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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
first this morning in No. 02-371, Virginia v. Kevin Lamont  
Hicks.

Mr. Hurd.

ORAL ARGUMENT OF WILLIAM H. HURD  
ON BEHALF OF THE PETITIONER

MR. HURD: Mr. Chief Justice, and may it please  
the Court:

Before this trespass policy took effect, the  
families in Whitcomb Court lived in the middle of an open-  
air drug market. Surely those who must rent from public  
housing ought not be required by the law to live in  
greater danger from criminals than those who rent from  
private landlords. And yet, that is the consequence of  
the decision below and its mistaken application of the  
First Amendment.

This defendant is a common trespasser, not  
engaged in any expressive activity. The court below  
struck down the trespass policy only by indulging in an  
extravagant expansion of the overbreadth doctrine.

QUESTION: Well, was -- was the State applying  
some State law notion of standing, because certainly  
Virginia can have different rules for standing than the

1 Federal court might have.

2 MR. HURD: There is absolutely no indication in  
3 the record, Your Honor, that the State supreme court was  
4 doing anything other than applying what it thought was  
5 this Court's overbreadth jurisprudence.

6 QUESTION: Well, but on -- on the matter of  
7 standing, would we necessarily assume they were applying  
8 some Federal standard?

9 MR. HURD: Your Honor, you don't need to assume  
10 that in this case. They -- they discuss the question of  
11 standing in their opinion, and they referred to this  
12 Court and this Court's traditional rule and the  
13 overbreadth rule, never suggesting for a moment that they  
14 thought Virginia might have a more generous rule of  
15 standing than this Court has required.

16 QUESTION: Did they cite our cases?

17 QUESTION: There's -- there's no --

18 MR. HURD: They did.

19 QUESTION: There's no citation of any Virginia  
20 case in the opinion, is there?

21 MR. HURD: There is no citation when discussing  
22 the -- the standing issue, the overbreadth issue at all.  
23 That's correct, Your Honor.

24 They -- they cite this Court's cases, and this  
25 is found joint appendix page 159. It says the Supreme

1 Court -- and I'm quoting now from the second complete  
2 paragraph -- the Supreme Court has held that in the  
3 context of a First Amendment challenge, a litigant may  
4 challenge government action granting government officials  
5 standardless discretion even if that government action as  
6 applied to the litigant is constitutionally permissible.

7 They then cite this Court's decision in Los  
8 Angeles Police Department. They then go on to cite this  
9 Court's decision in Ferber and in Broadrick and in Gooding  
10 v. Wilson and in Dombrowski and in Thornhill, never  
11 suggesting for a moment that Virginia has a more generous  
12 notion of overbreadth standing --

13 QUESTION: But if we were to hold for you on  
14 that ground, the Virginia Supreme Court would be free to  
15 say on remand, would it not, that it has decided to take a  
16 more generous view of standing?

17 MR. HURD: It certainly could do that, Your  
18 Honor. The Virginia Supreme Court has historically  
19 adhered very closely in its interpretation of the State  
20 constitutional standards to the standards laid down by  
21 this Court under the Federal Constitution.

22 QUESTION: But when we're not talking about  
23 substantive law, why is that really an -- an issue for us?

24 MR. HURD: Well, Your Honor --

25 QUESTION: They can do what they want. It's

1 their courts.

2 MR. HURD: Your Honor, they -- they believe they  
3 are required by this Court's jurisprudence to grant --

4 QUESTION: Well, but they didn't say that here.  
5 I mean, they didn't say the Supreme Court requires this  
6 and our standing doctrine would be narrower, but we feel  
7 we must. I mean, we -- we just don't know.

8 MR. HURD: Your Honor, I believe we -- we do  
9 know based on the portions of the record I read. They  
10 relied solely upon this Court's overbreadth standing  
11 jurisprudence.

12 QUESTION: Well, they -- they did with respect  
13 to -- to substantive law -- the substantive doctrine  
14 overbreadth. But at no point did they say, we would not  
15 entertain this matter if it were brought under State law,  
16 but we are required to do so by the Supreme Court's  
17 substantive doctrine.

18 MR. HURD: Your Honor, I -- I think of the --  
19 the recently decided case of Virginia v. Black cross  
20 burning where in that case the criminal defendant raised  
21 claims under both Federal and State law. It decided it  
22 under the Federal. It did not decide it under the State.

23 QUESTION: Mr. Hurd, that's not the issue  
24 anyway, is it, whether they would have had a narrower  
25 interpretation under State law?

1                   MR. HURD: No, Your Honor --

2                   QUESTION: The issue is whether -- whether they

3                   adopted a broader interpretation under State law than

4                   Federal law would require.

5                   MR. HURD: That's --

6                   QUESTION: Isn't that the issue?

7                   MR. HURD: That's correct, Your Honor.

8                   QUESTION: There's no indication that they were

9                   adopting a broader interpretation than Federal law

10                  requires.

11                  MR. HURD: That is correct. A -- a State may

12                  well be able to adopt a broader interpretation of standing

13                  than this Court requires, but it cannot adopt a narrower

14                  interpretation. It cannot disregard this Court's

15                  direction that you give overbreadth standing according to

16                  the Federal constitutional standards, according to this

17                  Court's standards. There's nothing in the record to

18                  suggest at all that it was adopting a broader

19                  interpretation. It said that this Court -- I'm

20                  paraphrasing, of course. But it says this Court's

21                  standing rule -- its traditional standing rules do not

22                  apply in these overbreadth cases, and then it cites this

23                  Court's decisions.

24                  QUESTION: And if they were correct about what

25                  our standing rules are, they would have to follow those

1 standing rules, wouldn't they? They could not apply a  
2 narrower --

3 MR. HURD: That's --

4 QUESTION: -- basis for standing, could they?

5 MR. HURD: That is absolutely correct, Your  
6 Honor. The State supreme court has no discretion to  
7 disregard this Court's application of the First Amendment  
8 through its overbreadth doctrine. Here, what happened --

9 QUESTION: If they -- if they were wrong in  
10 interpreting our cases, they still could have done exactly  
11 what they did.

12 MR. HURD: They could have, Your Honor, but  
13 there's no indication that they did.

14 QUESTION: They didn't say so.

15 MR. HURD: They didn't say so.

16 QUESTION: So if we sent it back and then they  
17 said so, then we'd have to take the case and decide  
18 whether they're right or wrong on the merits.

19 MR. HURD: That's correct, Your Honor.

20 QUESTION: Yes. I'm not sure why we -- why it's  
21 called standing. That's where I'm basically mixed up in  
22 this case. The person has nothing to do with speech, the  
23 particular defendant. It's sort of like a person who has  
24 a gun under a gun statute that forbids it. And he wants  
25 to say that this law is unconstitutional because it might



1    apply to people who were petitioning, and if it did, it  
2    wouldn't do it right. It might apply to people who were  
3    speaking. It might apply to speech, just as the gun law  
4    might apply to people who have a gun in a theater in a  
5    part of a play. And he wants to say that this law is  
6    unconstitutional as applied to him because of that problem  
7    with it. And in the gun case, it would be apparent that  
8    the law wouldn't be unconstitutional as applied to him  
9    because in most of its applications, it would be  
10   constitutional and he has nothing to do with speech.

11                   And now you want to say, that's true here, too.

12                   MR. HURD: Absolutely, Your Honor.

13                   QUESTION: Well, why aren't you and he arguing  
14   on the merits of a constitutional matter, whether this  
15   statute is or is not unconstitutional because of the  
16   possibility that it could be badly applied in a free  
17   speech area that isn't this one?

18                   MR. HURD: Well --

19                   QUESTION: Why isn't that the merits? Why is it  
20   standing?

21                   MR. HURD: Well, Your Honor, there are a number  
22   of problems with -- with Mr. Hicks' case, one of which is  
23   exactly the one you described. We think that there are  
24   several aspects of that. We think one aspect of standing.  
25   We think another aspect is that this Court's practice has

1 been not to allow overbreadth challenges to be brought in  
2 cases where it was not a -- a speech-related statute or a  
3 statute governing something closely related to speech.

4 QUESTION: Mr. Hurd, we don't normally decide  
5 whether a statute is constitutional in the abstract, do  
6 we? I thought we normally decided whether someone has  
7 been unconstitutionally convicted. We don't go around  
8 bashing statutes in their totality. We say this person  
9 was unconstitutionally convicted.

10 MR. HURD: That's correct, Your Honor. And --  
11 and certainly --

12 QUESTION: And that's why it's -- it's a  
13 question of third-party standing whether you can say I was  
14 unconstitutionally convicted because if you applied this  
15 statute to somebody else, he would be unconstitutionally  
16 convicted.

17 MR. HURD: It -- that is certainly our argument,  
18 Your Honor. Standing is one problem with Mr. Hicks' case.

19 But even if he had standing, there's a problem  
20 here of not meeting the requirement that alleged  
21 overbreadth be substantial. In fact, the State supreme  
22 court didn't address this prong of the overbreadth  
23 doctrine at all. And it's clear, we believe, that even if  
24 there were some possible unconstitutional application of  
25 this policy, that the overbreadth would not be

1 substantial. The legitimate sweep of this policy is very  
2 broad. It sweeps up those who come to Whitcomb Court to  
3 deal drugs and batter women and damage property and steal  
4 and intimidate and try to make this property their turf.

5 QUESTION: I didn't think it was limited to  
6 those people. I thought it was a total ban on people  
7 coming in without permission.

8 MR. HURD: Your Honor, that is -- that is not  
9 exactly the -- what the policy says. The --

10 QUESTION: Well, what does the policy ban?

11 MR. HURD: The policy is --

12 QUESTION: It doesn't just ban drug dealers,  
13 does it?

14 MR. HURD: No, Your Honor, but in terms of -- of  
15 the legitimate sweep, if we tried to contrast the  
16 legitimate sweep of the policy --

17 QUESTION: Well, I -- let's say it's legitimate  
18 to keep all the drug dealers and all the armed robbers  
19 out, but -- but how many other people does it keep out?  
20 That's what I was curious about.

21 MR. HURD: Well, Your Honor, we believe that the  
22 risk that any legitimate speaker will be chilled is -- is  
23 very small. In fact, you know, the policy was developed  
24 to chase away the ne'er-do-wells I have described, and if  
25 we're unable to remove the criminals, it would not be safe

1 for people to come and engage in speech.

2 QUESTION: But doesn't the no trespassing sign  
3 apply to everybody? It doesn't just apply to ne'er-do-  
4 wells, does it?

5 MR. HURD: Your Honor, it -- it does not apply  
6 to -- just to ne'er-do-wells, and the problem is how do  
7 you know until you actually catch them in the act of  
8 dealing drugs?

9 QUESTION: Well, it applies to -- it does not  
10 apply to someone who is coming to see someone in the  
11 housing development, as I understand it.

12 MR. HURD: That's correct, Your Honor. The --  
13 the policy is explained by Gloria Rogers, the housing  
14 manager, on page 32 of the joint appendix. There's a  
15 question and an answer at the bottom. If a nonresident --  
16 question -- if a nonresident is seen on privatized public  
17 housing property and he cannot demonstrate that he is  
18 either visiting a lawfully residing resident or conducting  
19 legitimate business, is he an authorized -- an  
20 unauthorized person?

21 QUESTION: Which, as far as the text of the  
22 ordinance is concerned, legitimate business could include  
23 pamphleting.

24 MR. HURD: It -- it certainly could, Your Honor.

25 QUESTION: As far as the text is concerned.

1           MR. HURD: Absolutely. Absolutely. It all  
2 could be included under the concept of visiting residents,  
3 going door to door to visit them and hand them material.

4           QUESTION: If -- if we agree --

5           QUESTION: It wasn't the interpretation by one  
6 of the administrators that leafleting was not ipso facto  
7 legitimate businessing, or pamphleting or whatever. Isn't  
8 that right?

9           MR. HURD: Your Honor, we would characterize  
10 that not so much as an interpretation of the written  
11 policy as an addendum --

12          QUESTION: An addendum

13          MR. HURD: -- an addendum to it which requires  
14 the demonstration of legitimate purpose, which is  
15 discussed in the policy, which would require that  
16 demonstration be made to the housing manager to show that  
17 the leafleting is legitimate. That --

18          QUESTION: Suppose -- and suppose I -- the --  
19 the Court were to agree with you that the speech analysis,  
20 particularly the overbreadth analysis here, was wrong.  
21 Does the case then go back to the Supreme Court of  
22 Virginia in a posture where Mr. Hicks has the opportunity  
23 to challenge the ordinance as being unconstitutional for  
24 other reasons apart from the First Amendment? It's vague.  
25 It inhibits his right of -- of movement. These are

1 streets that are the functional equivalent of a public,  
2 whatever. Does he have all of those issues preserved to  
3 him on remand?

4 MR. HURD: Your Honor, he certainly has this --  
5 this due process right to wander issue preserved. There's  
6 a question that the State supreme court did not address,  
7 which is whether these streets and sidewalks are a  
8 traditional public forum or a nonpublic forum. And he has  
9 certainly asserted the right to -- to be there -- the  
10 right to --

11 QUESTION: And in the context of that, to say  
12 that the ordinance is vague for other reasons.

13 MR. HURD: That would be a substantive due  
14 process challenge there. He also has raised below a -- a  
15 vagueness challenge. It's a little different than the one  
16 he raises here. But he would have that available to him  
17 as well. So that the -- the only -- Your Honor, the --  
18 the only argument he raised below in the State supreme  
19 court that would -- that would not be available to him  
20 upon remand would be the one decided by this Court. And  
21 all the other issues he pressed below before the State  
22 supreme court he could press again.

23 QUESTION: Mr. Hurd --

24 QUESTION: Mr. Hurd, could we go back just to  
25 Justice Stevens' question for a minute? And I -- I just

1 want to -- I want you to comment on the significance of  
2 the -- of the -- the notice that you set out on page 5 of  
3 your brief. The notice says: no trespassing, private  
4 property, you are now entering private property and  
5 streets, et cetera. That sounds to me as though it -- it  
6 means, as -- as a no trespassing sign normally would, that  
7 if you are not a -- the landowner or a licensee of the  
8 landowner specifically, you're not supposed to enter.

9 Then it goes on to say, unauthorized persons,  
10 which I take it anybody who is not authorized to enter,  
11 will be subject to arrest and prosecution. So in answer  
12 to Justice Stevens' question, if -- if that notice, which  
13 is posted all over the -- the area, is a statement of  
14 policy, I assume it is excluding everybody --

15 MR. HURD: No, Your Honor, it's not.

16 QUESTION: -- who is not a resident.

17 And -- and it then goes on to say that following  
18 some review for what may or may not be authority, people  
19 coming in can be arrested and prosecuted.

20 MR. HURD: No, Your Honor. The -- the policy is  
21 not intended to convey the idea --

22 QUESTION: No, but is that what this says? If  
23 we -- if we stick simply to the notices that you've put  
24 up, isn't that, in effect, the burden of the notices that  
25 you've put up?

1                   MR. HURD: No, Your Honor, I do not believe  
2 that's the case. I believe that -- that the phrase  
3 unauthorized persons calls into question, well, who -- who  
4 is authorized and --

5                   QUESTION: Well, but before we get to that, it  
6 says, no trespassing. And doesn't that normally mean that  
7 if you are not the landowner or a licensee, you're  
8 trespassing?

9                   MR. HURD: Your Honor, in the context of a  
10 private apartment complex, it would not mean that. A  
11 private apartment complex or a public apartment complex  
12 where a tenant has a leasehold interest has the right to  
13 invite people to come to that premises without having to  
14 have the landlord grant permission.

15                  QUESTION: Is it the signs that are under  
16 challenge here, or is it the ordinance?

17                  MR. HURD: It is -- it is not the signs.

18                  QUESTION: It -- it may well be that the  
19 ordinance is constitutional but the signs aren't.

20                  MR. HURD: It is -- it is the policy --

21                  QUESTION: That's possible.

22                  MR. HURD: It is the policy that is -- that is  
23 challenged, not -- not the signs.

24                  QUESTION: But are you taking the position that  
25 the policy and the signs are different in their content?



1                   MR. HURD: We're taking the position they must  
2 be read together, Your Honor.

3                   QUESTION: If you read them separately, are they  
4 different?

5                   MR. HURD: A -- a person might be able to read  
6 the sign in isolation and believe that they had to get  
7 some permission to come in advance, but the people who  
8 come to the -- to this housing complex and do so  
9 legitimately typically receive invitations from the  
10 residents. So they understand. The residents understand  
11 what the policy is.

12                  QUESTION: Mr. Hurd, that's a curiosity about  
13 this case, the fact background of it that perhaps you can  
14 clarify. You keep saying legitimate visitor. This man's  
15 mother and his child and the mother of his child all live  
16 in this project, and one would think that he would  
17 certainly have a basis to visit his family.

18                  MR. HURD: Your Honor, two -- two points on  
19 that. The -- the first point is had he not been barred,  
20 certainly coming to visit his family would be a legitimate  
21 purpose. But once he is barred -- and he was -- he was  
22 barred under this --

23                  QUESTION: And we don't know why.

24                  MR. HURD: Well, the -- the record suggests on  
25 page 60 that there may have been some domestic violence in

1 the background. We do not know the specific facts of  
2 that. But we do know that that is referred to by Gloria  
3 Rogers on page 60 of the joint appendix. There's also a  
4 reference on that same page to giving out false  
5 information about addresses he allegedly lived at in the  
6 premises. He did plead guilty twice to trespassing and  
7 was convicted of damaging property.

8 He does not challenge the particular reasons why  
9 he was barred, and if he wants to deliver diapers, he  
10 should have thought about that before his misconduct  
11 earned him this barment notice and he thereby forfeited  
12 his right to return.

13 Besides, Your Honor, Justice Ginsburg, there's  
14 no evidence anyone saw any diapers or that he was there on  
15 such an errand other than what he said. And when he asked  
16 Gloria Rogers to let him back on the property, he never  
17 mentioned visiting the child or the child's mother.

18 QUESTION: It's not disputed that his -- that  
19 they live in the project.

20 MR. HURD: They do, and had he not engaged in  
21 misconduct, the situation never would have arisen. But it  
22 certainly cannot --

23 QUESTION: Maybe they want him out too. We  
24 don't really know that either, do we?

25 MR. HURD: We -- we do not, Your Honor. We do

1 not. The -- there was no testimony at trial from the  
2 mother that she had asked him to come or that he had  
3 brought her diapers or -- or any of that. We have no idea  
4 whether he is welcome there or not.

5 But the -- the point I want to make is that  
6 surely it cannot be the law that a desire to visit one's  
7 mother or one's girlfriend trumps a barment notice  
8 regardless of how bad the individual's prior conduct may  
9 have been. He did not challenge that barment notice by  
10 saying, well, it wasn't bad enough. What we do know in  
11 the record is that it was pretty bad: two prior instances  
12 of trespass, damaging property, and so forth.

13 In sum -- I see my time is -- is running out.  
14 I'd like to reserve some of it.

15 In sum, we have families here living in  
16 desperate circumstances, marijuana for sale on Bethel  
17 Street, crack cocaine on Ambrose, heroin over on DeForrest  
18 Street. The overbreadth doctrine was designed to remedy  
19 situations where a challenged statute chills the rights of  
20 others not before the court. Here it's not this trespass  
21 policy that chills the right of free speech, but the  
22 dangerous conditions at Whitcomb Court that the policy was  
23 designed to alleviate.

24 We ask that the judgment below be vacated.

25 Thank you.

1                   QUESTION: Thank you, Mr. Hurd. And you wish to  
2 reserve the rest of your time?

3                   MR. HURD: Yes, Your Honor. Thank you.

4                   QUESTION: Mr. Dreeben, we'll hear from you.

5                   ORAL ARGUMENT OF MICHAEL R. DREEBEN  
6 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE  
7 SUPPORTING THE PETITIONER

8                   MR. DREEBEN: Thank you, Mr. Chief Justice, and  
9 may it please the Court:

10                  What makes this case distinctive as a First  
11 Amendment case is the presence of a general law not  
12 directed at speech at all but directed at conduct that's  
13 under challenge and the absence of any expressive activity  
14 whatsoever by the person seeking to raise the overbreadth  
15 challenge.

16                  This Court's cases have entertained overbreadth  
17 challenges as a means of alleviating the chill of First  
18 Amendment rights of persons who are not before the Court,  
19 but the Court has never entertained overbreadth when the  
20 consequence of doing so would be to invalidate a general  
21 law that's primarily aimed at conduct and when the person  
22 who's raising the challenge did nothing to engage in  
23 speech or any expressive activity at all.

24                  The costs of an overbreadth challenge, this  
25 Court has recognized, are high because they prohibit the

1 Government from enforcing a law against conduct that is  
2 not constitutionally protected. But those costs are  
3 magnified when the law under challenge is not merely a law  
4 that directs --

5 QUESTION: Mr. Dreeben, assume -- I know it's  
6 not quite clear, but assume for the moment that Virginia  
7 had clearly -- Virginia Supreme Court clearly said we're  
8 going to allow standing as a matter of State law, but --  
9 even though it wouldn't be allowed as a matter of Federal  
10 law, and the case then came to us in that posture. Would  
11 we then have authority to decide the overbreadth issue?

12 MR. DREEBEN: I'm not sure that this Court  
13 would, Justice Stevens. It would then be in a posture  
14 more analogous to the J.H. Munson case that was before the  
15 Court in which the Court considered and Your Honor's  
16 separate opinion addressed the question of whether, when  
17 there was an independent State overbreadth analysis, could  
18 an aggrieved State official then bring the case to this  
19 Court.

20 What is clear on the current record is that the  
21 Virginia Supreme Court cited and relied on --

22 QUESTION: No. I understand that. But I'm just  
23 -- I'm just wondering if it went back and they said, well,  
24 that's true, but it was a matter of Virginia law. We  
25 think we'll entertain a stand, and then they decide on

1 Federal grounds that it violates the First Amendment.

2 Then my question is, could we review that holding, and if  
3 -- if we reviewed it in that?

4 MR. DREEBEN: Well, the question there would be  
5 whether the State was sufficiently aggrieved so as to have  
6 standing under the principles announced --

7 QUESTION: Some of our loyalty oath cases -- I  
8 forget if it was Adler or Doremus. Doremus was First  
9 Amendment -- allowed us to relax our standing rules in  
10 order to reach a substantive constitutional issue cited by  
11 the State court.

12 MR. DREEBEN: Well, the most relevant case is  
13 probably the Asarco decision in which the Court concluded  
14 that once the State court binds the State officials to a  
15 particular ruling, that there may be the requisite case or  
16 controversy to allow this Court to decide --

17 QUESTION: There's -- there's also --

18 QUESTION: The same party can have standing to  
19 appeal.

20 MR. DREEBEN: That's right. And --

21 QUESTION: There's also a question, isn't there,  
22 Mr. Dreeben, of whether this overbreadth doctrine is  
23 essentially a part of the First Amendment or a part of the  
24 standing doctrine?

25 MR. DREEBEN: Well, it has two aspects, Mr.

1 Chief Justice. One aspect of it does relate to whether  
2 there is a case or controversy, and there clearly has to  
3 be a developed enough case or controversy to allow Article  
4 III to be invoked for this Court to announce First  
5 Amendment principles at all. And part of the overbreadth  
6 doctrine responds to those concerns.

7 But another aspect of the overbreadth doctrine  
8 is purely prudential, and this Court has adopted those  
9 limits as a matter of -- of prudential principles to avoid  
10 the premature adjudication of hypothetical and abstract  
11 First Amendment questions.

12 QUESTION: But it clearly relates to the  
13 doctrine of standing, doesn't it, which doctrine says that  
14 you normally do not have standing to raise the objections  
15 of other people? You only have standing to raise  
16 objections to your own treatment, not to the treatment of  
17 others, right?

18 MR. DREEBEN: That's correct. I wouldn't  
19 dispute --

20 QUESTION: And overbreadth changes that. It  
21 says in this one area, you can object to the treatment of  
22 other people.

23 MR. DREEBEN: Well, I think overbreadth is -- is  
24 an application of a more general principle that this  
25 Court has adopted on -- in various circumstances to allow

1 a party who's before the Court and who is aggrieved to  
2 raise the rights of others. For example, in Batson  
3 challenges, the Court allows criminal defendants to raise  
4 the rights of the excluded jurors.

5 This is an example of third party standing  
6 designed to implement First Amendment norms, but the  
7 Court has recognized that the costs of invalidating a law,  
8 when the person before the Court doesn't have  
9 constitutionally protected conduct, are high, and those  
10 costs are higher when what's being invalidated is not  
11 merely a law aimed at speech, but a law aimed at access,  
12 general conduct, as is this law.

13 QUESTION: But the irony of what you're saying  
14 is that the Virginia -- Virginia Supreme Court might  
15 undertake that cost, invalidate a Virginia statute on  
16 Federal grounds that we think are wrong and we couldn't do  
17 anything about it.

18 MR. DREEBEN: That is probably true unless the  
19 Court applies the Asarco principle to allow an aggrieved  
20 State official to bring the case here because its own  
21 supreme court has interfered with the implementation of  
22 Federal law --

23 QUESTION: See, but that's -- that's the  
24 problem. I mean, this is exactly -- that's why I'm mixed  
25 up about the standing part versus the merits. It seems to



1 me if it's a traditional question of standing, there --  
2 there are a group of people who are trespassing who have  
3 nothing to do with speech. And then there's some other  
4 hypothetical people that might have to do with speech.  
5 And the question is can these people who have nothing to  
6 do with speech invalidate the statute because of the way  
7 it applies to some other people? Now, in the First  
8 Amendment area, we have normally let people do that, but  
9 in other areas not.

10 All right. So suppose the answer is not. You  
11 can't. That's their problem. Let them raise it.

12 Now, Virginia says, we want to let any taxpayer  
13 raise it. If it were purely standing, any taxpayer could  
14 raise it, but then what? I would have said that the first  
15 holding would have meant it is not unconstitutional under  
16 the Federal Constitution to convict this person. And --  
17 and now, under -- under the guise of standing, they're  
18 going to come back and say, oh, no, it is unconstitutional  
19 because we let this person raise the rights of some  
20 others. That's where I'm confused.

21 MR. DREEBEN: I think the answer to this paradox  
22 is that the State court can adopt much broader principles  
23 of law with respect to standing than this Court would  
24 impose, and it can administer them even when it's  
25 adjudicating Federal rights. For example, a

1 State could allow a purely advisory opinion to be issued  
2 by its State supreme court challenging this law by any  
3 citizen.

4 QUESTION: Well, fine, let them challenge it.

5 QUESTION: Okay. Does --

6 QUESTION: But if you're right, no matter how  
7 much they challenge it, the simple fact is, if you're  
8 right, it doesn't violate the Federal Constitution to  
9 convict this person.

10 MR. DREEBEN: That's true.

11 QUESTION: So what's raising it going to get  
12 him?

13 MR. DREEBEN: Well, that -- that is an  
14 adjudication of the -- of the overbreadth challenge on the  
15 merits. It would be a determination that there is not  
16 sufficient real and substantial overbreadth to invalidate  
17 this law, and we do think that that is a correct analysis  
18 and would suffice to reject the Virginia Supreme Court's  
19 holding in this case.

20 QUESTION: Okay, but you're -- I think you're  
21 saying that -- that under Asarco, they can challenge the  
22 substantiality point, but they wouldn't necessarily be  
23 able to challenge the standing point which gets this  
24 particular defendant in a position to raise the issue in  
25 the first place. Is that right?

1                   MR. DREEBEN: It's not exactly right, Justice  
2 Souter, because I think this is an area analogous to the  
3 Court's rules in criminal cases under Michigan v. Long  
4 where the Court has to decide, does this opinion rest on a  
5 question of Federal law or does it rest on a question of  
6 State law? And in Michigan v. Long, the Court adopted a  
7 presumption that if what a State court does is cite and  
8 rely on Federal precedents, we will presume that it did  
9 what it did because it thought it was compelled to by the  
10 force of this Court's decisions.

11                  QUESTION: We certainly -- that certainly  
12 applies when you're talking about substantive law whether  
13 it -- it would be an extension of that to apply it to  
14 standing.

15                  MR. DREEBEN: I think it would only be a modest  
16 extension because in this case the court did not  
17 separately analyze the questions of standing as such from  
18 whether respondent could bring an overbreadth challenge,  
19 and the question wasn't posed with a --

20                  QUESTION: Why -- why isn't that a question of  
21 standing by definition?

22                  MR. DREEBEN: It -- what it --

23                  QUESTION: Overbreadth is an exception to  
24 standing, and -- and so why is it anything but a standing  
25 issue? Substantiality of overbreadth is -- is a

1 substantive issue, but -- you see my --

2 MR. DREEBEN: Let me -- let me explain it this  
3 way, Justice Souter. If this Court said the First  
4 Amendment overbreadth doctrine requires that State courts  
5 entertain overbreadth claims like this one even when it's  
6 a general law and even when the party before the court has  
7 been convicted of conduct that doesn't involve speech,  
8 then State courts would be required to follow that rule  
9 and could not adopt a different standing principle that  
10 was narrower and that would exclude respondent.

11 And our reading of the Virginia Supreme Court's  
12 opinion is that Virginia either thought or assumed that it  
13 was required by this Court's cases to entertain an  
14 overbreadth challenge. The proper response, if the Court  
15 agrees that it's not the State court's obligation to  
16 entertain this overbreadth challenge, would be to vacate  
17 the judgment, announce the correct First Amendment  
18 principles, and remand the case to the Virginia Supreme  
19 Court for proceedings not inconsistent with this opinion.

20 QUESTION: But that would -- that would  
21 basically be applying something like Michigan v. Long  
22 rather than Asarco, right?

23 MR. DREEBEN: In this case, it certainly would  
24 because the State court hasn't relied on a clearly  
25 insufficient case or controversy in order to adjudicate

1 Federal rights. There is, in fact, a case or controversy  
2 here. The respondent has been convicted of a criminal  
3 offense, and he is challenging the law under which he was  
4 convicted. So this case does not fall outside of the case  
5 or controversy requirement even measured by Article III  
6 standards.

7 QUESTION: If we follow that course, we wouldn't  
8 get to the substantive overbreadth, right? We would  
9 just --

10 MR. DREEBEN: That -- that is correct, Justice  
11 Ginsburg.

12 Thank you.

13 QUESTION: Thank you, Mr. Dreeben.

14 Mr. Benjamin, we'll hear from you.

15 ORAL ARGUMENT OF STEVEN D. BENJAMIN

16 ON BEHALF OF THE RESPONDENT

17 MR. BENJAMIN: Mr. Chief Justice, and may it  
18 please the Court:

19 In 1997, Richmond took a neighborhood and by  
20 ordinance, deed, and a police authorization, made it so  
21 that a person could not walk down the street or the  
22 sidewalk unless he could prove to the police that he was  
23 authorized to do so. The policy that the city implemented  
24 was of such breadth that it included the public, residents  
25 and nonresidents alike of this community, that it included

1 innocent people doing lawful things, and it included  
2 protected conduct, such as the distribution of literature.

3 QUESTION: Are you suggesting that these streets  
4 were still as if they belonged to the City of Richmond  
5 after they were deeded to the housing authority?

6 MR. BENJAMIN: Yes, Your Honor.

7 QUESTION: Why is that?

8 MR. BENJAMIN: They were still public. They  
9 were still public streets, regardless of the transfer --

10 QUESTION: Why -- you know, clearly the city  
11 intended that they no longer be public streets. Why did  
12 that intention fail?

13 MR. BENJAMIN: Your Honor, for the same reason  
14 when Congress ruled -- or -- or passed a law saying that  
15 the sidewalks around this building were no longer to be  
16 used, for the same reason. The intent didn't matter. The  
17 character and the use and the form didn't change at all,  
18 and those were the criteria that mattered.

19 QUESTION: That wasn't a law making those  
20 private sidewalks.

21 What -- what about the streets to and from the  
22 entry to the Governor's mansion in Richmond? Are they  
23 public streets too?

24 MR. BENJAMIN: Yes, they are, Your Honor.

25 QUESTION: They are.

1                   MR. BENJAMIN: Yes, sir.

2                   QUESTION: You can't exclude the public from --

3 from marching right up to the Governor's front door?

4                   MR. BENJAMIN: You can exclude the public from

5 the gate. There's a gate.

6                   QUESTION: From the gate, but there's a street

7 that goes right from the gate right up, you know, circular

8 driveway, right up to the Governor's front door. That's a

9 public street.

10                  MR. BENJAMIN: That is not a public street, Your

11 Honor.

12                  QUESTION: Of course, it's not a public street.

13                  (Laughter.)

14                  QUESTION: So it's --

15                  QUESTION: So -- so there can be streets owned

16 by the State of Virginia or the City of Richmond that are

17 not public streets.

18                  MR. BENJAMIN: Yes, sir.

19                  QUESTION: And the only issue is whether this is

20 one of them

21                  MR. BENJAMIN: Well, that street, Your Honor, I

22 would call a driveway. That's what it is.

23                  (Laughter.)

24                  QUESTION: Well, the residents of this housing

25 project would call these streets their -- their driveways,

1 the -- the access to their particular apartments.

2 MR. BENJAMIN: I disagree with you.

3 QUESTION: Well, there are a lot of streets in  
4 Cambridge which are called private ways, and nobody knows  
5 what that means.

6 (Laughter.)

7 MR. BENJAMIN: And that, Your Honor --

8 QUESTION: A lot of stuff in Cambridge that  
9 nobody understands.

10 (Laughter.)

11 QUESTION: Well, they have some original alleys  
12 in the District that are comparable I think.

13 MR. BENJAMIN: That's true too, but you know, I  
14 have never, Your Honor, heard anyone with a grievance say  
15 let's take it to the alley. It's always, let's take it to  
16 the street because --

17 QUESTION: Well, I -- I take -- I take it there  
18 are any number of -- of difficult and important issues  
19 here. One is the character of these streets. We don't  
20 know very much about it in the record. The other is  
21 whether, even if they are streets with some special  
22 status, whether Ms. Rogers is the one who has the right to  
23 say who can come and who can go. This is Ms. Rogers'  
24 neighborhood in a very interesting way.

25 (Laughter.)



1                   QUESTION: But I -- I take it that all of those  
2 issues are open for you to argue if we were to agree with  
3 the State that the Supreme Court of Virginia was simply  
4 wrong in its First Amendment analysis on overbreadth, and  
5 you would have all of those arguments to confront and to  
6 see if you can prevail on if we remand it to the Supreme  
7 Court of Virginia.

8                   MR. BENJAMIN: Your Honor, that's correct.  
9 However, those same issues, of course, were before the  
10 Virginia Supreme Court. The -- the State, the petitioner,  
11 did not even challenge standing until the State sought  
12 cert at this Court.

13                   The question presented concerning the closest  
14 issue to standing was whether Mr. Hicks was untimely in  
15 his challenge to the barment-trespass policy. The State  
16 in all of the State courts argued that Mr. Hicks should  
17 have challenged his barment in some civil proceeding, and  
18 that's the question presented on page 97 of the joint  
19 appendix and that was what the Virginia Supreme Court  
20 dealt with, it having been the only issue presented to  
21 them on this at page 158.

22                   QUESTION: It doesn't have to argue it if they  
23 decide it. We -- we will review a question that is either  
24 argued or decided by the State court. There's no doubt  
25 that the Virginia Supreme Court decided the standing

1 question, decided the overbreadth question, and you're  
2 saying that we cannot review that decision because he was  
3 not the one that initiated the -- the matter? That's just  
4 not what our law says.

5 MR. BENJAMIN: I don't know, Your Honor, if it  
6 is true to say that the Virginia court necessarily decided  
7 the standing order, it not -- the standing issue, it not  
8 having been raised. But --

9 QUESTION: They had a whole long discussion of  
10 overbreadth. I mean --

11 MR. BENJAMIN: Yes, sir.

12 QUESTION: What do you think that was about?

13 MR. BENJAMIN: Yes, Your Honor, that was on the  
14 merits. When the Virginia Supreme Court discussed the  
15 merits, they discussed whether there was overbreadth and  
16 whether it was substantially overbroad.

17 QUESTION: But they didn't decide that  
18 overbreadth was an issue. They just went ahead and  
19 decided if overbreadth had been an issue, this is how the  
20 issue would be resolved. Certainly they decided that  
21 overbreadth -- that is, the standing doctrine of  
22 overbreadth -- was applicable to this case.

23 MR. BENJAMIN: Your Honor, I disagree with you.  
24 I don't think they decided that and I don't think it  
25 was --

1                   QUESTION: Then why did they go into the  
2 discussion of whether this was overbroad? They must have  
3 thought it relevant.

4                   MR. BENJAMIN: Your Honor, because it -- it was  
5 the -- the immediate issue that confronted them. They  
6 were confronted with a policy that was unconstitutional in  
7 so many fundamental respects.

8                   QUESTION: But they dealt with only one. Mr.  
9 Hurd said, yes, your question of public forum or not would  
10 be open, your due process vagueness argument would be  
11 open. What wouldn't be open, if we ruled against you on  
12 this First Amendment overbreadth thing, is -- that's all.  
13 Everything else -- the Virginia Supreme Court said this is  
14 what we're deciding and we're not getting to -- they  
15 deliberately said we're not getting to public forum.

16                  MR. BENJAMIN: Your Honor, if the Virginia  
17 Supreme Court did implicitly decide the standing issue,  
18 then it was a right that it had to accept this -- this  
19 case which was, as the Government concedes, and the  
20 petitioner, a case and controversy. Mr. Hicks was  
21 convicted, and he did raise all of these constitutional  
22 issues in defense of his conviction. And if the Virginia  
23 Supreme Court implicitly reached the standing question,  
24 then as a matter of State law and State rights, it was  
25 entitled to do that.

1                   QUESTION: Mr. Benjamin, certainly the  
2   dissenting opinion in the Supreme Court of Virginia talked  
3   about overbreadth. I mean, the -- the one -- I'm just  
4   reading a sentence here from appendix page: Thus, I  
5   conclude that the defendant may only challenge the  
6   trespass policy as it was applied to him Now, that --  
7   that is overbreadth.

8                   MR. BENJAMIN: Yes, sir. Yes, Your Honor.

9                   QUESTION: So what is the answer then to the  
10   overbreadth question? That is, the first question  
11   presented in the petition for certiorari, which we  
12   granted, asks, as I read it, the question of whether a  
13   person who does not engage in expressive conduct at all  
14   can ask the court and can succeed in having the court  
15   strike down a statute as applied to him for the reason  
16   that it might be unconstitutional as applied to other  
17   people engaged in expressive conduct.

18                   The example would be, favoring their side, that  
19   you have a gun statute. Any person who possesses a gun is  
20   -- goes to jail, and the defendant says, well, I did  
21   possess a gun and I was trying to rob a bank, but maybe  
22   this statute would be applied to a person in a play, in  
23   which case it would be too broad. And they say it's like  
24   that absurd example.

25                   All right. Now, why isn't it close enough to

1 the absurd example? They're also arguing that this is a  
2 statute that deals with drugs. It deals with ordinary  
3 trespass. Very few of these people want to pamphlet or  
4 engage in expressive conduct. A handful might, but if  
5 they do, let's consider it, when this statute is applied  
6 to them, which it never has been in their view.

7 Now, what's your response?

8 MR. BENJAMIN: Your Honor, my response is that  
9 in the ordinary case, such as some of your hypotheticals  
10 suggest, it would become instantly apparent that the  
11 robber, although claiming that the statute or the policy  
12 is overbroad -- it would become instantly apparent that he  
13 had no basis whatsoever to bring this motion. If he even  
14 got to a hearing, there would be an immediate failure of  
15 proof, but it wouldn't get to a hearing because there  
16 would be a motion to quash the motion for lack of --

17 QUESTION: There happened to be -- I didn't give  
18 you the whole statute. There were seven other  
19 constitutional errors in it, but I didn't mention them  
20 because they could be raised on remand.

21 (Laughter.)

22 QUESTION: So it's -- that -- that I'm trying to  
23 make this --

24 MR. BENJAMIN: In this policy I counted eight  
25 constitutional errors.

1           In this case, Mr. Hicks' conduct was expressive.  
2   Mr. Hicks meets Virginia's own test because he was going  
3   to see his children, and there is no expressive action --

4           QUESTION: You know, I -- I think it's a mistake  
5   to put too much onto the First Amendment. The police  
6   officer stops me unlawfully and I say, I was on the way  
7   home to talk to my wife. I mean, this -- this -- it tends  
8   to trivialize the First Amendment if you put so much on  
9   it. You have some very important substantive issues here  
10   about the right of freedom of movement to use the streets  
11   and so forth, and it seems to me that for the -- for you  
12   to rest the case, A, on the First Amendment, B, under what  
13   is a very questionable application of the overbreadth  
14   doctrine. It -- it is not the right way to proceed in  
15   this case.

16           MR. BENJAMIN: Your Honor, I understand your  
17   question, and Mr. Hicks at the inception was not outraged  
18   about free speech and First Amendment issues. He was  
19   outraged about the fact that he had been banned for  
20   apparently nothing more, as the en banc Virginia court  
21   found, going back to see his family repeatedly. He was  
22   upset and challenged the very barment proceeding and the  
23   -- the entire policy.

24           QUESTION: May I just stop you there as a matter  
25   of accuracy? We don't know why he was debarred, but we do

1 know that one of the charges was destruction of property.  
2 We don't know what property that was. So it's -- I think  
3 you're painting a somewhat false picture to suggest that  
4 this was a loving father who was simply going to visit his  
5 children.

6 MR. BENJAMIN: The en banc court at page 125,  
7 footnote --

8 QUESTION: Is this the court of appeals?

9 MR. BENJAMIN: Yes, Your Honor.

10 QUESTION: Not the supreme court.

11 MR. BENJAMIN: Not the supreme court, had found,  
12 Your Honor, that the -- the charge of damaging property  
13 had nothing to do with his barment, and there was nothing  
14 in the record or in the evidence suggesting otherwise.

15 The testimony at page 60 of the joint appendix  
16 does not permit the inference urged by the petitioner.  
17 The inference at most urged -- that you could draw from  
18 page 60, the testimony there is that the police quite  
19 often saw Mr. Hicks in the development and he gave them an  
20 address, and then Ms. Rogers would confirm that he did not  
21 live there.

22 QUESTION: Well, if you're going appeal to page  
23 60, you're just out of the frying pan into the -- into the  
24 fire. Yes, it -- it doesn't mention destruction of  
25 property, but it does mention domestic violence.

1                   MR. BENJAMIN: Your Honor, what Gloria Rogers is  
2 doing in that instance, although she has been asked the  
3 specific question, how did Kevin Hicks come to be barred,  
4 she begins, as she does, giving a general answer in how  
5 people get barred. And in the -- she began with that.  
6 Then she went to Mr. Hicks' case, and then she went back  
7 to one of her own reasons of domestic violence.

8                   QUESTION: No. She's answering the question,  
9 please tell the court how he came -- how has he come and  
10 have you banned him from the property. Yes. All right.  
11 Please tell the court how that came about. And she said,  
12 number one -- she gave two reasons. When the police see a  
13 person in the development and they say they live  
14 someplace, they confirm with the office, and Kevin Hicks  
15 gave a false address. Secondly, because of the domestic  
16 violence in the development. I -- I take that to be a  
17 response to the question that was asked. So, you know, to  
18 the extent we know anything about why he was banned, it  
19 was either because he destroyed property or because he  
20 participated in domestic violence.

21                   MR. BENJAMIN: Yes, Your Honor. We had sought  
22 discovery of the reasons that he was banned, and counsel  
23 at page 1312 and 13 had said that counsel needed to  
24 demonstrate why Mr. Hicks was barred. But RRHA counsel,  
25 the housing authority counsel, objected that the reason



1    why Mr. Hicks was banned was irrelevant because being a  
2    private property owner, the position was, they could ban  
3    anyone at any time for any reason.

4                QUESTION:    Okay, Mr. Benjamin, I'm going to ask  
5    you to assume that I at least do not accept the view that  
6    the record shows that your client was there for an  
7    expressive purpose that ought to be recognized by the --  
8    by the First Amendment.    I don't ask you to stipulate that  
9    he was banned because he was a criminal.    I will simply  
10   assume that he is in some middle ground, that he is not  
11   there for expressive purposes.    Assume we don't know why  
12   he's there.

13              What's your -- your answer basically to the  
14   question put to you by Justice Breyer?    Why is it  
15   necessary, in order to protect the First Amendment, to  
16   allow a person in that position to -- to raise this kind  
17   of -- of issue with respect, say, to leafleters or people  
18   who are there for expressive purposes?    Why do we need to  
19   recognize this?

20              MR. BENJAMIN:    Because, Your Honor, as you --  
21   this very exchange illustrates how unworkable that very  
22   test would be because reasonable people will disagree over  
23   whether any given conduct is in fact expressive.    If the  
24   very fact that Mr. Hicks --

25              QUESTION:    Well, you're changing my hypo.    I

1 mean, I -- I said let's assume that we don't have a  
2 predicate for saying this person's conduct is expressive.  
3 I will grant you that there are always going to be points  
4 on the margin in which we say, well, was he there for  
5 speech or wasn't he. Assume he wasn't. What -- what is  
6 the -- what is the best argument for recognizing his right  
7 to raise a First Amendment claim?

8 MR. BENJAMIN: Because the whole reason for the  
9 exception is the importance of First Amendment rights and  
10 values. To impose this sort of a test would defeat the  
11 purpose and -- and the value, the opportunity for society  
12 to deal with laws that sweep this broadly and infringe  
13 upon and violate people's --

14 QUESTION: Why -- why don't you have an adequate  
15 basis to deal with them under the vagueness doctrine, for  
16 example, that is open to you on remand, even if you lose  
17 here? Why do we have to turn this into a First Amendment  
18 issue?

19 MR. BENJAMIN: Because I think the Virginia  
20 Supreme Court, when it saw the entirety of this policy,  
21 including not just the First Amendment issues, but the  
22 vagueness that permeates this policy -- I think that the  
23 Virginia Supreme Court decided, from a conservative  
24 approach, that it would deal with the most to it -- the  
25 most obvious deficiency and that is the complete

1 unfettered discretion that -- that Gloria Rogers, the  
2 housing manager, had, that every single police officer  
3 had, and deal with it then while the policy was before it,  
4 instead of going on and settling other questions, instead  
5 of requiring that challenges --

6 QUESTION: But what you just said goes right to  
7 vagueness, that you have an administrator who says, I'm  
8 queen. I'll let you in or I won't let you in. I don't  
9 see why you need the First Amendment hook to challenge  
10 that point.

11 MR. BENJAMIN: Mr. Hicks didn't need the First  
12 Amendment. His issue from the very beginning began with  
13 the -- the vagueness that permeates this, but it -- he --

14 QUESTION: But -- but maybe it's not your fault,  
15 but that's what the Supreme Court of Virginia said, and in  
16 the course of doing so, it arguably -- and there's a very  
17 serious concern that it misapplied Thornhill.

18 QUESTION: Mr. Benjamin, I don't want to put  
19 words in your mouth -- excuse me. I'm sorry. I didn't --  
20 I don't want to put words in your mouth, but is this what  
21 you're trying to say, that if the statute is so overbroad  
22 it would be unconstitutional if the person has standing to  
23 challenge it? It doesn't matter whether he is -- his  
24 disability is -- is because it's not a First Amendment  
25 issue at all or whether he's engaged in First Amendment

1 conduct which is perfectly prohibitable as to him In  
2 either event, it doesn't matter why he can't challenge it  
3 as long as his -- as the statute itself is overbroad. Is  
4 that what your position is?

5 MR. BENJAMIN: Yes, Your Honor, that is.

6 QUESTION: All right. Then --

7 (Laughter.)

8 QUESTION: That's -- is there a -- is there a  
9 risk here? And I'm not asking it from one point of view  
10 or another. I don't know. But if we accepted that, there  
11 are trespass laws all over the country. And -- and would  
12 -- I don't know what they all say, but people who are  
13 convicted of ordinary trespass -- and a lot of them apply  
14 to public property, et cetera -- could then come in and  
15 say, look, these trespass laws, even though they've never  
16 been applied to stop expression -- except in my case, but  
17 I'm assuming it's not expression in my case. Assume it's  
18 not. We have to set them all aside because they might be  
19 applied to expression in -- in a way that's  
20 unconstitutional. If I accepted the proposition that  
21 you've just accepted, have I got myself in that box?

22 MR. BENJAMIN: Your Honor, I'm afraid I lost you  
23 somewhat during --

24 QUESTION: Well, in other words, if I take the  
25 proposition you've just accepted as your argument, am I

1 then allowing people who trespass -- nothing to do with  
2 expression -- to start attacking all the trespass laws on  
3 the ground that if applied in the expression area, they  
4 would be unconstitutional? And they haven't been applied  
5 in that area.

6 MR. BENJAMIN: Yes, Your Honor.

7 QUESTION: In other words -- I would be --

8 MR. BENJAMIN: Yes, Your Honor.

9 QUESTION: I would be accepting that.

10 MR. BENJAMIN: Yes. And that -- that -- but  
11 it's not much of a risk.

12 QUESTION: Because?

13 MR. BENJAMIN: Because those challenges would  
14 fail almost immediately because it -- I know of no other  
15 case where the trespass law has applied so pervasively to  
16 the entire streets and sidewalks of a community.

17 QUESTION: But trespass on public property --  
18 there could be all kinds of situations, Federal buildings  
19 and dozens of them, where in fact it's really applied  
20 against people who are breaking in who have no business  
21 there, and they just don't apply it or it never has come  
22 up whether they would apply it were somebody interested in  
23 a demonstration.

24 MR. BENJAMIN: Yes, Your Honor, but the system  
25 can easily deal with frivolous motions because of the

1 requirements already built into the requirement.  
2 Overbreadth must not only exist and be articulable, it  
3 must be substantial. And the system could deal with that,  
4 with sanctions if necessary.

5 In this case it wasn't enough for a citizen to  
6 have, in fact, a legitimate purpose to use the sidewalk.  
7 He had to be able to demonstrate that he had a legitimate  
8 purpose. The legitimate purpose was by reference solely  
9 to the subjective standards of any particular police  
10 officer or Gloria Rogers, the housing manager. There was  
11 no housing authority handbook of what constitutes  
12 legitimate business. There was no clear meaning as to  
13 what legitimate meant. Left unsaid would be whether  
14 someone could go onto these streets and sidewalks if their  
15 business was to argue and have it out with someone or to  
16 go meet with abortion activists. All we know from this  
17 policy is that before you can use these sidewalks, you  
18 must be engaged in a legitimate -- whatever that means --  
19 business or social reason, which by its own terms --

20 QUESTION: Those are all vagueness -- those are  
21 all vagueness points. They -- they really don't go to the  
22 -- right? You're making the vagueness argument now.

23 MR. BENJAMIN: I am --

24 QUESTION: You -- you would have us rule on a  
25 vagueness ground as well, wouldn't you?

1                   MR. BENJAMIN: I would, but --

2                   QUESTION: I'd sort of like to separate the  
3 arguments that are going to vagueness and those that are  
4 going to overbreadth. The ones you're making now don't go  
5 to overbreadth, it seems to me.

6                   MR. BENJAMIN: Your Honor, you can't separate  
7 vagueness and overbreadth, and this argument goes directly  
8 to the heart of First Amendment.

9                   QUESTION: Well, our cases have certainly  
10 separated vagueness from overbreadth.

11                  MR. BENJAMIN: I think that this Court has used  
12 the terms vagueness and overbreadth interchangeably and --

13                  QUESTION: Well, let's -- let's assume that  
14 we're up to the challenge.

15                  (Laughter.)

16                  QUESTION: It -- it seems to me that there are  
17 some very important vagueness arguments in -- in the -- in  
18 the classical sense of that term that your client can and  
19 should make, and they're unrelated to the speech point.  
20 They're completely unrelated to it. They can play back in  
21 the speech context just as well, but -- but the Supreme  
22 Court of Virginia thought about this just in the speech  
23 context, and that's our concern.

24                  MR. BENJAMIN: I submit, Your Honor, that the  
25 Virginia Supreme Court was taken and impressed by the

1 First Amendment implications that are produced by the  
2 vagueness. If you must have a legitimate business or  
3 social purpose -- and by those terms what's excluded as a  
4 legitimate purpose are lawful purposes like wandering or  
5 jogging because that's not a -- a business or social  
6 purpose, but also protected purposes such as distributing  
7 fliers, literature, or holding religious meetings. That  
8 does not -- that kind of conduct at least arguably does  
9 not fall within the rubric of business or social --

10 QUESTION: No, but isn't it true -- but isn't  
11 the problem with your argument this: It is one thing to  
12 say that a statute that ostensibly addresses speech is  
13 likely to have a serious overbreadth problem if it is very  
14 vague in the way it does it, but it is a very different  
15 thing to say that a statute that does not ostensibly  
16 address speech, that addresses conduct, walking across a  
17 line, becomes an overbreadth -- presents an overbreadth  
18 problem simply because somebody who crosses that line  
19 might want to talk. And you're arguing on the basis of  
20 cases in the first category, speech with vague  
21 limitations, to tell us that we ought to -- that we ought  
22 to consider everything in the second category a speech  
23 case. Isn't that the -- the difficulty of your argument?

24 MR. BENJAMIN: It is not, Your Honor, because  
25 this policy targeted streets in the first place, streets



1 and sidewalks, which are -- a principal purpose of which  
2 is for expressive activity. The policy itself was called  
3 the street privatization program

4 QUESTION: Well, that --

5 QUESTION: But the --

6 QUESTION: Mr. Benjamin, it may not be  
7 immediately before us, but it seems to me it is the heart  
8 of your case. You are essentially saying that a public  
9 authority cannot create, for people who live in projects,  
10 a gated community. The people who live outside projects  
11 can have streets, everything just like this, but  
12 government can't create it for poor people. Is that --

13 MR. BENJAMIN: Your Honor, they -- they can't --  
14 the Government can't do it by simply saying that the  
15 streets are private and simply putting up signs because --

16 QUESTION: Okay. If you're right on that, we  
17 don't have to get to the speech issue. If you're wrong on  
18 that, you have the problem that I just presented to you,  
19 don't you?

20 MR. BENJAMIN: I don't understand.

21 QUESTION: If -- look, if -- if you're right  
22 that the Government cannot, in their words, privatize the  
23 streets, then that's the end of the case. Your guy can't  
24 be prosecuted for trespass in this instance, and that's  
25 the end of the issue here. If it turns out, on the other

1 hand, that the Government can indeed do what it purported  
2 to do here, then it seems to me your argument suffers from  
3 the problem that I raised. You're saying that even in a  
4 case in which the statute doesn't address speech but  
5 addresses conduct, crossing a property line, there is a  
6 speech implication and every one of those trespass cases  
7 becomes a First Amendment overbreadth case. Isn't --  
8 isn't that correct?

9 MR. BENJAMIN: I agree that the challenge can be  
10 made if counsel sees fit to do so, but of course, he's  
11 bound by the State's ethical requirements. And the -- the  
12 issue won't be there in most cases. There is no policy  
13 that is going to be as vague and overbroad, so pervasive  
14 in its effect on First Amendment freedoms as well as --

15 QUESTION: You're saying when it gets very,  
16 very, very, very, very vague that's when it becomes a -- a  
17 First Amendment problem even though it -- the statute  
18 doesn't address speech. Is that basically it?

19 MR. BENJAMIN: Your Honor, yes.

20 QUESTION: How could we administer that?

21 MR. BENJAMIN: It's not -- what you administer  
22 is what has always been administered, the requirement of a  
23 finding of substantial overbreadth.

24 QUESTION: Do we -- do we have any -- any  
25 overbreadth cases that -- that would support that? I

1 mean, our overbreadth cases start with -- with a speech  
2 claim and says, well, maybe you can stop my speech, but  
3 you can't stop his. Do -- do you have any authority  
4 for --

5 MR. BENJAMIN: I don't think that in Chicago v.  
6 Morales that there was any claim that the petitioners in  
7 that case were involved in expressive activity.

8 QUESTION: I thought they wanted to have a  
9 parade or a -- a --

10 MR. BENJAMIN: That was --

11 QUESTION: -- an assembly of some sort.

12 MR. BENJAMIN: I think, Your Honor, that was in  
13 Forsyth County.

14 QUESTION: Oh.

15 MR. BENJAMIN: We have cases such as Watchtower,  
16 for example, where admittedly in Watchtower, Jehovah's  
17 Witnesses were engaging in expressive activity, but there  
18 was nothing about the facts of that case or the ordinance  
19 that suggested that anyone in nonexpressive activity would  
20 not have been able to raise the substantial overbreadth  
21 challenge. If it had been Girls Scouts, for example.

22 QUESTION: No. I think that was a First  
23 Amendment. What about Morales? What -- what did Morales  
24 involve?

25 MR. BENJAMIN: That involved the Chicago anti-

1 loitering statute.

2 QUESTION: Street corner assembly.

3 MR. BENJAMIN: Right. In a police -- a two-  
4 part test, the police --

5 QUESTION: Their -- their right to gather and  
6 assemble. I -- that's sort of First Amendment stuff,  
7 isn't it?

8 MR. BENJAMIN: I don't know that this Court  
9 reached it on that point. It -- the Court did reach  
10 overbreadth, but didn't decide on overbreadth because the  
11 statute -- see, the ordinance explicitly by its terms did  
12 not reach First Amendment freedoms or protected activity  
13 because you had to be doing something with no apparent  
14 purpose.

15 QUESTION: No, but the thing that the person  
16 wanted to do was to -- was to gather with his buddies on  
17 the street corner.

18 MR. BENJAMIN: Under that ordinance, it wasn't  
19 illegal. That didn't violate the ordinance because that  
20 was an apparent --

21 QUESTION: Yes, it did, and one of them was a  
22 gang member.

23 MR. BENJAMIN: It did not because if he wanted  
24 to do it for an apparent purpose of expressive activity,  
25 then it didn't violate, and so that was not a problem

1           In this case we have the extraordinary situation  
2   that a person must have government permission, police  
3   permission to walk a street, to use a sidewalk, and his  
4   right to do this depends entirely upon the completely  
5   unfettered discretion of the police and a government  
6   official. If someone wants to go onto that sidewalk and  
7   pass out literature, they must get permission. They must  
8   get Gloria Rogers' permission, and she can give that  
9   permission or deny that permission in accordance with  
10   whatever criteria she uses at any given moment.

11           The First Amendment problems with this case are  
12   substantial and pervasive. The Virginia Supreme Court saw  
13   that and dealt with it while it was there, seeing nothing  
14   redeemable about this policy whatsoever.

15           QUESTION: Thank you, Mr. Benjamin.

16           Mr. Hurd, your time is expiring even as we  
17   speak.

18           (Laughter.)

19           CHIEF JUSTICE REHNQUIST: So the case is  
20   submitted.

21           MR. HURD: Thank you, Your Honor.

22           (Whereupon, at 11:03 a.m., the case in the  
23   above-entitled matter was submitted.)

24

25