No. 122203

IN THE SUPREME COURT OF ILLINOIS

CONSTANCE OSWALD, *Plaintiff-Appellant*, v. BRIAN HAMER, Director of the Illinois Department of Revenue, And the ILLINOIS DEPARTMENT OF REVENUE, *Defendant-Appellee*, and ILLINOIS HOSPITAL ASSOCIATION, *Intervenor-Defendant-Appellee*	)	Appeal from the Appellate Court of Illinois, First District No. 1-15-2691 There on Appeal from the Circuit Court of Cook County Illinois, No. 2012-CH-42723 The Honorable Robert Lopez-Cepero, Judge Presiding

BRIEF *AMICUS CURIAE* OF CHAMPAIGN COUNTY AND THE CHAMPAIGN COUNTY TREASURER

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STATEMENT OF INTEREST OF *AMICUS CURIAE* CHAMPAIGN COUNTY AND CHAMPAIGN COUNTY TREASURER

The Champaign County Treasurer and Champaign County, by and through the Office of the State's Attorney of Champaign County, submit this amicus curiae brief in support of the taxpayer Plaintiff-Appellant Constance Oswald ("Oswald"). Unlike the named parties, Champaign County and the Champaign County Treasurer provide input on the issues before this Court from the perspective of taxing districts. While Oswald represents the interest of an individual taxpayer, Champaign County can speak to the aggregate impact of tax exemptions on tens of thousands of taxpayers who are similarly situated. The Champaign County Treasurer, in particular, has been a party to litigation relating to hospital property tax exemptions for over a decade, and is intimately familiar with the issues presented. *See* Champaign County causes 2008-L-202; 2013-CH-170; 2015-L-75; *Carle v. Cunningham Tp., et al.*, 2017 IL 120427 (2017)[1].

This case comes before the Court in a unique posture due to the status of the parties. A taxpayer filed a declaratory judgment action challenging the facial constitutionality of Section 15-86, a statute granting property tax exemptions to certain hospitals. An individual taxpayer is a poor spokesperson for the interests of the public as a whole in this issue. While the aggregate impact of a property tax exemption on taxpayers across a county is quite significant, the impact of a property tax exemption on an individual taxpayer is

[1] Some of the analysis in this brief was presented in support of the County Defendants' position before this Court in *Carle v. Cunningham Tp., et al.*, 2017 IL 120427 (2017), to address issues that were ultimately not reached by this Court in that case.

often quite small. This is particularly true in a county the size of Cook County, the county where this suit was brought.

Each of the remaining parties has a limited perspective. The Illinois Department of Revenue (Department) has no direct financial stake in the outcome of this case. Certainly, the Department has an interest in properly construing the Illinois Constitution and the Property Tax Code; but it also has a competing interest in the orderly administration of the Property Tax Code at the state level. The institutional pressure on the Department to find an exemption standard that is certain and easily-applied is in tension with its interest in finding a standard that adequately protects the interests of taxpayers and local taxing districts. The very basis for the motion by Illinois Hospital Association (IHA) to intervene in this case was that its members have an interest in this action different from that of the general public. (Vol. I, C. 160-61). That interest is adverse to the interests of taxpayers in general.

Noticeably absent from this case is the voice of any taxing district. Taxing districts are ideally suited to represent the collective interests of their constituents. The interests of individual taxpayers are aggregated at the ballot box, giving a taxing district and a county treasurer the responsibility to speak for them in litigation such as this. While Oswald's interest in this case is concrete enough to confer standing, a county treasurer represents numerous taxing districts and thousands of taxpayers similarly-situated to him.

In addition, taxing districts such as Champaign County have a direct financial interest in property tax exemptions. Tax rates are calculated by dividing a taxing district's levy by its equalized assessed valuation (EAV). *See* 35 ILCS 200/18-45. Exempt property is removed from the EAV. *See* 35 ILCS 200/9-95; 35 ILCS 200/16-70. This causes the

denominator of the tax rate fraction to contract, and tax rates to rise. Every exemption therefore forces taxing districts to either: (1) accept less tax revenue; or (2) allow their tax rates to increase.

This puts taxing districts in a difficult position. Some taxing districts are subject to tax rate caps which prevent them from increasing their tax rates in proportion to the lost EAV. *See* 55 ILCS 5/5-1024. Those districts with the power to increase their tax rates pay a high price for doing so, as this puts them at a competitive disadvantage with neighboring communities in attracting homeowners and businesses. Increased tax rates also make it difficult to pass other rate increases or bond issues necessary to adequately fund public services. The net effect of growing exemptions is "a steadily narrowing group of taxpayers [who] will show more resistance to higher taxes by repudiating bond issues, rejecting school levies, and encouraging tax slashing political candidates". J. Hilbert, *Illinois Property Tax Exemptions: A Call for Reform*, 25 DePaul Law Rev. 585, 586-87 (1976) (Hilbert, *Call for Reform*). This effect is exaggerated when large institutions, such as regional hospitals, obtain exemptions. Neighboring communities are allowed to free ride on the hosting taxing districts, receiving most of the economic benefits of the exempt institution while paying none of the costs.

The interest of taxing districts in exemptions relates directly to the constitutional provision now before this Court, which provides the legislature may only exempt "property exclusively used for *** charitable purposes." Ill. Const. 1970, Art. IX, §. 6. This provision is designed to protect units of local government, and their constituents, from political maneuvering at the State level, where they have little voice. Because the state legislature never sees the bill for property tax exemptions during the state budget process,

those with concentrated political power can obtain unwise exemptions at the expense of a diffuse majority. Exemptions are provided through an obscure process before the Department and the Board of Review, and only affect other taxpayers indirectly in calculation of the tax rate. Accordingly, they provide an ideal method of subsidizing special interest groups while hiding the true cost to other taxpayers. Hilbert, *A Call for Reform*, at 586.

The delegates to the 1970 Constitutional Convention recognized this issue. The Committee on Revenue and Finance expressed concern about further erosion of the tax base, prompting increased taxes on non-exempt property. Record of Proceedings, Sixth Illinois Constitutional Convention ("Proceedings"), Vol. 3, p. 2157. Later, in opposing constitutional authority for a property tax exemption for veterans, Delegate Karns stated:

> "They are not mandatory exemptions***; they are permissive. But I think, in our committee we were told many times, even by those that proposed the broader, wide-open revenue article, that in this area they would recommend a restrictive provision, because if you allow a broad range of exemptions which the legislature may grant, I think it is obvious that under the force of pressure from time, and over the period of time, that they well might succumb to the temptation to grant unwise exemptions. ***"
>
> Proceedings Vol. 4 at 3845 (Comments of Delegate Karns, August 9, 1970).

This concern is played out in the case at hand, where the legislature, "[w]orking with the Illinois hospital community and other interested parties" (35 ILCS 200/15-86(a)(5)) created a new property tax exemption standard that forces local taxing districts to subsidize regional health care.

A county treasurer is a proper officer to bring this perspective to this court. The Illinois Constitution gives a county treasurer all duties, powers or functions derived from common law or historical precedent, unless altered by law or ordinance. *See* Ill. Const.

1970, Art. VII, §. 4(d). The county treasurer speaks for all taxing districts in his jurisdiction in exemption claims raised as an objection to tax judgment. *See, e.g., People ex rel. Cnty Collector v. Hopedale Med. Found.*, 46 Ill. 2d 450 (1970). Similarly, the county treasurer speaks for these districts when exemption is sought through a tax injunction complaint. *See, e.g., Altier v. Korzen*, 43 Ill.2d 156 (1969); 35 ILCS 200/23-25(e) (reviving common law tax injunctions as method of establishing exemption).

Champaign County and the Champaign County Treasurer, in particular, are well-suited to provide input in this case from the perspective of taxing districts. For over a decade, Champaign County has been at the forefront of the ongoing controversy regarding property tax exemptions for hospitals. *See Carle Found. v. Cunningham Twp, et al.*, 2017 IL 120427 (2017); *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill.2d 368 (2010). Urbana, Illinois, in Champaign County, hosts two large hospitals, Carle Foundation Hospital and Presence Covenant Medical Center (formerly Provena Covenant). The tax exempt status of these hospitals has a significant impact on all of the taxing districts hosting them. The owners of each of the Champaign County hospitals have filed suit to establish a right to exemption under Section 15-86 for tax years that pre-date its enactment. *See* Champaign County causes 2008-L-202; 2013-CH-170; 2015-L-75; *Carle*, 2017 IL 120427[2]. For these reasons, Champaign County and the Champaign County Treasurer respectfully submit this *amicus curiae* brief to the Court.

[2] Each of those hospitals is represented by counsel for IHA in the current appeal, who has raised several of the same arguments presented in this matter in those cases.

ARGUMENT

INTRODUCTION

The Illinois Constitution provides that the General Assembly may exempt "property exclusively used for *** charitable purposes." Ill. Const. 1970, Art. IX, § 6. While the legislature has the authority to define exemptions in the first instance, it cannot add to or broaden the exemptions that Section 6 of Article IX specifies. *Eden Retirement Center, Inc. v. Dep't of Revenue*, 213 Ill.2d 273, 286 (2004). This constitutional standard gives rise to two requirements in conflict with Section 15-86: (1) that the parcel to be exempted be put to charitable use; and (2) that this charitable use be the exclusive use of the parcel. First, Section 15-86 purports to grant hospitals credit toward an exemption for certain statutory services that do not meet the constitutional standards for charity set forth in *Methodist Old Peoples Home v. Korzen*, 39 Ill.2d 149 (1968) ("*Korzen Factors*"). Second, Section 15-86 purports to grant an exemption to hospitals if the value of certain services they provide meets their estimated property tax liability, without regard to whether the allegedly charitable activity is the primary use of that parcel. *See* 35 ILCS 200/15-86(c).

Two districts of the appellate court have been presented facial attacks to Section 15-86 based upon the latter constitutional defect. In the case at hand, the First District held this defect could be addressed by adopting an "Overlay Approach", requiring a non-profit hospital to establish compliance with the constitutional requirement of exclusive charitable use over and above the statutory exemption requirements. *See Oswald v. Hamer*, 2016 IL App (1st) 152691, ¶¶ 26, 41, 45. In a decision that was later vacated on jurisdictional grounds, the Fourth District held that the conflict between Section 15-86 could not be read

to allow the Overlay Approach; that Section 15-86 was irreconcilable with the constitutional requirement that charitable use be exclusive; and that therefore Section 15-86 was facially unconstitutional. *See Carle Found. v. Cunningham Twp.*, 2016 IL App (4th) 140795, *vacated* 2017 IL 120427.

The Overlay Approach is central to the dispute now before this Court: If the Overlay Approach of the First District is accepted, then Section 15-86 should be facially constitutional. The Champaign Treasurer expresses no opinion in this brief on whether the Overlay Approach should be adopted. Instead, the Champaign Treasurer addresses two other issues which are likely to arise in the course of argument and on which it has great interest. First, if the Overlay Approach is rejected, Section 15-86 is facially unconstitutional because of its failure to require that the exclusive use of an exempted parcel be charitable. This Court should reject an alternate basis for the First District's ruling, that Plaintiff's facial attack is defeated by the rigid standard for such attacks suggested by *U.S. v. Salerno*, 481 U.S. 739 (1987). Second, the Treasurer presents why this Court should avoid the attempt to use this appeal to rewrite the constitutional definition of charitable use as set forth in *Korzen*. It is not necessary to address the conflict between the services defined in Section 15-86(e) and the Korzen Factors in this appeal, and doing so conflicts with the doctrine of constitutional avoidance. If the Court does address the status of the Korzen Factors in this appeal, it should reaffirm each as part of the constitutional definition of charitable use.

I. SECTION 15-86 VIOLATES THE CONSTITUTIONAL REQUIREMENT THAT CHARITABLE USE OF EXMEMPT PROPERTY BE EXCLUSIVE

A. Overview of the Constitutional Exclusive Charitable Use Standard

Section 15-86's most glaring constitutional flaw is its failure to require that the charitable use of the exempt property – however charitable use is defined -- be exclusive. The exclusive use requirement is explicit in the text of the Constitution. This Court has interpreted the term "exclusive" use as "primary" use. *See Chicago Bar Ass'n v. Dep't of Revenue,* 163 Ill.2d 290, 300 (1994). Incidental use for a non-exempt purpose will not destroy the exemption. *See Streeterville Corp. v. Dep't of Revenue,* 186 Ill.2d 534, 536 (1999); *Illinois Inst. of Tech. v. Skinner,* 49 Ill.2d 59, 65-66 (1971). But it is not enough that one of several purposes or results is charity: Charity must be the "chief, if not sole, object." *People ex rel. Nelson v. Rockford Masonic Temple Bldg. Ass'n,* 348 Ill. 567, 570 (1932).

For the word "exclusive" in the Constitution's text to have meaning, it must require a comparison between the charitable activity on the parcel and the total activity on the parcel. *Korzen* emphasized that the Court is to examine how the property is actually used in determining whether the constitutional standard is met, and not to look solely at its organizational documents or statements of intent. *Korzen*, 39 Ill.2d at 157. Any standard which does not look to the amount of charitable activity actually happening on the parcel to be exempted violates this proscription and would encourage hospitals seeking exemption to locate in areas where there is a low demand for charity care. *Cf. Provena,* 236 Ill.2d at 398.

In the past, this Court has deemed hospital property to be exclusively used for charity, even though the majority of patients receiving care on it did not receive charity

care. *See Sisters of Third Order of St. Francis v. Board of Review of Peoria County*, 231 Ill. 317, 320-322 (1907) (hospital received exemption even though it was paid by 89% of its patients); *People ex rel. Cannon v. Southern Ill. Hosp. Corp.*, 404 Ill. 66, 72 (1949). But these cases must be placed in context. When presented with a charity charging fees, the Court should ask whether the goal of such fees is to allow the entity to continue as a charity.

In *Sisters of the Third Order*, the Court confirmed that, notwithstanding the low percentage of patients receiving charity care, no private benefit was being siphoned off the hospital's use of the property. Members of the exempt hospital's corporation were members of a convent who conveyed absolute title to all their property to the corporation and received no compensation other than room and board. *Sisters of the Third Order*, 231 Ill. at 319. The hospital was controlled by persons selected from the convent. *Id*. Fees to those who could pay were proper "so long as all the money received by [the hospital] is devoted to the general purposes of the charity, and no portion of the money received by it is permitted to inure to the benefit of any private individual engaged in managing the charity". *Id*. at 321. The Court noted that private benefit would undermine a claim to exemption since it was possible that a hospital could be established and conducted for the professional and financial benefit of certain physicians. *Id.* at 323. The record before the Court allowed it to conclude that the 89% of patients who did not receive charity and instead paid for the services they received were being treated to allow the entity to serve those who had no ability to pay, without regard to that ability. Such a conclusion is harder for a hospital to make as the percentage of patients receiving charity care approaches zero.

To the extent *Sisters of the Third Order* could support a standard that would give no weight at all to the actual amount of charity care provided, it has been overruled. This Court has long recognized that the percentage of revenue or activity on the land dedicated to specific charitable activities is still directly relevant to whether the property, as a whole, is being put exclusively to a charitable use. *See People ex rel. Nordlund v. Assoc. of Winnebago Home for the Aged*, 40 Ill.2d 91 (1968) (court rejected a claim to charitable exemption when considering the few numbers of persons admitted without charge to nursing home); *Small v. Pangle*, 60 Ill.2d 510 (1975) (same basis for rejection). In *Quad Cities Open, Inc. v. City of Silvis*, 208 Ill.2d 498 (2004), this Court held that a charity golf tournament was exempt from a city's municipal amusement tax, even though only 7% of its revenue for a 2 year period was donated to charity. However, this Court only reached that conclusion after first carefully noting that the legal issue presented was not a property tax exemption governed by the rigorous "exclusive charitable use" standard at issue here. *Id.* at 506-507.

An emphasis on actual charity care provided is consistent with the decision in *Provena*. The plurality opinion concluded that a hospital was not used exclusively for charitable purposes, in part, because the number of uninsured patients receiving free or discounted care and the dollar value of the care they received were *de minimus*. *Provena*, 236 Ill.2d at 397. Waived fees represented less than 0.723% of the hospital owner's revenues for the year, and admissions receiving charity care represented just 0.27% of the hospital's total annual patient census. *Id.* at 381-382. "With very limited exception, the property was devoted to the care and treatment of patients in exchange for compensation through private insurance, Medicare and Medicaid, or direct payment from the patient or

the patient's family." *Id.* at 397; *see also Riverside Med. Ctr. v. Dep't of Revenue*, 342 Ill.App.3d 603, 610 (3rd Dist. 2003)(denying exemption to hospital in part because it budgeted only 3% of its revenues to charity care); *Community Health Care, Inc. v. Dep't of Revenue*, 369 Ill. App.3d 353 (3rd Dist. 2006) (hospital not used primarily for charitable purpose when admittedly used only 27% of time for its stated charitable purpose of serving medically underserved community and 73% of time as not-profit medical clinic).

The partial dissent in *Provena* accused the plurality of setting a specific quantum of care and monetary threshold, an exercise best left to the legislature. *Provena*, 236 Ill.2d at 412 (Burke, J., concurring in part and dissenting in part); *id*. at 415 ("[S]etting a monetary or quantum of standard is a complex decision which should be left to our legislature, should it so choose"). Similarly, the trial court in the instant case concluded that the *Korzen* Factors constitutionally define charitable use, but leave to the legislature the decision of "how much charitable use is enough". (V. I, C. 453). But the plain text of the constitution sets a quantitative standard: that charitable use be exclusive. Contrary to the trial court's reasoning, the *Korzen* Factors explicitly incorporate the constitutional rule that charitable use be exclusive. *Korzen*, 39 Ill.2d at 156-157. In giving meaning to this rule, this Court need not establish specific and uniform constitutional rules in order to consider the amount of charity care provided as it is relevant.

B. The Offset in Section 15-86(c) Conflicts with the Constitutional Standard

Here, the legislature established a specific quantitative rule that has nothing to do with exclusive charitable use. Section 15-86(c) provides that an exemption "shall be issued" if the value of certain statutory services equals or exceeds the applicant's estimated property tax liability. *See* 35 ILCS 200/15-86(c). Nothing in the text of Section 15-86

requires any comparison, whatsoever, between the charitable use of property --however defined --and the total use of the property. For instance, the 2002 tax liability for the hospital in *Provena* was $1.1 million (*Provena*, 384 Ill. App.3d at 736), while the hospital's net patient service revenue was $113 million (*Provena*, 236 Ill.2d at 376). Services with cost representing less than 1% of the hospital's net patient service revenue have very little bearing on the primary use of the parcel. Under Section 15-86, once the statutory threshold is met, it makes no difference how much of the activity on the land is associated with the services credited, or any form of charity. The hospital then has no requirement to provide any additional charitable services, even as the activity on the land-- and the government service burden associated with it-- continues to grow.

C. The Section 15-86 Credit for Off-Site Services Conflicts with the Constitutional Standard

It is the use of the property, not the use of the income generated from it, which determines its exempt status. *See City of Lawrenceville v. Maxwell*, 6 Ill.2d 42, 49 (1955); *Provena*, 336 Ill.2d at 404-405 (plurality); *see also* G. Braden and R. Cohen, *The Illinois Constitution: An Annotated and Comparative Analysis* (1969), p. 438. Yet the focus of Section 15-86 is not limited to the parcel seeking exemption. *See* 35 ILCS 200/15-86(a)(3)("***Health care is moving beyond the walls of the hospital. In addition to treating individual patients, hospitals are assuming responsibility for improving the health status of communities and populations.***").

Several of the statutory services need not be provided on-site at all. Section 15-86 provides credit for:

(1) Subsidizing goods and services addressing low-income or underserved individuals (35 ILCS 200/15-86(e)(2));

(2) Providing support to other entities that treat low-income or underserved individuals (35 ILCS 200/15-86(e)(2));

(3) Subsidizing outreach to low-income or underserved individuals for disease management and prevention (35 ILCS 200/15-86(e)(2));

(4) Providing free or subsidized medical goods or services to low-income or underserved individuals (35 ILCS 200/15-86(e)(2));

(5) Providing prenatal or childbirth outreach to low income or underserved individuals (35 ILCS 200/15-86(e)(2));

(6) Providing subsidies to government for activities or programs related to healthcare for underserved individuals (35 ILCS 200/15-86(e)(3)).

There is no statutory requirement that any of these payments or services be provided on-site, or, in fact, within any of the taxing districts that bear the financial brunt of the exemption.

D. Section 15-86's Approach to Partial Exemptions Conflicts with the Constitutional Standard

It is the taxpayer's burden to identify a basis for severing exempt and non-exempt portions of its property and where it fails to do so, its property is taxable in its entirety. *Hopedale*, 46 Ill.2d at 464. Property used for non-exempt purposes may still be entitled to a partial exemption for an "identifiable portion" of the property which is used for exempt purposes. *See Streeterville*, 186 Ill.2d at 536; *Skinner*, 49 Ill.2d at 65-66. In circumstances where the nature of the property makes it impossible to determine the "identifiable portion" of the property which is used for exempt purposes, the taxpayer will be unable to establish an exemption. *See Streeterville*, 186 Ill.2d at 538-39. Section 15-86 nods to this rule when it provides that any portion of the subject parcel is "leased, licensed or operated by a for-

profit entity" shall not qualify for exemption regardless of whether healthcare services are provided on it. *See* 35 ILCS 200/15-86(c). Yet Section 15-86 does not define partial exemptions by use, but by the legal status of the user: whether the parcel is "leased, licensed, or operated by a for-profit entity". Section 15-86 makes no effort to tease out uses of a parcel by a non-profit hospital that are still not charitable within the meaning of the State constitution.

E. Section 15-86 Allows Exemptions to Be Aggregated in Conflict with the Constitutional Standard

A taxpayer may not extend an exemption to property used for non-exempt purposes by grouping it together with property used for exempt purposes. *See City of Mattoon v. Graham*, 386 Ill. 180 (1944) (improper to group 3% of contiguous property used for exempt purposes with 97% of property used for non-exempt farming purposes); *see also Carr*, 307 Ill. at 27-28.

Section 15-86 allows parcels to be exempted by aggregating the activities of geographically distinct parcels. Section 15-86 provides that if a hospital owner owns more than one hospital, the value of the statutory services "shall be calculated only with respect to the properties comprising that hospital". *See* 35 ILCS 200/15-86(c). Still, a "hospital" is defined broadly to include any "health care facility located in Illinois that is licensed under the Hospital Licensing Act and has a hospital owner". 35 ILCS 200/15-86(b)(1). The Hospital Licensing Act, in turn, provides that, in counties with fewer than 3 million inhabitants, a hospital may apply for a single license to conduct operations from more than one geographic location within the county under a single license. *See* 210 ILCS 85/4.5. Section 15-86 further supports aggregating separate parcels when it defines "estimated property tax liability" as:

> "the estimated dollar amount of property tax that would be owed, with respect to the exempt portion of each of the relevant hospital entity's properties that are already fully or partially exempt, or for which an exemption in whole or in part is currently being sought, and then aggregated as applicable, as if the exempt portion of those properties were subject to tax [calculated according to a statutory formula]".
>
> 35 ILCS 200/15-86(g)(1)(Emphasis added).

If the activities listed in Section 15-86(e) can be aggregated across geographically distinct parcels, a hospital could receive the exemption for a parcel on which none of those services --or any other charitable services-- are provided.

II. UNLESS THIS COURT REQUIRES A TAXPAYER SEEKING EXEMPTION UNDER SECTION 15-86 TO DEMONSTRATE COMPLIANCE WITH THE CONSTITUTIONAL STANDARD OF EXCLUSIVE CHARITABLE USE, SECTION 15-86 IS FACIALLY UNCONSTITUTIONAL

A. The First District's Overlay Approach

The First District adopted an "Overlay Approach", concluding an exemption under Section 15-86 requires a taxpayer to meet both the statutory and constitutional criteria for exemption. This is consistent with long-standing rules of construction applied to statutes defining property tax exemptions. *See, e.g., Chicago Bar Ass'n v. Dep't of Revenue*, 163 Ill.2d 290, 298-99 (1994). Section 15-86 provides that a hospital that meets the statutory criteria "shall be granted an exemption". *See* 35 ILCS 200/15-86(c). But the First District interpreted the word "shall" as directory, rather than mandatory, based upon the statute's failure to establish a specific consequence for non-compliance. *Oswald*, 2016 IL App (1st) 152691, ¶ 26. One of the legislative findings to Section 15-86 bolsters this conclusion, stating 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". *See* 35 ILCS 200/15-86(a)(5). The First District invoked the general rule of construction that

statutes should be construed in a manner that avoids constitutional issues and preserves their validity. *Oswald*, 2016 IL App (1st) 152691, ¶¶ 41, 45. Finally, the *Oswald* decision also invoked the inherent power of the court to read language into a statute to correct a legislative oversight. *Id.* The First District would use this power to read the constitutional requirement of exclusive charitable use into Section 15-86, even if in conflict with the text of Section 15-86(c), in order to preserve its constitutional validity.

The First District concluded that, even absent the Overlay Approach, Section 15-86 was facially valid under the strict standard for facial constitutional attacks suggested by the U.S. Supreme Court in *U.S. v. Salerno*, 481 U.S. 739 (1987). *See Oswald*, 2016 IL App (1st) 152691, ¶ 47, *citing In re M.A.*, 2015 IL 118049 ¶ 39 (2015). Under this standard, outside of the First Amendment context, a challenger making a facial constitutional attack on a statute must establish that no set of circumstances exists under which the statute is valid. *Salerno*, 481 U.S. at 745. The First District held this high standard for facial attacks was not met here because, conceivably, a hospital could comply with both the State constitutional requirement of exclusive charitable use and Section 15-86. *Oswald*, 2016 IL App (1st) 152691, ¶ 47.

B. The Fourth District's Rejection Of The Overlay Approach

Oswald is in conflict with the recent decision in *Carle* in which the Fourth District ruled Section 15-86 facially unconstitutional. The Fourth District noted the statutory formula for exemption is inconsistent with the constitutional requirement of exclusive charitable use. The decision focused on how the formula focused on a comparison between the statutory services and the estimated property tax liability, rather than the primary use

of the parcel; and how Section 15-86 allowed credit for off-site subsidies. *See Carle*, 2016 IL App (4th) 140795, ¶¶ 141, 142.

The *Carle* decision concluded the text of Section 15-86 does not support the Overlay Approach, but instead requires that once the statutory formula is met, an exemption "shall be" granted. *See* 35 ILCS 200/15-86(c). The Fourth District interpreted this "shall" as mandatory. The *Carle* decision focused on one of Section 15-86's legislative findings stating an intent "to establish quantifiable standards for the issuance of charitable exemptions ***". *See Carle*, 2016 IL App (4th) 140795, ¶ 78, *citing* 35 ILCS 200/15-86(a)(5). The Fourth District noted that several of the exemption statutes for which the Overlay Approach has been invoked have also included language, not present here, requiring exclusive use for exempt purposes, generally. *See Carle*, 2016 IL App (4th) 140795, ¶¶ 137, 138, *citing Chicago Bar Ass'n*, 163 Ill.2d at 298, and *McKenzie v. Johnson*, 98 Ill.2d 87, 94 (1983). Finally, the Fourth District noted that the "no set of circumstances" standard should not be read rigidly to require the court to engage in hypothetical musings about an otherwise invalid statute. *See Carle*, 2016 IL App (4th) 140795, ¶¶ 141, 142, citing *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123 (10th Cir. 2012). The Fourth District held that the statute was facially invalid because disregarding the unconstitutional offset in Section 15-86(c) would effectively delete an essential part of the statute. *Carle*, 2016 IL App (4th) 140795, ¶¶ 163, 142.

C. The Effect of the Overlay Approach

Champaign County and the Champaign County Treasurer state no position on whether the Overlay Approach should be adopted to reconcile the conflict between Section 15-86 and the State constitution. If adopted, the Overlay Approach would

impose the same constitutional exclusive charitable use requirement on a Section 15-86 exemption that apply to a traditional Section 15-65 exemption. This conclusion is not surprising: the constitution sets a floor that the legislature cannot go below in defining charitable exemptions.

This does not render Section 15-86 meaningless. The clearest valid effect of Section 15-86 would then be the way it redefines charitable ownership. Section 15-65, the traditional charitable exemption standard, requires that an exempt entity be "owned by an institution of public charity". See 35 ILCS 200/15-65(a). In applying this standard, the *Provena* decision declined to credit the hospital with charitable works done by a corporate affiliate that did not hold title to the property. *See Provena*, 236 Ill.2d at 393 (plurality); *id.* at 411-412 (concurrence). Section 15-86 addresses this holding regarding ownership directly, stating:

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

Section 15-86 provides that, if the formula in Section 15-86(c) is met, the activities of a hospital owner's corporate affiliates may be used to support the claim to exemption. *See* 35 ILCS 200/15-86(b)(3), (b)(6). Under the Overlay Approach, a hospital trying to use the broader definition of exempt ownership provided by Section 15-86 must document activities meeting the statutory criteria in Section 15-86(e) equal in value to the estimated property tax liability, either on or off site, as that section allows. Then, to be entitled to the exemption, the hospital must also ensure that the specific property to be exempted is itself primarily used to provide services meeting the constitutional definition of charity.

D. If The Overlay Approach Is Rejected, Section 15-86 Is Facially Unconstitutional

If the Overlay Approach is rejected, this Court should hold Section 15-86 facially unconstitutional. The First District reasoned Section 15-86 is facially valid because of the stringent standard for facial constitutional attacks suggested by the U.S. Supreme Court in *U.S. v. Salerno*, 481 U.S. 739 (1987). *Salerno* denied a facial constitutional attack on a federal bail statute that allowed pre-trial detention upon a finding of future dangerousness, based on the rule that "[t]he fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstance is insufficient to render it wholly invalid". *Salerno*, 481 U.S. at 745. The *Salerno* opinion also made a broader statement that, outside of the First Amendment context, a challenger making a facial constitutional attack on a statute must establish that no set of circumstances exists under which the statute is valid. *Salerno*, 481 U.S. at 745. IHA argues that because a hospital could, conceivably, comply with both Section 15-86 and the constitutional standard, a facial attack would fail under this standard.

The Fourth District appropriately rejected this rigid interpretation of *Salerno*. A literal approach to the no-set-of-circumstances test "completely divorces review of the constitutionality of a statute from the terms of the statute itself and instead improperly requires a court to engage in hypothetical musings about potentially valid applications of the statute". *See Carle*, 2016 IL App (4th) 140795, ¶ 158, quoting *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123 (10th Cir. 2012) (emphasis in *Doe*). An approach looking solely at possible valid outcomes would reject a facial attack to a statute granting a charitable exemption to every hospital simply because one such hospital might also

happen to be a charity meeting the constitutional standard for exemption. *Carle*, 2016 IL App (4th) 140795, ¶ 152.

In *People v. Burns*, 2015 IL 117387 (2015), this Court adopted a flexible interpretation of *Salerno*, holding an unconstitutional statute does not 'become constitutional' simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so. *Burns* at ¶ 29. This Court held a provision of Illinois' aggravated unlawful use of a weapon statute facially unconstitutional under the Second Amendment because it created a flat ban carrying ready-to-use guns outside the home, even though, hypothetically, the legislature could have constitutionally placed that restriction on a convicted felon. *See Burns*, ¶¶ 29, 30. Similarly, here, Section 15-86 is not valid simply because, hypothetically, it could be applied to a hospital that also happened to meet the constitutional requirement of exclusive charitable use.

As an officer of the Court, undersigned counsel acknowledges this Court has also applied the *Salerno* standard strictly in other recent cases. *See People v. Rizzo*, 2016 IL 118599 (2016); *People v. Minnis*, 2016 IL 119563, Par. 24 (2016); *Burns*, 2015 IL 117387, ¶ 48 (Garman, J., concurring)(collecting cases). This Court has done so in addressing facial attacks under the State Constitution. *See Kakos v. Butler*, 2016 IL 120377, ¶ 29 (2016). Still, the *Salerno* rule is not required in state court as a matter of federal law, even where federal constitutional rights are at issue: the limits on facial attacks in federal court is a prudential doctrine grounded in third party standing, not the U.S. Constitution. *City of Chicago v. Morales*, 427 U.S. 41, 55, n.22 (1999).

The U.S. Supreme Court has declined to apply *Salerno*'s "no set of circumstances" test rigidly. *See Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1176,

n.1 (1996) (Stevens, J., memorandum respecting denial of petition for *certiorari*)(collecting cases). In fact, *Salerno*'s "no set of circumstances" standard has been described by that court as merely a "suggestion" (*Troxel v. Granville*, 530 U.S. 57, 85 n.6 (2000)); or a "rhetorical flourish" (*Janklow*, 517 U.S. at 1175). The "no set of circumstances" standard was not the basis for several decisions of the U.S. Supreme Court in which it was repeated, including *Salerno* itself. *See City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999)(plurality opinion); *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (noting *Salerno* standard was dicta). In fact, *Salerno*'s rule is most strenuously invoked by the justices of the U.S. Supreme Court in dissent, criticizing the majority for not following the strict formulation used by the First District. *See, e.g., Morales*, 527 U.S. at 79-81 (1999) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 643 (1996) (Scalia, J., dissenting).

Some members of the U.S. Supreme Court have endorsed an alternate standard for facial attacks under which a statute is facially unconstitutional if it lacks any "plainly legitimate sweep". *See Washington v. Glucksberg*, 521 U.S. 702, 740, n.7 (1997) (Stevens, J., concurring); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 202-203 (2008) (Stevens, J., with two justices concurring and three justices concurring in the judgment). While this standard originated as the overbreadth standard for First Amendment cases, it accurately describes the U.S. Supreme Court's rulings outside of that context. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992) (Supreme Court held an abortion regulation facially invalid as a substantial obstacle to exercise of right in "large fraction" of cases); *Stenberg v. Carhart*, 530 U.S. 914, 1019-20 (2000) (Scalia, J., dissenting) (critiquing majority for not following *Salerno*). While the "no set

of circumstances" language of *Salerno* has not been disavowed, the U.S. Supreme Court has recognized that whether this rule or the "plainly legitimate sweep" test applies in the typical case outside the First Amendment is currently a matter of dispute. *U.S. v. Stevens*, 559 U.S. 460, 472 (2010).

It has been suggested that the "plainly legitimate sweep" standard would render as-applied challenges redundant, because a litigant need not raise his own constitutional rights as long as he can identify someone else to whom application of the law would be unconstitutional. *See Burns*, 2015 IL 117387, ¶ 50 (Garman, J., concurring). But a valid statute must have a plainly legitimate sweep, not a perfect sweep. At issue is not speculative hypothetical unconstitutional applications of a statute with a valid general sweep, but a statute that defines its core applications in unconstitutional terms, and applies constitutionally only by chance. In fact, under the First District's rigid interpretation of *Salerno*, all facial attacks outside of the First Amendment would be redundant: a litigant could not succeed in a facial challenge unless he also could succeed in an as applied challenge. *See Washington*, 521 U.S. at 739-40, n.6 (Stevens, J., concurring).

Just as a statute does not have to be constitutional in all applications to be facially valid, it should not have to be unconstitutional in all conceivable applications to be facially invalid. The limit on facial attacks avoid hypothetical challenges to statutes where their constitutional application might be cloudy and delay adjudication until the court is presented with a concrete controversy that would allow it to find a limiting construction. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008); *U.S. v. Raines*, 362 U.S. 17, 22 (1960); *Morales*, 527 U.S. at 55 n.22 (1999). This rule loses its rationale where "the statute in question has already been declared

unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover". *Raines*, 362 U.S. at 23.

It does harm to continue to recognize the validity of a statute that is unconstitutional in the vast majority of its applications because of merely hypothetical constitutional applications. This approach imposes costs on the public, which is called upon to either invoke or forfeit its valid constitutional claims in the vast majority of its applications; and the court system, which is called upon to adjudicate these claims. *Cf., Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2318-19 (2016) (declining to enforce severability clause rendering each application severable on these grounds). It encourages those who would violate the constitution to exploit the litigation costs of invoking one's rights. Finally, this approach leaves in place a defective statute with a scope defined more by the accidents of precedent than any coherent legislative intent.

In *City of Los Angeles v. Patel*, 135 S.Ct. 2443 (2015), the U.S. Supreme Court recognized an important exception to *Salerno*'s rule. In that case, the court considered a facial attack on a municipal ordinance which would authorize a regulatory search of the records of motel operators, without requiring a warrant based upon probable cause. The municipality argued a facial attack would fail because even though the ordinance did not require a warrant, it did not prohibit one, either. Because an officer with a search warrant could search motel records pursuant to the ordinance, the ordinance was capable of being applied constitutionally. The U.S. Supreme Court rejected this argument, noting a search pursuant to warrant was valid with or without the statute. Even under *Salerno's* strict formulation, the Court is only to consider applications of the statute in which it actually

authorizes or prohibits conduct. *See Patel*, 135 S.Ct. at 2451. In assessing the facial attack, the Court considered only searches the law actually authorizes, not those for which it was irrelevant. *See Patel*, 135 S. Ct. at 2451.

If Section 15-86 contains no constitutional overlay, it has very little legitimate sweep. The fundamental facial defect in Section 15-86 is the offset of certain statutory services against the taxpayer's property tax bill without regard to exclusive charitable use. As noted above, Section 15-86 would still serve a limited legitimate role in redefining charitable ownership. But this limited rule is small compared to its intended sweep. It does little to resolve the "considerable uncertainty surrounding the test for charitable property tax exemption" in light of the *Provena* decision. See 35 ILCS 200/15-86(a)(1). Nor does it accomplish the legislature's goal of establishing "quantifiable standards for the issuance of charitable exemptions". See 35 ILCS 200/15-86(a)(5). Section 15-86 expressly allows hospitals meeting that standard to continue to receive their exemption under the pre-existing statutory standard (35 ILCS 200/15-86(i)), which already incorporates the constitutional *Korzen* standard (35 ILCS 200/15-65; *Provena*, 236 Ill.2d at 390). If the Overlay Approach is rejected, the primary effect of Section 15-86 is to extend exemptions to hospitals that cannot meet this constitutional standard, but can meet the formula set forth in Section 15-86(c). Like the statute in *Patel*, Section 15-86 operates constitutionally primarily where it is irrelevant.

Section 15-86 is also facially invalid under a "Valid Rule" approach to facial attacks. Under such an approach, a facial challenge is understood as one in which a litigant asserts a constitutional defect in the terms of the statute itself, independent of its application to particular cases. *See People v. One 1998 GMC*, 2011 IL 110236, ¶ 86 (2011) (Karmeier,

J., concurring), *citing* M. Isserles, *Overcoming Overbreadhth: Facial Challenges and the Valid Rule Requirement,* 48 Am. U. L. Rev. 359, 363-64 (1998). This approach recognizes that litigants have a right to have their claims adjudicated only under constitutional laws. The fundamental facial defect in Section 15-86, exemption based exclusively on the offset of statutory services against property tax liability, inheres in the statute itself rather than in any particular application. If Section 15-86 happens to apply to a hospital that meets the constitutional *Korzen* standard, it does so by chance, not design.

This Court has already suggested this approach in a case very similar to the one before it now. In *Chicago Bar Ass'n v. Dep't of Revenue,* 163 Ill.2d 290 (1994), this Court ultimately rejected a facial constitutional attack to a statute which purported to grant an educational property tax exemption to certain property adjacent to university property, without regard to whether the exempted property itself was used exclusively for educational purposes, an exclusive use requirement comparable to the constitutional charitable use requirement applicable here. This Court adopted an Overlay Approach, requiring compliance with the constitutional exclusive use requirement in addition to the statutory criteria for exemption. *See Chicago Bar Ass'n*, 163 Ill.2d at 289-300. In rejecting the trial court's contrary construction of the statute, this Court stated, "If the circuit court's construction of the statute were accepted, its conclusion would be correct. The [exemption provision] would be invalid on its face". *Chicago Bar Ass'n*, 163 Ill.2d at 298[3]. Similarly, here, if the Overlay Approach is rejected, Section 15-86 is invalid on its face.

[3] *McKenzie v. Johnson*, 98 Ill.2d 87 (1983) also avoided a facial attack to an exemption statute by adopting the Overlay Approach. *See Chicago Bar Ass'n,* 163 Ill.2d at 299-300

III. IF THIS COURT ADDRESSES THE CONSTITUTIONAL STATUS OF THE *KORZEN* FACTORS, IT SHOULD HOLD THAT SECTION 15-86 IS CONSTITUTIONALLY INFIRM

At 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. As discussed below, Section 15-86 would purportedly grant an exemption without regard to several of the *Korzen* Factors. If the *Korzen* Factors are part of the constitutional definition of charitable use, then they would apply as part of the overlay under the Overlay Approach. If the Overlay Approach is rejected, and these *Korzen* Factors are constitutional in nature, then the failure of Section 15-86 to account for them gives rise to another claim that the statute is constitutionally infirm.

A. It is Not Appropriate to Address the *Korzen* Factors

The decisions of the First and Fourth Districts wisely avoided ruling whether the *Korzen* Factors are constitutional in nature. In addressing the facial validity of Section 15-86, the First District noted only that the constitution was an overlay over the statute, but did not describe in detail what the constitution required. Similarly, in holding Section 15-86 unconstitutional in its decision in *Carle,* the Fourth District focused on its conflict with the exclusive use requirement, not its conflict with the other *Korzen* Factors.

(discussing *McKenzie*). There is language in *McKenzie* suggesting a facial constitutional attack must also fail because the exempt parcel could, conceivably, be used primarily for the purpose justifying the exemption, and exempt property has been used in this manner on occasion in the past. *McKenzie*, 98 Ill.2d at 98-102. To the extent *McKenzie* rested on this ground, it was overruled *sub silento* by *Chicago Bar Association*.

This Court has long held that it should reach constitutional issues only as a last resort. *Carle*, 2017 IL 120427, ¶ 34; *In re E.H.*, 224 Ill.2d 172, 178 (2006). Constitutional issues should only be addressed if necessary to decide a case. *Carle*, 2017 IL 120427, ¶ 34; *People .v. Hampton*, 225 Ill.2d 238, 244 (2007). The Court does not typically "anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring, joined by Stone, Roberts and Cardozo, JJ), quoting *Liverpool, New York & Philadelphia, Steamship Coi. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). Nor will the Court typically "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied". *Id*.

As the decisions of the First and Fourth Districts suggest, it simply is not necessary to address the constitutional status of the *Korzen* Factors to address this facial attack. Certainly, this status is not central to Plaintiff's facial attack. There is a huge gap between the amount of services necessary to meet the offset and the primary use of a parcel. Whether the services meeting the offset also meet the constitutional definition of charity has nothing to do with the fact this gap exists. Whether the services used to meet that offset are consistent with the remaining *Korzen* Factors has very little bearing on whether the primary use of the parcel as a whole does. As discussed below, while Section 15-86 is in conflict with the *Korzen* Factors, this conflict is more fact-dependent.

None of the analytical approaches to address the offset require the Court to address the *Korzen* Factors. If Section 15-86 is facially valid because a constitutional standard is an overlay over Section 15-86, this would be true regardless of whether the *Korzen* Factors are part of that overlay. If Section 15-86 is read literally as mandating an exemption once

the statutory formula is met, it would be facially unconstitutional because it violates the exclusive use requirement, regardless of whether it is also unconstitutional because of the conflict with the *Korzen* Factors. Even if this Court were inclined to adopt the First District's rigid approach to *Salerno*'s "no set of circumstances" standard, the constitutional status of the *Korzen* Factors would not change the outcome of this case. A facial attack on Section 15-86 would lose because a hypothetical hospital could comply with the constitutional standard and Section 15-86, regardless of whether the *Korzen* Factors are part of that constitutional standard. The relief sought by Plaintiff here, a blanket injunction on enforcement of Section 15-86, would be denied, either way. The only impact addressing the constitutional status of the *Korzen* Factors would have would be on cases not currently before this Court.

If the Court now changes the constitutional status of the *Korzen* Factors, it would be engaging in unnecessary exercise with far-reaching ramifications. Currently, there is a case pending in Champaign County on remand from this Court, in which the hospital plaintiff is seeking exemption under both Section 15-86 and Section 15-65. Regardless of whether the *Korzen* Factors apply to the Section 15-86 claims, they will apply to that hospital's Section 15-65 claims. That case, or another like it, offers the Court an opportunity to make decisions about the constitutional status of the *Korzen* Factors in an as-applied attack based upon a fully- developed record. By contrast, this case comes before the Court on a blank record. Plaintiff did not initially seek discovery in the case at hand, because it was "supposed to involve a legal question, not factual issues". (Vol. I, C. 412). IHA successfully opposed Plaintiff's later motion under Supreme Court Rule 191 to obtain additional discovery before summary judgment was argued. (Vol. I, C. 438-39). It is bold

for IHA to ask this Court to redefine over 40 years of state constitutional law. It is even more bold to make such a request with no factual record before the Court.

B. Section 15-86 Contains a Constitutionally Defective Definition of Charitable Use

If the Court reaches the issue, it should reaffirm the constitutional role of the *Korzen* Factors, and conclude Section 15-86 is in conflict with them. For over forty-five years, this Court has defined "charitable use" by reference to them. *See Methodist Old Persons Home v. Korzen*, 39 Ill.2d 149 (1968). Section 15-86 purports to create an exemption under a standard that ignores them. Constitutional history, policy, and principles of stare decisis all weigh heavily in favor of continuing to recognize the *Korzen* Factors as part of the constitutional definition of charitable use.

1. Overview of the *Korzen* Factors

The Illinois Supreme Court defined "charitable use" in *Methodist Old Persons' Home v. Korzen*, 39 Ill.2d 149 (1968). In *Korzen*, the Court construed a property tax exemption the legislature had granted to all property certain non-profit "old people's homes". Ill. Rev. Stat. 1965, chap. 120, par. 500.7. The Court rejected an interpretation that would make all non-profit old people's homes exempt ipso facto. *Korzen*, 39 Ill.2d at 156. Instead, the Court required the property be used exclusively for charitable purposes. In giving meaning to this standard, the Court first noted:

> "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".
>
> *Korzen*, 39 Ill.2d at 156-57, *citing Crerar v. Williams*, 145 Ill. 625.

The Court then fleshed out this standard with the "*Korzen* Factors", stating:

> "that 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, ***; that the statements of the agents of an institution and the wording of its governing legal documents evidencing an intention to use its property exclusively for charitable purposes do not relieve such institution of the burden of proving that its property actually and factually is so used, ***; and that the term 'exclusively used' means the primary purpose for which property is used and not any secondary or incidental purpose. These principles constitute the frame of reference to which we must apply plaintiff's use of its property to arrive at a determination of whether or not such use is in fact exclusively for charitable purposes."
>
> *Korzen*, 39 Ill.2d at 156-57 (Internal citations omitted).

The *Korzen* standard remained unchanged in the 1970 Constitution. *See Eden*, 213 Ill.2d at 286.

2. All of the *Korzen* Factors are Constitutional In Nature

The claim in *Korzen* arose under a statute which requires taxpayer seeking exemption to establish: (1) "charitable use", that the exemption be "exclusively used for charitable or beneficent purposes"; and (2) "charitable ownership", that the exempt entity be an "institution of public charity". *See* 35 ILCS 200/15-65(a). At the trial court in this case, the Department argued that when *Korzen* referred to "the distinctive characteristics of a charitable institution", it signaled that certain of its factors are relevant to the statutory issue of charitable ownership and not to the constitutional issue of charitable use. (Vol. I, C. 209). The IHA also adopted this position. (Vol. I, 214-15).

Korzen itself characterized all of the *Korzen* Factors as relating to use, not ownership. Immediately before introducing them, this Court stated:

> The concept of property use which is exclusively charitable does not lend itself to easy definition *** However, though past decisions of this court provide no precise formula for resolving questions of purported charitable use, they do furnish guidelines and criteria which should generally be applied.
>
> *Korzen*, 39 Ill.2d at 156 (Emphasis added, citation omitted).

Immediately after listing the *Korzen* Factors, this Court stated "[t]hese principles constitute the frame of reference to which we must apply plaintiff's use of its property to arrive at a determination of whether or not such use is in fact exclusively for charitable purposes." *See Korzen*, 39 Ill.2d at 156 (Emphasis added). Certainly, there is no basis in this language for relating some of the *Korzen* Factors to use and others to ownership.

In *Eden Retirement Center*, this Court unequivocally rejected IHA's argument. This Court reviewed a statute which added to the list of properties granted an exemption old person's homes that qualified as non-profits under Federal income tax laws and had by-laws providing fee waivers or reductions based upon an individual's ability to pay. The appellate court had interpreted this statute as categorically providing an exemption when the statutory requirements were met, without requiring the exempt entity to also comply with the *Korzen* Factors. This Court disagreed. *Eden*, 213 Ill.2d at 294. The decision quoted the ALJ's decision at length, which ended with this statement:

> "I therefore conclude that the [property at issue] met only one of the six guidelines set forth in the *Methodist Old Peoples Home* case. Consequently these duplex units were not used primarily for charitable purposes."
>
> *Eden*, 213 Ill.2d at 252 (Emphasis added).

This Court concluded the ALJ had "applied the appropriate legal standard to the undisputed facts." *Id*. In doing so, this Court noted the *Korzen* Factors:

> "are not mere nonstatutory 'hurdles' intended to apply only to the [prior] version of the charitable-use property tax exemption statute. Rather, this court articulated the [*Korzen* Factors] to resolve the constitutional issue of charitable use."
>
> *Eden*, 213 Ill.2d at 290 (citation omitted, emphasis in original).

This Court expressly stated the lower courts' interpretation of the exemption statute violated the state Constitution and had to be reversed. *Eden*, 213 Ill.2d at 292-93.

It is true that, in *Provena*, the *Korzen* Factors were used by the plurality to define ownership where the statutory ownership and constitutional use standards are perfectly aligned. *See Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill.2d at 390. As a factual matter, constitutional issues of charitable use and statutory issues of charitable ownership are often intertwined. But nothing about this alternate use of the Korzen Factors suggests they have somehow lost their status as part of the constitutional definition of charitable use.

3. The *Korzen* Factor of Charitable Donations Is Not Addressed By Section 15-86

Section 15-86 would purport to grant an exemption without regard to whether the hospital receives income from charitable donations. This Court has long held that income from donations is part of the constitutional definition of charity. In *Small v. Pangle*, 60 Ill.2d 510 (1975), this Court concluded that an old person's home was not used exclusively for charitable purposes, in part, because it had an operating income derived almost entirely from contractual charges rather than donations. *See Small*, 60 Ill.2d at 517. In doing so, this Court emphasized "the legislature did not intend to deviate from the constitutional

requirement that to be exempt from taxation property of an old people's home must be used exclusively for charitable purposes". *Small*, 60 Ill.2d at 519 (Emphasis added).

Donations are constitutionally significant for several reasons. First, they are an excellent signal that the public views a particular entity as undertaking charitable activities. J. Colombo, *Hospital Property Tax Exemption in Illinois: Exploring the Policy Gaps*, 37 Loy. U. Chi. L.J. 493, 519 (2006) (Colombo, *Exploring Policy Gaps*); M. Hall and J. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 Ohio State Law Journal 1379, 1385 (1991) (Hall & Colombo, *Donative Theory*). Second, donations are a signal that the public views the service as one that the private market would not provide on its own. Hall & Colombo, *Donative Theory*, at 1385. Finally, charitable donations are significant to the extent the charitable source of funds places restrictions on their current use for non-charitable purposes. *Korzen*, 36 Ill.2d at 348.

4. The *Korzen* Factor of Improper Private Benefit Is Not Addressed by Section 15-86

Section 15-85 purports to provide an exemption without regard to whether the exempt entity provides an improper private benefit to others. *Korzen* itself grouped this factor with "dispens[ing] charity to all who need and apply for it", which is indisputably an aspect of charitable use, not ownership. A central goal of Article IX, § 6 of the 1970 Constitution was to limit public subsidies for special interest groups. *See* Proceedings, *supra*, Vol. 5 at 3845 (statements of Delegate Karns, August 9, 1970). Private benefit undercuts the express constitutional requirement that the charitable use be exclusive: any use designed to provide a private benefit is, by definition, use which is not charitable. In *People ex rel. Cty. Collector v. Hopedale Med. Found.*, 46 Ill.2d 450 (1970), the sole issue presented was an improper private benefit to a private individual managing the hospital

claiming exemption. This Court denied exemption, stressing that the taxpayer failed to demonstrate its facilities were used exclusively for charitable purposes "within the statutory and constitutional provisions." *Hopedale*, 46 Ill.2d at 463 (Emphasis added).

Impermissible private benefit is not present merely because a hospital contracts with doctors or other health care providers to provide services. *See Provena*, 236 Ill.2d at 392; Colombo, *Exploring Policy Gaps*, at 520-21. Yet if the arrangements between the hospital and the doctors are not at arms' length, or if the hospital transfers significant wealth to other entities for reasons that cannot be justified by its charitable purpose, then the exemption is not appropriate. Colombo, *Exploring Policy Gaps*, at 520-21, 525. Nor is exemption appropriate if the non-profit hospital is doing little more than acting as a broker between the patient and for-profit care providers. Colombo, *Exploring Policy Gaps*, at 523. When the hospital employs for-profit outside independent contractors to provide core services to its charitable base, the hospital should justify why the arrangement is appropriate to further its charitable mission. Colombo, *Exploring Policy Gaps*, at 523.

5. The Korzen Factor of Offset of Government Burdens is Not Adequately Addressed by Section 15-86

Under the *Korzen* standard, the Court is to consider the extent to which the taxpayer's activities reduce the burdens of government. *Korzen*, 39 Ill.2d at 156-57. A charitable exemption is justified, in part, by the fact that charitable activities supply services which would otherwise have to be provided by the public, thereby reducing the tax burden. *People ex rel. Cnty. Treasurer v. Muldoon*, 306 Ill. 234, 237-38 (1922). Each tax dollar lost to exemption is one less dollar affected governmental bodies have to meet their obligations directly. *Provena*, 236 Ill.2d at 395. It is only fitting that the exempt

entity provide some compensatory benefit in exchange. *Id*. Services extended for value received do not relieve the State of its burdens. *Id.* at 396.

Section 15-86 considers this Korzen Factor, but only in a limited way: It compares the value of statutory services with the value of the exemption. *See* 35 ILCS 200/15-86(c). Prior to Section 15-86, Illinois law never required a direct, dollar-for-dollar correlation between the value of the exemption and the value of goods or services provided by the charity. This fact was emphasized by the plurality in *Provena*. *Provena*, 236 Ill.2d at 395. Before the trial court, IHA relied upon this language in *Provena* to support its odd but creative argument that Section 15-86 actually makes it harder for hospitals to get property tax exemptions because it requires such an offset. (Vol. I, C. 65, 176, 220, 437-438).

While offsetting burdens on government is one of many factors constitutionally defining charity, the more demanding requirement that the charitable use be exclusive is the core of the constitutional standard, and it is completely disregarded by Section 15-86. By IHA's strange logic, Section 15-86 makes the exemption standard more strict by demanding a more detailed exemption form. *See* 35 ILCS 200/15-86(h). While true, that point, like IHA's argument, is not central to the issues now before the Court. Certainly, the sponsors of Public Act 97-688 did not see the new standard in Section 15-86, as a whole, as stricter: It was intended to compensate hospitals for burdens placed on them by a new health care tax assessment. 97th Gen. Assem. House Proceedings, May 25, 2012, at 68 (statements of Representative Curie).

Offsetting burdens on government may be a necessary condition of exemption, but it is not a sufficient one. *Cf., Provena*, 236 Ill.2d at 397 (though offset standard was not met, plurality would deny exemption even without considering this factor). Illinois law

has never held that a match of charitable activity to property tax liability, alone, would qualify a use for exemption. This is with good reason. Burdens on government do not match up perfectly with charitable services, and a unit of local government cannot pay its police and firefighters with a hospital's charity care.

Moreover, for-profit hospitals should be the benchmark for assessing the burden relieved by hospitals claiming to be charitable. D. Hyman, *The Conundrum of Charitability: Reassessing Tax Exemption for Hospitals*, 16 Am.J.L. & Med. 327, 360 (1990) (Hyman, *Conundrum of Charitability*); Colombo, *Exploring Policy Gaps*, at 514-15. If for profits and non-profits provide the same quantity of charity care, the nonprofit is not shouldering an extra burden to offset the lost tax revenue. Hyman, *Conundrum of Charitability,* at 361.

Section 15-86 makes no effort to compare contributions of those claiming exemption with similar contributions made by for-profit hospitals. Section 15-86(e)(1) provides a credit for services provided through a hospital's "financial assistance program"; and Section 15-86(e)(2) provides a credit for other unreimbursed costs of "addressing the health of low-income or underserved individuals". 35 ILCS 200/15-86(e)(2). However, for-profit hospitals also provide large amounts of uncompensated care annually. Colombo, *Exploring Policy Gaps,* at 514. In fact, when the legislature created Section 15-86, it also enacted a new income tax credit for for-profit hospitals for the lesser of their property taxes paid and the cost of free or discounted services provided pursuant to their charitable financial assistance policy, measured at cost. *See* 35 ILCS 5/223(a). These services may simply represent a business decision not to pursue debt collection. D. Hyman, *Conundrum of Charitability*, at 360. For-profit hospitals regularly incur unreimbursed costs for

emergency care for those whom they are not legally allowed to turn away. *See* 210 ILCS 85/11.1. For-profit hospitals also support state health care programs for low-income individuals (activity credited at Section 15-86(e)(4)) and serve dual-eligible Medicare/Medicaid patients (activity credited at Section 15-86(e)(5)).

6. The Non-Profit Limitation of 15-86 Does Not Cure the Constitutional Defect in Section 15-86

Section 15-86 is at least consistent with one of the *Korzen* Factors to the extent it is limited to non-profit hospitals. *Korzen* considers whether the use is by an institution that has "no capital, capital stock or shareholders, and earns no profits or dividends". Korzen, 39 Ill.2d at 156. Section 15-86 exemptions extended to "hospital owners". See 35 ILCS 200/15-86(b)(6). A hospital owner is required to be a not-for-profit corporation. See 35 ILCS 200/15-86(b)(2).

Yet non-profit status, alone, has never been determinative of exemption. *See People ex rel. Carr v. Alpha Pi of Phi Kappa Sigma Educational Ass'n of Univ. of Chicago*, 326 Ill. 573, 578-79 (1927). Speaking in opposition to a failed proposal to exempt all non-profit nursing homes, Delegate Karns quoted an expert who spoke before committee, that "the words "not-for-profit" cover a multitude of sins". Proceedings of Sixth Illinois Constitutional Convention, *supra*, Vol. 5, p. 3847 (Statements of Delegate Karns, August 9, 1970). In earlier debate, Delegate Durr stated:

> "It gets to be a question of whether it is really charitable, and putting a label of 'not-for-profit' on it is not going to answer that question – the question of fact – of whether it's a charitable purpose. You can make any corporation 'not-for-profit' just by playing games with the salaries."
>
> Proceedings, Vol. 3 p. 1918 (Delegate Durr, June 19, 1970).

A primary emphasis on non-profit status is inconsistent with the history of our Constitution.

This skepticism makes sense. One would not "allow a dry cleaner or shoe store with an inurement prohibition qualify for tax exemption". D. Hyman, *The Conundrum of Charitability: Reassessing Tax Exemption for Hospitals*, 16 Am.J.L. & Med. 327, 378 (1990) (Hyman, *Conundrum of Charitability*). A non-profit can still have surpluses inconsistent with a claim to charitable exemption. *Small v. Pangle*, 60 Ill.2d 510 (1975). Being non-profit does not, in and of itself, ensure that the institutions' benefits are held open to all, or that its activities reduce the burdens of government. *See Carr*, 326 Ill. at 578-79. Nor does it ensure an entity's primary function is charitable, and not the social, professional, or business advancement of its members. *Kiwanis Int'l v. Lorenz*, 23 Ill.2d 141, 146 (1961).

Moreover, Section 15-86 exemptions are not limited to not-for-profit entities. The exemption is also extended to "hospital affiliates". *See* 35 ILCS 200/15-86(b)(6). This term is broadly defined to include a wide array of entities, including any corporation that indirectly controls a hospital owner, and provides support to it. *See* 35 ILCS 200/15-86(b)(3).

7. Section 15-86 Credits Activities that Fall Outside the Constitutional Definition of Charity

Section 15-86(e) provides credits toward exemption for activities that simply are not charitable in nature. Charity is "a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons***". *Provena*, 236 Ill.2d at 416. Section 15-86 provides credits for several activities that do not meet this standard. As argued above, several of the credits in Section 15-86(e) do not meaningfully distinguish between for-profit and charitable hospitals, and may not be a gift at all. In particular, the *Korzen* standard would not allow reassignment of bad debt to charity care. *See id.* at 398;

Riverside, 342 Ill.App.3d at 608-09; *Alivio Med. Ctr. v. Dep't of Revenue*, 299 Ill.App.3d 647, 651-52 (1st Dist. 1998); *Highland Park*, 155 Ill.App.3d at 280-81. A hospital may receive credit for "providing support to other entities that treat low-income or underserved individuals", even if that other entity does so in exchange for full payment. *See* 35 ILCS 200/15-86(e)(2). Moreover, Sections 15-86(e)(4) and (5) provide credits to hospitals based upon discounts provided to Medicare and Medicaid patients. Serving these patients is not charitable because it is done in exchange for payment, rather than as a gift. *Provena*, 236 Ill.2d at 402, n.12; *see also Riverside Med. Ctr*, 342 Ill.App.3d at 610; *Alivio Med. Ctr.*, 299 Ill.App.3d at 651-52. Participation in these programs is optional, it provides the hospital with a reliable source of revenue, and it allows the hospital to qualify for favorable federal income tax treatment. *Provena*, 236 Ill.2d at 402-03.

Finally, Section 15-86(e)(1) improperly allows a finding of charitable use based upon discounts provided under the Hospital Uninsured Patient Discount Act ("Discount Act", 210 ILCS 89/1, *et seq*.). *See* 35 ILCS 200/15-86(e)(1). Prior to the Discount Act, the nominal rate used by hospitals was effectively a rate for charges collected only from the uninsured: Compensation for Medicaid and Medicare recipients was set by government regulation; and the rate actually paid for insured patients was negotiated on a contract-by-contract basis with private insurers. The uninsured were the only ones that paid full "sticker price". *See* 95th Gen. Assem. House Proceedings, May 27, 2008, at 29 (statements of Representative May). In fact, the uninsured paid over two hundred percent more, roughly, for their health care. *See* 95th Gen. Assem. Senate Proceedings, May 30, 2008, at 59-59 (statements of Senator Schoenberg; 95th Gen. Assem. House Proceedings, September 23,

2008, at 3 (statement of Representative May). Reductions from inflated nominal charges to the uninsured are not charity care. *Provena*, 236 Ill.2d at 400.

Starting in 2008, the Discount Act barred hospitals from recovering from uninsured patients more than a certain percentage markup over cost. *See* 210 ILCS 89/10(b); 95th Gen. Assem. House Proceedings, September 23, 2008, at 3 (statement of Representative May) ("this Bill would limit [bills to the uninsured] to 35 percent above cost"); 95th Gen. Assem. House Proceedings, May 27, 2008, at 30 (statement of Representative May) ("They [uninsured] will pay closer to what everyone else is paying right now for these services. We can correct this injustice."). For eligible uninsured patients and eligible charges, the Discount Act prohibits hospitals from collecting from an uninsured patient any amount over its charges less a statutorily-defined "Uninsured Discount". 210 ILCS 89/10(b).

Although Section 15-86 provides that free or discounted care is to be measured at cost, it also credits as charity discounts provided under the Discount Act. 35 ILCS 200/15-86(e)(1). The Uninsured Discount corresponds with the amount of nominal charges a hospital foregoes in order to reach the allowable markup under the Discount Act's formula. This Uninsured Discount is exactly the same markup that the *Provena* plurality rejected as charity care. A lost chance to overcharge the uninsured is not charity.

CONCLUSION

For the above-stated reasons, Champaign County and the Champaign County Treasurer requests that, should this Court reject the Overlay Approach, it conclude that Section 15-86 is facially unconstitutional; that this Court decline any request to address the constitutional status of the *Korzen* Factors in the course of ruling on this appeal; and that should this Court address this issue, it reaffirm each of the *Korzen* Factors as part of the constitutional definition of charitable use.

Respectfully Submitted,

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SUPREME COURT RULE 341(c) COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief excluding the pages or words contained in the Rule 341(c) 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 forty-one (41) pages.

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CERTIFICATE OF SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that on this 1st day of November, 2017, I caused the foregoing (1) Motion for Leave to File *Amicus Curiae* Brief in support of Plaintiff-Appellant Constance Oswald, (2) Proposed Order, and (3) *Amicus Curiae* Brief of Champaign County and the Champaign County Treasurer:

1. To be electronically submitted to the Illinois Supreme Court via the Clerk's electronic filing system; and

2. To be served upon each of the following by electronic mail:

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Under penalties provided by law pursuant to Section 1-109 of the Rules of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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