No. 122203

IN THE SUPREME COURT OF ILLINOIS

CONSTANCE OSWALD,

Plaintiff-Appellant,

v.

CONSTANCE BEARD, in Her Official Capacity as Director of the Illinois Department of Revenue, and ILLINOIS DEPARTMENT OF REVENUE,

Defendants-Appellants,

and

ILLINOIS HEALTH AND HOSPITAL ASSOCIATION,

Defendant-Intervenor-Appellee.

On review of the opinion of the Appellate Court of Illinois,
First Judicial District, No. 1-15-2691

There on appeal from the Cook County Circuit Court Circuit,
No. 2012 CH 42723, The Honorable Robert Lopez-Cepero, Judge Presiding

APPELLEE'S BRIEF OF THE ILLINOIS HEALTH AND HOSPITAL ASSOCIATION

Steven F. Pflaum
Tonya G. Newman
Collette A. Brown
Neal, Gerber & Eisenberg LLP
Two N. LaSalle St., Suite 1700
Chicago, IL 60602
312-269-8000
spflaum@nge.com
tnewman@nge.com
cbrown@nge.com

Mark D. Deaton
Senior Vice President & General Counsel
Illinois Health and Hospital Association
1151 East Warrenville Road
PO Box 315
Naperville, IL 60566
(630) 276-5466
mdeaton@team-iha.org

Counsel for Intervenor-Defendant-Appellee Illinois Health and Hospital Association

Oral Argument Requested

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NATURE OF THE ACTION AND THIS APPEAL

Plaintiff, Constance Oswald, is challenging the facial constitutionality of the charitable property tax exemption for nonprofit hospitals contained in Section 15-86 of the Property Tax Code, 35 ILCS 200/15-86 ("Section 15-86"). The circuit court rejected Oswald's argument that Section 15-86 purported to mandate issuance of exemptions regardless of compliance with constitutional requirements, and concluded that Oswald also failed to carry her burden of showing that there was no set of circumstances in which an exemption issued under Section 15-86 could be constitutional. The court therefore denied Oswald's motion for summary judgment and granted the motions for summary judgment filed by Defendants, the Illinois Department of Revenue and its Director (collectively, the "Department"), and by Intervenor-Defendant, the organization now known as the Illinois Health and Hospital Association ("IHA").

The Appellate Court affirmed. In an opinion authored by Justice McBride with Justices Howse and Rochford concurring, the Appellate Court agreed with both of the circuit court's grounds for summary judgment, ruling that Section 15-86 is facially constitutional because (1) its statutory exemption criteria supplement, but do not supplant, the constitutional charitable use requirement, and (2) the plaintiff cannot carry her burden of demonstrating that there is no set of circumstances in which an exemption

under Section 15-86 could comply with the Constitution. *Oswald v. Hamer*, 2016 IL App (1st) 152691.

No questions are raised on the pleadings other than those pertaining to the parties' cross-motions for summary judgment.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The judgment in favor of the defendants should be affirmed if the answer to either or both of the following questions is "yes":

1. Whether the courts below correctly determined that Section 15-86 is facially constitutional because it should be interpreted to create statutory exemption criteria that supplement, but do not supplant, the charitable use requirement contained in article IX, section 6 of the Illinois Constitution?
2. Whether the courts below correctly determined that Oswald is unable to carry the burden, imposed on those attacking the facial constitutionality of a statute, of establishing that there is no set of circumstances in which an exemption issued under Section 15-86 would comport with article IX, section 6 of the Illinois Constitution?

STATEMENT OF FACTS

Because this case concerns a facial constitutional challenge to a statute, it does not present any facts regarding the application of the statute to a given set of circumstances. The case does not involve a particular

hospital. It does not involve a specific property tax exemption application. It does not involve an exemption decision by the Department of Revenue. The most important facts relate to the history of property tax exemptions for not-for-profit hospitals in our state, a history that includes a 2010 decision by this Court that was the express impetus for the statute now being challenged.

The background discussion that follows therefore begins by tracing the history of property tax exemptions for not-for-profit hospitals in Illinois, culminating with this Court's decision in *Provena Covenant Med. Ctr. v. Dep't of Revenue,* 236 Ill.2d 368 (2010) ("*Provena*") and the ensuing enactment of Section 15-86. The narrative concludes with a summary of the nature and procedural history of this litigation.

I. ORIGINS OF SECTION 15-86: FROM *SISTERS* TO *PROVENA*

Article IX, section 6 of the 1970 Illinois Constitution authorizes the General Assembly to exempt from taxation various kinds of property, including "property used exclusively for … charitable purposes." Derived from a similar provision in the 1870 Constitution, this provision contains what has become known as the "charitable use requirement." *See also* Ill. Const. 1870 art. IX, § 3 (property "used exclusively for … charitable purposes, may be exempted from taxation").

The General Assembly initially exercised its authority to create a charitable property tax exemption by enacting the statute now found in Section 15-65 of the Property Tax Code, 35 ILCS 200/15-65. Section 15-65

includes the constitutionally mandated charitable use requirement, but also requires that the property for which exemption is sought be owned by an "institution[] of public charity" or certain other types of organizations. This is known as the "charitable ownership requirement." Unlike the requirement of charitable use, the charitable ownership requirement is not mandated by the Constitution and can be altered or even eliminated by the General Assembly. *See Provena,* 236 Ill.2d at 390.

The ability of not-for-profit hospitals to qualify for charitable property tax exemptions under the Illinois Constitution was established by this Court more than a century ago in *Sisters of Third Order of St. Francis v. Bd. of Review,* 231 Ill. 317 (1907). There, the Court held that a not-for-profit hospital was entitled to a charitable property tax exemption under the predecessor to Section 15-65 even though only five percent of its patients were "charity patients" who received free care. *Id.* at 320-22. For purposes of the charitable use requirement, providing care to all who need and apply for it, regardless of ability to pay, matters more than a comparison between the number of charity patients and those who pay for care. Acknowledging "the great disparity between the number of charity patients and those who pay for the care and attention they receive at the institution," *id.* at 322, the Court nevertheless rejected the taxing authority's argument that providing charity to only five percent of the hospital's patients did not satisfy the Constitution's exclusive charitable use requirement:

> "This objection seems to us without merit, so long as charity was dispensed to all those who needed it and who applied therefor, and so long as no private gain or profit came to any person connected with the institution, and so long as it does not appear that any obstacle, of any character, was by the corporation placed in the way of those who might need charity of the kind dispensed by this institution, calculated to prevent such persons making application to or obtaining admission to the hospital." *Id.*.[1]

Following this Court's rejection of a quantitative analysis of the constitutional charitable use requirement based on the absolute or relative number of patients who receive free or discounted care, Illinois not-for-profit hospitals routinely received charitable property tax exemptions as long as they provided care to all, regardless of ability to pay, and satisfied the related conditions articulated in *Sisters of Third Order*. *See, e.g.*, *People ex rel. Cannon v. Southern Ill. Hospital Corp.*, 404 Ill. 66 (1949) (upholding exemption for not-for-profit hospital); *Streeterville Corp. v. Dep't of Revenue*, 186 Ill.2d 534 (1999) (parking garage was exempt from taxation to the extent it was used by employees and patients of Northwestern Memorial Hospital).

Beginning around 2002, however, some county boards of review and, ultimately, the Illinois Department of Revenue, the agency responsible for making non-homestead property tax exemption determinations, balked at

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[1] *Sisters of the Third Order* reveals that the assertion by certain *amici* that not-for-profit hospitals "had humble beginnings as institutions that exclusively served the indigent" is pure myth, at least as applied to their entitlement to property tax exemptions in our State. *Amicus Curiae* Brief of Illinois Association of School Boards, *et al.* (collectively, the "School Associations") at 15.

granting charitable exemptions to some not-for-profit hospitals that were alleged to provide inadequate amounts of free or discounted care ("charity care"). But the absence of any standards for the amount of charity care or other types of charitable activities needed to qualify for property tax exemption created uncertainty and confusion. 2 C296, ¶ 2.[2] One of the first such hospital property tax exemption controversies, involving the Urbana hospital then known as Provena Covenant Medical Center, ultimately reached this Court. *Provena*, *supra*, 236 Ill.2d 368 (2010).

The decision in *Provena* failed to resolve whether the charitable use requirement includes a quantitative minimum of charity care. Only five Justices participated. All agreed that the hospital had not demonstrated that it satisfied the statutory charitable ownership requirement, and the Department's denial of the hospital's exemption application was affirmed solely on that basis. *Id.* at 393, 411.

A majority of the Justices were unable to agree on whether the hospital had satisfied the constitutional charitable use requirement. In *dicta,* three Justices concluded that the charitable use requirement includes a quantitative minimum. Although Justice Karmeier's opinion for the three-Justice plurality did not define how much charitable use is required—stating only that the hospital's charitable activities were insufficient because they were "*de minimis*"—it stressed that the amount of aid provided under the

[2] Citations to the common law record appear as "[Volume no.] C[page no.]."

hospital's charity care program was less than the amount of tax benefits the hospital stood to gain from an exemption. *Id*. at 381, 397.

The other two Justices asserted that construing the charitable use requirement to include a quantitative minimum was both unprecedented and unwise. Writing for herself and Justice Freeman, Justice Burke opined that, "[b]y imposing a quantum of care requirement and monetary threshold, the plurality is injecting itself into matters best left to the legislature.... Setting a monetary or quantum standard is a complex decision which should be left to our legislature, should it so choose." *Id.* at 412, 415.

II. THE AFTERMATH OF *PROVENA*

As noted by the General Assembly in findings included in Section 15-86, in the aftermath of *Provena* there was "considerable uncertainty surrounding the test for charitable property tax exemption, especially regarding the application of a quantitative or monetary threshold." 35 ILCS 200/15-86(a)(1). Matters reached a head in 2011 after the Department denied the exemption applications of three not-for-profit hospitals. *See id*. With applications from more than 20 additional hospitals pending before the Department, Governor Quinn attempted to facilitate a legislative solution to the growing controversy. 2 C298, ¶ 4; *see also* 2 C309-10. The Governor directed his staff and the Department to work with key stakeholders, including legislators, the Attorney General's Office, and the IHA, to develop legislation to address the situation. Other interested parties soon joined the

discussions, including representatives of the Department of Healthcare & Family Services, Cook County, the City of Chicago, the Illinois Municipal League, and a patients' advocacy organization known as the Fair Care Coalition. The Governor set a March 1, 2012, deadline for the submission of legislation. 2 C298, ¶ 4; 2 C310.

III. THE LEGISLATIVE SOLUTION AND SECTION 15-86

Ultimately, the General Assembly passed and the Governor signed a landmark legislative package intended to improve access to health care by low-income and underserved persons. 2 C298, ¶ 5. Public Act 97-688 was one aspect of "a comprehensive combination of related legislation that addresses hospital property tax exemption, significantly increases access to free health care for indigent persons, and strengthens the Medical Assistance [Medicaid] program." 35 ILCS 200/15-86(a)(5). *See also* P.A. 97-690, § 10 (amending Hospital Uninsured Patient Discount Act to require hospitals to provide low-income patients with free care for all medically necessary services exceeding $300); P.A. 97-688, § 5-60 at p. 147 (enacting 305 ILCS 5/5A-2(b-5) to impose assessment on hospitals generating $289.9 million to help fund Medicaid program).

The provisions regarding property tax exemptions for not-for-profit hospitals contained in P.A. 97-688 answered the two most pressing questions that *Provena* had left unresolved—namely, should hospital charitable exemptions be based on a quantitative analysis, and if so, how much in the

way of charitable activities and services should be required? Not only did the General Assembly decide to impose a quantitative minimum, but it established one that was more stringent than even the *Provena* plurality had concluded was mandated by the Constitution. Section 15-86 conditions a hospital's entitlement to a property tax exemption on proof that the value of its charity care and other services that address the health care needs of low-income or underserved individuals, or that relieve the burden of government with regard to health care services to low-income individuals, equals or exceeds the value of the hospital's property tax exemptions. 35 ILCS 200/15-86(c). Prior to passage of P.A. 97-688, "Illinois law ha[d] never required that there be a direct, dollar-for-dollar correlation between the value of the tax exemption and the value of the goods or services provided by the charity…." *See Provena*, 236 Ill.2d at 395 (plurality opinion).

Essentially, in enacting P.A. 97-688, the General Assembly cautiously exercised its prerogative, as noted in Justice Burke's opinion in *Provena*, to establish a monetary threshold for hospitals to receive property tax exemptions. The General Assembly explained that it did so by replacing the statutory charitable ownership requirement contained in Section 15-65 with an objective and quantifiable standard:

> "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'. It is also the intent of the General Assembly to establish quantifiable

> standards for the issuance of charitable exemptions for such property." 35 ILCS 200/15-86(a)(5).

The heart of the provisions in P.A. 97-688 addressing property tax is contained in its addition of Section 15-86 to the Property Tax Code. Section 15-86(e) enumerates seven categories of activities that may be considered in measuring the total value of a hospital's charitable activities against the total value of its exemptions. For example, Section 15-86(e)(1) allows consideration of charity care, which is defined as the unreimbursed cost of free or discounted services provided to low-income individuals pursuant to a hospital's financial assistance policy. All seven categories relate to "[s]ervices that address the health care needs of low-income or underserved individuals or relieve the burden of government with regard to health care services." 35 ILCS 200/15-86(e).[3]

A hospital is not required to rely on all seven categories. To be entitled to an exemption pursuant to Section 15-86, a hospital must show that the

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[3] Additional charitable activities that may be considered in determining a hospital's eligibility for a property tax exemption include: (2) other unreimbursed costs of health services provided by the hospital to low-income and underserved individuals; (3) hospitals' cash or in-kind subsidy of State or local governmental activities or programs related to health care for low-income or underserved individuals; (4) support for Medicaid and similar State health care programs for low-income individuals; (5) the unreimbursed cost of treating individuals who are eligible under both Medicaid and Medicare; (6) other unreimbursed costs attributable to providing, paying for, or subsidizing goods, activities, or services that relieve the burden of government related to health care for low-income individuals; and (7) any other hospital activity that the Department of Revenue determines relieves the burden of government or addresses the health of low-income or underserved individuals. 35 ILCS 200/15-86(e)(2)-(7).

total value of any or all of the various categories of activities contained in Section 15-86(e) equals or exceeds the total value of the hospital's exemptions. Indeed, a hospital can satisfy Section 15-86 by demonstrating that the value of its activities in just one category, such as charity care, is at least as great as the total value of its property tax exemptions.

IV. HISTORY OF THIS LITIGATION

A. Circuit Court Proceedings

Governor Quinn signed P.A. 97-688 into law on June 14, 2012. Later that year, Constance Oswald filed this lawsuit against the Department and its then-Director, alleging that Section 15-86 violates the charitable use requirement contained in article IX, section 6 of the Constitution. 1 C5, ¶ 8. She sought a declaration that Section 15-86 is unconstitutional on its face, an injunction prohibiting the Department from granting further hospital exemptions under Section 15-86, and a mandatory injunction requiring the collection of taxes from entities whose exemptions had already been approved. *Id*. at 1 C5.

The IHA was granted leave to intervene. 1 C182. After the circuit court denied the motions to dismiss filed by the Department and the IHA, the parties agreed that there were no genuine issues of material fact bearing on the constitutionality of Section 15-86, and filed cross-motions for summary judgment. 1 C183; 1 C244; 1 C265; 1 C270.

The crux of Oswald's argument on summary judgment was that Section 15-86 is facially unconstitutional "because the language that the legislature used makes the issuance of exemptions by the Department … non-discretionary and premised solely upon an applicant's 'estimated property tax liability.'" 1 C244. According to Oswald, Section 15-86 "thus requires exemptions to be issued without regard" to whether the property at issue is exclusively used for charitable purposes. *Id*.

The circuit court rejected Oswald's argument, denied her motion for summary judgment, and granted the summary judgment motions filed by the Department and IHA. 3 C505. The circuit court reasoned that the plain meaning of the General Assembly's findings set forth in the statute demonstrate that "the legislature did not enact Section 15-86 to establish what charity is or should be, but to determine how much of the claimant's charitable actions are enough to grant her a tax exemption." 2 C472. Rejecting Oswald's argument that the statute allowed exemptions regardless of whether hospital property was used exclusively for charitable purposes, the circuit court held that the Department must still evaluate whether the hospital's application for an exemption under Section 15-86 was consistent with the requirements of the Illinois Constitution. 2 C469; *see also* 2 C473-74 (a claimant seeking a charitable use property tax exemption must establish charitable use of the property); 2 C476 (Section 15-86 does not "disregard the charitable use requirement").

The court expressly rejected Oswald's argument that the use of the word "shall" in Section 15-86(c) requires the issuance of an exemption whenever the value of the hospital applicant's services and activities listed in subsection (e) meet or exceed the hospital's property tax liability. Section 15-86(c), states:

> "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 …" 35 ILCS 200/15-86(c).

The court reasoned that comparing the value of the charitable services and activities listed in subsection (e) to the amount of the hospital's property tax liability is only the first step in the analysis for issuance of an exemption under Section 15-86. 2 C473. In particular, the hospital applicant still must establish that the property is used for charitable purposes. 2 C473-74.

The circuit court went on to embrace a second ground for upholding the facial constitutionality of Section 15-86, namely, Oswald's inability to satisfy the no-set-of-circumstances test applicable to facial constitutional challenges. Oswald tried to turn that test on its head by suggesting hypothetical situations where Section 15-86 would allegedly be unconstitutional. The court was not persuaded, citing established case law for the proposition that "the mere fact that a statute *might* be unconstitutional 'under some conceivable set of circumstances' is not enough to declare the whole statute

void." 2 C475 (emphasis in original) (citing *Davis v. Brown*, 221 Ill.2d 435, 442 (2006)).

B. Appellate Court Proceedings

The Appellate Court agreed with both grounds articulated by the circuit court for upholding the facial constitutionality of Section 15-86. With respect to the heart of Oswald's argument—namely, that Section 15-86 purports to require issuance of exemptions regardless of compliance with the constitutional charitable use requirement because Section 15-86(c) states that a hospital applicant "shall be issued a charitable exemption" if specified criteria are satisfied—the Appellate Court "reject[ed] plaintiff's interpretation that the legislature intended the word 'shall' to be mandatory rather than directory in nature in Section 15-86(c)." *Oswald*, 2016 IL App (1st) 152691, ¶ 22. Applying this Court's jurisprudence for determining whether a particular statutory provision is mandatory or directory, the Appellate Court concluded that Section 15-86 was merely directory, meaning that a Department of Revenue decision to deny an exemption application would be legally effective even if the statutory exemption criteria in Section 15-86 had been satisfied. *Id.*, ¶¶ 23, 26.

The Appellate Court noted that its interpretation of Section 15-86 was consistent with prior cases interpreting property tax exemption statutes to supplement, but not supplant, the applicable constitutional requirements. The court stressed that this "Court has consistently held that statutes

detailing types of property subject to exemption are descriptive and illustrative of property that might qualify under the 'exclusive' requirement of article IX, section 6 of the constitution." *Id.*, ¶ 27.

The Appellate Court also agreed with the circuit court's conclusion that Section 15-86 was facially constitutional because Oswald was unable to meet her burden of demonstrating that there is no set of circumstances in which Section 15-86 could be constitutionally applied. Consequently, Section 15-86 would be facially constitutional "even if we agreed with plaintiff's interpretation that section 15-86 required the issuance of a charitable exemption based only on the satisfaction of the statute…." *Id.*, ¶ 47.

Oswald filed a petition for leave to appeal (PLA) after her petition for rehearing was denied by the Appellate Court. By granting the PLA, this Court appears poised to decide the issue regarding the facial constitutionality of Section 15-86 that had recently been raised in *Carle Foundation v. Cunningham Township*, 2017 IL 120427. In that instance, however, the Court did not reach the merits because there was no jurisdiction over the defendants' interlocutory appeal from a trial court ruling regarding the applicability of Section 15-86 to the properties and tax years at issue in that lawsuit. *Id.*, ¶ 36. Unlike *Carle Foundation*, this appeal does not present any jurisdictional or other issues that would need to be addressed or overcome before deciding the facial constitutionality of Section 15-86.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

A. The Duty to Construe Statutes to Uphold Their Constitutionality When Reasonably Possible

The legal standards governing this appeal erect steep hurdles to Oswald's challenge to the constitutionality of Section 15-86. These hurdles are not attributable to any deference to the trial court, whose decision on the dispositive legal issue is subject to *de novo* review. *See*, *e.g.*, *Walker v. McGuire*, 2015 IL 117138, ¶ 12 ("The constitutionality of a statute is a question of law that we review de novo").

Rather, the deference here is to the legislature. This Court "has frequently emphasized … [there is] a strong presumption that legislative enactments are constitutional." *Sayles v. Thompson*, 99 Ill.2d 122, 124-25 (1983) (citations omitted). Courts have a "duty to construe acts of the legislature so as to affirm their constitutionality and validity, if it can be reasonably done…." *Id.*; *Irwin Indus. Tool Co. v. Ill. Dep't of Revenue*, 238 Ill.2d 332, 340 (2010) (courts "must construe a statute so as to uphold its constitutionality if it is reasonably possible to do so"). The burden of trying to prove that a statute is unconstitutional, against the headwinds generated by this strong presumption and judicial duty pressing in the direction of constitutionality, rests squarely upon Oswald as the party challenging the statute. *See, e.g.*, *In re M.A.*, 2015 IL 118049, ¶ 21 (reciting oft-stated rule

that "[t]he party challenging the constitutionality of a statute has the burden of proving that the statute is unconstitutional").

This Court has repeatedly reaffirmed these basic tenets in upholding the constitutionality of property tax exemption statutes. *See, e.g., Chicago Bar Ass'n v. Dep't of Revenue*, 163 Ill.2d 290, 298 (1994) (circuit court erred by construing statute to authorize issuance of exemption without satisfaction of constitutional requirements); *Methodist Old Peoples Home v. Korzen*, 39 Ill.2d 149, 156 (1968) (statutory exemption for old peoples homes was constitutional because "the legislature did not intend to deviate from the constitutional requirement that to be exempt from taxation the property of an old peoples home must be used exclusively for charitable purposes").

B. The "No-Set-of-Circumstances" Test Applicable to Challenges to the Facial Constitutionality of Statutes

Oswald's burden is especially challenging because she is attacking the constitutionality of Section 15-86 on its face. *See* 1 C5. While an "as-applied" constitutional challenge seeks to invalidate a statute only as to a particular application, "a finding that a statute is facially unconstitutional voids the statute entirely and in all applications." *In re M.A.*, 2015 IL 118049, ¶ 40. Small wonder, then, that '[f]acial challenges to legislation are generally disfavored." *City of Chicago v. Pooh Bah Enters., Inc.*, 224 Ill.2d 390, 442 (2006), *cert. denied*, 552 U.S. 941 (2007). The reasons for courts' reluctance to find statutes facially unconstitutional relate to fundamental principles of constitutional jurisprudence and judicial restraint:

> "[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.' … It is axiomatic that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.' … Accordingly, the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329, 126 S. Ct. 961, 967-68 (2006) (citations omitted) (vacating judgment of facial invalidity).

The disfavored nature of facial challenges is expressed in an exacting legal standard that makes a "facial challenge to the constitutionality of a legislative enactment … the most difficult challenge to mount successfully…." *Napleton v. Village of Hinsdale,* 229 Ill.2d 296, 305 (2008). Under that standard:

> "[A]n enactment is facially invalid only if no set of circumstances exist under which it would be valid…. The fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity." *Id.* at 306 (citations omitted) (rejecting facial challenge to zoning ordinance).

See also In re M.T., 221 Ill.2d 517, 533 (2006) ("If any situation may be posited where the statute could be validly applied, the facial challenge must fail").

Applying these governing legal principles to Oswald's challenge to Section 15-86, the following discussion demonstrates that there are two

separate and independent grounds for affirming the decisions of the courts below that Section 15-86 is facially constitutional:

- First, contrary to Oswald's argument that Section 15-86 purports to mandate issuance of exemptions regardless of compliance with the Constitution, Section 15-86 should be construed to authorize issuance of exemptions only if the constitutional charitable use requirement is satisfied; and
- Second, even if Section 15-86 were construed to mandate issuance of exemptions regardless of compliance with the Constitution, it would still be *facially* constitutional because it is undisputed that there are circumstances in which an exemption under Section 15-86 would comport with the constitutional charitable use requirement by involving property used exclusively for charitable purposes.

Each of these grounds for affirmance leaves for another day, and another lawsuit, a determination whether the issuance of a exemption under Section 15-86 to a particular hospital for a particular parcel of property is constitutional as applied to those facts. In the meantime, the facial constitutionality of Section 15-86 should be upheld.

II. SECTION 15-86 IS FACIALLY CONSTITUTIONAL BECAUSE IT SHOULD BE INTERPRETED TO AUTHORIZE EXEMPTIONS ONLY IF BOTH ITS STATUTORY CRITERIA AND THE CONSTITUTIONAL CHARITABLE USE REQUIREMENT ARE SATISFIED

Oswald's challenge to the facial constitutionality of Section 15-86 rests on her assertion that the General Assembly, in defiance of more than a century of case law emphasizing that statutory property tax exemption criteria are subservient to constitutional requirements, mandated that exemptions be issued under Section 15-86 regardless of whether the constitutional charitable use requirement is satisfied. Despite accusing the General Assembly of flouting the Constitution, Oswald is unable to point to any expression of legislative intent to override the Constitution's charitable use requirement. In truth, Section 15-86 states just the opposite. A legislative finding expressly states the General Assembly's intent to simply establish a new statutory charitable ownership requirement—not to intrude on the constitutional charitable use requirement.

Oswald pins her entire argument—and her entire appeal—on one word: "shall." By asserting that the language in Section 15-86 stating that an exemption "shall" be issued under certain circumstances purports to impose a requirement to issue exemptions regardless of constitutional requirements, Oswald ignores this Court's admonition that "[i]t misses the point to stress that the legislature used 'shall' and that 'shall' indicates intent to impose a mandatory obligation." *People v. Robinson*, 217 Ill.2d 43, 53 (2005). Oswald also disregards decades of precedent teaching that statutory

exemptions are interpreted to be merely "illustrative and descriptive" of circumstances where exemptions may be issued, provided that the applicable constitutional requirements are also satisfied.

It is no coincidence that Oswald is unable to cite a single case holding a property tax exemption statute to be facially unconstitutional. The position she has taken in this litigation is literally unprecedented. The courts below properly applied well-established principles in interpreting Section 15-86 to supplement the constitutional charitable use requirement. The judgment in favor of the defendants should be affirmed.

A. The General Assembly Expressly Intended Section 15-86 to Create a New Statutory Category of Charitable Ownership, Not to Supplant the Constitutional Charitable Use Requirement

Section 15-86 includes legislative findings that provide the context and intent relating to the enactment of that statute. The findings begin by stating that the legislation was enacted in response to this Court's decision in *Provena*. 35 ILCS 200/15-86(a)(1), (2). *Provena* addressed a hospital's entitlement to exemptions under Section 15-65 of the Property Tax Code, which as previously noted adds a statutory charitable ownership requirement to the Constitution's charitable use requirement. *See* 35 ILCS 200/15-65(a)(1) (authorizing exemptions for property owned by "[i]nstitutions of public charity"). Against that backdrop, the General Assembly expressed its intent to simply create a new statutory ownership requirement for not-for-profit hospitals, replacing that contained in Section 15-65, when it declared

> "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'." 35 ILCS 200/15-86(a)(5) (emphasis added).

Oswald argues that language in this same finding stating that "[i]t is also the intent of the General Assembly to establish quantifiable standards for the issuance of charitable exemptions" indicates that the General Assembly intended to supplant the constitutional charitable use requirement. (Oswald Br. at 11 n.1.) This argument ignores that the finding expressly states that those quantifiable standards relate to the creation of "a new category of ownership" to replace "the existing ownership category of 'institutions of public charity.'" 35 ILCS 200/15-86(a)(5). Charitable ownership is not a constitutional requirement; it constitutes a restriction in addition to the constitutional charitable use requirement and, hence, can be modified or even eliminated by the General Assembly, should it so choose. *See Provena***,** 236 Ill.2d at 390.

The legislative finding contained in Section 15-86(a)(5) went on to acknowledge that this new statutory category of ownership would not override the constitutional charitable use requirement. Employing language that this Court had used to explain that it was the province of the courts to determine whether uses of property that satisfied statutory exemption criteria also satisfied the constitutional charitable use requirement, the

General Assembly alluded to the following passage from *Eden Retirement Center v. Dep't of Revenue*, 213 Ill.2d 273 (2004):

> "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." *Id.* at 290 (emphasis in original).

The General Assembly received this message loud and clear. It borrowed this language from *Eden* in acknowledging that satisfaction of the statutory criteria in Section 15-86 did not *ipso facto* establish satisfaction of the constitutional charitable use requirement for exemptions, which determination must be made on a case-by-case basis:

> "It is not the intent of the General Assembly to declare any property exempt *ipso facto*, but rather to establish criteria to be applied to the facts on a case-by-case basis." 35 ILCS 200/15-86(a)(5).

In short, the General Assembly knew exactly what it was doing when it enacted Section 15-86. It was well aware that exercising its prerogative to establish statutory criteria for exemption would not, and could not, relieve hospitals of the need to satisfy the constitutional charitable use requirement. Because the courts below properly construed Section 15-86 to supplement, and not supplant, the provisions of article IX, section 6 of the Constitution, the decisions upholding the constitutionality of Section 15-86 should be affirmed. *See Oswald*, 2016 IL App (1st) 152691, ¶ 43 (the legislative finding

contained in Section 15-86(a)(5) evinced the legislature's awareness of *Eden* and its intent "for the requirements of section 15-86 to be considered on a case-by-case basis, along with the constitutional requirements").

B. Statutory Exemption Criteria Like Those in Section 15-86 Are Interpreted to Be Merely "Illustrative and Descriptive" of Circumstances Where Exemptions Are Warranted, But Issuance of Exemptions Also Requires Satisfaction of the Constitutional Criteria

Statutory criteria for property tax exemptions are considered "illustrative and descriptive" of circumstances where exemptions are warranted, provided that the applicable constitutional requirements are satisfied. This is true even if, unlike Section 15-86, the General Assembly has not expressly acknowledged that its statutory exemption criteria are supplemented by constitutional requirements. *See, e.g., Chicago Bar Ass'n v. Dep't of Revenue*, 163 Ill.2d 290 (1994); *School of Domestic Arts and Science v. Carr*, 322 Ill. 562 (1926).

This Court's decision in *Chicago Bar Ass'n* illustrates this basic principle of property tax law. That case involved a property tax exemption sought by the Chicago Bar Association ("CBA") for its headquarters building. The applicable statute appeared to unequivocally entitle CBA to an exemption because it was adjacent to John Marshall Law School:

> "Also exempt is … [property] on or adjacent to … the grounds of a school, if that property is used by an academic, research or professional society, institute, association or organization which serves the advancement of learning in a field or fields of study taught by the school and which property is

> not used with a view to profit." Ill. Rev. Stat. 1991 ch. 120, para 500.1 (now codified at 35 ILCS 200/15-35(d)).

Like Section 15-86, the exemption statute involved in *Chicago Bar Ass'n* appeared at first glance to require issuance of an exemption if the criteria contained in the statute were satisfied. And like Section 15-86, the pertinent portion of that statute did not mention the constitutional requirements for such exemptions. These considerations apparently led the circuit court to rule that the statute was facially unconstitutional because, as interpreted by the court, it allowed exemptions in circumstances not permitted by the Constitution. *See* 163 Ill.2d at 298.

This Court disagreed. Referencing governing legal principles that also apply to Oswald's challenge to Section 15-86, the Court stressed that, "when evaluating the constitutionality of a legislative enactment, a court must presume that the statute is constitutional[,] … construe acts of the legislature so as to affirm their constitutionality, and [resolve] all reasonable doubts … in favor of upholding a statute's validity." *Id.* The Court construed the statutory criteria to be merely "illustrative and descriptive" of circumstances in which exemptions were warranted. Even though the statute did not mention the constitutional requirements with respect to adjacent property, the Court interpreted the statute to require satisfaction of those requirements:

> "[W]e do not believe that the "adjacent property" clause in [the statute] should be construed as eliminating the [constitutional requirement]. …

> [W]e believe that the "adjacent property" clause in [the statute] merely provides a description or illustration of a type of property that may be entitled to exemption under article IX, section 6. It in no way modifies the limitations imposed by our constitution. The exclusive-school-use requirement of article IX, section 6, therefore still pertains." *Id.* at 298, 299-300.[4]

More than 60 years before its decision in *Chicago Bar Ass'n*, this Court employed similar reasoning in upholding the constitutionality of a statute that exempted from taxation "all property of schools … not leased by such schools or otherwise used with a view to profit." *School of Domestic Arts and Science v. Carr*, 322 Ill. 562, 570 (1926) (quoting paragraph 1 of section 2 of the Revenue Act of 1909). Even though the statutory provision failed to state the constitutional exclusive use requirement or contain express "signifiers of descriptive or illustrative intent" (Oswald Br. at 12), the Court upheld the constitutionality of the statute by construing it "in connection with [that] constitutional provision":

> "Where the property is used exclusively for school purposes this court has considered the exemption statute pertaining to schools in connection with the constitutional provision thereon and has regarded the statute as valid.… The facts presented in this record show the property was used exclusively for school purposes and should be held exempt from taxation under the first paragraph of section 2 of the Revenue act." *Id.* at 570-71 (citations omitted).

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[4] *Chicago Bar Association* also reveals that, contrary to Oswald's assertion, an exemption statute need not contain "signifiers of descriptive or illustrative intent, such as 'including," to be construed to merely provide a description or illustration of circumstances where exemptions are authorized, subject to satisfaction of constitutional requirements. (Oswald Br. at 12.)

See also MacMurray College v. Wright, 38 Ill.2d 272, 275-77 (1967) (statute exempting school housing facilities was constitutional because it was merely "descriptive[] and illustrative[]," and not intended to be a declaration that "school housing facilities, simply because they are such, are property used exclusively for school purposes" and therefore exempt).

Similarly, this Court should construe Section 15-86 to provide a description or illustration of properties owned by not-for-profit hospitals or their affiliates that may be entitled to exemption, but that issuance of an exemption still requires satisfaction of the constitutional requirement that the property is used exclusively for charitable purposes. Even *amici* who submitted briefs in support of Oswald have conceded this point. *See* Brief *Amicus Curiae* of Champaign County and the Champaign County Treasurer ("Champaign Br.") at 15 (First District's conclusion that "Section 15-86 requires a taxpayer to meet both the statutory and constitutional criteria for exemption … is consistent with long-standing rules of construction applied to statutes defining property tax exemptions"). Similarly, although their brief in this Court ducks this dispositive issue, the School Associations' *amicus* brief in the Appellate Court acknowledged that Section 15-86 should not be viewed "as supplanting … [constitutional requirements], but as merely creating additional requirements nonprofit hospitals must meet to qualify for a charitable exemption." School Associations' App. Ct. Br. at 14. As so construed, Section 15-86, like the exemption statutes at issue in *Chicago Bar*

Ass'n, *School of Domestic Arts and Science,* and *MacMurray College*, is facially constitutional. *Accord, Presbyterian Theological Seminary v. People*, 101 Ill. 578, 581-82 (1882) (exemption statute that did not contain the constitutional exclusive use requirement "must be read in connection with the section of the constitution on the same subject"; it "must therefore be understood the legislature only intended to exempt such property of institutions of learning as 'may be used exclusively' for the objects and purposes of such institutions").

C. The Use of the Word "Shall" in Section 15-86 Does Not Mandate Issuance of an Exemption Without Regard to the Constitution's Charitable Use Requirement

The principle that the legislature's lawmaking authority is constrained by constitutional requirements is nearly as old as our nation. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Equally venerable is the maxim that the fundamental goal of statutory interpretation is to effectuate legislative intent. *E.g., People ex rel. Krebs v. Jacksonville & S. L. R. Co.*, 265 Ill. 550, 555 (1914) ("In construing statutes the cardinal rule is to give effect to the intention of the legislature in adopting the act").

Given these fundamental foundational principles, one could dismiss, as facetious, any suggestion that the General Assembly *deliberately* intended to require exemptions to be issued under Section 15-86 regardless of consistency with applicable constitutional requirements. Even Oswald stops short of

expressly making that accusation. But if that wasn't the intent, then why should Section 15-86 be interpreted to have that meaning?

Oswald provides no answer to this question because she has none. Instead, she relies on a superficial and wooden interpretation of Section 15-86 that disregards the manner in which this Court has instructed that statutes containing the word "shall" are to be construed. As explained in *People v. Robinson*, 217 Ill.2d 43 (2005), and its progeny, the proper analysis examines two distinct questions: first, whether the statutory provision is mandatory or permissive; and second, whether it is mandatory or directory. For Section 15-86 to be construed to require issuance of exemptions regardless of compliance with constitutional requirements, Oswald would have to establish that the statute is "mandatory" under both the mandatory/permissive and the mandatory/directory dichotomies. The following discussion demonstrates that Oswald is unable to satisfy either of these two prerequisites to the interpretation that she urges.

1. The issuance of exemptions under Section 15-86 is permissive rather than mandatory

For purposes of the threshold mandatory/permissive determination, "mandatory" refers to an obligatory duty which a governmental entity is required to perform, while "permissive" refers to a discretionary power which a governmental entity may choose whether to exercise. *People v. Delvillar*, 235 Ill.2d 507, 514 (2009). A statute's use of "shall" generally indicates

mandatory intent, but that is not invariably the case. *Robinson*, 217 Ill.2d at 53.

This Court has long held that "[t]he word 'shall' appearing [in a statute] does not have an exclusive, fixed or inviolate connotation, and has been construed as meaning both 'must' and 'may,' depending upon the legislative intent." *In re Armour*, 59 Ill.2d 102, 104 (1974), citing *Cooper v. Hinrichs*, 10 Ill.2d 269, 272 (1957). *Accord, In re Rosewell,* 97 Ill.2d 434, 440-41 (1983) (rejecting mandatory construction of "shall").

Here, legislative findings express the General Assembly's intent to create a new category of ownership for charitable property tax exemptions that supplements the constitutional charitable use requirement. 35 ILCS 200/15-86(a)(5). That finding buttresses the presumption that the legislature acted with knowledge of the prevailing case law. *Burrell v. Southern Truss*, 176 Ill.2d 171, 176 (1997). Extending back more than 130 years, that precedent consistently interpreted exemption statutes to be merely illustrative and descriptive of the circumstances in which exemptions may be granted, but subject to applicable constitutional requirements. *See* Section II(B), above.

Consistent with this longstanding precedent and legislative intent, the use of "shall" in Section 15-86 should be construed to have a permissive meaning to allow consideration of the constitutional use requirement before an exemption is issued. As conceded by the School Associations in the *amici*

curiae brief that they filed in support of Oswald in the Appellate Court, "[w]hen it enacted Section 15-86, the Legislature is presumed to have been aware that the Supreme Court's decisions … require that applicants for a charitable exemption meet both the constitutional test as well as any statutory criteria it created." (School Associations App. Ct. Br. at 13.) But we need not rely on a presumption to know that the General Assembly intended Section 15-86 to be interpreted to contain merely a description or illustration of circumstances qualifying for exemption, and that entitlement to exemption would also require satisfaction of applicable constitutional requirements. The legislative findings contained in Section 15-86(a)(5) reveal that is precisely what the General Assembly intended. *See* 35 ILCS 200/15-86(a)(5) (expressing "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,'" and not "to declare any property exempt *ipso facto*, but rather to establish criteria to be applied to the facts on a case-by-case basis").

In summary, longstanding precedent, fundamental principles of statutory interpretation, and a clear expression of legislative intent all demonstrate that Section 15-86 is permissive, in the sense that it authorizes the issuance of property tax exemptions when its statutory criteria are satisfied, but it is not intended to require that exemptions be issued unless

the constitutional charitable use requirement also is satisfied. Because the courts below properly rejected Oswald's argument that Section 15-86 requires issuance of exemptions regardless of compliance with the Constitution, the judgment upholding the facial constitutionality of Section 15-86 should be affirmed.

2. The issuance of exemptions under Section 15-86 is directory rather than mandatory

Section 15-86 would be constitutional, even if it were interpreted to make issuance of exemptions mandatory rather than permissive if the statutory criteria are satisfied, because any putative requirement to issue exemptions would be merely directory. Under this second question required by *People v. Robinson* and its progeny, the focus is on the consequences of a government official's or agency's failure to comply with a statute. Section 15-86 is facially constitutional because a decision by the Department to deny an exemption application due to failure to satisfy the constitutional charitable use requirement, notwithstanding satisfaction of the statute's charitable ownership criteria, would constitute a legally effective denial.

The dispositive consideration, with respect to the mandatory/directory determination, is that Section 15-86 does not dictate a particular consequence if the Department of Revenue fails to grant an exemption application that satisfies the statutory criteria. This Court has explained that, in determining whether a statutory provision is mandatory or directory,

> "statutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with the provision.… In the absence of such intent the statute is directory and no particular consequence flows from noncompliance. That is not to say, however, that there are no consequences. A directory reading acknowledges only that no specific consequence is triggered by the failure to comply with the statute." *People v. Delvillar*, 235 Ill.2d at 514-15 (citations omitted).

If the legislature had intended Section 15-86 to be mandatory, it would have gone beyond merely stating that an exemption shall be issued. It would have dictated a particular consequence—*i.e.*, that no tax may be imposed on the property that is the subject of the exemption application—if the Department fails to issue an exemption despite satisfaction of the statutory exemption criteria. The absence of any such provision indicates that Section 15-86 is merely directory.

The conclusion that Section 15-86 is directory is consistent with the "presum[ption] that language issuing a procedural command to a government official indicates an intent that the statute is directory." *Delvillar*, 235 Ill.2d at 517. Section 15-86 contains the procedure for issuance of property tax exemptions to charitable not-for-profit hospitals and their affiliates. Neither of the two circumstances in which the presumption that procedural commands are directory can be overcome are present here, namely, "when there is negative language prohibiting further action in the case of noncompliance or when the right the provision is designed to protect would generally be injured under a directory reading." Section 15-86 lacks any such

negative language and a property owner has no right to receive an exemption under conditions not permitted by the Constitution. As the Appellate Court concluded:

> "[Section 15-86] does not contain any negative language prohibiting noncompliance. No consequence is triggered by the failure to issue a charitable exemption under the language of section 15-86(c), and noncompliance with the statute offers no direct injury. Further, given the presumption that taxation is the rule, this statute is not protecting a right. Tax exemption is an exception, and section 15-86(c) directs the Department on its consideration of a hospital applicant's property tax status." *Oswald v. Hamer*, 2016 IL App (1st) 152691, ¶ 26.[5]

The Champaign *amici* agree. They acknowledge that "[o]ne of the legislative findings to Section 15-86 bolsters" the Appellate Court's conclusion that Section 15-86 is directory rather than mandatory. (Champaign Br. at 15 (citing 35 ILCS 200/15-86(a)(5).)

[5] The second condition in which the directory presumption can be overcome—*i.e.*, whether a right the provision is intended to protect would be generally injured—underscores the unusual context in which the mandatory/directory determination arises in this case. Ordinarily, an aggrieved party contends their rights were violated by noncompliance with a statutory provision. *See, e.g.*, *Robinson* (issue was whether order dismissing postconviction petition was voided by clerk's failure to comply with statute requiring notice of dismissal within ten days); *Delvillar* (whether guilty plea should be set aside due to circuit court's failure to comply with statute requiring admonishment regarding possible immigration consequences). Here, on the other hand, Oswald argues that a statute was intended to require action—issuance of property tax exemptions regardless of satisfaction of the constitutional charitable use requirement—that violates the Constitution. No statute could protect a "right" to governmental action that violates the Constitution.

Oswald disputes the relevance of the directory/mandatory dichotomy, asserting that "[i]n this case, the issue is whether Section 15-86(c) is mandatory or permissive; not, contrary to the Appellate Court's analysis, whether it is mandatory or directory." (Oswald Br. at 12.) In reality, Oswald has to demonstrate *both* that Section 15-86(c) is mandatory rather than permissive, and mandatory rather than directory. *See*, *e.g.*, *Robinson*, 217 Ill.2d at 50-59 (after determining that statutory ten-day notice requirement was mandatory rather than permissive, Court analyzed whether it was mandatory rather than directory); *Delvillar*, 235 Ill.2d at 516-19 (after determining that admonishment of immigration consequences was mandatory rather than permissive, Court analyzed whether it was mandatory rather than directory).

Oswald's last gasp is a fallback argument. The Appellate Court erred, she claims, even if a mandatory-directory analysis applies, because there is a negative consequence of the Department of Revenue's failure to comply with the statute. "[T]he obvious consequence … is a hospital applicant will not be issued a Section 15-86(c) exemption." (Oswald Br. at 12-13.) However, the question is not whether there are any consequences from a government official's failure to follow the statute's directive. As this Court has noted, the conclusion that a statute is directory "is not to say … that there are no consequences" from failing to follow the statute's direction. *Delvillar*, 235 Ill.2d at 515. Rather, the question is whether the statute "*dictates* a

particular consequence for failure to comply with the provision." *Id.* at 514 (emphasis added). Section 15-86 is directory because it fails to dictate a particular consequence for failure to issue an exemption if its statutory exemption criteria are satisfied.

The directory nature of Section 15-86 means that the Department of Revenue's denial of an exemption application, due to noncompliance with the constitutional charitable use requirement, would not be vitiated even if the statutory charitable ownership requirement is satisfied. Because the courts below correctly concluded that Section 15-86 does not mandate issuance of exemptions in circumstances that violate the Constitution, Oswald's challenge to the constitutionality of that statute fails.

III. SECTION 15-86 IS ALSO FACIALLY CONSTITUTIONAL BECAUSE OSWALD CANNOT SATISFY HER BURDEN OF DEMONSTRATING THAT THERE IS NO SET OF CIRCUMSTANCES IN WHICH EXEMPTIONS ISSUED UNDER THE STATUTE WOULD INVOLVE PROPERTY USED EXCLUSIVELY FOR CHARITABLE PURPOSES

A. The No-Set-of-Circumstances Test Governs Facial Challenges to the Constitutionality of Statutes

A separate and independent ground for the Appellate Court's decision upholding the facial constitutionality of Section 15-86—and a separate and independent ground for affirmance—is that, even if Oswald were right that Section 15-86 should be interpreted to mandate issuance of property tax exemptions regardless of compliance with the constitutional charitable use requirement, Oswald cannot carry her burden of establishing that there is no

set of circumstances in which the statute could be validly applied. In the Appellate Court, Oswald herself acknowledged that "it is hypothetically possible to imagine a 'hospital applicant that, during the hospital year, provided services and activities listed in subsection (e) [of Section 15-86] that equaled or exceeded its estimated property tax liability and that *also* used its subject property exclusively for charitable purposes.…'" (Oswald App. Ct. Br. at 14, quoting *Carle Found. v. Cunningham Twp.*, 2016 IL App (4th) 140795, ¶ 160, *vacated*, 2017 IL 120427 (emphasis in original).) This concession is fatal to Oswald's facial challenge.

This Court employs the "no-set-of-circumstances" test to decide challenges to the facial constitutionality of statutes. *E.g., In re M.A.*, 2015 IL 118049, ¶ 39 (2015), citing *Napleton v. Village of Hinsdale,* 229 Ill.2d 296, 306 (2008). Under that standard:

> "[A]n enactment is facially invalid only if no set of circumstances exist under which it would be valid…. The fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity." *Napleton*, 229 Ill.2d at 306 (citations omitted) (rejecting facial challenge to zoning ordinance).

Illinois courts have upheld the issuance of property tax exemptions to not-for-profit hospitals for more than a century. *See*, *e.g.*, *Sisters of Third Order of St. Francis v. Bd. of Review,* 231 Ill. 317 (1907) (not-for-profit hospital that provided free care to five percent of its patients was entitled to charitable property tax exemption); *People ex rel. Cannon v. Southern Ill.*

Hospital Corp., 404 Ill. 66 (1949) (upholding exemption for not-for-profit hospital); *Streeterville Corp. v. Dep't of Revenue*, 186 Ill.2d 534 (1999) (parking garage was exempt from taxation to the extent it was used by employees and patients of Northwestern Memorial Hospital). Accordingly, to prevail on her facial challenge, Oswald must show that Section 15-86 (1) would not authorize exemptions under any of the circumstances in which courts have previously determined that it is constitutional for hospitals to receive exemptions; and (2) would only authorize exemptions under circumstances where it is unconstitutional to do so.

Neither Oswald nor any of the *amici* claim that she can meet this burden. The Champaign *amici* expressly acknowledge that she cannot. *See* Champaign Br. at 28 (under the no-set-of-circumstances test, "[a] facial attack on Section 15-86 would lose because a hypothetical hospital could comply with the constitutional standard **and** Section 15-86") (emphasis in original). Oswald made the same concession in the Appellate Court. *See Oswald v. Hamer*, 2016 IL App (1st) 152691, ¶ 47 ("Plaintiff concedes that it is 'hypothetically possible' for a hospital to satisfy the requirements of section 15-86(c) … and use[] its property exclusively for charitable purposes under article IX, section 6, of the constitution").

Even if Section 15-86 should be interpreted to mandate issuance of exemptions regardless of compliance with the Constitution, as Oswald contends, it would simply mean that it is theoretically possible that

Section 15-86 would *sometimes* allow exemptions under circumstances prohibited by the Constitution. If and when such circumstances arose, under Oswald's interpretation Section 15-86 would be unconstitutional as applied to those facts. In the meantime, however, the facial constitutionality of Section 15-86 should be upheld. *See Napleton*, 229 Ill.2d at 306 ("The fact that [an] enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity").

B. Oswald Misapplies the No-Set-of-Circumstances Test

Facial challenges like Oswald's are not tied to the facts of a particular application of a statute. They require courts to hypothesize whether "any situation may be posited where the statute could be validly applied…." *In re M.T.*, 221 Ill.2d at 533. If any such situations may be posited, "the facial challenge must fail." *Id.*

In this Court, Oswald has abandoned the position that she had taken in the Appellate Court disputing that a party challenging the constitutionality of a statute is obliged to "hypothetically establish that the text of a statute can never be constitutional under any circumstance whatsoever while ignoring the statute's plain language." (Oswald App. Ct. Br. at 13, citing *Carle Found.*, 2016 IL App (4th) 140795, ¶¶ 143-165, *vacated*, 2017 IL 120427.) Of course, no one would suggest that the no-set-of-circumstances test requires "ignoring the statute's plain language." *Id.* But that test absolutely does require a challenger to "hypothetically establish that

the text of a statute can never be constitutional under any circumstance…." *Id.*

Consider, for example, the facial constitutional challenge to an extended-term sentencing statute addressed by this Court in *Hill v. Cowan*, 202 Ill.2d 151 (2002), *cert. denied*, 538 U.S. 989 (2003). The defendant argued that the extended term provisions were facially unconstitutional because they permitted the trial court to impose an enhanced sentence without a jury finding facts relating to that enhancement.[6] *Id.* at 156. This Court disagreed, noting that under the no-set-of-circumstances test "so long as there exists a situation in which a statute could be validly applied, a facial challenge must fail." *Id.* at 157. The Court then envisioned a hypothetical scenario in which a defendant committed a home invasion of a victim known by him to be more than 60 years old, and injured the victim in the course of the invasion. *Id.* A hypothetical jury finds the defendant guilty of home invasion and aggravated battery (based on the age of the victim), and the hypothetical trial court merges the aggravated battery conviction into the home invasion conviction but, under the challenged statute, sentences the

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[6] The defendant's challenge was based on the United States Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), which held that a judge may not make factual findings that increase the defendant's sentence beyond that for which he or she is eligible based on the jury's verdict. *Id.* at 490, 120 S.Ct. at 2362-63. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*

defendant to an extended term sentence based on the victim's age. *Id.* at 158. The Court concluded, "In this hypothetical, there would be no *Apprendi* violation.… Because a situation can be envisioned in which the statute can be applied without running afoul of constitutional constraints, the statute is not facially unconstitutional." *Id.* *See also In re Parentage of John M.*, 212 Ill.2d 253 (2004) (reversing circuit court ruling holding section 7(a) of Illinois Parentage Act facially unconstitutional and positing two hypothetical scenarios in which the statute would be validly applied).

This Court has likewise considered hypothetical scenarios in rejecting facial challenges to property tax exemption statutes. In *McKenzie v. Johnson*, 98 Ill.2d 87 (1983), the Court upheld the facial constitutionality of a statute that purported to mandate exemptions for school-owned fraternity houses because it was conceivable that such residences could satisfy the constitutional exclusive use standard:

> "Given that in appropriate circumstances this court has upheld property tax exemptions for a campus union … and for campus dormitories…, we cannot say that school-owned fraternity houses *per se* may never qualify for a property tax exemption as property used exclusively for school purposes. The availability of the exemption depends on questions of fact such as how students become eligible to use the facility, and no such evidence has been presented in this facial challenge to the statute. For that reason, we hold that the language in section 19.1 referring to fraternities and sororities is not unconstitutional on its face." *Id.* at 102.

Similarly, given that this Court has repeatedly upheld property tax exemptions for not-for-profit hospitals, it cannot be said that such hospitals

that satisfy the requirements of Section 15-86 "may never qualify for a property tax exemption as property used exclusively for [charitable] purposes." *Id.* As the Appellate Court concluded:

> "We cannot say that a hospital applicant *per se* may not satisfy the requirement of section 15-86 with property used exclusively for charitable purposes. *See McKenzie*, 98 Ill. 2d at 102. As both the General Assembly and the supreme court have noted, that analysis is left to the courts on a case-by-case basis. Thus, section 15-86 is facially constitutional, and the trial court properly granted summary judgment in favor of the defendants." *Oswald v. Hamer*, 2016 IL App (1st) 152691, ¶ 47 (citations omitted).

Oswald tries to turn the no-set-of-circumstances test on its head by arguing that Section 15-86 "is not valid under any circumstances because it provides, in all cases, for exemptions not based on any consideration of whether the constitutionally mandated 'exclusive charitable use' requirement has been satisfied." (Oswald Br. at 17-18.) Oswald's circular reasoning does not comport with the disfavored nature of facial challenges or the manner in which the no-set-of-circumstances test is applied. If Oswald were right, then statutes would be facially unconstitutional unless they expressly stated the applicable constitutional limitations. This Court has never imposed such a requirement. To the contrary, it has stressed that "[t]he fact that [an] enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity." *Napleton v. Village of Hinsdale,* 229 Ill.2d 296, 306 (2008) (citations omitted). If statutes were required to expressly state the applicable constitutional limitation, then a facially valid

statute could never be found unconstitutional as applied to any set of circumstances because the statute would always require adherence to constitutional limitations.

Accordingly, the courts below correctly held that Oswald's facial challenge to Section 15-86 would fail even if Section 15-86 were construed to authorize exemptions regardless of compliance with the constitutional charitable use requirement. Oswald's inability to satisfy the no-set-of-circumstances test constitutes a separate and independent ground for affirming the entry of judgment in favor of the defendants. *See also* Champaign Br. at 20 ("As an officer of the Court, undersigned counsel acknowledges this Court has also applied the … [no-set-of-circumstances test] strictly in other recent cases") (collecting cases); *accord*, *People v. Burns*, 2015 IL 117387, ¶ 40 (Supreme Court first adopted no-set-of-circumstances test "in 1994 and has consistently applied it in facial constitutionality challenges ever since") (concurring opinion) (collecting cases).

IV. THE *AMICI CURIAE* BRIEFS IMPROPERLY ATTEMPT TO ADDRESS ISSUES NOT RAISED BY THE APPELLANT AND TO DISCUSS PUTATIVE "FACTS" NOT CONTAINED IN THE RECORD

Three *amici curiae* briefs have been filed in this appeal: one by the School Associations; one by the Champaign *amici*; and one by Cunningham Township, the Cunningham Township Assessor, and the City of Urbana (collectively, the "Township *amici*"). Unfortunately, all of the *amici* briefs include issues and arguments that were neither raised by Oswald nor

germane to the appellate court decision and, therefore, are not properly before the Court.

In *Burger v. Lutheran General Hospital*, 198 Ill.2d 21, 62 (2001), this Court admonished *amici curiae* to confine their arguments to the issues framed by the parties, noting that the "court has repeatedly rejected attempts by *amicus* to raise issues not raised by the parties to the appeal." *See also Karas v. Strevell*, 227 Ill.2d 440, 451 (2008) (striking *amicus* brief because it attempted to raise issues not raised by the parties to the appeal); *People v. J.W.*, 204 Ill.2d 50, 73, *cert. denied*, 540 U.S. 873 (2003) (declining to consider issues raised by the amici that were not addressed by the parties).

The IHA will refrain from addressing in detail issues raised by the *amici* that are not properly before the Court. Instead, the following discussion will briefly identify what those issues are—primarily to reduce any risk that the Court would misinterpret why IHA has declined to provide a substantive response.

A. *Amici* Urge the Court to Abandon Its Longstanding Formulation of the No-Set-of-Circumstances Test

The School Associations and the Champaign *amici* devote much of their briefs to urging this Court to abandon the no-set-of-circumstances test for determining the facial constitutionality of legislation. School Associations Br. at 6-15; Champaign Br. at 19-25. No such argument has been made by Oswald or any other party at any point in this litigation.

As the School Associations acknowledge, this Court has applied the no-set-of-circumstances test "[f]or decades." (School Associations Br. at 9.) "As it has been traditionally conceived, the test requires the Court to consider every possible circumstance in which legislation can be applied, and construe it as constitutional if there is one in which it can validly be applied." (*Id.* at 10.) Citing three cases from 2016, one of which cites more than 20 additional cases, the Champaign *amici* note that there are recent cases in which the Court has continued to adhere to this traditional application of the no-set-of-circumstances test. (Champaign Br. at 20.)

Both the School Associations and the Champaign *amici* nevertheless urge the Court to depart from its longstanding application of the no-set-of-circumstances test. Their reasons for doing so are based on a misreading of the history and rationale for that doctrine, but now is not the time, and this is not the case, to address their arguments. Rather, the true significance of their attempt to entice the Court to abandon the no-set-of-circumstances test is their recognition that the facial constitutionality of Section 15-86 would be upheld under the traditional formulation of that test. Indeed, the Champaign *amici* concede that, under the traditional application of the no-set-of-circumstances test, a "facial attack on Section 15-86 would lose because a hypothetical hospital could comply with the constitutional standard and Section 15-86…." (Champaign Br. at 28 (emphasis in original).) In the Appellate Court, Oswald herself acknowledged that "it is 'hypothetically

possible' for a hospital to satisfy the requirements of section 15-86(c) … and use[] its property exclusively for charitable purposes under article IX, section 6, of the constitution." *Oswald v. Hamer*, 2016 IL App (1st) 152691, ¶ 47.

These concessions are entirely warranted. They are also fatal to Oswald's appeal.

B. The *Amici* Argue That the *Korzen* Factors Constitute the Test for Determining Whether the Constitutional Charitable Use Requirement Has Been Satisfied

Sections II and III, above, reveal that neither of the two grounds for upholding the facial constitutionality of Section 15-86—namely, that (1) the exemption criteria in Section 15-86 should be construed to supplement but not supplant the constitutional charitable use requirement, and (2) Oswald cannot carry her burden of demonstrating that there is no set of circumstances in which an exemption under Section 15-86 would comport with the Constitution—requires this Court to address the test for determining satisfaction of the constitutional charitable use requirement. The Appellate Court upheld the facial constitutionality of Section 15-86 without discussing that issue, and Oswald has never raised any issue in this litigation regarding the nature of that test.

Nevertheless, all three *amici* briefs either assert as a given, or urge the Court to determine, that the test for determining whether property is used exclusively for charitable purposes is embodied in the so-called "*Korzen*

factors" articulated by this Court in *Methodist Old Peoples Home v. Korzen*, 39 Ill.2d 149 (1968). (School Associations Br. at 15; Champaign Br. at 29, Township Br. at 5.) The Champaign *amici*'s brief is perhaps the most perplexing of the three. It praises the Appellate Court for "wisely avoid[ing] ruling whether the *Korzen* Factors are constitutional in nature." (Champaign Br. at 26.) It notes that under basic principles of constitutional litigation, "it simply is not necessary to address the constitutional status of the *Korzen* Factors to address this facial attack" on Section 15-86, and that the *Korzen* issue "is not central to Plaintiff's facial attack." (*Id.* at 27.) After discussing these and other reasons why the Court should not address whether the *Korzen* factors embody the test for determining satisfaction of the charitable use requirement, the Champaign *amici* proceed to devote 12 pages to an argument that all of the *Korzen* factors are constitutional in nature. (*Id.* at 29-40.)

The Champaign *amici* had it right the first time—it is neither necessary nor appropriate to address in this case the precise nature of the constitutional test for charitable use, or the extent, if any, to which any of the *Korzen* factors bear on that issue. Even the Champaign *amici* do not argue that Oswald has raised that issue, although they do assert that in "the trial court, IHA sought to use this case as a vehicle to ask the Court to address the constitutional status of the *Korzen* Factors." (*Id.* at 26.) That is simply not true, which would explain why the Champaign *amici* (who did not participate

in this litigation before it reached this Court) provide no record cite for that assertion. In reality, the IHA has asserted throughout this lawsuit that it was unnecessary to determine the constitutional test for charitable use in order to uphold the facial constitutionality of Section 15-86. (1 C217-19; 2 C291 n.3; IHA App. Ct. Br. at 43-44.)

For their part, neither the Township *amici* nor the School Associations address whether it is appropriate for them to raise the issue regarding the constitutional test for charitable use. That did not stop the Township *amici* from baldly asserting that the *Korzen* factors are used for determining whether property is used exclusively for charitable purposes and that the Appellate Court agrees (Township Br. at 5-6)—when, in truth, the Appellate Court neither cited *Korzen* nor said a word about the test for charitable use.

The School Associations went even further, declaring that "there is one point upon which there is no dispute: in order to qualify for a charitable property tax exemption, nonprofit hospitals must bear the distinct characteristics of a charitable institution set forth in *Methodist Old Peoples Home v. Korzen*, 39 Ill.2d 149 (1968)." (School Associations Br. at 15.) It is doubtful if any other participant in this litigation would agree with this "point about which there is [supposedly] no dispute." For starters, the "distinct characteristics of a charitable institution" relate to the nature of the owner of the exempt property—*i.e.*, the statutory ownership requirement contained in the exemption codified in 35 ILCS 200/15-65(a)—rather than to

the constitutional charitable use requirement. The School Associations may be right to suggest that the *Korzen* factors bear on whether an exemption applicant is an institution of public charity, but they are wrong to suggest that there is any such constitutional requirement. *See*, *e.g.*, *Provena*, 236 Ill.2d 368 (distinguishing between statutory charitable ownership requirement and constitutional charitable use requirement). Moreover, to the extent the School Associations mean to suggest that the *Korzen* factors also bear on the charitable use requirement, that point would be very much disputed.

The IHA agrees with the Champaign *amici* that the test for charitable use—and the extent, if any, to which the *Korzen* factors bear on that issue—should be decided in the context of a hospital exemption application where the Court could simultaneously announce the governing standard and apply it to specific facts. Such a ruling would provide far more guidance to hospitals, local taxing authorities, and the Department of Revenue than an abstract pronouncement of the governing standard in the context of the present facial challenge.

While this case does not provide an appropriate vehicle for addressing the charitable use test, given the extent to which the *amici* rely on *Korzen*, the IHA feels compelled to say a few words about the *Korzen* factors. What follows does not express the IHA's views regarding what the constitutional charitable use test is or should be. Rather, it is intended to reduce any risk

that the Court might otherwise accept the *amici*'s depiction of the *Korzen* factors at face value.

Over the years this Court has variously described the *Korzen* factors as bearing on the statutory charitable ownership issue and the constitutional charitable use issue. The Court's ambivalence began with *Korzen* itself, which at one point said there were guidelines and criteria "for resolving questions of purported charitable use" (*i.e.*, the constitutional charitable use issue), but in the very next sentence described those guidelines and criteria as relating to "the distinctive characteristics of a charitable institution" (*i.e.*, the statutory charitable ownership issue). *Korzen*, 39 Ill.2d at 157.

Subsequent Supreme Court decisions have been inconsistent, with the most recent case to address the issue, *Provena*, describing the *Korzen* factors as bearing on the statutory charitable ownership requirement. *Compare Eden Retirement Center v. Dep't of Revenue*, 213 Ill.2d 273, 290 (2004) (*Korzen* factors "resolve the constitutional issue of charitable use") *with Provena,* 236 Ill.2d at 390 (the *Korzen* factors relate to "the distinctive characteristics of a charitable institution"); *see also Provena*, 236 Ill.2d at 392.

In one especially noteworthy decision, this Court applied the *Korzen* factors where the only issue was whether the applicant for a property tax exemption satisfied the statutory charitable ownership requirement. *Chicago Patrolmen's Ass'n v. Dept. of Revenue*, 171 Ill.2d 263 (1996), involved a

charitable exemption application for a police museum located on property that was partially owned by an association of police officers. It was "concede[d] that the charitable-use requirement ha[d] been met here," and that "the determinative issue … is whether the property is owned by a charitable organization within the meaning of" the statutory exemption now codified at 35 ILCS 200/15-65(a). *Id.* at 270. This Court applied the *Korzen* factors in deciding this charitable ownership issue. The patrolmen's association "can qualify as a charitable organization only by satisfying the criteria set forth in *Methodist Old Peoples Home v. Korzen*…." *Id.* at 271. *See also Dep't of Revenue v. ABC Business*, IDOR No. ST 14-10, p. 5 (Department of Revenue applies *Korzen* factors to application for charitable sales tax exemption, which is based on the charitable nature of the applicant organization rather than the charitable use of property).

A rigorous analysis and definitive determination of the constitutional test for charitable use must await a case in which that issue is squarely presented. The Court need not determine the precise nature of that test in order to decide that Section 15-86 is facially constitutional. No additional constitutional decisions need be, or should be, made in this case. *See Coram v. State,* 2013 IL 113867, ¶ 56 ("We must … consider constitutional issues only if necessary to the resolution of this case").

C. The School Associations Improperly Discuss Alleged Facts That Are Outside the Record

The School Associations' brief reads more like an advocacy piece directed to legislators than an appellate brief submitted to judges. Going far beyond facts "not subject to reasonable dispute" that can be judicially noticed under Rule of Evidence 201(b), the School Associations' brief is replete with allegations and speculation about everything from the nature of contemporary nonprofit hospitals to the supposed relationship between property tax exemptions and educational outcomes. To the extent those assertions purport to be based on facts, the relevance, admissibility, and accuracy of the secondary sources on which the School Associations rely would have been challenged if any such "evidence" had been submitted in the circuit court. Of course, no such evidence was presented, and in this forum the School Associations are precluded from presenting or arguing putative facts that are not in the record. *See Zurich Ins. Co. v. Raymark Ind., Inc.*, 118 Ill.2d 23, 59 (1987) (striking *amicus curiae* brief that improperly attempted to supplement the record); *People v. Broadnax*, 177 Ill.App.3d 818, 827 (2d Dist. 1988), *cert. denied*, 493 U.S. 834 (1989) (rejecting *amicus* brief that relied on materials that were not part of the record on appeal).[7]

[7] The brief submitted by the Champaign *amici* also suffers from this flaw, at one point citing a 1976 law review article warning of dire consequences from "growing exemptions." (Champaign Br. at 3.) It is unclear whether the Champaign *amici* are suggesting that the article's predictions have materialized during the past 42 years or perhaps are expected to arise any day now.

It is particularly irksome that the School Associations may have fostered the misimpression that property tax exemptions adversely impact the revenues of school districts and other public entities. In reality, property tax exemptions are generally revenue-neutral to taxing districts. The amount of property tax revenue that local taxing entities wish to receive in a given year—known as a "levy"—is raised from the total equalized assessed value of property in the district. Property tax exemptions do not usually affect the amount of the levy. Rather, they affect the tax rate, generally by a modest amount, applicable to non-exempt property. *See* 35 ILCS 200/18-10 and 18-15 (taxing districts' determination of the amount of their levies); 35 ILCS 200/18-45 (tax rates equal the percentage of the equalized assessed valuation that will produce sufficient tax to satisfy the levies, subject to certain limitations). As the Champaign *amici* correctly observe, "the impact of a property tax exemption on an individual taxpayer is often quite small." (Champaign Br. at 1-2.)

CONCLUSION

Oswald has not come close to making the showing that would be required for this case to yield the first Supreme Court decision in Illinois history declaring a property tax exemption statute to be facially unconstitutional. Far from flouting constitutional requirements, the General Assembly carefully hewed to a road well-traveled and clearly demarked when it enacted Section 15-86.

The courts below correctly determined that the General Assembly simply intended Section 15-86 to be another property tax exemption statute that supplements, rather than supplants, the constitutional charitable use requirement and that, in any event, Oswald is unable to carry her burden of establishing that all exemptions issued under Section 15-86 would violate the Constitution. For each of these reasons, the IHA respectfully requests that this Court affirm entry of summary judgment in favor of IHA and the Department and uphold the facial constitutionality of Section 15-86 of the Property Tax Code.

Dated: February 14, 2018

Respectfully submitted,

ILLINOIS HEALTH AND HOSPITAL ASSOCIATION

By: /s/ Steven F. Pflaum
One of Its Attorneys

Steven F. Pflaum
Tonya G. Newman
Collette A. Brown
NEAL, GERBER & EISENBERG LLP
Two North LaSalle Street
Suite 1700
Chicago, IL 60602-3801
(312) 269-8000
spflaum@ngelaw.com
tnewman@ngelaw.com
cbrown@ngelaw.com

Mark D. Deaton
Senior Vice President & General Counsel
Illinois Health and Hospital Association
1151 East Warrenville Road
PO Box 315
Naperville, IL 60566
(630) 276-5466
mdeaton@team-iha.org

Counsel for Appellee
Illinois Health and Hospital Association

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). Excluding 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), this brief contains 12,824 words.

/s/ Steven F. Pflaum
Steven F. Pflaum

CERTIFICATE OF FILING AND SERVICE

I, Steven F. Pflaum, an attorney, hereby certify that on February 14, 2018, I electronically filed the foregoing **APPELLEE'S BRIEF OF THE ILLINOIS HEALTH AND HOSPITAL ASSOCIATION** with the Illinois Supreme Court Clerk by using the Odyssey eFileIL system.

I further certify that the following participants in this appeal are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Edward T. Joyce (ejoyce@joycelaw.com) Joan M. Mannix (jmannix@joycelaw.com Kenneth D. Flaxman (kflaxman@joycelaw.com) *Counsel for Appellant Constance Oswald*	Carl J. Elitz Illinois Assistant Attorney General (celitz@atg.state.il.us) (civilappeals@atg.state.il.us) *Counsel for Appellees Illinois Department of Revenue and Constance Beard*
Eugene C. Edwards (eedwards@hauserizzo.com) *Counsel for Amici Curiae Illinois Association of School Administrators, Illinois Association of School Boards, and Illinois Association of School Business Officials*	

I further certify that the following participants in this appeal are not registered service contacts on the Odyssey eFileIL system, and thus were served on February 14, 2018, by transmitting a copy from my e-mail address to all e-mail addresses of record designated by those participants:

Frederic M. Grosser (frederic.grosser@gmail.com) *Counsel for Amici Curiae Cunningham Township, City of Urbana, and Cunningham Township Assessor*	Joel D. Fletcher Assistant State's Attorney (jfletch@co.champaign.il.us) *Counsel for Amici Curiae Champaign County and the Champaign Treasurer and Ex Officio Champaign County Collector*

John M. Rizzo (jizzo@hauserizzo.com) *Counsel for Amici Curiae Illinois Association of School Administrators, Illinois Association of School Boards, and Illinois Association of School Business Officials*	

/s/ Steven F. Pflaum
Steven F. Pflaum

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Carolyn Taft Grosboll
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