No. 01-1502

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STAR SCIENTIFIC, INC.,
a Delaware Corporation,

Plaintiff-Appellant,

v.

RANDOLPH A. BEALES,
in his official capacity as Acting Attorney General
of the Commonwealth of Virginia,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF DKT LIBERTY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT FOR REVERSAL

William M. Hohengarten
Julie M. Carpenter
Janis C. Kestenbaum
Counsel of Record
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Amicus Curiae *DKT Liberty Project*

June 20, 2001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

INTEREST OF *AMICUS CURIAE*[1/]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the DKT Liberty Project was founded in 1997 to promote civil liberties, including economic liberties, against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of civil and economic liberties that threaten the reservation of power to the citizenry that underlies our constitutional system.

The due process and equal protection issues presented in this case implicate fundamental constitutional guarantees against government overreaching. Because of the Liberty Project's strong interest in these issues, it is well situated to provide this Court with additional insight into the questions presented in this case.

SUMMARY OF ARGUMENT

The Virginia Qualifying Statute, 1999 Va. Acts chs. 714, 754, *codified at* Va. Code Ann. §§ 3.1-336.1, 3.1-336.2, does not satisfy the most minimal test of constitutionality under the Due Process and Equal Protection Clauses because its actual purpose is impermissible. The Statute was passed pursuant to the Master Settlement Agreement ("MSA") between the Commonwealth and major tobacco

---

1/ Pursuant to Fed. R. App. P. 29(b), amicus is seeking leave to file this brief by motion submitted herewith.

companies (the "Big Four"), which unambiguously states that the real purpose of the Statute is to saddle Non-Participating Manufacturers ("NPMs") that have not joined the MSA with the same financial burdens that settling tobacco companies assumed in joining the settlement – even though the NPMs have never even been *accused* of the wrongdoing committed by the Big Four.

The Constitution does not allow government to pursue such blatantly illegitimate purposes, whether or not there is some legitimate but hypothetical purpose that could be offered as a pretext. Where the record unambiguously demonstrates that the government's *actual* purpose in enacting a statute is an impermissible one, the plaintiff satisfies its burden of "negativ[ing] every conceivable basis which might support [the legislation]," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), and the statute does not survive rational basis review.

Even if the Court were to consider the *ostensible* purpose put forward to justify the Virginia Qualifying Statute – seizing an NPM's property to create a fund for recovery by the Commonwealth in a future lawsuit – the Statute is woefully deficient under well-established due process principles. The constitutionality of prejudgment seizures of property turns on the nature of the property interest affected, the risk of erroneous deprivation and the value of the

additional procedures, and the countervailing interests of the plaintiff and the government in existing procedures. *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991).

The Qualifying Statute fails this test. It deprives NPMs of the use of substantial funds for a 25-year period with absolutely no procedural safeguards against error. The resulting high risk of erroneous deprivation could readily be reduced through the most basic procedural safeguards: requiring the Commonwealth to articulate its allegations (if any) concerning an NPM's potential liability, and then exposing those allegations to the test of an adversarial hearing. Further, the Commonwealth could readily protect its interests through other mechanisms, such as bonding and financial responsibility requirements, that would impose much less severe deprivations yet still effectively guarantee a fund for recovery.

The constitutionality of the Qualifying Statute cannot be saved by drawing analogies to valid bonding requirements. The test of due process is context-specific. Bonding statutes will usually survive due process scrutiny because the deprivation they impose is less severe, the risk of erroneous deprivation is lower or cannot be cured by additional procedures, and/or the government's countervailing interests in existing procedures are more weighty than under the

Qualifying Statute. The fact that *other* procedures might satisfy due process does not validate the Qualifying Statute.

ARGUMENT

I. The Virginia Qualifying Statute Fails Rational Basis Review Because Its Actual Purpose Is Impermissible, Notwithstanding Any Pretextual Purpose.

Under the MSA, Virginia must either enact and enforce a "Qualifying Statute" or forgo very substantial payments from the Big Four tobacco companies. J.A. 205-13 (MSA § IX(d)(1)-(2)). The MSA describes the purpose of a Qualifying Statute with surprising frankness: it must "effectively and fully neutralize[] the cost disadvantages that the Participating Manufacturers experience vis-a-vis Non-Participating Manufacturers" as a result of the damages that the former must pay under the MSA. J.A. 210 (MSA § IX(d)(2)(E)). A state may satisfy its obligation to enact a Qualifying Statute by adopting the model statute set out in Exhibit T to the MSA, or by adopting some other law that "effectively and fully neutralizes the cost disadvantages" of the Big Four tobacco companies. J.A. 210-12 (MSA § IX(d)(2)(E), (G)). Virginia chose the former course and enacted the Virginia Qualifying Statute, which is substantially identical to MSA

Exhibit T. *Compare* 1999 Va. Acts chs. 714 and 754 (Virginia Qualifying Statute) *with* J.A. 423-27 (MSA Ex. T).[2/]

It is therefore plain that the purpose of the Virginia Qualifying Statute is to eliminate the cost disadvantage that the Big Four would otherwise experience as a result of their substantial monetary liabilities under the MSA. The Statute does this by imposing the same onerous financial burdens on NPMs that the MSA imposes on the Big Four, even though the NPMs have not been found guilty of – or even charged with – the culpable conduct that resulted in liability for the Big Four. *See* Va. Code Ann. § 3.1-336.2(B)(2) (tying amount paid into escrow by NPM to amounts paid by settling tobacco manufacturer under MSA). Imposing a burden on an innocent party in order to neutralize the liabilities rightfully borne by a wrongdoer is not a legitimate government purpose.[3/] In this respect, the Virginia

---

2/ The parties to the MSA, including the Commonwealth, recognized that the Qualifying Statute was constitutionally suspect and thus included a provision in the MSA specifying what will happen if "a court of competent jurisdiction . . . invalidates or renders unenforceable the Model [Qualifying] Statute." J.A. 211 (MSA § IX(d)(2)(F)). Under such circumstances, payments to the Commonwealth under the MSA would be reduced but not eliminated. *Id.*

3/ Although the Big Four did not admit liability in the MSA, they entered into that settlement and agreed to pay "damages" in a case in which the Commonwealth alleged significant wrongdoing as the basis for recovery. In comparison with NPMs like Star Scientific, against whom no allegations of culpable conduct have been lodged, the Big Four are properly regarded as wrongdoers.

Qualifying Statute is no more legitimate than a law that fines every restaurant when one is found guilty of health code violations.

Not surprisingly, defendant has not tried to justify the Qualifying Statute as furthering this illegitimate purpose. Instead, defendant has argued – and the District Court accepted – that the Statute is reasonably related to a different purpose: ensuring a source of recovery should the Commonwealth obtain a judgment against Star Scientific in a suit that has not even been brought. As explained in Section II below, the Qualifying Statute falls far short of the requirements of due process even if that ostensible purpose is accepted. Nonetheless, the Court should not even consider it, because under the rational basis test, a rational relationship to a pretextual purpose cannot save the constitutionality of a law whose actual and indisputable purpose is illegitimate.

Under both the Due Process and the Equal Protection Clauses, the minimal requirement of a law's constitutionality is that the law bear a "rational relationship to an independent and *legitimate legislative end.*" *Romer v. Evans,* 517 U.S. 620, 633 (1996) (equal protection) (emphasis added); *see also, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (legislation "must meet the test of due process: a *legitimate legislative* purpose furthered by rational means") (internal quotation marks omitted and emphasis added). Under this test, courts begin with

the presumption that the government is acting within constitutional bounds, so that the state does not have the burden of proving the actual purpose behind the statute. Rather, the person challenging the statute must rule out the possibility that it serves a legitimate end. Where there is no indication that lawmakers pursued an illegitimate purpose, the challenger can prevail only if he or she shows that the law does not bear a rational relationship to *any* of the possible legitimate purposes it *might* have been enacted to serve. *See Beach Communications*, 508 U.S. at 317-18.

That does not mean, however, that a court may disregard a law's *actual* purpose when it is both manifest and illegitimate. To the contrary, the Supreme Court has repeatedly examined the factual record, the legislative history, and the terms of the statute itself to determine the actual purpose of a regulation where it appears that such purpose may be impermissible. *See Romer*, 517 U.S. at 632 (finding, based on amendment's terms, that it was actually rooted in anti-homosexual animus, despite benign justifications offered by state); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (finding, based on review of record, that adverse zoning decision was made in response to neighbors' negative attitudes toward mentally retarded); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (finding, based on legislative history, that

Congress intended food-stamp restriction to harm "hippies"). In these and other rational basis cases, the Court has found that the real purposes animating the challenged laws were impermissible. *See Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534-35; *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985); *Zobel v. Williams*, 457 U.S. 55, 63 (1982); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 622-23 (1985).

As these cases show, rational basis review is "not . . . toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Before the District Court, however, defendant argued that the above-cited cases represent special instances of rational basis review reserved solely for infringement of the civil rights of politically unpopular groups. That argument is refuted by this Court's decision in *Phan v. Virginia*, 806 F.2d 516 (4th Cir. 1986), holding that these cases cannot be isolated in a category of "second order rational basis review." *Id.* at 521 n.6 (internal quotation marks and citation omitted); *see also id.* at 523 (remanding for fact-finding under rational basis test). Defendant's position is also contrary to *Metropolitan Life*, *supra*, which concerned monetary burdens imposed on corporations.

The distinguishing feature of these rational basis cases is not that the invalid laws were targeted at unpopular groups, but more generally that the *actual* purposes behind the laws were impermissible. As these cases show, government

may not actively pursue impermissible purposes on the mere pretext that its action has some loose fit to a hypothetical legitimate purpose. By showing that the actual purpose being pursued by the government is impermissible, the plaintiff satisfies his burden of "negativ[ing] every conceivable basis which might support [the legislation]," *Beach Communications*, 508 U.S. at 315 (internal quotation marks omitted). Accordingly, where, as here, the actual purpose of a statute is illegitimate, the court should not uphold the impermissible state action merely because some legitimate state objective can be offered as a pretext.[4/]

II. Even Accepting the Ostensible Rationale for the Qualifying Statute, It Violates Due Process.

Even apart from the foregoing considerations, the Virginia Qualifying Statute violates due process. The District Court concluded that the Statute is rationally related to the purpose of providing a fund for recovery by the Commonwealth in potential future litigation. *See* J.A. 126-27 (Mem. Op.). Under that rationale, the Statute mandates attachment or sequestration of NPM assets as a prejudgment remedy. It does so, however, without providing any of the

---

4/ In contrast, when there is no evidence of an illegitimate purpose and the plaintiff simply alleges that the fit between the government's ends and its means is less than perfect, the plaintiff must show such lack of fit for every hypothetical purpose, since a legislature is not required to articulate its reasons for enacting a statute. *See Beach Communications*, 508 U.S. at 313.

procedural protections required under the Due Process Clause for prejudgment seizures of property.[5/] Indeed, the inapt design of the Qualifying Statute for achieving this would-be purpose reflects the fact that its real purpose is to deprive NPMs of property in the same amount as the damages paid by the Big Four.

5/ Star Scientific argued in the District Court that the Qualifying Statute fails to provide the procedural protections required for prejudgment attachments. *See* Pl's Mem. in Opp. to Def's Mot. to Dismiss, at 29-30, 33 (citing *Connecticut v. Doehr*, 501 U.S. 1 (1991), and *Fuentes v. Shevin*, 407 U.S. 67 (1972)); J.A. 96-97 (transcript of oral argument) ("We think DOEHR and Fuentes alone would prompt the Court to invalidate the Qualifying Statute"). Defendant's sole response to this argument was an ungrounded assertion that Star Scientific had raised a substantive rather than a procedural due process claim. *See* Def's Reply Br. in Support of Mot. to Dismiss, at 16 n.21. In fact, the First Amended Complaint – which controls on a motion to dismiss – contains no such limitation on the scope of Star Scientific's due process claim. Indeed, the District Court acknowledged that Star Scientific had alleged "that since the NPM statute's assumption of future liability is wildly speculative at best, the requirement that Star Scientific place such large sums in escrow violates due process." J.A. at 128 (Mem. Op.).

Further, the procedural deficiencies of the Virginia Qualifying Statute are directly relevant to application of the rational basis test. Where a regulation attempts to achieve a potentially permissible purpose through impermissible means, the regulation cannot be upheld based on that purpose. Thus, alleged *procedural* infirmities are always relevant to whether a statute violates *substantive* due process or equal protection rights. *See, e.g., Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 280-84 (1990) (considering whether procedural requirement of clear and convincing evidence comports with substantive due process right to refuse treatment); *Romer*, 517 U.S. at 633 (striking down law under equal protection rational basis test in part because law imposed distinct onerous procedures on disadvantaged group).

A. Prejudgment Remedies Involving Seizure of Property Must Provide Procedural Safeguards.

The Supreme Court has repeatedly considered the procedural adequacy of statutes creating prejudgment remedies. *See Connecticut v. Doehr*, 501 U.S. 1 (1991) (striking down statute permitting prejudgment attachment of real estate); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (striking down statute permitting prejudgment garnishment of bank accounts); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (upholding statute permitting prejudgment sequestration of personal property with adequate procedural protections); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (invalidating statutes permitting prejudgment seizure of personal property without adequate protections); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (striking down statute permitting prejudgment garnishment of wages).

The endless variety of such statutes and the interests they affect requires fact-specific analysis. *See Doehr*, 501 U.S. at 10 ("These cases underscore the truism that [d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances") (internal quotation marks and citation omitted). Accordingly, the adequacy of prejudgment remedies is subject to the familiar three-part balancing test of *Mathews v.*

Eldridge, 424 U.S. 319, 335 (1976), modified only to reflect the fact that "[p]rejudgment remedy statutes *ordinarily* apply to disputes between private parties rather than between an individual and the government." *Doehr*, 501 U.S. at 10-11 (emphasis added). The *Doehr* (or modified *Mathews*) test requires

> first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, . . . principal attention to the interest of the party seeking the prejudgment remedy, with . . . due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing added protections.

Doehr, 501 U.S. at 11.

Before applying this test to the Virginia Qualifying Statute, several principles that emerge from the cases are worth noting. First, state procedures permitting *temporary* and *partial* prejudgment seizures constitute deprivations of property which require due process. In *Fuentes*, for example, the Court held that a deprivation of property for as little as 3 days is covered by the Due Process Clause. *See* 407 U.S. at 86. *See also id.* at 84-85 ("it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment"). And in *Doehr*, the Court held that due process was implicated by an attachment or lien placed on real property, even

though the property owner retained full use and enjoyment of the real estate, because a lien affects property rights such as alienation. *See* 501 U.S. at 11-12.

Second, the availability of a prompt judicial forum for testing the validity of the plaintiff's legal claims against the person whose property is seized is a critical factor for the procedural adequacy of prejudgment remedies. Although the Supreme Court has at times struggled with the question whether an adversarial hearing must be had pre-deprivation rather than post-deprivation, the Court has never questioned that such a hearing must be both available and prompt. *See Doehr*, 501 U.S. at 15 (striking down prejudgment attachment statute because it did not provide for adversarial predeprivation hearing); *Di-Chem*, 419 U.S. at 607 (striking down statute allowing prejudgment garnishment of corporation's bank account because "[t]here is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment"); *id.* at 606 (emphasizing lack of judicial oversight under invalid statute); *id.* at 613 (Powell, J., concurring in judgment) ("[t]he most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing"); *Mitchell*, 416 U.S. at 615-16 (emphasizing importance of judicial oversight); *id.* at 618 (emphasizing importance of prompt adversarial hearing); *id.* at 625 (Powell, J., concurring) ("An opportunity for an adversary hearing must

then be accorded promptly after sequestration to determine the merits of the controversy, with the burden of proof on the creditor [invoking the prejudgment procedure]"); *Fuentes*, 407 U.S. at 80-81 (purpose of right to be heard is "to minimize substantively unfair or mistaken deprivations of property"); *Sniadach*, 395 U.S. at 343 (Harlan, J., concurring) ("due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the debtor *before* he can be deprived of his property or its unrestricted use").

Third, significant weight attaches to the nature of the allegations underlying the prejudgment seizure. In *Mitchell*, for example, the Court upheld a Louisiana sequestration procedure in favor of creditors with liens on personal property, in part because the underlying issues – the existence of a debt, a lien, and delinquency – "are ordinarily uncomplicated matters that lend themselves to documentary proof." 416 U.S. at 609. Based on this and the risk that the debtor would destroy or transfer the subject property, it was permissible for the state to order sequestration on *ex parte* application by the creditor to a judge, *id.* at 609-10, provided, of course, that the debtor could obtain a prompt adversarial hearing post-sequestration, *id.* at 618. In contrast, *Doehr* struck down a Connecticut procedure that permitted a litigant to attach the defendant's real property in a suit

alleging intentional assault, an allegation whose validity could not be assessed without a full adversarial hearing. *See* 501 U.S. at 14. Because the initial risk of erroneous deprivation was too great, the Connecticut procedure could not be saved even if an adversarial hearing were available immediately after the attachment. *Id.* at 15.

Fourth, the guarantee of due process for prejudgment remedies is not reserved to individuals but extends equally to seizure of a corporation's property. *See Di-Chem*, 419 U.S. at 608 ("the probability of irreparable injury in the latter case [of a corporation] is sufficiently great so that some procedures are necessary to guard against the risk of initial error").

Finally, the validity of a prejudgment seizure does not turn on whether the potential plaintiff is a private entity or a government such as the Commonwealth. Indeed, due process is primarily concerned with deprivations of liberty or property *by the government. See, e.g., Mathews v. Eldridge*, 424 U.S. at 332 ("Procedural due process imposes constraints on government decisions which deprive individuals of 'liberty' or 'property' interests . . ."). It cannot be gainsaid that a prejudgment seizure deprives the defendant of property regardless of whether the plaintiff is an individual or the government. In the latter instance, moreover, state action, which is an element of a due process violation, is all the more clear.

Accordingly, due process imposes the same restrictions on prejudgment seizures for the benefit of the government as it does on seizures for the benefit of a private party.[6/]

B. The Qualifying Statute Violates Due Process Because It Deprives NPMs of Substantial Property with No Procedural Safeguards.

Bearing the foregoing considerations in mind, it is plain that the Virginia Qualifying Statute falls far short of the requirements of due process. Under the first factor of the *Doehr* test, *see* 501 U.S. at 11, the Qualifying Statute deprives NPMs of very substantial property interests. The Statute requires an NPM to deposit significant sums of money into an escrow account, thereby depriving the NPM of all use of the funds. This deprivation is far more severe than that struck down in *Doehr*, which merely involved a lien on property that the defendant could otherwise use. Here, the NPM is deprived of working capital that could be used for research and development or other business purposes. The escrow requirement also severely affects an NPM's ability to engage in price competition. Indeed, that

---

6/ While the third factor in the *Doehr* test refers to the interests of private plaintiffs, that test is a mere modification of the test in *Mathews v. Eldridge*, which contains no such reference. *See Doehr*, 501 U.S. at 10-11. As stated in *Mathews*, the third factor requires consideration of "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail." 424 U.S. at 335. This difference in phraseology is not material to the validity of the Virginia Qualifying Statute. *See generally infra* at 22-25 (applying third factor).

is its very purpose. *See* J.A. 210 (MSA § IX(d)(2)(E)) (Qualifying Statute "effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-a-vis Non-Participating Manufacturers"). Although the severity of the deprivation is somewhat mitigated by the NPM's right to receive interest on the escrowed funds, the comparatively low rate of return from bank interest cannot compensate a company for its loss of working capital. Further, even with interest, the Statute undermines the NPM's ability to compete, since it "effectively and fully neutralizes" an NPM's cost advantages.

The most noteworthy characteristic of the Virginia Qualifying Statute with respect to the first *Doehr* factor, however, is the unprecedented duration of the deprivation: 25 years. None of the prejudgment statutes considered by the Supreme Court involved deprivations remotely that long. Further, the Virginia Qualifying Statute provides no mechanism for release of the funds to the NPM before the 25 years elapse. *See* Va. Code Ann. § 3.1-336.2(B) (providing for release within 25-year period only to satisfy judgment or settlement in favor of Commonwealth). Even if the possibility of further liability by an NPM is entirely eliminated, for example by a final judgment barring further claims against the NPM, the funds will not be released from escrow before 25 years are up. *See id.* § 3.1-336.2(B)(1).

Turning to the second *Doehr* factor, *see* 501 U.S. at 11, the likelihood of an erroneous deprivation under the Virginia Qualifying Statute is exceedingly high, and this risk could readily be reduced through additional procedures or safeguards. The hallmark of the Qualifying Statute is that it deprives NPMs of their property for 25 years *with no procedural safeguards whatsoever*. The Commonwealth is not even required to *allege* wrongdoing by an NPM before depriving it of its property, much less provide *evidence* of wrongdoing tested in an *adversarial hearing*. The Supreme Court has repeatedly struck down prejudgment remedies because the absence of a prompt adversarial hearing creates an unreasonably high risk of erroneous deprivation. *See Doehr*, 501 U.S. at 15; *Di-Chem*, 419 U.S. at 606-07; *id.* at 613 (Powell, J., concurring in judgment); *Fuentes*, 407 U.S. at 80-81; *Sniadach*, 395 U.S. at 343 (Harlan, J., concurring). The risk of erroneous deprivation is even higher here, because the Commonwealth need not even allege wrongdoing before depriving an NPM of its property for 25 years.

The risk of erroneous deprivation is also especially great here because any potential claims the Commonwealth might have against an NPM would be highly fact-specific, rather than incontestable claims subject to documentary proof. *Compare Doehr*, 501 U.S. at 14-15 (striking down statute permitting prejudgment attachment based on *ex parte* allegations of intentional assault, which are not

subject to straightforward documentary proof) *with Mitchell*, 416 U.S. at 609-10 (upholding statute allowing prejudgment sequestration based initially on *ex parte* evidence of debt, lien, and delinquency, which are matters subject to documentary proof).

The fact that tobacco is a dangerous product does not provide any basis for this prejudgment seizure, because selling tobacco, by itself, does not give rise to liability to the Commonwealth under Virginia law. The Bill of Complaint filed by the Commonwealth against the Big Four tobacco companies is instructive. The Commonwealth's Bill of Complaint asserts claims against the Big Four sounding in antitrust, consumer protection, and unjust enrichment/restitution *based on specific factual allegations of unlawful collusion and deceptive practices*. J.A. 542-48 (factual allegations in Bill of Complaint). No similar unlawful acts have been alleged against Star Scientific. Further, because the Bill of Complaint was filed after the Commonwealth and the Big Four had agreed to settle the Commonwealth's potential claims pursuant to the MSA, *see* J.A. 538 (Bill of Complaint) ("The Commonwealth brings this action in connection with the settlement of claims . . ."), the validity of the Commonwealth's theories of relief – including its claimed right to reimbursement for health care costs caused by the Big Four's unlawful actions – have never been tested by adjudication on the

merits. *A fortiori*, the Commonwealth has not even articulated a legal basis for liability to the Commonwealth by NPMs such as Star Scientific.

If the Virginia legislature had tried to enact legislation making all tobacco companies strictly liable for smoking-related health-care costs, the "dangerous product" argument might be different.[7/] But Virginia has not enacted any such substantive legislation giving rise to liability. According to its own recitals, the policy pursued by the Virginia Qualifying Statute is

> that financial burdens imposed on the Commonwealth by cigarette smoking be borne by tobacco product manufacturers rather than by the Commonwealth *to the extent that such manufacturers either determine to enter into a settlement with the State or be found culpable by the courts.*

1999 Va. Acts ch. 714 (recitals, fourth paragraph) (emphasis added); *id.* ch. 754 (same). And the declared purpose of the Statute is to "ensur[e] that the Commonwealth will have an eventual source of recovery from [NPMs] *if they are proven to have acted culpably*." *Id.* ch. 714 (recitals, sixth paragraph) (emphasis added); *id.* ch. 754 (same). Yet, the Commonwealth has not alleged so much as a single fact – much less provided evidence – suggesting that Star Scientific or any other NPM has acted "culpably" or in a manner creating liability to the

---

7/ Note, however, that federal law preempts may potential state causes of action against cigarette manufacturers. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Commonwealth under substantive Virginia law. In the absence of evidence of culpable conduct tested in an adversarial hearing, the risk of erroneous deprivation is extremely high.

A final consideration creating an unreasonably high risk of erroneous deprivation is that the *amount* of money that an NPM must place in escrow is wholly arbitrary. The escrow requirement does not reflect any quantification of an NPM's potential liability or the Commonwealth's alleged losses. Rather, the amount that an NPM must escrow is based solely on the Qualifying Statute's purpose of "effectively and fully neutraliz[ing] the cost disadvantages that the Participating Manufacturers experience vis-a-vis Non-Participating Manufacturers." J.A. 210 (MSA § IX(d)(2)(E)). *See also* Va. Code Ann. § 3.1-336.2(B)(2) (tying escrow requirement to amount NPM would pay under MSA if it had settled with Commonwealth). The failure to provide any reasonable basis for quantifying an NPM's potential liability to the Commonwealth greatly multiplies the risk of erroneous deprivation, since there is absolutely no assurance that the amounts that an NPM must place in escrow do not exceed its potential liability (assuming that the Commonwealth could articulate a basis for liability in the first place).

The second *Doehr* factor also requires consideration of the extent to which additional procedures or safeguards would reduce this risk. *See Doehr*, 501 U.S. at 11. As the Supreme Court has repeatedly emphasized, the risk of erroneous deprivation can be substantially reduced by providing a prompt adversarial hearing to determine the merits of the plaintiff's claims against the defendant. *See id.* at 14 ("[N]o better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it") (internal quotation marks omitted). *See also supra* at 13-14 (citing cases requiring prompt adversarial hearing to sustain seizure). The Virginia Qualifying Statute is procedurally deficient because it does not require the Commonwealth to give notice of the basis for its would-be claims against an NPM and the extent of the NPM's alleged liability, to provide evidence supporting such allegations, or to expose such evidence to the truth-finding engine of an adversarial proceeding.

The third and final *Doehr* factor goes to the Commonwealth's interests as potential plaintiff in the prejudgment remedy and its ancillary interests as sovereign in providing or not providing specific procedures. *See Doehr*, 501 U.S. at 11; *see also Mathews v. Eldridge*, 424 U.S. at 335 (stating third factor of general procedural due process test). This factor in no way diminishes the

necessity that the Commonwealth provide procedural safeguards when depriving NPMs of their property. As potential plaintiff, the Commonwealth's sole legitimate interest in a prejudgment remedy is to prevent the defendant from rendering itself judgment-proof by disposing of assets before the Commonwealth obtains and enforces a judgment. *See Doehr*, 501 U.S. at 16 ("[Plaintiff's] only interest in attaching the property was to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action"); 1999 Va. Acts ch. 714 (recitals, sixth paragraph) (stating that Commonwealth's interest is "to prevent [an NPM] from . . . becoming judgment-proof before liability may arise"). As in *Doehr*, however, this interest can be served while still reducing the risk of erroneous deprivation by providing a prompt adversarial hearing.

This conclusion is not altered by the fact that injury from smoking may not become manifest for years, deferring the time at which an NPM's potential liability to the Commonwealth might ripen. *See* 1999 Va. Acts ch. 714 (recitals, first and sixth paragraphs); *id.* ch. 754 (same). Due process is sufficiently flexible to accommodate this state of affairs without altogether dispensing with procedural safeguards against erroneous deprivations of property. In this instance, although injury may not emerge until the future, an NPM's potential liability is predicated on (unarticulated) *wrongdoing* at the *present time*. Thus, before depriving an

NPM of property, the Commonwealth should at a minimum be required to establish the existence of the supposed wrongdoing and the legal theory under which the NPM would be liable once injury emerges. Moreover, since statistics on injury from smoking are readily available, the Commonwealth should be required to adduce some evidentiary basis for quantifying the NPM's potential liability as a predicate for depriving the NPM of use of funds in such amount.

The extent of the threat that the defendant will destroy or transfer its property to make itself judgment-proof is also relevant to a plaintiff's interest in a prejudgment seizure. *See, e.g.*, *Doehr*, 501 U.S. at 16. Here, the Commonwealth has adduced no facts indicating that Star Scientific or any other NPM will become judgment-proof. Even if such facts existed, moreover, the Commonwealth could protect its interest in enforcing a (purely speculative) future judgment through alternative mechanisms imposing a much smaller deprivation of property on NPMs. For example, in lieu of depositing funds in escrow, an NPM could be required to post a bond or prove its financial responsibility. In fact, all of the bonding statutes that defendant points to as precedents for the Virginia Qualifying Statute permit these less onerous alternatives. *See infra* Section II.C.

Finally, the interests of the Commonwealth as sovereign cannot outweigh the necessity of providing an adversarial hearing and other safeguards against

erroneous deprivations. While providing *some* procedures necessarily imposes some burden on government compared with providing *no* procedures at all, that cannot defeat the requirement of procedural safeguards commensurate with the property interest involved. Otherwise, the government would always defeat procedural due process claims, since additional procedures always impose some administrative burden. The safeguards that are lacking here – specific factual and legal allegations and an adversarial evidentiary hearing – are everyday elements of judicial process. These procedural protections are precisely what the Supreme Court has required in prejudgment seizure cases, even where the property interests at stake were much less substantial than a 25-year deprivation of significant funds. *A fortiori*, they are required here.

C. The Existence of Bonding Requirements in Other Contexts Cannot Save the Qualifying Statute Under the Context-Specific Test for Constitutionally Valid Procedures.

In the District Court, defendant analogized the Virginia Qualifying Statute to various statutory bonding requirements and argued that the asserted validity of the bonding requirements demonstrates the constitutionality of the Qualifying Statute.[8/] Yet, even assuming that all the other statutes relied on by defendant are

---

8/ Br. in Support of Mot. to Dismiss, at 23-24 & n.18 (citing Va. Code Ann. § 62.1-44.34:16 (imposing requirements on tank vessels and facilities); *id.* § 45.1-185 (mine operators); *id.* § 4.1-238 (alcohol manufacturers and merchants); *id.*

constitutionally valid, they prove nothing about the validity of the Qualifying Statute. As explained above, due process is a context-specific concept that requires balancing of the particular property interest at stake, the risk of erroneous deprivation and value of additional safeguards, and the countervailing interests of the government and any other adverse party. *See supra* at 12; *Doehr*, 501 U.S. at 10-11; *Mathews v. Eldridge*, 424 U.S. at 334-35. Viewed through this lens, none of the other laws cited by defendant even remotely resembles the Qualifying Statute.

First, none of the other statutes implicates a deprivation of property comparable to the Qualifying Statute's 25-year cash-escrow requirement. Each of the other statutes permits a covered entity to post a bond or its equivalent rather than depositing cash in the full amount of its potential liability. *See* Va. Code Ann. § 62.1-44.34:16(E); *id.* § 45.1-185; *id.* § 4.1-238(A); *id.* § 45.1-361.31(A); *id.* § 59.1-306(A). The covered entity's cost of obtaining the bond will ordinarily be far less than its total potential liability, since the cost of a bond factors in the risk that the covered entity will both incur liability and default. Accordingly, the deprivation of property under a bonding requirement – the cost of obtaining a

---

§ 45.1-361.31 (oil and gas drillers); *id.* §§ 59.1-306 and 59.1-307 (health spa operators)).

bond – is significantly less severe than the deprivation when an entity is required to deposit cash to cover its total potential liability. Some statutes also relieve a covered entity from even the lesser deprivation of posting a bond if the entity can establish its financial responsibility, thereby *eliminating* any deprivation of property altogether. *See* Va. Code Ann. § 62.1-44.34:16; *id.* § 4.1-238(B).[9/] Finally, in many cases the deprivation of property is of very limited duration. *See, e.g.*, Va. Code Ann. § 62.1-44.34:16(A) (deprivation only while tanker is in Virginia waters); *see also Fuentes*, 407 U.S. at 86 ("the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing"). In short, the Qualifying Statute's onerous 25-year cash-deposit requirement is *sui generis*.[10/]

9/ Similarly, under Va. Code Ann. § 59.1-306, a health spa operator can conduct its business without posting any bond or other security – and thus without any deprivation of property – if it does not accept moneys from customers in excess of current monthly fees. *Id.* § 59.1-306(B).

10/ The unique requirement of a cash deposit directly reflects the real purpose of the Qualifying Statute, which is to raise an NPM's costs to a specified level, not to ensure payment on any eventual liability to the Commonwealth. Although a bond would ensure payment, its lower and indeterminate cost would undermine the Qualifying Statute's actual purpose of raising the NPM's costs to a specific threshold. In other words, the Qualifying Statute imposes the greater deprivation precisely because its purpose is to raise NPMs' costs to a certain level.

Second, none of the bonding requirements is so completely untethered to any articulated basis for liability as the Virginia Qualifying Statute. Under several of the statutes, bonds are required solely or primarily to cover future liabilities that are *certain* to arise under the governing substantive law. *See* Va. Code Ann. § 4.1-238 (bond in amount to cover tax liability of alcoholic beverage manufacturer, bottler, or wholesaler); *id.* § 45.1-185 (bond in amount to cover mine operator's strict liability for restoring site); *id.* § 45.1-361.31 (bond in amount to cover strict liability for plugging oil and gas wells and restoring sites). In these instances, eventual liability stems directly from engaging in the covered activity, not solely from culpable conduct, so that there is no risk of erroneous deprivation and hence no need for additional procedures to reduce such risk. Elsewhere, the risk of erroneous deprivation is mitigated because the amount of any bond must be based on a fact-specific inquiry into the scope of an entity's potential liability.[11/]

11/ *See, e.g.*, Va. Code Ann. § 62.1-44.34:16(D) (providing that regulations for amount of financial responsibility required for oil facilities "shall take into consideration the type, oil storage or handling capacity and location of a facility, the risk of a discharge of oil at that type of facility in the Commonwealth, the potential damage or injury to state waters or the impairment of their beneficial use that may result from a discharge at that type of facility, the potential cost of containment and cleanup at that type of facility, and the nature and degree of injury or interference with general health, welfare and property that may result from a discharge at that type of facility").

Finally, the interests of the Commonwealth in dispensing with additional procedures may be greater under certain of the bonding requirements than it is under the Qualifying Statute. For example, because oil tankers can leave state waters without warning, the need to establish financial responsibility during the relatively limited period during which such tankers are in state waters is particularly pressing.

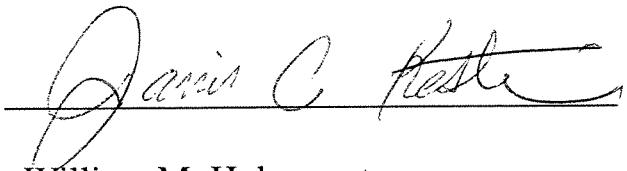
In sum, each of the bonding requirements cited by defendant has features that distinguish it sharply from the Virginia Qualifying Statute, with its severe deprivation of property and extremely high risk of erroneous deprivation. More generally, under the settled due process jurisprudence reflected in cases like *Mathews v. Eldridge* and *Doehr*, each of these statutes must be examined separately to determine whether it comports with due process. The fact that the vast majority of bonding requirements imposed by the Commonwealth are assuredly valid does not mean that the extraordinary provisions of the Virginia Qualifying Statute also survive due process scrutiny. *See Doehr*, 501 U.S. at 17-18 & Appendix (holding that distinctive characteristics of Connecticut prejudgment statue render it invalid, even though every state has some prejudgment attachment procedure). For the reasons explained in Section II.B

above, the Qualifying Statute undoubtedly falls short of the requirements of due process.

CONCLUSION

For the foregoing reasons, the order of the District Court dismissing Star Scientific's equal protection and due process claims should be reversed.

Respectfully submitted,



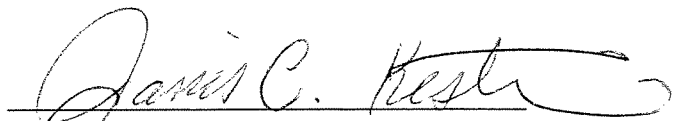
William M. Hohengarten
Julie M. Carpenter
Janis C. Kestenbaum
Counsel of Record
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for DKT Liberty Project

June 20, 2001

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Janis C. Kestenbaum, hereby certify that the foregoing "Brief of DKT Liberty Project as *Amicus Curiae* in Support of Appellant For Reversal" complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d). The brief contains 6,744 words, as counted by WordPerfect 9, the word-processing system used to prepare the brief.



Janis C. Kestenbaum
Counsel of Record for Amicus Curiae
DKT Liberty Project

CERTIFICATE OF SERVICE

I, Janis C. Kestenbaum, hereby certify that on this 20th day of June 2001, I served the foregoing "Brief of DKT Liberty Project as *Amicus Curiae* In Support of Appellant For Reversal" by dispatching 2 copies to a third-party commercial carrier (Federal Express) for overnight delivery to each of the following:

Charles Fried
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

Patrick M. McSweeney
Kathleen Moriarty Mueller
John L. Marshall, Jr.
McSWEENEY & CRUMP, P.C.
11 South Twelfth Street
Richmond, VA 23218
(804) 783-6800

James F. Neal
James G. Thomas
NEAL & HARWELL, PLC
2000 Fourth Avenue, North
Nashville, TN 37219
(615) 244-1713

Counsel for Plaintiff-Appellant

J. Steven Sheppard, III
Gregory E. Lucyk
Sydney E. Rab
OFFICE OF THE ATTORNEY GENERAL
OF VIRGINIA
900 East Main Street
Richmond, VA 23219
(804) 786-2071

Counsel for Defendant-Appellee

Janis C. Kestenbaum