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SUPREME COURT OF THE STATE OF WASHINGTON

THE HONORABLE JAY INSLEE, in his official capacity as Governor of the State of Washington,

Appellant,

v.

WASHINGTON STATE LEGISLATURE,

Respondent.

GOVERNOR'S OPENING BRIEF

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I. INTRODUCTION

The Washington State Department of Transportation Public Transportation Division administers grants that help local transportation providers improve access and mobility. When selecting recipients for the grants, state law requires the Division to consider environmental impacts, including “energy efficiency issues” and air quality requirements, as part of the selection criteria. RCW 47.66.040(2). It also requires the Division to “enhance Washington’s quality of life through transportation investments that promote energy conservation, enhance healthy communities, and protect the environment.” RCW 47.04.280(1)(e), (2).

In its 2019 transportation budget bill, the Legislature appropriated funds to the Division subject to several conditions, including one that prohibited the Division from considering fuel type as a factor in selecting grantees of all but one of the grant programs it administers.

The Governor appropriately vetoed this fuel type condition because it was a separate “appropriation item” subject to the Governor’s article III, section 12 veto power. The fuel type condition was a “nondollar proviso,” because it “condition[ed] an agency appropriation on the agency’s taking or not taking certain action” without affecting the amount of the appropriation. *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 325, 931 P.2d 885 (1997); *Washington State Legislature v. State*, 139 Wn.2d 129, 141, 985 P.2d 353 (1999) (*Locke*). By requiring the Division to exclude consideration of fuel type as a factor in future grant determinations, the proviso fell squarely within this Court’s definition of an appropriation item.

The Legislature nevertheless contends that the fuel type condition was not a separate appropriation item because it was not a whole "subsection" of an appropriations bill. It claims the Governor's line-item veto power is circumscribed by the Legislature's definition of a "subsection" absent "extreme legislative manipulation." CP 14.

The Legislature's position, however, conflicts with the text and purpose of article III, section 12, as well as this Court's explicit rejection of a "subsection" requirement on the Governor's line-item veto as "too easily manipulated by the mere placement of a number or letter, or artificial designation into paragraphs." *Locke*, 139 Wn.2d at 142. The Constitution expressly authorizes the Governor to veto "appropriation items," not "subsections." Unlike the Governor's "section" veto authority, which is defined by reference to legislative formatting choices, an "appropriation item" veto is objectively defined based on a proviso's language and operative effect. Adding a "subsection" requirement thus has no basis in the constitutional text. It also defeats the very reason this Court requires "nondollar provisos" to be categorized as individual "appropriation items" subject to veto: to encourage treatment of policy issues on their individual merits, fortify the benefits of the line-item veto, and discourage legislative logrolling. *Lowry*, 131 Wn.2d at 327-28. This rationale is even stronger when the Legislature intertwines a nonmonetary condition into multiple subsections. Adding a subsection requirement gives the Legislature power to thwart the constitutional purpose and function of the line-item veto through legislatively-controlled formatting decisions. This Court has

rejected such artificial limitations on the Governor's line-item veto authority as distorting the balance of legislative power between the executive and legislative branches. It should do so again here.

Finally, even if reinstated, the vetoed provisions should, nonetheless, be stricken under article II, sections 19 and 37. By prohibiting the Division from considering fuel type in making future grant decisions—including those extending beyond the current biennium—the Legislature inserted substantive law into an appropriations bill and amended the law governing the grant selection process without setting it forth in full.

II. ASSIGNMENTS OF ERROR

1. Article III, section 12 provides that if a section of legislation contains one or more appropriation items, the Governor's veto power extends to "any such appropriation item or items." This Court has defined an "appropriation item" to include a nondollar condition on an agency's expenditure of funds contained within an appropriations bill. Did the trial court err in ruling that the Governor's veto of the fuel type condition in the transportation budget bill exceeded his authority?

2. Article II, section 19 requires a bill to embrace only one subject, which shall be expressed in the title. The title of the 2019 transportation budget bill is "An Act relating to transportation funding and appropriations." Where the Legislature imposed in its transportation budget bill a new substantive requirement on the Department of Transportation's

process for selecting future grant recipients, which is otherwise specified in RCW 47.66, did it impermissibly exceed the scope and title of the Act?

3. When the Legislature revises or amends an act, article II, section 37 requires that it do so by setting forth the act revised or the section amended at full length, and not by mere reference to its title. Did the addition of the fuel type restriction in the 2019 transportation budget bill violate article II, section 37, by amending RCW 47.66 without setting forth the revised act or section in full?

III. STATEMENT OF THE CASE

The Washington State Department of Transportation is the steward of Washington State's multimodal transportation system. In addition to building, maintaining, and operating the state highway and ferry systems, the Department works in partnership with others to support alternatives to driving, such as public transportation. *See generally* Title 47 RCW; *Washington State Department of Transportation,* "About us," https://wsdot.wa.gov/About/default.htm (last visited Oct. 23, 2020). To that end, the Public Transportation Division facilitates integration of public transportation services with the state transportation system, and administers grants that help local transportation providers improve access and mobility. *See, e.g.*, RCW 47.01.330, .340; RCW 47.66. Funds awarded through these grant programs help to fund the purchase of new vehicles, build infrastructure, and provide funds to facilitate and encourage the use of public transportation. *See generally* RCW 47.01.330; *Washington State*

Department of Transportation, "Apply for a Public Transportation Grant," https://wsdot.wa.gov/transit/grants/apply-public-transportation-grant (last visited November 4, 2020).

A. The Public Transportation Division Administers Grant Programs Consistent with RCW 47.66 and Other Governing Law

Recognizing a "significant state interest in assuring that viable multimodal transportation programs are available throughout the state", the "need to create a mechanism to fund multimodal transportation and projects", and the "complexities" associated with prior funding mechanisms, in 1993, the Legislature created a more consistent "process that would allow for all transportation programs and projects to compete for limited resources." Laws of 1993, ch. 393, § 3 (codified in RCW 47.66.010). Thus, RCW 47.66.040 sets forth the Public Transportation Division's general authority and process for selecting multimodal grant programs and projects.

RCW 47.66.040 requires the Division to consider and act consistently with "[l]ocal, regional, and state transportation plans;" "[o]bjectives of … the commute trip reduction act;" "[o]bjectives of … federal and state air quality requirements;" and "energy efficiency issues;" among other factors, when making grant determinations. RCW 47.66.040. More broadly, RCW 47.01.011 requires the Division to further the Department's statutorily-set policy goals, including to "enhance Washington's quality of life through transportation investments that

promote energy conservation, enhance healthy communities, and protect the environment." RCW 47.04.280(1)(e), (2). The Legislature has targeted certain reductions in greenhouse gas emissions for the state, and specifically requires state and local governments, to the extent practicable (as determined by Department of Commerce rules), to transition their fuel usage to electricity or biofuel. RCW 70A.45; RCW 43.19.648. Many of the entities that seek public transportation grants are local governments subject to these environmentally-focused obligations.

Some grant programs have additional requirements. For example, RCW 47.66.030 sets forth the process for administering the regional mobility grant program, which helps local governments fund projects "such as intercounty connectivity service, park and ride lots, rush hour transit service, and capital projects that improve connectivity and efficiency of our transportation system." RCW 47.66.030(1)(a). For this program, prior to the legislative session in which funds are to be appropriated, the Division is required to submit a prioritized list of projects, consistent with the criteria and process set forth in RCW 47.66.030 and .040. RCW 47.66.030(1). The Legislature then directs appropriated funds to some or all of those pre-selected projects. *Id*. *See also* RCW 47.66.100 (governing process for selecting rural mobility grants, and requiring that half of the moneys appropriated for that program be distributed through a noncompetitive process "in a manner similar to past disparity equalization programs"); RCW 47.66.110 (governing process for selecting transit coordination

grants); RCW 47.66.120 (governing process for selecting green transportation capital grants).

In sum, the Division furthers the Legislature's intent to "assur[e] that viable multimodal transportation programs are available throughout the state" by administering the grant programs under its charge consistent with RCW 47.66, RCW 47.04.280, and other governing laws. RCW 47.66.010.

B. The Legislature Conditioned its 2019 Appropriation to the Division on a New Requirement Precluding the Division from Considering Fuel Type in Future Grant Determinations

In Section 220 of its 2019 transportation appropriations bill, the Legislature appropriated $261,865,000 to the Department's Public Transportation Program, subject to a number of monetary and non-monetary conditions. Engrossed Substitute H.B. (ESHB) 1160, 66th Leg., Reg. Sess., ch. 416, § 220 (Wash. 2019). Section 220 included monetary conditions specifying that certain sums could be used "solely" for specific projects or grant programs, including certain pre-selected projects. ESHB 1160 § 220. Section 220 also included non-monetary conditions, untethered to the size of the appropriation. The "fuel type" condition at issue in this case was one of these nonmonetary conditions.

1. Section 220 allocated some portions of its appropriations to specific pre-selected projects

For some of the total appropriation to the Public Transportation Division, the Legislature allocated funding to specific projects that were already identified and selected. For example, Subsection 220(5)(a) allocated

funds to be spent on regional mobility grant projects "identified in LEAP Transportation Document 2019-2 ALL PROJECTS as developed April 27, 2019, Program - Public Transportation Program (V)." *See* RCW 47.66.030 (describing process for selecting and funding regional mobility grant projects). These pre-selected projects anticipated funding for either two or four years. LEAP Transportation Document 2019-2 ALL PROJECTS as developed April 27, 2019, at 36-41, http://leap.leg.wa.gov/leap/Budget/leapdocs/CTLEAPDoc2019-2_0428.pdf. Similarly, Subsection 220(4) directed unspent funds appropriated in the prior biennium for regional mobility projects already selected and funded.

Subsection 220(8) allocated funding to certain "connecting Washington transit projects identified in LEAP Transportation Document 2019-2 ALL PROJECTS as developed April 27, 2019." As with the regional mobility grant projects in subsection 220(5), the projects at issue in subsection 220(8) had already been selected and identified prior to appropriation. *See* LEAP Transportation Document 2016-3 as developed March 7, 2016, Connecting Washington Transit Projects, http://leap.leg.wa.gov/leap/Budget/Detail/2016/CTLEAPDoc 2016-3-0307.pdf; LEAP Transportation Document 2019-2 ALL PROJECTS as developed April 27, 2019, at 44-46, http://leap.leg.wa.gov/leap/Budget/leapdocs/CTLEAPDoc2019-2_0428.pdf. Subsection 220(11) detailed how unspent funds relating to

connecting Washington transportation projects (set forth in subsection 220(8)) could be applied to other specifically identified projects.

Several other subsections conditioned the appropriation in Section 220 to the Division by requiring that certain amounts be spent on specific, pre-identified projects. ESHB 1160 (2019) §§ 220(12) (allocating $750,000 of the appropriation to the Division to be provided “solely for Intercity Transit for the Dash shuttle program”); (13) (allocating $485,000 “solely for King county” for specified projects); (15) (allocating $555,000 of the appropriation to the Division to be provided solely as interagency transfer to Washington State University to establish and administer a technical assistance and education program).

Thus, for seven different subsections in Section 220, the Legislature imposed seven different dollar provisos directed to specific, pre-identified transportation projects. ESHB 1160 (2019) §§ 220(4), (5)(a), (8), (11)(a), (12), (13), (15).

2. Section 220 also required that certain amounts be spent on specific grant programs

For another portion of the total appropriation to the Division in Section 220, the Legislature instead limited certain funding to be used exclusively for certain grant programs in which the Division had yet to select grantees for funding.

In Subsection 220(1)(a) and (b), the Legislature directed that $62,679,000 of the total appropriation to the Division was to be used “solely for a grant program for special needs transportation,” and, of that amount,

$14,278,00 was to be used “solely for grants to nonprofit providers,” and $48,401,000 “solely for grants to transit agencies.”

In Subsection 220(2), the Legislature provided that $32,223,000 of the appropriation to the Division was to be used “solely for grants to aid small cities in rural areas as prescribed in RCW 47.66.100.”

In Subsection 220(3), the Legislature directed that $10,290,000 of the appropriation could be used for a grant program to add or replace vanpools, or incentivize vanpool use.

Subsection 220(7) provided that $8,454,000 of the appropriation to the Division could be used “solely for CTR [Commute Trip Reduction] grants and activities,” with other limitations. The State Clean Air Act and Commute Trip Reduction Act authorize the commute trip reduction board and the Department to assist and allocate funding to regional transportation planning organizations, counties, cities, and towns implementing CTR plans, based on criteria established by the commute trip reduction board. *See* RCW 70A.15.4000-.4080. Subsection 220(6) provided that funds allocated for the CTR program could also be used for the growth and transportation efficiency center program. *See* RCW 70A.15.4010(7) (defining “[g]rowth and transportation efficiency center” based on “criteria established by the commute trip reduction board”).

Subsection 220(9) allocated funding to transit coordination grants. The detailed process for selecting these grants is set forth in RCW 47.66.110.

Last amongst the allocations of funding to specific grant programs with projects to be selected, Subsection 220(14) allocated $12,000,000 for a newly created "green transportation capital grant program," established and detailed in Engrossed Second Substitute House Bill 2042 (2019), now codified in RCW 47.66.120. That statute sets forth a comprehensive process for project selection.

3. Section 220 included several nonmonetary conditions

Besides limiting certain amounts of the total appropriation to the Public Transportation Division for use on certain projects or programs, Section 220 also imposed conditions that required the Division to take or refrain from taking certain actions. Some were uniquely tailored to specific grant programs, and are not at issue in this case.[1]

[1] For example, consistent with RCW 47.01.450, RCW 47.66.040, and transportation budget bills dating back at least as far as 1997, Section 220(1) required consideration of need, demand, coordination with other providers, and efficiency in selecting grantees of the special needs transportation grants. *See, e.g.*, Laws of 1997, ch. 457, § 227(5) (allocating appropriated funds for special needs transportation); Laws of 1987, ch. 173 (creating the agency council on coordinated transportation to address access and efficiency issues for special needs transportation). *See also, e.g.*, Laws of 2017, ch. 313, § 220(1); Laws of 2015, 1st. Spec. Sess., ch. 10, § 220(1); Laws of 2013, ch. 306, § 220(1); Laws of 2011, ch. 367, § 220(1); Laws of 2009, ch. 470, § 222(1); Laws of 2007, ch. 518, § 224(1); Laws of 2005, ch. 313, § 225(1); Laws of 2003, ch. 360, § 224(1).

Consistent with RCW 47.66.100, subsection 220(2) requires that half of the amounts allocated for the rural mobility grant program be spent on noncompetitive grants to rural and small city transit systems with the goal of reducing historical transportation disparity, and half to competitive grants to rural mobility service providers in underserved or unserved areas. RCW 47.66.100(1)(a)-(b).

Consistent with prior transportation budgets, subsection 220(3) further specified that vanpool grants to transit agencies could only cover capital costs, and not operating costs, and required the Division to encourage grant applicants and recipients to leverage funds other than state funds. *See, e.g.*, Laws of 2003, ch. 360, § 224(4); Laws of 2011, ch. 367, § 220(3). *See also* RCW 47.66.040 (requiring Division to consider "the leveraging of other funds" in its grant selection process); Laws of 2017, ch. 313, § 220(3); Laws of 2015, 1st Spec. Sess., ch. 10, § 220(3); Laws of 2013, ch. 306, § 220(3); Laws of 2009, ch. 470, § 222(3); Laws of 2007, ch. 518, § 224(3); Laws of 2005, ch. 313, § 225(3).

Two conditions in Section 220 were generally-applicable conditions requiring action or inaction by the Division as to multiple grant programs. First, Subsection 220(10) required that the Division "shall not require more than a ten percent match from nonprofit transportation providers for state grants." That condition is not at issue in this case, but demonstrates how the Legislature has generally imposed a condition on the Division's process for administering multiple grant programs in its budget bills.[2]

Second, at issue in this case, Subsections 220(1)(a), (1)(b), (2), (3)(a), (5)(a), (7), (9) all provided that "[f]uel type may not be a factor in the grant selection process." This condition was inserted verbatim into each subsection that governs future grant award determinations to be made under all of the programs funded by Section 220, except for the newly-created green transportation capital grant program in Subsection 220(14).[3] And, although the 2019-21 regional mobility projects to be funded under

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Subsection 220(5) contained a number of conditions on the funds directed towards regional mobility grants that have been repeated biennium after biennium. It provided that transit agencies could only be eligible for such grants if they have established a process for private transportation providers to apply for the use of park and ride facilities. It also required the Division to provide annual status reports regarding the projects. ESHB 1160 § 220(5). Subsection 220(5) also provided instruction governing future biennium: it directed the Division that, "when allocating funding for the 2021-2023 biennium, no more than thirty percent of the total grant program may directly benefit or support one grantee." *See, e.g.*, Laws of 2017, ch. 313, § 220(5); Laws of 2015, 1st Spec. Sess., ch. 10, § 220(5); Laws of 2013, ch. 306, § 220(5); Laws of 2011, ch. 367, § 220(5)(b); Laws of 2009, ch. 470, § 222(6); Laws of 2007, ch. 518, § 224(4). *See also* Laws of 2005, ch. 313, § 225(6) (referencing creation of regional mobility grant program in Laws of 2005, ch. 318).

[2] *See, e.g.*, Laws of 2017, ch. 313, § 220(11) (imposing identical requirement).

[3] The fuel type condition is not included in in subsections §§ 220(4), (8), (11)(a), (12), (13)(a), and (15), which makes sense, because those provisions fund projects already identified and selected, and thus a change in grant selection criteria could not influence future Division behavior as to project selection during the biennium covered by the budget bill. And, as mentioned, subsection (10) is, itself, a separate condition on the appropriation in Section 220.

Subsection 220(5) were already identified on the LEAP list and approved by the Legislature, Subsection 220(5) also specified that the Division could not use fuel type as a factor in future grant determinations under that program. To have any meaning, this condition could only apply to grant determinations in the next biennium (2021-23) or beyond, not the grants that had already been pre-selected for the current 2019-21 biennium.

Thus, while some conditions imposed individualized requirements for specific grant programs, Subsections 220(1)(a), (1)(b), (2), (3)(a), (5)(a), (7), (9), and (10) reflected two generally-applicable conditions.

C. The Governor Vetoed the New Fuel Type Requirement, and ESHB 1160 Became Law Without It

The Governor returned ESHB 1160 without his approval to the fuel type condition. He concluded that this new requirement reflected a policy change and conflicted with the statutory mandates in RCW 47.66.030 and .040, which govern the Division's grant selection process and require the Division to consider, among other things, "energy efficiency issues," and objectives of the Clean Air and Commute Trip Reduction Acts; and RCW 43.19.648, which requires state and local governments to transition their fuel usage to electricity or biofuel, to the extent practicable.

The Legislature did not reconvene and override the Governor's veto. Thus, ESHB 1160, as enacted by the Legislature and partially vetoed by the Governor, became effective May 21, 2019. Laws of 2019, ch. 416, § 1202; Const. art. III, § 12.

D. The Trial Court Invalidated the Governor's Veto

The Legislature filed suit against the Governor, seeking a declaratory judgment that the Governor's veto exceeded the scope of his constitutional veto authority and was therefore invalid. CP 5. The Governor responded that the veto was valid, but counterclaimed that if the veto was not upheld, the vetoed language should be stricken because it violates article II, sections 19 and 37 by interjecting substantive law into a budget bill and amending substantive law without setting it forth in full. CP 9.

On cross summary judgment motions, the trial court sided with the Legislature, thereby invalidating the veto and denying the Governor's counterclaims. CP 188. The Governor appealed directly to this Court, which granted direct review.

IV. ARGUMENT

The Governor legitimately exercised his constitutional authority to veto individual appropriation items, and the Court should uphold the veto. If the Court does not sustain the veto, it should, nonetheless, strike the fuel type condition under article II, sections 19 and 37.

A. The Governor Properly Vetoed the Fuel Type Condition as a Separate Appropriation Item

First, the Governor's constitutional authority to veto "appropriation items" extends to each and every budget proviso, and, accordingly, extends to the fuel type condition at issue here. The language and operative effect of the fuel type condition demonstrates that it is a separate "whole" nondollar proviso distinct from the other conditions included in

Section 220. The very reason this Court has already decided that even nonmonetary conditions on an appropriation must be subject to individual veto is to protect the true line-item veto, discourage legislative logrolling, and encourage individual treatment of policy changes on their merits. These same reasons mandate against the Legislature's argument here that it can prevent the Governor's veto by condensing multiple conditions into one subjectively-designated "subsection." The Court should uphold the veto.

1. The Governor has broad constitutional authority to veto each individual appropriation item

"The Washington Constitution confers upon the Governor general veto authority over legislation and a distinct veto power over 'appropriation items[.]' " *Lowry*, 131 Wn.2d at 315.

> If any bill presented to the governor contain several sections or appropriation items, he may object to one or more sections or appropriation items . . . *Provided*, That he may not object to less than an entire section, except that if the section contain one or more appropriation items he may object to any such appropriation item or items.

Const. art. III, § 12. The appropriation item veto is intended to allow the Governor to "exercise a true line item veto." *Lowry*, 131 Wn.2d at 322. "By its very specific language, article III, section 12 envisions appropriation items as something less than an entire section of an appropriations bill." *Id*.

The general purpose of the line item veto is twofold. *Id.* at 316. First, it gives the Governor "the power to achieve fiscal constraint and to advance statewide rather than parochial fiscal interests; the Governor can excise unneeded 'pork barrel' programs or projects[.]" *Id*. Second, it "permit[s] the

Governor to disentangle issues so they will be considered on their individual merits. This policy is consistent with the constitutional framers' evident fear of legislative logrolling[.]" *Lowry*, 131 Wn.2d at 316-17.

The Washington Legislature's unique method for drafting budget bills has led this Court to define the Governor's "appropriation item" veto power broadly, such that it extends not only to an appropriation of funds, but to each condition imposed on an appropriation. *See id.* at 321-22. Rather than employ a "true programmatic or line item budget," the Legislature instead "has chosen to make general agency [or large agency program[4]] appropriations with provisos for policy or specific agency programs." *Id*. As this Court opined, the Legislature "frustrates" the purpose of the "line item" veto by drafting appropriations bills in this manner. *Id.* at 323. "The only feature of modern legislative bill drafting in Washington that resembles the traditional budget line item is the budget proviso." *Id.* Thus, as "long as the Legislature drafts budget bills as lump sum appropriations to agencies conditioned by provisos," the Court concluded, the "Governor's appropriations item veto power extends to each such proviso." *Id*.

This Court defines an "appropriation item," therefore, to include "any budget proviso with a fiscal purpose contained in an omnibus appropriations bill." *Id.* A "budget proviso," in turn, is "language

[4] As with the appropriation to the Public Transportation Program in this case, the appropriations bills at issue in *Lowry* and discussed in the law review article referenced in that case included lump sum appropriations to large agency programs, which "are as big as other agencies." *Stephen Masciocchi*, Comment, *The Item Veto Power in Washington*, 64 Wash. L. Rev. 891, 895 n. 36 (1989); *Lowry*, 131 Wn.2d at 321-22 (referencing Masciocchi Comment and Laws of 1994, 1st Spec. Sess., ch. 6, §§ 204, 303, 610; Laws of 1994, ch. 303, §§ 5, 6).

conditioning how an agency may spend an appropriation." *Lowry,* 131 Wn.2d at 314; *Locke*, 139 Wn.2d at 138. There are two relevant types of budget provisos: "dollar provisos" and "nondollar provisos." *Lowry*, 131 Wn.2d at 314; *Locke*, 139 Wn.2d at 138. Each dollar and nondollar proviso is a separate "appropriation item" which is subject to the Governor's veto pen. *Lowry*, 131 Wn.2d at 323; *Locke*, 139 Wn.2d at 138.

As explained below, the fuel type condition is a "nondollar proviso" which "must" be treated as separate appropriation items in order to discourage legislative logrolling, encourage treatment of policy issues on their individual merits, and protect the rationale for the line item veto. *Lowry*, 131 Wn.2d at 328. The Legislature's position that it can avoid an appropriation item veto by smuggling a nondollar proviso into the same subsection with a dollar proviso is contrary to the plain language of the constitution and the very reason why *Lowry* and *Locke* require nondollar provisos to be treated as separate appropriation items subject to veto.

2. The fuel type condition was a separate whole nondollar proviso within the Governor's constitutional appropriation item veto authority

First, the fuel type condition is a separate "whole" nondollar proviso, and, thus, an "appropriation item" subject to veto. *See Locke*, 139 Wn.2d at 142 ("*Lowry* directs that the Governor's line item veto power is limited to 'whole provisos.' ") (quoting *Lowry*, 131 Wn.2d at 323 n.8). Each "whole" budget proviso—dollar and nondollar—is subject to veto. *Lowry*, 131 Wn.2d at 323; *Locke*, 139 Wn.2d at 138. As demonstrated in both *Lowry* and *Locke*, each "whole proviso" is defined not by the Legislature's

designation of a "subsection," which "can be too easily manipulated by the mere placement of a number or letter, or artificial division into paragraphs," but through "an examination of the language in question and the operative effect of such language." *Locke*, 139 Wn.2d at 142-44 (discussing *Lowry*).

Here, the appropriations made to the Public Transportation Division in Section 220 are conditioned by a number of requirements, some dollar provisos and some nondollar provisos. *See* ESHB 1160 § 220 ("The appropriations in this section are subject to the following conditions and limitations"). An examination of the fuel type condition and its operative effect, in light of similar provisos examined by this Court in *Lowry* and *Locke*, demonstrates that it is a "whole" nondollar proviso subject to veto.

a. Dollar provisos, explained

"Dollar provisos" condition an appropriation on an agency's compliance with the direction that certain funds be spent in a particular way. *Lowry*, 131 Wn.2d at 314. They "reference specific amounts," and are generally "a determinative condition of the initially appropriated amount," such that they "define agency action which must be undertaken as a condition of the agency's receipt of the initial appropriation." *Locke*, 139 Wn.2d at 142. A proviso that specifies that a certain amount of a total appropriation be spent only on one specific purpose is the classic example of a dollar proviso. *See Lowry*, 131 Wn.2d at 324.

This Court has explicitly held that a single sentence within a subsection constitutes a dollar proviso, subject to line item veto based on the effect of the language, not its formatting. In *Lowry*, for example, the

Court concluded that language stating that "$95,039,000 is provided solely for the state need grant program," was a dollar proviso. *Lowry,* 131 Wn.2d at 324 (addressing Laws of 1994, 1st Spec. Sess., ch. 6, § 610(5)(a)).[5] But the Court also recognized that there may be "proviso[s] within a proviso." *Locke*, 139 Wn.2d at 142-43 (discussing *Lowry*, 131 Wn.2d at 324-25). Thus, a *sentence contained within a subpart of a subsection* that provided that, within the total allocation of $95,039,000 for the state need program, "a maximum of $249,000 may be expended to establish postsecondary education resource centers . . ." was its own separate proviso that could be vetoed without impacting the total appropriation. *Id.* As *Lowry* demonstrates, "an examination of the language in question and the operative effect of such language indicate[d] the nature" of each proviso that is subject to veto. *Id.* at 143.

Similarly, in *Locke*, this Court examined a subsection allocating moneys from an appropriation to the Economic Services Administration of the Department of Social and Health Services. That subsection provided:

> (6) **$73,129,000 of the general fund—federal appropriation is provided solely for child care assistance for low-income families in the WorkFirst program and for low-income working families as authorized in Engrossed House Bill No. 3901 (implementing welfare reform).** All child care assistance provided shall be subject to a monthly copay to be paid by the family receiving the assistance.

[5] The session laws at issue in *Lowry* and *Locke* are located at CP 135-86.

Locke, 139 Wn.2d at 134 (quoting Laws of 1997, ch. 454, § 204(6) (emphasis added). The subsection went on in three subparts ("a" through "c") to include further details related to the copayment requirement. *Id.* The Court concluded that the only "true dollar proviso" in all of subsection 204(6) was the "first sentence of (6)" (bolded above), which allocated part of an appropriation to the Economic Services Administration of DSHS to be used "solely for child care assistance for low-income families in the WorkFirst program and for low-income working families as authorized in Engrossed House Bill 3901 (implementing welfare reform)." *Id*. The remaining sentence of the first paragraph of subsection (6), "[a]ll child care assistance provided shall be subject to a monthly copay to be paid by the family receiving assistance," together with the specifications set forth in parts (a) through (c), together constituted a separate whole "nondollar proviso," as explained next. *Id*. The Court again emphasized function over form in delineating the scope of the appropriation item.

b. Nondollar provisos, explained

"Nondollar provisos," on the other hand, "condition an agency appropriation on the agency's taking or not taking certain action", *Lowry*, 131 Wn.2d at 325, but "do not determine the size of the *initial* appropriation," nor "define agency action which must be undertaken as a condition of the agency's receipt of the *initial* appropriation." *Locke*, 139 Wn.2d at 141-42 (second emphasis added). This Court has applied this definition of nondollar proviso based solely on the effect of the language and without any consideration of legislative formatting.

Thus in, *Lowry*, this Court examined two separate single-sentence conditions the Legislature imposed on two divisions within the Washington State Patrol in 1994, and concluded that each were nondollar provisos. First, the Legislature appropriated a specific amount to the Field Operations Bureau, but "condition[ed] the appropriation" by requiring the Patrol to only assign vehicles to " 'commissioned officers and commercial vehicle enforcement officers involved directly and primarily in traffic enforcement activities.' " *Lowry*, 131 Wn.2d at 325 (quoting Laws of 1994, ch. 303, § 5). This Court concluded that this condition was a "nondollar proviso." *Id*. Second, the *Lowry* Court also concluded that conditions on a $63,525,000 appropriation to the Patrol's Support Services Bureau that "[t]here be no cadet classes during the 1993-95 biennium;" and that the "current field force level of seven hundred troopers and sergeants" be maintained through "management reductions," were nondollar provisos which could be vetoed by the Governor without impacting the total appropriation to the bureau. *Id.* at 326-30.

The *Lowry* Court determined that all of these conditions were separate nondollar provisos subject to veto even though they were identified as conditions on the Patrol's use of the appropriation. In neither instance did the Court consider legislative formatting in making these determinations. To the contrary, the Court rejected the Legislature's proposed definition of an appropriation item precisely because it would "encourage legislatures to weave substantive policy provisions and fiscal measures into appropriations bills, thereby legitimatizing Byzantine bill drafting in appropriations measures."

Lowry, 131 Wn.2d at 329. It also rejected an interpretation that would validate efforts by the Legislature to "try to slip substantive law provisos into appropriations bills to derive political advantage against the executive, thereby upsetting the constitutional framework of checks and balances." *Id*.

Similarly, in *Locke*, this Court concluded that the only "true dollar proviso" in all of subsection 204(6) was the "first sentence of (6)," which allocated part of an appropriation to the Economic Services Administration of DSHS to be used "solely for child care assistance for low-income families in the WorkFirst program and for low-income working families as authorized in Engrossed House Bill 3901 (implementing welfare reform)." *Locke*, 139 Wn.2d at 134. The remaining sentence of the first paragraph of subsection (6), "[a]ll child care assistance provided shall be subject to a monthly copay to be paid by the family receiving assistance," plus the specifications set forth in parts (a) through (c), were collectively one "nondollar proviso." *Id*. As to the copayment requirement in subsection (6), the Court observed that it did "not reference the specific dollar amount appropriated," nor was it a "determinative condition of the initially appropriated amount," as it did "not define agency action which must be undertaken as a condition of the agency's receipt of the initial appropriation." *Id*. at 142. At best, the copayment language was "only tangentially related" to the appropriation, as it "establish[ed] criteria poor families must meet in order to *receive* disbursements *from* DSHS out of the appropriated sum designated in the first sentence of (6) for child care."

Locke, 139 Wn.2d at 141-42. Thus, it was a nondollar proviso “as defined by the operative effect of the proviso’s language.” *Id*. at 144.

c. The fuel type condition was a nondollar proviso

Like the nondollar conditions in *Lowry* and *Locke*, the operative effect of the fuel type condition in Section 220 demonstrates that it was a separate nondollar proviso subject to veto. Nondollar provisos “ ‘make[ ] no reference to a specific dollar amount.’ ” *Id.* at 138 (quoting *Lowry*, 131 Wn.2d at 314). They also “do not determine the size of the *initial* appropriation.” *Id*. at 141 (citing *Lowry*, 131 Wn.2d at 314).

Similar to *Lowry* and *Locke*, the only “true dollar provisos” in subsections 220(1)(a), 220(1)(b), 220(2), 220(3)(a), 220(5)(a), 220(7), and 220(9) of the legislation at issue here are the sentences specifying that “$X” is “provided solely” for “Y project or program.” *Id.* at 134. *See, e.g.*, ESHB 1160 § 220(1) (“$62,679,000 of the multimodal transportation account—state appropriation is provided solely for a grant program for special needs transportation provided by transit agencies and nonprofit providers of transportation.”). The fuel type condition, which specified that “[f]uel type may not be a factor in the grant selection process,” did not “reference the specific dollar amount appropriated,” nor did it determine “the initially appropriated amount.” *Id.* at 142. Rather, “[a]t best,” it “establishe[d] criteria” that the Division was to apply in making “disbursements *from*” the “appropriated sum designated in the first sentence.” *See Locke,* 139 Wn.2d at 141-42. The fuel type condition was a nondollar condition just like the conditions evaluated in *Lowry* and *Locke*.

In sum, ESHB 1160 Section 220 included the fuel type condition amongst many conditions on the Division's appropriation, but the fuel type condition did not determine the size of or specifically link to the Division's receipt of the initial appropriation. Thus, it was a "nondollar proviso" subject to the Governor's appropriation item veto power. *Lowry*, 131 Wn.2d at 325-28.

3. The Legislature may not defeat the Governor's distinct appropriation item veto authority by designating several items in a single subsection

Although the Governor has express distinct constitutional authority to veto "appropriation items," apart from the section veto, the Legislature conflates the two by arguing that an "appropriation item" is no less than each of the Legislature's subjectively-numbered "subsections," and that this Court may not look past the Legislature's formatting choices without first determining the Legislature has engaged in "extreme legislative manipulation." CP 14. But nowhere in the Constitution is an "appropriation item" defined as a "subsection," and the Legislature's theory is inconsistent with the very reason that nondollar provisos are subject to appropriation item vetoes in the first place.

As its sole authority for why a "subsection" should define an "appropriation item," the Legislature reads a single passage from a footnote in *Lowry* too expansively and without due consideration to the rest of the opinion, its context, or this Court's later explanation of that footnote in *Locke*. CP 103. In footnote 8 of the opinion in *Lowry*, the Court states:

> The budget provisos to which the Governor's line item veto extends include full provisos to an appropriations bill, that is, full subsections of the section of an appropriations bill. We do not believe an "appropriations item" may be a sentence, phrase, letter, digit, or anything less than the whole proviso.

Lowry, 131 Wn.2d at 323 n.8. Considered in context, the Court hardly was suggesting (let alone holding in a footnote) that legislative denomination of a subsection defines an appropriation item for purposes of the appropriation item veto authority of the Governor. Footnote 8 should be read in light of the Court's earlier discussion of historical vetoes here and elsewhere, which were being extended even to "words, parts of words, letters, digits, and punctuation marks," and often "alter[ed] the meaning of substantive legislation," *Id.* at 322-23 (citing *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis.2d 429, 424 N.W.2d 385 (1988)). Accordingly, the Court clarified in footnote 8 that an appropriation item is nothing less than a "whole proviso." *Id.* at 323 n.8. But footnote 8 also follows the Court's definitive holding that, based on the way the Legislature has elected to draft budget bills as lump sum appropriations conditioned by provisos, "the Governor's appropriations item veto power extends to each such proviso." *Id*. at 323. And it precedes an extensive discussion in which the Court provides an objective definition for a "nondollar proviso," untethered to a Legislative denomination of a "subsection," and explains why such nondollar provisos must be individually subject to veto, rejecting the Legislature's position that nondollar provisos must be considered only as part of the dollar provisos they relate to. *Lowry*, 131 Wn.2d at 325-30.

Taken together, the overall context demonstrates that footnote 8 only means that an appropriation item for purposes of the Governor's veto authority does not extend to anything less than a whole proviso.

That footnote 8 stands for this modest proposition (rather than the position advanced by the Legislature) is further apparent by the remainder of the *Lowry* opinion and the vetoes upheld in that case. The *Lowry* Court upheld appropriation item vetoes of provisions that were not legislatively-defined "whole subsections" without any finding of manipulation related to those provisions because each constituted a "whole proviso," regardless of how the Legislature formatted it. *See, e.g.*, *id*. at 324 (considering part of division (a) of subsection 610(5) of Laws of 1994, 1st Spec. Sess., ch. 6, as an appropriation item), 314 n.2 (identifying vetoes to part (h) of subsection 204(4) and part (b) of subsection 303(8) of Laws of 1994, 1st Spec. Sess., ch. 6, which were upheld). In fact, one of the provisions vetoed and upheld (subsection 610(5)(a)) was not even a lettered or numbered subpart of a subsection, but instead one sentence and a part of another sentence contained within the subpart of a subsection. *Id*.; Laws of 1994, 1st Spec. Sess., ch. 6, § 610(5)(a). The Court, indeed, referred to the single-sentence dollar proviso as a "subsection" of the appropriations bill, suggesting that it used the term "subsection" in the general sense of the word—as a part, a piece, or a bit—not as a formatting unit. *Id.* at 325. This reading is consistent with the Court's upholding of these vetoes without any discussion of deference to legislative divisions by numbers or sections with respect to appropriation items. *Id.* at 324, 331. It did so because each vetoed provision

was an objectively-discernable separate "budget proviso" as defined by the Court in that case. *See Lowry*, 131 Wn.2d. at 314 n.3.

Reviewing its decision in *Lowry*, the Court in *Locke* reiterated that "the mere placement of a number or letter, or artificial division into paragraphs," is not the appropriate delineation of what constitutes an "appropriation item" subject to veto. *Locke*, 139 Wn.2d at 142-43. In addressing the question of "what is a whole proviso?" the Court first stated that footnote 8 in *Lowry* "does not adequately answer the question." *Id*. at 142. Rather, the Court explained that its discussion of the veto of subsection 610(a)(5) in *Lowry*, where the Court "recognized and discussed the effect of a proviso within a proviso" provided the answer. *Id*.

> Thus, *under Lowry*, the Governor's line item veto power extends to whole provisos, but the parameters of such provisos are not necessarily determined by artificial divisions by number or letter; rather, *an examination of the language in question and the operative effect of such language indicates the nature of the proviso*.

Id. at 143 (emphasis added). The Court in *Locke* described the rule from *Lowry* in this way, where no manipulation was ever at issue in *Lowry* with respect to the appropriation item vetoes.

Also, very early on its opinion in *Locke*, the Court repeated the rule from *Lowry* that "appropriations items subject to the Governor's line item veto" include separate " 'dollar provisos' " and " 'nondollar provisos,' " each of which constitute " 'language conditioning how an agency may spend an appropriation.' " *Locke*, 139 Wn.2d at 138 (quoting *Lowry*, 131 Wn.2d at 314). The Court further described its holding in *Lowry* without any

reference to manipulation: "the Governor was at liberty to define an appropriations item without regard to the language of the legislation," as long as it applied to the "whole proviso." *Id*. at 139. The Court recited no holding suggesting that an "appropriation item" is even presumptively a "subsection," or that the Court must find manipulation to look past the Legislature's formatting choices.

The Legislature points to the Court's finding of legislative manipulation in *Locke* to argue that such a finding is *required* for the Governor to veto less than a full subsection. But it is difficult to fathom that this Court would stealthily add a "subsection" requirement to the Governor's line-item veto without explicitly stating as much, based on a relatively limited analysis, without examining the relevant constitutional text, and while also stressing the arbitrariness and risk of manipulation inherent in legislative formatting choices. It is also not credible that the Court would adopt a limitation that would effectively cripple the line-item veto without offering any constitutional purpose served by the requirement, while also repeatedly emphasizing the importance of the line-item veto in maintaining the balance of legislative power between the executive and legislative branches. The Legislature's view of *Lowry* as adding a strict subsection requirement to the Governor's appropriations-item veto simply makes no sense in the context of *Lowry*'s or *Locke*'s holdings or rationales.

Instead, the Court's separate discussion and finding of legislative manipulation in *Locke* can best be described as part of a larger, but unnecessary, response buttressing its rejection of the Legislature's

arguments in that case. *See Locke*, 139 Wn.2d at 140-41. The Court expressed its "disagree[ment] with the Legislature's assertion" that its placement decisions conclusively defined appropriation items, and quoted the *Lowry* rule governing section vetoes in support. *Id*. But that hardly makes manipulation a mandatory prerequisite to the Court exercising its constitutional authority to analyze whether a provision in question meets the objective definition of an "appropriation item." And, after discussing the manipulation present in that case, including the Legislature's "interweaving" of a policy provision in its budget bill, the Court quickly returned to a practical analysis of the language in question, just as it had applied in *Lowry*. It concluded that the copayment language in question was a separate budget proviso based on its objective language and "operative effect," as required by *Lowry*. *Id.* at 141-42. *Locke* does not purport to modify *Lowry* in any manner.

Considered in the full context of the *Lowry* decision, and the further explanation in *Locke*, footnote 8 does not support the Legislature's position.

4. Adding a subsection requirement undermines the Governor's independent authority to veto substantive legislation and encourages legislative logrolling—consequences this Court declined to sanction in *Lowry*

It is not surprising that the Legislature wishes to characterize each of subsections 220(1)(a), 1(b), (2), (3), (5), (7), and (9) as single provisos or single appropriation items. If it succeeds, the Legislature will combine dollar and nondollar provisos in what it denominates a "full subsection" and essentially do away with the holdings of this Court in *Lowry* that:

(1) nondollar provisos are appropriations items and thus subject to veto under article III, section 12, and (2) such vetoes do not reduce appropriations. *Lowry*, 131 Wn.2d at 327, 330. “Nondollar provisos” will be buried with “dollar provisos” and the Legislature will claim that this device shields them from veto, just as the Legislature asserts they are shielded from veto in this case. As in *Lowry*, however, the Legislature’s “view of an appropriations item is too narrow” and would unconstitutionally constrain the Governor’s veto power. *Id*. at 323.

It is easy to imagine how adding a “subsection” requirement to the Governor’s line-item appropriation veto could be used to immunize massive substantive policy changes by squirreling them away into appropriations bills. For example, the Legislature could add a single sentence to any law enforcement related appropriation stating that a condition of such funding is complete cooperation with Immigration and Customs Enforcement in detaining and transferring custody of individuals based on their immigration status, contrary to the substantive policy of the State under RCW 10.93.160. Similarly, the Legislature could add a single sentence to all energy-related appropriations requiring that such funding not be used on any form of clean energy, including solar or wind energy. Under the Legislature’s interpretation, such weighty policy changes, if implemented through single sentences buried into various subsections of an appropriations bill, would be immune from veto. This case and these examples underscore how radically the Legislature’s proposed interpretation would shift the balance

of legislative power and undermine a primary purpose of the line-item veto to forestall such legislative logrolling.

The Governor has separate authority to veto substantive legislation in whole or by section when the Legislature creates new policy. Article III, section 12. Yet, according to the Legislature, if the Legislature injects such legislation into a subsection of its appropriation bill, the Governor is powerless to veto it without foregoing an entire appropriation or some part thereof. This Court specifically rejected this kind of forced decision in *Lowry*. As the *Lowry* Court observed, "it is unlikely the Governor would risk the biennial appropriation for the State Patrol's field operations over a disagreement with the Legislature about the officers' use of vehicles, even if the legislative proviso is fundamentally unwise." *Lowry*, 131 Wn.2d at 328. Moreover, " '[I]f through the appropriation process, the Legislature were able to compel the Governor either to accept general legislation or to risk forfeiture of appropriations for a department of government, the careful balance of powers . . . would be destroyed, and the fundamental principle of separation of powers . . . would be substantially undermined.' " *Id*. at 328 n.12 (alterations in original) (quoting *Opinion of the Justices*, 384 Mass. 828, 832, 428 N.E.2d 117, 120 (1981)).

The Court's solution to this type of drafting is to treat each condition on an appropriation, even those that do not specify dollar amounts, as a separate "appropriation item" subject to veto. *Id.* at 329. While this Court has acknowledged that nondollar provisos in appropriations bills have become "very common," they have the potential to serve as tools for

"legislative micromanagement of agencies," and for sneaking in substantive legislation that could not pass on its own. *Lowry,* 131 Wn. 2d at 325-26. Accordingly, the Court addressed the Legislature's choice to use "nondollar provisos" in appropriations bills in a legally sound and practical way. The Court did not prohibit the Legislature from using nondollar provisos, but it recognized that treating them as anything other than separate appropriation items subject to veto would preclude treatment of policy issues on their merits. *Id*. at 328. Unless such provisos are considered "appropriation items" subject to veto, "the Legislature will try to slip substantive law provisos into appropriation bills to derive political advantage against the executive, thereby upsetting the constitutional framework of checks and balances." *Id*. at 329. "Nondollar budgetary provisos carry significant policy implications and should be addressed individually, on the merits, as substantive legislation." *Id*.

The Legislature also suggests that the Governor's exercise of his veto power is an "invasion of the Legislature's constitutional authority to craft bills." CP 103. But the Governor's veto power is part of the legislative process—not separate from it. *Washington Fed'n of State Emps. v. State*, 101 Wn.2d 536, 544, 682 P.2d 869 (1984). If the Legislature had appropriately amended the existing relevant statutes in a policy bill, the Governor would have had the opportunity to consider this policy change on its merits, and the public would have had the opportunity to comment on it. The Governor's express constitutional veto authority means that the Legislature's separate authority to "craft bills" is constitutionally

conditioned. While the Legislature has the "final say" under the Constitution to override the Governor's veto, it did not do so here.

The Court's strong rationale for treating nondollar provisos as separate appropriation items subject to veto is no less potent whether the Legislature makes an appropriation condition its own separate subsection or weaves it into other subsections. If anything, it is more compelling when the Legislature combines multiple conditions and policies into one subsection, thereby increasing the chance of legislative logrolling. Without affording the Governor the constitutional authority to veto each individual budget proviso, the Legislature's drafting has the potential to circumvent not only the Governor's appropriation item veto, but also his authority to veto substantive legislation. Accordingly, budget provisos like the fuel type condition at issue here are subject to individual gubernatorial veto.

5. If an appropriation item veto is presumptively defined as a subsection, the legislative drafting here has the objective effect of circumventing the Governor's veto

As explained above, based on its plain language and operative effect, the fuel type condition constitutes a nondollar proviso appropriate for veto under the definitions articulated in *Lowry* and *Locke*. Just as the Court in *Lowry* did not consider whether the Legislature engaged in manipulation before defining and identifying the separate "appropriation items" subject to veto, it does not need to do so here. But even if, as the Legislature suggests, manipulation is a prerequisite to defining appropriation items as anything less than a subsection, the legislative drafting at issue in this case warrants that treatment.

As a preliminary matter on this point, the test is not nearly as "extreme" as the Legislature suggests. *See* CP 14, 23-26. Where manipulation is a relevant issue, this Court has "expressly decline[d] to offer bright-line definitions of legislative or gubernatorial manipulation," because such definitions "are more likely to provide guidelines for evasion[.]" *Lowry*, 131 Wn.2d at 321. Rather, although the Court envisions its involvement to be "rare and reluctant," it has recognized its "constitutional responsibility" to referee disputes between the branches and decide "whether legislative designation" is "true to the spirit of the constitution." *Id*. at 320-21.

In *Lowry*, the Court found that the Legislature's substantive repeal of multiple provisions of law within one section constituted sufficient "manipulation" to warrant judicial intervention, and the Court upheld the Governor's veto of only parts of a legislatively-defined "section." *Id*. The Court did not find anything "extreme" as the Legislature insists the Court must find here in order to go beyond the Legislature's subjective designation. *Id*. In fact, the Legislature frequently repeals multiple provisions of law within one section of legislation, and the Code Reviser's guide to legislative drafting recommends it. *See* Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington's Law of Law-Making*, 39 Gonz. L. Rev. 447, 491 (2004) (discussing *Lowry* and noting "it is interesting to see how quickly the court will infer legislative manipulation," and that the "legislature followed standard drafting format in constructing this section") (citing to Statute Law Committee, *Bill Drafting Guide* 11

(2003)); *see also* Statute Law Committee, *Bill Drafting Guide* 10 (2019), http://leg.wa.gov/CodeReviser/Pages/bill_drafting_guide.aspx#REPEALERS (last visited Nov. 18, 2020) (continuing to recommend repeal of multiple sections within one section of legislation).

As this Court later explained, the relevant inquiry in evaluating legislative manipulation is "the effect the legislative act had on the constitutional division of legislative power rather than on any subjective intent to thwart the constitution." *Eyman v. Wyman*, 191 Wn.2d 581, 603-04, 424 P.3d 1183 (2018) (plurality) (Gordon McCloud, J.) (rejecting Legislature's argument that *Lowry* requires "a single, very restrictive test for determining whether it has infringed on the authority of another branch"). The Court does "not demand proof that legislators harbored individual, subjective animosity or the desire to deceive," but, rather, looks at whether the objective effect of the "legislature's actions [are] inconsistent with the constitutional balance of legislative power between the legislature and the governor." *Id*. at 604.

Regardless of whether the Court need even address this issue, the legislative drafting here establishes ample manipulation. There was a very simple and straightforward way for the Legislature to add a "don't consider fuel type" restriction to the numerous other requirements the Department is required to apply and consider when evaluating and awarding grants: it could have amended the law governing such grant determinations in RCW 47.66, subjecting this policy change to public scrutiny and the Governor's independent authority to veto sections of substantive

legislation. That is exactly what the Legislature did, in fact, when it funded the green transportation capital grant program and set forth in separate substantive legislation the added criteria the Department must consider in selecting such projects. RCW 47.66.120; Laws of 2019, ch. 416, § 220(14).

Alternatively, rather than weaving in and repeating its new fuel type condition throughout seven different subsections in its appropriations bill, the Legislature could have set forth this new limitation in one subsection, specifying which programs it applied to. This is what the Legislature did with respect to another condition on grants covered by Section 220. *See* Laws of 2019, ch. 416, § 220(10) ("The department shall not require more than a ten percent match from nonprofit transportation providers for state grants.").[6] Under the Legislature's theory that an "appropriation item" is equivalent to a "subsection," however, this would have subjected the Legislature's change in policy to gubernatorial veto. So instead, the Legislature engaged in clever drafting to insulate its policy change from either the Governor's section or appropriation item veto authority. This is sufficient to raise the specter of circumvention.

As this Court held in *Lowry*, the Legislature "frustrates" the purpose of the line item veto by drafting appropriations bills with lump sum appropriations, subject to numerous conditions. *Lowry,* 131 Wn.2d at 323. Moreover, the Legislature's insertion of policy requirements into

[6] Not all of the grant programs were impacted by this condition because not all of them were available to nonprofit providers. *See*, *e.g.,* Laws of 2019, ch. 416, § 220(1)(b), (2), (4), (5), (7)(b). Nonetheless, the Legislature chose to make this its own subsection rather than inserting it into the subsections governing the applicable grant programs.

appropriations bills in and of itself demonstrates circumvention. *Lowry*, 131 W.2d. at 329. This Court recognized the legislative inclination to "try to slip substantive law provisos into appropriations bills to derive political advantage against the executive, thereby upsetting the constitutional framework of checks and balances." *Id*. This is precisely why such provisos should "be addressed individually, on the merits, as substantive legislation." *Id*. *See also Locke*, 139 Wn.2d at 141 (considering Legislature's "interweaving" of policy provision into budget bill as evidence of circumvention).

When the Court finds circumvention, it should exercise its "right to strike down such maneuvers" and uphold vetoes of "de facto 'section[s]' [or, in this case, 'appropriation items' of legislation] to which the veto applies." *Lowry*, 131 Wn.2d at 320-21. A clear instance of circumvention is drafting that forces the Governor to "either accept general legislation or to risk forfeiture of appropriations for a department of government." *Opinion of Justices to House of Representatives*, 384 Mass. 820, 825, 425 N.E.2d 750 (1981) (quoted with approval in *Lowry*, 131 Wn.2d at 328 n.12; and *Eyman*, 191 Wn.2d at 603). Thus, if the Court does not conclude based solely on the plain language and operative effect of the proviso at issue that the Governor appropriately vetoed a separate "appropriation item," it should so conclude after determining that the Legislature engaged in manipulative drafting sufficient for the Court to disregard the Legislature's artificial designations of subsections. In either case, the veto here should be upheld.

B. Alternatively, the Vetoed Condition is Invalid

If the Court does not uphold the veto, it should address the Governor's counterclaim and strike the fuel type condition as invalid under article II, sections 19 and 37.

1. The fuel type condition violates article II, section 19 because it is substantive law in a budget bill

First, the fuel type restriction is unconstitutional substantive legislation included an appropriations bill in violation of article II, section 19. *Locke*, 139 Wn.2d at 144. That section provides that "[n]o bill shall embrace more than one subject, and that shall be expressed in the title," which thisCourt has consistently construed as "forbid[ding] inclusion of substantive law in appropriations bills." *Id.* at 145 (citing Const. art. II, § 19). As explained by the Court, an appropriations bill does not stand on equal footing with substantive legislation and is thus no place for enacting or changing substantive policy:

> It is not a rule of action. It has no moral or divine sanction. It defines no rights and punishes no wrongs. It is purely *lex scripta*. It is a means only to the enforcement of law, the maintenance of good order, and the life of the state government. Such bills pertain only to the administrative functions of government.

Id. at 145 (quoting *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 54 Wn.2d 545, 551, 342 P.2d 588 (1959)).

Appropriations bills are nevertheless a "tempting [ ] target for legislative logrolling" due to their omnibus and must-pass nature. *Id*. at 145; *Flanders v. Morris*, 88 Wn.2d 183, 187, 558 P.2d 769 (1977). Unlike

substantive legislation, appropriation bills are frequently "the result of a free conference committee," and "must be voted on in its entirety and cannot be amended." *Locke*, 139 Wn.2d at 186. Such bills are thus particularly vulnerable to efforts to compel legislative support for unpopular substantive policies outside the glare of public or legislative scrutiny. As the Court explained in *State ex rel. Washington Toll Bridge Authority v. Yelle*:

> [T]here had crept into our system of legislation a practice of engrafting upon measures of great public importance foreign matters for local or selfish purposes, and the members of the legislature were often constrained to vote for such foreign provisions to avoid jeopardizing the main subject or to secure new strength for it, whereas if these provisions had been offered as independent measures they would not have received such support.

Yelle, 54 Wn.2d at 550; *see also Flanders*, 88 Wn.2d at 186 ("It is obvious why a legislator would hesitate to hold up the funding of the entire state government in order to prevent the enactment of a certain provision" even though the legislator would have "voted against it if it had been presented as independent legislation.").

The purpose of article II, section 19 is to curb this type of "legislative evil" and to ensure that "members of the legislature and the public are generally aware of what is contained in proposed new laws." *Locke*, 139 Wn.2d at 146 (citing *Serv. Emps. Int'l Union, Local 6 v. Superintendent of Pub. Instruction*, 104 Wn.2d 344, 705 P.2d 776 (1985)). In light of these strictures, this Court has explicitly warned against "weaving substantive policy provisions into omnibus appropriations or operating

budget bills," *Locke*, 139 Wn.2d at 144, which the Legislature does "at the peril of having the proviso invalidated." *Id.* (quoting *Lowry*, 131 Wn.2d at 328 n.11). While the Court has declined to adopt a "categorical definition" of what constitutes "substantive law," it has identified certain non-exhaustive, alternative indicators that a budget proviso has crossed the line into substantive law. Where "the policy set forth in the budget has been treated in a separate substantive bill, its duration extends beyond the two year time period of the budget, *or* the policy defines rights or eligibility for services, such factors may certainly indicate substantive law is present." *Id.* at 147 (emphasis added); *see also Garcia v. Dep't of Soc. & Health Servs.*, 10 Wn. App. 2d 885, 911, 451 P.3d 1107 (2019) ("The word 'or' is most commonly used in the disjunctive and employed to indicate an alternative.").

Here, the fuel type restriction epitomizes the type of "foreign" substantive policy grafted onto an omnibus, must-pass appropriations bill that could never have passed on its own merits. The fuel type restriction bears the key hallmark of substantive legislation—that the Legislature has historically addressed this same policy in substantive legislation, debated publicly, and adopted on its own merits. Without the fuel type restriction, RCW 47.66.040(2) establishes the criteria the Department of Transportation "shall" consider in selecting and awarding multimodal transportation grants and projects and expressly includes "energy efficiency" and the purposes underlying the commute trip reduction act and air quality requirements as two of several mandatory considerations. *See also* RCW 43.19.648

(requiring state and local governments to transition to electricity or biofuel to the extent practicable); Laws of 2007, ch. 348, § 1 (intent of requiring transition to clean fuels to improve air quality, among other reasons). The Division, in fact, is statutorily required to act consistently with the legislatively set policy goals to "enhance Washington's quality of life through transportation investments that promote energy conservation, enhance healthy communities, and protect the environment." RCW 47.04.280(1)(e), (2). The fuel type restriction would have changed these laws and precluded consideration of an important component of air quality and energy efficiency that the Division is otherwise required to consider in awarding the grants referenced in the appropriations bill.

Not only did the Legislature previously address this same policy in substantive legislation in the past (including in 2005, 1995, and 1993), it addressed such policy in the *same* legislative session. On the same day the Legislature passed the appropriations bill, it also passed a significant green transportation bill—Engrossed Second Substitute House Bill 2042—specifically aimed at increasing the adoption of clean alternative fuel through various levers of state power, including through tax incentives, infrastructure funding, technical assistance, incentives for private investment in alternative fuel vehicle infrastructure, and through *multimodal transportation grants*. E2SHB 2042 66th Leg., Reg. Sess., ch. 287 §§ 1, 18 (Wash. 2019).[7] In embracing a substantive policy of

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[7] E2SHB 2042 established a multimodal capital grant under RCW 47.66—the same chapters as the grants at issue here—specifically focused on aiding transit authorities

incentivizing a statewide transition to alternative fuel energy, the Legislature found that "increasing the rate of adoption of electric vehicles and vessels and other clean alternative fuel vehicles will help to reduce harmful air pollution from exhaust emissions, including greenhouse gas emissions, in the state." It further found "increased reliance on greener transit options will help to further reduce harmful air pollution from exhaust emissions" and that state "support for clean alternative fuel infrastructure can help to increase adoption of green transportation." E2SHB 2042, § 1. The Legislature drove home the urgent need for "legislative clarity" on this issue and that "[s]tate policy can achieve the greatest return on investment in reducing greenhouse gas emissions and improving air quality by expediting the transition to alternative fuel vehicles, including electric vehicles." E2SHB 2042, § 4(3), 4(2). E2SHB 2042 underscores that the Legislature itself considers this issue to be an important matter of substantive policy.

Additionally, the Legislature's insertion of the fuel type restriction demonstrates an intent to extend beyond the current biennium. First, to the extent that these grant programs contained in Section 220 are not already spelled out in RCW 47.66, the Legislature has been including the same grant selection criteria in years of transportation budget bills. *See* footnote 1, *supra*. Thus, once a factor is included, it tends to become a semi-permanent

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to fund capital grant projects "to reduce the carbon intensity of the Washington transportation system" including to ease a transition to alternative fuel vehicles. E2SHB 2042, § 18.

aspect of the grant program, although not codified anywhere. The language and structure of ESHB 1160 also demonstrates that the Legislature uses its biennial transportation budget bill to instruct future behavior beyond the current biennium. For example, in Subsection 220(5), the Legislature instructs the Division that "when allocating funding for the *2021-2023 biennium*, no more than thirty percent of the total grant program may directly benefit or support one grantee," even though ESHB 1160 only appropriated funds for the 2019-21 biennium. (Emphasis added).

Second, as to some of the grant programs in Section 220, there was no "grant selection process" to be employed at all in the 2019-2021 biennium, as the projects had already been identified prior to session and funded through the appropriations bill. *See, e.g.*, ESHB 1160, §§ 220(4), (5), (8), (11), (12), (13), (15). Such processes must necessarily occur in future biennia. Yet for one of those programs, the Legislature still instructed the Division that it may not use fuel type as a factor in the grant selection process. ESHB 1160 § 220(5). This can only be interpreted as an attempt to set policy and direct actions for future biennia.

Last, the fuel type restriction, if effective, would define rights or eligibility for these grant programs. Specifically, it defines the process the Division must employ in selecting and recommending projects for funding by the Legislature. The requirement to completely omit a factor previously deemed relevant and influential necessarily shapes the eligibility for prospective grantees. For the public, insertion of the fuel type change means that hopeful grantees must somehow know that they must first review the

relevant details of a previously enacted budget to determine whether they should even bother applying for a grant.

This Court has also warned that provisos "in an appropriations section not containing a specific dollar amount" often bear "all the characteristics of substantive legislation." *Locke*, 139 Wn.2d at 144 (quoting *Lowry*, 131 Wn.2d at 328 n.11). Here, as discussed in detail above, regardless of the Legislature's manipulative drafting, the fuel type condition was a separate proviso that did not reference a specific dollar amount. This additional hallmark of substantive legislation further supports striking the fuel-type restrictions as a violation of article II, section 19. *Lowry*, 131 Wn.2d at 329 ("Nondollar budgetary provisos carry significant policy implications and should be addressed individually, on the merits, as substantive legislation; policy should be made in a formal bill subject to the normal legislative process.").

The fuel type restriction here extends beyond the permissible scope of appropriations oversight and instead embodies the type of substantive law that cannot be constitutionally squirreled into a must-pass omnibus appropriations bill, free from public and legislative scrutiny. It must instead be considered as substantive legislation, debated openly, and forced to stand on its own merits. The restriction should be stricken as violating article II, section 19.

2. The fuel type condition violates article II, section 37 because it amends substantive law without setting forth that law in full.

The fuel type restriction should also be stricken as an unconstitutional amendment of existing law in violation article II, section 37. That section provides that "[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." This Court has applied article II, section 37 to appropriations bills, emphasizing that "[c]onstitutional provisions apply even if a measure does not have permanent effect." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 233, 11 P.3d 762, 27 P.3d 608 (2000) (citing *Flanders*, 88 Wn.2d at 190).

The Court applies a two-part test in evaluating a challenge under article II, section 37. *Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 205, 457 P.3d 453 (2020). First, the Court considers whether the new enactment "is a '"complete act,"' such that the rights or duties under the" new enactment "can be understood without referring to another statute[.]" *Id*. (quoting *El Centro de la Raza v. State*, 192 Wn.2d 103, 129, 428 P.3d 1143 (2018) (plurality opinion) (quoting *State v. Manussier*, 129 Wn.2d 652, 663, 921 P.2d 473 (1996))). "The purpose of this part of the test is 'to make sure the effect of the new legislation is clear and to "avoid[ ] confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the

same volume." ' " *Black*, 195 Wn.2d at 129. (quoting *El Centro de la Raza*, 192 Wn.2d at 129 (alteration in original)).

Second, the Court considers "whether a straightforward determination of the scope of rights or duties under the existing statute [would] be rendered erroneous by the new enactment." *Id*. (alteration in original) (internal quotation marks omitted) (quoting *El Centro de la Raza*, 192 Wn.2d at 129). The purpose of this requirement is "to ensure[ ] that the legislature is aware of the legislation's impact on existing laws." *El Centro de la Raza*, 192 Wn.2d at 129 (citing *Amalgamated. Transit*, 142 Wn.2d at 246). A complete act "may still violate article II, section 37" by "not informing readers how the statute is impacting or modifying a straightforward determination of the scope of rights and duties created by those other statutes." *Black*, 195 Wn.2d at 210.

The fuel type restriction here plainly violate both prongs of the article II, section 37 test. First, the restriction contained within the appropriations bill is not a complete act and would create substantial confusion, ambiguity, and uncertainty about the criteria applicable to various multimodal grants. Multimodal grants and programs administered by the Department are governed by RCW 47.66. *See* RCW 47.66.010 (intent of chapter to "create a process that would allow for *all* transportation programs and projects to compete for limited resources" (emphasis added)). RCW 47.66.040 provides the baseline process and criteria to be used when selecting multimodal programs and projects, while other provisions provide additional criteria applicable to specific grant programs. *See, e.g.*,

RCW 47.66.030 (regional mobility grants); RCW 47.66.100 (rural mobility grant program); RCW 47.66.110 (transit coordination grant program); RCW 47.66.120 (green transportation capital grant program). Despite these independently-existing statutes governing the grant selection and administration process, six of the subsections allocating moneys to these programs and purporting to set forth additional criteria the Department is to consider do not even reference RCW 47.66. *See, e.g.*, ESHB 1160 §§ 220(1)(a), (1)(b), (3)(a), (5)(a), (7), (9). The seventh applicable subsection references part of RCW 47.66, but not all of the applicable provisions. ESHB 1160 § 220(2) (appropriating $32,223,000 "solely for grants to aid small cities in rural areas as prescribed in RCW 47.66.100"). Without the essential legislative backdrop of RCW 47.66, the proviso here is incomplete. Such critical information for administration of the grants is set forth in RCW 47.66, including the presumptive process and factors to be considered as set forth in RCW 47.66.040. The proviso at issue here thus is not a "complete act" and the first prong of the test for a violation of section 37 is plainly met.

The second prong is likewise violated here because, as discussed above, the fuel type restriction changes substantive law as set forth in RCW 47.66.040. Current law requires the Division to consider purposes of the commute trip reduction act "state air quality requirements" and "energy efficiency issues" in selecting and awarding multimodal transportation grants. RCW 47.66.040(2)(a)-(b). A primary consideration in energy efficiency is fuel type, as E2SHB 2042 underscores. *See also*

RCW 43.19.648 (requiring state and local governments to transition to electricity or biofuel to the extent practicable); Laws of 2007, ch. 348, § 1 (intent of requiring transition to clean fuels to improve air quality, among other reasons). Thus, the law as it exists without the fuel type restriction permits, if not requires, the Division to consider fuel type in awarding the multimodal transportation grants identified in Section 220. With the new fuel type restriction, the Division would no longer have been permitted to do so in awarding those same grants. Imagine the confusion for grant administrators and applicants who look to the substantive law and find no restriction related to "fuel type," while the restriction is interspersed among several pages of a transportation appropriation bill. This change in substantive law plainly renders the criteria set forth in RCW 47.66 erroneous.

This Court struck down budget provisos in two cases similar to the budget proviso at issue in this case. In *Washington Education Association v. State*, 93 Wn.2d 37, 41, 604 P.2d 950 (1980), the Court struck down a proviso that limited school districts from increasing employee salaries greater than a certain amount. But the general powers of school districts and school boards to fix employee salaries were set forth in other statutes not referenced in the appropriation or provisos. *Id*. at 40-41 (citing RCW 28A.58.010 and .100(1)). The Court noted that the challenged budget proviso did not "specify what powers remain with the district or whether the district has the power to grant salary increases at all," both of which could be determined by looking at RCW 28A.58.010 and .100(1), thereby

violating the first prong of the article II, section 37 test. *Wash. Educ. Ass'n,* 93 Wn.2d at 41. The challenged provision also violated the second prong by purporting to amend school districts' general authority to set teacher salaries without specifically referencing that authority. *Id*. Likewise here, the transportation budget proviso does not specify what powers remain with the Division, or under what authority the Division has the power to award grants at all. The general powers of the Department to select and administer multimodal grant programs are set forth in RCW 47.66, yet all but one of those budget provisos fail to even reference RCW 47.66.

In *Flanders*, 88 Wn.2d 183, the Court struck down a budget proviso which purported to add an eligibility restriction for receipt of public assistance funds appropriated under that section. The new restriction in the appropriations bill was "clearly an amendment" to substantive law by "adding to the restrictions already enumerated" elsewhere, yet it did not set forth or reference those restrictions in the appropriations bill. *Id*. at 189. The Court found compelling that the statute containing the substantive restrictions would "never reflect" the change in the appropriations bill, thus forcing "[o]ne seeking the law on the subject" to "know one must look under an 'appropriations' title in the *uncodified* session laws to find the amendment." *Id*. Thus, the additional restriction added in an appropriations bill violated article II, section 37. *Id*. This was the case even if the restriction was time-limited. *Id.* Just as in *Flanders*, the Legislature here added additional grant selection criteria in its appropriations bill that one would never know exists by looking at the otherwise-applicable substantive law in

RCW 47.66. As the *Flanders* Court noted in striking down such a provision, the "fact that the budget bill is not codified strikes at the very heart and purpose of Const. art. II, § 37." *Flanders*, 88 Wn.2d at 189. The new fuel type restriction was clearly an amendment to an existing law without setting forth (or even referencing) the law it amended.

The fuel type restriction here should never have been included in an appropriations bills in the first instance under article II, section 19. It was further invalid because it did not include the text of the statutes it amended, depriving the public and the Legislature of a clear understanding of the fact and scope of the changes in substantive law, as demanded by article II, section 37. Like the budget provisos struck down in *Washington Education Association* and *Flanders*, the budget proviso here should be stricken, if the Governor's veto is not allowed to stand.

V. CONCLUSION

The new fuel type condition was a separate nondollar proviso appropriately vetoed as an appropriation item. Alternatively, the vetoed language should be invalidated under article II, sections 19 and 37.

RESPECTFULLY SUBMITTED this 19th day of November, 2020.

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