IN THE COURT OF APPEALS OF VIRGINIA

Case No. 2110-23-2

JOSHUA HIGHLANDER,

Plaintiff-Appellant,

v.

VIRGINIA DEPARTMENT OF WILDLIFE RESOURCES, ET AL.,

Defendants-Appellees.

On Appeal from the Circuit Court of Henrico County,
Fourteenth Judicial District,
Case No. CL23-4100
The Honorable L.A. Harris, Jr. Presiding

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF PLAINTIFF-APPELLANT

John S. Moran, Esq. (VSB No. 84236)
Patrick A. Wallace, Esq. (VSB No. 95053)
McGuireWoods LLP
888 16th St. NW, Ste. 500
Washington, D.C. 20006
Telephone: 202-857-1700
Email: jmoran@mcguirewoods.com
pwallace@mcguirewoods.com

Counsel for Amicus Curiae
NFIB Small Business Legal Center

APPLICATION TO FILE *AMICUS CURIAE* BRIEF

To the Court of Appeals of Virginia:

Pursuant to Rule 5A:23(c) of the Rules of the Supreme Court of Virginia, the National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) respectfully requests leave to file an *amicus curiae* brief in support of Plaintiff-Appellant Joshua Highlander (Appellant).[1] On March 1, 2024, pursuant to Rule 5A:23(c)(2), NFIB Legal Center notified counsel for both parties of its intent to file for leave to participate as *amicus curiae*. Both Appellant and Defendants-Appellees consented. The proposed brief follows this application.

The NFIB 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. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to

[1] The proposed brief was authored in whole by counsel for NFIB Legal Center. No other counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

NFIB represents approximately 300,000 member 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 employees 10 people and reports gross sales of about $500,000 a year. NFIB's membership reflects 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 the small business community. The NFIB Legal Center files in this case because it raises an important issue for small business owners. The proposed *amicus curiae* brief makes two key points:

First, the Fourth Amendment of the United States Constitution, which provides the minimum property protections that Virginia must recognize, prohibits the search and seizure of personal property that occurred in this case.

Second, small businesses will suffer if this Court concludes that law enforcement may seize personal property without a warrant or exigent circumstances.

Accordingly, the NFIB Legal Center respectfully urges this Court to grant this application and file the attached *amicus curiae* brief.

March 22, 2024

Respectfully submitted,

/s/ John S. Moran

John S. Moran, Esq. (VSB No. 84236)
Patrick A. Wallace, Esq. (VSB No. 95053)
McGuireWoods LLP
888 16th St. NW, Ste. 500
Washington, D.C. 20006
Telephone: 202-857-1700
Email: jmoran@mcguirewoods.com
pwallace@mcguirewoods.com
Counsel for Amicus Curiae
NFIB Small Business Legal Center

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

AMICUS CURIAE BRIEF

INTEREST OF AMICUS CURIAE[2]

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB 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. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members. 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.

SUMMARY OF ARGUMENT

One of the "driving forces" behind the Revolution that birthed our Republic was the lack of respect shown to private property from British

[2] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

officers. *Riley v. California*, 573 U.S. 373, 403 (2014). Prior to the Revolution, British officers used "general warrants" and "writs of assistance" to conduct limitless searches of one's home for evidence of criminal activity. *Id.* A 1761 speech in Boston decrying these "writs of assistance" would sow the "seeds" for independence. Akhil Reed Amar, THE WORDS THAT MADE US 9–22, 29–39 (2021) (discussing the writs issue, the 1761 speech, and its impact on the cause of independence).

Although we no longer have "general warrants" and "writs of assistance," this case raises similar concerns about the unlimited search for evidence of wrongdoing. Specifically, can law enforcement officers enter private property and conduct warrantless seizures of personal property? This Court should answer that they cannot.

The Fourth Amendment provides the baseline protection of property rights that Virginia must adhere to. While the Commonwealth may extend more property rights to its citizens than the Amendment requires, it is prohibited from providing fewer. The Supreme Court's open fields doctrine speaks only to one prohibition in the Fourth Amendment: unreasonable searches. It does not grant law enforcement permission to

seize personal property without a warrant. The warrantless seizure of personal property is per se unreasonable under the Fourth Amendment.

In *Hopkins v. Nichols*, 37 F.4th 1110 (6th Cir. 2022), the Sixth Circuit persuasively set forth the legal analysis for the warrantless seizure of personal property on a private citizen's land. This Court should follow that example and hold that law enforcement must get a warrant before seizing personal property. And the Supreme Court's decision in *Riley* makes clear that the warrantless search of personal electronic devices—such as cameras—is unreasonable under the Fourth Amendment.

The impact of this case extends far beyond hunting and Department of Wildlife Resources (DWR) conservation officers. If this Court determines that law enforcement officers can seize and subsequently search personal property without a warrant, it will impact all businesses across the Commonwealth. Department of Labor and Industry officials may begin using their authority to enter businesses and inspect accident, injury, or illness records as carte blanche to seize personal property, such as containers or file cabinets, containing sensitive business or employee information. Businesses that care for animals may see the State

Veterinarian use its authority to enter and inspect business establishments for compliance with animal care laws as a hall pass to seize the animals within those establishments. Farmers may be forced to watch law enforcement officers seize their cattle, chickens, or pigs without a warrant, based on nothing more than a general obligation to protect the food supply and livestock.

Federal law mandates that the DWR officers needed a warrant to seize and search the contents of Appellant's camera. The terrifying implications of the Government's position for all Virginia businesses further demonstrates the proper outcome. This Court should reverse the judgment of the circuit court.

ARGUMENT

I. The Fourth Amendment's Open Fields Doctrine Does Not Permit the Warrantless Seizure of Personal Property.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. AMEND. IV. The Fourth Amendment is "indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property." 3 J. Story COMMENTARIES ON THE CONSTITUTION OF THE UNITED

STATES § 1895 (1833). To secure these rights, the Amendment protects against two separate abuses: unreasonable searches and unreasonable seizures. Warrantless searches are "per se unreasonable under the Fourth Amendment." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

It is "elementary that States" may "provide greater protections . . . than the Federal Constitution requires." *California v. Ramos*, 463 U.S. 992, 1013–14 (1983); *see also Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions *to accord greater protection* to individual rights than do similar provisions of the United States Constitution." (emphasis added)). But they may not provide less—the United States Constitution is the floor. *See Am. Legion v. Am. Humanist Assoc.*, 588 U.S. 29, 72 (2019) (Kavanaugh, J., concurring). The Virginia Supreme Court recently recognized this, interpreting the Virginia Constitution's free exercise clause to provide greater protection than the federal Constitution requires. *Vlaming v. West Point School Board*, 895 S.E.2d 705, 716–19 (Va. 2023). Applied to the Fourth Amendment, this fundamental truth means that Virginia may narrow the situations when government actors

can proceed with a warrantless search or seizure but cannot expand when they may do so.

Under the Supreme Court's caselaw, the Fourth Amendment does not protect against searches of privately-owned "open fields." *See e.g.*, *Oliver v. United States*, 466 U.S. 170, 176–77 (1984) ("[T]he government's intrusion upon the open fields is not one of those *'unreasonable searches'* proscribed by the text of the Fourth Amendment." (emphasis added)). Virginia follows this interpretation of the Fourth Amendment. *Wellford v. Commonwealth*, 227 Va. 297, 303 (1984) ("[T]he police intrusion upon the open field in question was not one of those *'unreasonable searches'* proscribed by the Fourth Amendment." (emphasis added)).

But the open fields doctrine applies to only one of the abuses guarded against by the Fourth Amendment: unreasonable searches. *See Hopkins v. Nichols*, 37 F.4th 1110, 1118 (6th Cir. 2022). It does not apply to seizures. And as the name suggests, the doctrine applies only to *real* property. It does not validate a warrantless search of *personal* property, nor does it permit the warrantless seizure of *personal* property. Warrantless seizures of personal property are per se unreasonable. *United States v. Place*, 462 U.S. 696, 701 (1983) ("[T]he Court has viewed

a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." (citations omitted)); *Jean-Laurent v. Commonwealth*, 34 Va. App. 74, 78 (Ct. App. 2000) (quoting *Place*, 462 U.S. at 701).

In resolving this case, this Court should follow the roadmap provided by the Sixth Circuit in a recent, and factually similar, case.

In *Hopkins*, Tennessee law enforcement received a complaint about cattle in poor health, and an officer personally witnessed a dead cow on the plaintiff's farm. 37 F.4th at 1113. After this, law enforcement returned with a state agricultural officer and demanded, lacking a warrant, to see the rest of the farm's cattle. *Id.* at 1114. Upon doing so, the officials determined the cattle were in poor health and "probable cause for animal cruelty existed." *Id.* Thereafter, the officials entered the farm again and seized the cattle, without a warrant. *Id.*

Not only did the court conclude that this warrantless seizure of personal property violated the Fourth Amendment, but it also held that the officials were not entitled to qualified immunity because the law in

this area was so clearly established. *Id.* at 1117–19. Making clear how the open fields doctrine applies, the court stated:

> [T]he open fields doctrine allowed the officers to lawfully *search* the farm for the cattle, it did not give the officers lawful access to *seize* the cattle. The open fields doctrine is an exception to the Fourth Amendment prohibition on unreasonable searches, not seizures. . . . While the officers could lawfully search the property under the open fields doctrine, that doctrine does not speak to whether they could seize the cattle.

Id. at 1118. It flatly rejected the Government's outrageous attempt to join the open fields doctrine for searches with the plain view seizure exception, noting that the latter required exigent circumstances. *Id.* "[I]t is clearly established that police officers may not seize property without exigent circumstances." *Id.* at 1119. Going further, "no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances." *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971)).

The Court in *Hopkins* rightly rejected the Government's attempt to justify the seizure of cattle under the plain view exception. Even if this court were to disagree with *Hopkins* that a warrantless seizure of personal property requires exigent circumstances, the plain view doctrine cannot justify such a holding. For property seized without a warrant, the

"incriminating character," or "probative value," of the seized property must have been "immediately apparent." *Horton v. California*, 496 U.S. 128, 136–37 (1990) (quoted sources omitted).

The actions of DWR's conservation officers closely mirror those of the Tennessee officials from *Hopkins*. The DWR officers entered Appellant's private property and seized personal property. While the entrance onto Appellant's property may be constitutionally permissible under the Fourth Amendment, the warrantless seizure and subsequent search of the camera is not. *See Place*, 462 U.S. at 701; *Hopkins*, 37 F.4th at 1118. There was nothing incriminating about the camera, nor was any evidence of wrongdoing that *may have been* on the camera immediately apparent. *See Horton*, 496 U.S. at 136. Even worse, the conservation officers conducted a search of the personal property they seized, with no exigent circumstances to justify the search. *See Coolidge*, 403 U.S. at 468; *see also Riley v. California*, 573 U.S. 373, 401–02 (2014) (noting that exigencies like the imminent destruction of evidence, pursuit of a fleeing suspect, or assisting those injured or threatened with injury may render a warrantless search of personal property reasonable). All of this was done without a warrant.

Even if this Court were to find *Hopkins* unpersuasive, electronic devices outside of the home and its curtilage receive Fourth Amendment protection. *See Riley*, 573 U.S. at 403. In *Riley*, the Supreme Court held that law enforcement must secure a warrant before searching a cell phone, regardless of it being a smartphone or flip phone. *Id.* at 378–81, 403. In discussing the personal information kept on cell phones and the immense intrusion of privacy a search would entail, the Court said these devices "could just as easily be called *cameras*" due to the ability to store "thousands of pictures." *Id.* at 393–94 (emphasis added). And important for this case, *Riley* did not turn on the treasure trove of information contained on modern smartphones. *Riley* was the consolidation of two cases—one involving a smartphone and the other involving a simple "flip phone" with a "smaller range of features than a smart phone." *Id.* 378–381. Even a search of the simple flip phone required a warrant under the Fourth Amendment.

The search of Appellant's camera cannot pass muster under *Riley*. Like the camera phones at issue in *Riley*, the camera here could take "thousands of pictures." *Id.* at 394; Compl. ¶¶28, 83 (noting that the camera here could take "thousands of photos" and law enforcement

"downloaded copies of thousands of photos"). It is impossible to know what a search of a camera's contents may reveal—even one in a field positioned for monitoring wildlife. For example, beyond capturing wildlife, an outside camera on one's property could reveal personal and private activity like the camera owner's children playing tag with their friends, intimate moments between the homeowners during a nighttime stroll, the relatives and associates of the homeowners, and so on.

Virginia can interpret its constitution to expand property rights, but it may not provide less than the Fourth Amendment requires. The Fourth Amendment's open fields doctrine does not grant unfettered law enforcement discretion to search and seize personal property without a warrant, absent exigent circumstances. None existed here—there was no threat of the imminent destruction of evidence, no fleeing suspect, and no harm or threat of harm to people. DWR officials had ample time to obtain a warrant for searching and seizing Appellant's camera. The Fourth Amendment, *Riley*, and *Hopkins* make clear that they needed to do so.

II. Small Businesses Will Suffer If the Government Can Seize Personal Property Without a Warrant or Exigent Circumstances.

Upholding the consent-less and warrantless search and seizure of Appellant's camera will have consequential implications for many

businesses across the Commonwealth. While this case concerns hunting on private property, the Government's defense of its warrantless search and seizure without exigent circumstances could easily apply to all commercial properties.

This case goes far beyond DWR's activities, with ripple effects reaching all businesses regulated by the Department of Labor and Industry (DLI). Virginia law created DLI to "administer[] and enforc[e] occupational safety and occupational health activities[.]" Code § 40.1-1. DLI is run by a single Commissioner, who may appoint representatives to aid in his work. *Id.* at §§ 40.1-5, 40.1-6(5). The Commissioner may "require that accident, injury, and occupational illness records and reports" be kept at the place of employment. *Id.* at § 40.1-6(7). One of the powers of the Commissioner and his representatives is to "enter without delay . . . any business establishment, construction site, or other area, workplace, or environment where work is performed by an employee" in the Commonwealth and to "inspect and investigate" in a reasonable manner and without prior notice, "any such business establishment or place of employment and all pertinent . . . materials therein[.]" *Id.* at §§ 40.1-6(8a-b).

Can DLI officials enter a commercial property and seize a file cabinet without exigent circumstances, a warrant, or any indication of what the cabinet contains? Under the Government's position in this case, the answer would be yes. In the hypothetical posed, DLI officials would lawfully be in the place of business pursuant to § 40.1-6(8a). Like a camera, a file cabinet is generally considered personal property. And its contents would only become clear after conducting a search. Nearly every business keeps records on the property, including accident and injury records within DLI's jurisdiction, but also records not under DLI's jurisdiction like tax information and employee personnel records containing sensitive information. If this Court upholds the seizure of personal property in this case, DLI officials could conduct a warrantless seizure of a business file cabinet to search for accident and injury records and gain illegitimate access to private information.

Animal shelters, pet stores, and boarding facilities will face similar concerns. Code § 3.2-6502 gives the State Veterinarian and their representatives the power to inspect "public and private animal shelters, and inspect any business premises where animals are housed or kept, including any boarding establishment, kennel, pet shop, or the business

premises of any dealer, exhibitor, or groomer" in order to uphold the State's animal care laws. Upon receiving a complaint, state officials may "enter upon, during business hours, any business premises, including any place where animals or animal records are housed or kept, of any dealer, pet shop, groomer, or boarding establishment." *Id.* at 3.2-6564. Section 3.2-6569(A) allows any investigator or animal control officer to "seize and impound any animal" that the officer determines was "abandoned, has been cruelly treated, or is suffering . . . a direct and immediate threat to its life, safety or health[,]" without restriction.[3][4]

Could law enforcement or the State Veterinarian conduct a warrantless seizure of pet animals based on nothing more than a suspicion of animal cruelty, even when there is time to obtain a warrant? Virginia law deems dogs and cats personal property, *id.* at § 3.2-6585, and *Hopkins* persuasively suggests this seizure would violate the Fourth

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[3] Section 3.2-6569(A) states: "Any humane investigator, law-enforcement officer or animal control officer may lawfully seize and impound any animal that has been abandoned, has been cruelly treated, or is suffering from an apparent violation of this chapter that has rendered the animal in such a condition as to constitute a direct and immediate threat to its life, safety or health."

[4] Section 3.2-6569 provides only post-seizure court procedures and remedies for the seizure of animals.

Amendment. *Hopkins*, 37 F.4th at 1119 (holding that state officials seizing cattle based on belief of animal cruelty, without a warrant or exigent circumstances, "committed a constitutional violation"). Presumably, the Government's position here could be used to justify the warrantless seizure of animals from these businesses, and § 3.2-6569(A) seems to place no restriction on the authority to conduct a warrantless seizure of these animals.

What about farming? Virginia promotes the right to farm. Code § 3.2-301. "Agriculture is Virginia's largest private industry" with 41,500 farms in the Commonwealth covering nearly 8,000,000 acres.[5] The Commissioner of Agriculture has vast authority to "promote, protect, and develop the agricultural interests of the Commonwealth." *Id.* at § 3.2-102. The Commissioner's duties include protecting the "safety and quality of the Commonwealth's food supply through food and dairy inspection activities" and to "ensure animal health and protect the Commonwealth's livestock industries through disease control and surveillance." *Id.* The State Veterinarian also has a role in maintaining the Commonwealth's

[5] Virginia Department of Agriculture and Consumer Services, *Agriculture Facts & Figures*, https://tinyurl.com/34969e8b.

livestock and poultry. *Id.* at § 3.2-6569(B) (requiring law enforcement to contact the State Veterinarian before seizing any "agricultural animal"); *Id.* at § 3.2-6500 (defining "agricultural animals" as "all livestock and poultry").

Can Virginia Department of Agriculture and Consumer Services (VDACS) officials or local animal control officers seize the cattle, chickens, pigs, or other farm animals from a farming business? Virginia law appears to give officials unrestricted authority to seize livestock without first obtaining a warrant. *Id.* at § 3.2-6569(A-B) (permitting the seizure of animals and requiring owner consent or a court order only for "impound[ing] the agricultural animal on the land where the agricultural animal is located"). So did Tennessee law in *Hopkins*. *Hopkins*, 37 F.4th at 1114; Tenn. Ann. Code. § 39-14-211. If this Court holds that the seizure of personal property without a warrant, consent, or exigent circumstances passes constitutional muster, nothing prevents VDACS or other law enforcement officials from seizing cattle or horses grazing on a farm. Where time exists to get a warrant, a subjective belief about animal cruelty should not be enough to disregard the Fourth Amendment.

To be clear, *amicus* does not raise these two previous examples to suggest that Code § 3.2-6569 is facially unconstitutional. As was the case in *Hopkins*, presenting similar seizures of animals based on a subjective belief about animal cruelty, and all Fourth Amendment cases, the facts matter. In *Hopkins*, there were no exigent circumstances requiring an immediate seizure and officials had ample time to get a warrant before seizing the animal, which caused the warrantless seizure to be a "constitutional violation." *Hopkins*, 37 F.4th at 1118–19. So too here. DWR officials had no immediate need, or exigent circumstances, requiring the seizure of the camera. There was ample time to seek a warrant for the seizure, but officials disregarded a constitutional mandate for the sake of convenience. This is the concern expressed here regarding the use of Virginia's current statutes by state officials. If the Court upholds the seizure in this case—where DWR officers had ample time to get a warrant and lacked exigent circumstances—it may signal to other state officials that they too can conduct warrantless seizures without exigent circumstances, further diminishing the warrant requirement.

The outcome of this case is not limited to residential property and hunting. As demonstrated above, the warrantless seizure of personal property will affect businesses across the Commonwealth. Therefore, this Court should be reluctant to accept the Government's position that law enforcement may conduct warrantless seizures of personal property without exigent circumstances.

CONCLUSION

This Court should hold that the seizure of Appellant's camera and search of its contents were improper. The judgment of the circuit court should be reversed.

March 22, 2024

Respectfully submitted,

/s/ John S. Moran

John S. Moran, Esq. (VSB No. 84236)
Patrick A. Wallace, Esq. (VSB No. 95053)
McGuireWoods LLP
888 16th St. NW, Ste. 500
Washington, D.C. 20006
Telephone: 202-857-1700
Email: jmoran@mcguirewoods.com
pwallace@mcguirewoods.com
Counsel for Amicus Curiae
NFIB Small Business Legal Center

CERTIFICATE OF SERVICE AND WORD COUNT

I hereby certify on this 22nd day of March, 2024, that a copy of the forgoing Amicus Brief has been served on counsel below via email:

Appellant Counsel:

Robert Frommer (VSB No. 70086)
Joseph Gay (NY Reg. No. 4800462, DC Bar No. 1011079)*
Joshua Windham (NC Bar No. 51071)*
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320
rfrommer@ij.org
jgay@ij.org
jwindham@ij.org

Appellee Counsel:

Thomas J. Sanford, TSanford@oag.state.va.us
R. Cooper Vaughan, CVaughan@oag.state.va.us
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL

This brief contain 3,443 words.

/s/ John S. Moran