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.

REPLY 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

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ARGUMENT

I. THE ISSUE IN THIS CASE IS THE SCOPE OF A SCHOOL BOARD'S POWER OF "SUPERVISION" OVER THE PUBLIC SCHOOLS, NOT THE FACTS OF THE CASE, OR AN ALLEGED "AMBIGUITY" IN THE STATUTE IN QUESTION, § 18.2-370.5 OF THE CODE OF VIRGINIA, OR THE APPLICATION OF DILLON'S RULE.

Mr. Doe's attempt to paint a sympathetic picture of the facts of this case is not relevant because the issue here is not whether the facts support the trial court's decision to lift the statutory ban on Mr. Doe going onto school property. Rather, the issue is whether the trial court went too far when it granted him the right to go onto school property and placed a duty on the School Board to allow him on school property. Va. Code § 18.2-370.5(B) allows a trial court to enter an order permitting a violent sex offender to go onto school property. In this case, the trial court did much more than grant permission; it gave Mr. Doe, a convicted violent sex offender, the affirmative right to go onto school property and placed a concomitant duty on the School Board to allow Mr. Doe on its property. As set forth below and in the Opening Brief of Appellants, the trial court's interpretation of § 18.2-370.5, as embodied in its Order, is unconstitutional because it takes away from the School Board and vests in the trial court the power to decide whether, under what circumstances, and subject to what conditions to allow a convicted violent sex offender onto school property.

Mr. Doe claims that a "necessary implication" of Appellants' argument is that § 18.2-370.5 is ambiguous, and he then argues at length that the statute is not ambiguous and is not subject to construction by this Court. See Brief of Appellee at 5-12. Mr. Doe misunderstands Appellants' argument. It is well-settled that, when possible, statutes should be construed to avoid constitutional problems. See, e.g., H. L. Carpel of Richmond, Inc. v. Richmond, 162 Va. 833, 840-41, 175 S.E. 316, 318 (1934) ("[W]e sustain the constitutionality of statutes when it is possible to do so."). In accordance with this principle, Appellants merely have suggested an alternative construction of the statute that would preserve its constitutionality.

Finally, Mr. Doe relies on the Dillon Rule, claiming that it "must be seen as a rule of at least quasi-constitutional force." Brief of Appellee at 16. Mr. Doe cites no authority for this proposition. Moreover, the Dillon Rule is irrelevant to this case. The issue in this case is whether the trial court's interpretation of § 18.2-370.5 infringes on the School Board's authority to supervise the public schools under Article VIII, § 7.

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

A. WHEN THE GENERAL PLENARY LEGISLATIVE POWER OF THE GENERAL ASSEMBLY GRANTED BY ARTICLE IV, § 1 OF THE CONSTITUTION OF VIRGINIA CONFLICTS WITH THE SPECIFIC POWER OF SUPERVISION GRANTED TO LOCAL SCHOOL BOARDS BY ARTICLE VIII, § 7, THE LOCAL SCHOOL BOARDS' SPECIFIC POWER OF SUPERVISION PREVAILS.

Mr. Doe does not dispute that the authority to control access to school property is within the School Board's power of supervision, nor does he dispute that the trial court's Order takes that authority away from the School Board. Rather, Mr. Doe argues that the General Assembly may infringe on the School Board's supervisory power when exercising its "plenary" legislative power and "balancing competing interests." See Brief of Appellee at 27-37.

This Court has never held as Mr. Doe suggests. Rather, this Court has made it quite clear that when there is a conflict between the exercise of the General Assembly's "plenary" legislative power under Article IV, § 1 of the Constitution of Virginia and a local school board's power of "supervision" under Article VIII, § 7, the local school board's power of supervision will prevail. "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 fact, in every case in which this Court has

found that a statute divests a local school board of a function fundamental to the power of supervision, this Court has invalidated the statute. See, e.g., Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959) Howard v. County School Board, 203 Va. 55, 58, 122 S.E.2d 891, 895 (1961).

Although Mr. Doe argues that the police power of the General Assembly is plenary, he concedes, as he must, that the General Assembly's police power is limited by the Constitution of Virginia, which explicitly vests the supervision of schools in the local school boards. See Brief of Appellee at 13. Thus, despite Mr. Doe's unsupported assertion to the contrary, the General Assembly may not divest local school boards of their constitutional authority to supervise the public schools, even to "balanc[e] competing interests." See, e.g., Russell County School Bd. v. Anderson, 238 Va. 372, 383, 384 S.E.2d 598, 604 (1989).

B. THE GENERAL ASSEMBLY, THE STATE BOARD OF EDUCATION, AND LOCAL SCHOOL BOARDS ALL HAVE SPECIFIC ROLES UNDER ARTICLE VIII OF THE CONSTITUTION OF VIRGINIA.

In support of his argument that, Article VIII, § 7 notwithstanding, the General Assembly may infringe on a school board's supervisory power, Doe cites various examples of obligations or limits that are placed on local school boards by the General Assembly or the Board of Education. See Brief of Appellee at 19-32. Mr. Doe argues that because school boards do

not have absolute authority over education, the trial court's infringement on the School Board's supervisory authority in this case is permissible. Mr. Doe's argument fails to recognize that local school boards are a part of the overall system of education established by the Constitution, which also includes the General Assembly and the Board of Education.

The Constitution charges the General Assembly with establishing a system of public education in the Commonwealth and seeking to "ensure that an education program of high quality is established and continually maintained." Va. Const. art. VIII, § 1. The Board of Education is vested with the "general supervision of the public school system," and is tasked with such matters as dividing the Commonwealth into school divisions. Va. Const. art. VIII, §§ 4-5.[1] Local school boards are the only entities vested with "the supervision of schools in each school division." Va. Const. art. VIII, § 7. Thus, neither the General Assembly, nor the Board of Education,

[1] The constitutional authority of the Board of Education is made subject to the authority of the General Assembly. For example, the Board of Education's power to divide the Commonwealth into geographical school divisions is "[s]ubject to such criteria and conditions as the General Assembly may prescribe." Va. Const. art. VIII, § 5. Similarly, the Board of Education is vested with the authority to establish the standards of quality, "subject to revision only by the General Assembly." Va. Const. art. VIII, § 2. Notably, Article VIII, § 7 does not contain any like provision that would make the supervisory power of local school boards subject to the General Assembly's authority.

nor the local school board has absolute authority over education. Each is assigned, by the Constitution of Virginia, its respective role in public education. Therefore, statutes and regulations that may affect school boards do not all implicate Article VIII, § 7.

C. STATEWIDE PROCEDURAL OR ADMINISTRATIVE REQUIREMENTS IMPOSED BY THE GENERAL ASSEMBLY OR BOARD OF EDUCATION DO NOT INFRINGE UPON A LOCAL SCHOOL BOARD'S AUTHORITY TO SUPERVISE ITS PUBLIC SCHOOLS.

Not only does Mr. Doe's argument ignore the framework for public education established by the Constitution, but it also ignores the distinction between imposing a statewide procedural or administrative requirement on school boards and infringing on their local power of supervision. The constitutional power of supervision does not encompass local control over every aspect of education. Statewide procedural or administrative requirements do not implicate supervision.[2] Thus, not every statute or regulation that imposes an obligation or limit on school boards necessarily implicates Article VIII, § 7.

The requirement that notice of nonrenewal of a probationary teacher's contract must be given by April 15, for example, is a procedural

[2] In fact, statewide procedural and administrative requirements imposed by the General Assembly and Board of Education are contemplated by the Constitution. See generally, Va. Const. art. VIII.

requirement that does not implicate Article VIII, § 7 supervision. See Va. Code §§ 22.1-304 and 305. This deadline does not affect a local school board's authority to decide whether to nonrenew a probationary teacher's contract; it merely sets forth a procedural framework within which all local school boards must operate. Indeed, in Dennis v. County School Board, relied upon by Mr. Doe,[3] U.S. District Judge J. Harry Michael, a former member of the Senate of Virginia, clearly explained why the April 15 deadline does not implicate Article VIII, § 7:

> The constitutional scheme with respect to educational matters in Virginia contemplates the role of the General Assembly as formulating policies which will maintain an efficient, high quality, statewide educational system. The local school boards, on the other hand, have full responsibility for the application of statewide and local policies, rules, and regulations adopted for the day-to-day management of the public schools. There is no suggestion that these supervisory powers are infringed upon by the statewide establishment of minimum salary scales, teacher certification requirements, a minimum number of days in the school year, mandatory grievance procedures, and the like. Similarly, the creation of a statewide system of tenure is properly within the ambit of authority assigned under the Constitution to the General Assembly.

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[3] School Board v. Burley, 225 Va. 376, 302 S.E.2d 53 (1983), also relied upon by Mr. Doe, is inapposite. Burley did not involve a challenge to a statute on Article VIII, § 7 grounds. In fact, Article VIII, § 7 is not mentioned and appears not to have been raised or considered in Burley. Moreover, the function at issue in Burley was a procedural requirement that a contract to purchase land be in writing. That requirement did not affect the school board's authority to enter into such an agreement; it merely set forth the procedures that a school board must follow.

> The court finds that Va. Code §§ 22.1-304 and 22.1-305 are valid under the powers granted to the General Assembly through Article VIII, § 1 of the Constitution of Virginia.

582 F. Supp. 536, 543 (W.D. Va. 1984).

Similarly, the requirements imposed by § 22.1-279.8 that every school board must require each of its schools to conduct an annual school safety audit and prepare a crisis management plan are procedural requirements that do not implicate Article VIII, § 7 supervision.[4] Conducting the safety audits and developing the details of the crisis management plans are left to the local school boards.[5]

Mr. Doe cites to § 18.2-308 , claiming that it "provides that a student may bring a firearm onto school property, provided that it is unloaded and locked in a trunk." See Brief of Appellee at 31. His claim is wide of the

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[4] Likewise, the other statutes cited by Mr. Doe, including § 2.2-3112 (part of the State and Local Governments Conflict of Interest Act requiring disqualification from participating in a transaction in which one has a financial interest); § 2.2-3700 et seq. (Virginia Freedom of Information Act); § 22.1-84 (requiring that liability insurance purchased by a school board be with insurance companies authorized to do business in the Commonwealth); § 22.1-79.1 (requiring that students not be required to attend school prior to Labor Day); § 22.1-202 (requiring the recitation of the Pledge of Allegiance); § 22.1 203 (requiring a moment of silence), all impose procedural or administrative requirements and do not implicate the local school board's constitutional power of supervision.

[5] In fact, the statute also directs the Board of Education to develop a model crisis management plan that each local school board is free to adopt, modify, or reject, in its discretion. See Va. Code § 22.1-279.8(D).

mark for three reasons. First, he cited the wrong statute. Presumably, he meant to refer to § 22.1-308.1. Second, the law does not permit students to bring a firearm onto school property if it is unloaded and locked in a trunk. Rather, the statute prohibits any person from possessing a firearm on school property, but exempts from that prohibition persons who have an unloaded firearm in a closed container in a motor vehicle. Third, the General Assembly enacted § 22.1-277.07:1, which makes it crystal clear that that despite the exemptions in § 18.2-308.1, a school board has the authority to adopt disciplinary policies prohibiting weapons on school property. Lest someone reach the incorrect conclusion that it was making new law, the General Assembly made it clear that §22.1-277.07:1 was "declaratory of existing law." See 2004 Acts of Assembly, Ch. 560.

Other authorities relied upon by Mr. Doe likewise do not support his argument because the functions at issue are not supervisory functions. Mr. Does cites an Oct. 19, 2004, Opinion of the Attorney General of Virginia, for example, for the proposition that a school board may not loan money to a board of supervisors. See Brief of Appellee at 21. The power to loan money to a board of supervisors has nothing to do with the supervision of the public schools. Indeed, the Attorney General stated that "the overriding duty of a school board is the supervision of schools in each school division.

It is my opinion that . . . such authority does not include the power to make loans to the locality." See 2004 Va. Op. Att'y Gen. 117.

Mr. Doe also relies on a September 12, 1991, Attorney General's Opinion for the proposition that a school board may not adopt a stricter nepotism policy than that established by the State and Local Government Conflict of Interests Act. See Brief of Appellee at 21. This opinion does not support Mr. Doe's argument because, as the Attorney General noted, this Court has never held that the power to establish a more strict nepotism policy constitutes "an indispensable function essential to the daily supervision of the schools." Moreover, as the Attorney General noted, this Court has

> invalidated legislation transferring to other entities those functions indispensable to the daily supervision of schools. . . . By adopting the Act and imposing a uniform nepotism policy, however, the General Assembly has not transferred or delegated school system management to a third party or outside entity.

See 1991 Va. Op. Att'y Gen. 1. Unlike the situation presented in that Opinion, the present case does involve the transfer of "school system management" to another entity, namely the trial court.

In short, there is no authority to support Mr. Doe's contention that the General Assembly may infringe on a local school board's constitutional power of supervision to "balanc[e] competing interests." Nor is there any

authority to support Mr. Doe's proposed "institutional competence" test.[6] See Brief of Appellee at 33. This Court has never upheld a statute that divests a local school board of its supervisory authority. Rather, this Court has consistently invalidated such statutes.

D. THE TRIAL COURT'S ORDER UNCONSTITUTIONALLY DIVESTS THE SCHOOL BOARD OF ITS AUTHORITY TO SUPERVISE THE PUBLIC SCHOOLS.

1. The Ability to Control Access to School Property Is Within the Power of Supervision That Is Vested Solely in the School Board.

This Court has consistently construed Article VIII, § 7 to confer broad authority on local school boards. See, e.g., Howard v. County Sch. Bd., 203 Va. 55, 58-59, 122 S.E.2d 891, 895 (1961); Sch. Bd. of the City of Richmond v. Parham, 218 Va. 950, 958-59, 243 S.E.2d 468, 472-73 (1978); Russell County Sch. Bd. v. Anderson, 238 Va. 372, 383, 384 S.E.2d 598, 604 (1989); County Sch. Bd. v. Farrar, 199 Va. 427, 433, 100 S.E.2d 26, 30 (1957). Although this Court has not defined the outer limits

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[6] Mr. Doe attempts to analogize the dissenting opinion in Arlington County v. White, 259 Va. 708, 528 S.E.2d 706 (2000), to this case, but the issue addressed in the dissent – recognizing and defining marital relationships – is not relevant here. Moreover, despite Mr. Doe's claims to the contrary, this case is not about a local government substituting its judgment for that of the General Assembly, nor is the issue in this case one "for which the General Assembly has unique responsibility." Brief of Appellee at 37. The School Board, not the General Assembly, has "unique responsibility" for the supervision of the public schools.

of local school boards' power of supervision, it is clear that the day-to-day operation of the public schools is within a school board's constitutional power of supervision. See Opening Brief of Appellants at 7-13.

The ability of the local school board to control access to school property, especially while children are present, is fundamental to the day-to-day operation of the schools. A school board cannot safely and efficiently operate the public schools if it does not have the authority to control access to school property, including the authority to determine whether, under what circumstances, and subject to what conditions it will allow any person, but particularly a convicted violent sex offender, onto school property. See Opening Brief of Appellants at 11-13.

Mr. Doe previously asserted that prior to the enactment of § 18.2-370.5, he had the "right" to go onto school property. See Appx. at 1-2. Mr. Doe now apparently concedes that the School Board does have the authority to keep everyone except violent sex offenders off its property. See Brief of Appellee at 9 ("the trespass statute has an independent application for everyone not subject to the strictures of § 18.2-3705").[7]

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[7] Mr. Doe's assertion that the trespass statute does not apply to convicted violent sex offenders is untenable. A violent sex offender would not be insulated from a trespass charge (or from civil liability for common law tresspass) for going onto school property after being directed by the School

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However, Mr. Doe still assumes, incorrectly, that such authority is rooted in the trespass statute. The School Board's authority to control access to school property is rooted in Article VIII, § 7. Thus, the School Board has the authority to decide whether, under what circumstances, and subject to what conditions to allow a violent sex offender onto school property.

2. The Trial Court's Order Is Unconstitutional Because It Divests the School Board of the Authority to Control Access to School Property.

The trial court's interpretation of § 18.2-370.5 divests the School Board of its authority to control access to school property because it takes away from the School Board the power to decide whether, under what circumstances, and subject to what conditions to allow Mr. Doe, a convicted violent sex offender, onto school property. The Order gives Mr. Doe the affirmative right to go onto school property and imposes on the School Board the obligation to allow him on its property.[8] Thus, this Court

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Board not to do so. The trial court's removal of the prohibition in § 18.2-370.5(A) does not also remove the effect of the trespass statute or the common law cause of action for trespass.

[8] Mr. Doe references a former and current School Board policy regarding sex offenders. See Brief of Appellee at 25-26. Neither policy is in the record before this Court and neither policy was mentioned by any party in the proceedings before the trial court. Moreover, the content of the School Board's policy regarding violent sex offenders is irrelevant. It is within the

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should hold that the trial court's interpretation of § 18.2-370.5, as embodied in its Order, is unconstitutional.

E. SECTION § 18.2-370.5 CAN BE CONSTRUED TO PRESERVE THE SCHOOL BOARD'S CONSTITUTIONAL AUTHORITY TO CONTROL ACCESS TO SCHOOL PROPERTY.

As noted above, it is well-settled that, when possible, statutes should be construed to avoid constitutional problems. See, e.g., H. L. Carpel of Richmond, Inc. v. Richmond, 162 Va. 833, 840-41, 175 S.E. 316, 318 (1934). In accordance with this principle, Appellants have suggested an alternative construction that would preserve the constitutionality of the statute.[9] Section 18.2-370.5 can be construed to give trial courts the authority to remove the statutory prohibition on, and corresponding criminal penalty for, a violent sex offender entering school property, but preserve 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.

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School Board's constitutional authority to determine what its policy will be and to change that policy when it deems it appropriate to do so.

[9] Under Mr. Doe's argument that § 18.2-370.5 cannot be construed any way other than the manner in which the trial court construed it, this Court would have no choice but to find the statute unconstitutional.

This proposed interpretation is consistent with the plain language of the statute and does not lead to an absurd result, as Mr. Doe claims. See Brief of Appellee at 10-11. 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 the proposed interpretation, a violent sex offender who is successful in obtaining relief under § 18.2-370.5(B) would be relieved from the blanket prohibition against entering onto school property and be placed on the same footing as all other individuals – they may go onto school property subject to whatever restrictions the School Board imposes. Such an interpretation clearly would not be "absurd."

Regardless whether this Court accepts Appellants' proposed construction, the trial court's interpretation of § 18.2-370.5 violates Article VIII, § 7 and, therefore, the trial court's Order must be reversed.

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:

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

2. One electronic copy of this Reply 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 Reply 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

Dated: April 6, 2009.

Warner Davies Chapman / SCH
Counsel for Appellants