IN THE SUPREME COURT OF TEXAS

NO. 16-0519

HONORS ACADEMY, INC., D/B/A/ HONORS ACADEMY AND AMERICAN YOUTHWORKS, INC., D/B/A AMERICAN YOUTHWORKS CHARTER SCHOOL, PETITIONERS,

v.

TEXAS EDUCATION AGENCY AND MICHAEL MORATH, IN HIS OFFICIAL CAPACITY AS TEXAS COMMISSIONER OF EDUCATION, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

JUSTICE JOHNSON, concurring.

I agree with and join the Court's opinion and judgment, subject to the following comments.

The Court makes extensive references to *LTTS Charter School, Inc. v. C2 Construction, Inc.*, where we considered whether an open-enrollment charter school was a "governmental unit" for purposes of the Tort Claims Act, and therefore authorized to take an interlocutory appeal from the trial court's denial of its plea to the jurisdiction. 342 S.W.3d 73, 74–75 (Tex. 2011). The Court notes that after we decided *LTTS*, the Legislature "expanded charter-school immunity to include immunity from suit and added charter holders to the immunity granted." *Ante* at __ (citing TEX. EDUC. CODE § 12.1056(a)).

In *LTTS*, we did "not resolve the underlying issue of whether [the school] enjoys immunity" and did not otherwise address the question of charter school immunity. 342 S.W.3d at 82. The dissenting justice in *LTTS* noted that the issue of whether the Legislature had authority under the Texas Constitution to confer immunity on a private entity was far from clear. *Id.* at 89 (Guzman, J., dissenting) ("[T]he precise contours of the Legislature's power to grant immunity by statute remain unclear—it is no doubt limited by the Open Courts and Due Course of Law provisions of our Constitution."). As this Court has explained numerous times, the doctrine of sovereign immunity, or governmental immunity as it is referred to in connection with political subdivisions of the state, developed through the common law. That being so, the judiciary "has historically been, and is now, entrusted with 'defin[ing] the boundaries of the common-law doctrine and . . . determin[ing] under what circumstances sovereign immunity exists in the first instance.'" *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 432 (Tex. 2016) (quoting *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006)). On the other hand, courts have consistently deferred to the Legislature to decide if and when immunity should be *waived* because "the Legislature is better suited to balance the conflicting policy issues associated with waiving immunity." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695–96 (Tex. 2003).

Whether the Texas Constitution authorizes the Legislature to grant sovereign or governmental immunity to an entity is a question warranting full and transparent presentation and analysis—especially in light of our extensive and consistent prior statements and decisions. *See, e.g., Univ. of the Incarnate Word v. Redus*, 518 S.W.3d 905, 911 (Tex. 2017); *Wasson Interests*, 489 S.W.3d at 432; *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015); *Reata*

Const. Corp., 197 S.W.3d at 375. That the question, an issue of obvious great magnitude, has not been presented or decided in this case is manifested both by the Court's brief and passing references to section 12.1056(a)'s immunity language and the lack of any discussion or analysis regarding the constitutionality question.

Phil Johnson
Justice

OPINION DELIVERED: April 27, 2018