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.

RESPONSE TO PETITIONER'S BRIEF

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I. STATEMENT OF THE CASE

A. Introduction

As Petitioner asserts, the West Virginia Constitution does require the Board of Education of the County of Cabell ("Petitioner" or Cabell BOE") to provide a thorough and efficient education to its students; however, this requirement does not permit the Cabell BOE to disregard Acts of the Legislature. This includes the Cabell Public Library Special Act, in Section 5, Chapter 207, of the 1967 Acts of the West Virginia Legislature ("Cabell Public Library Special Act") and the Park District Special Act, in Section 7, Chapter 194, of the 1983 Acts of the West Virginia Legislature ("Park District Special Act") (collectively, "the Cabell Special Acts"). While Petitioner claims that precedent establishes that legislation compelling a school board to include library funding in excess levies violates Equal Protection, the applicable decisions from this Court hold to the contrary – that school excess levies are not violative of Equal Protection. *See generally Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) (hereinafter "*Pauley*"); *State ex rel. Bds. Of Educ. Of the Cnty. Of Upshur. V. Chafin*, 180 W. Va. 219, 376 S.E.2d 113 (1988) (hereinafter "*Chafin*"); *Kanawha Cnty. Pub. Lib. Bd. V. Bd. Of Educ. Of Cnty. Of Kanawha*, 231 W. Va. 386, 745 S.E.2d 424 (2013) (hereinafter "*Board II*").

Thus, the Circuit Court of Cabell County did not err in granting mandamus relief. Excess levies are not subject to equal protection review. *See Pauley*, 162 W. Va. At 711-12, 255 S.E.2d at 880; Syl. Pt. 3, *Chafin*, 180 W. Va. At 220, 376 S.E.2d at 114. Further, this Court's previous decisions demonstrate that the Cabell Public Library

Special Act was purposefully excluded from those decisions for this very reason. *See Board II*, 231 W. Va. At 391 n.2, 745 S.E.2d at 429 n.2. In addition, the equalization checks due to the Public Library and Park District, must be issued pursuant to the requirements of the Cabell Special Acts. Therefore, the Cabell County Public Library ("Public Library") and the Greater Huntington Park and Recreation District ("Park District") (collectively "Respondents") request that the Circuit Court of Cabell County's decision be affirmed.

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

In 1957, the West Virginia Legislature passed the Kanawha County Public Library Special Act. JA 000147– JA 000151. Section 5 of the Kanawha County Public Library Special Act required the Board of Education of Kanawha County ("Kanawha BOE") to provide funding to the Kanawha Public Library out of the Kanawha BOE's regular levy receipts. JA 000149 – JA 00150. Special Acts from eight other counties similarly impose obligations to fund public libraries on regular levy receipts collected by county boards of education. JA 000152 – JA 000194; *see also Board II*, 231 W. Va. at 391 n.2, 745 S.E.2d at 429 n.2.

In 2006, the Board of Education of Kanawha County ("Kanawha BOE") launched an Equal Protection challenge against the Kanawha Public Library Special Act, which provided funding to the Kanawha Public Library. *See generally Bd. of Educ. of Cnty. of Kanawha v. W. Virginia Bd. of Educ.*, 219 W. Va. 801, 639 S.E.2d 893 (2006) (hereinafter "*Board I*"). In *Board I*, this Court addressed equal protection in school funding broadly. Finding that the Kanawha Public Library Special Act,

along with the Special Acts of eight other counties, violated Equal Protection principles, this Court encouraged amendments to W. Va. Code § 18-9A-11 to remedy the disparate treatment.

Partially in response to *Board I*, in 2008, the West Virginia Legislature amended W. Va. Code § 18-9A-11, permitting the nine counties[1] with regular levy Special Acts to transfer their funding obligations required by their Special Acts away from their regular levies to their discretionary retainage or excess levies. This was done in an attempt to avoid the disparate treatment found to have existed in *Board I*. After these amendments, the Kanawha BOE again challenged the Kanawha Special Act on Equal Protection grounds in *Board II*.

In *Board II*, the Kanawha Public Library argued that encumbering the Kanawha County BOE's regular levies and discretionary retainage with library obligations was not unconstitutional because the Kanawha BOE had the *option* of transferring the obligation to its excess levy funding. *Board II* 231 W. Va. at 404–405, 745 S.E.2d at 442–443. This argument was rejected and led this Court to find that "the option of transferring the obligation to the excess levy does nothing to alleviate the disparate treatment." *Id*. Further, in the *Board II* decision, this Court specifically identified the nine counties affected by the *Board II* decision: Berkeley, Hardy, Harrison, Kanawha, Ohio, Raleigh, Tyler, Upshur, and Wood. *Board II* 231 W. Va. At 391 n.2, 745 S.E.2d at 429 n.2. Notably, Cabell County and Lincoln County, the only

[1] The nine counties referenced in these changes to the code did not include Cabell, because Cabell's Special Acts have never implicated regular levy funds and thus were always immune to equal protection challenge.

counties with special acts specifically providing for funding only from excess levies, were excluded from this list of affected counties. *See id.*

C. The Cabell Special Acts and the Instant Dispute

On March 9, 1967, the West Virginia Legislature passed the Cabell Public Library Special Act, providing a method of financing for public libraries in Cabell County. JA 000023 – JA 000027. Similarly, on March 11, 2011, the West Virginia Legislature passed the Park District Special Act.[2] JA 000028 – JA 000038. The Cabell Special Acts require the Cabell BOE to place excess levies on the ballot for consideration of Cabell County voters on whether to provide funding for the Public Library and Park District and to provide specific amounts of funding pursuant to those excess levies. As had been done for decades, on May 8, 2018, the Cabell BOE approved an excess levy order ("Excess Levy Order") for fiscal years beginning on July 1, 2020 through July 1, 2024. JA 000039 – JA000045. The Excess Levy Order provides funding to Respondents as follows:

> Cabell County Public Library—*The operation of the Cabell County Public Library as required by Section 5, Chapter 207, of the 1967 Acts of the West Virginia Legislature.*
>
> $1,471,869.00
>
> Greater Huntington Park and Recreation District—*The operation of the Greater Huntington Park and Recreation District as required by Section 7, Chapter 194, of the 1983 Acts of the West Virginia Legislature.*
>
> $ 455,229.00

Id.

[2] Prior to March 11, 2011, the Park District was provided funding pursuant to a previous Park District Special Act, however, the 2011 Park District Special Act is the one currently at issue.

On May 18, 2018, the voters of Cabell County passed the Excess Levy Order. Until May of 2023, the Cabell BOE complied with the Excess Levy Order and the Cabell Special Acts. However, in April of 2023, the Cabell BOE informed the library and the Park Board that the Cabell BOE had unilaterally decided that it would no longer be providing equalization checks. JA 000010 at ¶¶ 18–19. Equalization checks are typically payments pursuant to the Special Acts provided to Respondents in August of each year, which reconcile the difference between the amount in the Excess Levy Order, which is an estimate based on then-known property values, and the actual amounts of property taxes assessed and collected. The Cabell BOE also advised Respondents that they would not follow the Cabell Special Acts on the renewal of the excess levy in 2024. JA000055-58,

Respondents filed a Petition for Writ of Mandamus asking the Circuit Court of Cabell County to order the Cabell BOE to comply with the Cabell Special Acts and find those acts were not unconstitutional. The Circuit Court granted that Writ as requested, and this appeal followed.

II. PROCEDURAL HISTORY

Respondents join Petitioner's statements regarding the procedural history of this case.

III. SUMMARY OF ARGUMENT

Mandamus is 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 compels, 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). 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).

In the instant dispute, the Circuit Court of Cabell County properly gave effect to the Cabell Public Library Special Act and the Park District Special Act. The Cabell Special Acts do not violate Equal Protection like the Special Act at issue in *Board II*. First, the Cabell Special Acts are not subject to Equal Protection challenges because excess levies are not subject to Equal Protection principles. The Cabell Special Acts are distinctly different than the Special Acts at issue in *Board II*. Further, in *Board II*, this Court excluded the Cabell Public Library Special Act from its decision. Additionally, the Circuit Court of Cabell County did not err in mandating that the Cabell BOE issue equalization payments to Respondents. While the Excess Levy Order may "authorize and empower" the Cabell BOE to spend surplus in its discretion, this language does not override the requirements of the Special Acts, which require the Cabell BOE to pay to Respondents certain amounts based on assessed values of property in Cabell County. The amounts provided for by the Excess Levy Order were simply estimates, subject to change.

Because the Cabell BOE is required to provide funding to the Public Library and Park District, in accordance with the Cabell Special Acts, and obligated to provide equalization checks, pursuant to the Cabell Special Acts, mandamus is

appropriate in this case. Respondents request that the Circuit Court of Cabell County's decision be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents respectfully request Rule 20 oral argument. This matter involves an issue of fundamental public importance: whether, pursuant to the Acts, the Cabell BOE is required to provide certain funding to the Public Library and Park District. Given the importance of this question, Rule 20 oral argument is necessary and appropriate.

V. ARGUMENT

A. The Circuit Court Correctly Held that the Cabell Special Acts are Constitutional.

Petitioner jumps straight to the chase by arguing that "the Kanawha and Cabell Special Acts are identical in all respects that are material to an Equal Protection analysis." (Pet. Br. p. 11). And while the loaded nature of that statement will be examined, it is important to start first with what this Court is actually examining. Two acts of the Legislature are being challenged as unconstitutional. Because the longstanding lens of judicial review shapes this Court's analysis in ways Petitioner appears to ignore, these constants bear repeating.

The question before the Court is not just weighing whether *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*") or *State ex rel. Bd. of Educ. v. Chafin*, 180 W. Va. 219, 376 S.E.2d 113 (1988) ("*Chafin*") is more on point here. Instead, the question is whether two acts of the Legislature are unconstitutional. When evaluating questions such as

that, this Court has long held that an act will only be held to be unconstitutional if that belief is resolute: "the negation of legislative power must be manifest beyond reasonable doubt." Syl. Pt. 3, *State Rd. Comm'n v. Kanawha Cnty. Ct.*, 112 W. Va. 98, 163 S.E. 815, 815 (1932). Constitutional principles designed to defer to the legislative branch mean that "[a]ny doubt as to the constitutionality of an act of the Legislature will always be resolved in favor of the validity of the statute." Syl. Pt. 3, *Bd. of Ed. of Wyoming Cnty. v. Bd. of Pub. Works*, 144 W. Va. 593, 594, 109 S.E.2d 552, 553 (1959).

This deference is more than just a standard of review; it is rooted in the constitutional principle of separation of powers itself—keeping the Court from becoming a super-legislature in the delicate action of judicial review. *See Farley v. Graney*, 146 W. Va. 22, 32–33, 119 S.E.2d 833, 840 (1960). Accordingly, this Court has noted that "[w]henever an act of the legislature can be so construed as to avoid conflict with the constitution and give it force of law, such construction will be adopted by the courts." Syl. Pt. 4, *Osburn v. Staley*, 5 W. Va. 85, 85 (1871). A pertinent corollary to that principle is "[w]hen a statute is susceptible of two constructions, one of which is, and the other of which is not, violative of a constitutional provision, the statute will be given that construction which sustains its constitutionality unless it is plain that the other construction is required." *Farley*, 146 W. Va. at 33, 119 S.E.2d at 840; *Bd. of Ed. of Wyoming Cnty*, 144 W. Va. at 606, 109 S.E.2d at 559 (citing cases). These principles ensure the Court, in properly exercising its judicial review, goes no further than necessary.

Petitioner's entire constitutional challenge rests on the Cabell Special Acts violating equal protection because, as simply as Petitioner states: the acts affect school funding, not every county has to hold an excess levy vote, so the acts violate equal protection. But Respondent's position, and that of the Circuit Court, preserves the constitutionality of the statutes and operates within this Court's past interpretations of the framework of school funding in West Virginia. Appropriately applying these standards of review, this Court should affirm the Circuit Court's determination granting its writ of mandamus against the Cabell BOE.

Petitioner argues that *Board II* is plain on its face, its strict scrutiny equal protection analysis straightforward, and its holding mandating that the Cabell Special Acts in question here be found unconstitutional. But Petitioner is only able to make that argument by skimming the surface of this State's constitutional school funding analysis. For instance, Petitioner quotes a portion of Syllabus Point 13 as stating that if a board of education is required to divert a portion of its regular or excess levy then the statute is unconstitutional. But the latter half of Syllabus Point 13 cannot be taken out of context with the first part of that same point: that the quotation applies to the Kanawha Special Act at issue in that case.

A brief examination of the Kanawha Special Act at issue and the Cabell Special Acts at issue here is warranted because, unlike Petitioner's assertion, they are not materially the same. Each fits into the school funding framework quite differently.

This Court described our state's "school financing formula" in *Chafin*, 180 W. Va. at 221–22, 376 S.E.2d at 115–16; *see also Bd. of Educ. of Cnty. of Kanawha v. W.*

Virginia Bd. of Educ., 219 W. Va. 801, 804, 639 S.E.2d 893, 896 (2006) ("*Board I*"); *Board II*, 231 W. Va. at 391, 745 S.E.2d at 429. A county's basic foundation program is determined and the costs for providing that are divided amongst a county's local share and the State's share. *Chafin*, 180 W. Va. at 221, 376 S.E.2d at 115. "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." *Id.* "State funding is provided to the county in an amount equal to the difference between the basic foundation program and the local share." *Chafin*, 180 W. Va at 221–22, 376 S.E.2d at 115–16. In *Board I*, this "Court held that to the extent that the state share of the basic education program was not increased to accommodate the Kanawha County BOE's required diversion of the local share [to fund its library system], it was being treated unequally." *Board II*, 231 W. Va. at 391, 745 S.E.2d at 429 (summarizing *Board I*). Because the diversion of that local share of the school financing formula "potentially impinge[d] on a school board's ability to provide a thorough and efficient education to its students," it impinged upon a substantial right and the act's disparate impact amongst counties was subject to strict scrutiny. *See Board I*, 219 W.Va. at 807–08, 639 S.E.2d at 899–900. Thus, *Board I* established that statutory adjustments to the "State's educational financing system," specifically by adjusting a county's local share to account for funding non-school purposes, would be subject to strict scrutiny. *See* Syl. Pts. 4 and 6, *Board I*, 219 W. Va. at 802–03, 639 S.E.2d at 894–95.

Board II, the case that Petitioner argues controls here, also dealt with funding obligations created by statute that earmarked part of Kanawha County's regularly

levied funds to supporting non-school projects. The revised Special Acts at issue in *Board II* provided:

> that the library funding obligation created by a Special Act would now be placed upon only the "discretionary retainage" resulting from the regular levy receipts. The statute defines "discretionary retainage" as "the amount by which the regular school board levies exceeds [sic] the local share as determined hereunder," thereby leaving the local share of the basic foundation program intact. The statute further provides that if the discretionary retainage is less than the funding obligation, the library funding obligation is reduced to the amount of the discretionary retainage; likewise if the retainage is more than the funding obligation, the school board may retain any excess and use it as it sees fit. Significantly, the statute also provides that a Special Act County may transfer its funding obligation to its excess levy, provided that it includes a specific line item in the levy for the library funding obligation. If the levy fails, the funding obligation is voided, but the county must continue to include the funding obligation in any subsequent excess levies.

Board II, 231 W. Va. at 392–93, 745 S.E.2d at 430–31. In other words, the Legislature created a funding obligation payable from a county education board's regular levy, but just the overage, and gave those named counties the option of funding that statutorily created obligation through an excess levy.

This Court in *Board II* did not find that scheme constitutional. The focus of the Court's opinion is on disparities or a lack of uniformity within the State's "educational financing system." That phrase is repeated eleven times in the opinion. *See, e.g.*, *Board II*, Syl. Pts. 9, 10, 12, 231 W. Va. at 402, 403, 404, 405, 406, 745 S.E.2d at 440, 441, 442, 442, 444. That phrase also is referenced in *Board I*, Syllabus Point 4, *Board I*, 219 W. Va. 801, 802, 639 S.E.2d 893, 894 (2006) ("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."), *Chafin*, 180 W. Va. 219, 222, 376 S.E.2d 113, 116 (1988), and Syllabus Point 2, *State ex rel. Bd. of Educ. for Grant Cnty. v. Manchin*, 179 W. Va. 235, 235, 366 S.E.2d 743, 743 (1988). It is a phrase first appearing in Syllabus Point 4, *Pauley v. Kelly*, 162 W. Va. 672, 672, 255 S.E.2d 859, 861 (1979), that "[b]ecause education is a fundamental, constitutional right in this State, under our Equal Protection Clause any discriminatory classification found in the State's *educational financing system* cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.". In *Pauley*, this Court referred to the "The Financing System" as four components (also calling it the "State school aid formula"):

> Our State school aid formula is composed of four basic components: (1) an amount raised from local levy on real and personal property;[31] (2) the State foundation aid, which is money the State pays out of general revenue funds to the counties based on a formula composed of seven components;[32] (3) State supplemental benefits; and (4) amounts raised locally by special levies by vote of the people in the county.

Pauley, 162 W. Va. at 708–09, 255 S.E.2d at 878–79. The *Pauley* Court offered guidance for implementation and analysis of the general equal protection principles. The *Pauley* Court alluded to the principle that excess levies, where a funding obligation is created by the people instead of created by the state, is not subject to equal protection analysis. *Pauley*, 162 W. Va. at 711–12, 255 S.E.2d at 880. At that

time, though, this Court stopped short of discounting the impact of excess levies as part of the funding formula or the educational financing system. *Id.*

In *Manchin*, this Court evaluated a specific interplay between excess funding and how that impacted the state or local share of the educational financing system. *State ex rel. Bd. of Educ. for Grant Cnty. v. Manchin*, 179 W. Va. 235, 239, 366 S.E.2d 743, 747 (1988). There, the Legislature set up a funding model that took into account excess levies, but reduced the state's share of the educational financing system when county voters failed to renew their excess levies. The act in question "award[ed] state equity funding for salary supplementation purposes in an amount based upon whether or not the particular county had in effect an excess levy to provide additional financing on a particular date." *Manchin*, 179 W. Va. at 241, 366 S.E.2d at 749. This Court held that act to be unconstitutional.

Later that same year, this Court examined the impact of excess levies again, this time squarely weighing whether excess levies were indeed a constitutional component of the educational financing system that is subject to equal protection. The circuit court, looking to *Pauley*, held that it was and because excess levies created unconstitutional discrimination in funding amongst the counties, a more uniform way of dealing with excess levies was constitutionally required. *Chafin*, 180 W. Va. at 223, 376 S.E.2d at 117. This Court, however, issued a writ of prohibition stopping any redistribution of excess levies. *Chafin*, 180 W. Va. at 226–27, 376 S.E.2d at 120–21.

In reaching that conclusion, this Court reexamined the makeup of the educational financing system. The Court discussed the local share and the State share and also noted that 43 of our state's counties had excess levies (at that time) creating additional funds overtop the state and local shares of financing. *Chafin*, 180 W. Va. at 221-222, 376 S.E.2d at 115-116. But the Court was not persuaded it could treat excess levies to the same constitutional equal protection standard as the rest of the educational financing system. "We find, under *Lawson*, that the excess levy provision does not violate equal protection principles since W.Va. Const. art. X, § 10 expressly authorizes these very levies. Excess levies are *withdrawn* from the operation and scope of equal protection principles." *Chafin*, 180 W. Va. at 225, 376 S.E.2d at 119 (emphasis added). This Court, like in *Pauley*, counseled the state on further development and implementation of the educational financing system going forward:

> As discussed more fully above, the focus of equal protection is not merely on the existence of financing disparities. Local excess levies will undoubtedly promote some disparities between counties. These disparities are expressly countenanced by W.Va. Const. art. X, § 10. They represent the initiative of individual counties whose residents are willing to tax themselves to improve the level of local education.
>
> We find the true focus of *Pauley* to be whether the State has complied with its constitutional duty to provide school financing in a manner, and at a level, that is thorough and efficient. This requires an examination of the school financing formula, without consideration of excess levy revenues.

Chafin, 180 W. Va. at 227, 376 S.E.2d at 121. Thus, after *Chafin*, the school financing formula—the educational financing system that is subject to equal protection analysis in this State—no longer included excess levies within that calculus. *Chafin* did not overrule *Pauley's* Syllabus Point that "under our Equal Protection Clause any discriminatory classification found in the State's educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.' Syl. Pt. 4, *Pauley*, 162 W.Va. at 672, 255 S.E.2d at 859. *Chafin* did, however, *withdraw* from that "educational financing system" any equal protection analysis associated with excess levies. The focus of constitutionally guarded financial uniformity would remain on the other aspects of the educational financing system, mainly the state and local shares.

For instance, even post *Chafin*, this Court in *State ex rel. Bd. of Educ. for Cnty. of Randolph v. Bailey*, 192 W. Va. 534, 535, 453 S.E.2d 368, 369 (1994), reiterated the unconstitutionality of a similar act that was struck down in *Manchin*. The State cannot "fix[ ] a county entitlement to state equity funding based upon whether an excess levy was in effect on a particular date and continues to limit that county's funding to the specific amount awarded on that date, even if the county's voters subsequently reject continuation of the levy at the polls." *See id.*, Syl. Pt. 3. The concern was not about the excess levy per se but instead the reduction of funding within the educational financing system, particularly when the excess levy was not in effect.

Fast-forwarding to *Board I* in 2006, it is then relatively straightforward to see why this Court applied equal protection analysis to a diversion of certain counties' local share. Those Special Acts implicated the local share of the educational financing system of certain counties without a corresponding increase in the state share to cover the diversion.

And while not quite as straightforward as *Board I*, the Special Acts in *Board II* still created a funding obligation originating with the State that, regardless of amendments to West Virginia Code § 18-9A-11, impacted certain counties' local share: the Special Acts impacted the revenue received from regular levies. Thus, when the *Board II* Court restates as Syllabus Point 10 the rationale from *Board I*, that "[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," the educational financing system this Court is referring to is not excess levies, but the interplay between the calculation of the state and local shares. *See* Syl. Pt. 10, *Board II*, 231 W. Va. at 389, 745 S.E.2d at 427. That funding must be constitutionally sufficient and uniform.

And there is no question that even though a Special Act County in *Board II* had the option to pay the legislatively created financial obligation through an excess levy, it still was an obligation that *by statutory language* also impacted or could impact the funds created from the county's regular levy and, therefore, the local share of the educational financing system. Based on its analysis, this Court appropriately drafted its holding of unconstitutionality in Syllabus Point 12 around the impact to

the educational financing system created by a legislative act that created a funding obligation on that system. "[T]he amendments to W. Va.Code § 18–9A–11 continue to treat 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 to create a lack of uniformity in the State's educational financing system which is subject to strict scrutiny review* and may stand only upon demonstration that such lack of uniformity is necessary to further a compelling state interest." *Board II*, 231 W. Va. at 405, 745 S.E.2d at 443 (emphasis added). The discretionary retainage is still a portion of the regular levy proceeds, proceeds that in the school funding formula are still subject to the highest standards of equal protection. Therefore, this Court noted the Kanawha Special Act and similar Special Acts could not stand.

But the same is not true of the Cabell Special Acts. As noted succinctly from the Circuit Court: "the Cabell BOE's funding obligation for [Respondents] begins and ends with the excess levy." JA 000219. The financial obligation is placed on the Board by the people of Cabell County. "[T]he Public Library Special Act and the Park District Special Act do not burden the Cabell BOE's regular levy receipts or its discretionary retainage, and the Cabell BOE is not required to make a "'Hobson's choice.'" *Id.* "The Cabell Special Acts only require funding out of an excess levy if passed by the voters." *Id.*; *see* 1967 W. Va. Acts 1247 (Cabell Public Library Special Act, § 5(B)); 2011 W.Va. Acts 1911 (Park District Special Act, § 7(b)(3)).

The material differences between the Cabell Special Acts and those at issue in *Board II* was enough for the Circuit Court to reach a different result than *Board II*.

Applying *Chafin's* holding regarding excess levies being withdrawn from equal protection analysis and, following this Court's precedent on judicial review to construe a statute as not unconstitutional if reasonable to do so, the Circuit Court held the Cabell Special Acts not unconstitutional. JA 000223.

Cabell BOE raises numerous arguments against the distinctions that the Circuit Court drew arguing instead that *Board II* is controlling. (Pet. Br. 11). These arguments fail to support a conclusion beyond a reasonable doubt that the Cabell Special Acts are unconstitutional.

First, the Cabell BOE argues that the Hobson's choice in *Board II* was arguably less unconstitutional than the circumstances here because Cabell BOE has no choice but to ask for the excess levy whereas other counties do not have to split their excess levy capacity with other entities. (Pet. Br. 12-13). But this Court in *Board II* was explicit about the fact that the funding obligation for the nine counties referenced in *Board II* was put in place by the Legislature and implicated the educational financing system—a system that we know post-*Chafin* does not include excess levies. *See, e.g, Board II*, 231 W. Va. at 404, 745 S.E.2d at 442 ("This interpretation of *Chafin* is squarely at odds with both Pauley and Board I wherein we held that *any lack of uniformity in the school financing scheme* must withstand the strict scrutiny analysis implicated by the potential equal protection violation."). The Court in *Board II* did not find the financial obligation on proceeds from the regular levy constitutional just because it could be pawned off on the excess levy. It was precisely because there was a choice—at least in part of which implicated the educational financing system—that

created the problem. The Court in *Board II* had no reason to isolate its analysis just to an excess levy because that was *not* the language of the Act in question. "Prospective conditions which may never arise are entitled to little, if any, weight in considering the constitutionality of an act." Syl. Pt. 4, *State Rd. Comm'n v. Kanawha Cnty. Ct.*, 112 W. Va. 98, 163 S.E. 815, 815 (1932). However, as far as the Cabell BOE is concerned, *only* the excess levy is implicated in the Cabell Special Acts. And both Special Acts existed before *Board II* and, in the case of the Cabell Public Library Special Act, had been funded (if at all) from the excess levy since the acts passage in 1967. It was not until 2023—ten years after *Board II* and decades after *Pauley*, *Manchin*, and *Chafin*—that the Cabell BOE unilaterally decided the Cabell Special Acts were unconstitutional. But when determining whether all reasonable deference is afforded the constitutionality of an act, "[t]he continued acquiescence of courts in the constitutionality of a statute over a considerable period of time is also entitled to weight." Syl. Pt. 7, *State Rd.*, 112 W. Va. at 98, 163 S.E. at 816. Thus, is it precisely the distinction of the Cabell Special Acts, and their impact solely on excess levies, that set them apart from the unconstitutional choice associated with the acts in *Board II* that in no small part implicated the local share of the educational financing system. This Court should affirm the judgment of the Circuit Court seizing on this material distinction.

Second, Petitioners accuse the Circuit Court of taking a "no harm, no foul" analysis that was rebuffed in *Board II*. (Pet. Br. 13-15). The Circuit Court did not undertake that analysis. The Cabell Special Acts do not touch any aspect of the

education financing system as has been defined in this State. This Court in *Board II* was not just concerned about striving for uniformity in the minimums associated with the local share, but instead of protecting uniformity in the formula as a whole, including where the regular levy leads to a surplus of funds. Indeed, when focused on the excess levy in *Board II* this Court aptly pointed out that the excess levy affords "educational '*extras*.'" The excess levy does not afford constitutionally mandated funding subject to strict scrutiny equal protection analysis for disparate treatment. It affords extras. And those extras, as *Chafin* and *Pauley* note, can, and certainly do, vary widely from county to county. *Chafin*, 180 W. Va. at 227, 376 S.E.2d at 121 ("Local excess levies will undoubtedly promote some disparities between counties."). "These disparities are expressly countenanced by W.Va. Const. art. X, § 10." *Id*. "They represent the initiative of individual counties whose residents are willing to tax themselves to improve the level of local education." *Id*.

Here, in fact, Cabell BOE maximizes its ask of the people of Cabell County with its excess level, asking for approximately $29 million annually in extras according to the present proposal. *See* JA 000048-49. The currently operational excess levy proposed in 2018 was approved at just over $24 million, including just under 8% of which was for the library and parks. JA 000043-45. There are undoubtedly some counties that have zero excess levy. As of 1988 in *Chafin*, forty-three West Virginia counties had excess levies, but not all fifty-five. *See Chafin*, 180 W. Va. at 222, 376 S.E.2d at 116.

In short, regardless of why the Cabell BOE wants 100% of an excess levy, that excess levy is not subject to the same constitutional protection as the required educational financing system, and thus, the Cabell BOE is not entitled to have its desires constitutionally protected. For sure, it would not be unconstitutional for the people of Cabell County to say "enough," and vote against the excess levy. That outcome would undoubtedly harm the current state of affairs of education in Cabell County, as well as the library and parks, but it would not create a financial obligation of the Cabell BOE to fund either the library or park system.[3]

Petitioner's third argument questions the Circuit Court's application of *Chafin* because the Legislature, which passed the Cabell Special Acts, is clearly a state actor, an issue not present in *Chafin*. (Pet. Br. 15-16). However, no one is contending the Legislature is not a state actor nor is anyone arguing that the Cabell Special Acts are not acts of the Legislature. But these Special Acts of the Legislature do not, like those in *Board I* and *Board II*, obligate a county board of education to fund anything. The Acts create a tax rate structure and an obligation that, so long as asked by the boards for the library and parks, require the Cabell BOE to present the library and parks funding requests to the voters in the form of an excess levy. If the voters do not enact the levy order, there is no excess levy, and no payment obligation. While the legislation may create the circumstances for the voters' request and guide the tax rate, it is the voters of Cabell County who choose to obligate themselves to fund it—not the state. Moreover, the Cabell Special Acts do not alter the key point in *Chafin*

[3] This is the key distinction between the Kanawha Acts which were overturned in 2013 and the Cabell Acts which were left untouched.

that it is because of W.Va. Const. art. X, § 10 expressly authorizing these levies which pulls them from equal protection principles. The key component of Article X, Section 10 is that the increase levy must be "approved, in the manner *provided by law*, by at least a majority of the votes cast for and against the same." *Id*. (emphasis added). The Cabell Special Acts, read *in pari materia* with other state statutes regarding levies, carry forth this constitutionally permissible levy. The Acts do not contravene the constitution beyond a reasonable doubt.[4]

Petitioners last argue that the Circuit Court erred in distinguishing *Board II* by, in part, pointing out that even though Cabell County has the benefit of a special act of our Legislature for a library (and later a park), the Court in *Board II* did not refer to Cabell's special act status when discussing other special act counties. This stems from Petitioner's insistence that *Board II* controls, so much so that it is as if Cabell County was one of the nine counties with the same special acts under review there.[5] It is not now, nor was it then. The Cabell Public Library Special Act was

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[4] Even if the Special Acts were subject to equal protection analysis because only two of fifty-five counties have these legislative requests of the people for an excess levy, because the excess levy does not impact the constitutional funding right of a uniform educational system, the act would not be subject to strict scrutiny review. Where equal protection is raised, this Court first determines which one of the three tests to apply. Absent infringement on constitutional rights or suspect class, a statute is "reviewed under the 'highly deferential standard' of the rational basis test." *State ex rel. West Virginia Secondary School Activities Commission v. Cuomo*, 247 W.Va. 324, 332, 880 S.E.2d 46, 54 (2022). "An equal protection challenge may not succeed under the rational basis test as long as the question of rational relationship is 'at least debatable.'" *Id.* at 333, 880 S.E.2d at 55.

[5] Twice Petitioner argues that this Court speaks through its mandate. While certainly true, that would generally only apply to the parties in that case and the lower court (on remand). *See State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 808, 591 S.E.2d 728, 734 (2003) ("The mandate of an appellate court is its order formally advising the lower court of its decision, which marks the end of appellate jurisdiction and the return of the case to the lower tribunal for such proceedings as may be appropriate") (cleaned up). *Board II* did not review Cabell County's Special Acts. Thus, this case is not *Board III*. These two acts have not been the subject of a constitutional challenge until now. Thus, Petitioner' insistence that the Circuit Court failed to follow the mandate of *Board II* is misplaced.

different than the nine special acts in *Board I* because it did not encumber any aspect of Cabell County's regular levy. Accordingly, it did not need to be amended by the Legislature in 2008 and was not before the Court in *Board II*.[6] This is the point the Circuit Court was making—that *Board II* is not controlling because the law under review in *Board II* is different than the law under review here. Those differences lead to different constitutional outcomes. The *option* to shift a state-ordered funding obligation from regularly levies to an excess fund does not save the law from infringing on the calculus of the educational financing system. That is the result of the laws in *Board II*. But when there is no infringement on that financing system, *see, e.g., State v. Beaver*, 248 W. Va. 177, 188, 887 S.E.2d 610, 621 (2022) ("Thus, per the plain language of the statute, the Hope Scholarship's funding is 'in addition to all other amounts required' to fund public education."), and the people of Cabell County choose to financially obligate themselves, the constitutional calculus is different.

The Special Acts legislation here is not subject to review under strict scrutiny as Petitioner argues. And as that argument is all that Petitioner raises, the Circuit Court was correct not to find the Cabell Special Acts unconstitutional beyond a reasonable doubt. Because the Acts are not unconstitutional, the Cabell BOE must follow them. Assuming the elements of a request from the library and parks Boards are met, and the parties do not dispute that is the case, the Cabell BOE is required

[6] This is why Cabell County was not among the list of counties effected in footnote 2 of *Board II*. Judge Howard correctly found that "the exclusion of any discussion in *Board II* of Cabell County or the Special Acts at issue in this was no mere oversight." JA 000222.

to place the request on the excess levy ballot. The Circuit Court was correct to issue its writ of mandamus and this Court should affirm.

B. The Circuit Court Correctly Held that Equalization Payments are Due.

With respect to the equalization payments, the Public Library and the Park District are asking that they be provided with funds set by law and that Cabell County voters elected to provide them in the Levy Order. Petitioner's reliance on the 2018 tax estimate amounts quoted in the Levy Order, rather than the actual amounts collected, is misplaced because the Levy Order specifically states that Cabell County citizens were voting, in part, to fund "[t]he operation of the Cabell County Public Library as required by Section 5, Chapter 207, of the 1967 Acts of the West Virginia Legislature." JA000039 - JA000045. Similarly, those voters were asked to fund "[t]he operation of the Greater Huntington Park and Recreation District as required by Section 7, Chapter 194, of the 1983 Acts of the West Virginia Legislature." *Id.* Because the Levy Order specifically references and recognizes the Cabell Special Acts, including the rates set by law, the Cabell BOE cannot withhold the specific amounts those rates established in those Special Acts generate, including the equalization payments.

Nothing in the Levy Order gives the Cabell BOE license to ignore the language of the Cabell Special Acts to limit payments to estimated amounts—and even if it did, the Cabell BOE lacks the authority to disregard its statutory obligations. "The board of education of a school-district is a corporation created by statute with functions of a public nature expressly given and no other; and it can exercise no power not expressly

conferred or fairly arising from necessary implication, and in no other mode than that prescribed or authorized by the statute." *City of Huntington v. Bacon*, 196 W. Va. 457, 460, 473 S.E.2d 743, 746 (1996) (quoting *Shinn v. Board of Education*, 39 W. Va. 497, 20 S.E. 604 (1894)). The Cabell BOE has no expressly conferred power to disregard the Cabell Special Acts and the Excess Levy Order itself does not create one; therefore, the Cabell BOE must fund the Public Library and Park District as those Special Acts dictate.

The Cabell Special Acts explicitly set the amount of funding required to be placed on the ballot for the Public Library and the Park District. JA000023-38. Section 5(B) of the Public Library Special Act establishes that the Public Library shall receive a certain amount of funding from excess levies based on property tax assessments.[7] JA000023, *et. seq*. Nowhere does the Public Library Special Act provide for a specific amount. Similarly, the Park District Special Act provides that the Park District shall receive a certain amount of funding based the most recent assessed valuation of property in Cabell County.[8] JA000029, *et. seq*. Like the Public Library Special Act, the Park District Special Act does not provide a specific number. In other words, both Cabell Special Acts at issue here require that the Cabell BOE

[7] Per Section 5(B) of the Public Library Special Act, the Public Library shall receive, per $100 of "assessed valuation of the property taxable in the area served by it according to the last assessment for state and county purposes" the following amount: 1.4 cents for Class I Property; 2.8 cents for Class II Property, and 5.6 cents for Class III and IV Properties. JA 000023, at § 5(B).

[8] Per Section 7(b)(3) of the Park District Special Act, the Park District shall receive "on each $ 100 of assessed valuation of the property taxable in the area served by it according to the last assessment for state and county purposes" the following amount: 0.433 cents for Class I Property; 0.866 cents for Class II Property, and 1.73 cents for Class III and IV Property. JA 000029 at § 7(b)(3).

place on the levy a certain percentage of funds based on the most recent valuation of property.

Cabell County assesses property annually for the purposes of taxation. The Cabell BOE's claim that the Public Library is only owed $1,471,869.00 per year and the Park District only $455,229.00 per year is contrary to the plain language of the Cabell Special Acts, which require calculations based on the most recent assessed property values. JA 000023-38. The estimated numbers in the Levy Order are based on a valuation "for the assessment year ending June 30, 2018[.]" JA 000039, *et. seq*. That assessment is more than five years out of date. The equalization checks the Cabell BOE must provide to the Public Library and the Park District are issued to bring the funding received into compliance with the Cabell Special Acts—to ensure the Public Library and Park District receive what they are owed as calculated by applicable Acts of the Legislature based on each year's taxes assessed and collected. The Cabell BOE has no authority to do otherwise, so the Circuit Court was correct in holding that mandamus should lie directing the Cabell BOE to meet its obligations under the Cabell Special Acts.

The Cabell BOE only raises two arguments in support of its position that the Circuit Court erred in granting Respondents' writ of mandamus related to the equalization payments. First, Cabell BOE argues that the Cabell Special Acts are unconstitutional. As discussed *supra*, that argument fails. Second, they argue that the Cabell Special Acts are in "direct conflict" with the plain language approved by Cabell County's voters. This imaginary "conflict" is simply impossible when the Levy

Order itself references the Cabell Special Acts by name. The fact that the levy order also listed dollar amounts based on the previous year's property tax assessments does not create some sort of "conflict" which can only be resolved by shuttling any excess tax collections into the coffers of the Cabell BOE. Petitioner fails to offer any support or precedent, just as it failed to offer any to the Circuit Court, in support of the position that outdated property tax estimates in a Levy Order supersede the percentages required by the Acts of the Legislature. As a result, the Circuit Court correctly held that equalization payments were required, and the Writ was granted as to that issue as well. This Court should affirm that well-reasoned decision.

VI. CONCLUSION

The Circuit Court's grant of Respondents' Writ of Mandamus was correct, thorough, and lawful, followed the well-established precedent in West Virginia regarding equal protection and school funding, and should be affirmed.

Dated: January 17, 2024

/s/ Marc E. Williams

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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 attorney hereby certifies that the foregoing ***"Response to Petitioner's Brief"*** was electronically filed using the File & ServeXpress system on the 17th day of January, 2024, which shall send automatic notification to the following:

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