NO. 02-0371

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 FOR RESPONDENT

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April 4, 2003

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QUESTION PRESENTED

Is a law that makes it a crime to be on city streets and sidewalks adjacent to public housing unless one can demonstrate, to a government official's satisfaction, that one has a "legitimate business or social purpose" to be there, unconstitutionally overbroad and vague?

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STATEMENT OF THE CASE

The City of Richmond prohibits non-residents from using numerous streets and sidewalks surrounding public housing in that city unless they can demonstrate, to the satisfaction of a government official or a police officer, a "legitimate business or social purpose" for being there. Kevin Lamont Hicks, whose mother and two children lived in the Whitcomb Court housing project, was arrested on three separate occasions for trespassing in Whitcomb Court. After his first arrest, he was notified that he was barred from returning to any public housing property, including the streets and sidewalks around Whitcomb Court and those around other housing projects in Richmond. In defense to his latest trespass charge, Hicks successfully argued that Richmond's trespass-barment policy is unconstitutional on its face because it gives government officials unfettered discretion to deny access to numerous streets and sidewalks throughout Richmond to anyone they think does not have a "legitimate" reason to be there.

1. Richmond's "Privatization" Of Public Streets.

The Richmond Redevelopment & Housing Authority ("Housing Authority"), an arm of the Richmond City government, operates 4,100 units of housing that serve over 12,000 residents, making it the largest public housing authority in Virginia. *See* <www.rrha.org/html.aboutintro.htm>. Until 1997, the streets and sidewalks adjacent to public housing in Richmond were directly owned by the City and were similar to all other streets in Richmond. J.A. 123. In 1997, the Richmond City Council conveyed numerous streets and sidewalks adjacent to the City's public housing projects to the Housing Authority. J.A. 122; *see also* note 2. Petitioner refers to these

streets as having been "privatized." *See, e.g.,* J.A. 86. However, the Housing Authority is a city government agency, and thus the streets are still owned by the government of the City of Richmond.

Whitcomb Court is located near the heart of downtown Richmond. *See* Map Lodged With Court by Respondent (located at K-6). The following streets adjacent to, or running through, Whitcomb Court were conveyed to the Housing Authority on July 25, 1997: Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, blocks 2100-2300 of Sussex Street and blocks 2700-2800 of Magnolia Street. J.A. 81. Other than the designated blocks, Sussex and Magnolia Streets remain open to the public. J.A. 80. Petitioner asserts that none of the closed streets "continue[s] beyond the Housing Authority property to other parts of the city." Pet. Br. 5. Petitioner is incorrect. Sussex Street, which is "closed" only for the 2100-2300 block, continues past the Whitcomb Court housing project into "other parts of the city." J.A. 80; *see also* Map Lodged with Court by Respondent (located at K6).

After the conveyance, the Housing Authority erected "no trespassing" signs along the newly conveyed streets, stating:

NO TRESPASSING

PRIVATE PROPERTY

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

UNAUTHORIZED PERSONS
WILL BE SUBJECT TO
ARREST AND PROSECUTION.

UNAUTHORIZED
VEHICLES WILL BE TOWED
AT OWNERS EXPENSE.

J.A. 154-155. The signs do not define "unauthorized persons" and do not state where someone may go to ask permission to walk on these streets and sidewalks.

Other than posting "no trespassing" signs, the Housing Authority made no physical changes to the streets and sidewalks adjacent to Whitcomb Court. J.A. 123. The streets are not barricaded or gated and remain open to vehicular traffic. *Id*. The City maintains utility and maintenance easements on these streets, and it has designated them as public highways for law enforcement purposes. J.A. 77. In addition, the Housing Authority stated in a publication to residents that its "privatization" of the streets would not cause "[d]isruption to the flow of traffic or services" and that "[s]chool buses, delivery trucks, and city service vehicles will be able to drive into" the streets of Whitcomb Court. J.A. 87.

Petitioner's brief in this Court asserts, without citation, that the "closed streets were those with no use other than to provide entrance and egress to the residential units on the property." Pet. Br. 5. That statement is contradicted by facts in this record and in the public record. For example, a public school, the Whitcomb Court Elementary School, is located at 2100 Sussex Street — one of the blocks of Sussex Street that has been "closed" to the public. *See* J.A. 80 (showing the symbol for a school); *see also* Map Lodged with Court by

Respondent. (showing the same symbol more clearly); <www.richmondk12.va.us/schools/rpsredesign/es/Whitcomb/webpage1.html> (home page of Whitcomb Court Elementary School). Whitcomb Court Recreation Center, located at 2302 Carmine Street, another "privatized" street, serves as the polling place for Richmond residents in precinct 602, which includes voters who do not live in Whitcomb Court. *See* <www.sbe.state.va.us/VotRegServ/Polling_Place/PollingPlacecounty-city.asp>. In addition, a local Boys and Girls Club is located at the Whitcomb Court Recreation Center. *See* <www.bgcmr.org/htl.joinclub/joinclub_location.htm>.[1]

2. The Trespass-Barment Policy.

The Housing Authority has authorized the Richmond police to enforce the trespass laws of Virginia on the deeded streets. J.A. 84. The Housing Authority has further authorized:

> 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

[1] The map on page 80 of the Joint Appendix shows a graphic of a park/playground on the corner of Carmine and Sussex Streets. That same graphic is reproduced more clearly both on the map lodged with the Court by petitioner and the map lodged with the Court by respondent. Petitioner has informed respondent that it does not believe the park exists, although it could not say if the park had ever existed, or when it had been removed.

> Richmond police 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. 84-85.

Gloria Rogers, the Housing Manager for Whitcomb Court, is the Housing Authority official responsible for implementing the trespass-barment policy at Whitcomb Court. J.A. 33-34. Non-residents wishing to visit Housing Authority property, including the streets and sidewalks adjacent to Whitcomb Court, must first obtain Rogers' permission or risk arrest for trespass. J.A. 155-156. The posted signs, however, do not inform the public that they may request that Rogers give them permission to enter the streets.

Rogers testified that she has authority to decide whether an individual or group may walk, meet, picket, leaflet, or gather for any purpose on the streets and sidewalks adjacent to Whitcomb Court. J.A. 22-41. She stated that she is unaware of any guidelines that limit her discretion. J.A. 35. Rogers explained her understanding of the trespass-barment policy as follows:

> Q. Here's the question: if the policeman stopped you, is it your policy that when the police sees someone who cannot demonstrate that they are either visiting a lawful residing resident or conducting legitimate business, that person is an unauthorized person?
>
> ROGERS: I would say so. Yes.

J.A. 30.

> Q. You, as housing manager, gets [sic] to determine who is properly on that property or not. That's part of your job, isn't it?
>
> ROGERS: I would say yes.
>
> Q. And if someone is not properly, legitimately on your property, then you can say so to the police that that person is not authorized?
>
> ROGERS: Correct. And they're not tenants.
>
> Q. And the policy is at [R.R.H.A.] to enforce trespass laws against unauthorized people who are present on R.R.H.A. property.
>
> ROGERS: Correct.

J.A. 34.

> ROGERS: . . . if a person is on the property and they're there for the right reasons, they haven't been barred, there are no problems. That church members can come, family can come on the property. That is no problem. A trespasser is a person that's been barred from the property, and there are certain reasons they have been barred and the trespass comes into enforcement at that time.

J.A. 22.

Rogers makes no exception for those wishing to engage in leafletting, proselytizing, protesting, or other expressive activity. She testified that sometimes she grants such speakers

permission to come on to the streets and sidewalks adjacent to Whitcomb Court and sometimes she does not:

> Q. Are you in a position — does your position enable you to tell people — to give people permission to come on and picket or demonstrate on housing community property?
>
> ROGERS: I'm not sure what you're asking. To picket? I've had people to call [sic] to pass out flyers, and asked to have church services. And these are things I'm used to. As far as picketing and stuff, I never had that so I'm not familiar with it.
>
> Q. Let's talk about what you're used to.
>
> ROGERS: Okay.
>
> Q. With situations such as those, people wanting to pass out flyers for example, or hold church related meetings, do they have to come to you for permission?
>
> ROGERS: Yes.
>
> Q. Then do you give permission?
>
> ROGERS: Depending on the circumstances, sometimes its [sic] granted, yes.
>
> Q. Sometimes you do and sometimes you don't?
>
> ROGERS: Correct.

J.A. 36-37.

Contrary to petitioner's assertion, Pet. Br. 7, Rogers has not added an "unwritten addendum" to the trespass-barment policy. Rogers never claimed to be following an unwritten policy of her own regarding leafletters or others wishing to engage in First Amendment activities. Rather, her testimony reveals that she is doing no more and no less than exercising the unfettered discretion granted to her under the trespass-barment policy.

3. The Facts Of This Case.

At the time of the events leading to his arrest, respondent Kevin Hicks did not live in the Whitcomb Court housing project, but his mother, his children, and his children's mother did. J.A. 70. Hicks was convicted of trespassing at Whitcomb Court in February 1998 and again in June 1998. J.A. 68. The record does not reveal where Hicks was when he was arrested for trespassing or what he was doing on those two occasions. On April 14, 1998, Rogers served Hicks with written notice that he was barred from all Housing Authority property, and that if he was "seen or caught on the premises, [he would] be subject to arrest by the police." J.A. 90. Thus, Hicks was not only barred from streets and sidewalks adjacent to Whitcomb Court, but also from entering all the other "privatized" streets and sidewalks adjacent to other housing projects.[2]

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[2] The following ordinances purported to "close" streets and sidewalks adjacent to public housing: Ordinance No. 97-182-198 closed Raven Street, North of Ford Avenue, near the Mosby Court housing project; ordinance No. 97-183-99 closed the 2000-2200 Block of Creighton Road, Walcott Place and Bunch Place near the Creighton Court housing project; ordinance No. 97-292-293 closed Afton Avenue, between Lynhaven Avenue and Thaxton Street; ordinance No. 97-205-218 closed the 1600-1800 block of (continued...)

After receiving the barment notice, Hicks twice went to Rogers' office and asked for permission to enter the streets and sidewalks around Whitcomb Court. J.A. 125. His requests were denied. *Id*.[3] Petitioner asserts that 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." Pet. Br. 9. However, there is also no evidence that Hicks was informed of any such procedures. Neither the barment notice he received nor the "no trespass" signs in Whitcomb Court explain that barred individuals may appeal their status in writing — indeed, petitioner can point to no document that explains how one can appeal a barment notice — and Rogers never testified that she informed Hicks that he could submit his appeal in writing.

On January 20, 1999, a Richmond police officer stopped Hicks while he was walking on Bethel Street, one of the "privatized" streets adjacent to Whitcomb Court, and issued a summons for trespass. J.A. 125.

In April 1999, Hicks was tried and convicted of trespass in Virginia district court. He appealed to the Circuit Court of

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[2](...continued)
Harwood Street, the 1600-1800 block of Rosecrest Avenue, the 1500-1600 block of Lone Street, the 1700-1800 bock of Southlawn Avenue, and the 1600 block of Glenfield Avenue, near the Hillside Court housing project; ordinance 97-181-197 closed Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 block of Sussex Street, and the 2700-2800 block of Magnolia Street near the Whitcomb Court housing project.

[3] Rogers' office is located on one of the "privatized" streets. Although Hicks was technically trespassing when he asked for permission to return, he was not arrested on either occasion. J.A. 39-40.

the City of Richmond, where he received a trial *de novo*. Before that trial, Hicks moved to dismiss the trespass charge on the ground that prohibiting the public from entering the streets surrounding Whitcomb Court violates both the Virginia and federal constitutions. In pursuing that motion, Hicks asked for documents that explained why he was barred. J.A. 11. The Housing Authority responded that it did not have to give an explanation because it could bar anyone for any reason:

> MR. JOHNSON BLANK (counsel for the Housing Authority). Judge, if I may, 18.2-119 is the trespass statute, and I think, Judge, you hit right on it. The trespass statute says that a landowner can ban anybody they want for whatever reason they want at anytime that they want to. And the Housing Authority objects to them having to produce documents in this case because they're irrelevant beyond the criminal statute.

J.A. 13.

Hicks's motion was denied. He was subsequently convicted of trespass and sentenced to 12 months in jail and fined $1,000, although both penalties were suspended. J.A. 94-95. Nonetheless, Hicks served a 12-month sentence because his conviction on the trespass charge violated the terms of the suspended sentences imposed on him for his previous trespass violations. J.A. 94-95.

Hicks appealed his conviction to the Virginia Court of Appeals, where he attacked the trespass policy on its face, arguing that it is unconstitutionally vague and overbroad. He also contended that the policy violated his right of freedom of association under the Virginia Constitution and the First and Fourteenth Amendments of the U.S. Constitution. A divided

panel of that court rejected his claims. J.A. 98. On rehearing *en banc,* the Virginia Court of Appeals reversed the panel, holding that streets and sidewalks are public fora and that the Housing Authority's exclusion of the public from these fora violated the First and Fourteenth Amendments. J.A. 121.

The Supreme Court of Virginia affirmed on overbreadth grounds. The court recognized that overbreadth is "strong medicine" to be used "sparingly," but nonetheless held that the Housing Authority's trespass policy was "overly broad" because it granted government officials unfettered discretion to determine who has a right to speak on city streets and sidewalks, in violation of the First Amendment. J.A. 160, 167. The court concluded that it did not need to decide the question whether the streets and sidewalks adjacent to public housing are public fora to find that the policy was overbroad on its face. J.A. 166-167. The court did not reach Hicks's arguments based on the Virginia Constitution.

Petitioner never argued below that Hicks lacked standing to challenge the trespass-barment policy as overbroad because he had not been engaged in expressive activity. In addition, petitioner never asserted that the Housing Authority had greater authority to restrict First Amendment rights when acting as landlord than when acting as sovereign. Both of these arguments were raised for the first time in the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Virginia law prohibits non-residents from entering numerous streets and sidewalks unless they can demonstrate a "legitimate business or social purpose" for doing so. The law does not define the types of activities that are considered "legitimate" or describe how an individual would demonstrate his or her legitimate purpose to the Housing Authority's or police officer's satisfaction. Neither the Housing Authority nor the police has established any standards to clarify who may enter the streets in question. Because this sweeping trespass-barment policy gives government officials and the police unfettered discretion to decide who may have access to streets and sidewalks throughout the City of Richmond, it suffers from the closely related defects of overbreadth and vagueness, and thus is unconstitutional on its face.

Streets and sidewalks are quintessential public fora. Like the streets and sidewalks throughout the rest of Richmond, those adjacent to Whitcomb Court continue to provide access to homes, and to public spaces such as a school and polling place, and serve as a space for public displays and association. Contrary to petitioner's assertion, the City's transfer of the streets and sidewalks to the Housing Authority did not automatically transform these public fora into nonpublic fora, or give the Housing Authority special authority to ignore constitutional restraints on government action. The Housing Authority is no more the "landlord" of streets and sidewalks around public housing than the City is "landlord" of the rest of the streets and sidewalks in Richmond. Nor is the Housing Authority in a lessor/lessee relationship with the individuals it bars from Housing Authority property. Thus, the Housing Authority has no greater authority than does the City of

Richmond to prohibit the public from being on the streets and sidewalks adjoining its property.

In any case, the trespass-barment policy is overbroad whether analyzed under strict scrutiny as a public fora or the reasonableness standard that applies to nonpublic fora. Concern over criminal activity on the streets around housing projects does not justify giving public housing officials and police unfettered discretion to decide who has a "legitimate purpose" to enter these streets and who will be barred or arrested for doing so. Excluding everyone without a "legitimate purpose" from numerous neighborhoods, whether or not suspected of current criminal activity, is not a "narrowly tailored" or even "reasonable" method of combating crime.

Contrary to the assertions of petitioner and the United States, Hicks has standing to defend against a charge of trespass on First Amendment overbreadth grounds. Petitioner seeks to limit overbreadth challenges to those engaged in expressive, but not constitutionally protected, activity. As a threshold matter, petitioner waived the issue because it did not question Hicks's prudential standing to challenge the law as overbroad in the courts below. For that reason, there is very little evidence in the record regarding Hicks's activities at the time of his arrest, and none explaining why he was barred. The evidence that does exist indicates that Hicks was trying to communicate with his family, which is expressive activity that gives him standing to bring an overbreadth challenge under even petitioner's standard.

In any event, petitioner's novel restriction on overbreadth challenges is at odds with the purpose of the overbreadth doctrine, which is to benefit third parties not before the Court, and is unworkable because almost every imaginable

human activity — including Hicks's activities at the time of his arrest — is "expressive" in one way or another. *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Furthermore, this case arose in a state court, and state courts are not required to adhere to prudential limitations on standing applicable in federal courts.

The United States, but not petitioner, argues that overbreadth challenges can be brought only against laws that target speech or expressive conduct, and not against laws that target conduct more generally. Adopting this new limiting principle would require overruling this Court's prior decisions holding that laws that target conduct, but nonetheless substantially restrict speech, are overbroad. In any case, the restriction is unnecessary to curtail overbreadth challenges. As the law stands now, for an overbreadth challenge to be successful, the purported overbreadth must be "not only real, but substantial as well, judged in relation to the law's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). This limitation is sufficient to ensure that the only laws that will be held unconstitutionally overbroad are those that have a significant chilling effect on speech. Because the trespass-barment policy threatens with arrest anyone who does not first obtain the government's approval for using streets and sidewalks around public housing, it meets this standard.

ARGUMENT

I. THE TRESPASS-BARMENT POLICY IS UNCONSTITUTIONAL BECAUSE IT GRANTS THE HOUSING AUTHORITY AND THE POLICE UNBOUNDED DISCRETION TO CHOOSE WHO MAY HAVE ACCESS TO STREETS AND SIDEWALKS.

The trespass-barment is both overbroad, in violation of the First Amendment, and vague, in violation of due process, because it grants Housing Authority officials and the police unfettered discretion to decide who has a "legitimate purpose" to use streets and sidewalks.

A. The Trespass-Barment Policy Is Substantially Overbroad.

The Housing Authority's trespass-barment policy is overbroad because it "reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). The policy flatly excludes the public from numerous streets, making exceptions only for residents and those whom the police and Housing Authority officials decide have a "legitimate business or social purpose" for being there. The trespass-barment policy applies to all individuals, including those who seek to engage in First Amendment activity on the streets and sidewalks at issue, and Gloria Rogers, housing manager for Whitcomb Court, testified that she applies the policy to individuals seeking to engage in First Amendment activity. J.A. 37-38. In essence, the policy gives government officials and police unchecked authority to prohibit any and all speech and expression by non-

residents on streets and sidewalks near public housing projects in Richmond.

In determining whether a law is overbroad, "a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis." *Hoffman Estates*, 455 U.S. at 494 n.6. Unclear laws and policies suppress protected expression in two ways. First, they chill speech and expressive conduct that might, or might not, fall within the scope of the law because "ambiguous meanings cause citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal quotation marks and citation omitted)). Second, broadly-worded prohibitions empower government decisionmakers to pick and choose among speakers based on their personal preferences, leading to "selective enforcement against unpopular causes." *NAACP v. Button*, 371 U.S. 415, 435 (1963). The trespass-barment policy exhibits both flaws.

Under the policy, no one can know in advance whether the police or Housing Authority will deem any particular purpose to be legitimate. Faced with the possibility of arrest and prosecution for trespass if they guess wrong, many leafletters, proselytizers, demonstrators, canvassers, and the like will be dissuaded from risking criminal penalties for entering any of the posted streets. *See Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (overbreadth challenges "deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression"). "[W]here a [policy] unquestionably attaches sanctions to protected conduct, the likelihood that the

[policy] will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19 (1984).

To avoid the possibility of arrest for trespass and banishment from all Housing Authority property, non-residents must first obtain permission from Housing Authority officials before entering posted streets and sidewalks. J.A. 155-156. The inherent ambiguity of the "legitimate purpose" standard gives government officials free rein to decide who may use streets and sidewalks, and therefore may lead to the suppression of speech disfavored by these officials. For example, Rogers explained that she decides who has a legitimate reason to be on the streets on a case-by-case basis, and she testified that she has denied permission in the past to those seeking to engage in First Amendment-protected activity. J.A. 37. She also could not identify any factors or guidelines that ensure that her determination is objective. J.A. 35.

This Court has consistently stated that laws "that delegate[] standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights" are unconstitutionally overbroad. *Broadrick*, 413 U.S. at 613; *see also Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536, 551-558 (1965); *Kunz v. New York*, 340 U.S. 290 (1951); *Lovell v. Griffin*, 303 U.S. 444 (1938). In *Shuttlesworth*, the Court struck down a Birmingham, Alabama ordinance because it gave similar unbridled discretion to city officials to determine who could obtain a permit to hold a demonstration on city streets. Birmingham officials could grant or deny permits based solely on their view of the "public welfare, peace, safety, health, decency, good order, morals or convenience." *Shuttlesworth*, 394 U.S. at 149. The Court declared that "a law

subjecting First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Id.* at 150-151. The Housing Authority's trespass-barment policy, like the Birmingham ordinance at issue in *Shuttlesworth*, is unconstitutional because it establishes a similar prior restraint on speech by allowing government officials to pick and choose the content of speech and conduct that will be permitted on the streets. *See also Board of Airport Comm'rs of Los Angeles v. Jews for Jesus,* 482 U.S. 569, 576 (1987).

The United States asserts that "there is no reason to believe that the challenged trespass policy has any impact at all on expressive activity or that anyone seeking to engage in such activity on Whitcomb Court property has ever been denied permission to do so." U.S. Br. 8. However, Rogers testified that church groups and leafletters have asked to enter the streets, and that she has, on occasion, denied them permission to do so. J.A. 37. When questioned about whether she allows people to enter Whitcomb Court to pass out fliers or hold church related meetings, she responded that "[d]epending on the circumstances, sometimes [permission] is granted." When Hicks's counsel asked her as a follow up question: "Sometimes you do [grant permission] and sometimes you don't?," Rogers responded, "Correct." J.A. 37.

The United States finds Rogers' testimony unclear on this point. U.S. Br. 17 n.5. We disagree in light of the unambiguous testimony quoted above. But in any case, the power to bar speakers from using a public forum, whether or not it is exercised, has an unconstitutional chilling effect on speech. *See, e.g., Watchtower Bible and Tract Soc'y of New York v. Village of Stratton*, 536 U.S. 150, 156 (2002) (striking down permitting scheme even though no one had ever been denied a permit). "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very

existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

Moreover, petitioner did not argue below that the policy is narrower than it appears to be, or that Rogers and other Housing Officials have anything less than complete discretion to decide who may, and who may not, access those streets and sidewalks. To the contrary, petitioner asserted below that it was free to deny anyone and everyone access to its "private" property for any reason. J.A. 13. Thus, even if Rogers had not already exercised that authority to deny speakers access — as she testified she has done — the written policy, on its face, has a substantial impact on speech that is more than sufficient to raise a "realistic danger that the [policy] itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Taxpayers for Vincent*, 466 U.S. at 801.

Finally, the "mere fact that the [policy] covers so much speech raises constitutional concerns." *Watchtower*, 536 S. Ct. at 165. In striking down the much narrower ordinance at issue in *Watchtower*, which required only that individuals obtain a permit before engaging in door to door advocacy, this Court stated:

> It is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

Id at 165-166.

The scope of Richmond's trespass-barment policy extends far beyond that of the ordinance in *Watchtower*. In Richmond, citizens cannot even walk onto a neighboring street without first obtaining government permission. As a result, public housing neighborhoods are effectively isolated from the civic life of the community by a law that threatens with arrest and banishment any non-resident who walks on the sidewalk without first obtaining permission. Because the trespass-barment policy's sweeping restriction on speech and association substantially impinges on constitutionally protected conduct and expression, it should be struck down as overbroad.

B. The Trespass-Barment Policy Is Void For Vagueness.[4]

For many of the same reasons that the trespass-barment is overbroad, it is also unconstitutionally vague. Because of the extraordinary discretion granted to Housing Authority officials and the police to decide who has a "legitimate" reason to be on streets adjacent to public housing, the policy fails to define the criminal offense with sufficient clarity to provide an ordinary person with notice of the prohibited conduct and, more importantly, fails "to establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotation marks and citation omitted). Where

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[4] The Virginia Supreme Court decided this case on overbreadth grounds alone. However, vagueness was raised by Hicks below, and the relevant facts are not in dispute. In addition, "vagueness and overbreadth" are "logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983); *see also Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *Button*, 371 U.S. at 433. Thus, this Court may resolve this case on vagueness grounds. *See Chicago v. Morales*, 527 U.S. 41, 52-53 (2001) (plurality) (reaching overbreadth challenge even though Illinois Supreme Court had decided case solely on vagueness grounds); *cf. Hoffman Estates*, 455 U.S. at 495-96 (resolving overbreadth challenge even though court of appeals had decided case solely on vagueness grounds).

such minimal guidelines are lacking, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors and juries to pursue their personal predilections." *Id.* (internal quotation marks and citation omitted).

The lack of clarity is particularly problematic because the trespass-barment policy inhibits the exercise of constitutionally protected rights. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974). Not only does the law suppress the exercise of First Amendment rights of speech and association, it also affects the fundamental right to associate with one's family and "implicates consideration of the constitutional right to freedom of movement." *Kolender*, 461 U.S. at 358; *see also Chicago v. Morales*, No. 97-1121, Br. for the U.S. as Amicus Curiae, 1998 WL 331132, *23 ("[U]nder the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving and associating with others."); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (discussing First Amendment right to communicate with family).

Under the trespass-barment policy, police and Housing Authority officials exercise extraordinary, and unchecked, authority over members of the public. For example, any individual found on the streets of Whitcomb Court can be stopped by the police and questioned about his or her purpose for being there. J.A. 26, 29-30. If, in the officer's opinion, the purpose is not "legitimate," the officer may then give oral or written notice that the individual is barred, indefinitely, from all Housing Authority property. J.A. 84. Housing Authority officials such as Rogers also have unchecked authority to issue notices barring members of the public. An individual who is barred, such as Hicks, is prohibited not only from returning to the streets around the public housing project at which he was stopped, but also from entering many other streets and

sidewalks adjacent to public housing throughout Richmond. *See* J.A. 84; *see also* note 2 (listing "closed" streets around housing projects in Richmond). Once barred, the individual may not enter the streets for any purpose, even when invited there as the guest of a relative living in the housing project. J.A. 39. Thus, a barred individual such as Hicks would risk arrest for trespass if he returned to the "privatized" streets to pick up his children from the Whitcomb Court Elementary School or from the local Boys & Girls Club, or if he went to vote at the polling place located at the Whitcomb Recreation Center. *See supra* 3-4. Because this policy "grant[s] a policeman virtually standardless discretion to close off major portions of the city to an innocent person" it constitutes "a major . . . limitation upon the free state of nature." *Morales*, 527 U.S. at 70 (Breyer, J., concurring) (quotation and citation omitted).

Access to the streets around Whitcomb Court is granted or denied on the police or Rogers' whim. Rogers testified that "if a person is on the property and they're there for the *right reasons*, they haven't been barred, there are no problems." J.A. 22 (emphasis added). Rogers did not define what she meant as the "right reasons" for being on the streets, although she did state that "church members can come, family can come on the property. That is no problem." J.A. 22. Obviously, however, even those minimal standards are not consistently followed, because Hicks himself was barred even though his children and mother lived at Whitcomb Court. The Constitution does not permit government officials to grant or deny access to streets and sidewalks based on such vaguely defined and subjective criteria.

The vaguely worded trespass-barment policy closely resembles the standardless anti-loitering ordinances that repeatedly have been struck down on vagueness grounds by this Court. *See, e.g., Morales,* 527 U.S. 41; *Kolender*, 461 U.S.

352; *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). Most recently, in *Morales*, the Court invalidated for vagueness an ordinance that made it a crime to "loiter" in the company of someone a police officer reasonably believed was a criminal street gang member and to refuse to disperse when ordered to do so by the police. 527 U.S. at 47. Loitering was defined as "remain[ing] in one place with no apparent purpose." *Id.* The Court found that definition "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene." *Id.* at 62.

Obvious parallels exist between the ordinance at issue in *Morales* and the Housing Authority's trespass-barment policy. Like that ordinance, the trespass-barment policy requires police and housing authorities to engage in the "inherently subjective" determination of whether someone has a "legitimate business or social purpose" to be on the property. *Morales*, 527 U.S. at 62. As was the case with the ordinance struck down in *Morales*, the trespass-barment policy is not limited to those persons who have "an apparently harmful purpose" or who are "reasonably believed to be criminal[s]." *Morales*, 527 U.S. at 62. In fact, the trespass-barment policy has fewer limitations than did the ordinance in *Morales*, which at least required that the loiterer be in the presence of an individual believed to be a gang member before he or she could be ordered to leave.

Similarly, the statute struck down in *Kolender* required that people found loitering on the streets provide "credible and reliable" identification and account for their presence when requested to do so by a police officer. If they refused, they could be arrested. The Court concluded that, because the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification," it "vests virtually complete discretion in the hands of the police to determine

whether the suspect has satisfied the statute . . . ." 461 U.S. at 358. Likewise, the trespass-barment policy gives the Housing Authority and the police unchecked authority to decide who will be told to leave the streets, who will be barred from returning, and who will be arrested for trespass. The official need not provide an explanation or create a record to memorialize the basis for the decision. Consistent with this practice, nothing in this record reveals where Hicks was when he was first charged with trespass or why he was barred. Neither of those issues was even relevant to his "crime" under the policy. J.A. 13 (claiming that Housing Authority officials can "ban anybody they want for whatever reason they want at anytime that they want to").

In *Coates*, 402 U.S. 611, the Court invalidated an ordinance that made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." *Id.* at 611. The Court held that the ordinance was unconstitutionally vague, explaining that "[c]onduct that annoys some people does not annoy others." *Id.* at 614. Similarly, where one official might find distributing leaflets to be a "legitimate" reason to be on the streets of Whitcomb, another might consider that illegitimate and thus an act of trespass.

Like the laws at issue in *Morales*, *Kolender*, and *Coates,* the trespass-barment policy is void for vagueness because, under it, "a person may stand on a public sidewalk in [Richmond] only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.'" *Morales*, 527 U.S. at 59 n.29 (plurality) (quoting *Shuttlesworth v. Birmingham,* 382 U.S. 87, 90 (1965)).

II. THE CONSTITUTIONAL FLAWS OF THE TRESPASS-BARMENT POLICY ARE NOT CURED BY THE CITY'S CONVEYANCE OF STREETS TO THE HOUSING AUTHORITY.

Petitioner does not dispute that the trespass-barment policy would be unconstitutional if applied to streets and sidewalks throughout Richmond. Pet. Br. 36, 37. Rather, petitioner argues that the policy is constitutional because the streets and sidewalks around public housing in Richmond have been transformed into nonpublic fora over which the Housing Authority is "landlord."

Regardless of the nature of the forum, the trespass-barment policy is unconstitutional because it is vague and because it gives unbridled discretion to government officials to decide whom to enforce it against. But in any case, the act of transferring streets from one government entity to another does not, by itself, transform streets and sidewalks from public to nonpublic fora, or free the Housing Authority from constitutional limits on government action. The Housing Authority argues that it has greater constitutional leeway to regulate streets in its capacity as "landlord." But the Housing Authority is not "landlord" over streets and sidewalks near public housing any more than the City is "landlord" over the rest of the streets of Richmond, nor does the Housing Authority have a lessor-lessee relationship with those it seeks to exclude. Thus, the Housing Authority is subject to the same constitutional restrictions as any other government entity when establishing policies regarding public access to streets and sidewalks. Finally, even if the deeding of streets somehow altered their status, the sweeping trespass-barment policy is an unreasonable method of combating crime around public housing and cannot withstand even the lower level of constitutional scrutiny reserved for nonpublic fora.

A. Richmond's Conveyance Of The Streets And Sidewalks Around Public Housing To The Housing Authority Does Not Transform These Residential Streets Into Nonpublic Fora Or Free The Housing Authority From Constitutional Restraints On Government Action.

Streets and sidewalks are "the archetype of a traditional public forum." *Frisby v. Schultz,* 487 U.S. 474, 480 (1988). As this Court explained in *United States v. Grace*, 461 U.S. 171 (1983), streets and sidewalks are presumed to be public fora:

> Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.

Id. at 179; *see also Carey v. Brown*, 447 U.S. 455, 460-61 (1980); *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J.).

Presumably, petitioner believes that the streets at issue here cannot be equated with the streets throughout the rest of Richmond because they have been transferred to the Housing Authority, and because they have been "closed" to the public. Pet. Br. 6. However, petitioner has presented no evidence that would rebut the presumption that the streets and sidewalks around Whitcomb Court and other public housing projects in Richmond are still used for the same purposes as the rest of the streets throughout Richmond, and thus share the same status as public fora subject to full First Amendment protection.

Petitioner states, incorrectly, that the "closed streets were those with no use other than to provide entrance and egress to the residential units on the property." Pet. Br. 5; *see also id.* at 45. The "closed" streets surrounding Whitcomb

Court are not only the entryways to residences, but, as noted above, *see supra* 3-4, also lead to a public school, a Boys and Girls' Club, and a polling location, all of which are visited by non-residents (such as parents, teachers, children, volunteers, voters and polling workers). *See* J.A. 80; Map Lodged with Court by Respondent (K-6).

Moreover, even purely residential streets serve as more than means of physical access to the homes on those streets. Just as a "public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood," *Frisby,* 487 U.S. at 480, a public street does not lose that status simply because it runs through a public housing project, let alone along side of it. Streets and sidewalks are among a city's most important public spaces. *See, e.g.,* Eric A. Cesnik, "The American Street," 33 Urb. Law. 147, 147 (2001). They "constitute not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people enjoy the open air or the company of friends and neighbors in a relaxed environment." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981). The public uses streets and sidewalks every day to walk, jog, visit neighbors, solicit business, canvass, protest, march, and assemble for various reasons. Petitioner's narrow view of the purpose of the streets of Whitcomb Court reflects its fundamental misunderstanding of the role of streets and sidewalks in American civic life.

True, in rare cases, sidewalks and streets are considered nonpublic fora because of their unusual characteristics. For example, in *Greer v. Spock*, 424 U.S. 828 (1976), the streets and sidewalks at issue were located within an enclosed military installation and were thus separated from the streets and sidewalks of the surrounding municipality. *Id.* at 830; *see also Grace*, 461 U.S. at 179 (noting that distinction). The Court concluded that the normal presumption that streets are public

fora does not apply to a military installation, where the commanding officer has the "historically unquestioned power" to "summarily [] exclude civilians from the area of his command." 424 U.S. at 838. Likewise, in *United States v. Kokinda*, 497 U.S. 720 (1990), the sidewalk at issue ran only from a post office parking lot to the post office itself, and "was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." *Id.* at 728. Thus, four members of this Court concluded that this walkway was not the "quintessential public sidewalk which we addressed in *Frisby v. Schultz*, 487 U.S. 474 (1988) (residential sidewalk)." *Id.* at 727-728. These two cases, where the streets and sidewalks served atypical purposes, are the exceptions that prove the general rule that streets and sidewalks are public fora from which the public cannot be excluded.

Petitioner argues that the City of Richmond's conveyance of the streets and sidewalks to the Housing Authority transforms the Housing Authority into "landlord" of these spaces and then contends that the government is subject to fewer constitutional restrictions when acting as landlord than when acting as sovereign. Pet. Br. 32-49. In making this argument, petitioner cites this Court's decision in *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002), which held that the government could enforce a lease term permitting eviction of tenants from public housing if illegal drugs were found in their residence. The very passage quoted by petitioner from *Rucker* makes clear that the government's leeway to set lease-terms does not create a right to regulate the general population, as the Housing Authority is doing here:

> 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.

Id. at 135.

Here, the government *is* "attempting to criminally punish" respondent Hicks in his status as member of the "general populace." Hicks is not in a contractual relationship with the Housing Authority; he is a member of the public who, like everyone else, is prohibited from entering the streets adjacent to public housing unless the Housing Authority decides that he has a "legitimate business or social purpose" to do so.

The Housing Authority is not the "landlord" of the streets and sidewalks the City deeded to it any more than the City can claim "landlord" status over the rest of the streets of Richmond. In addition, the trespass-barment policy, by definition, does not apply to residents, and so the Housing Authority is not in a lessor/lessee relationship with anyone charged with trespassing on those streets. Thus, the Housing Authority has no more leeway under the Constitution to pick and choose who may walk on the streets around public housing in Richmond than the City has to apply the same restrictions to any of the other streets and sidewalks in Richmond.

Petitioner draws comparisons to the private sector, and argues that landlords of private apartment projects may require that visitors have a legitimate purpose for coming on the property. Pet. Br. 34-35. Of course, petitioner is a government agency, not a private actor, and thus it is limited by the Constitution in ways that private owners are not. In any case, petitioner can point to no example of a private apartment owner being allowed to exclude the public from numerous streets and sidewalks throughout a city, including streets leading to a public school and polling place, as the Housing Authority has

attempted to do. Although private owners have more leeway in some circumstances to restrict access to their property, they, like the government, cannot restrict access to spaces, such as streets and sidewalks, that are used by the general public. So, for example, in *Marsh v. State of Alabama*, 326 U.S. 501 (1946), the Court held that the corporate owner of a "company town" could not pick and choose who could walk on streets and sidewalks:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statute and constitutional rights of those who use it.

Id. at 505-07. As *Marsh* suggests, the most important question is not who owns the streets and sidewalks at issue, but rather the purpose they serve. As demonstrated above, the streets and sidewalks around public housing serve the same purpose as any other street and sidewalk in Richmond, and thus the Housing Authority must comply with all of the constitutional restraints when it seeks to bar the public from using them.

The United States cites three factors that it thinks should be considered in determining whether streets and sidewalks are public fora, U.S. Br. 29, all of which support the conclusion that the streets around Whitcomb Court are public fora.

First, the United States asserts that the Court should look to whether the sidewalk and streets in question are, as a practical matter, closed to the public. U.S. Br. 29. The answer to that question here is no. No physical barriers separate the streets from the rest of the neighborhood. Even under the new trespass-barment policy, anyone with a "legitimate purpose" may enter those streets and sidewalks. Moreover, there are many reasons that non-residents would enter the streets of Whitcomb Court. According to the pamphlet the Housing

Authority provided to Whitcomb Court residents, "[s]chool buses, delivery trucks, and city service vehicles" are free to enter the purportedly "privatized" streets. J.A. 87. Parents, teachers, employees, and volunteers regularly have reason to use the "closed" streets around Whitcomb Court to enter the public school, the Boys and Girls Club, or the polling place. *See supra* 3-4.

Second, according to the United States, a court should consider whether the government has taken sufficient steps to make its closure of streets clear to the public. J.A. 29. Again, the Housing Authority has not satisfied that standard. Other than posting "no trespassing" signs, the Housing Authority has taken no steps to separate the streets and sidewalks adjacent to Whitcomb Court from the open streets around surrounding it. J.A. 123. "No trespassing" signs alone cannot transform public streets into non-public streets, for that would be no different than simply allowing the government to deem a street closed to the public without otherwise altering its physical form, which this Court has held insufficient to oust First Amendment protections. *See Grace*, 461 U.S. at 180. The government "cannot foreclose the exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429.

The government's third factor is whether the purpose served by the sidewalks and streets at issue is consistent with a finding that they have become a nonpublic forum. J.A. 29. The purpose of the sidewalks and streets around Whitcomb Court remains what it has always been: to serve as a pathway to the homes, school, polling place, and other facilities located on those streets, as well as a space for community life. *See supra* 3-4. The *only* change is that now members of the public are trespassers unless they can demonstrate to the police and Housing Authority's satisfaction that they have a "legitimate" purpose to be there. Because this is the very policy whose constitutionality is at issue, it cannot serve as the change in

purpose that would justify itself. In short, city government may not, by its "own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums." *Grace*, 461 U.S. at 180 (quoting *U.S. Postal Service v Greenburgh Civic Assns.*, 453 U.S. 114, 133 (1981)).

As well as listing the three factors, the United States declares:

> Vesting a gatekeeper at a public park with discretion to permit or deny entry based on the gatekeeper's determination whether a person has an otherwise unspecified valid purpose would likely run afoul of this Court's public forum cases. But no case of this Court suggests that vesting an official at a publicly owned office building or apartment complex with discretion to determine whether a visitor seeks entry for a valid business or social purpose would violate the First Amendment.

U.S. Br. 25.

Even if the United States is correct in principle, that principle does not apply here. This case does not concern the Housing Authority's right to prohibit the public from entering the Whitcomb Court *residences*. At issue here is the Housing Authority's application of the trespass-barment policy to streets and sidewalks adjacent to the property, which, for all the reasons give above, are public fora.[5]

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[5] Both the United States and petitioner cite *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994), to support their contention that Richmond can bar the public from entering streets and sidewalks around housing projects. *See* U.S. Br. 25; Pet. Br. 36. However, in *Daniel*, the Eleventh Circuit upheld Tampa's trespass policy because, "[a]lthough access to the Housing Authority property is limited, the City-owned streets and sidewalks (continued...)

B. The Trespass-Barment Policy Is Unreasonable.

Because the streets and sidewalks around public housing are public fora, the public cannot be prohibited from entering them unless the government establishes a narrowly tailored restriction on access that is necessary to achieve a compelling governmental interest and the restriction "leave[s] open ample alternative channels of communication." *Frisby* 487 U.S. at 481 (internal quotation marks and citation omitted). The sweeping restriction on public access to these streets and sidewalks, which includes a restriction on First Amendment-protected expression, does not come close to meeting this standard, and thus is facially overbroad. *Cf. Kokinda*, 497 U.S. at 738-39 (Kennedy, J., concurring) (upholding ban on solicitation because public allowed to engage all other types of speech and expression). But even if the City's transfer of streets around public housing to the Housing Authority somehow transformed these streets into a nonpublic forum, the

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[5](...continued)
surrounding and intersecting with the Housing Authority property are open to the public." *Id.* at 548 n.3. The court specifically noted that the "police are trained not to arrest someone who confines himself to the City-owned streets and sidewalks surrounding the Housing Authority property." *Id.* at 550 n.9.

Petitioner also claims that *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002) and *Thompson v. Ashe*, 250 F.3d 399 (6th Cir. 2001), support the conclusion that the trespass-barment policy is constitutional. Pet. Br. 37, 44. The trespass policies at issue in those cases are far narrower than the policy at issue here. The policy in *Widell* applies only to the "common grounds" of government-owned housing and barred only those individuals who engaged in a list of prohibited activities (fighting, making loud noise, etc.). The policy in *Thompson* applies only to individuals who are suspected of being involved in criminal activities and who enter the residential property itself, rather than the streets adjacent to that property. Thus, *Daniel, Widell* and *Thompson* serve only to demonstrate that the Housing Authority in Richmond has adopted a policy of unprecedented breadth.

trespass-barment policy would still be unconstitutionally overbroad because it is not "reasonable in light of the purpose served by the forum." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985). "[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Kokinda*, 492 U.S. at 732 (internal quotation marks omitted).

As already discussed, the streets at issue here, even after their purported "privatization," serve many purposes, all amenable to the exercise of speech and association. Indeed, the streets have a far broader purpose than did the Los Angeles Airport ("LAX"), where this Court struck down a ban on First Amendment activity because the ban "cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition on speech." *Jews for Jesus*, 482 U.S. at 575. Likewise, even if the streets and sidewalks around public housing in Richmond are considered to be nonpublic fora, no government interest could justify the granting of unchecked authority to Housing Authority officials to decide who may or may not use streets and sidewalks. *See Arkansas Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998) (even in nonpublic forum, government cannot exercise "unfettered power to exclude"); *see also International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1999) (same) (O'Connor, J., concurring).

In any event, the Housing Authority has provided almost no evidence of what purpose it hoped the trespass-barment policy would serve, or why it gave its officials free rein to decide who may enter those streets and who may not. The only document in the record discussing the purpose of the

policy is the pamphlet the Housing Authority provides to residents. J.A. 87; Pet. Br. 4 n.2. None of the goals listed in the pamphlet justifies granting Housing Authority officials authority to decide who may use streets adjacent to public housing.[6]

The pamphlet declares that the "goal" of street privatization is:

> [1] To make communities safer by removing persons who commit unlawful acts which destroy the peaceful enjoyment of other residents.
>
> [2] To ensure that children have places to play free of drug paraphernalia and the danger of gunshots and other criminal activity.
>
> [3] 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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[6] The record contains no evidence of the City of Richmond's purpose in deeding the streets to the Housing Authority, or any contemporaneous evidence of the Housing Authority's goals in establishing the trespass-barment policy. Although the record contains Rogers' impression that the policy was adopted to prevent drug dealing in the neighborhood, J.A. 45-46, Rogers did not purport to speak for the City of Richmond, and there is no evidence that she played any role in the adoption of the trespass-barment policy. The absence of record evidence is in sharp contrast with the well-developed record attempting, albeit unsuccessfully, to justify the anti-loitering policy at issue in *Morales*. 527 U.S. at 46-47; *see also Watchtower*, 536 U.S. at 169 (Breyer, J., concurring) (rejecting the Village of Stratton's crime-prevention justification for anti-canvassing ordinance because Stratton failed to present any evidence to justify it on those grounds).

> [4] To hold households who knowingly harbor persons who engage in criminal activity accountable.

J.A. 87.

The policy is an extreme, unreasonable, and grossly overinclusive method by which to accomplish the first stated goal of "removing persons who commit unlawful acts" from the streets and sidewalks around public housing projects. Independent of the trespass-barment policy, the police have authority under other, narrower laws to arrest anyone engaged in illegal activity**.** *See, e.g.,* Va. St. 18.2-248 (crime to manufacture, sell, or possess controlled substance); Va. St. 18.2-58 (crime to commit robbery). Thus, Richmond did not need to bar anyone the government decides does not have a "legitimate" business or social purpose. *See, e.g., Watchtower*, 536 U.S. at 164-169 (ordinance prohibiting canvassers from going on private property to explain or promote "cause" without a permit is far broader than necessary to protect the Village's interest in protecting privacy of its residents and preventing fraud).

Nor did Richmond need to bar the public from all streets and sidewalks adjacent to public housing to achieve its second goal of providing children with places to play that are free from drugs and crime. Again, the Housing Authority could rely on Virginia's laws penalizing criminal activity to accomplish this purpose, or the City could adopt more narrowly focused laws targeted at persons engaged in criminal or gang activity. *See, e.g., Morales*, 527 U.S. at 67-68 (O'Connor, J., concurring).

Richmond's third goal — providing "an opportunity for residents to develop safety initiatives in their community" — has no relation at all to the trespass-barment policy. Residents

may organize neighborhood watch or other crime prevention programs in their communities regardless of whether the streets in their community have been "privatized."

Finally, the fourth goal of holding accountable those households that "harbor criminals" is entirely unconnected to the trespass-barment policy. The trespass-barment policy only allows the police to arrest and ban "unauthorized" individuals; it does not give the Housing Authority or police any greater power to penalize households that "harbor" criminals than it exercised beforehand. In any case, federal law already provides housing authorities with the right to evict anyone whose guest engages in "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises" or "drug-related criminal activity on or off [federally assisted low-income housing] premises." 42 U.S.C. § 1437d(*l)*(6); *see also Rucker*, 535 U.S. 125

In *Kolender* and *Morales*, the government contended that it needed "strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation." *Kolender*, 461 U.S. at 361; *see also Morales*, 527 U.S. at 47. In both cases, this Court explained that law enforcement needs "cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Id.*; *see also Morales*, 527 U.S. at 64. Likewise, the purported purposes of the trespass-barment policy do not free petitioner from the requirement that its policies provide "sufficiently specific limits on the enforcement discretion of the police to meet constitutional standards of definiteness and clarity." *Morales*, 527 U.S. at 64 (internal quotation marks and citation omitted).

III. HICKS HAS STANDING TO CHALLENGE THE TRESPASS-BARMENT POLICY ON ITS FACE.

Petitioner and the United States devote much of their briefs to the question whether Hicks has standing to challenge the trespass-barment policy as constitutionally overbroad in violation of the First Amendment. If this Court agrees with Hicks that the law is void for vagueness in violation of the due process clause, it need not decide this issue. In addition, as we explained in our opposition to certiorari, petitioner waived this question by failing to raise it at any point below.

Moreover, as a threshold matter, this Court has no warrant to regulate the prudential limitations on standing established by the Virginia Supreme Court. This Court has loosened prudential limits on standing in federal courts in the First Amendment context because it recognizes that the mere existence of laws impinging on First Amendment activities will, even when applied only to those engaged in unprotected activities, have a chilling effect on the speech rights of others. *Broadrick*, 413 U.S. at 612. If this case arose in a federal court, then this Court could consider whether to restrict overbreadth challenges to those engaged in expressive activity. But those constraints should not be imposed on the states. As Justice Stevens has explained, "if a state court has reached the merits of a constitutional claim, 'invoking prudential limitations on [the respondent's] assertion of *jus tertii* would serve no functional purpose'" because "state courts need not apply prudential notions of standing created by this Court." *Morales*, 527 U.S. at 55 n.22 (plurality) (quoting *Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 243 (1983)); *see also Raines v. Byrd*, 521 U.S. 811, 823 (1997) (interest that state court deemed sufficient to confer standing to raise federal claim sufficient for this Court to review state court's resolution

of merits of claim) (citing *Coleman v. Miller*, 307 U.S. 433, 446 (1939)).[7]

A. Petitioner Waived The Question Whether Hicks Has Standing To Bring An Overbreadth Challenge.

Petitioner has waived these nonjurisdictional standing issues by failing to raise them at any point below. *See, e.g., Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 522 n.4 (2002). Petitioner responded to Hicks's overbreadth challenge in the trial court, twice in the Virginia Court of Appeals, and then in the Virginia Supreme Court. Not once did petitioner argue that Hicks lacked standing to make an overbreadth challenge because he was not engaged in expressive activity or because he was challenging an "unwritten addendum" to the trespass-barment policy that had not been applied to him. Instead, petitioner argued that "Hicks has not demonstrated a substantial

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[7] Petitioner also contends that Hicks's conduct "was not proscribed by that portion of the [policy] he challenges as overbroad." Pet. Br. i. Petitioner argues that Rogers invented an "unwritten addendum" to the policy, under which "visitors who wish to engage in leafleting must obtain her permission before doing so." Pet. Br. 7. Thus, petitioner claims that Hicks cannot challenge the "unwritten addendum" as overbroad because it was not applied to him.

On the contrary, Hicks is challenging the trespass-barment policy, which is the very policy that was applied to him and that is applied to anyone else who enters the "privatized" streets adjacent to Whitcomb Court, including those wishing to engage in speech protected by the First Amendment. Petitioner has no basis for claiming that Rogers invented a separate policy for those wishing to engage in First Amendment activities at Whitcomb Court. Petitioner cannot point to anything in Rogers' testimony that suggests she was applying some different policy to First Amendment speakers than she applied to anyone else, or that she considered herself to be doing anything but faithfully applying the trespass-barment policy to all who sought access to the streets and sidewalks of Whitcomb Court.

risk that enforcement of the policy will lead to the suppression of speech." Va. S. Ct. Br. 22 (internal quotation marks omitted), a position that it does not press in this Court.[8]

Moreover, petitioner's waiver imposes a particular hardship on Hicks and, ultimately, this Court. Petitioner's failure to raise the issue below prevented Hicks from presenting any evidence regarding his conduct at the time of his arrests for trespass or the reasons why he was barred from returning. Petitioner states "there is nothing to suggest that expressive activity was involved in [Hicks's] barment from Whitcomb Court, nor is there any suggestion that his previous convictions" for trespass "were related to any expressive activity." Pet. Br. 19. Any absence of evidence on these issues is *petitioner's* fault for not raising the issue below.

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[8] In his opposition to the petition for a writ of certiorari, Hicks argued that petitioner had waived the issues in both its questions presented by failing to raise them at any time below. Opp. Cert. at 5-6. In its reply, petitioner argued that it had raised these issues, although it did not cite to any portion of any brief in which it made these arguments. Pet. Rep. to Opp. Cert. 2. Petitioner then wrote: "Indeed, the majority opinion [of the Virginia Supreme Court] explicitly acknowledges that Petitioner argued 'Hicks is not entitled to challenge the constitutional validity of the Housing Authority's practices or policies in the criminal prosecution for trespass.' *See* App. at 7." *Id.* Petitioner's use of that quote is extremely misleading. The quoted sentence refers to petitioner's unsuccessful argument below that Hicks should not have been permitted to raise overbreadth as a defense to trespass because he failed to challenge the barment notice in a separate, civil proceeding. J.A. 157-58; *see also* Cert. Pet. App. 7. Petitioner does not raise that argument here, and it is entirely unrelated to its standing arguments in this Court. The fact remains that petitioner *never* raised its standing arguments in any of its briefs below.

As petitioner admits, Pet. Br. 24-25, this Court has never limited overbreadth challenges to those engaged in expressive conduct, and thus Hicks had no reason to think that his conduct was relevant to his facial challenge to the trespass-barment policy. For its part, petitioner never presented *any* evidence regarding Hicks's activities at the time of the earlier trespassing charges, and it never explained why Rogers decided to bar Hicks from the numerous streets and sidewalks adjacent to public housing in Richmond. To the contrary, petitioner objected when Hicks's counsel attempted to obtain information about why Hicks was arrested and barred, arguing that such information was "irrelevant" because the Housing Authority, like all landowners, "can ban anybody they want for whatever reason they want at anytime that they want to." J.A. 11-13.[9]

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[9] Although the record is nonexistant regarding Hicks's activities at the times of his first two arrests for trespassing and the reasons for his barment, there is some evidence that, at the time of Hicks most recent arrest, he was trying to visit his family. *See* J.A. 67-68. Virginia claims that an individual has standing to challenge a law as overbroad as long as the challenger is engaged in expressive activity, even if that expressive activity is not constitutionally protected. Pet. Br. 29. Communication with family members *is* expressive activity, and is constitutionally protected. *Board of Directors of Rotary Int.*, 481 U.S. at 545 (The "First Amendment protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.") (internal quotation marks and citation omitted); *cf. Watchtower*, 536 U.S. at 166 (ordinance requiring people to obtain a permit before "speak[ing] to [their] neighbors" violates First Amendment). Thus, the little evidence that exists in this record supports the proposition that Hicks satisfies Virginia's new, and previously unasserted, condition on standing.

B. Hicks Need Not Have Been Engaged In Expressive Conduct To Have Standing To Bring An Overbreadth Challenge.

This Court's precedents establish that Hicks need not be engaged in expressive conduct himself to raise the First Amendment rights of others. For example, in *Morales*, the plurality considered defendants' overbreadth challenge to Chicago's anti-loitering law, even though defendants had not been engaged in any expressive activity at the time of their arrest for loitering. *Morales*, 527 U.S. at 52-53 (plurality). Although the plurality ultimately concluded that the anti-loitering ordinance was not overbroad because it did not apply to First Amendment activities, it conducted the overbreadth analysis without ever suggesting that defendants lacked standing to raise this issue.

Beyond *Morales*, none of the Court's overbreadth decisions turns on the identity of the challenger. So, for example, nothing in this Court's decision in *Watchtower* suggests that although Jehovah's Witnesses could challenge the anti-canvassing and solicitation policy, the Girl Scouts or trick-or-treaters could not. *See Watchtower* Oral Argument Tr., 2002 WL 341775, *28, *51-52 (Feb. 26, 2002) (discussing whether ordinance applies to these groups). The "crucial issues" for standing to bring an overbreadth challenge are whether the challenger "satisfies the requirement of 'injury-in-fact' and whether it can be expected satisfactorily to frame the issues in the case," *not* whether the challenger was engaged in expressive activity. *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 958 (1984). This Court has made clear that the challenger's activities are not relevant in overbreadth challenges, because "[w]here regulations of the liberty of free discussion are concerned, there are special

reasons for observing the rule that it is the statute, and *not the accusation or the evidence under it*, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill*, 310 U.S. at 98 (emphasis added).

Moreover, petitioner's proposed limitation on overbreadth challenges is at odds with that doctrine's purpose. "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society — to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Munson*, 467 U.S. at 958. Overbreadth challenges protect not only the rights of speakers, but also the public's interest in access to information and ideas. *See* Richard Fallon, "As Applied and Facial Challenges and Third-Party Standing," 113 Harv. L. Rev. 1321, 1367 (2000). As this Court explained in *Eisenstadt v. Baird*, 405 U.S. 428 (1972), "in First Amendment cases we have relaxed our rules of standing *without regard to the relationship between the litigant and those whose rights he seeks to assert* precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech." *Id.* at 445 n.5 (emphasis added); *see also Broadrick,* 413 U.S. at 612; *Gooding*, 405 U.S. at 520-21. In short, the very reason for permitting overbreadth challenges is to enable parties whose activity is *not* protected by the First Amendment to challenge laws on the ground that they have a chilling effect on the First Amendment rights of others and suppress valued speech; indeed, the Court has suggested that *only* one whose conduct is unprotected may bring a facial overbreadth challenge. *See Brockett v. Spokane Arcades*, 472 U.S. 491, 503-04 (1985); *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) ("The use of overbreadth 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."). Requiring a nexus between the challenger's conduct and the law's unconstitutional application is thus inconsistent with the doctrine's prophylactic purpose.

Furthermore, this Court has already established significant limitations on overbreadth challenges that are in accord with the doctrine's purpose to protect the speech rights of third parties. Overbreadth challenges can only be successfully brought against laws that have a "*substantial* impact on conduct protected by the First Amendment," because only such laws have a significant chilling effect on constitutionally-protected activity. *Morales*, 527 U.S. at 52-53 (plurality) (emphasis added). Applying overbreadth only when a substantial amount of speech is affected is far more in keeping with the purpose of the doctrine than is a rule requiring that the person challenging the law be engaged in expressive speech.

Petitioner's proposal would limit standing in overbreadth challenges to the odd category of cases in which the challenger is engaging in expressive conduct that is *not* protected by the First Amendment. Pet. Br. 29. Under petitioner's rule, an individual who wishes to display his pornography collection on the streets of Whitcomb Court has "standing" to challenge the trespass-barment policy, while someone like Hicks, whose children lived at Whitcomb Court, does not. The Constitution does not recognize any distinction between expressive conduct that is *not* protected by the First Amendment and conduct that is simply not expressive, *see Chaplinski v. New Hampshire,* 315 U.S. 568, 572 (1942), and, for the reasons already given, it makes no sense to do so.

Petitioner's proposed limitation on standing is not just illogical, it is unworkable because it would require courts and

parties to resolve a complicated factual question — *i.e.*, whether the party's conduct was "expressive" — that is entirely separate from, and irrelevant to, the question whether the law is overbroad. Petitioner assumes that it would be a simple matter to determine whether an individual is engaged in expressive activity. However, as this Court has noted, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one's friends at a shopping mall. . . ." *Stanglin*, 490 U.S. at 25.

Indeed, the slim evidence in this record suggests that Hicks was seeking to communicate with his family, *see* J.A. 67-68, which is surely expressive activity. *See supra* note 9. Moreover, Hicks knew he was barred from Whitcomb Court, but returned anyway, possibly because he disagreed with the policy that kept him from visiting his family. Thus, he could argue that simply by walking down the street, he was expressing his objection to the trespass-barment policy. Presumably, petitioner would agree that if Hicks had carried a sign, or wore a t-shirt, that said "I object to the Housing Authority's trespass-barment policy," he would have "standing" to challenge the law as overbroad. Courts and parties should not be required to delve into the difficult and entirely irrelevant question whether a party's conduct was "expressive" before concluding that the party has standing to challenge a law as overbroad.

Finally, limiting standing to those engaged in expressive (but not constitutionally protected) activity would not accomplish the goals that petitioner and the United States claim it would. The United States asserts that the "costs of a challenge like respondent's are more substantial than in an ordinary overbreadth case" because it "will disable society from

enforcing its laws even against those engaged in no expressive activity at all." U.S. Br. 8, *see also* 15-16. Whether or not Hicks had been engaged in expressive conduct at the time of his arrest for trespass, however, his challenge, if successful, would prevent petitioner from enforcing its trespass-barment policy against *anyone*, including those not engaged in expressive activity, because a "successful overbreadth challenge . . . suspends enforcement of a statute entirely." *Munson*, 467 U.S. at 977 (Rehnquist, C.J., dissenting). For example, if Rogers barred a musician or dancer from entering the streets of Whitcomb Court, and that person then brought a successful overbreadth challenge to the trespass-barment policy, the would thereafter be unenforceable against *anyone*, including those not engaging in expressive activity.

The United States also criticizes the application of the overbreadth doctrine to cases such as this on the ground that it will lead to courts "prematurely" deciding constitutional questions. U.S. Br. 16-17. But overbreadth challenges are never "premature" in the Article III sense — that is, they are ripe cases for a court to review, as here, where Hicks was charged with a crime as a result of the policy. True, the overbreadth doctrine leads courts to decide whether a law is unconstitutional earlier than they would otherwise have done, but that is the very reason this doctrine exists. The Court loosened prudential restrictions on standing in the First Amendment context to strike down sooner, rather than later, laws that will have a chilling effect on speech.

In a variation on petitioner's theme, the United States also suggests limiting overbreadth to laws that solely target expression. U.S. Br. 17-21. Not only was this issue *never* raised below, it is also not fairly included within the question presented and it is *still* not pressed by petitioner here. Thus, the

issue should not be addressed by this Court. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) (refusing to address an argument raised only by *amicus*).

Moreover, such a limitation would require overruling the long line of cases in which this Court has applied overbreadth analysis to laws that apply generally to both speech and conduct. *See Morales*, 527 U.S. at 52-53 (plurality), *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (requiring groups to obtain a permit before gathering at public places); *Houston v. Hill*, 482 U.S. 451, 478-481 (1987) (concluding that ordinance that makes it a crime to "oppose, molest, abuse or interrupt any policeman" applies to unprotected conduct as well as protected speech, but nonetheless violates the First Amendment and Fourteenth amendments on its face) (Powell, J., concurring); *see also id.* at 472 (Scalia, J., concurring); *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) ("our cases firmly establish appellant's right to raise an overbreadth challenge" to anti-noise ordinance prohibiting making of noise that breaches the peace near a public school); *Broadrick*, 413 U.S. at 615 (noting that overbreadth challenges can be brought against state laws regulating expressive and unexpressive conduct); *Coates,* 402 U.S. at 615 (concluding that a law that prohibits three or more people from assembling and conducting themselves in a manner annoying to others is overbroad as well as vague because it applies, in part, to conduct protected by the First Amendment).

The United States argues that the law at issue in *Forsyth County*, which required groups to obtain a permit before using public spaces, actually targeted expression because "[g]atherings of people in a public forum are a characteristic of expressive activity and a traditional function of public parks and streets." U.S. Br. 19-20. But if that is so, the trespass-

barment policy that prevents *anyone* — whether in large groups or as individuals — from "gathering" on streets must also target speech. Individuals as well as groups engage in expressive activity. And, of course, the policy that forbids individuals to be on the streets of Whitcomb Court also, by definition, forbids groups from being there as well. Perhaps the United States is suggesting that had Forsyth County chosen to regulate *everyone's* access to streets — individuals as well as groups — that ordinance could not have been challenged on overbreadth grounds. Yet it would be anomalous, and wholly at odds with the overbreadth doctrine's purpose, for this Court to allow individuals to challenge *narrow* laws that target speech as overbroad, while refusing to allow individuals to challenge far *broader* laws that target conduct as well as speech as overbroad.

The United States is concerned that overbreadth not be used to strike down broad laws aimed at non-expressive conduct that have little impact on First Amendment protected activity. However, existing limitations on the overbreadth doctrine put that fear to rest. For overbreadth challenges to be successful, the challenged law's impact on protected expressive conduct 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 (emphasis added). This limitation ensures that broadly sweeping laws that do not impinge significantly on speech in relation to their affect on constitutionally unprotected conduct will not be struck down as overbroad. Because the trespass-barment policy threatens with arrest anyone who does not first obtain the government's approval for using streets and sidewalks around public housing, it meets this standard.

CONCLUSION

For the reasons stated above, this Court should affirm the Supreme Court of Virginia's holding that the trespass-barment policy is facially unconstitutional.

Respectfully submitted,

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April 4, 2003

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