IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

DOROTHEA "JEANNIE" FORD,
FRIEDA ICKES, and
KENT "BROOKS" MCCUMBEE,

Plaintiffs,

vs. Civil Action No. 14-C-1

(Including former Civil Actions 14-C-2 and 14-C-3, which have been consolidated herein)

(Judge Sanders)

MORGAN COUNTY BOARD OF EDUCATION,

Defendant.

MEMORANDUM OF THE DEFENDANT, THE BOARD OF EDUCATION OF MORGAN COUNTY

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Comes now the Board of Education of the County of Morgan, Defendant herein, by its counsel, to offer the following as its brief upon the legal issues raised by this civil action.

II. STATEMENT OF FACTS

The facts relevant to this case may be summarized as follows:

1. On the 5th day of February, 2013, the Morgan County Board of Education entered an order proposing a five-year excess levy for Morgan County's public schools. The levy was proposed pursuant to the board's authority under W.Va. Code §11-8-16, and the proposed rate of the levy was set in the order at 100% of the maximum allowable levy. The 2013 levy order delineated the purposes for which the levy would be raised, and the levy order scheduled the question of the levy's approval to be laid before the citizens of Morgan County at a special election to be held on the 11th day of May, 2013. (See Exhibit #1; Defendant's Appendix).
2. The citizens of Morgan County rejected this levy at the special election held on the 11th day of May, 2013.
3. In the intervening eight months which elapsed between May 11, 2013, and January 14, 2014, the Morgan County Board of Education, and its individual members, have sought out the opinions of the citizens. The board has held numerous public meetings all over Morgan County. The board, and its individual members, have heard and have listened carefully to the concerns of the citizens of Morgan County, concerns about their taxes, about ways to improve the school system, concerns and ideas about ways to become more frugal and efficient in the

operation of the public schools of Morgan County, and concerns about their hopes and aspirations for the children or Morgan County.

4. The Morgan County Board of Education has taken all of the information it has received from the citizens of Morgan County to heart.

5. The Morgan County Board of Education has investigated ways to cut its budget, and the board has implemented many cuts and cost-saving measures.

6. Despite cuts which are hiving to be made, it is the judgment of the Morgan County Board of Education that providing a high-quality education for the children of Morgan County, the kind of education that the children of Morgan County deserve and the kind that will be needed to enhance the chances of future success, fulfillment and prosperity in their lives, will require more funds than that which will be produced by the Morgan County's regular levy alone.

7. Accordingly, on 14th day of January, 2014, the Morgan County Board of Education issued an order proposing a new excess levy for the Morgan County school system. The new levy order proposes a substantially reduced excess levy. The levy proposal reduces the levy rate and revenue by 30% from the excess levy which was approved by the citizens in 2008 (now expired), and by 30% from the 2013 levy proposal which was rejected by the citizens.

8. The proposed new excess levy will lower the property taxes of all Morgan County taxpayers from the amounts which they have been paying over the last five years under the 2008 levy (now expired), while providing some additional revenue to keep public education for the children of Morgan County from ruin. The

proposed, new levy eliminates of some expenditures and the reduction of many other expenditures that were paid out of the previous excess levy.

9. The Morgan County Board of Education understands and acknowledges that some taxpayers are opposed to raising or spending any excess levy money for the benefit of Morgan County's children, 61% of whom live in households that are considered economically disadvantaged by the federal government, but based upon its many meetings and conversations throughout Morgan County with its citizens, the Morgan County Board of Education believes that its new excess levy proposal has the support of a majority of the citizens of Morgan County.

10. The board's order proposing the new excess levy calls for the question of the approval of the excess levy to be laid before the citizens of Morgan County at the primary election scheduled to be held on the 13th day of May, 2014. (See Exhibit #2; Defendant's Appendix).

11. Because the election is scheduled to be held at the same time as the statutorily scheduled primary elections, there will be no extra cost or expense associated with the holding of an election on the proposed new excess levy.

12. The Plaintiffs have filed the instant civil actions seeking to have this Court declare that the citizens of Morgan County do not have the right to consider and vote upon the newly crafted proposed excess levy for Morgan County's children.

13. Notwithstanding the desire of the Plaintiffs, expressed by their filing of this civil action, to circumvent the constitutional and statutorily required electoral process for this question, the citizens of Morgan County have the right to have all of their voices heard in the election scheduled for May 13, 2014, on the question of

whether this new proposed levy should be approved, and not just the voices of the three Plaintiffs here.

III. SUMMARY OF THE DEFENDANT'S ARGUMENTS

There is absolutely no basis for the Court to render the declaratory judgment sought here by the Plaintiffs. First and foremost, W.Va. Code §18-9-1, the statute upon which the Plaintiffs have staked their entire case, does not apply to the excess levy election which has been ordered for March 13, 2014. The election scheduled for March 13, 2014 is specifically authorized and governed by W.Va. Code §11-8-16 and Article X, §10 of the West Virginia Constitution.

Secondly, even if W.Va. Code §18-9-1 did apply in this case, under its very terms, that statute would not prohibit the levy election from being held on May 13, 2014. Under that statute, the series of events which trigger the requirement of a petition before election may be held earlier than November have not occurred.

Third, because the Plaintiffs have no injuries, because they have not joined parties who are indispensable to this case, and because their claims are all founded upon contingencies and future events which may or may not ever happen, the Plaintiffs' contentions and claims are not appropriate for adjudication under the Uniform Declaratory Judgments Act.

Finally, because the Plaintiffs have no actual injuries, they have no standing. Because the Plaintiffs' claims are dependent upon contingencies and future events which may or may not happen, their claims are not ripe for adjudication. Because the Plaintiffs

have no standing, and because their claims are not ripe or justiciable, this Court lacks subject matter jurisdiction for this case.

IV. DISCUSSION OF THE LAW

a. W.VA. CODE §18-9-1 HAS BEEN SUPERSEDED BY AMENDMENTS TO THE WEST VIRGINIA CONSTITUTION AND BY STATUTORY ENACTMENTS, SO THAT W.VA. CODE §18-9-1 DOES NOT PRECLUDE THE NEW EXCESS LEVY ELECTION FROM BEING HELD WITH THE PRIMARY ELECTION IN MAY OF 2014.

THE LAW OF WEST VIRGINIA AND ITS HISTORICAL DEVELOPMENT SHOW CONCLUSIVELY THAT W.VA. CODE §18-9-1 DOES NOT APPLY TO ANY SCHOOL LEVIES IN WEST VIRGINIA NOW.

Understanding why W.Va. Code §18-9-1[1] has no application to the new excess school levy now proposed by the Morgan County Board of Education requires an

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1 In its totality, W.Va. Code §18-9-1 provides as follows:

"18-9-1. School levies; when levy election necessary; special election

The board of education of every school district or independent school district, wherein a majority of the votes cast on the question of school levy at the last general or special election at which the question of school levy was submitted to the qualified voters of such district or independent school district were in favor of such levy, shall annually, at the time and in the manner provided by law for making levies, levy a tax on all taxable property in its district or independent school district for the support and maintenance of free schools therein: Provided, That upon petition of not less than forty percent of the registered voters in any district or independent school district, as shown by the last registration of voters therein, addressed to the board of education of such district or independent school district, requesting the submission of the school levy to the voters of such district, the board of education of such district or independent district shall submit the question of authorizing a levy for school purposes to the voters of such district at the general election held next after such petition is presented; and the board of ballot commissioners of the county of which such district constitutes a part shall prepare or cause to be prepared separate ballots from the official ballot to be voted at said election, which separate ballot shall have printed thereon the following:

BALLOT ON SCHOOL LEVY

[ ] For school levy.
[ ] Against school levy.

The officers conducting the general election at each place of voting shall conduct the election on the question of the school levy and canvass and certify the result thereof to the commissioners of the county court in the same manner, so far as applicable, as they are required to conduct and certify the result of the general election; and such commissioners shall promptly certify the result of the election on the question of the school levy to the board of education of the district or independent school district within which the

understanding of the history of public education in and the development of the law relating to the financing of public education in West Virginia over the last century.

This statute, first enacted in 1872, was last reenacted in 1923. It is not now, nor was it ever, applicable to excess levies. Excess levies did not even exist until long after the statute was last enacted. Although this statute has not been repealed, it has been rendered wholly obsolete and inapplicable to all school levies in West Virginia as a result of other statutes enacted subsequently by the Legislature and as a result of several intervening amendments to the West Virginia Constitution, including the "Tax Limitation Amendment" of 1932 (W.Va. Const., Article X, Section 1), the "Better Schools

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election was held, and such certificate shall be entered by the secretary as part of the minutes and records of such board of education. If a majority of the ballots cast at said general election in any district or independent school district on the question of such school levy be in favor of the levy, the board of education of such district or independent school district shall annually thereafter levy a tax on all the taxable property in its district, for the support and maintenance of the schools in the district, until such time as an election may again be held on the question of such school levy in the manner hereinbefore provided.

In the event that a majority of the votes cast in any school district or independent school district upon the question of the school levy submitted at any general election be against the levy, the board of education of such district or independent school district shall have authority to call a special election for the purpose of resubmitting the question of authorizing such school levy to the voters of such district or independent district. Such special election shall be held in accordance with the provisions of the next succeeding section of this article, so far as applicable, and the ballots shall be similar to those heretofore described in this section. If a majority of the ballots cast at such special election in any school district or independent school district be in favor of the school levy, the board of education of such district or independent school district shall annually thereafter levy a tax for the support of the free schools in its district or independent school district, in the manner provided by law for school levies, until such time as the question of school levy may again be submitted at a general election upon a petition signed by not less than forty percent of the registered voters of the district or independent district, as hereinbefore provided, and a majority of the votes cast at such election be against the levy. If a majority of the votes cast at any such special election be against the school levy the board of education of any such district or independent district shall again submit the question of a school levy to the voters of its district or independent district at the next general election: Provided, however, That upon petition of not less than forty percent of the qualified voters of the district, as determined from the last registration of voters, such board of education may again submit the question of school levy at a special election to be held for that purpose, in the manner hereinbefore provided, prior to the next succeeding general election.

CREDIT(S)

Acts 1872-3, c. 123, § 2; Acts 1877, c. 77, § 2; Acts 1879, c. 74, § 2; Acts 1881, c. 15, § 2; Acts 1883, c. 74, § 2; Acts 1893, c. 26, § 2; Acts 1901, c. 11, § 1; Acts 1908, c. 27, § 20; Acts 1921, c. 16, § 184a; Acts 1923, c. 12, § 1."

Amendment" (W.Va. Const., Article X, Section 10), and the "Property Tax Limitation and Homestead Exemption Amendment of 1982" (W.Va. Const., Article X, Section 1b).

i. PUBLIC EDUCATION IN WEST VIRGINIA IN THE LATE NINETEENTH AND EARLY TWENTIETH CENTURIES

In the late nineteenth century and the early part of the twentieth century, the structure of public education and funding for public education in West Virginia were both very different from what we know today. Notwithstanding the requirement of the West Virginia Constitution that "[t]he Legislature shall provide, by general law, for a thorough and efficient system of free schools" (W.Va. Const. Article XII, Section 1), the operation of free, public schools was then less a "system" than an inconsistent and disjointed scattering of local operations. In the late 19th century and early 20th century, "local" meant "local" in the truest sense.

There was no significant funding from the State of West Virginia for public schools at that time.[2] Indeed, the statute upon which the Plaintiffs rely is a relic from a time before West Virginia had even put into place "the county unit system" discussed below. The statute cited by the Plaintiffs, W.Va. Code §18-9-1, begins as a directive to the board of education of "every school district or independent school district." At every instance in which this statute was enacted and reenacted, school boards were elected and existed not for entire counties, but by individual magisterial districts. This is the manner in which schools were organized, staffed, and funded throughout the State of West Virginia, including Morgan County until 1933. Exhibits #3 through #8 (Defendant's

[2] In 1929, "...94% of the total school revenues was collected in the districts, and 97% of the total expenditures for schools came from direct taxes on general property.....West Virginia was the only state in the Union in which more than two-thirds of the total cost of public education was thus derived." Dr. Charles H. Ambler, *A History of Education in West Virginia (From Early Colonial Times to 1949); page 440.*

Appendix) are attested copies of deeds appearing of record in the Office of the Clerk of Morgan County West Virginia. These deeds represent conveyances of real estate for public schools in Morgan County to the following:

Ex. #	Date	Grantee
3	1888	The Board of Education of the Allen District;
4	1898	The Board of Education of the Bath District;
5	1905	The Board of Education of the Sleepy Creek District;
6	1916	The Board of Education of the Timber Ridge District;
7	1912	The Board of Education of the Sleepy Creek District;
8	1925	The Board of Education of the Rock Gap District;

As was the case throughout West Virginia at the time of the last enactment of W.Va. Code §18-9-1, each of Morgan County's magisterial districts had its own board of education, which was authorized under the procedures outlined in W.Va. Code §18-9-1 to raise money to operate schools within a magisterial district with a levy upon the taxable property located within that district.

In the landmark case of *Pauley v. Kelly,* 162 W.Va. 672, 255 S.E.2d 859 (1979), the Supreme Court cited Dr. Charles H. Ambler's book, *A History of Education in West Virginia (From Early Colonial Times to 1949)* and its perceptive observations about the disparities found in the funding of public education in West Virginia in the early 20th century:

> "The worst feature of the entire system was its stultifying inequalities. For instance, the per capital wealth per student in the 1920's varied from $841 in Jumping Branch District, Summers County, to $14,664 in Cass District, Monongalia County. The thirty cent levy on these values yielded $1.59 for each child in the former and $48.90 in the latter. At the same time, active rates of taxation for school purposes varied from 37 cents in Freeman's

> Creek District, Lewis County, to $2.22 in Ripley Independent District, Jackson County. For the year ending 1917 the school term in thirty-seven districts varied from seventy-five to one hundred ten days of the required six month term, and the Survey of Education, made ten years later, indicated that children in rural districts with short terms and poor teachers were far behind children who attended city and consolidated schools.
>
> The chief difficulty lay in the fact that the wealth of the state was amassed in spots and sections, while other spots and sections were without taxable wealth to support even good elementary schools. As a consequence, in 1924 terms varied from 180 days in fifty-three districts to 160 days or less in three hundred forty-four districts, and the average per capita cost in districts with the longer terms was much less than in those with shorter terms. In the former, buildings and equipment were of the finest sort, whereas in the latter children were crowded into 'huts,' unpainted and bare, poorly heated, rudely furnished, without libraries and sanitary outbuildings. Moreover, the best teachers were in the wealthy districts which were also provided with supervisors and special instructors in music, drawing, and other subjects. In face of the law requiring property to be assessed at its full and actual value, the assessments in some counties were lowered from year to year so as to boost their shares of the supplemental funds." (Ambler, 439-40). (*Pauley v. Kelly*, at 726-7).

During that time, legislators from various parts of West Virginia sought for their constituents piece-meal, local remedies to the problems within this "system" of public education. They introduced special, local acts for their own districts, addressing problems one school at a time. The jurisprudence from that era includes several constitutional challenges made to the authority of the Legislature to act locally in the area of school district structure and funding for individual counties and schools. For instance, in 1911, the Legislature passed a special act (Ch. 26, Acts 1911), to create a high school for Nicholas County in or near to the town of Summersville. The Act provided for the purchase of the ground, the erection of a building and the maintenance of the school "by a tax to be levied by the board of directors of said school upon all the taxable property in the county." *Herold v. McQueen*, 71 W.Va. 43, 75 S.E. 313 (1912).

H. W. Herold and 39 other taxpayers of Nicholas County filed suit on behalf of themselves and all other taxpayers of the county to enjoin the collection of the tax which had been levied to raise the funds for the new high school. Although the processes delineated in W.Va. Code §18-9-1 were not specifically discussed in the case, the case is important because the appellants in *Herold* argued that the Legislature lacked the constitutional authority to pass a special act where a "general law can be made applicable to the case." *Id.*, at 315. The Supreme Court rejected the constitutional challenges. In discussing the authority of the Legislature to act in this area, the Supreme Court said:

> "....We think the Legislature can, with equal right, tax the county as a unit to support a county high school. True, sections 6 and 10, art. 12, of the Constitution recognize the districts existing at the time the Constitution was adopted, as the unit for free school purposes, but those sections also recognize the inherent power vested in the Legislature to change the unit, and they do not divest it of that power. There is nothing in article 12, which is the article dealing especially with the subject of public education, prohibiting the Legislature from making the county, instead of the district, the unit, if it should see fit to do so; and nothing to prevent it from retaining the district as the unit for the general or common free schools, and establishing the county as the unit for graded or high schools." *Id.*, at 316.

Even though the statute which would become W.Va. Code §18-9-1 was part of the law at the time of the decision in *Herold*, the Supreme Court recognized that the Legislature had authority to bypass it with a subsequent enactment, even a completely local one. As discussed in *Herold*, the Legislature bypassed the general statutes governing school funding, including W.Va. Code §18-9-1, with a special, local law, the uses of which by the Legislature are restricted and circumscribed by Article VI, Section 39 of the West Virginia Constitution. In the case at bar, W.Va. Code §18-9-1 has been superseded, not by a local act, but by subsequent enactments of general law.

A similar case a decade later produced the same result. In 1923 the Legislature passed a local act (Ch. 86 Acts, 1923) to provide for the establishment of a county high school in Upshur County, and to provide for a special levy to "build, equip, and maintain the same, upon the taxable property in all of the districts of the county." The act created a board of education for the new high school composed of "the presidents of the boards of education of each of the magisterial districts with the county superintendent as president thereof with the power to purchase a site, make levies therefor, and conduct the affairs of the school under the general school laws of the state." Citing the decision in *Herold*, the Supreme Court upheld the constitutionality of the act. *Casto v. Upshur County High School Board*, 119 S.E. 470, 94 W.Va. 513 (1923).

Changes would come a short time later with the Great Depression.

ii. THE GREAT DEPRESSION

It is a cliche to say that everything changed with the Great Depression, but it is true. Public education in West Virginia was no exception. The depression brought many changes to the funding and structure of public education in West Virginia.

First and foremost among the changes wrought by the Great Depression was the "Tax Limitation Amendment" to the West Virginia Constitution (W.Va. Const., Article X, §1). In the wake of massive losses of homes and farms in West Virginia upon which the owners could not afford to pay the taxes, the Legislature, sitting in extraordinary session in 1932, proposed H.J.R. 3, the "Tax Limitation Amendment" to the West Virginia Constitution. This amendment was ratified by the citizens of West Virginia in the general election in November of 1932.

The Tax Limitation Amendment (W.Va. Const., Article X, §1) enshrined in the West Virginia Constitution a maximum amount that could be imposed (a "hard cap") upon the aggregate of all levies that could be laid upon taxable property in West Virginia.[3] The maximum total levy rate for all levies was set at fifty cents per hundred dollars of value for personal property used in agriculture (and other delineated personal property). The maximum total levy rate for all levies was set at one dollar per hundred dollars on the value of residential real estate, and "upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other property situated within municipalities, two dollars."

From the time of the ratification of the Tax Limitation Amendment, all of the levying bodies had to live within the maximum levies established by the Constitution. The Tax Limitation Amendment did allow for increases by the levying bodies, but these were limited (a) in amount (50% of a levying body's maximum levy); (b) in duration (three years); and (c) in how they could occur (only upon approval of 60% of the voters).

The depression brought another change to public education in West Virginia, a change in its structure. In extraordinary session in 1933, the West Virginia Legislature did what 21 years earlier, the Supreme Court in *Herold v. McQueen*, 71 W.Va. 43, 75 S.E. 313 (1912) had said that it could do. The Legislature enacted Senate Bill 3, the

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[3] Then, as now, in addition to levies for schools, there were levies for county government, for the state, for municipal governments as to property located within municipalities. W.Va. Code §11-8-4 (1933) provides:

> "The taxing units of the State for the purposes of this article are declared to be (1) the State, (2) the county, for all county purposes including indebtedness other than school indebtedness, (3) present school districts for current school purposes, (4) school districts existing prior to the twenty-second day of May, one thousand nine hundred thirty-three, for school debt service purposes, (5) magisterial and other road districts for road and other debt service purposes other than county road debts, (6) other specially created taxing districts for indebtedness existing at the time of the adoption of the Tax Limitation Amendment, (7) municipalities for municipal purposes including municipal debt service purposes."

"county unit" bill. This new law abolished all of West Virginia's magisterial school districts and subdistricts and independent school districts,[4] and created in its place a "county unit" plan of organization for public schools. The challenges to the new law's constitutionality were rejected by the Supreme Court in the case of *Leonhart v. Board of Education of Charleston Independent School District*, et al.., 114 W.Va. 9, 170 S.E. 418 (1933).

Under the "county unit plan," as adopted in 1933, every school district in every county was placed "under the supervision and control of a county board of education," composed of five members, to be nominated and elected by the voters of the respective county, and with no more than two members being elected from the same magisterial district.[5] (W. Va. Code §18-5-1).

The county unit plan was a wholesale replacement of the magisterial and independent district structure which had preceded it. The law provided, as it still does, that:

> "The county board of education shall be a corporation by the name of 'The board of education of the county of .....,' and as such may sue and be sued, plead and be impleaded, contract and be contracted with. It shall succeed and be subrogated to all the rights of former magisterial and independent district boards and may institute and maintain any and all actions, suits and proceedings now pending or which might have been brought and prosecuted in the name of any former board for the recovery of any money or property, or damage to any property due to or vested in the former board, and shall also be liable in its corporate capacity for all claims legally existing against the board of which it is a successor. The board shall, according to law, hold and dispose of any real estate or

[4] These are the very "school districts" and "independent school districts" referred to in W. Va. Code §18-9-1, the statute upon which the Plaintiffs rely in this case. The "county unit' law abolished 398 school districts in West Virginia. Charles H. Ambler, *A History of Education in West Virginia (From Early Colonial Times to 1949); page 610.*

[5] No doubt the requirement for diversification among magisterial districts of the members of the county boards of education was a recognition of the structure which had preceded the "county unit plan" and perhaps a political requirement to secure passage of the bill.

> personal property belonging to the former corporation or its predecessors, or that may hereafter come into its possession." W.Va. Code §18-5-5. (emphasis added)

The transfer of title to lands was accomplished by this section and by the provisions of W.Va. Code §18-5-6, which provides:

> "The county board shall have title to any land or school site which for five years has been in the undisputed possession of the county board or any board of education of a magisterial district, or subdistrict, or independent district, and to which title cannot be shown by any other claimant." (emphasis added).

Accordingly, in Morgan County, when the properties which had been conveyed to the boards of education of the various magisterial districts in the county (See Exhibits #3-8; Defendant's Appendix) became obsolete and unnecessary for purposes of public education, it was the Morgan County Board of Education which disposed of them all under the law. (See Exhibits #9-13; Defendant's Appendix).

It is noteworthy that while all of the school districts and independent school districts were abolished in the enactment of the "county unit plan," it was recognized by the Legislature that the school districts had to remain as lawful levying bodies, not for the purpose of operating schools, but solely for the purpose of retiring any indebtedness that they had contracted before their abolition. W.Va. Code §11-8-4 (1933) provides:

> "The taxing units of the State for the purposes of this article are declared to be (1) the State, (2) the county, for all county purposes including indebtedness other than school indebtedness, (3) present school districts for current school purposes, (4) school districts existing prior to the twenty-second day of May, one thousand nine hundred thirty-three, for school debt service purposes, (5) magisterial and other road districts for road and other debt service purposes other than county road debts, (6) other specially created taxing districts for indebtedness existing at the time of the adoption of the Tax Limitation Amendment, (7) municipalities for municipal purposes including municipal debt service purposes." (emphasis added).

Again, W.Va. Code 18-9-1 was last reenacted in 1923. The school districts to which W.Va. Code §18-9-1 refers were abolished in 1933.

iii. THE PUBLIC'S DEMAND FOR BETTER SCHOOLS AND THE RATIFICATION OF THE "BETTER SCHOOLS AMENDMENT" (W.VA. CONST., ARTICLE X, §10) AS A MECHANISM TO BYPASS THE HARD CAPS IMPOSED BY THE TAX LIMITATION AMENDMENT OF 1932. (W.VA. CONST., ARTICLE X, §1).

The population of West Virginia grew steadily from the time of the depression to the 1950's. According to the 1930 Census of the United States, the population of West Virginia was 1,729,205 people.[6] In 1950, just twenty years later, the state's population had grown by 16%, to 2,006,000 people.[7] Economic growth and population growth in the Mountain State made increasing demands upon public education, financing for which was still tightly constrained by the Tax Limitation Amendment of 1932.

In 1957, the Legislature passed S.J.R. 8, a resolution proposing the "Better Schools Amendment" to the W.Va. Constitution. (1957 Acts, Ch. 17). This amendment to the Constitution was ratified by the citizens of West Virginia in the general election of 1958, and it is codified in Article X, §10 of the West Virginia Constitution. It provides, in pertinent part, as follows:

> "Notwithstanding any other provision of the Constitution to the contrary, the maximum rates authorized and allocated by law for tax levies on the several classes of property for the support of public schools may be increased in any school district for a period not to exceed five years, and in an amount not to exceed one hundred percent of such maximum rates, if such increase is approved, in the manner provided by law, by at least a majority of the votes cast for and against the same.
>
> Notwithstanding any other provision of the Constitution to the contrary, the maximum rates provided for tax levies by school districts on the

[6] U.S. Census 1930.

[7] U.S. Census 1950.

several classes of property may be used entirely for current expense purposes; ....."
....."

This amendment to the Constitution provided a method by which the citizens of each county, if they voted to do so, could unshackle themselves from the restraints of the Tax Limitation Amendment of 1932 to obtain increased funding for public schools. The Better Schools Amendment allowed an additional levy of up to 100% of the maximum regular levy for a period of up to five years. These additional levies, which are generally referred to as "special" or "excess" levies could be implemented "in the manner provided by law, by at least a majority of the votes cast for and against the same." Moreover, these levies could be used "entirely for current expense purposes," as opposed to just for the retirement of debt.

As of 2011, forty-four of West Virginia's fifty-five counties, including Morgan County, had excess levies in place for their public school systems.[8]

County excess levies under the Better Schools Amendment are permitted "if such increase is approved, *in the manner provided by law*, by at least a majority of the votes cast for and against the same." (W.Va. Const., Art. X, §10). Clearly, W.Va. Code §18-9-1, upon which the Plaintiffs rely in this case, is not the procedure enacted by the Legislature for implementation of the Better Schools Amendment. As noted above, the Better Schools Amendment was ratified in 1958, thirty-five years after W.Va. Code §18-9-1 was last re-enacted.

[8] 2011 Report on Special Excess levies in West Virginia by the Honorable Glen Gainer, West Virginia Auditor; http://www.wvsao.gov/localgovernment/files/reports/Special_Excess_Levy_Report.pdf

The statutes enacted by the Legislature to implement the Better Schools Amendment are found in Article 8, Chapter 11 of the West Virginia Code. W.Va. Code §11-8-16 provides as follows:

> "A local levying body may provide for an election to increase the levies by entering on its record of proceedings an order setting forth:
>
> (1) The purpose for which additional funds are needed;
>
> (2) The amount for each purpose;
>
> (3) The total amount needed;
>
> (4) The separate and aggregate assessed valuation of each class of taxable property within its jurisdiction;
>
> (5) The proposed additional rate of levy in cents on each class of property;
>
> (6) The proposed number of years, not to exceed five, to which the additional levy applies;
>
> (7) The fact that the local levying body will or will not issue bonds, as provided by this section, upon approval of the proposed increased levy.
>
> The local levying body shall submit to the voters within their political subdivision the question of the additional levy at either a ***primary, general or special election.*** If at least sixty percent of the voters cast their ballots in favor of the additional levy, the county commission or municipality may impose the additional levy. If at least a majority of voters cast their ballot in favor of the additional levy, the county board of education may impose the additional levy: *Provided,* That any additional levy adopted by the voters, including any additional levy adopted prior to the effective date of this section, shall be the actual number of cents per each one hundred dollars of value set forth in the ballot provision, which number shall not exceed the maximum amounts prescribed in this section, regardless of the rate of regular levy then or currently in effect, unless such rate of additional special levy is reduced in accordance with the provisions of section six-g of this article or otherwise changed in accordance with the applicable ballot provisions. For county commissions, this levy shall not exceed a rate greater than seven and fifteen hundredths cents for each one hundred dollars of value for Class I properties, and for Class II properties a rate greater than twice the rate for Class I properties, and for Class III and IV properties a rate greater than twice the rate for Class II properties. For municipalities, this levy shall not exceed a rate greater than six and

> twenty-five hundredths cents for each one hundred dollars of value for Class I properties, and for Class II properties a rate greater than twice the rate for Class I properties, and for Class III and IV properties a rate greater than twice the rate for Class II properties. For county boards of education, this levy shall not exceed a rate greater than twenty-two and ninety-five hundredths cents for each one hundred dollars of value for Class I properties, and for Class II properties a rate greater than twice the rate for Class I properties, and for Class III and IV properties a rate greater than twice the rate for Class II properties." (Emphasis added)

Under this statute, an excess levy election may be held at any "primary, general or special election."[9]

Even assuming *arguendo* that W.Va. Code §18-9-1 could somehow ever apply to excess levy elections -- elections authorized under a constitutional amendment that was ratified more than a third of a century after the last enactment of §18-9-1, elections for which the Legislature enacted specifically tailored statutes, -- it must be recognized that the procedures delineated under W.Va. Code §18-9-1, on the one hand, and W.Va. Code §11-8-16, on the other hand, are in mortal conflict with each other. The law governing the resolution of this conflict does not bode well for those who would rely on W.Va. Code §18-9-1:

> "When faced with two conflicting enactments, this Court and courts generally follow the black-letter principle that 'effect should always be given to the latest ... expression of the legislative will ....' *Joseph Speidel Grocery Co. v. Warder,* 56 W.Va. 602, 608, 49 S.E. 534, 536 (1904). '[T]he statute which is the more recent ... prevails....'" *Wiley v. Toppings*, 210 W.Va. 173, 556 S.E.2d 818 (2001), at 820 and 175.

As discussed previously, W.Va. Code §18-9-1 was last re-enacted in 1923. Reenactments of W.Va. Code §11-8-16 following the ratification of the Better Schools

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[9] Prior to 2005, this statute permitted an excess levy election to be held at "either a general or special election." This statute was amended and reenacted in 2005 by the Legislature for the specific purpose of adding primary elections to list of those elections when a board of education may submit the question of approval of an excess levy to the voters. This change in the statute became effective upon the bill's passage on September 9, 2005. Copies of both the Engrossed Senate Bill 4002 and the final Enrolled Senate Bill 4002 are attached hereto together as Defendant's Exhibit # 14.

Amendment to the West Virginia Constitution have occurred in 1959, 1963, 1993, and 2005, with the reenactment in 2005 being for the purpose of specifically providing that an excess levy election may be held in conjunction with a primary election. (Acts 1959, c. 159; Acts 1963, c. 174; Acts 1993, 1st Ex. Sess., c. 8; Acts 2005, 4th ex. Sess., c. 10).

iv. WEST VIRGINIA CODE §18-9-1 HAS NO APPLICATION TO THE REGULAR (CURRENT EXPENSE) LEVIES OF WEST VIRGINIA'S COUNTY BOARDS OF EDUCATION.

No discussion of the obsolescence of W.Va. Code §18-9-1 would be complete without an explanation of what has happened with regular school levies in West Virginia in the last 35 years, and how other changes in the Constitution and the statutes of West Virginia have rendered W.Va. Code §18-9-1 irrelevant and inapplicable not only to excess levies, but also to the regular, current expense levies of the county boards of education.

All fifty-five county boards of education in West Virginia impose "regular" (or "current expense") levies. As noted above, the vast majority of these counties have also approved excess levies, but there is a regular levy for schools in every county of the state.

Under W.Va. Code §11-8-6c, the maximum levy rates that county boards of education may impose on the various classes of property are: Class I - 22.95¢ per $100 of assessed valuation; Class II - 45.90¢ per $100 of assessed valuation; Class III - 91.80¢ per $100 of assessed valuation; and Class IV - 91.80¢ per $100 of assessed valuation. Even though West Virginia's fifty-five county boards of education are the levying bodies for the regular school levy in each county, the boards of education do not control the levy rate.

This discussion must begin with the 1979 decision of the Supreme Court in *Pauly v. Kelly,* 162 W.Va. 672, 255 S.E.2d 859 (1979). *Pauly* began as a suit brought by the parents of children in Lincoln County's public schools. In *Pauly*, the Supreme Court held that the West Virginia Constitution's "thorough and efficient education" clause (Art. XII, §1) makes public education in West Virginia a fundamental, constitutional right. The Court also held that constitutional equal protection principles apply to public education and that discriminatory practices trigger strict scrutiny analysis. *Id.*, Syllabus Point 4.

Much of the attention in *Pauly* was focused on the very low appraisements and assessments of property in Lincoln County, which depressed the amount of money the regular school levy produced for public education. The Court held in *Pauly* that the deplorable conditions and the substandard state of public education in Lincoln County pleaded by the parents of its children were sufficient to state a claim as a denial of equal protection.

In the aftermath of the decision in *Pauly*, in November of 1982, the citizens of West Virginia ratified the "Property Tax Limitation and Homestead Exemption Amendment of 1982." (W.Va. Const., Art. X, §1b). It required, *inter alia*, that all property in West Virginia subject to taxation be assessed at 60% of its value. It also required the implementation of a system of statewide reappraisal of all taxable property in West Virginia to bring appraisals and assessments into line with their true fair market values. Subsection E of the Constitutional Amendment provides as follows:

"Subsection E--Levies for Free Schools

> In equalizing the support of free schools provided by state and local taxes, the Legislature may require that the local school districts levy all or any portion of the maximum levies allowed under section one of this article which has been allocated to such local school districts."

Subsection F of the Constitutional Amendment gave the Legislature "plenary power to provide by general law for the equitable application of this article..."

The Legislature has indeed exercised this power. While the county boards of education are still levying bodies under W.Va. Code §11-8-4, the county boards of education no longer control what their regular levies will be each year. The regular (or "current expense") levy for every county is now set by the Legislature. The regular school levy is set by statute at a uniform rate for all fifty-five county boards of education. W.Va. Code §11-8-6f provides in pertinent part as follows:

> "(a) Notwithstanding any other provision of law, where any annual appraisal, triennial appraisal or general valuation of property would produce a statewide aggregate assessment that would cause an increase of two percent or more in the total property tax revenues that would be realized were the then current regular levy rates of the county boards of education to be imposed, the rate of levy for county boards of education shall be reduced uniformly statewide and proportionately for all classes of property for the forthcoming tax year so as to cause the rate of levy to produce no more than one hundred two percent of the previous year's projected statewide aggregate property tax revenues from extending the county board of education levy rate, unless subsection (b) of this section is complied with. The reduced rates of levy shall be calculated in the following manner: (1) The total assessed value of each class of property as it is defined by section five of this article for the assessment period just concluded shall be reduced by deducting the total assessed value of newly created properties not assessed in the previous year's tax book for each class of property; (2) the resulting net assessed value of Class I property shall be multiplied by .01; the value of Class II by .02; and the values of Classes III and IV, each by .04; (3) total the current year's property tax revenue resulting from regular levies for the boards of education throughout this state and multiply the resulting sum by one hundred two percent: *Provided,* That the one hundred two percent figure shall be increased by the amount the boards of education's increased levy provided for in subsection (b), section eight, article one-c of this chapter; (4) divide the total regular levy tax revenues, thus increased in subdivision (3) of this subsection, by the total weighted net assessed value as calculated in subdivision (2) of this subsection and multiply the resulting product by one hundred; the resulting number is the Class I regular levy rate, stated as cents-per-one hundred dollars of assessed value; and (5) the Class II rate is

> two times the Class I rate; Classes III and IV, four times the Class I rate as calculated in the preceding subdivision.
>
> An additional appraisal or valuation due to new construction or improvements, including beginning recovery of natural resources, to existing real property or newly acquired personal property shall not be an annual appraisal or general valuation within the meaning of this section, nor shall the assessed value of the improvements be included in calculating the new tax levy for purposes of this section. Special levies shall not be included in any calculations under this section.
>
> (b) After conducting a public hearing, the Legislature may, by act, increase the rate above the reduced rate required in subsection (a) of this section if an increase is determined to be necessary.
> .....
> ....."

County boards of education have no control over this function. They have no power to raise or reduce this levy, and each county's regular school levy rate is exactly the same throughout the state.

The result of all of this is that W.Va. Code §18-9-1 has no application under the current law to any school levies, whether they be regular levies or excess levies. This statute is an obsolete relic from the pre-depression era of public education in West Virginia, an era when schools were administered by the boards of education elected in individual magisterial districts. These school districts no longer exist at all. They were abolished by law in 1933. As to both regular levies and excess levies, W.Va. Code §18-9-1 has been superseded by at least three amendments to the West Virginia Constitution and by numerous statutes subsequently enacted by the West Virginia Legislature, including W.Va. Code §11-8-16, which specifically authorizes the election which the Plaintiffs have challenged in this case.

b. EVEN IF W.VA. CODE §18-9-1 APPLIED TO LEVIES NOW, THAT STATUTE DOES NOT PRECLUDE THE MORGAN COUNTY BOARD OF EDUCATION FROM SETTING MAY 13, 2014, THE DATE OF THE WEST VIRGINIA PRIMARY ELECTION, AS THE DATE FOR A NEW EXCESS LEVY ELECTION.

As demonstrated in the previous section II(a) of this memorandum, W. Va. Code §18-9-1 does not apply to the new excess levy being proposed by the Morgan County Board of Education. However, even if the statute did apply generally to excess levies proposed by boards of education, by its very terms, W. Va. Code §18-9-1 does not apply to the election which is the subject of this civil action.

The first part of the statute provides that if the voters of a district approve a levy for schools, then the board of education for the district will collect the levy thereafter "at the time and in the manner provided by law for making levies."

> "The board of education of every school district or independent school district, wherein a majority of the votes cast on the question of school levy at the last general or special election at which the question of school levy was submitted to the qualified voters of such district or independent school district were in favor of such levy, shall annually, at the time and in the manner provided by law for making levies, levy a tax on all taxable property in its district or independent school district for the support and maintenance of free schools therein:"

The statute then provides a mechanism for the levy to be reviewed and reconsidered "at the next general election" upon a petition of not less than forty percent of the registered voters in any district or independent school district:

> "....Provided, That upon petition of not less than forty percent of the registered voters in any district or independent school district, as shown by the last registration of voters therein, addressed to the board of education of such district or independent school district, requesting the submission of the school levy to the voters of such district, the board of education of such district or independent district shall submit the question of authorizing a levy for school purposes to the voters of such district at the general election held next after such petition is presented; and the board of ballot commissioners of the county of which such district constitutes a part shall prepare or cause to be prepared separate ballots from the official

ballot to be voted at said election, which separate ballot shall have printed thereon the following:

BALLOT ON SCHOOL LEVY

[ ] For school levy.
[ ] Against school levy.

The officers conducting the general election at each place of voting shall conduct the election on the question of the school levy and canvass and certify the result thereof to the commissioners of the county court in the same manner, so far as applicable, as they are required to conduct and certify the result of the general election; and such commissioners shall promptly certify the result of the election on the question of the school levy to the board of education of the district or independent school district within which the election was held, and such certificate shall be entered by the secretary as part of the minutes and records of such board of education...."

The statute then prescribes what must happen thereafter, depending upon the result of the general election referendum which is triggered by "the petition of not less than forty percent of the registered voters in any district or independent school district." If the levy passes at this general election, then the levy stays in place "until such time as an election may again be held on the question of such school levy in the manner hereinbefore provided," i.e., until there is another general election referendum which has been triggered by another petition containing "not less than forty percent of the registered voters in any district or independent school district":

"....If a majority of the ballots cast at said general election in any district or independent school district on the question of such school levy be in favor of the levy, the board of education of such district or independent school district shall annually thereafter levy a tax on all the taxable property in its district, for the support and maintenance of the schools in the district, until such time as an election may again be held on the question of such school levy in the manner hereinbefore provided." (emphasis added).

Under this methodology from the pre-depression, magisterial school district era for raising a levy for schools within a magisterial district, once the citizens of the magisterial district had a school levy in place, the levy stayed in place indefinitely until there was again an election on the question of whether or not to remove it. An election for that purpose could only occur upon a petition signed by "not less than forty percent of the registered voters in any district or independent school district," and such an election had to be held at a general election. These mechanisms have no applicability to the case *sub judice* because there was no indefinite levy ever imposed by the Morgan County Board of Education. There was a five-year excess levy for schools approved in 2008, but by its own terms, it expired after five fiscal years (See Exhibit #1, Plaintiffs' Complaint). Because of the constitutional and statutory limitations imposed by W.Va. Const., Art. X, §10, and by W.Va. Code §11-8-16, no excess levy may exceed five years in its duration. The levy approved in 2008, was not the subject of the election held in 2013. The election held in May of 2013 was a special election held upon a new levy order issued by the Morgan County Board of Education on February 5, 2013. (Exhibit #1; Defendant's Appendix). The 2008 levy had a defined life of five years. Moreover, the election held in May of 2013 was most certainly not an election which had been triggered by the signatures on a petition of "not less than forty percent of the registered voters in any district or independent school district" as provided under the provisions of W. Va. Code §18-9-1. The Plaintiffs do not allege that, nor could they. Finally, the 2013 excess levy election in Morgan County was not a referendum held in conjunction with a general election, as W.Va. Code §18-9-1 requires.

The statute then goes on to describe the procedure for how a magisterial district levy may be reimposed after it had been rejected at a general election:

> "In the event that a majority of the votes cast in any school district or independent school district upon the question of the school levy submitted at any general election be against the levy, the board of education of such district or independent school district shall have authority to call a special election for the purpose of resubmitting the question of authorizing such school levy to the voters of such district or independent district. Such special election shall be held in accordance with the provisions of the next succeeding section of this article, so far as applicable, and the ballots shall be similar to those heretofore described in this section. If a majority of the ballots cast at such special election in any school district or independent school district be in favor of the school levy, the board of education of such district or independent school district shall annually thereafter levy a tax for the support of the free schools in its district or independent school district, in the manner provided by law for school levies, until such time as the question of school levy may again be submitted at a general election upon a petition signed by not less than forty percent of the registered voters of the district or independent district, as hereinbefore provided, and a majority of the votes cast at such election be against the levy." (emphasis added).

The foregoing language of the statute cannot apply to the situation *sub judice* for three obvious reasons. First, the election held in May of 2013 was not an election that had been triggered by a petition signed by "not less than forty percent of the registered voters in any district or independent school district," as delineated in the statute above. Secondly, the election proposed now by the Morgan County Board of Education is not an election following the defeat of the levy at a general election. The Plaintiffs have acknowledged in their Complaint (¶¶5 and 6) that the election at which the voters rejected the levy proposed by the board of education's order entered on February 5, 2013 was not a general election. It was a special election held on May 11, 2013. Third, the election ordered by the Morgan County Board of Education for May 13, 2014, is clearly not an order "resubmitting the question of authorizing ***such*** school levy" (either the levy

adopted in 2008 or the levy proposed and rejected on May 11, 2013). The excess levy upon which the citizens will cast their ballots in May of 2014, is different in many aspects from both the excess levy approved in 2008, which has now expired, and the excess levy which was proposed and rejected in May of 2013.

In their effort to try to fit the case *sub judice* into the language of W.Va. Code §18-9-1, the Plaintiffs have had to make allegations in their pleadings which simply are not true. For instance, paragraph 9 of the Plaintiffs' Complaint provides as follows:

> "... the Board intends upon placing the resubmission of the special levy election that was rejected at the May 2013 special election on the ballot at the primary election to be held in May, 2014, in violation of §18-9-1...."

This is demonstrably incorrect and false. The excess levy being proposed for the education of the children of Morgan County which will be the subject of the election in May of 2014 is not in any stretch of the imagination a "resubmission" of the rejected 2013 levy. (See Exhibits #1 and #2 Defendant's Appendix). As a result of the rejection of the 2013 excess levy proposal, the Morgan County Board of Education has made some dramatic cuts in its budget, and the 2014 excess levy proposal is vastly different from the proposal which was rejected by the voters in 2013.

As shown in the following table,[10] in its 2014 excess levy proposal, the proposed levy excess rates are 30% lower than they were in the 2013 proposal.

Property classification	Levy rate Cents per $100 2013 levy proposal	Levy rate Cents per $100 2014 levy proposal
I	22.95	16.08
II	45.9	32.16
III	91.8	64.32
IV	91.8	64.32

[10] The levy rate data are extracted from the two levy orders, Exhibits #1 and #2;Defendant's Appendix.

The 2014 excess levy proposal will produce $1,795,565.00 less annually in property tax revenue to the Board of Education than what was proposed under the 2013 levy order. Over the life of the levy, this will amount to $8,977,825 in savings to the taxpayers of Morgan County. The proposed uses of the money under the 2014 levy order are quite different from the uses proposed by the 2013 levy order. The differences are too numerous to repeat them all here, but there are differences in the amounts allocated for every purpose, and some of the funding and purposes proposed in 2013 have been totally eliminated in the 2014 proposal. (See Exhibits #1 and #2; Defendant's Appendix).

The 2014 excess levy proposal is anything but a "resubmission" of the 2013 levy proposal. The 2014 levy proposal is a completely new, reduced and different levy proposal, one crafted by the Morgan County Board of Education after hearing and listening to the voices of the citizens of Morgan County, first in their rejection of the 2013 proposal at the special election held on May 11, 2013, and thereafter in a series of many public meetings with the citizens of Morgan County in all corners of the county. The board of education listened to all the concerns voiced by all of the citizens about public education in Morgan County. Ultimately, the Morgan County Board of Education concluded that it could not, and would not, "resubmit" the 2013 proposal to he citizens in 2014. It has not.

Even the Plaintiffs' Complaint contains acknowledgement that in order for W.Va. Code §18-9-1 to apply, there has to be a "resubmission" to a vote <u>on the rejected levy</u>:

> "The aforementioned provision of §18-9-1 of the Code requires the <u>resubmission of the vote on the rejected levy</u> to be held at the next general election, not a primary election." (¶11 of the Plaintiffs' Complaint). (Emphasis added).

The 2014 levy proposal is surely <u>not</u> a "resubmission" of the "rejected levy."

Based upon all of the foregoing, the final portion of W.Va. Code §18-9-1, the portion upon which the Plaintiffs rely, is likewise inapplicable to the case *sub judice*:

> "If a majority of the votes cast at any such special election be against the school levy the board of education of any such district or independent district shall again submit the question of a school levy to the voters of its district or independent district at the next general election: Provided, however, That upon petition of not less than forty percent of the qualified voters of the district, as determined from the last registration of voters, such board of education may again submit the question of school levy at a special election to be held for that purpose, in the manner hereinbefore provided, prior to the next succeeding general election."

The reference here to "such special election" is clearly a reference to the special election described above it in the statute. In the words of the statute, that is a special election held after the defeat of the levy at a general election. And again, that refers to a general election which had been triggered and compelled by a petition to have such an election held signed by "not less than forty percent of the registered voters in any district or independent school district."

In summary on this point, even if W.Va. Code §18-9-1 had any vitality at all, by its own terms, the portion of the statute upon which the Plaintiffs rely could apply only if these things had all happened:

1. a school levy had been in place;
2. a petition for an election on continuation of the levy had been filed by not less than forty percent of the registered voters in any district or independent school district;
3. the matter of continuation of the levy was then put to a vote at the next general election;
4. continuation of the levy was rejected by the voters at that general election;
5. the board of education then decided to resubmit the matter to a vote of the people at a special election;
6. the matter of continuation of the levy was then put to a vote at a special election; and then,
7. continuation of the levy was rejected by the voters at that special election.

At that point, and only at that point, could the language upon which the Plaintiffs rely apply. The statutory prerequisites to the applicability of the language which the Plaintiffs have cited have not occurred.

The final point not to be missed under the statute is this. The language cited by the Plaintiffs -- requiring a petition signed by not less than forty percent of the registered voters in the district in order for a board of education to accelerate the holding of a levy election from a general election to an earlier special election -- applies only after a levy has been defeated in two separate elections, the first a being at a general election, and the second being at a special election. As discussed above, the levy order upon which the voters will cast their ballots on May 13, 2014 has never been laid before the voters before. It is a new proposal. But even if the Court were to consider the May, 2013, election to have been a first election at which the voters considered a levy that is now being "resubmitted," the restriction under §18-9-1 permitting an accelerated special election only upon a petition by 40% of the registered voters cannot apply because there have not been two electoral rejections of a levy proposal. The statute plainly requires two electoral rejections before the petition restriction for (an accelerated) special election applies.

c. THE PLAINTIFFS' CLAIMS ARE NOT APPROPRIATE FOR ADJUDICATION UNDER THE UNIFORM DECLARATORY JUDGMENTS ACT, W.VA. CODE §55-13-1, ET SEQ.

West Virginia has adopted the Uniform Declaratory Judgments Act, W.Va. Code §55-13-1, et seq., (the "Act"), under which the Plaintiffs have filed the instant action. Respectfully, the Defendant contends that the claims of the Plaintiffs are inappropriate

for adjudication under the Act. Even though the Court's adjudicatory power is broad under the Act (W.Va. Code §55-13-1), and even though the Act's provisions are available to a wide variety of persons (W.Va. Code §55-13-2) and are to be liberally construed and administered (W.Va. Code §55-13-12), there are limitations on the Act's overall scope and breadth. Two of those limitations are discussed in this section. A third limitation, the lack of ripeness or justiciability, is discussed below in Section II(d), which addresses the Court's lack of subject matter jurisdiction in this case.

i. A DECLARATION UNDER THE UNIFORM DECLARATORY JUDGMENTS ACT WOULD BE INAPPROPRIATE BECAUSE THE PLAINTIFFS HAVE NO INJURIES OR DAMAGES.

In order for the Plaintiffs to have a justiciable claim under the Act, they must have "significant interests" which have been "directly injured" or "adversely affected" by governmental action. *West Virginia Utility Contractors Ass'n v. Laidley Field Athletic and Recreational Center Governing Bd.*, 260 S.E.2d 847, 164 W.Va. 127 (1979). In that case, the Laidley Field Athletic and Recreational Center Governing Board had executed "no bid" contracts with various companies for work that was necessary for the upgrading of Charleston's Laidley Field. The governing statute required competitive bidding for these contracts. The plaintiffs in that case filed suit for declaratory judgment under the Act. The Supreme Court permitted the suit to proceed because the plaintiffs there had an obvious injury. The plaintiffs in that case had been completely excluded from any possibility of obtaining any of the work which had already been awarded illegally to other companies without competitive bidding. The plaintiffs' injuries in that case were thus real and immediate.

What "injury" or "adverse effect" can the Plaintiffs show here? Are the Plaintiffs injured if an election occurs? Certainly not. If they are registered voters, then they may exercise their franchise and vote in the election in May, just as they could if the election were being held in November. There is no injury to the Plaintiffs in the holding of an election, not even an issue of cost. The proposed excess levy election is scheduled to be held in conjunction with the West Virginia primary election, so there is no cost to the Plaintiffs nor to any taxpayer for holding of the proposed levy election at the same time in May.

The Plaintiffs may claim that they *might* be injured in the future if the voters approve the levy, and the Plaintiffs would then have to pay an additional amount of tax as a result of the levy being approved at an "illegal" or "improper" election, but that is a future contingency and yet another reason why a declaratory judgment now is inappropriate. (See discussion on subject matter jurisdiction in section II(d) below). In point of fact, the Plaintiffs have sustained no injury now. The Plaintiffs' Complaint does not even allege that the Plaintiffs have been injured or damaged.

ii. THE DECLARATORY JUDGMENTS ACT IS INAPPROPRIATE HERE BECAUSE DECLARATION SOUGHT WOULD AFFECT MANY MORE PEOPLE THAN THE THREE PEOPLE WHO ARE PLAINTIFFS IN THIS CASE, PEOPLE WHO ARE SURELY INDISPENABLE PARTIES.

The second limitation to the applicability of the Act discussed in this section arises because there are undeniably persons who have important interests in the outcome of this case who have not been joined as parties to the case. (See Sixth Defense; Answer of the Defendant, the Morgan County Board of Education). On this point, in addition to

the requirements of Rule 19 of the WVRCP, the Act itself provides in W.Va. Code §55-13-11 as follows:

> "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. ...."

The Plaintiffs' Complaint seeks to have this Court adjudicate questions of whether a county-wide election which has been scheduled is legal, and secondarily, whether an excess school levy, if approved by a majority of the voters at such election, may be legally imposed in 2014.

These are questions of such moment to so many people that it is inconceivable that they may be adjudicated in litigation with participation of only the three Plaintiffs who are the named parties in this case. Do not the remainder of the voters of Morgan County have a right to be heard upon this question? There are many voters who desire to have the right to vote upon the new levy, no doubt both for and against the levy, in the election which the Plaintiffs seek to have this Court declare to be "illegal." What about the taxpayers? What about the interests of the children? Do not the children of Morgan County, or their parents on their behalf, have a right to have their voices heard here? The statute requires the joinder of all persons who have "...any interest which would be affected by the [Court's] declaration." Can the Plaintiffs say with any credibility that they are the only three people in Morgan County who have "any interest" in the outcome of the case which they have filed? Surely not. The citizens, voters and taxpayers of Morgan County <u>all</u> have important interests at stake in any declaration that might be rendered by the Court in this case. The Plaintiffs have not sought to be certified as representatives of a class under the West Virginia Rules of Civil Procedure.

Likewise, the officials of the government whose duties require them to act to hold an election, or to act afterward, are necessary parties as well. As noted by Plaintiffs' counsel during the telephonic conference held on January 29th, there are looming deadlines for ballot preparation by the Clerk of the Morgan County Commission. The Clerk is required under Chapter 3, Article 4A of the West Virginia Code to have custody of and administer the voting machines that are used in any county-wide election. The Clerk is responsible for operating absentee and early voting for the citizens (Chapter 3, Article 3). The Plaintiffs acknowledge in their Complaint the Clerk's duties and the importance of the Clerk's role:

> "Plaintiffs move this Honorable Court for an expedited hearing on this matter sufficiently in advance of the May, 2014 general [sic] election so that ballots may be timely printed by the Clerk of the County Commission of Morgan County, West Virginia." (Final sentence of the Plaintiffs' Complaint)

Can it be that the legality of an election that will be administered by the Clerk of the County Commission of Morgan County may be adjudicated without the Clerk being a party to the case? Certainly not. The Clerk of the County Commission of Morgan County is an indispensable party and has not been joined. Neither have any ballot commissioners been joined as parties in this case. An examination of *White v. Manchin*, 173 W.Va. 526318 S.E.2d 470 (1984) and many other cases deciding pre-election challenges strongly suggests that in all such cases, the ballot commissioners are absolutely indispensable as parties.

If the proposed excess levy is approved, it will be the Sheriff of Morgan County who is charged with the legal responsibility of collecting it. (W.Va. Code §11A-1-4). Must not the Sheriff be a party to a case which seeks to adjudicate the legality of a levy

he would have a legal duty to collect? In the case of *Pauley v. Kelly*, 255 S.E.2d 859, 162 W.Va. 672 (1979), an action for declaratory judgment on a claim that the system for financing public schools violated West Virginia's Constitution by denying plaintiffs the "thorough and efficient" education required by Constitution, the Supreme Court ruled that essential parties included the Speaker of the West Virginia House of Delegates, the President of Senate of West Virginia, the West Virginia State Tax Commissioner, the county superintendent, the county's school board, the county's assessor and county commission. Addressing this same issue, W. Va. Code §55-13-6 provides:

> "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

This statute dovetails with the language of W. Va. Code §55-13-11, providing that "...no declaration shall prejudice the rights of persons not parties to the proceeding....." Here, even if there were a basis for entertaining this declaratory judgment action, there are indispensable parties who have not been joined and without whom this action should not proceed.

In summary on this argument, the case *sub judice* is inappropriate for a declaratory judgment under the Act for the reasons set forth above. First, the Plaintiffs have no injuries. Any injuries that they may ever be able to claim are dependent upon contingencies and future events (See II(d) below). Secondly, there are far too many interests at stake in the outcome of the question for the Plaintiffs to prosecute the action alone. The Act itself does not contemplate such a usurpation by the Plaintiffs of a question in which every citizen of Morgan County has an interest and which embraces legal duties by local elected officials who are not parties to the case.

d. THE PLAINTIFFS HAVE ASKED THIS COURT TO RULE UPON A MATTER OVER WHICH THE COURT LACKS SUBJECT MATTER JURISDICTION. THE PLAINTIFFS DO NOT HAVE STANDING, AND THE PLAINTIFFS' CLAIMS ARE NOT RIPE FOR ADJUDICATION. ACCORDINGLY, THE COURT LACKS SUBJECT MATTER JURISDICTION.

The Answer of the Defendant Morgan County Board of Education contains the Defendant's Motion, pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure, to dismiss the Plaintiffs' Complaint on the grounds that this Court lacks subject matter jurisdiction.[11] Among the doctrines which apply in this case to preclude subject matter jurisdiction are the doctrines of standing and of justiciability and ripeness.

i. THE PLAINTIFFS LACK STANDING

Standing to bring an action is integrally related to the question of the Court's subject matter jurisdiction. It is well settled that under Article III of the United States Constitution, a plaintiff must establish that a "case or controversy" exists, *Smith v. Frye,* 488 F.3d 263, 272 (4th Cir.2007), and "[t]he doctrine of standing is an integral component of the case or controversy requirement," *Miller v. Brown,* 462 F.3d at 316. At its core, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues," *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), which is always a distinct inquiry from the question of how a litigant's claim should be decided.

Likewise, Article 8, Section 6 of the West Virginia Constitution confers upon the circuit courts of this State subject matter jurisdiction over certain cases and controversies. In West Virginia, a plaintiff's standing to bring an action is a prerequisite to a Court's

[11] This is asserted as the "Second Defense" delineated in the Answer of the Defendant.

subject matter jurisdiction to hear it. *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 220 S.E.2d 672 (1975). In *Eastern*, the Supreme Court noted several doctrines which have historically been recognized as depriving courts of subject matter jurisdiction, to-wit: "justiciability, ripeness, mootness, standing, case or controversy, and political questions." *Id.*, at 678.

The Supreme Court of Appeals of West Virginia has held that standing is comprised of three elements. First, the party attempting to establish standing must have suffered an "injury-in-fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court. *Findley v. State Farm Mutual Automobile Insurance Company,* 213 W.Va. 80, 576 S.E.2d 807 (2002); *The Affiliated Construction Trades Foundation v. West Virginia Department of Transportation*, 713 S.E.2d 809, 227 W.Va. 653 (2011).

Here, the Plaintiffs cannot pass the test. They have suffered no "injury-in-fact." There has been no invasion of a legally protected interest which is "concrete and particularized" to them and is also "actual or imminent, and not conjectural or hypothetical." (See Section II(c) above). The Plaintiffs assert that they are registered voters of Morgan County (¶1 of the Plaintiffs' Complaint). If that is the sole basis for their claim, it is insufficient to confer standing for their suit.

ii. THE PLAINTIFFS' CLAIMS ARE NOT RIPE OR JUSTICIABLE.

It is well settled that the Court has no subject matter jurisdiction over claims that are not ripe or justiciable. *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 220 S.E.2d 672 (1975).

In order for a Court to have subject matter jurisdiction of a claim, the claim must be ripe for adjudication. Here, the Plaintiffs' claims are not ripe, not only for the reason that the Plaintiffs have not been damaged in any way, but also because there are contingencies which may prevent any potential claims from ever ripening into an actual claim or damage.

A challenge to the ripeness of an action for adjudication is appropriately brought as a motion to dismiss for lack of subject matter jurisdiction. *See Phila. Fed'n of Teachers, Am. Fed'n of Teachers, Local 3, AFL–CIO v. Ridge,* 150 F.3d 319 (3d Cir.1998). Because ripeness affects justiciability, unripe claims should ordinarily be disposed of on a motion to dismiss. *Taylor Inv., Ltd. v. Upper Darby Twp.,* 983 F.2d 1285, 1290 (3d Cir.1993).

Ripeness is a justiciability doctrine intended to prevent a court from entangling itself in abstract disagreements by avoiding premature adjudication. *Nat'l Park Hospitality Ass'n v. Dept. of Interior,* 538 U.S. 803, 807, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (*citing Abbott Labs. v. Gardner,* 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)); *see also NE Hub Partners, L.P. v. CNG Transmission Corp.,* 239 F.3d 333, 341 (3d Cir.2001).

Ripeness, which determines *when* a party may bring a claim, provides a slightly more narrow ground for dismissal than standing, which implicates the question of *who*

may bring suit. *See Phillies Tomato & Produce Corp. v. Veneman,* Civ. A. No. 01–3502, 2002 WL 32356398, at *6 (E.D.Pa. Mar.28, 2002); *Joint Stock Soc'y v. UDV North Am., Inc.,* 266 F.3d 164, 174 (3d Cir.2001)) (emphasis in original). The ripeness doctrine requires courts to evaluate "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs.,* 387 U.S. at 149, 87 S.Ct. 1507.

Under the fitness prong, courts consider, among other matters, the degree of finality of the challenged action and whether the claim involves uncertain or contingent events that may not occur as anticipated. *NE Hub Partners,* 239 F.3d at 342 n. 8; *Phila. Fed'n of Teachers,* 150 F.3d at 323. Under the hardship prong, courts consider whether the challenged action creates direct and immediate harm to the plaintiffs, such that denial of review will present plaintiffs with costly choices. *NE Hub Partners,* 239 F.3d at 342 n. 8; *Phila. Fed'n of Teachers,* 150 F.3d at 323.

A declaratory judgment action, like any other action, must be ripe in order to be justiciable." *Orix Credit Alliance, Inc. v. Wolfe,* 212 F.3d 891, 896 (5th Cir.2000); *Roark & Hardee LP v. City of Austin,* 522 F.3d 533, 544 (5th Cir.2008). As a general rule, an actual controversy only exists where a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests. *Orix,* 212 F.3d at 896 (citing *Middle S. Energy, Inc. v. City of New Orleans,* 800 F.2d 488, 490 (5th Cir.1986)

A claim is not ripe if it "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Texas v. United States,* 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (citations omitted).

The ripeness and standing inquiries are related in that they both share the constitutional prerequisite of imminent injury. *Prestage Farms, Inc. v. Bd. of Supervisors,* 205 F.3d 265 (5th Cir.2000). The ripeness doctrine is designed to serve as "a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary." *Simmonds v. INS,* 326 F.3d 351, 357 (2d Cir.2003).

The same jurisdictional limitations apply to claims in West Virginia under the Uniform Declaratory Judgments Act (W.Va. Code §§55-13-1, et seq.). Even though the Act is to be liberally construed and administered (W.Va. Code §55-13-12), the law of West Virginia is well settled that in order for there to be a valid basis for the entry of a declaratory judgment under the Act, there must not be contingencies or a dependence upon future events. *Town of South Charleston v. Board of Ed. of Kanawha County*, 50 S.E.2d 880, 132 W.Va. 77 (1948).

In *Town of South Charleston*, the town had a lease agreement with the board of education. South Charleston sought declaratory judgment regarding the lease. The Supreme Court held that the town could not have declaratory judgment regarding its lease agreement with the board of education because the town lacked clear title to the real estate which was the subject of the lease. Syllabus Point 2 from the case is instructive:

> "2. The rights, status, and legal relations of parties to a proceeding under the Uniform Declaratory Judgments Act depend upon facts existing at the time the proceeding is commenced. Future and contingent events will not be considered."

In that case, the Supreme Court also noted:

> "This record raises the question whether a justiciable controversy exists, or whether the town and board are merely seeking and advisory opinion on a nonexistent controversy. The courts of this State have no jurisdiction

> under the act, if no justiciable controversy exists between the parties to the proceeding. Crank v. McLaughlin, 125 W.Va. 126, 23 S.E.2d 56; *Mainella v. Board of Trustees*, 126 W.Va. 183, 27 S.E.2d 486; *Dolan v. Hardman*, 126 W.Va. 480, 29 S.E.2d 8. .....'Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken.' *Mainella v. Board of Trustees*, 126 W.Va. 183, 27 S.E.2d 487." *Id.*, at 83

So it is here as well. Contingencies abound. As discussed above, the Plaintiffs have no injury, and they have alleged none. Let us suppose that the election is held in May of 2014, and the proposed excess levy is defeated. In that scenario, the Plaintiffs can never have any injury from the holding of the election which they challenge here. Any "injury" or "damage" which the Plaintiffs may claim is contingent upon the outcome of the election which they challenge, and not something which arises from the holding of an election in May.

What the Plaintiffs are asking for this Court to do is for the Court to issue an advisory opinion, based upon contingencies, and dependent upon a future state of presumed facts. The Supreme Court has said that a declaration of rights will not be based on a future contingency. *Town of South Charleston, infra.* (citing *Washington-Detroit Theater Co. v. Moore*, 249 Mich. 673, 229 N.W. 618).

The decision in *Town of South Charleston* does not stand alone in West Virginia. A justiciable controversy conferring jurisdiction for purposes of Uniform Declaratory Judgment Act, does not arise when the claim involves uncertain and contingent events that may not occur at all. *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 475 S.E.2d 55, 197 W.Va. 55 (1996). An actual controversy, susceptible of judicial determination, must be presented, wherein a legal right is claimed by one party and denied by another, before an action for declaratory relief may be determined. *Dolan v. Hardman*, 29 S.E.2d

8, 126 W.Va. 480 (1944). The rights, status, and legal relations of parties to a proceeding under the Uniform Declaratory Judgments Act depend upon facts existing at the time the proceeding is commenced, and future and contingent events will not be considered. *Chesapeake & Potomac Tel. Co. of W. Va. v. City of Morgantown*, 107 S.E.2d 489, 144 W.Va. 149 (1959). Courts will not in declaratory judgment proceedings adjudicate contingent rights nor resolve academic disputes. *Farley v. Graney*, 119 S.E.2d 833, 146 W.Va. 22 (1960).

The Plaintiffs' entire case is a request for this Court to rule upon contingent questions to-wit: whether an excess levy will be valid ***if*** the election at which it is approved is held in May of 2014. The very manner in which the Plaintiffs' claim is framed makes the Plaintiffs' claim nothing more than a request for an advisory opinion based upon a contingency or a hypothetical state of future facts.

Accordingly, the Plaintiffs' claims are not ripe for adjudication. Because the Plaintiffs lack standing for their suit, and because their claims are not ripe for adjudication, this Court lacks subject matter jurisdiction.

IV. CONCLUSION

The Plaintiffs' claims are not grounded in or upon any provision of the West Virginia Constitution or of the United States Constitution. Their entire suit is based upon the misreading of a statute that is obsolete and inapplicable to the excess levy election scheduled to be held on May 13, 2014. The election now scheduled for May 13, 2014, is specifically authorized by Article X, Section 10 of the West Virginia Constitution and by W.Va. Code §11-8-16. The Plaintiffs lack standing for a declaratory judgment action

because they have suffered no injury or damage, and their claims that they may be injured in the future are contingencies which make a declaratory judgment inappropriate and beyond this Court's subject matter jurisdiction.

In truth, the levy itself is a contingency, a critical one for Morgan County. The bar graph included as Exhibit #16[12] in the Defendant's Appendix shows educational expenditures per student by county in West Virginia's fifty-five counties. Morgan County appears on the graph twice (in red). If the new excess levy which has been proposed by the Morgan County Board of Education is approved by the voters and adopted in May, Morgan County's children will place 46th out of 55 counties in expenditures per student. It the levy is defeated, or, if this Court improvidently precludes the holding of the election which has been ordered, then Morgan County's children will be last among all of West Virginia's counties, and it will be by a margin which is considerable.

That graph (Exhibit #15) shows what is at stake in the question of whether the new excess levy is approved. If the levy is not approved in May of 2014, then this bar graph represents the reality for the children of Morgan County starting immediately, in 2014.

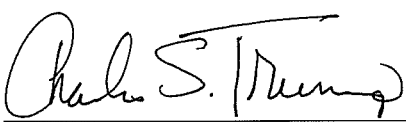
While approval of the levy at an election in November could help move Morgan County's children from West Virginia's lowest per child expenditures starting in the 2015-16 school year, it will come too late to prevent the looming evisceration of educational programs in the system. By then, the school system in Morgan County will have been decimated, and the children will suffer for years while the Board of Education tries to rebuild what will have been destroyed. November will be too late.

[12] This bar graph utilizes per pupil expenditure data from the 2011-2012 school year for all counties.

The Board of Education of Morgan County urges this Court to recognize that the Constitution of West Virginia and West Virginia's statutes clearly give the citizens of Morgan County the right and the power to decide this question for themselves and for their children in an election on May 13, 2014. For all the reasons set forth above, this Court should refuse the Plaintiffs' request to silence the voices of the people of Morgan County.

Most respectfully submitted.

The Board of Education of
Morgan County, West Virginia,
Defendant,
by its counsel,



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IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

DOROTHEA "JEANNIE" FORD,
FRIEDA ICKES, and
KENT "BROOKS" MCCUMBEE,

Plaintiffs,

vs. Civil Action No. 14-C-1

(Including former Civil Actions 14-C-2 and 14-C-3, which have been consolidated herein)

(Judge Sanders)

MORGAN COUNTY BOARD OF EDUCATION,

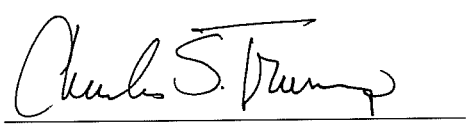
Defendant.

CERTIFICATE OR SERVICE

I, Charles S. Trump IV, counsel for the Defendant Morgan County Board of Education do hereby certify that I have this day served a true and complete copy of the foregoing MEMORANDUM OF THE DEFENDANT, THE BOARD OF EDUCATION OF MORGAN COUNTY, WEST VIRGINIA, along with a copy of the Defendant's Appendix of Exhibits upon counsel for the Plaintiffs by sending the same by United States first class mail, postage pre-paid, addressed as follows

Michael L. Scales, Esq.
Michael L. Scales, PLLC
314 W. John Street
P.O. Box 6097
Martinsburg, WV 25402-6097

Given under my hand this 31st day of January, 2014.



Charles S, Trump IV