In The

Supreme Court of Virginia

RECORD NO. 190764

HOOKED GROUP, LLC,

***Appellant*,**

v.

CITY OF CHESAPEAKE,

Appellee.

BRIEF AMICI CURIAE OF OWNERS' COUNSEL OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND THE VIRGINIA PROPERTY RIGHTS COALITION IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

STATEMENT OF THE CASE 6

STATEMENT OF FACTS 6

ARGUMENT 6

I. An Exercise of Police Power May Effect a Damaging or Taking of Private Property For Public Use Under the U.S. and Virginia Constitutions 6

II. A Major Reason For Virginia's 1902 Inclusion of the "Damaged" Clause Was to Require Compensation for Lost Access to Public Roads, the 2012 Amendment Underscored This Constitutional Principle 12

III. Conclusion 15

CERTIFICATE 18

TABLE OF AUTHORITIES

Page(s)

CASES

Calder v. Bull,
3 U.S. 386 (1798) 8

Gardner v. Village of Newburgh,
2 Johns. Ch. 162 (N.Y. Chancery 1816) 10, 11

Knick v. Township of Scott,
139 S. Ct. 2162 (2019) 6

Penn. Coal Co. v. Mahon,
260 U.S. 393 (1922) 7, 9, 10

Richmeade, L.P. v. City of Richmond,
267 Va. 598 (2004) 11

Tidewater Ry. Co. v. Shartzer,
107 Va. 562, 59 S.E. 407 (1907) 13

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 7, 9, 12

U.S. CONST. amend. XIV 7, 9

VA. CONST. Art. I, § 11 12

STATUTES

42 U.S.C. § 1983 8

I.R.C. § 501(c)(6) 1

Va. Code Ann. § 25.1-100 (Supp. 2013) 12-13

OTHER AUTHORITIES

2012 Virginia Property Rights Amendment 4, 9, 12

James W. Ely, The Guardian of Every Other Right:
A Constitutional History of Property Rights (2d ed. 1998) ... 1

Maureen Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*,
102 Va. L. Rev. 1167 (2016) 14

Nichols on Eminent Domain 2

INTEREST OF *AMICI CURIAE*

Amici curiae Owners' Counsel of America (OCA), National Federation of Independent Business Small Business Legal Center (NFIB), and the Virginia Property Rights Coalition (Coalition) respectfully submit this Brief *Amici Curiae* in support of Petitioner-Appellant Hooked Group, LLC (Hooked) which addresses the trial court's incorrect determination that, as a matter of law. Hooked has no property right or interest in access from its property to Callison Drive.

OCA. OCA is a national, invitation-only network of the most experienced eminent domain and property rights attorneys who seek to advance, preserve and defend the rights of private property owners and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). OCA is a non-profit organization, organized under I.R.C. § 501(c)(6) and sustained solely by its members. Only one member lawyer is admitted from each state.

OCA brings unique experience to this task. Its member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or amici in many of the takings cases the U.S. Supreme Court and other courts of last resort have considered in the past forty years. OCA members have also authored treatises, books, and scholarly articles on eminent domain, inverse condemnation, and regulatory takings, including authoring and editing chapters in the seminal treatise *Nichols on Eminent Domain*. OCA believes that its members' long experience in advocating for property owners and protecting their constitutional rights will provide an additional, valuable viewpoint on the issues presented to the Court.

NFIB. NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business is the nation's leading small business association, representing

members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

Coalition. The Virginia Property Rights Coalition is a group of citizens who have organized to advocate for the fair treatment of property owners facing infringements upon their fundamental right to own private property. The Virginia Property Rights Coalition regularly advocates at the General Assembly and throughout the Commonwealth of Virginia for legislative reforms

on behalf of property owners. The Coalition was heavily involved in the passage of the 2012 Virginia Property Rights Amendment. The membership of the Coalition extends across the Commonwealth of Virginia and includes farmers, business owners, homeowners and other citizens. The Coalition is uniquely qualified to comment upon the variance in treatment received by owners across Virginia seeking to protect their fundamental right to private property as well as on the constitutional requirement of just compensation when property is taken or damaged for public uses.

SUMMARY OF ARGUMENT

The government's mere invocation of the "police power" to excuse itself from paying just compensation for the elimination of a property owner's access to a public road does not solve the constitutional takings question in this case. The owner cannot be deprived of its right to have a jury—and not the circuit court by demurrer—determine whether the exercise of police power resulted in a "material impairment" of direct access. In short, Virginia owners possess a property right in access, and when any

exercise of government power extinguishes or results in a material impairment of that right—whether through eminent domain, the police power, or any other government power—the owner states a claim for compensation that must be resolved by a jury.

Amici make two brief points.

1. An exercise of the police power may effect a damaging or taking of private property for public use under the U.S. and Virginia Constitutions. For nearly a century it has been black-letter law that if regulation (even regulations adopted for public safety) go "too far" and impact the use and value of property, the owner is entitled to be justly compensated.

2. The people of Virginia emphasized this fundamental principle when they amended the Constitution, both in 1902 (by requiring just compensation was "damaged," which provision was principally designed to compensate property owners for their loss of street access), and again in 2012 (leaving no question that "lost access" is a compensable property right).

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief of Appellant (filed Nov. 25, 2019).

STATEMENT OF FACTS

Amici adopt the Facts in the Brief of Appellant (filed Nov. 25, 2019).

ARGUMENT

I. An Exercise of Police Power May Effect a Damaging or Taking of Private Property For Public Use Under the U.S. and Virginia Constitutions

An inverse condemnation takings or damaging claim does not focus on the government power being exercised. Thus, whether the government has invoked its eminent domain power to affirmatively take property for the public's use (and acknowledges its obligation to provide just compensation); or whether the government has invoked its police power to regulate for the public safety (and does not recognize its obligation to provide compensation), is of no particular constitutional moment. The latest example is *Knick v. Township of Scott*, 139 S. Ct. 2162, 2172, 2175 (2019), in which the Supreme Court held that

government may violate the Fifth Amendment's Takings Clause and the Due Process Clause of the Fourteenth Amendment when it regulates property to such a degree that it is a taking. Rather than the source of power the government asserts, the critical examination is on the impacts of the government's action (whatever its stripe) on the owner's rights, and "how far" the government action has intruded on her property interests. *See Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

The City of Chesapeake has ignored these well-established constitutional principles to argue here that incanting "police power" absolves it of its constitutional obligation to pay just compensation The essence of their argument here is this: "we cut off Hooked's access to Callison Drive because public safety compelled us to do so. Thus, there hasn't been a *taking*, merely an exercise of the police power, and we owe no compensation." But that misses the point of inverse condemnation entirely. It is a truism that in all inverse condemnation claims the government has refused to pay just compensation. That is why the proceeding is "inverse."

The assertion that the City extinguished Hooked's access to the street for safety reasons using its police power is not even relevant in a takings inquiry. Indeed, the Takings Clause imposes a condition on the lawful exercise of police powers with a requirement to pay just compensation where government goes too far in abrogating common law property rights. Thus, to state a valid claim for inverse condemnation, the property owner must first *concede* the validity of the government action (government actions that do not further some public purpose are *ultra vires* and void, and cannot result in a requirement to provide compensation).[1] Thus, if the City had not extinguished Hooked's access for a public purpose, Hooked would not have an inverse condemnation claim with a compensation remedy, but rather one for a due process violation with injunctive or declaratory relief.[2]

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[1] *See*, *e.g.*, *Calder v. Bull*, 3 U.S. 386, 388 (1798) ("a law that takes property from A. and gives it to B … is against all reason and justice for a people to entrust a legislature with such powers, and therefore it cannot be presumed that it has done it").

[2] An owner may be able to recover under 42 U.S.C. § 1983 for a deprivation of property without due process of law.

This is nothing new. Nearly a century ago, the U.S. Supreme Court established the constitutional "floor" that no state may go beneath: even when a regulation may further the health, safety, or welfare of the public and is the product of a legitimate exercise of the police power, if it "goes too far" in its impact on private property rights such that it has the same effect on her property rights as an affirmative exercise of eminent domain, the Fifth and Fourteenth Amendments compel the government to provide just compensation. *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922). Over the intervening century, that principle has been reaffirmed and reinforced – specifically so in Virginia's 2012 Property Rights Amendment.

Mahon itself illustrates why the circuit court wrongly sustained the demurrer. There, subsurface coal mining caused surface structures across the state to collapse, and put the public in grave danger. Thus, there was no question that the Kohler Act—by which the state prohibited such mining—was a valid exercise of Pennsylvania's police power. *Id*. at 413 ("No doubt there is a public interest even in this."). But that alone did not

end the property owner's takings claim. Because Pennsylvania law also recognized the right to mine subsurface coal as a distinct property right, the U.S. Supreme Court held that although government has a free hand to regulate property in the public interest, it is a separate inquiry whether a taking has occurred as a result and whether compensation is owed. *Id*. (Property is held under an "implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone."). And "[w]hen [the police power regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id*. Thus, the Court concluded:

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Id. at 415. This principle has long been familiar. For example, Chancellor Kent recognized in *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. Chancery 1816) that when a municipality relocated a stream for public safety pursuant to its police power (although courts in those days did not use that term), the village

had the obligation to "indemnify" the (formerly) riparian owner whose access to the waterway it had extinguished. *Id*. at 166-67.

Moreover, this Court has consistently recognized the same rationale (as it must): "[t]o take or damage property in the constitutional sense does not require that the sovereign actually invade or disturb the property. Taking or damaging property in the constitutional sense means that the governmental action adversely affects the landowner's ability to exercise a right connected to the property." *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 603 (2004) (internal citations omitted).

Thus, while the City undoubtedly possess the police power to extinguish Hooked's access to Callison Drive—an action that Hooked has not sought to prevent—that alone does not resolve the question of whether the City must provide compensation for taking or damaging Hooked's private property. The City is not categorically *exempt* from the requirement to provide compensation simply because it claimed to invoke its "police powers." Ultimately, the question of whether the City should provide compensation should be determined by the jury

determining whether Hooked's access to Callison Drive has been "materially" impaired by the City. That question cannot be resolved by demurrer and the invocation of nonexistent categorical rules.

II. A Major Reason For Virginia's 1902 Inclusion of the "Damaged" Clause Was to Require Compensation for Lost Access to Public Roads, the 2012 Amendment Underscored This Constitutional Principle

The Virginia Constitution and related eminent domain statutes confirm that just compensation must be paid when access is taken. The Virginia Constitution recognizes significantly greater constitutional protections for property rights than the Fifth Amendment's Takings Clause in the U.S. Constitution. In 2012, the people amended Article I, Section 11 of the Virginia Constitution to prohibit the legislature from adopting laws "whereby private property, the right to which is fundamental, shall be damaged or taken except for public use." The amendment also clarified that just compensation includes "lost access." *Id*. The legislature further defined "lost access" as "a *material* impairment of direct access to property, a portion of

which has been taken or damaged . . . .” Va. Code Ann. § 25.1-100 (Supp. 2013) (emphasis added).

The 2012 constitutional and statutory amendments requiring compensation for lost access must also be read in light of the “damaged or taken” clause in the same Article. The phrase “damaged” was added to the Virginia Constitution in 1902 and this Court’s earliest decisions interpreting that amendment recognize that the new words did “not require [that] the damage . . . be caused by a trespass, or an actual physical invasion of the owner’s real estate, but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover.” *Tidewater Ry. Co. v. Shartzer*, 107 Va. 562, 59 S.E. 407, 409-10 (1907) (citation omitted, emphasis added). That same principle applies where the government’s exercise of power, even where it does not involve construction of a public infrastructure project, results in taking or damaging of private property. A reading of the plain text shows that a “taking” is not required in order to trigger the right to just

compensation, but that a "damaging" of private property also results in the requirement to provide compensation.

A corollary of that logic is that it is not necessary for the government to affirmatively exercise eminent domain in order to be liable for just compensation if it has damaged private property for public use in the course of the exercise of some power other than eminent domain. Indeed, "damaging" clauses such as Virginia's were added to state constitutions in part to constitutionalize state court decisions which had—contrary to a long line of earlier state decisions denying compensation for extinguishment of access when an adjacent street was regraded—recognized a compensable property right in a parcel's access to the public streets. *See* Maureen Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 Va. L. Rev. 1167, 1190 (2016) ("State constitutional changes helped accelerate the process of compensation for regrades . . . Illinois was home to the first constitution revised explicitly to provide compensation for regrades [by adding the "or damaged" clause]."). Although the Constitution is self-executing and local

governments should not damage property for public use without first providing compensation, here, the property owner was forced to institute an inverse condemnation action because the City brazenly ignored its constitutional obligation even though it acknowledges it intentionally extinguished all access from the parcel to the adjacent public street. Again, this is the "inverse" part of the proceeding. The City's declaration of "police power" to avoid its constitutional obligation to pay just compensation is, under long standing state and federal law, irrelevant to the takings or damaging question. The government can no more take or damage its citizens' property without compensation under the guise of police power than it can subject citizens to unreasonable searches merely by conducting them under the police power.

III. Conclusion

Claims for compensation for a damaging or taking of private property by government regulation are not susceptible to facile categorical rules, as the City urges. The circuit court improperly started and ended its analysis by asking what power the City exercised to cut off Hooked's access to Callison Drive. It

concluded the owner was entitled to no compensation for the loss of all access to an abutting street merely because the City stated it was using its police power. The owner should have the opportunity to prove that the City's admitted extinguishment of all access to Callison Drive resulted in a "material impairment" of its property right of access to property public road.

If the government can avoid just compensation simply by calling its actions police power, it has authority to disregard the citizens' constitutional rights. That is not the law under the Constitution of Virginia.

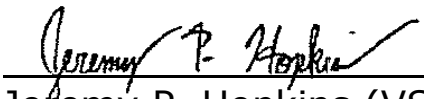
Respectfully submitted,

OWNERS' COUNSEL OF AMERICA

VIRGINIA PROPERTY RIGHTS COALITION

NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

By Counsel



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December 9, 2019.

CERTIFICATE

Pursuant to Rules 5:26 and 5:30 of the Supreme Court of Virginia, I hereby certify the following:

1. That on December 9, 2019, three paper copies of the Brief Amicus Curiae were hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief was served, via email, upon:

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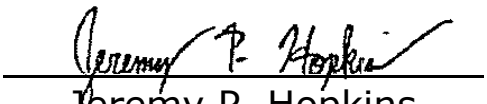
2. That this brief does not exceed 50 pages or 8,750 words in length.



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