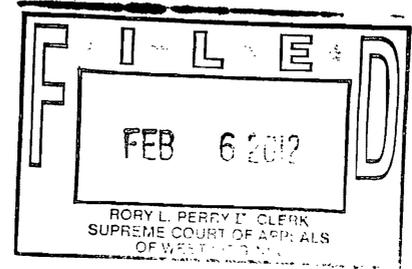


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-1224 and 11-1486



**KANAWHA COUNTY PUBLIC LIBRARY BOARD,**  
a public corporation; **WEST VIRGINIA BOARD OF**  
**EDUCATION,** a public corporation; and **DR. JOREA**  
**MARPLE,** in her official capacity as Superintendent of  
Schools of the State of West Virginia, Defendants Below,

**Petitioners,**

vs.

**BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,**  
a public corporation, Plaintiff Below,

**Respondent.**

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Underlying Case No. 08-C-2020  
Circuit Court of Kanawha County, WV

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**AMICUS CURIAE BRIEF OF THE OHIO COUNTY PUBLIC LIBRARY  
AND OTHER INTERESTED WEST VIRGINIA PUBLIC  
LIBRARIES IN SUPPORT OF PETITIONERS  
AND URGING REVERSAL**

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## INTRODUCTION

A good book is the precious life blood of a master spirit, embalmed and treasured up on purpose to a life beyond life.

*Kanawha County Public Library v. The County Court of Kanawha County*, 143 W.Va. 385, 405; 102 S.E.2d 712, 724 (1958) (quoting John Milton, author of *Paradise Lost*). In that case, this Court upheld against a constitutional challenge the legislation which created the Kanawha County Public Library and the mandate that it be funded in part by the Kanawha County Commission. The Kanawha County Circuit Court has now held that the mandate that the Kanawha County Board of Education provide part of the funding for the Kanawha County Public Library is unconstitutional based on its conclusion that requirement infringes on the fundamental right to an education.

The Ohio County Public Library, the Cabell County Public Library, the Clarksburg-Harrison Public Library, the Hardy County Public Library, the Hamlin-Lincoln County Public Library, the Sistersville Public Library, the Parkersburg/Wood County Public Library, and the Vienna Public Library (collectively, “Interested Public Libraries”) respectfully submit this *amicus curiae* brief asking the Court to reverse the decision of the circuit court and hold that because libraries such as the Kanawha County Public Library and other “Special Act” libraries funded under similar legislation provide educational benefits to students, the legislature’s decision to mandate funding for certain libraries does not infringe on the rights of students in those counties to an education and does not deprive anyone of their right to equal protection.<sup>1</sup> We do not believe any constitutional analysis of the funding of the so-called “Special Act” libraries can be

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, nor did any counsel or party make a monetary contribution (direct or indirect) towards the preparation or submission of this brief.

divorced from the beneficial and educational impact those libraries have on the students and communities they serve. Putting the focus where it belongs – on the students – will demonstrate the constitutionality of the legislative system under attack.

The outcome of this appeal is of great interest to the Interested Public Libraries. Although the decisions of the Kanawha County Circuit Court which are the subject of this appeal are specifically limited to funding for the Kanawha County Public Library and although the Interested Public Libraries were not parties to the proceedings below, the issues decided in this appeal have the potential to impact the Interested Public Libraries as well. Some arguments in favor of the constitutionality of the current legislatively-mandated funding mechanism are well-defined in the briefing of the petitioners here and in the Court below. This amicus is therefore limited to discussing why the focus of this appeal must be on the students whose right to an education is at stake and why ignoring that focus – as the circuit court’s decision did - does those students a disservice.

### **STATEMENT OF INTEREST**

The Interested Public Libraries are all “Special Act” Libraries created at various times by the West Virginia Legislature. Each receives a vast majority of its operating income from its legislatively-mandated funding. The West Virginia Library Commission compiles an annual report which includes funding sources for West Virginia’s public libraries.<sup>2</sup> The 2010 WVLC report shows the following:

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<sup>2</sup> The West Virginia Library Commission (“WVLC”) is a state agency established pursuant to West Virginia Code § 10-1-12. Pursuant to West Virginia Code § 10-1-21, the WVLC is “authorized and empowered to collect and preserve statistics and other data, concerning libraries of any sort located within this State; to make surveys relating to the needs or conditions of such libraries or the library conditions of any city, town, county, regional library area, or other subdivision of this State; and to publish the results and findings thereof in accordance with the provisions of section fourteen of this

<b>Library System</b>	<b>City Funding</b>	<b>County Funding</b>	<b>Board of Education Funding</b>	<b>Total Library Operating Income</b>	<b>Special Act Funding As A Percentage of Operating Income</b>
Ohio County	0	\$449,525	\$488,358	\$1,036,793	90.46%
Cabell County	\$15,620	\$1,300,228	\$1,281,395	\$2,885,989	89.99%
Hardy County	\$7,571	\$85,508	\$17,101	\$131,641	83.70%
Clarksburg-Harrison	\$133,000	\$120,249	\$117,355	\$431,012	85.98%
Sistersville (Tyler)	\$15,316	\$2,000	\$12,300	\$35,064	84.46%
Vienna (Wood)	\$298,084	\$55,306	\$57,958	\$445,497	92.23%
Parkersburg/Wood	\$213,603	\$235,257	\$379,534	\$901,270	91.91%

*West Virginia Library Commission Statistical Report 2010 at 28 – 29.* The West Virginia

Department of Education recently summarized the impact of the Special Act funding

mechanism:

Through special acts of the Legislature, a portion of the tax levies of eleven county boards of education are designated for public libraries. These dedicated funds are from regular levy proceeds in nine of the counties and from excess levy proceeds in two (Cabell and Lincoln). The eleven boards are: Berkeley, Cabell, Hardy, Harrison, Kanawha, Lincoln, Ohio, Raleigh, Tyler, Upshur, and Wood. A total of \$7.1 million is dedicated to public libraries through these special acts, \$5.6 million from regular levy collections and \$1.5 million from excess levy collections. In addition, \$421,608 of Cabell County Schools' excess levy proceeds is dedicated for support of the Huntington Park Board.

WVDE, *Executive Summary Ad Valorem Property Taxes For School Purposes 2009-10*

Year at 3 (<http://wvde.state.wv.us/finance/files/Data/2009-10/Property%20Taxes/>)

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article.” The statute further provides that the “data, surveys and findings of the library commission shall be available to all school, public, institutional, regional and/or other libraries within this State, whether proposed or established.” In addition, public libraries in West Virginia are required to create annual reports and forward these to the WVLC. West Virginia Code § 10-1-8.

Property%20Tax%20Summary.pdf).

The Interested Public Libraries are concerned that affirmance of the circuit court's decision - based in part on its conclusion that the legislatively-mandated funding for the Special Act library system in Kanawha County infringes upon the right to an education - potentially threatens funding for the Interested Public Libraries. Indeed, the circuit court's order refers in several places not only to the Kanawha County Board of Education, but also to "the eight other county boards of education subject to a special act library funding obligation." (*see e.g.*, A0022, A0025). As a result, the Interested Public Libraries have a significant interest in the outcome of this appeal and believe their voices should be heard.

The governing body of each of the Interested Public Libraries has authorized the filing of an *amicus curiae* brief on its behalf.

#### **STATEMENT OF EXPERIENCE**

The circuit court held that a legislative mandate that the Kanawha County Board of Education use approximately 1% of its total expenditures on funding for the Kanawha County Public Library infringed on a fundamental right. Although it is never directly stated in the circuit court's order granting summary judgment, that fundamental right has to refer to the right to an education recognized in *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979) as discussed in its order denying the Kanawha County Public Library's motion to dismiss the equal protection count of the complaint. (A0004). That same opinion held that Board of Education had standing to bring an equal protection claim on behalf of the students of the Kanawha County Schools based on the fundamental right to an education. (A0008-0009).

The Kanawha County Public Library has articulated a strong argument that a board of education does not, in its own right, have standing to litigate equal protection claims both because it is not a person and because it is political subdivisions of the state which created the classification in the first place.<sup>3</sup> While the Interested Public Libraries agree with that analysis, our brief is not intended to address this argument. Instead, our brief is intended to address the broader question of whether mandated funding for public libraries infringes on students' right to an education in the affected counties. If there is no infringement, then the equal protection issue becomes moot. To the extent any of this Court's prior decisions can be read to hold that mandated funding for libraries is a *per se* infringement on students' fundamental right to an education, we believe those decisions rest on faulty assumptions and cannot stand. The Interested Public Libraries believe that determining whether there has been an infringement requires an analysis of the uses to which Special Act Libraries are put. Accordingly, this section of our *amicus* brief discusses very briefly the background and operations of each of the Interested Public Libraries and the nominal financial burdens each puts on the expenditures of the board of education in its home county.

### ***Ohio County Public Library***

The present-day Ohio County Public Library was started in 1859 as a library and literary association called the Wheeling Library Association. In 1883, the legislature enabled what was then the Wheeling school district to obtain the association's assets "so as to provide for the establishment, maintenance, support, increase and government of a

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<sup>3</sup> The Kanawha County Public Library also points out that this Court upheld the constitutionality of the legislation establishing the Kanawha County Public Library in *Kanawha County Public Library v. The County Court of Kanawha County*, 143 W.Va. 385; 102 S.E.2d 712 (1958).

public library in said district, by the board of education thereof.” Virginia Ebeling, *Library Development in Ohio County*, in *West Virginia History* at 142 (noting the Acts of the Legislature, 1882). The Library continued under the administration of the Wheeling Board of Education until 1932. In 1933, the Legislature created the Ohio County Public Library, passing title to the public library’s assets from the Wheeling independent school district to a board of trustees for the library. Committee Substitute for Senate Bill 55 – Originating in the Committee on Education, Chapter 118 Acts of the Legislature, First Extraordinary Session. In the same act, the Legislature provided for funding of the library by the newly-created Ohio County Board of Education. *Id.*

With 25,970 registered adult and juvenile borrowers, the Ohio County Public Library circulated 82,715 children’s materials during the 2010/2011 fiscal year. *West Virginia Library Commission 2011 Statistical Report* at. 24. During that same year, 730 children’s and 32 young adult programs were held at the Ohio County Public Library. *2011 WVLC Report* at 29. The Ohio County Public Library provides a number of resources for schools and educators in Ohio County at the library’s main building, at the schools themselves, and in the community. Ohio County Public Library, *Minutes of the Board of Trustees Meeting of January 11, 2012 – End of Year Report 2011 – Children’s Department*.<sup>4</sup> These include classroom visits to Ritchie Elementary Kindergarten and Head Start classes, Orchard Park Head Start Classes, daily visits from Madison Elementary School second- through fifth-grade students every other week. *Id.* The daily visits of Madison Elementary School through the Ohio County Schools’ Anchor Program are especially popular. *See* *Wheeling News Register*, January 8, 2012, Section C at 1.

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<sup>4</sup> Public libraries are required to hold meetings and the minutes of such are public records.

The OCPL provides Summer Reading programs for students, hosts a regular slate of storytimes, provides programming for middle-school and high-school students, and promotes a variety of programs at Ohio County Schools including WV Children's Book Week, Read-to-Me Day, National Library Week, and Read Across America Day. *See*, *Wheeling Intelligencer* Region Section January 19, 2012 at 9; *see also* <http://ocplkids.blogspot.com>. OCPL's Outreach program also provides book delivery and reading services to pre-schools, daycares, Head Start programs, and homebound students throughout Ohio County. <http://ocploutreachservices.blogspot.com>. The OCPL also creates a special reserve collection for the required reading assigned by Ohio County Schools. This collection is stocked with numerous copies of each required reading book which are kept on reserve for students. <http://ocplkids.blogspot.com>.

### ***Cabell County Public Library***

The Cabell County Library was opened to the public in 1902. In the late 1940's it established branches outside of Huntington and today has seven branches. <http://cabell.lib.wv.us/pages/aa-aboutus.html>. The Cabell County Library was created by House Bill 801 during the 1967 Regular Session of the Legislature, which created "a public library, which shall be known as the 'Cabell County Public Library,' which shall be supported by the board of education of the county of Cabell and the county court of Cabell county, as a joint endeavor of the two governing authorities in the manner hereinafter prescribed." H.B. 801 § 1. Pursuant to that legislative enactment, the Cabell County Board of Education appoints two members to the board of directors of the library, two members are appointed by what is now the Cabell County Commission, and the final

member is appointed by the City of Huntington. <http://cabell.lib.wv.us/pages/aa-administration.html>.

The Cabell County Public Library has a number of programs for children and students. <http://cabell.lib.wv.us/index.html>. Four of its branches host regular visits from near-by schools. In November 2011 alone, there were 106 such school visits and, in addition to in-library visits by students, librarians visit the local schools. (*Western Counties Regional Library Circulation and Usage Report*, November, 2011 at 3 as noted in the Minutes of November 15, 2011 Meeting of the Board of Trustees of the Cabell County Public Library. The Cabell County Public Library holds story times and young adult programs, as well as weekly math tutoring sessions <http://cabell.lib.wv.us/index.html>. It houses an Adult Learning Center at the main library, which provides room, utilities and custodial service, while the Cabell County Board of Education provides the teacher, telephone, furnishings and materials <http://cabell.lib.wv.us/pages/aa-adultlearning.html>. The main library also houses the Tri-State Literacy Center, for which the Cabell County Public Library provides funding and in-kind services <http://cabell.lib.wv.us/pages/aa-literacy.html>. In addition, it serves as the service center for other public libraries, including ones in Wayne, Putnam, Mingo, Mason, and Logan Counties. *2011 WVLC Report* at 12. It reported 83,948 registered borrowers and circulated 206,515 children's library materials in the 2010-2011 fiscal year. *2011 WVLC Report* at 20.

### ***Hardy County Public Library***

The path to the present-day Hardy County library began in 1824 with the establishment of a "book loan system" in Moorefield. Hardy County Public Library

Informational Brochure 2011; Charles Anthony Julian, Ph.D, *An Analysis Of The Historical Growth And Development Of The West Virginia Library Association And Its Effect Upon The Advancement Of Public Librarianship In The State Of West Virginia*, UMI (1990) at 243. In 1927, the Moorefield Women's Club began a free public library loan service and it grew sufficiently popular that the library was incorporated in 1939. *Julian* at 278; Hardy County Public Library Informational Brochure 2011. In 1952, it acquired a building to house the library with assistance from Governor Patten. *Id.* It established bookmobile service in the 1960's, with pick-up and delivery to county schools and stores. *Id.* In 1981, House Bill 1352 established the Hardy County Public Library and provided for funding for the library through the County Board of Education, the County Commission, and the town of Moorefield. Chapter 223, Acts of the Legislature, 1981 Regular Session.

Today the Hardy County Public Library has over 7,200 patrons and circulated 14,537 children's library materials in 2010-2011. *2011 WVLC Report* at 21. It provides class space and resources, children and youth programming (including a summer reading program), and tours. Hardy County Public Library Informational Brochure 2011.

### ***Parkersburg and Wood County Public Library***

In 1899, the Parkersburg High School and Public Library was established by the Board of Education of Parkersburg (an independent school district). Ann Cushing and Brian Raits, *History of Parkersburg & Wood County Public Library* 2005. In 1904, the Board of Education successfully obtained funding for the construction of a library building and the secretary of the Board of Education served as its first librarian. *Id.* For decades, the Board of Education (first of the independent school district and then for

Wood County) was the sole support for the Public Library. *Id.* In 1967, the Wood County Board of Education, the Wood County Court, and the City of Parkersburg entered into an agreement to establish, equip, maintain, and support the public library. In 1987, House Bill 2994 created a public library board, which consisted of two members appointed by the Wood County Board of Education, two members by the Wood County Commission, and one member appointed by the City of Parkersburg. Chapter 156, Acts of the Legislature, 1987 Regular Session. That same bill provided in Section 5 for a funding mechanism through the three supporting governing authorities. *Id.*

The Parkersburg and Wood County Public library reported 215,081 library visit during the last fiscal year. *2011 WVLC Report* at 25. The total circulation last fiscal year was 321,883 with 114,445 checkouts being juvenile materials. *Id.* Its bookmobile regularly visits two schools throughout the year. One of the middle schools, Van Devender, takes weekly tours of classes through the library and Waverly Library (one of its branches) shares a site with a local school and operates as a school library one day a week. The branch librarian also provides readings to younger classes and provides instruction on performing research with library material. In addition, it provides summer reading programs, a young adult reading club, and bookmobile visits to day care centers throughout the county. *Parkersburg –Wood County Public Library Board of Trustees Minutes* 2011.

### ***Vienna Public Library***

The Vienna Public Library is an independent library in Wood County, created by the same legislation that created the Parkersburg and Wood County Public Library. Chapter 156 § 8, Acts of the Legislature, 1987 Regular Session, H.B. 2994. Originally

founded by the Vienna Woman's Club in 1960, the library was housed for years in property provided to it by the Wood County Board of Education and governed by a five-member board appointed by the Vienna City Council. In 1975, it became a corporation and was given space by the Wood County Board of Education to continue to house the library. In 1987, House Bill 2994 was passed, creating a five-member board to operate the Vienna Public Library and supported by "the board of education of the county of Wood, by the county commission of Wood County, and by the city of Vienna, as a joint endeavor of the three governing authorities." Chapter 156 § 8, Acts of the Legislature, 1987 Regular Session. The board consists of one member appointed by the Wood County Board of Education, one member appointed by the Wood County Commission and the remainder appointed by the City of Vienna. *Id.*

The Vienna Public Library reported 7,421 registered patrons and circulated 37,919 children's library materials during the 2010-2011 fiscal year. *2011 WVLC Report*. It provides a weekly story hour, class tours and visits for story time, introduction to the library and its resources attended by public schools and day care centers. Its summer reading program has enrolled between 800 and 1,000 children and it also provides a holiday reading program for students on break. *Vienna Public Library Board of Trustees Board Meeting Minutes 2011*.

### ***Clarksburg-Harrison Public Library***

As with most of West Virginia's well-established public libraries, the Clarksburg-Harrison Public Library began as the efforts of a local woman's organization. Lawrence

R. Lynch, *History of Clarksburg Public Library* at 1-6.<sup>5</sup> It opened its doors in 1907 and eventually operated in space provided by the City of Clarksburg. *Id.* at 12-13. In 1987, the legislature created a governing board of the Clarksburg-Harrison public library, “which library shall be supported by the board of education of the county of Harrison, by the county commission of Harrison County, and by the city of Clarksburg, as a joint endeavor of the three governing authorities.” Chapter 150 § 1, Acts of the Legislature, 1987 Regular Session. Its board consists of five members, two of which are appointed by the Harrison County Board of Education, two appointed by the County Commission, and one by the City of Clarksburg. Chapter 150 § 2, Acts of the Legislature, 1987 Regular Session. The same legislation mandated funding for the library from the three governing authorities.

The Clarksburg-Harrison Public Library has 15,169 registered users and circulated 17,489 library materials to children during the 2010-2011 fiscal year. *2011 WVLC Report*. It holds a weekly story hour with activities aimed at meeting the early literacy benchmarks as well as modeling behavior for attending parents. [clarksburglibrary.info/children.htm#Story%20Times](http://clarksburglibrary.info/children.htm#Story%20Times). Local schools tour the library on field trips where the students are taught what resources are available at the library. *Clarksburg-Harrison County Public Library Board of Trustees Meeting Minutes October 21, 2009*. The Library also collaborates with the Harrison County Schools to offer the Harrison County Student Art Show each year. <http://www.facebook.com/events/134281203308347/>. It offers outreach programs for the

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<sup>5</sup> As Dr. Julian pointed out in his dissertation, the most significant development for libraries in the early 1900’s, “one which was to possess the greatest impact upon librarianship, was the founding and flourishing of women’s clubs in the state.” *Julian* at 43.

local schools, provides a summer reading program coupled with activities which encourage students to maintain their reading skills over the summer break.

[http://www.facebook.com/pages/Clarksburg-Harrison-Public-](http://www.facebook.com/pages/Clarksburg-Harrison-Public-Library/415650380297?ref=tn_tnmn)

[Library/415650380297?ref=tn\\_tnmn](http://www.facebook.com/pages/Clarksburg-Harrison-Public-Library/415650380297?ref=tn_tnmn); <http://kstier26301.tripod.com/>. The Clarksburg-

Harrison Public Library also has provided space for GED classes and for the Harrison

County Literacy Volunteers to conduct its Homework Help tutoring program.

*Clarksburg-Harrison County Public Library Board of Trustees Meeting Minutes,*

*October 21, 2009*; [www.clarksburglibrary.info](http://www.clarksburglibrary.info).

### ***Sistersville Public Library***

In 1935, the Legislature created the “board of trustees of county school and public library” in Tyler County. House Bill 398, Chapter 145 § 1, Acts of the Legislature, 1935 Regular Session. Section 2 of that legislation provided that the board would consist of six members, two appointed by the Tyler County Board of Education and two by the Sistersville City Council. *Id.* The remaining *ex officio* members were the president of the Board of Education and the mayor of Sistersville. The Library Board was directed to maintain a facility in Sistersville. The City was directed to provide facilities and utilities for the library free of charge, and Board of Education was directed to pay into the “library fund” an amount not to exceed \$1,200 per annum. Chapter 145 § 7 - 8, Acts of the Legislature, 1935 Regular Session. In 1953, Section 8 was amended to provide for payments from the Tyler County Board of Education and today the Sistersville Public Library continues to receive funding from the Board of Education, the County Commission and the City of Sistersville. Chapter 200 Acts of the Legislature, 1953 Regular Session, House Bill 279 .

The Sistersville Public Library has 1,212 registered borrowers and circulated 5,099 children's library materials during the 2010-2011 fiscal year. *2011 WVLC Report*. It provides books for parents and volunteers who read to students at Sistersville Elementary School and provides after-school tutoring for Sistersville Elementary, Tyler Consolidated Middle School, and Tyler Consolidated High School. *Sistersville Public Library Board of Trustees Meeting Minutes 2011*. Sistersville Public Library also has a six-week summer reading program to stress the importance of reading during summer break and has a reading incentive program for students that runs throughout the year. (*Id.*).

#### ***Hamlin-Lincoln County Public Library***

Lincoln County originally received library services through the West Virginia Library Commission's "Flying Book Express," a forty-foot tractor trailer which the WVLC sent to Boone, Gilmer, Lincoln, Summers, Webster and Wyoming counties, none of which had public library services. Julian at 75. The county's first public library was opened in January, 1972 by the town of Hamlin. Donna B. Calvert et al, *A Study and Evaluation of the Direct Services Region WVLC 1995* at 45.. The board of directors was appointed by the town's governing authority. Senate Bill 20, Acts of the Legislature, 1986 Extraordinary Session. Both the Lincoln County Board of Education and the Lincoln County Commission entered into contracts with the library board to provide services to patrons throughout the county. *Id.* In 1978 Lincoln Countians began seeking library services in the Branchland area and an "instant" library was placed beside the Branchland elementary school, and in 1985 another outpost library was constructed next door to the Midway Elementary School. *Id.* In 1986, Senate Bill 20 was passed, creating

the Hamlin-Lincoln County Public Library Board and mandating funding provided jointly by the City of Hamlin, the Lincoln County Board of Education, and the Lincoln County Commission.

The library currently has approximately 9,800 registered patrons. It is part of the Western Counties Regional Libraries' computer system, which means that patrons from any of the participating counties may obtain books from the Lincoln County libraries. <http://cabell.lib.wv.us/pages/aa-howtosearchcat.html>. The Hamlin-Lincoln County Library has a summer reading program, storytimes, and special programming for students and teachers *Hamlin-Lincoln County Public Library Board of Trustees Meeting Minutes 2011*. It encourages field trips both to allow students to learn about the library and its benefits, as well as to use its resources as part of their classwork. *Id.* It has a small greenhouse and an outdoor amphitheater which are used by students *Id.* The library does not charge overdue fees to students or teachers *Id.* It is also a supporter and partner of the Lincoln County Reading Council for which it provides space and allocates a [significant] portion of its book buying budget for young adult materials in anticipation of the Council's needs. *Lincoln County Reading Council Brochure, 2010.*

### ***Interested Public Library Financing***

The West Virginia Library Commission's statistical report for 2010 reports the following financial information with respect to the Interested Public Libraries:

<b>Library System</b>	<b>City Funding</b>	<b>County Funding</b>	<b>Board of Education Funding</b>	<b>Total Library Operating Income</b>	<b>Special Act Funding As A Percentage of Operating Income</b>
Ohio County	0	\$449,525	\$488,358	\$1,036,793	90.46%
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Clarksburg-Harrison	\$133,000	\$120,249	\$117,355	\$431,012	85.98%
Sistersville (Tyler)	\$15,316	\$2,000	\$12,300	\$35,064	84.46%
Vienna (Wood)	\$298,084	\$55,306	\$57,958	\$445,497	92.23%
Parkersburg/Wood	\$213,603	\$235,257	\$379,534	\$901,270	91.91%
Hamlin-Lincoln	\$2,892	\$60,297	\$104,572	\$177,621	94.45%

West Virginia Library Commission *Statistical Report 2010* at 28 – 29.

The West Virginia Department of Education reports the following financial information for the counties which are homes to the Interested Public Libraries for the 2008-2009 fiscal year:

<b>Library System</b>	<b>Board of Education Expenditures</b>
Ohio County	\$59,228,429
Cabell County	\$156,668,711
Hardy County	\$22,188,126
Clarksburg-Harrison	\$114,230,866
Sistersville (Tyler County)	\$16,772,561
Wood County	\$142,110,034
Lincoln	\$38,441,732

<http://wvde.state.wv.us/finance/data/2009/Current%20Exp%20by%20Function%202009.pdf>

pdf at 1.

Based on that data, it is possible to do a rough comparison of the relative burden the Special Act libraries place on the budgets of the boards of education in each the counties which house the Interested Public Libraries:

<b>Library System</b>	<b>08-09 Board of Education Expenditures</b>	<b>2010 WVLC Report on BOE Funding for Libraries</b>	<b>Interested Library Funding as a Percentage of BOE Expenditures</b>
Ohio County	\$59,228,429	\$488,358	<1% (0.82%)
Cabell County	\$156,668,711	\$1,281,395	< 1% (0.82%)
Hardy County	\$22,188,126	\$17,101	< 0.1% (0.08%)
Clarksburg-Harrison	\$114,230,866	\$117,355	0.1%
Sistersville (Tyler County)	\$16,772,561	\$12,300	< 0.1% (0.07%)
Wood County	\$142,110,034	\$437,492	< 1% (0.31%)
Lincoln County	\$38,441,732	\$104,572	< 1% (0.27%)

From this chart, it is apparent that the Interested Public Libraries impose a nominal burden on the overall expenditures of the boards of education for the counties which they jointly serve.

### **DISCUSSION**

In its order granting summary judgment for the Kanawha County Board of Education, the circuit court found that the “Kanawha Special Act mandates the Kanawha Board to divert a portion of its regular levy tax receipts for the support of the Kanawha County Public Library.” (A0012). Although that opinion noted that the amount “diverted” exceeded \$2,000,000 in recent years (*id.* and at A0019), it did not discuss at all the fact that the amount at issue constituted less than 1% of the Board of Education’s annual expenditures. Nonetheless, the circuit court concluded that “any discriminatory classification found in the State’s educational financing system cannot stand unless the

State can demonstrate some compelling State interest to justify the unequal classification.” It further concluded that, “if the Kanawha Board’s regular levy receipts exceed its local share, it is mandated to pay all or a portion of those receipts to the Kanawha Library, while forty-six other counties could use any such funds as they see fit in the education of their students.” (A0020). According to the Circuit Court, the “Kanawha Special Act and Section 18A-9A-11 clearly create a lack of uniformity in the public education financing scheme as there is unequal treatment of the Kanawha Board as opposed to forty-six other county boards of education.” (A0021). It further concluded that the “Kanawha Special Act and Section 18-9A-11 infringe on a fundamental constitutional right....” (A0022).

This brief will focus on three aspects of the circuit court’s analysis. First, we believe it incorrectly concluded there was a funding disparity between counties with Special Act Libraries and those without such libraries. In fact, the counties are treated equally in how much money is available for educational purposes. Second, we believe that funding of public libraries, whether mandated or voluntary, is congruent with the educational mission of the boards of education. From that premise, we assert that expenditures on library funding do not *per se* infringe upon students’ right to an education and in fact enhance their educational opportunities. Third, the simple fact that some boards of education are required to spend money on a particular educational resource does not mean that the students in those counties have been deprived of anything.

**I. THERE IS NO DISPUTE THAT THE FORMULA FOR COMPUTING THE OVERALL FUNDING PROVIDED FOR UNDER CURRENT STATE LAW DOES NOT VARY BY COUNTY FOR PURPOSES OF AN EQUAL PROTECTION ANALYSIS.**

The Circuit Court's analysis and the parties briefing below did not suggest that the **overall** funding available to county boards of education varied for purposes of an equal protection analysis. Rather, the claim was that because state law mandated that certain counties were obligated to provide funding for public libraries, the **net** amount available to the board of education to spend as it saw fit was reduced. *See, e.g.*, A0020 at ¶ 6 (“Here, if the Kanawha Board’s regular levy receipts exceed its local share, it is mandated to pay all or a portion of those receipts to the Kanawha Library, while forty-six other counties could use any such funds as they see fit in the education of their students.”). But reducing the discretion of a school board to spend money “as it sees fit” is not the same as saying it has less money overall to spend on educational purposes.

*Pauley v. Kelly* is not to the contrary. That case was brought by parents of students in Lincoln County claiming that the state’s mechanism of funding schools deprived their children of the right to an education. Noting that courts have held education was a “state, rather than local responsibility,” 162 W. Va. at 689; 255 S.E.2d at 869, this Court addressed whether aid formulae were subject to a facial challenge:

We do not consider, at least facially, that the State's foundation aid statute violates concepts of equal protection, because the gross foundation aid has subtracted from it amounts raised by the county from the regular local property levy. Thus, a county which generates a small amount from the local property tax receives a larger amount of State foundation aid than does a county with a large local property tax. This is graphically demonstrated by Exhibit B to plaintiffs' brief. [Attached as Appendix IV] The amounts raised from the local property tax by general levy are shown in the first segment on the bar graph. The State foundation aid is the second segment of the graph.

*Pauley v. Kelly*, 162 W.Va. at 710; 255 S.E.2d at 879. Here, the claim is not that the funding mechanism facially discriminates – it does not – but rather whether the obligations imposed by Special Act legislation infringe upon a fundamental right and we turn to that issue next.

## II. FUNDING PUBLIC LIBRARY SYSTEMS SERVES AN EDUCATIONAL PURPOSE AND DOES NOT PER SE DEPRIVE STUDENTS OF THEIR RIGHT TO AN EDUCATION.

We believe that in order for a funding mandate to impinge upon a fundamental right to education, the obligation imposed must be for a non-educational purpose. It is not enough, as the circuit court suggested, that the money be used for “school purposes.” (A0021).<sup>6</sup> This Court has recognized a fundamental right to an **education**, not (to use the circuit court’s phrase) a fundamental right for a school board free to use money “as they see fit in the education of their children.” (A0020). This Court defined in *Pauley* what constituted a thorough and efficient system of education:

It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.

Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices

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<sup>6</sup> This language may have been drawn from dicta in the majority decision in *Board of Education of the County of Kanawha v. West Virginia Board of Education*, 219 W.Va. 801, 808; 639 S.E.2d 893, 900 (2006), which referred to a “school purpose” in its discussion of the equal protection analysis. To the extent the decision relied on the difference between a “school purpose” and “education,” it is inconsistent with *Pauley* and was apparently reached without any input from any library, interested or otherwise, as to the true functions that Special Act libraries serve in West Virginia.

among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work -- to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatability with others in this society.

Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.

*Pauley v. Kelly*, 162 W.Va. at 706, 255 S.E.2d at 877. Implicit in the circuit court's analysis is the idea that requiring the school board to spend money on a public library deprives the students of the right to an education as this Court defined it in *Pauley*. This simply cannot be.

Indeed, as set forth above in our Statement of Experience, the Interested Public Libraries, like the Kanawha Public library, undeniably provide services that are educational under this Court's conception of that term. From storytimes for the younger children to summer reading programs to tutoring services and GED programs to literacy initiatives to class tours to everything else the Special Act libraries provide to students in their counties, it is simply indisputable that they provide an educational resource. Thus, the issue is not as simple as asking whether the Kanawha County Board of Education and other Special Act boards are required to provide some level of public library funding when other county boards do not. No one disputes that, nor does anyone dispute that county boards of education can and do provide voluntary funding for public libraries and other community services without depriving their students of the right to an education. Accordingly, the question for constitutional purposes has to be whether that requirement

*in and of itself* infringes on the right of students to an education. Given this Court's definition of that term in *Pauley*, the answer has to be "no." The circuit court's conclusion to the contrary is error.

### **III. MANDATING FUNDING FOR PUBLIC LIBRARIES IN CERTAIN COUNTIES DOES NOT DEPRIVE THOSE STUDENTS OF A FUNDAMENTAL RIGHT TO AN EDUCATION.**

In light of the analysis above, it should be apparent that the circuit court's decision rested on a faulty assumption – that the simple fact the Kanawha County Board of Education is mandated to contribute a small percentage of its expenditures to fund the Kanawha County Public Library is, without more, sufficient to create an equal protection violation by depriving students of the right to an education. That is tantamount to a *per se* determination that providing funding for the library is not for an educational purpose. The constitutional issue at stake is not whether the Board of Education can spend its budget as it "sees fit" because that trivializes the rights at stake. Instead, if this case is really about education of the students, then we believe the educational benefits of the Interested Public Libraries cannot be ignored. When those benefits are considered, the lack of infringement on the fundamental right at stake is apparent

### **CONCLUSION**

For over 80 years, the West Virginia Legislature has sought to provide for stable funding for certain libraries and this Court has upheld against constitutional attack the legislation creating those libraries. That same legislation created the funding mechanism for those libraries and they have planned and operated for decades based on the stability provided by the funding sources. To say now, after all these years, that the Special Act boards of education – which had often owned the libraries in question until the enabling

legislation passed – can claim the deprivation of a right to an education for their students because the board cannot spend money “as they see fit” makes a mockery of the constitutional analysis. Instead, the question has to be whether imposing a funding obligation on a county board of education to provide some level of support for a public library has a detrimental educational impact on the students in that county. Absent such an impact, there is simply no basis for saying that the right to an education has been infringed. Because our experience tells us we provide educational benefits to the students in the counties we serve, the Interested Public Libraries ask that the Court reverse the decision below and uphold the Special Act funding for the Kanawha County Public Library.

**OHIO COUNTY PUBLIC LIBRARY AND OTHER  
INTERESTED WEST VIRGINIA PUBLIC  
LIBRARIES**

BY:

  
\_\_\_\_\_  
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-1224 and 11-1486

**KANAWHA COUNTY PUBLIC LIBRARY BOARD,  
a public corporation; WEST VIRGINIA BOARD OF  
EDUCATION, a public corporation; and DR. JOREA  
MARPLE, in her official capacity as Superintendent of  
Schools of the State of West Virginia, Defendants Below,**

**Petitioners,**

**vs.**

**BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,  
a public corporation, Plaintiff Below,**

**Respondent.**

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Underlying Case No. 08-C-2020  
Circuit Court of Kanawha County, WV

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**CERTIFICATE OF SERVICE**

Service of the foregoing *AMICUS CURIAE* BRIEF OF THE OHIO COUNTY PUBLIC LIBRARY AND OTHER INTERESTED WEST VIRGINIA PUBLIC LIBRARIES IN SUPPORT OF PETITIONERS AND URGING REVERSAL was had upon the parties herein by mailing true copies thereof, by regular United States mail, postage prepaid, to the following at their last known addresses as follows, on this 6<sup>th</sup> day of February, 2012.

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