IN THE

SUPREME COURT OF VIRGINIA

Record No. 111587

ANDREW MIKEL, on his own Behalf

and as father and next Friend of

ANDREW MIKEL II,

Petitioner-Appellant,

v.

SCHOOL BOARD OF THE

COUNTY OF SPOTSYLVANIA,

Respondent-Appellee.

PETITION FOR REHEARING

Rita M. Dunaway
Virginia State Bar No. 46821
John W. Whitehead
Virginia State Bar No. 20361
Douglas R. McKusick
Virginia State Bar No. 72201

ASSIGNMENTS OF ERROR

I. The Circuit Court erred in ruling that Andrew's conduct constituted "Violent Criminal Conduct" within the meaning of Spotsylvania County Schools Student Code of Conduct Section(B)(3). (T. 125-126).

SUMMARY OF THE CASE

This case is about whether school officials' classification of childish horseplay as "Violent Criminal Conduct" constitutes the type of irrational, arbitrary disciplinary action that demands judicial intervention to secure the ends of justice.

On December 10, 2010, Andrew Mikel II (hereafter "Andrew") took to school several tiny, hollow plastic balls that were part of a toy (J. Ex. at 7; Def. Ex. 1). He blew these balls at other students' backpacks through the tube of an ink pen. (J. Ex. at 8, 13; T. at 29). A few students who were struck by the balls as they walked down the hallway were offended and reported the matter to school officials. These students reported feeling a "pinch" (J. Ex. at 9), a "sting" (J. Ex. at 11), or that they just felt something hit their back (J. Ex. at 10; T. 50-52).

For this, school officials imposed upon Andrew a long-term suspension of approximately five (5) months under the Student Code of Conduct provisions concerning "Violent Criminal Conduct." (J. Ex. at 2, 16). Andrew's conduct cannot rationally be encompassed under the cited provisions, and judicial intervention is therefore essential. This Court is empowered to review the Circuit Court's decision *de*

novo, as it results from the application of law to undisputed facts. Johnson v. Hart, 279 Va. 617, 623, 692 S.E.2d 239, 242 (2010).

LEGAL ARGUMENT

I. Andrew's Behavior Cannot Rationally Be Classified as "Violent Criminal Conduct."

There must be some limitation on the exercise of school officials' discretion in classifying student misconduct, for this classification impacts not only the level of sanction imposed, but also the student's permanent academic record and thus his opportunities for future academic achievement. Moreover, fundamental notions of fairness and due process of law demand that the disciplinary authority wielded by government actors be bounded by basic guidelines governing how misconduct will be classified and penalized.

In this case, Andrew's blowing of plastic "spitwads" was treated as "Violent Criminal Conduct" under two provisions—neither of which fairly or rationally encompasses this manner of horseplay. The first provision, Section (B)(3)(b) of the Student Code of Conduct, prohibits "killing, shooting, stabbing, cutting, wounding, otherwise physically injuring or battering any person."

School officials have justified this classification of Andrew's conduct by arguing that under certain common law principles, the *slightest* touching of another can technically constitute a legal "battery." However, this interpretation of the word "battery" as a legal term of art is inappropriate for the school setting. It is at odds with the plain meaning of the term as understood by students, parents and administrators. Moreover, it leads to the unconscionable result, as evidenced by this case, of treating horseplay on par with murder and branding immature students as criminals.

Even upon carefully reviewing this provision, no reasonable student, parent or administrator could understand it to encompass a number of commonplace behaviors that could technically be considered batteries—behaviors such as shooting paper spitwads or flipping a rubber band. These technical "batteries" simply do not rise to the level of "Violent Criminal Conduct." In the case at bar, the fact that no injuries further than "a pinch" were reported by the complaining students makes it inconceivable that the behavior in question could be classified under this provision.

The doctrine of *ejusdem generis* applied by this Court in other school discipline cases provides the critical source of common-sense

limitation on the exercise of school officials' discretion in classifying student misbehavior. This layman-friendly doctrine eliminates any possibility that the general phrase "otherwise physically injuring or battering any person," read in the context of the particular prohibited actions listed here ("killing, shooting, stabbing, cutting, wounding,") could encompass the blowing of hollow plastic balls through an ink pen tube. See Wood v. Henry County Public Schools, 255 Va. 85, 495 S.E.2d 255 (1998).

Likewise, the second and only other "Violent Criminal Conduct" provision cited by school officials cannot rationally be said to encompass Andrew's prank. This provision, Section (B)(3)(g) of the Student Code of Conduct, prohibits the *possession* of inherently deadly or dangerous weapons on school property.

In an apparent recognition of the disparity between Andrew's tiny balls and ink pen tube on the one hand, and prohibited items such as revolvers, bombs, and machetes on the other, school officials based their classification of Andrew's conduct under this provision on another catch-all sentence in Section (B)(3)(g), which states, "[a]ny type of weapon, or object used to intimidate, threaten or harm others, any explosive device or any dangerous article(s) shall subject the

student to a recommendation of expulsion." However, a contextual reading of this sentence indicates that it prohibits *the possession* of items that are *inherently* intimidating, dangerous and useful as weapons. Items that are less dangerous in nature are prohibited under a separate provision.

School officials' interpretation converts the provision from being a strict liability prohibition of possession of deadly weapons (those which are inherently useful "to intimidate, threaten or harm others") to an all-inclusive prohibition of *any* item actually used to "intimidate, threaten or harm others," no matter how harmless the object actually is. This, combined with their unbounded interpretation of the words "intimidate," "threaten," and "harm" to encompass purely subjective "intimidation" and "harms" consisting of nothing more than feeling a slight pinch, transforms commonplace student behavior such as the playful tossing of a wad of paper at another student, or certainly the "shooting" of a rubber band, into both "battery" under Section (B)(3)(b) and possession of a deadly weapon under Section (B)(3)(g).

Again, the doctrine of *ejusdem generis* provides the common-sense guiding principle that is critical to prevent irrational classification. If that doctrine was properly applied in Wood, supra, to

preclude the exercise of school officials' discretion from classifying a pocketknife under a provision that encompassed switchblades, then it *a fortiori* precludes school officials in this case from classifying tiny plastic balls and an ink pen tube under the prohibition of deadly weapons such as revolvers, bombs and machetes.

II. Crucial Public Policy Considerations Demand That the Court Reverse the School Board's Irrational Classification of Horseplay as "Violent Criminal Conduct."

Much is at stake in this case—much more, even, than Andrew's academic future. This Court must intervene in order to preserve meaningful judicial review of school disciplinary actions, to preclude schools from enjoying an unjust double standard, and to prevent the adoption of a draconian penal culture in our Commonwealth's schools.

If the Court fails to identify the irrational application of discipline in this case as being the sort of action that triggers judicial intervention, then judicial review of student discipline retains little meaning. If school officials' discretion is so broad that it licenses the branding of horseplay as "violent criminal conduct," then it is, in effect, absolute authority.

Second, school officials' argument in this case turns on its head the *reason* why they enjoy such broad discretion in disciplining students. Non-lawyer school officials enjoy lenient, relaxed procedural and legal standards so that they can efficiently manage discipline in the school setting. It is manifestly unjust for these same officials to employ—to a student's detriment—a highly technical, legal definition of a term like "battery," which is directly at odds with the word's plain meaning and completely out of sync with the word's context.

Finally, the Court should note that if school officials' discretion empowers them to classify harmless, childish pranks as "Violent Criminal Conduct," then the result will be a Commonwealth of schools teeming with violent criminals whose continued attendance lies at the mercy of school officials and their "discretion." Approximately 70 Virginia school districts use the term "battery" to describe the most serious disciplinary offenses which also trigger mandatory police intervention. If the decision below is left standing, administrators at these schools will henceforth enjoy absolute authority to choose whether to treat horseplay for what it is, or to use it as a basis for

excluding children from public schools and destroying their academic futures.

Respectfully submitted,

Dated: November 1, 2011

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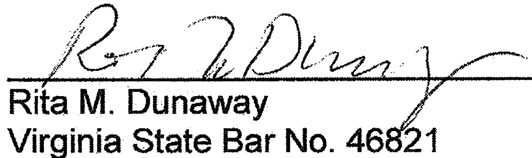

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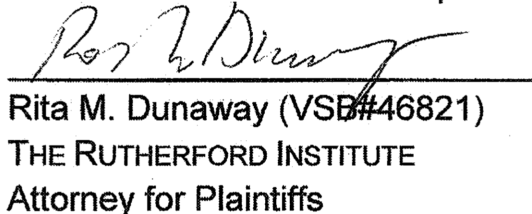
CERTIFICATE OF COMPLIANCE WITH THE WORD COUNT LIMIT

The foregoing Petition for Rehearing, exclusive of cover page and certificates, does not exceed the 1,750 word-count imposed by Rule 5:20A of the Rules of the Supreme Court of Virginia.



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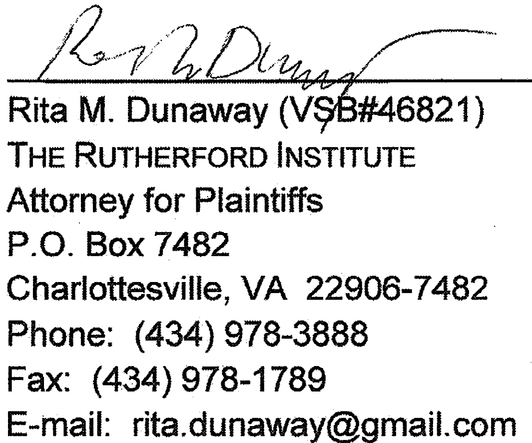
CERTIFICATE OF SERVICE

A copy of this petition for appeal has been mailed, postage prepaid, to opposing counsel this 1st day of November, 2011.



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