

NO. 19-0962

IN THE SUPREME COURT OF TEXAS

ODYSSEY 2020 ACADEMY, INC.,

Petitioner,

v.

GALVESTON CENTRAL APPRAISAL DISTRICT,

Respondent.

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

**BRIEF OF AMICUS CURIAE
TEXAS CHARTER SCHOOLS ASSOCIATION
IN SUPPORT OF PETITION FOR REVIEW**

GREENBERG TRAURIG, LLP

Dale Wainwright
State Bar No. 00000049
wainwrightd@gtlaw.com
Elizabeth G. Bloch
State Bar No. 02495500
blochh@gtlaw.com
300 West 6th Street, Suite 2050
Austin, Texas 78701
Telephone: (512) 320-7200
Facsimile: (512) 320-7210

COUNSEL FOR AMICUS CURIAE TEXAS
CHARTER SCHOOLS ASSOCIATION

IDENTITIES OF PARTIES AND COUNSEL

Petitioner

Odyssey 2020 Academy, Inc.
(Odyssey)

Trial and Appellate Counsel

Joseph E. Hoffer
Robert A. Schulman
Denise Nance Pierce
John J. Joyce
SCHULMAN, LOPEZ, HOFFER &
ADELSTEIN, LLP
845 Proton Road
San Antonio, Texas 78258
Telephone: (210) 538-5385
Facsimile: (210) 538-5384

Respondent

Galveston Central Appraisal District
(GCAD)

Trial and Appellate Counsel

Anthony P. Brown
MCLEOD, ALEXANDER, POWEL &
APFFEL, P.C.
P.O. Box 629
Galveston, Texas 77553
Telephone: (409) 763-2481
Facsimile: (409) 762-1155

Amicus Curiae

Texas Charter School Association
(TCSA)

Counsel

Dale Wainwright
Elizabeth G. Bloch
GREENBERG TRAURIG, LLP
300 West 6th Street, Suite 2050
Austin, Texas 78701
Telephone: (512) 320-7200
Facsimile: (512) 320-7210

TABLE OF CONTENTS

	<i>Page</i>
IDENTITIES OF PARTIES AND COUNSEL	ii
INDEX OF AUTHORITIES.....	iv
STATEMENT OF INTEREST OF AMICUS CURIAE	vii
STATEMENT OF JURISDICTION.....	ix
INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
ARGUMENT AND AUTHORITIES.....	3
I. The Property Is Exempt Under Tax Code § 11.11 By Virtue Of Education Code § 12.128, Which Mandates That Leased Property Is Public Property For All Purposes, And Is Held In Trust For The Public.	3
A. The leased Property is public property for all purposes under Texas law.....	3
B. The leased Property is “property of this state held in trust” for the public.	4
II. Texas Constitution Article XI, Section 9 Prohibits Taxation Of The Property Because It Is Devoted Exclusively To The Use And Benefit Of The Public.....	6
III. The Court Of Appeals’ Overbroad And Imprecise Holding Is Already Having Negative Consequences In Tax Protests Involving Different Circumstances.....	9
CONCLUSION.....	11
CERTIFICATE OF COMPLIANCE.....	12
CERTIFICATE OF SERVICE	13

INDEX OF AUTHORITIES

	Page(s)
Cases	
<i>ANM Consol. ISD v. City of Bryan</i> , 184 S.W.2d 914 (Tex. 1945)	6
<i>Bradley v. Shaffer</i> , 535 S.W.3d 242 (Tex. App.—Eastland 2017, no pet.).....	4
<i>Davis v. Mueller</i> , 528 S.W.3d 97 (Tex. 2017).....	4
<i>Faulkner v. Bost</i> , 137 S.W.3d 254 (Tex. App.—Tyler 2004, no pet.).....	4
<i>Harmony Education Foundation and Harmony Public Schools v.</i> <i>Tarrant Appraisal District</i> , Case No. 153-313213-19	11
<i>Hays County Appraisal Dist. v. S.W. Texas State Univ.</i> , 973 S.W.2d 419 (Tex. App.—Austin 1998, no pet.).....	8
<i>Honors Acad., Inc. v. Texas Educ. Agency</i> , 555 S.W.3d 54 (Tex. 2018).....	1, 5, 9
<i>Jubilee Academic Center, Inc. v. Cameron Appraisal District</i> , Case No. 2019-DCL-05470	11
<i>LCRA v. Chemical Bank & Trust</i> , 190 S.W.2d 48 (Tex. 1945).....	7, 8
<i>Leander ISD. v. Cedar Park Water Supply Corp.</i> , 479 S.W.2d 908 (Tex. 1972)	8
<i>LTTs Charter Sch., Inc. v. C2 Constr., Inc.</i> , 342 S.W.3d 73 (Tex. 2011).....	1
<i>Martin v. Martin</i> , 363 S.W.3d 221 (Tex. App.—Texarkana 2012, pet. dism'd by agr.)	4

<i>Meadow Oaks Academy d/b/a Pioneer Technology & Arts Academy v. Dallas Central Appraisal District,</i> Case No. DC-19-17188.....	11
<i>Odyssey 2020 Academy, Inc. v. Galveston Cent. Appraisal Dist.,</i> 2019 WL 3294991 (Tex. App.—Houston [14th Dist.] July 23, 2019, pet. filed).....	5, 9, 11
<i>Satterlee v. Gulf Coast Waste Disp. Auth.,</i> 576 S.W.2d 773 (Tex. 1978)	8
<i>State of New Mexico v. Locke,</i> 29 N.M. 148, 219 P. 790 A.L.R. 407.....	8
<i>State v. Houston Lighting & Power Co.,</i> 609 S.W.2d 263 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)	8
<i>Texas Turnpike Co. v. Dallas County,</i> 271 S.W.2d 400 (Tex. 1954)	4, 5

Statutes

TEX. EDUC. CODE Ch. 12.....	1
TEX. EDUC. CODE § 12.102	1
TEX. EDUC. CODE § 12.104(c).....	1
TEX. EDUC. CODE § 12.105	1
TEX. EDUC. CODE § 12.106	1
TEX. EDUC. CODE § 12.128	<i>passim</i>
TEX. EDUC. CODE § 12.128(a).....	2, 3, 5
TEX. EDUC. CODE § 12.128(a-1).....	1
TEX. EDUC. CODE § 12.128(a)(1)	1
TEX. EDUC. CODE § 12.128(a)(2)	1, 4
TEX. EDUC. CODE § 12.1053	5

TEX. TAX CODE § 11.113, 6

Other Authorities

TEX. CONST. ART. VIII, § 26, 7

TEX. CONST. ART. XI, § 9.....6, 7, 8, 9

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Established in 2008, TCSA is the statewide nonprofit membership association of open-enrollment public charter schools throughout Texas. The mission of TCSA is to accelerate student achievement in Texas by empowering and improving a diverse set of effective and quality-driven public charter schools.

TCSA accomplishes this mission through four core functions: Member Services, Quality Framework, Advocacy, and the TCSA Annual Conference. TCSA provides services to member schools such as model board policies, training, legal assistance, and discount purchasing programs. Through the TCSA Quality Framework, a research-improvement tool, TCSA helps member schools assess quality and improve academic, financial, and operational effectiveness. TCSA also provides strong, member-driven advocacy on behalf of Texas Charter Schools and annually hosts the Texas Charter Schools Conference, the largest gathering of charter stakeholders in the state that is committed to advancing quality public charter schools and improving student achievement.

TCSA members are improving public education in Texas by offering students an alternative to traditional public schools by affording them specialized attention in mission-driven schools that are focused on college preparation, dropout prevention, dropout recovery, alternative education, residential placement, and other important

objectives. A board of directors that consists of a majority of charter school operators governs TCSA. TCSA is funding the preparation of this brief.

Odyssey's petition raises significant issues that have impact beyond the parties to this action, affecting many of TCSA's open-enrollment charter school members. More importantly, as the legal issues relate to state funding provided to charter schools that is then diverted away through property taxes, it directly impacts the children those charter schools serve throughout the state.

STATEMENT OF JURISDICTION

This charter school case presents questions of law that are important to the jurisprudence of the state (TEX. GOV'T CODE § 22.001(a)) because:

- a) it involves construction of two Texas statutes;
- b) it implicates provisions of the Texas Constitution;
- c) it affects a critical component of our state's public-school system;
- d) the court of appeals compounded its statutory construction error by ruling in a manner that was unnecessarily broad for resolution of this particular case, and that erroneous ruling is already negatively affecting other charter schools in Texas; or
- e) all of the above.

The importance of this case to the students enrolled in charter schools and to the continued viability of charter schools throughout Texas demands this Court's attention.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Charter schools derive their powers, authority, status, even existence 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. This role in Texas’ public education system is a crucial one. Open-enrollment charter schools are “a new and innovative form of public schooling,” and an integral part of this State’s public-school system. *Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54, 63, 64 (Tex. 2018) (*citing* TEX. EDUC. CODE § 12.105).

Open-enrollment charter schools do not have the power to tax, but are entitled to state funding. *Honors Acad.*, 555 S.W.3d at 63, citing TEX. EDUC. CODE §§ 12.102, 12.106, and 12.104(c). Because of this reliance on state funding, the state designates the character of its funds and the items purchased or leased with those funds through legislation. *LTTS Charter Sch.*, 342 S.W.3d at 80 (*citing* TEX. EDUC. CODE Ch. 12). As relevant here, the legislature has mandated that all property either purchased or leased with state funds received by a charter holder is “public property for all purposes under state law,” and is “property of this state held in trust” for the benefit of the students. TEX. EDUC. CODE § 12.128(a)(1) and (a)(2).¹

¹ Citations to 12.128 refer to the statute that was in effect at the time this dispute arose. A recent non-substantive amendment moved the operative statutory language regarding leased property to a new subsection 12.128(a-1).

The dispute in this case is whether Odyssey’s charter school property (Property) that is leased with state funds constitutes public property entitled to exemption from ad valorem taxation. This is a significant issue affecting open-enrollment charter schools throughout the State. Many of TCSA’s member schools lack sufficient funds to purchase property outright, do not have bond financing options, or cannot find suitable property in desired locations available for purchase. Leasing property is often the only viable alternative, and the tax obligation, if any, is almost invariably the contractual obligation of the lessee. State funds are used to pay the lease obligations, and § 12.128(a) dictates that such leased property is property of the state for *all* purposes. The court of appeals erred in holding that Odyssey’s leased Property is not property of the state for tax purposes.

Moreover, the overbroad and erroneous holding of the court of appeals—that § 12.128 has no application outside the context of charter revocation—is already being used by other appraisal districts to reverse course by denying tax exempt status to TCSA’s members under different circumstances, such as a lease/purchase option where there is indisputable “equitable ownership” for tax purposes, that have heretofore supported an exemption.

ARGUMENT AND AUTHORITIES

I. The Property Is Exempt Under Tax Code § 11.11 By Virtue Of Education Code § 12.128, Which Mandates That Leased Property Is Public Property For All Purposes, And Is Held In Trust For The Public.

A. *The leased Property is public property for all purposes under Texas law.*

TCSA agrees with Odyssey’s argument that the court of appeals erred in failing to properly interpret the clear and unambiguous language of Education Code § 12.128(a). As discussed below, the court of appeals’ holding went even further than necessary to decide this case on its facts, effectively limiting application of § 12.128 to situations involving revocation of a charter holder’s charter, and foreclosing any application of § 12.128 to the Tax Code. But the court of appeals erred in reading *any* limitations into § 12.128 since the legislature made its intent for broad application clear.

The phrase “for all purposes” in § 12.128 means “for all purposes.” The legislature could have ended the sentence there, and its intent would have still been clear. But it emphasized that property purchased or leased with state funds is “public property for all purposes *under state law*.” TEX. EDUC. CODE § 12.128(a). The statute is not limited to all purposes “under this chapter” or all purposes “under this section.” The legislative intent is clear: property purchased or leased with state funds is public property for **all** purposes under **all** Texas law. As this Court has succinctly noted,

“All means all.” *Davis v. Mueller*, 528 S.W.3d 97, 102 (Tex. 2017). This necessarily includes, contrary to the court of appeals’ holding, the Texas Tax Code.

B. *The leased Property is “property of this state held in trust” for the public.*

In addition to requiring that property leased with state funds is public property for all purposes under state law, § 12.128 also mandates that such property “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). Because open-enrollment charter schools are part of this state’s public education system, their students are public school students. Leased property, paid with state funds, is thus held in trust for the public.

By virtue of this statutorily-imposed trust, the beneficiaries (Texas public school students) “become the owners of the equitable or beneficial title to the trust property and are considered the real owners.” *Martin v. Martin*, 363 S.W.3d 221, 227 (Tex. App.—Texarkana 2012, pet. dism’d by agr.); *Faulkner v. Bost*, 137 S.W.3d 254, 258 (Tex. App.—Tyler 2004, no pet.); *Bradley v. Shaffer*, 535 S.W.3d 242, 248 (Tex. App.—Eastland 2017, no pet.).

This Court recognized in *Texas Turnpike Co. v. Dallas County*, 271 S.W.2d 400, 402 (Tex. 1954), that “equitable title is the taxable title” in certain situations. More recently, this Court explained that “open-enrollment charter schools are expressly considered ‘governmental entit[ies] for ... [statutes] relating to property

held in trust’.” *Honors Acad.*, 555 S.W.3d at 64 (Tex. 2018) (citing TEX. EDUC. CODE § 12.1053).

The court of appeals ignored the effect of this statutory provision. While correctly noting that “equitable title may support a public entity’s claim for a tax exemption,” the court incorrectly concluded that there was no basis for asserting a tax exemption here through equitable title. *Odyssey 2020 Academy, Inc. v. Galveston Cent. Appraisal Dist.*, 2019 WL 3294991 *4 (Tex. App.—Houston [14th Dist.] July 23, 2019, pet. filed). The legislatively-imposed trust provides that basis as a matter of law.

The court of appeals relied on *Texas Turnpike* for the proposition that ownership must be based on true facts, not legislative pronouncements. *Odyssey*, 2019 WL 3294991 at *3. But the legislature can impose a trust on property purchased or leased with state funds. The legislative imposition of that trust is an actual fact, which in turn legally changes the factual nature of beneficiaries’ interest to equitable or beneficial title. This is very different from the situation in *Texas Turnpike*, where the legislature passed a statute purporting to declare that certain deeds to property held in escrow, which were conditioned and might never actually be delivered to the state, effectively transferred title to the state for tax purposes. *Texas Turnpike*, 271 S.W.2d at 402-403. Section 12.128(a) is not the type of counterfactual enactment denounced in *Texas Turnpike*.

II. Texas Constitution Article XI, Section 9 Prohibits Taxation Of The Property Because It Is Devoted Exclusively To The Use And Benefit Of The Public.

This case has primarily focused on Texas Constitution art. VIII § 2, which authorizes the legislature to exempt from taxation public property used for public purposes, and on Texas Tax Code § 11.11, which is the legislature’s primary exercise of that authority. Another provision of the Texas Constitution, however, is “self-operative and absolutely exempts from taxation the public property therein referred.” *ANM Consol. ISD v. City of Bryan*, 184 S.W.2d 914 (Tex. 1945). Texas Constitution art. XI, § 9 is self-effectuating in that it prohibits taxation of certain property without the need for legislative action. *Id.*

Article XI, § 9 exempts from both forced sale and from taxation certain property of counties, cities and towns, and “all other property devoted exclusively to the use and benefit of the public”:

§ 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 therefor, 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 forced sale and from taxation, provided, nothing herein shall prevent the enforcement of the vendors lien, the mechanics or builders lien, or other liens now existing.

TEX. CONST. ART. XI, § 9.

Some constitutional provisions and enabling statutes regarding tax exemption focus on ownership, while others focus on the use of the property in question. For

example, art. VIII § 2 of the Texas Constitution allows the legislature to exempt “actual places of religious worship” (use) and “property owned by a disabled veteran” (ownership). Some provisions require exclusivity regarding either ownership or use, while others do not.

The first section of art. XI, § 9 focuses on both ownership and use—property of municipalities “owned and held only for public purposes.” But the latter section expressly exempts from taxation “all other property devoted exclusively to the use and benefit of the public.” This latter provision focuses solely on use, requiring exclusive public use, and makes no mention of ownership. And it must refer to property *other* than property owned by municipalities else it would be surplusage.

In *LCRA v. Chemical Bank & Trust*, this Court held that art. XI, § 9 exempted all public property used exclusively for public purposes even though not owned by a county, city or town. 190 S.W.2d 48 (Tex. 1945) (holding that the exemption required by art. XI, § 9 extended to other governmental units such as LRCA). In reaching its conclusion, the Court noted the futility of requiring a governmental entity to pay taxes. Otherwise:

[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.

LCRA, 190 S.W.2d at 51 (citing *State of New Mexico v. Locke*, 29 N.M. 148, 219 P. 790, 30 A.L.R. 407). Charter schools that lease property are typically required under the lease to pay any tax obligation. Since charter schools are funded by the state, taxing their leased property would be using public funds to pay a public debt.

Although the holding in *LCRA* has been discussed on occasion, it has not been disturbed. See *Leander ISD. v. Cedar Park Water Supply Corp.*, 479 S.W.2d 908, 913 (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 Disp. Auth.*, 576 S.W.2d 773, 779 (Tex. 1978) (again declining to reconsider the holding in *LCRA*). In *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 court noted that “the holding by the majority in *Lower Colorado River Authority* has never been disapproved or limited by any later decision of the Supreme Court.” That is still true today.

The holding in *LCRA* is an accurate and literal reading of a constitutional provision requiring that property “devoted exclusively to the use and benefit of the public shall be exempt from ... taxation.” Although some intermediate appellate decisions have indicated that art. XI, § 9 may not extend to property that is not owned by a governmental entity, this portion of art. XI, § 9 requires only exclusive public use, not public ownership. See, e.g., *Hays County Appraisal Dist. v. S.W. Texas State*

Univ., 973 S.W.2d 419, 422-23 (Tex. App.—Austin 1998, no pet.). Even so, any public ownership requirement that may exist under this provision is satisfied here by the legislatively-imposed trust, which makes Texas public charter school students the equitable title-holders of the property. *See also Honors Acad.*, 555 S.W.3d at 64 (“open-enrollment charter schools are expressly considered ‘governmental entit[ies] for ... [statutes] relating to property held in trust’”).

It is time for this Court to reconfirm its decision in *LCRA* and hold that under art. XI, § 9, Property held in trust for the public that is leased by a charter school with public funds is exempt from taxation because it is “devoted exclusively to the use and benefit of the public.”

III. The Court Of Appeals’ Overbroad And Imprecise Holding Is Already Having Negative Consequences In Tax Protests Involving Different Circumstances.

Not only did the court of appeals err by failing to recognize that Property leased by a charter holder with state funds is public property “for all purposes under state law,” the court went too far by effectively holding that such property is public property for only one purpose—in circumstances involving revocation of a charter holders’ charter.

The court stated that § 12.128 “generally...comes into play when a school charter is revoked.” *Odyssey*, 2019 WL 3294991 at *4. The court then concluded that § 12.128 did not apply for purposes of tax exempt status because the section

“does not speak to tax exemptions” and “does not mention taxes or exemptions at all.” *Id.* This erroneous interpretation ignores that the statute need not “speak to” or “mention” tax exemptions because the legislature made clear that it applied “for all purposes under state law.” The court’s holding ignores the plain language of the statute, violating sound principals of statutory construction.

The court of appeals erred by refusing to recognize the expansive (“all means all”) scope of § 12.128. The court then compounded its error by effectively limiting the scope of § 12.128 to situations involving revocation of a charter-holder’s charter—a conclusion that was not necessary to determine the instant case on its facts. This error could have the unintended effect of precluding application of § 12.128 to *any* situation involving tax exemptions, including those where exemptions have historically been recognized.

For example, if § 12.128 is read as narrowly as the court of appeals holds, it could arguably not apply even where a charter school undisputedly holds equitable title such as in a lease-to-purchase agreement, or perhaps even where a charter school holds legal title. In both situations, most appraisal districts have recognized tax exemptions in the past, and it is imperative that they continue to do so.

TCSA is not overstating the impact of this erroneous holding simply for effect. Several appraisal districts in Texas are already misconstruing and relying on the court of appeals’ opinion to deny tax exemptions for some of TCSA’s charter school

members with lease/purchase agreements, which provide the schools with equitable ownership. *See, e.g., Jubilee Academic Center, Inc. v. Cameron Appraisal District*, Case No. 2019-DCL-05470 pending in the 404th Judicial District Court of Cameron County, Texas; *Harmony Education Foundation and Harmony Public Schools v. Tarrant Appraisal District*, Case No. 153-313213-19 pending in the 153rd Judicial District Court of Tarrant County, Texas; *Meadow Oaks Academy d/b/a Pioneer Technology & Arts Academy v. Dallas Central Appraisal District*, Case No. DC-19-17188 pending in the 193rd Judicial District Court, Dallas County, Texas. In the *Jubilee* action, the appraisal district specifically cited the *Odyssey* opinion in discovery responses in support of its denial. The other two actions involve tax denial rulings that occurred after *Odyssey* was decided, and were likely impacted by that opinion.

An intermediate appellate court decision that erroneously changes the law in a way that goes beyond the specific facts of the case before it is misguided and must be corrected by this Court.

CONCLUSION

Amicus Curiae Texas Charter Schools Association respectfully requests that the Court reverse the court of appeals' decision, and render judgment that *Odyssey's* Property is exempt from ad valorem taxation.

Respectfully submitted,

GREENBERG TRAUIG, LLP

By: /s/ Dale Wainwright

Dale Wainwright

State Bar No. 00000049

wainwrightd@gtlaw.com

Elizabeth G. Bloch

State Bar No. 02495500

blochh@gtlaw.com

300 West 6th Street, Suite 2050

Austin, Texas 78701

Telephone: (512) 320-7200

Facsimile: (512) 320-7210

*Counsel for Amicus Curiae Texas
Charter Schools Association*

CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations of TEX. R. APP. P. 9.4(i)(3) because this brief consists of 2,669 words as determined by Microsoft Word Count, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ Dale Wainwright

Dale Wainwright

CERTIFICATE OF SERVICE

I certify that a copy of this Brief of Amicus Curiae was served on counsel of record by using the Court's CM/ECF system on the 6th day of December, 2019, addressed as follows:

Joseph E. Hoffer
jhoffer@slh-law.com
Robert A. Schulman
rschulman@slh-law.com
Denise Nance Pierce
dpierce@slh-law.com
John J. Joyce
jjoyce@slh-law.com
SCHULMAN, LOPEZ, HOFFER &
ADELSTEIN, LLP
845 Proton Road
San Antonio, Texas 78258

Counsel for Petitioner

Anthony P. Brown
State Bar No. 03091300
apbrown@mapalaw.com
McLeod, Alexander, Powel &
Apffel, P.C.
P.O. Box 629
Galveston, Texas 77553

Counsel for Respondent

/s/ Dale Wainwright
Dale Wainwright