 U.S. 36, 41 (1992). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon . . . ." *Id.* Clearly, the lower court passed upon the issue of whether Hicks had standing to bring an overbreadth challenge. As the dissent notes:

> The majority reaches this issue [of overbreadth] by allowing the defendant to make a facial challenge to the Authority's trespass policy. I do not believe that such a challenge is permissible in this case.

* * *

> *Explaining the defendant's standing*, the majority states that, "in the context of a First Amendment challenge, a litigant may challenge government action . . . even if that government action as applied to the litigant is constitutionally permissible." The majority intertwines its *examination of the standing issue* and its substantive analysis of the trespass policy . . . .

J.A. at 167-68 (Kinser, J., joined by Lemons, J., dissenting) (emphasis added; quoting J.A. 159). *See* J.A. 159-60 (majority opinion) (contrasting "traditional rule" of standing with overbreadth exception).

Finally, contrary to Hicks' suggestion, the lower court's decision that Hicks has standing does not reflect the application of a state rule of prudential standing. Rather, the lower court believed that this Court's pronouncements of federal constitutional law *required* it to hold that Hicks has standing. *See* J.A. 159 (discussing what litigant may challenge based on what "[t]he Supreme Court has held . . ." and citing U.S. Supreme Court). Certainly, this Court may review a lower court's application of this Court's precedents.

III. THE HOUSING AUTHORITY ACTS AS LANDLORD – NOT AS SOVEREIGN – AND ITS TRESPASS POLICY IS REASONABLE.

Hicks says the streets at issue were once "similar" to "all other streets in Richmond." Resp. Br. at 1. But that is history. When the City closed those streets and deeded them to the Housing Authority, their legal status changed. *See* J.A. 75 and 81. They became the property of the Housing Authority, just as if the Housing Authority had owned them from the beginning.

A. The Streets and Sidewalks of Whitcomb Court Are a Non-public Forum.

The United States suggests three factors to be considered in determining whether property that was once a

traditional public forum has been converted to another use.[9] Hicks embraces these factors, but then fails to apply them correctly. *See* Resp. Br. at 30-32.[10]

1. Hicks asserts that the Whitcomb Court streets are not "as a practical matter, closed to the public." Resp. Br. at 30. Certainly, there are no physical barriers preventing entry onto the streets. However, for law-abiding citizens, physical obstructions are unnecessary. "No Trespassing" signs are enough – and the signs are plentiful. J.A. 55-56, 154-55. Hicks then says that anyone may enter the streets so long as he has a "legitimate purpose." Resp. Br. at 30. That is exactly the point. The requirement that visitors have a legitimate purpose sharply distinguishes Whitcomb Court from ordinary streets, where the general public may wander at will, with or *without* any particular purpose. Moreover, by listing some of the visitors who may have a legitimate purpose, Hicks merely underscores the reasonableness of the requirement. *See* Resp. Br. at 30-31. Finally, the streets are not thoroughfares. As a practical matter, no one need enter them other than residents of Whitcomb Court and others having a legitimate social or business purpose.

2. Hicks says that government has not "taken sufficient steps to make its closure of streets clear to the public." Resp. Br. at 31. Again, he is mistaken. The street closing was accomplished in a public meeting through the enactment of a public law by the Richmond City Council – a body chosen by Richmond voters to act in the public interest. Moreover, the signs posted every 100 feet carry the unambiguous warning

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[9] The three factors are: "(1) whether the sidewalk and street in question are, as a practical matter, closed to the public; (2) whether the government has taken sufficient steps to make that closure clear to the public; and (3) whether the purpose served by the sidewalks and streets at issue is consistent with a finding that they have become a nonpublic forum." United States Br. at 29.

[10] Hicks fails to address the two-part analysis based on "location" and "purpose" found in *United States v. Kokinda*, 497 U.S. 720, 729-30 (1990) (plurality). *See* Com. Br. at 40-41.

that the streets are private. *See* Com. Br. at 5-6. The public has ample notice that the streets are closed.

3. Hicks suggests that the purpose of the streets "remains what it has always been" and thus is inconsistent with a finding that they are now a non-public forum. Resp. Br. at 31. But this simply is not so. Use of the streets and sidewalks is now limited to persons having a legitimate purpose for being there. Hicks says the streets "serve as a pathway to homes, school, polling place, and other facilities located on those streets, as well as a space for community life." *Id.* But the "homes" to which Hicks refers are simply the apartment units forming the housing project. The "school" is accessible to the public by another street, *see* J.A. 79, and there is no evidence that anyone – other than residents of Whitcomb Court – approaches the school through privatized streets belonging to the housing project. There is no polling place except on election days.[11] Moreover, Hicks has not identified any "other facilities" except for the "Whitcomb Court Recreation Center" – again part of Whitcomb Court – where a group of children may meet. Such uses are far more limited than the broad purposes served by traditional city streets and sidewalks. Finally, describing the streets as "a space for community life" begs the question. Assuming that crime is brought under control, they may become spaces for "community life" among residents of Whitcomb Court, but not for the public at large. Thus, under the three-part test suggested by the United States, the streets and sidewalks of Whitcomb Court are a non-public forum.

B. Hicks Misreads *Marsh* and *Rucker*.

1. Hicks makes the sweeping claim that "private owners . . ., like the government, cannot restrict access to

[11] There is no right-to-vote problem here. As a matter of state and/or federal law, a voter may surely enter private property to vote at his assigned polling place even if such entry would otherwise be an unlawful trespass due to barment by the property owner. The Commonwealth does not contend otherwise.

spaces, such as streets and sidewalks, that are used by the general public." Resp. Br. at. 30. In support of this assertion, he cites *Marsh v. Alabama*, 326 U.S. 501 (1946). However, *Marsh* is easily distinguishable and uses a mode of analysis that actually supports the Housing Authority.

a. In *Marsh*, the site in question was not an apartment complex. It was an entire town – Chickasaw, Alabama. The town had "all the characteristics of any other American town," but was owned by a private corporation. *Id*. at 502. The Court ruled that a person could not be constitutionally convicted of trespass for distributing religious literature on a sidewalk in the town business block. As the Court explained:

> Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.

Id. at 507.

This case is the other side of the *Marsh* coin. Whether a private corporation or a government entity owns an apartment complex, the owner has an identical interest in operating the complex in a manner that promotes the security of the premises and its residents. In other words, just as towns generally are not owned by private corporations, apartment complexes generally are not owned by governments. *Marsh* stands for the proposition that, where a town is owned by a private corporation, its streets will be subject to the same rules of access as ordinary towns. The converse should also be true. Where an apartment complex is owned by government, its streets should be subject to rules of access similar to those at ordinary,

privately owned apartments. Government as landlord may impose restrictions that government as sovereign cannot.[12]

b. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court rejected an argument similar to the one made by Hicks. Discussing privately owned streets and sidewalks, this Court held that property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Id.* at 569. The Court also explained its decision in *Marsh*, noting that "the owner of the company town was performing the full spectrum of municipal powers." *Id.* Such powers greatly exceed the Housing Authority's limited role. *See* Va. Code § 36-19.

2. In *Department of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 135 (2002), this Court recognized a distinction between government as "sovereign" regulating "members of the general populace" and government as "landlord of property it owns" dealing with tenants and regulating that property. Hicks argues that, because he was not a tenant, the Housing Authority can only affect him as a member of the "general populace," and that the Housing Authority is acting as sovereign when it applies its trespass policy to him. Resp. Br. at 28-29. He is mistaken. When a person steps across a property line onto the land of another, he is no longer a member of the "general populace." He then becomes an invitee or licensee or trespasser, depending on the property owner's permission or prohibition. The power of the Housing Authority – like the power of any property owner – is bounded by that same property line. In deciding whether to allow entry onto its premises, the Housing Authority is acting like any other property owner. It is acting as landlord, not as sovereign.

[12] *See* Com. Br. at 37-38. (Noting that government as landlord is still subject to some restrictions not applicable to private owners).

C. The Housing Authority Trespass Policy Is a Reasonable Response to the Epidemic of Crime at Whitcomb Court.

"Open-air drug markets have returned to Whitcomb Court" in the wake of the decision below. *See* Housing Authority Br. at 15. Hicks does not deny this. Even so, he contends that the Housing Authority trespass policy is unreasonable, claiming there is no rational relationship between the policy and the four goals of street privatization listed in the Housing Authority brochure.[13] Resp. Br. at 33-37. He is mistaken.

1. Under the trespass policy, it is not necessary to wait until someone is caught in the act of dealing drugs or until shots are fired or someone is assaulted. By requiring visitors to have a legitimate purpose in order to enter the premises, those with illegitimate purposes can be turned away at the threshold. By giving this besieged community a forward line of defense, the trespass policy promotes the first two goals: "removing persons who commit unlawful acts" and "ensur[ing] that children have places to play free of . . . criminal activity." J.A. at 87.

2. When residents of public housing live under a "reign of terror," 42 U.S.C. § 11901(3) (Congressional finding), it is exceedingly difficult for the community to summon the resolve and other resources necessary to organize effectively. By substantially thinning out the criminal element on the premises, the trespass policy gives the community the breathing space it needs, thereby promoting the third goal: "provid[ing] an opportunity for

[13] Hicks also suggests that the goals listed in the brochure (J.A. 87) may not reflect the true purpose of the City of Richmond in closing the streets or the true purpose of the Housing Authority in adopting its trespass policy. Resp. Br. at 35, n.6. Such a suggestion ignores both the record and the *amicus* brief jointly filed by the Housing Authority and the City of Richmond.

residents to develop safety initiatives . . . such as resident patrols . . . and neighborhood watch." J.A. at 87.

3. The fourth goal – holding accountable households that "knowingly harbor" criminals – is also promoted. Without the trespass policy, those who come on the premises need not identify what household, if any, they are visiting. With the trespass policy in place, any links between outside visitors and households can be more easily discerned. If a visitor turns out to be engaged in criminal activity, this information allows the Housing Authority to hold residents responsible for the conduct of their guests. *See Rucker*, 535 U.S. at 130.

4. Hicks' claim that the trespass policy is unreasonable is also refuted by the widespread use of such policies at public housing projects nationwide. *See* Large Public Housing Authorities Br. at 7 n.3 and 8 n.6 (noting that almost 85% of public housing authorities have adopted trespass-barment policies and view them as "essential to controlling crime and drugs in [their] developments").

D. The Trespass Policy Protects Resident Safety and the First Amendment.

Hicks and some *amici* contend that the streets of Whitcomb Court must be treated as a traditional public forum in order to protect freedom of speech. They are mistaken. The challenge here is to fashion a legal tool that distinguishes between (i) the right to engage in legitimate communications with residents, and (ii) the "right to wander" that has allowed criminals from the outside to disrupt and endanger the lives of those same residents. The former right must be protected, and the abuse of the latter curtailed. However, in a traditional public forum, the right to engage in speech and the right to wander apparently go hand-in-hand. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Under that model, the Housing Authority cannot exclude *either* sort of visitor from the streets. Even if such an approach protected free speech, it would do so by sacrificing the safety of families who reside in public housing. Furthermore, such an approach would

not guarantee access to those wanting to engage in door-to-door leafleting. They would still have to enter the curtilage of the apartment buildings, an area that is plainly a non-public forum. Thus, treating the streets as a traditional public forum would sacrifice tenant safety without benefitting freedom of expression.

On the other hand, treating these streets as a non-public forum means there is no unlimited "right to wander." The Housing Authority may require visitors to have a legitimate purpose for entering the property, thereby providing residents a significant measure of protection against the criminals who have plagued public housing. Even so, freedom of expression can be protected because one legitimate purpose for coming to a housing project – streets and curtilege – may be to engage in legitimate communications with those residents. To be sure, such communications may be regulated more closely in a non-public forum than in a traditional public forum. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 677-78 (1992). However, viewpoint discrimination is still prohibited, and any regulations that might be imposed must pass scrutiny under a reasonableness standard. What a reasonableness standard entails may vary in detail, depending on the facts of a particular situation, thereby leaving courts with broad discretion to curtail any restrictions that seem excessive. The safety of residents and freedom of expression can both be protected.

IV. HICKS' VOID-FOR-VAGUENESS CLAIM HAS NO MERIT AND HICKS HAS NO STANDING TO RAISE IT.

Hicks claims the Housing Authority trespass policy is invalid, arguing that a key term – "legitimate" – is unconstitutionally vague and that the policy is analogous to the ordinance struck down in *City of Chicago v. Morales*, 527 U.S. 41 (1999). Resp. Br. at 22. His claim has no merit, and he lacks standing to raise it.

A. This is a new argument. Though vagueness concerns were raised at various times below, nowhere before

now has Hicks argued that "legitimate" is insufficiently precise to satisfy due process. The state supreme court did not address the argument, nor did Hicks mention it in opposing certiorari. While he suggested several issues he would raise if certiorari were granted, vagueness was not among them. *See* Hicks' Brief in Opposition at 15. For these reasons alone it would be improvident for this Court to take up the question. Hicks' last minute effort to inspire ill-founded void-for-vagueness concerns ought not distract this Court's attention from the real and important questions upon which certiorari was granted.

B. Even if Hicks had previously criticized the word "legitimate," he would not have standing. In *Morales,* the defendants challenged the ordinance they were charged with violating. Hicks is challenging a *different* rule than the one he violated. Insofar as vagueness may allegedly affect freedom of speech, Hicks lacks standing under the overbreadth doctrine. *See* Com. Br. at 21; *supra* at 5-8. Insofar as vagueness may allegedly affect the "right to wander" or "right to visit," there is no corollary to the overbreadth doctrine.[14] Traditional standing rules apply. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 495 (1982). Hicks may not bring a vagueness challenge to vindicate the rights of others. *Parker v. Levy*, 417 U.S. 733, 756 (1974).

C. Hicks cannot claim vagueness in his own case. The trespass policy clearly applied to his conduct. He was prosecuted because he violated the Trespass-After-Warning rule. This rule clearly states that anyone barred from Housing Authority property, who returns without permission, will be subject to arrest and prosecution for criminal trespass. J.A. 84-85. The same warning is found

[14] Allowing Hicks to use the streets and sidewalks of Whitcomb Court would still leave him barred from the buildings, curtilage and common areas. Thus, Hicks' "right to visit" cannot be vindicated in this case and need not be considered by the Court.

in the written barment notice given to Hicks. J.A. 90-91. He knew full well that he would be prosecuted if he returned to Whitcomb Court.

D. Even if Hicks had standing, his challenge would lack merit. It is not at all clear that the void-for-vagueness doctrine reaches property access policies which, like the Legitimate Purpose rule, do not lead directly to imposition of penalties. Hicks has cited no cases from this Court showing that it applies, and the Commonwealth is unaware of any such decisions. And, even if the doctrine can be applied to the trespass policy, "[t]he degree of vagueness that the Constitution tolerates depends in part on the nature of the enactment." *Hoffman Estates,* 455 U.S. at 498. Hicks believes the trespass policy should be treated like the ordinance struck down in *Morales*, however, the policy is fundamentally different from that ordinance in at least five ways.

1. *Governmental roles:* In *Morales*, the ordinance was a criminal law enacted by Chicago acting in its capacity as *sovereign*. It regulated the general populace throughout the city. In contrast, the trespass policy is an administrative rule adopted by the Housing Authority in its proprietary capacity as *landlord*. It affects only non-residents who enter Housing Authority property.

2. *Nature of the property:* The public sidewalks governed by the Chicago ordinance were a traditional public forum. The sidewalks affected by this trespass policy are a non-public forum, where government has wider discretion. *See* Com. Br. at 40; *supra* at 9-11. *See also* Crim. Jus. Legal Foundation. Br. at 13.

3. *Alternative venues:* The Chicago ordinance applied throughout the city to any location open to the public, whether owned publicly or privately. *Morales*, 527 U.S. at 47. The trespass policy applies only within the narrow confines of Housing Authority property. Countless other venues remain available – nearby and throughout Richmond – for citizens to associate with each other or engage in expressive activity.

4. *Consequences of violation*: The Chicago ordinance was a criminal law, and violating it resulted in a fine or jail

time or both. The trespass policy is not a criminal law. It merely explains when the Housing Authority will press charges for trespass under Virginia Code § 18.2-119. If someone has been barred wrongly he may challenge the basis for his barment. Hicks never made such a challenge. Given his two guilty pleas for trespassing and his conviction for damaging property, his failure to do so is understandable.

5. *Language employed:* Most importantly, the *Morales* ordinance used a highly subjective standard – "with no *apparent* purpose" – which made the lawfulness of a citizen's conduct depend not on facts as they actually existed, but on a policeman's *perception* of those facts.[15] The trespass policy has no such Achilles' heel. Concerns whether a person has a legitimate purpose usually can be quickly resolved simply by asking the resident whom the person says he has come to visit. In *Morales*, there was no such ready source of guidance to police. Moreover, the term "legitimate" is found frequently in the law.[16] While there might be disagreement at the margins about what is covered, the standard focuses on the facts as they are, not on how they may be perceived by whatever policeman happens to be there at the time. As this Court has explained:

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[15] A similar flaw led the Court to strike down laws in *Kolender v. Lawson*, 461 U.S. 352, 359 (1983) ("suspect violates [the statute] unless the officer is satisfied that the identification is reasonable"); and in *Coates v. City of Cincinnati*, 402 U.S. 611, 613 (1971) (statute bans "annoying" conduct, even though conduct annoying some does not annoy others). In all three cases, statutes imposed criminal penalties because a person failed to comply with a standard residing nowhere but the mind of another. There is no such problem here.

[16] *See, e.g.,* 7 U.S.C. § 8401(b)(4) (providing for availability of biological agents and toxins for research, education, and other *legitimate purpose*); 8 U.S.C. § 1367(b)(2) (providing that information about alien may be disclosed solely for a *legitimate* law enforcement *purpose*); 18 U.S.C. § 1514(c)(1)(B) (defining "harassment" as conduct directed at a specific person that serves no *legitimate purpose*); 25 C.F.R. § 11.441(a)(3) (defining "disorderly conduct" as creating hazardous or physically offensive condition by act serving *no legitimate purpose* of actor).

> [A]lthough [the] prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

United States Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 578-79 (1973). Anyone entering Housing Authority property will know whether his purpose is legitimate. If it is legitimate, he has no reason to expect that he will be barred.[17] There is no vagueness here. The policy is constitutional.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief of petitioner, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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[17] Sometimes attacking the word "legitimate" and sometimes ignoring it, Hicks erroneously suggests that the policy "grant[s] . . . unchecked authority to Housing Authority officials to decide who may or may not use streets and sidewalks." Resp. Br. at 34. The policy contains no such sweeping terms. Even the unwritten addendum, applied by Ms. Rogers to leafleting, represents an attempt to ensure that those purporting to engage in that activity are legitimate.