

SOUTER, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 02–371

VIRGINIA, PETITIONER *v.* KEVIN LAMONT HICKS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
VIRGINIA

[June 16, 2003]

JUSTICE SOUTER, with whom JUSTICE BREYER joins,
concurring.

I join the Court’s opinion and add this afterword to flag an issue of no consequence here, but one on which a future case might turn. In comparing invalid applications against valid ones for purposes of the First Amendment overbreadth doctrine, the Supreme Court of Virginia apparently assumed that the appropriate focus of the analysis was the “unwritten” element of the housing authority’s trespass policy, that is, the requirement that nonresidents distributing literature or demonstrating on the property obtain prior authorization. 264 Va. 48, 58–60, 563 S. E. 2d 674, 680–681 (2002) (finding that the “unwritten” portion of the policy, although designed to punish unprotected activities, allowed the housing manager to prohibit protected speech “that she finds personally distasteful or offensive” and “speech that is political or religious in nature”). We, on the other hand, take a broader view of the relevant law, by looking to the potential applications of the entire trespass policy, written and unwritten. *Ante*, at 8–10. It does not matter here, however, which position one takes on the appropriate “law” whose overbreadth is to be assessed, for there is no substantial overbreadth either way. Regardless of the scope of the law that forms the denominator of the fraction here, the numerator of potential invalid applications is too small to

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result in a finding of substantial overbreadth. But in other circumstances, the scope of the law chosen for comparison with invalid applications might decide the case. It might be dispositive whether, say, a city's speech ordinance for a public park is analyzed alone or as one element of the combined policies governing expression in public schoolyards, municipal cemeteries, and the city council chamber. Suffice it to say that today's decision does not address how to go about identifying the scope of the relevant law for purposes of overbreadth analysis.