NO. 19-0962

IN THE SUPREME COURT OF TEXAS

ODYSSEY 2020 ACADEMY, INC.
Petitioner,

v.

GALVESTON CENTRAL APPRAISAL DISTRICT
Respondent.

On Petition for Review from the Fourteenth Court of Appeals
Houston, Texas, No. 14-18-00358-CV

RESPONDENT GALVESTON CENTRAL APPRAISAL DISTRICT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Petitioner brought a Petition for Review contesting the denial of an ad valorem tax exemption for property owned by private two Delaware limited liability companies based in Boca Raton, Florida. Petitioner, which subleases the property, sought the exemption as "public property," relying on Tex. Tax Code § 11.11 and Tex. Educ. Code § 12.128. (C.R. 5-14). In its Petition, Petitioner sought reversal of Respondent's and Respondent's Appraisal Review Board's denial of the requested exemption. *Id.*

Both parties moved for summary judgment in the Trial Court. That Court denied Petitioner's Motion for Summary Judgment and granted Respondent's Motion for Summary Judgment, ordering that Petitioner take nothing on its claims. (C.R. 1164–1165). Petitioner appealed these rulings. (C.R. 1168).

On July 23, 2019, the Fourteenth Court of Appeals issued a written opinion affirming the Trial Court's judgment, in *Odyssey 2020 Academy, Inc. v. Galveston Central App. Dist.*, 585 S.W.3d 530 (Tex. App. – Houston 2019, pet. filed). Petitioner filed a Motion for En Banc Reconsideration on August 6, 2019, which the Fourteenth Court of Appeals denied on September 12, 2019. Petitioner has now filed its Petition for Review in this Court.

ISSUES PRESENTED

1. Whether property owned by two Delaware limited liability companies based in Boca Raton, Florida is exempt as "public property" under Tex. Const. art. VIII § 2, Tex. Tax Code § 11.11 and Tex. Educ. Code § 12.128, because the property is (1) leased to a private for-profit corporation and (2) subleased with state funds received by a public charter school, when the public charter school did not hold legal or equitable title to the property.
2. Whether the Fourteenth Court of Appeals erred in its interpretation of Tex. Educ. Code § 12.128 in the context of the facts presented in this case.
3. Whether Odyssey may raise a novel claim of first impression that its property is exempt under Article XI, § 9 of the Texas Constitution for the first time in its Brief on the Merits to this Court, and if so, whether Article VIII, § 9 of the Texas Constitution applies in this case.

STATEMENT OF FACTS

A. The Property

The property made the basis of this lawsuit consists of 2.4866 acres of land in the City of Galveston, Galveston County, Texas, and is located near the southeast corner of the intersection of 61st Street and Stewart Road in Galveston. (*See* C.R. 283-286 and 290-293). Hereafter, this property is referred to as "the Property".

B. Ownership of the Property

As of October 1976, the Property was owned by Barnsafe—O.K. Associates, Incorporated. On October 1, 1976, Barnsafe—O.K. Associates, Inc. leased the Property to Safeway Stores, Inc. (C.R. 67-67). The landlord's interest in the Property was subsequently acquired by two Florida Trusts – the Aneff Trust and the Alisan Trust – which owned the Property in joint, undivided interests. (C.R. 74-84). The two Trusts acquired the Property subject to Safeway's lease.

In September 2012, Susan Sandelman, as Successor Trustee of the Aneff Trust, conveyed that Trust's undivided interest in the Property to Aneff, LLC. (C.R. 280-286). At that same time Ms. Sandelman, as Trustee of the Alisan Trust, conveyed that Trust's interest in the Property to Alisan, LLC. (C.R. 287-293). Both Aneff, LLC and Alisan, LLC are Delaware Limited Liability Companies based in Boca Raton, Florida, and continue to own the Property.

C. The Property is Leased and then Sub-Leased

As noted above, Safeway Stores, Inc. leased the Property in October 1976. Safeway subsequently assigned its Tenant's interest in the lease to HEB Grocery Company, L.P. ("HEB").[1]

On July 31, 2009, HEB subleased the Property, along with other adjoining property, to Appellant (the "Sublease"). (C.R. 194-264). The Sublease expires on October 31, 2026. (C.R. 200). Petitioner had no right to purchase any of the leased premises. (C.R. 196). Under its terms, Appellant pays HEB $16,710.42 per month in rent. (C.R. 256). Petitioner understood that the Property was taxable and agreed to pay ad valorem taxes assessed against the Property as additional rent. (C.R. 201).

D. The Adjoining Property

The Sublease originally included additional adjoining property, referred to therein as the "Ainbinder Lease" property. (C.R. 194). HEB subsequently acquired fee title to the Ainbinder Lease property, and then sold it to Petitioner. (C.R. 255). That property is not included in this lawsuit. Rather, this lawsuit concerns the property Petitioner subleases from HEB, and which HEB leases from the two Delaware LLC's.

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[1] *See* C.R. at pp. 88 and 128-129 ["Existing HEB Lease" and legal description thereof]. *See also* C.R. 194 [The two Trusts are identified as "Kin Properties," and the lease to Safeway/HEB is identified as the "Kin Properties Lease." That Lease was apparently amended two times, in 2004 and in 2007.] *Id.* The record in this case is silent as to whether the Landlord was ever notified of or consented to the sublease to Petitioner. Petitioner was provided a copy of the Lease and its amendments. *See* C.R. 231.

E. Exemption Application, Lawsuit and Appeal

Petitioner filed an application in December, 2016 with Respondent seeking to exempt the Property as "public property" under Tex. Tax Code § 11.11. The application sought to apply the exemption retroactively going back to 2009, and for all subsequent years.[2] Respondent denied Petitioner's application to exempt the Property, and Petitioner exhausted its administrative remedies by protesting to the Appraisal Review Board. The Appraisal Review Board denied the protest, and Petitioner appealed to District Court. (C.R. 5 – 14). Respondent filed its Motion for Summary Judgment on January 5, 2018. (C.R. 54 – 309). Petitioner filed its Motion for Summary Judgment on February 15, 2018. (C.R. 353 – 1160).

The Trial Court denied Petitioner's claims for relief under Chapter 42 of the Texas Tax Code and Petitioner's parallel request for declaratory relief, entering judgment that Appellant take nothing on those claims. (C.R. 1164 – 1166). In three separate Orders, the Trial Court: (1) denied Petitioner's Cross-Motion for Summary Judgment on its claims, (2) granted Respondent's first Motion for Summary Judgment on Petitioner's claims for declaratory relief, based on the exclusive remedies provided in the Texas Tax Code, per Tex. Tax Code § 42.09, and (3)

[2] *See* C.R. 305-308. Petitioner also sought a refund of taxes paid for years 2013 – 2015, in the amount of $184,572.05. *Id.*

entered Judgment that Petitioner take nothing on its remaining claims. (*See* C.R. 1164 – 1166). Petitioner appealed the Judgment. (C.R. 1168).

On appeal, the Fourteenth Court of Appeals affirmed the judgment of the Trial Court on the basis that the Property was not owned by the State or a political subdivision of the State, and was therefore not entitled to an exemption from ad valorem taxation as "public property" pursuant to Tex. Tax Code § 11.11. Petitioner has now filed its Petition for Review seeking for this Court to reverse the Fourteenth Court of Appeals – again claiming that this privately-owned property should be exempt as public property solely because it is leased to a grocery store chain and subleased to an open-enrollment charter school.

SUMMARY OF THE ARGUMENT

The Fourteenth Court of Appeals did not err in affirming the Trial Court's Judgment. Tex. Const. art. VIII § 2 and Tex. Tax Code § 11.11 require that property be publicly owned in order to be exempt from ad valorem taxation.

Exemptions from ad valorem taxation must be expressly provided for in the Texas Constitution. The Texas Constitution does not exempt, and does not authorize the Legislature to exempt, privately owned property that is subleased to a public charter school.

Purported exemptions from ad valorem taxation are strictly construed because they depart from the constitutional requirement that ad valorem taxes be equal and uniform. Here, Petitioner relies on Tex. Educ. Code § 12.128(a-1)[3] to support its exemption claim. This statute does not exempt the owner's fee interest from ad valorem taxation. Petitioner responds by using an interpretation which, if taken to its logical conclusion, would operate to divest the fee owner of title to the leased property – because the sublease has now made the otherwise taxable fee estate "public property for *all purposes*." Ad valorem taxation is merely one facet of that conversion to "public property."

[3] Tex. Educ. Code § 12.128 (a-1) was formerly part of § 12.128(a) prior to amendments made in 2019. *See* Senate Bill 1454 (2019), attached as Tab 1 in the Appendix to Respondent's Response to Petition for Review (filed March 11, 2020).

Petitioner's and Amicus' concerns about the Fourteenth Court of Appeals' "narrow interpretation" of Tex. Educ. Code § 12.128 is misplaced. The Court of Appeals did not state, or even hint, that a public charter school holding legal or equitable title to real property would not be entitled to exempt that property from ad valorem taxation. This red herring is simply a feeble attempt to induce this Court to accept review on a case involving a clear application of narrow, well-established legal principles.

Petitioner asserts for the first time in its Brief on the Merits that the property it subleases should also be exempt from taxation pursuant to Tex. Const. art. XI § 9.[4] This claim was not raised in Petitioner's exemption application filed with Respondent,[5] in its Petition filed in the District Court below,[6] in its Response to Respondent's Motion for Summary Judgment filed in the District Court,[7] in its own competing Motion for Summary Judgment,[8] in its Brief to the Court of Appeals below,[9] or in its Petition for Review filed in this proceeding. Therefore,

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4 *See* Petitioner's Brief on the Merits at 19-25. However, this claim is not identified as one of the "Issues Presented" to this Court. *See Id.* at xii.

5 *See* C.R. 305-308.

6 *See* C.R. 5-14 (Petitioner's Original Petition); C.R. 25-34 (Petitioner's First Amended Original Petition; C.R. 44-53 (Petitioner's Second Original Petition).

7 C.R. 310-324.

8 C.R. 353-368.

9 http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=8456ef39-0225-42a4-987d-e35007566bf4&coa=coa14&DT=Brief&MediaID=fd901444-4883-4e5d-b39c-7fcd365e9038 .

consideration of this claim is improper. Alternatively, the Property covered by Petitioner's sublease is not entitled to an exemption under Tex. Const. art. XI § 9.

For these reasons Petitioner's Petition for Review should be denied.

ARGUMENT AND AUTHORITIES

A. Petitioner Does Not Own the Property. Therefore, the Property is not Exempt from Ad Valorem Taxation as "Public Property."

The Texas Constitution provides that all real property is subject to taxation unless exempt. Tex. Const. art. VIII, § 1(b). Article VIII, § 2 vests in the legislature authority to create and enumerate exemptions pertaining to public property used for public purposes. *Id.* at art. VIII, § 2 (providing that "the legislature may, by general laws, exempt from taxation public property used for public purposes").

However, ad valorem tax exemptions are disfavored and are strictly construed against the taxpayer and in favor of the taxing authority, because they undermine the constitutional requirement that ad valorem taxes be equal and uniform. Thus, all doubts are resolved against the granting of an exemption. *Brazos Elec. Power Coop., Inc., v. Tex. Comm'n on Envtl. Quality*, 576 S.W.3d 374, 384 (Tex. 2019) *N. Alamo Water Supply Corp. v. Willacy Cty. Appraisal Dist*., 804 S.W.2d 894, 899 (Tex. 1991); *See also Bullock v. Nat'l Bancshares Corp*., 584 S.W.2d 268, 272 (Tex. 1979). As the claimant, the burden of proof of demonstrating that the Property is exempt lies with Petitioner. *Id*.

In this case, Petitioner seeks to exempt the Property as "public property" under Tex. Tax Code § 11.11. This section provides two requirements for obtaining an ad valorem exemption for public property. In order to obtain the exemption, the property must be (1) "owned by this state or a political subdivision," and (2) "used

for public purposes." Tex. Tax Code § 11.11(a). This requirement is based on Article VIII, § 2 of the Texas Constitution, which does not permit the exemption of privately owned property as "public property." *DeGuerin v. Washington County App. Dist.*, No. 01-11-00548-CV, 2012 Tex. App. LEXIS 3031, 2012 WL 1379633 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Hayes County App. Dist. v. Southwest Texas State Univ.*, 973 S.W.2d 419, 422-423 (Tex. App. – Austin 1998, no pet.).[10]

Texas courts have defined "ownership" for purposes of taxation as referring to the person or entity who holds legal or equitable title. *See Childress County v. State*, 127 Tex. 343, 92 S.W.2d 1011, 1015 (Tex. 1936) (person who has legal title is the "owner" for taxation purposes); *TRQ Captain's Landing L.P. v. Galveston Cent. Appraisal Dist.*, 212 S.W.3d 726, 732 (Tex. App.—Houston [1st Dist.] 2006) (explaining that legal and equitable title holders may claim tax exemption), *aff'd*, 423 S.W.3d 374 *(Tex. 2014); Comerica Acceptance Corp. v. Dallas Cent. Appraisal Dist*., 52 S.W.3d 495, 497 (Tex. App.—Dallas 2001, pet. denied) (common meaning of "owner" in Tax Code is person or entity holding legal title or equitable right to obtain legal title to property). "Equitable title is defined as the present right to compel legal title." *Travis Cent. Appraisal Dist. v. Signature Flight Support Corp*., 140

[10] *See also* Op. Atty. Gen. No. GM-2904 (1940)(private property leased to the City of Corpus Christi for water reservoir purposes not exempt from ad valorem taxation); Op. Atty. Gen. No. GM-1621(1939) (private property leased to the Federal Works Progress Administration not exempt from ad valorem taxation).

S.W.3d 833, 840 (Tex. App.—Austin 2004, no pet.); *see also AHF-Arbors at Huntsville I, LLC v. Walker Cty. Appraisal Dist*., 410 S.W.3d 831, 837 (Tex. 2012). Thus, "even when a public entity does not possess legal title to property, if it holds equitable title and the property is used for public purposes, the property is exempt from taxation." 2016 Tex. Op. Att'y Gen. KP-0066.

In this case, Petitioner is a sublessee of the Property at issue, holding neither legal nor equitable title. Petitioner attempts to avoid the ownership requirement by shaving the corners on the ownership requirement, citing *Travis Central App. Dist. v. Signature Flight Corp.,* 140 S.W.3d 833, 839-40 (Tex. App. – Austin 2004, no pet.) for the proposition that ownership "must be ascertained from the context and subject matter."[11] However, Petitioner ignores the Austin Court of Appeals' ultimate conclusion – that a leasehold interest cannot constitute "ownership" for purposes of *ad valorem* taxation:

> Whatever possessory interests appellees have, they do not include the right to compel legal title upon certain conditions. Thus, appellees, who do not have legal title, also do not have equitable title and are not the owners of the facilities...Were appellants to prevail, any lessee could be said to have an equitable interest subject to taxation based on its "benefit" of possession. Such is not the law.[12]

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[11] *See* Petitioner's Brief on the Merits at 19.

[12] 140 S.W.3d at 841. Note that in *Signature Flight Support Corp.,* the issue was whether Signature owned improvements built the property it leased at the Austin-Bergstrom Airport. The taxing authorities claimed Signature owned the improvements, making them taxable under Tex. Tax Code § 25.08(b). Signature's lease, however, said that the Airport owned any improvements constructed on the leased property; therefore, they could not be taxed to Signature. Note also that the burden to prove that property is taxable is not the high bar required by this Court to prove entitlement to an exemption. *See* p. 16, *supra*.

B. The Fourteenth Court of Appeals did not erroneously interpret Tex. Educ. Code § 12.128.

The Court of Appeals limited its decision to the facts of this case:

> No argument of state ownership can rest on legal or equitable title here. It is undisputed that the Property is privately owned, and that the private owners possess legal title. Odyssey signed a sublease agreement knowing the property was privately owned, and Odyssey agreed to pay all ad valorem taxes assessed on the privately-owned Property. ***Additionally, though equitable title may support a public entity's claim for a tax exemption, Odyssey does not argue that the State or a political subdivision has a claim of equitable title to the Property. Nothing in the summary-judgment record shows any basis for equitable title.***[13]
>
> [Tex. Educ. Code] Section 12.128 does not speak to tax exemptions as to leased real property during the period a charter remains active. It does not establish that this State or a political subdivision owns the Property for Tax Code section 11.11 tax-exemption purposes, and Odyssey's interest in the Property is limited to its leasehold. Education Code section 12.128 does not vest in Odyssey a right to claim a tax exemption on the State's behalf. In fact, the section does not mention taxes or exemptions at all.[14]
>
> To the extent Education Code section 12.128(a) applies in the present context before a school charter has been revoked, we can say that this section does not mean that the Property Odyssey has leased is "owned by this state" as that phrase is contemplated under Tax Code section 11.11. Odyssey cites no authority holding otherwise.[15]

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[13] *Odyssey*, 585 S.W.3d at 535.
[14] *Id.* at 536.
[15] *Id.*

C. Petitioner's Circular Attempt to Distinguish *Texas TurnPike Co. v. Dallas County* Fails.

Petitioner begins its argument with an attempt to distinguish *Texas Turnpike Co. v. Dallas County,* 153 Tex. 474, 271 S.W.2d 400 (1954), by claiming that the state's ownership interest in that case was "contingent," while Petitioner's sub-leasehold estate is "fixed."[16] In fact, the exemption claim in *Texas Turnpike* was much stronger – the Company had actually executed *deeds* conveying its roadway property to the State. However, the Company's agreements with the State required that those deeds be held in escrow, pending the Company's completion of various tasks.[17] Because the State did not yet have the right to compel legal title, which is required to find equitable title for *ad valorem* tax purposes, the State could not be the roadway property's "owner" for *ad valorem* tax purposes.[18] In doing so, the Court set out an important legal principle:

> Public ownership, for tax-exemption purposes, must grow out of the facts; it is a legal status, based on facts, that may not be created or conferred by mere legislative, or even contractual, declaration. If the state does not in fact own the taxable title to the property, neither the Legislature by statute, nor the petitioners and the Authority by contract, may make the state the owner thereof by simply saying that it is the owner.[19]

Petitioner distinguishes *Texas Turnpike* by attempting to use a "legislative declaration" in Tex. Educ. Code § 12.128, stating that this statute makes its

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[16] *Petitioner's Brief on the Merits* at 6-9.
[17] 271 S.W.2d at 401-402.
[18] *Id.* at 402-403
[19] *Id.* at 402.

exemption claim fixed, while the turnpike company's ownership claim was contingent. *Texas Turnpike* expressly proscribes this argument.

D. Petitioner's Recitation of Cases Concerning Charter Schools Does Not Address the Issue in this Case.

Petitioner next discusses various cases decided by this Court, in an effort to show what is undisputed - that open-enrollment charter schools are part of the Texas Public school system, having been created by the Legislature and funded largely by the State.[20] None of this is disputed, and none of this addresses the issue actually at hand – whether property leased by an open-enrollment charter school is exempt from taxation, as "public property for all purposes."

As the Court of Appeals correctly noted, many cases interpreting Tex. Educ. Code § 12.128 concern property purchased by a charter school, after the school ceases to operate. Such cases have held that there are no impediments to the state assuming ownership and control of property purchased with State Funds.[21] When the state does so, it is not a "taking" without compensation.[22] It is one thing to say a charter holder has no takings claim against the state as to property acquired by a charter holder with state funds. However, that does not mean that a private owner leasing property to a charter holder would not have a takings claim, were the state to

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[20] *Petitioner's Brief on the Merits*, at 11-15.

[21] *Texas Educ. Agency v. Academy of Careers & Technologies, Inc.*, 499 S.W.3d 130, 136 (Tex. App. – Austin 2016, no pet).

[22] *Transformative Learning Systems v. Texas Educ. Agency*, 572 S.W.3d 281, 290-92 (Tex. App. – Austin 2018, no pet.)

assert ownership of the owner's interest as "public property for all purposes." Thus, the following statement in Petitioner's Brief is only a half-truth:

> This Court and the Legislature have made clear that charter school bear the burdens and responsibilities of being entrusted with publicly owned property, which can be taken by the state without implicating private property rights.[23]

This statement is true as to the charter school and the charter holder. None of the cases Petitioner cites hold that taking an owner's interest in property leased to a charter school would not implicate such private property rights. Nevertheless, as discussed below, that is the ultimate result of Petitioner's proposed construction of § 12.128.

E. Petitioner's Efforts to Apply Rules of Statutory Construction to Tex. Educ. Code § 12.128 Create "Absurd Results" and Therefore Fail.

Petitioner's whole case is based on Tex. Educ. Code § 12.128(a-1)(1) – Property leased with funds received by a charter holder from the State is "considered to be public property *for all purposes under state law.*" As Petitioner states, "all means all."[24] An exemption from *ad valorem* taxation as public property is merely one of those "purposes." Petitioner supports its contention by citing numerous cases cited for the principle that Courts generally rely on the plain meaning of the words used when interpreting a statute.

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[23] *Petitioner's Brief on the Merits* at 15.

[24] *Id.* at 29, *citing Davis v. Mueller,* 528 S.W.3d 97, 102 (Tex. 2017). This case concerned a general grant of all the grantor's mineral/royalty interests owned in Harris County. It did not involve statutory interpretation.

However, Petitioner ignores the language in many of these same cases stating Courts will not do so if the "plain meaning" asserted in a given case leads to absurd results. *Greene v. Farmers Insurance Exchange*, 446 S.W.3d 761, 765 (Tex. 2014)("We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results."); *Owens & Minor, Inc. v. Ansell Healthcare Products, Inc.*, 251 S.W.3d 481, 486 (Tex. 2008)("Statutory provisions will not be so construed or interpreted as to lead to absurd conclusions . . . if the provision is subject to another, more reasonable construction or interpretation."); *Dovalina v. Albert*, 409 S.W.2d 616, 621 (Tex. Civ. App. – Amarillo 1966, writ ref'd n.r.e.)("The court will never adopt a construction that will make a statute absurd or ridiculous, or one that will lead to absurd conclusions or consequences, if the language of the enactment is susceptible of any other meaning.").

Owens & Minor provides a clear example of this principal. The case concerned Tex. Civ. Prac. & Rem. Code § 82.002(a), which provided in part that "A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action." Owens & Minor was one of the "sellers" in this multiparty case; Ansell was one of the manufacturers. Owens & Minor sought to require Ansell to indemnify it for its costs in (successfully) defending the case. However, Owens &

Minor *did not sell Ansell's products.* The Court declined to adopt Owens & Minor's literal reading of the statute, because it would require a manufacturer to indemnify a seller who sold a competitor's products. "Doing so would lead to absurdities and inequities the legislature certainly did not intend." *Owens & Minor, Inc.*, 251 S.W.3d at 486, *citing C&H Nationwide, Inc. v. Thompson,* 903 S.W.2d 315, 322 n. 5 (Tex. 1994).

Other cases Petitioner cites use slightly different terms, stating that the plain meaning of statutes should be viewed "in context" to give them proper effect. *LTTS Charter School, Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 75 (Tex. 2011); *Liberty Mutual Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998); *St. Luke's Episcopal Hosp. v. Agbor,* 952 S.W.2d 503, 507 (Tex. 1997). *See also* Tex. Govt. Code § 311.023(1),(5)("In construing a statute, *whether or not the statute is considered ambiguous on its face*, a court may consider the (1) object sought to be obtained, and…(5) consequences of a particular construction;"). Put another way, at its most fundamental level:

> The real principle at work here is this: in some circumstances, words, no matter how plain, will not be construed to cause a result the Legislature almost certainly could not have intended.

Bridgestone/Firestone, Inc. v. Glyn-Jones, 878 S.W.2d 132, 135 (Tex. 1994) (Hecht, J., concurring).

Petitioner avoids such language because its fundamental premise – that private property leased to an open-enrollment charter school immediately becomes "public property *for all purposes* under state law" – leads to absurd results that were not intended by the Legislature. Under Petitioner's literal interpretation, any person leasing property to a charter school is effectively *divested* of their private ownership interest. The property immediately becomes "public property for all purposes," and can no longer be privately owned. The landlord's ownership interest is automatically forfeited.[25]

Petitioner feebly asserts that this result is appropriate, because "the landlord in question…knew it was leasing to a charter school."[26] Even if that proposition supported the result, Petitioner is factually incorrect. Petitioner is a sublessee from HEB, the assignee Tenant of a separate Lease with the two Delaware LLC's discussed above. That main lease is not in the record in this case. There is no evidence that these owners had notice of or consented to Petitioner's sublease. Nevertheless, Petitioner's literal interpretation of § 12.128 mandates that their property, which they leased to a grocery store chain, suddenly became "public

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[25] Petitioner may assert that this condition would last only for the term of the Lease. However, the "plain words" of § 12.128 contains no such limitation.

[26] *Petitioner's Brief on the Merits* at 17-18. Petitioner supports this proposition by citing *Acad. of Skills & Knowledge, Inc. v. Charter School USA, Inc.*, 260 S.W.3d 529, 545 (Tex. App – Tyler 2008, pet denied)(charter management company sought repayment of a loan made in violation of Tex. Educ. Code § 12.124), *citing Plumlee v. Paddock*, 832 S.W.2d 757 (Tex. App. – Fort Worth 1992, writ denied)(court refused to enforce a contract in which a lawyer was to share fees with a non-lawyer, in violation of barratry laws).

property for all purposes" when the Sublease was signed – perhaps without their knowledge or consent – automatically divesting them of their private property rights.[27] Among other results, Petitioner's literal interpretation creates a taking of private property without adequate compensation, in violation of Tex. Const. art. I § 17(a).

Clearly, the Legislature did not intend this "absurd" result in a statute governing how a charter school uses funds provided by the state. When analyzed in context with the entire statute and the "surrounding statutory landscape"[28] in Tex. Educ. Code Chapter 12, under the heavy burden required to find an exemption from *ad valorem* taxation, Petitioner's claim fails. Rather, § 12.128 is intended to act as a "careful circumscription of a charter school's authority" limiting how property purchased or leased with state funds may be used. *Texas Educ. Agency v. Academy of Careers & Technologies, Inc.*, 499 S.W.3d 130, 136 (Tex. App. – Austin 2016, no pet.), *citing LTTS Charter School,* 342 S.W.3d at 80.

With this focus, the statute makes more sense. When a charter school leases property using state funds, the entire fee estate does not become "public property for all purposes." Rather, it is the school's *leasehold estate* that is public property. As the Austin Court of Appeals noted in *Signature Flight Support Corp.*:

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[27] Petitioner may assert that the Property's status as "public property" would last only for the sublease term. However, § 12.128 says no such thing.

[28] *LTTS Charter School, Inc.,* 342 S.W.3d at 75.

> An ownership interest in a leasehold is the legal right to possess that property for a set period of time . . . [which] has a measurable fair market value because there are people who are willing to purchase and do purchase that right to possess the property under the terms of the lease.

140 S.W.3d at 841, *citing Panola Cnty. Fresh Water Supply Dist. No. 1 v. Panola Cnty. App. Dist.*, 69 S.W.3d 278, 284 (Tex. App. – Texarkana 2002, no pet.). When read in this context, Tex. Educ. Code § 12.128 becomes clear. When a charter school leases property, the leasehold estate in that property belongs to the state and is held in trust for the children attending the charter school. Thus, when a charter school leases a copier from Ricoh, a school administrator cannot take it home and sell copies for personal gain. This is because the statute "circumscribes" that use of publicly leased property. *Academy of Careers & Technologies, Inc.*, 499 S.W.3d at 136. Moreover, that leasehold estate may well be a tax-exempt property interest, but that does not matter under the Texas Tax Code – the property is taxable to the owner. *See* Tex. Tax Code § 25.06; *Cherokee Water Co. v. Gregg County Appraisal Dist.*, 801 S.W.2d 872, 875 (Tex. 1990); *County of Dallas Tax Collector v. Roman Catholic Diocese*, 41 S.W.3d 739, 743-44 (Tex. App. – Dallas 2001, no pet.). As discussed above, private property leased to a city, a county, or a school district is still taxable to the owner. Leasehold estates in privately owned property are not taxed, regardless of whether the tenant is a public entity.[29]

[29] *See* Tex. Tax Code § 25.06.

Clearly, this is a more rational interpretation and result, which is consistent with this Court's requirement that purported exemption claims be strictly construed.[30]

F. Petitioner May Not Raise a New Claim That The Subject Property Is Exempt under Tex. Const. Article XI, § 9 For the First Time in its Brief on the Merits to this Court.

As noted above, Petitioner never once argued that the property it subleases should be exempt under Tex. Const. art. XI § 9 until Petitioner included it within the argument in its Brief on the Merits. Indeed, this claim is not even included in the "Issues Presented" in its Brief of the Merits. Rather, it appears in the Argument at pages 19-25, almost as an aside.

On an appeal from a summary judgment, Texas Courts will not consider issues that the movant did not present to the trial court. *See* Tex. R. App. P. 33.1(a); *In the Interest of L.M.I.*, 119 S.W.3d 707, 710 (Tex. 2003) (constitutional claim concerning termination of parental rights waived where not asserted in the trial court); *Lopez v. Munoz, Hockema & Reed, LLP*, 22 S.W.3d 857, 862 (Tex. 2000) (excessive fee

[30] Legislators themselves have apparently recognized this. In 2017, companion bills HB 382 and 1030 were filed; each provided what Petitioner seeks here – to exempt property leased to an open-enrollment charter school if (1) the school is required to pay ad valorem taxes, and (2) rent would be reduced were the property exempt. Legislators also recognized the need for a constitutional amendment to support such an exemption, proposing HJR 34 and SJR42. The House Bill and House Joint Resolution did not pass that year. The Fiscal Notes to the Bills predicted *millions* of dollars per year in local tax revenue losses to cities, counties, and the public school finance system. *See* C.R. at Vol. 1, 325-334, and Tab 4 to Respondent's Brief to the Court of Appeals.

claim supporting a breach of fiduciary claim, suggested by amicus on appeal, was not allowed; the only ground supporting the breach of fiduciary claim in the trial court was breach of contract); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (appellate Courts refused to consider claim that ruling in paternity suit also violated due process and equal protection claims under 14th Amendment to the U.S. Constitution, where claim was not raised in the trial court); *Travis v. Mesquite*, 830 S.W.2d 94, 99-100 (Tex. 1992) (police officers not allowed to assert alternate basis for immunity from suit for the first time on appeal).

Petitioner's reliance on *Greene v. Farmers Inc. Exch.*, 446 S.W. 3d 761, 764 n. 4 (Tex. 2014) and *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018) is misplaced. This is not a matter of citing different provisions of a homeowner's policy, different case law or different subparts of the same statute. Here, Petitioner is raising an *entirely new constitutional provision* supporting its exemption claim, for the first time – ever. Furthermore, a property owner seeking an exemption under Tex. Const. art. XI § 9 must exhaust administrative remedies pursuant to Tex. Tax Code Chapters 41 and 42, as a prerequisite to judicial review of its application to the owner's property. This is true even though the exemption provided by art. XI § 9 is automatic or "self-operative." *Wackenhut Corr. Corp. v. Bexar App. Dist.*, 100 S.W.3d 289, 290-91 (Tex. App. – San Antonio 2002, no pet.) In this case, Petitioner neither applied for nor protested the denial of an exemption

under art. XI § 9 of the Texas Constitution. Rather, throughout that process and this litigation, its claims have been limited exclusively to the constitutional authorization set out in art. VIII § 2, and Tex. Tax Code § 11.11, which was adopted to implement that authorization.

Having failed to exhaust administrative remedies on this claim, and having failed to raise it in its pleadings or as a summary judgment ground, Petitioner may not assert a claimed exemption under Tex. Const. art. XI § 9 for the first time in the arguments in its Brief on the Merits.

G. Alternatively, Tex. Const. Article XI, § 9 Does Not Exempt the Privately Owned Property that Plaintiff Subleases from HEB

By its language, Tex. Const. art. XI § 9 applies to the property of "counties, cities and towns." Petitioner is correct that this Court judicially expanded its operation between the words actually used in *Lower Colo. River Authority v. Chemical Bank & Trust Co.,* 144 Tex. 326, 190 S.W.2d 48 (Tex. 1945). In that case, the LCRA was a public, governmental agency established by the Legislature pursuant to Tex. Const. art. XVI § 59. 190 S.W.2d at 50. From there, the Court simply declared that "LCRA is a governmental agency serving a public purpose…. Hence, its property is public property devoted exclusively to public use and is exempt from taxation under Art. XI, Sec. 9 of the Constitution." *Id.* Subsequent cases appear to question the Court's expansion of art. XI § 9 to all public entities beyond "counties, cities and towns." *Satterlee v. Gulf Coast Waste Disposal*

Authority, 576 S.W.2d 773, 779 (Tex. 1978); *Leander I.S.D. v. Cedar Park Water Supply Corp.*¸479 S.W.2d 908, 913 (Tex. 1972). It would seem extremely unlikely that *Lower Colo. River Authority* would be decided the same way today. *See EXLP Leasing, LLC v. Galveston Cent. App. Dist.*, 554 S.W.3d 572 (Tex. 2018) (Tex. Const. art. VIII § 1(b)'s requirement that "real property…shall be taxed in proportion to its value, which shall be ascertained as provided by law" does not require a valuation based on market value.)[31] Regardless, no Texas Court has extended Tex. Const. art XI § 9 to apply to property that is not publicly owned. *Hays County App. Dist. v. Southwest Texas State Univ.*, 973 S.W.2d 419, 422 (Tex. App. – Austin 1998, no pet.). Moreover, no Texas Court has even considered applying art. XI § 9 to property owned by private, for-profit corporations because their commercial lessee subleased the property to a public entity.

Petitioner responds to this complete lack of supporting authority by pointing to grammatical structure, citing *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d

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[31] "But the county argues our case law acknowledges "market value" as the appropriate constitutional benchmark. *See, e.g., Enron, 922 S.W.2d at 935* ("We have further held that section 1 of article VIII of our Constitution requires 'value' for ad valorem purposes to be based on the reasonable market value of the property."); *State v. Whittenburg, 153 Tex. 205, 265 S.W.2d 569, 572 (Tex. 1954)* (noting that courts "have interpreted [article VIII, section 1 and a statute providing that 'real property shall be valued at its true and full value in money'] to mean that assessed valuations shall be based on the reasonable cash market value of property" (internal quotation marks omitted)); *Lively v. Mo., K. & T. Ry. of Tex., 102 Tex. 545, 120 S.W. 852, 856 (Tex. 1909)* ("The value of the property is to be determined by what it can be bought and sold for." (quoting *New York State v. Barker, 179 U.S. 279, 285, 21 S. Ct. 121, 45 L. Ed. 190 (1900))*…. Of course, if our case law contradicts the constitution's plain text, our case law is wrong."

171, 184-85 (Tex. 2012). Petitioner again ignores the context – this provision appears in art. XI of the Constitution ("Municipal Corporations") and it is entitled "County or Municipal Property Held for Public Purpose Exempt from Forced Sale and Taxation." Rather, Petitioner cites to certain beneficial rules of grammatical construction to assert that the phrase "and all other property devoted exclusively to the use and benefit of the public" should be considered an independent category to be exempted from forced sale and taxation, so as to avoid it being "surplusage."[32] Petitioner cites *TIC Energy & Chemical, Inc. v. Martin*, 498 S.W.3d 68 (Tex. 2016) for this proposition. Again, however, Petitioner ignores the balance of the Court's discussion on that issue:

> We disagree that subsection (b) is superfluous if section 406.122 is afforded the role TIC advocates, and even if it were, redundancy is not determinative. Indeed, "there are times when redundancies are precisely what the Legislature intended."

498 S.W.3d at 77, *citing In re Estate of Nash*, 220 S.W.3d 914, 918 (Tex. 2007). *Nash*, in turn cites *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001), in which this Court held that provisions excepting privileged attorney-client information from disclosure under the Texas Public Information Act (Tex. Govt. Code § 552.022), in both subsections (a) and (b). The majority was not concerned that one provision or the other was rendered "surplusage":

> The only reasonable explanations for the redundancies in section

[32] *Petitioner's Brief* at pp. 22-24.

> 552.022 about exceptions from disclosure when information is "expressly confidential under other law" is that ***the Legislature repeated itself out of an abundance of caution, for emphasis, or both***. There is no indication that the Legislature intended the repetition in section 552.022 to bring about a radical change in the application of attorney-client, work-product, and consulting-expert privileges to governmental entities.

City of Georgetown, 53 S.W.3d at 336. Moreover, these cases discuss statutes. When analyzing a constitutional provision such as art. XI § 9, redundancy and emphasis make that much more sense.

Finally, there is one piece of art XI § 9 Petitioner ignores – this provision also exempts property from *forced sale*. Here Petitioner's argument goes beyond simply divesting a private owner of its ownership interest. It also operates to *nullify mortgage liens* on property leased (or subleased) to open-enrollment charter schools. In this case, there is no evidence one way or the other as to whether the actual owners of the property in this case – Aneff, LLC and Alisan, LLC, two for-profit Delaware LLCs – have taken out any loans secured by a lien on this property. If they have done so, Petitioner's construction of art. XI § 9 automatically invalidates the lender's deed of trust lien when the property was subleased to Petitioner. Clearly no such result was intended when this provision was proposed and adopted, and cannot, by its own terms, apply in such cases. Otherwise, there would be yet another private-property "taking" – the lender's lien securing payment of its mortgage loan.

CONCLUSION AND PRAYER

This is a relatively simple case. The statute Petitioner relies on does not provide the exemption it seeks. Petitioner's attempts to broadly construe the plain language of Tex. Educ. Code § 12.128 far beyond its intended scope in order to infer an exemption fail under the "strict construction" standard that applies in this case. The Property is privately owned by two Delaware LLCs based in Boca Raton, Florida. The owners leased the Property to a grocer, who then subleased the property to a public charter school. Like all privately owned property leased to a public entity, this property is not entitled to an exemption as "public property." The Court of Appeals opinion addresses the narrow issues raised in this case. Petitioner's claim asserting an exemption under Tex. Const. art. XI § 9 was not raised below, and does not apply to Petitioner's privately owned property. There are no unique or novel legal issues presented here. Respondent GCAD therefore requests that Petitioner's Petition for Review be denied in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the **2nd** day of **September, 2020,** I emailed a copy of the foregoing document, and also electronically filed with the Clerk of Court using the e-filing manager, which will send notification of such filing to counsel of record for Appellant in this proceeding as follows: Mr. Joseph E. Hoffer, Mr. Robert A. Schulman, and Ms. Denise Nance Pierce, and Mr. John J. Joyce, Schulman, Lopez, Hoffer & Adelstein, LLC, 845 Proton Road, San Antonio, Texas 78258, Email: jhoffer@slh-law.com, rschulman@slh-law.com, dpierce@slh-law.com and jjoyce@slh-law.com.

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i), I hereby certify that this Petition for Review contains 6,398 words (excluding the caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of issues presented, signature, certificate of service, and certificate of compliance).

I further certify that this is a computer-generated document created in Word for Mac, using 14-point typeface for all text, except for footnotes, which are in 12-point typeface. In making this certificate of compliance I am relying on the word count provided by the software used to prepare this document.

I understand that a copy of this document may be posted on the Court's website and that the electronically filed copy of the document becomes part of the Court's record.

Copies have been sent to all parties associated with this case.

/s/ *Anthony P. Brown*
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