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, Cause No. 14-18-00358-CV

ODYSSEY 2020 ACADEMY, INC.'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case:
Odyssey, a public open-enrollment charter school and an arm of the state of Texas, brought a Petition for Review upon GCAD's and GCAD's Appraisal Review Board's denial of a tax exemption under Tex. Tax Code §11.11 and Tex. Educ. Code §12.128 for property leased by Odyssey to operate a public school campus. In its Petition, Odyssey sought reversal of the denials by GCAD and GCAD's Appraisal Review Board of its requested exemption.

Name of Trial Judge, Designation and County of Trial Court, and Disposition in the Trial Court:
On April 9, 2019, the Honorable Patricia Grady, Presiding Judge in the 212th Judicial District Court, Galveston County, denied Odyssey's Motion for Summary Judgment. On April 26, 2019, Judge Grady granted GCAD's Motion for Summary Judgment, and ordered that Odyssey take nothing on its claims. *See* Tab 1, Trial Court Order. Odyssey appealed. CR at p. 1168 (v1).[1]

Parties and District of the Court of Appeals; Disposition in the Court of Appeals:
The parties in the Fourteenth Court of Appeals were Odyssey and GCAD. On July 23, 2019, the Fourteenth Court of Appeals issued a written opinion affirming the trial court's judgment. Odyssey filed a Motion for En Banc Reconsideration on August 6, 2019. The Court of Appeals denied the motion on September 12, 2019. No other motions are currently pending before the Court of Appeals.

Citation to the Court of Appeals' Opinion and Justices Participating in the Opinion:
Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist., 585 S.W.3d 530 (Tex.App.—Houston [14th Dist.] 2019, pet. filed), en banc review denied (Sept. 12, 2019). Opinion written by Chief Justice Kem Thompson Frost and joined by Justices Kevin Jewell and Francis Bourliot.

[1] References to the Clerk's record will be made by referencing CR, the page number, and volume. References to the Appendix filed with Odyssey's Petition for Review will be made by tab number. For example, "Tab 3" references Appendix Tab 3.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Section 22.001(a) of the Texas Government Code. This appeal presents a question of law that is important to the jurisprudence of the state, and should be decided by this Court. *See* Tex. Gov't Code §22.001(a); *see also* Tex. R. App. P. 56.1(a)(6).

Furthermore, this Court should exercise its discretion to grant review for the following additional reasons: (1) this appeal involves the construction and validity of a statute; (2) the Fourteenth Court of Appeals' interpretation of Tex. Educ. Code §12.128 constitutes an error of law of such importance to the state's jurisprudence that it should be corrected; and (3) this is an important question of state law that impacts public charter schools statewide and that should be, but has not been, resolved by the Texas Supreme Court. *See* Tex. R. App. P. 56.1(a)(3)-(6).

ISSUES PRESENTED

1. Whether property purchased or leased with state funds received by a public charter school under Sections 12.106 of the Texas Education Code constitutes public property sufficient to be exempt from *ad valorem* taxes under Texas law, including Section 12.128 of the Texas Education Code, relevant provisions of the Texas Constitution pertaining to public property, and Section 11.11 of the Texas Tax Code.

2. Whether the Fourteenth Court of Appeals erred in failing to apply the plain language of Section 12.128 of the Texas Education Code.

3. Whether the Fourteenth Court of Appeals further erred by so narrowly construing Section 12.128 of the Texas Education Code to apply only in the context of charter revocations without regard for different factual scenarios under which Section 12.128 plainly would apply including "equitable title" cases.

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ODYSSEY 2020 ACADEMY, INC.'S BRIEF ON THE MERITS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Petitioner Odyssey 2020 Academy, Inc. (d/b/a Odyssey Academy, Inc.) (herein "Odyssey") respectfully requests that this Court grant its Petition for Review and reverse the Fourteenth Court of Appeals' decision, with instructions to render judgment in Odyssey's favor.

STATEMENT OF FACTS

The State of Texas authorized Odyssey to operate public open-enrollment charter school campuses and provide a public education to children in and around Galveston County and surrounding TEA authorized school districts. *See* CR at p. 7 ¶ 12 (v1); CR at pp. 764-765 (v2). Odyssey's main campus is located partially on property not owned by Odyssey, but is subject to a long-term lease (2009-2026) from private owners ("Property"). *See* CR at p. 55 (v1); CR at pp. 764-765 ¶¶ 4-8 (v2).

Odyssey requested that the Galveston County Appraisal District ("GCAD") designate the Property as exempt from *ad valorem* taxes. *See* CR at pp. 7-8 ¶¶ 14-15 (v1). This was based on the plain language and application of two Texas statutes: (1) Section 12.128(a) of the Texas Education Code, which provides that the leased Property is "public property for all purposes under state law" and "is property of this state;"[2] and (2) Section 11.11 of the Tax Code, which provides that "property owned by this state or a political subdivision of this state is exempt from taxation if the property is used for public purposes." *See* CR at pp. 7-8 ¶¶ 14-15 (v1).

At all stages of this litigation, it has been undisputed that:

1. Odyssey has continuously leased and operated the Property since July 31, 2009;

[2] Section 12.128 was recently amended and leased property was moved to a newly created subsection 12.128(a-1), which contains the same language as former 12.128(a); all citations to section 12.128(a) herein refer to the previous statute in effect at the time of this dispute.

2. All lease payments have been made with state funds received under Section 12.106 of the Texas Education Code;
3. Odyssey uses the Property exclusively as a public school campus;
4. The Property is used only for purposes for which a school district may use district property;
5. Odyssey has exclusive use and control of the Property; and
6. The portions of the school campus owned fee simple by Odyssey are exempt as public property. CR at pp. 8-9 ¶ 17, p. 14 (v1); CR at p. 54 (v1) (GCAD MSJ: "Odyssey owns some of the property on which its school is located. *That property is exempted from ad valorem taxation as public property*, and is not in dispute.").

GCAD denied Odyssey's exemption request for the Property. Odyssey exhausted its administrative remedies and timely filed its petition for review in the Galveston County District Court. CR at p. 9 ¶¶ 18-19, p. 5 (v1). Both parties filed motions for summary judgment, and the Trial Court entered judgment in GCAD's favor. *See* CR at pp. 1164, 1166 (v2).

Odyssey appealed. CR at p. 1168 (v2). While the Fourteenth Court correctly stated the nature of the case, the Court's opinion erroneously concluded that Section 12.128 did not operate to qualify Odyssey for an exemption. Tab 3 at 4.

SUMMARY OF THE ARGUMENT

The plain language of Section 12.128 compels a finding that Odyssey's interest in the property is for and on behalf of the state, is property "of the state" and is further public property "for all purposes under state law." "[A]ll purposes" necessarily includes *ad valorem* state tax law purposes. The Fourteenth Court erred in three material respects. First, the Court misplaced its reliance on *Texas Turnpike Company v. Dallas County*, 153 Tex. 474 (Tex.1954), and misapplied rationale from that opinion to Chapter 12 of the Education Code. Through Chapter 12, the State Legislature creates and regulates open-enrollment charter schools, under a unique legal framework. The property interests created or modified pursuant to that legal framework are not taxable. Second, the Court of Appeals ignored the plain language of Texas Education Code Section 12.128 by finding that the Property is not public property for *ad valorem* taxes. Third, and importantly, the Court of Appeals' erroneous interpretation of Section 12.128 will preclude tax exemption where public charter schools (and the state) hold either legal or equitable title to real property. Ownership through equitable title is an important legal doctrine and considered ownership for tax purposes, as described below, that is deeply rooted in Texas jurisprudence. The Court of Appeals' interpretation threatens the proper application of that doctrine.

For these important reasons, which all related to the proper use of state and public funds, state and public property, and the taxation thereof, Odyssey respectfully requests that this Court reverse the Court of Appeals' decision and instruct the lower court to enter judgment in favor of Odyssey, holding that its leased property is exempt from *ad valorem* taxation.

ARGUMENT

1. Public ownership for purposes of property tax exemption is met by the Texas Education Code's statutory framework applicable to public charter schools.

The legislative intent behind Texas Education Code Section 12.128 is clear: Property purchased or leased by a charter school with state funds is considered public property and "property of this state" held in trust by the charter holder for the benefit of public school children. *See* Tex. Educ. Code 12.128(a). The Court of Appeals erroneously held that Odyssey's charter property is not public property, and thus, should be subject to *ad valorem* taxes. In doing so, the Court of Appeals rendered Section 12.128(a) devoid of meaning, and in essence held that state property used for the education of public school children should be taxed as private property, thereby requiring that state funds dedicated to educating those same students instead be diverted away through this taxation to other entities. Pursuant to Tex. R. App. P. 56.1(a)(5)-(6), this Court should correct this error of law by the lower court and resolve this important question of Texas law. Tax exempt status exists for charter school property "purchased or leased by a charter school" according to the plain terms in Section 12.128 and other applicable Texas law.

A. The Court of Appeals' reliance on *Texas Turnpike* was misplaced.

The Court of Appeals discounted Texas Education Code Section 12.128's clear and direct language, straining to rely instead on *Texas Turnpike Company v.*

Dallas County in determining that "public ownership cannot be legislatively declared." Tab 3 at *4. (citing *Texas Turnpike Company v. Dallas County,* 153 Tex. 474 (Tex.1954)). The Court quoted the following section of the *Texas Turnpike* case in support of its holding:

> 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 [parties], may make the state the owner thereof by simply saying that it is the owner**.

Tab. 3 at *4 (emphasis in original).

However, the Appellate Court's reliance on *Texas Turnpike* is misplaced, as the circumstances in *Texas Turnpike* are not even remotely analogous to the instant case. In *Texas Turnpike*, the petitioners seeking exemption from taxes were private corporations created for the purpose of building, acquiring, owning, operating and maintaining toll roads within Texas. *Texas Turnpike,* 153 Tex. at 401. In 1953, the legislature enacted Article 6674v, which allowed for roads constructed by private toll road corporations, such as the petitioners, to be transferred to the state upon completion of certain conditions. *Id.* Among the conditions required before transfer were that the roads meet certain quality standards and that the property be free of indebtedness. *Id.* Deeds to the roads were held in escrow until such time as those conditions were fulfilled. *Id.* Article 6674v mandated that the state could not accept the toll road property until those conditions were met, and declared that the property

"shall be vested at all times in the State of Texas and shall constitute public property used for public purposes … ." Article 6674v, Sec. 18 (1953) (repealed 1995).

In *Texas Turnpike*, the petitioners contracted with the Turnpike Authority, executed escrow agreements, and placed deeds in escrow for the toll roads. The petitioners then claimed a tax exemption for the toll roads as being publicly owned and used for a public purpose under Article XI, Section 9 of the Texas Constitution. *Id.* at 401-02. The petitioners argued that Article 6674v, when considered with their bylaws and escrow agreements, had the effect of placing taxable title in the state, making the toll roads exempt from taxation.

Article 6674v recognized the continued private ownership of the toll roads, subject to completion of the conditions. *Id*. at 401. By placing conditions on the delivery of the deeds, Article 6674v acknowledged that deeds might never be delivered. Contrary to that acknowledgment, however, the Legislature simultaneously declared that toll roads conveyed by those deeds were public property. *See* Art. 6674v ("The equitable, beneficial, and superior title to the property *belonging to a corporation* described in Section 5, subsection (n) hereof, which is *subject to an escrow agreement herein* shall be vested at all times in the State of Texas."). In doing so, the Legislature, in effect, created a situation that reflected the exact opposite of reality; the title to the property could not be vested in the State of Texas while it was simultaneously withheld by the private corporation

by remaining in escrow. This Court in *Texas Turnpike* recognized that, no matter the language of the statute, the actual ownership remained in the private corporation. The state would not assume ownership until the statutory conditions were fulfilled by the private corporations and deeds were delivered. *Id.* at 402.

Accordingly, the *Texas Turnpike* Court found that the toll roads were not "publicly owned" as constitutionally required. The Court further found that under those facts, the state had only a *contingent* interest in the toll roads, because the delivery of deeds was based upon fulfilment of conditions outside of the state's control, *e.g.*, the elimination of all debt by the private corporation. *Turnpike,* 153 Tex. at 478.

The *Texas Turnpike* facts differ considerably from the facts and situation before this Court in the present matter. Here, there are no conditions precedent in the Texas statutes concerning property held by public charter schools: Property purchased or leased by a charter school with state funds ***is*** clearly public property, and "property of this state" held in trust by the charter holder for the benefit of public school children. *See* Tex. Educ. Code 12.128(a) (emphasis added). Because of this critical distinction, the Appellate Court erred in relying on the holding and reasoning in *Texas Turnpike* to inform its decision in the present matter.

B. The unique statutory framework of Chapter 12 not only governs charter schools, but defines their status and informs all entities and the public of their nature.

As explained above, the *Texas Turnpike* Court was concerned about a premature (and therefore, counterfactual) legislative declaration of public ownership of otherwise private property. In this case, the Court of Appeals was similarly concerned about Section 12.128, but that concern is unfounded. Chapter 12's declaration that a public charter school's property, purchased or leased with public funds, is public property for all purposes under state law, and property of this state held in trust for public school students, is not a mere declaration. Rather, Chapter 12 creates the trust relationship between the charter holder and the public with regard to public funding. Indeed, it is a recognition and culmination of the statutory and regulatory framework under which a unique and public form of education exists to serve the public, and acts to preserve the state's and public's investment of money and resources in these charter schools.[3]

Section 12.128 of the Education Code prescribes explicitly that charter school property is property of this state "for all purposes under state law." This is wholly

[3] A review of the legislative history shows that the legislative intent behind Section 12.128 was to ensure that the State of Texas maintained ownership of real property purchased or leased by the charter school. Further, in the event of closure, the bill authorizes TEA to directly disposal of the school property. *See, e.g.,* Texas Bill Analysis, S.B. 2, 2013, Texas Bill Analysis, H.B. 6, 3/20/2001, Texas Bill Analysis, H.B. 6, 3/26/2001, Texas Bill Analysis, H.B. 6, 4/4/2001, Texas Bill Analysis, S.B. 1454, 4/15/2019, Texas Bill Analysis, S.B. 1454, 2019.

based in actual and present facts, stemming from the legislatively imposed framework and funding structure governing charter schools. The creation of Odyssey as a public charter school and the funds it uses to make its lease payments are derived wholly from the state.

Furthermore, Odyssey is publicly funded under Chapter 12 of the Education Code, with the Legislature conditioning the school's receipt of state funding on the property being public. *See*, *e.g.*, Tex. Educ. Code §12.1071 (by accepting public funds, "charter holder agrees to accept all liability under this subchapter"); *id*. at §12.128 (charter property purchased or leased with state funds is public property; state takes possession of charter property purchased with state funds upon charter school ceasing operation).

The language in Section 12.128 is not the Legislature declaring a falsehood as in *Texas Turnpike*, but rather mandating that funds disseminated to charter schools, and the property purchased or leased therewith, retain their public character. The funds do not lose the quality of public property when the funds leave the state coffers. *Transformative Learning Sys. v. Texas Educ. Agency*, 572 S.W.3d 281, 293 (Tex.App.—Austin 2018, no pet.) (legal framework of Education Code Chapter 12 Subchapter D implicates the rights and obligations of recipients of state funding); *Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54, 63 (Tex.2018), reh'g

denied (Sept. 28, 2018) ("the Legislature has [not] … created vested private-property rights in the creation of the charter school system").

Section 12.128's language is wholly consistent with Chapter 12 as a whole, and the facts that surround public charter schools. Public charter schools are a creation of the State Legislature; their powers, authority, status, and even their right to exist all emanate from legislative command. *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 81 (Tex.2011). An all-encompassing legislative regime "called charter schools into existence" and "defines their role in our public education system." *Id*. at 81-82. State dollars form the source of charter school funding and the state is able to designate the character of its own funds and of items purchased or leased with its funds through legislation. *Id*. at 80 (holding that "[U]se of state-funded property and state funds is also carefully circumscribed."), *citing* Tex. Educ. Code Ch. 12. By legislative mandate, the receipt of funds by a charter school is conditioned upon the state's continued interest in those funds, and in the property purchased or leased with those funds. Accordingly, the funds or property held by the charter school retain their public character. "This legislative scheme indicates that an open-enrollment charter is a new and innovative form of public schooling rather than a mere contract to outsource public education to a private entity." *Honors,* 555 S.W 3d at 63. The "Education Code does not treat the charter holder or school like a private citizen; they exist as a part of the public school

system." *Id.* at 64, citing Tex. Educ. Code §12.105. Indeed, this Court has very recently concluded that open-enrollment charter schools act as "arm[s] of the State government." *El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 18-1167, 2020 WL 2601641, at *6 (Tex. May 22, 2020).

If a charter school's property were truly private property like the toll roads were in *Texas Turnpike*, the Legislature would not have been able to enforce Section 12.128(c), which allows the state to retake the property upon the charter school ceasing operation. *See* TEX. EDUC. CODE 12.128(c). If charter school property is private property, the exercise of Section 12.128(c) would certainly constitute a taking of private property by the state, but, Texas courts have found that no taking occurs when the state takes control over a charter holder's charter school property pursuant to Education Code Section 12.128(c). *See Transformative Learning*, 572 S.W.3d at 292 (also finding a charter school listing property as belonging to the State consistent with the statutory framework); *see also Texas Educ. Agency v. Acad. of Careers & Techs., Inc.*, 499 S.W.3d 130, 136 (Tex.App.—Austin 2016, no pet.) (because the state provides the funds to be used for a public purpose, the state can take property purchased with those funds; "what the Legislature giveth, the Legislature may taketh away" (internal citation omitted)).

Further, unlike *Texas Turnpike*, the statutory framework for charter schools dictates that the state does not have a mere contingent interest in charter school

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v.

GALVESTON CENTRAL APPRAISAL DISTRICT,

***Respondent*.**

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

ODYSSEY 2020 ACADEMY, INC.'S BRIEF ON THE MERITS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Petitioner Odyssey 2020 Academy, Inc. (d/b/a Odyssey Academy, Inc.) (herein "Odyssey") respectfully requests that this Court grant its Petition for Review and reverse the Fourteenth Court of Appeals' decision, with instructions to render judgment in Odyssey's favor.

STATEMENT OF FACTS

The State of Texas authorized Odyssey to operate public open-enrollment charter school campuses and provide a public education to children in and around Galveston County and surrounding TEA authorized school districts. *See* CR at p. 7 ¶ 12 (v1); CR at pp. 764-765 (v2). Odyssey's main campus is located partially on property not owned by Odyssey, but is subject to a long-term lease (2009-2026) from private owners ("Property"). *See* CR at p. 55 (v1); CR at pp. 764-765 ¶¶ 4-8 (v2).

Odyssey requested that the Galveston County Appraisal District ("GCAD") designate the Property as exempt from *ad valorem* taxes. *See* CR at pp. 7-8 ¶¶ 14-15 (v1). This was based on the plain language and application of two Texas statutes: (1) Section 12.128(a) of the Texas Education Code, which provides that the leased Property is "public property for all purposes under state law" and "is property of this state;"[2] and (2) Section 11.11 of the Tax Code, which provides that "property owned by this state or a political subdivision of this state is exempt from taxation if the property is used for public purposes." *See* CR at pp. 7-8 ¶¶ 14-15 (v1).

At all stages of this litigation, it has been undisputed that:

1. Odyssey has continuously leased and operated the Property since July 31, 2009;

[2] Section 12.128 was recently amended and leased property was moved to a newly created subsection 12.128(a-1), which contains the same language as former 12.128(a); all citations to section 12.128(a) herein refer to the previous statute in effect at the time of this dispute.

2. All lease payments have been made with state funds received under Section 12.106 of the Texas Education Code;
3. Odyssey uses the Property exclusively as a public school campus;
4. The Property is used only for purposes for which a school district may use district property;
5. Odyssey has exclusive use and control of the Property; and
6. The portions of the school campus owned fee simple by Odyssey are exempt as public property. CR at pp. 8-9 ¶ 17, p. 14 (v1); CR at p. 54 (v1) (GCAD MSJ: "Odyssey owns some of the property on which its school is located. *That property is exempted from ad valorem taxation as public property*, and is not in dispute.").

GCAD denied Odyssey's exemption request for the Property. Odyssey exhausted its administrative remedies and timely filed its petition for review in the Galveston County District Court. CR at p. 9 ¶¶ 18-19, p. 5 (v1). Both parties filed motions for summary judgment, and the Trial Court entered judgment in GCAD's favor. *See* CR at pp. 1164, 1166 (v2).

Odyssey appealed. CR at p. 1168 (v2). While the Fourteenth Court correctly stated the nature of the case, the Court's opinion erroneously concluded that Section 12.128 did not operate to qualify Odyssey for an exemption. Tab 3 at 4.

SUMMARY OF THE ARGUMENT

The plain language of Section 12.128 compels a finding that Odyssey's interest in the property is for and on behalf of the state, is property "of the state" and is further public property "for all purposes under state law." "[A]ll purposes" necessarily includes *ad valorem* state tax law purposes. The Fourteenth Court erred in three material respects. First, the Court misplaced its reliance on *Texas Turnpike Company v. Dallas County*, 153 Tex. 474 (Tex.1954), and misapplied rationale from that opinion to Chapter 12 of the Education Code. Through Chapter 12, the State Legislature creates and regulates open-enrollment charter schools, under a unique legal framework. The property interests created or modified pursuant to that legal framework are not taxable. Second, the Court of Appeals ignored the plain language of Texas Education Code Section 12.128 by finding that the Property is not public property for *ad valorem* taxes. Third, and importantly, the Court of Appeals' erroneous interpretation of Section 12.128 will preclude tax exemption where public charter schools (and the state) hold either legal or equitable title to real property. Ownership through equitable title is an important legal doctrine and considered ownership for tax purposes, as described below, that is deeply rooted in Texas jurisprudence. The Court of Appeals' interpretation threatens the proper application of that doctrine.

For these important reasons, which all related to the proper use of state and public funds, state and public property, and the taxation thereof, Odyssey respectfully requests that this Court reverse the Court of Appeals' decision and instruct the lower court to enter judgment in favor of Odyssey, holding that its leased property is exempt from *ad valorem* taxation.

ARGUMENT

1. Public ownership for purposes of property tax exemption is met by the Texas Education Code's statutory framework applicable to public charter schools.

The legislative intent behind Texas Education Code Section 12.128 is clear: Property purchased or leased by a charter school with state funds is considered public property and "property of this state" held in trust by the charter holder for the benefit of public school children. *See* Tex. Educ. Code 12.128(a). The Court of Appeals erroneously held that Odyssey's charter property is not public property, and thus, should be subject to *ad valorem* taxes. In doing so, the Court of Appeals rendered Section 12.128(a) devoid of meaning, and in essence held that state property used for the education of public school children should be taxed as private property, thereby requiring that state funds dedicated to educating those same students instead be diverted away through this taxation to other entities. Pursuant to Tex. R. App. P. 56.1(a)(5)-(6), this Court should correct this error of law by the lower court and resolve this important question of Texas law. Tax exempt status exists for charter school property "purchased or leased by a charter school" according to the plain terms in Section 12.128 and other applicable Texas law.

A. The Court of Appeals' reliance on *Texas Turnpike* was misplaced.

The Court of Appeals discounted Texas Education Code Section 12.128's clear and direct language, straining to rely instead on *Texas Turnpike Company v.*

Dallas County in determining that "public ownership cannot be legislatively declared." Tab 3 at *4. (citing *Texas Turnpike Company v. Dallas County,* 153 Tex. 474 (Tex.1954)). The Court quoted the following section of the *Texas Turnpike* case in support of its holding:

> 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 [parties], may make the state the owner thereof by simply saying that it is the owner**.

Tab. 3 at *4 (emphasis in original).

However, the Appellate Court's reliance on *Texas Turnpike* is misplaced, as the circumstances in *Texas Turnpike* are not even remotely analogous to the instant case. In *Texas Turnpike*, the petitioners seeking exemption from taxes were private corporations created for the purpose of building, acquiring, owning, operating and maintaining toll roads within Texas. *Texas Turnpike,* 153 Tex. at 401. In 1953, the legislature enacted Article 6674v, which allowed for roads constructed by private toll road corporations, such as the petitioners, to be transferred to the state upon completion of certain conditions. *Id.* Among the conditions required before transfer were that the roads meet certain quality standards and that the property be free of indebtedness. *Id.* Deeds to the roads were held in escrow until such time as those conditions were fulfilled. *Id.* Article 6674v mandated that the state could not accept the toll road property until those conditions were met, and declared that the property

"shall be vested at all times in the State of Texas and shall constitute public property used for public purposes … ." Article 6674v, Sec. 18 (1953) (repealed 1995).

In *Texas Turnpike*, the petitioners contracted with the Turnpike Authority, executed escrow agreements, and placed deeds in escrow for the toll roads. The petitioners then claimed a tax exemption for the toll roads as being publicly owned and used for a public purpose under Article XI, Section 9 of the Texas Constitution. *Id.* at 401-02. The petitioners argued that Article 6674v, when considered with their bylaws and escrow agreements, had the effect of placing taxable title in the state, making the toll roads exempt from taxation.

Article 6674v recognized the continued private ownership of the toll roads, subject to completion of the conditions. *Id*. at 401. By placing conditions on the delivery of the deeds, Article 6674v acknowledged that deeds might never be delivered. Contrary to that acknowledgment, however, the Legislature simultaneously declared that toll roads conveyed by those deeds were public property. *See* Art. 6674v ("The equitable, beneficial, and superior title to the property *belonging to a corporation* described in Section 5, subsection (n) hereof, which is *subject to an escrow agreement herein* shall be vested at all times in the State of Texas."). In doing so, the Legislature, in effect, created a situation that reflected the exact opposite of reality; the title to the property could not be vested in the State of Texas while it was simultaneously withheld by the private corporation

by remaining in escrow. This Court in *Texas Turnpike* recognized that, no matter the language of the statute, the actual ownership remained in the private corporation. The state would not assume ownership until the statutory conditions were fulfilled by the private corporations and deeds were delivered. *Id.* at 402.

Accordingly, the *Texas Turnpike* Court found that the toll roads were not "publicly owned" as constitutionally required. The Court further found that under those facts, the state had only a *contingent* interest in the toll roads, because the delivery of deeds was based upon fulfilment of conditions outside of the state's control, *e.g.*, the elimination of all debt by the private corporation. *Turnpike,* 153 Tex. at 478.

The *Texas Turnpike* facts differ considerably from the facts and situation before this Court in the present matter. Here, there are no conditions precedent in the Texas statutes concerning property held by public charter schools: Property purchased or leased by a charter school with state funds ***is*** clearly public property, and "property of this state" held in trust by the charter holder for the benefit of public school children. *See* Tex. Educ. Code 12.128(a) (emphasis added). Because of this critical distinction, the Appellate Court erred in relying on the holding and reasoning in *Texas Turnpike* to inform its decision in the present matter.

B. The unique statutory framework of Chapter 12 not only governs charter schools, but defines their status and informs all entities and the public of their nature.

As explained above, the *Texas Turnpike* Court was concerned about a premature (and therefore, counterfactual) legislative declaration of public ownership of otherwise private property. In this case, the Court of Appeals was similarly concerned about Section 12.128, but that concern is unfounded. Chapter 12's declaration that a public charter school's property, purchased or leased with public funds, is public property for all purposes under state law, and property of this state held in trust for public school students, is not a mere declaration. Rather, Chapter 12 creates the trust relationship between the charter holder and the public with regard to public funding. Indeed, it is a recognition and culmination of the statutory and regulatory framework under which a unique and public form of education exists to serve the public, and acts to preserve the state's and public's investment of money and resources in these charter schools.[3]

Section 12.128 of the Education Code prescribes explicitly that charter school property is property of this state "for all purposes under state law." This is wholly

[3] A review of the legislative history shows that the legislative intent behind Section 12.128 was to ensure that the State of Texas maintained ownership of real property purchased or leased by the charter school. Further, in the event of closure, the bill authorizes TEA to directly disposal of the school property. *See, e.g.,* Texas Bill Analysis, S.B. 2, 2013, Texas Bill Analysis, H.B. 6, 3/20/2001, Texas Bill Analysis, H.B. 6, 3/26/2001, Texas Bill Analysis, H.B. 6, 4/4/2001, Texas Bill Analysis, S.B. 1454, 4/15/2019, Texas Bill Analysis, S.B. 1454, 2019.

based in actual and present facts, stemming from the legislatively imposed framework and funding structure governing charter schools. The creation of Odyssey as a public charter school and the funds it uses to make its lease payments are derived wholly from the state.

Furthermore, Odyssey is publicly funded under Chapter 12 of the Education Code, with the Legislature conditioning the school's receipt of state funding on the property being public. *See*, *e.g.*, Tex. Educ. Code §12.1071 (by accepting public funds, "charter holder agrees to accept all liability under this subchapter"); *id*. at §12.128 (charter property purchased or leased with state funds is public property; state takes possession of charter property purchased with state funds upon charter school ceasing operation).

The language in Section 12.128 is not the Legislature declaring a falsehood as in *Texas Turnpike*, but rather mandating that funds disseminated to charter schools, and the property purchased or leased therewith, retain their public character. The funds do not lose the quality of public property when the funds leave the state coffers. *Transformative Learning Sys. v. Texas Educ. Agency*, 572 S.W.3d 281, 293 (Tex.App.—Austin 2018, no pet.) (legal framework of Education Code Chapter 12 Subchapter D implicates the rights and obligations of recipients of state funding); *Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54, 63 (Tex.2018), reh'g

denied (Sept. 28, 2018) ("the Legislature has [not] … created vested private-property rights in the creation of the charter school system").

Section 12.128's language is wholly consistent with Chapter 12 as a whole, and the facts that surround public charter schools. Public charter schools are a creation of the State Legislature; their powers, authority, status, and even their right to exist all emanate from legislative command. *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 81 (Tex.2011). An all-encompassing legislative regime "called charter schools into existence" and "defines their role in our public education system." *Id*. at 81-82. State dollars form the source of charter school funding and the state is able to designate the character of its own funds and of items purchased or leased with its funds through legislation. *Id*. at 80 (holding that "[U]se of state-funded property and state funds is also carefully circumscribed."), *citing* Tex. Educ. Code Ch. 12. By legislative mandate, the receipt of funds by a charter school is conditioned upon the state's continued interest in those funds, and in the property purchased or leased with those funds. Accordingly, the funds or property held by the charter school retain their public character. "This legislative scheme indicates that an open-enrollment charter is a new and innovative form of public schooling rather than a mere contract to outsource public education to a private entity." *Honors,* 555 S.W 3d at 63. The "Education Code does not treat the charter holder or school like a private citizen; they exist as a part of the public school

system." *Id.* at 64, citing Tex. Educ. Code §12.105. Indeed, this Court has very recently concluded that open-enrollment charter schools act as "arm[s] of the State government." *El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 18-1167, 2020 WL 2601641, at *6 (Tex. May 22, 2020).

If a charter school's property were truly private property like the toll roads were in *Texas Turnpike*, the Legislature would not have been able to enforce Section 12.128(c), which allows the state to retake the property upon the charter school ceasing operation. *See* TEX. EDUC. CODE 12.128(c). If charter school property is private property, the exercise of Section 12.128(c) would certainly constitute a taking of private property by the state, but, Texas courts have found that no taking occurs when the state takes control over a charter holder's charter school property pursuant to Education Code Section 12.128(c). *See Transformative Learning*, 572 S.W.3d at 292 (also finding a charter school listing property as belonging to the State consistent with the statutory framework); *see also Texas Educ. Agency v. Acad. of Careers & Techs., Inc.*, 499 S.W.3d 130, 136 (Tex.App.—Austin 2016, no pet.) (because the state provides the funds to be used for a public purpose, the state can take property purchased with those funds; "what the Legislature giveth, the Legislature may taketh away" (internal citation omitted)).

Further, unlike *Texas Turnpike*, the statutory framework for charter schools dictates that the state does not have a mere contingent interest in charter school

property. Tex. Educ. Code 12.128(a) (citing the trust relationship between the state and the charter entity). Quite the opposite, this Court has held that "the Legislature has [not] … created vested private-property rights in the creation of the charter school system." *Honors,* 555 S.W.3d at 63. To this end, any state dollar given to a charter school remains public property – it is simply held in trust by the charter holder for benefit of the public and the state. *See* Tex. Educ. Code §12.107(a)(2) (state funds received by a charter holder are held in trust by the charter holder for the benefit of the students of the charter school); Tex. Educ. Code §12.128(a)(2) (Property purchased or leased with public funds "is property of this state held in trust …").

In *Honors*, this Court stated that "… open-enrollment charter schools are expressly considered "governmental entit[ies] for … [statutes] relating to property held in trust[.]" *Honors,* 555 S.W.3d at 64. As with the creation of any valid trust, the beneficiaries become the owners of the equitable or beneficial title to the trust property, and are considered the real owners, and the trustee is only the depositary of the bare legal title. *See, e.g. City of Mesquite v. Malouf*, 553 S.W.2d 639, 644 (Tex.Civ.App.—Texarkana 1977, writ ref'd n.r.e.) (finding that when a valid trust is created, the beneficiaries become the owner of the equitable title to the property, and are considered the real owners).

In short, the facts in *Texas Turnpike* are not analogous to the case before this Court, and the reasoning is therefore inapplicable. Under Chapter 12 of the Education Code, public ownership was not created or conferred on private property by a mere declaration; the character of public funds was retained as public to dispel the notion that public funds would become private upon receipt by a charter holder. The Legislature prescribed the conditions upon which charters schools would hold public funds, imposing upon the charter holder a trustee relationship and fiduciary duties to the state, while retaining the public nature of the state's assets. From the time the funds were in the state coffers to the time the state retakes possession when the charter school ceases operation, the property remains public. Whether taking the form of cash assets in the school's depository or of personal or real property, it is still "property of this state" and "public property for all purposes under state law." Tex. Educ. Code §§12.107(a) and 12.128(a).

This Court and the Legislature have made clear that charter schools bear the burdens and responsibilities of being entrusted with publicly owned property, which can be taken by the state without implicating private property rights. Tex. Educ. Code §12.128(a), (c); *LTTS*, *Transformative Learning*, *supra*. Charter schools are entrusted as stewards of public funds, and have the state-imposed duty to safeguard those funds.

In stark contrast with these statutes and precedent concerning the facts surrounding charter school property, the Court of Appeals found that property that the Legislature designated as "of this State" which is "public property **for all purposes under state law**," "held in trust" by the charter holder is not publicly-owned property for tax exemption purposes. This interpretation cannot be reconciled and must be squared by this Court. Odyssey's interpretation reconciles the plain language of the law and, more importantly, preserves the public purpose to make charter holders trustees of the public funds granted by the state and the property which those funds are used to secure for the benefit of public school children.

C. Chapter 12 is fundamental in granting Odyssey's qualifying status under Tax Code Section 11.11.

As stated above, Chapter 12 and Section 12.128 create a unique public property relationship with and public trustee status for open-enrollment charter schools. Chapter 12 also confers public powers and public status on charter schools like Odyssey. *See, e.g. El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 18-1167, 2020 WL 2601641, at *6 (Tex. May 22, 2020), *citing* Tex. Educ. Code §12.105 (concluding, based on several provisions of Chapter 12, that charter schools act as arms of the state government). However, GCAD, in its response to Odyssey's Petition for Review, states that:

> If a public charter school holds legal or equitable title to property and uses it for public purposes, the property will be exempt as "public

> property" under Tex. Tax Code §11.11 – irrespective of Tex. Educ. Code §12.128.[4]

Response to Petition for Review at 18. It is incorrect to conclude, as asserted by GCAD, that a charter schools' public status, and therefore its status as a qualifying entity under Section 11.11, simply exists irrespective of Chapter 12. This Court should articulate an explicit holding disavowing that notion. The components of Chapter 12's legislative framework mandate a finding that Odyssey has a sufficient interest in the property to qualify as an owner under Tax Code Section 11.11.

Education Code Section 12.128(a-1) states that "Property leased[5] with [public] funds … (1) is considered to be public property for all purposes under state law; (2) is property of this state held in trust by the charter holder for the benefit of the students of the open-enrollment charter school; (3) may be used only for a purpose for which a school district may use school district property. Tex. Educ. Code §12.128(a-1).

Here, the landlord in question ("Landlord") knew that it was leasing to a charter school. *See* CR at p. 703 (v2) (use will be exclusively for operation of a charter school); p. 732 (v2) (explicitly stating that Odyssey would meet any charter

[4] While it is legally correct that public charter schools holding legal or equitable title to property used for public purposes should be exempt as public property under Tex. Tax Code §11.11, several appraisal districts around the state do not follow this premise, leaving charter schools, like Odyssey, to spend further resources contesting these cases.

[5] Notably, the statutory language references the property itself ("Property leased with [public] funds") rather than restricting the scope of the statute to merely the leasehold interest in the property.

school codes and guidelines). It is presumed that the Landlord knew that it was subjecting the property to the provisions of Chapter 12 and Section 12.128. *See, generally, Acad. of Skills & Knowledge, Inc. v. Charter Sch., USA, Inc.,* 260 S.W.3d 529, 545 (Tex.App.—Tyler 2008, pet. denied) (stating in Texas there is a presumption that contracting parties are knowledgeable of the law and contract accordingly), *citing Plumlee v. Paddock,* 832 S.W.2d 757, 759 (Tex.App.—Fort Worth 1992, writ denied). As discussed above, "property leased" by the charter school is "property of this State" and "public property for all purposes under State law." Tex. Educ. Code §12.128.

Because Texas law presumes that the Landlord has knowledge of the laws governing charter schools (such as Section 12.128), it follows that the Lease must be subject to those laws. Applying Section 12.128 to the construction of the Lease agreement in question ("Lease Agreement"), the Landlord has agreed that the Property leased to Odyssey is property of this state (at a minimum for tax purposes), and public property for all purposes under state law. This agreement with the legal title holder demonstrates that the Landlord submits the property to the state's equitable ownership; it is willing to convey whatever interest necessary to satisfy the strictures to make the Property "property of this state" and "public property for all

purposes under state law," during and for the term of the Lease Agreement.[6] Because the agreement between the parties creates a state interest and makes the property public for all purposes under state law, which includes the Tax Code, this Court should give effect to that agreement and find that the Landlord conveyed a sufficient qualifying interest to the Property in Odyssey to meet the requirements of Section 11.11.[7]

D. Chapter 12's framework requires exemption as public property devoted exclusively to the use and benefit of the public under Article XI Section 9 of the Texas Constitution.

As noted by Amici Texas Charter Schools Association ("TCSA") in its *Brief of Amicus Curiae*, the property in question also falls under the exemption of Texas Constitution art. XI, §9.[8] Article XI, §9 exempts from taxation a myriad of different types of property used for the public benefit:

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[6] In other legal contexts, a long term lease on realty (in reasonable relationship to the life of the improvements on the leased realty) is recognized as worthy of tax exemption. *See, e.g.,* Texas Comptroller's Decision No. 31,505 (1994) (stating that test for personal property tax exemption to improvements to leased realty required that the leasing entity was tax exempt and the lease was sufficiently long that the exempt leasing entity would receive the primary use and benefit of the improvements under the lease). The Comptroller's State Property Accounting Process User's Guide – Appendix A – Class Codes prescribe that the useful life for buildings and building improvements – non-componentized is 264 months, or 22 years. Here, Odyssey's lease is for over 17 years. This length is certainly long enough to constitute a long term lease in reasonable relationship to the life of the improvements on the real property.

[7] Having a title interest lesser than a fee title can demonstrate ownership for taxation purposes, and the meaning of ownership "must be ascertained from the context and subject matter." *Signature Flight Support Corp.*, 140 S.W.3d at 839-840; *see also Childress County v. State*, 92 S.W.2d 1011, 1015 (Tex.1936) ("No rigid or exact form is required to vest title to property in a person to make it subject to taxation.").

[8] GCAD asserts that this argument is improper because it was not raised in the Courts below. *Response to Petition for* Review at 14, n. 4. However, this is not a new issue that has failed to be

> §9 Property Exempt From Forced Sale And From Taxation.
>
> The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefore, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public shall be exempt from the force sale and from taxation …

Tex. Const. art. XI, §9.

This Court determined that art. XI, §9's exemption extends to property owned by entities other than counties, cities or towns. *Lower Colorado River Authority v. Chemical Bank & Trust Co.*, 144 Tex. 326, 190 S.W. 2d 48 (Tex.1945) (holding that exemption applied to LCRA, a government agency).

The jurisprudence surrounding the *Chemical Bank* decision cited above indicates that if public ownership is required, Odyssey is a qualifying entity under that decision. Odyssey has been:

- "created by the legislature;" and

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preserved; it is merely an extension of an existing issue that the property is exempt as public property used for public purposes. The Court shows leniency in allowing parties to construct new *arguments* on appeal as long as the new arguments support a preserved *issue*. *See Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex.2014). This Court has also held that a party is "not required on appeal or at trial to rely on precisely the same case law or statutory subpart that we now find persuasive." *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex.2018) (internal citations omitted). Odyssey has always maintained throughout these proceedings that the property is exempt based on its status as public property and its public use; Article XI, Section 9 is merely more legal authority that supports that position and the same issue as preserved.

- "declared by legislative enactment to be a governmental agency with the powers of government."

Cent. Appraisal Dist. of Erath County v. Pecan Valley Facilities, Inc., 704 S.W.2d 86, 89 (Tex.App.—Eastland 1985, writ ref'd n.r.e.) (distinguishing *Chemical Bank* and noting the qualifying claimant there was created by the legislature, and was declared by legislative enactment to be a governmental agency with the powers of government) (internal quotations omitted).

Therefore, Odyssey clearly meets the qualifications of Article XI, Sec. 9 set forth in *Chemical Bank* and *Pecan Valley*. *See, e.g., El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 18-1167, 2020 WL 2601641, at *6 (Tex. May 22, 2020) (charter schools act as arms of the state government); *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 78, 81 (Tex.2011) (charter schools exist by legislative creation, and function in many ways like a governmental entity); *University of the Incarnate Word v. Redus,* 518 S.W.3d 905, 910 (Tex.2017) (stating "the Legislature granted charter schools all of the powers and privileges of public schools[.]"). Odyssey's status as a qualifying entity for Article XI, Section 9 purposes, coupled with the property's undisputed exclusive public use as a public school, result in exemption from *ad valorem* taxes under Article XI, Section 9.

Even if Chapter 12 and the Lease Agreement did not create a sufficient "ownership" interest for Odyssey under Tax Code Section 11.11, which we do not

contend is the case, Section 12.128 requires that charter property is devoted exclusively to public use, which leads to exemption under Article XI, Section 9. As noted by *amici* TCSA, the constitutional provisions and enabling statutes regarding tax exemption focus on two areas: ownership or use. *Brief of Amicus Curiae* at 6-7 (citing examples). The first part of Section 9 deals with both ownership and use; property of counties, cities and towns **owned** and held **only for public purposes.** However, the second section exempts "all other property devoted exclusively to the use and benefit of the public." This focuses solely on property's use, without regard to ownership.[9]

Odyssey expects that GCAD will argue that the Article XI, Section 9 only applies to the "property of counties, cities and towns," as stated in the first section of Section 9. However, this is erroneous for three unique reasons.

First, this Court has already extended the exemption to non-municipalities. *See LCRA, supra* (finding that Article XI, Section 9 exemption applied to River Authority, a governmental agency).

[9] Odyssey recognizes that the authority on this argument addressed in the intermediate courts of appeal may be argued to run counter to its position. *See Hays County Appraisal Dist. v. Sw. Tex. State Univ.*, 973 S.W.2d 419, 422 (Tex.App.—Austin 1998, no pet.) (declining to extend Article XI, Section 9 exemption to property not publicly owned), *citing Cent. Appraisal Dist. of Erath County v. Pecan Valley Facilities, Inc.*, 704 S.W.2d 86, 89 (Tex.App.—Eastland 1985, writ ref'd n.r.e.) (holding private nonprofit Texas corporation not entitled to exemption under Article XI, Section 9). However, neither of these cases undergo any analysis of the construction of Article XI, Section 9. As such, this Court should consider Odyssey's construction arguments.

Second, this Court has articulated that, in grammatical interpretation of statutes, "modifiers should come, if possible, next to the words they modify." *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 184-185 (Tex.2012), *citing* William Strunk, Jr. & E.B. White, The Elements of Style R. 30 (4th ed. 2000), Bryan A. Garner, Garner's Modern American Usage 523 (2003) (noting that "[w]hen modifying words are separated from the words they modify, readers have a hard time processing the information," and adding that "the true referent should generally be the closest appropriate word"). Here, GCAD will likely argue that the language "of counties, cities, and towns, owned and held only for public purposes" modifies the object "all other property devoted exclusively to the use and benefit of the public." However, this proposed modifier appears separated by a list, far from the object it proposes to modify. Therefore, this Court's simple rule in *Tex. W. Oaks Hosp., LP v. Williams* indicates that the proposed modifier does not modify the object "all other property devoted exclusively to the use and benefit of the public" that GCAD may claim it does.

Third, the phrase "all other property devoted exclusively to the use and benefit of the public" must necessarily refer to a use requirement only, or else it would be mere surplusage with no meaning. The first part of Section 9 states that it applies to "property of counties, cities and towns, owned and held only for public purposes …" The second part states "and all other property devoted exclusively to the use and

benefit of the public … .” In each of the two parts, the use requirement for exemption is exactly the same (use solely for public purposes). The sole distinction between the two is that the ownership requirement found in the first part (property *owned* by counties, cities, and towns) is absent in the second part.

In short, if the ownership requirement from the first part is grafted upon the second, whether by the doctrine of *ejusdem generis*[10] or other means, it has the exact same meaning as the first part. In that construction, both parts would apply to the property (1) owned by counties, cities and towns and (2) used only for a public purpose. Such a construction would render the second part duplicative and therefore meaningless surplusage. This Court has expressed that this type of construction is improper. *See, e.g., TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex.2016) (“We consider the statute as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage”).[11]

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[10] This Court has already rejected applying the doctrine of ejusdem generis as applied to Article XI, Section 9 where the result would be the State taxing its own revenue. *See LCRA* at 332; *infra* at Section 2A.

[11] GCAD may argue that the phrase “all other property” in Section 9 indicates that the property in the second part is meant as a general statement to encompass any “other” property not specifically listed as examples of property, and that the first part’s ownership requirement applies to the second part’s general language.

However, such an argument is flawed. A general statement of included property is found in the first part (“The property of counties, cities and towns, owned and held only for public purposes”); the examples of public buildings, fire engines, etc., are given as examples of those pieces of property owned by municipalities and held for public purposes. Because the first part of the Section makes the general statement of included property, there is no need to add a second statement of generality. In short, the second part, if containing an ownership and use requirements, remains duplicative of the first part, and remains mere surplusage.

In order to avoid an improper construction and follow the rules of statutory interpretation to give meaning to both part of Section 9, we must examine their distinctions. As stated above, the public use requirement is the same. The sole remaining difference is that the second part lacks an ownership requirement. Therefore, there is no other reasonable way to give effect to the second part other than to interpret it as exempting property that is devoted exclusively to the public use and benefit, regardless of ownership. Because Odyssey's property is devoted exclusively to public use as a public school pursuant to Section 12.128, it is also exempt from taxation under art. XI, sec. 9 of the Texas Constitution.

2. The Court erred by not following the plain language of Section 12.128

A. The Court of Appeals did not give effect to the plain language of Section 12.128.

If the language of a statute is not vague or ambiguous, Courts are bound to follow the letter and intent of the statute without utilizing extrinsic aids and rules of statutory construction.[12] *Archer v. F.D.I.C.*, 831 S.W.2d 483, 484–85 (Tex.App.—Houston [14th Dist.] 1992, no writ) (recognizing although following the plain language of the statute created a harsh result, carving out exceptions is not permissible). A court's focus when construing a statute is the intent of the

[12] As this case involves questions of statutory construction, granting review is proper. TEX. R. APP. P. 56.1(a)(3).

Legislature. *City of LaPorte v. Barfield,* 898 S.W.2d 288, 292 (Tex.1995). It is a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent. *Owens & Minor, Inc. v. Ansell Healthcare Products, Inc.*, 251 S.W.3d 481, 483 (Tex.2008).

To give effect to the Legislature's intent, we rely on "the plain and common meaning of the statute's words." *Owens & Minor, citing Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.,* 966 S.W.2d 482, 484 (Tex.1998). When a statute is clear and unambiguous, courts need not resort to rules of construction or extrinsic aids to construe it, but should give the statute its common meaning. *Cail v. Service Motors Inc.,* 660 S.W.2d 814, 815 (Tex.1983). Moreover, courts must take statutes as they find them. *See RepublicBank Dallas, N.A. v. Interkal, Inc.,* 691 S.W.2d 605, 607 (Tex.1985). Courts must not engage in forced or strained construction; instead, they must yield to the plain sense of the words the Legislature chose. *Saade v. Villarreal*, 280 S.W.3d 511, 518 (Tex.App.—Houston [14th Dist.] 2009, pet. dism'd), *citing St. Luke's Episcopal Hosp. v. Agbor,* 952 S.W.2d 503, 505 (Tex.1997).

i. The words "for all purposes" indicates that the legislature intended a far-reaching mandate

In *Saade*, the Court of Appeals for Houston's 14th District interpreted four clauses within a subsection to determine whether a supported medical school was a state agency (1) only for purposes of Chapter 104 of the Civil Practice and Remedies Code and for determining the liability of an employee, or (2) for all purposes. *Saade*,

280 S.W.3d at 519-520. In finding that the supported medical school was a state agency only for the limited purposes in the subsection, the Court acknowledged that using the term "for all purposes" in the statute would have "far reaching effects":

> Dropping in a provision that supported medical schools (and certain other medical entities) are state agencies **for all purposes—a mandate that could have far reaching effects**—in the middle of this section otherwise dealing only with individual liability makes no sense. Further still, had the legislature intended to say in section 312.007 that such entities were state agencies for all purposes, **it would have been more logical to put such an important pronouncement in its own separately lettered subsection**, or at a minimum, to put it in a separate sentence within subsection (a), **most helpfully with an indication that the pronouncement was for all purposes and not just for the purposes enunciated in section 312.007**.

Id. at 520 (emphasis added).

Here, when writing Section §12.128, the Legislature used the exact same language ("for all purposes") that the Court of Appeals below had previously regarded as an "important pronouncement." The Legislature also "most helpfully" created 12.128 subsections (a)(1) and (a)(2) "in [their] own separately lettered subsection[s]." As noted by the Court in *Saade*, this was a "logical" construction for such an important pronouncement that property in question is "property of this state for all purposes under state law." *Id*.; Tex. Educ. Code §12.128. Nevertheless, in stark contrast to the view in *Saade* that the "for all purposes" language holds a far-reaching mandate, the Court of Appeals in this matter ignored the Legislature's plain language and intentional structure of Chapter 12 of the Texas Education Code.

ii. Ignoring the Legislature's broad intent resulted in a judicially created, unwritten exception for property tax exemptions within Section 12.128

In discarding the plain language of Section 12.128, the Court of Appeals reasoned that the statute generally "comes into play when a school charter is revoked" App. 3 at 4. As an initial matter, the precedent construing Section 12.128 has focused narrowly on the time period when a charter is revoked because, until now, that is where controversies have arisen. The fact that this is the first known appellate controversy over interpretation of Section 12.128(a) regarding tax matters should not have caused the Court of Appeals to ignore the section's plain language, nor does it obviate the requirement to give the entire statute meaning. *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487, 493 (Tex.2017), reh'g denied (Apr. 21, 2017) (Courts interpret each word, phrase, and clause in a manner that gives meaning to them all).

Section 12.128(a)'s language does not in any way limit its application to charter revocations only. If anything indicates Section 12.128's scope, it is the broad and all-encompassing language that charter property is public property "for all purposes under state law," not merely when the school ceases operation. Section 12.128(a)(3) further indicates the present and continuous character of this property as public when it restricts use to "only for a purpose for which a school district may use school district property." The attempt by the Court of Appeals to

limit Section 12.128's application is therefore without foundation and is not compatible with the plain language of the statute.

iii. Section 12.128 expressly references all areas of state law, which includes taxes and exemptions

The Court of Appeals further reasoned that "section [12.128] does not mention taxes or exemptions at all." App. 3 at 4. However, Section 12.128 most certainly does cover taxes and exemptions. Taxes, exemptions, and any other subject matter state law could contemplate are necessarily encompassed by the use of "all purposes under state law." No speculation is required as to which purposes the legislature intended when it wrote the words "all purposes." As this Court has quite plainly found, "[a]ll means all." *Davis v. Mueller*, 528 S.W.3d 97, 102 (Tex.2017); *see also Higgins v. Bordages*, 88 Tex. 458, 461, 31 S.W. 52, 53 (1895) (stating that a tax for *any* purpose is within the terms "tax for all purposes").

Despite this, the Court of Appeals limited Section 12.128's application to instances of charter revocation only. *Odyssey* at 535. However, the Legislature did not limit Section 12.128's scope in such a manner. Section 12.128 does not say "all purposes, except as applied to Chapter 11 of the Tax Code," or "all purposes except for exemption of taxation," or even "all purposes under this section," as commonly done in definition statutes throughout Texas law. The Legislature instead purposefully chose the expansive words "all purposes under State law" to describe the purposes for which publicly-funded charter school property was to be considered

and treated as public property. *See, e.g., Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex.1995) (Every word of a statute must be presumed to have been used purposefully, and every word excluded from a statute must also be presumed to be excluded purposefully). The word "all" is inclusive and all-encompassing; thus, it necessarily must include the Tax Code.

This Court must presume the plain meaning of the word "all" to mean "all," including the Tax Code. *See Davis v. Mueller*, 528 S.W.3d 97 at 102; *Owens & Minor,* 966 S.W.2d at 484; *Cail,* 660 S.W.2d at 815; *Saade,* 280 S.W.3d at 518.[13] Because charter school property purchased or leased with state funds is "public property for all purposes under state law," the Court of Appeals cannot rewrite the statute's plain language and create exclusions *ex nihilio*.

iv. The Court failed to consider the entire statute

Further, the Court did not discuss the provisions of Section 12.128(a)(2), which should have been considered when deciding how to construe the entirety of Section 12.128. This was error. *See Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004) (Courts must read the statute as a whole and not just isolated portions). It is presumed that the entire statute is intended to be effective. Tex. Gov't Code §311.021. Section 12.128(a)(2) discusses the trustee relationship

[13] Even if the word "all" were ambiguous, agency definitions supports Odyssey's position. *See* 19 Tex. Admin. Code §100.1063 (reiterating that charter property is public property, and misuse of such property is subject to Texas law governing same).

between the charter school and the public property. Property purchased or leased with public funds "is **property of this state** held in trust by the charter holder for the benefit of the students of the open-enrollment charter school." Tex. Educ. Code. 12.128(a)(2) (emphasis added).

If the Court of Appeals had properly considered the trustee relationship that is imposed between charter schools and the state with regard to state funds and property purchased or leased with same, it would have properly concluded that this trustee relationship is sufficient under the Tax Code to convey the requisite level of "ownership" status to qualify for exemption. *See*, *e.g. Signature Flight Support Corp.*, 140 S.W.3d at 839-840 (stating that having a title interest lesser than a fee title can demonstrate ownership for taxation purposes, and the meaning of ownership "must be ascertained from the context and subject matter"); *see also Childress County v. State*, 92 S.W.2d 1011, 1015 (Tex.1936) ("No rigid or exact form is required to vest title to property in a person to make it subject to taxation."). As with the creation of a valid trust, the beneficiaries (the state and its students) become the owners of the equitable or beneficial title to the trust property, and are considered the real owners, and the trustee is only the depositary of the bare legal title. *See, e.g., City of Mesquite,* 553 S.W.2d at 644. Here, under the trustee-beneficiary relationship imposed by the Legislature, the state is effectively the beneficiary or owner of the

subject real property, which is sufficient "ownership" for purposes of *ad valorem* tax exemption.

B. In addition to ignoring the plain language of the statute, the Court of Appeals' statutory interpretation creates an absurd result.

As this Court has held, if a statute is reasonably susceptible of a construction showing the Legislature's intention to have been otherwise, a statute shall not be construed to ascribe to the Legislature an intention of doing an unjust thing. *State Highway Dep't v. Gorham*, 139 Tex. 361, 366, 162 S.W.2d 934, 936 (1942). Put another way:

> 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. Nor will application be made of any rule of construction that, in the circumstances, will lead to absurdity. Thus, a statute or provision should not be given a construction rendering it fruitless, futile, meaningless, purposeless, or useless, if the language can be otherwise construed. The reason of the rule is that the legislature is not to be credited with doing or intending a foolish, useless, or vain thing, nor with requiring a futile, impossible, or useless thing to be done.

Dovalina v. Albert, 409 S.W.2d 616, 621 (Tex.Civ.App.—Amarillo 1966, writ ref'd n.r.e.), *citing* 53 Tex.Jur.2d, Section 165, p. 243.

In construing Tax Code §11.11 and Education Code §12.128, the Court of Appeals found that "all purposes under state law," did not include a purpose under the Tax Code. *Odyssey 2020 Acad., Inc.* at 536 (stating "in fact, [Section 12.128] does not mention taxes or exemptions at all"). Under the Court of Appeals'

misinterpretation of these statutes, the Legislature's intent would have been to ensure that charter schools' property, paid for by public funds, is subject to *ad valorem* taxation. The legislature could not have intended such an absurd result.

Accordingly, Court of Appeals' statutory interpretation (already erroneous by ignoring the plain language of the statute) also mandates a most useless and foolish result: allowing GCAD and the multitude of local taxing entities (including the school district who no longer serves the students enrolled in Odyssey), to tax state dollars which are allocated specifically to fund a public school and to benefit the students enrolled therein. Funds received by Odyssey under Section §12.106 will necessarily be used to pay property taxes, rather than their intended purpose of providing a statutorily mandated free public education to the public students enrolled at Odyssey.

In allowing such an interpretation of the statute that allows for taxing of these properties, the Court of Appeals has required the state to tax its own revenue. In its interpretation of Section 12.128 and Tax Code Section 11.11, the Court of Appeals completely disregarded the economic realities of requiring a public school to pay taxes to other subordinate units of government. This is not permissible. *See, Combs v. Roark Amusement & Vending L.P.*, 422 S.W.3d 632, 637 (Tex.2013) ("We believe that in the area of tax law, like other areas of economic regulation, a plain-meaning determination should not disregard the economic realities underlying the

transactions in in issue"). This Court has recognized the futility of a government taxing itself:

> [The] government in Texas could engage in the senseless process of taxing itself, the net result of which would be but to take its own money out of one pocket for the purpose of putting it into another-less the cost of assessing and collecting the tax. Obviously that procedure could never accomplish anything but an idle expenditure of public funds.

Chemical Bank, 190 S.W.2d at 51 (citations omitted).

The erroneous statutory interpretation by the Court of Appeals must be rejected. Instead, this Court should adhere to the polestar of statutory construction and ascertain the legislative intent from the plain language of Section 12.128 to find, as it has in the past, that "[a]ll means all," including the Tax Code. *Davis v. Mueller*, 528 S.W.3d 97, 102 (Tex.2017).

3. The Court's narrow interpretation of Section 12.128 precludes *any* application to the Tax Code.

The Court of Appeals found that Odyssey's leasehold interest did not confer the requisite legal or equitable title sufficient to implicate the "ownership" requirement for exemption under Tex. Tax Code §11.11. Tab 3 at *4. However, in doing so, the Court's holding precluded Tex. Educ. Code §12.128 from having any impact upon other ownership interests, such as where a charter school might hold legal or even equitable title under a lease agreement with a purchase option.

In its discussion of Odyssey's argument, the Court stated that Odyssey's reliance on Section 12.128 was misplaced, reasoning that Section 12.128 "does not

speak to tax exemptions as to leased real property during the period a charter remains active," and "[i]n fact, the section does not mention taxes or exemptions at all." *Id.*, at *4 (internal citations omitted). In effect, the Court of Appeals found that Section 12.128 has no effect on Odyssey's qualifications under Section 11.11.

The Court of Appeals' finding is thoroughly confusing, as both parties asserted in their briefing that the plain meaning of Section 12.128 implicated Section 11.11 along with all other state laws. Even GCAD disagreed with the Court of Appeals' holding on this point, when, in its Response Brief in the Court of Appeals, GCAD tacitly conceded that Section 12.128 *would* create a public property interest sufficient to implicate the Section 11.11 exemption if there was an ownership interest beyond a leasehold:

> Applying the plain meaning of Tex. Tax Code §11.11 and Tex. Educ. Code §12.128, the "property of this state held in trust" in section 12.128(a) refers to Appellant's leasehold interest in the subject property. Clearly, that leasehold estate in the property is "public property," and must be used exclusive [*sic*] for school purposes.

See Response Brief at 9.[14]

Despite this admission by GCAD, the Court categorically denied that Section 12.128(a) gives charter schools *any* rights to a Section 11.11 tax exemption,

[14] In its Response to Odyssey's Petition for Review in this Court, GCAD reversed its position, stating that Section 11.11 would exempt property to which the charter school held legal or equitable title, *irrespective of Section 12.128*. *Response to Petition for Review* at 18 (emphasis added).

and completely disregarded the Section's plain language ("public property for all purposes under state law," "property of this state held in trust"). Such a denial is without justification in the language of the statute or precedent, and it is even inconsistent with both parties' aligned prior briefing in this matter.

The Court's language also forecloses the ability of charter schools to assert the equitable title (of the School or the state), or for charter schools that have lease arrangements (a lease with purchase option for example) that *do* grant them equitable title under the current state of the law[15] from claiming any right to relief under Section 12.128. App. 3 at 4 ("Education Code section 12.128 does not vest in Odyssey a right to claim a tax exemption on the State's behalf ... ."). While Odyssey's property is tax-exempt *via* its leasehold interest and the plain language of Section 12.128, a situation where a charter school has either legal or equitable title is equally compelling, and such property is certainly exempt under Tex. Tax Code §11.11 through the charter holder or the state's equitable ownership under Section 12.128.[16]

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[15] *See, e.g., Texas Dept. of Corrections v. Anderson County Appraisal Dist*., 834 S.W.2d 130, 131 (Tex.App.—Tyler, 1992, writ denied) (TDOC held equitable title and was exempt under Section 11.11).

[16] Most appraisal districts around the state recognize this premise and grant exemptions at the agency level. At least one trial court has held that charter school property is exempt under Section 11 in an equitable title scenario. *See International American Education Foundation, Inc. v. Dallas Central Appraisal District,* No. DC18-18763, (95th Judicial District, Dallas County, Tex., currently on appeal), *Dallas Central Appraisal District* v. *International American Education Foundation, Inc.*, Case No. 05-19-01354-CV (Tex.App—Dallas, all briefs submitted). In very few other courts, cases involving Section 11.11, equitable title, and charter schools remain pending.

In light of the legislature's important pronouncement[17] that charter property purchased with public funds is public property "for all purposes under state law," and "property of this state held in trust" by the charter holder, the Court of Appeals' erroneous statements that Section 12.128 has no application to taxes or exemptions "at all" has far-reaching implications for charter schools that have either legal or equitable title that must be rectified in order to not disturb their existing *ad valorem* tax exemptions already recognized across the state.

Simply stated, Odyssey has "ownership" of the subject property adequate for it to be exempt from *ad valorem* tax under Texas law and thus preserving state funds for the students intended to be benefitted from those same state funds.

PRAYER

For the foregoing reasons, Odyssey prays that this Court grant its Petition for Review, reverse the opinion of the Court of Appeals with instructions to render judgment in Odyssey's favor.

See, e.g., Jubilee Academic Center v. Cameron County, Case No. 2019-DCL-5470 (404th Dist. Ct., Cameron County, Tex., pending); *Harmony Education Foundation and Harmony Public Schools v. Tarrant Appraisal District,* Case No. 513-313213-19 (153rd Dist. Ct., Tarrant County, Tex., pending); *International American Education Foundation, Inc. v. Tarrant Appraisal District*, Case No. 236-304400-18 (236th Dist. Ct., Tarrant County, Tex., pending)*; Meadow Oaks Education Foundation v. Dallas Central Appraisal District,* Case No. DC-19-17188 (193rd Dist. Ct., Dallas County, Tex., pending).

[17] *Saade,* 280 S.W.3d at 520.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020, a true and correct copy of the foregoing has been delivered by electronic service to counsel of record for in this proceeding as follows:

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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 9278 words (excluding the caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, statement of issues presented, signature, certificate of service, certificate of compliance, and appendix).

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/ Joseph E. Hoffer
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