IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 081691

COMMONWEALTH OF VIRGINIA, CHARLOTTESVILLE CITY SCHOOL BOARD, and ROSA S. ATKINS, SUPERINTENDENT OF CHARLOTTESVILLE CITY SCHOOLS,

Appellants,

v.

JOHN DOE,

Appellee.

OPENING BRIEF OF APPELLANTS

Warner Davies Chapman
(VSB No. 19082)
Room 331, City Hall
P.O. Box 911
Charlottesville, VA 22902
(434) 970-3176 (Telephone)
(434) 971-8202 (Facsimile)
Email:
chapman@charlottesville.org

Commonwealth's Attorney for the City of Charlottesville

D. Patrick Lacy, Jr., Esq. (VSB No. 07190)
H. Lane Kneedler, Esq. (VSB No. 07722)
Kathleen S. Mehfoud, Esq. (VSB No. 18096)
Stacy L. Haney, Esq. (VSB No. 71054)
REED SMITH LLP
901 East Byrd Street, Suite 1700
Richmond, Virginia 23219-4069
(804) 344-3400 (Telephone)
(804) 344-3410 (Facsimile)
Email: placy@reedsmith.com
lkneedler@reedsmith.com
kmehfoud@reedsmith.com
shaney@reedsmith.com

Counsel for Charlottesville City School Board and Rosa S. Atkins, Superintendent of Charlottesville City Schools

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Statement of the Nature of the Case and the Material Proceedings in the Trial Court 1

Assignment of Error 3

Question Presented 4

Statement of Facts 4

Argument 7

I. AN ORDER THAT DIVESTS THE LOCAL SCHOOL BOARD OF THE AUTHORITY TO DECIDE WHETHER, UNDER WHAT CIRCUMSTANCES, AND SUBJECT TO WHAT CONDITIONS IT WILL ALLOW A VIOLENT SEX OFFENDER CONVICTED OF OFFENSES AGAINST A CHILD ONTO SCHOOL PROPERTY VIOLATES ARTICLE VIII, § 7 OF THE CONSTITUTION OF VIRGINIA. 7

A. THE AUTHORITY TO SUPERVISE THE PUBLIC SCHOOLS IS VESTED IN THE LOCAL SCHOOL BOARDS BY ART. VIII, § 7 7

B. NO STATUTE MAY DIVEST A LOCAL SCHOOL BOARD OF ITS FUNDAMENTAL POWER TO SUPERVISE THE PUBLIC SCHOOLS 8

C. THE ORDER ENTERED BY THE TRIAL COURT UNCONSTITUTIONALLY DIVESTS THE SCHOOL BOARD OF ITS AUTHORITY TO DETERMINE WHETHER, UNDER WHAT CIRCUMSTANCES, AND SUBJECT TO WHAT CONDITIONS TO ALLOW A VIOLENT SEX OFFENDER ONTO SCHOOL PROPERTY 11

1. The Ability to Control Access to School Property Is Fundamental to the Supervision of the Public Schools 11

2. The Order Entered by the Trial Court Divests the School Board of the Authority to Determine Whether, Under What Circumstances, and Subject to What Conditions to Allow a Convicted Violent Sex Offender onto School Property 13

D. SECTION 18.2-370.5 CAN, AND SHOULD BE CONSTRUED TO (i) PERMIT A TRIAL COURT TO ENTER AN ORDER THAT RELIEVES A CONVICTED VIOLENT SEX OFFENDER OF THE STATUTORY PROHIBITION ON ENTERING SCHOOL PROPERTY BUT (ii) PRESERVE THE LOCAL SCHOOL BOARD'S CONSTITUTIONAL AUTHORITY TO SUPERVISE THE PUBLIC SCHOOLS BY DETERMINING WHETHER, UNDER WHAT CIRCUMSTANCES, AND SUBJECT TO WHAT CONDITIONS TO ALLOW A CONVICTED VIOLENT SEX OFFENDER ONTO SCHOOL PROPERTY. 16

Conclusion 22

Certificate of Service 24

TABLE OF AUTHORITIES

STATE CASES

Bourne v. Board of Supervisors, 161 Va. 678, 172 S.E. 245 (1933) 17

County Sch. Board v. Farrar, 199 Va. 427, 100 S.E.2d 26 (1957) 8

DeFebio v. County School Board, 199 Va. 511, 100 S.E.2d 760 (1957) 10

H. L. Carpel of Richmond, Inc. v. Richmond, 162 Va. 833, 175 S.E.2d 316 (1934) 17

Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959) 8

Howard v. County Sch. Board, 203 Va. 55, 122 S.E.2d 891 (1961) 7, 9, 10

Oceanview Improvement Corp. v. Norfolk & W. Railway Co., 205 Va. 949, 140 S.E.2d 700 (1965) 17

Russell County Sch. Board v. Anderson, 238 Va. 372, 384 S.E.2d 598 (1989) 7, 8, 18, 19

Sch. Board of the City of Richmond v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978) 7, 9, 17

STATE CONSTITUTION

Va. Const. art. VIII, § 7 ..... *passim*

STATE STATUTES

Va. Code § 9.1-101 12

Va. Code § 9.1-902 ..... 1, 5

Va. Code § 18.2-370.1 ..... 1, 4, 5, 27

Va. Code § 18.2-370.5 ..... *passim*

Va. Code § 18.2-370.5(A) 2, 5

Va. Code § 18.2-370.5(B) 2, 5, 20

Va. Code §22.1-79(3) 12

Va. Code § 22.1-131 16

Va. Code § 22.1-279.8 12

Va. Code § 22.1-310 18

OPINIONS OF THE ATTORNEY GENERAL

2006 Va. Op. Att'y Gen. 122 15

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

This appeal arises out of the trial court's Order granting John Doe, a violent sex offender convicted of two offenses against a child, the affirmative right to go onto school property in the City of Charlottesville while children are present and over the objection of the School Board. Under the terms of the Order, the School Board does not have the discretion to prevent or condition Mr. Doe's presence on school property. Thus, the Order, and the trial court's interpretation of Va. Code § 18.2-370.5, is unconstitutional because it divests the School Board of the authority vested in it by Article VIII, § 7 of the Constitution of Virginia ("Art. VIII, § 7") to supervise the public schools.

Mr. Doe is, by statutory definition, an "adult convicted of a sexually violent offense." See Va. Code § 18.2-370.5. He was convicted in 1999 of two counts of violating § 18.2-370.1 by taking indecent sexual liberties on two occasions, "with lascivious intent, knowingly and intentionally," with a child under age 18 who was under his custody or supervision. This crime is classified as a "sexually violent offense" under Va. Code §§ 9.1-902 and 18.2-370.5.

Section 18.2-370.5(A)[1] prohibits adults who have been convicted of a "sexually violent offense" from entering school property during school hours or school-related and school-sponsored activities. A violation of this section is punishable as a Class 6 felony. Section 18.2-370.5(B), however, provides that an adult who is prohibited by § 18.2-370.5(A) from entering school property may petition the juvenile and domestic relations court or the circuit court for permission to go onto school property. In August, 2007, Mr. Doe filed a Petition for Relief Under Va. Code § 18.2-370.5 (the "Petition for Relief") in the Circuit Court for the City of Charlottesville. At the May 27, 2008 hearing on his Petition for Relief, Mr. Doe sought entry of an order granting him the affirmative right to enter onto the property of the public schools in the City of Charlottesville despite any objection of the Charlottesville City School Board.

The Commonwealth's Attorney, the Charlottesville City School Board (the "School Board") and Rosa S. Atkins, Superintendent of Charlottesville City Schools ("Mrs. Atkins") opposed Mr. Doe's Petition and entry of the order tendered by him on the grounds that the proposed order violated

[1] The full text of § 18.2-370.5 is attached hereto as Exhibit A.

Article VIII, § 7 of the Constitution of Virginia ("Article VIII, § 7")[2], which provides, in pertinent part, that "[t]he supervision of [public] schools in each school division shall be vested in a school board." See Appendix ("Appx.") at 10-19. At the conclusion of the hearing, and over the objection of the Commonwealth's Attorney, the School Board and Mrs. Atkins, the trial court entered the order tendered by Mr. Doe (the "Order"). See Appx. at 4-6. Under the Order, the School Board does not have the authority to make its own decision as to whether it is appropriate for Mr. Doe to go on school property or to determine what restrictions should apply to his entry. The Commonwealth's Attorney, the School Board, and Mrs. Atkins timely noted their appeal to this Court.

ASSIGNMENT OF ERROR

1. The trial court erred in interpreting and applying Va. Code § 18.2-370.5 in such a way as to divest the School Board of the authority granted it by Article VIII, § 7 of the Constitution of Virginia to supervise the public schools.

[2] The full text of Article VIII, § 7 is attached hereto as Exhibit B.

QUESTION PRESENTED

1. Does the Order entered by the Circuit Court in this case, which divests the local School Board of the authority to supervise the public schools by deciding whether, under what circumstances, and subject to what conditions it will allow onto school property a violent sex offender who has been convicted of taking indecent liberties – on two occasions and "with lascivious intent, knowingly and intentionally" – with a child under age 18, violate Article VIII, § 7 of the Constitution of Virginia, which provides that "[t]he supervision of schools in each school division shall be vested in a school board"? [Assignment of Error No. 1.]

STATEMENT OF FACTS

Mr. Doe was convicted in 1999 of taking indecent liberties with a child under age 18 – on two occasions and "with lascivious intent, knowingly and intentionally" – while that child was in his custody or supervision, in violation of § 18.2-370.1. See Appx. at 1. Section 18.2-370.1 provides, in pertinent part, that:

> Any person 18 years of age or older who . . . maintains a custodial or supervisory relationship over a child under the age of 18 . . . who, with lascivious intent, knowingly and intentionally (i) proposes that any such child feel or fondle the sexual or genital parts of such person or that such person feel or handle the sexual or genital parts of the child; or (ii) proposes to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361; or (iii)

> exposes his or her sexual or genital parts to such child; or (iv) proposes that any such child expose his or her sexual or genital parts to such person; or (v) proposes to the child that the child engage in sexual intercourse, sodomy or fondling of sexual or genital parts with another person; or (vi) sexually abuses the child as defined in § 18.2-67.10 (6), shall be guilty of a Class 6 felony.

Va. Code § 18.2-370.1.[3]

The crimes of which Mr. Doe was convicted are classified as "sexually violent offenses" under §§ 9.1-902 and 18.2-370.5. See Appx. at 1. Accordingly, Mr. Doe is subject to the prohibition on entering school property contained in § 18.2-370.5(A). In August, 2007, Mr. Doe filed a Petition for Relief under § 18.2-370.5(B), seeking relief from this prohibition. See Appx. at 1. The Petition was granted and an Order was entered by the trial court granting the requested relief. See Appx. at 4-6.

The Order gives Mr. Doe the absolute right to go onto school property "to pick up or drop off his step-son," which right is limited only in that Mr. Doe "shall not get out of the motor vehicle except to report to the front office or unless asked to do so by the school administration." See Appx. at 4. The Order also gives Mr. Doe the affirmative right to come onto school property for other reasons, including "to participate in teacher conferences

[3] The full text of § 18.2-370.1 is attached hereto as Exhibit C.

or meet with faculty or staff [and] to be a spectator at any school performance at which his step-son is a participant." Id. In order to go onto school property for some reason other than to pick up or drop off his step-son, Mr. Doe must notify the school principal 48 hours in advance and he may come onto school property only for the specific activity for which he has been granted permission, he must leave school property promptly after the activity, and he must abide by the terms and conditions of the school administration. See Appx. at 5. The Order permits the principal to refuse Mr. Doe permission to come onto school property only "if there is some particular reason why his presence on school property would be inappropriate or a danger to others." Id. The Order further provides that permission to come onto school property "shall not be unreasonably withheld." Id.

The Order grants Mr. Doe affirmative rights to go onto school property and strips the School Board of the authority to prohibit or condition his presence on school property. Thus, the Order is in conflict with Article VIII, § 7 of the Constitution of Virginia, which "vests" the "supervision of [public] schools" in the School Board, not in the Circuit Court.

ARGUMENT

I. AN ORDER THAT DIVESTS THE LOCAL SCHOOL BOARD OF THE AUTHORITY TO DECIDE WHETHER, UNDER WHAT CIRCUMSTANCES, AND SUBJECT TO WHAT CONDITIONS IT WILL ALLOW A VIOLENT SEX OFFENDER CONVICTED OF OFFENSES AGAINST A CHILD ONTO SCHOOL PROPERTY VIOLATES ARTICLE VIII, § 7 OF THE CONSTITUTION OF VIRGINIA.

A. THE AUTHORITY TO SUPERVISE THE PUBLIC SCHOOLS IS VESTED IN THE LOCAL SCHOOL BOARDS BY ART. VIII, § 7.

The Constitution of Virginia provides that "[t]he supervision of [public] schools in each school division shall be vested in a school board." Va. Const. art. VIII, §7. This Court has consistently construed Art. VIII, § 7 to vest extensive authority in local school boards to carry out this constitutional mandate to supervise the public schools. The supervisory authority conferred on local school boards by Art. VIII, § 7 includes, for example, authority over the control and use of school property, Howard v. County Sch. Bd., 203 Va. 55, 58-59, 122 S.E.2d 891, 895 (1961), the management of teaching staff, Sch. Bd. of the City of Richmond v. Parham, 218 Va. 950, 958-59, 243 S.E.2d 468, 472-73 (1978), the power to discharge employees, Russell County Sch. Bd. v. Anderson, 238 Va. 372, 383, 384 S.E.2d 598, 604 (1989), and the authority to expend bond

proceeds for the construction of school buildings, County Sch. Bd. v. Farrar, 199 Va. 427, 433, 100 S.E.2d 26, 30 (1957).

B. NO STATUTE MAY DIVEST A LOCAL SCHOOL BOARD OF ITS FUNDAMENTAL POWER TO SUPERVISE THE PUBLIC SCHOOLS.

Because the power to supervise the public schools is rooted in the Constitution of Virginia, the General Assembly may not divest a local school board of this authority: "No statutory enactment can permissibly take away from a local school board its fundamental power to supervise its school system." Russell County School Bd. v. Anderson, 238 Va. 372, 383, 384 S.E.2d 598, 604 (1989) (citations omitted). In Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959), for example, this Court considered the validity of massive resistance laws enacted by the General Assembly in the 1950s that provided for the closing of schools, divested local authorities of power and control over the schools, and established a state school system to be administered by the Governor. This Court struck down those laws because they unconstitutionally divested local school boards of the power to supervise the public schools. Harrison, 200 Va. at 452, 106 S.E.2d at 646-47.

While the statutes invalidated in Harrison v. Day divested local school boards of all authority to supervise, or even operate, the schools in their

school divisions, a statute need not go that far before this Court will invalidate it. In Sch. Bd. of the City of Richmond v. Parham, 218 Va. 950, 958-59, 243 S.E.2d 468, 472-73 (1978), for example, this Court declared unconstitutional a provision in the State Board of Education's grievance procedure which required local school boards to submit to binding arbitration certain employee disputes concerning the application of the local school board's policies, rules, and regulations. 218 Va. at 951, 243 S.E.2d at 469. This Court stated that "the function of applying local policies, rules, and regulations, adopted for the management of a teaching staff, is a function essential and indispensable to exercise of the power of supervision vested by § 7 of Article VIII." 218 Va. at 958, 243 S.E.2d at 473 (emphasis in original). This Court concluded that the binding arbitration provision was unconstitutional because it "divest[ed] the School Board of a function indispensable to its § 7 power of supervision and transfer[ed] to an arbitration panel the authority to make a final and binding decision upon the application of the policy." 218 Va. at 958-59, 243 S.E.2d at 473.

Similarly, in Howard v. County School Board, 203 Va. 55, 58, 122 S.E.2d 891, 895 (1961), this Court considered the constitutionality of a statute which permitted voters, by referendum, to force the sale of school property. This Court stated that within the constitutional authority to

supervise the schools "it is an essential function of the local [school] board to determine whether a particular property is needed for school purposes and the manner in which it shall be used" and that the effect of the statute at issue was "to divest the [school] board of the exercise of that function and lodge it in the electorate." 203 Va. at 58, 122 S.E.2d at 893-94. In concluding that the statute was unconstitutional this Court held that "[c]learly the [school] board cannot properly exercise 'supervision' of schools entrusted to it if it may thus be divested of property which in its judgment is being used or should be used for school purposes." 203 Va. at 59, 122 S.E.2d at 894.

When the function at issue does not relate to the power of supervision, Art. VIII, § 7 is not implicated. For example, in DeFebio v. County School Board, this Court held that one of the massive resistance laws that established the Pupil Placement Board to assign pupils to schools did not violate § 133 of the 1902 Constitution of Virginia (the predecessor to Art. VIII, § 7) because the statute did not interfere with the school board's supervisory authority. DeFebio, 199 Va. 511, 513, 100 S.E.2d 760, 762 (1957). The statute at issue in DeFebio granted to the Pupil Placement Board the power to assign pupils, which is an administrative, not supervisory, function and did not deprive the local school board of the

authority to supervise the pupils once they were assigned. Thus, Art. VIII, § 7 was not implicated.[4]

C. THE ORDER ENTERED BY THE TRIAL COURT UNCONSTITUTIONALLY DIVESTS THE SCHOOL BOARD OF ITS AUTHORITY TO DETERMINE WHETHER, UNDER WHAT CIRCUMSTANCES, AND SUBJECT TO WHAT CONDITIONS TO ALLOW A VIOLENT SEX OFFENDER ONTO SCHOOL PROPERTY.

1. The Ability to Control Access to School Property Is Fundamental to the Supervision of the Public Schools.

There are few, if any, functions more fundamental to the day-to-day operations of the public schools and the use of school property than the ability of the School Board to control access to school property, especially while children are present. Local school boards are charged not only with educating children, but also with maintaining a safe environment while children are present.[5] School boards cannot perform either of these

---

[4] Similarly, the blanket prohibition on violent sex offenders entering school property contained in subsection (A) of § 18.2-370.5 does not implicate Art. VIII, § 7 because a school board's supervisory authority is not triggered if a person is never allowed onto school property. The power to supervise only comes into play when a person attempts or requests to come onto school property.

[5] The importance of school security and safety is emphasized throughout Title 22.1, the education title of the Code of Virginia. School boards are required, for example, to ensure that each school has a written school crisis, emergency management, and medical emergency response plan, which must include, inter alia, procedures to "prevent, manage, and respond to . . . the presence of unauthorized persons or trespassers; the

Continued on following page

functions if they cannot control access to school property. Visitors, whether authorized or unauthorized, cause disruptions to the educational process and can pose a safety risk. There are hundreds of children in each school every day and relatively few teachers and staff to look after them. To maintain order and safety in the schools, school boards can and do restrict and monitor access to school property when children are present. Not even parents of students are allowed unfettered access to school property.[6]

Continued from previous page
loss, disappearance or kidnapping of a student; hostage situations; violence on school property or at school activities; . . . and other incidents posing a serious threat of harm to students, personnel, or facilities." Va. Code § 22.1-279.8 (emphasis added). Each school also is required to conduct an annual school safety audit, which includes the identification and development of solutions for "physical safety concerns, including building security issues." Id. Local school boards also employ school security officers to ensure "the safety, security, and welfare of all students, faculty, staff, and visitors in the assigned school." Va. Code §§ 9.1-101, 22.1-279.8.

[6] In his Petition for Relief, Mr. Doe erroneously claims that, prior to the enactment of § 18.2-370.5, he had the "right" to come onto school property. See Petition for Relief at ¶ 1. Individuals do not have an affirmative "right" to come onto school property. School property is not "public property" that is open for members of the public to come and go as they please. Rather, school property is property that is under the management, control, and supervision of the local school board. See, e.g., Va. Code §22.1-79(3) ("A school board shall ... care for, manage and control the property of the school division.") Thus, despite Mr. Doe's contention to the contrary, he did not have a pre-existing "right" to come onto school property.

School boards must have the authority to set restrictions on access to school property, such as requiring all visitors to check in with a designated staff member or placing restrictions on where visitors may go and what they may do while on school property. Most importantly, school boards must also have the authority to prohibit a person from coming onto school property when the school board deems it necessary and appropriate. If school boards do not have the authority to make these day-to-day decisions regarding who can come onto school property when children are present, they cannot safely operate the schools. Accordingly, the ability to determine whether and under what conditions any person, but especially a violent sex offender convicted of offenses against a child, has access to school property is a function that is fundamental to the School Board's supervision of the public schools.

2. The Order Entered by the Trial Court Divests the School Board of the Authority to Determine Whether, Under What Circumstances, and Subject to What Conditions to Allow a Convicted Violent Sex Offender onto School Property.

The trial court's interpretation of § 18.2-370.5 divests the School Board of its authority to decide whether and under what conditions to allow a convicted violent sex offender onto school property and vests that authority in the trial court. The trial court's Order gives a convicted violent sex offender the absolute right to come onto school property to pick up and

drop off his step-son, regardless of what the School Board believes is necessary and appropriate, and leaves no room for the School Board to determine whether, under what circumstances, and subject to what conditions Mr. Doe should be permitted to come onto school property. See Appx. at 4-5. The Order also gives Mr. Doe the right to go onto school property for other reasons, such as parent-teacher conferences or school performances in which his step-son is a participant. The trial court ordered that permission for Mr. Doe to go onto school property for these purposes "shall not be unreasonably withheld." A request by Mr. Doe can only be denied if the principal has "some particular reason why his presence on school property would be inappropriate or a danger to others." See Appx. at 4-5. It is clear from the Order itself that the fact that Mr. Doe is a violent sex offender convicted of two offenses against a child is not, in the trial court's view, an acceptable reason for the School Board to bar Mr. Doe from school grounds. School boards can, and do, bar from school property persons who engage in conduct far less egregious than that of which Mr. Doe was convicted.

The Order further strips the School Board of its supervisory power by vesting the school principal – not the School Board – with the so-called discretion to determine whether to grant or refuse a request by Mr. Doe to

come onto school property. Thus, while the Order does place some restrictions on Mr. Doe's presence on school property, those restrictions do not cure the constitutional defects in the Order because they were imposed by the trial court, not the School Board.

In short, under the terms of the Order, the School Board itself has no control over whether, under what circumstances, and subject to what conditions Mr. Doe, a convicted violent sex offender, may come onto school property. The School Board has the authority to make this decision with respect to any other person who wishes to come onto school property, but under the terms of the Order, the School Board does not get to make this decision with respect to Mr. Doe. As interpreted by the trial court, the statute gives convicted violent sex offenders more rights than the public at large and divests the School Board of its supervisory authority.

In support of his argument at the hearing on his Petition for Relief that § 18.2-370.5 does not violate Art. VIII, § 7, Mr. Doe relied upon a 2006 Opinion of the Attorney General of Virginia, 2006 Va. Op. Att'y Gen. 122, that concluded that there was no conflict between Virginia's criminal trespass statutes and the Code sections authorizing the use of public school buildings as polling places. The use of public school property as a polling place, however, does not implicate Art. VIII, § 7 because school

property may be used as a polling place only if the local school board voluntarily decides to permit its property to be put to such use. See Va. Code § 22.1-131. Thus, a school board's decision to permit school property to be used as a polling place and, as a result, the fact that persons who otherwise could be prohibited from entering onto school property are allowed on the property for the sole purpose of voting, is not inconsistent with a local school board's power to supervise the schools. Accordingly, the Attorney General's Opinion relied upon by Mr. Doe is inapposite.

Unlike the Code sections at issue in the Attorney General's Opinion cited by Mr. Doe, the trial court's construction of § 18.2-370.5 in this case directly implicates Art. VIII, § 7. The Order entered by the trial court divests the School Board of the authority to control access to school property, a function that is fundamental to the supervision of the public schools. Thus, this Court should hold that the Order entered by the trial court and § 18.2-370.5, as interpreted by the trial court in this case, are unconstitutional.

D. SECTION 18.2-370.5 CAN, AND SHOULD, BE CONSTRUED TO (i) PERMIT A TRIAL COURT TO ENTER AN ORDER THAT RELIEVES A CONVICTED VIOLENT SEX OFFENDER OF THE STATUTORY PROHIBITION ON ENTERING SCHOOL PROPERTY BUT (ii) PRESERVE THE LOCAL SCHOOL BOARD'S CONSTITUTIONAL AUTHORITY TO SUPERVISE THE PUBLIC SCHOOLS BY DETERMINING WHETHER, UNDER WHAT CIRCUMSTANCES, AND SUBJECT TO WHAT CONDITIONS TO ALLOW A CONVICTED VIOLENT SEX OFFENDER ONTO SCHOOL PROPERTY.

It is well-settled that, when possible, statutes should be construed to be valid and constitutional. See, e.g., H. L. Carpel of Richmond, Inc. v. Richmond, 162 Va. 833, 840-41, 175 S.E.2d 316, 318 (1934) ("[W]e sustain the constitutionality of statutes when it is possible to do so. If courts were alert to set aside legislation, balance of powers would be at an end and our theory of their division would come to naught"). "There is a presumption that the legislature in the passage of an act intended that it should be effective, and if such an act is susceptible of two constructions, one of which would render the act invalid as being in violation of the Constitution, and the other sustain the validity of the act, the latter will be adopted upon the presumption that the legislature intended that construction to be given to the act that would make it effective." Bourne v. Bd. of Supervisors, 161 Va. 678, 684-85 172 S.E. 245, 247 (1933); see also H. L. Carpel, 162 Va. at 840, 175 S.E.2d at 318 ("Where a statute is susceptible of more than one interpretation, that which sustains its constitutionality should be adopted") (citations omitted); Oceanview Improvement Corp. v. Norfolk & W. Ry. Co., 205 Va. 949, 955, 140 S.E.2d 700, 704 (1965) ("There is a well recognized cannon of construction that when a statute or an ordinance is susceptible of two constructions, one of which is within the legislative

power and the other without, the courts are required to adopt the former construction") (citations omitted).

In at least one case, and in apparent recognition of the principle that, when possible, statutes should be construed to avoid constitutional problems, this Court construed a Code section seemingly at odds with Art. VIII, § 7 in a way that did not divest local school boards of the power to supervise the public schools. See Russell County Sch. Bd. v. Anderson, 238 Va. 372, 384 S.E.2d 598 (1989). In Russell, this Court considered Va. Code § 22.1-310, which permits a teacher subjected to disciplinary proceedings to request a hearing before a fact-finding panel. In that case, the superintendent recommended that a teacher be dismissed and the teacher requested a fact-finding panel. The panel found that there was no basis for dismissal, but the school board rejected the panel's recommendation and voted to dismiss the teacher. The trial court held that the school board was bound by the findings of the panel and ordered that the teacher be reinstated.

This Court reversed, holding that the school board was not bound by the panel's findings and stating that "this case presents a clash between the finality of the findings of a statutorily created panel and a school board's power to discharge employees – a power which is rooted in the

Constitution of Virginia." Russell, 238 Va. at 383, 384 S.E.2d at 604 (citations omitted). The Court further stated that, if construed to mean that that the school board was bound by the panel's findings, the statute may be unconstitutional. Noting, however, that "the statute was written in the shadow of the Constitutional provision concerning school boards [i.e., Art. VIII, § 7] and in the shadow of our cases giving the full effect to that provision," 238 Va. at 384, 384 S.E.2d at 604, this Court construed the statute to mean that the panel's findings were not binding on the school board. Id. In adopting this second of two possible constructions, the Court preserved the constitutionality of the statute.

Like the statute at issue in Russell, § 18.2-370.5 can be construed in two ways. The first construction, and the one that the trial court adopted, is that § 18.2-370.5 gives trial courts the authority to enter an order bestowing on a violent sex offender convicted of offenses against a child the right – and imposing on a school board the corresponding duty to allow the sex offender – to go onto school property. Such an interpretation clearly strips the school board of its authority to prohibit such a person from entering onto school property and, as demonstrated above, renders § 18.2-370.5 unconstitutional. This interpretation should be rejected by this Court.

The second possible construction, and the one this Court should adopt, is that § 18.2-370.5 gives trial courts the authority to remove the statutory prohibition, and corresponding criminal penalty, on a violent sex offender entering onto school property, but it does not affect the separate constitutional authority of the local school board to make its own determination whether, under what circumstances, and subject to what conditions it will allow such a person to come onto school property.

This proposed interpretation is not inconsistent with the plain language of the statute. Subsection B of §18.2-370.5 provides that a convicted violent sex offender prohibited from entering school property pursuant to subsection A may petition the court "for permission to enter such property." Va. Code § 18.2-370.5(B) (emphasis added). Subsection B further provides that "[f]or good cause shown, the court may issue an order permitting the petitioner to enter and be present on such property, subject to whatever restrictions of area, reasons for being present, or time limits the court deems appropriate." Id. (emphasis added).

Section 18.2-370.5 can be construed to mean that permission from the court for a violent sex offender to enter school property does not confer upon the violent sex offender the affirmative right to go onto school property. Under this interpretation, once a trial court has decided to

remove the statutory prohibition on a convicted violent sex offender entering school property, it is up to the local school board to determine whether, under what circumstances, and subject to what conditions it will allow such a person to come onto school property, just as the school board can determine whether to allow any other person on school property. Thus, the trial court could enter an order removing the statutory ban, such that a violent sex offender would not be in violation of § 18.2-370.5 if he went onto school property (so long as he was in compliance with any terms or restrictions set forth in the order) but the school board could refuse to allow him entry onto its property and could have him removed from its property pursuant to trespass laws.

This second construction of §18.2-370.5 is the one that would render it constitutional and, therefore, is the construction that this Court should adopt. Accordingly, this Court should reverse the decision of the trial court and hold that while § 18.2-370.5 permits the trial court to grant a Petition for Relief and enter an Order removing the absolute statutory prohibition, and the attendant criminal penalty, on a violent sex offender entering onto school property, the School Board also retains its authority under the Constitution to determine whether, under what circumstances, and subject

to what conditions it will permit a violent sex offender to come onto school property.

CONCLUSION

Appellants, the Commonwealth of Virginia, the Charlottesville City School Board, and Rosa S. Atkins, Superintendent of Charlottesville City Schools, respectfully request that this Court reverse the decision of the Circuit Court.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
CHARLOTTESVILLE CITY SCHOOL
BOARD, and ROSA S. ATKINS,
SUPERINTENDENT OF
CHARLOTTESVILLE CITY SCHOOLS

By Counsel

Warner Davies Chapman / SLH

Warner Davies Chapman
(VSB No. 19082)
Room 331, City Hall
P.O. Box 911
Charlottesville, VA 22902
(434) 970-3176 (Telephone)
(434) 971-8202 (Facsimile)
Email: chapman@charlottesville.org

Commonwealth's Attorney for the City of Charlottesville

D. Patrick Lacy, Esquire (VSB No. 07190)
H. Lane Kneedler, Esquire (VSB No. 07722)
Kathleen S. Mehfoud, Esq. (VSB No. 18096)
Stacy L. Haney, Esquire (VSB No. 71054)
REED SMITH LLP
901 East Byrd Street, Suite 1700
Richmond, Virginia 23219-4069
(804) 344-3400 (Telephone)
(804) 344-3410 (Facsimile)
Email: placy@reedsmith.com
lkneedler@reedsmith.com
Kmehfoud@reedsmith.com
shaney@reedsmith.com

Counsel for Charlottesville City School Board and Rosa S. Atkins, Superintendent of Charlottesville City Schools

CERTIFICATE OF SERVICE

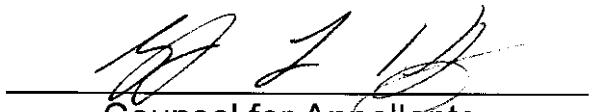
Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, counsel for the Appellants certifies the following on February 24, 2009:

1. Twelve copies of this Opening Brief of Appellants have been filed with the Clerk of the Supreme Court of Virginia;

2. One electronic copy of this Opening Brief of Appellants has been filed with the Clerk of the Supreme Court of Virginia by electronic mail to scvbriefs@courts.state.va.us;

3. Three copies of this Opening Brief of Appellants have been sent first-class mail, postage prepaid to:

J. Lloyd Snook, III
Snook & Haughey, P.C.
408 East Market Street, Suite 107
P.O. Box 2486
Charlottesville, VA 22902
Counsel for Appellee



Counsel for Appellants

Va. Code § 18.2-370.5. Sex offenses prohibiting entry onto school property; penalty.

A. Every adult who is convicted of a sexually violent offense, as defined in § 9.1-902, shall be prohibited from entering and being present, during school hours and during school-related and school-sponsored activities, upon any property he knows or has reason to know is a public or private elementary or secondary school or child day center property, unless (i) he is a lawfully registered and qualified voter, and is coming upon such property solely for purposes of casting his vote; (ii) he is a student enrolled at the school; or (iii) he has obtained a court order allowing him to enter and be present upon such property, and is in compliance with terms and conditions of the order. A violation of this section is punishable as a Class 6 felony.

B. Every adult who is prohibited from entering upon school or child day center property pursuant to subsection A may after notice to the attorney for the Commonwealth and either (i) the proprietor of the child day center, (ii) the superintendent of public instruction of the school division in which the school is located, or (iii) the chief administrator of the school if such school is not a public school, petition the juvenile and domestic relations district court or the circuit court in the county or city where the school or child day center is located for permission to enter such property. For good cause shown, the court may issue an order permitting the petitioner to enter and be present on such property, subject to whatever restrictions of area, reasons for being present, or time limits the court deems appropriate.

EXHIBIT A

Va. Const. art. VIII, § 7.

The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.

EXHIBIT B

Va. Code § 18.2-370.1. Taking indecent liberties with child by person in custodial or supervisory relationship; penalties.

A. Any person 18 years of age or older who, except as provided in § 18.2-370, maintains a custodial or supervisory relationship over a child under the age of 18 and is not legally married to such child and such child is not emancipated who, with lascivious intent, knowingly and intentionally (i) proposes that any such child feel or fondle the sexual or genital parts of such person or that such person feel or handle the sexual or genital parts of the child; or (ii) proposes to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361; or (iii) exposes his or her sexual or genital parts to such child; or (iv) proposes that any such child expose his or her sexual or genital parts to such person; or (v) proposes to the child that the child engage in sexual intercourse, sodomy or fondling of sexual or genital parts with another person; or (vi) sexually abuses the child as defined in § 18.2-67.10 (6), shall be guilty of a Class 6 felony.

B. Any person who is convicted of a second or subsequent violation of this section shall be guilty of a Class 5 felony; provided that (i) the offenses were not part of a common act, transaction or scheme; (ii) the accused was at liberty as defined in § 53.1-151 between each conviction; and (iii) it is admitted, or found by the jury or judge before whom the person is tried, that the accused was previously convicted of a violation of this section.

EXHIBIT C