GOVERNOR GREG ABBOTT

Memorandum

To: The Honorable Glenn Hegar, Comptroller of Public Accounts

From: Jimmy Blacklock, General Counsel, Office of the Governor
Kara Belew, Budget Director, Office of the Governor
Andrew Oldham, Deputy General Counsel, Office of the Governor

Re: Constitutionality of the H.B. 1 Veto Proclamation

Since 1866, the Texas Constitution has given the Governor the power to line-item veto the State's budget. Over the last 149 years, the Supreme Court of Texas and the Attorney General of Texas have had multiple opportunities to interpret the scope of the Governor's veto power. Moreover, governors in 43 other States also have line-item veto authority, and courts and attorneys general in those States also have had numerous opportunities to interpret that power. According to all of the relevant legal authorities—including the Texas Supreme Court's landmark decision in *Jessen v. Bullock*—the Governor may veto any language in an appropriation bill that (1) sets aside a sum of money (2) for a particular purpose.

Each of Governor Abbott's line-item vetoes of the 84th Legislature's General Appropriations Act easily satisfies that simple test. The contrary view, expressed in the recent letter to you from the director of the Legislative Budget Board ("LBB"), is not based on legal authority written by objective arbiters such as courts. It is based on faulty conventional wisdom that has somehow come to be relied upon as if it were law by the staff of the LBB, who of course have an institutional interest in minimizing the Governor's veto authority. We have been unable to identify any source of actual legal authority from this State or any other State that casts doubt on the legality of Governor Abbott's line-item vetoes of the 84th Legislature's General Appropriations Act.

It is telling that the LBB director cannot point to a case from any court, an attorney general opinion from any State, or even a law review article embracing her view that the LBB can take away the Governor's constitutional power to veto a budget item by merely *changing the label* it uses to describe the item. Remarkably, the LBB staff believe that when they change the label affixed to a budget item, they insulate the item from veto *without any material change to the item's effect on a state agency's obligations*. In the LBB staff's view, the only relevant question is whether legislative budget writers intended for an item to be veto-eligible. Under that view, the LBB staff—not the Texas Constitution—unilaterally determine which budget items are eligible for veto. That gets the law exactly backwards. The Texas Constitution—not the LBB staff—determines the scope of the Governor's veto power. And under all the relevant legal authority interpreting the Texas Constitution and similar constitutional language in other states, the question courts ask is never whether budget writers intended an item to be veto-eligible. The

question courts ask is whether budget writers intended to (1) set aside a sum of money (2) for a particular purpose.

Not only is this rule the best reading of the text and structure of the Constitution, it also comports with the purpose of the line-item veto power in our constitutional system. If the LBB staff's view were the law, the Legislature could unilaterally eliminate the Governor's line-item veto power simply by playing word games. This elevation of semantics over substance is antithetical to the whole point of the line-item veto power, which ensures that budget writers cannot control every detail of the State's expenditures without subjecting their decisions to the Governor's veto pen. Thus, in addition to being contrary to the controlling legal precedent, the LBB staff's position would upset the carefully balanced separation of powers contained in the Texas Constitution. The Framers of both the Texas and the United States Constitutions recognized that the only way to protect the People from an over-reaching government is to ensure that one branch can effectively check and balance the power of another. In Texas, the Governor's line-item veto power over the budget is a vital part of the system of checks and balances that protects Texas taxpayers. But the LBB staff believe they can promulgate thousands of pages of binding instructions that regulate down to the penny the amount of money that state agencies can spend—and regulate in excruciating detail what those pennies can be spent on—and there is *nothing* that the Governor can do besides veto the budget for entire institutions of higher education or veto multi-million-dollar or even billion-dollar lump-sum amounts for individual agencies.

The LBB staff's view would vitiate the line-item veto as a true check on legislative budget-making. It is the LBB staff's view of the law—not Governor Abbott's valid exercise of his constitutional authority—that amounts to an unprecedented power-grab and that upsets the separation of powers mandated by the Texas Constitution. Fortunately, the LBB staff's view is not the law. It conflicts with the text and structure of the Texas Constitution, it conflicts with the judicial decisions interpreting the Texas Constitution, and it conflicts with foundational principles of divided government and separation of powers that form the bedrock of our constitutional tradition. For these reasons, no court we are aware of has ever embraced the LBB staff's view. Nor is there any likelihood a court in the future would do so.

BACKGROUND

The Texas Constitution gives the Governor the power to line-item veto any bill that "contains several items of appropriation." TEX. CONST. art. IV, § 14. When a bill contains several items of appropriation, the Governor "may object to one or more of such items, and approve the other portion of the bill." *Ibid.* Thus, the Governor may line-item veto one or more "items of appropriation" without vetoing the entire appropriations bill.

A. The LBB Staff's "Magic Words"

While the text of the line-item veto clause is simple, the efforts by LBB staff to circumvent it are elaborate. Those efforts are motivated by two principal goals. First, the LBB staff want to maximize their control over the spending of every penny of the taxpayers' money.

And second, the LBB staff want to minimize the extent to which their work can be checked—and vetoed—by the Governor.

The LBB staff advance their twin goals of maximizing control while minimizing gubernatorial oversight through an array of budgetary jargon. Of course, the meaning of the Constitution's line-item veto clause does not turn on the particular buzzwords chosen by the LBB. But given that the present dispute turns on the LBB staff's view that it can thwart the veto of *anything* by adjusting the terminology it uses to describe it, it will be useful to clarify which words supposedly carry this extraordinary power and where those words came from.

"Goal." According to a House Research Organization document on the LBB's website, "goals are general statements of the agency's long-range purposes." HOUSE RESEARCH ORGANIZATION, WRITING THE BUDGET 4 (Feb. 14, 2007), *available at* http://www.lbb.state.tx.us/Budgeting/Writing the State Budget-80th Legislature Courtesy of the House Research Organization.pdf (hereinafter "WRITING THE BUDGET"). The "goal" is basically a subject heading tied to a defined amount of appropriated money; for example, the Attorney General's "goals" in the latest budget include "Provide Legal Services [$192,786,837]" and "Enforce Child Support Law [$692,045,141]."

"Strategy" and "Item of Appropriation." The LBB staff started using the term "strategy" in the early 1990s. The term is not mentioned anywhere in the Constitution, but in most instances the LBB staff use it interchangeably with the constitutional term "item of appropriation." *See* TEX. CONST. art. IV, § 14. According to the House Research Organization, "*Strategies*, sometimes called line items, are the bases for appropriating money to an agency." WRITING THE BUDGET, *supra*, at 4. The LBB staff generally believes that things it chooses to label as "Strategies" *can* be line-item vetoed. *See* Memorandum to the Comptroller from Ursula Parks, Re: HB 1 Veto Proclamation at 5 (July 21, 2015) (hereinafter "LBB Staff Memo"). But, in the LBB staff's view, the word "strategy" does not always carry this legal significance, as "strategies" for higher-education institutions are thought by LBB staff to be beyond the veto power. *See ibid.*

The LBB staff's unifying principle appears to be that anything it chooses to label as an "item of appropriation" is vetoable, while anything it chooses to withhold that label from is not vetoable. The only exception to that rule is a rider that uses the term "appropriate" (as opposed to another, functionally equivalent term such as "allocate"), which the LBB staff concedes can be vetoed. LBB Staff Memo at 5-6. Of course, this approach makes the budget writers—rather than the Texas Constitution—the sole determiner of which parts of the appropriations act the Governor may veto.

"Rider," "Informational Listing," and "Capital Budget." These labels are used variably to describe the detailed language that makes up the real guts of the budget. Again, none of these terms is mentioned anywhere in the Constitution. But the LBB staff understands them to be "conditions on an appropriation." WRITING THE BUDGET, *supra*, at 6. Sometimes a "rider" or "informational listing" is phrased in terms of actual conditions or directions. For example, a rider in article IX of the 2016-2017 budget provides, "The funds appropriated by this Act may

not be expended [for travel] unless the travel and the resulting requests for payment or reimbursement comply with the conditions and limitations in this Act, Chapter 660, Government Code, and the Comptroller's Rules."[1]

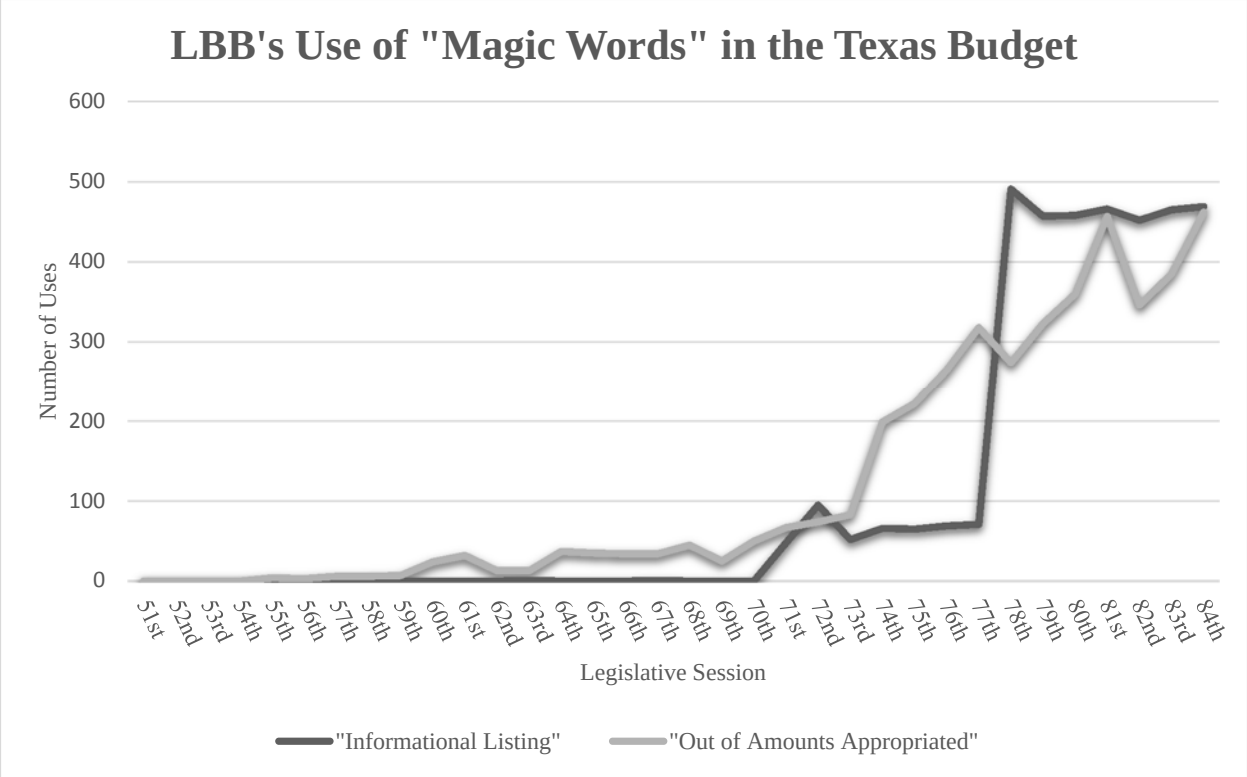
But sometimes the rider sets aside a specific sum of money for a specific purpose. The House Research Organization gives this example from the budget for the Texas Department of Criminal Justice:

> "Out of funds appropriated above in Strategy A.1.2, Diversion Programs, $6,500,000 in fiscal year 2006 and $6,500,000 in fiscal year 2007 in discretionary grants shall be made to the Harris County Community Supervision and Corrections Department for the continued operations of the Harris County Community Corrections Facility."

Id. at 11. The LBB staff do not dispute that this rider is the *functional equivalent* of a vetoable item of appropriation because it forces a particular state agency (TDCJ) to spend a particular sum ($6.5 million per year) on a particular thing (a jail in Harris County). Rather, the staff argue that the TDCJ rider is "veto-proof" because it combines two magical phrases. *Ibid.*; *see also* LBB Staff Memo at 5. First, the LBB staff labeled it a "rider," and they believe this mere label controls whether an item of appropriation is vetoable. *E.g.*, LBB Staff Memo at 6. Again, however, the LBB staff's reliance on the label "rider" is only half-hearted because they are forced to concede that *some* of their "riders" are vetoable notwithstanding their labels. *See id.* at 5 (conceding "on occasion riders" are vetoable). Second, and most importantly, the rider is prefaced by the phrase, "Out of funds appropriated above in Strategy A.1.2." In the LBB staff's view, the mere invocation of those words establishes conclusively that the *strategy* is the item of appropriation and that the *rider* is not an item of appropriation. *See* LBB Staff Memo at 5-6; WRITING THE BUDGET at 11.

Over time, the LBB staff have placed ever-increasing weight on their view that semantics control over substance. As the following chart shows, over the course of decades, the LBB staff have exponentially increased their use of these "magic words" in an attempt to "veto-proof" the budget. And there is no end in sight. Under the staff's view, budget writers can change a strategy (which the LBB staff assert is vetoable) into a rider (which the LBB staff assert is non-vetoable); or budget writers could roll-up the entire budget into a single lump-sum "Item of Appropriation" that provides $200 billion to the State of Texas, followed by nothing but 1,000 pages of "riders" and "informational listings" that direct expenditures "out of funds appropriated above." And in the LBB staff's view, that one-item budget would foreclose the Governor from line-item vetoing *anything*. *See* WRITING THE BUDGET, *supra*, at 11-12; LBB Staff Memo at 5-6.

[1] Even a rider that is genuinely conditional might be unconstitutional for other reasons. As the Supreme Court of Texas and Attorney General of Texas have recognized, a rider that is tantamount to general law is unconstitutional under Article III, Section 35 of the Texas Constitution. *See, e.g., Moore v. Sheppard*, 192 S.W.2d 599 (1946); Op. Tex. Att'y Gen. No. V-1254, at 10-18 (1951).



* "Out of Funds Appropriated" includes the following variations: "out of funds appropriated", "out of the funds appropriated", "from funds appropriated above", "out of amounts appropriated", and "out of the amounts appropriated".

"Bill Pattern." All of the terminology explained above combines to form the "bill pattern." Each agency or institution of higher education has its own bill pattern. A small entity might have one goal, two strategies, and 10 riders or informational listings; a larger entity obviously will have many more. And the bill patterns for related entities (like colleges and universities) will often closely resemble one another. The key import of the bill pattern, though, is that the LBB staff believe they can accomplish *substantive* changes in the vetoability of an agency's budget—while leaving in place all the requirements on agencies to spend specific sums of money on specific purposes—solely by tinkering with the bill pattern. The following hypothetical illustrates the point:

Agency A (2013)		**Agency A (2015)**	
Goal: Welfare and Common Good		**Goal**: Welfare and Common Good	
Strategy: Promote welfare	$1,000,000	*Strategy*: Promote welfare and common good	$2,000,000
Strategy: Promote common good	$1,000,000	Rider: Out of funds appropriated above, $1,000,000 shall be used to promote welfare and $1,000,000 shall be used to promote common good.	

The practical meaning of both sides of the chart is identical: under either scenario, Agency A gets $2 million, and the Legislature has required the agency to use $1 million to promote welfare and $1 million to promote the common good. But despite the functional equivalence of these two

scenarios, the LBB staff believe they would have dramatically different results for purposes of the Governor's veto power. In 2013, the LBB staff would argue, the Governor could veto $1 million for welfare, $1 million for the common good, or he could veto both. In 2015, by contrast, the LBB staff would argue that the Governor's *only* option is to veto all $2 million for Agency A because the division of the money into two pots of $1 million takes place in a "rider" that contains the words "Out of funds appropriated above." It bears repeating that, in the LBB staff's view, the division of funds into two pots of $1 million is no less legally binding on the agency when it is framed as a rider "out of funds appropriated above." Both budgets set aside the same sum of money for the same purposes. All that has changed between the 2013 and 2015 budgets, according to LBB staff, is the reach of the Governor's veto power.

B. The LBB Staff's Abuse of "Magic Words"

The example above is far from a purely hypothetical scenario. The LBB staff have done it numerous times over the decades. For instance, Governor Abbott vetoed a rider in the Texas Education Agency's budget that would have funded the Southern Regional Education Board with $193,000 per year. This provision appeared in previous budgets as a "strategy."[2] The LBB staff believe that they insulated this expenditure from veto, while maintaining the budgetary restriction imposed on TEA, simply by moving it from a "strategy" to a "rider" containing the phrase "out of funds appropriated above."

Two other examples are particularly relevant to the present dispute: higher education and so-called "capital budget" items (like buildings). First, take higher education. In the budget for the 1980-81 biennium, Governor Clements vetoed more than 100 items of appropriation for institutions of higher education, ranging from funding for the University of Texas at Austin's Bureau of Business Research to Stephen F. Austin's Stone Fort Museum. *See* Appendix Tab B, *infra*. At the time, the LBB staff had labeled each of those provisions as "items" of appropriation, so no one (including the LBB staff) challenged the Governor's power to veto them. Instead, in subsequent budgets, the LBB staff changed the bill pattern by removing the term "item" and listing the very same projects under a different label, typically "informational listing."

As shown in the following chart, some of the exact items Governor Clements vetoed in 1980-1981 remain in the higher-education budget today. While the LBB staff did not object to Governor Clements's vetoes then, they claim that the Governor today cannot veto these items—*solely because LBB staff changed their labels*.

[2] *See, e.g.*, 2002-2003 General Appropriations Act at III-52, *available at* http://www.lrl.state.tx.us/scanned/ApproBills/77_0/77_R_ALL.pdf (appropriating $157,000 for FY 2002 and $159,500 for FY 2003 to Strategy C.4.1: Southern Regional Education Compact).

	1980-81 Budget: Vetoed Appropriations	**2016-17 Budget: LBB's "Veto-Proof" Appropriations**
Sul Ross State University	Item 9b – Sul Ross State University Museum ($73,419)	Strategy C.2.1 – Sul Ross Museum ($165,00)
University of North Texas (North Texas State University)	Item 10g – Institute for Applied Sciences ($362,044)	Strategy C.2.1 –Institute of Applied Science ($87,642)
Stephen F. Austin University	Item 9b – Stone Fort Museum ($41,043)	Strategy C.3.1 – Stone Fort Museum & Research Center ($211,748)
Texas A&M Kingsville (Texas A&I University)	Item 10c –John E. Connor Museum ($66,334)	Strategy C.3.1 – John E. Connor Museum ($36,697)
University of Texas at Austin	Item 10b(2) – Marine Science Institute at Port Aransas ($988,324)	Strategy C.2.1 – Marine Science Institute – Port Aransas ($7,857,954)
University of Texas at Austin	Item 10b(5) – Bureau of Business Research ($935,158)	Strategy C.2.3 – Bureau of Business Research ($348,730)

This session, the Governor vetoed five items of appropriation at five institutions of higher education. Each one of them is analogous in every material respect to the items Governor Clements vetoed for the 1980-81 biennium. In all five instances, the General Appropriations Act dedicated a specific sum of money for a specific purpose at a specific institution—and in doing so, it created an "item of appropriation" that implicated the Governor's veto power. (We have attached in the Appendix to this letter an item-by-item explanation of the Governor's vetoes, *see* Tab A, *infra*.) The *only* difference between 2015 and 1979 is that the LBB staff *labeled* the 2015 items as something other than "items of appropriation." But the LBB staff can point to no source of legal authority—much less can they find anything in the Constitution—that suggests its labels matter. And given that Governor Abbott's vetoes are materially identical to those by Governor Clements, the LBB staff cannot accurately describe Governor Abbott's as "unprecedented." LBB Staff Memo at 1.

Next, take so-called "capital budget" items, such as parking garages. Governors for decades have vetoed unnecessary expenditures on buildings. Here are just a few examples; a fuller explanation (along with supporting citations) can be found in the Appendix Tab C, *infra*.

Samples Of Facility Construction Vetoes (FY 1964 – FY 2017)			
Budget	**Governor**	**Capital Appropriations Vetoed**	**Vetoed Spending**
1964-1965	John B. Connally, Jr.	To the Building Commission for "construction of a new state finance building"	$3,600,000
1970-1971	Preston Smith	To the Department of Public Safety "For the construction of subdistrict headquarters building"	$262,717

Samples Of Facility Construction Vetoes (FY 1964 – FY 2017)			
1976-1977	Dolph Briscoe	To the State Building Commission for the construction of "two parking garages" in the Capitol Complex Area To the State Board of Control to "Construct Services Building in Capitol Complex Area"	$6,973,527
1980-1981	William P. Clements	To the State Board of Control for a "New State Office Building" and for a "Parking Garage" to be located in the "Capitol Area"	$33,113,772
2014-2015	Rick Perry	To the Facilities Commission for two "office buildings" and one "parking structure" split between the Capitol Complex and North Austin Complex	$325,586,000
2016-2017	Greg Abbott	To the Facilities Commission for the replacement of the "San Antonio State Office Building," a "New Parking Garage" in Houston, and the "Acquisition and Relocation of Department of Motor Vehicles Headquarters"	$215,995,000

As noted in the last entry in the foregoing table, Governor Abbott line-item vetoed three new buildings. Again, the items he vetoed were materially identical to the other vetoes referenced in the chart. And again, the *only* difference between Governor Abbott's veto of three construction projects this year and Governor Briscoe's veto of two parking garages in 1975 is that the LBB staff changed the label it attached to these projects. Indeed, the LBB made very clear the "capital budget" items it created in 2015 are the functional equivalent of "strategies" by explicitly prefacing them with this directive: "The amounts shown . . . shall be *expended only* for the *purposes* shown and are not available for expenditure for other *purposes*." (Emphasis added.)

In short, the LBB cannot claim that the Governor's vetoes of building projects are "unprecedented," just as they cannot claim that his higher-education vetoes are "unprecedented." The only question is whether the LBB staff can use labeling games to turn previously vetoed "items of appropriation" into "veto-proof" non-items without giving up any of its power over the details of those expenditures. As explained in the balance of this letter, the Constitution's line-item veto clause, the separation-of-powers principles undergirding that clause, and decisions of the Texas Supreme Court foreclose the LBB staff 's position.

DISCUSSION

I. THE H.B. 1 VETO PROCLAMATION COMPLIES WITH THE LINE-ITEM VETO CLAUSE

The items vetoed in the 84th Legislature's General Appropriations Act easily qualify as "items of appropriation" under the line-item veto clause in Article IV, Section 14. That is so for

three reasons. First, the vetoes comport with *Jessen* and *Fulmore*, which are the Supreme Court of Texas's two leading cases interpreting the Governor's veto power. Second, the vetoes comport with Supreme Court decisions from other States, decisions which both *Jessen* and *Fulmore* rely upon as instructive. Third, the LBB Staff Memo's contrary arguments are unpersuasive and should be rejected.

A. *Jessen* and *Fulmore* Support the Governor

The Texas Supreme Court examined the Governor's line-item veto authority in *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593 (Tex. 1975). In *Jessen*, the General Appropriations Act made certain appropriations for the University of Texas at Austin, and following those appropriations, the Legislature attached this rider:

> The Board of Regents of The University of Texas System is hereby authorized (1) to expend such amounts of its Permanent University Fund bond proceeds and/or other bond proceeds and such amounts of its other available moneys as may be necessary to fund one or more of the following projects either in whole or in part, (2) to accept gifts, grants, and matching grants to fund any one or more of such projects either in whole or in part, and (3) to acquire, construct, alter, add to, repair, rehabilitate, equip and/or furnish any one or more of such projects for The University of Texas at Austin:
> (1) Alterations and Additions to Law School . . . .

Jessen, 531 S.W.2d at 597. The Governor vetoed the rider, and the question presented to the Supreme Court was whether the above-quoted text constituted an "item of appropriation" within the meaning of the line-item veto clause of Article IV, Section 14.

The Supreme Court of Texas held it was not—and hence fell outside the Governor's line-item veto power. The Court first held that "[a]n item of appropriation is an indivisible sum of money dedicated to a stated purpose." 531 S.W.2d at 599. The Court elaborated: "[T]he term 'item of appropriation' contemplates the setting aside or dedicating of funds for a specified purpose. This is to be distinguished from language which qualifies or directs the use of appropriated funds or which is merely incidental to an appropriation. Language of the latter sort is clearly not subject to veto." *Ibid.*

The Court held that the Governor's veto in *Jessen* was invalid because he struck a rider that did not set aside or dedicate specified funds for any purpose. Rather, the Governor attempted to veto a rider that merely "authorized" the Board of Regents to spend unspecified sums of "bond proceeds," and "to accept gifts" and "grants" in unspecified sums, for building alterations and additions at the Law School. 531 S.W.2d at 597. That language constituted "legislative approval" of construction projects at the Law School; but because the rider did not set aside a particular sum of money for that purpose, it did not constitute a vetoable "item of appropriation." *Id.* at 600. *Nowhere* did the Court even suggest that the label "rider" mattered to the outcome of the case.

Jessen's key teaching is that the Constitution's line-item veto clause draws a bright line between two concepts: (1) budget provisions that set aside particular amounts of money for particular purposes (and hence are vetoable), and (2) budget provisions that allow the agency flexibility to use unspecified amounts of money for unspecified or vaguely specified purposes (and hence are not vetoable). The Legislature gets to choose the level of granularity at which it uses the budget to control the agency's spending. Where the Legislature chooses a broad level of generality—as in *Jessen*—and does not require the agency to do anything or to set aside any particular amount of money, the Governor is powerless to use a line-item veto. But the more the Legislature restricts the agency and directs it to use specific dollar amounts for specific things, the more its instructions constitute "the setting aside or dedicating of funds for a specified purpose" and hence trigger the line-item veto power. *Jessen*, 531 S.W.2d at 599.

Jessen relied and built upon the Supreme Court's earlier decision in *Fulmore v. Lane*, 140 S.W. 405 (Tex. 1911). In *Fulmore*, the Legislature attempted to make the following appropriation for the Office of the Attorney General:

"Attorney General's Department.

For the Years Ending—
August 31, 1912—August 31, 1913.

For the support and maintenance of the Attorney General's department, including postage, stationery, telegrams, telephones, furniture, repairs, express, typewriters and fittings, contingent expenses, costs in civil cases in which the state of Texas or any head of a department is a party; for the actual traveling expenses and hotel bills incurred by the Attorney General or any of his assistants or employés in giving attention to the business of the state elsewhere than in the city of Austin; for depositions and procuring evidence and documents to be used in civil suits or contemplated suits wherein the state is a party; for law books and periodicals; for the payment of any and all expenses incident to and connected with the administration of the duties of the Attorney General's office; for the enforcement of any and all laws, wherein such duty devolves upon the Attorney General; for the payment of any and all expenses in bringing, prosecuting and defending suits; for the payment of the salary and maximum fees provided by the Constitution for the Attorney General, and for the payment of the salaries and compensation of his assistants and employés and other help deemed by the Attorney General to be necessary to carry on the work of the Attorney General's department, there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty ($83,160.00) dollars, to be expended during the two fiscal years ending August 31st, 1912, and August 31st, 1913, to be paid by the Treasurer on warrants drawn by the Comptroller upon vouchers approved by the Attorney General $41,580.00 $41,580.00

140 S.W. at 407. The Governor struck through the number $83,160 because he determined it was "excessive," and he also struck the sum of $41,580 for the second year of the biennium. *Id.* at 408. The Governor explained in his veto proclamation that he intended to reduce the Attorney General's appropriation by half—that "[b]y striking out the lump appropriation and the words

describing the same, and the appropriation of $41,580.00 for the second year, the sum of $41,580.00 is left subject to the use of the Attorney General for the maintenance of his department for the two fiscal years named . . . ." *Ibid.* The Governor further explained that the $41,580 "is available for use [by the Attorney General] until exhausted, and may be applied during both of the fiscal years ending August 31, 1912, and August 31, 1913." *Id.* at 411.

The principal question for the Court was whether the budget contained a single "item of appropriation" for the Attorney General in the amount of $83,160, or rather two "items of appropriation" in the amount of $41,580 each. By a vote of 2-1, the Court held that the numbers constituted two, separate "items of appropriation"—and therefore, the Governor was free to veto one of them. *See id.* at 410 (opinion of Dibrell, J.) ("[I]t must be concluded indubitably" that the Legislature appropriated "two separate and distinct sums of $41,580 each."); *id.* at 413 (opinion of Brown, C.J.) (similar). It did not bother the Court that the plain text of the Act said that "*there is hereby appropriated* [to the Attorney General] the sum of eighty-three thousand and one hundred and sixty ($83,160.00) dollars." *Id.* at 407 (emphasis added). Rather, the Court held that by breaking that sum into two halves, the Legislature effectively set aside two particular sums of money ($41,580) for a particular purpose (namely, running the Attorney General's Office). That was sufficient to make each half its own "item of appropriation" and bring each one within the ambit of the Governor's line-item veto power.

Each item in Governor Abbott's veto proclamation comports with Article IV, Section 14 of the Constitution as interpreted in *Jessen* and *Fulmore*. He vetoed particular items that set aside particular sums of money for particular purposes—including sums for constructing particular buildings, a sum for paying dues to a specified entity, and a sum for a particular museum. In adopting those items, the Legislature "set[ ] aside" and "dedicat[ed] funds for a specified purpose." *Jessen*, 531 S.W.2d at 599. And in doing so, it triggered the Governor's line-item veto power.

Jessen makes very clear that it does not matter whether a particular item is prefaced with "Out of funds appropriated above," or other language to that effect. According to the Court, "[t]he mere fact that the funds have been appropriated elsewhere does not preclude the construction that a provision is an item of appropriation." 531 S.W.2d at 600. The *Jessen* Court further held that a binding set-aside of funds "is an item of appropriation *even though it may be included in a larger, more general item*." *Id.* at 599 (emphasis added). Indeed, *Fulmore* itself is a perfect example of that fact: The plain language of the Attorney General's appropriation said that "there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty ($83,160.00) dollars," 140 S.W. at 407, and the Court held that the larger, more general item of $83,160 contained two equally vetoable items of $41,580. It was irrelevant that the Legislature tried to "appropriate[ ]" $83,160, and it was irrelevant that each of the $41,580 sums came out of funds "appropriated" above.

B. Decisions From Other States Support The Governor

Both *Jessen* and *Fulmore* instruct that the meaning of an "item of appropriation" under our Constitution should be understood in light of decisions "by courts in other jurisdictions with

similar constitutional provisions." *Jessen*, 531 S.W.2d at 599; *see also Fulmore*, 140 S.W. at 511.

Illinois provides a salient example. Like the Texas Constitution, the Illinois Constitution gives the Governor the power to "not approve any one or more of the items" of an appropriations bill. *See Fulmore*, 140 S.W. at 511 (relying on Supreme Court of Illinois). In *People ex rel. State Board of Agriculture v. Brady*, 115 N.E. 204 (Ill. 1917), the Illinois Legislature passed an act "making an appropriation in aid" of several state agencies, including the Board of Agriculture. The Act provided "[t]o the State Board of Agriculture the sum of $153,150 . . . to be used as follows," and what followed were a list of 44 purposes, with each purpose given a specified dollar amount. 115 N.E. at 204. The Governor vetoed 7 of the purposes. The veto message included, for example, "In section 1, paragraph (a), I veto the item 'For Forage, $720 per annum" and "In section 1, paragraph (a), I veto the Item 'For construction of permanent and sanitary eating houses, $10,000." *Id.* at 205.

The Board challenged the validity of the vetoes and demanded payment of each of the specified amounts from the state auditor. The Board argued the vetoes were invalid "on the ground that the only distinct item of appropriation was the whole amount of $153,150, and what followed was only an apportionment of that item or a direction how it should be used." *Id.* at 206. The Supreme Court of Illinois rejected the argument, noting that "[t]he general appropriation of the total sum specifies no purpose or object" and "to hold that it was the only distinct item of the appropriation would be to nullify the power given by the Constitution to the Governor to withhold his approval from distinct items." *Id.* at 206-07. The Court continued: "The word 'item' is in common use and well understood as a separate entry in an account or a schedule, or a separate particular in an enumeration of a total which is separate and distinct from the other particulars or entries, and the items vetoed by the Governor come within that meaning." *Id.* at 207. "The Governor had power to veto the particular items in the bill in question in this case, and, having done so, the items vetoed did not become any part of the law." *Ibid.*

Florida provides another example. Like the Texas Constitution, the Florida Constitution gives the Governor the power to veto any " 'item or items of any bills making appropriations of money embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void.' " *Green v. Rawls*, 122 So. 2d 10, 13 (Fla. 1960); *see Jessen*, 531 S.W.2d at 599 (relying on *Green*). In *Green*, the Legislature appropriated $579,344 to the Florida Division of Corrections and $4,576,831 to the Florida Board of Forestry. 122 So. 2d at 12. The Legislature labeled the first appropriation "Item 13," and it labeled the second appropriation "Item 23." *Ibid.* Then the Governor attempted to veto one sub-part of each "item"; the Governor's line-item vetoes are depicted by underlining added by the Florida Supreme Court in item 13(a)(1) and item 23(a):

"13. Corrections, Division Of		
"a. General office		
"1. Salaries—including salary of $12,000 per annum for the director and salaries of 25 employees...	$ 143 580	$ 143,580
"2. Expenses	53,739	53,779
"3. Operating capital outlay	12,816	7,100
"4. Special—discharge pay of inmates in an amount not exceeding $15 per inmate and transportation at not exceeding $25 per inmate, as provided by law	78.930	85.850
"Subtotal (a)	$ 289,035	$ 290,309"
(Underscoring added.)		
"23. Forestry, Florida Board of		
"a. Salaries—including salary of $10,000 per annum for the state forester and salaries of 890 employees in 1959/60 and 891 employees in 1960/61	$1,014,794	$1,005,004
"b. Expenses	952,013	921,542
"c. Operating capital outlay	466.704	216,774
"Total of Item No. 23.....	$2,433,511	$2,143,320"
(Underscoring added.)		

Ibid.

Adopting the same definition of "item of appropriation" used in *Jessen* and *Fulmore*, the Florida Supreme Court held that "$12,000 per annum" and "$10,000 per annum" were vetoable "items." The Court explained: "Quite obviously the legislature did go to the extent of saying that a specified sum of money raised by taxation, i.e. $12,000 and $10,000, respectively, should be spent for specified purposes, i.e. for the salaries of the two employees designated." *Green*, 122 So. 2d at 16. And the Court held it was irrelevant that the Governor vetoed only one piece of something the Legislature labeled "Item 13" and only one piece of something the Legislature labeled "Item 23." All that mattered, the Court held, is that the things vetoed by the Governor were intended to (1) set aside money for (2) a particular purpose: "These two factors are the essentials of an item. If they are present in relation to any detail or particular of the matters treated in an appropriations bill *the detail or particular is an item irrespective of the fact that it be included within a larger, more general item, as is the situation in the case now before us*." *Ibid.* (emphasis added).

The definitions used in *Jessen*, *Fulmore*, *Brady*, and *Green* comport with the dictionary definition of "appropriation," which Black's Law Dictionary defines as "a legislative body's or business's act of setting aside a sum of money for a specific purpose." BLACK'S LAW DICTIONARY (10th ed. 2014). And they are consistent with the longstanding view of what constitutes an appropriation in state courts across the country. *See, e.g.*, *Commonwealth v. Dodson*, 11 S.E.2d 120, 127 (Va. 1940) ("An item in an appropriation bill is an indivisible sum of money dedicated to a stated purpose. It is something different from a provision or condition . . . ."); *Stratton v. Green*, 45 Cal. 149, 151 (Cal. 1872) (defining a "specific appropriation" as "an Act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand"); *Clayton v. Berry*, 27 Ark. 129, 131 (Ark. 1871) ("The expression 'appropriated by law' means the act of the legislature setting apart, or assigning to a

particular use, a certain sum of money to be used in the payment of debts or dues from the State to its creditors.").

There are several more cases from around the country making the same point. The bottom line is that the LBB cannot set aside money for a particular purpose and then claim that its efforts are anything other than an "item of appropriation" subject to the Governor's line-item veto. As far as we are aware, there is no court in the country that ever has embraced the LBB's arguments to the contrary.[3]

C. The LBB's "Magic Words" Test Has No Basis in Law

1. The LBB staff's principal argument is as sweeping as it is unprecedented. In the LBB staff's view, the *only* thing that matters is whether it labels something an "item of appropriation" or otherwise uses the term "appropriate" to describe what it is doing. The staff argues: "the [General Appropriations Act] itself specifically identifies such items, and each agency bill pattern contains the line, 'Items of Appropriation' immediately preceding the" provisions the LBB wants to make vetoable. LBB Staff Memo at 5. The LBB staff believe that these labels ("Items of Appropriation") are "deliberately chosen and used consistently throughout the GAA" wherever the LBB staff elect, in an act of grace, to give the Governor an opportunity to exercise his constitutional powers. *Ibid.*

It should go without saying, however, that the Constitution, not the LBB, is the arbiter of the Governor's powers. And it takes an extraordinarily cramped view of our constitutional system to think that bureaucratic budget writers can control something as venerable as the Governor's line-item veto authority with something as picayune as a label in a "bill pattern." Indeed, if the LBB director's memo were correct that the only relevant question is whether budget writers labeled something as an "item" in the bill pattern, the Supreme Court of Texas would have spared itself a lot of effort and spilled ink in *Jessen* and *Fulmore* by simply identifying the relevant label and entering judgment accordingly.

Of course, the Court did no such thing. It examined the *substance* of the legislature's action, not the *label* placed on it by budget writers. And as far as our research reveals, every court to consider the magic-words theory of the line-item veto has emphatically rejected the notion that legislative staff can change the vetoability of budget language by changing its label or

[3] To the extent there are contrary authorities, they arguably embrace an *even more capacious* definition of "item" than do *Jessen* and *Fulmore*. For example, like the Texas Constitution, the Iowa Constitution provides: "'The governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill; and the part approved shall become a law.'" *Turner v. Iowa State Highway Comm'n*, 186 N.W.2d 141, 143 (Iowa 1971); *see Jessen*, 531 S.W.2d at 599 (relying on *Turner*). And the Iowa Supreme Court has rejected the notion that an "item" must set aside money: "Either by circumstance or design, our item veto amendment makes no reference to appropriations 'of money' in its provisions which enable a governor to approve appropriation bills in whole or in part, and permits the disapproval of any 'item' of an appropriation bill." *Turner*, 186 N.W.2d at 149; *see also Colton v. Branstad*, 372 N.W.2d 184, 189 (Iowa 1985) ("permit[ting] item veto of appropriation bill language that does not, itself, appropriate a sum of money").

the bill pattern. For example, in *Fulmore*, the Supreme Court of Texas held it was irrelevant that the Legislature changed the bill pattern it used for the Office of the Attorney General. Only one member of the *Fulmore* Court—Justice Ramsey—agreed with the LBB staff that bill patterns and labels matter, and his dissenting view unquestionably is *not* the law.

Justice Ramsay began by explaining that everyone would agree that the Attorney General's budget "contained many clearly distinct and several items" of appropriation if it had been written like this:

Attorney General's Department.

	For the Years Ending— Aug. 31, 1912.	Aug. 31, 1913.
Salary of Attorney General.....	$2,000.00	2,000.00
And the further sum each year, or so much thereof as may be necessary to pay such fees as may be prescribed by law.....	2,000.00	2,000.00
Salary of first assistant.....	2,500.00	2,500.00
Salary of second assistant.....	2,500.00	2,500.00
Salary of third assistant.....	2,000.00	2,000.00
Salary of fourth assistant, who shall assist the Attorney General in enforcing the anti-trust laws..	2,500.00	2,500.00
Salary of fifth assistant.....	2,000.00	2,000.00
Salary of record clerk and bookkeeper, who shall also discharge the duties of stenographic clerk..	1,400.00	1,400.00
Salary of two stenographic clerks..	2,400.00	2,400.00

Id. at 420 (Ramsey, J., dissenting in part). But the enacted budget did not look like that. Rather, through a committee substitute, the Legislature adopted a budget for the Attorney General that "grouped all of the 18 separate and distinct items contained in the original bill and made but one entire item of them all." *Id.* at 421 (Ramsey, J., dissenting in part); *see supra* at 10 (reprinting the final appropriation). Moreover, Justice Ramsey observed that the Attorney General's budget deviated from the bill pattern that the Legislature used for the other state agencies. *See ibid.* (Ramsey, J., dissenting in part) ("This is the only department of the state government in respect to which such a measure was passed."). In Justice Ramsey's view, the Legislature's (1) deviation from the bill pattern, (2) its use of different labels, and (3) its effort to "roll-up" the 18 individual entries in the original bill into a single lump-sum appropriation of $83,160 "evidences a clear and unequivocal intention to make a specific, clear, unambiguous, and *single appropriation* for the two years of $83,160," which would have rendered the Governor's veto unconstitutional. *Ibid.* (emphasis added).

But Justice Ramsey lost that argument, and the majority of the *Fulmore* Court ruled against him. That is because Justice Ramsey then—like the LBB now—misunderstood the relevance of "legislative intent." It is obviously true that, "[i]n construing a statute, our purpose is to give effect to the Legislature's intent." *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000). But the question *never* is whether the LBB, the LBB staff, or even the members of the Legislature "intended" to make something veto-proof. The question *always* is whether the Legislature intended to set aside a particular sum of money for a particular purpose. *See Jessen*, 531 S.W.2d at 599-600.

That is why courts across the country—like the Supreme Court of Texas in *Fulmore* and *Jessen*—look behind the Legislature's labels to the *substance* of the Legislature's act. Take, for

example, the Arizona Supreme Court's decision in *Fairfield v. Foster*, 214 P. 319 (Ariz. 1923); *see Jessen*, 531 S.W.2d at 599 (relying on *Fairfield*). Like the Texas Constitution, the Arizona Constitution gives the Governor the power to line-item veto a bill "contain[ing] several items of appropriation." In *Fairfield*, the Legislature appropriated $72,880 to the Corporation Commission, of which $53,880 should be used for employees' "salaries and wages." 214 P. at 154. Then, out of the sums appropriated for employees' salaries and wages, the Legislature specified: "For the following positions, not to exceed the annual rates herein specified: **** 1 rate clerk. $2,100 per annum." *Ibid.*

The Governor line-item vetoed "1 rate clerk. $2,100 per annum." A plaintiff challenged the constitutionality of that veto and argued—in terms that could have been taken verbatim from the LBB director's memo—that "the only 'item' which can be considered by the Governor is the whole subdivision 'For the Corporation Commission' which amounts to $72,880, or at the most 'For salaries and wages,' which is $53,880, and that the positions and salaries specified are merely 'a direction' by the Legislature as to how certain moneys are to be expended, but not an 'appropriation' of a particular 'item.'" *Id.* at 154-55. The Arizona Supreme Court rejected the argument that form controls over substance:

> Certainly, whenever the Legislature goes to the extent of saying in any bill appropriating money that a specified sum of money raised by taxation shall be spent for a specified purpose, and that alone, while other sums mentioned in the bill are to be used otherwise, *no matter what language it may be disguised under*, it is, nevertheless, within both the spirit and letter of the Constitution, an 'item' within the bill, and may be disapproved by the Governor without affecting any other items of appropriation contained therein.

Id. at 157 (emphasis added).

Critically, the Arizona Supreme Court explained why the line-item veto power must be interpreted this way. The line-item veto was designed to avoid the mischief prevalent in the federal system whereby "the annual 'pork barrel' is presented to the President, and he is under the necessity of either signing it without 'dotting an i or crossing a t' or suspending the operations of a necessary department of government." *Id.* at 153. The Arizona Constitution's drafters intended the line-item veto to protect against these legislative practices: "In plain English, they wished the Governor to have the right to object to the expenditure of money for a specified purpose and amount, without being under the necessity of at the same time refusing to agree to another expenditure which met his entire approval." *Ibid.*; *see also Bengzon v. Sec'y of Justice of Philippine Islands*, 299 U.S. 410, 415 (1937) ("[The line-item veto's] object is to safeguard the public treasury against the pernicious effect of what is called 'log-rolling'—by which, in order to secure the requisite majority to carry necessary and proper items of appropriation, unnecessary or even indefensible items are sometimes included."); Op. Tex. Att'y Gen. No. V-1253, at 5 (1951) (explaining that the line-item veto (along with the single-subject rule) protect the public fisc by preventing budget writers from putting riders on the appropriation bills "which could never succeed if they stood on their separate merit" and "thus coercing the

executive to approve obnoxious legislation, or bring the wheels of the government to a stop for want of funds.").

Construing the line-item veto provision as the plaintiff in *Fairfield* did a century ago—and as the LBB does today—would "render[ ] utterly nugatory the [state Constitutions'] attempt[s] . . . to meet the very definite evil referred to above." *Fairfield*, 214 P. at 156. The consequences of the LBB staff's proposed interpretation are clear:

> If we follow that line of reasoning, the Legislature may simply make a separate appropriation in any lump sum for each department, or, by proper language in the general appropriation bill, consolidate the funds for almost the entire state government, and, under guise of 'directing' the expenditure of the money, limit its application to matters and amounts which the Governor believes to be highly injurious in part to the best interests of the state, practically compelling him to choose between abandoning the veto power, or suspending the operations of the government, thus nullifying the provisions of the Constitution under consideration, and going back to the very conditions its makers sought to avoid.
>
> The form of the appropriation bill under consideration, if we take the view of plaintiff, is a step in that very direction. . . . [I]t endeavors to make a lump appropriation for a certain department of the government, and then to determine exactly to the last dollar just how that money shall be spent; yet, according to plaintiff, the Governor must either take the nauseous dose to the last drop, or stop the operation of the Corporation Commission for two years. *If this construction be upheld, obviously the next step for a Legislature hostile to a future Governor will be a further consolidation of the 'items' of the appropriation bill, with a 'direction' of how the money shall be spent, until the special veto is practically abolished.*

Id. at 156-57 (emphasis added); *see also, e.g.*, *Colton*, 372 N.W.2d at 189 (holding "[i]t is clear from these decisions that the section 12 sentence in issue does not qualify as a condition on the appropriation in section 4(6)," even though section 12 expressly said "*As a condition of the appropriation under section 4, subsection 6*" (emphasis added)); *cf.* TEX. GOV'T CODE § 311.024 ("The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.").

Similarly, the Supreme Courts of California and Washington have disregarded attempts to disguise "items of appropriation" as mere "provisos" (or "riders"). In *Wood v. Riley*, 219 P. 966 (Cal. 1923), the California Supreme Court looked behind the label of a budgetary "proviso" to determine whether it substantively "fill[s] all the requirements of a distinct item of appropriation of so much of a definite sum of money as may be required for a designated purpose connected with state government." *Id.* at 971. That "the Legislature attempted, by the inclusion of the proviso in the bill, to make such additional appropriation for such a purpose *under the guise of an administrative allotment*" could not evade the line-item power of the Governor. *Ibid.* (emphasis added). Rather, "looked at in the light of what it was intended to accomplish, and

what it would have accomplished if allowed to stand, one cannot escape the conviction that it worked an appropriation." *Ibid.* And to hold otherwise would allow the Legislature to "defeat the purpose of the constitutional amendment giving the Governor power to control the expenditures of the state, when it could not accomplish that purpose directly or by an express provision in appropriation bills." *Ibid.*

And more recently, in *Washington State Legislature v. Lowry*, 931 P.2d 885 (Wash. 1997), the Washington Supreme Court noted the Washington Legislature's "historical[ ]" practice of making lump sum appropriations to state agencies and "us[ing] both provisos and appropriations to express policy determinations and further refine an appropriation to specific programs within an agency." *Id.* at 892. In deciding "if such budget provisos are constitutional 'appropriations items' subject to veto," the Washington Supreme Court considered the Legislature's view that "the Governor's line item veto power extends only to dollar amounts contained in an appropriations bill because language in an appropriations bill conditioning expenditure of funds does not constitute an 'appropriations item.'" *Ibid.* The Court recognized that "the Legislature's view of an 'appropriations item' is too narrow, and would eviscerate the Governor's line item veto power." *Id.* at 893. The Court continued:

> Because the purpose of the Governor's 'line item' veto is to excise line items in appropriations bills, we should give effect to such a purpose. The Legislature frustrates such a purpose, however, if it drafts budget bills as lump sum appropriations to agencies. The only feature of modern legislative bill drafting in Washington that resembles the traditional budget line item is the budget proviso.
>
> Consequently, we hold that any budget proviso with a fiscal purpose contained in an omnibus appropriations bill is an 'appropriations item' under article III, section 12. Thus, so long as the Legislature drafts budget bills as lump sum appropriations to agencies conditioned by provisos as we have defined them here, the Governor's appropriations item veto power extends to each such proviso.

Ibid.

2. As an alternative version of the magic-words test, the LBB director (at 6) asserts that it somehow matters whether the LBB staff included the word "appropriation" in an item. The idea seems to be that the Constitution always uses the word "appropriation" to mean "the removal of funds from the Treasury," LBB Staff Memo at 3 (citing TEX. CONST. art. III, § 49a(b); art. IV, § 14; and art. 8, § 22), and therefore, the LBB's work product is vetoable only when *the Legislature* invokes the label "appropriation." *See id.* at 6 ("The use of the word 'appropriation' is both meaningful and deliberate.").

Again, that is specious. Here, as with the LBB staff's other articulation of the magic-words test, there are two distinct questions: (1) whether a particular part of the budget makes an appropriation, and (2) whether the LBB labels that same part of the budget as an appropriation. The LBB's entire legal argument is an attempt to conflate those questions and pretend that its

labels are all that matters. By now it should be painfully clear, however, that the fixation on labels over substance is misguided.

It is also legally baseless for five additional reasons. First, the Supreme Court of Texas already has rejected the idea that "appropriation" is a magic word in budget documents. For example, in *National Biscuit Co. v. State*, 135 S.W.2d 687 (Tex. 1940), the Court rejected the Legislature's argument that it made an "appropriation" only when it used that word. The Court held that "[i]t is settled that no particular form of words is required to render an appropriation specific within the meaning of the constitutional provision under discussion. It is sufficient if the Legislature authorizes the expenditure by law, and specifies the purpose for which the appropriation is made." *Id.* at 693. And the Court held that the Legislature failed that objective test—notwithstanding its invocation of the word "appropriation." *Ibid.*; *see also* Op. Tex. Att'y Gen. No. M-3685 (1941) (citing *National Biscuit* for the proposition that "[n]o particular form, or method, or verbiage, is required to constitute an item of appropriation. A provision in an appropriation bill which does not list positions or contain specified items may none the less be sufficient as an item of appropriation.").

Likewise in *Fulmore*, only the dissenter, Justice Ramsey, found it probative of the Legislature's intent that the budget said "there is hereby *appropriated* [$83,160]" to the Attorney General. 140 S.W. at 421 (Ramsey, J., dissenting in part) (emphasis added). For the other 60 departments of state government, the Legislature simply said at the beginning of the budget that the following sums were "appropriated," and it did not repeat that word for each individual agency. Justice Ramsey agreed with the LBB that the repetition of the word "appropriation" in the Attorney General's budget item was legally significant because it removed a single sum of $83,160 from the Treasury. *See ibid.* But the *Fulmore* majority emphatically disagreed:

> A repetition of the language making the appropriation for the maintenance of the departments of government was not essential, and may be regarded, where repeated, as surplusage. It evidently was so regarded by the Legislature, for out of about 60 departments, commissions, institutions, and subjects for which appropriations were made the appropriating language contained in section 1 of the bill has not been repeated, except in making the appropriation for the department of the Attorney General. So that we regard the repetition of the language contained in section 1, made under the head of Attorney General's department, *as without significance.*

Id. at 409 (opinion of Dibrell, J.) (emphasis added). Given that the Supreme Court of Texas held that the Legislature's use of the word "appropriation" is "without significance," it is strange to insist over a century later that the LBB staff 's use of the word is nonetheless "meaningful and deliberate." LBB Staff Memo at 6.

Second, courts in other States likewise have rejected the notion that "appropriation" is a magic word. Take, for example, Florida. *See Jessen*, 531 S.W.2d at 599 (relying on Florida Supreme Court). Its Supreme Court "has not required the use of the word 'appropriate' to constitute a valid appropriation." *Republican Party of Florida v. Smith*, 638 So. 2d 26, 28 (Fla.

1994); *see also Thompson v. Graham*, 481 So.2d 1212, 1214 (Fla. 1985) (the phrase "authorizing and funding" is another way of saying "appropriating"); *State ex rel. Bonsteel v. Allen*, 91 So. 104, 106 (Fla. 1922) ("Statutes setting apart or designating public moneys for special governmental purposes have been held to be appropriations, notwithstanding the word 'appropriation' is not used."); *State v. Southern Land & Timber Co.*, 33 So. 999, 1003 (Fla. 1903) (finding an "appropriation" where legislature did not use that word).

Third, it is not self-evidently true that a word must mean the same thing every time it is used in the Constitution. As the Supreme Court of the United States recently held, "'the meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise.'" *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932)). It is not obvious—and the LBB does not explain—why the word "appropriation" nonetheless must have a universal meaning in contexts as disparate as the Comptroller's financial-statement obligations (TEX. CONST. art. III, § 49a(b)) and the Governor's power to veto "items of appropriation" (TEX. CONST. art. IV, § 14).

Fourth, the LBB staff does not apply its own magic-words test consistently. The LBB Staff Memo argues that on the one hand, "use of the word 'appropriation' is both meaningful and deliberate." LBB Staff Memo at 6. But on the other hand, it concedes that the "contingency rider" for H.B. 14 *did* make an appropriation (and thus was validly vetoed), even though it omits the allegedly meaningful "appropriation" word. *See* LBB Staff Memo at A-5.

Finally, the LBB staff can find no comfort in Texas Attorney General Opinion No. GA-0776 (2010) because it—like every court case we can find—looks behind the LBB's labels to the substance of the budget's items. In GA-776, the budget first made an appropriation to the Texas Department of Transportation ("TxDOT"), effective on September 1, 2009. Two months later, on November 1, 2009, the Legislature used a rider to transfer certain functions, funds, and full-time positions from TxDOT to the newly created Texas Department of Motor Vehicles ("DMV"). When asked whether the transfer from TxDOT to DMV constituted an "appropriation," the Attorney General correctly said no: "The actual *appropriation* in question was made to TxDOT upon the effective date of the [General Appropriations] Act, i.e., September 1, 2009." Op. Tex. Att'y Gen. No. 0776, at 3. Crucially, the date of the appropriation was when the funds ($103.7 million) were set aside for a particular purpose (to provide DMV programs and services). *See Jessen*, 531 S.W.2d at 599-600. In *transferring* those funds to DMV, the Legislature did not set aside new money or change the money's purpose; hence it did not make a second "appropriation." The transfer to DMV added to neither the amount nor the purpose of the funds appropriated to TxDOT. All of Governor Abbott's item vetoes, by contrast, contain a discrete sum of money set aside for a purpose unique to that item.

GA-0776 stands for the proposition that transferring an appropriation from one agency to another does not create an independent appropriation. It does not even remotely support the proposition that legislative labels are all that matters when determining the veto eligibility of budget language. The opinion does find it *probative* that the legislature used the word "transfer"

rather than "appropriate" to describe its actions, but that is just one factor among many the opinion considers. The opinion's overriding concern is with the substance of the legislature's action. And if the opinion had focused solely on the labels, it would have conflicted with *Jessen* and *Fulmore*, which make abundantly clear that the touchstone in this analysis is the substantive effect of the legislature's actions, not the labels chosen.[4]

3. As the final iteration of its magic-words argument, the LBB staff argue that the term "capital budget" somehow insulates an item from the Governor's veto.

That argument depends on a misreading of *Jessen*. In *Jessen*, the Education Code required the Coordinating Board or the Legislature to approve any new construction at the University of Texas Law School. *See* 531 S.W.2d at 596-97 (quoting TEX. EDUC. CODE § 61.058). In the budget for the 1976-1977 biennium, the Legislature provided that approval when it "authorized" the Board of Regents to use unspecified sums of grants, gifts, and bond proceeds for unspecified alterations and additions to the Law School. *See supra* at 9 (reprinting the authorization). The Supreme Court held that the rider was not vetoable because it merely provided the legislative approval—not an appropriation—for construction projects at the law School. *See* 531 S.W.2d at 600.

That does not mean, however, that the LBB staff can use the budget to make its own approval process and then declare that all of the items of appropriation are veto-proof. The LBB staff's argument goes something like this. Under Article IX, § 14.03(a)(1) and (h)(2) of the budget, an agency cannot use funds to build things like parking garages unless (A) the budget itself uses the label "capital budget" to make an appropriation for the parking garage, or (B) the agency requests and receives approval from the Governor and the Legislative Budget Board to build the parking garage. Thus, according to the LBB staff, when it uses the label "capital budget" to appropriate a specific sum for a specific parking garage, it is merely providing the legislative approval that otherwise would be required for the garage under Article IX, § 14.03. To illustrate, here is the way the budget directed the Facilities Commission to build the Elias Ramirez State Office Building's parking garage:

[4] If the opinion had found labels dispositive, which it did not, it also would have conflicted with numerous other Attorney General opinions. *See, e.g.*, Op. Tex. Att'y Gen. No. V-1254, at 4 (1951) ("[T]he Governor can veto appropriation items and riders, but he does not have the power to veto nonappropriating riders."); Op. Tex. Att'y Gen. No. V-1196, at 14 (1951) (Governor may veto "riders" that are "items of appropriation," notwithstanding their label); Op. Tex. Att'y Gen. No. M-1141, at 5 (1972) (looking behind "rider" label and concluding a particular one was unconstitutional); Op. Tex. Att'y Gen. No. M-1199, at 2-3 (1972) (noting "rider" label does not control); Op. Tex. Att'y Gen. No. MW-51, at 3-4 (1979) (determining that a particular rider is not an "item of appropriation" because it set aside no funds for a particular purpose but nowhere giving dispositive effect to the "rider" label).

3. **Capital Budget.** None of the funds appropriated above may be expended for capital budget items except as listed below. The amounts shown below shall be expended only for the purposes shown and are not available for expenditure for other purposes. Amounts appropriated above and identified in this provision as appropriations either for "Lease Payments to the Master Lease Purchase Program" or for items with an "(MLPP)" notation shall be expended only for the purpose of making lease-purchase payments to the Texas Public Finance Authority pursuant to the provisions of Government Code §1232.103.

		2016	2017
	* * *		
(6)	Elias Ramirez State Office Building - New Parking Garage	26,000,000	UB

The Ramirez garage item is easily distinguishable from the *Jessen* rider for two reasons. First, unlike the rider in *Jessen*, the capital budget item for the Ramirez garage contains a sum certain—$26,000,000 of general revenue—that can be used for one and only one thing. The *Jessen* rider, by contrast, set aside zero dollars and required the Board of Regents to do nothing. The Legislature cannot set aside a specific sum of money, direct the Facilities Commission to use it for only one purpose, and then claim that it merely authorized or approved a construction project in the same way the Legislature in *Jessen* did.

Second, it does not matter that the budget itself creates an approval process of construction projects that do not bear the "capital budget" label. Were it otherwise, the LBB staff could insulate the entire budget from line-item vetoes simply by designating special approval processes for items that are unadorned by an arbitrary list of magic words. That would be a dramatic expansion of the LBB's powers, and it would run directly contrary to *Jessen* and the constitutional provision for the Governor's line-item veto authority.

In short, there is not a shred of legal support for the proposition that an "item of appropriation" is vetoable *only if* the LBB staff labels it as such in its bill pattern. In budgets—as in all statutes—the courts will look behind legislative labels to ascertain the substance of the disputed item.

II. THE GOVERNOR'S LINE-ITEM VETO POWER IS INTEGRAL TO THE SEPARATION OF POWERS

This is not just a one-time budget dispute between a fiscally conservative Governor and the LBB staff. This dispute also implicates the separation of powers, which is the foundational feature of our government. The Framers of both the Texas and the United States Constitutions recognized that the People never will be free from abusive and over-reaching government when one branch can unilaterally aggrandize its power without an effective check from another branch. The LBB staff's manipulation of the budget process proves that the Framers' concerns were well founded.

A. Separation of Powers Principles In The Texas Constitution Support The Governor

The separation of powers is arguably the most foundational principle in Texas constitutional law. Indeed, the very first provision of the 1836 Constitution of the Republic of Texas sought to prevent the Legislature and its agents from usurping the powers of the State's other governmental branches: "The powers of this government shall be divided into three departments, viz: legislative, executive, and judicial, which shall remain forever separate and distinct." TEX. CONST. art. I, § 1 (1836). When Texas became a State in 1845, the Framers moved the separation-of-powers provision to Article II, § 1, where it remains in nearly unaltered form today: "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; *and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted*." TEX. CONST. art. II, § 1 (1845) (emphasis added).

The veto is one of the instances in which the Constitution "expressly permit[s]" the Governor to exercise a legislative power. *See Fulmore*, 140 S.W. at 411 ("The veto power, when exercised, is a legislative and not an executive function."). For most bills that the Legislature passes, the Governor faces an all or nothing choice: either veto the bill in its entirety or allow it to become law in its entirety. *See* TEX. CONST. art. IV, § 14. But when it comes to an *appropriations* bill, the Framers specifically empowered the Governor to remove some "items of appropriation" while leaving the others: "If any bill presented to the Governor contains several *items of appropriation* he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and no item so objected to shall take effect." *Ibid.* (emphasis added). While the Governor has had the power to line-item appropriations bills since 1866, the Framers adopted the key constitutional phrase—"items of appropriation"—in 1875. It has existed in unaltered form ever since.

As the leading treatise on the Texas Constitution recognizes, the Governor's line-item veto power has "proved to be a major contribution to American government." GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 333 (1977). That is because the line-item veto gives the Governor the power to check legislative abuses in the budget-making process. Braden explains:

> The veto, particularly the item veto, is perhaps the most significant of the Texas governor's constitutional powers. Its availability and the threat of its use provides the governor with an effective tool by which to influence any legislative enactment, and because he has no significant budgetary powers, the item veto is the primary method by which he exercises some control over the amounts and purposes of state expenditures. As the Comparative Analysis reveals, the veto and

> item veto are almost universally accepted, and debate over their desirability is almost nonexistent.[5]

Id. at 339 (citation omitted); *see also id.* at 96 ("The governor's fiscal or budget powers lie in his authority to submit a budget at the commencement of each regular session of the legislature (Art. IV, Sec. 4) and his authority to veto items of appropriation (Art. IV, Sec. 14). *The latter power is the important one . . . .*" (emphasis added)). That is why opinions of the Texas Attorney General have sided with the Executive Branch when faced with LBB encroachment. *See, e.g.*, Op. Tex. Att'y Gen. No. V-1254 (1951) (explaining that "the fiscal administration" of government is an executive function and therefore separation of powers principles forbid the LBB to attach appropriation riders that direct state agencies to obtain LBB approval prior to spending appropriated funds).

In short, "[f]ew sections of the Texas Constitution are as basic to the structure and functioning of government in Texas as Article II," which establishes the separation of powers. BRADEN, *supra*, at 97. And when it comes to fiscal matters, no section of the Constitution is as vital to the separation of powers as the Governor's line-item veto authority.

B. Separation of Powers Principles In The United States Constitution Support The Governor

The separation of powers principles that undergird the Texas Constitution are older than the United States itself. Montesquieu recognized the need to separate and balance the powers of the government in *The Spirit of Laws*, which he published in 1748. And James Madison embraced the views of "the celebrated Montesquieu" in the *Federalist Papers*. *See, e.g.*, THE FEDERALIST PAPERS NO. 47 at 301 (C. Rossiter ed. 1961) (Madison). " 'When the legislative and executive powers are united in the same person or body,' says [Montesquieu], 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.' " *Id.* at 303. Or as Madison summarized the point, "It is equally evident, that none of [the branches of government] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers." THE FEDERALIST NO. 48 at 308.

Madison recognized the particular need to use checks and balances against the Legislature—precisely because its power over the purse makes it the most dangerous branch:

> What this security ought to be, is the great problem to be solved. Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But

[5] As proof of that near-universal acceptance, at last count, 44 States (including Texas) give their governors some form of line-item veto authority. *See* THE COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 2014, tbl. 4.4 at 154-55.

> experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government. *The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.*

Id. at 308-09 (emphasis added); *see also id.* at 310 (noting "the legislative department alone has access to the pockets of the people").

The solution that Madison and his fellow Framers devised is to empower the other branches to effectively check encroachments by the Legislature. *See* THE FEDERALIST NO. 51 at 322-23. Madison's views are equally insightful today, and they form the basis for modern separation-of-powers cases striking down legislative overreach. *See, e.g.*, *Myers v. United States*, 272 U.S. 52 (1926); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

C. The LBB's View Threatens the Separation Of Powers

Of course, the LBB Staff Memo does not mention the separation of powers or the original meaning of either the Texas or United States Constitutions. Rather, the LBB simply asserts that the Legislature has "plenary power . . . to legislate." LBB Staff Memo at 6; *see also id.* at 2, 7, A-1 (repeatedly characterizing its power as "plenary"). That position should be rejected for three reasons.

First, it is simply not true that the Legislature's power to legislate is "plenary," which the dictionary defines as "unqualified; absolute." The line-item veto power was plainly intended to qualify and checks the Legislature's authority. As Professor Braden has explained:

> By authorizing the governor to prevent . . . any item of appropriation from becoming law by objecting in the proper manner (assuming the legislature does not muster the votes necessary to override), Section 14 [of Article IV of the Constitution] *grants the governor a substantial role in the legislative process.*

BRADEN, *supra*, at 333-34 (emphasis added). Indeed, the Supreme Court of Texas has repeatedly held that "[t]he veto power, when exercised, is a legislative and not an executive function." *Fulmore*, 140 S.W. at 411 (citing, *inter alia*, *Pickle v. McCall*, 24 S.W. 265 (Tex. 1893)). The Attorney General also has recognized that the Governor's line-item veto power gives him a substantial role to play in the legislative process. *See, e.g.*, Op. Tex. Att'y Gen. Nos. M-1199, M-1141 (1972). Thus, it cannot be said that the Legislature's power is "plenary."

Second, in our system of checks, balances, and separation of powers, virtually no power of any branch of government can be characterized as "plenary":

> [The Framers] used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to

> the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.

Clinton v. New York, 524 U.S. 417, 450-51 (1998) (Kennedy, J., concurring); *accord Miller v. French*, 530 U.S. 327, 341-42 (2000) ("While the boundaries between the three branches are not hermetically sealed, the Constitution prohibits one branch from encroaching on the central prerogatives of another." (internal quotation marks and citation omitted) (citing *Loving v. United States*, 517 U.S. 748, 757 (1996); *Buckley v. Valeo*, 424 U.S. 1, 121-22 (1976) (per curiam)); *Sinking-Fund Cases*, 99 U.S. 700, 718 (1879) ("One branch of government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."). The upshot is that no branch of government gets to act in a vacuum—and the political branches of government do not get to determine the scope of one another's power.

Third, the Supreme Court of Texas already has rejected the notion that *the Legislature* gets to define the scope of the Governor's role in the legislative process. In *Fulmore*, the Court held: "In exercising this function [i.e., the line-item veto], while he is not confined to rules of strict construction, [the Governor] nevertheless must look to *the Constitution* for the authority to exercise such power." 140 S.W. at 411; *see also Field v. People*, 3 Ill. 79, 80-81 (Ill. 1839) (quoted favorably in *Fulmore*) ("In deciding this question, recurrence must be had to the Constitution. That furnishes the only true rule by which the court can be governed. That is the character of the Governor's authority. . . . The Constitution is a limitation upon the powers of the legislative department of the government, but it is to be regarded as a grant of powers to the other departments."). Thus, it is the Constitution and not the LBB staff's views about "plenary powers" that controls the outcome here. When the LBB staff assert that their bill patterns and magic-word choices should somehow be cloaked in "plenary power" sufficient to trump the Governor's constitutional powers, they have plainly overstepped their bounds.

III. The LBB Staff Memo's Other Arguments Are Faulty

Finally, the LBB staff offer three miscellaneous arguments. Each is baseless.

A. The Governor's Vetoes Are Far From "Unprecedented"

The LBB staff complain that the Governor's vetoes are "in many respects unprecedented." LBB Staff Memo at 1. The criticism is baseless for two reasons. First, as Justice Scalia has explained, "[t]he historical practice of the political branches is, of course, irrelevant when the Constitution is clear." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2600 (2014) (Scalia, J., concurring in judgment). And as demonstrated above, the plain meaning of the line-item veto clause, the unbroken line of judicial precedent interpreting it, and basic separation-of-powers principles all clearly support the Governor's vetoes.

Second, even if historical practice matters, it supports the Governor's vetoes rather than calling them into question. As explained above, there is nothing "unprecedented" about the higher-education and capital-budget vetoes. The practical effect of these vetoes is identical to numerous vetoes by past governors. All that has changed is the "bill pattern"—and the willingness of the Governor to ignore the LBB staff's legally baseless view of what constitutes an item of appropriation. Nor is there anything unprecedented about the contingency-rider vetoes. *See* Appendix Tab D, *infra*. All the Governor's vetoes, as a matter of substance, enjoy a long line of precedent. The only thing that is truly unprecedented here is the length to which the LBB staff have gone to use arbitrary labels and bill patterns to systematically reduce the power of the Executive Branch. That is the only power-grab at issue here.

B. The Governor's Vetoes Do Not Implicate "Budget-Reduction" Authority

Governor Abbott has called for an amendment to Article IV, § 14 of the Constitution to give the Governor the power to reduce items of appropriation in addition to his current power to veto them in their entirety. *See* LBB Staff Memo at 2. Several States' constitutions give that power to their Governors because it allows flexibility in reducing the States' spending. *See, e.g.*, CAL. CONST. art. IV, § 10(e); MASS. CONST. art. 63, § 5; WIS. CONST. art. V, § 10. Obviously, the People of Texas have not yet given that power to the Governor.

It should be equally obvious, however, that Governor Abbott did not purport to use such a power. For each of the items of appropriation in his veto proclamation, he vetoed the item in its entirety. The Governor's actions were guided by the veto methods of his predecessors and by the Supreme Court of Texas's decisions in *Jessen* and *Fulmore*. None of those precedents permitted him to reduce an item of appropriation, and he did not purport to do so.

Of course, when an item of appropriation contains sub-items, a veto of one sub-item results in the reduction of the overall amount of the umbrella appropriation. This is unremarkable. *Jessen* makes abundantly clear that budget language can be "an item of appropriation even though it may be included in a larger, more general item." 531 S.W.2d at 599. The kind of veto contemplated by *Jessen*—of one item within "a larger more general item"—necessarily reduces the size of the "larger, more general item." LBB staff may not like this result, but their complaint is with the Constitution and the Texas Supreme Court, not the Governor.

C. The Governor's Vetoes Do Not Violate "Outside The Bounds" Resolutions

Finally, the so-called "Outside the Bounds" resolutions actually undermine the LBB staff's arguments.

As an initial matter, the fact that "[t]he LBB staff prepare the out of bounds resolution for appropriations bills" hurts its case rather than helps it. LBB Staff Memo at 8. As the Supreme

Court of the United States has recognized in a related context,[6] courts should be hesitant to rely on legislative documents that do not go through bicameralism and presentment because they reflect the views of "unelected staffers" more than those of the Legislature. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of [bicameralism and presentment], may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text."). Just as a staffer's committee report does not carry the force of a statute, the LBB's "out of bounds" resolution does not carry the force of the General Appropriations Act.

But even if the resolutions are relevant, they actually support the line-item vetoes. In fact, in many cases, the resolutions label the vetoed items as "items of appropriation," which makes the items veto-eligible even under the LBB staff's view:

Agency	House Resolution	Senate Resolution
Texas A&M University *International Summer Law Course*	On page III-25 of HR 3315 (84-R), the LBB writes: "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.1.1. Strategy: INTERNATIONAL SUMMER LAW COURSE"	On page III-25 of SR 1019 (84-R), the LBB writes: "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.1.1. Strategy: INTERNATIONAL LAW SUMMER COURSE"
Tarleton State University *Center for Anti-Fraud, Waste and Abuse*	On page III-27 of HR 3315 (84-R), the LBB writes: "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.2. Strategy: CENTER FOR ANTI-FRAUD"	On page III-27 of SR 1019 (84-R), the LBB writes: "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.2. Strategy: CENTER FOR ANTI-FRAUD"

[6] House and Senate Resolutions are generally ceremonial. *See, e.g.*, HR 77, 84-R Alonzo (Commemorating the 29th anniversary of Mount St. Michael Catholic School in Dallas in March 2015); HR 3635, 84-R Price (Commemorating the 2016 Dogie Days celebration organized by the Dumas Noon Lions Club).

Agency	House Resolution	Senate Resolution
Stephen F. Austin University *Waters of East Texas Center*	On page III-37 of HR 3315 (84-R), the LBB writes: "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.4. Strategy: WET CENTER"	On page III-37 of SR 1019 (84-R), the LBB writes: "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.4. Strategy: WET CENTER"
University of Texas at Austin *Center for Identity*	On page III-23 of HR 2700 (83-R), the LBB writes: "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.2.8. Strategy: IDENTITY THEFT AND SECURITY"	On page III-23 of SR 1055 (83-R), the LBB writes: "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.2.8. Strategy: IDENTITY THEFT AND SECURITY"

Legislative staff's inconsistent use of the term "item of appropriation" in documents like the out-of-bounds resolution is telling. The practical effect of these university budget provisions does not change depending on the label used to describe them. Given that fact, it is understandably difficult for a legislative staffer to keep track of whether a proposed addition to the budget should be called an "appropriation," "allocation," "informational listing," or something else. Only those concerned with "veto-proofing" the budget would care what label is used to describe these budget provisions.

Courts, it turns out, are not concerned with veto-proofing the budget. They are concerned with correctly interpreting and applying the Constitution. And if the Constitution is our guide, then the veto-avoiding word games played by the LBB staff are futile. No court decision we have found has ever held that budget labels like "item," "strategy," or "rider" have any legal significance. Instead, as court after court has consistently held, what matters is the substance of the language enacted by the Legislature—not the labels affixed to it.

Because each of Governor Abbott's budget vetoes struck language that (1) set aside a sum of money for (2) a particular purpose, the vetoes comply with the Texas Constitution and the Supreme Court cases interpreting it. TEX. CONST. art. IV, § 14; *Jessen*, 531 S.W.2d at 599-600. These vetoes should be enforced by the Comptroller and by any other state officers and employees charged with implementing the state budget.

APPENDIX

Tab	Description
A	Item-by-Item Explanation of Veto Proclamation
B	Higher Education Precedents
C	Capital Budget Precedents
D	Contingency Rider Precedents

TAB A

Item-by-Item Explanation of Veto Proclamation

The following is an explanation of and justification for each of the Governor's line-item vetoes contested by the LBB staff.

1. Commission on the Arts Veto

	2016	**2017**
A.1.3. Strategy: CULTURAL TOURISM GRANTS	$ 5,670,000	$ ~~5,670,000~~

5. Contingency for Cultural Districts. Included in amounts appropriated above in Strategy A.1.3, Cultural Tourism Grants, is $5,000,000 in General Revenue in fiscal year 2016 ~~and $5,000,000 in General Revenue in fiscal year 2017~~ for cultural and fine arts districts, as defined by Government Code, §444.031. The $5,000,000 in General Revenue ~~in each fiscal year of the 2016-17 biennium appropriated above~~ is contingent upon sufficient revenue certified by the Comptroller of Public Accounts. The Comptroller must certify that sufficient revenue is generated from cultural and fine arts districts, as defined by Government Code, §444.031, to offset the cost of the appropriation made herein.

Any unexpended balances of these funds remaining as of August 31, 2016, are appropriated to the Commission on the Arts for the fiscal year beginning September 1, 2016, for the same purpose.

A fiscally conservative approach to governing requires limiting the rate of growth in state spending. Funding for cultural tourism grants would be substantially increased from $1.3 million in FY 2014-15 to $11.3 million in FY 2016-17. I therefore object to and disapprove of one year of this appropriation.

LBB STAFF'S ASSERTION:

Commission on the Arts
The veto Proclamation clearly identifies Strategy A.1.3, Cultural Tourism Grants, and strikes the appropriation to the second year of the biennium. Strategy A.1.3 is an item of appropriation, and as such may be vetoed. The Proclamation also seeks to amend Rider 5, Contingency for Cultural Tourism Grants, by striking language associated with the strategy appropriation in fiscal year 2017. This has no effect, as the rider itself is not an item of appropriation and is therefore not subject to veto; however, as the appropriation in the second year is itself struck, the issue of the rider is moot.

GOVERNOR'S RESPONSE:

The LBB staff concedes that the Governor may lawfully veto the "strategy," and it further concedes that it has no basis to object to the veto of the "rider" because "the issue of the rider is moot."

Moreover, even without the LBB staff's concessions, the vetoes still would be lawful. The rider sets asides a specific amount of money for a specific purpose, namely $5,000,000 for grants for "cultural and fine arts districts." That is a vetoable "item of

appropriation" because it sets aside a specific amount of funding for a specific purpose. *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 599 (Tex. 1975).

In addition, very similar rider language—related to funds that must be certified by the Comptroller—has been vetoed previously, apparently without any protestation by the LBB or its staff.[1] As such, the rider veto is hardly "unprecedented." Memorandum to the Comptroller from Ursula Parks, Re: HB 1 Veto Proclamation at 1 (July 21, 2015) (hereinafter "LBB Staff Memo").

2. Commission on State Emergency Communications Veto

8. Contingency for Legislation Related to Regional Poison Control Centers Consolidation. ~~The amounts appropriated above in Strategy B.1.1, Poison Call Center Operations, are intended to cover costs for fulfilling the requirements of Health and Safety Code, Chapter 777, for six Regional Poison Control Centers. Contingent on the enactment of legislation reducing the number of Regional Poison Control Centers from six to four, the appropriated amounts above in Strategy B.1.1, Poison Call Center Operations, shall be reduced by $460,420 in fiscal year 2016 and $471,113 in fiscal year 2017 from the General Revenue-Dedicated Commission on State Emergency Communications Account No. 5007.~~

This veto deletes a contingent rider for a bill that did not pass.

[1] *See* Proclamation by the Governor of the State of Texas at 2, 82nd Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/82/HB1.pdf ("37. Contingency for Increasing the State Traffic Fine. Contingent on the enactment of House Bill 1233 or House Bill 258, or similar legislation relating to an increase in the state traffic fine, by the Eighty-second Legislature, Regular Session, 2011, the Department of Transportation is appropriated $5,000,000 for the fiscal year 2013 from General Revenue Funds to implement the provisions of the legislation to enhance traffic safety and provide additional grants to law enforcement agencies to increase enforcement on weekend and holiday periods. *This appropriation is contingent upon certification by the Comptroller of Public Accounts* that revenue generated from the increase in the state traffic fine imposed by the legislation generates at least $5,000,000 in fiscal year 2012 and $5,000,000 in fiscal year 2013." (emphasis added)); Proclamation by the Governor of the State of Texas at 3, 77th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/77/sb1.pdf ("Sec. 52. Utility Funding Increase for Public Higher Education Institutions. *Contingent upon a finding of fact by the Comptroller of Public Accounts at the time of certification of this Act*, or after certification of this Act, that sufficient revenue is estimated to be available from the General Revenue Fund, and following approval by the Legislative Budget Board, there is hereby appropriated to the Comptroller of Public Accounts $19,515,970 per fiscal year, or such amounts as may be available for the purpose of funding increased utility costs at public institutions of higher education. Distribution of any amounts authorized shall be based on the Texas Higher Education Coordinating Board's infrastructure funding formula." (emphasis added)).

LBB STAFF'S ASSERTION:

Commission on State Emergency Communications
Rider 8, Contingency for Legislation Related to Regional Poison Control Centers. The Proclamation strikes a contingency rider that directs an appropriation reduction in the event legislation passed that reduced the number of poison control centers. The legislation on which the rider is contingent did not pass, and therefore the appropriation reduction would not take effect irrespective of the veto Proclamation.

GOVERNOR'S RESPONSE:

For over 20 years, Governors have vetoed similar contingency riders. Apparently, this practice has never been contested by the LBB. *See* Appendix Tab D, *infra*. In fact, a very similar *reduction* contingency rider was vetoed in 2009 by Governor Perry.[2]

3. Facilities Commission Vetoes

3. Capital Budget. None of the funds appropriated above may be expended for capital budget items except as listed below. The amounts shown below shall be expended only for the purposes shown and are not available for expenditure for other purposes. Amounts appropriated above and identified in this provision as appropriations either for "Lease Payments to the Master Lease Purchase Program" or for items with an "(MLPP)" notation shall be expended only for the purpose of making lease-purchase payments to the Texas Public Finance Authority pursuant to the provisions of Government Code §1232.103.

[2] *See* Proclamation by the Governor of the State of Texas at 6, 81st Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/81/SB1.pdf ("Sec. 17.101. Contingency for Senate Bill No. 1007 or House Bill No. 2203. Contingent upon the enactment of Senate Bill 1007 or House Bill 2203, or similar legislation relating to the continuation and operation of the Texas Department of Insurance and the operation of certain insurance programs; imposing administrative penalties, by the Eighty-first Legislature, Regular Session, appropriations to the Texas Department of Insurance *shall be reduced* in the amounts of $805,576 in fiscal year 2010 and $805,576 in fiscal year 2011 from General Revenue-Dedicated Texas Department of Insurance Operating Account Fund No. 036 and $491,997 in fiscal year 2010 and $491,997 in fiscal year 2011 from General Revenue." (emphasis added)).

		2016	2017
a.	Repair or Rehabilitation of Buildings and Facilities		
	(1) Emergency Repairs	$ 20,000,000	$ UB
	(2) Deferred Maintenance for Texas School for the Deaf	3,006,320	UB
	(3) Deferred Maintenance for Facilities	219,680,852	275,496 & UB
	(4) Hobby Building Complex - Renovation and Retrofit to Accommodate Additional FTEs	2,000,000	UB
	Total, Repair or Rehabilitation of	$ 244,687,172	$ 275,496
b.	Acquisition of Information Resource Technologies		
	(1) Accounting System Maintenance	55,000	55,000
	(2) Computer Lifecycle Replacement	96,795	96,795
	Total, Acquisition of Information Resource	$ 151,795	$ 151,795
c.	Other Lease Payments to the Master Lease Purchase Program (MLPP)		
	(1) Recycling Collection Vehicles	37,617	37,617
d.	Data Center Consolidation		
	(1) Data Center Consolidation	254,432	259,966
e.	Construction of Buildings and Facilities		
	(1) Capitol Complex - Utility Infrastructure Phase One	71,335,306	UB

(2) Capitol Complex - Office Building and Parking Garage, Phase One	174,446,464	UB
(3) Capitol Complex - MLK Blvd	335,441,766	UB
(4) North Austin Complex - New Building and Parking Garage, Phase One	186,446,464	UB
~~(5) G. J. Sutton Building Replacement (San Antonio State Office Building)~~	~~132,000,000~~	~~UB~~
~~(6) Elias Ramirez State Office Building - New Parking Garage~~	~~26,000,000~~	~~UB~~
~~(7) Acquisition and Relocation of Department of Motor Vehicles Headquarters~~	~~57,995,000~~	~~UB~~
Total, Construction of Buildings and Facilities	$983,665,000	$ UB
f. Acquisition of Capital Equipment and Items (1) Secure Workplace Environment	1,013,498	UB
Total, Acquisition of Capital Equipment and Items	$ 1,013,498	$ UB
Total, Capital Budget	$1,229,809,514	$ 724,874

Method of Financing (Capital Budget):

General Revenue Fund	$ 269,246,586	$ 625,540

GR Dedicated - Federal Surplus Property Service Charge Fund Account No. 570	5,075	5,337
Other Funds		
Appropriated Receipts	46,869	47,234
Interagency Contracts	45,984	46,763
Bond Proceeds - General Obligation Bonds	2,800,000	UB
Bond Proceeds - Revenue Bonds	957,665,000	UB
Subtotal, Other Funds	$ 960,557,853	$ 93,997
Total, Method of Financing	$ 1,229,809,514	$ 724,874

20. Department of Motor Vehicles Headquarters Acquisition and Relocation. ~~In accordance with Government Code Chapters 1232 and 2166, the Texas Public Finance Authority shall issue revenue bonds on behalf of the Texas Facilities Commission in an amount not to exceed $57,995,000 for the purpose of acquisition, the construction of facilities and relocation to new headquarters space for the Texas Department of Motor Vehicles. Included in the amounts appropriated to the Texas Facilities Commission, in Strategy A.2.1, Facilities Design and Construction, is $57,995,000 in Revenue Bond Proceeds in fiscal year 2016 for acquisition and relocation to new headquarters space for the Texas Department of Motor Vehicles, pursuant to Government Code, §2166.453.~~

~~Any unexpended balances in the appropriation made herein and remaining as of August 31, 2016, are appropriated for the same purposes for the fiscal year beginning September 1, 2016.~~

22. G.J. Sutton Building Replacement. ~~In accordance with Government Code Chapters 1232 and 2166, the Texas Public Finance Authority shall issue revenue bonds on behalf of the Texas Facilities Commission in an amount not to exceed $132,000,000 for the purpose of managing and constructing a new state office building and associated parking facilities for state use to be located on state-owned property in Bexar County at the site of the existing G.J. Sutton State Office Complex. Included in the amounts appropriated to the Texas Facilities Commission, in Strategy A.2.1, Facilities Design and Construction, is $132,000,000 in Revenue Bond Proceeds in fiscal year 2016 for the construction of facilities at the site of the existing G.J. Sutton State Complex, pursuant to Government Code, §2166.453.~~

~~Any unexpended balances in the appropriations made herein and remaining as of August 31, 2016, are appropriated for the same purposes for the fiscal year beginning September 1, 2016.~~

To keep Texas fiscally strong, we must limit unnecessary state debt and spending. Debt service can burden the state's budget and limit the economic freedom of future generations. All debt and spending to construct new facilities should be approved only after a project has been carefully scrutinized to determine that tax dollars are spent in the most cost-effective manner. Some of the appropriations for debt and capital projects included in the 2016-17 Budget have merit because they will strategically save taxpayer dollars by lowering lease costs. Other projects warrant more careful review. I am committed to working with state and local leaders during the interim to review these projects to ensure they are well suited for state facility and local community needs. I therefore object to and disapprove of the appropriations stricken above.

LBB STAFF'S ASSERTION:

Facilities Commission

The veto Proclamation does not veto the appropriation related to state facilities construction; that appropriation is in Strategy A.2.1, Facilities Design and Construction. The Proclamation does seek to amend Rider 3, Capital Budget, and to strike Rider 20, DMV Headquarters Acquisition and Relocation; and Rider 22, G.J. Sutton Building Replacement. As none of those riders makes an appropriation, and are therefore not "items of appropriation" they are not subject to veto. The funds identified in the riders, $216 million, remain a valid appropriation. Rider 3 neither in whole nor in part can stand alone; it relies on appropriations made elsewhere. This distinction is recognized by Attorney General Opinion GA-0776. Riders 20 and 22 also cannot stand alone; they simply provide direction to the Facilities Commission on how to manage the sources of funding.

Article IX allows an agency to request to re-purpose funds for projects identified in the Capital Budget rider for other uses. For example, the Facilities Commission could make a request to the LBB and the Governor to not use funds for the DMV headquarters but rather for a different project entirely; there is nothing in the struck language that abridges that ability to repurpose the appropriated funds. The appropriations made in Strategy A.2.1 remain valid, and the legislative direction provided in Riders 2, 20, and 22 remain as well.

GOVERNOR'S RESPONSE:

As detailed at length in Appendix Tab C, *infra*, Governors have a long history of vetoing nearly *identical* construction projects and garages as those vetoed by Governor Abbott without protestation from the LBB. Thus, these vetoes are hardly "unprecedented." LBB Staff Memo at 1.

Contrary to the LBB's assertion, the fact that the rider includes funds that were appropriated "elsewhere" in Strategy A.2.1 does not prevent a constitutional veto. The

words “Capital Budget” from “funds appropriated above” indicates that the LBB staff made a lump-sum appropriation in Strategy A.2.1 and then made a *sub-appropriation* in the rider.

It is well settled that such sub-appropriations fall within the Governor’s line-item veto power. The *Jessen* Court specifically held that a binding set-aside of funds “is an item of appropriation *even though it may be included in a larger, more general item*.” 531 S.W.2d at 599 (emphasis added); *see also id.* at 600 (“The mere fact that the funds have been appropriated elsewhere does not preclude the construction that a provision is an item of appropriation . . . .”). *Fulmore v. Lane*, 140 S.W. 405 (Tex. 1911), is a perfect example of that fact: the plain language of the Attorney General’s appropriation said that “there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty ($83,160.00) dollars,” *id.* at 407, and the Court held that the larger, more general item of $83,160 contained two equally vetoable items of $41,580. It was irrelevant that the Legislature tried to “appropriate[ ]” $83,160, and it was irrelevant that each of the $41,580 sums came out of funds “appropriated” above.

Further, the Capital Budget (above) clearly includes sub-appropriations of specific sums for specific purposes. *Jessen*, 531 S.W.2d at 599. Indeed, the LBB prefaces its Capital Budget with the following requirements: “The amounts shown . . . shall be *expended only* for the *purposes* shown and are not available for expenditure for other *purposes*.” (Emphasis added.)

Importantly, the LBB staff do not dispute that this rider is the *functional equivalent* of a vetoable item of appropriation because it forces a particular state agency (the Facilities Commission) to spend a particular sum on a particular thing (buildings). Rather, the staff argue the rider is “veto-proof” merely because the budget writers labeled the appropriations “riders” instead of “strategies.” There is no legal support for that view.

Furthermore, Riders 20 and 22 include the following language: “Any unexpended balances in the appropriations made herein and remaining as of August 31, 2016, are appropriated for the same purposes for the fiscal year beginning September 1, 2016.” The Attorney General has determined that the Governor may constitutionally veto “unexpended balances” because unexpended balances are specific funds being dedicated

for a specific purpose. *See* Op. Tex. Att'y Gen. No. MW-51 at 160-161. And previous Governors have done so without objection.[3]

Finally, the LBB staff cannot claim that its use of the term "capital budget" merely approves the construction projects listed in the budget. *Jessen* involved a rider that approved construction projects *without* setting aside money for particular construction purposes. The riders that Governor Abbott vetoed, by contrast, do set aside money for particular purposes. Accordingly, they are vetoable items of appropriation, regardless of the label that the LBB staff attached to them.

4. Department of State Health Services

70. Jail-Based Competency Restoration Pilot Program. Out of funds appropriated above in Strategy B.2.3, Community Mental Health Crisis Services, the Department of State Health Services shall allocate $1,743,000 in ~~each fiscal year of~~ the 2016-17 biennium in General Revenue to be used only for the purpose of conducting a jail-based restoration of competency pilot program established under Article 46B.090 of the Code of Criminal Procedure, as a continuation of the pilot program started by the 83rd Legislature.

The Department of State Health Services shall submit interim quarterly progress reports to the Legislative Budget Board, Chair of the House Appropriations Committee, Chair of the Senate Finance Committee, Speaker of the House, and Lieutenant Governor no later than 15 business days after the end of each fiscal quarter.

This item was provided an appropriation for the first time during the 2013 Legislative session, but the pilot program was never implemented. Due to legislative action, there are now more beds available across the state for competency restoration than existed at the time the pilot program was authorized. In order to minimize the spending of limited taxpayer dollars, funding is reduced for this item. I therefore object to and disapprove of one year of this appropriation.

[3] To take just two recent examples, *see* Proclamation by the Governor of the State of Texas at 1, 79th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/79/SB1.pdf ("5. Unexpended Balances within the Biennium. Any unexpended balances in appropriations made to Strategy A.1.2, Arts Education Grants, remaining as of August 31, 2006, are hereby appropriated to the Commission on the Arts for the fiscal year beginning September 1, 2006, for the same purpose." Governor Perry vetoed this rider, stating: "This veto deletes the ability to carry grant fund balances from year to year. The agency should award and make grants in the year funds are appropriated."); Proclamation by the Governor of the State of Texas at 2, 78th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/78/HB1.pdf ("Rider 31. Border Faculty Loan Repayment Program. The Higher Education Coordinating Board may allocate additional funds from Strategy B.1.11., TEXAS Grant Program, to the Border Faculty Loan Repayment Program, and any unexpended balances on hand at the end of the fiscal year 2004 are hereby appropriated for the same purposes in fiscal year 2005." The veto struck only the final portion of the rider addressing unexpended balances.).

LBB STAFF'S ASSERTION:

Department of State Health Services
Rider 70, Jail-Based Competency Restoration Pilot Program. The veto Proclamation seeks to strike "each fiscal year of" in the rider text as a means to reduce by half the appropriated amount. The rider does not make an appropriation; it provides direction to the agency on how to continue an existing program. The appropriation resides in Strategy B.2.3, Community Mental Health Crisis services. There is no direction in the Texas Constitution allowing the Governor to edit a rider or indeed to veto legislative direction or intent. This rider cannot stand alone; it relies on an appropriation made elsewhere (see Attorney General Opinion GA-0776). As such, the Proclamation seeks to amend a directive rider. It is unclear from the Proclamation to what the Governor objects; there is a lack of specificity with respect to the period of the appropriation the Proclamation seeks to veto. Both the appropriation authority provided in Strategy B.2.3 and the direction provided in Rider 70 remains valid.

GOVERNOR'S RESPONSE:

The rider sets aside a specific amount of money for a specific purpose. *Jessen*, 531 S.W.2d at 599. Specifically, the Rider appropriates "$1,743,000 in each fiscal year . . . in General Revenue to be used *only for the purpose* of conducting a jail-based restoration competency pilot program." (Emphasis added). The LBB staff do not dispute that this rider forces a particular state agency (the Department of State Health Services) to spend a particular sum ($1,743,000 each fiscal year) on a particular thing (a jail-based competency restoration program). Rather, the staff argue the rider is "veto-proof" merely because the budget writers labeled the appropriation a "rider" instead of a "strategy." There is no legal support for that view.

The fact that the rider includes funds that were appropriated "elsewhere" in Strategy B.2.3 does not prevent a constitutional veto. The words "out of funds appropriated above" indicates that the LBB staff made a lump-sum appropriation in Strategy B.2.3 and then make a *sub-appropriation* in the rider.

It is well settled that such sub-appropriations fall within the Governor's line-item veto power. The *Jessen* Court specifically held that a binding set-aside of funds "is an item of appropriation *even though it may be included in a larger, more general item.*" 531 S.W.2d at 599 (emphasis added); *see also id.* at 600 ("The mere fact that the funds have been appropriated elsewhere does not preclude the construction that a provision is an item of appropriation . . . ."). *Fulmore* is a perfect example of that fact: the plain language of the Attorney General's appropriation said that "there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty ($83,160.00) dollars," 140 S.W. at 407, and the Court held that the larger, more general item of $83,160 contained two equally vetoable items of $41,580. It was irrelevant that the Legislature tried to "appropriate[ ]" $83,160, and it was irrelevant that each of the $41,580 sums came out of funds "appropriated" above.

5. Texas Education Agency

61. Southern Regional Education Board. ~~Out of funds appropriated above, the Texas Education Agency shall allocate funds for the purpose of paying membership fees to the Southern Regional Education Board, estimated to be $193,000 per fiscal year.~~

The Southern Regional Education Board supports the national Common Core curriculum effort. The federal government should not determine what is taught in Texas classrooms, and Texas taxpayer dollars should not be used to finance the promotion of Common Core. I therefore object to and disapprove of this appropriation.

LBB STAFF'S ASSERTION:

The rider does not make an appropriation; it directs the agency to allocate funds to pay an estimated (not specific) amount of dues. The rider does not specify the source of funds.

GOVERNOR'S RESPONSE:

The rider sets aside a specific estimate of an amount of money for a specific purpose. *Jessen*, 531 S.W.2d at 599. Specifically, the rider provides $193,000 "for the *purpose* of paying membership fees." (Emphasis added). It is irrelevant that the LBB staff prefaced the rider with "out of funds appropriated above." That phrase indicates that the LBB staff wanted to make a lump-sum appropriation "above" and then make a *sub-appropriation* in the rider.

It is well settled that such sub-appropriations fall within the Governor's line-item veto power. The *Jessen* Court specifically held that a binding set-aside of funds "is an item of appropriation *even though it may be included in a larger, more general item.*" 531 S.W.2d at 599 (emphasis added); *see also id.* at 600 ("The mere fact that the funds have been appropriated elsewhere does not preclude the construction that a provision is an item of appropriation . . . ."). *Fulmore* is a perfect example of that fact: the plain language of the Attorney General's appropriation said that "there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty ($83,160.00) dollars," 140 S.W. at 407, and the Court held that the larger, more general item of $83,160 contained two equally vetoable items of $41,580. It was irrelevant that the Legislature tried to "appropriate[]" $83,160, and it was irrelevant that each of the $41,580 sums came out of funds "appropriated" above.

The LBB staff's argument that the rider is not making an appropriation because it "estimated" the cost of membership dues is specious. If the LBB staff were correct, to prevent a future Governor from vetoing all appropriations in the entire budget, all the staff would need do is put the word "estimate" in front of appropriation amounts throughout the budget. Further, the Attorney General has specifically rejected the argument that use of words like "estimate" can thwart the Governor's constitutional veto authority. *See* Op. Tex. Att'y Gen. No. GM-3685, ("No particular form, or method, or verbiage, is required to constitute an item of appropriation. A provision in an appropriation bill which does not list positions or contain specified items may none the

less be sufficient as an item of appropriation. It may constitute a sufficient appropriation although *it does not name a certain sum or a maximum sum*." (emphasis added; citing *National Biscuit Company vs. State*, 135 S.W.2d 687, 693 (Tex. 1940))).

Indeed, previous Governors have vetoed appropriations when the amount that would be spent could range from $0 to $2.5 million.[4] Further, the LBB staff are wrong to claim that it matters whether the item identifies the "source of funds." *See National Biscuit*, 135 S.W.2d at 693. Moreover, the specific "source of funds" is not identified in the budget for each strategy. Nonetheless, the LBB agrees strategies can be vetoed. *See* LBB Staff Memo at 5.

Finally, the LBB staff do not dispute that this rider is the *functional equivalent* of a vetoable item of appropriation because it forces a particular state agency (the Texas Education Agency) to spend a particular sum ($193,000 each year) on a particular thing (SREB membership fees). Rather, the staff argue the rider is "veto-proof" merely because the budget writers changed their bill pattern and moved the SREB entry from a "strategy" to a "rider."[5] There is no legal support for that view.

[4] *See, e.g.*, Proclamation by the Governor of the State of Texas at 2878, 64th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/64/sb52.pdf ("There is hereby appropriated a sum not to exceed $2,500,000 to the Texas Youth Council for the biennium beginning September 1, 1975 out of unobligated balances as of August 31, 1975 in appropriations made by House Bill No. 139, Acts of the Sixty-third Legislature, Regular Session, to the Youth Council (excluding balances in the Youth Council Building and Repair Program) to construct and operate two regional centers, not to exceed 48 beds each, to be located in El Paso and Cameron Counties. The funds appropriated above shall not be used to purchase land. The cost of constructing and equipping each regional center shall not exceed $825,000."); Proclamation by the Governor of State of Texas at 735, 56th Legislature, 3rd Called Session, *available at* www.lrl.state.tx.us/scanned/vetoes/56/hb4.pdf (vetoing the "Construction of quarters for senile patients" at a cost not to exceed $1,216,000).

[5] *See, e.g.*, 2002-2003 General Appropriations Act at III-52, *available at* http://www.lrl.state.tx.us/scanned/ApproBills/77_0/77_R_ALL.pdf (appropriating $157,000 for FY 2002 and $159,500 for FY 2003 to Strategy C.4.1: Southern Regional Education Compact).

6. Institutions of Higher Education

	2016	2017
C.2.8. Strategy: ~~IDENTITY THEFT AND SECURITY~~	~~$ 2,500,000~~	~~$ 2,500,000~~

9. Appropriation for Identity Theft and Security. ~~Amounts appropriated above include $5,000,000 in General Revenue for the 2016-17 biennium to provide research and education in the areas of identity management, protection, security, and privacy, and to develop solutions to identity problems for businesses, adults, and children at The Center for Identity at The University of Texas at Austin. The Comptroller estimates additional General Revenue of $5,000,000 for the biennium will be available as a result of increased identity security and privacy.~~

I object to and disapprove of this appropriation, which is in addition to other appropriations to The University of Texas at Austin. If The Center for Identity is a priority, the University may use its appropriation for institutional enhancement, leverage public-private partnerships, or allocate other resources for this purpose.

Texas A&M University

	2016	2017
C.1.1. Strategy: ~~INTERNATIONAL LAW SUMMER COURSE~~	~~$ 137,577~~	~~$ 137,577~~

4. International Law Summer Course. ~~Out of funds appropriated to Texas A&M University in Strategy C.1.1, International Law Summer Course, $137,577 in General Revenue in fiscal year 2016 and $137,577 in General Revenue in fiscal year 2017 will be used for the International Summer Course.~~

Texas A&M University did not request funding for this item in its 2016-17 Legislative Appropriations Request. If the International Law Summer Course is a priority, the University may use its appropriation for institutional enhancement, leverage public-private partnerships, or allocate other resources for this purpose. I therefore object to and disapprove of this appropriation.

Tarleton State University

	2016	2017
C.3.2. Strategy: ~~CENTER FOR ANTI-FRAUD~~	~~$ 1,000,000~~	~~$ 1,000,000~~

6. Center for Anti-Fraud, Waste and Abuse. ~~Out of funds appropriated to Tarleton State University in Strategy C.3.2, Center for Anti-Fraud, Waste and Abuse, $1,000,000 in General Revenue in fiscal year 2016 and $1,000,000 in General Revenue in fiscal year 2017 will be used for the Center for Anti-Fraud, Waste, and Abuse.~~

Efforts to prevent fraud, waste and abuse are being funded at numerous state agencies. As a result, this appropriation is duplicative. If the Center for Anti-Fraud, Waste and Abuse is a priority, the University may use its appropriation for institutional

enhancement, leverage public-private partnerships, or allocate other resources for this purpose. I therefore object to and disapprove of this appropriation.

Stephen F. Austin State University

	2016	2017
C.3.4. Strategy: ~~WET CENTER Waters of East Texas Center.~~	~~$ 500,000~~	~~$ 500,000~~

4. Waters of East Texas Center. ~~Out of funds appropriated to Stephen F. Austin State University in Strategy C.3.4, Waters of East Texas Center, $500,000 in General Revenue in fiscal year 2016 and $500,000 in General Revenue in fiscal year 2017 will be used for the Waters of East Texas Center.~~

If the WET Center is a priority, the University may use its appropriation for institutional enhancement, leverage public-private partnerships, or allocate other resources for this purpose. I therefore object to and disapprove of this appropriation.

Del Mar College

	2016	2017
O.2.1. Strategy: ~~MARITIME MUSEUM~~	~~$ 100,000~~	~~$ 100,000~~

26. Del Mar College - Maritime Museum. ~~Out of funds appropriated above in Strategy O.2.1, Maritime Museum, $100,000 in General Revenue for fiscal year 2016 and $100,000 in General Revenue for fiscal year 2017 shall be used for a maritime museum.~~

Del Mar College did not request funding for this item in its 2016-17 Legislative Appropriations Request. I therefore object to and disapprove of this appropriation.

LBB STAFF'S ASSERTION:

Institutions of Higher Education

The Proclamation seeks to eliminate the following informational strategies:

UT Austin: C.2.8, Identity Theft and Security	$5,000,000
A&M University: C.1.1, International Law Summer Course	$275,154
Tarleton State: C.3.2, Center For Anti Fraud	$2,000,000
SFA State: C.3.4, WET Center	$1,000,000
Del Mar College: O.2.1, Maritime Museum	$200,000

Appropriations for Institutions of Higher Education (IHEs) are lump-sum and are identified as such in the GAA. The strategy listing for IHEs is purely informational, again, as noted in the GAA itself. Striking the informational strategy listing does not reduce the appropriation. As the listings and the associated riders are not items of appropriation, they are also not subject to veto. Both the appropriation authority and the direction provided via informational strategies and riders remain valid.

GOVERNOR'S RESPONSE

As detailed at length below, *see* Appendix Tab B, *infra*, the LBB's argument that higher education strategies cannot be vetoed has no basis in law. And these vetoes are far from "unprecedented." LBB Staff Memo at 1. Governor Clements alone vetoed more than one hundred appropriations that were functionally identical to those vetoed by Governor Abbott. The LBB's application of "magic words" has no meaningful impact on the Governor's constitutional powers to limit the wasteful spending on items the institutions, on at least one occasion, did not even request to be funded.

Contrary to the LBB's assertion, it does not matter that the amounts Governor Abbott vetoed were included in the larger, lump-sum appropriation to each institution. It is well settled that such sub-appropriations fall within the Governor's line-item veto power. The *Jessen* Court specifically held that a binding set-aside of funds "is an item of appropriation *even though it may be included in a larger, more general item.*" 531 S.W.2d at 599 (emphasis added); *see also id.* at 600 ("The mere fact that the funds have been appropriated elsewhere does not preclude the construction that a provision is an item of appropriation . . . ."). *Fulmore* is a perfect example of that fact: the plain language of the Attorney General's appropriation said that "there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty ($83,160.00) dollars," 140 S.W. at 407, and the Court held that the larger, more general item of $83,160 contained two equally vetoable items of $41,580. It was irrelevant that the Legislature tried to "appropriate[ ]" $83,160, and it was irrelevant that each of the $41,580 sums came out of funds "appropriated" above.

It also does not matter that the LBB staff chose to preface the riders with the word "informational." In budgets as in all statutes, there are no magic labels. If the LBB staff's contrary view were correct, the LBB staff could use these labels to prevent the Governor from vetoing anything and everything in the budget.

Further, the strategy rider and riders that were vetoed are setting aside specific amounts of money for specific purposes, making them appropriations. *Jessen*, 531 S.W.2d at 599. Indeed, the LBB prefaces each institution's strategies rider by providing "appropriations made above . . . include the following amounts for the *purposes* indicated." (Emphasis added.) Thus, the LBB staff cannot deny (and do not deny) that the vetoed provisions are *functional equivalent* of items of appropriation. They force particular institutions to spend particular sums on particular things. Their only argument is that the provisions are "veto-proof" merely because the budget writers labeled them as "informational." That view has no basis in law.

Finally, as further explained in Appendix Tab B, *infra*, the LBB staff concede that the vetoed strategies are "appropriations." For example, the LBB itself refers to this form of strategy as an appropriation in the text of the 2016-17 State Budget for Del Mar College. And for the four-year institutions, the LBB has described each of these items as an appropriation in "outside the bounds" resolutions prepared by the LBB and adopted by the legislature.

7. Water Development Board

20. Water Conservation Education Grants. ~~Included in amounts appropriated above in Strategy A.3.1, Water Conservation and Assistance, is $1,000,000 in fiscal year 2016 from General Revenue for the purpose of providing grants to water conservation education groups. The Water Development Board shall award the grants through a competitive process, which may require grant applicants to provide private matching funds. Any unexpended balances as of August 31, 2016 in funds appropriated for this purpose are appropriated for the same purpose in the fiscal year beginning September 1, 2016.~~

A fiscally conservative budget requires eliminating appropriations that, even if well intended, are duplicative or unnecessary. While water conservation is a laudable goal and remains a key component to the state's long-term water plan, this appropriation is duplicative of existing water conservation initiatives. The Texas Water Development Board currently funds programs aimed at teaching the importance of conservation to our youth and providing educational materials to the public. In addition to numerous locally-funded conservation efforts, existing water conservation programs include TWDB Kids, Major Rivers, Raising Your Water IQ, and Water Exploration. I therefore object to and disapprove of this appropriation.

LBB STAFF'S ASSERTION:

Water Development Board
Rider 20, Water Conservation Education Grants. The rider does not make an appropriation; it provides conditions and direction on the use of funds appropriated elsewhere. The rider cannot stand alone; it relies on appropriations made elsewhere (see Attorney General Opinion GA-0776). Both the appropriation authority and the direction provided via Rider 20 remain valid.

GOVERNOR'S RESPONSE:

This rider sets aside a specific amount of money for a specific purpose. *Jessen*, 531 S.W.2d at 599. Specifically, the Rider appropriates $1,000,000 in General Revenue "for the *purpose* of providing grants to water conservation education groups." (Emphasis added). That makes it a vetoable item of appropriation.

It is irrelevant that the LBB staff prefaced the rider with "included in amounts appropriated above in Strategy A.3.1." That phrase indicates that the LBB staff made a lump-sum appropriation Strategy A.3.1 and then made a *sub-appropriation* in the rider.

It is well settled that such sub-appropriations fall within the Governor's line-item veto power. The *Jessen* Court specifically held that a binding set-aside of funds "is an item of appropriation *even though it may be included in a larger, more general item*." 531 S.W.2d at 599 (emphasis added); *see also id.* at 600 ("The mere fact that the funds have been appropriated elsewhere does not preclude the construction that a provision is an item of appropriation . . . ."). *Fulmore* is a perfect example of that fact: the plain

language of the Attorney General's appropriation said that "there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty ($83,160.00) dollars," 140 S.W. at 407, and the Court held that the larger, more general item of $83,160 contained two equally vetoable items of $41,580. It was irrelevant that the Legislature tried to "appropriate[ ]" $83,160, and it was irrelevant that each of the $41,580 sums came out of funds "appropriated" above.

Finally, the LBB staff do not dispute that this rider is the *functional equivalent* of a vetoable item of appropriation because it forces a particular state agency (the Water Development Board) to spend a particular sum ($1,000,000 each fiscal year) on a particular thing (grants to water conservation education groups). Rather, the staff argue the rider is "veto-proof" merely because the budget writers labeled the appropriation a "rider" instead of a "strategy." There is no legal support for that view. And the LBB staff apparently agreed without objection that Governor Perry could veto a similar water-related strategy and rider last session.[6]

8. Securities Board

3. Contingency for HB 2493. ~~Amounts appropriated above include $557,352 in fiscal year 2016 and $636,688 in fiscal year 2017 in General Revenue for the purpose of employee merit salary increases contingent upon House Bill 2493, or similar legislation relating to the classification of the agency as a Self-Directed and Semi-Independent agency, not being enacted.~~

This veto deletes a contingent rider for a bill that did not pass.

LBB STAFF'S ASSERTION:

Securities Board
Rider 3, Contingency for HB 2493. This contingency addressed the use of certain funds in the event HB 2493 was not enacted. The contingency does not make an appropriation and is not subject to veto, as it provides direction on the purpose of funds appropriated elsewhere in a certain contingency.

GOVERNOR'S RESPONSE:

For over 20 years Governor's have vetoed similar contingency riders. *See* Appendix Tab D, *infra*. Apparently this practice has never before been contested by the LBB staff.

9. Federal Funds

Sec. 13.11. Definition, Appropriation, Reporting and Audit of Earned Federal Funds.

[6] *See* Proclamation by the Governor of the State of Texas at 2, 83rd Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/83/SB1.pdf.

(l) Contingency for HB 8. ~~Contingent on the passage of House Bill 8 or similar legislation by the Eighty-fourth Legislature, Regular Session, which authorizes establishment of a special fund in the treasury to hold money received from the federal government and any earnings on federal money, beginning September 1, 2015, Earned Federal Funds as defined in Subsection (a) and estimated by agency in Subsection (b), Collected Revenue, would be deposited into a special fund in the treasury for federal funds and any earnings on federal money. The amounts appropriated to an agency under Articles I-VIII of this Act as General Revenue that consist of revenues collected from federal receipts, classified as Comptroller revenue object codes 3602, 3702, 3726, 3745, 3750, 3773, 3851, 3965, 3971 and 3972, and listed in Subsection (b), Collected Revenue, are eliminated and replaced by appropriations in the equivalent amount from the special fund in the treasury for federal funds and earned federal funds. The total reduction in the General Revenue Fund is estimated to be $55,793,926 in fiscal year 2016 and $55,694,259 in fiscal year 2017, with an offsetting appropriation increase from the special fund for federal and earned federal funds of an estimated $55,793,926 in fiscal year 2016 and $55,694,259 in fiscal year 2017. The amounts of the appropriation reduction in General Revenue and the corresponding appropriation increase from the special fund for federal and earned funds for each affected agency under Articles I-VIII of this Act are listed in Subsection (b), Collected Revenue. All remaining subsections in Section 13.11 would apply to the EFF amounts previously deposited to the General Revenue Fund, but as of September 1, 2015, deposited to a special fund in the treasury for federal funds and any earnings on federal money.~~

This veto deletes a contingent rider for a bill that did not pass.

LBB STAFF'S ASSERTION:

Article IX
Section 13.11 Definition, Appropriation, and Reporting and Audit of Earned Federal Funds. The Proclamation strikes subsection (l) which relates to a contingency for HB 8, which did not pass. Since the legislation on which the language was contingent did not pass, the section has no effect. However, the section does not make an appropriation, and is not an item of appropriation. This section directs a reclassification of revenues pursuant to HB 8; as such, it is not subject to veto.

GOVERNOR'S RESPONSE:

This rider is an appropriation as it reduces certain general revenue "with an offsetting *appropriation* increase . . . of an estimated $55,793,926 in fiscal year 2016 and $55,694,259 in fiscal year 2017."

For over 20 years Governor's have vetoed similar contingency riders. *See* Appendix Tab D, *infra*. Apparently this practice has never before been contested by the LBB staff. For

example, in 2009, Governor Perry vetoed a similar contingency rider that appropriated, reduced, and transferred funds.[7]

The Legislative Budget Board asserts that all other vetoes were constitutional.

[7] *See* Proclamation by the Governor of the State of Texas at 8-9, 81st Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/81/SB1.pdf (rider would have (a) "appropriated $35,060,992 for fiscal year 2010 and $57,834,840 for fiscal year 2011 out of the Water Plan Projects Fund"; (b) reduced other funds across multiple strategies by $46,447,916 for the 2010-11 biennium; and (c) transferred $46,447,916 in General Revenue to the General Revenue-Dedicated Texas Emissions Reduction Plan Account No. 5071).

TAB B

Higher Education Precedents

There is nothing unprecedented about the Governor's higher-education vetoes. Each of them follows a well-worn precedential pattern.

For example, during the 66th and 67th Legislative Sessions (1979 and 1981), Governor Clements struck more than 100 separate items of appropriations for institutions of higher education. For example, the State Budget for the 1978-79 Biennium appropriated $41,043 to Stephen F. Austin State University for the "Stone Fort Museum" special item. Governor Clements vetoed this special item appropriation:

STEPHEN F. AUSTIN STATE UNIVERSITY

	For the Years Ending August 31, 1980	August 31, 1981
* * *		
Special Items (non-transferable):		
a. Center for Applied Studies in Forestry	216,589	227,635
~~b. Stone Fort Museum~~	~~20,011~~	~~21,032~~
c. Soils Testing Laboratory	34,412	37,412
d. Scholarships	21,500	21,500
Repairs and Rehabilitation of Facilities (non-transferable):		
a. Improvements to Conserve Energy	150,000	U.B.
b. Improvements to Storm Water Drainage	447,000	U.B.
GRAND TOTAL, STEPHEN F. AUSTIN STATE UNIVERSITY	$ 19,870,778	$ 20,125,876

When Governor Clements returned to office in 1987, the LBB staff changed the bill pattern for institutions of higher education.[1] Over two biennia, the LBB moved previously designated "items of appropriation" into riders, and then labeled the riders as "informational listings."[2] The LBB then sought to appropriate each institution only a single lump-sum amount. Thus, using nothing but labels, the LBB staff asserts that it turned once-vetoable budget provisions into unvetoable ones, effectively insulating institutions of higher education from spending reductions. According to the LBB staff, the only permissible veto the Governor may make to an institution of higher education is to strike a university's entire lump-sum appropriation amount. *See* LBB Staff Memo at 7, A-4.

[1] *See, e.g.*, 1988-1989 General Appropriations Act at III-75, *available at* http://www.lrl.state.tx.us/scanned/ApproBills/70_2/70_2_ALL.pdf.

[2] *See, e.g.*, 1990-1991 General Appropriations Act at III-105, *available at* http://www.lrl.state.tx.us/scanned/ApproBills/71_0/71_R_ALL.pdf.

The LBB staff argues the following special item veto is now unconstitutional, notwithstanding that it is virtually identical to the veto that Governor Clements made in Stephen F. Austin University's budget 35 years ago.

STEPHEN F. AUSTIN STATE UNIVERSITY

	For the Years Ending August 31, 2016	August 31, 2017
* * *		
Items of Appropriation:		
1. Educational and General State Support	$ 56,796,076	$ 57,013,115
* * *		

1. Informational Listing of Appropriated Funds. The appropriations made above for Educational and General State Support are subject to the special and general provisions of this Act and include the following amounts for the purposes indicated.

* * *		
C. Goal: SPECIAL ITEM SUPPORT		
Provide Special Item Support.		
C.1.1. Strategy: RURAL NURSING INITIATIVE	$ 632,445	$ 632,445
C.2.1. Strategy: APPLIED FORESTRY STUDIES CENTER	$ 555,424	$ 555,454
Center for Applied Studies in Forestry.		
C.3.1. Strategy: STONE FORT MUSEUM & RESEARCH CENTER	$ 105,874	$ 105,874
Stone Fort Museum and Research Center of East Texas		
C.3.2. Strategy: SOIL PLANT & WATER ANALYSIS LAB	$ 60,394	$ 60,394
Soil Plant and Water Analysis Laboratory.		
C.3.3. Strategy: APPLIED POULTRY STUDIES & RESEARCH	$ 56,960	$ 56,960
Applied Poultry Studies and Research.		
~~**C.3.4. Strategy:** WET CENTER~~	~~$ 500,000~~	~~$ 500,000~~
~~Waters of East Texas Center.~~		
C.4.1. Strategy: INSTITUTIONAL ENHANCEMENT	$ 4,762,047	$ 4,762,047
Total, Goal C: SPECIAL ITEM SUPPORT	$ 6,673,174	$ 6,673,174

If the LBB's arguments were correct, at least six of the appropriations vetoed by Governor Clements in 1979 could no longer be vetoed in the 2016-17 State Budget. This is because, according to the LBB, identical higher education appropriations that were formerly *vetoed* by Governor Clements are now labeled by LBB staff as "purely informational . . . and not items of appropriation." LBB Staff Memo at A-4.

	1980-81 Budget: Vetoed Appropriations	2016-17 Budget: LBB's "Veto-Proof" Appropriations
Sul Ross State University	Item 9b – Sul Ross State University Museum ($73,419)	Strategy C.2.1 – Sul Ross Museum ($165,00)
University of North Texas (North Texas State University)	Item 10g – Institute for Applied Sciences ($362,044)	Strategy C.2.1 –Institute of Applied Science ($87,642)
Stephen F. Austin University	Item 9b – Stone Fort Museum ($41,043)	Strategy C.3.1 – Stone Fort Museum & Research Center ($211,748)
Texas A&M Kingsville (Texas A&I University)	Item 10c –John E. Connor Museum ($66,334)	Strategy C.3.1 – John E. Connor Museum ($36,697)
University of Texas at Austin	Item 10b(2) – Marine Science Institute at Port Aransas ($988,324)	Strategy C.2.1 – Marine Science Institute – Port Aransas ($7,857,954)
University of Texas at Austin	Item 10b(5) – Bureau of Business Research ($935,158)	Strategy C.2.3 – Bureau of Business Research ($348,730)

Despite their protestations now, the LBB staff previously conceded that their "informational" strategies for higher education do in fact set aside particular funds for particular purposes. Take, for example, the Governor's veto of Del Mar College Strategy O.2.1 and rider 26. The plain language of the that provision says that funds were "*appropriated*" in the so-called "informational strategy":

> **26. Del Mar College - Maritime Museum.** Out of funds appropriated above in Strategy O.2.1, Maritime Museum, $100,000 in General Revenue for fiscal year 2016 and $100,000 in General Revenue for fiscal year 2017 shall be used for a maritime museum.[3]

Finally, the LBB's so-called "out of bounds" resolutions further concede that these are actually *appropriations*, regardless of the LBB staff's labels. The following table illustrates the point—using the LBB's own language from the resolutions drafted by its staff.

[3] *See* FY 2016-2017 Conference Committee Report for HB 1 at III-200, III-207 (emphasis added).

Institution of Higher Education	Specific Purpose	Specific Amount	LBB Admission That Provision Is An "Item of Appropriation"
University of Texas at Austin	The Center for Identity	$5,000,000	On page III-23 of HR 2700 (83-R), the LBB writes: "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.2.8. Strategy: IDENTITY THEFT AND SECURITY" On page III-23 of SR 1055 (83-R), the LBB writes: "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.2.8. Strategy: IDENTITY THEFT AND SECURITY"
Texas A&M University	International Law Summer Course	$275,154	On page III-25 of HR 3315 (84-R), the LBB writes: "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.1.1. Strategy: INTERNATIONAL SUMMER LAW COURSE" On page III-25 of SR 1019 (84-R), the LBB writes: "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.1.1. Strategy: INTERNATIONAL LAW SUMMER COURSE"
Tarleton State University	The Center for Anti-Fraud, Waste, and Abuse	$2,000,000	On page III-27 of HR 3315 (84-R), the LBB writes: "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.2. Strategy: CENTER FOR ANTI-FRAUD" On page III-27 of SR 1019 (84-R), the LBB writes: "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.2. Strategy: CENTER FOR ANTI-FRAUD"
Stephen F. Austin State University	The Waters of East Texas Center."	$1,000,000	On page III-37 of HR 3315 (84-R), the LBB writes: "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.4. Strategy: WET CENTER" On page III-37 of SR 1019 (84-R), the LBB writes: "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.4. Strategy: WET CENTER"
Del Mar College	Maritime Museum	$200,000	In Public Community/Junior Colleges Rider 26: "Out of **funds appropriated above in Strategy O.2.1, Maritime Museum**, $100,000 in General Revenue for fiscal year 2016 and $100,000 in General Revenue for fiscal year 2017 shall be used for a maritime museum"

TAB C

Capital Budget Precedents

Nor is there anything unprecedented about the Governor's vetoes of appropriations for so-called "capital budget" items like buildings and parking garages. As shown in the table below, for decades former Governors have vetoed capital budget appropriations for garages and new state buildings that are functionally identical to Governor Abbott's vetoes:

State Budget	Governor	Capital Appropriations Vetoed (Examples)	Vetoed Spending
1960-1961	Price Daniel, Sr.	To the Hospital Board for the "Construction of quarters for senile patients"	At a cost not to exceed $1,216,000[1]
1964-1965	John B. Connally, Jr.	"New Construction"[2] including Hospitals; Correctional institutions; Airport facilities; Finance Building; and Park Development "Major repairs and rehabilitation of physical structures and facilities"[3] including Hospitals; Schools; Homes for orphaned children; Correctional institutions; Park roads; Park rehabilitation; 20 four-year colleges and Universities	Items totaling $9,462,400 per LBB analysis attached to the veto proclamation[4]
1966-1967	John B. Connally, Jr.	To the Building Commission "For the construction of a museum building" and To the Aeronautical Commission "Airport Facilities"	$500,000[5]

[1] Proclamation by the Governor of State of Texas at 735, 56th Legislature, 3rd Called Session, *available at* www.lrl.state.tx.us/scanned/vetoes/56/hb4.pdf.

[2] Proclamation by the Governor of State of Texas, 58th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/58/hb86.pdf (hereinafter "1963 Proclamation"); An Analysis of the Governor's Item-Vetoes in H.B. No. 86 (General Appropriations Act, 1964-65 Biennium), Legislative Budget Board, June 14, 1963.

[3] 1963 Proclamation.

[4] *Ibid.*

[5] Proclamation by the Governor of the State of Texas at 2, 59th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/59/hb12.pdf; General Appropriations Act (H.B. 12), 59th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/ApproBills/59_0/59_0_HB12_article03.pdf.

State Budget	Governor	Capital Appropriations Vetoed (Examples)	Vetoed Spending
1968-1969	John B. Connally, Jr.	To the Building Commission for a "Corpus Christi State School" and for "Capital Repair and Renovation"	$436,000[6]
1968-1969	John B. Connally, Jr.	To the Building Commission for "Two automatic elevators in the Capital Building" and to the Comptroller of Public Accounts for "For the purpose of constructing . . . a prefabrication Building"	$875,000[7]
1970-1971	Preston Smith	To the Department of Public Safety "For the construction of a subdistrict headquarters building" and to "Stephen F. Austin State University" for Fish Raising Facility"	$322,717[8]
1976-1977	Dolph Briscoe	To the Texas Youth Council Building and Repair Program to "construct and operate two regional centers" in El Paso and Cameron Counties	$2,500,000[9]
1976-1977	Dolph Briscoe	To the State Building Commission for the construction of "two parking garages" in the Capitol Complex Area	$5,732,024[10]
1976-1977	Dolph Briscoe	To the State Board of Control to "Construct Services Building in Capitol Complex Area"	$1,241,503[11]
1980-1981[12]	William P. Clements	To the State Board of Control for a "New State Office Building"	$28,948,368[13]

[6] Proclamation by the Governor of the State of Texas at 2328, 2331, 60th Legislature, Regular Session, *available at* www.lrl.state.tx.us/scanned/vetoes/60/sb15.pdf.

[7] Proclamation by the Governor of the State of Texas at 391-92, 60th Legislature, 1st Called Session, *available at* www.lrl.state.tx.us/scanned/vetoes/60/hb5.pdf.

[8] Proclamation by the Governor of the State of Texas at 1044, 1046-47, 61st Legislature, 2nd Called Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/61/hb1.pdf.

[9] Proclamation by the Governor of the State of Texas, 64th Legislature, Regular Session, *available at* www.lrl.state.tx.us/scanned/vetoes/64/sb52.pdf.

[10] *Ibid.*

[11] *Ibid.*

[12] Of note, the Chair of the House Appropriations requested that several of the Governor's vetoes of appropriations in the 1980-81 General Appropriations Act be reviewed by the Texas Attorney General's Office. But no one asked the Attorney General to write an opinion about the legality of the Governor's veto of the "New State Office Building" or "Parking Garage" above.

State Budget	Governor	Capital Appropriations Vetoed (Examples)	Vetoed Spending
1980-1981	William P. Clements	To the State Board of Control for a "Parking Garage" to be located in the "Capitol Area"	$4,165,404[14]
1988-1989	William P. Clements	To the State Department of Highways and Public Transportation for "Capital Construction" of a new administrative office building	$33,973,696[15]
2014-2015	Rick Perry	To the Texas Facilities Commission for two office buildings and one parking structure split between the Capitol Complex and North Austin Complex	$325,586,000[16]

Consider, for example, Governor Perry's veto of the 2013 supplemental appropriations bills, which dedicated funds for the construction of the North Austin office building complex:[17]

> **SECTION 52. CONSTRUCTION OF FACILITIES FOR STATE AGENCIES.**
> ~~(a) In accordance with Government Code Chapters 1232 and 2166, the Texas Public Finance Authority (TFPA) shall issue revenue bonds on behalf of the Texas Facilities Commission (TFC) in an amount not to exceed $325,586,000 for the purpose of constructing one office building in the Capitol Complex, as defined by Government Code, Chapter 443.0071(b),~~ **and one office building and one parking structure in the North Austin Complex,** ~~as described in the Facilities Master Plan. The Facilities Commission is appropriated an amount not to exceed $325,586,000 out of Revenue Bond Proceeds in Strategy A.2.1, Facilities Design and Construction, for the fiscal biennium ending August 31, 2015, for the construction of facilities for state agencies, pursuant to Government Code, Section 2166.453.~~
> ~~(b) The Facilities Commission is appropriated $5,193,445 out of the general revenue fund the fiscal biennium ending August 31, 2015 for lease payments (debt service) to the Texas Public Finance Authority for any revenue bonds issued under subsection (a).~~ (emphasis added).

The same North Austin Complex building and parking garage project appeared again in the Facilities Commission bill pattern for the 2016-17 State Budget, this time in Rider

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[13] Proclamation by the Governor of the State of Texas, 66th Legislature, Regular Session, *available at* www.lrl.state.tx.us/scanned/vetoes/66/hb558.pdf.

[14] *Ibid.*

[15] Proclamation by the Governor of the State of Texas, 70th Legislature, 2nd Called Session, *available at* www.lrl.state.tx.us/scanned/vetoes/70/sb1.pdf

[16] Proclamation by the Governor of the State of Texas, 83rd Legislature Supplemental Appropriations Bill Veto, *available at* www.lrl.state.tx.us/scanned/vetoes/83/HB1025.pdf.

[17] *Ibid.*

3.e.4.[18] In essence, the LBB argues that if Governor Abbott had vetoed funding for the new office building and parking structure at the North Austin Complex this session, the exact same veto that was constitutional for Governor Perry just two short years ago would now be unconstitutional simply because the LBB staff now labeled it a "rider."

The LBB also challenges Governor Abbott's vetoes of Riders 20 and 22 in the Facilities Commission budget. *See* LBB Staff Memo at A-3. But both of those riders state that "Any unexpended balances in *the appropriation made herein* and remaining as of August 31, 2016 *are appropriated* for the same purposes for the fiscal year beginning September 1, 2016."[19] Thus, in addition to providing specific amounts for specific projects, Riders 20 and 22 also provide unspent balance appropriations for these projects, and they even use the label "appropriated." It is beyond dispute that Governors can veto such carryover authority.[20]

[18] FY 2016-2017 Conference Committee Report for HB 1, at I-41.

[19] FY 2016-2017 Conference Committee Report for HB 1, at I-46 (emphasis added).

[20] *See, e.g.*, Proclamation by the Governor of the State of Texas, Rick Perry at 1, 79th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/79/SB1.pdf.

TAB D

Contingency Rider Precedents

Line-Item Vetoes of Contingency Riders		
84th (FY 16-17)	Governor Abbott	11
83rd (FY 14-15)	Governor Perry	7
82nd (FY 12-13)	Governor Perry	31
81st (FY 10-11)	Governor Perry	26
80th (FY 08-09)	Governor Perry	15
79th (FY 06-07)	Governor Perry	17
78th (FY 04-05)	Governor Perry	1
77th (FY 02-03)	Governor Perry	9
76th (FY 00-01)	Governor Bush	3
75th (FY 98-99)	Governor Bush	14
74th (FY 96-97)	Governor Bush	14
73rd (FY 94-95)	Governor Richards	13
72nd (FY 92-93)	Governor Richards	9