No. 122203

IN THE SUPREME COURT OF ILLINOIS

CONSTANCE OSWALD, Plaintiff-Petitioner v. BRIAN HAMER, Director of the Illinois Department of Revenue, and The ILLINOIS DEPARTMENT OF REVENUE, Defendants-Respondents and ILLINOIS HOSPITAL ASSOCIATION, Intervenor-Defendant-Respondent	) Appeal from the Appellate Court for the First District, Fourth Division Maywood, Illinois) Gen. No. 1-15-2691)) There heard on appeal from the Circuit Court of Cook County, Illinois)) Hon. Robert Lopez Cepero Judge Presiding) No. 2012-CH-042723

BRIEF AMICUS CURIAE IN SUPPORT OF CONSTANCE OSWALD, PLAINTIFF-PETITIONER, BY CUNNINGHAM TOWNSHIP, THE CITY OF URBANA AND CUNNINGHAM TOWNSHIP ASSESSOR

Frederic M. Grosser
Registration No. 1070436
Suite 503
201 West Springfield Avenue
Champaign, Illinois 61820
(217)352-2784
frederic.grosser@gmail.com
Attorney for Amici
Cunningham Township
City of Urbana
Cunningham Township Assessor

POINTS AND AUTHORITIES

ARGUMENT

Organization of Brief

When addressing parties, Plaintiff-Petitioner Constance Oswald will be referred to as Oswald, Defendants-Respondents Illinois Department of Revenue and the Director of the Illinois Department of Revenue will be referred to collectively as the Department, and Intervenor-Defendant-Respondent Illinois Hospital Association will be referred to as IHA. Headings are liberally applied throughout the brief solely to aid the reader, not as separate points or issues.

Purpose of this Brief

This case presents the issue of the facial constitutionality of the hospital property tax exemption statute 35 ILCS 200/15-86 which affects taxpayers and taxing bodies throughout the State of Illinois. Cunningham Township and the City of Urbana are taxing bodies directly affected by the constitutionality or unconstitutionality of the statute which is the subject of the case. The Cunningham Township Assessor is the elected Assessor for Cunningham Township. These amici appealed the constitutionality of this statute in the Fourth District Appellate Court which ruled the statute to be facially unconstitutional. Carle Foundation v. Cunningham Township *et al.*, 2016 IL App (4th) 140795 (Carle II). That ruling was vacated by this Court for lack of appellate

jurisdiction. While this Court vacated the opinion of the Fourth District, this Court did not render an opinion on the merits of the Fourth District's ruling that the statute is facially unconstitutional. Carle Foundation *et al*. v. Cunningham Township *et al*., 2017 IL 120427 (Carle III). While there is not a present conflict between the appellate districts, it is clear that there is a difference of opinion between the Courts. This brief discusses the similarities and differences between the rulings of the Fourth and First Districts and the legal argument that the Fourth District ruling was correct and that the First District ruling is incorrect on the issue of constitutionality. Citations to the Fourth District opinion are not presented as precedent but are presented as part of that discussion. The constitutionality issue is one of facial unconstitutionality and therefore consists solely of an issue of law.

I. 35 ILCS 200/15-86 IS FACIALLY UNCONSTITUTIONAL

Introduction

On January 5, 2016, the Fourth District ruled that Section 15-86 was facially unconstitutional. Carle II. On December 22, 2016, the First District disagreed on that issue and ruled that Section 15-86 was not unconstitutional. Oswald v. Hamer et al., 2016 IL App (1st) 152691 (Oswald). At the time of the First District's ruling, the

Fourth District Opinion was a valid, precedential ruling. This Court vacated the Fourth District's Opinion on jurisdictional grounds but issued no opinion as to the reasoning of the Fourth District on the issue of constitutionality. Carle III. It is clear that a conflict between districts was of record, is likely to occur again and that conflict was not resolved. These amici support the ruling of the Fourth District and the reasoning behind that ruling of unconstitutionality remains sound.

Section 15-86 by its terms creates a property tax exemption for hospitals without regard to whether a hospital meets the requirements for an exemption under the Illinois Constitution of 1970, article IX, section 6. Section 15-86 by its terms creates a special category of exemption for property owned by hospitals and used as hospitals with requirements different from any other kind of exemption.

The First and Fourth District Rulings

The First and Fourth Districts agree on most of the law regarding Section 15-86. Both Courts agree that the Illinois Constitution restricts the General Assembly's authority to exempt property from taxation to only the types of property mentioned specifically in the exemption provisions of the Constitution. Oswald, para. 6. Both Courts agree that the General Assembly may create

exemptions for property used for charitable purposes. Both Courts agree that the Constitution requires the charitable use to be exclusively charitable. Both Courts agree that this Court has ruled that a property satisfies the exclusive-use restriction if it is used primarily for charitable purposes. Oswald, para. 7.

Foremost of the agreement between the First and Fourth Districts, both Courts agree that the constitutional criteria as outlined in Methodist Old Peoples Home v. Korzen (Ill. 1968), 39 Ill.2d 149, 233 N.E.2d 537, (Korzen) must be met for any applicant to qualify for a charitable property tax exemption. The Fourth District cites Provena Covenant Medical Center v. Department of Revenue 236 Ill.2d 368, 925 N.E.2d 1131, 339 Ill.Dec. 10 (Provena), which in turn cites Korzen. The First District cites Eden Retirement Center, Inc. v. Department of Revenue (Ill. 2004), 213 Ill.2d 273, 821 N.E.2d 240, Ill.Dec. 189 (Eden), which in turn cites the standards outlined in Korzen.

Both Courts agree that Section 15-86 does not contain the constitutional requirement of exclusive use for charitable purposes. Oswald, para 41. The Courts differ on whether this flaw is fatal to the legislation. The First District found that the infirmity was a legislative oversight and could be remedied by reading into the statute additional language. Oswald, para. 44. The Fourth

District found the failure to be fatally unconstitutional. Carle II, para. 164.

In their constitutional analysis, the Courts also disagreed on the application of the no-set-of-circumstances test. The First District found that if a hypothetical circumstance might exist where the statute could be found to be constitutional, then the statute could not be found to be unconstitutional. Oswald, para 47. The Fourth District held that application of the no-set-of-circumstances test was problematic and ultimately concluded that the new statute could not be "validly applied." Carle II, para. 146, 163-164.

The Korzen Criteria

This Court has made clear that it is the province of the courts, not the legislature, to determine what is charitable. Eden, 213 Ill.2d 273, 290, 821 N.E.2d 240, 250, 290 Ill.Dec. 189, 199.

This Court set forth criteria, the Korzen criteria, for determining whether property is used exclusively for charitable purposes. Korzen, 39 Ill.2d 149, 157, 233 N.E.2d 537, 541. These criteria were set forth by this Court, not to explain the exemption statute, but to explain the restrictions dictated by our Illinois Constitution.

The First District agrees that the Korzen criteria as recited in Eden must be applied to obtain a charitable

exemption. Oswald, para. 37. The Department agrees that the Korzen factors are still the relevant criteria to determine charitable use under our Constitution. (Department's Appellee Brief to First District, p. 8)

An important distinction between the amendment considered in Korzen and the statute in the present case is that the amendment in Korzen was an amendment to the same statute. In the present case the General Assembly created a new statutory exemption and added it to the Property Tax Code. In was an amendment only in the context that it amended the Property Tax Code; it did not amend a previously existing exemption.

Section 15-86 is Not an Illustration or Example

The First District states that this Court has "consistently found that statutes detailing property tax exemption were descriptive and illustrative of property that may qualify under the constitutional requirements of exclusive use." Oswald para. 46. The entirely new, very lengthy and very detailed exemption created by Section 15-86 is not merely an example. Of what is it an example? It is clearly a test of expenditures, not an example or an illustration. The statute cannot simultaneously be merely a descriptive example and also be a very detailed new test establishing a new category of exemption.

15-86 Should Not be Read as an Addition to 15-65

The First District reasons that the new Section 15-86 should essentially be interpreted as an addition to Section 15-65 and that the two should be read together rather than considering 15-86 to be a free-standing exemption statute. Oswald, para. 45.

The plain language of the statute makes clear that the statute was not intended to be a subset or read along side Section 15-65:

> It is the intent of the General Assembly to establish a new category of ownership for charitable property tax exemption to be applied to not-for-profit hospitals and hospital affiliates in lieu of the existing ownership category of "institutions of public charity". [emphasis added] 35 ILCS 200/15-86(a)(5)

The Court need look no further than the face of the statute itself to determine that the General Assembly stated its clear intention to create "a new category" of exemption "in lieu of" the exemption of Section 15-65.

In Eden, this Court referred to and applied the same reasoning it had applied in Korzen to an actual amendment to Section 15-65. Korzen and Eden describe the General Assembly's amending of Section 15-65 and its predecessor statute. The General Assembly has demonstrated that it knows how to add amendments. It was not their intent to create an amendment to Section 15-65 with the new Section 15-86. The First District also disregards that the

constitutional restraints are specifically recited in the exemption statutes addressed in Eden and Korzen.

15-86 Does Not Require Exclusively or Primarily Charitable Use

The newly created Section 15-86 does not require property being exempted to be used exclusively or primarily for charitable purposes. In contrast, the old and still existing Section 15-65 does explicitly require that an applicant for exemption demonstrate compliance with the constitutional restrictions regarding charitable exemptions where it includes the provision:

> "All property of the following is exempt when actually and exclusively used for charitable or beneficent purposes ..."

In the present case with Section 15-86, the General Assembly did not include that language, but instead included other language making it clear that they were defining a new and specific exemption:

> It is the intent of the General Assembly to establish a new category of ownership for charitable property tax exemption to be applied to not-for-profit hospitals and hospital affiliates in lieu of the existing ownership category of "institutions of public charity". 15-86(a)(5)

The only considerations to be given in qualifying for the new exemption were the considerations explicitly stated in Section 15-86. As the First District points out, Section 15-65 contains the very language requiring

compliance with the constitutional criteria that is not included in Section 15-86.

The General Assembly knew how to include the constitutional restraints in the language of an exemption statute, was aware of the existence of 15-65 and had a working example of how to include the necessary language within the new statute. Considering the extensive detail contained in the new Section 15-86, the most reasonable presumption is that the new section contains exactly what the General Assembly intended and only what it intended.

The First District says the failure to include the constitutional restraints in the language of 15-86 should not condemn the statute. As support the Court cites Eden. Oswald, para. 46. The significant differences in Eden are that 1) the constitutional constraints were clearly enunciated within the statute in question and 2) the Department denied the exemption in Eden for failure of Eden to meet the constitutional criteria. The Department in Eden required Eden to prove it was exclusively charitable as required by our Constitution.

The First District ruled differently in a very recent case where it recognized that "courts may not read unexpressed limitations into an unambiguous statute." Village of North Riverside v. Illinois Labor Relations

Board, 2017 IL App (1st) 162251, para. 25. It cites this Court in Evanston Ins. Co. v Riseborough, which stated:

> "[W]here an enactment is clear and unambiguous a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express." Evanston Ins. Co. v Riseborough, 2014 IL 114271, para. 15, 5 N.E.3d 158, 163, 378 Ill.Dec. 778, 783.

Exclusively and Primarily

In regard to exclusively charitable use, as the Fourth District explained in detail, this Court has interpreted the word exclusively in our Constitution to mean "primarily" to avoid the harsh result that might result if a minor amount of resources are expended for a non-charitable purpose. In the context of the Constitution, primarily means nearly or almost exclusively. It does not mean barely 51%, and it certainly does not mean something significantly less than 50%. Carle II, para. 124-126.

The Provena Court explained that the hospital in that case provided almost entirely non-charitable services. The Court determined that the hospital's 0.723% charitable activity--an amount the Court determined to be *de minimis*--clearly did not make the hospital primarily charitable. Provena specifically noted that if the hospital had provided just $268,276 more in "charitable" care, the amount of "charity care" would have equaled its property tax bill. This still *de minimis* 0.969% of "charity care"

is precisely the "threshold" prescribed by the General Assembly in the new Section 15-86 exemption.

The dissent in Provena noted that the word primarily does not define an actual amount, but no ordinary interpretation of primarily as used by this Court suggests that a bare 51% would be considered to be primarily charitable. If 51% cannot meet a standard of exclusively or primarily charitable, then it is beyond doubt that an amount of charity care equaling a mere property tax bill, without comparison to the total amount of revenue received, cannot deem an entity to be charitable. No doubt there is quite a large number of businesses and households throughout the state that could be deemed charitable entities if the standard is whether one contributes as much to charitable causes annually as the dollar value of its property tax bill.

The Proper Comparison

The General Assembly has not included anywhere in the statute any reference to the actual, total income or total patient revenue of the entity. In a proper comparison, the amount of actual charity care would be compared to the total income or total patient revenue of the entity.

The General Assembly in creating 15-86 provides a list of items to be included in this evaluation. The list of items includes “charity care” plus six additional

categories of expenditures it allows the entity to include. Instead of comparing the generous list of allowable expenses to the total income or total patient revenue, it compares the allowable expenses to the amount of property taxes the entity would pay if they did not receive an exemption. Comparing the entity's allowable expenses with their property tax bill creates an extremely low threshold to qualify as a charitable institution.

Even the First District recognized that this calculation does not measure whether an entity is primarily charitable. They acknowledged that this Court has established certain indicia of a chartable institution--the Korzen criteria as recited in Eden--and that the Korzen criteria are what establish whether an entity is primarily charitable. By acknowledging that it is the Korzen criteria that are the indicia of charitability, the First District undermines its own logic when it states that the Korzen criteria should be applied in addition to the standards supplied in 15-86. If the Korzen criteria must be considered, then the test created by the General Assembly is rendered irrelevant.

"Shall" Does not Change the Meaning of "Primarily"

The First District spends a great deal of time discussing whether the General Assembly's use of the word "shall" is mandatory or merely directory. Their analysis of the word "shall" divorces the word from the long and

detailed sentence in which it was included. The full sentence that included the word "shall" reads:

> "A hospital applicant satisfies the conditions for an exemption under this Section with respect to the subject property, and shall be issued a charitable exemption for that property, if the value of services or activities listed in subsection(e) for the hospital year equals or exceeds the relevant hospital entity's estimated property tax liability, as determined under subsection(g), for the year for which exemption is sought." 15-86(c)

This clearly demonstrates the intent of the General Assembly to grant an exemption based on the test it provided without any additional testing or consideration necessary.

The First District reminds us that we are to presume the General Assembly did not intend to violate the Constitution. Presuming the General Assembly did not intend to violate the Constitution does not guarantee that they did not actually violate the Constitution. Whether or not the General Assembly intended to comply with the Constitution, the statute they wrote violates the Constitution on its face whether it mandates or merely directs the Department to grant an exemption without giving any consideration to the constitutional requirements.

For the word "shall" in this instance to be reinterpreted as "may" suggests that there is an alternative decision the Department may make. The statute provides no alternatives. It merely says that if the

applicant passes this test you give them the exemption. It does not matter whether the Department is "directed" to violate the Constitution or "mandated" to violate the Constitution. In this circumstance it is a distinction without a difference since either action violates the Constitution.

Even if the statute specifically stated that the Department "may" grant the exemption based on the criteria in the statute, the statute still fails to apply the restrictions in our Constitution. The heart of the legislation that the First District deems to be "directory" in nature does not direct the Department to apply the constitutional test, *i.e.*, the Korzen criteria. It is the First District that now "directs" that the Korzen criteria be applied in addition to the statute's direction.

If the elements of the statute were restrictions to be applied after first testing whether an entity meets the Korzen criteria, then this argument might be more convincing. However, the tests described by the statute are not restrictions but are a lesser standard than the Korzen tests and therefore become meaningless once the entity is required to meet the Korzen criteria.

In other words, to fix the statute by applying the Korzen criteria effectively eliminates the majority of the statute. The Korzen criteria require an entity be

exclusively or at least primarily charitable, but the tests and calculations in 15-86 describe a significantly relaxed monetary threshold for charity care than either of the words "exclusively" or "primarily."

Incidental Use vs. Primary Use

The First District also cites this Court's opinion in Chicago Bar Association v Department of Revenue (Ill. 1994), 163. Ill.2d 290, 644 N.E.2d 1166, 206 Ill. Dec. 113, for the point that it is the primary purpose of property, not its incidental use, that determines its tax exempt status. Oswald, para. 34. It is significant to note that 15-86 is itself a test of incidental use, rather than a test of primary use since it fails to inquire about the total income or total patient revenue of the entity.

In addition, the test does not require any charitable use of the property at all. As the Fourth District noted, it is possible for an entity to pass the General Assembly's test without providing any charity care on the property at all if the entity can prove it satisfied some of the other monetary tests such as paying subsidies to community clinics or paying subsidies to the state or to local governments. The Fourth District points out that this Court has made clear that it is the use of the property that is determinative, not how the income derived from the property is spent. Carle II, para. 142.

The Department is not Applying the Korzen Criteria

The First District ruled that Section 15-86 is not unconstitutional because it must be read alongside the Constitution. This is in direct juxtaposition to the way the Department has actually interpreted Section 15-86. The Department created Form PTAX-300-H for entities to receive an exemption pursuant to Section 15-86. (R. C414-422) This form includes the criteria specifically enunciated in Section 15-86, but contains no information from which the Department can determine if the entity has met the constitutional constraints described in Korzen such as total income or total patient revenue.

The Department argued to the First District (and to this Court in Carle III) that the statute should be read in parallel with the Constitution, but the Department has not actually done so in practice. This is not included to argue an issue of fact. It is merely to illustrate that the Department recognized that the General Assembly removed the Korzen criteria from consideration when the Department created the form it uses to evaluate 15-86 applications.

Charitable Ownership vs. Charitable Use

IHA has attempted to distinguish charitable ownership from charitable use because of the way it was discussed in Provena. The Provena Court noted that the owner of the property was not the same as the entity providing services.

IHA asserts that the Korzen criteria defined by this Court apply only when considering charitable use and not when considering charitable ownership or alternatively that some of the criteria apply only to ownership and some apply only to use. However, the Korzen criteria are as equally applicable to determining if the owner of the property is a charitable entity as they are to determining if the user of the property is charitable. The criteria were summarized to define the characteristics of the charitable entity:

> It has been stated that a charity is a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, persuading them to an educational or religious conviction, for their general welfare -- or in some way reducing the burdens of government; the distinctive characteristics of a charitable institution are that it has no capital, capital stock or shareholders, earns no profits or dividends, but rather derives its funds mainly from public and private charity and holds them in trust for the objects and purposes expressed in its charter; that a charitable and beneficent institution is one which dispenses charity to all who need and apply for it, does not provide gain or profit in a private sense to any person connected with it, and does not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses… [emphasis added, internal citations omitted] Korzen 39 Ill.2d 149, 156-157, 233 N.E.2d 537, 541-542

The Korzen criteria are the hallmarks defined by this Court to evaluate the basic characteristics of the entity itself. If the entity cannot meet these criteria, it does not matter if the entity is the owner or the user.

IHA misses that point and argues that the reason 15-86 does not include the Korzen criteria is because the purpose in creating 15-86 was to create a new category of ownership and under this new category of ownership the only tests regarding charitable use are those defined in 15-86.

Provena Did Not Create Different Standards for Owners and Users

The discussion of ownership in Provena did not say there were different rules for charitable owners than for charitable users. Provena made the point that the property owner and the property user in that case were different legal entities. The Korzen criteria were considered in the context of both the owner corporation and the user corporation. The purpose of the discussion was that there was no proof that the parent corporation which owned the property used the property for primarily charitable use.

This Court's prior rulings demonstrate that there is no separation between owner and user in determining whether an entity is charitable.

> In order to qualify its property for exemption the party seeking it must prove that it is the kind of organization or institution described in the applicable exempting statute and that its property is used exclusively for purposes set forth in the act.
>
> ***
>
> Plaintiff must therefore clearly show that its organization and the use of the property came within the provisions of the statute and the constitution.

***

> Plaintiff has not sustained the burden of showing that the property is used exclusively for charitable, patriotic and civic purposes, as we interpret the statute in light of the constitution. [emphasis added] North Shore Post No. 21 v. Korzen (1967), 38 Ill.2d 231, 234-235, 230 N.E.2d 833, 835-836

Separate But Affiliated Owner and User

If the real purpose of 15-86 was merely to add an allowance for exemption under circumstances where the owner and the user of the property are separate but affiliated legal entities, the General Assembly could have added that language to 15-65(a). The General Assembly added language of this type to 15-65(c) which defines exemptions for old people's homes. The last sentence of 15-65(c) reads:

> If a not-for-profit organization leases property that is otherwise exempt under this subsection to an organization that conducts an activity on the leased premises that would entitle the lessee to an exemption from real estate taxes if the lessee were the owner of the property, then the leased property is exempt.

The existence of the final sentence in 15-65(c) allowing an old people's home to be leased from a different charitable entity shows that the General Assembly knows how to add such a qualification. They did not choose to add such an amendment to 15-65(a).

New Category of Exemption

The General Assembly did not amend the law concerning charitable property tax exemption. It created a new

category of exemption. It called it a hospital exemption. The Department and IHA argue that 15-86 was the creation of a new category of property tax exemption based on ownership for not-for-profit hospitals and hospital affiliates. The Constitution defines qualifying property owners. Hospitals and hospital affiliates are not mentioned:

> The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts… . Illinois Constitution of 1970, Article IX, Section 6

IHA also argues that the statute was creating a new category of use for not-for-profit hospitals and hospital affiliates. The Illinois Constitution regarding categories of use for property tax exemption continues:

> … and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes. Illinois Constitution of 1970, Article IX, Section 6

The General Assembly does not have the authority to create a new category of use not explicitly allowed by the Constitution.

Special Category of Exemption

IHA recognizes that 15-86 creates a new category of exemption but suggests it just sets some quantifiable standards. Actually, 15-86 sets aside the constitutional requirement that there be exclusively charitable use. The new statute sets forth a standard where if a not-for-profit hospital--and only a hospital--spends as much on charity

care and six other types of expenses as it would spend on its property tax bill then it qualifies for the new tax exemption, no matter whether the use is primarily charitable. No other entity is entitled to a property tax exemption for merely contributing to charity in an amount equal to its property tax liability. This creates a special category of property tax exemption not authorized by the Illinois Constitution.

Property Owner Responsible for Paying Property Taxes

These attempts to distinguish ownership from use lose track of what is an exemption. An exemption is the removal of an obligation. In other words, to be exempt from taxation, one must first be obliged to pay taxes. In the case of property taxes on private property, the benefit of a property tax exemption is available only to the property owner who is the only person or entity obliged to pay the taxes. Without the ownership interest in the property, there is no obligation from which to be exempted.

If the IHA argument were correct, any entity could own a property, lease it to a charitable organization for a profit, and then get an exemption as the property taxpayer merely because the tenant was charitable. The flaw in this theory is that it is the property owner who is responsible for the taxes on its property. Therefore only the owner has a potential basis for getting the exemption. In

analyzing the use of the property, it is the use by the owner that matters. In this separate-owner scenario, the owner is not using the property for a charitable purpose, it is using the property to generate income and therefore does not qualify for an exemption.

The "No Set of Circumstances" Test

The First District argues that the statute survives an examination under the "no set of circumstances" test. The Fourth District found that the statute cannot survive a "valid rule" challenge. The First District did not analyze the constitutionality of the statute using the "valid rule" analysis.

A valid rule challenge that a statute is unconstitutional on its face need not explore the facts of any specific application of the statute at issue. The wording of the statute itself--the four corners or face of the document--demonstrate its lack of constitutionality. It is the statute's defying or circumventing the Constitution that makes it unconstitutional.

The Fourth District attempted to apply the no-set-of-circumstances analysis and concluded:

> A statute granting a charitable exemption to all hospital applicants cannot be "validly applied" even to a hospital applicant that uses its property exclusively for charitable purposes, because the statute grants an exemption on the basis of an unconstitutional criterion: being a hospital applicant. A "law" purporting to grant a charitable

> exemption has to contain the criterion that article IX, section 6, requires: "use[] exclusively for *** charitable purposes." Ill. Const. 1970, art. IX, § 6.

Measured against the terms of article IX, section 6 (id.), section 15-86 is unconstitutional on its face because it purports to grant a charitable exemption on the basis of an unconstitutional criterion, i.e., providing services or subsidies equal in value to the estimated property tax liability (35 ILCS 200/15-86(c) (West 2014)), without requiring that the subject property be "used exclusively *** for charitable purposes." Carle II, para. 163-164.

The special concurrence in People v. One 1998 GMC explained the common misconception and misuse of the "no set of circumstances" phrase and provided an apt description and distinction of the valid rule facial challenge:

> Application-specific constitutional scrutiny is the characteristic feature of overbreadth methodology. But a valid rule challenge must be resolved through a different method primarily because a valid rule challenge seeks to disprove precisely that which the overbreadth challenge necessarily assumes: that the rule as written and construed is facially valid under the relevant constitutional standards. Salerno's facial challenge methodology, as employed by the Court in Salerno, directs a court faced with a valid rule facial challenge to evaluate the challenged statute against the relevant constitutional doctrine, independent of the statute's application to particular cases. A court entertaining a facial challenge under Salerno is not concerned with the details of particular statutory applications, and instead focuses on the content of the statutory terms to assess their consistency with constitutional requirements. In other words, a valid rule facial challenge is a challenge that 'puts into issue an explicit rule of law, as formulated by the legislature or the court, and involves the facts only insofar as it is necessary to establish that the rule served as a basis of decision.' Again, 'no set of circumstances' is a descriptive claim about a facially invalid rule of law, and not an application-by-application method

> of proof. [emphasis added] People v. One 1998 GMC, (Ill. 2011) 2011 IL 110236, para 93, 960 N.E.2d 1071, 1098-1099, 355 Ill.Dec. 900, 927-928

The Hypothetical Case

In support of the "hypothetical case", the First District states that Oswald has conceded that she can imagine a case where an entity could satisfy both the requirements of 15-86 and the constitutional requirements. Oswald, para. 47. That Court has the hypothetical analysis backwards. The hypothetical question should be whether there is a circumstance where an entity could satisfy the constitutional criteria, but somehow fails to satisfy the statutory criteria. That is the circumstance that would show that 15-86 has added restrictions or requirements in addition to the constitutional requirements. The General Assembly has the authority to add restrictions and that should be the target of the hypothetical test.

This Court reminded us in People v. Burns (Ill. 2015), 2015 IL 117387, Para. 26-27, that when evaluating a facial challenge to determine if a set of circumstances could exist that would not offend the Constitution, the set of circumstances should be those that would actually be affected by the statute, not hypothesized circumstances that are not actually implicated.

The U.S Supreme Court case of United States v. Salerno (U.S. 1987), 481 U.S. 739, 745, is often cited as the

origin of the no set of circumstances test. That case states that the actual test is whether a set of circumstances actually exists, not whether one can be imagined. The line so often attributed to the use of one's imagination in that case is where the Court imagines a circumstance where the law is unconstitutional, not one where it is constitutional.

This would be a welcome opportunity for this Court to rule that hypothesizing and imagining circumstances is not the standard when no other situation applies. Imagining hypothetical circumstances should not be sufficient argument to refute a constitutional challenge. This Court could require future litigants to demonstrate that an actual circumstance exists and that the circumstance would actually be implicated by the statute.

15-86 is Not Ambiguous

The First District ruled that the new statute must be read to be constitutional if possible in deference to the General Assembly. That may be true in the circumstance where the General Assembly's intent was unclear. There is no uncertainty or ambiguity in this statute.

The Court is not presented with a case of deciding between reasonable interpretations of the language and choosing one that gives the statute constitutionality. The Court cannot use interpretation to relieve this statute of

its constitutional flaw. The Court cannot rewrite this legislation to avoid the constitutional issue. Provena, 236 Ill.2d 368, 388, 925 N.E.2d 1131, 1144, 339 Ill.Dec. 10, 23. The Court cannot read something into the statute that the General Assembly did not write, no matter how good an idea the Court may think that would be. People v. Madrigal (Ill. 2011), 241 Ill.2d 463, 474-475, 948 N.E.2d 591, 598, 350 Ill.Dec. 311, 318.

> "If a statute is unconstitutional, this court is obligated to declare it invalid. [internal citation omitted] This duty cannot be evaded or neglected, no matter how desirable or beneficial the legislation may appear to be." Taylor Machine Works v. Union Pacific Railroad Company (Ill. 1997), 179 Ill.2d 367, 378, 689 N.E.2d 1057, 1064, 228 Ill.Dec. 636, 643.

The Preamble

The First District says that the language included in the preamble of Section 15-86 justifies and overrides any offensive language in the remainder of the statute. This Court disagrees:

> It is well established, however, that a declaration of policy or a preamble is not a part of the act itself and has no substantive legal force. While it may be used as a tool of statutory construction, it may not be used to create an ambiguity in an otherwise unambiguous statute. As this court has stated, "[t]o the extent that any express language in a statute contradicts a preamble, the statutory language controls." (Emphasis in original.) [internal citations omitted] People v. McCarty (Ill. 2006), 223 Ill.2d 109, 129, 858 N.E.2d 15, 23, 306 Ill.Dec. 570, 578.

Reading the preamble makes clear the intention of the General Assembly was to create a statute it did not have the authority to create.

The Constitution is Not Ambiguous

The clause of the Illinois Constitution, Article IX, Section 6, means precisely what it says. Whether a statute is or is not constitutional on its face does not depend on hypothetical facts. This statute is not ambiguous. The intent to create a new category of tax exemption is clear and obvious on its face. It is equally clear that the Constitution does not confer upon the General Assembly the authority to create a new category of exemption.

Just as the courts cannot rewrite section 15-86 of the Property Tax Code, this Court reminded us recently that courts likewise cannot rewrite article IX, section 6 of the Illinois Constitution. Kanerva v. Weems (Ill. 2014), 2014 IL 115811 para 41, 13 N.E.3d 1228, 1240, 383 Ill.Dec. 107, 119.

The Constitution Represents the Will of the People

The General Assembly exceeded its authority and the First District can not fix this constitutional defect.

> "As the ultimate sovereign, the people can, 'within constitutional restrictions imposed by the Federal constitution, delegate the powers of government to whom and as they please. They can withhold or [e]ntrust it, with such limitations as they choose.'" In re Pension Reform Litigation (Ill. 2015), 2015 IL 118585, para. 78.

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> "The powers they have reserved are shown in the prohibitions set forth in their state constitutions." Pension Reform, para. 79.

The constitutional provision does not include the power to create a new category of property tax exemption. "This is a restriction the people of Illinois had every right to impose." Pension Reform, para. 76. The General Assembly has no right to contravene the wishes of the people of the state.

This Court noted that it was a lack of trust in the General Assembly that caused the people to include restrictions on the General Assembly in their Constitution. Pension Reform, para. 82.

The General Assembly's Authority is Limited by the Constitution

> "Where rights have been conferred and limits on governmental action have been defined by the people through the constitution, the legislature cannot enact such legislation in contravention of those rights and restrictions." Pension Reform, para. 79.

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> "… all their acts, contrary or in violation of the constitutional charter, are void." Pension Reform, para. 80.

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> "The General Assembly may not legislate on a subject withdrawn from its authority by the constitution." Pension Reform, para. 85.

The problem with the General Assembly creating a new category of property tax exemption free of constitutional limitations is that it lacks the constitutional authority to do so. Creating a category of property tax exemption for a specific kind of property owner other than the State, local governments and school districts is beyond the authority of the General Assembly. Ill. Const. 1970, art. IX, sec. 6.

Likewise, creating a category of property tax exemption for a specific use of property other than that used exclusively for agricultural and horticultural societies, school, religious, cemetery or charitable uses is beyond the authority of the General Assembly. Ill. Const. 1970, art. IX, sec. 6.

Chicago Bar Association v Department of Revenue, cited by the First District and involving the Department reiterated the limits of the constitutional authority of the General Assembly stating:

> a property tax exemption created by statute cannot be broader than the provisions of the constitution, and no property except that mentioned in the exemption provisions of the constitution can be exempted by any laws passed by the legislature. Chicago Bar Association v Department of Revenue (Ill. 1994), 163. Ill.2d 290, 297, 644 N.E.2d 1166, 1170, 206 Ill. Dec. 113, 117.

The same language is found in Korzen and other cases cited by the First District.

This is not a matter of the judiciary versus the legislature. This is about the Constitution and the underlying policy of law in this state. The Constitution is established by the people of this state--they are the actual sovereign--and they have spoken. This Court explained:

> "[u]nder our institutions this sovereignty or transcendent power of government resides in or with the people. [citation omitted] Sovereignty is lodged in the people [citation omitted] and the people are the sovereign power." Pension Reform, para. 77.

The General Assembly simply cannot create an exemption that is broader than the provisions of the Constitution. It is the responsibility of the courts to enforce the will of the people when the General Assembly exceeds its authority.

> "[L]imitations written into the Constitution are restrictions on legislative power and are enforceable by the courts." Pension Reform, para. 81.

The Fourth District recognized the limits the Constitution placed upon the General Assembly. The First District did not recognize that limitation. This Court's ruling in Eden is equally applicable to the First District's Oswald ruling:

> The controlling principles, which flow from article IX of the 1970 Illinois Constitution, are quite established. Had the lower courts merely recited this fundamental authority, which they did not, the error in their judgments would have been apparent.

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> The Illinois Constitution does not grant power to the legislature, but rather restricts the legislature's power to act.
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> Thus: " 'It is the well settled rule of law in the State of Illinois that all property is subject to taxation, unless exempt by statute, in conformity with the constitutional provisions relating thereto. Taxation is the rule-tax exemption is the exception.'
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> ***
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> Charitable use is a constitutional requirement. An applicant for a charitable-use property tax exemption must "comply unequivocally with the constitutional requirement of exclusive charitable use." [emphasis in original]
>
> ***
>
> The legislature could not declare that property, which satisfied a statutory requirement, was *ipso facto* property used exclusively for a tax-exempt purpose specified in section 6 of article IX of the Illinois Constitution. It is for the courts, and not for the legislature, to determine whether property in a particular case is used for a constitutionally specified purpose. [emphasis in original] Eden, 213 Ill.2d 273, 284-290, 821 N.E.2d 240, 247-250, 290 Ill.Dec. 189, 196-199.

CONCLUSION

There is no dispute that the General Assembly has the authority to tax. What the General Assembly lacks is the authority to grant exemptions to local real property taxes except in those cases specifically enumerated in the Illinois Constitution. The General Assembly has created a statute that on its face violates Title IX, Section 6 of

the Illinois Constitution and the courts cannot fix this fundamental defect.

This Court should reverse the Opinion of the First District Appellate Court in part and find that 35 ILCS 200/15-86 is facially unconstitutional and void *ab initio*.

Respectfully submitted,

/s/ Frederic M. Grosser

Frederic M. Grosser
Registration No. 1070436
Suite 503
201 West Springfield Avenue
Champaign, Illinois 61820
(217) 352-2784
frederic.grosser@gmail.com
Attorney for Amici
Cunningham Township
City of Urbana
Cunningham Township Assessor

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 32 pages.

/s/ Frederic M. Grosser

Frederic M. Grosser
Attorney for Amici
Cunningham Township
City of Urbana
Cunningham Township Assessor

PROOF OF SERVICE AND FILING

The undersigned, an attorney, certifies that he is filing by electronic means the Motion for Leave to File Brief Amicus Curiae in Support of Constance Oswald, Plaintiff-Petitioner, by Cunningham Township, the City of Urbana and the Cunningham Township Assessor and the proposed Brief Amicus Curiae in Support of Constance Oswald, Plaintiff-Petitioner, by Cunningham Township, the City of Urbana and the Cunningham Township Assessor with the Clerk's Office of the Illinois Supreme Court on October 30, 2017, and has served the foregoing documents and this proof of service by sending copies by email on October 30, 2017, at the hour of 12:25pm , to the email addresses set forth below:

Edward T. Joyce
Kenneth Flaxman
Kathleen Callahan
The Law Offices of Edward T.
Joyce & Associates, P.C.
135 South LaSalle Street, Suite 2200
Chicago, Illinois 60603
(312) 641-2600
ejoyce@joycelaw.com
kflaxman@joycelaw.com
kcallahan@joycelaw.com

Joan M. Mannix
Joan M. Mannix, Ltd.
135 South LaSalle Street, Suite 2200
Chicago, Illinois 60603
(312) 521-5845
jmannix@joanmannixltd.com
jmannixlaw@gmail.com

Lisa Madigan, Attorney General
Carolyn E. Shapiro, Solicitor General
Carl J. Elitz, Assistant Attorney General
100 W. Randolph Street, 12th Floor
Chicago, IL 60601
civilappeals@atg.state.il.us
celitz@atg.state.il.us

Mark D. Deaton
Senior Vice President &
General Counsel
Illinois Hospital Association
1151 East Warrenville Road
P.O. Box 315
Naperville, IL 60566
mdeaton@ihastaff.org

John M. Izzo
Eugene C. Edwards
Hauser Izzo, LLC
19730 Governor's Highway, Suite 10
Flossmoor, IL 60422
jizzo@hauserizzo.com
eedwards@hauserizzo.com

Steve Pflaum
Tonya G. Newman
Collette A. Brown
Neal, Gerber & Eisenberg LLP
Two North LaSalle Street
Suite 1700
Chicago, IL 60602-3801
spflaum@nge.com
tnewman@nge.com
cbrown@nge.com

Caroline Chapman
Miriam Hallbauer
LAF
120 S. LaSalle Street
Suite 900
Chicago, IL 60603
webmaster@lafchicago.org

/s/ Frederic M. Grosser
Frederic M. Grosser

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Date October 30, 2017

/s/ Frederic M. Grosser
Frederic M. Grosser

Frederic M. Grosser
Suite 503
201 West Springfield Avenue
Champaign, Illinois 61820
Registration No. 1070436
(217) 352-2784
frederic.grosser@gmail.com