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SUPREME COURT OF TEXAS
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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 REPLY BRIEF ON THE MERITS

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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.

ARGUMENT

1. Odyssey's Lease Agreement, coupled with the application of Chapter 12, creates a sufficient property interest to assert ownership for tax purposes.

In its Brief on the Merits, GCAD rightly notes that Article VIII, Section 2 of the Texas Constitution "vests in the legislature authority to create and enumerate exemptions pertaining to public property used for public purposes." However, GCAD ignores the legislature's same authority regarding school property. Specifically, the Legislature may broadly exempt any school property, to-wit:

> [A]ll buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools and property used exclusively and reasonably necessary in conducting any association engaged in promoting the religious, educational and physical development of boys, girls, young men or young women operating under a State or National organization of like character.

Tex. Const. art. VIII, § 2.

This school property provision of the Texas Constitution has been interpreted and noted to not expressly require the owner and user be one and the same. By referring to "persons or associations of persons" so long as the property is used exclusive for school purposes, the Legislature may exempt school property regardless of who or what owns the property (*i.e.,* whether a for profit corporation, a nonprofit corporation, an individual, or an associations of persons).

The two courts of appeals that have analyzed this specific issue have recognized the same. The San Antonio Court of Appeals, in *Seguin v.*

Bexar Appraisal District, 373 S.W.3d 699 (Tex.App.—San Antonio 2012), followed the reasoning of the Dallas Court of Appeals in *Ultrasound Technical Services, Inc. v. Dallas Central Appraisal District,* 357 S.W.3d 175 (Tex.App.—Dallas 2011, no pet. H). The Dallas Court of Appeals recognized that the Texas Constitution in Article VIII, § 2, does not itself exempt property from taxation but authorizes the Legislature to provide exemptions by statute. *Id.* "The court explained that 'while the legislature may restrict an exemption authorized in the constitution, it may not 'broaden' or 'enlarge' a tax exemption beyond the constitutional confined." *Seguin,* 373 S.W.3d at 711. The San Antonio and Dallas Courts of Appeals both "emphasized that the constitutional provisions provide that the legislature 'may' exempt 'schools' from taxation. *Id.* (*citing Ultrasound Technical Services,* 357 S.W.2d at 178). This legislative authority includes schools of all types (for profit, nonprofit, public, private). For example, the San Antonio Court of Appeals found that through Tax Code section 11.21's enactment the Legislature had chosen to only "exempt[] a subset of schools-nonprofit schools." *Id.* These courts' interpretation of the school property provision of the Texas Constitution recognizes that the Legislature may likewise grant tax exemption to other types of schools in its discretion, by statute. *Id.*

For purposes of charter schools, as a relatively new type of public school, the Legislature used its constitutionally provided discretion when it enacted

Texas Education Code Section 12.128. There is no requirement that the Legislature only provide exemptions under or through Sections 11.11 or 11.21 for schools. For charter schools, they provided exemption in Chapter 12 of the Education Code. The legislative intent behind Section 12.128 is clear: Property purchased or leased by a charter school with state funds is considered "public property for **all purposes** under state law" 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), (a-1) (emphasis added). In this case, the Galveston Court of Appeals erroneously held that despite the Legislature's express intent to designate the character of its own funds and the public character of property purchased or leased with state funds, charter property leased with public funds is not public property, and thus, should be subject to *ad valorem* taxes. This ignores the plain language of "for all purposes under state law" which the court was not permitted to do.

GCAD argues that Odyssey is attempting to "shave the corners" off of the ownership requirement. GCAD's Brief at p. 21. This is not true for a number of reasons. First, as explained above, Article VIII, § 2 does not require the school operator and the school property owner necessarily be the same person. The constitutional provision allows the potential that the "persons or associations of persons" can own property, and that if the property is "used exclusively … for school purposes" the Legislature can provide exemption. Second, this Court has previously

found that "[w]hen we come to define the word or term owner, we find that it has no definite legal meaning." Strictly speaking, it is not a legal term. The meaning of the term owner is not the same under all circumstances. It is not a technical term or word at all, but one of wide application in various connections. In all instances its meaning must be ascertained from the context and subject matter. All this is true when the term is used in a statute." *Realty Tr. Co. v. Craddock*, 131 Tex. 88, 94–95, 112 S.W.2d 440, 443 (1938).

Signature Flight, while probative for its discussion of the word "owner" did not construe a legislatively-created lessee governed within a unique statutory framework such as Education Code Chapter 12, nor the effect of that framework on that lease.

GCAD simply does not recognize the import of charter school enabling legislation in Chapter 12, specifically Section 12.128, and its impact on the Lease Agreement, an interest conveyed to Odyssey (and the state through Odyssey). Odyssey's Lease Agreement stipulates that the property will be used for a charter school and that Odyssey would meet any charter school codes and guidelines. *See* CR at pp. 703, 731 (v2). This stipulation therefore adopts the statement in Section 12.128 that property is "property of this state" and considered "public property for all purposes under state law." It also complies with the Constitutional restriction that the property must be used exclusively for school purposes.

Even assuming the Landlord did not know that HEB would lease the property to a charter school, there is no indication in the record that the Landlord objected to such a submission of the property (and its property interest) to Chapter 12.[1] Even assuming that the Landlord did not have actual knowledge of the rules governing charter schools, entities contracting with governmental units are charged by law to be familiar with the laws affecting contracts with governmental entities. *Test Masters Educ. Services, Inc. v. Houston Indep. Sch. Dist.*, 14-02-00237-CV, 2003 WL 21911120, at *3 (Tex.App.—Houston [14th Dist.] Aug. 12, 2003, no pet.) (persons or entities are charged by law with notice of the limits of the authority of the governmental unit and are bound at their peril to ascertain if the contemplated contract is properly authorized."); *citing Base–Seal, Inc. v. Jefferson County,* 901 S.W.2d 783, 788 (Tex.App.—Beaumont 1995, writ denied). The Landlord effectively gave HEB *carte blanche* to contract in whatever way it saw fit, thereby consenting to any further "lawful purpose." Section 12.128 is lawful, and accordingly, by the terms of the HEB-Odyssey Lease Agreement, Section 12.128's language is given effect, and the interest sufficient to comply with Section 12.128's

[1] Upon review of the record, the original lease with HEB as lessee is in fact present. The Landlord *waived* consent to any sublease, thereby submitting the property to *any* sublease. *See* CR at 104. Further, HEB's use in the original lease is for *any* lawful purpose, which would include a charter school. CR at 104.

language is transferred.[2] This interest is sufficient to make the property that "of this state" and "public property for all purposes under state law" so long as Odyssey exists and operates a charter school on site.

2. The Court of Appeals erroneously interpreted Tex. Educ. Code § 12.128, and its errors of statutory interpretation extend the erroneous nature of its decision even beyond the facts of this case.

Making no defense of how the Court of Appeals' interpretation of Section 12.128 might be proper, GCAD argues that the Court of Appeals' decision is limited to cases involving simple leases. GCAD's Brief at p. 22. The Court of Appeals decision denies Section 12.128 its plain meaning, affecting not only this case, but cases with other factual scenarios. For example, the Court of Appeals' examination of the purposes of Section 12.128 and conclusion (that the law has nothing to do with property taxes) is wholly erroneous. The statement that "Education Code section 12.128 does not vest in Odyssey a right to claim a tax exemption on the State's behalf" fails to recognize Odyssey's, and any other open-enrollment charter schools' clearly public status. *See 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). In claiming the

[2] Any notion that this interaction of statute and contract is somehow a "taking" is therefore a mischaracterization; by the terms of the contract, the parties agree to give the laws governing charter schools, including 12.128, effect.

Section 11.11 exemption, open-enrollment charter schools act as arms of the state government, as this Court has concluded them to be. No statutory authorization is needed in order to claim this exemption, as these schools act as trustees of state property. *See* Tex. Educ. Code 12.128(a)(2), (a-1)(2) (stating that charter schools act as trustees for property purchased and leased with state funds). It could even be argued that failure to do so is a breach of the trustee's duty and a waste of state resources.

The notion that the "section does not mention taxes or exemptions at all" flouts the plain meaning of the Legislature's chosen words "for all purposes under state law" which necessarily includes the entirety of the Tax Code existing under state law. By stating that 12.128 has no application, the Court of Appeals not only violated the rules of statutory interpretation, but it also placed an arrow in the quiver of any appraisal district seeking to shoot down exemptions for any charter school, even one that has the more traditional forms of equitable title, or even legal title.

GCAD's contention to this Court, like the Court of Appeals, is that the legislature only "sort of" meant what it said when it stated that charter property purchased with public funds is considered "property of this state" and "public property for all purposes under state law." In other words, GCAD and the Court of Appeals would have Section 12.128 be applied arbitrarily and not in accordance with its plain language (*e.g.*, Section 12.128 has meaning when it imposes burdens of

being a trustee of public property, but it is inapplicable when that trusteeship has benefits such as tax exemption).[3] The law should not suffer such duplicity of application. *See, e.g. City of Rockwall v. Hughes*, 246 S.W.3d 621, 628 (Tex.2008) (finding that by interpreting statutes in a straightforward manner, "we build upon the principle that 'ordinary citizens [should be] able to rely on the plain language of a statute to mean what it says.'"), *citing Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999) (internal quotations omitted).

3. *Texas Turnpike* involved a bare legislative command, wholly unsupported by fact; Section 12.128 and Chapter 12 create many of the facts surrounding a charter school's existence.

Without analysis, GCAD flatly concludes that Tex. Educ. Code § 12.128 is a mere legislative declaration of public ownership, and *Texas Turnpike* prescribes any effect to such a declaration. GCAD's Brief at pp. 23-24. In coming to this conclusion, GCAD makes no argument in response to Odyssey's distinguishment of the statute at issue in *Texas Turnpike* and Section 12.128. *Texas Turnpike* took issue with the effect of Article 6674v because it declared that property would be vested in the state, *in direct contradiction* to the statute's own requirement that deeds to

[3] The full context of Subchapter D, Chapter 12 of the Education Code reveals that the Legislature intended both benefits and restrictions attendant to a public entity to apply to open-enrollment charter schools. *See, e.g.*, Tex. Educ. Code § 12.104(a) ("An open-enrollment charter school has the powers granted to schools under this title."); Tex. Educ. Code § 12.1056 ("Immunity From Liability and Suit"); Tex. Educ. Code §§ 12.104(a), 12.1056; *Univ. of the Incarnate Word v. Redus*, 518 S.W.3d 905, 910 (Tex.2017) ("the Legislature granted charter schools all of the powers and privileges of public schools").

private property be held in escrow and not delivered. *See Texas Turnpike Company v. Dallas County,* 153 Tex. 474 (Tex.1954) (holding legal status of public ownership must be conferred by facts not mere legislative declaration); *see also* 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*.") (emphasis added).[4]

Here, Section 12.128 does not constitute a bare "mere legislative declaration." Charter schools' very right to exist emanate from the Legislature and Chapter 12 is the enabling legislation, and nearly every portion of their existence is controlled either by legislation or regulation. The Legislature and the Texas Education Agency create and control virtually every stricture comprising the factual reality of open-enrollment charter schools with nearly unfettered authority. *Tex. Educ. Agency v. American YouthWorks, Inc.*, 496 S.W.3d 244, 261-62 (Tex.App.—Austin 2016), *aff'd, Honors Acad., Inc. v. Tex. Educ. Agency,* 555 S.W.3d 54 (Tex.2018) (holding that pursuant to the provisions of that charter school's charter and the Texas Education Code, the state (through the Commissioner) has "unfettered

[4] Because the Petitioner in *Turnpike* had yet to deliver the deeds, and delivery was contingent upon satisfaction of conditions, the state's interest was likewise contingent. Here, Odyssey's arrangement through the Lease Agreement, which is subject to Section 12.128, contains no such contingency.

discretion" over the charter school at issue); *see also* Tex. Educ. Code Ann. § 12.114 (West 2018) (revisions to a charter "may be made only with the approval of the commissioner" and noting the Commissioner's absolute discretion to approve or disapprove); 19 Tex. Admin. Code 100.1033 (setting the regulatory requirements for amendments and revisions to a charter and commissioner approval, and noting there is no appeal of the commissioner's decisions).

Even if Odyssey's right to exist as a charter school was not conditioned upon this legislative framework (it is), its funding is conditioned upon public dollars, and property purchased or leased with those dollars, remaining public in character. *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).

In sum, Section 12.128 is not a bare, counterfactual legislative command, as in *Texas Turnpike*, where the Legislature commanded one thing (that title was vested in the state) and declared another (that title would be held in escrow). Section 12.128 does not necessarily contemplate any transfer of a deed; instead it retains and preserves the state's right and interest in property purchased or leased with taxpayer dollars and while being used for public school purposes with those dollars. This legislative provision is not a bare declaration; it is true, operative, and supported by

fact. The state retains the public's rights in public funds and property, and open-enrollment charter schools act as trustees of public funds and property in their day-to-day functions.

4. Cases involving charter schools and Chapter 12 of the Education Code address the issues underlying this case, and GCAD's argument regarding same demonstrates the Court of Appeals' error.

While it is earnest of GCAD to admit Odyssey's public character (and therefore status as a qualifying entity under Tax Code Section 11.11), the Court of Appeals disagreed. *See Odyssey* at 536 ("Education Code section 12.128 does not vest in Odyssey a right to claim a tax exemption on the State's behalf."). As this issue is "undisputed," this Court should at a minimum clarify that, regardless of issues of ownership, Odyssey is a qualified governmental entity under Tax Code 11.11, either as an arm of the state or as a governmental unit.

GCAD argues that under Odyssey's position, a private owner leasing property to a charter holder would have a takings claim, as the state would be claiming ownership of the owner's interest as "public property for all purposes. " In response, one must ask, what private property right is being "taken" by granting a tax exemption, especially when the lessor received bargained for consideration through rent that it agreed to? Through the lease, Odyssey as lessee is already conveyed exclusive rights of possession and quiet use and enjoyment on the property. CR at 206. The designated use on the property is to operate a public charter school, subject

to the rules governing charter schools. CR at 232. The property is only required to be used for purposes for which a school district may use school district property. Tex. Educ. Code § 12.128(a-1)(3). During the term of the Lease Agreement, the property has all the characteristics and burdens of public school property, save for the name of the public school being on the deed. While there is no "taking" as the state would not usurp the private owner's remaining interest, there is simultaneously an undeniable recognition in both law and fact that this property is public while Odyssey operates thereon. Consistently, the Legislature has manifested its clear intent in Section 12.128 that property leased with public funds is "considered to be public property *for all purposes under state law*" and is "property of this state."

Further, with its red herring argument around "takings," GCAD's argument highlights how the Court of Appeals erroneously ignored the plain language of Section 12.128. By narrowly construing Section 12.128 to only those scenarios where a charter school ceases to operate, the Court of Appeals did not give effect and deliberately disregards the broad language chosen by the legislature. *See Saade v. Villarreal*, 280 S.W.3d 511, 520 (Tex.App.—Houston [14th Dist.] 2009, pet. dism'd) (legislative use of the term "for all purposes" would be an important pronouncement and mandate having far reaching effects); *see also City of San Antonio v. Abbott*, 432 S.W.3d 429, 433 (Tex.App.—Austin 2014, pet. denied)

(holding that where broad language is used, Courts "must presume that the Legislature chose such a broad formulation purposely").

A. GCAD's argument regarding failed legislation is inappropriate and inapplicable.

To support its argument regarding legislative intent, GCAD points to failed legislation for the notion that the Legislature has considered *ad valorem* exemptions for property leased by open-enrollment charter schools, and that because the proposed legislation failed to pass, the Legislature purportedly decided that no such exemptions should be granted. *See* GCAD's Brief at p. 31.[5] What was or was not contained in failed legislation is irrelevant, and the Texas Supreme Court has recognized the same and directed that courts should not look to or consider failed legislation. *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009) ("we attach no controlling significance to the Legislature's failure to enact [legislation]"); *Dutcher v. Owens,* 647 S.W.2d 948, 950 (Tex.1983) (discerning legislative intent from failed bills would be mere "inference" that "would involve little more than conjecture").

[5] If it were appropriate to consider the proposed legislation that GCAD refers to (85th(R) H.B.382, H.J.R. 34, S.B. 1030, S.J.R. 42), that legislation was inapposite to Odyssey's position. Had the proposed legislation been enacted, it would not have allowed Odyssey to seek and obtain an exemption from *ad valorem* taxes. Instead, the proposed legislation contemplated—subject to an unnecessary constitutional amendment—allowing a private property owner (not an open-enrollment charter school lessee, like Odyssey) to seek an exemption under very limited circumstances. *See* CR at 325-334. The difference in this matter is that Odyssey as a public school—not a private landowner—was seeking the exemption, and Odyssey did so pursuant to *existing and fully enacted* legislation, Section 12.128 of the Texas Education Code.

Even if this argument were appropriate, the substance of the argument does not reflect reality. GCAD notes that 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* GCAD's Brief at p. 31, n. 30. However, when the lessee is a publicly-funded school, the lease payments constituting the "millions of dollars" used to pay the tax revenue to cities, counties, and the public school system *are public tax dollars to begin with*. Extending GCAD's argument to conclusion would mean the legislature intends that citizens be taxed by the state to pay for public schools, so that the public schools can then be re-taxed to pay for different public schools. The absurdity of such a situation is outweighed only by the inefficiency in applying public funds, which the Legislature also said, "are held in trust by the charter holder for the benefit of the students of the open-enrollment charter school." Tex. Educ. Code § 12.107(a)(2). The state provides the funds to Odyssey for its enrolled students, not to be taxed by Galveston ISD for its students, which is the actual result of GCAD's argument and the Court of Appeals' erroneous decision.

5. Interpreting 12.128 according to its plain language and granting an exemption does not create absurd results.

Odyssey acknowledges that statutes must be construed in such a way that does not lead to an absurd result. However, GCAD demonstrates no such absurd result and absurdity does not exist simply because GCAD does not favor the outcome from plain meaning of the statute.

Construing Section 12.128's language of "all purposes under state law" to include the purpose of *ad valorem* tax exemptions does not implicate a "forfeiture" of private property rights. Such an interpretation only operates to grant a tax exemption.

Characterization of the property as "public" does not act as a deprivation of any of the landlord's rights, nor does granting a tax exemption. During the term of the Lease Agreement, the public has certain rights in the property as a public school. None of those rights are inconsistent with the rights the Landlord has already contracted away in the Lease Agreement, such as exclusive possession during the lease term. GCAD notes that Section 12.128 does not limit the property's public character to only the duration of lease term, but that is irrelevant. The Lease Agreement itself limits the term of the property's public nature; when the lease term ends, as would its tenure as public property, and its exemption from *ad valorem* taxes.

There is no absurd result in this case from applying the plain language of Section 12.128. Designation of the property as "public" is not absurd, as the public has rights in the property during the term of the Lease Agreement. A public school being exempt from taxes is not absurd, as all public school districts are similarly exempt. As noted in Odyssey's Brief on the Merits, the real absurdity is for tax

dollars allocated by the state to a public school to be used for paying taxes instead of the intended purpose of educating children. *See* Odyssey's Brief at pp. 32-34.

GCAD further argues, consistent with the Court of Appeals' narrow interpretation of Section 12.128, that the purpose of Section 12.128 is to circumscribe a charter school's authority. *See* GCAD's Brief at p. 29, *citing Texas Educ. Agency v. Academy of Careers & Technologies, Inc.*, 499 S.W.3d 130, 136 (Tex.App.–Austin 2016, no pet.). However, *Academy of Careers* does not attribute any such single intent to Section 12.128. *See id.* at 137. While restricting the use of charter property is certainly part of the effect of Section 12.128, the plain words demonstrate that the legislature intended that charter school property be considered public for *all* purposes under state law, not just for those purposes that circumscribe a charter school's authority.[6] *See Saade v. Villarreal*, 280 S.W.3d 511 at 518 (legislative use of all purposes has far-reaching consequences); *Davis v. Mueller*, 528 S.W.3d 97, 102 (Tex.2017) ("[a]ll means all"); *City of San Antonio v. Abbott*, 432 S.W.3d 429, 433 (Tex.App.—Austin 2014, pet. denied) (courts "must presume that the Legislature chose such a broad formulation purposely").

[6] The full context of Subchapter D, Chapter 12 of the Education Code reveals that the Legislature intended both benefits and restrictions attendant to a public entity to apply to open-enrollment charter schools. *See* n. 5*, supra, citing e.g.*, Tex. Educ. Code § 12.104(a); Tex. Educ. Code § 12.1056; Tex. Educ. Code §§ 12.104(a), 12.1056; *Univ. of the Incarnate Word v. Redus*, 518 S.W.3d 905, 910 (Tex.2017).

6. Article XI, Section 9 exemption is proper in this case.

A. Article XI, Section 9 has not been waived.

i. No waiver for failure to exhaust administrative remedies

As GCAD admits, Article XI, Section 9's exemption is self-operative. *See A. & M. Consol. Indep. Sch. Dist. v. City of Bryan,* 143 Tex. 348, 350, 184 S.W.2d 914, 915 (1945). GCAD argues that administrative remedies still must be administratively exhausted for an Article XI, Section 9 claim. In other words, Odyssey would have had to applied under Article XI, Section 9, received a denial, and then followed its administrative process. In support for this argument, GCAD cites *Wackenhut Corr. Corp. v. Bexar App. Dist.*, 100 S.W.3d 289, 290-291 (Tex.App.—San Antonio 2002, no pet.).

GCAD misreads the *Wackenhut* decision. *Wackenhut* recognized Article XI, Section 9's self-operative nature, and even stated that for such an exemption, an application to the appraisal district was not required:

> Article XI, section 9 provides in relevant part that "[t]he property of counties, cities and towns, owned and held only for public purposes ... shall be exempt ... from taxation ... ." Tex. Const. art. XI, § 9; *see also* Tex. Tax Code Ann. § 11.11(a) (Vernon 2001). And, as Wackenhut correctly argues, the article XI, section 9 exemption has been held to be "self-operative." *A. & M. Consol. Indep. Sch. Dist. v. City of Bryan,* 143 Tex. 348, 350, 184 S.W.2d 914, 915 (1945). The Tax Code thus provides that the exemption "is effective immediately on qualification for the exemption," Tex. Tax Code Ann. § 11.42(b); and no application is required. *See id.* § 11.43(a).

Wackenhut Corr. Corp. v. Bexar Appraisal Dist., 100 S.W.3d at 291–92. The *Wackenhut* Court instead applied Tax Code Section 23.13 to determine that Wackenhut's leasehold interest in the Bexar County Jail was taxable because it was a taxable leasehold or other possessory interest in real property that was exempt from taxation to the owner of the estate, severing the property interests under the Tax Code. *Id.* at 292. The Court never stated that administrative remedies needed to be exhausted for application of Article XI, Section 9;[7] it disagreed that Wackenhut was entitled to an Article XI, Section 9 exemption because it interpreted the Tax Code as requiring Wackenhut's leasehold interest to be taxed. Accordingly, there was no requirement that Odyssey exhaust administrative remedies in order to obtain the protection of the constitutionally-based exemption, which this Court has held to be "self-operative." *See A. & M. Consol. Indep. Sch. Dist.,* 143 Tex. at 350, 184 S.W.2d at 915.

ii. The issue of exemption for public property is properly preserved

GCAD also argues that Article XI, Section 9 is an entirely new argument. This is simply not true. Both Article XI, Section 9 and Tax Code 11.11 have the same premise for exemption; property must be used for the public. *See* Tex. Const., Art. XI, Sec. 9 (property "devoted exclusively to the use and benefit of the public"

[7] "In light of our holding, *we deem it unnecessary to decide either whether the state or a political subdivision entitled to claim an article XI, section 9 exemption must do likewise* …" *Id.* at 292 (emphasis added).

exempt); Tex. Tax Code § 11.11 (property "exempt from taxation if the property is used for public purposes"). In the caselaw cited by GCAD, the Court of Appeals treats Section 11.11 and Art. XI, Sec. 9 as having the same premise.[8] Article XI, Section 9 provides in relevant part that "[t]he property of counties, cities and towns, owned and held only for public purposes ... shall be exempt ... from taxation ... ." Tex. Const. Art. XI, § 9; *see also* Tex. Tax Code Ann. § 11.11(a) (Vernon 2001). *Wackenhut Corr. Corp. v. Bexar Appraisal Dist.*, 100 S.W.3d at 291.

As noted by the Court in *Greene v. Farmers Inc. Exch.,* this Court does not consider new *issues* on appeal, but the parties are free to construct new arguments in support of those issues. The issue before the Court is whether the property is exempt as public property; both procedural vehicles (Tax Code Section 11.11 and Article XI, Section 9) are arguments for that issue. The issue is therefore preserved and properly before this Court.

[8] GCAD's caselaw cited for waiver of Article XI, Section 9's exemption is unavailing. The Petitioner in *Dreyer v. Greene* tried to raise a due process and equal protection claim to this Court. 871 S.W.2d 697, 698 (Tex.1993). However she made no similar arguments to the trial court, under the Constitution or otherwise. *Id.; see also In the Interest of L.M.I.,* 119 S.W.3d 707, 710 (Tex.2003) (finding no preservation where no due process issue was raised in the trial court). In *Travis v. Mesquite*, the issue was causation; state law immunity was not raised before the trial court. 830 S.W.2d 94 (Tex.1992). In *Lopez v. Munoz, Hockema & Reed, L.L.P.*, the plaintiff had not submitted any other basis for the breach of fiduciary duty claim other than an underlying breach of contract. 22 S.W. 3d 857, 862 (Tex.2000). Therefore, a theory based on the separate notion that the fee charged was excessive was not preserved. *Id*. All of these cases share the common thread consistent with Odyssey's cited cases; an issue needs to be preserved, but not an argument in support of that issue. Article XI, Section 9's language is simply another basis for exemption for public property.

B. Article XI, Section 9 claim is applicable

i. *Chemical Bank* is applicable and good law

As GCAD freely admits, public entities beyond "cities, counties, and towns" fall within the scope of Article XI, Section 9, and does not argue that Odyssey is not a public entity for this purpose. GCAD's Brief at pp. 33-34. Instead, confusingly, while simultaneously acknowledging that *Chemical Bank*[9] is good law, GCAD tries to imply that the Court should somehow discount its own holdings in the years since *Chemical Bank* was decided. GCAD's Brief at pp. 33-34. For clarity, this Court has had many occasions since *Chemical Bank* was decided to reconsider its holding. Despite multiple opportunities, at every turn the Court has either tacitly or expressly declined to do so. *See Leander Independent School District v. Cedar Park Water Supply Corporation*, 479 S.W.2d 908 (Tex.1972) ("the holding in *Lower Colorado River Authority [v. Chemical Bank]* will not be disturbed since it is now firmly embedded in our jurisprudence"); *Satterlee v. Gulf Coast Waste Disposal Auth.*, 576 S.W.2d 773, 779 (Tex.1978) (acknowledging the decision in *Leander* and declining to reconsider *Chemical Bank*); *State v. Houston Lighting & Power Co.,* 609 S.W.2d 263, 271 (Tex.Civ.App.—Corpus Christi 1980, writ ref'd n.r.e.) ("the holding by the majority in *Lower Colorado River Authority* has never been

[9] *Lower Colorado River Authority v. Chemical Bank & Trust Co.*, 144 Tex. 326, 190 S.W. 2d 48 (Tex.1945)

disapproved or limited by any later decision of the Supreme Court."). Accordingly, GCAD's suggestion that "[i]t would seem extremely unlikely that [*Chemical Bank*] would be decided the same way today" should be given no weight by the Court.

GCAD also cites *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). However, neither the Court in *Hays County* nor the Court in *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.) were presented with arguments regarding the construction of Article XI, Section 9. Accordingly, this Court should consider the construction argument on its merits.

ii. Article XI, Section 9's language cannot be considered redundant and should be given effect in this case

When interpreting the state Constitution, the Supreme Court relies heavily on its literal text and gives effect to the plain language. *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 89 (Tex.1997). GCAD's argument for not applying Article XI, Section 9 in this case boils down to an assertion that the text of the Constitution ("and all other property devoted exclusively to the use and benefit of the public") is intended to be merely redundant of the language that proceeds it. In doing so, GCAD relies primarily upon language in a line of cases stemming from *In re City of Georgetown*, 53, S.W.3d 328 (Tex.2001), where this Court construed a

provision of the Texas Public Information Act ("TPIA") which applied to exempt disclosure of a consulting expert report in connection with pending and anticipated litigation.

In rejecting the dissent's interpretation of the TPIA, the majority concluded that the phrase "that is not privileged under the attorney-client privilege" in Government Code Section 552.022(a)(16) was not surplusage. In *In re City of Georgetown,* this Court stated: "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." *Id.* (emphasis added). The court indicated that the *only reasonable explanation* there was that the Legislature repeated itself out of an abundance of caution, for emphasis, or both. *Id.* In that circumstance, the Court did not accept an interpretation of a statute presume the legislative intent to radically alter (and in practice, abolish) established privileges upon which the legal system is premised.

In short, the Court found that language should only be considered a redundancy where it is the "only reasonable explanation" for similar language. It seems that the Court's findings in *In re City of Georgetown* are more in keeping with the general rule that absurd constructions should be avoided, rather than creating a new preference for finding redundancy. *See, e.g. State Highway Dep't v. Gorham*, 139 Tex. 361, 366, 162 S.W.2d 934, 936 (1942) (finding that 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).

Particularly instructive is this Court's opinion in *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578 (Tex.2000). In that case, this Court construed Article XVI, Section 50 of the Texas Constitution, which deals with homestead exemptions. In construing the Constitution's language, this Court stated that it "give[s] effect to all the words of a statutes and [does] not treat any statutory language as surplusage[,] if possible." *Id.* at 580, citing *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex.1987). This Court also stated that it "avoid[s] constructions that would render any constitutional provision meaningless or nugatory." *Spradlin*, 34 S.W.3d at 580, *citing Hanson v. Jordan*, 145 Tex. 320, 198 S.W.2d 262, 263 (1946). In refusing to apply a construction that would create an "immediate redundancy," the Court stated that "we should refuse, **whenever possible**, to construe constitutional language in a way that renders it idle or inoperative." *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex.2000) (emphasis added).

GCAD suggests the new rule for constitutional interpretation be to assume that the authors of Texas's Constitution intended redundancy and emphasis, rather than giving words their ordinary meaning according to commonly accepted

grammatic principals. While GCAD requests that this Court adopt its proposed rule, such a request is wholly inconsistent with Texas law. *See, e.g.*, *Spradlin*, 34 S.W.3d at 580.[10] Squaring this Court's language in *In Re City of Georgetown* with *Spradlin*, the rule becomes obvious: whenever possible, the Court should give meaning and effect to Constitutional language, and not infer that the Texas Constitution's language is redundant or chosen for "emphasis." Here, there are other plainly reasonable interpretations for the language "and all other property devoted exclusively to the use and benefit of the public" other than redundancy in conjunction with the preceding portion of the section. The most reasonable interpretation is consistent with the plain language of the words of the Section itself, and with the ordinary rules of grammar and construction;[11] to exempt all other

[10] To attempt to further distance this Court's analysis from the text, GCAD states, without authority, that when analyzing a constitutional provision (as opposed to a statutory provision), redundancy and emphasis make "that much more sense." By making this statement, GCAD argues that statutes and the constitution should be interpreted differently, with language in the constitution being construed in favor of redundancy and emphasis rather than in accordance with the rules of grammar and common usage. While novel, that argument flies in the face of years of established law. *See*, *e.g.*, *Ex Parte Shires*, 508 S.W.3d 856, 859–60 (Tex.App.—Fort Worth 2016, no pet.) (stating "in construing both constitutional and statutory language, we are principally guided by the language of the text itself), *citing Johnson v. Tenth Jud. Dist. Ct. App. at Waco*, 280 S.W.3d 866, 872 (Tex.Crim.App. 2008) (noting that the text is "the best indicator of the intent of the framers who drafted it and the citizenry who adopted it"); *Booth v. Strippleman*, 61 Tex. 378, 380 (1884) ("constitutions, like statutes, must be construed ... with the view of arriving at and enforcing the intention of the convention"); *Baird v. State*, 398 S.W.3d 220, 228 (Tex.Crim.App. 2013) (stating that "when considering the literal text, we read it in context and construe it according to the rules of grammar and common usage").

[11] *See* Odyssey's Brief at pp. 23-25.

property which is devoted exclusively to the use and benefit of the public from forced sale and taxation.

Following the rule as set forth by this Court, the interpretation and application of Article XI, Section 9 becomes clear; property devoted exclusively to the use and benefit of the public shall be exempt from taxation. The property at issue here is unquestionably devoted exclusively to the use and benefit of the public as a public school. Therefore, it should be exempt under Article XI, Section 9 of the Texas Constitution.

iii. Application of Article XI, Section 9 does not "nullify" mortgage liens

GCAD throws out another red herring arguing that application of Article XI, Section 9 would "nullify mortgage liens" on property leased to open-enrollment charter schools. They make this claim despite admitting that there is no evidence one way or the other as to whether the landlord has a mortgage lien on the property. GCAD's Brief at p. 36. Regardless, the Legislature has already addressed and resolved this concern in Section 12.128(e) which expressly provides "This section does not affect a security interest in or lien on property established by a creditor in compliance with law." Tex. Ed. Code § 12.128(e). Thus, GCAD's argument is baseless.

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.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i), I hereby certify that this Reply Brief on the Merits contains 6,593 words (excluding the caption, table of contents, index of authorities, signature, certificate of service and certificate of compliance).

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