IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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THE BOARD OF EDUCATION OF THE
COUNTY OF CABELL, WEST VIRGINIA

Respondent below, Petitioner,

v.

Appeal No.: 23-691

THE CABELL COUNTY PUBLIC LIBRARY
and THE GREATER HUNTINGTON PARK
AND RECREATION DISTRICT,

Petitioners below, Respondents,

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

A. The Circuit Court erred by giving effect to the Cabell Special Acts because the legislation is unconstitutional under Equal Protection.

B. The Circuit Court erred by compelling "equalization checks" because the Cabell voters authorized Petitioner to spend these funds on Cabell County schools rather than parks and libraries.

II. STATEMENT OF THE CASE

A. Introduction

The West Virginia Constitution charges Petitioner, the Board of Education of the County of Cabell ("Petitioner" or the "Cabell BOE"), with providing a thorough and efficient education to its students—even in times of inflation, decreased enrollment, and cessation of emergency federal funding. According to forty (40) years of precedent from this Court, acts of the Legislature creating disparate treatment in school funding are subject to strict scrutiny under Equal Protection. Twice in recent years, this Court has found that special legislation targeting a school board and compelling it to include library funding in its general or excess levy violates Equal Protection guarantees. *See Bd. of Educ. of the Cnty. of Kanawha v. West Virginia Bd. of Educ.*, 219 W. Va. 801, 639 S.E.2d 893 (2006) ("*Board I*"); *Kanawha County Public Library Bd. v. Bd. of Educ. of Cnty. of Kanawha*, 231 W. Va. 386, 745 S.E.2d 424 (2013) ("*Board II*").

The Circuit Court erred by granting mandamus relief under the color of materially identical special legislation compelling Petitioner to do the same thing. Focusing on Cabell County's omission from a footnote in *Board II*, the Circuit Court found the Cabell Special Acts to be categorically immune from Equal Protection scrutiny. Independently, the Circuit Court ordered the Cabell BOE to issue "equalization checks" above and beyond the annual line-item amounts due to the Library and Park District under the existing excess levy order—despite express authorization in the order for the Cabell BOE to spend the surplus on schools.

Ultimately, the Circuit Court's decision defies this Court's prior syllabus points, holdings, and mandates and the express will of Cabell voters. The Cabell BOE does not oppose funding for libraries and parks, but students come first. The Cabell BOE requests that the Circuit Court's extraordinary writ be reversed and vacated.

B. Relevant History of Library Special Acts and Library Special Act Litigation

The Legislature has enacted a series of special acts creating libraries, parks, and other local institutions in communities across West Virginia (generally, "Special Acts"). But the Legislature has not created a uniform state-wide source of funding for these institutions. Instead, the Special Acts use a medley of different mechanisms to fund these local services. Pertinent here, some Special Acts require individual county boards of education to divert their general or excess levy receipts to contribute funding. Specifically, at one point or another, all of the following counties had Special Acts directing that local libraries be funded by their respective boards of education via the general or excess levy receipts: Berkeley, Cabell, Hardy, Harrison, Lincoln, Kanawha, Ohio, Raleigh, Tyler, Upshur, and Wood.

At the same time, "education in this state is dependent . . . upon an economic base which ensures levels of revenue sufficient to fund the public schools." W. Va. Code § 18-9A-1. A basic constitutional guarantee to county boards of education is that the Legislature will not draw discriminatory classifications with respect to education funding. The Legislature has, therefore, established a statutorily designated formula for baseline funds. *See* W. Va. Code § 18-9A-1, *et seq.* (commonly referred to as the "State school funding formula").[1] The State school funding

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[1] The WVSCA described the State school funding formula 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 . . . . 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 . . . . State

formula calculates state and local shares, in part, based on a county school board's general levy amount.

The State school funding formula, though, does not account for the fact that some, but not all, county BOEs' general levy receipts—which play into the local share computations—were mandatorily diverted to libraries and other purposes. So, the Special Acts, in combination with an indiscriminatory State school funding formula, placed certain school boards at a disadvantage. Nine of the eleven Special Act county boards of education were, at the time, impacted by this particular nuance with local shares: Berkeley, Hardy, Harrison, Kanawha, Ohio, Raleigh, Tyler, Upshur, and Wood. The other two—Cabell and Lincoln—were not impacted by this specific disparity because their Special Acts required that their libraries be funded through excess levy receipts which do not play a role in the computation of local or state shares.

In 2006, the Kanawha BOE—one of the general levy/local share boards of education—launched a successful Equal Protection challenge to this scheme. *See Board I*, 219 W. Va. 801, 639 S.E.2d 893. This Court noted that the scheme treats Special Act "school boards differently" by "diverting a portion of their local shares to support non-school purposes," which, "in turn, potentially impinges on a school board's ability to provide a thorough and efficient education to its students." *Id.* at 807-808, 899-900. Thus, this Court held that the State school funding formula "violates equal protection principles because it operates to treat [Special Act school boards] less favorably than county school boards with no such requirement." *Id.* at 808, 900. This Court concluded by noting its "belie[f] that the Legislature must take corrective action by amending the applicable statutes as provided in this opinion." *Id.*

> 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 Educ. v. Chafin, 180 W. Va. 219, 221-22, 376 S.E.2d 113, 115-16 (1988) (internal citations omitted).

But the Legislature chose *not* to enact a uniform library funding scheme. Instead, the 2008 Legislature construed *Board I* to focus on the prejudice suffered to an affected school boards' local share—which, as explained, is impacted only by general levies. *See* W. Va. Code § 18-9A-11. According to the 2008 Legislature, so long as the library funding obligation does not impact the school board's local share, *Board I* would not apply. Under this view, only nine of the eleven Special Acts were in jeopardy. But Cabell and Lincoln—which impose library funding on the excess levies—were already safe. So, the 2008 Legislature amended the local shares statute, W. Va. Code § 18-9A-11 (amended 2008), to identify the other nine Special Act counties and to transfer the library funding obligation away from their general levies. Specifically, the Legislature transferred the funding obligation to their (i) "discretionary retainage" (i.e., surplus collections under the general levy) or (ii) excess levy. Again, the impetus for the Legislature's 2008 amendment was the belief that transferring library funding to surplus/excess collections would cure the disparate treatment of local shares found in *Board I*.

The Kanawha BOE immediately challenged this amended legislation, arguing that "moving the obligation to the excess levy was [still] unequal treatment since no other counties must do so and are free to maximize their excess levy revenues for school purposes." *Board II*, 231 W. Va. at 394, 745 S.E.2d at 432. The Kanawha BOE was, for a second time, successful. This Court again struck the amended legislation *and* the Kanawha Special Act as violative of Equal Protection guarantees. *See Board II*, 231 W. Va. 386, 745 S.E.2d 424. This Court cut to the chase:

> [T]he fact that the Kanawha County BOE is being treated differently than forty-six other counties by virtue of its mandatory library funding obligation is fairly manifest . . . . The non-Special Act counties are not set with the Hobson's choice of choosing to deplete their discretionary retainage to satisfy the library funding obligation or risking the failure of their excess levy and the

> educational 'extras' it affords by placing a large library funding line item on the ballot.

231 W. Va. at 404, 745 S.E.2d at 442. The fact that the amended legislation targeted *excess* levies rather than *general* levies was of no consequence. This Court held that "transferring the obligation to the excess levy does nothing to alleviate the disparate treatment." *Id.* An obligation on an excess levy forces an affected board of education to "risk[] the failure of the excess levy and the educational 'extras' it affords," while non-Special Act BOEs were not. *Id.* This Court emphasized that the risk of failure for an excess levy is not merely a "political problem," but one of constitutional import: "making critical excess levy funds the potential 'sacrificial lamb' only further illustrates the disparate treatment between [Special Act] and non-Special Act counties." *Id.* at n.23.

Consequently, this Court found that the amended legislation "continue[d] to treat [Special Act BOEs] less favorably . . . than other non-Special Act counties and, therefore, continue[d] to create a lack of uniformity in the State's educational financing system which is subject to strict scrutiny review." *Board II*, 231 W. Va. at 405; 745 S.E.2d at 443. The Court turned to whether the "lack of uniformity is necessary to further a compelling state interest." *Id.* at 406, 444. The Court discerned no rationale why certain BOEs are singled out to divert funds to libraries, while other BOEs are not. *See id*. Thus, the Court found the local share statute and Kanawha County's Special Act unconstitutional insofar as they, "in combination," imposed a library funding obligation on the Kanawha BOE that was not imposed on other school boards. *Id.* at 407, 445.

In a footnote, this Court listed "[o]ther counties with Special Act Libraries"—but omitted Lincoln and Cabell. The footnote only identifies the nine Special Act counties that were expressly listed in the 2008 amendments to the local shares statute. *Board II*, 231 W. Va. at 391, 745 S.E.2d at 429, n.2.

C. The Cabell County Special Acts and the Instant Dispute

The Cabell Public Library Special Act, House Bill 801 (enacted 1967), purports to require the Cabell BOE to levy certain amounts for the library by special and excess levies. [*See* Ex. 1 to Verified Petition at § 5.] [JA 000026 – JA 000027]. The Greater Huntington Public Park Special Act, House Bill 3004 (enacted 2011), similarly purports to require the Cabell BOE to levy certain amounts for the park district,[2] again by special and excess levies. [*See* Ex. 2 to Verified Petition at § 7(b).] [JA 000036]. The Cabell County Special Acts set forth Library and Park District excess levy funding up to a certain statutory amount. [*See* Ex 1 to Verified Petition at § 5; Ex. 2 to Verified Petition at § 7(b).]

At the primary election held on May 8, 2018, Cabell County voters approved an excess levy submitted by the Cabell BOE covering expenditures in fiscal years 2021 to 2025. [*See* Ex. 3 to Verified Petition, the "2021-25 Excess Levy Order."] [JA 000039 – JA 000045]. The 2021-25 Excess Levy Order includes $1,471,869 of annual funding to Cabell County Public Library (the "Library") and $455,229 of annual funding to the Greater Huntington Park and Recreation District (the "Park District"). [*Id.*] For the lifespan of the 2021-2025 Excess Levy, the Cabell BOE has provided, and will continue to provide, annual funding to the Library and to the Park District of at least $1,471,869 and $455,229, respectively.

However, the Library and Park District allege that they are entitled to additional funding, above and beyond what is allocated in the 2021-25 Excess Levy Order, commensurate with actual surplus collections. [*See* Verified Petition at ¶¶ 16, 20.] [JA 000009 – JA 000010]. As provided in the 2021-25 Excess Levy Order, and as approved by the voters of Cabell County, the Cabell BOE is "authorized and empowered to expend" surplus and/or excess collections "for the

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[2] Including parks in Wayne County, West Virginia. [See Ex. 2 to Verified Petition at §1(c).] [JA 000030].

enrichment, supplementation, operation, and improvement of the educational services and/or facilities in the public schools" of Cabell County. [Ex. 3 to Verified Petition.] [JA 000039 – JA 000045].

Because excess levies must be resubmitted to the voters every five years, *see* W. Va. Code § 11-8-16, the Cabell BOE will submit a new excess levy proposal to the voters in the 2024 election cycle covering fiscal years 2026 to 2030. Developments over the last five years have put severe strains on the Cabell BOE's finances. Declining enrollment, inflation, and the imminent cessation of federal funding[3] has forced the Cabell BOE to eliminate approximately $10 million from its own funding priorities—including $1.4 million in technology, $2 million in contracted services, $3 million in employee salaries, and $1.5 million in facility enhancements. [*See* Ex. 4 to Verified Petition at p. 4.] [JA 000049]. The Library and Park District are currently disbursed $1,927,098 annually, or 8% of the total funds authorized by the 2021-25 Excess Levy Order. [*Id.*]

In a public meeting held on August 1, 2023, the Cabell BOE voted to approve a proposed levy for the fiscal years 2026-2030. [*See* Ex. 4 to Verified Petition at p. 4.] [JA 000049]. The excess levy proposal, approved by the Cabell BOE for submission to the voters of Cabell County, includes funding for school safety, cyber and device security, career and technical education and workforce development, employee salary and benefits, summer programs, athletics, and facilities and maintenance. [*See* Ex. A to Memorandum of Law in Support of Motion to Dismiss, the "2026-30 Excess Levy Proposal".] [JA 000073 – JA 000080]. The 2026-30 Excess Levy Proposal also includes $195,089 in annual funding to the Library. [*See id.*] However, the Library funding included in the 2026-30 Excess Levy Proposal is less than the

[3]Specifically, federal funding from the American Rescue Plan (ARP) and Elementary and Secondary School Emergency Relief Fund (ESSERF) are set to expire.

amount demanded by the Library, and there is no line-item funding for the Park District. [*See id.*]

D. Procedural History

On September 14, 2023, Respondents filed a *Verified Petition for a Writ of Mandamus, Declaratory Judgment, and Injunctive Relief*. The Verified Petition seeks mandamus, declaratory, and injunctive relief along two general theories. First, Respondents seek mandamus, declaratory, and injunctive relief, requiring Library and Park District funding to be placed on the 2026-30 Excess Levy Proposal in the amounts demanded by the Library and the Park District. Second, Respondents seek mandamus, declaratory, and injunctive relief compelling the Cabell BOE to disburse surplus/excess amounts collected under the 2021-25 Excess Levy Order to the Library and the Park District above and beyond the amounts provided in the ballot itself.

On October 5, 2023, Petitioner filed a Motion to Dismiss, alleging that Respondents failed to state plausible claims for mandamus, declaratory, or injunctive relief. After briefing and a hearing, in an e-mail ruling, the Circuit Court denied Petitioner's Motion and granted the relief requested by Respondents. The Circuit Court's e-mail ruling focused on Cabell County's omission from a footnote in *Board II*, and later issued findings of fact and conclusions of law on December 1, 2023. On December 5, 2023, the Cabell BOE filed a Notice of Appeal to the Intermediate Court, which was dismissed for lack of jurisdiction, given the fact that the Circuit Court issued an extraordinary writ. On December 6, 2023, the Cabell BOE filed a renewed Notice of Appeal to this Court and moved to expedite.

III. SUMMARY OF ARGUMENT

Mandamus relief may only be issued to compel the performance of a nondiscretionary duty by a governmental body. Syl. Pt. 1, *State ex rel. Allstate Ins. Co. v. Union Public Serv. Dist.*, 151 W. Va. 207, 151 S.E.2d 102 (1966). Mandamus is only appropriate when the

petitioner has a clear right to the relief sought, the respondent has a legal duty to do the thing which the petitioner seeks to compel, and there is no other adequate remedy at law. *See* Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).

Here, the Circuit Court erred by issuing a writ of mandamus compelling Petitioner to (i) include funding for Respondents in its upcoming excess levy proposal and (ii) issue equalization checks above and beyond the line-item amounts approved by the voters under the excess levy order currently in effect. Ultimately, Respondents have no clear legal right to either future funding or "equalization" funding, and Petitioner is under no obligation to provide them.

Specifically, the Circuit Court erred by giving effect to the Cabell Special Acts. The Cabell Special Acts violate Equal Protection the exact same way the Kanawha Special Act did in *Board II*. The distinctions between the Cabell and Kanawha Special Acts offered by Respondents and the Circuit Court are meaningless and refuted by *Board II*'s syllabus, reasoning, and mandate. The Cabell Special Acts are unconstitutional under this Court's prior decision, and it was in error for the Circuit Court to issue mandamus relief compelling that they be enforced. Independently, the Circuit Court erred by compelling the issuance of equalization checks. The existing excess levy order expressly "authorize[s] and empower[s]" the Cabell BOE to spend the surplus for the betterment of the school system. Mandamus does not lie to override what was voted upon and approved by Cabell voters in 2018.

Because the Cabell BOE is under no obligation to include funding for Respondents in its excess levy and is under no obligation to issue equalization checks to Respondents, no mandamus may issue in this case. The Cabell BOE requests that the Circuit Court's decision be reversed and vacated.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principal issues in this case have been decided in *Board II*, 231 W. Va. 386, 745 S.E.2d 424, oral argument under West Virginia Rule of Appellate Procedure 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a West Virginia Rule of Appellate Procedure 19 argument and disposition.

V. ARGUMENT

A. The Circuit Court erred by giving effect to the Cabell Special Acts because the legislation is unconstitutional under equal protection.

1. The Cabell Special Acts violate Equal Protection pursuant to *Board II*.

The Cabell County Special Acts are unconstitutional insofar as they compel the Cabell BOE to include Library or Park District funding in its excess levy. Syllabus Point 13 of *Board II* reads as follows:

> [As it] pertains to the obligation of the Kanawha County Board of Education to divert a portion of its ***regular or excess levy receipts*** to the Kanawha County Public Library Board, [the Kanawha County Special Act] is unconstitutional and unenforceable.

231 W. Va. 386, 745 S.E.2d 424 (emphasis added).

This Court applied a straightforward Equal Protection analysis to reach this holding. The Court found it "fairly manifest" that "the Kanawha County BOE is being treated differently" than county school boards without obligatory Special Act library funding. *Board II*, 231 W. Va. at 404, 745 S.E.2d at 442. The disparate treatment warranted strict scrutiny, given its impacts on school funding. *Id.* at 405, 443 (quoting *State ex rel. Bd. of Educ. for Grant Cnty. v. Manchin*, 179 W. Va. 235 at 240, n.8, 366 S.E.2d 743 at 748, n.8 (1988)). Lastly, applying strict scrutiny, the disparate treatment was not necessary to further a compelling state interest. *Id.* Indeed, other

"counties have libraries of their own but their boards of education are not required to contribute their funding." *Id.*

This case is straightforward: the same reasoning applies here. The Kanawha and Cabell Special Acts are identical in all respects that are material to an Equal Protection analysis. The Legislature is treating the Cabell BOE differently than 53 other county school boards—after all, 53 other county school boards are freely allowed to propose excess levies to their voters that are wholly dedicated to funding their school systems. Burdens to the Cabell BOE's excess levy, in practice, impede the Cabell BOE's ability to compete with neighboring counties in offering competitive teacher salaries.

Under decades of precedent, this sort of disparate treatment in school funding warrants strict scrutiny under Equal Protection. *See Board II*, 231 W. Va. at 402-04, 745 S.E.2d at 441-43 (collecting cases). Neither Respondents nor the Circuit Court identify a compelling state interest to explain why the Cabell BOE is being treated differently than 53 other county school boards. Because *Board II* squarely applies, the Cabell BOE is under no legal obligation to burden its upcoming excess levy with funding for the Library or the Park District, and neither entity has a legal entitlement to the same. The Cabell BOE's upcoming excess levy proposal is, instead, discretionary; mandamus relief cannot lie, and the Circuit Court erred by issuing it.

2. The Circuit Court's attempt to avoid *Board II* does not withstand scrutiny.

Below, the Circuit Court upheld the Cabell Special Acts by sidestepping Equal Protection altogether. The Circuit Court made no analysis as to whether the Legislature is subjecting the Cabell BOE to disparate treatment (it plainly is) or whether there is a compelling state interest to justify it (there plainly is not). Instead, the Circuit Court offers four scattershot reasons why Equal Protection guarantees do not apply.

At the outset, in *Board II*, this Court dedicated two pages of analysis addressing similar claims that library-funding Special Acts should be excused from Equal Protection. *See Board II*, 231 W. Va. at 402-04, 745 S.E.2d at 441-43. Rejecting these arguments, this Court emphasized that "nothing in our precedents would suggest that such an act from the Legislature would somehow be immune from equal protection scrutiny." *Id.* at 404, 442. This Court cited to forty years of precedent holding "that *any* lack of uniformity in the school financing scheme must withstand the strict scrutiny analysis implicated by the potential equal protection violation." *Id.* The Court concluded that the Kanawha Special Act "treat[s] the Kanawha County BOE less favorably with respect to its discretionary retainage ***and/or excess levy funds*** than other non-Special Act counties, and, therefore, continue[s] to create a lack of uniformity in the State's educational financing system." *Id.* 405, 443.

Ultimately, the Circuit Court's bases to sidestep this precedent lack merit.

a. The fact that Kanawha BOE enjoyed a "Hobson's choice," while Cabell BOE has no choice at all, makes no difference under Equal Protection.

The Circuit Court distinguished the Cabell and Kanawha Special Acts on the grounds that the latter provides two options for library funding, while the former does not. In the Kanawha Special Act (as amended in 2008), the Legislature gave the Kanawha BOE a "Hobson's choice" between funding the library from discretionary retainage (i.e., surplus general levy collections) or an excess levy. [*See* Final Order at ¶¶53-54.] [JA 000219]. By contrast, the Cabell Special Acts' "funding obligation . . . begins and ends with the excess levy." [*Id.* at ¶54.] [JA 000219].

This distinction carries no import. A Hobson's choice is, by definition, a meaningless one.[4] Whether by a false choice (like Kanawha) or by no choice at all (like Cabell), this Court has recognized a cognizable and disparate harm attendant with burdening a school board's excess levy: "risking the failure of the[] excess levy and the educational 'extras' it affords by placing a large library funding line item on the ballot." *Board II*, 231 W. Va. at 404, 745 S.E.2d at 442. And "the option of transferring the obligation to the excess levy does nothing to alleviate the disparate treatment" between Special Act and non-Special Act counties. *Id.*

That the Kanawha BOE had a "Hobson's choice," while the Cabell BOE has no choice at all, is a vaporous distinction of no consequence. Kanawha's Hobson's choice did nothing to alleviate Kanawha's disparate treatment—Cabell's *lack* of choice does not, somehow, alleviate Cabell's. Outside of Cabell and Lincoln, none of the other 53 school boards in this state are compelled to burden their excess levy proposals with millions of proposed tax dollar expenditures to libraries and parks. The disparate treatment is beyond dispute, and the difference between a false choice and no choice at all carries no constitutional meaning.

b. The Cabell Special Acts pose constitutionally significant harm to the Cabell BOE's access to excess levy funding.

Second, the Circuit Court found that the Cabell Special Acts do not "affect[] the funding that satisfies the requirement that the children of Cabell County receive a constitutionally adequate education." [Order at ¶53.] [JA 000219].

This holding does not distinguish *Board II*—it expressly adopts a baseless argument that has been flat out rejected by this Court on several occasions. *See Board II*, 231 W. Va. at 405,

[4] *See Hobson's Choice*, Merriam-Webster ("An apparently free choice when there is no real alternative; the necessity of accepting one of two or more equally objectionable alternatives.") available at https://www.merriam-webster.com/dictionary/Hobson%27s%20choice#:~:text=choyss%5C%20%E2%80%A2%20noun-,1%20%3A%20an%20apparently%20free%20choice%20when%20there%20is%20no%20real,or%20more%20equally%20objectionable%20alternatives, last visited Dec. 5, 2023).

745 S.E.2d at 443 ("[T]he narrow view that the only constitutional issue implicated in the school financing scheme is whether students are being denied a thorough and efficient education was previously rejected.") (quoting *State ex rel. Bd. of Educ. for Grant Cnty. v. Manchin*, 179 W. Va. 235, 366 S.E.2d 743 (1988)). In the build-up to *Board II*, the 2008 Legislature read *Board I* to only protect a school board's local and state share computations. *See supra* at 4. Under the mistaken belief that there is "no harm, no foul" so long as a county school board's local share is unaffected, the 2008 Legislature amended the local share statute to transfer the library funding obligation to surplus collections and excess levies. In the 2008 Legislature's view, keeping the local share intact would defeat any argument that mandatory library funding harms a school board's ability to provide a thorough and efficient education to students.

But *Board II* dismissed this argument out of hand. This Court held that "the narrow view that the only constitutional issue implicated in the school financing scheme is whether students are being denied a thorough and efficient education was previously rejected." *Board II*, 231 W. Va. at 405, 745 S.E.2d at 443 (quoting *Manchin*, 179 W. Va. 235). The Court further found that any statute that "creates a lack of uniformity in the State's education financing system" "is subject to strict scrutiny" and rejected the notion that it is somehow "impervious to constitutional scrutiny." *Id.* at 402, 440 (quoting Syl. Pt. 4, *Board I*). As explained earlier, the burdens to an excess levy are, indeed, a constitutionally significant harm jeopardizing access to a school board's ability to propose excess levies wholly dedicated to education. This argument has been considered and rejected by this Court already.

The Circuit Court's "no harm, no foul" reasoning is not just foreclosed by precedent—it dangerously downplays the importance of excess levy funding. *See Pauley v. Kelly*, 162 W. Va. 672, 719, 255 S.E.2d 859, 884 (1979) ("Our basic law makes education's funding second in

priority only to the State debt, and ahead of every other State function."). As *Board II* held, excess levy funding is "critical" for the "educational 'extras' it affords" to boards of education in counties with voters willing and able to bear the increased tax burden associated with educational benefits." *Board II*, 231 W. Va. at 404, 745 S.E.2d at 442, n.23. While the Cabell BOE is forced to divert millions of tax dollars annually to the Library and the Park District, neighboring counties can freely propose excess levies that are for the total betterment of their education system—and, for example, offer competitive teacher salaries that place the Cabell BOE at a disadvantage for recruiting and retaining educators. The Circuit Court's conclusion to the contrary is baseless and has already been rejected in *Board II*.

c. The Cabell Special Acts are not immune from Equal Protection challenge.

Third, the Circuit Court misreads *State ex rel. Bd. of Educ. v. Chafin*, 180 W. Va. 219, 376 S.E.2d 113 (1988), to render the Cabell Special Acts immune from Equal Protection scrutiny. *Chafin* says no such thing. In *Chafin*, this Court recognized that excess levies ***themselves*** will always "promote some disparities between counties" insofar as some counties will pass them, and some counties will not. *Chafin*, 180 W. Va. at 220, 36 S.E.2d at 114. This sort of disparity "represent[s] the initiative of individual counties whose residents are willing to tax themselves to improve the level of education" rather than potentially insidious classifications drawn by a state actor. *Id.*; *see Pauley*, 162 W. Va. at 71, 25 S.E.2d at 880. Because there is no state action in the passage of an excess levy, *Chafin* straightforwardly concludes that ***excess levies themselves*** are not amenable to an Equal Protection challenge.

This point of law is inapposite. This case does not present a challenge to an excess levy. In this case, it is the actions of the State Legislature—specifically, the Cabell Special Acts—that violate Equal Protection. The Cabell Special Acts constitute state action drawing an arbitrary

classification between Cabell and 53 other school boards. State action is defined as an "act of a legislative body in setting, by some statute or ordinance, an arbitrary classification." *Pauley,* 162 W. Va. at 71, 25 S.E.2d at 880. There is no support in *Chafin* for the idea that state legislation targeting a school board is, somehow, not a state action. The Circuit Court's inapposite citations to *Chafin* reflect a misapplication of the state action doctrine.

d. Nothing in Board II or the legislative history supports any distinction between the Cabell and Kanawha Special Acts.

Fourth and finally, the Circuit Court reads Cabell County's omission from a footnote in *Board II* to mean that the decision does not apply to the Cabell Special Acts. This Court speaks through its syllabus, its holdings, and its mandate, not through loopholes tacitly read into omissions from footnotes.

The footnote in question attempts to identify "[o]ther counties with Special Act libraries." *Board II*, 231 W. Va. at 391, 745 S.E.2d at 429, n.2. Although Cabell is plainly a "count[y] with a Special Act library," it is not included in the list. *Id.* The simple fact that Cabell *is* a county with a Special Act library—but is *not* identified as one—is proof positive that the footnote is imprecise. But the Circuit Court reads Cabell County's omission as tacit recognition that the Cabell Special Acts are fundamentally unlike the others.

But there is no support for the difference anywhere in the decision itself, and Cabell County's omission from the footnote is, instead, easily explained by the legislative history. Special Acts are not codified and, consequently, are not found in the West Virginia Code or most online legal research databases. It is likely not a coincidence that the footnote is identical to the list of Special Act counties found in the 2008 amendments to the Local Shares Statute. *Compare Board II*, n.2 *with supra* at 4. That amendment was squarely at issue in *Board II*. So, in all likelihood, this Court relied on the list of Special Act counties found in the statute that was in

dispute in the appeal pending. As explained previously, Cabell County's omission from the 2008 amendment is a straightforward matter of legislative history—after all, the 2008 Legislature was amending the Kanawha Special Act (and eight others) to make them more like Cabell and Lincoln's.

Resisting the likely explanation, the Circuit Court emphasizes that the Cabell Library filed an *amicus* brief in connection with *Board II* and, thus, concludes that this Court was aware of the Cabell Special Acts and must have intentionally omitted Cabell from the footnote. [Order at 63.] The *amicus* was filed by the Ohio County Public Library and seven other Special Act libraries (including Cabell).[5] The *amicus* brief (i) does not recognize or advance any distinction between the *amicus* libraries and the Kanawha Library; (ii) never claims that any individual Special Act is somehow uniquely different from the others; (iii) does not even disclose that the Cabell Special Acts' funding obligation stems from the excess levy, and (iv) does not cite, reference, quote, or include, as an exhibit, any of the Special Acts in question. [*See id.*] Put simply, there is ***nothing*** in either the *amicus* brief or the footnote supporting the Circuit Court's reasons for excusing the Cabell Special Acts from Equal Protection. The Circuit Court instead tacitly read its reasoning into these footnotes and *amicus* briefs and, ultimately, into the *Board II* syllabus, holdings, and mandate, by omission.

3. Conclusion: the Cabell Special Acts violate Equal Protection.

Ultimately, this Court speaks through its syllabus, its holdings, and its mandate—not loopholes read into omissions from footnotes or from uncited *amicus* briefs. And the Cabell Special Acts cannot withstand constitutional scrutiny under *Board II*'s actual syllabus, holdings,

[5]The *amicus* was filed on behalf of the Ohio County Public Library, the Cabell County Public Library, the Hardy County Public Library, the Parkersburg and Wood County Public Library, the Vienna Public Library, the Clarksburg-Harrison Public Library, the Sistersville Public Library, and the Hamlin-Lincoln County Public Library.

and mandate. Syllabus Point 13 finds the Kanawha Special Act unconstitutional insofar as it burdens the Kanawha BOE's "general ***or excess*** levy receipts." Syl. Pt. 13, *Board II*. This Court found the Hobson's choice offered to the Kanawha BOE to be meaningless—and went on to (i) recognize specific harms attendant with burdening a school board's excess levy with library funding and (ii) emphasize their constitutional import. *See id.* at 404, 442, n.23. This Court dedicated a full two pages of reasoning to emphatically reject claims that this Court should refuse to entertain an Equal Protection challenge to the Kanawha Special Acts. In rejecting these arguments, this Court emphasized that "nothing in our precedents would suggest that such an act of the Legislature would somehow be immune from equal protection scrutiny." *Id.* at 404, 442. Yet that is what the Circuit Court found below to avoid applying an Equal Protection analysis to the Cabell Special Acts. This is plain error.

The Cabell Special Acts straightforwardly violate Equal Protection following the *Board II* decision, and the Circuit Court erred by issuing mandamus relief giving the Cabell Special Acts force and effect.

B. The Circuit Court erred by compelling "equalization checks" because the Cabell voters authorized Petitioner to spend these funds on Cabell County schools rather than parks and libraries.

In May of 2018, the Cabell voters approved an excess levy order dedicating $1,471,869 to the Library and $455,229 to the Park on an annual basis. As balloted to voters, the excess levy order "authorize[s]" and "empower[s]" the Cabell BOE to "expend" surplus collections for "the enrichment, supplementation, and improvement of educational services and/or facilities in the public schools." Consequently, the Cabell BOE has disbursed, and will continue to disburse, funds in the amount of $1,471,869 and $455,229 to the Library and Park, respectively—but the Cabell BOE has committed collections in excess of those amounts to the betterment of the Cabell

school system. Here, Respondents claim an entitlement to a portion of the surplus in the form of "equalization checks."

The Circuit Court granted mandamus relief compelling the Cabell BOE to disburse funds to the Library and to the Park District in excess of the specified amounts. The Circuit Court reasoned that the Cabell Special Acts compel funding in terms of a percentage of actual levy collections, as opposed to a line-item amount. In essence, the Circuit Court held that the Cabell Special Acts' percentage allocation controls over the express authorization Cabell voters provided to the Cabell BOE to spend surplus collections to schools.

The Circuit Court's holding is in error for two reasons. First, as detailed already, the Cabell Special Acts are unconstitutional insofar as they compel *any* library or park funding—let alone dictating a percentage versus a set amount. And, second, even if the Cabell Special Acts are enforceable in this context, they pose a direct conflict with the plain language approved by Cabell voters. The Cabell Special Acts direct a percentage of surplus collections to the Library and Park District, while the excess levy ballot directs a specific amount and then expressly empowers the Cabell BOE to expend surplus collections for the school system.

In the face of such a conflict, the terms of the excess levy—as approved by the voters—prevails:

> The true interpretation of the language of a special levy proposal ***is the meaning given to it by the voters of the county***, who, by their approval of the special levy, consent to be taxed more heavily to provide the necessary funds.

Syl. Pt. 1, *Thomas v. Bd. of Educ. of McDowell Cnty*, 164 W. Va. 84, 261 S.E.2d 66 (1979) (emphasis added). "[T]he purpose for which funds were raised at a special election levy is determined by the proposal approved by the voters." *Id.* at 89, 70. The proposal is to be read as the voters read it, all "[t]echnicalities aside." *Id.* Here, by approving the excess levy ballot, the

Cabell voters approved concrete annual disbursement amounts—not a percentage of actual levy collections—to the library and parks over these fiscal years, and further approved "authoriz[ing] and empower[ing]" the Cabell BOE to spend the surplus on schools. [*See* Ex. 3 to Verified Petition at p. 2.] [JA 000041]. Uncodified Special Acts of the Legislature are unlikely to have mobilized voters. The express language controls.

VI. CONCLUSION

The Circuit Court's order granting Respondents a writ of mandamus should be reversed and vacated.

BOARD OF EDUCATION OF THE
COUNTY OF CABELL,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE BOARD OF EDUCATION OF THE
COUNTY OF CABELL, WEST VIRGINIA

Respondent below, Petitioner,

v. Appeal No.: 23-691

THE CABELL COUNTY PUBLIC LIBRARY
and THE GREATER HUNTINGTON PARK
AND RECREATION DISTRICT,

Petitioners below, Respondents,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this **3rd day of January 2024**, the foregoing ***Petitioner's Brief*** was served using the electronic File & ServeXpress system, which will send notification of such filing to all counsel record.

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