No. _____

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

LIST OF PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Virginia respectfully petitions this Court for a writ of *certiorari* to review the judgment of the Supreme Court of Virginia, which held that the trespass policy of the Richmond Redevelopment and Housing Authority ("the Housing Authority") violates the First Amendment.

OPINIONS BELOW

The Supreme Court of Virginia held that the trespass policy of the Housing Authority is overly broad and thus unconstitutional. On this basis, it affirmed the judgment by which the Court of Appeals of Virginia, sitting *en banc*, reversed the trespass conviction of the respondent, Kevin Lamont Hicks. The decision by the Supreme Court of Virginia is published as *Virginia v. Hicks*, 563 S.E.2d 674 (Va. 2002), and is reprinted in the Appendix at App. 1. The *en banc* opinion of the Court of Appeals of Virginia is published as *Hicks v. Virginia,* 548 S.E.2d 249 (Va. App. 2001). It is reprinted at App. 28. The overruled panel opinion of the Court of Appeals of Virginia, affirming the convictions of Hicks, is published as *Hicks v. Virginia*, 535 S.E.2d 678 (Va. App. 2000). It is reprinted at App. 59. The record of the ruling whereby the Circuit Court of the City of Richmond denied Hicks' motion to dismiss is found at App. 90.

JURISDICTION

The opinion of the Supreme Court of Virginia was entered on June 7, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

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

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

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

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

4. A copy of the ordinance by which the City of Richmond closed streets running through the Whitcomb Court housing project and transferred them to the Housing Authority is found at App. 93.

5. The Housing Authority trespass policy provides, in pertinent part:

> Richmond Redevelopment and Housing Authority hereby authorizes each and every sworn officer of the Richmond Police Department to

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

App. 98.

STATEMENT OF THE CASE

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

42 U.S.C. § 11901(3) and (4) (Congressional findings) (quoted in *Department of Housing and Urban Development v. Rucker*, 122 S. Ct. 1230, 1232, 1235 (2002)).

Before the events giving rise to this case, Whitcomb Court was likewise described as "an open air drug market." App. 3. A public housing project in Richmond, Virginia, Whitcomb Court suffered from the same crime epidemic that has plagued many housing projects across the country. The root of the problem was not the people living there, but those who came from the outside. *See* App. 3.

Determined to provide greater protection to the residents of Whitcomb Court, the City of Richmond passed an ordinance, in June of 1997, declaring that the streets inside the housing project were "no longer needed for the public convenience" and closing them to public use and travel. App. 93, 97 (plat).[1] The City then deeded the streets to the Richmond Redevelopment and Housing Authority ("the Housing Authority"), a government entity that owns and operates this project. App. 3. The sidewalks that run adjacent to these streets were conveyed as part of the same transaction.

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

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

App. 104-05.

The deed required the Housing Authority to give notice that it was now the owner, by "mak[ing] provisions to give the appearance that the closed streets, particularly at the entrances, are no longer public streets and that they are in fact private streets." App. 3, 4. The Housing Authority erected signs every 100 feet along the streets of Whitcomb Court, and affixed them to the apartment buildings. The clearly visible red and white signs gave this warning:

NO TRESPASSING

PRIVATE PROPERTY

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

UNAUTHORIZED PERSONS
WILL BE SUBJECT TO
ARREST AND PROSECUTION.

UNAUTHORIZED
VEHICLES WILL BE TOWED
AT OWNERS EXPENSE.

App. 4.

As owner of the private streets, the Housing Authority then implemented a written policy aimed at preventing trespass on the premises. Under the policy, trespassers were first notified to stay away, and then arrested if they refused to leave or if they returned. Those to be given such notice included "any person" found at Whitcomb Court who is not a resident or employee or who "cannot demonstrate a legitimate business or social purpose for being on the premises." App. 98. Pursuant to the policy, the Richmond Police Department was authorized to serve notices,

and to arrest any person for trespass if, having been duly notified, he either stayed upon Whitcomb Court property or returned to it. *Id.* The policy also provided a process by which those so barred from the premises might apply for permission to return by submitting a written application through the Housing Authority's director of housing operations. App. 62.

The respondent, Kevin Lamont Hicks, was barred from the property by notice delivered outside the courtroom immediately following a prior criminal conviction in April of 1998. There is no question about the receipt of notice. Hicks signed an acknowledgment in the presence of a police officer. App. 106-07.[2] The record does not reflect the facts that made it necessary to bar Hicks from the premises. The record does show that the conviction at issue here was not the first time that Hicks had been convicted for his activities at Whitcomb Court. He was previously convicted for trespassing there in February of 1998 and, again, in June of 1998. He was also convicted of damaging property there in April of 1998. App. 60. While Hicks twice asked the housing manager, Gloria Rogers, orally for permission to return, App. 44, there is no evidence that he ever availed himself of the written procedures by which such a request might be properly considered. Nor did he otherwise seek to challenge his

[2] The letter provided, in part: "This letter serves to inform you that effective immediately you are not welcome on Richmond Redevelopment and Housing Authority's Whitcomb Court or any Richmond Redevelopment and Housing Authority property. This letter is an official notice informing you that you are not to trespass on RRHA property. If you are seen or caught on the premises, you will be subject to arrest by the police." App. 106.

status as *persona non grata*. Instead, in direct defiance of the notice, he simply went back to the property.

In January of 1998, a Richmond police officer who knew Hicks – and knew he was barred – saw him walking along the sidewalk adjacent to Bethel Street, one of the streets closed to public traffic and conveyed to the Housing Authority. Thus, he was inside Whitcomb Court, on property owned by the Housing Authority, where he had been told not to return. The officer gave Hicks a summons for trespass.[3] App. 6.

Hicks was tried and convicted of trespass in the general district court in April of 1999.[4] He appealed his conviction to the Circuit Court of the City of Richmond where, pursuant to Virginia law, he received a trial *de novo*. Va. Code § 16.1-132, 17.1-513. Before this trial in the circuit court, Hicks moved to dismiss the charge on the grounds that it violated the federal and state constitutions, listing as his federal constitutional claims the First and Fourteenth Amendments. App. 86 (motion to dismiss). At a hearing on the motion, counsel for Hicks questioned Rogers, the Whitcomb Court housing manager. She explained that persons who were not barred and who were invited to the property by a resident were not affected by

[3] Hicks claimed to be there "to bring pampers for his baby." App. 61. There is no evidence that the officer saw any pampers, and no other evidence corroborating Hicks' claim that he was engaged on such an errand. Moreover, there is nothing in the trespass policy that would allow such an excuse to override a notice not to return. Nor does such an errand implicate any fundamental right.

[4] In Virginia, a general district court is a court not of record in which misdemeanors are tried in bench trials. Va. Code § 16.1-123.1.

the trespass policy. She also discussed an unwritten practice apparently originating in her implementation of the written policy. It was this unwritten practice that the Supreme Court of Virginia ultimately found to be problematic – and that Hicks was allowed to attack even though he had never engaged in the expressive conduct it purported to regulate.

According to Rogers, non-residents wishing to hold meetings on the premises or distribute leaflets must obtain permission in advance in order to be on the property. Requests to hold meetings, she said, were sometimes referred to a "community council." She had never turned down anyone wanting to pass out leaflets and said that, if she saw something she was not comfortable in approving, she would refer it to her supervisor. App. 102. The trial court ruled from the bench, denying the motion to dismiss without elaboration. A bench trial was held. Hicks was convicted of trespassing and sentenced to 12 months in jail and a $1,000 fine, both of which were suspended.[5] App. 82-83.

Hicks appealed his conviction to the Virginia Court of Appeals. There he again argued that the trespass policy and street privatization violated his rights to freedom of association under the First Amendment, and that, despite their privatization, the streets remained a public forum. App. 59, 66, 67. Hicks also renewed his attack on the trespass policy, arguing that it was unconstitutionally

[5] Based on that same conduct, Hicks was also found to have violated the terms of the suspended sentences imposed as a result of his previous three convictions. App. 84.

vague and overbroad. App. 60. A panel of the Court of Appeals rejected all of his constitutional claims and affirmed the decision of the trial court. *Id.*[6] Hicks then sought and obtained a rehearing *en banc* by the Virginia Court of Appeals, which ruled in his favor on the grounds asserted by the panel dissenter. In a 6-5 decision, the full court held that, notwithstanding the ordinance and deed, the streets in Whitcomb Court remained a public forum, and that the Housing Authorities efforts to regulate speech in that forum failed strict scrutiny and thus violated the First Amendment. The trespass conviction was overturned.[7]

The Commonwealth then sought and obtained review by the Supreme Court of Virginia. That Court affirmed the result below, but on a wholly different ground than the one used by the Court of Appeals.[8] The Virginia Supreme Court held that the Housing Authority's trespass policy is invalid because it is overly broad and infringes upon First Amendment rights. App. 2, 17. It reached this result in spite of the fact that there was no evidence that Hicks was ever engaged in – or ever sought to engage in – any

[6] One of the three judges dissented, expressing the view that the "barment-trespass procedure . . . unconstitutionally infringes upon a citizen's First and Fourteenth Amendment rights to lawfully congregate in a public place." App. 72.

[7] The trial court order revoking suspension of his three previous sentences was not set aside. Instead, the Court of Appeals remanded the issue to the trial court to reconsider the revocation in light of its opinion. App. 43, n.4.

[8] The grounds on which the Court of Appeals had ruled for Hicks were expressly vacated. App. 16. Hicks' state law claims were not addressed.

expressive conduct at Whitcomb Court. Thus, he never had occasion to ask Rogers whether he could pass out leaflets or hold a meeting or display a sign or engage in any other sort of expressive activity that she said required prior approval under her application of the trespass policy. Even so, the Supreme Court of Virginia ruled that – under this Court's overbreadth doctrine – Hicks was entitled to complain that Roger's unwritten practice was unconstitutional and, by prevailing on that point, escape conviction for a trespass wholly unrelated to the conduct regulated by the policy. In so ruling, the court ignored the decisions of other state and federal courts which had, with one exception, upheld the constitutionality of trespass-after-warning statutes and rejected the Commonwealth's argument that Hicks was not entitled to challenge the constitutional validity of the Housing Authority's practices or policies in the prosecution for trespass. App. 7.

Two members of the court dissented from the result, noting that "the majority does not separate the question of standing from its substantive First Amendment analysis." App. 18. The dissent found that Hicks lacked standing to assert a facial challenge to the trespass policy under the overbreadth doctrine, that he may only challenge those policies as they were applied to him, and that, as so applied, they were constitutional. The dissent also relied on this Court's decision in *Rucker* and explicitly noted the special concerns that arise when government acts as landlord of a public housing project:

> The policy of banning individuals who are not residents or employees of the Authority, or who cannot demonstrate a legitimate business or social purpose for coming onto the premises, is rationally related to, and advances, the legitimate

> governmental goal of preventing crime in public housing. Charging individuals with trespass when they enter upon the Authority's property after having been banned, as in the case of the defendant, also advances that goal. It must be remembered that the defendant is challenging his conviction for trespass in this appeal, not his barment from the Authority's property.

App. 26.

The Commonwealth brings this petition both to place clear limits on the use of overbreadth standing and to vindicate the authority of government, as landlord, to protect residents of public housing from the criminals under whose sway those at Whitcomb Court and elsewhere have been often forced to live.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case implicates fundamental questions about the rules of constitutional adjudication and the ability of government to provide protection to law-abiding citizens living as tenants in public housing. This Court should grant review for two reasons.

First, this Court should grant review to decide an important federal question that has not been, but should be, decided by this Court. That question is whether a criminal defendant may escape conviction by invoking the overbreadth doctrine even though (i) his own offense did not involve *any* expressive conduct, and (ii) his conduct was not proscribed by that portion of the government policy he challenges as overbroad, but by *other* portions of the policy. Although this Court created the overbreadth doctrine as an exception to the general rules of standing, it

has never clearly articulated a bright line beyond which the overbreadth rationale is so attenuated that the criminal defendant will not be able to avail himself of the doctrine. This absence of a clear outer limit caused the lower court to allow Hicks to challenge an unwritten portion of the Whitcomb Court trespass policy dealing with the need to obtain approval before distributing leaflets, even though that type of activity had absolutely nothing to do with Hicks' own conduct. This Court should grant review to articulate a bright line limitation on the application of the overbreadth doctrine.

Second, this Court should grant review to resolve a conflict among federal and state appellate courts concerning the interpretation of the federal Constitution. In resolving the constitutionality of trespass-after-warning policies for government-owned housing projects, most appellate courts have recognized a distinction between government acting as landlord and government acting as sovereign. Using such a distinction, the appellate courts have generally upheld such policies. Similarly, this Court, in the context of eviction from public housing, has recognized a distinction between the government as landlord and the government as sovereign. However, the lower court did not recognize such a distinction. Consequently, the lower court struck down the housing authority's policy and allowed the trespasser to escape punishment. This conflict over the proper interpretation of the federal Constitution cannot be allowed to persist.

I. THE LIMITS OF OVERBREADTH STANDING PRESENT AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

This petition provides the Court an opportunity to set limits on the use of its overbreadth doctrine. It asks this

Court to decide whether a criminal defendant may escape conviction by invoking the overbreadth doctrine even though (i) his own offense did not involve *any* expressive conduct, and (ii) his conduct was not proscribed by that portion of the government policy he challenges as overbroad, but by *other* portions of the policy. This is an important question of federal law that has not been, but should be, settled by this Court.

This case presents an excellent vehicle for the Court to resolve this question. Hicks was not involved in any expressive activity when he trespassed on the property of Whitcomb Court. He was charged with trespass because he returned to the property after being notified in writing not to do so. There is no evidence that the notice barring his return was related to any previous expressive activity. Nor is there any suggestion that his previous convictions for misconduct at Whitcomb Court – two for trespass and one for damaging property – were related to any expressive activity. Hicks is a common trespasser and an incorrigible one. Yet, he was allowed to escape conviction for his fourth offense by challenging an unwritten portion of the Whitcomb Court trespass policy dealing with the need to obtain approval before passing out leaflets, an activity having absolutely nothing to do with Hicks' own conduct. Such a novel reading of the overbreadth doctrine goes well beyond anything this Court has previously recognized as an exception to the traditional rule of standing.

Under the traditional rule, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767

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

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

> [T]he Court has altered its traditional rules of standing to permit – in the First Amendment area – "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick, 413 U.S. at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

Although the Court has stepped beyond traditional rules of standing for the sake of the First Amendment, it has nonetheless reaffirmed that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 610-11 (citing *Younger v. Harris*, 401 U.S. 37, 52 (1971)). Thus, *Broadrick* did not go so far as to say that an allegedly unconstitutional provision may be challenged by *anyone* at all. This Court still requires a sufficient nexus between a litigant and the statute he attacks. Without a sufficient nexus, the litigant has no standing. Under *Broadrick,* how close the nexus must be in order to provide standing varies, depending on the circumstances. The ability of a criminal defendant to invoke the overbreadth doctrine "*attenuates* as the otherwise unprotected behavior that [the First Amendment] forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws. . . . " *Broadrick*, 413 U.S. at 615 (emphasis added). Even so, what is lacking in *Broadrick* – and in this Court's other overbreadth cases – is the clear articulation of a cutoff point – a bright line beyond which the overbreadth rationale is so attenuated that the criminal defendant may not avail himself of the doctrine. It is the lack of a bright line that allowed the lower court to go astray in the case at bar. This petition provides an opportunity not only to correct the misstep below, but to prevent similar errors by other tribunals.

The bright line sought by the Commonwealth is simply this: before a criminal defendant will be allowed to escape conviction by vindicating the First Amendment rights of others, he must at least show (i) that *his own* conduct involved some sort of expressive activity, and (ii)

that his conduct falls within the particular prohibition he challenges as overbroad. Where he cannot make such a showing, the traditional rules of standing should still apply. While such a limit has never been expressly articulated by this Court, it is nonetheless consistent with its existing jurisprudence. Such a limit would be in keeping with this Court's history of treating overbreadth as "strong medicine" to be employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. It would also be consistent with the Court's observation that "[o]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." *Id*. Moreover, each of the six cases cited by the Supreme Court of Virginia in discussing overbreadth standing involved facts consistent with the bright line sought by the Commonwealth. *See* App. 9.[9] Indeed, the Commonwealth is unaware of any case where this Court has overturned a conviction – or invalidated a statute – in a manner inconsistent with the

[9] These cases include: *Los Angeles Police Department v. United Reporting Publishing Corp.,* 528 U.S. 32 (1999) (upholding statute regulating publisher's access to arrestees' addresses held by police); *Ferber* (upholding conviction of bookseller who sold films depicting sexual activities of young boys in violation of statute); *Broadrick* (upholding statute limiting partisan political activity by state employees against constitutional claim brought by employees charged with violating those limitations); *Gooding v. Wilson*, 405 U.S. 518 (1972) (affirming habeas relief for war protestor convicted of using opprobrious words and abusive language tending to cause breach of the peace, based on overbreadth of statute); *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (allowing civil rights organizations to bring suit to enjoin prosecution under subversive activities statute, and noting that the organizations were affected by the statute they challenged) and *Thornhill v. Alabama*, 310 U.S. 88 (1940) (overturning conviction of picketer under statute found to be overbroad).

bright line rule sought by the Commonwealth. While such a rule is arguably implicit in this Court's jurisprudence, it has not yet been expressly articulated. This petition provides the Court an opportunity to do so.

In some cases, this Court has described the overbreadth doctrine in terms which, on their face, could be read as broad enough to permit overbreadth challenges whether or not the litigant was engaged in expressive activity. *See, e.g., Broadrick*, 413 U.S. at 612 ("[L]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). Such broad language is not, of course, dispositive of the issue presented by this petition. As Justice Stevens noted, writing for the Court in the context of the First Amendment, "we learned long ago that 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." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 65 (1976).[10] Thus, notwithstanding the broad language of *Broadrick* and its progeny, it remains an open question whether the overbreadth doctrine is so broad as to benefit a criminal defendant whose conduct involved no expressive activity and fell

[10] A similar point was made by Justice Scalia, again in the context of the First Amendment: "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." *R. A. V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

outside that portion of the governmental policy alleged to be overbroad.

Whether the overbreadth doctrine should be carried so far requires weighing those principles that undergird traditional rules of standing against those competing concerns that originally led to the development of the doctrine. It is a balance that, ultimately, only this Court can strike. Yet, in that balance, the three principles undergirding traditional limits on standing must carry special weight. The first principle is that constitutional rights may not be asserted vicariously. *Broadrick*, 413 U.S. at 610. Admittedly, this principle has been greatly diminished under the overbreadth doctrine. Yet, the overbreadth cases decided by this Court still reflect some nexus between the litigant's conduct and the right he purports to vindicate. Both involve some form of expressive activity. In the decision below, even that attenuated nexus was completely absent. Hicks was allowed to assert the expressive rights of others even though his own conduct involved no expression whatsoever. Surely, this goes too far.

The second principle consists of "prudential limitations on constitutional adjudication." *Ferber*, 458 U.S. at 767. As the Court has explained, "[b]y focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face 'flesh-and-blood' legal problems with data 'relevant and adequate to an informed judgment.'" *Id.* at 768. This principle, set aside in some measure in this Court's overbreadth cases, is marginalized even further by the decision below. Before a statute will be invalidated for overbreadth, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Making such an

assessment involves a comparison between the legitimate and illegitimate applications of the statute in question. This can be difficult enough where the defendant's own case presents an example of expressive conduct that may be legitimately prohibited. But where a court has before it *no* expressive conduct, there are even fewer facts on which to base the necessary judicial balancing. In such a case, the prudential concerns that underlie the traditional rule of standing are especially strong and ought to limit the reach of the overbreadth exception.

Finally, there is the constitutional limitation provided by Article III. In ordinary overbreadth cases, the litigant asserting overbreadth standing has engaged in an action governed by *the same provision* he challenges as overbroad. In such case, there is enough of a connection between the litigant and the issue he raises to satisfy the requirement that there be "an actual case or controversy." *Ferber*, 458 U.S. at 768 n.20. There is no such nexus here. Hicks' conduct was not governed by the portion of the policy he challenged as overbroad. He complained that the housing manager had unfettered discretion in approving who could come on the property to hold meetings or distribute leaflets. But Hicks was not charged with trespass because he sought to engage in expressive conduct without permission. He was charged for returning to the property after being told in writing to stay away. Thus, he was a total stranger to the dispute he was allowed to litigate. To find an "actual case or controversy" in such a situation would render those words meaningless, eviscerate the limitations on jurisdiction and convert courts into the sort of "roving commissions" this Court has scorned as alien to our constitutional system. *Broadrick*, 413 U.S. at 611.

In sum, the decision by the Supreme Court of Virginia represents, at best, a significant expansion of the overbreadth doctrine. At worst, it reflects a fundamental misreading of this Court's precedents.[11] In either case, the decision below merits review and will allow this Court to draw an outer boundary for use of overbreadth standing. The Court may decide that a criminal defendant does not have access to overbreadth standing unless his own conduct involved some sort of expressive activity. Additionally – or alternatively – the Court may limit overbreadth challenges to cases where the litigant's own conduct falls under that portion of the statute, regulation or policy being challenged as overbroad. Or, the Court may use this case to fashion some other rule providing guidance regarding the intended reach of overbreadth standing. Regardless of the answer the Court may give, this petition presents a question about the overbreadth doctrine that has not been, but should be, settled by this Court. Certiorari should be granted.

[11] This is the second case within a year where the Supreme Court of Virginia has overturned a criminal conviction based on a novel reading of the overbreadth doctrine. In the earlier case, *Black v. Virginia*, 553 S.E.2d 738 (2001), *cert. granted*, 122 S. Ct. __ (2002), the court struck down the Virginia statute banning cross-burning with intent to intimidate, Va. Code § 18.2-423. In so ruling, the court relied, in part, on its view that the overbreadth doctrine could be invoked when innocent persons might be charged under a statute, even though the statute's prohibitory terms did not bar any protected expression whatsoever. This issue is now before this Court on a writ of certiorari. Coming on the heels of *Black* – and from the same lower court – this case provides the Court with an especially useful opportunity to set limits on its overbreadth jurisprudence.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE FEDERAL AND STATE APPELLATE COURTS.

The constitutional interpretation of the court below is in direct conflict with the decisions of other state appellate courts and federal courts. The nature of this conflict has profound implications for our constitutional system. Accordingly, this Court should grant review to resolve the conflict.

A. There Is a Conflict Among the Federal and State Appellate Courts on the Issue of Whether Government Acting as Landlord Is Accorded Broader Discretion Than Government Acting as Sovereign.

In *Department of Housing and Urban Development v. Rucker,* 122 S. Ct. 1230 (2002), this Court held that when government acts as a landlord of public housing, it may impose restrictions on the use and occupation of its property that it could not constitutionally impose on citizens generally in its capacity as sovereign. *Rucker,* 122 S. Ct. at 1236. Although *Rucker* marks the first time that this Court had formally articulated such a distinction, and although *Rucker* is limited to the context of property interests protected by due process, a similar distinction has been recognized by federal courts of appeal and state appellate courts in the context of trespass-after-warning provisions. Unfortunately, the court below did not acknowledge such a distinction and, instead, implicitly held that, when government acts as landlord, it is bound by the same constraints as a government acting as sovereign. Thus, the court below is in direct conflict with the other lower appellate courts.

1. Other Appellate Courts Consistently Have Permitted Government as Landlord to Have Broader Discretion than Government as Sovereign.

Prior to the decision of the lower court, federal and state appellate courts had universally recognized that there is a distinction between government as sovereign and government as landlord. Moreover, all of these courts had utilized this distinction to hold that policies excluding non-residents from government-owned residential properties are not unconstitutional.

a. Washington:

Most recently, in *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002), the Supreme Court of Washington held that there is no constitutionally protected right to enter a public housing authority's property, explaining that "the State, no less than a private property owner, 'may control the use of its property so long as the restriction is for a lawful, nondiscriminatory purpose.'" *Id.* at 743 (citing *Adderley v. Florida*, 385 U.S. 39, 47 (1966)). In other words, when the State acts as a landlord, its discretion is much broader than it is when it acts as sovereign.

b. Minnesota:

Likewise, in *Minnesota v. Holiday*, 585 N.W.2d 68 (Minn. App. 1998), the Court of Appeals in Minnesota pointed out that "government, no less than a private owner of property, has the right to limit access to its property." *Id.* at 71. In keeping with the private owner analogy, the court relied on agency theory. Holding that police cannot have any greater authority to exclude than

that of the tenants, whose agents they are, the court struck down a trespass conviction under a trespass-after-warning ordinance that sought to ban individuals from *all* of the property owned by the housing authority throughout the city. *Id.* at 71.

c. Sixth Circuit:

Similarly, the Sixth Circuit has concluded that the trespass-after-warning policy of the Knoxville public housing authority does not implicate any fundamental right and reasonably advances the goal of suppression and prevention of crime in public housing. *Thompson v. Ashe*, 250 F.3d 399 (6th Cir. 2001). Acknowledging that the Knoxville Community Development Corporation ("KCDC") is a public housing authority "organized under the laws of Tennessee," the court went on to describe the particular role of that government entity:

> "KCDC manages twelve residential housing developments that provide housing to some 9000 low-income individuals. . . . KCDC is required to provide its tenants with decent, safe, and sanitary places to live.
>
> * * *
>
> KCDC properties are prominently posted with 'no trespassing' signs . . . [T]he City of Knoxville has leased to KCDC certain interior streets and sidewalks within the housing developments . . . KCDC, in turn, contracts with the City to provide supplemental police services.

Thompson, 250 F.3d at 403-04.

Focusing on KCDC's role as landlord, the Sixth Circuit did not find it necessary to examine the "no

trespass policy" as a regulation by government acting as sovereign that might be applied to the general population. Instead, the court focused its analysis on the rights and interests of the non-resident trespasser with regard to access to KCDC's properties, clearly treating the government more like a traditional property owner. As a result, the court required that the government have only a rational basis for its policy. Examining the "precise nature of the government function involved," the court described KCDC's mandate "to provide its residents a safe place to live." *Id.* at 408. This, of course, is the quintessential description of a government acting as a landlord, not as sovereign.

d. Eleventh Circuit:

In *Daniel v. City of Tampa,* 38 F.3d 546 (11th Cir. 1994), the Eleventh Circuit determined that government could restrict access to government-owned property, dedicated for residential use by eligible low income families. In reaching this result, the Court concluded that the property must be treated as a non-public forum and that the applicable constitutional standard (for government acting as landlord in that context) was that restrictions on access to the property need be only reasonable and content neutral. *Daniel*, 38 F.3d at 550. Finding no evidence that the appellant was arrested because government disagreed with his message, and that enforcement of the statute was a reasonable means of combating the rampant drug and crime problems within the housing authority property, the Eleventh Circuit held that the conviction of an individual who had entered onto the housing authority's property to post signs and distribute flyers, pursuant to Florida's

trespass-after-warning statute, did not violate his First Amendment rights. *Id.*

e. Fifth Circuit Panel:

Finally, a panel decision of the Fifth Circuit, recently vacated with a grant of rehearing en banc, also supports the proposition that there is a distinction between government as landlord and government as sovereign. *See Vasquez v. Housing Authority of the City of El Paso*, 271 F.3d 198, 203 (5th Cir. 2001), *vacated and reh'g en banc granted sub nom. De La O v. Housing Authority*, 289 F.3d 350 (5th Cir. 2002). Although the *Vasquez* panel, in direct conflict with the Eleventh Circuit's decision in *Daniel*, struck down a trespass-after-warning statute as an unreasonable restriction on the First Amendment rights of residents to receive information, it nevertheless explicitly acknowledged the unique character of the public housing property as limited in purpose to providing affordable housing to low income citizens. 271 F.3d at 202. In addition, ruling that the trespass-after-warning statute, as applied to political candidates, was an unreasonable restriction on the rights of residents, the court noted that "the Government*, even when acting in its proprietary capacity*, does not enjoy absolute freedom from First Amendment constraints." *Id.* at 203 (emphasis added). The clear implication of this language is that, though not entirely free of constitutional limitations, government is treated differently when it acts as landlord than when it acts as sovereign.

2. The Court Below Disregarded the Distinction Between Government Acting as Landlord and Government Acting as Sovereign.

Although every other court to address the constitutionality of trespass-after-warning policies for public housing projects has recognized the distinction between government as sovereign and government as landlord, the lower court did not acknowledge any such distinction. Instead, the Virginia Supreme Court treated government efforts to regulate access to residential property as if government were acting as sovereign and "attempting to criminally punish or civilly regulate members of the general populace." *Rucker*, 122 S. Ct. at 1236. Indeed, the court below reviewed the trespass-after-warning policy of the Richmond Redevelopment and Housing Authority without any hint of distinction, recognized by every other court to consider the issue, between government acting as landlord and government acting as sovereign. Although it held that the regulation violated the First Amendment, the lower court, unlike the courts in Washington, Minnesota, and the federal circuits, did not conduct an analysis of the nature of the Housing Authority's property as a forum and therefore ignored the residential character of the property the government sought to regulate. It engaged in no discussion of the government's distinct role with regard to regulating access to a particular piece of government owned residential property, or its substantial interest, as landlord, in providing its tenants with a safe, clean and healthy place to live. Instead, it treated the policy as a "government action granting government officials standardless discretion." App. 9.

The standard applied by the lower court is a standard applied to government when it is attempting to regulate

the populace at large. *See, e.g.*, *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (invalidating ordinance requiring marchers to seek permission from mayor); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (invalidating ordinance prohibiting public worship without a permit from police commissioner); *Saia v. New York*, 334 U.S. 558, 559-61 (1948) (invalidating ordinance that required operators of sound trucks to obtain permission from police chief). While it may be the appropriate standard to apply to government acting as sovereign, it is not the standard to apply when government is acting as landlord.

This Court should grant this petition to resolve the conflict and make clear the appropriate standard for evaluating constitutional challenges to trespass policies implemented by government acting as landlord.

B. This Conflict Has Profound Constitutional Implications.

Moreover, this conflict among the lower courts of appeal is not a simple matter of jurisprudential semantics. Rather, it has profound constitutional implications that counsel for immediate resolution by this Court.

First, the lower court's notion that there is no constitutionally significant distinction between actions of the government as sovereign and actions of the government as landlord directly conflicts with this Court's explicit recognition of such a distinction in *Rucker*. This Court has long recognized that government, acting as sovereign, may not deprive persons of their property interests without due process. *See Scales v. United States,* 367 U.S. 203 (1961); *Southwestern Telegraph & Telephone Co. v. Danaher,* 238

U.S. 482 (1915). Yet, just last term, this Court held that government, acting as landlord, may evict public housing tenants simply because their guests engage in drug crimes. *Rucker,* 122 S. Ct. at 1236. Although *Rucker* is limited to the eviction of tenants and does not address the exclusion of non-residents, it would be nonsensical for the distinction between government as landlord and government as sovereign to exist in the context of one public housing regulation but not another.

Second, the lower court's rejection of such a distinction is at odds with this Court's explicit recognition of a similar distinction between government as employer and government as sovereign. For example, this Court has repeatedly emphasized that when government, acting as sovereign, creates a forum for others to speak, it may not impose viewpoint regulations. *See Board of Regents of the Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 229 (2000). However, when government, acting as employer, directs its employees to speak, it may certainly tell them what to say. *See Rust v. Sullivan*, 500 U.S. 173, 198-99 (1991). Given that there is a distinction between government as employer and government as sovereign, it would be odd if there were not a similar distinction between government as sovereign and government as landlord.

Third, if, as the lower court implied, there is no distinction between government as sovereign and government as landlord, it will severely compromise the ability of public housing authorities to deal with the "reign of terror on public and other federally assisted low-income housing tenants." *Rucker*, 122 S. Ct. at 1232 (quoting the Anti-Drug Abuse Act of 1988, 42 U.S.C. § 11901(3)). If the government may evict tenants because some family members are involved in drug crime, as *Rucker* allows,

then government logically may take measures reasonably aimed at excluding persons involved in drug crime from frequenting the property. Yet, because the lower court assumed that there is no distinction between government acting as sovereign and government acting as landlord, the lower court invalidated *all* aspects of the policy. Thus, no part of the housing authority policy, even that part which would have excluded drug dealers bent on a reign of terror, remains in effect. Moreover, as a practical matter, the lower court's failure to recognize a distinction between government as sovereign and government as landlord, means that any constitutional misstep on the part of the low-level public servants who run the housing authority results in a complete invalidation of policies designed to protect tenants from the "reign of terror" perpetrated by drug dealers. Such a constitutional rule can only chill government employees in the exercise of their duties to protect the tenants of public housing.

C. Summary

Quite simply, this court's jurisprudence must recognize a distinction between government as sovereign and government as landlord. There is a fundamental difference between the legislature enacting a statute that applies to all citizens throughout the State and a low-level public servant implementing a policy for a public housing project. While neither the legislature nor the public servant should be allowed to violate the Constitution, the analysis of whether there has been a constitutional violation should depend upon whether government was acting as a sovereign or as a landlord. *See Rucker*, 122 S. Ct. at 1236. Most lower appellate courts have recognized this necessity, but

the court below did not. This Court should grant review to resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

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