TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE MATERIAL

MISCELLANEOUS

No. 02-371

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,
Petitioner,

V.

KEVIN LAMONT HICKS,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

BRIEF OF *AMICI CURIAE* COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, HOUSING AND DEVELOPMENT LAW INSTITUTE, HOUSING AUTHORITY RISK RETENTION GROUP, NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, NATIONAL ORGANIZATION OF AFRICAN-AMERICANS IN HOUSING, AND PUBLIC HOUSING AUTHORITIES DIRECTORS ASSOCIATION IN SUPPORT OF THE PETITIONER

INTERESTS OF THE AMICI CURIAE[1]

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[1] In compliance with Rule 37.6 of this Court, *amici curiae* state that the counsel named below authored this brief in its entirety, and no party or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the

Council of Large Public Housing Authorities (CLPHA) is a not-for-profit organization whose membership consists of 55 of the largest public housing authorities (PHAs) in the country. CLPHA members collectively own and manage 40% of the nation's public housing stock. CLPHA's function is to educate and advocate on behalf of its membership before the United States Congress and various government agencies, including HUD, and to research and develop policy on matters relevant to the operations and funding of public housing.

Housing and Development Law Institute (HDLI) is the only national nonprofit organization whose mission is to serve as a legal resource to local public housing and redevelopment agencies and their legal counsel. Since 1984, HDLI has worked to enlighten its members with respect to all legal aspects of state and federal housing law and policy. In addition to serving as *amicus* in appropriate cases important to its membership, HDLI provides its members with current and timely information concerning the myriad legal issues relating to affordable and public housing. It does this by publishing legal periodicals, conducting conferences and other educational activities, and providing legal training and individualized counseling.

The Housing Authority Risk Retention Group (HARRG) is a captive mutual insurance company owned by PHAs. It was licensed in 1987 in the State of Vermont and operates under the Federal Liability Risk Retention Act of 1986. The company is the largest single PHA liability insurer, writing liability insurance coverage for PHAs that

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filing of this brief. The consents have been filed with the Clerk of the Court.

own more than fifty percent (50%) of the public housing units nationwide.

National Association of Housing and Redevelopment Officials (NAHRO) is a nationwide nonprofit organization dedicated to facilitating local community development and the provision of decent, safe and sanitary housing to low-income families. Formed in 1933, with membership including approximately 2900 agencies and 16,000 local officials, NAHRO is the oldest and largest national membership organization devoted to affordable housing and community development. NAHRO's member agencies own or manage more than 95% of all public housing in the United States. NAHRO has played a key role in the development and implementation of the nation's housing programs since their inception.

The National Organization of African-Americans in Housing (NOAAH) is a member organization comprised of government officials, professionals, and consultants working in the field of affordable housing, as well as residents of various forms of affordable housing, including public housing. NOAAH provides technical, operational and moral support to its members and offers opportunities for professional skills enhancement, resident training, and economic development. NOAAH's national network of proactive housing advocates partner with industry and government to design and implement fair housing policies and programs as well as innovative strategies that improve the quality of housing services delivery and promote healthy, vibrant communities.

Public Housing Authorities Directors Association (PHADA) is a nationwide nonprofit advocacy organization formed in 1979 whose membership consists of approximately 1900 executive directors of public housing authorities. In addition to advocating for better, more

efficient administration of the federal affordable housing programs, PHADA conducts a variety of training and educational activities concerning the development and operation of affordable housing.

The organizations comprising the *amici curiae*, represent public housing authorities and those entities and individuals responsible for managing virtually all of the nation's public housing units. In addition, *amicus curiae* HARRG and its member PHAs have a particular interest in this matter as an insurer against PHA liability arising out of criminal and tortious acts occurring on public housing property. The *amici curiae* believe that the legal standards governing the authority of PHAs to bar and/or remove individuals from public housing properties vitally impact upon the ability of PHAs successfully to manage the developments in their inventory. The *amici curiae* further believe that, if sustained, the decision under review will have a disastrous effect upon the efficacy of PHAs' efforts to meet their legal responsibility to combat illegal drugs and crime in public housing developments and, consequently, upon the physical and social well-being of the hundreds of thousands of law-abiding residents of public housing.

SUMMARY OF ARGUMENT

The power to protect PHA property through implementation of trespass-barment policies is a crucial and widely-used tool for PHAs seeking to prevent potential wrongdoers from gaining access to public housing grounds. In order to fulfill their duties of maintaining resident safety and security, PHAs must have the authority to bar individuals who do not have a legitimate reason for their presence on PHA-owned property, and must be able to rely on state trespass laws as a means of effecting such bars. In the absence of such authority, public housing residents

remain vulnerable to the scourge of drug-related and criminal activities that currently plagues public housing properties.

With respect to the administration of their properties, PHAs act as landlords, not as entities carrying out sovereign functions. Because they have little or no regulatory authority with respect to the general public, PHAs occupy, as a practical matter, substantially the same footing as private landlords. It is therefore inappropriate, as the Virginia Supreme Court has done, to impose additional constraints on the efforts of PHAs to protect their residents and property from unwarranted intrusion merely because PHAs are governmental entities.

Contrary to the Virginia Supreme Court's apparent assumption, public housing developments are not public fora. Where PHAs take steps to exercise dominion over streets and sidewalks within public housing developments to which they hold title, those streets and sidewalks are likewise nonpublic fora, and PHAs are entitled to use available trespass-barment policies to limit access to these areas.

Given its breadth and scope, the opinion of the Virginia Supreme Court under review threatens to cripple PHAs in their efforts to maintain safety and security on the properties that they own and manage. By holding the Richmond Redevelopment and Housing Authority's trespass-barment policy facially unconstitutional because it could, hypothetically, be implemented in a fashion that would violate speech rights, the Virginia Supreme Court has placed the burden on PHAs of justifying, in every instance, an individual's exclusion from public housing property. The difficulties of implementing any system that would satisfy

the Virginia Supreme Court's criteria would render virtually any PHA trespass-barment policy effectively impracticable.

ARGUMENT

I. THE USE OF STATE TRESPASS STATUTES BY PHAs TO CONTROL UNWARRANTED ACCESS BY NONRESIDENTS TO PUBLIC HOUSING DEVELOPMENTS IS ONE OF THE PRIMARY VEHICLES THROUGH WHICH PHAs SEEK TO PROVIDE SAFE AND SECURE LIVING ENVIRONMENTS.

PHA "trespass-barment" policies, such as the one at issue in this case, are one of the principal tools employed by PHAs to assure safe living environments for their tenants. Typically, these policies provide for charging certain individuals with criminal trespass if found upon public housing property after having been given a written warning by PHA personnel or local police officers acting on the PHA's behalf. Grounds for initial warnings may vary from simple loitering on the PHA's residential properties without an apparent right to be present or the commission of criminal acts ranging from property damage (as in the case at issue) or vandalism to extremely serious violent or drug-related criminal activity.

Along with tenant evictions, strict admissions procedures, and certain federally and locally sponsored crime suppression programs, PHA trespass-barment policies are a principal means through which PHAs address illegal drug and other crime problems in public housing. That these problems have been pervasive in some public housing

developments is well-known to this Court.[2] *Amici curiae* believe that, if sustained, the decision of the court below will virtually eliminate the use of this vital tool that is intrinsic to the ability of PHAs, as landlords, to control their premises.

The use of trespass-barment policies is prevalent among PHAs,[3] and PHAs that have adopted such policies frequently use them.[4] Virtually all housing authorities

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[2] In *Dep't of Hous. and Urban Dev. v. Rucker*, this Court stated that "[w]ith drug dealers 'increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants,' Congress passed the Anti-Drug Abuse Act of 1988." 535 U.S. 125, 127 (2002). The preamble to the 1988 legislation contains the following findings: (1) "public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime," (2) "drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants," (3) "the 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," and (4) "the Federal Government should provide support for effective safety and security measures to combat drug-related and violent crime, primarily in and around public housing projects with severe crime problems . . . ." 42 U.S.C. § 11901. The brief of *amicus curiae,* Richmond Redevelopment and Housing Authority, compellingly illustrates that, for some housing authorities, these Congressional findings remain fully and distressingly accurate.

[3] A survey conducted in February 2003 by *amici curiae* CLPHA, NAHRO and PHADA indicated that approximately 85% of responding PHAs (287 of 338 respondents) have adopted trespass-barment policies. The respondents own and operate more than 126,000 units of public housing.

[4] Data generated in the survey by *amici curiae* indicated that approximately 90% of respondents having trespass-barment policies actually used them to bar or arrest one or more individuals within the 12-month period preceding the survey. PHAs that kept data concerning frequency of use reported that the policy was used to bar or arrest an individual on average 36 times during such annual period. PHAs estimating the frequency with which their policies were used, estimated

having such policies have put them in place as a measure to control crime and drugs in their developments and to protect residents.[5] Available data suggest that PHAs with trespass-barment policies consider them essential both for controlling crime and drugs in their developments and for the safety and well-being of public housing residents.[6]

A. PHAs HAVE A LEGAL RESPONSIBILITY TO PROVIDE SAFE PREMISES, AND THE USE OF TRESPASS-BARMENT POLICIES FOR THIS PURPOSE IS CONSISTENT WITH BOTH FEDERAL POLICY AND PHAs' OBLIGATIONS, AS LANDLORDS, UNDER COMMON LAW.

Federal law and policy have long mandated that public housing authorities provide safe public housing premises to their residents. This legal responsibility has consistently appeared in federal policy regarding affordable housing.[7] In addition to expressions of policy, Congress has

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that they used the policy to bar or arrest, on average, 53 times during this annual period.

[5] Almost all (97%) of the respondents in the survey by *amici curiae* stated that they had adopted their trespass-barment policies "in whole or in part as a measure to protect residents from crime or illegal drugs."

[6] In the survey by *amici curiae*, 284 of 287 PHAs reporting that they had adopted trespass-barment policies answered that they considered such policies to be "essential to controlling crime and drugs in [their] developments,", and all 287 reported that they considered their policies to be "essential for the safety and well-being of residents" in their developments.

[7] The actions of PHAs to foster safe living environments for their tenants are in keeping with numerous general and specific directives in federal statutes and regulations. Statements of national housing policy include the goal of "a decent home and a suitable living environment for every American," 42 U.S.C. § 1441; a national objective "to help make neighborhoods safe and livable," 42 U.S.C. § 12702(4); a purpose of a

also enacted specific statutory directives to public housing authorities to ensure the safety of their residents and the properties that they manage and own. Section 5A(d) of the 1937 Act, codified at 42 U.S.C. § 1537c-1(d), requires each PHA to submit an annual plan, describing, among other things, what measures it is taking to ensure the safety of its residents, including crime prevention measures and coordination with local police departments. Section 6(*l*)(3) of the 1937 Act, codified at 42 U.S.C. § 1437d(*l*)(3), requires each PHA to obligate itself, in its tenant leases, to maintain the public housing project in a decent, safe, and sanitary condition.

The security of residents is also taken into account in monitoring and evaluating the management performance of PHAs, which is undertaken by the Department of Housing and Urban Development (HUD) on a regular basis using an evaluation system known as the Public Housing Assessment System. One of the performance indicators contained in this assessment system is security. This indicator addresses how well a PHA performs in adopting "anticrime strategies," coordination of such strategies with local government officials and residents, tracking crime related problems in its developments, and reporting incidents to local police. 24 C.F.R. § 902.43(a)(5). HUD's assessment system also evaluates the success of anticrime measures through resident surveys in which residents are asked, among other things, specifically how safe they feel in their units, building and parking area, and whether they are aware of any crime

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1998 statute which extensively revised the public housing statute "to promote homes that are affordable to low-income families in safe and healthy environments," Quality Housing and Work Responsibility Act of 1998, P.L. No. 105-276, § 502(b), 112 Stat. 2520 (1998); and the United States Housing Act of 1937 (1937 Act), one of the purposes of which is to remedy the "shortage of decent and safe dwellings for low-income families," 42 U.S.C. § 1437(a)(1)(A).

prevention program available to residents. 24 C.F.R. § 902.53(a)(i)(C); Public Housing Assessment System Resident Service and Satisfaction Scoring Process, 65 Fed. Reg. 40,034 (2000).

Resident safety *vis-a-vis* nonresidents has also been an important consideration in the design of public housing developments in recent years. For example, PHAs undertaking new construction or major renovations of public housing projects have taken into account the principles of "crime prevention through environmental design," more commonly known as CPTED, as a tool for crime interdiction through the definition and protection of property boundaries. Chief among those CPTED principles is the notion of "defensible space," whereby residents of a public housing site enjoy private space identifiable with a given unit, as well as common areas within a development distinguishable from public ways. Measures that PHAs and other communities have implemented in order to create defensible space include dedicated entry ways for each residential unit, so-called "eyes on the street" unit placement (whereby each housing unit fronts on a street, thus permitting observation of activities in common areas and rights of way associated with a given unit), gating, and privatization of streets running through and around PHA properties.[8] In privatizing the streets and sidewalks around Whitcomb Court, the Richmond Redevelopment and Housing Authority (RRHA) has not engaged in some manner of legerdemain to avoid legal or constitutional constraints, but rather has simply

[8] *See* OSCAR NEWMAN, U.S. DEP'T OF HOUS. AND URBAN DEV., CREATING DEFENSIBLE SPACE, 13-23 (1996) (discussing benefits of street privatization in St. Louis, Missouri); U.S. DEP'T OF HOUS. AND URBAN DEV. & CONGRESS FOR THE NEW URBANISM, PRINCIPLES FOR INNER CITY NEIGHBORHOOD DESIGN, 24-27 (2000) (discussing "eyes on the street," creation of private space, gating of communities).

implemented a measure consistent with CPTED principles and recommended by federal authorities.[9]

Finally, *amici curiae* note that, in addition to federal requirements, PHAs, like other landlords, are increasingly held legally responsible to ensure the well-being of their residents under emerging principles of state common law.[10] Both PHAs and their insurers may suffer serious liability for failure to exercise due care in protecting tenants against intruders.[11] By way of illustration, since June 1987, *amicus*

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[9] *See* U.S. DEP'T OF JUSTICE, KEEPING ILLEGAL ACTIVITY OUT OF RENTAL PROPERTY: A POLICE GUIDE FOR ESTABLISHING LANDLORD TRAINING PROGRAMS, 18-21 (2000); "Security Planning for HUD-Assisted Multi-Family Housing," HUD-PIH Directive No. 7460.4, § 19.

[10] Traditionally, under common law, a landlord had no duty to protect tenants from harm by others. This is no longer the case. Increasingly, courts are imposing duties upon landlords, public and private alike, to exercise due care to protect their tenants against criminal harm that is reasonably foreseeable. *See, e.g., Ortiz v New York City Housing Authority*, 22 F. Supp. 2d 15 (E.D.N.Y. 1998) (housing authority deemed 60% liable for rape of tenant where it failed to provide adequate building security to prevent entry of intruder); *Zuniga v. Housing Authority of the City of Los Angeles*, 41 Cal. App 4th 82, 48 Cal. Rptr. 2d 353 (Cal. App. 1995) (housing authority liable for firebombing of family by purported drug dealers where it had failed to make arrests or erect barriers to keep out intruders); *Daly v. City of New York et al*., 626 N.Y.S.2d 409 (S. Ct. N.Y. 1995) (New York City Housing Authority held to have a duty to protect passers-by where it was aware of recurring violence on the common areas of a housing project); *Tenny v. Atlantic Associates*, 594 N.W. 2d 11 (Iowa 1999) (while not an insurer of tenants' safety, landlord owed a duty of care to protect plaintiff, who had been raped, from reasonably foreseeable harm).

[11] Minimizing such losses is a matter of no small import. The federal law pursuant to which *amicus curiae* HARRG was established arose out of a crisis among PHAs (as well as other entities) that were unable to obtain liability insurance on the private market. In light of the substantial liability that PHAs faced at that time – and continue to face – liability

curiae HARRG has paid a total of $20,785,780.00 in premises liability claims due to inadequate security. In addition, HARRG maintains an outstanding reserve of $1,716,294.00 for similar claims. This represents a total of $22,502,074.00 across 465 claims, and fully ten percent of HARRG's total claims payment over sixteen years.

B. THE ABILITY TO REMOVE AND BAR INDIVIDUALS WHO ARE NOT MEMBERS OF TENANT HOUSEHOLDS, AS WELL AS INDIVIDUAL HOUSEHOLD MEMBERS WHO ENAGAGE IN CRIMINAL ACTIVITY, IS VITAL TO THE ABILITY OF PHAs TO CONTROL DRUGS AND CRIME IN THEIR PUBLIC HOUSING DEVELOPMENTS.

Viewed in the appropriate context, PHA trespass-barment policies, as well as their physical "defensible space" strategies to prevent unwanted intrusion, must be seen as complementing the remedy of evictions in PHAs' efforts to combat illegal drugs and crime in public housing. Just as the eviction process allows the PHA to address these problems from within, trespass-barment policies afford a remedy to be applied externally to persons other than those who have a contractual relationship with the PHA. As the brief of *amici curiae*, Richmond Redevelopment and Housing Authority and City of Richmond in support of the petition for certiorari amply illustrates, a substantial portion of the serious crime on public housing premises is generated by the presence of nonresidents over whom the PHA has no control.

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insurance for PHAs had become cost-prohibitive. In order to ease this burden, the Congress passed the Liability Risk Retention Amendments of 1986, P.L. No. 99-563, §§ 12(b)-12(d), 100 Stat. 3177 (1986), under which PHAs were able to create captive insurance companies more sensitive to the particular needs and exposure of PHAs, and less driven by maximization of profits.

Trespass-barment policies are the principal means through which the PHAs reduce the risk of crime perpetrated by nonresidents. Without such policies, PHAs must, in their crime control efforts, rely entirely on catching criminal offenders in the act – even those who have a record of past offenses on housing authority property - on each and every occasion. Given the resources available to most PHAs, their ability to carry out security measures in this fashion is, to say the least, limited.[12] Because of the practical difficulties that such a direct enforcement strategy entails, the trespass-barment power is not only the preferred method of protecting public housing residents and property, it is – for all intents and purposes – the only effective method of doing so with respect to nonresidents.

It is worth noting that PHAs also utilize trespass-barment policies for lease enforcement under circumstances where they wish to avoid evicting an entire family because of criminal conduct on the part of one of the members of the household. Under such circumstances, written barment from the premises enforced by arrest for trespass may be used to enforce an agreement by the family to exclude a household member who has engaged in criminal activity as a condition to continued tenancy for the remaining members of the household.[13] This use of the policy has, of course, the

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[12] This is particularly so in light of recent cuts in funding directed at crime control on public housing properties. The former Public Housing Drug Elimination Grant Program (PHDEP) allowed PHAs to pay for security and surveillance services that they could not otherwise afford using the limited operating assistance they received from the federal government. However, as of federal fiscal year 2002, Congress eliminated PHDEP funding, and thus deprived PHAs availing themselves of PHDEP assistance of a crucial resource in fighting crime on their properties.

[13] HUD regulations at 24 C.F.R. § 966.4(*l*)(5)(C) provide:

salutary effect of preserving the tenancy of the remaining household members in circumstances where the entire household would otherwise be subject to eviction.

Finally, as owners of the scarce resource that is public housing, PHAs have both a right and duty to protect public housing properties as well as tenants. The association between physical deterioration of buildings and common areas in public housing developments plagued by crime is well-known. The ability to restrict access to public housing properties to residents and other authorized persons is crucial to preserving this important national asset.[14]

C. THE USE OF TRESPASS-BARMENT POLICIES BY PHAs IS SANCTIONED BY STATE LAW THAT IS APPLICABLE TO ALL PROPERTY, WHETHER PUBLIC OR PRIVATE.

The authority for PHAs to implement trespass-barment policies does not reside in federal law, although, as noted previously, such policies are fully consistent with, and operate in furtherance of, federal housing law and policy. Rather, these policies find their authorization in state-enacted "trespass after warning" statutes, of which Va. Code § 18.2-119 is typical.[15] Trespass-after-warning laws are equally

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> (C) *Exclusion of culpable household member.* The PHA may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.

[14] Congress has estimated that the federal government has invested more than $90 billion in public housing assets. Quality Housing and Work Responsibility Act of 1998, P.L. No. 105-276, § 502(a)(2), 112 Stat. 2520 (1998).

applicable to all property and may be used by both public and private owners. Thus, a PHA exercising its prerogatives as landlord under these state laws does so upon the same legal footing as any private owner. In fact, PHAs have greater need to control access to their properties through the use of these policies than do private unsubsidized landlords who do not, as do PHAs, have explicit obligations under federal law to provide safe premises.

As this Court noted in its opinion in *HUD v. Rucker*, the federal regulatory scheme invests each PHA with significant discretion with respect to determining how it will exercise its rights as a landlord, including how and when it will employ the remedy of eviction. PHAs also have considerable discretion with respect to the manner in which they control their premises *vis-a-vis* nonresidents. As with the remedy of eviction, someone must make the determination whether enforcement of a state trespass statute is warranted. As the entities created under state law to own and operate public housing, it is appropriate that PHAs are empowered to exercise this discretionary function as they do the many other discretionary functions necessary to carrying out their mission as owners and landlords.

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[15] Va. 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, structures, premises or portion or area thereof at a place or places where it or they may be reasonably seen … he shall be guilty of a … misdemeanor.

II. IN MANAGING THEIR HOUSING PROJECTS PUBLIC HOUSING AUTHORITIES ACT AS LANDLORDS, NOT AS SOVEREIGN ENTITIES.

Because of the unique role that PHAs serve in the scheme of government, it is appropriate to treat PHAs more as landlords than as government bodies when carrying out their appointed purposes. Certainly, a government entity, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 800 (1985) (internal quotations and citation omitted). This is doubly true in the context of a PHA because it seldom operates in a capacity other than that of a property owner. Much like a public library or a state hospital, a PHA's primary functions are not "sovereign" in nature (*e.g.*, regulatory, taxing, or enforcement).[16] Rather, PHAs perform a direct service for a defined population. To the extent that a PHA acts as a "regulator" with respect to its constituency, it does so by way of a contractual agreement. This Court has stated, for example, that when a PHA evicts a tenant, it "is acting as a landlord of property that it owns" and not as a sovereign. *Rucker*, 535 U.S. at 135. That is, the terms and conditions that a PHA places on admission to and continued occupancy of a public housing unit apply to a resident through the lease executed between the PHA and the resident. Limitations and controls on resident conduct flow only through that document. Even so, this Court has not viewed PHA actions to enforce lease terms as sovereign acts, but instead as those

[16] In fact, the provision of housing is not historically a function that government entities have performed. It was only after the passage of the 1937 Act, which established the system of federally-assisted low-income housing, that most state and local governments took on the task of providing such housing.

of "a landlord of property that it owns, invoking a clause in a lease to which [a tenant] has agreed . . . ." *Id.*

By contrast, a PHA has remarkably little authority over nonresidents entering onto its properties simply by virtue of the fact that it has no contractual arrangement with members of the general public. In this respect, the PHA stands even more clearly in the posture of a property owner – and not that of a regulator or enforcer – in its dealings with the general public than it does in its dealings with its clientele. Consistent with this role, the primary – if not sole – power that a PHA might exercise with respect to a nonresident is the same one as is available to a private property owner, *i.e.*, to attempt to deny that person entry to a site.

However, the greater the constraints or conditions that the courts place on PHAs in relying on that power, the less capable a PHA is of ensuring the safety and integrity of its developments as effectively as any other landlord might be. If, because a PHA is a special purpose unit of local government, it cannot rely on trespass-barment remedies with substantially the same measure of freedom as other landlords, it would yield a perverse inequity not only as between PHAs and landlords of unassisted properties, but also as between PHAs and other landlords providing similar types of affordable housing. The federal government relies on a variety of types of housing owners under several programs to implement its housing goals: local public housing authorities, private nonprofit organizations, limited profit entities, for-profit entities, and, recently, various combinations of these types of entities. The choice of a particular form of affordable housing provider is largely a function of historical factors, such as the date of program enactment, rather than any intrinsic differences in the housing type or how it should be operated. Like public

housing, assisted housing projects operated by private owners are governed by contracts entered into with HUD and by many of the same or similar rules applicable to public housing.

Subjecting PHAs to additional limitations, through the First Amendment or otherwise, above and beyond those applicable to private owners of subsidized housing effectively places residents of public housing in an inferior position to residents of privately-owned affordable housing. This is emphatically so where the decision, such as the one under review, has the effect of prejudicing the safety and well-being of public housing tenants. The safety and welfare of a low-income tenant should not depend on the form of affordable housing available to that tenant – be it public housing or privately-owned subsidized housing. Residents of public housing should not bear greater safety risks because of the structure of the program serving those residents.

III. THE WHITCOMB COURT HOUSING PROJECT, INCLUDING THE STREETS AND SIDEWALKS IN AND AROUND THE PROJECT, CONSTITUTES A NONPUBLIC FORUM.

In contrast to the *en banc* decision of the Virginia Court of Appeals, the decision of the Virginia Supreme Court does not engage in an analysis either of the type of forum at issue or of the standard it would apply in determining the constitutionality of the PHA's trespass-barment policy. Rather, the Virginia Supreme Court appears to assume for the purpose of its decision that the PHA property at issue is a public forum. However, any reliance by the Virginia Supreme Court on the premise that the PHA's property is a public forum is misplaced.

This Court has divided government-owned property into three separate categories for First Amendment purposes. They are: the traditional public forum, the designated public forum and the nonpublic forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

As this Court noted in *Perry*, the traditional public forum is epitomized by the "streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Sidewalks are also usually considered to be a public forum. *United States v. Grace*, 461 U.S. 171, 179-180 (1983). However, *Grace* instructs that not every public sidewalk is a public forum. *United States v. Kokinda*, 497 U.S. 720, 728 (1990). Rather, "the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum." *Id.* at 728-729.

This Court has, in several instances, determined that government-owned real property constitutes a nonpublic forum. For example, in *Greer v. Spock*, 424 U.S. 828 (1976), this Court held that the streets and sidewalks of Fort Dix, although open to the public, were a nonpublic forum. Likewise, in *Kokinda,* the Court found that the sidewalk outside the entrance of a Post Office was a nonpublic forum. Similarly, in *Adderly v. Florida*, 385 U.S. 39 (1966) the Court determined that the driveway and adjacent area outside the Leon County jail in Florida were part of the jail's curtilage and, as such, were a nonpublic forum. [17]

[17] Although *Greer* and *Adderly* were decided before the forum analysis established by *Perry*, it is clear from subsequent decisions that, in the context of *Perry*, the Court now views both the streets and sidewalks at

In response to the rampant drug and crime problems at Whitcomb Court, the streets and sidewalks in and around Whitcomb Court were privatized by the transfer of ownership to the Richmond Redevelopment and Housing Authority. This was done because, as in *Adderly*, security concerns are paramount and serve as the catalyst for the implementation of the trespass policy at issue. Moreover, as the dissent in the Virginia Court of Appeals *en banc* decision noted, the Richmond Redevelopment and Housing Authority took the additional steps of notifying the public of the private character of the Whitcomb Court streets and sidewalks through the prominent display of "no trespassing" signs, through public meetings and pamphleting, and by expressly limiting access to the streets to "school buses, delivery trucks, city service vehicles and law enforcement . . . ." *Hicks v. Virginia*, 548 S.E.2d 249, 260 (Va. App. 2001) (Humphreys, J. dissenting).

It would therefore appear that the Richmond Redevelopment and Housing Authority employed every reasonable measure short of barricading the Whitcomb Court streets and sidewalks in staking its claim to its property. In this respect, the PHA's actions in this circumstance bear out the converse of the Court's observation in *Marsh v. Alabama*, 326 U.S. 501, 506 (1946), that "[t]he 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 statutory and constitutional rights of those who use it." That is, the Richmond Redevelopment and Housing Authority obtained title to the streets and sidewalks at issue here, it placed the public on notice of the limited purposes for which those streets and sidewalks were

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issue in *Greer* and driveway and adjacent area at issue in *Adderly* as nonpublic forums.

dedicated, and, as is evident from the Respondent's citation and arrest, undertook to enforce its rights with regard to its property. Accordingly, as in *Adderly*, the Court should treat the streets and sidewalks at issue as part of the curtilage of Whitcomb Court. As such, they are clearly a nonpublic forum. *Cf. Vasquez v. Housing Authority of City of El Paso*, 271 F.3d 198 (5th Cir. 2001), *vacated for reh'g en banc,* 289 F.3d 350 (5th Cir. 2002) (both majority and dissent agreed that housing authority property is a nonpublic forum); *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994) (housing authority property is a nonpublic forum).

Once it is determined that Whitcomb Court, including the streets and sidewalks in and around the project owned by the RRHA, is a nonpublic forum, the trespass policy at issue is constitutional under the First Amendment if it is reasonable and not an effort to suppress expression merely because public officials oppose a speaker's view. *Perry,* 460 U.S. at 46. The policy does not need to be the most reasonable or the only reasonable limitation. *Cornelius*, 473 U.S. at 808. Moreover, "[i]t is a long-settled principle that government actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating… [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operations . . . .'" *Kokinda*, 497 U.S. at 725 (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)).

In this case, the trespass policy at issue was implemented to protect the safety of the residents at the Whitcomb Court housing project by restricting the access of nonresidents to the project. The policy became necessary because of the prevalence of drug-related and other criminal activity in and around Whitcomb Court caused primarily by nonresidents. Clearly, the trespass policy implemented at

Whitcomb Court is reasonable and, in accordance with the standards enunciated by this Court, is constitutional under the First Amendment.

IV. THE DECISION OF THE COURT BELOW IS INCORRECT AS A MATTER OF LAW AND, IF SUSTAINED, WILL IRREPARABLY HARM THE ABILITY OF PHAs TO PROVIDE SAFE LIVING ENVIRONMENTS TO RESIDENTS OF PUBLIC HOUSING.

There is no dispute that the Respondent in this case had no intention of exercising a cognizable First Amendment right when arrested for the third time for trespass upon public housing property. The record reveals no assertion on respondent's part that, at the time of his arrest, he was engaged in, or that he intended to engage in, the exercise of protected speech.[18] Nor is he among the class of persons with respect to whom this Court has recognized a right of "intimate association."[19] Respondent was arrested and convicted on account of conduct that he well knew to be prohibited.

The Supreme Court of Virginia based its decision, not on the facts of the case, but rather upon a hypothetical

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[18] *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.")

[19] In *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984), this Court recognized a right of intimate association protected by the First Amendment. The right to protection in a particular circumstance would be evaluated on the basis of a continuum under which "objective characteristics locate [the relationship] on a spectrum from the most intimate to the most attenuated of personal attachments."

state of facts involving a potential exercise of free speech that was not before the court. In this respect, the opinion in the court below is reminiscent of the opinion of the *en banc* Ninth Circuit Court of Appeals in *Rucker v. Davis*,[20] which purported to avoid the clear language of § 6(*l*)(6) of the 1937 Act in significant part because the court construed the statutory language as susceptible of interpretations that could produce "odd and absurd" results. Respondent was a trespasser, thrice arrested, who had been warned that he would be arrested if he again entered housing authority property.

The Virginia Supreme Court has, in substance, held that placing discretion in the hands of a housing authority official renders the trespass-barment policy *prima facie* invalid for overbreadth, regardless of the circumstance under which that discretion is or is not exercised. The very purpose of a PHA policy limiting access to public housing sites either through physical barriers or through threat of arrest is to place the onus of demonstrating a legitimate need to enter the property on the person seeking access. Approving the rationale of the court below would be tantamount to requiring that every circumstance under which an individual would have a right to be present protected under the First Amendment be codified in advance and that every denial of access to public housing property require individuated proof that the barred or arrested individual did not intend to exercise protected rights to speech. Such a requirement would impose an impracticable burden upon PHAs, who would be saddled with the responsibility of explaining, in each and every case, why their gates should be closed or doors locked against each non-resident that they seek to bar from entering onto their residential properties. Under such a judicial result, it is likely that PHAs would discover, as did

[20] 237 F.3d 1113 (9th Cir. 2001), *rev'd sub nom. Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

the United States Postal Service, when faced with onerous requirements regarding control of its facilities that efforts to limit access would be rendered, for all intents and purposes, administratively impossible.[21] As mentioned, sustaining the holding of the court below would thus greatly limit the capacity of PHAs to reduce crime on their properties through protecting the physical boundaries of their residential developments against unwanted intrusion.

As noted above, the opinion ignores entirely the forum analysis that is customary under previous decisions of this Court, which has been applied by the circuit courts of appeal in more than one instance to uphold PHA trespass-barment policies. In so doing, it ignored the status of PHAs as landlords who are entitled, like other landlords, to exercise discretion in excluding nonresidents from their properties. Finally, the court below improperly based its decision on mere speculation.[22]

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[21] *See Kokinda*, 497 U.S. at 732.

[22] "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid `in the vast majority of its intended applications . . . .' " *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (quoting *United States v. Raines,* 362 U.S. 17, 23 (1960)).

CONCLUSION

The Court should hold that the trespass-barment policy of the RRHA is constitutional under the First Amendment. Accordingly, the decision of the Virginia Supreme Court should be reversed.

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