IN THE
SUPREME COURT OF VIRGINIA

Record No. 191563

C. ROBERT JOHNSON, III, LISA LAWSON JOHNSON, THOMAS A. HAZELWOOD, JOHNSON AND SONS SEAFOOD, LLC, and HAZELWOOD OYSTER FARMS, INC.,

Appellants

v.

CITY OF SUFFOLK and HAMPTON ROADS SANITATION DISTRICT,

Appellees.

BRIEF OF AMICUS CURIAE OWNERS' COUNSEL OF AMERICA AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

Daniel T. Woislaw (VSB 91180)
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Ste. 610
Arlington, VA 22201
Telephone: (610) 888-4293
Facsimile: (916) 419-7477
dwoislaw@pacificlegal.org

Counsel for Amici Curiae

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STATEMENT OF THE CASE

This case comes before the Supreme Court of Virginia on an appeal from a final judgment of the Suffolk Circuit Court granting demurrers filed by the City of Suffolk ("City") and the Hampton Roads Sanitation District ("HRSD") against the petitioners, C. Robert Johnson III, Thomas A. Hazelwood, Johnson and Sons Seafood, LLC, and Hazelwood Oyster Farms, LLC ("Oystermen"), on their petition seeking declaratory judgment for inverse condemnation.

The Oystermen alleged that HRSD and the City knowingly operated a sewage and stormwater system in such a way that it discharged wastewater into the Nansemond River, invading oyster beds the Oystermen leased from the state for the express purpose of oyster cultivation, thereby damaging and taking the oysters—their private property—without compensation. They sought a judgment of inverse condemnation under Article I, § 11 of the Virginia Constitution.

The court below entered a final order granting the demurrers of the City and HRSD and an opinion finding the Oystermen's claims were superseded by the right of localities to pollute freely pursuant to *Darling v. City of Newport News*, 249 U.S. 540, 543 (1919). Opinion of Judge

Farmer Granting Demurrer, at 5. HRSD has been subject to a series of federal consent decrees aimed at preventing its polluting behavior. *See* Appendix to Brief of Appellant, at 68-168.

QUESTION PRESENTED

May a municipal entity evade liability under Article I, § 11 of the Virginia Constitution after discharging wastewater from its public sanitation system into the Nansemond River, destroying privately owned oysters on sections of riverbeds leased from the Commonwealth for the express purpose of oyster cultivation?

STATEMENT OF FACTS

Amici concur with the Statement of Facts set forth in the Oystermen's petition and opening brief.

STANDARD OF REVIEW

Amici concur with the Statement of Facts set forth in the Oystermen's petition and opening brief.

ASSIGNMENTS OF ERROR

Amici concur with the Assignments of Error set forth in the Oystermen's petition and opening brief.

ARGUMENT

I. Inverse Condemnation Takings Are Defined by the Deliberateness or Foreseeability of Interference with Private Property Rights.

The City contends that its pollution of the Nansemond River and consequent destruction of the Oystermen's oysters was an act for which the Virginia Constitution provides no remedy of compensation. *See* Respondent City of Suffolk's Demurrer, at 3. This is not so.

Inverse condemnation law in Virginia recognizes a valid claim against state action that foreseeably results in the destruction or invasion of private property for a public use. *See Livingston v. Virginia Department of Transportation*, 726 S.E.2d 264, 271-72 (Va. 2012). Unlike for claims sounding in tortious negligence, high levels of care exercised by the government will not exempt it from the obligation to pay, as the Constitution of Virginia mandates compensation for damagings and takings of property. Va. Const. art. I, § 11 (1971) (emphasis added). So long as the interference with property rights constitutes a public use, the government is liable under the "implied contract" of Article I, § 11. *See AGCS Marine Ins. Co. v. Arlington Cty.*, 800 S.E.2d 159, 163 (Va. 2017)

(describing the constitutional promise of compensation for takings and damagings as an "implied contract").[1]

This is so because even non-negligent interference with private property is a cost of state action that should be borne by the public as a whole rather than shifted onto individuals who share only in a part of the project's benefit but are forced by happenstance to bear an unreasonably disproportionate burden thereof. *See Armstrong v. United States*, 364 U.S. 40, 48 (1960). However, not *all* state actions that interfere with private property interests are compensable takings. *E.g.*, *Eriksen v. Anderson*, 79 S.E.2d 597, 660-61 (Va. 1954) (negligent operation of quarry by State Highway Commissioner did not result in taking when private property was damaged thereby). This Court's case law instead draws the line between compensable takings and non-compensable acts by reference to the "public use" limitation in Article I, § 11. It has applied a rule through a series of decisions that recognizes such a use where the

[1] And if state action does *not* constitute a public use but *does* effect a taking of property, then it is an ultra vires act against which injunction is a remedy. *Cf. Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302, 308 (3d Cir. 2008) ("A plaintiff that proves that a government entity has taken its property for a private, not a public, use is entitled to an injunction against the unconstitutional taking, not simply compensation.").

Commonwealth engages in conduct that either deliberately or foreseeably results in the damage or invasion of private property in the course of developing or operating public systems and projects. *See AGCS Marine Ins. Co.*, 800 S.E.2d at 164-66.

Other jurisdictions, including the United States Supreme Court, the Federal Circuit Court of Appeals, and other states have likewise adopted this foreseeability test for delineating the line between takings and torts. *See, e.g.*, *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 34 (2012); *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003); *Albers v. County of Los Angeles*, 398 P.2d 129, 137 (Cal. 1965); *Electro-Jet Tool Mfg. Co., Inc. v. City of Albuquerque*, 845 P.2d 770, 777 (N.M. 1992); *Henderson v. City of Columbus*, 827 N.W.2d 486, 495-97 (Neb. 2013); *City of Dallas v. Jennings*, 142 S.W.3d 310, 312 (Tex. 2004). Applied to the Oystermen's allegations that HRSD deliberately discharged wastewater into the Nansemond River which destroyed their property and devalued their leased sections of riverbed, this test weighs in favor of finding a valid claim for inverse condemnation.

A. The Commonwealth's Case Law Evinces a Foreseeability Test for Drawing the Line Between Takings and Torts.

The Oystermen made out a valid claim for inverse condemnation against the City and HRSD based on the deliberate discharge of public wastewater into the Nansemond River because the natural, probable, and foreseeable consequence of that discharge was the destruction of the Oystermen's oysters. *See* Petition for Declaratory Judgment, at 7-8. The transaction in fact cuts to the heart of the constitutional guarantee of just compensation, which this Court has identified as dating back to Magna Carta[2] and was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 48. Just as a public waste conveyance system designed to discharge onto private land effects a taking, *HRSD v. McDonnell*, 360 S.E.2d 841, 843 (Va. 1987), so too does such a system that pollutes a leased section of riverbed, destroying valuable mollusks.[3]

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[2] *See AGCS Marine*, 800 S.E.2d at 170.

[3] This Commonwealth defines the classes of property defended by its Constitution's guarantee of compensation for takings quite broadly. *See AGCS Marine*, 800 S.E.2d at 170.

As noted above, state action foreseeably resulting in the invasion or destruction of private property through a public plan or design effects a taking under Article I, § 11 of the Virginia Constitution. This Court employed that principle in *Livingston v. Virginia Department of Transportation*, 726 S.E.2d 264 (Va. 2012) ("*VDOT*"), where it held that an inverse condemnation claim validly asserted a compensable taking against VDOT's relocation of a river to benefit the operation of a highway system. *Id.* at 267-68. Foreseeable rains and sedimentary accumulation thereafter caused flooding to private property. *Id.* at 271-72. Despite the government's contention that storm-related floods were an act of God as opposed to a public taking, this Court relied on the foreseeability of predictable rain events and found a causal link between VDOT's developments and the flooding of private property. *Id.*

Likewise, a series of this Court's decisions has considered the degree of deliberateness necessary to hold the government accountable for compensation when deciding whether an allegation of inverse condemnation sounds in the law of takings or torts. In *Hampton Roads Sanitation District v. McDonnell*, it found that HRSD's use of a "bypass valve" designed to release excess waste onto private property constituted

a taking for public use. 360 S.E.2d at 843. And in *Jenkins v. County of Shenandoah*, this Court found a taking occurred where the county's use of a drainage ditch that was insufficiently maintained and therefore, predictably, overflowed onto private property during rain events. 436 S.E.2d 607, 610 (Va. 1993). The case of *Kitchen v. City of Newport News*, decided in 2008, also displays this Court's employment of the foreseeability test where it held that landowners asserted a valid claim for inverse condemnation where a city-permitted development drained stormwater onto private properties, using those properties as *de facto* detention and retention ponds. 657 S.E.2d 132, 137-38 (Va. 2008). And most recently, in *AGCS Marine Insurance Company v. Arlington County*, this Court held that a grocery store's insurer made out a valid claim where it alleged that a county sewer system was designed to overflow into the insured store to permit the rest of the sewer system to continue functioning. 800 S.E.2d 159 (Va. 2017).

To be certain, the factual similarities between the cases above and HRSD's discharge of wastewater to flow over the Oystermen's leased tracts is striking. The common denominator between these cases is the deliberateness of government conduct in the design or implementation of

public projects in tandem with the foreseeability of substantial interference with private property rights springing therefrom.

But not all allegations of interference with property interests are governed by this Commonwealth's constitutional guarantee of just compensation. Had the claims here been against HRSD employees who damaged oysters during their lunch breaks by motoring on the Nansemond River with boats leaking fuel, this case would be a closer call. Those classes of government conduct that fall outside the scope of the state's promise to pay include negligent acts that do not predictably interfere with private property rights to further a public end. *See Eriksen v. Anderson*, 79 S.E.2d at 660 (holding negligent acts of State Highway Commissioner's employees did not effect a compensable taking).

If state action is *merely* negligent, then the cause of action is grounded in tort law rather than the constitutional guarantee of just compensation. *See id.* However, the Virginia Constitution "permits a landowner to enforce his constitutional right to compensation […] 'where his property is taken [or damaged] for public uses […], *irrespective of whether there be negligence in the taking or the damage*.'" *Jenkins*, 436 S.E.2d at 609 (quoting *Heldt v. Elizabeth River Tunnel Dist.*, 84 S.E.2d

511, 514 (Va. 1954)) (emphasis added). Thus, the question is not whether the government acted negligently *or* foreseeably when it caused an invasion or damaging of private property, but instead whether its conduct on behalf of the public is reasonably traceable to the foreseeable invasion or damage of private property.

Viewed this way, the test is one that searches out a causal relationship between a public design, project, or plan, and interference with private property rights. This Court's case law contains the same mechanisms that federal courts have developed in answering the tort-or-taking question.

B. Virginia's Case Law Follows the Federal Standard Articulated in *Arkansas Game & Fish Commission v. United States.*

Virginia case law has identified the foreseeability test as a function of the "public use" requirement of Virginia's Just Compensation Clause while the federal courts have applied it as a mechanism of the "taking" test. In either event, the result is the same: if government conduct on behalf of the public deliberately or predictably invades a property interest, a taking rather than a tort has occurred and the government is not immune from demands for compensation.

The Supreme Court of the United States encountered this question in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), where it held that temporary flooding of private land caused by a dam operated by the U.S. Army Corps of Engineers was not exempt from liability from claims grounded in the Fifth Amendment's Just Compensation Clause. *Id.* at 38. Justice Ginsburg, writing for the Court, instructed the lower courts and future litigants to look to three factors for determining whether government conduct that temporarily interferes with private property constitutes a compensable taking: (1) the duration of interference with private property, (2) the foreseeability of such interference, and (3) the character of the private property, including investment-backed expectations. *Id.* at 38-39.[4]

In distinguishing between compensable and non-compensable interference with private property, the Court identified that its prior case law—like that of this Commonwealth—had already deployed the

[4] Since this Commonwealth's constitution recognizes both damagings and takings in its Just Compensation Clause, and its prior case law evinces that even temporary takings are compensable, as described above, there is no need to analyze this first factor. As to the third, this brief takes up the question of investment-backed expectations in the section regarding property rights below.

foreseeability analysis. In *Sanguinetti v. United States*, 264 U.S. 146 (1924), a "flood of unprecedented severity" caused a public canal to overflow, but the government was immune from suit because the storm-caused flooding was not a foreseeable result of its construction or maintenance. *Id.* at 147. "This outcome[,]" wrote the Court in *Arkansas Game & Fish*, "settled on principles of foreseeability and causation." 568 U.S. at 34.

Cited approvingly in *Arkansas Game & Fish* was a decision from the Federal Circuit, *Ridge Line, Inc. v. United States*. *Arkansas Game & Fish*, 568 U.S. at 39. In *Ridge Line*, the construction of a federal post office caused drainage water to flow regularly over a claimant's property who alleged the taking of a drainage easement by inverse condemnation. 346 F.3d at 1350-51. The court identified a two-part test for drawing the line between torts and takings as follow. First, is the deliberateness or foreseeability prong:

> [A] property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action."

Id. at 1355 (quoting *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Fed. Ct. Cl. 1955)). Second, explained the court,

> [e]ven where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owners' right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.

Id. at 1356.

While this Court has applied these principles, *see supra* Part I.A, it has not expressed the foreseeability test as a rule of law. This Court should adopt as a rule the test adopted by *Arkansas Game & Fish* as articulated in *Ridge Line* because it is a coherent and workable standard for interpreting the line between compensable takings and non-compensable torts under this Commonwealth's constitution, and it would erect a stable framework for the litigation of inverse condemnation claims, reducing uncertainty. Under the allegations made by the Oystermen, it would yield the result of recognizing a validly asserted claim for inverse condemnation as there can be little doubt that the oysterbed leases were a matter of public record and wastewater dumped into the Nansemond River would inevitably and foreseeably flow over those beds, destroying the claimants' property. *See* Appendix to Brief of

Appellant, at 21-35. After all, "[f]oreseeability—in contrast to intent, which more aptly accounts for subjective positions—is not simply measured from the viewpoint of the government; foreseeability is an objective inquiry." *In re Upstream Addicks*, 146 Fed. Cl. 219, 255 (2019) (holding the operation of a dam that caused upstream flooding to prevent downstream flooding in response to Hurricane Harvey effected a compensable taking).

Other states and scholarly publications have likewise pointed to the foreseeability test as a sound method for determining whether public action effects a taking or tort. *See Albers*, 398 P.2d at 137; *Electro-Jet Tool*, 845 P.2d at 777; *Henderson*, 827 N.W.2d at 495-97; *Jennings*, 142 S.W.3d at 312; James Burling & Luke Wake, *Takings and Torts: The Role of Intention and Foreseeability in Assessing Takings Damages*, SS035 ALI-ABA 773, 781-87 (2011); *see generally* Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 Hastings L.J. 431 (1968) (examining, among other concepts, the role of foreseeability in state liability for takings).

II. Private Property Rights Are Broadly Defined in the Commonwealth and Include Both Personalty and Other Rights Inhering in Property

The destruction of the Oystermen's oysters is not the only interference with property rights at stake in this litigation. In addition, the lower court's consideration of "a locality's right to pollute the waterways[,]" Opinion of Judge Farmer Granting Demurrer, at 5, concerns the deprivation of a beneficial right to cultivate oysters on state-leased riverbed. If the right of HRSD to pollute inheres in the title obtained by the Oystermen from their leases with the Commonwealth, then the destruction of their oysters from HRSD's pollution would not effect a taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (holding that the Takings Clause only applies to rights that inhere in the title of property itself, excluding tortious uses of property). However, this is not the case. Not only does no limitation on the cultivation of oysters inhere in their title to the leased tracts of riverbed, but it is the analysis above regarding foreseeability that provides the framework for evaluating takings that flow from physical invasions, *not* the regulatory takings analysis employed by the court

below through its reliance on *Darling v. City of Newport News*, 249 U.S. at 542-43. *See* Opinion of Judge Farmer Granting Demurrer, at 5.

The Virginia Constitution recognizes the right of private property as "fundamental," Va. Const. art. I, § 11, and this Court has identified that, as James Madison wrote in his essay on property published in 1792, "as a man is said to have a right to his property, he may be equally said to have a property in his rights." *AGCS Marine*, 800 S.E.2d at 163. Thus, the Oystermen have a right not only in their oysters (property), but also in their *right to cultivate* oysters on state-leased tracts of riverbed.

The constitutional promise of compensation for takings of "private property," Va. Const. art. I, § 11, applies equally to personalty as it does to realty. *AGCS Marine*, 800 S.E.2d at 170 ("Nothing in the denotation of 'private property' excludes personal property—which, by definition, is simply a subset of private property."). Thus, answering whether the Oystermen's "right to [their] property," as Madison put it, was violated is a readily straightforward proposition. Since their allegation is that HRSD deliberately discharged wastewater into the Nansemond River that destroyed their oysters, a valid claim for damaging or taking property is asserted under Article I, § 11. Whether "a property in [their]

rights" has been taken is answered similarly, since the physical invasion frustrates the very purpose of their leases with the Commonwealth—the cultivation of oysters.

Even if this Court were persuaded to approach the question of the Oystermen's right to cultivate on their leased tracts from the perspective of a regulatory taking in the style of *Lucas v. South Carolina Coastal Council*, the same result would obtain—the Oystermen have made out a valid claim for inverse condemnation because HRSD's pollution deprives them of all economically viable use of their leased properties. *See Lucas*, 505 U.S. at 1029 (holding regulations that deprive all economically beneficial use of property effect a taking).

Under federal law, the case of *Lucas* provides the framework for such a taking. It held that regulations prohibiting "all economically beneficial use of land" effect a taking. 505 U.S. at 1030. Under such an approach, identifying a right to pollute the Nansemond River on behalf of the HRSD would take all economically viable use of the Oystermen's leases since the express purpose and only right attached to those leases was the exclusive cultivation of private oysters. *See* Appendix to Brief of Appellant, at 21-35.

Virginia adopted the *Lucas* economic taking rule in *City of Virginia Beach v. Bell*, 498 S.E.2d 414 (Va. 1998). It identified an important limitation on the right to compensation in such a case, however, as follows:

> The [*Lucas*] Court declared that a state may "resist compensation," even in categorical takings, if an "inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." … Thus, [the proper case in which compensation for such a taking should be made is] when the state is exercising regulatory power over the "bundle of rights" that the owner acquired when first obtaining title to the property.

Id. at 417 (quoting *Lucas*, 505 U.S. at 1027) (internal citation omitted).

What the *Lucas* Court envisioned as being excluded from a property's title were uses of land that are tortious in themselves. Thus, a landowner has no property right to create a private nuisance. *Lucas*, 505 U.S. at 1029. Such limitations "must inhere in the title itself" that a private property owner acquires in order to insulate the state from paying just compensation for depriving owners of such a use. *Id.* If a legal limitation on the right to use property for a noxious use predates the acquisition of that property by an inverse condemnation claimant, then the limitation "inheres" in the title and the state's prevention of that use does not effect a taking. *Id.*

This Court held in *City of Virginia Beach v. Bell*, for example, that a zoning ordinance preventing new construction on a claimant's property predated that claimant's acquisition of the property, rendering his taking claim non-compensable. 498 S.E.2d at 417. "[T]he 'bundle of rights' which either [property owner] acquired upon obtaining title to the property," reasoned the Court, "did not include the right to develop the lots without restrictions." *Id.* This test, which has been adopted by Virginia, is an extension of the "investment-backed expectations" factor under the federal definition for a taking:

> [The Supreme Court] has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance.

Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). The *Lucas* rule, applied in *Bell*, focused particular scrutiny on the investment-backed-expectations factor. After all, it would not be reasonable for a developer to expect to use his property in a residential neighborhood as a brick kiln—so long as the regulations did not effect a taking of substantially all economically valuable use.

This is the sort of "background principle" the *Lucas* Court considered to exempt a law or regulation from the ambit of the Takings Clause. If the prohibited use is one that is a nuisance in itself, then the enacted law or regulation does not limit the use of property any more than common law principles already do:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas, 505 U.S. at 1029.

But the Oystermen stand in a much different position than such a purchaser. There is no law or background principle preventing the cultivation of oysters on their leased sections of riverbed, and their use is not contrary to any common law principles. In fact, quite the opposite is true. The leases they acquired give them the exclusive right to cultivate oysters on the leased tracts. *See* Appendix to Brief of Appellant, at 21-35. Even if this Court looks beyond common law principles, the positive law framework governing the use of the Commonwealth's waters supports the Oystermen's reasonable investment-backed expectations of oyster cultivation.

The leases they acquired from the state are strong evidence of this expectation and cut against the right of localities to freely pollute the Commonwealth's waters and enjoy insulation from takings claims for this conduct. Indeed, Virginia and the United States have come very far from the world Justice Holmes discussed in *Darling v. City of Newport News*, when he wrote on behalf of the Court,

> Whatever science may accomplish in the future we are not aware that it yet has discovered any generally accepted way of avoiding the practical necessity of so using the great natural purifying basin. Unless precluded by some right of a neighboring State, such as is not in question here, or by some act of its own, or of the United States, clearly a State may authorize a city to empty its drains into the sea.

249 U.S. at 542-43. Fortunately, we no longer live in a pollute-as-you-may world. Increased protections surrounding private property rights and a robust infrastructure of federal and state law have sprung up protecting the quality of this Commonwealth's waters and imposing civil and criminal liability on polluters. *See* 33 U.S.C. § 1251, *et seq.* (Clean Water Act); Va. Code Ann. § 62.144.2 (West 2020), *et seq.* (State Water Control Law).

This is even reflected in the Virginia Constitution, which reflects that "it shall be the Commonwealth's policy to protect its atmosphere,

lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth." Va. Const. art. XI, § 1 (1971). It is against *this* backdrop, and not the free-pollution era of *Darling*, that the Oystermen acquired their leases from the Commonwealth to cultivate oyster beds on the Nansemond River.

The rights acquired by the Oystermen through their leases are not qualified by the right of HRSD and the City to pollute the Nansemond River because no such absolute right to pollute exists. Virginia is a Dillon Rule jurisdiction in which "local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Tabler v. Board of Sup'rs of Fairfax Cty.*, 269 S.E.2d 358, 359 (Va. 1980) (citing *Board of Sup'rs v. Horne*, 215 S.E.2d 453, 455 (1975)). And while Virginia created the sanitation districts, including HRSD, by legislation, it likewise exercises control over the districts and other persons and entities that are prohibited, except by permit, from discharging materials into the waters of the Commonwealth. *See, e.g.*, Va. Code. Ann. §§ 21-218, 21-287, 62.1-44.5, 1-219.1 (West 2020).

Specifically, Virginia Code Sections 21-218 and 21-287 prohibit the discharge of pollution, including sewage, into both tidal and non-tidal waters. Va. Code Ann. §§ 21-218, 21-287 (West 2020).

The federal Clean Water Act likewise prohibits pollution of navigable waters, including the Nansemond River, and is binding on the Commonwealth and its sanitation districts. *See* 33 U.S.C. § 1251, *et seq*. (1972). In fact, HRSD, which is charged with maintaining the cleanliness of the waters within its jurisdiction, has been under a federal consent decree since 2010 to ensure its compliance with federal law and prevent it from discharging sewage into the water. *See* Appendix to Brief of Appellant, at 14, 68-168.

The protection of the Oystermen's property, as with the defense of private property rights generally, will further the public interest in reducing pollution within Virginia's waterways consistent with the constitutional policy of keeping the "waters from pollution, impairment, or destruction." Va. Const. art. XI, § 1 (1971). When landowners have the right to protect their property from government pollution, government has an even greater incentive not to pollute.

The default backdrop against which the Oystermen acquired their reasonable, investment-backed expectation of cultivating oysters was (1) pursuant to a lease from the Commonwealth specifically for the purpose of cultivating oysters, and (2) within a legal framework that has adopted as its default rule on both a federal and state level that the pollution of waters such as the Nansemond River is unlawful. For HRSD and the City to contend that they are free to pollute the Oystermen's beds at will is to claim that the Oystermen acquired no rights of value through their leases with the Commonwealth. Certainly, the Commonwealth would not offer an exploding deal of this sort, and the Oystermen acted reasonably in assuming as much. Thus, this Court should recognize both their personalty in the oysters themselves and their right to cultivate them on leased riverbed as valuable properties subject to the protection of Article I, § 11 of the Virginia Constitution.

CONCLUSION

Amici request that this Court reverse the order of the court below granting the City and HRSD's demurrers on the grounds that municipal pollution that destroys oysters on state-leased property takes private

property rights without just compensation in violation of Article I, § 11 of Virginia's Constitution.

DATED: June 29, 2020. Respectfully submitted,

s/ Daniel T. Woislaw

Daniel T. Woislaw (VSB 91180)
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Ste. 610
Arlington, VA 22201
Telephone: (610) 888-4293
Facsimile: (916) 419-7477
dwoislaw@pacificlegal.org

Counsel for Amici Curiae

CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that on June 29, 2020, a true and correct copy of the foregoing was served electronically via email on all counsel of record.

I further certify that the foregoing does not exceed 50 pages or 8,750 words and that I have otherwise complied with Rules 5:26 and 5:30 of the Rules of the Supreme Court of Virginia.

s/ Daniel T. Woislaw
Daniel T. Woislaw (VSB 91180)