NO. 98835-8

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 REPLY BRIEF

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I. ARGUMENT

Both parties agree that the Governor's line item veto authority over "appropriation items" extends only to "whole provisos," so this case comes down to the question: "what is a whole proviso?" Under *Lowry* and *Locke*, each condition on an appropriation—monetary and non-monetary—is a separate "whole proviso" subject to the Governor's appropriation item veto. *Washington State Legislature v. State* (*Locke*), 139 Wn.2d 129, 138, 985 P.2d 353 (1999); *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 314, 931 P.2d 885 (1997). This is so regardless of whether the proviso is designated as its own numbered subsection or combined with other conditions in a single subsection. The parameters of each condition are determined by examining the language in question and its operative effect.

In arguing that determination of an appropriation item instead requires deference to legislatively-prescribed subsections, the Legislature rehashes arguments this Court considered and rejected in *Locke* and *Lowry*, which are inconsistent with the constitutional text and purpose of the line item veto. This Court rebuffed the Legislature's arbitrary definition of an appropriation item as too easily manipulated, and instead applied a more substantive definition that preserves a core purpose of the line item veto: to disentangle issues so they will be considered on their individual merits. Deferring to legislatively-formatted subsections would defeat this purpose

by granting the Legislature nearly unfettered power to insulate nondollar provisos from veto by weaving them into subsections with must-pass dollar provisos. Combined with the Legislature's impossibly high proposed standard for demonstrating legislative manipulation, the Legislature's argument would throttle the Governor's authority to veto nondollar provisos. The very fact that the vetoes affirmed by this Court in *Locke* and *Lowry* would not meet the Legislature's proposed definition of an appropriation item here signals how far it has departed from those decisions.

Rather than tackling these problems, the Legislature evades and misdirects. It sidesteps the lack of textual support for its proposed definition of an appropriation item, which, unlike the "section" veto, is not tied to legislative formatting. And it repeatedly conflates this Court's section veto analysis with its distinct appropriation item veto analysis. Because this Court has objectively defined the term—and concluded that nondollar provisos are appropriation items—there is no constitutional basis to limit the scope of the line item veto to a legislatively-determined subsection.

Alternatively, if this Court concludes that the fuel type condition was not properly vetoed, it should invalidate it. By prohibiting the Public Transportation Division from considering a factor it is otherwise entitled to consider when selecting recipients under RCW 47.66.040, the condition silently amends substantive law in violation of article II, sections 19 and 37.

A. Like the Nondollar Provisos at Issue in *Lowry* and *Locke*, the Fuel Type Restriction is a Discrete Condition on the Appropriation of Funds Subject to Veto

The fuel type condition here is a distinct whole budget proviso because it imposes a separate non-monetary condition on appropriations to the Public Transportation Division: it requires the Division to exclude consideration of fuel type when selecting recipients of its multimodal grant programs. The Legislature fails to distinguish the fuel type condition from the provisos defined by the Court in *Lowry* and *Locke*. Instead, without acknowledging it is doing so, the Legislature asks this Court to retreat from two key holdings of those cases. First, consistent with the distinct constitutional power to veto "appropriation items" (not "subsections"), a budget proviso is defined objectively by examining its language and operative effect. It is not even presumptively defined by the Legislature's delineation of a "subsection." Second, because nondollar provisos have policy implications demanding individual treatment, they are subject to veto separately from the dollar provisos to which they relate. This Court should decline the Legislature's implicit request to overrule these principles.

1. The Governor has constitutional authority to veto each dollar and nondollar budget proviso

Unlike a "section veto," which, by its own title, at least starts with a subjective legislative formatting choice, an "appropriation item veto" is not even presumptively defined by legislative numbering. Each condition on an

appropriation, otherwise known as a budget proviso, is a separate appropriation item subject to veto. *Locke*, 139 Wn.2d at 138; *Lowry*, 131 Wn.2d at 314. Such budget provisos are divided into two categories: (1) dollar provisos—conditions that direct the expenditure of appropriations to specific purposes; and (2) nondollar provisos—conditions that do not determine the size of the appropriation, but require the agency to take action in a particular way. *Locke,* 139 Wn.2d at 138, 141-42. A budget proviso is ascertained objectively based on its language (what it says), and its operative effect (what it does). *Id*.

This Court treats each separate condition on an appropriation as a separate "appropriation item" to preserve one of the central purposes of the appropriation item veto: to "permit the Governor to disentangle issues so they will be considered on their individual merits." *Lowry*, 131 Wn.2d at 316-17. This is necessary because, rather than employ a true line-item budget format, the Legislature uses provisos "to express policy determinations" in its budget bills. *Id*. at 321; *Locke*, 139 Wn.2d at 140. This Court recognizes that while nondollar provisos may be "legitimate expression[s] of the Legislature's oversight function over agencies and programs," they may also serve as tools of "legislative micromanagement" and "device[s] to revive substantive legislation." *Lowry*, 131 Wn.2d at 325-26. The must-pass nature of appropriations bills also makes them a ripe

target for legislative logrolling. *Id*. So, to serve as a check against such tactics, the "Governor's line item veto" authority applies equally to "nondollar provisos in appropriations bills." *Id*. at 316-17, 329.

2. The Legislature is implicitly rearguing *Lowry* and *Locke*

By continuing to argue that a subsection presumptively defines an "appropriation item," the Legislature raises a number of arguments that were considered and rejected by the Court in *Lowry* and *Locke*.

a. The history relating to the Governor's "Section" veto authority does not warrant restricting his distinct "Appropriation Item" veto

The Legislature begins its argument with a lengthy discussion of the history of Article III, section 12, suggesting that the Governor's appropriation item veto was historically abused and had to be reined in by constitutional amendment. Leg. Br. at 10-13. This misstates the purpose of the amendment and ignores the fact that it preceded *Lowry* and *Locke.*

First, the purpose and effect of Amendment 62 was to define the Governor's veto section power with respect to *non*appropriation bills. It did not target the Governor's separate appropriation item veto power. As this Court recounted, prior to the amendment, "Washington governors began to veto sentences and phrases in *general legislation that did not contain appropriations*." *Lowry*, 131 Wn.2d at 322 (emphasis added). Amendment 62 was "a moderate compromise" that narrowed the Governor's veto with

respect to "*nonappropriation* bills," while maintaining "'that budget bills *would still be subject to the item veto*'" as it existed previously. *Washington State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 672-73, 763 P.2d 442 (1988) (quoting voters pamphlet); *see also* CP 58.

Second, all of the history the Legislature rehashes here was before the Court in *Lowry* and *Locke*. Yet there, the Court analyzed appropriation item vetoes differently from section vetoes. *Lowry*, 131 Wn.2d at 322 (rejecting the "unconventional notion that the 62nd Amendment repealed the Governor's line item veto"). The Court also expressly "disagree[d]" with the Legislature's narrow position that "the Governor's line item veto power extends only to dollar amounts." *Id*. at 322-23.

b. The Court's review of appropriation item vetoes demands a different analysis than its review of section vetoes

The Legislature similarly conflates the history and rationale for the Court's decision to presumptively defer to the Legislature's formatting choices with respect to the *section* veto with the separate history and rationale for the Court's review of the *appropriation item* veto. The Legislature starts its argument from a presumption of overreach if the Governor vetoes anything less than a subsection, rather than recognizing that the Governor has the distinct constitutional authority to veto individual "appropriation items," not "subsections." In doing so, the Legislature

repeatedly tries to engraft limits applicable to the section veto onto the Governor's appropriation item vetoes. *See, e.g.*, Leg. Br. at 13, 23-25.

(1) A budget proviso is not defined by a subsection; It is defined by its language and operative effect

The Legislature continues to advocate for a rule, based on a footnote in *Lowry*, that the Governor presumptively exceeds his constitutional authority to veto appropriation items if he vetoes less than a full numbered subsection. Leg. Br. at 13. But this Court rejected that argument in *Locke*.

Speaking directly to whether footnote 8 in *Lowry* means that an appropriation item is presumptively a subsection, the *Locke* decision clearly provides it does not:

> *Lowry* directs that the Governor's line item veto power is limited to "whole provisos." . . . The issue then becomes what is a whole proviso? *Lowry*'s footnote 8, although commenting on the issue, *does not adequately answer the question* as designating a "full subsection" can be too easily manipulated by the mere placement of a number or letter, or artificial division into paragraphs.

Locke, 139 Wn.2d at 142 (emphasis added). Instead, the *Locke* Court concluded, the "answer is suggested" by its earlier discussion in *Lowry* of the appropriation item vetoes at issue there. *Id*. As this Court explained, the *Lowry* Court "clearly referred" to a single-sentence condition within a subsection as "'this proviso language'" and as a "'subsection'" appropriately vetoed, despite not meeting the Legislature's definition of a

"subsection." *Id*. (quoting *Lowry*, 131 Wn.2d at 324-25). Thus, the *Locke* Court concluded, a "whole proviso" is determined by examining "the language in question and the operative effect of such language," not by "artificial divisions by number or letter." *Id*. at 143.

Importantly, the Legislature does not and cannot point to difficulties in applying the objective definitions set forth in *Locke* and *Lowry*. Even if it could, any difficulty in applying the law cannot support ignoring it altogether and arbitrarily tying the scope of the Governor's veto to a legislatively defined subsection, which has no basis in constitutional text. Contrary to the Legislature's argument, "language in an appropriations bill conditioning expenditure of funds" constitutes an appropriation item. *Lowry*, 131 Wn.2d at 322; *Locke*, 139 Wn.2d at 138.

(2) Nondollar provisos are separate appropriation items subject to veto, regardless of how formatted

Lowry also demands that nondollar provisos are subject to veto, independently from the dollar provisos to which they may relate. *Lowry*, 131 Wn.2d at 327-28. And based on this rule, the *Locke* Court determined that an appropriations bill subsection that both (1) designated funds for a childcare subsidy program and (2) conditioned such funds on a copayment requirement contained two distinct provisos—one dollar and one nondollar—each alone subject to veto. *Locke*, 139 Wn.2d at 140, 144.

The Legislature does not meaningfully distinguish the fuel type condition here from the copayment condition at issue in *Locke*. Instead, it seeks to impose a rule that is not warranted by either *Lowry* or *Locke*: that a nonmonetary condition grouped into a subsection with a monetary condition must presumptively be treated as part of that monetary condition. Such a rule would only encourage crafty drafting and logrolling, and impede the Governor's role to disentangle policy issues so they will be considered on their individual merits. *See Lowry*, 131 Wn.2d at 316-17, 328-29.

The Legislature even goes so far as to craft a new test for review of nondollar provisos by including only a partial quotation from *Lowry*. Leg. Br. at 17. It suggests that "[c]ourts approve nondollar provisos . . . so long as they do not amount to 'a device to revive substantive legislation that perished during a legislative session.'" *Id*. (quoting *Lowry*, 131 Wn.2d at 325-26). This Court announced no such test. The Court acknowledged in *Lowry* that the Legislature may have some legitimate and some less valid reasons for including nondollar conditions in appropriations bills, such as "legislative micromanagement." *Lowry*, 131 Wn.2d at 325-26. But, the Court concluded, *regardless* of the Legislature's reasons, *all* nondollar provisos are individually subject to veto. *Id.* at 328. Such a rule discourages legislators from "weav[ing] substantive policy provisions and fiscal measures into appropriations bills" and trying 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*. at 329. Tying the scope of the line item veto to a legislatively-defined subsection would allow the Legislature to thwart this purpose through basic formatting choices. A constitutional check so easily evaded is no check at all. Indeed, the Legislature noticeably avoids explaining how its definition promotes, or can even be reconciled with, this core function.

Ultimately, the Legislature appears to be urging the Court to reconsider its settled position on nondollar provisos, without even acknowledging that it is doing so. *See, e.g.*, Leg. Br. at 18 n.3 (informing the Court that, in "treating nondollar provisos as separate 'items' subject to the item veto power," it has "adopted the minority position among states with parallel constitutional provisos"[1]). But where the Court has "expressed a clear rule of law" as it did in *Lowry* and *Locke*, it "will not—and should not—overrule it *sub silentio*." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009). The Legislature has not even attempted to make a "clear showing" that the established nondollar proviso

[1] The states identified in in the Legislature's footnote have markedly different constitutional language from that at issue here. Alaska's Constitution, for example, provides that the Governor may either veto whole "bills" or "by veto, strike or reduce items in appropriations bills." Alaska Const. art. II, § 15. The Pennsylvania Supreme Court also characterized Washington's veto provision as "facially far broader" than its own. *Jubelirer v. Rendell*, 598 Pa. 16, 50-51 n. 20, 953 A.2d 514 (2008).

rule is "incorrect and harmful" such that it should be abandoned. *See id*. at 278 (internal quotations omitted). The Court should be especially wary of veiled attempts, like here, to rewrite the balance of legislative power.

3. The fuel type condition is a separate nondollar proviso that was appropriately vetoed

Consistent with *Lowry* and *Locke*, the Court should conclude that the fuel type restriction here imposed a distinct nondollar condition on the appropriation to the Public Transportation Division. The Legislature cannot avoid this result by claiming that the fuel type restriction is simply part of the dollar provisos directing the expenditure of specific funds on specific grant programs. The Legislature made essentially the same argument in *Locke*, arguing that the Governor could not "pick and choose" from conditions that were grouped together in one subsection addressing the child care subsidy program. *Locke*, 139 Wn.2d at 139. But this Court rejected that argument, reiterating that "'*any* budget proviso . . . is an "appropriations item,"'" subject to veto, and if a subsection contained more than one proviso, then *each* was "subject to the Governor's veto pen under *Lowry*." *Id*. at 140 (quoting *Lowry*, 131 Wn.2d at 323). Thus, a condition requiring an agency to spend certain sums solely on the childcare subsidy program was a separate condition from one requiring it to implement a copayment, even though the two conditions were related and included in the same

subsection. *Id*. at 144. Like the copayment proviso in *Locke*, the fuel type restriction is a discrete condition from the restriction that funds be used solely for certain grant programs and projects, even though they appear in the same subsection and may be tangentially related. *See id*. at 141-42.

And unlike the dollar provisos dedicating certain funds for specific projects and programs, the fuel type proviso did not "determine the size of the *initial* appropriation" to the Division. *See id*. (identifying relevant criteria). Nor did it reference the specific dollar amount appropriated, or "define agency action which must be undertaken as a condition of the agency's receipt of the initial appropriation." *See id*. Instead, the fuel type restriction circumscribed the Division's statutory authority and criteria for selecting projects to fund. "At best," the fuel type restriction was "only tangentially related" to the $262 million appropriation, as it impacted "criteria" that the Division was to apply in determining who would "*receive* disbursements *from* [*the Division*] out of the appropriated sum[s] designated in the first sentence" of the relevant subsections. *See id*. "Thus," it did "not constitute a dollar proviso as defined in *Lowry*" and *Locke*. *See id*.

a. The Governor did not have to veto the dollar proviso with the fuel type proviso

The Legislature suggests the purpose of each of its appropriation bill subsections is to "set forth a set of spending directives," and, accordingly,

all of the conditions contained within each subsection must be considered one whole dollar proviso. Leg. Br. at 20. But the same argument was made in *Locke*, and this Court had no problem distinguishing the allocation of funds to the child care subsidy program from a separate condition in the same subsection requiring that program to include a copayment. *Locke*, 139 Wn.2d at 140, 143-44. The Legislature's argument, moreover, would mean that it could avoid the rule in *Lowry* simply by including every nondollar proviso in the same subsection as a dollar proviso.

Additionally, the Legislature's description of the operative effect here as "setting forth a set of spending directives" has no discernable limit: it could be used to argue that an entire appropriations bill, or at least an entire section, is one budget proviso, and this Court has clearly rejected such a rule. *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."). The Legislature's position would swallow the rule that nondollar provisos are independently subject to veto.

The Legislature also argues that the fuel type condition must be part of the preceding dollar proviso because the dollar proviso would otherwise "provide no guidance to WSDOT as to how to spend the money." Leg. Br. at 19. But this ignores three key points.

First, it is misleading to suggest the Division would lack guidelines to administer grants. RCW 47.66.040 supplies the general statutory purposes and criteria applied by the Division to *all* multimodal grant programs, a point the Legislature does not dispute. The dollar provisos identify the funded grant programs. And other statutes specify more criteria for some programs (including, contrary to the Legislature's assertion, the special needs grant program). *See, e.g.*, RCW 47.66.030; RCW 47.66.100; RCW 47.66.110; RCW 47.66.120; RCW 47.01.450.

The fact that not every grant program has its own statute does not mean that the Division lacks sufficient guidance. RCW 47.66 was enacted to create and vest a process for selecting *all* multimodal transportation programs and projects in one administrative entity. *See* RCW 47.66.010; Laws of 1993, ch. 393. The Division has the authority and responsibility to implement these statutes, including to "determine specific factors necessary to meet a legislatively mandated general standard." *See Tuerk v. State, Dep't of Licensing*, 123 Wn.2d 120, 125-26, 864 P.2d 1382 (1994). RCW 47.66.040 provides those general standards.

Second, even absent these specific grant statutes, the Division has the broad statutory authority to "facilitate the supply of federal and state aid to those areas which will most benefit the state as a whole," RCW 47.01.011, and "facilitate connection and coordination of transit

services and planning." RCW 47.01.330(1). These statutes, and others, provide the Division with authority and direction under which it could create, define, and administer grant programs, even absent RCW 47.66. *See Tuerk*, 123 Wn.2d at 124-25 (Agencies have "those powers expressly granted to them and those necessarily implied from their statutory delegation of authority.").

Third, where the Legislature wishes to provide more specific "guidance" for administering grants, the proper way to do that is through the creation or amendment of a statute. That is what the Legislature has done with respect to several grant programs. RCW 47.01.450; RCW 47.66.030; RCW 47.66.100-.120. The Legislature did exactly that in the same appropriations bill when it appropriated funds for the green transportation capital grant program, but referred to substantive law for the applicable parameters and criteria. ESHB 1160, § 220(14), 66th Leg., Reg. Sess. (Wash. 2019) (dollar proviso that certain funds be spent "solely for the green transportation capital grant program established in" RCW 47.66.120); *see also, e.g.*, *id*. § 212(1) (providing funding for the airport aid grant program set forth in RCW 47.68.090), § 801(2) (providing funding for grants as described in RCW 47.61.5054(3)). The Legislature may have the option to create grant programs and define their parameters through appropriation items, but the Governor has the right to veto such conditions.

Contrary to the Legislature's argument, the Governor is not arguing for a rigid rule that would preclude the Legislature from including more than one sentence in a proviso. *See* Leg. Br. at 18. This Court should avoid *any* formalistic interpretation of an appropriation item, whether to permit or reject the veto. Rather, the Court should adhere to its long-standing analytical framework and conclude that the fuel type condition here is a nondollar proviso because of its language and operative effect.

b. The Governor did not have to veto the other nondollar provisos with the fuel type proviso

The Legislature points out that for some of the grant programs at issue, the Legislature imposed other conditions, in addition to the dollar provisos and the fuel type conditions, which the Governor did not veto. Leg. Br. at 20. The Legislature seems to imply that the Governor should have vetoed all of those nonmonetary conditions as one indivisible proviso. For example, the Legislature required that "[g]rants for nonprofit providers must be based on need." ESHB 1160 § 220(1)(a). This is a discrete condition from one precluding the Division from considering fuel type, and, in any event, is consistent with codified law. RCW 47.01.450.

If the Court concludes that such nonmonetary conditions governing the grant selection process naturally fit together and form only one budget proviso, its instruction would be useful going forward. In any event, the

argument that the Governor did not veto "enough" of the nondollar conditions would not apply to the fuel type conditions in subsections 220(2), (7), and (9), all of which, as the Legislature points out, include only the dollar provisos and the fuel type conditions.

B. If the Fuel Type Condition is Something Other Than an Appropriation Item, Then it is Substantive Law in an Appropriations Bill in Violation of Article II, Sections 19 and 37

For the reasons discussed above, the fuel type condition is a nondollar proviso, and thus subject to veto. But if this Court concludes that the fuel type condition is not an appropriation item, then it should strike it.

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

Article II, section 19 "forbid[s] inclusion of substantive law in appropriations bills." *Locke*, 139 Wn.2d at 145. "Policy legislation must pass or fail on its own merits, taking the normal course of a bill." *Id*. at 145-46. This constitutional protection prevents logrolling and "'assure[s] that the members of the legislature and the public are generally aware of what is contained in proposed new laws.'" *Id*. at 146 (quoting *Serv. Emp. Int'l Union, Local 6 v. Superintendent of Pub. Instruction*, 104 Wn.2d 344, 351, 705 P.2d 776 (1985)). *See also id*. at 145 n.6 (noting compulsory nature of budget bills, and their susceptibility to improper horse trading).

This Court has declined to provide a categorical definition for what constitutes substantive law, but has indicated that prior treatment in

substantive legislation, probable duration extending beyond the fiscal biennium covered by the appropriation bill, *or* definition of rights or eligibility for services *may* indicate substantive law is present. *Locke*, 139 Wn.2d at 147. "These are not the exclusive factors defining substantive law, however." *Id*. A non-monetary condition on an appropriation, for example, "'often has all the characteristics of substantive legislation.'" *Id*. at 144 (quoting *Lowry*, 131 Wn.2d at 328 n.11). Here, at a minimum, the fuel type condition eliminated a factor that the Division was otherwise authorized by law to consider when selecting multimodal transportation programs and projects. The fuel type restriction is substantive law that must be stricken.

a. Fuel type is indisputably relevant to the factors the Division considers under RCW 47.66.040

While not every multimodal grant program is individually identified in RCW 47.66, the Legislature does not dispute that RCW 47.66.040, which sets forth the criteria the Division must consider "in selecting programs and projects," applies to all of the programs and projects at issue in this case. Leg. Br. at 28 (acknowledging RCW 47.66.040 as "the statute that directly governs multimodal transportation project selection"). Indeed, the Legislature enacted RCW 47.66 to "create a mechanism to fund multimodal transportation programs and projects," and "a process that would allow for *all* [multimodal] transportation programs and projects to compete for

limited resources." RCW 47.66.010 (emphasis added).

RCW 47.66.040, in turn, requires that "in selecting programs and projects" the Division "shall" consider objectives of air quality requirements,[2] and "energy efficiency issues." RCW 47.66.040(2)(a)-(b). The parties again agree that fuel type is a relevant consideration of both energy efficiency and clean air (undoubtedly an "objective[]" of "air quality requirements"). Leg. Br. at 29-31. The Legislature has repeatedly stated so. *See, e.g.*, Laws of 2019, Ch. 287, § 1;[3] Laws of 2007, ch. 348, § 1.[4] And for that very reason, it has required local governments to transition to electricity or biofuel as practicable. RCW 43.19.648.

Inherent in the Division's broad authority to administer multimodal grant programs and apply criteria is its discretion to determine the specific factors necessary to meet these legislatively mandated standards. *Tuerk*, 123 Wn.2d at 125. Thus, while no statute may, in so many words, expressly *require* the Division to consider fuel type as a factor in selecting grant

[2] Objectives of the Commute Trip Reduction Act and transportation demand management programs overlap with the objectives of clean air requirements. *See* WAC 468-63-010 ("Washington state's laws relating to commute trip reduction (CTR law) were adopted in 1991 and incorporated into the Washington Clean Air Act…."); WAC 468-63-030(1)(a) ("The purposes of the CTR program . . . are to decrease automobile-related air pollution, consumption of gasoline, and traffic congestion."), (2)(b); RCW 70A.15.4000.

[3] "[I]ncreasing the rate of adoption of . . . clean alternative fuel vehicles" and increasing "reliance on greener transit options" will "help to reduce harmful air pollution from exhaust emissions, including greenhouse gas emissions."

[4] "[C]lean fuels and vehicles protect public health by reducing toxic air and climate change emissions."

recipients, certainly the Division is authorized to consider it because it is relevant to the "legislatively mandated general standard[s]" set forth in RCW 47.66. *Id. See also* Leg. Br. at 46 (recognizing agency's discretion to "fill in the gaps of a statutory framework if necessary to effectuate a general statutory scheme") (quoting *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 112 Wn.2d 314, 322, 771 P.2d 335 (1989)). Of course, the Division would not be able to consider fuel type if a statute expressly precluded it. That is exactly what the budget proviso purports to do.

b. The fuel type condition restricts the Division from doing something it is statutorily authorized to do

The fuel type condition imposed by the Legislature purports to restrict the Division's grant selection criteria: "Fuel type may not be a factor in the grant selection process." ESHB 1160, §§ 220(1)(a), (1)(b), (2), (3)(a), (5)(a), (7), (9). The condition necessarily controls the criteria the Division may apply under RCW 47.66.040. Without it, as described above, the Division may consider fuel type as part of its determination of what will further both energy efficiency and clean air. With it, the Division may not. Thus, the fuel type condition is a substantive change in the law.

The Legislature overstates what the Governor must show to establish that the fuel type condition is substantive law. *See* Leg. Br. at 26-28. This Court's cases do not require that a provision in a budget bill directly

"conflicts" with a preexisting statute in order to constitute "substantive law." Rather, the question is whether the issue has been or should be treated as a substantive law. In *Locke*, the copayment budget proviso did not conflict with a statute that prohibited a copayment. 139 Wn.2d at 144-49. Nonetheless, the copayment requirement was clearly a matter of substantive law, as it imposed legal duties on the agency administering the childcare subsidy program to require copayments. *See id*. at 134-35 (quoting proviso at issue). In *Flanders v. Morris*, the budget proviso at issue also "add[ed] to the restrictions already enumerated" in codified law; it did not eliminate or change any of those restrictions. 88 Wn.2d 183, 189, 558 P.2d 769 (1977).

Here, the Legislature admits that the grant selection criteria in RCW 47.66.040 is a "substantive statute." *See* Leg. Br. at 43. Indeed, it places affirmative obligations on the Division to select programs and projects based on specified criteria. While the Division is indisputably permitted to include fuel type amongst the factors considered under RCW 47.66.040, the fuel type condition would prohibit it. Whether the fuel type condition directly conflicts or simply narrows the criteria the Division considers under RCW 47.66.040, it is an amendment to that law.

Although not necessary or dispositive, the fuel type condition also has the probable effect of imposing a policy change beyond the 2019-21 biennium. *See* RP at 19-20 (arguing probable longevity to trial court). When

the Legislature imposed a copayment requirement in the 1997-99 biennial budget related to the child care assistance program, this Court found that such a requirement was "substantive law," even though nothing in the proviso stated it would apply beyond that biennium. *Locke*, 139 Wn.2d at 146-47. The Court considers the enduring effect a requirement would have *if* it were passed as its own substantive measure. *Id.*; *Flanders*, 88 Wn.2d at 190 (also opining that "it is not necessary that a given provision have effect in perpetuity . . . to be stricken . . . as substantive, amendatory law").

Likewise here, the grant selection criteria the Division is required to apply is codified in substantive law which applies perpetually. RCW 47.66. And the fact that many programs and projects are already selected before the Legislature appropriates funds and imposes conditions demonstrates that the Legislature is using Section 220 as a shortcut to amend RCW 47.66 and to provide direction for the selection of projects to be funded in future biennia, not just the current one. As the Governor argued to the trial court, the Legislature does not even hide this intent when it expressly provides direction to the Division regarding its selection criteria to be applied for the *next* biennium. RP 19-20. And, given the repetition of these budget provisos, *see* Gov. Br. at 42-43, the Court can reasonably "assume that if this provision were allowed to stand, it would extend beyond this budget bill's biennium and be reeanacted in future budget bills." *See Flanders*, 88

Wn.2d at 190. The current transportation budget bills for the next biennium, both of which include the fuel type condition, prove this point. Substitute H.B. 1135, § 220 (Wash. 2021); Substitute S.B. 5165, § 220 (Wash. 2021).

Last, the Legislature seems to suggest that because multimodal programs and projects are not entitlement programs, their statutorily-defined selection criteria do not constitute substantive law. Leg. Br. at 40; *See also* CP 90-91 (Governor's contrary arguments). This is an illogical and overly-narrow view of what constitutes substantive law. It would allow the Legislature to radically change agency authority through budget provisos, without public input. The proper way to redefine an agency's statutorily defined authority and discretion is through substantive legislation.

Article II, section 19 "forbid[s] inclusion of substantive law in appropriations bills." *Locke*, 139 Wn.2d at 145. The fuel type condition violates this provision by changing the statutory grant selection criteria.

2. The fuel type condition amends the statutory grant criteria without setting forth the affected statutes in full

For many of the same reasons that the fuel type condition violates article II, section 19, it also violates article II, section 37. It is undisputed that RCW 47.66 is substantive law. Leg. Br. at 43. It is further agreed that, based on this substantive law, the Division would be acting within its authority to consider energy efficiency and clean air if it considered fuel

type as a relevant factor in the grant selection process. Leg. Br. at 29-31. Since 1993, the statutory law has provided the criteria the Division is to apply when selecting programs and projects, with no restriction on fuel type as a factor. The fuel type condition changes this legal landscape. The Legislature has effectively amended RCW 47.66.040(2) as follows:

> (2) The following criteria shall be considered by the department in selecting programs and projects:
>
> (a) Objectives of the . . . commute trip reduction act, transportation demand management programs, federal and state air quality requirements, except the Department shall not consider fuel type as it may be relevant to those objectives. . . .
>
> (b) Enhancing the efficiency of regional corridors in moving people among jurisdictions and modes of transportation, [and] energy efficiency issues, except the Department shall not consider fuel type as it may be relevant to such efficiency. . . .

"[A] restriction, while temporary, is still a statutory amendment and thus subject to article II, section 37 analysis." *Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 213, 457 P.3d 453 (2020).

The fuel type condition (separate or together with the other provisos in the appropriations bill) is not a complete act, because one cannot understand the authority and duty of the Division in selecting grant recipients without referring to RCW 47.66.040 and the other statutes that govern specific grant programs. One seeking the law on the Division's process for awarding multimodal grants would have to know that they must

look under an appropriations title in the uncodified session laws to find the amendment. "The fact that the budget bill is not codified strikes at the very heart and purpose of Const. art. 2, s 37." *Flanders*, 88 Wn.2d at 189.

Second, and separately dispositive, a straightforward determination of the Division's authority under RCW 47.66.040, which indisputably allows the Division to consider fuel type, is rendered erroneous by an uncodified restriction that expressly prohibits it. The fuel type condition does not "inform[] readers" how it "is impacting or modifying a straightforward determination of the scope of rights and duties created by" RCW 47.66. *See Black*, 195 Wn.2d at 210. Again, it does not matter that the Division was not previously *required* to make fuel type a factor in its grant selection process; the point is that it was *authorized* to do so. Most of the subsections in Section 220 make no reference to the statutes that otherwise control. "[C]itizens or legislatures must not be required to search out amended statutes to know the law on the subject treated in a new statute." *Id*. at 210-11 (citations and quotation marks omitted).

The Governor appropriately exercised his constitutional power to veto individual nondollar budget provisos when he vetoed the new fuel type condition. If the Court disagrees, it should, nonetheless, strike the condition.

RESPECTFULLY SUBMITTED this 2nd day of April 2021.

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CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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