IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Respondent below, Petitioner,

Appeal No.: 23-691

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

Petitioners below, Respondents,

REPLY BRIEF

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The Legislature is treating the Cabell BOE differently than 53 other school boards which are free to propose excess levies for the betterment of their school systems unencumbered by allocations to libraries and parks. This manifest and undisputed disparate treatment is all that matters under this Court's precedent. *See Board II*, *Kanawha County Public Library Bd. v. Bd. of Educ. of Cnty. of Kanawha*, 231 W. Va. 386, 745 S.E.2d 424 (2013).

There is no basis to immunize the Cabell Special Acts from Equal Protection scrutiny or from the *Board II* mandate. Instead, Respondents advance a thinly disguised invitation to upend *Board II* and to revive disparities that this Court has already put to bed. This Court should not countenance this effort and should instead apply its precedent to the Cabell Special Acts. And Respondents' position on equalization checks under the current levy order ignores the order's express authorization of the Cabell BOE's action. The Cabell BOE therefore requests that the Circuit Court's decision be reversed and vacated.

I. A "deferential" review of the Cabell Special Acts would undermine Equal Protection and stare decisis.

Respondents urge a "deferential" review of the Cabell Special Acts, urging this Court to "resolve[] all doubt in favor of the validity of the statute" and to refrain from "becoming a super-legislature." (Resp. Br. at 8.) Respondents' deference is based on a rule of constitutional avoidance that does not apply here: when faced with two reasonable interpretations of a statute, only one withstanding constitutional scrutiny, courts give effect to the constitutional construction if possible. *See, e.g.*, *Farley v. Graney*, 146 W. Va. 22, 33, 119 S.E.2d 833, 840 (1960); Syl. Pt. 4, *Osburn v. Staley*, 5 W. Va. 85 (1871). But this Court is not facing competing interpretations of a statute—rather, the parties dispute the application of Equal Protection and stare decisis to the Cabell Special Acts. Unneeded deference to the Legislature would be an affront to both.

Indeed, in *Board II*, the Kanawha Library made similarly "broad pronouncements of the plenary power of the Legislature," but this Court was undeterred from exercising judicial review. 231 W. Va. at 401-02, 745 S.E.2d at 439-40. "[T]he Legislature's power in the realm of education funding is necessarily constrained by equal protection principles and must withstand strict scrutiny." *Id.* at 402, 440 (quoting Syl. Pt. 4, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979)). This Court found it "fairly self-evident" that "the statute at issue is subject to equal protection analysis . . . by virtue of the predecessor litigation" in *Board I*. *Id.* at 401, 439. This Court does not defer to the Legislature's disparate classifications; this Court has the "authority and responsibility" to strictly scrutinize them. *Id.* at 402, 441.

A "deferential" review also undermines stare decisis. In a recent Syllabus Point, this Court held as follows:

> [The Kanawha Special Act] insofar only as 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, is unconstitutional and unenforceable.

Syl. Pt. 13, *Board II* (emphasis added).

Stare decisis "promotes certainty, stability, and uniformity" in the law and "deviation from its application should not occur absent some urgent and compelling reason." *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974) (quoting *Adkins v. St. Francis Hospital*, 149 W. Va. 705, 718, 143 S.E.2d 154, 162 (1965)). Deviating from precedent is only warranted if "it is clearly apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice." *Adkins*, 149 W. Va. at 718, 143 S.E.2d at 162.

Embracing Respondents' arguments would overturn *Board II* in all material respects. Respondents would revive arbitrary classifications by the Legislature while the courts surrender the power of judicial review. This revival would not only come at the expense of stare decisis

principles like certainty, stability and uniformity—but, even more acutely, at the expense of voters in targeted communities who are compelled to bundle their vote for (or against) critical educational "extras" with funding for libraries, parks, or conceivably any other initiative that the Legislature has declined to fund from general revenue or by other means.

This Court need not reinvent the wheel in confronting these constitutional issues. This Court has confronted them twice before—and it should scrutinize the Cabell Special Acts with the same eye that it scrutinized Kanawha's. Respondents' request for a "deferential" review of the Cabell Special Acts (rather than strict scrutiny) is an affront to Equal Protection guarantees and to stare decisis. It should not be entertained.

II. Because *Board II* is squarely on point, Respondents seek to relitigate issues that this Court has already considered and rejected.

At bottom, Respondents claim that unlike the mandatory library funding obligation in *Board II*, the Cabell Special Acts encumber excess levy revenue and therefore do not create a lack of uniformity in the State's educational financing system. (*See* Resp. Br. at 17.) But when the State, through the Legislature, dictates the Cabell BOE's funding opportunities, but not other school boards', the State does indeed create a lack of uniformity in the education financing system.

Board II has addressed this issue already because the 2008 amendments encumbered substantially the same funding. At the time of *Board II*, the Kanawha BOE was required to provide library funding out of either its (i) surplus general levy collections (called "discretionary retainage" by the Legislature) or (ii) excess levy receipts. *See* W. Va. Code § 18-9A-11(f)-(h) (2008), available at JA 000135-144. Surplus collections and excess levy receipts are **both** above the local shares in the state school funding formula. *See id.* at § 18-9A-11(f) (2008), available at JA 000139-40 (defining "discretionary retainage" as "the amount by which the regular school board levies exceed the local share"). Indeed, this was the whole point of the 2008 amendment: to avoid *Board*

I by transferring library funding obligations out of the local share and, in the 2008 Legislature's view, avoiding constitutional harm to targeted school boards. (*See* Opening Br. at 3-5 (explaining history of *Board I*, the 2008 amendment, and *Board II*.))

The distinction that Respondents urge here—that encumbrance to funding wholly above the local share avoids constitutional harm to school boards—is the **exact same** distinction the Kanawha Library argued in *Board II*. But *Board II* strictly scrutinized, and struck, the scheme under Equal Protection all the same:

> Accordingly, we find that [the surplus/excess levy burdens] continue to treat the Kanawha County BOE less favorably with respect to its [surplus] and/or excess levy funds than other non-Special Act counties and, therefore, continue 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. "[T]ransferring the obligation" from one levy to another "does nothing to alleviate the disparate treatment." *Id.* at 404, 442. "The non-Special Act counties may utilize their [surplus] for any purpose which they see fit and proper" and are not required to "risk[] the failure of their excess levy and the educational 'extras' it affords by placing a large library funding line item on the ballot." *Id.*[1]

Respondents' reliance on *State ex rel. Bd. of Educ. v. Chafin*, is similarly misplaced. (Resp. Br. at 14-15 (citing 180 W. Va. 219, 376 S.E.2d 113 (1988)).) *Chafin*'s holding—that excess levies inevitably result in disparate funding due to "the initiative of individual counties whose residents are willing to tax themselves," 180 W. Va. at 227, 376 S.E.2d at 121—is inapposite. The disparate treatment here is not that the Cabell BOE might receive less funding than other school boards because of county-by-county differences in election outcomes. That sort of funding

[1] Respondents have never addressed this holding in *Board II* in nearly 50 pages of briefing. (*See* Resp. Br.; JA 000082-102.)

disparity is "expressly countenanced" by Article X, Section 10 of the West Virginia Constitution. *Chafin*, 180 W. Va. at 227, 376 S.E.2d at 121. The disparate treatment here is that the Legislature is forcing the Cabell BOE to include millions in proposed expenditures for libraries and parks in its excess levy proposals unlike 53 other school boards that are free to make proposals to their voters that are unencumbered by such allocations. The Legislature picking, choosing, and dictating excess levy contents is decidedly *not* countenanced by the Constitution[2] and carries unlawful disparate impacts that this Court has recognized already.

Although Respondents maintain that *Chafin* has the effect of "withdraw[ing]" the Cabell Special Acts from Equal Protection purview, (Resp. Br. at 14-15), Respondents concede that *Chafin*'s premise does not apply. (Resp. Br. at 21.) *Chafin* "was premised . . . by the absence of State action, which foreclosed the funding disparities from an equal protection challenge." *Board II*, 231 W. Va. at 404, 745 S.E.2d at 442 (rejecting the Kanawha Library's reliance on *Chafin*). Respondents concede, as they must, that the Cabell Special Acts constitute state action. (Resp. Br. at 21.) Respondents' continued reliance on *Chafin* is untenable.

Pivoting still, Respondents argue that the Cabell Special Acts "do not . . . obligate [the Cabell BOE] to fund anything" because voters might vote down the levy. (Resp. Br. at 21.) But the same was true in *Board II* and this Court struck the statute all the same. *See* 231 W. Va. at 393, 745 S.E.2d at 431 ("If the levy fails, the funding obligation is voided." (referencing W. Va. Code § 18-9A-11(h) (2008)). Ultimately, the fact that Cabell's excess levy might pass, or might fail, is no reason to "withdraw" Equal Protection guarantees. Again, 53 other school boards are free to propose excess levies dedicated entirely to the betterment of their schools, and voters in 53

[2] Article X, Section 10 authorizes school boards to propose excess levies "for the support of public schools" and makes no reference of the Legislature having any role in dictating the contents of the levy or diverting its receipts to other civic institutions.

other counties are free to vote on what their locally elected school boards propose without the Legislature dictating the terms of the choice for them.

There is no viable reason to immunize the Cabell Special Acts from well-settled Equal Protection guarantees. Nor is there a viable reason to excuse the Cabell Special Acts from the *Board II* mandate. The Circuit Court erred by doing so.

III. The Cabell BOE is authorized and empowered to expend surplus collections under the current excess levy on the betterment of the school system.

Respondents' claim to "equalization checks" under the current levy order begins and ends with the language of the order itself. As approved by Cabell voters, the excess levy ballot identifies the "amounts . . . [that] will be needed" for the lifespan of the levy: namely, $1,471,869 annually to the Library and $455,229 annually for the Park System. (JA 000040-41.) The ballot, as approved by voters, continues:

> The Board of Education of the County of Cabell is hereby **authorized and empowered to expend**, during the term of this levy, **the surplus, if any, accruing in excess of the above amounts** needed for any of the above stated purposes, plus excess collections due to increased assessed valuations **for the enrichment, supplementation, operation, and improvement of educational services and/or facilities in the public schools in of the County of Cabell**.

(JA 000041 (emphasis added).)

The language is dispositive. "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 necessary funds." Syl. Pt. 1, *Thomas v. Bd. of Educ. of McDowell Cnty.*, 164 W. Va. 84, 261 S.E.2d 66 (1979). The levy order is therefore read with all "[t]echnicalities aside" because such "public policy should not rely on . . . obscure, formal interpretations of language." *Id.* The true meaning of this levy order is plain: the Cabell BOE is

(i) required to disburse $1,471,869 and $455,229 annually to the Library and the Park System and (ii) authorized and empowered to expend any surplus toward the betterment of its school system.

Respondents insist that these express allocations are "estimated numbers" and that the true amounts due are the percentages dictated by the Cabell Special Acts, which are cross-referenced (but not explained) in the levy order. (Resp. Br. at 26-27.) Respondents then claim that the Cabell Special Acts control because the express language of the order cannot "override" the legislation. (Resp. Br. at 6.)

Respondents get it backwards. The ***voters*** have chosen to tax themselves at higher rates—not the Legislature—so it is the ***voters'*** understanding of purpose—not the Legislature's—that controls. *See* Syl. Pt. 1, *Thomas*. Imputing the terms of the Cabell Special Acts, which are merely cross-referenced on the ballot, to voters—at the expense of express language in the order—would "represent[] the highest form of legal technicality and is a perfect example of exalting form over substance." *Thomas*, 164 W. Va. at 89-90, 261 S.E.2d at 70. Urging precisely that result, Respondents make no mention of the applicable rule of construction because their argument relies upon supplanting the voters' intent with the Legislature's. The express language of the levy order controls and that language authorizes and empowers the Cabell BOE's conduct.

At bottom, the Legislature may not dictate the contents of the Cabell BOE's next excess levy proposal, nor may it dictate the purposes for the proceeds of the Cabell BOE's current excess levy order. The authority for the former rests with the Cabell BOE, and the authority for the latter rests with the Cabell voters when they approve a levy. Respondents request that the Circuit Court's decision be vacated and reversed in full.

BOARD OF EDUCATION OF THE
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this **24th day of January 2024**, the foregoing ***Reply Brief*** was served using the electronic File & ServeXpress system, which will send notification of such filing to all counsel record.

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