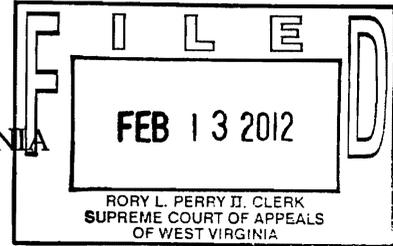


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos. 11-1224 and 11-1486



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

Petitioners,

v.

(Circuit Court of Kanawha County  
Civil Action No. 08-C-2020)

THE BOARD OF EDUCATION OF  
THE COUNTY OF KANAWHA,  
a public corporation,

Respondent.

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**BRIEF OF RESPONDENT THE BOARD OF EDUCATION  
OF THE COUNTY OF KANAWHA**

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## STATEMENT OF THE CASE

### I. WEST VIRGINIA PUBLIC SCHOOL FINANCING

The West Virginia Constitution mandates that the Legislature “shall provide, by general law, for a thorough and efficient system of free schools.” W. Va. Const. art. XII, § 1. In order to carry out this mandate, the Legislature enacted an education financing system which establishes the financial responsibilities of both the State and each of the fifty-five counties for public education.

In simple terms, the State’s public education financing system consists of three items, a county’s “basic foundation program,” a county’s “local share,” and the “state share” provided to each county by the State. This Court has described the State public education financing system as follows:

W.Va. Code, 18-9A-1, *et seq.*, sets out the State's public school support plan, popularly known as the school financing formula. The formula contemplates a shared responsibility of education costs to be borne by the State and individual counties.

Very broadly, the operation of the formula may be described as follows: First, a county’s estimated level of need, or “basic foundation program,” is determined. The basic foundation program is the total sum required for each of seven categories of need, viz., professional educators, service personnel, fixed costs, transportation costs, administrative costs, other current expenses and substitute employees, and improvement of instructional programs.

Second, the county’s “local share” must be computed. Local share is the amount of tax revenue which will be produced by levies at specified rates, on all real property situate in the county. Local share thus represents the county’s contribution to education costs on the basis of the value of its real property. State funding is provided to the county in an amount equal to the difference between the basic foundation program and the local share.

*State ex rel. Boards of Education of the Counties of Upshur, et al. v. Chafin*, 180 W.Va. 219, 221-22, 376 S.E.2d 113, 115-16 (1988) (citations omitted).

Thus, the West Virginia State Board of Education (“State Board of Education”) determines the amount that each county needs for its “basic foundation program.” It then determines each county’s “local share,” the amount each county is projected to raise by regular tax levy receipts to spend on education. Once such computations are completed, the State Board of Education must certify to each county board of education the amount of state aid, or the “state share,” allocated to the county for that fiscal year. *See* W. Va. Code § 18-9A-12(d). In other words, each year, the State provides to each county the difference between each county’s “local share” and their “basic foundation program.”

## **II. THE KANAWHA SPECIAL ACT**

In 1957, the Legislature enacted the Kanawha Special Act.<sup>1</sup> The Kanawha Special Act, Chapter 178 of the Acts of the Legislature, Regular Session, 1957, mandates the diversion of a substantial part of the regular tax levy receipts of the Board of Education of the County of Kanawha (“Kanawha Board of Education”) for support of the Kanawha County Public Library (“Kanawha Library”). The diverted portion of the regular tax levy receipts that the Kanawha Board of Education pays to the Kanawha Library has consistently exceeded 2 million dollars annually. [*See* A0292 (stating that the Kanawha Board’s library funding obligation for the 2011-2012 fiscal year is over \$2.8 million)].

## **III. KANAWHA BOARD I**

In 2003, because of the discriminatory classification of the Kanawha Board of Education in the amount of financial support available for the education of Kanawha County students, the Kanawha Board of Education commenced an action in the Circuit Court of

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<sup>1</sup> The Legislature has passed similar special acts for eight other county boards of education.

Kanawha County against the State Board of Education, Civil Action No. 03-C-2955. The Kanawha Board of Education sought a declaration that the mandate that it distribute a portion of its regular tax levy receipts for the support of the Kanawha Library denied the Kanawha Board of Education the equal protection of the laws guaranteed to it and, through it, the public school students of Kanawha County, by Article III, § 10 of the West Virginia Constitution.

The lower court applied a “rational basis” level of review and held that the discriminatory treatment against the Kanawha Board of Education, as compared to the forty-six other county boards of education that were not mandated to set aside a portion of their annual regular tax levy receipts for the support of a public library, did not present an enforceable denial of equal protection. [See A0085-0095]. In determining that a rational basis level of review was appropriate, the lower court relied upon the fact that the Kanawha Board of Education had sufficient funds to not only meet its “basic foundation program,” but to carry over a surplus every fiscal year ranging from \$6,000,000.00 to \$13,000,000.00. [A0087, 0093-0094].<sup>2</sup> Essentially, the lower court found the case presented a “purely economic issue.” [A0093].

Upon appeal of the Kanawha Board of Education, this Court reversed. This Court rejected the lower court’s holding that because it was a “purely economic issue,” that only a rational basis level of review applied. Instead, this Court held that “strict scrutiny” review should have been applied. *See Board of Educ. of the County of Kanawha v. West Virginia Bd. of Educ.*, 219 W.Va. 801, 807, 639 S.E.2d 893, 899 (2006). Next, this Court determined whether a compelling state interest was present to justify the discriminatory treatment of the Kanawha Board of Education:

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<sup>2</sup> In addition to the Kanawha County excess levy, this surplus was created by the fact that, in computing a county’s local share, the Code permits a deduction of 5% of the regular levy funds to cover uncollectibles. *See* W.Va. Code § 18-9A-11(a)(2). Kanawha County’s actual percentage of uncollectibles was typically lower than the statutory 5%. [A0088, 0094].

When we apply the strict scrutiny test to the present facts, we can find no compelling reasons that justifies treating those school boards differently that are charged by law with applying a portion of their local share to support a non-school purpose such as a public library. Clearly, the end result of such unequal treatment is that county school boards charged by law with diverting a portion of their local shares to support non-school purposes have less funds from regular tax levies to expend directly on public schools. Simply put, the more than 2.2 million dollars directed each year to the support of the library is money taken from the support of school children in the classrooms of Kanawha County schools. This, in turn, potentially impinges on a school board's ability to provide a thorough and efficient education to its students.

*Id.* at 807-08, 639 S.E.2d at 899-900.

Ultimately, this Court held that Section 18-9A-12 of the code violated equal protection because, in computing the Kanawha Board of Education's "state share," it did not make any adjustment and/or give any credit to account for the fact that the Kanawha Board of Education was required to divert a portion of its local share for the support of the Kanawha Library. *Id.* at syl. pt. 6. This Court then stayed the effect of its ruling to allow for the Legislature to amend the statutes as provided for in the opinion. *See id.* at 808, 639 S.E.2d at 900 ("Having found that W. Va. Code § 18-9A-12 is deficient, we believe that the Legislature must take corrective action by amending the applicable statutes as provided in this opinion.").

#### **IV. THE LEGISLATIVE RESPONSE**

In *Kanawha Board I*, this Court gave clear guidance to the Legislature on what needed to be done to correct the constitutional deficiency found. Specifically, this Court stated that, in order to pass constitutional muster, Section 18-9A-12 of the Code would need to be amended to provide an adjustment to the Kanawha Board of Education's "state share," an adjustment that would take into account the Kanawha Board of Education's special act library funding obligation. However, the Legislature chose not to follow this Court's guidance. The

Legislature did not provide an adjustment to the Kanawha Board of Education's "state share" to account for its special act library funding obligation. Instead, the Legislature specifically incorporated the Kanawha Special Act, as well as the other eight special acts, into Section 18-9A-11 of the Code. The Legislature provided that any special act library funding obligation would now come from those amounts by which the Kanawha Board of Education's regular school board levies exceeded its computed "local share":

- (f) . . . For the purposes of any computation made in accordance with the provisions of this section, the library funding obligation on the regular school board levies which is created by a special act and is due and payable from the levy revenues to a library shall be paid from the county school board's discretionary retainage, which is hereby defined as the amount by which the regular school board levies exceeds the local share as determined hereunder . . . .
- (g) . . . Specifically, the special acts which are subject to said subsection upon the enactment of this section during the two thousand seven regular session of the Legislature include:
  - (1) Enrolled Senate Bill No. 11, passed on the twelfth day of February, one thousand nine hundred seventy, applicable to the Berkeley County Board of Education;
  - (2) Enrolled House Bill No. 1352, passed on the seventh day of April, one thousand nine hundred eighty-one, applicable to the Hardy County Board of Education;
  - (3) Enrolled Committee Substitute for House Bill No. 2833, passed on the fourteenth day of March, one thousand nine hundred eighty-seven, applicable to the Harrison County Board of Education;
  - (4) Enrolled House Bill No. 161, passed on the sixth day of March, one thousand nine hundred fifty-seven, applicable to the Kanawha County Board of Education;
  - (5) Enrolled Senate Bill No. 313, passed on the twelfth day of March, one thousand nine hundred thirty-seven, as amended by Enrolled House Bill No. 1074, passed on the eighth day of March, one

thousand nine hundred sixty-seven, and as amended by Enrolled House Bill No. 1195, passed on the eighteenth day of January, one thousand nine hundred eighty-two, applicable to the Ohio County Board of Education;

- (6) Enrolled House Bill No. 938, passed on the twenty-eighth day of February, one thousand nine hundred sixty-nine, applicable to the Raleigh County Board of Education;
- (7) Enrolled House Bill No. 398, passed on the first day of March, one thousand nine hundred thirty-five, applicable to the Tyler County Board of Education;
- (8) Enrolled Committee Substitute for Senate Bill No. 450, passed on the eleventh day of March, one thousand nine hundred ninety-four, applicable to the Upshur County Board of Education; and
- (9) Enrolled House Bill No. 2994, passed on the thirteenth day of March, one thousand nine hundred eighty-seven, applicable to the Wood County Board of Education.

W.Va. Code § 18-9A-11(f)-(g). The statute then provides that “[a]ny excess of the discretionary retainage over the library funding obligation shall be available for expenditure by the county board in its discretion for its properly budgeted purposes.” *Id.* § 18-9A-11(f). If the library funding obligation is greater than the “discretionary retainage,” then the library funding obligation “is amended and reduced to the amount of the discretionary retainage.” *Id.*

As further part of its amendments of Section 18-9A-11, the Legislature provided an option whereby the Kanawha Board of Education and the eight other counties subject to a library funding obligation could transfer their funding obligation from the “discretionary retainage” of their regular school levy revenues to their excess levy revenues. *See id.* § 18-9A-11(h). If the Kanawha Board of Education elects to transfer its library funding obligation to its excess levy revenues, the statute mandates that the Kanawha Board of Education include the library funding obligation as a specifically described line item of the excess levy. *See id.* § 18-

9A-11(h)(2). Moreover, if the excess levy fails to pass, the Kanawha Board of Education is mandated to include the funding obligation to the Kanawha Library as a line item in any subsequent excess levies. *Id.*

## V. THE CURRENT LITIGATION

The Legislature's response to *Kanawha Board I* did not correct, but only perpetuated the unconstitutional discriminatory classification against the Kanawha Board of Education. Unlike the Kanawha Board of Education, forty-six other county boards of education in West Virginia are not required to expend any of their "discretionary retainage" for the support of a public library, but are free to spend any such "discretionary retainage" in furtherance of the education of the public school students therein. For example, the Putnam County Board of Education could use its "discretionary retainage" on whatever educational benefits for its students were discretionarily determined by the county board to be in their best interests. Moreover, unlike the Kanawha Board of Education, forty-six other county boards of education are under no mandate to include a library funding obligation on their excess levy if not paid out of the regular levy receipts.

Because the Legislature only continued an unconstitutional public education financing system identified in *Kanawha Board I*, the Kanawha Board of Education was left with no choice but to once again pursue litigation. On October 14, 2008, the Kanawha Board of Education filed its Complaint for Declaratory Judgment and Injunctive Relief in the Circuit Court of Kanawha County. [A0036-0044]. On February 2, 2009, the Kanawha Library moved to intervene as a party defendant. [A0056-0063]. The intervention was unopposed and on March 2, 2009, an Agreed Order granting the Kanawha Library's motion to intervene was

entered. [A0074-0075]. On November 12, 2009, the Kanawha Board of Education filed its Motion for Summary Judgment and Injunctive Relief. [A0084-0084].

On January 14, 2010, the Kanawha Library filed a motion to dismiss, arguing that the Kanawha Board of Education had no standing to pursue a claim for an equal protection violation under the West Virginia Constitution. [A0115-0181]. On August 5, 2010, the lower court heard both the Kanawha Board of Education's motion for summary judgment and the Kanawha Library's motion to dismiss. [A0210-0211]. On July 28, 2011, the lower court entered an order denying the Kanawha Library's motion to dismiss and granting the Kanawha Board of Education's motion for summary judgment. [A0001-0009, 0010-0030]. The lower court held that the Section 18-9A-11 of the Code, in combination with the Kanawha Special Act, to the extent they required the Kanawha Board of Education to divert a portion of its regular levy receipts for the support of the Kanawha Library or to transfer the library funding obligation to its excess levy revenues, were unconstitutional. [A0029-0030]. As a result, the lower court enjoined the State Board of Education and the Kanawha Library from enforcing Section 18-9A-11 of the Code and the Kanawha Special Act and as they pertain to the Kanawha Board of Education's library funding obligation to the Kanawha Library. [A0030].

## SUMMARY OF ARGUMENT

The lower court correctly held that the unequal treatment of the Kanawha Board of Education created by Section 18-9A-11 of the Code and the Kanawha Special Act violate equal protection under the West Virginia Constitution. Because education is a fundamental constitutional right, “[a] statute that creates a lack of uniformity in the State’s educational financing system is subject to strict scrutiny and this discrimination will be upheld only if necessary to further a compelling State interest.” Syl. pt. 4, *Kanawha Board I*, 219 W.Va. at 801, 639 S.E.2d at 893. Section 18-9A-11 and the Kanawha Special Act clearly create a lack of uniformity in the public education financing system. Unlike forty-six other county boards of education, the Kanawha Board of Education is mandated to either pay a special act library funding obligation from its regular levy receipts or make it a continuing obligation of its excess levy revenues. In accordance with *Kanawha Board I*, the lower court correctly held there was no compelling State interest to justify this unequal treatment.

The lower court properly held that the Kanawha Board of Education had standing to make an equal protection challenge under the West Virginia Constitution. In addition to *Kanawha Board I* in 2006, this Court has previously permitted county boards of education to make equal protection challenges in order to protect the fundamental constitutional right of education. *See, e.g., State ex rel. Board of Education for the County of Grant v. Manchin*, 179 W.Va. 235, 366 S.E.2d 743 (1988).

The lower court properly held the Legislature has no authority to place specific mandates upon a specific county board of education’s excess levy. Under Article X, § 1b, the Legislature may only enact a statewide excess levy or, by general law, reserve to the local school districts the power to lay authorized excess levies.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This is a case involving the constitutionality of a statute. As a result, the Kanawha Board of Education would submit that oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure is necessary and appropriate.

## ARGUMENT

This matter arises out of the lower court's granting of summary judgment in favor of the Kanawha Board of Education. As a result, the standard of review is *de novo*. See syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) (“A circuit court's entry of summary judgment is reviewed *de novo*.”).

### **I. THE LOWER COURT'S RULING DID NOT EXCEED THE SCOPE OF RELIEF REQUESTED IN THE COMPLAINT.**

The Kanawha Board of Education will first address the contention by the Kanawha Library and the State Board of Education that the lower court's ruling somehow exceeded the scope of the relief requested in the Complaint for Declaratory Judgment and Injunctive Relief. This argument is wholly without merit.

West Virginia is a “notice pleading” jurisdiction. Rule 8(e)(1) states, “Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.” W.Va. R. Civ. P. 8(e)(1) (2012). “The primary purpose of these provisions is rooted in fair notice. Under Rule 8, a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is.” *State ex rel. McGraw v. Scott Runyan Pontiac Buick*, 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995).

Here, the Complaint clearly alleged that, as compared to forty-six other county boards of education, the mandate of the Kanawha Special Act diminished the amount of funding available to the Kanawha Board of Education for the education of its students:

5. Pursuant to a Special Act passed by the Legislature in 1957, the Kanawha Board was mandated to distribute a substantial portion of the proceeds of its annual regular tax levy receipts for the support of the Kanawha County Public Library.

6. The mandate that the Kanawha Board distribute a portion of its regular tax levy receipts for the support of the Kanawha Library diminished the amount of funds available to the Kanawha Board for public school student purposes, as compared to forty-six other county schools boards that were not subject to such a mandate.

[A0037]. The Complaint then alleged that the Legislature's amendments to Section 18-9A-11 of the Code did not correct the constitutional infirmity found in *Kanawha Board I*, and that requiring the Kanawha Board of Education to continue to divert funds for the support of the Kanawha Library violated equal protection:

20. W.Va. Code § 18-9A-11, as amended, continues the discriminatory classification of the Kanawha Board in comparison to the forty-six other county boards of education that have no library funding obligation.
21. There is no "compelling state interest" to justify the discriminatory treatment of the Kanawha Board, as compared to the forty-six other county boards of education in West Virginia.
22. The requirements of W.Va. Code § 18-9A-11 that the Kanawha Board must expend a portion, or potentially all, of its "discretionary retainage" for the support of a public library violates equal protection of the laws as guaranteed by Article III, § 10 of the West Virginia Constitution.

[A0041].

Moreover, the Complaint then specifically asked, *inter alia*, the lower court to declare that Section 18-9A-11 of the Code, in combination with the Kanawha Special Act, creates a discriminatory classification within the public education financing system in violation of equal protection. The Complaint then asked the lower to enjoin any requirement that the Kanawha Board of Education divert any portion of its regular levy receipts or any of its "state share" funds to the Kanawha Library:

WHEREFORE, the plaintiff prays that the Court enter an order:

1. Declaring that W.Va. Code § 18-9A-11 and related provisions of the West Virginia Code, as interpreted and applied by the defendants, in combination with the Special Act, creates a discriminatory classification of the Kanawha Board within the public school financing system in plain violation of the equal protection provisions of Article III, § 10 of the West Virginia Constitution;

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3. Enjoining the defendants from requiring any part of the regular tax levy receipts of the Kanawha Board or any part of the funds of the state allocated by the State Board to the Kanawha Board pursuant to Code § 18-9A-12 to be expended for the benefit of the Kanawha Library.

[A0043]. It was the right to this relief that was briefed in the Kanawha Board of Education's motion for summary judgment, [see A0105-0108], and it is exactly this relief the lower court granted, *i.e.*, that Section 18-9A-11 of the Code in combination with the Kanawha Special Act violated equal protection. [See A0019-0025, 0029-0030].

Strangely, the Kanawha Library and State Board of Education continue to assert that the lower court's ruling was overbroad because the Complaint only challenged the state school aid formula in Section 18-9A-11 of the Code and not the Kanawha Special Act. For example, in its brief, the Kanawha Library states, "The sole and proper issue before the Circuit Court was the validity of the state school aid formula, and not the Library's Special Act . . . The School Board's Complaint only challenged the state school aid formula statute which the Legislature revised in 2007 and 2008." [KCPL Brief at p.8; *see also* State Board Brief at p.10].

The Kanawha Library and the State Board of Education are literally ignoring the language of the Complaint and attempting to create an issue "out of whole cloth." The Kanawha Library and the State Board of Education cannot realistically contend the state school aid

formula and the Kanawha Special Act are separate and distinct when, following the Legislature's 2007 amendments, Section 18-9A-11 now specifically references and incorporates the requirements of the Kanawha Special Act.

Moreover, the cases to which the Kanawha Library and the State Board of Education cite have zero application to modern civil practice, as they arose decades prior to the adoption of the modern Rule of Civil Procedure and the Rule 8 notice pleading standard. For example, the Kanawha Library cites to *Blue v. Blue*, 92 W.Va. 574, 116 S.E. 134 (1922), which held that “[w]here a bill contemplates, and the prayer asks for, specific relief, in this case reformation of a deed, the court cannot grant relief inconsistent therewith, under the clause in the prayer for general relief.” *Id* at syl. pt. 2. Although the allegations in the Complaint here were specific enough to satisfy even the heightened pleading standards in effect at the time of *Blue*, Rule 8 long did away with these “technical forms of pleading.”

Lastly, the Kanawha Library makes the novel argument that it was an indispensable party under Rule 19 and because it was not originally named as a defendant, by implication, the Kanawha Board of Education's constitutional challenge must not have involved the Kanawha Special Act. [KCPL Brief at pp.14-15]. This argument fails. There is no authority that, when challenging the constitutionality of a statute, every individual or entity that could possibly have rights under the statute and/or be affected by the decision is an indispensable party. If that were the case, many constitutional challenges, such as those in federal courts to the Patient Protection and Affordable Care Act and its health care mandates, would require joining every member of the public. The Kanawha Library cites to *Pauley v. Gainer*, 177 W.Va. 464, 353 S.E.2d 318 (1986), where the plaintiffs contended that the governor's line-item veto of an appropriation intended to finance salary equity adjustments for school teachers and school

service personnel was improper. The holding of that case was simply that in a constitutional challenge to the governor’s veto authority, the governor is an indispensable party. *See id.* at syl. pt. 2. It is unclear how the Kanawha Library believes this holding somehow supports its argument it was an indispensable party. Moreover, it is important to point out that in making its argument the Kanawha Library fails to appreciate the “other side of the coin.” Upon the filing of the Complaint, the Kanawha Library promptly sought to intervene. In other words, by virtue of the fact that it sought to intervene, it must have been apparent to the Kanawha Library that the Kanawha Special Act was at issue.

Accordingly, the argument that the lower court’s ruling somehow exceeded the scope of relief sought in the Complaint is not supported by the record and should be outright rejected.

**II. THE LOWER COURT PROPERLY HELD THAT THE UNEQUAL TREATMENT OF THE KANAWHA BOARD OF EDUCATION CREATED BY SECTION 18-9A-11 OF THE CODE AND THE KANAWHA SPECIAL ACT VIOLATES EQUAL PROTECTION.**

**A. The Lower Court Properly Held That the Discriminatory Classification Created by Section 18-9A-11 of the Code and the Kanawha Special Act Was Subject to Strict Scrutiny Review.**

It is important to point out that, before the lower court, the parties did not dispute that there was a discriminatory classification against the Kanawha Board of Education within the public education financing system that was subject to strict scrutiny review. The sole issue was whether the unequal treatment of the Kanawha Board of Education was justified by a compelling State interest. For example, in its response to the Kanawha Board of Education’s motion for summary judgment, the Kanawha Library stated, “The *Pauley* case sets the standard for this Court to use in adjudicating the validity of the challenged statute . . . [T]he question to be litigated in this matter is whether the unequal treatment created by the statute as alleged by the

School Board serves some compelling state interest.” [A0216]. However, despite its position before the lower court, the Kanawha Library now appears to contend there is no discriminatory classification against the Kanawha Board of Education. In its brief, the Kanawha Library states, “The Plaintiff in this case, the School Board, was required to prove by facts in evidence that there is a discriminatory classification, contrary to the Legislature’s findings of fact.” [KCPL Brief at p.25].<sup>3</sup>

“[T]he mandatory requirements of ‘a thorough and efficient system of free schools’ . . . make education a fundamental, constitutional right in this State.” Syl. pt. 3, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979). “[A]ny 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.” *Id.* at syl. pt. 4 (emphasis added). “A statute that creates a lack of uniformity in the State’s educational financing system is subject to strict scrutiny and this discrimination will be upheld only if necessary to further a compelling State interest.” Syl. pt. 4, *Kanawha Board I*, 219 W.Va. at 801, 639 S.E.2d at 893 (emphasis added).

In this case, following *Kanawha Board I*, a discriminatory classification in the public education financing system still exists. In amending Section 18-9A-11 of the Code, the Legislature did nothing more than move the discriminatory impact against the Kanawha Board of Education to the newly defined “discretionary retainage,” which is defined as “the amount by which the regular school board levies exceeds the local share.” W.Va. Code § 18-9A-11(f). Apparently, the Legislature felt that once the Kanawha Board of Education had sufficient funds from its regular levy revenues to meet its computed “local share,” it was permissible to then

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<sup>3</sup> This argument concerning “evidence” of a discriminatory classification simply makes no sense. The lack of uniformity and unequal treatment of the Kanawha Board of Education as compared to forty-six other county boards of education is apparent on the face of Section 18-9A-11.

discriminate against the Kanawha Board of Education and the eight other county boards subject to a special act library funding obligation.

However, the Legislature ignored this Court's holdings that "any discriminatory classification" in the public education financing system is subject to strict scrutiny review, syl. pt. 4, *Pauley*, 162 W.Va. at 672, 255 S.E.2d at 859, and that any statute that creates a "lack of uniformity" in the public education financing system is subject to strict scrutiny review. Syl. pt. 4, *Kanawha Board I*, 219 W.Va. at 801, 639 S.E.2d at 893. It does not make it any more permissible to discriminate against the Kanawha Board of Education simply because the library funding obligation is now coming from its "discretionary retainage." Matter of fact, there is nothing "discretionary" about the "discretionary retainage" with respect to the Kanawha Board of Education. It is mandated to use all or a portion of its "discretionary retainage" for the library funding obligation created by the Kanawha Special Act while forty-six other counties could use any such funds how they see fit in the education of their students.

In fact, in amending Section 18-9A-11, the Legislature appears to have done nothing more than put a different label upon the same unconstitutional financing system that was rejected in *Kanawha Board I*. In *Kanawha Board I*, the lower court applied a "rational basis" review and held that the discriminatory treatment against the Kanawha Board of Education was constitutional because Kanawha Board of Education was running a surplus. This surplus was, in part, because the Kanawha Board of Education's regular levy receipts exceeded its computed "local share" due to favorable property tax collections in Kanawha County. [See A0088, 0093-0094]. This was simply another way of saying that "rational basis" review applied because the Kanawha Board of Education had a "discretionary retainage," as that term is now defined. Again, *Kanawha Board I* rejected this logic.

In *Kanawha Board I*, it did not matter how much the Kanawha Board of Education's regular levy receipts exceeded its "local share." It was constitutionally impermissible to discriminate against the Kanawha Board of Education by requiring it to pay over two millions dollars annually for the support of a public library. *See id.* at 807-08, 639 S.E.2d at 899-900 ("Simply put, the more than 2.2 million dollars directed each year to the support of the library is money taken from the support of school children in the classrooms of Kanawha County schools. This, in turn, potentially impinges on a school board's ability to provide a thorough and efficient education to its students."). It does not now make it constitutionally permissible in 2012 to require the Kanawha Board of Education to pay nearly three million dollars simply because the Legislature labeled the same source of funding as "discretionary retainage."

Moreover, giving the Kanawha Board of Education the option of transferring the library funding obligation to its excess levy revenues does not somehow eliminate the discriminatory classification, but only perpetuates it. Unlike forty-six other county boards of education, if not paid out of its regular levy receipts, the Kanawha Board of Education is mandated to transfer a special act library funding obligation to its excess levy revenues. *See* W.Va. Code § 18-9A-11(h).

There is clearly a discriminatory classification against the Kanawha Board of Education that creates a lack of uniformity within the public education financing system. Unlike forty-six other counties, the Kanawha Board of Education is mandated by to either (1) pay a special act library funding obligation from its regular levy receipts or (2) make it a continuing obligation of its excess levy revenues. Accordingly, the lower court properly held that strict scrutiny review applied.

**B. The Lower Court Properly Held That No Compelling State Interest Justified the Unequal Treatment of the Kanawha Board of Education.**

Having determined that strict scrutiny review applies, the only remaining question in the equal protection analysis is whether the State can demonstrate that the unequal treatment of the Kanawha Board of Education was necessary to further a compelling State interest.

If a statute infringes on a fundamental constitutional right, there is a “presumption of unconstitutionality.” *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 694 n.14, 408 S.E.2d 634, 644 n.14 (1991). It is the State’s burden to prove the unequal treatment of the Kanawha Board is justified by a compelling State interest. *See* syl. pt. 4, *Pauley*, 162 W.Va. at 672, 255 S.E.2d at 859 (a discriminatory classification in the educational financing system cannot stand “unless the State can demonstrate some compelling State interest to justify the unequal classification”) (emphasis added). The Kanawha Board of Education does not have the burden of proving that the discriminatory classification against it is not necessary to further a compelling State interest.

In *Kanawha Board I*, this Court, on this very same issue, already held there was no compelling State interest justifying the unequal treatment of the Kanawha Board of Education:

When we apply the strict scrutiny test to the present facts, we can find no compelling reasons that justifies treating those school boards differently that are charged by law with applying a portion of their local share to support a non-school purpose such as a public library. Clearly, the end result of such unequal treatment is that county school boards charged by law with diverting a portion of their local shares to support non-school purposes have less funds from regular tax levies to expend directly on public schools. Simply put, the more than 2.2 million dollars directed each year to the support of the library is money taken from the support of school children in the classrooms of Kanawha County schools. This, in turn, potentially impinges on a school board’s ability to provide a thorough and efficient education to its students.

*Kanawha Board I*, 219 W.Va. at 807-08, 639 S.E.2d at 899-900. The lower court properly held that, just as in *Kanawha Board I*, there was no compelling State interest justifying the unequal treatment of the Kanawha Board of Education.

**C. Whether Public Libraries Are An Aid to Education or Serve a “Legitimate School Purpose” Is Irrelevant to the Equal Protection Analysis.**

Both the State Board of Education and the Kanawha Library argue that the Legislature “overruled” this Court’s holding in *Kanawha Board I* by declaring that public libraries serve a “legitimate school purpose.” W.Va. Code § 18-9A-11(f). For example, in its brief, the State Board of Education states, “The court below failed to appreciate that the Legislature overruled this Court’s ‘non-school purpose’ holding by enacting West Virginia Code § 18-9A-11(f) . . . .” [State Board Brief at p.9; see also KCPL Brief at p.9]. This argument fails for multiple reasons.

**(i) Public libraries are not a “school purpose.”**

The Legislature does not have the prerogative to “overrule” the Supreme Court of Appeals of West Virginia on matters concerning the West Virginia Constitution. It has long been held that the interpretation of the West Virginia Constitution, and the determination of the constitutionality of statutory enactments, is a function of the judiciary. *See, e.g., State v. Rutherford*, 223 W.Va. 1, 3, 672 S.E.2d 137, 139 (2008) (“This Court previously has recognized that the constitutionality of a statute is a question of law . . . .”); *Kanawha County Public Library v. County Court of Kanawha*, 143 W.Va. 385, 391, 102 S.E.2d 712, 716 (1958) (“[T]he principle was long ago established that the determination of whether a legislative act was in conflict with a constitutional provision was a question to be determined by the judicial branch of the government.”). Similarly, it has also been recognized that, in passing upon the constitutionality

of a statute, the judiciary is not bound by legislative declarations or findings. For example, in determining whether a state debt is created in violation Article X, § 4 of the West Virginia Constitution, the Supreme Court of Appeals has stated, “A mere legislative declaration that a state debt is not created by the statute is not conclusive or binding upon a court. Whether a state debt is created by the statute is a judicial question, rather than a legislative question.” *State ex rel. Hall v. Taylor*, 154 W.Va. 659, 674, 178 S.E.2d 48, 57 (1970) (citations omitted), *overruled on other grounds*, *State ex rel. West Virginia Resource Recovery-Solid Waste Disposal Authority v. Gill*, 174 W.Va. 109, 322 S.E.2d 590 (1984).

This Court, particularly where fundamental constitutional rights are involved, is not bound by a one sentence legislative declaration. If the Legislature could “overrule” the judiciary on matters of constitutionality by simply making a bald legislative “finding,” the system of checks and balances that is the basis of state and federal governments alike would be meaningless. *See, e.g., State ex rel. Brotherton v. Blankenship*, 158 W.Va. 390, 402, 214 S.E.2d 467, 477 (1975) (“The system of ‘checks and balances’ provided for in American state and federal constitutions and secured to each branch of government by ‘Separation of Powers’ clauses theoretically and practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch.”); *United States v. Peters*, 9 U.S. 115, 136 (1809) (“If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.”).

The Kanawha Library is not a “school library” maintained by the schools for the primary benefit of school students. It is a public library available for use by the general public. In fact, the Legislature has itself recognized the difference between public libraries and school libraries maintained primarily for school use. *See* W.Va. Code § 10-1-1 (1961) (“The term “public library” as used in this article shall be construed to mean a library maintained wholly or in part by any governing authority from funds derived by taxation and the services of which are free to the public . . . The term shall not, however, include special libraries, such as law, medical or other professional libraries, or school libraries which are maintained primarily for school purposes.”).

School purposes in terms of public education financing include school facilities, textbooks, teacher and staff salaries, student transportation, etc. Public libraries are simply not school purposes with respect to public education financing, which is exactly what this Court said in *Kanawha Board I*. The Legislature cannot subvert the reality of the situation and this Court by merely declaring public libraries are now a school purpose.

No one will dispute public libraries are an aid to education, as are many public facilities. For example, the Clay Center for the Arts & Sciences of West Virginia in Charleston certainly has educational benefits. Many schools from surrounding counties take field trips to the Clay Center. However, this does not mean the Legislature can openly discriminate and require the Kanawha Board of Education to fund a public facility such as the Clay Center merely because it can serve educational purposes for both students and the general public.

- (ii) **Even assuming, *arguendo*, public libraries can serve a “legitimate school purpose,” it does not change the fact that there is an unconstitutional public education financing scheme.**

“Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner.” Syl. pt. 2, *Israel by Israel v. West Virginia Secondary Schools Activities Comm'n*, 182 W.Va. 454, 388 S.E.2d 480 (1989); *see also Kyriazis v. University of West Virginia*, 192 W.Va. 60, 67, 50 S.E.2d 649, 656 (1994) (“[E]qual protection means the State cannot treat similarly situated people differently unless circumstances justify the disparate treatment.”). What is relevant to the equal protection analysis is whether there is a compelling State interest to justify the unequal classification. *See* syl. pt. 4, *Pauley*, 162 W.Va. at 672, 255 S.E.2d at 859 (“[A]ny 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.”) (emphasis added). Thus, the issue is not whether public libraries can serve a legitimate school purpose, but whether there is a compelling State interest to justify the unequal treatment of the Kanawha Board of Education as compared to forty-six other county boards of education. .

Take the following example. The Legislature enacts a statute mandating that nine counties had to spend eighty-five percent of their budgets on the purchase of textbooks. Undoubtedly, the purchase of textbooks is a legitimate school purpose. Nonetheless, there would be a lack of uniformity in the public financing system and there would have to be a compelling State interest justifying the unequal treatment of the nine county boards of education as compared to the other forty-six. Otherwise, the Legislature could impose different financing and spending standards on each of the fifty-five counties and this would be permissible as long as the expenditures were for a “legitimate school purpose.”

Likewise, even if one assumes public libraries serve a compelling State interest, the analysis is the same. For example, police and fire protection is undoubtedly a compelling State interest in every county. However, if the Legislature passed a law requiring the Kanawha Board of Education to fund Kanawha County's fire and police protection, would this satisfy equal protection? No, because the issue would be not whether police and fire protection is important, but whether there was a compelling State interest requiring the Kanawha Board to do so and not any other county board of education.

Here, taking the Legislature's finding on its face, the Legislature recognized that to the extent public schools recognize and avail the resources of public libraries, such libraries can serve legitimate school purposes in every county. However, despite this declaration, the Legislature did not act by general law. The Legislature does not mandate all fifty-five counties to divert funding to the support of public libraries. The Legislature only singles out nine. Thus, unlike forty-six other counties, the Kanawha Board of Education has to divert over \$2.8 million annually to give its students the privilege of "availing" themselves of a public library. There is no compelling State interest for this unequal treatment. This was the precise holding of *Kanawha Board I*.

Indeed, the State Board of Education and the Kanawha Library are doing nothing more than advancing the same arguments this Court already rejected in *Kanawha Board I*. There, arguments were made concerning the various benefits public libraries serve. The lower court in *Kanawha Board I* had found that libraries were an aid to education. *Id.* at 806, 639 S.E.2d at 898. Justice Albright, in his dissenting opinion, stated:

There is simply no end to the benefits that a public library offers to the citizens of this state, initially extended at the pre-school level, continuing through the school years, and enduring throughout adulthood. Without question, the public library enhances every

community in which it is situated through services that are both cultural and educational in nature.

*Kanawha Board I*, 219 W.Va. at 809, 639 S.E.2d at 901 (Albright, J., dissenting). Justice Starcher argued, “[S]ince public libraries are an integral part of any sound educational system providing educational monies for their support is educationally sound.” *Id.* at 810, 639 S.E.2d at 902 (Starcher, J., dissenting). In the end, however, as Justice Davis pointed out in her concurring opinion, the issue was whether there was a compelling reason to justify mandating the Kanawha Board of Education to divert its funds to a public library when no such requirement was imposed on forty-six other county boards of education. *See id.* at 811, 639 S.E.2d at 903 (“Applying the test enunciated by this Court nearly thirty years ago in *Pauley*, the majority determined that, in the absence of a compelling reason for this differentiation in funding, the schoolchildren of these nine counties should be receiving the same educational opportunities as those enjoyed by the schoolchildren in the State’s other forty-six counties.”) (Davis, J., concurring).

**D. Giving the Kanawha Board of Education the Option of Transferring Its Library Funding Obligation to Its Excess Levy Revenues Does Not Cure, But Only Perpetuates, the Equal Protection Violation.**

Before the lower Court, in its three-page response brief to the Kanawha Board of Education’s motion for summary judgment, the State itself did not even attempt to identify a compelling State interest that would justify the unequal treatment of the Kanawha Board of Education. [See A0262-0265]. In an apparent concession that requiring the Kanawha Board to pay its library funding obligation out of its regular levy revenues violated equal protection, the State’s sole argument was that this constitutional infirmity was cured by the fact that the Kanawha Board of Education could transfer its library funding obligation to its excess levy revenues. [See *id.*]. This, however, is not a cure. It is nothing more than allowing the Kanawha Board to choose an alternative violation of it and its students’ equal protection rights.

Pursuant to Section 18-9A-11 of Code, the Kanawha Board of Education is mandated to either (1) pay the special act library obligation out of the “discretionary retainage” of its regular levy receipts or (2) make the library funding obligation a continuing obligation of its excess levy revenues. *See* W.Va. Code § 18-9A-11(h). Thus, unlike the other forty-six county boards of education, the Kanawha Board of Education does not have the discretion, if it so chooses, to raise all of its excess levy funds for school purposes such as technology, salary supplements, or facility upgrades. Unlike the other forty-six county boards of education, the Kanawha Board of Education is forced to choose between funding its mandated library obligation out of its regular levy revenues, or to transfer it to its excess levy revenues and risk the excess levy being defeated in its entirety. Even then, if defeated, the Kanawha Board of Education is still mandated to include the library funding obligation on any subsequent excess levies. In addition to violating equal protection, as set forth in Part IV below, the Legislature’s mandates upon the Kanawha Board of Education’s excess levy exceed the Legislature’s powers granted under Article X, § 1b of the West Virginia Constitution.

In response, the State Board of Education and the Kanawha Library cite *State ex rel. Board of Education of the County of Upshur, et al. v. Chafin*, 180 W.Va. 219, 376 S.E.2d 113 (1988) for the proposition that excess levies are not subject to equal protection principals. Specifically, the State Board of Education and the Kanawha Library argue that *Chafin* prevents the Kanawha Board of Education from challenging the requirement of Section 18-9A-11 that, if not paid out of its discretionary retainage, the Kanawha Board of Education must transfer the library funding obligation to its excess levy revenues. The State Board of Education and the Kanawha Library misconstrue the holding of *Chafin*, which has no application to the issue presented here.

*Chafin* involved an equal protection challenge to excess levies on the ground that they created an inequality of educational funding between those counties that had an excess levy in effect as compared to those that did not. In other words, the challenge was that county excess levies, by their very existence, violated equal protection. The Court held that because the West Virginia Constitution expressly provided for and contemplated county excess levies, the funding inequality created by counties having excess levy revenues as compared to others that did not was not subject to equal protection challenges. *See id.* at syl. pt. 3.

Clearly, *Chafin* stands for the proposition that the disparity in educational funding excess levies create between counties is not subject to an equal protection challenge. However, *Chafin* does not stand for the proposition, as the State Board of Education and Kanawha Library contend, that the Legislature may discriminate against a county board of education with respect to the content of its excess levy by requiring it to place a library funding obligation on its excess levy when no such requirement is placed upon forty-six other county boards of education.

Indeed, it was actually *Pauley*, not *Chafin*, that first recognized county excess levies were not subject to equal protection challenges due to the educational funding inequality they create between counties. *See Pauley*, 162 W.Va. at 711, 255 S.E.2d at 880. The reason *Pauley* held this was that excess levies represented the local prerogative of voters for additional taxes to provide additional educational advantages. The element of legislative involvement, or “state action,” was lacking:

The violation of the equal protection standard usually arises from state action; that is, the act of a legislative body in setting, by some statute or ordinance, an arbitrary classification. *Woodring v. Whyte*, W.Va., 242 S.E.2d 238 (1978); *O’Neil v. City of Parkersburg*, W.Va., 237 S.E.2d 504 (1977); *State ex rel. City of Charleston v. Coghill*, W.Va., 207 S.E.2d 113 (1973); *Chesapeake & Potomac Telephone Co. v. City of*

*Morgantown*, 143 W.Va. 800, 105 S.E.2d 260 (1958). Here, these excess levies are determined by the vote of the people.

*Id.* at 712, 255 S.E.2d at 880 (emphasis added). Here, this is not an equal protection challenge based upon the disparity in funding created by the very existence of excess levies. Unlike in *Pauley* and *Chafin* where the element of “state action” was lacking, this is a case where the Legislature has imposed express statutory mandates upon the excess levies of nine county boards of education with no such requirement upon the remaining forty-six. Such discriminatory classifications are subject to and must comply with equal protection. Otherwise, under the State Board of Education and the Kanawha Library’s argument, the Legislature could dictate the specific public education requirements of each of the fifty-five counties’ excess levies with impunity because its actions would be insulated from equal protection challenges.

**E. The Lower Court Did Not “Overrule” the Kanawha Special Act.**

The State Board of Education and the Kanawha Library argue that the lower court “overruled” the Kanawha Special Act and was inconsistent with *Kanawha County Public Library Board v. County Court of Kanawha County*, 143 W.Va. 385 (1958). [See State Board Brief at p.10 (“[T]he court below overruled the Kanawha Special Act . . .”).] This is simply not the case.

First, even the State admits that *Kanawha Board I* “may be said to have brought the constitutionality of the Kanawha Special Act into some question . . .” [State Board Brief at p.10]. Nonetheless, the lower court still did not “overrule” the Kanawha Special Act. The Kanawha Special Act places a library funding obligation upon the City of Charleston, the Kanawha County Commission, and the Kanawha Board of Education. The lower court’s ruling, by its express terms, was limited to the unconstitutional classification against the Kanawha Board of Education created by Section 18-9A-11 of the Code in combination with the Kanawha

Special Act. The lower court's ruling in no way affected the Kanawha Special Act's library funding obligations as applied to the City of Charleston or the Kanawha County Commission.<sup>4</sup>

Second, the lower court's ruling is not at odds with *Kanawha County Public Library Board v. County Court of Kanawha County*, 143 W.Va. 385, 102 S.E.2d 712 (1958). The 1958 case presented an entirely different constitutional question. In that case, what is now known as the Kanawha County Commission challenged the Kanawha Special Act on the ground that it constituted special legislation in violation of Section 39, Article VI of the West Virginia Constitution. The 1958 case was not an equal protection challenge and the Kanawha Board of Education was not a party. In fact, it was not until twenty years later in *Pauley* that this Court held education to be a fundamental constitutional right under the West Virginia Constitution. The State Board of Education and the Kanawha Library are simply attempting to compare apples and oranges.

### **III. THE LOWER COURT CORRECTLY HELD THE KANAWHA BOARD OF EDUCATION HAS STANDING TO MAKE AN EQUAL PROTECTION CHALLENGE UNDER THE WEST VIRGINIA CONSTITUTION.**

Our basic law makes education's funding second in priority only to payment of the State debt, and ahead of every other State function. Our Constitution manifests, throughout, the people's clear mandate to the Legislature, that public education is a Prime function of our State government. We must not allow that command to be unheeded.

*Pauley*, 162 W.Va. at 719, 255 S.E.2d at 884. The above quote from *Pauley* perhaps best embodies the role and importance of public education in West Virginia. The holding of *Pauley* has been consistently reaffirmed throughout the years, leaving no doubt that the right to an education is a fundamental right of the highest order under the West Virginia Constitution. *See*,

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<sup>4</sup> Section 9 of the Kanawha Special Act contains a severability clause, which states, "If any provision hereof is held invalid, such invalidity shall not affect other provisions hereof which can be given effect without the invalid provision . . . ." Chapter 178, Acts of the Legislature, Regular Session, 1957.

e.g., *West Virginia Educ. Ass'n v. Legislature of the State of West Virginia*, 179 W.Va. 381, 382 (1988) (“Indeed, in this commonwealth, education is an essential constitutional right. The financing of education is, among mandated public services, the first constitutional priority.”). Likewise, since *Pauley*, the fundamental right to an education of West Virginia children has been protected under the equal protection rights afforded by Article III, § 10 of the West Virginia Constitution. *See* syl. pt. 4, *Pauley*, 162 W.Va. at 672, 255 S.E.2d at 859.

The Kanawha Library would now have this Court reverse the course of *Pauley* and its progeny and find that the Kanawha Board of Education has no standing to pursue an equal protection claim under the West Virginia Constitution. Importantly, the State itself has never contended the Kanawha Board of Education lacks standing to make an equal protection challenge. This meritless argument is solely the creation of the Kanawha Library.

**A. The Kanawha Board of Education Has Standing In Its Own Right to Make Equal Protection Challenges Under the West Virginia Constitution.**

In support of its argument that the Kanawha Board of Education lacks standing, the Kanawha Library states, “A review of the reported West Virginia cases involving equal protection claims for the violation of the fundamental right to an education shows that claims are properly filed by aggrieved individuals who are persons.” [KCPL Brief at p.29]. This is flat wrong.

This Court has consistently allowed county boards of education to make equal protection challenges under the West Virginia Constitution. In *State ex rel. Board of Education for the County of Grant v. Manchin*, 179 W.Va. 235, 366 S.E.2d 743 (1988), the Board of Education of Grant County and the Board of Education of Ritchie County made an equal protection challenge to the State funding formula for teacher and service personnel salaries. Specifically, Grant County and Ritchie County both had excess levies in effect. However, voters

failed to renew the excess levies in those counties. The State funding formula did not take into account the failure of the excess levies which resulted in less monies available to Grant County and Ritchie County for supplemental salary payments. This Court agreed with the county boards of education and held that the funding formula violated equal protection. *Id.* at 241-42, 366 S.E.2d at 749-50. In *State ex rel. Board of Education for the County of Randolph v. Bailey*, 192 W.Va. 534, 453 S.E.2d 368 (1994), the Board of Education of Randolph County and the Board of Education of Upshur County, similar to *Manchin*, made an equal protection challenge to the State funding formula for teacher and service personnel salaries. The Supreme Court of Appeals once again agreed with the county boards of education and held that the funding formula violated equal protection. *Id.* at 536, 453 S.E.2d at 370. Lastly, in *Kanawha Board I*, the Kanawha Board of Education successfully prosecuted an equal protection challenge on the practically identical issue presented in this litigation, *i.e.*, its library funding obligation to the Kanawha Library. *See Kanawha Board I*, 219 W.Va. at 801, 639 S.E.2d at 893. At no time in any of the above cases did the Supreme Court of Appeals indicate that county boards of education had no standing to make equal protection challenges with respect to the fundamental right of education under the West Virginia Constitution.

The Kanawha Library tries to ignore the fact that this Court has allowed for county boards of education to make equal protection challenges by arguing that, in those cases, standing was not raised by the parties or otherwise addressed by the Court. This is, again, incorrect. This Court has been clear that standing is a requirement of subject matter jurisdiction and appellate courts have not only the authority, but the duty, to raise a lack of standing, even if the issue was not raised in the trial court. *See, e.g., State ex rel. Abraham Linc Corp. v. Bedell*, 216 W.Va. 99, 111, 602 S.E.2d 542, 554 (2004) (Davis, J., concurring) (“The decisions of this

Court and other jurisdictions have pointed out that an appellate court has the inherent authority and duty to *sua sponte* address the issue of standing, even when the parties have failed to raise the issue at the trial court level or during a proceeding before the appellate court.”). In other words, issues of standing are always before the Court. Had this Court believed that local school boards had no standing to make an equal protection challenge under the West Virginia Constitution, it would have so held in the above-cited cases as it had a duty to do so.

It is important to point out that the West Virginia Constitution places a higher constitutional importance upon education than does the United States Constitution. Unlike in West Virginia, education is not a fundamental right under the federal constitution and, thus, not subject to strict scrutiny analysis. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 37-38 (1973). Nonetheless, local school boards have still been held to have standing to pursue equal protection claims under the United States Constitution. In *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), a statewide initiative, Initiative 350, was passed in Washington to terminate the use of mandatory busing for purposes of racial integration in the public schools. Three local school district sued the State of Washington, alleging that Initiative 350 violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 464. The Supreme Court agreed with the local school districts and held that Initiative 350 was in violation of the Fourteenth Amendment. In *In re Real Estate Title and Settlement Serv. Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), the Third Circuit specifically held that local boards of education are “persons” within the meaning of due process and equal protection and, therefore, have standing to pursue such claims. *Id.* at 756 n.3 (“[W]e believe that the school boards are persons within the meaning of the Fifth Amendment due process clause. Although they may derive their funding from the state, we think that the school districts, whom the school boards

represent, are more like private corporations-which can be persons under the due process clause- than like states.”).<sup>5</sup> In *Board of Natural Resources of the State of Washington v. Brown*, 992 F.2d 937 (9th Cir. 1993), the Ninth Circuit also specifically held that local boards have standing to pursue equal protection claims. *Id.* at 943 (“[W]e hold that school districts are persons under the Fifth Amendment. Because the Boards have standing to raise an equal protection challenge on behalf of the school districts, we need not consider whether [other defendants] also have standing to raise this argument.”).

Accepting the Kanawha Library’s argument would mean local board of education could not make an equal protection challenge under the West Virginia Constitution, where education is a fundamental right of the highest constitutional priority, but could make an equal protection challenged under the United States Constitution, where education is not a fundamental right. The fallacy of this result is readily apparent.

**B. Even Assuming, *Arguendo*, the Kanawha Board of Education Does Not Having Standing In Its Own Right, the Kanawha Board of Education Has Standing to Pursue An Equal Protection Violation On Behalf of the Students of Kanawha County Schools.**

Not only does the Kanawha Library ignore clear case law recognizing that a local board of education does have standing to pursue an equal protection claim, the Kanawha Library completely ignores case law recognizing a board of education has standing to pursue equal protection challenges on behalf of its students. In *School Board of The City of Richmond, Virginia v. Baliles*, 829 F.2d 1308, 1310 (4th Cir. 1987), the Fourth Circuit held that the school board not only had standing in its own right, *id.* at 1311, but also on behalf of its adversely affected students. *Id.* at 1310-11. In *Akron Bd. of Educ. v. State Bd. of Educ. of Ohio*, 490 F.2d 1285 (6th Cir. 1974), the Sixth Circuit held that a board of education had standing to pursue an

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<sup>5</sup> “Persons” under the equal protection analysis for the Fifth Amendment are the same as that under the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

equal protection claim on behalf of its students given the close relationship between the board and the students it represents. *See id.* at 1289 (“Where, however, there is a close relationship between the plaintiffs who seek to bring an action and the class of persons whose constitutional rights are claimed to be violated, standing to sue has frequently been found.”).

Whether on its own behalf directly, or on behalf of its students, the Kanawha Board of Education clearly has standing to pursue an equal protection challenge under the West Virginia Constitution and to rectify the unequal treatment of Kanawha County students. Any holding otherwise would severely undercut the policy of *Pauley* and its progeny in protecting the fundamental right of education. The public education financing system is complex and when unequal treatment within this system arises, it may not be readily apparent to ordinary students and parents. It is county boards of education that are in the best position to know when there is unequal treatment and to protect their respective students’ rights in response. To not allow county boards of education to make equal protection challenges would lead to a significantly less likelihood that unequal treatment in the public education financing system would ever be addressed.

**IV. THE LOWER COURT CORRECTLY HELD THAT SECTION 18-9A-11 OF THE CODE CONSTITUTES AN UNCONSTITUTIONAL INTERFERENCE WITH THE KANAWHA BOARD OF EDUCATION’S EXCESS LEVY POWERS.**

Article X, § 10 of the West Virginia Constitution provides for local school districts, such as the Kanawha Board, to seek excess levy tax revenues over and above the regular school levy revenues. Article X, § 1b, Subsection E, titled “Levies for Free Schools,” was later added to the West Virginia Constitution in 1982. It empowers the Legislature to enact a statewide excess levy to supersede and replace local school district excess levies. It provides:

Within the limits of the maximum levies permitted for excess levies for schools or better schools in sections one and ten of this

article, the Legislature may, in lieu of the exercise of such powers by the local school districts as heretofore provided, submit to the voters, by general law, a statewide excess levy, and if it be approved by the required number of voters, impose such levy, subject however to all the limitations and requirements for the approval of such levies as in the case of a district levy . . . The Legislature may also by general law reserve to the school districts such portions of the power to lay authorized excess levies as it may deem appropriate to enable local school districts to provide educational services which are not required to be furnished or supported by the state.

W.Va. Const. art. X, § 1b (emphasis added).

The above language is clear and unambiguous. The Legislature may submit to the voters, by general law, a statewide excess levy that is to be in lieu of the powers of the local school district. The Legislature may also, by general law, reserve to the local school districts the power to lay authorized excess levies as the Legislature may deem appropriate.<sup>6</sup> However, the Legislature has no authority to mandate the specific content of the excess levy of specific school districts, such as the Kanawha Board of Education. The West Virginia Constitution does not give the Legislature the power to intrude into this area of public school finance.

The State Board of Education and the Kanawha Library, of course, disagree. They argue the Legislature has plenary authority to control, on a county-by-county basis, the specific content of each excess levy. This, again, only highlights the overall absurdity of their argument. In effect, the State Board of Education and the Kanawha Library argue there are absolutely no constitutional checks whatsoever upon the Legislature's prerogatives with respect to county excess levies. The Legislature is not bound by equal protection. The Legislature is not

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<sup>6</sup> Section 10-1-2 of the Code is an example of the Legislature, by general law, reserving to the school district the powers to lay authorized excess levies. Section 10-2-1 provides that a public library "may be financed . . . by the imposition of an excess levy for library purposes, in accordance with the provisions of section sixteen, article eight, chapter eleven of this code." W.Va. Code § 10-1-2. The Legislature does not have the power to mandate the specific content of a specific county board of education's excess levy.

bound by Article X. The Legislature can simply do whatever it wants whenever it wants and everyone apparently just has to “live with it.”

**V. THE KANAWHA LIBRARY HAD ADEQUATE TIME AND OPPORTUNITY TO CONDUCT ANY NECESSARY DISCOVERY.**

As it concedes in its brief, the State itself did not assert the need to do any discovery before the lower court. [State Board Brief at p.22 n.8]. The Kanawha Library, however, contends summary judgment was premature because there was necessary discovery to be conducted. This argument is unavailing for many reasons.

First, discovery was unnecessary as this issue before the lower court presented a pure question of law that this Court had already decided in *Kanawha Board I*. The sole issue presented in this case was whether the Legislature’s amendments corrected the constitutional deficiency identified in *Kanawha Board I*, a determination that can be made by looking at the face of Section 18-9A-11 of the Code. In fact, in a proposed order submitted to the lower court, the Kanawha Library referred to this action as a mere continuance of *Kanawha Board I*:

The present civil action is essentially the second round and a continuance of the litigation commenced in 2003 by the [Kanawha Board of Education] . . . concerning the state school aid financing system as it relates to the library funding obligation owed to the [Kanawha Library] under its special act of the West Virginia Legislature passed in 1957.

[KCPL Proposed Memorandum Opinion and Order at p.1].

Second, the Kanawha Library did not follow the proper procedures under Rule 56 of the West Virginia Rules of Civil Procedure, as it did not tender an affidavit pursuant to Rule 56(f) that additional discovery was necessary. See *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 702, 474 S.E.2d 872, 882 (1996) (“We, like the Fourth Circuit, place great weight on the Rule 56(f) affidavit, believing that [a] party may not simply assert in its

brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in the affidavit.”) (internal quotations and citation omitted). Not only did the Kanawha Library not tender a Rule 56(f) affidavit, it did not in any manner identify in writing the specific facts it believed discovery would reveal that would have somehow changed the result reached in *Kanawha Board I*. In *Powderidge*, this Court held:

An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified “discoverable” material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

*Id.* at syl. pt. 1. The Kanawha Library did nothing more than assert in conclusory, bald fashion that unspecified “discovery” was necessary. *See id.* at 702, 474 S.E.2d at 882 (“a party may not simply assert in its brief that discovery was necessary”).

Third, the Kanawha Library had more than ample time to conduct any discovery it felt necessary. “The party seeking a continuance must show due diligence both in pursuing discovery before the summary judgment initiative surfaced and in pursuing an extension of time thereafter.” *Cleckley, et al., Litigation Handbook on West Virginia Rules of Civil Procedure* at 1144-45 (3d ed. 2008). Here, the Kanawha Library became a party in March 2009, a year and a

half prior to the hearing on the Kanawha Board of Education's motion for summary judgment and two and a half years prior to the granting of summary judgment. The Kanawha Board of Education filed its motion for summary judgment in November 2009, nine months prior to the hearing and twenty-one months prior to the granting of summary judgment. During this entire time, the Kanawha Library was free to conduct any discovery it felt necessary. It did nothing. *See, e.g., Crain v. Lightner*, 178 W.Va. 765, 771, 364 S.E.2d 778, 784 (1987) ("These facts disclose that the appellant may have had about ten months (from the May, 1983 order dismissing the media defendants to the March, 1984 order granting the appellees' summary judgment motion) to conduct discovery in order to develop his case against the appellees. This would appear to be adequate time for discovery to resist a motion for summary judgment.").

Lastly, the Kanawha Library's purported purpose for needing discovery was to prove that public libraries serve a compelling State interest. However, as previously stated, this was not the relevant issue, but whether a compelling State interest justifies the unequal treatment of the Kanawha Board of Education. Moreover, the amendments to Section 18-9A-11 were passed in 2007. If there was a compelling State interest for the unequal treatment of the Kanawha Board of Education, it should have existed at that time. The Legislature does not get to pass legislation infringing upon a fundamental constitutional right and then afterward try to "discover" a compelling State interest to support it.

Moreover, the Kanawha Library's own actions and the briefing in this matter make it abundantly clear that the information the Kanawha Library claimed it needed to "discover" was in its own possession or readily available as a matter of public record all along. For example, following the granting of summary judgment, the Kanawha Library filed a Rule 59(e) motion. Attached to that motion was a verification of Alan Engelbert, the Director of the

Kanawha Library, verifying various facts and statistics concerning the operations of the Kanawha Library. [A0326-0327, 0351]. The lower court correctly struck Mr. Engelbert's verification as an improper attempt to supplement the record following summary judgment. [A0032]. Nonetheless, the point is this was information the Kanawha Library had concerning its own operations. It did not need to "discover" this from the Kanawha Board of Education.

**VI. IF THIS COURT AFFIRMS THE LOWER COURT, THE UNEQUAL TREATMENT OF THE KANAWHA BOARD OF EDUCATION SHOULD BE IMMEDIATELY ENJOINED.**

Since 2003, the Kanawha Board of Education has sought to correct the unequal treatment against it and, through it, the students of Kanawha County schools. In the nine years following, over twenty million dollars have gone from the classrooms to the Kanawha Library under this unconstitutional system. The primary reason: the Legislature's failure to follow this Court's guidance.

In *Kanawha Board I*, this Court stayed the effect of its ruling to allow the Legislature time to amend the applicable statutes as provided in the opinion. However, the Legislature did not listen. Of course, this case does not present the first time the Legislature has failed to do so. In *State ex rel. Board of Education for the County of Grant*, 179 W.Va. at 241, 366 S.E.2d at 749, this Court held this was unconstitutional because such a financing system operated to treat counties which never passed excess levies more favorably than those which had excess levies in effect on January 1, 1984, but failed to renew them. This Court then stayed the effect of the ruling to permit the Legislature to correct the constitutional infirmity. *Id.* at 242, 366 S.E.2d at 750. However, the Legislature's amendment still operated to adversely treat counties that failed to renew their excess levies for a period of one fiscal year. As a result, the Randolph County Board of Education was denied a single year of state equity funding for salary supplementation totaling just over \$450,000. In *State ex. rel. Board of Education for the County*

of *Randolph*, 192 W.Va. at 540, 453 S.E.2d at 374, this Court held that the Legislature did not get it right, and an unconstitutional public financing system cannot stand, even if only for a single year. Importantly, having already given the Legislature a chance to properly rectify the unequal treatment and it failing to do so, the Court did not stay the effect of its ruling once again. It simply declared the act unconstitutional and void.

Here, the Legislature already had its chance to fix the problem and it failed. As a result, if affirmed, the Kanawha Board of Education would respectfully request that the enforcement of Section 18-9A-11 and the Kanawha Special Act be immediately enjoined.

### CONCLUSION

For the above reasons, Respondent respectfully requests that the Court affirm the lower court's granting of summary judgment in its favor.

**Respectfully submitted,**

**THE BOARD OF EDUCATION OF THE  
COUNTY OF KANAWHA**

**By Counsel**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos. 11-1224 and 11-1486

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

Petitioners,

v.

(Circuit Court of Kanawha County  
Civil Action No. 08-C-2020)

THE BOARD OF EDUCATION OF  
THE COUNTY OF KANAWHA,  
a public corporation,

Respondent.

**CERTIFICATE OF SERVICE**

I, Jonathan L. Anderson, do hereby certify that I have served the foregoing *Brief of Respondent the Board of Education of the County of Kanawha* upon counsel of record this the 13<sup>th</sup> day of February, 2012, by mailing a true and exact copy thereof via first class United States Mail, postage prepaid, in an envelope addressed as follows:

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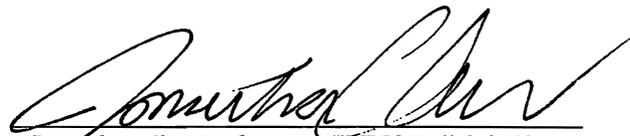
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