Andy Oldham

From: Andy Oldham
Sent: Wednesday, July 12, 2017 1:49 PM
To: Berry, Jonathan (OLP)
Subject: SJQ - latest draft
Attachments: SJC Questionnaire - 7.12.2017.docx; Cert-Petition-Mullenix-v-Luna.pdf

Jon--

Apologies for not getting this back to you last night. Took longer than I estimated. (b) (5) [redacted] I will do my best to do that today.

I cannot remember if I already sent you the cert petition in Mullenix. So I'm attaching (or re-attaching) it here.

Please let me know if there's anything else I can do to help. In the meantime, (b) (5) [redacted].

Best,
Andy

No.

In the Supreme Court of the United States

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY, PETITIONER

v.

BEATRICE LUNA, INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.;
CHRISTINA MARIE FLORES, AS NEXT FRIEND OF
J.L. AND J.L., MINOR CHILDREN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@texasattorneygeneral.gov
(512) 936-1700

QUESTIONS PRESENTED

Rather than submit to arrest under a lawfully issued warrant, a suspect led police on an extended nighttime chase at speeds up to 110 miles per hour, during which he told a police dispatcher that he had a gun and would shoot police officers. The defendant officer fired his service rifle from an overpass in an attempt to disable the suspect's vehicle before it reached an officer stationed beneath the overpass and other officers further along the road. The questions presented are:

(1) Viewing the facts from the officer's perspective at the time of the incident, did he act reasonably, under the Fourth Amendment, when an officer in his situation would believe that the suspect posed a risk of serious harm to other officers or members of the public?

(2) Did the law clearly establish that this use of potentially deadly force was unlawful, when existing precedent did not address the use of force against a fleeing suspect who had explicitly threatened to shoot police officers?

PARTIES TO THE PROCEEDING

Petitioner Chadrin Lee Mullenix, in his individual capacity, was the Defendant-Appellant in the court of appeals.

Respondents Beatrice Luna, individually and as representative of the estate of Israel Leija, Jr., and Christina Marie Flores, as next friend of J.L. and J.L., minor children, were the Plaintiffs-Appellees in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provision, Statutes and Rules

In the Supreme Court of the United States

No.

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY, PETITIONER

v.

BEATRICE LUNA, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.; CHRISTINA MARIE FLORES, AS NEXT FRIEND OF J.L. AND J.L., MINOR CHILDREN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The court of appeals' decision creates two separate circuit splits. And it contradicts *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), which unanimously confirmed that the Fourth Amendment gives police leeway during high-speed car chases to protect the public, and that qualified immunity shields officers from personal liability unless existing precedent establishes "beyond debate" that their conduct was unlawful.

The Fifth Circuit heeded neither of these admonitions. It denied qualified immunity to a police officer who used deadly force against a suspect who not only evaded arrest and initiated a high-speed nighttime car chase but also made explicit threats to use deadly

force against police officers. As interpreted by the court of appeals, the Fourth Amendment forbids an officer to use deadly force against a fleeing suspect unless and until alternative, non-deadly means have failed even when the suspect has threatened to use deadly force against other officers, and even when alternative means will expose other officers and members of the public to a serious risk of harm. The Fifth Circuit held that this principle was clearly established without identifying any existing precedent considering the use of force against a fleeing suspect who threatened to shoot police officers.

This case therefore presents issues of exceptional importance, as police need proper latitude to protect themselves and the public from dangerous fleeing suspects in high-speed car chases. The Fifth Circuit's decision creates an unprecedented limitation on the use of force, which, if left unreviewed, will have a chilling effect on the seizure of fleeing suspects, thereby increasing the risk to officers and civilians.

OPINIONS BELOW

On August 7, 2013, the United States District Court for the Northern District of Texas denied Petitioner's motion for summary judgment. The district court's order is available at 2013 WL 4017124. *See* Pet. App. 25a 38a.

On August 28, 2014, the Fifth Circuit issued an opinion affirming the district court, with Judge King dissenting. That opinion is available at 765 F.3d 531. *See* Pet. App. 55a 92a. On December 19, 2014, the

Fifth Circuit withdrew its initial opinion, issued a substitute opinion, and denied the petition for rehearing en banc, with Judges Jolly, King, Davis, Jones, Smith, Clement, and Owen dissenting from the denial of rehearing en banc. The Fifth Circuit's substitute opinion is available at 773 F.3d 712. *See* Pet. App. 1a 24a. The Fifth Circuit's order denying the petition for rehearing en banc and the dissenting opinions are available at 777 F.3d 221. *See* Pet. App. 39a 52a.

JURISDICTION

The Fifth Circuit had appellate jurisdiction because the district court's order denying Petitioner's motion for summary judgment was a final decision within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 527 30 (1985).

On December 19, 2014, the Fifth Circuit entered judgment denying Petitioner's petition for rehearing en banc, Pet. App. 53a 54a, and issued a substitute opinion affirming the district court, Pet. App. 1a. Petitioner filed this timely petition for writ of certiorari on March 19, 2015. *See* Sup. Ct. R. 13(1), (3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents seek damages under 42 U.S.C. § 1983 for an alleged violation of the decedent's rights under the Fourth Amendment.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

STATEMENT

1. At 10:21 p.m. on March 23, 2010, an officer of the Tulia, Texas, Police Department attempted to serve an arrest warrant on Israel Leija, Jr. at a Sonic drive-in restaurant. When the officer informed Leija that he was under arrest, Leija sped away in his car toward Interstate 27, which he entered near mile marker 77. Texas Department of Public Safety ("DPS") Trooper Gabriel Rodriguez joined the pursuit and took the lead. As the chase proceeded north on I-27 at speeds up to 110 miles per hour, Leija made two calls to the Tulia Police Dispatch stating that he had a gun and threatening to shoot police officers. Pet. App. 26a 27a.

As the pursuit continued, several officers joined in the effort to capture Leija. Officer Troy Ducheneaux of the Canyon, Texas, Police Department stopped to set up tire spikes underneath an overpass at Cemetery Road and I-27, near mile marker 103. Other officers prepared to set up tire spikes at two additional locations farther north on I-27. Pet. App. 3a, 27a.

Defendant DPS Trooper Chadrin Mullenix was on patrol thirty miles north of the chase when he responded. Mullenix and the other officers were informed of Leija's threats, Pet. App. 3a 4a, and Mullenix was told that Leija might be intoxicated, Pet. App. 31a. Aware that other officers were preparing to set up tire spikes, Mullenix parked his patrol car on the Cemetery Road overpass above I-27. Pet. App. 4a.

After he reached the overpass, Mullenix informed Rodriguez that he intended to fire his rifle from the bridge to disable Leija's car. Rodriguez responded, "10-4," gave Mullenix his location, and told him that Leija was going 85 miles per hour. Mullenix then asked the Amarillo DPS dispatch to inform his supervisor, Sergeant Robert Byrd, of his plan to fire at Leija's car and to ask whether he thought it was "worth doing."[1] Before the dispatch responded, Mullenix got out of his patrol car, took his rifle from the trunk, and took a shooting position on the south side of the bridge. Pet. App. 4a 5a, 28a. At some point thereafter, the DPS dispatch relayed Sergeant Byrd's message to "stand by" and "see if the spikes work first." Pet. App. 5a. The parties dispute whether or not Mullenix received that message.[2]

As he waited for the pursuit, Mullenix discussed his plan to disable Leija's vehicle with Randall County Sheriff's Deputy Tom Shipman, who reminded Mullenix that there was another officer underneath the

---

[1] The parties dispute the details of Mullenix's communication with the Amarillo DPS dispatch. Plaintiffs allege that Mullenix contacted Byrd to "request permission" to fire. Pet. App. 4a. Mullenix testified that he did not need permission but merely asked for Byrd's advice. Pet. App. 4a–5a. Byrd confirmed that Mullenix did not need permission. Pet. App. 83a n.1.

[2] Mullenix stated that he did not hear the response because he did not turn on his outside loudspeakers. Plaintiffs alleged that Mullenix should have been able to hear the response through his police radio, since his trunk was open, or through Ducheneaux's radio underneath the bridge. Pet. App. 5a, 28a–29a.

bridge. Mullenix later testified that he was not sure who was underneath the overpass, where precisely that officer was positioned, or whether that officer had set up tire spikes. Pet. App. 5a.

The pursuit reached Mullenix approximately three minutes after he reached the overpass. When Leija approached, Mullenix fired six rounds at his car. Leija's car continued under the overpass, hit the tire-spike strip set out by Ducheneaux, went out of control, and rolled two-and-a-half times. Pet. App. 4a, 5a, 30a. Shortly afterward, Leija was pronounced dead. His death was caused by a shot to the neck. Pet. App. 6a, 30a. After the pursuit ended, officers discovered that Leija did not have a gun. Pet. App. 3a.

Plaintiffs sued Mullenix, Rodriguez, the Texas DPS, and Texas DPS Director Steve McCraw under the Texas Tort Claims Act and 42 U.S.C. § 1983. Pet. App. 6a 7a. Claims against Rodriguez, McCraw, and the DPS were dismissed. Mullenix moved for summary judgment based on qualified immunity. Pet. App. 7a.

2. The district court denied Mullenix's motion for summary judgment. It determined that at the time of the shooting, clearly established law provided:

> a police officer's use of deadly force is justified only if a reasonable officer in Defendant Mullenix's position had cause to believe that there was an immediate threat of serious physical harm or death to himself which Officer Mullenix has testified did not exist in

> this case or there existed at the time of the shooting an immediate threat of serious physical harm or death to others.

Pet. App. 35a 36a (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The summary judgment evidence included Mullenix's testimony that at the time of the shooting, he believed that Leija posed a risk of serious injury or death to the officer under the Cemetery Road overpass, other officers setting out spikes, and possibly citizens in the cities of Canyon and Amarillo if the chase continued. Pet. App. 36a. The court nevertheless denied summary judgment, finding genuine issues of material fact concerning "the existence of an immediate risk of serious injury or death"; whether Mullenix "acted recklessly, or acted as a reasonable, trained peace officer would have acted" in the circumstances; "whether Mullenix did or did not hear, and should have obeyed, the instructions from his superior officer to let the other officers . . . first try the planned non-lethal or less-dangerous methods being utilized to end the high-speed pursuit"; and whether there existed "any *immediate* threat to officers involved in the pursuit [or] to other persons who were miles away from the location of the shooting." Pet. App. 36a 37a.

3.a. On August 28, 2014, a divided panel of the Fifth Circuit affirmed, finding that a genuine issue of material fact as to "[t]he immediacy of the risk posed by Leija" precluded summary judgment. Pet. App. 66a. In the court of appeals' view, two facts "negate[d] the risk factors central to the reasonableness find-

ings" in other cases. Pet. App. 67a. First, Leija's driving did not pose a serious risk because traffic was "light, there were no pedestrians, businesses or residences along the highway, and Leija ran no other cars off the road and did not engage any police vehicles." Pet. App. 69a. Second, "the non-lethal methods that were already prepared were never given a chance to work." Pet. App. 70a. Accordingly, the Fifth Circuit determined that "a jury could find that a reasonable officer would have concluded that the risk Leija posed was not sufficiently immediate so as to justify deadly force, and that the non-lethal methods already in place could stop the chase without the need for deadly force." Pet. App. 75a.

Moving to the second step of the qualified-immunity analysis, the Fifth Circuit concluded:

> At the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a substantial and immediate threat, violated the Fourth Amendment.

Pet. App. 78a. The Fifth Circuit affirmed the denial of qualified immunity on the ground that "the immediacy of the risk posed by Leija cannot be resolved as a matter of law at the summary judgment stage." *Ibid.*

b. Judge King dissented. She explained that the factual dispute alleged by the majority was "simply a restatement of the objective reasonableness test," which presented a legal question for the court. Pet.

App. 80a. Based on the summary-judgment record, Judge King concluded that Mullenix's conduct was not objectively unreasonable given Leija's threat to shoot police officers, the presence of police officers in Leija's path, and Leija's own culpability for the risks he created. Pet. App. 85a 86a.

Judge King criticized the majority for minimizing the risk Leija posed to Ducheneaux and other officers. She noted that the cases distinguished by the majority concerned suspects who were on foot or in stopped vehicles, giving officers a chance to observe the suspects that was not available to the officers who responded to Leija's high-speed nighttime flight. Pet. App. 86a 87a. In her view, the majority's suggestion that Leija's threat to shoot officers did not create a serious risk because he was "not fleeing the scene of a violent crime," and "no weapon was ever seen," Pet. App. 87a "eviscerates the Supreme Court's requirement that we adopt the perspective of a reasonable officer on the scene," Pet. App. 88a.

Responding to the majority's conclusion that Mullenix should have waited to see if non-lethal alternatives stopped the chase, Judge King noted that "Mullenix reasonably believed that deploying tire spikes along the highway posed a significant risk of harm to officers." Pet. App. 88a. She also pointed out that in *Thompson v. Mercer*, 762 F.3d 433 (5th Cir. 2014) a case distinguished by the majority the non-lethal methods included shooting at the suspect's tires, and "tire spikes twice failed to stop the suspect's truck." Pet. App. 88a 89a. Given the evidence that tire spikes

presented risks of their own and were often ineffective, an objectively reasonable officer could have concluded that the risks outweighed the potential benefits. Pet. App. 89a.

In light of Mullenix's knowledge that an officer was underneath the overpass, that his flashing patrol lights would alert Leija to his presence, and that operating tire spikes could expose the officer to gunfire, Judge King concluded that the risks presented to Mullenix "were at least as particularized as in the Supreme Court's decisions in *Scott* and *Brosseau* and our decision in *Thompson*, where the officers employing force were not aware of the precise location or identity of the other officers and civilians they were acting to protect." Pet. App. 89a. Regarding the immediacy of the threat, Judge King found it

> difficult to conceive of a threat that is more immediate than the one Leija posed. At the moment Mullenix fired, Leija was seconds away from crossing the path of one of the officers he had threatened to shoot and minutes away from passing several other officers.

Pet. App. 90a. And despite the majority's criticism of Mullenix's plan to disable Leija's car, Judge King pointed out that in *Thompson*, "an officer positioned at the side of the road aimed at and successfully shot the radiator of the fleeing suspect's vehicle." Pet. App. 91a n.3.

4.a. Mullenix filed a petition for rehearing en banc, which the Fifth Circuit denied by a 9-to-6 vote. Pet. App. 40a. In response to Mullenix's rehearing petition, the panel majority withdrew its opinion of August 28, 2014, and issued a substitute opinion affirming the denial of summary judgment. Pet. App. 1a.

In the substitute opinion, most of which was identical to the original opinion, the court of appeals removed all references to the jury and to disputed questions of fact, replacing them with statements to the effect that Mullenix's conduct was objectively unreasonable as a matter of law. *See, e.g.*, Pet. App. 12a. In its discussion of clearly established law, the court altered its formulation slightly to state that "the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a *sufficiently* substantial and immediate threat, violated the Fourth Amendment." Pet. App. 24a (emphasis added).

b. Judge Jolly, joined by six other judges, dissented from the denial of rehearing en banc.[3] Pet. App. 40a. In his dissenting opinion, he criticized the panel's substitute opinion sharply, concluding:

> the panel majority either does not understand the concept of qualified immunity or, in defiance thereof, impulsively determines

[3] Although Judge King dissented from the denial of rehearing en banc, the order denying the en banc petition does not reflect that she voted in the court's en banc poll. Pet. App. 40a.

> the "right outcome" and constructs an opinion to support its subjective judgments, which necessarily must ignore the concept and precedents of qualified immunity.

Pet. App. 40a 41a. Judge Jolly faulted the panel majority for the following errors, among others:

- failing "to recite or accept the clearly established law that applies to car-chase cases," Pet. App. 44a;
- deeming Mullenix's conduct unreasonable based on its subjective judgment "that tire spikes should have been the preferred alternative means for stopping Leija's car," Pet. App. 45a;
- "fail[ing] to heed the Supreme Court's instruction to account for Leija's culpability," *ibid.*;
- failing to view the facts from Mullenix's perspective, Pet. App. 46a;
- failing to grant qualified immunity to Mullenix despite the lack of clear notice that his conduct was unconstitutional, *ibid.*; and
- improperly relieving Plaintiffs of their burden to show that Mullenix was not entitled to qualified immunity, Pet. App. 47a.

Considering the facts known to Officer Mullenix particularly his knowledge that Leija fled arrest for an extended period, that Leija was suspected of being intoxicated, that Leija said he had a gun and would

shoot any officer he saw, and that Officer Ducheneaux was in Leija's path below Mullenix, Pet. App. 49a Judge Jolly concluded that the court's opinion "condone[d] second-guessing of split-second decisions in contravention to the principles of qualified immunity," Pet. App. 50a 51a.

Judge King joined in Judge Jolly's opinion, writing separately to note that the panel majority did not consult her about the withdrawal and substitution of its opinion. Pet. App. 51a. She concluded, "As the law now stands, Mullenix was entitled to qualified immunity." Pet. App. 52a.

REASONS TO GRANT THE PETITION

I. THE FIFTH CIRCUIT CONTRAVENED THIS COURT'S RECENT PRECEDENTS IN ERRONEOUSLY DENYING QUALIFIED IMMUNITY.

A. The Fifth Circuit's Fourth Amendment Analysis Failed to Adopt the Officer's Perspective or Account for Leija's Direct Threat to Shoot Police Officers.

At the first step of a qualified immunity analysis, the question whether an officer's conduct is objectively unreasonable "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Plumhoff*, 134 S. Ct. at 2020 (quoting *Graham*, 490 U.S. at 396). The officer's conduct "must be judged from the perspective of a reasonable officer on the scene, rather than with

the 20/20 vision of hindsight." *Ibid.* (internal quotation marks omitted). Thus, courts must consider only the facts known to the officer "when the conduct occurred." *Saucier v. Katz*, 533 U.S. 194, 207 (2001).

1. The Fifth Circuit violated this cardinal rule by failing to consider the facts from Officer Mullenix's perspective. Instead, with the benefit of hindsight, the court of appeals judged Mullenix's conduct to be unreasonable based on facts not available to him. Its determination that Mullenix's conduct was objectively unreasonable directly contravenes this Court's recent decisions in cases involving high-speed pursuits.

In *Plumhoff*, 134 S. Ct. at 2021, the Court held that officers did not violate the Fourth Amendment when they fired 15 shots at a fleeing suspect even though a collision had brought the high-speed chase "temporarily to a near standstill." Although the threat to other drivers had arguably abated at the time of the shooting, the Court held that the use of force was justified because "all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road." *Id.* at 2022.

Similarly, in *Scott v. Harris*, an officer's use of potentially lethal force was deemed objectively reasonable because of "an actual and imminent threat to the lives of any pedestrians who *might have been present*, to other civilian motorists, and to the officers involved in the chase." 550 U.S. 372, 384 (2007) (emphasis added). The Court recognized an actual and imminent

threat despite video evidence that "when Scott rammed respondent's vehicle it was not threatening any other vehicles or pedestrians. (Undoubtedly Scott *waited* for the road to be clear before executing his maneuver.)." *Id.* at 380 n.7. Notwithstanding the lack of an immediate threat at the moment of impact, *Scott* held, "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386.

Considered in the light of *Scott* and *Plumhoff*, this should have been an *a fortiori* case. At the time he fired his rifle to disable Leija's car, Mullenix knew that Leija had explicitly threatened to shoot any officer he saw, and he knew that a fellow officer was parked underneath the overpass with flashing lights alerting Leija to his presence. Whereas the officers in *Plumhoff* acted when the threat had temporarily abated, Mullenix acted when the threat continued to mount. And unlike *Scott*, the circumstances Mullenix faced presented a particular risk to a specific individual. Mullenix was entitled to take Leija's threat to shoot police officers at face value.

The facts gave Officer Mullenix every reason to believe that Leija posed a risk of serious bodily harm or death to the officer below him, as well as other officers and civilians. It would have been unreasonable for Mullenix, or any other officer in his position, to discount that risk. Without some particular reason to believe that the suspect would not follow through on his

threat to shoot and Mullenix had none he did not act unreasonably in using deadly force to stop Leija before he could reach the people he had threatened with deadly force.

2. Instead of asking whether Officer Mullenix made a reasonable decision, the Fifth Circuit asked whether he made the *right* decision based on information he did not have. The court of appeals determined that Officer Mullenix's use of force was objectively unreasonable because, with the benefit of a fully developed summary-judgment record, it decided that this force was not necessary.[4] According to the Fifth Circuit, the Fourth Amendment required Mullenix to wait and see if the spike strip stopped Leija's car. But at the moment he had to make a decision, Officer Mullenix did not know if spike strips had been laid out below the overpass, much less whether they would work. And Mullenix had to consider the possibility that Leija would shoot Officer Ducheneaux whether or not the spike strip stopped his car. The court of appeals had the benefit of knowing that Leija did not have a gun or attempt to shoot Ducheneaux, but Officer Mullenix did not.

---

[4] *See* Pet. App. 21a ("[Mullenix's] justification for the use of force was to disable the car, but alternative methods were already in place to achieve the same goal, undermining the asserted necessity for resorting to deadly force at that particular instant."). But as Judge Jolly noted, "the record does not begin to suggest, which alternative—bullets to the engine block or spikes to the tires—would have been less likely to produce a deadly result." Pet. App. 47a.

The Fifth Circuit also minimized the critical information Mullenix *did* have: Leija made two explicit threats to shoot police officers. Instead of considering the significance of those threats to a reasonable officer on the scene, the court of appeals labored to downplay the risk Leija presented:

> [A]lthough Leija had stated to the dispatcher that he was armed and would shoot officers, he was not fleeing the scene of a violent crime, no weapon was ever seen, and at the time of the shooting, most officers and bystanders were miles away, where they would not have been encountered until after the spikes were given a chance to stop the chase.

Pet. App. 18a 19a. This rationalization of Leija's flight is misguided for several reasons. First, whether or not Leija was fleeing the scene of a violent crime is irrelevant; he had expressly threatened (twice) to *commit* a violent crime.[5] Second, as to Leija's failure to brandish a weapon during the chase, Mullenix did

---

[5] Leija's threat to shoot police officers arguably constituted a felony under Texas law. *See* Tex. Penal Code § 22.07(a)(6) ("A person commits an offense if he threatens to commit any offense involving violence to any person or property with intent to . . . influence the conduct or activities of a branch or agency of the federal government, the state, or a political subdivision of the state."); *id.* § 22.07(e) ("An offense under Subsection (a)(4), (a)(5), or (a)(6) is a felony of the third degree."); *see also Phillips v. State*, 401 S.W.3d 282 (Tex. App.—San Antonio 2013, pet. ref'd) (upholding conviction based on defendant's statement to 911 operator that he would kill a certain police officer if he was sent to his house).

not have the luxury of waiting to see if Leija followed through on his threat; he had to take it seriously. *See, e.g.*, *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) ("A reasonable officer need not await the 'glint of steel' before taking self-protective action . . . ."); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997) ("[A]n officer is not required to wait until an armed and dangerous felon has drawn a bead on the officer or others before using deadly force."); *cf. Scott*, 550 U.S. at 385 (rejecting the argument that police should have ceased the pursuit instead of ramming the suspect's car, explaining that "the police need not have taken that chance and hoped for the best"). Finally, the statement that "most officers and bystanders were miles away" writes Officer Ducheneaux out of the picture, ignoring the most immediate risk that Mullenix had to consider.

The Fifth Circuit's judgment that Mullenix should have given other officers a chance to stop Leija with tire spikes further minimizes the risk to Officer Ducheneaux. According to the court:

> the facts, taken in the light most favorable to the plaintiffs, also show that officers were trained to deploy spikes in a location where they were able to take a protective position, that there were several pillars at the Cemetery Road overpass and that Ducheneaux had positioned himself behind a pillar as he was trained to do.

Pet. App. 19a. Even if Ducheneaux had taken a protective position, it would not have guaranteed his

safety from Leija. That officers "had been trained to take a protective position while deploying spikes, if possible, so as to minimize the risk posed by the passing driver," Pet. App. 3a, demonstrates an inherent risk. But Ducheneaux's actual position is beside the point: Mullenix "did not actually know Ducheneaux's position or what he was doing beneath the overpass." Pet. App. 19a. The Fifth Circuit therefore had no basis to rely on the "facts" about Ducheneaux's position to conclude that Mullenix did not "reasonably perceive[] an immediate threat at the time of the shooting, sufficient to justify the use of deadly force." Pet. App. 20a.

To the extent it acknowledged the risk to Ducheneaux, the Fifth Circuit faulted Mullenix for making a decision without complete knowledge of the facts. Recognizing that Mullenix did not know what the officer under the bridge was doing, Pet. App. 5a, 19a, the court did not consider how this might have affected his assessment of the risk. Nor did the court consider Leija's relative culpability, contrary to this Court's instruction in *Scott*, 550 U.S. at 384. Instead, the Fifth Circuit suggested that Mullenix should not have acted at all because he "lacked sufficient knowledge to determine whether or not Ducheneaux was in immediate danger from Leija, or whether Mullenix's own actions were decreasing the risk to Ducheneaux." Pet. App. 19a n.2.

Faulting Mullenix for acting without "sufficient knowledge" misses the point. In the line of duty, officers must make decisions and take action based on incomplete or imperfect information. The very purpose

of qualified immunity is "to protect officers from the sometimes hazy border between excessive and acceptable force." *Saucier*, 533 U.S. at 206 (internal quotation marks omitted).

The Fifth Circuit's failure to consider the facts from Mullenix's perspective deprived him of any leeway to make reasonable judgments. A reasonable belief about the risk presented, even if mistaken, may justify the use of greater force than was actually necessary. "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was necessary." *Id.* at 205. Here, Mullenix reasonably believed that Leija intended to shoot Ducheneaux and other officers, so he was justified in using force to stop Leija from reaching them.

B. In Finding Clearly Established Law, the Fifth Circuit Disregarded This Court's Decisions and Concocted a Novel Legal Standard.

1. The Fifth Circuit Ignored This Court's Consistent Warning Not to Rely on General Propositions of Law.

At the second step of the qualified immunity analysis, this Court has established distinct guidelines for courts to identify clearly established law:

> To be clearly established, a right must be sufficiently clear that every reasonable official would [have understood] that what he is

> doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question *beyond debate*.

Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012) (internal citations and quotation marks omitted) (emphasis added). General concepts not rooted in specific facts cannot provide sufficient notice to officers in the line of duty. *See, e.g.*, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) ("The general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."). This Court has therefore warned courts not to frame the law at a high level of generality.

The Fifth Circuit failed to tailor its statement of law to the circumstances Mullenix faced. Devoting little attention to the question, it stated:

> We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.

Pet. App. 22a (quoting *Lytle v. Bexar County*, 560 F.3d 404, 417 (5th Cir. 2009)). At least one court has criticized this very formulation of the law, noting that "[w]hile this general principle is correct, it still begs the question of what constitutes a *sufficient* threat."

Cordova v. Aragon, 569 F.3d 1183, 1193 (10th Cir. 2009). The Fifth Circuit made no attempt to explain why the threat posed by Leija was not "sufficient."

More specific notice is required to deny qualified immunity. This Court has expressly rejected attempts to define the law at a similar level of generality. In *Anderson v. Creighton*, for instance, the Court held that "the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances" did not provide adequate warning that the circumstances of a particular warrantless search "did not constitute probable cause and exigent circumstances." 483 U.S. 635, 640 41 (1987); *cf. Wilson v. Layne*, 526 U.S. 603, 615 (1999) (considering "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed").

If qualified immunity depends on the application of general principles, an officer's individual liability will likely hinge on an arbitrary choice among various general propositions. In this case, for instance, the court could have found clear support for Officer Mullenix's use of force in the general standard of *Tennessee v. Garner*: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." 471 U.S. 1, 11 (1985). Leija's threat

to shoot officers gave Mullenix probable cause to believe that Officer Ducheneaux faced a risk of serious injury or death. That belief, even if mistaken, should have entitled him to qualified immunity under *Graham*. *See, e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) ("Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." (quoting *Anderson*, 483 U.S. at 641)); *cf. Fisher v. City of San Jose*, 558 F.3d 1069, 1081 (9th Cir. 2009) ("[T]hreatening to shoot police officers constitutes separate criminal behavior that establishes probable cause for arrest independent of the initial offense.").

Of course, *Graham* is also cast at a high level of generality and therefore cannot provide clear notice in most cases. *See, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (holding that the court of appeals erred when it "proceeded to find fair warning in the general tests set out in *Graham* and *Garner*"). A general statement of law can "'clearly establish' the answer, even without a body of relevant case law" only "in an obvious case." *Ibid.* But even if this is not the obvious case for which *Graham* gives a clear answer, probable cause is a more objective standard (and produces a more obvious answer here) than the Fifth Circuit's formulation, which would effectively require courts to second-guess an officer's decision based on a subjective, retrospective judgment that the risk was not "sufficiently substantial and immediate." This defeats the purpose of qualified immunity, which rests on the principle that "officials should not err always

on the side of caution because they fear being sued." *Bryant*, 502 U.S. at 229 (internal quotation marks omitted). Without clear notice that particular conduct is unlawful, and with knowledge that his conduct will be judged on the vague standard of "sufficiency," a reasonable officer has every incentive to err on the side of caution.

2. It Was Not Clearly Established that Police Must Exhaust Non-Lethal Alternatives Before Using Deadly Force Against a Suspect Who Threatened to Shoot Police Officers.

Leija's threat to shoot police officers distinguishes this case from existing precedent regarding the use of force against fleeing suspects. Before an officer may be subjected to personal liability, "existing precedent must have placed the statutory or constitutional question beyond debate." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam); *Plumhoff*, 134 S. Ct. at 2023. But as of March 2010, neither this Court nor the Fifth Circuit had considered a case in which a suspect made explicit verbal threats to shoot police officers. A rule prohibiting the use of force in these circumstances would therefore require a settled consensus among other courts before a reasonable officer in Texas could be charged with knowledge that his use of force was unlawful. *See, e.g.*, *Plumhoff*, 134 S. Ct. at 2023. The Fifth Circuit identified no such consensus, nor did it cite a single case in which a suspect explicitly threatened to shoot police officers.

The Fifth Circuit's inability to find any comparable authority should have resulted in qualified immunity for Officer Mullenix. Although a decision on indistinguishable facts is not essential, existing precedent must be clear enough to demonstrate, beyond any reasonable disagreement, that particular conduct is clearly *unlawful*. *See, e.g.*, *Saucier*, 533 U.S. at 202 ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."); *cf. Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on th[e] issue, immunity should be recognized.").

But instead of asking whether Officer Mullenix's conduct was *foreclosed* by clearly established law, the Fifth Circuit asked whether clearly established law *supported* his use of force. This put the onus on Mullenix to identify existing precedent that endorsed his specific conduct under the Fourth Amendment. As a result, the Fifth Circuit denied qualified immunity by distinguishing cases finding officers' conduct to be reasonable, including cases decided after the events in question. For instance, when Mullenix relied on *Plumhoff* to argue that his conduct was not clearly established as unlawful,[6] the Fifth Circuit fell back on gen-

[6] While later-decided cases may demonstrate the absence of clearly established law, they cannot provide clear notice that particular conduct is unlawful. *See, e.g.*, *Plumhoff*, 134 S. Ct. at 2023 (citing *Brosseau* to demonstrate the absence of clearly established law in 1999, but noting, "We did not consider later decided

eral principles, responding that *Plumhoff* did not "undermine the clearly established law that an officer may not use deadly force against a fleeing suspect absent a sufficient risk to officers or bystanders." Pet. App. 23a. It then distinguished the Fifth Circuit's decision in *Thompson* decided, like *Plumhoff*, in 2014 as holding that the use of force "was not clearly established as unreasonable" on different facts. Pet. App. 23a 24a ("[T]he fleeing suspect had stolen a car and kidnapped a woman, had evaded four attempts to stop the car with alternate methods of seizure, and whose driving continued to pose a 'tremendous risk' to the public and other officers." (quoting *Thompson*, 762 F.3d at 440 41)).

In its discussion of clearly established law, the Fifth Circuit did not discuss a single case holding the use of force against a fleeing suspect to be unreasonable on similar facts, much less a case denying qualified immunity. *Cf. Ryburn v. Huff*, 132 S. Ct. 987, 990 (2012) (per curiam) (summarily reversing the denial of qualified immunity where "[n]o decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case"). But because the Fifth Circuit improperly shifted the burden to Officer Mullenix, the absence of existing precedent counted against him.

The Fifth Circuit's flawed analysis also led it to recognize an implicit duty to exhaust non-lethal

---

cases because they 'could not have given fair notice to [the officer].'" (quoting *Brosseau*, 543 U.S. at 200 n.4)).

means before using deadly force against a suspect. *See* Pet. App. 23a 24a. If anything, existing precedent would have suggested that officers are *not* required to exhaust non-lethal alternatives before using deadly force. As of 2007, this Court had flatly rejected a "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott*, 550 U.S. at 382. The Fifth Circuit did not identify any subsequent decision from this Court or a settled consensus among the lower courts to establish such a precondition, and none exists. *See, e.g.*, *Fenwick v. Pudimott*, No. 13-5130, 2015 WL 590295, at *7 n.1 (D.C. Cir. Feb. 13, 2015) (Henderson, J., concurring) ("To the extent the majority opinion implies that law enforcement officers must first try non-lethal means to neutralize a deadly threat or risk violating the Fourth Amendment, it is irreconcilable with a decades-long line of U.S. Supreme Court precedent." (citing *Brosseau*, 543 U.S. at 197-98; *Garner*, 471 U.S. at 11)).

In fact, the court of appeals' recognition of a duty to exhaust non-lethal means conflicts directly with this Court's decision in *Brosseau*. In that case, an officer shot a driver from behind to protect "other officers on foot who [she] *believed* were in the immediate area" and "any other citizens who *might be* in the area." 543 U.S. at 197 (emphases added). This Court held that the officer was entitled to qualified immunity even though the driver "had just begun to flee and . . . had not yet driven his car in a dangerous manner." *Plumhoff*, 134 S. Ct. at 2023.

Given the lack of authority addressing the use of force against suspects who expressly threaten to shoot police officers, Mullenix's conduct even if it were unreasonable fell somewhere in the border between excessive and acceptable force. It follows that it would not have been "clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202; *cf. id.* at 210 (Ginsburg, J., concurring in the judgment) ("Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, similarly situated, have believed the force employed was lawful?"). But the Fifth Circuit never asked that question.[7] As a result, it failed to grant Mullenix the qualified immunity to which he is entitled.

II. THE FIFTH CIRCUIT'S DECISION CREATES TWO SEPARATE CIRCUIT SPLITS.

A. The Fifth Circuit's Holding that Mullenix's Conduct Was Objectively Unreasonable Conflicts with Decisions of the First, Sixth, Eighth, and Eleventh Circuits.

The Fifth Circuit's holding that Mullenix's conduct was objectively unreasonable conflicts with decisions

---

[7] Neither did the district court. After formulating clearly established law in a manner that incorporated the question of reasonableness, Pet. App. 35a–36a, the district court denied summary judgment based solely on its conclusion that the reasonableness of Mullenix's conduct presented a genuine issue of material fact. Pet. App. 36a–37a.

in other circuits, which have consistently found the use of deadly force to be reasonable in similar circumstances, even in the absence of a direct threat to shoot police officers.

The Eleventh Circuit in *Quiles v. City of Tampa Police Department*, No. 14-12875, 2015 WL 53707, at *3 (11th Cir. Jan. 5, 2015) (per curiam), held that an officer did not violate the Fourth Amendment by shooting an unarmed suspect who was attempting to escape from an arrest on foot. Because the officer "believed reasonably (although mistakenly) that [he] had stolen and was still in possession of [another officer's] gun," the use of deadly force was reasonable even though the suspect "was running away . . . when he was shot and had not threatened definitely the officers with a gun." *Ibid.* Likewise, here, Mullenix rightfully believed (although mistakenly) that Leija had a gun and Leija had even threatened to shoot police officers.

Long v. Slaton, 508 F.3d 576, 581 (11th Cir. 2007), explicitly rejected an argument that alternative means should have been used before an officer fired shots at a suspect attempting to flee in a car. The Eleventh Circuit held that an officer did not act unreasonably when he fired several shots at a mentally unstable suspect who was backing away from the officer in the officer's own patrol car. Even if the suspect did not pose an "immediate" threat, the court held that "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect." *Ibid.* The court noted that the officer gave the suspect

clear warning (an option not available to Mullenix), and it rejected the plaintiffs' argument that the officer should have used "alternative means . . . such as shooting out the tires of the cruiser, using spike strips, or allowing [the suspect] to leave." *Id.* at 583.

In *Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014), the Sixth Circuit held that an officer did not act unreasonably when he shot a fleeing driver when any danger to officers on the scene had passed. The officer's use of force was deemed reasonable because he reasonably believed that the driver "posed a continuing risk to the other officers present in the immediate vicinity." *Id.* at 377. Here, the danger to Officer Ducheneaux had not passed, and even if it had, Leija posed a continuing risk to other officers.

The First Circuit in *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 1183 (2015), held that an officer acted reasonably in firing multiple shots at a driver who was attempting to resume a high-speed chase after crashing into a stone wall and a telephone pole. The officer fired two shots when the car was driving toward him and two more when it was driving away from him, possibly toward another officer. *Id.* at 28. The First Circuit held that the officer's conduct was objectively reasonable given the risk to himself, the risk to another officer, and the risk that the driver "'would once again pose a deadly threat for others' if he had resumed his flight." *Id.* at 29 (quoting *Plumhoff*, 134 S. Ct. at 2022). In this case, Mullenix fired shots immediately before Leija reached Officer

Ducheneaux and shortly before he would have reached other officers if the chase continued.

In *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), the Eighth Circuit ruled that an officer did not violate the Fourth Amendment when he fired eight shots at an unarmed suspect who was approaching him on foot with his hands raised or extended to his sides. The victim had not brandished a firearm, and bystanders yelled that the suspect was unarmed. The officer's use of deadly force was nevertheless deemed reasonable because the suspect was intoxicated, the officer had been told that the suspect was armed, and the officer "was in no position with [the victim] continuing toward him to verify which version was true." *Id.* at 966 67; *see also Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding that an officer who fired his pistol from a moving police car in an attempt to disable the engine of a fleeing eighteen-wheeler did not act unreasonably where previous efforts, including "shots at its tires and radiator" by officers on the side of the road, did not end the chase). Here, Mullenix also had been told the suspect was armed, and Mullenix was in no position to verify that fact.

In this case, Mullenix reasonably concluded that Leija presented a threat of serious physical harm. Mullenix was told Leija was armed, Leija was driving towards Ducheneaux, and Mullenix had no chance to verify the facts before Leija reached Ducheneaux. Leija's threat to shoot police officers eliminated any doubt about the risk he presented. Officer Mullenix's attempt to eliminate that risk was not unreasonable,

as confirmed by precedents in the First, Sixth, Eighth, and Eleventh Circuits.

B. The Fifth Circuit's Finding of Clearly Established Law Conflicts with Decisions of the Tenth and D.C. Circuits.

The Fifth Circuit's holding that Mullenix's conduct violated clearly established law creates a separate circuit split with the Tenth and D.C. Circuits.

In *Fenwick v. Pudimott*, the D.C. Circuit held that an officer who shot a sixteen-year-old suspected car thief as he tried to drive out of a parking lot was entitled to qualified immunity. It explained that the case, like *Brosseau*, involved a suspect "who posed no immediate threat to any officer or bystander when the officers fired," and officers who "justified their use of deadly force by claiming concern for the safety of other officers and bystanders." 2015 WL 590295, at *5. In the instant case, Mullenix also had every reason to believe that Leija posed an immediate threat to Officer Ducheneaux, the officers stationed up the road, and any bystander who might have been in his way. The law did not clearly establish that Mullenix's response to those threats was unreasonable.

In *Cordova v. Aragon*, the Tenth Circuit held that an officer was entitled to qualified immunity when he shot a fleeing driver in the back of the head. The suspect, whose truck was pulling a trailer with stolen heavy equipment, led police on an extended nighttime chase, during which he drove on the wrong side of the highway and attempted to ram a police car. 569 F.3d

at 1186. The defendant officer started to set out tire spikes, but when the suspect's truck approached him, he gave up the effort, drew his gun, and fired multiple shots, all but one of which hit the side of the suspect's truck. *Id.* at 1187. The court assumed, for purposes of summary judgment, that the officer "was not in immediate danger and that no innocent bystanders were in the vicinity," and it found it likely "that whatever danger he might have perceived had passed by the time he fired the fatal shot." *Ibid.* Finding the law to be "vague on whether the potential risk to unknown third parties is sufficient to justify the use of force nearly certain to cause death," the Tenth Circuit held that the officer was entitled to qualified immunity given precedent authorizing "the use of deadly force when a fleeing suspect poses a threat of serious harm to others," *id.* at 1193. Here, too, clearly established law did not provide that Mullenix had to see if tire spikes worked before firing at Leija's car.

III. THIS IS AN IDEAL VEHICLE TO ADDRESS THE QUESTIONS PRESENTED AND PROVIDE GUIDANCE ON THE APPLICATION OF *PLUMHOFF*.

This is an ideal vehicle for providing needed guidance on the important issue of police conduct while pursuing a fleeing suspect. The Fifth Circuit expressly ruled on both the reasonableness of Mullenix's conduct, Pet. App. 9a 21a, and whether the law was clearly established, Pet. App. 21a 24a. And both issues have been well vetted by the court of appeals.

Judge King wrote a thorough dissent from the majority's initial opinion; the panel majority issued a substitute opinion; and Judge Jolly's dissent from the denial of rehearing en banc highlights the profound consequences of the panel majority's substituted opinion.

While some qualified immunity cases may turn on fact-bound inquiries, the Fifth Circuit's opinion here announced propositions of law with a higher level of generality. The court held that (1) a fleeing suspect's threat to shoot police officers is not sufficient for an officer to use deadly force, Pet. App. 19a 20a, and (2) an officer cannot use deadly force until alternative means have been used to disable a car, Pet. App. 21a. Those legal questions are squarely presented for the Court's consideration. And the Fifth Circuit cited *Plumhoff* repeatedly, so this is also a good vehicle to provide guidance to the courts of appeals in applying this Court's recent precedent.

Nor are there any jurisdictional issues, as orders denying summary judgment based on a claim of qualified immunity are immediately appealable under the collateral-order doctrine. *Plumhoff*, 134 S. Ct. at 2018 19. The interlocutory posture does not counsel against review in qualified immunity cases. The Court has frequently granted certiorari to review summary judgment motions denying qualified immunity. *See, e.g.*, *id.* at 2018; *Scott*, 550 U.S. at 376; *Saucier*, 533 U.S. at 199 200. After all, qualified immunity is an "immunity from suit," and this immunity would be "irretrievably lost" if only "reviewed on appeal from a final judgment." *Plumhoff*, 134 S. Ct. at 2019.

This case is therefore an ideal vehicle for the Court to provide needed guidance to the courts of appeals on the important issue of police conduct while pursuing a fleeing suspect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

March 2015

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@texasattorneygeneral.gov
(512) 936-1700

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13 10899

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2014

Lyle W. Cayce
Clerk

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before HAYNES and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

We withdraw our prior opinion of August 28, 2014, *Luna v. Mullenix,* 765 F.3d 531 (5th Cir.2014), and substitute the following.[1]

This § 1983 excessive use of force case arises from the shooting and death of Israel Leija, Jr. by Texas Department of Public Safety (DPS) Trooper Chadrin Mullenix during a high-speed pursuit. The district court denied Mullenix's motion for summary judgment on the issue of qualified immunity, holding that multiple genuine disputes of material fact existed as to the qualified immunity analysis. Because we conclude that Mullenix is not entitled to summary judgment on qualified immunity, we affirm.

I. Factual and Procedural Background

On March 23, 2010, at approximately 10:21 p.m., Sergeant Randy Baker of the Tulia Police Department followed Israel Leija, Jr. to a Sonic Drive In to arrest him on a motion to revoke misdemeanor probation. The arrest warrant had been filed because (1) Leija had failed to complete all of his hours of community service, and (2) a new complaint of domestic violence had been filed against Leija, who was on probation. After some discussion with Baker, Leija fled the scene and headed north towards Interstate Highway 27 ("I 27"), with Baker in pursuit. Texas DPS Trooper Gabriel Rodriguez was on patrol nearby and took the lead in the pursuit. Around mile marker 77, Leija en-

[1] Judge King, a member of the original panel in this case, did not participate in the consideration of this opinion. This matter is decided by a quorum. 28 U.S.C. § 46(d).

tered I 27 and continued north, with Rodriguez directly behind him. During the approximately 18 minutes that the pursuit lasted, Rodriguez followed Leija and captured the pursuit on his video recorder. The video supports the plaintiffs' assertions that although the pursuit proceeded north on 1 27 at speeds between 85 and 110 miles per hour, traffic on the dry roadway was light; Leija remained on the paved portion of the road with his headlights on, did not run any vehicles off the road, did not collide with any vehicles, and did not cause any collisions; there were no pedestrians or stopped vehicles along the road; and all of the pursuit occurred in rural areas, without businesses or residences near the interstate, which was divided by a wide center median.

As the pursuit headed north on I 27, other law enforcement units joined. Officer Troy Ducheneaux of the Canyon Police Department deployed tire spikes underneath the overpass at Cemetery Road and I 27. DPS Troopers set up spikes at McCormick Road, north of Cemetery Road. Other police units set up spikes at an additional location further north, for a total of three spike locations ahead of the pursuit. The record reflects that officers had received training on the deployment of spikes, and had been trained to take a protective position while deploying spikes, if possible, so as to minimize the risk posed by the passing driver.

During the pursuit, Leija twice called the Tulia Police Dispatch on his cell phone, claiming that he had a gun, and that he would shoot at police officers if they did not cease the pursuit. This information was relayed to all officers involved. It was discovered later that Leija had no weapon in his possession.

DPS Trooper Chadrin Mullenix was on patrol thirty miles north of the pursuit, and also responded. Mullenix went to the Cemetery Road overpass, initially intending to set up spikes at that location, but ultimately decided to attempt to disable the car by shooting it. He positioned his vehicle atop the Cemetery Road bridge, twenty feet above I 27, intending to shoot at the vehicle as it approached. Mullenix planned to use his .223 caliber M 4 rifle to disable the vehicle by shooting at its engine block, although he had never attempted that before and had never seen it done before. The district court noted that "[t]here is no evidence one way or another that any attempt to shoot out an engine block moving at 80 mph could possibly have been successful." Mullenix testified that he had been trained in shooting upwards at moving objects, specifically clay pigeons, with a shotgun. He had no training on how to shoot at a moving vehicle to disable it.

Mullenix's dash cam video reflects that once he got to the Cemetery Road overpass, he waited for about three minutes for the pursuit to arrive. Mullenix relayed to Officer Rodriguez that he was thinking about setting up with a rifle on the bridge. Rodriguez replied "10 4," told Mullenix where the pursuit was, and that Leija had slowed down to 85 miles per hour. Mullenix then asked the Amarillo DPS dispatch to contact DPS Sergeant Byrd, Mullenix's supervisor, to tell Byrd that he was thinking about shooting the car and to ask whether the sergeant thought that was "worth doing." According to plaintiffs' allegations, he contacted Byrd to "request permission" to fire at the vehicle. Mullenix denies that he requested or needed "permission," but

stated that he "asked for what [Byrd] advised" and asked to "get his advice." Mullenix did not wait for a response from Sergeant Byrd, but exited his patrol vehicle, took out his rifle, and took a shooting position on the bridge. During this time, the dispatcher relayed a response from Sergeant Byrd to "stand by" and "see if the spikes work first." Mullenix alleges that he was unable to hear that instruction because he had failed to turn on his outside loudspeakers, thereby placing himself out of communication with his dispatch or other officers involved in the pursuit. Plaintiffs allege that since the trunk was open, Mullenix should have heard the response. Mullenix did have his radio microphone on him. During the waiting minutes, Mullenix had a short, casual conversation with Randall County Sheriff's Deputy Tom Shipman about whether he could shoot the vehicle to disable it. When Shipman mentioned to Mullenix that there was another officer beneath the overpass, Mullenix replied that he did not think he would hit that officer.

As the two vehicles approached, Mullenix fired six rounds at Leija's car. There were no streetlights or ambient lighting. It was dark. Mullenix admitted he could not discern the number of people in Leija's vehicle, whether there were passengers, or what anyone in the car was doing. Mullenix testified that at the time of the shooting, he was not sure who was below the overpass, whether Ducheneaux had actually set up spikes there, or where Ducheneaux was positioned beneath the overpass. After Mullenix fired, Leija's car continued north, engaged the spike strip, hit the median and rolled two and a half times. In the aftermath of the shooting, Mullenix remarked to his supervisor,

Sergeant Byrd, "How's that for proactive?" Mullenix had been in a counseling session earlier that same day, during which Byrd intimated that Mullenix was not being proactive enough as a Trooper.

Leija was pronounced dead soon after the shooting. The cause of death was later determined to be one of the shots fired by Mullenix that had struck Leija in the neck. The evidence indicates that at least four of Mullenix's six shots struck Leija's upper body, and no evidence indicates that Mullenix hit the vehicle's radiator, hood or engine block.

The incident was investigated by Texas Ranger Jay Foster. Foster concluded that Mullenix complied with DPS policy and Texas law. The DPS Firearms Discharge Review board reviewed the shooting and concluded that Mullenix complied with DPS policy and Texas law. A grand jury declined to return an indictment of Mullenix. A DPS Office of the Inspector General ("OIG") Report concluded the opposite, that Mullenix was not justified and acted recklessly. The parties disputed the relevance and admissibility of that OIG report, which was subsequently called into question by its author, who testified that he did not have full information on the incident or investigation when he wrote the report. The district court mentioned the report in its statement of facts, but did not further discuss the report.

Beatrice Luna, as the representative of Leija's estate, and Christina Flores, on behalf of Leija's minor child, sued DPS, the Director of DPS Steve McCraw, Trooper Rodriguez, and Trooper Mullenix, in state court, asserting claims under the Texas Tort Claims

Act and 42 U.S.C. § 1983. Defendants removed to federal court. Director McCraw's Motion to Dismiss was granted, and plaintiffs' stipulation of dismissal against DPS and Trooper Rodriguez was granted with prejudice. The sole remaining claim is the § 1983 claim against Mullenix, alleging that he subjected Leija to an unconstitutional use of excessive force in violation of the Fourth Amendment. Mullenix answered and asserted the defense of qualified immunity. After discovery, Mullenix moved for summary judgment on the issue of qualified immunity. On August 7, 2013, the district court issued a memorandum opinion and order denying Mullenix's motion for summary judgment. Mullenix appeals.

II. Discussion

The doctrine of qualified immunity shields "government officials performing discretionary functions ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In reviewing a motion for summary judgment based on qualified immunity, we undertake a two-step analysis. First, we ask whether the facts, taken in the light most favorable to the plaintiffs, show the officer's conduct violated a federal constitutional or statutory right. *See Tolan v. Cotton,* U.S. , 134 S.Ct. 1861, 1865, 188 L.Ed.2d 895 (2014); *Flores v. City of Palacios,* 381 F.3d 391, 395 (5th Cir.2004) (citing *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Second, we ask "whether the de-

fendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Flores,* 381 F.3d at 395 (internal quotation marks omitted) (quoting *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)); *see Tolan,* 134 S.Ct. at 1866. We may examine these two factors in any order. *See Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (overruling in part *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Claims of qualified immunity must be evaluated in the light of what the officer knew at the time he acted, not on facts discovered subsequently. *See Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Lytle v. Bexar Cnty., Tex.,* 560 F.3d 404, 411 (5th Cir.2009). As the Supreme Court has recently reaffirmed, "in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan,* 134 S.Ct. at 1863 (internal quotation marks and alteration omitted) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Our jurisdiction to review a denial of a motion for summary judgment based on qualified immunity is limited to legal questions. *See, e.g., Kinney v. Weaver,* 367 F.3d 337, 346 (5th Cir.2004) (en banc). Because of this jurisdictional limitation, "we consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Id.* at 348; *see Flores,* 381 F.3d at

394. We review the objective reasonableness of the defendant government official's actions and the scope of clearly established law de novo. *See Flores,* 381 F.3d at 394. We "may review the district court's conclusion that issues of fact are material, but not the conclusion that those issues of fact are genuine." *Id.*

A. Constitutional Violation

Under the first prong of the qualified immunity analysis, the plaintiffs must produce facts sufficient to show that Mullenix's actions violated Leija's Fourth Amendment rights. *Tolan,* 134 S.Ct. at 1865; *Flores,* 381 F.3d at 395. "[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). To show a violation, the plaintiffs must produce facts sufficient to show that Leija suffered (1) an injury; (2) which resulted directly from a use of force that was clearly excessive to the need; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi,* 202 F.3d 730, 740 (5th Cir.2000). "This is an objective standard: 'the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.' " *Ramirez v. Knoulton,* 542 F.3d 124, 128 29 (5th Cir.2008) (quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865).

"There are few, if any, bright lines for judging a police officer's use of force; when determining whether an officer's conduct violated the Fourth Amendment, we must slosh our way through the factbound morass of reasonableness." *Lytle,* 560 F.3d at 411 (internal

quotation marks and alteration omitted) (quoting *Scott v. Harris,* 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)). "To gauge the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the need for force," paying "careful attention to the facts and circumstances of each particular case." *Flores,* 381 F.3d at 399. "The intrusiveness of a seizure by means of deadly force is unmatched." *Garner,* 471 U.S. at 9, 105 S.Ct. 1694; *see Flores,* 381 F.3d at 399. Balanced against this intrusion are "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Lytle,* 560 F.3d at 411.

When deadly force is used, it is clear that the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis. *See Plumhoff v. Rickard,* U.S. , 134 S.Ct. 2012, 2021, 188 L.Ed.2d 1056 (2014) (concluding that deadly force was not objectively unreasonable where "it is beyond serious dispute that Rickard's flight posed a grave public safety risk"); *Scott,* 550 U.S. at 386, 127 S.Ct. 1769 (noting that the use of deadly force was not objectively unreasonable when "[t]he car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others"); *see also Garner,* 471 U.S. at 11, 105 S.Ct. 1694 ("Where the suspect poses no immediate threat to the officer ... the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."); *Thompson v. Mercer,* 762 F.3d 433,

440 (5th Cir.2014) (noting that "the question is whether the officer had reason to believe, at that moment, that there was a threat of physical harm"); *Hathaway v. Bazany,* 507 F.3d 312, 320 (5th Cir.2007) (noting that the "reasonableness of an officer's use of deadly force is ... determined by the existence of a credible, serious threat to the physical safety of the officer or to those in the vicinity"); *Bazan ex rel. Bazan v. Hidalgo Cnty.,* 246 F.3d 481, 493 (5th Cir.2001) ("The excessive force inquiry is confined to whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting Bazan."); *Vaughan v. Cox,* 343 F.3d 1323, 1330 (11th Cir.2003) ("Genuine issues of material fact remain as to whether [the suspects'] flight presented an immediate threat of serious harm to [the police officer] or others at the time [the officer] fired the shot.").

With regard to high-speed chases, the Supreme Court has held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott,* 550 U.S. at 386, 127 S.Ct. 1769; *see also Plumhoff,* 134 S.Ct. at 2021 22 (applying *Scott* to a case involving the shooting of a suspect in a high-speed chase). Likewise, this court has recently held that a sheriff who used an assault rifle to intentionally shoot a fleeing suspect as he approached in a truck, after a lengthy, dangerous chase, did not violate the Fourth Amendment. *Thompson,* 762 F.3d at 438. These cases, however, do not establish a bright-line rule; "a suspect that is fleeing in a motor vehicle is not so inherently

dangerous that an officer's use of deadly force is *per se* reasonable." *Lytle,* 560 F.3d at 416. Instead, *Scott, Plumhoff* and *Thompson* are simply applications of the Fourth Amendment's reasonableness requirement to particular facts. *See Plumhoff,* 134 S.Ct. at 2020 22; *Scott,* 550 U.S. at 382 83, 127 S.Ct. 1769; *Thompson,* 762 F.3d at 438. "Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public. As the cases addressing this all-too-common scenario evince, the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable." *Lytle,* 560 F.3d at 415; *see Thompson,* 762 F.3d at 438.

Mullenix asserts that, as a matter of law, his use of force was not objectively unreasonable because he acted to protect other officers, including Officer Ducheneaux beneath the overpass and officers located further north up the road, as well as any motorists who might have been located further north. However, accepting plaintiffs' version of the facts (and reasonable inferences therefrom) as true, these facts are sufficient to establish that Mullenix's use of deadly force was objectively unreasonable. *See Newman v. Guedry,* 703 F.3d 757, 762 (5th Cir.2012) ("Mindful that we are to view the facts in a light most favorable to Newman, and seeing nothing in the three video recordings to discredit his allegations, we conclude, based only on the evidence in the summary-judgment record, that the use of force was objectively unreasonable in these circumstances."); *Haggerty v. Tex. Southern Univ.,* 391 F.3d 653, 655 (5th Cir.2004) ("In an interlocutory appeal in which the defendant asserts qualified immunity, to the extent that the district court found that

genuine factual disputes exist, we accept the plaintiff's version of the facts (to the extent reflected by proper summary judgment evidence) as true."); *see also Tolan,* 134 S.Ct. at 1863 ("[I]n ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.").

Many of the facts surrounding Leija's flight from police, viewed in the light most favorable to the plaintiffs, negate the risk factors central to the reasonableness findings in cases like *Scott, Plumhoff* and *Thompson*. According to the plaintiffs' version of the facts, although Leija was clearly speeding excessively at some times during the pursuit, traffic on the interstate in the rural area was light. There were no pedestrians, no businesses and no residences along the highway, and Leija ran no other cars off the road and engaged no police vehicles. Further, there is evidence showing that Leija had slowed to 85 miles per hour prior to the shooting. Spike systems, which could have ended the pursuit without resort to deadly force, had already been prepared in three locations ahead of the pursuit. In *Scott* and *Plumhoff,* on the other hand, multiple other methods of stopping the suspect through alternate means had failed, the suspects were traveling on busy roads, had forced multiple other drivers off the road, had caused collisions with officers or innocent bystanders, and at the time of the shooting were indisputably posing an immediate threat to bystanders or other officers in the vicinity. *See Plumhoff,* 134 S.Ct. at 2017 18, 2021 22; *Scott,* 550 U.S. at 379 80, 383 84, 127 S.Ct. 1769. Likewise, in *Thompson,* this court found that the officers had tried "four

times" to stop the chase with "alternate means of seizure before resorting to deadly force" to stop a driver who posed "extreme danger to human life." *Thompson,* 762 F.3d at 438, 440. The *Thompson* court explained that

> even the Thompsons concede that their son represented a grave risk when he "reached speeds exceeding 100 miles per hour on the interstate, when he ran numerous stop signs, when he had 'recklessly' driven on the wrong side of the road, [and] when he avoided some road spikes [and] took officers down Blue Flat Road where a horse was loose." Indeed, parts of the police camera footage might be mistaken for a video game reel, with Keith disregarding every traffic law, passing other motorists on the left, on the right, on the shoulder, and on the median. He occasionally drove off the road altogether and used other abrupt maneuvers to try to lose his pursuers. The truck was airborne at least twice, with Keith struggling to regain control of the vehicle. In short, Keith showed a shocking disregard for the welfare of passersby and of the pursuing law enforcement officers.

Id. at 438.

To the extent that we must view facts in accordance with the video, *see Scott,* 550 U.S. at 378 80, 127 S.Ct. 1769; *Thompson,* 762 F.3d at 439, the video supports the plaintiffs' version of the facts. In *Scott,* the plaintiff argued that the force used was unreasonable because the driver posed "little, if any actual threat to pedestrians or other motorists." *Scott,* 550 U.S. at 378, 127 S.Ct. 1769. However, the Court said,

> [t]he videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379 80, 127 S.Ct. 1769. The Court relied on the video to resolve disputed facts, holding that the video "blatantly contradicted" the plaintiff's version of the facts, "so that no reasonable jury could believe it." *Id.* at 380, 127 S.Ct. 1769. Likewise, in *Thompson,* the plaintiffs argued that the threat posed by the chase had ended because the rural road was empty by the time of the shooting, but this court found that "the Thompsons' characterization of the scene is belied by the video evidence," which showed multiple cars pulling over to avoid the chase, and dangerous conditions on the road, which had limited visibility and no shoulder for cars to pull onto. *Thompson,* 762 F.3d at 439. Here, however, the video supports the plaintiffs' assertions that during the pursuit, traffic on the divided

highway was light, there were no pedestrians, businesses or residences along the highway, and Leija ran no other cars off the road and did not engage any police vehicles.

Further, in concluding that the use of force was not objectively unreasonable, the *Thompson* opinion relies repeatedly on the fact that the officers had made four attempts to disable the vehicle with "alternate means of seizure before resorting to deadly force." *Thompson,* 762 F.3d at 438, 440. With regard to the existence of a Fourth Amendment violation, the holding of *Thompson* is that "after multiple other attempts to disable the vehicle failed, it was not unreasonable for Mercer to turn to deadly force to terminate the dangerous high-speed chase." *Id.* at 438. The opinion later similarly concludes that "law enforcement reasonably attempted alternate means of seizure before resorting to deadly force," *id.* at 440, and discusses this fact twice in its discussion of whether the law was sufficiently clearly established, *id.* at 440 41. In the instant case, there were spikes already in place under the bridge, and officers prepared to deploy spikes in two additional locations up the road. Yet Mullenix fired his rifle at Leija's vehicle before Leija had encountered any of the spikes. In contrast to *Thompson,* the alternative methods of seizure that were already prepared were never given a chance to work before Mullenix resorted to deadly force.

We certainly do not discount Leija's threats to shoot officers, which he made to the Tulia dispatcher and which were relayed to Mullenix and other officers. However, allegedly being armed and in a car fleeing are not, by themselves, sufficient to establish that

Leija posed such an imminent risk of harm that deadly force was permitted. In a case involving the shooting of a suspect, we have stated that the "core issue" is "whether the officer reasonably perceived an immediate threat." *Reyes v. Bridgwater,* 362 Fed.Appx. 403, 408 (5th Cir.2010). "[T]he focus of the inquiry is the act that led the officer to discharge his weapon." *Id.* at 406 (internal quotation marks and alteration omitted) (quoting *Manis v. Lawson,* 585 F.3d 839, 845 (5th Cir.2009)); *see also Bazan,* 246 F.3d at 493 ("The excessive force inquiry is confined to whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting."). The factual scenario here is substantially different, in terms of the imminence and immediacy of the risk of harm, from situations where we have granted qualified immunity to officers who shot an armed suspect, or a suspect believed to be armed. *See Ramirez,* 542 F.3d at 127, 129 (suspect stopped by the side of the road after a brief chase displayed a gun, repeatedly ignored police commands, was located yards from police officers, and brought his hands together in a manner that indicated he may have been reaching for the gun, prompting officer to shoot him); *Ballard v. Burton,* 444 F.3d 391, 402 03 (5th Cir.2006) (mentally disturbed suspect "refused to put down his rifle, discharged the rifle into the air several times while near officers, and pointed it in the general direction of law enforcement officers"); *Reese v. Anderson,* 926 F.2d 494, 500 01 (5th Cir.1991) (suspect stopped after a high-speed chase refused to exit the car, refused to follow police commands, repeatedly raised and lowered his hands, turned away from the officer and reached

lower toward the floorboard, prompting the officer to shoot him); *compare Reyes,* 362 Fed.Appx. at 407 (fact issue precluded qualified immunity where suspect was armed with a knife, but made no threatening gesture or motion), *with Harris v. Serpas,* 745 F.3d 767, 773 (5th Cir.2014) (qualified immunity granted to officer where video confirmed that suspect "was standing up out of bed and had raised the knife above his head at the time the shots were fired"). We discuss these cases not because we hold that an officer must actually see a weapon before taking action to protect himself or others from the suspect, but because they illustrate that, even when a weapon is present, the threat must be sufficiently imminent at the moment of the shooting to justify deadly force.

In *Thompson,* the court did note the existence of a stolen gun in the car of the fleeing suspect as a fact that supported its conclusion that the suspect posed an "ongoing threat of serious harm," even though the officer had no way of ascertaining whether the suspect intended to use the weapon. *Thompson,* 762 F.3d at 439 (quotation omitted). However, in *Thompson,* the officer also knew at the time of the shooting that the suspect was fleeing in a stolen car with a stolen weapon, had abducted a woman during his flight, and that the "unidentified suspect was admittedly suicidal and had already acted with utter desperation in attempting to evade law enforcement." *Id.* Thus, the court found that the officer was "justified in assuming" that the presence of the stolen weapon contributed to the continuing threat posed by suspect. *Id.*

Here, although Leija had stated to the dispatcher that he was armed and would shoot officers, he was

not fleeing the scene of a violent crime, no weapon was ever seen, and at the time of the shooting, most officers and bystanders were miles away, where they would not have been encountered until after the spikes were given a chance to stop the chase. On appeal, Mullenix relies heavily on the presence of Ducheneaux beneath the overpass, and the risk that Leija could shoot Ducheneaux as he sped by. However, he also testified that he did not actually know Ducheneaux's position or what he was doing beneath the overpass.[2] Mullenix argues that he knew that an officer had to be positioned near a roadway to deploy spikes, but the facts, taken in the light most favorable to the plaintiffs, also show that officers were trained to deploy spikes in a location where they were able to take a protective position, that there were several pillars at the Cemetery Road overpass and that Ducheneaux had positioned himself behind a pillar as he was trained to do. Further, just prior to the shooting, Sheriff's Deputy Shipman mentioned Ducheneaux's presence beneath the overpass, and Mullenix replied only that he did not think *he* would hit Mullenix; he did not indicate that he perceived a threat to Ducheneaux from Leija. In this situation, the facts, viewed

---

[2] We do not hold that an officer must necessarily have another officer that he believes to be in danger in his sightline at the time he takes action. We merely state that the facts, viewed in favor of the plaintiffs, are sufficient to show that Mullenix-positioned atop a bridge in the dark of night, and eventually out of contact with other officers-lacked sufficient knowledge to determine whether or not Ducheneaux was in immediate danger from Leija, or whether Mullenix's own actions were decreasing the risk to Ducheneaux.

in the light most favorable to the plaintiffs, do not establish that Mullenix reasonably perceived an immediate threat at the time of the shooting, sufficient to justify the use of deadly force.

The plaintiffs also point to evidence in the record showing that Mullenix heard the warning that Leija had said he had a gun six minutes before the shooting, and went to the bridge and waited three minutes for Leija's car to approach. During this period Mullenix had time to consider his approach, including time to ask for his supervisor's opinion, inform Rodriguez of his intentions, and discuss the feasibility of shooting the car with Shipman. This is not the type of "split-second judgment" that officers must make when faced with an imminent risk of harm to themselves or others. *See Plumhoff,* 134 S.Ct. at 2020; *Graham,* 490 U.S. at 396 97, 109 S.Ct. 1865; *Hathaway,* 507 F.3d at 320 21. Although Mullenix relies heavily on the assertion that it is up to the "officer on the scene" to make judgments about the use of deadly force, Mullenix was not the only, or even the primary, officer on the scene. Officer Rodriguez was immediately in pursuit of Leija, and multiple other officers from various law enforcement agencies were on the scene at Cemetery Road and were at multiple locations further north along I 27, planning to deploy tire spikes to stop the suspect. There is no evidence that any other officer from any of the law enforcement agencies involved in the pursuit, hearing the same information that Mullenix heard, including the information regarding Leija's threats, decided that deadly force was necessary or warranted. Further, via the dispatcher, Mullenix asked his supervisor, Sergeant Byrd, about his

plan to shoot at the car. It is undisputed that Sergeant Byrd advised Mullenix to "stand by" and "see if the spikes work first." While Mullenix contends he did not hear his supervisor's command to stand by, plaintiffs proffered evidence that he could have heard that command. If plaintiffs' evidence is taken as true, it supports the conclusion that Mullenix acted objectively unreasonably. Lastly, Mullenix testified that he intended to shoot the engine block of the car in an attempt to disable it, although there is no evidence that shooting at the engine is a feasible method of immediately disabling a car. His justification for the use of force was to disable the car, but alternative methods were already in place to achieve the same goal, undermining the asserted necessity for resorting to deadly force at that particular instant.

We conclude that the plaintiffs have produced facts that, viewed in their favor and supported by the record, establish that Mullenix's use of force at the time of the shooting was objectively unreasonable under the Fourth Amendment.

B. Clearly Established Law

Under the second prong of the qualified immunity analysis, plaintiffs must show that Mullenix's actions violated a constitutional right that was sufficiently clearly established. *Flores,* 381 F.3d at 395. For a right to be clearly established, "[t]he contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against

the backdrop of the law at the time of the conduct." *Brosseau v. Haugen,* 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). "The central concept [of the test] is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.' " *Kinney,* 367 F.3d at 350 (quoting *Hope,* 536 U.S. at 740, 122 S.Ct. 2508). Further, while the Supreme Court has stated that "courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case,' " it has also recently reminded us that we "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan,* 134 S.Ct. at 1866 (quoting *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151).

While Mullenix devotes the bulk of his argument to this prong of the qualified immunity analysis, "We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle,* 560 F.3d at 417. "This holds as both a general matter and in the more specific context of shooting a suspect fleeing in a motor vehicle." *Id.* at 417 18 (internal citations omitted) (citing *Kirby v. Duva,* 530 F.3d 475, 484 (6th Cir.2008); *Vaughan,* 343 F.3d at 1332 33); *see also Sanchez v. Fraley,* 376 Fed.Appx. 449, 452 53 (5th Cir.2010) (holding that "it was clearly established well before [April 23, 2007] that

deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," and "the threat of serious harm must be immediate"); *Reyes,* 362 Fed.Appx. at 406 ("Unlike some areas of constitutional law, the question of when deadly force is appropriate and the concomitant conclusion that deadly force is or is not excessive is well-established.").

Mullenix points to the Supreme Court's recent decision in *Plumhoff* to argue that the law was not clearly established. The *Plumhoff* Court relied primarily on *Brosseau,* which held that as of 1999 it was not clearly established that it was objectively unreasonable force "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Brosseau,* 543 U.S. at 195 97, 200, 125 S.Ct. 596. However, *Plumhoff* holds only that where a fleeing suspect "indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby," a police officer's use of deadly force is not clearly established as unreasonable. *Plumhoff,* 134 S.Ct. at 2021 22, 2023; *see Brosseau,* 543 U.S. at 200, 125 S.Ct. 596. It does not, however, undermine the clearly established law that an officer may not use deadly force against a fleeing suspect absent a sufficient risk to officers or bystanders. *See Lytle,* 560 F.3d at 417 18. *Thompson* is no different. Similar to *Plumhoff,* it holds that the officer's use of force to stop a high-speed chase was not clearly established as unreasonable where the fleeing suspect had stolen a car and kidnapped a woman, had evaded four attempts to

stop the car with alternate methods of seizure, and whose driving continued to pose a "tremendous risk" to the public and other officers. *Thompson,* 762 F.3d at 440 41.

At the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment.[3]

III. Conclusion

For the foregoing reasons, we AFFIRM the denial of summary judgment.

---

[3] Mullenix makes a separate argument that the district court relied on inadmissible summary judgment evidence, specifically the OIG report concluding that Mullenix's actions were not justified. This report was later called into question by its author, who testified that it was not based on a full review of the incident. However, there is no indication in the district court's order that it relied on the OIG report in denying summary judgment, and we likewise do not rely on it. If there are questions as to its admissibility, the district court can resolve those in due course as the litigation proceeds.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

BEATRICE LUNA, Individually and as Representative of the Estate of ISRAEL LEIJA, JR., Deceased, and CHRISTINA MARIE FLORES, as Next Friend of J.L.L. and J.V.L., Minor Children,	§	
	§	CIVIL ACTION
PLAINTIFFS,	§	CAUSE NUMBER
vs.	§	
	§	2:12 CV 152 J
DPS TROOPER CHADRIN LEE MULLENIX, in his Individual Capacity,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A total of six rifle rounds were filed by Texas Department of Public Safety Trooper Chadrin Lee Mullenix at a fleeing automobile driven by Israel Leija, Jr., who died as a direct result of multiple wounds from that gunfire. Defendant Mullenix moves for summary judgment in this civil rights case on the basis of qualified immunity. The Plaintiffs and the Defendant have also filed counter-motions raising objections to

all or parts of certain filed summary judgment exhibits.

Background Facts

On the evening of March 23, 2010.[1] Sgt. Randy Baker of the Tulia, Texas, Police Department was searching for Israel Leija, Jr. to serve a misdemeanor arrest warrant on Leija. At approximately 10:21 p.m., Baker spotted Leija's car at a Sonic Drive In and moved to effect an arrest. Baker approached Leija's vehicle and informed Leija that he was under arrest. Leija, who was never taken into custody, fled the scene and headed north towards Interstate Highway Number 27 (I 27), with Baker in pursuit. Texas DPS Trooper Gabriel Rodriguez joined in the pursuit, taking the lead.

At approximately mile marker 77 of I 27, Leija entered a rural stretch of I 27 and began heading north on I 27, with Rodriguez directly behind him in pursuit. During the approximately 18 minutes that the pursuit lasted, Rodriguez followed Leija, capturing the pursuit on his video recorder.[2] Traffic on the dry roadway was light.

The pursuit proceeded north on I 27 at speeds up to 110 mph. During the entire pursuit, Leija remained on the paved portion of the road with his headlights on. Although Leija did exceed the speed limit and did

---

[1] The Court notes that the pleadings state two different dates on which the police shooting occurred—March 23, 2010, and October 23, 2010. Defendant Mullenix agreed in his deposition that the shooting occurred on the evening of March 23, 2010.

[2] Copies of police videos are included in Plaintiffs' filed Appendix as exhibits.

refuse to stop, he did not run any vehicles off the roadway, did not collide with any vehicles, and did not cause any collisions. There were no pedestrians along the route that were in danger of being hit by Leija, and no disabled vehicles. All of the pursuit occurred in rural areas. There were no businesses or residences located in proximity to the controlled-access interstate highway. The roadway was divided by a wide center median, mostly flat, dry, and the weather that night was good.

During the pursuit, Leija twice called the Tulia Police Dispatch on his cell phone. Leija claimed that he had a gun, and that he would shoot at a police officer if they didn't back off. Leija in fact had no weapon in his possession, which would later be confirmed by law enforcement.

As the pursuit headed north on I 27, other law enforcement units joined in. Officer Troy Ducheneaux of the Canyon, Texas, Police Department deployed tire spikes underneath the overpass at Cemetery Road and I 27, about mile marker 103. Troopers Chris Ecker and Dennis Brassfield set up spikes at McCormick Road, which was north of Cemetery Road. Other police units set up spikes at a location further north, for a total of at least three spiking locations on I 27 ahead of Leija.

DPS Trooper Chadrin Mullenix also responded to the pursuit. With knowledge that other units were setting up spikes at other locations, *possibly* including underneath the Cemetery Road overpass, Mullenix decided not to deploy his spike system. Instead, Mullenix positioned his vehicle atop the Cemetery Road

bridge, about twenty feet above the I 27 roadway. Mullenix testified in his deposition that he intended to shoot down at Leija's moving vehicle as it approached, hoping that he could use his .223 caliber M 4 rifle to take out the engine block of the vehicle.[3] Mullenix testified that he had never attempted such a shot before, had not been trained for it, and had never seen such a tactic done. He testified that he had, however, been trained in shooting upwards, at moving clays, with a shotgun.

Mullenix testified that he contacted his Amarillo DPS dispatch to ask them to contact his supervisor, DPS Sgt. Robert Byrd, to Plaintiffs' allege "request permission" to fire at the vehicle. Mullenix denies that he requested "permission." He alleges that he did not need anyone's "permission" before he fired because, under DPS policy and the specific circumstances at that place and time, the decision to fire was up to him and him alone.

In any event, not waiting in his vehicle on a response from Sgt. Byrd, Mullenix exited his patrol vehicle, closed his car door, opened his trunk, took out his rifle, left the trunk lid open, and took a shooting position above the edge of the grassy median, near the center of the Cemetery Road bridge, on the South side. Mullenix crouched behind the concrete bridge's railing, waiting for the pursuit to arrive at his location.

---

[3] There is no evidence in this record about the metal composition, type, weight in grains, or power of the ammunition used by Mullenix, or the metal composition of the engine block in Leija's vehicle. There is no evidence—one way or another—that any attempt to shoot out an engine block moving at 80 mph could possibly have been successful.

During this time, DPS dispatch responded that Sgt. Byrd declined to give permission to shoot, but instructed instead for Mullenix to wait and give the spikes a chance to work.

Mullenix alleges that he was unable to hear that instruction because he had failed to turn his outside loudspeakers on, thereby placing himself out of communication with his dispatch for the time that it took the pursuit to arrive at his location. Mullenix did have his radio microphone on him. During the waiting minutes, Mullenix had a recorded radio conversation with Randall County Sheriff's Deputy Tom Shipman about whether Mullenix could disable the vehicle by shooting it, and how and where to shoot the vehicle to best accomplish disabling it. Nearby, north of and below Mullenix, was Officer Ducheneaux's police vehicle, which did have its external loudspeakers turned on. Plaintiffs allege that because Mullenix's trunk was open he should have been able to hear his police radio, even though his car doors were closed and his external loudspeakers were not turned on. Plaintiffs further allege that Mullenix should have been able to hear on Ducheneaux's police radio the order not to fire on Leija.

Mullenix testified that he had a clear view towards the south and was able to make out the headlights of Leija's vehicle, with Rodriguez in pursuit, as they crested a low rise south of the Cemetery Road overpass. Because of the darkness, Mullenix was unable to see any actions of Leija, anything within his vehicle, or see whether there were other people inside of the vehicle. He assumed that there were no other persons inside the vehicle because, he testified, if there

were Officer Rodriguez probably would have told him about them. Rodriguez testified that he could only see the back of Leija's head and hands as Rodriguez followed in pursuit.

As the two vehicles approached, Mullenix pointed his rifle down onto Leija's vehicle and fired six rounds as the vehicle closed the gap towards the overpass. There is no testimony in this record where any of the six shots landed, except for the round or rounds which penetrated the windshield and killed Leija. There is no evidence that Mullenix hit the vehicle's radiator, hood or engine block. There is evidence that he hit Leija's upper body with four or more of his six shots.

After Leija's vehicle passed underneath the overpass, engaging the tire spike strip deployed there by Officer Ducheneaux, Leija's vehicle went out of control, rolling into the center median north of the overpass. There is evidence that, unknown to Officer Mullenix when he fired, there were at least two vehicles passing in the southbound lanes of the interstate at this time. During the incident, Officer Ducheneaux's vehicle was parked on the center median on the north side of the bridge.

Leija was pronounced dead a short time later. The cause of death was determined to be one or more of the shots fired by Mullenix that had fatally struck Leija in the neck, shoulder, upper arm, and possibly in his face. Subsequent examination of the crime scene by the DPS accident team revealed that Leija did not have a firearm inside his vehicle, and that Leija had not recently fired a firearm.

In the immediate aftermath of the shooting, Mullenix remarked to his supervisor, Sgt. Byrd, "How's that for proactive?" Mullenix's comment referred to a counseling session earlier in the same evening, during which Mullenix had been counseled, encouraged and/or criticized by Byrd for not being "proactive" enough as a Trooper. Byrd acknowledged that Mullenix had been having personal difficulties around this time, and that Mullenix was failing to live up to Byrd's expectations of how a DPS Trooper should be doing his job.

Defendant Mullenix testified in his deposition that, as of March 23, 2010, he had never met Leija, did not have any knowledge about Leija's criminal record, had no information that Leija had ever committed a violent crime or a felony, and did not personally know Leija. Mullenix testified that he did not know what the arrest warrant for Leija was for, but did know that an arrest warrant existed and that Leija was fleeing arrest. He testified that he had no information, at the time of the shooting, to lead him to believe that Leija was suicidal in any way. He did know that Leija was speeding, had told the Tulia dispatcher that he had a weapon with him in the car, and had been informed that Leija might be intoxicated.

A subsequent DPS review of the incident by the Office of Inspector General concluded that the claim by Trooper Mullenix that he used his firearm as a tool to disable Leija's vehicle was not justified given the high speed of the fleeing vehicle, the elevated position Mullenix chose to deploy, the amount of time Mullenix took to discuss using his firearm with Trooper Rodri-

guez and Deputy Shipman, and Mullenix's conversation with the DPS communications operator to request permission to shoot at Leija's vehicle. The DPS IG concluded that the evidence did not justify Mullenix's actions, and that the firearm discharge was reckless and without due regard for the safety of Canyon PD Officer Ducheneaux or Leija. The IG concluded that the evidence did not justify the use of deadly force, and that a classification of "Not Justified" was appropriate. *See* Plaintiff's Appendix Exhibit 7. The Defendant argues that the IG's conclusions are based upon inadequate information, are not reliable, are not relevant, are not properly authenticated, lack foundation, and should be ignored.

Legal Standards

A motion for summary judgment should be granted if the movant shows that there is no genuine issue as to any material fact. Fed. R. Civ. Pro. 56(a). A party who moves for summary judgment has the burden of identifying the parts of the pleadings and discovery on file that, together with any affidavits, show the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmovant must set forth specific facts that show a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To determine whether a genuine issue of material fact exists, courts must resolve all ambiguities of fact in favor of the nonmoving party. *Id.* Summary judgment is mandated if the nonmovaant fails to sufficiently establish the existence of an element essential to her case on which

she bears the burden of proof at trial. *Nebraska v. Wyoming,* 507 U.S. 584, 590, 113 S.Ct. 1689, 123 L.Ed.2d 317 (1993); *Celotex Corp.,* 477 U.S. at 322; *Cutrera v. Bd. of Supervisors of La. State Univ.,* 429 F.3d 108, 110 (5th Cir.2005); *Patrick v. Ridge,* 394 F.3d 311, 315 (5th Cir.2004).

Qualified Immunity

Qualified immunity is a defense that protects government officials from suit when they exercise the discretionary functions of their office. See *Harlow v. Fitzgerald,* 457 U.S. 800, 815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In order to overcome a defense of qualified immunity, a plaintiff must establish that: "(1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established at the time of the challenged conduct." *Morgan v. Swanson,* 659 F.3d 359, 371 (5th Cir.2011) (citing *Ashcroft v. al-Kidd,* U.S. , , 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011)). The court may examine these factors in any order. *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (*overruling in part Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). It is the Plaintiffs' burden to present evidence that a defendant is not entitled to qualified immunity when the defense is raised. *See Bazan ex rel. Bazan v. Hidalgo County,* 246 F.3d 481, 489 (5th Cir.2001).

Claims of qualified immunity are not judged on twenty-twenty hindsight, or in light of knowledge ascertained after an event, but by looking through the eyes of the officer, considering what that officer knew about the situation at the time force was used. *Graham v. Connor,* 490 U.S. 386, 396 97, 109 S.Ct. 1865,

104 L.Ed.2d 443 (1989); *Poole v. City of Shreveport,* 691 F.3d 624, 630 (5th Cir.2012).

Constitutional Violation

The use of deadly force for apprehension is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner,* 477 U.S. 1, 7, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1985). To support an allegation of excessive force, a plaintiff must show, "(1) an injury, (2) which resulted directly and only from the use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Ontiveros v. City of Rosenberg, Tex.,* 564 F.3d 379, 382 (5th Cir.2009) (citing *Freeman v. Gore,* 483 F.3d 404, 410 (5th Cir.2007). When examining whether the excessiveness was clearly unreasonable, a court should consider, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The immediacy of the threat and the reasonableness of the use of force are contested in this case.

Objective Unreasonableness

The Court must also consider whether the Defendant's use of force, though a violation of the Fourth Amendment, was nevertheless objectively reasonable in light of clearly established law at the time the challenged conduct occurred. *Bush v. Strain,* 513 F.3d 492, 501 (5th Cir.1998). "The central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long

as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.' " *Id.* at 502 (citing *Kinney v. Weaver,* 367 F.3d 337, 350 (5th Cir.2004) (*en banc*) (quoting *Hope v. Pelzer,* 536 U.S. 730, 740, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002))). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation." *Graham v. Connor,* 471 U.S. 386, 396 7, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1989). An officer's use of deadly force is reasonable against a moving vehicle when there exists "a credible, serious threat to the physical safety of the officer or to those in the vicinity." *Hathaway v. Bazany,* 507 F.3d 317 (5th Cir.2007). In *Tennessee v. Garner,* the Supreme Court determined that "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable ... where the suspect poses no immediate threat to the officer and no threat to others." *Tennessee v. Garner,* 471 U.S. at 11.

Discussion and Analysis

The Court has considered the contested exhibits only to the extent that they are competent summary judgment evidence. The Court notes that many of the specific facts alleged by the Defendant to be "undisputed" are, in fact, strongly disputed, are speculative, are questions of reasonable interpretation for a jury, and/or are genuine issues of disputed material facts.

It was clearly established law as of March 23, 2010 that a police officer's use of deadly force is justified

only if a reasonable officer in Defendant Mullenix's position had cause to believe that there was an immediate threat of serious physical harm or death to himself which Officer Mullenix has testified did not exist in this case or there existed at the time of the shooting an immediate threat of serious physical harm or death to others. *See Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). Defendant Mullenix testified during his deposition that he believed he was justified in firing on Leija because he believed there was a risk of serious injury or death to other officers, either the officer he did not see but thought might be somewhere under the Cemetery Road bridge, or to other officers further up the interstate who were setting out tire spikes, or even possibly to innocent bystanders in the cities of Canyon or Amarillo, if Leija traveled that far north.

As to the existence of an immediate risk of serious injury or death to other officers or to innocent bystanders, the summary judgment evidence in this case presents genuine issues of material fact as to whether that risk did, or did not, exist. Trooper Mullenix testified that he thought an officer was somewhere under the bridge because he saw a patrol car down there, with its overhead lightbar flashing. He did not believe Officer Ducheneaux was there, because he thought Ducheneaux was further north setting out tire spikes. Mullenix testified that he did not know who down there, or where the unknown officer was located at the time, and that he did not know whether he or she was inside or outside their patrol car or behind a bridge pillar. Mullenix testified, however, that he discharged his rifle to protect the unknown officer from possibly

being fired upon by Leija as he drove by at 80 or so miles per hour, and to protect other persons Mullenix believed were farther north in possibly vulnerable positions.

There are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances. Plaintiffs have tendered evidence raising the issue whether a reasonable officer would not have fired because of the possibly resulting increased risk to persons traveling southbound on I 27 at the time, or to Officer Ducheneaux. The evidence in the record raises the issue whether Mullenix was justified in his decision to fire six times upon Israel Leija, Jr., or whether a reasonable officer would not have fired at all given Mullenix's lack of relevant training and the caliber of weapon he utilized for this attempted stop. There are genuine issues of material fact as to whether Mullenix did or did not hear, and should have obeyed, the instructions from his superior officer to let the other officers responding to the situation first try the planned non-lethal or less-dangerous methods being utilized to end the high-speed pursuit. There also exist genuine questions of material fact as to the existence of any *immediate* threat to officers involved in the pursuit, including Officers Ducheneaux or Rodriguez, or an immediate threat to other persons who were miles away from the location of the shooting at issue in this case.

Conclusions

For all of the foregoing reasons, summary judgment can not be granted on the specific facts of this case. Defendant's motion for summary judgment is

therefore denied.

This is not to be construed as a ruling that any summary judgment exhibit is or is not admissible as a trial exhibit. The Court will consider objections to trial exhibits when and if the specific exhibits or portions thereof are offered at trial, and proper objections are timely made.

It is SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13 10899

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2014

Lyle W. Cayce
Clerk

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant Appellant

Appeal from the United States District Court for the Northern District of Texas, Amarillo

---

ON PETITION FOR REHEARING EN BANC

(Opinion August 28, 2014, 765 F.3d 531)

Before KING, HAYNES, and GRAVES, Circuit Judges.

ON PETITION FOR REHEARING EN BANC
PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 6 judges voted in favor of rehearing (Judges Jolly, Davis, Jones, Smith, Clement, and Owen), and 9 judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Elrod, Southwick, Haynes, Graves, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.

United States Circuit Judge

E. GRADY JOLLY, Circuit Judge, dissenting from the Denial of Rehearing En Banc, joined by KING, DAVIS, JONES, SMITH, CLEMENT and OWEN, Circuit Judges:

Certainly, I have great personal respect for all members of the instant panel. But, I will be candid: My impression is that the panel majority either does not understand the concept of qualified immunity or,

in defiance thereof, impulsively determines the "right outcome" and constructs an opinion to support its subjective judgments, which necessarily must ignore the concept and precedents of qualified immunity.

The concept of qualified immunity assumes that law enforcement officers want to respect the constitutional rights of citizens who violate the law or are suspected of violating the law. *Accord Ashcroft v. al-Kidd,* U.S. , 131 S.Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments" and "protects all but the plainly incompetent or those who knowingly violate the law." (internal quotation marks and citation omitted)). For an officer to respect those constitutional rights, he must know or have reasonable understanding of what the legal standards are that govern his conduct. *Presley v. City of Benbrook,* 4 F.3d 405, 409 (5th Cir.1993) ("[T]he essence of qualified immunity [is] that an officer may make mistakes that infringe constitutional rights and yet not be held liable where, given unclear law or uncertain circumstances, it cannot be said that she knew she was violating a person's rights."). The only means for an officer to have that understanding is by notice of the law through the decisions of the courts. Officers cannot be held liable for a violation of legal standards when there are three or four versions of the law applicable to judging the officers' decisions and responses to criminal suspects, arrestees, or those committing crimes. *McClendon v. City of Columbia,* 305 F.3d 314, 332 (5th Cir.2002) (en banc) (Qualified immunity must be granted "if a reasonable official would be left

uncertain of the law's application to the facts confronting him."); *Del A. v. Edwards,* 855 F.2d 1148, 1150 (5th Cir.1988) ("When the law is unclear ... the official ... require[s] protection [in the form of qualified immunity] so that fear of suit will not cloud the decision-making process."). Consequently, the constitutional law must be clearly established so as to provide reasonable notice of an officer's duties to citizens. To give such required notice, the right at issue cannot be defined at a high level of generality if it is to have any meaning that serves the purpose of qualified immunity. *Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (warning that "if the test of 'clearly established law' were to be applied at [a high] level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of [qualified immunity and plaintiffs] . . . would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."). Furthermore, qualified immunity recognizes that, even where constitutional rights are clearly established, an officer should not be liable for his conduct unless his conduct was unreasonable in the light of the clearly established law. *Accord Brosseau v. Haugen,* 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.").

The initial task here is to define the clearly established law that governs the specific facts of this case. If such law cannot reasonably be defined, the inquiry

ends, and the officer is not liable because he had no notice of the rights that he was bound to respect. If there is clearly established law, the qualified immunity analysis then asks: given the factual situation the officer confronted, was his conduct unreasonable in the light of the clearly established law of which he reasonably had notice. This final question acknowledges that, on some occasions, the safety of the public or the safety of the officers and the safety of surrounding lives is so at risk that the officer must make a snap judgment that requires him to act notwithstanding the lapidary principles of the law at issue.

The panel majority regrettably has demonstrated its lack of grasp of these qualified-immunity principles in fundamental ways and has done so from the beginning of its efforts to decide this case, through its present unexplained and puzzling reversal of positions:

• At the outset, the majority was doggedly determined to send this case to a jury against all precedent and notwithstanding Judge King's clear and unanswered dissent. My impression is confirmed by the evolution of the majority's approach from its earlier opinion [1] to today's substitute. In the first version, the majority holds that a jury is needed to determine whether Mullenix's conduct was reasonable under the Fourth Amendment. In its new opinion, the majority nods to the need for a jury, but it

---

[1] *Luna v. Mullenix,* 765 F.3d 531 (5th Cir.2014), vacated and replaced by *Luna v. Mullenix,* 773 F.3d 712 (5th Cir.2014). *Luna v. Mullenix,* 765 F.3d 531 (5th Cir.2014), vacated and replaced by *Luna v. Mullenix,* 773 F.3d 712 (5th Cir.2014).

proceeds to hold that not one of the facts supporting Mullenix's decision to disable Leija's car to prevent his continued threat to the police and the public is legally sufficient to render the shooting objectively reasonable under the Fourth Amendment. The panel's complete turnaround of its earlier dogmatic assertions, with no explanation, leaves the bench and bar to wonder: What is going on here? The confusing nature and unorthodox analysis of the opinion both initially and on rehearing will surely befuddle all readers; not the least, those officers who consider themselves familiar with the clearly established law of the Supreme Court and this Court.[2]

• The majority fails to recite or accept the clearly established law that applies to car-chase cases, and then dismissively states, "We need not dwell on this issue." "Dwelling" would have led to objective analysis of the relevant standard, articulated by the U.S. Supreme Court in *Scott v. Harris,* 550 U.S. 372, 386 [127 S.Ct. 1769, 167 L.Ed.2d 686] (2007) (holding in clear, easily understood language, "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious

[2] Given the majority's conclusions on rehearing, it is hard to see what issues remain other than damages and attorney's fees. The majority moved from improperly committing a question of law to the jury to rendering, in essence, an unprecedented liability verdict against Mullenix. The majority's subjective view of the case is clear, but its legal analysis remains, at best, cloudy.

injury or death.").[3]

• The majority irrationally concludes that Trooper Mullenix's conduct was unreasonable based on its own, subjective predilections, supported by arguments made of straw; in particular, that tire spikes should have been the preferred alternative means for stopping Leija's car.

• The majority fails to heed the Supreme Court's instruction to account for Leija's culpability.[4] It was Leija, after all, who placed himself and the public in danger when he fled arrest while intoxicated, traveled at excessive speeds for miles and miles, threatened to shoot officers in pursuit, and swerved around numerous vehicles. It was Leija's choices and actions not Mullenix's that led to his demise. Leija put innocent lives at risk; Mullenix responded and tried to restore public safety. The majority ignores Leija's culpability, making him an innocuous

---

[3] *See also Pasco ex rel. Pasco v. Knoblauch,* 566 F.3d 572, 581 (5th Cir.2009) ("Stuck between the choice of letting a presumptively intoxicated and reckless driver continue unabated or bumping the suspect off the road, [the officer] chose the course of action that would potentially save the lives of individuals who had no part in creating the danger. Although this choice ended tragically with [the driver's] death, the balancing test indicates that [the officer's] actions were reasonable.").

[4] *See Scott,* 550 U.S. at 384, 127 S.Ct. 1769 (stating that a court should "take into account not only the number of lives at risk, but also their relative culpability"); *id.* ("It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [the officer] confronted.").

actor rather than a man bent on escape at all costs.[5]

• The majority views the facts of this case through hindsight, substituting its own notions for controlling precedent. In the Delphic milieu of an appellate court, the majority condemns Mullenix for his real-time decision to shoot at the car's engine block and proceeds to challenge his judgment for not waiting to see what, if any, effect the tire spikes might have on Leija's flight. In so doing, the majority fails to give Mullenix "breathing room to make reasonable but mistaken judgments" and, in so doing, strips him of the qualified immunity to which he is entitled.[6]

• The majority demonstrates a lack of understanding of qualified immunity and its purpose as set out by the Supreme Court: to "protect officers from the sometimes 'hazy border between excessive and acceptable force,' " especially when as here, because the majority refused to accept the clearly established law governing car chases officers lack notice that their conduct is clearly established as unconstitutional.[7] *See Carroll v. Carman,* [U.S.] 135 S.Ct. 348, 350 [L.Ed.2d] (2014) ("[E]xisting

---

[5] *Id.* ("We have little difficulty in concluding it was reasonable for [the officer] to take the action that he did.").

[6] *Carroll v. Carman,* —— U.S. ——, 135 S.Ct. 348, 350, —— L.Ed.2d —— (2014) (quotation marks omitted).

[7] *Saucier v. Katz,* 533 U.S. 194, 206, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) ("Qualified immunity operates ... to protect officers from the sometimes 'hazy border between excessive and acceptable force,' and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." (citation omitted)), *overruled in part by Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

precedent must have placed the statutory or constitutional question *beyond debate*." (quotation marks omitted) (emphasis added)).

• As noted, the majority creates a phantom argument based on no record fact of any kind: that Mullenix chose "deadly force" when shooting at Leija's engine instead of choosing an alternate, non-deadly means for stopping the car. Even though the record does not begin to suggest, which alternative bullets to the engine block or spikes to the tires would have been less likely to produce a deadly result, the majority assumes an avuncular role and subjectively concludes, without any record support, that the tire spikes would have been the better choice. It then relies solely on that appellate post hoc unsupported opinion for its mantra that Mullenix made an unwise choice. Even more perfidious to the record, the majority repeats that Mullenix's plan was to shoot Leija himself. There was never such a plan. The plan was to shoot the engine block of the car. This unsupported, made up, shoot-to-kill "fact" reflects the reckless, unwarranted liberties that the majority takes to reach its predetermined "right result."

To comprehend how far the panel majority drifts from understanding that it is the *plaintiffs' burden* to show that Mullenix is *not* entitled to qualified immunity, one must only consider the undisputed facts that the majority attempted to avoid or to mitigate in its initial opinion and, now exposed, attempts to dismiss as inconsequential:

• Equipped with a warrant, an officer attempted to effect Leija's arrest at a Sonic Drive In in Tulia,

Texas.

• Rather than submit to that arrest, Leija fled in his car at speeds up to 110 mph.

• His flight lasted approximately eighteen minutes and covered more than twenty-five miles of interstate, plus some distance over city streets in Tulia, Texas.

• Leija's flight took him past ten interstate on-ramps.

• Leija sped at times down the center of the road, with his car straddling the left and right lanes; he swerved between lanes; and he changed lanes without using his blinker.

• Leija raced past eight vehicles in the northbound lane of the interstate: four passenger vehicles, one bus, two tractor trailers, and one truck carrying a large trailer. Some of these vehicles were in the right-hand lane as Leija sped past; others were partially on the right shoulder, waiting for Leija to race by them. There were more than fifty cars in the southbound lane of the interstate. Many of these vehicles had to pull off the road to escape Leija's path.

• Leija plausibly was believed to be intoxicated.

• During the high-speed chase, Leija called the police dispatch officer two times. Both times, Leija said that he had a gun and that he would shoot any officer he saw if law enforcement did not stop its pursuit. The dispatch officer relayed these threats to the pursing officers, including Trooper Mullenix.

• Leija was rapidly approaching Officer Ducheneaux, Trooper Mullenix, and other officers on the scene.

• Leija's car, gun, and intoxication posed risks to Officer Ducheneaux, who was setting up tire spikes near Trooper Mullenix's location.

• Leija's gun and intoxication posed risks to Troopers Rodriguez, who was in the chase car, and Mullenix, who was exposed on the bridge.

• Mullenix intended to shoot down at Leija's car as it approached, hoping that he could use his rifle to take out the car's engine block.

• Trooper Mullenix relayed his plan to disable Leija's car to the driver of the chase car, Trooper Rodriguez. Rodriguez responded, "10 4."

• Mullenix also had a brief conversation with a deputy about whether Mullenix could disable Leija's car by shooting it and how and where to shoot the car to best accomplish disabling it.

• When he fired his weapon, Trooper Mullenix knew (1) a warrant was issued for Leija's arrest, (2) Leija was fleeing arrest at high speeds and had been fleeing arrest for some time, (3) Leija was believed to be intoxicated, (4) Leija had a gun and said he would shoot at any officer he saw, (5) Officer Ducheneaux was below Mullenix's position and in Leija's path, and (6) Trooper Rodriguez was following Leija in his patrol car.

The majority finds Leija's threats to public safety neither immediate nor imminent. So, under the majority's view, when, if ever, is an officer's conduct shielded by qualified immunity except to employ spikes on the highway? Speed is not a compelling factor, if traveling between 85 and 110 miles per hour is not enough. Nor is obvious danger to other motorists, given that Leija (1) passed eight other vehicles, including a passenger bus; (2) passed fifty cars in the oncoming lanes; (3) raced by ten on-ramps to communities unknown; (4) drove recklessly; and (5) was thought to be drunk. Imminent danger from repeated threats to shoot pursuing officers apparently adds nothing. Nor does peril to officers in chase cars or on roadways. Nor does the *collective* weight of these factors impress the majority as a significant danger to the safety of the officers and public.[8]

The panel's contrary conclusion makes it impossible for an officer to understand whether and when his decision to disable a fleeing suspect's car will expose him to personal liability. Through its misunderstanding and misstatement of binding precedent, the panel condones second-guessing of split-second decisions

---

[8] The panel further misunderstands binding precedent of the Supreme Court when the panel requires an immediate threat of harm before force can be used to stop high-speed flight. The Supreme Court expressly stated that there is no "magical on/off switch that triggers rigid preconditions [such as an imminent threat of harm] whenever an officer's actions constitute 'deadly force.'" *Scott,* 550 U.S. at 382, 127 S.Ct. 1769. Instead, the Court adopted a case-specific test of reasonableness: "[A]ll that matters is whether [an officer's] actions were reasonable." *Id.* at 383, 127 S.Ct. 1769.

in contravention to the principles of qualified immunity.

Finally, the only redeeming aspect of this opinion is that it is such an outlier and so contrary to previous precedents that it can, and will, be dismissed under our strict rule that one panel cannot overrule precedent of earlier opinions. *Ford v. Cimarron Ins. Co.,* 230 F.3d 828, 832 (5th Cir.2000) ("We are a strict *stare decisis* court. Thus, one panel of this court cannot disregard, much less overrule, the decision of a prior panel." (quotation marks omitted)).

Because our Court is derelict in failing to employ the en banc procedures to rid this outlier from the law books, I respectfully dissent from the decision to deny rehearing en banc.

KING, Circuit Judge, joining Judge Jolly's dissent from the denial of rehearing en banc:

Although I was a member of the panel in this case, I was not consulted when the panel majority decided to vacate its original opinion and to issue a new one. I do not join the new opinion.

As for the merits of the new opinion and the decision of the en banc court to deny rehearing en banc, I join Judge Jolly's opinion. I would point out that other law enforcement officers involved in this event thought it advisable to wait to see if the spikes worked. Mullenix voiced particular concern about Leija's threats to shoot officers and elected to try to shoot out the engine block of Leija's car and thereby end his dangerous flight. That may have been a mistaken judgment; in my view, it was not an unreason-

able one. But, as Judge Jolly points out, qualified immunity protects reasonable but mistaken judgments in an emergency situation like this one. As the law now stands, Mullenix was entitled to qualified immunity.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Seal]
Certified as a true copy and issued as the mandate on Jan 12, 2015

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 19, 2014
Lyle W. Cayce
Clerk

No. 13-10899

D.C. Docket No. 2:12-CV-152

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs-Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant-Appellant

Appeal from the United States District Court for the

Northern District of Texas, Amarillo

Before HAYNES and GRAVES, Circuit Judges.*

JUDGMENT ON PETITION FOR REHEARING EN BANC

This cause came on to be heard on rehearing en banc without oral argument.

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. Our prior opinion of August 28, 2014 is withdrawn; and it is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

* Judge King, a member of the original panel in this case, did not participate in the consideration of this opinion. This matter is decided by a quorum. 28 U.S.C. § 46(d).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-10899

United States Court
of Appeals
Fifth Circuit
FILED
August 28, 2014

Lyle W. Cayce
Clerk

BEATRICE LUNA, Individually and as Representative of the Estate of Israel Leija, Jr.; CHRISTINA MARIE FLORES, as Next Friend of J.L. and J.L., Minor Children,

Plaintiffs Appellees

v.

CHADRIN LEE MULLENIX, In His Individual Capacity,

Defendant Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before KING, HAYNES, and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

This § 1983 excessive use of force case arises from the shooting and death of Israel Leija, Jr. by Texas Department of Public Safety (DPS) Trooper Chadrin Mullenix during a high-speed pursuit. The district court denied Mullenix's motion for summary judgment on the issue of qualified immunity, holding that multiple genuine disputes of material fact existed as to the qualified immunity analysis. We affirm.

I. Factual and Procedural Background

On March 23, 2010, at approximately 10:21 p.m., Sergeant Randy Baker of the Tulia Police Department followed Israel Leija, Jr. to a Sonic Drive In to arrest him on a motion to revoke misdemeanor probation. The arrest warrant had been filed because (1) Leija had failed to complete all of his hours of community service, and (2) a new complaint of domestic violence had been filed against Leija, who was on probation. After some discussion with Baker, Leija fled the scene and headed north towards Interstate Highway 27 ("I 27"), with Baker in pursuit. Texas DPS Trooper Gabriel Rodriguez was on patrol nearby and took the lead in the pursuit. Around mile marker 77, Leija entered I 27 and continued north, with Rodriguez directly behind him. During the approximately 18 minutes that the pursuit lasted, Rodriguez followed Leija and captured the pursuit on his video recorder. The video supports the plaintiffs' assertions that although the pursuit proceeded north on 1 27 at speeds between 80 and 110 miles per hour, traffic on the dry roadway was light; Leija remained on the paved portion of the road with his headlights on, did not run any vehicles off the road, did not collide with any vehicles,

and did not cause any collisions; there were no pedestrians or stopped vehicles along the road; and all of the pursuit occurred in rural areas, without businesses or residences near the interstate, which was divided by a wide center median.

As the pursuit headed north on I 27, other law enforcement units joined. Officer Troy Ducheneaux of the Canyon Police Department deployed tire spikes underneath the overpass at Cemetery Road and I 27. DPS Troopers set up spikes at McCormick Road, north of Cemetery Road. Other police units set up spikes at an additional location further north, for a total of three spike locations ahead of the pursuit. The record reflects that officers had received training on the deployment of spikes, and had been trained to take a protective position while deploying spikes, if possible, so as to minimize the risk posed by the passing driver.

During the pursuit, Leija twice called the Tulia Police Dispatch on his cell phone, claiming that he had a gun, and that he would shoot at police officers if they did not cease the pursuit. This information was relayed to all officers involved. It was discovered later that Leija had no weapon in his possession.

DPS Trooper Chadrin Mullenix was on patrol thirty miles north of the pursuit, and also responded. Mullenix went to the Cemetery Road overpass, initially intending to set up spikes at that location, but ultimately decided to attempt to disable the car by shooting it. He positioned his vehicle atop the Cemetery Road bridge, twenty feet above I 27, intending to shoot at the vehicle as it approached. Mullenix planned to use his .223 caliber M 4 rifle to disable the

vehicle by shooting at its engine block, although he had never attempted that before and had never seen it done before. The district court noted that "[t]here is no evidence one way or another that any attempt to shoot out an engine block moving at 80 mph could possibly have been successful." Mullenix testified that he had been trained in shooting upwards at moving objects, specifically clay pigeons, with a shotgun. He had no training on how to shoot at a moving vehicle to disable it.

Mullenix's dash cam video reflects that once he got to the Cemetery Road overpass, he waited for about three minutes for the pursuit to arrive. Mullenix relayed to Officer Rodriguez that he was thinking about setting up with a rifle on the bridge. Rodriguez replied "10 4," told Mullenix where the pursuit was, and that Leija had slowed down to 80 miles per hour. Mullenix then asked the Amarillo DPS dispatch to contact DPS Sergeant Byrd, Mullenix's supervisor, to tell Byrd that he was thinking about shooting the car and to ask whether the sergeant thought that was "worth doing." According to plaintiffs' allegations, he contacted Byrd to "request permission" to fire at the vehicle. Mullenix denies that he requested or needed "permission," but stated that he "asked for what [Byrd] advised" and asked to "get his advice." Mullenix did not wait for a response from Sergeant Byrd, but exited his patrol vehicle, took out his rifle, and took a shooting position on the bridge. During this time, the dispatcher relayed a response from Sergeant Byrd to "stand by" and "see if the spikes work first." Mullenix alleges that he was unable to hear that instruction because he had failed to turn on his outside loudspeakers, thereby

placing himself out of communication with his dispatch or other officers involved in the pursuit. Plaintiffs allege that since the trunk was open, Mullenix should have heard the response. Mullenix did have his radio microphone on him. During the waiting minutes, Mullenix had a short, casual conversation with Randall County Sheriff's Deputy Tom Shipman about whether he could shoot the vehicle to disable it. When Shipman mentioned to Mullenix that there was another officer beneath the overpass, Mullenix replied that he did not think he would hit that officer.

As the two vehicles approached, Mullenix fired six rounds at Leija's car. There were no streetlights or ambient lighting. It was dark. Mullenix admitted he could not discern the number of people in Leija's vehicle, whether there were passengers, or what anyone in the car was doing. Mullenix testified that at the time of the shooting, he was not sure who was below the overpass, whether Ducheneaux had actually set up spikes there, or where Ducheneaux was positioned beneath the overpass. After Mullenix fired, Leija's car continued north, engaged the spike strip, hit the median and rolled two and a half times. In the aftermath of the shooting, Mullenix remarked to his supervisor, Sergeant Byrd, "How's that for proactive?" Mullenix had been in a counseling session earlier that same day, during which Byrd intimated that Mullenix was not being proactive enough as a Trooper.

Leija was pronounced dead soon after the shooting. The cause of death was later determined to be one of the shots fired by Mullenix that had struck Leija in the neck. The evidence indicates that at least four of Mullenix's six shots struck Leija's upper body, and no

evidence indicates that Mullenix hit the vehicle's radiator, hood or engine block.

The incident was investigated by Texas Ranger Jay Foster. Foster concluded that Mullenix complied with DPS policy and Texas law. The DPS Firearms Discharge Review board reviewed the shooting and concluded that Mullenix complied with DPS policy and Texas law. A grand jury declined to return an indictment of Mullenix. A DPS Office of the Inspector General ("OIG") Report concluded the opposite, that Mullenix was not justified and acted recklessly. The parties disputed the relevance and admissibility of that OIG report, which was subsequently called into question by its author, who testified that he did not have full information on the incident or investigation when he wrote the report. The district court mentioned the report in its statement of facts, but did not further discuss the report.

Beatrice Luna, as the representative of Leija's estate, and Christina Flores, on behalf of Leija's minor child, sued DPS, the Director of DPS Steve McCraw, Trooper Rodriguez, and Trooper Mullenix, in state court, asserting claims under the Texas Tort Claims Act and 42 U.S.C. § 1983. Defendants removed to federal court. Director McCraw's Motion to Dismiss was granted, and plaintiffs' stipulation of dismissal against DPS and Trooper Rodriguez was granted with prejudice. The sole remaining claim is the § 1983 claim against Mullenix, alleging that he subjected Leija to an unconstitutional use of excessive force in violation of the Fourth Amendment. Mullenix answered and asserted the defense of qualified immunity. After discovery, Mullenix moved for summary

judgment on the issue of qualified immunity. On August 7, 2013, the district court issued a memorandum opinion and order denying Mullenix's motion for summary judgment. Mullenix appeals.

II. Discussion

The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In reviewing a motion for summary judgment based on qualified immunity, we undertake a two-step analysis. First, we ask whether the facts, taken in the light most favorable to the plaintiff, show the officer's conduct violated a federal constitutional or statutory right. *See Tolan v. Cotton,* U.S. , 134 S.Ct. 1861, 1865, 188 L.Ed.2d 895 (2014); *Flores v. City of Palacios,* 381 F.3d 391, 395 (5th Cir.2004) (citing *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Second, we ask "whether the defendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Flores,* 381 F.3d at 395 (internal quotation marks omitted) (quoting *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)); *see Tolan,* 134 S.Ct. at 1866. We may examine these two factors in any order. *See Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (overruling in part *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Claims of qualified immunity must be evaluated in

the light of what the officer knew at the time he acted, not on facts discovered subsequently. *See Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Lytle v. Bexar Cnty., Tex.,* 560 F.3d 404, 411 (5th Cir.2009). As the Supreme Court has recently reaffirmed, "in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan,* 134 S.Ct. at 1863 (internal quotation marks and alteration omitted) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Our jurisdiction to review a denial of a motion for summary judgment based on qualified immunity is limited to legal questions. *See, e.g., Kinney v. Weaver,* 367 F.3d 337, 346 (5th Cir.2004) (en banc). Because of this jurisdictional limitation, "we consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Id.* at 348; *see Flores,* 381 F.3d at 394. We review the objective reasonableness of the defendant government official's actions and the scope of clearly established law de novo. *See Flores,* 381 F.3d at 394. We "may review the district court's conclusion that issues of fact are material, but not the conclusion that those issues of fact are genuine." *Id.*

A. Constitutional Violation

Under the first prong of the qualified immunity analysis, the plaintiffs must produce facts sufficient to show that Mullenix's actions violated Leija's Fourth Amendment rights. *Tolan,* 134 S.Ct. at 1865; *Flores,*

381 F.3d at 395. "[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). To show a violation, the plaintiffs must produce facts sufficient to show that Leija suffered (1) an injury; (2) which resulted directly from a use of force that was clearly excessive to the need; and (3) the force used was objectively unreasonable. *Goodson v. City of Corpus Christi,* 202 F.3d 730, 740 (5th Cir.2000). "This is an objective standard: 'the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.' " *Ramirez v. Knoulton,* 542 F.3d 124, 128 29 (5th Cir.2008) (quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865).

"There are few, if any, bright lines for judging a police officer's use of force; when determining whether an officer's conduct violated the Fourth Amendment, we must slosh our way through the factbound morass of reasonableness." *Lytle,* 560 F.3d at 411 (internal quotation marks and alteration omitted) (quoting *Scott v. Harris,* 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)). "To gauge the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the need for force," paying "careful attention to the facts and circumstances of each particular case." *Flores,* 381 F.3d at 399. "The intrusiveness of a seizure by means of deadly force is unmatched." *Garner,* 471 U.S. at 9, 105 S.Ct. 1694; *see Flores,* 381 F.3d at 399. Bal-

anced against this intrusion are "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Lytle,* 560 F.3d at 411.

When deadly force is used, it is clear that the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis. *See Plumhoff v. Rickard,* U.S. , 134 S.Ct. 2012, 2021, 188 L.Ed.2d 1056 (2014) (concluding that deadly force was objectively reasonable where "it is beyond serious dispute that Rickard's flight posed a grave public safety risk"); *Scott,* 550 U.S. at 386, 127 S.Ct. 1769 (noting that the use of deadly force was objectively reasonable when "[t]he car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others"); *see also Garner,* 471 U.S. at 11, 105 S.Ct. 1694 ("Where the suspect poses no immediate threat to the officer . . . the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."); *Thompson v. Mercer,* 762 F.3d 433, 440, 2014 WL 3882460, at *5 (5th Cir. Aug. 7, 2014) (noting that "the question is whether the officer had reason to believe, at that moment, that there was a threat of physical harm"); *Hathaway v. Bazany,* 507 F.3d 312, 320 (5th Cir.2007) (noting that the "reasonableness of an officer's use of deadly force is . . . determined by the existence of a credible, serious threat to the physical safety of the officer or to those in the vicinity"); *Bazan ex rel. Bazan v. Hidalgo Cnty.,* 246 F.3d 481, 493 (5th Cir.2001) ("The excessive force inquiry is confined to

whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting Bazan."); *Vaughan v. Cox,* 343 F.3d 1323, 1330 (11th Cir.2003) ("Genuine issues of material fact remain as to whether [the suspects'] flight presented an immediate threat of serious harm to [the police officer] or others at the time [the officer] fired the shot.").

With regard to high-speed chases, the Supreme Court has held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott,* 550 U.S. at 386, 127 S.Ct. 1769; *see also Plumhoff,* 134 S.Ct. at 2021 22 (applying *Scott* to a case involving the shooting of a suspect in a high-speed chase). Likewise, this court has recently held that a sheriff who used an assault rifle to intentionally shoot a fleeing suspect as he approached in a truck, after a lengthy, dangerous chase, did not violate the Fourth Amendment. *Thompson,* 762 F.3d at 438 40, 2014 WL 3882460, at *4 5. These cases, however, do not establish a bright-line rule; "a suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer's use of deadly force is *per se* reasonable." *Lytle,* 560 F.3d at 416. Instead, *Scott, Plumhoff* and *Thompson* are simply applications of the Fourth Amendment's reasonableness requirement to particular facts. *See Plumhoff,* 134 S.Ct. at 2020 22; *Scott,* 550 U.S. at 382 83, 127 S.Ct. 1769; *Thompson,* 762 F.3d at 438 40, 2014 WL 3882460, at *4 5. "Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public. As the cases addressing this all-

too-common scenario evince, the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable." *Lytle,* 560 F.3d at 415; *see Thompson,* 762 F.3d at 438, 2014 WL 3882460, at *4.

Mullenix asserts that his use of force was objectively reasonable as a matter of law because he acted to protect other officers, including Officer Ducheneaux beneath the overpass and officers located further north up the road, as well as any motorists who might have been located further north. However, the district court found that, "As to the existence of an immediate risk of serious injury or death to other officers or to innocent bystanders, the summary judgment evidence in this case presents genuine issues of material fact as to whether that risk did, or did not, exist." We agree. The immediacy of the risk posed by Leija is a disputed fact that a reasonable jury could find either in the plaintiffs' favor or in the officer's favor, precluding us from concluding that Mullenix acted objectively reasonably as a matter of law. *See Scott,* 550 U.S. at 380, 127 S.Ct. 1769 (explaining that whether the driver "was driving in such fashion as to endanger human life" was a "factual issue"); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (explaining that the "inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying [the appropriate] evidentiary standard could reasonably find for either the plaintiff or the defendant").

On this record, the risk posed by Leija's flight is disputed and debatable, and a reasonable jury could conclude that Leija was not posing a "substantial and

immediate risk" at the time of the shooting. *Scott,* 550 U.S. at 386, 127 S.Ct. 1769. Many of the facts surrounding Leija's flight from police, viewed in the light most favorable to the plaintiffs, negate the risk factors central to the reasonableness findings in cases like *Scott, Plumhoff* and *Thompson.* According to the plaintiffs' version of the facts, although Leija was clearly speeding excessively at some times during the pursuit, traffic in the rural area was light. There were no pedestrians, no businesses and no residences along the highway, and Leija ran no other cars off the road and engaged no police vehicles. Further, there is evidence showing that Leija had slowed to about 80 miles per hour prior to the shooting. Spike systems which could have ended the pursuit with non-lethal means had already been prepared in three locations ahead of the pursuit. In *Scott* and *Plumhoff,* on the other hand, multiple other methods of stopping the suspect through non-lethal means had failed, the suspects were traveling on busy roads, had forced multiple other drivers off the road, had caused collisions with officers or innocent bystanders, and at the time of the shooting were indisputably posing an immediate threat to bystanders or other officers in the vicinity. *See Plumhoff,* 134 S.Ct. at 2017 18, 2021 22; *Scott,* 550 U.S. at 379 80, 383 84, 127 S.Ct. 1769. Likewise, in *Thompson,* this court found that the officers had tried "four times" to stop the chase with non-lethal methods, before resorting to deadly force to stop a driver who posed "extreme danger to human life." *Thompson,* 762 F.3d at 438, 440, 2014 WL 3882460, at *4, *6. The *Thompson* court explained that

> even the Thompsons concede that their son represented a grave risk when he "reached speeds exceeding 100 miles per hour on the interstate, when he ran numerous stop signs, when he had 'recklessly' driven on the wrong side of the road, [and] when he avoided some road spikes [and] took officers down Blue Flat Road where a horse was loose." Indeed, parts of the police camera footage might be mistaken for a video game reel, with Keith disregarding every traffic law, passing other motorists on the left, on the right, on the shoulder, and on the median. He occasionally drove off the road altogether and used other abrupt maneuvers to try to lose his pursuers. The truck was airborne at least twice, with Keith struggling to regain control of the vehicle. In short, Keith showed a shocking disregard for the welfare of passersby and of the pursuing law enforcement officers.

Id. at 438, 2014 WL 3882460, at *4.

To the extent that we must view facts in accordance with the video, *see Scott,* 550 U.S. at 378 80, 127 S.Ct. 1769; *Thompson,* 762 F.3d at 438 39, 2014 WL 3882460, at *4, the video supports the plaintiffs' version of the facts. In *Scott,* the plaintiff argued that the force used was unreasonable because the driver posed "little, if any actual threat to pedestrians or other motorists." *Id.* at 378, 127 S.Ct. 1769. However, the Court said,

> [t]he videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than

> a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379 80, 127 S.Ct. 1769. The Court relied on the video to resolve disputed facts, holding that the video "blatantly contradicted" the plaintiff's version of the facts, "so that no reasonable jury could believe it." *Id.* at 380, 127 S.Ct. 1769. Likewise, in *Thompson,* the plaintiffs argued that the threat posed by the chase had ended because the rural road was empty by the time of the shooting, but this court found that "the Thompsons' characterization of the scene is belied by the video evidence," which showed multiple cars pulling over to avoid the chase, and dangerous conditions on the road, which had limited visibility and no shoulder for cars to pull onto. *Thompson,* 762 F.3d at 438 39, 2014 WL 3882460, at *4. Here, however, the video supports the plaintiffs' assertions that during the pursuit, traffic on the divided highway was light, there were no pedestrians, businesses or residences along the highway, and Leija ran no other cars off the road and did not engage any police vehicles, such that a reasonable jury could find that Leija's driving did not

pose an immediate danger to other officers or drivers.

Further, in concluding that the use of force was reasonable, the *Thompson* opinion relies repeatedly on the fact that the officers had made four attempts to disable the vehicle with non-lethal methods before resorting to deadly force. *Thompson,* 762 F.3d at 438 39, 439 40, 2014 WL 3882460, at *4, *6. With regard to the existence of a Fourth Amendment violation, the holding of *Thompson* is that "after multiple other attempts to disable the vehicle failed, it was not unreasonable for Mercer to turn to deadly force to terminate the dangerous high-speed chase." *Id.* at 438, 2014 WL 3882460, at *4. The opinion later similarly concludes that "law enforcement reasonably attempted alternate means of seizure before resorting to deadly force," *id.* at 440, 2014 WL 3882460, at *6, and discusses this fact twice in its discussion of whether the law was sufficiently clearly established, *id.* In the instant case, there were spikes already in place under the bridge, and officers prepared to deploy spikes in two additional locations up the road. Yet Mullenix fired his rifle at Leija's vehicle before Leija had encountered any of the spikes. In contrast to *Thompson,* the non-lethal methods that were already prepared were never given a chance to work.

We certainly do not discount Leija's threats to shoot officers, which he made to the Tulia dispatcher and which were relayed to Mullenix and other officers. However, this fact is not sufficient, as a matter of law, to establish that Leija posed an immediate risk of harm at the time of the shooting. Under the plaintiffs' version of the facts and viewing all inferences in the light most favorable to the plaintiffs, a reasonable jury

could still conclude that there was not a sufficiently immediate threat to justify deadly force. In a case involving the shooting of a suspect, we have stated that the "core issue" is "whether the officer reasonably perceived an immediate threat." *Reyes v. Bridgwater,* 362 Fed.Appx. 403, 408 (5th Cir.2010). "[T]he focus of the inquiry is the act that led the officer to discharge his weapon." *Id.* at 406 (internal quotation marks and alteration omitted) (quoting *Manis v. Lawson,* 585 F.3d 839, 845 (5th Cir.2009)); *see also Bazan,* 246 F.3d at 493 ("The excessive force inquiry is confined to whether the Trooper was in danger at the moment of the threat that resulted in the Trooper's shooting."). The factual scenario here is substantially different, in terms of the imminence and immediacy of the risk of harm, from situations where we have granted qualified immunity to officers who shot an armed suspect, or a suspect believed to be armed. *See Ramirez,* 542 F.3d at 127, 129 (suspect stopped by the side of the road after a brief chase displayed a gun, repeatedly ignored police commands, was located yards from police officers, and brought his hands together in a manner that indicated he may have been reaching for the gun, prompting officer to shoot him); *Ballard v. Burton,* 444 F.3d 391, 402 03 (5th Cir.2006) (mentally disturbed suspect "refused to put down his rifle, discharged the rifle into the air several times while near officers, and pointed it in the general direction of law enforcement officers"); *Reese v. Anderson,* 926 F.2d 494, 500 01 (5th Cir.1991) (suspect stopped after a high-speed chase refused to exit the car, refused to follow police commands, repeatedly raised and lowered his hands, turned away from the officer and reached

lower toward the floorboard, prompting the officer to shoot him); *compare Reyes,* 362 Fed.Appx. at 407 (fact issue precluded qualified immunity where suspect was armed with a knife, but made no threatening gesture or motion), *with Harris v. Serpas,* 745 F.3d 767, 773 (5th Cir.2014) (qualified immunity granted to officer where video confirmed that suspect "was standing up out of bed and had raised the knife above his head at the time the shots were fired"). We discuss these cases not because we hold that an officer must actually see a weapon before taking action to protect himself or others from the suspect, but because they illustrate that, even when a weapon is present, the threat must be sufficiently imminent at the moment of the shooting to justify deadly force.

In *Thompson,* the court did note the existence of a stolen gun in the car of the fleeing suspect as a fact that supported its conclusion that the suspect posed an "ongoing threat of serious harm," even though the officer had no way of ascertaining whether the suspect intended to use the weapon. *Thompson,* 762 F.3d at 439, 2014 WL 3882460, at *5 (quotation omitted). However, in *Thompson,* the officer also knew at the time of the shooting that the suspect was fleeing in a stolen car with a stolen weapon, had abducted a woman during his flight, and that the "unidentified suspect was admittedly suicidal and had already acted with utter desperation in attempting to evade law enforcement." *Id.* at 439, 440 41, 2014 WL 3882460, at *5, 6. Thus, the court found that the officer was "justified in assuming" that the presence of the stolen weapon contributed to the continuing threat posed by suspect. *Id.* at 439, 2014 WL 3882460,

at *5.

Here, although Leija had stated to the dispatcher that he was armed and would shoot officers, he was not fleeing the scene of a violent crime, no weapon was ever seen, and at the time of the shooting, most officers and bystanders were miles away, where they would not have been encountered until after the spikes were given a chance to stop the chase. On appeal, Mullenix relies heavily on the presence of Ducheneaux beneath the overpass, and the risk that Leija could shoot Ducheneaux as he sped by. However, he also testified that he did not actually know Ducheneaux's position or what he was doing beneath the overpass.[1] Mullenix argues that he knew that an officer had to be positioned near a roadway to deploy spikes, but the facts, taken in the light most favorable to the plaintiffs, also show that officers were trained to deploy spikes in a location where they were able to take a protective position, that there were several pillars at the Cemetery Road overpass and that Ducheneaux had positioned himself behind a pillar as he was trained to do. Further, just prior to the shooting, Sheriff's Deputy Shipman mentioned Ducheneaux's presence beneath the overpass, and Mullenix replied only that he did not think *he* would hit Mullenix; he

[1] We do not hold that an officer must necessarily have another officer that he believes to be in danger in his sightline at the time he takes action. We merely state that, given his position atop a bridge in the dark of night, and given all the circumstances of this particular case, a reasonable jury could conclude that Mullenix lacked sufficient knowledge to determine whether or not Ducheneaux was in immediate danger from Leija, or whether Mullenix's own actions were decreasing the risk to Ducheneaux.

did not indicate that he perceived a threat to Ducheneaux from Leija. In this situation, a jury could conclude Mullenix did not reasonably perceive an immediate threat at the time of the shooting, sufficient to justify the use of deadly force.

The plaintiffs also point to evidence showing that Mullenix heard the warning that Leija had said he had a gun six minutes before the shooting, and went to the bridge and waited three minutes for Leija's car to approach. During this period Mullenix had time to consider his approach, including time to ask for his supervisor's opinion, inform Rodriguez of his intentions, and discuss the feasibility of shooting the car with Shipman. Plaintiffs argue that this is not the type of "split-second judgment" that officers must make when faced with an imminent risk of harm to themselves or others. *See Plumhoff,* 134 S.Ct. at 2020; *Graham,* 490 U.S. at 396 97, 109 S.Ct. 1865; *Hathaway,* 507 F.3d at 320 21. Although Mullenix relies heavily on the assertion that it is up to the "officer on the scene" to make judgments about the use of deadly force, Mullenix was not the only, or even the primary, officer on the scene. Officer Rodriguez was immediately in pursuit of Leija, and multiple other officers from various law enforcement agencies were on the scene at Cemetery Road and were at multiple locations further north along I 27, planning to deploy tire spikes to stop the suspect. There is no evidence that any other officer from any of the law enforcement agencies involved in the pursuit, hearing the same information that Mullenix heard, including the information regarding Leija's threats, decided that deadly force was necessary or warranted. Further, via the

dispatcher, Mullenix asked his supervisor, Sergeant Byrd, about his plan to shoot at the car. It is undisputed that Sergeant Byrd advised Mullenix to "stand by" and "see if the spikes work first." While there is a dispute of fact about whether Mullenix heard the instruction to "stand by," Byrd's response certainly bears on the question of whether Mullenix acted unreasonably. Lastly, Mullenix testified that he intended to shoot the engine block of the car in an attempt to disable it, although there is no evidence that shooting at the engine is a feasible method of immediately disabling a car. His justification for the use of force was to disable the car, but non-lethal methods were already in place to achieve the same goal, undermining the asserted necessity for deadly force at that particular instant.

We conclude that whether Leija was posing a substantial and immediate risk of danger to other officers or bystanders, sufficient to justify the use of deadly force at the time of the shooting, is a disputed fact, and we must draw all inferences in favor of the plaintiff. Based on the evidence in the record, a jury could find that a reasonable officer would have concluded that the risk Leija posed was not sufficiently immediate so as to justify deadly force, and that the non-lethal methods already in place could stop the chase without the need for deadly force. We thus cannot conclude that Mullenix's actions were objectively reasonable as a matter of law. *See Vaughan,* 343 F.3d at 1330 (denying a motion for summary judgment on the grounds of qualified immunity when "[g]enuine issues of material fact remain[ed] as to whether [the suspects'] flight presented an immediate threat of serious harm to [the

police officer] or others at the time [the officer] fired the shot").[2]

B. Clearly Established Law

Under the second prong of the qualified immunity analysis, plaintiffs must show that Mullenix's actions violated a constitutional right that was sufficiently clearly established. *Flores,* 381 F.3d at 395. For a right to be clearly established, "[t]he contours of that right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau v. Haugen,* 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). "The central concept [of the test] is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Kinney,* 367 F.3d at 350 (quoting *Hope,* 536 U.S. at 740, 122 S.Ct. 2508). Further, while the Supreme Court has stated that "courts

---

[2] We of course agree with the dissent that once the relevant facts are determined and all factual inferences are drawn in favor of the non-moving party to the extent supportable by the record, the question of whether the officer acted objectively unreasonably is one of law. *See Scott,* 550 U.S. at 381 n. 8, 127 S.Ct. 1769. Here, however, there are underlying questions of fact, including the immediacy of the risk and whether Mullenix heard his supervisor's direction to "stand by" and "see if the spikes work first."

should define the 'clearly established' right at issue on the basis of the 'specific context of the case,' " it has also recently reminded us that we "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Tolan,* 134 S.Ct. at 1866 (quoting *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151).

While Mullenix devotes the bulk of his argument to this prong of the qualified immunity analysis, "We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle,* 560 F.3d at 417. "This holds as both a general matter and in the more specific context of shooting a suspect fleeing in a motor vehicle." *Id.* at 417 18 (internal citations omitted) (citing *Kirby v. Duva,* 530 F.3d 475, 484 (6th Cir.2008); *Vaughan,* 343 F.3d at 1332 33); *see also Sanchez v. Fraley,* 376 Fed.Appx. 449, 452 53 (5th Cir.2010) (holding that "it was clearly established well before [April 23, 2007] that deadly force violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," and "the threat of serious harm must be immediate"); *Reyes,* 362 Fed.Appx. at 406 ("Unlike some areas of constitutional law, the question of when deadly force is appropriate and the concomitant conclusion that deadly force is or is not excessive is well-established.").

Mullenix points to the Supreme Court's recent decision in *Plumhoff* to argue that the law was not

clearly established. The *Plumhoff* Court relied primarily on *Brosseau,* which held that as of 1999 it was not clearly established that it was objectively unreasonable force "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Brosseau,* 543 U.S. at 195 97, 200, 125 S.Ct. 596. However, *Plumhoff* holds only that where a fleeing suspect "indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby," a police officer's use of deadly force is not clearly established as unreasonable. *Plumhoff,* 134 S.Ct. at 2021 22, 2023; *see Brosseau,* 543 U.S. at 200, 125 S.Ct. 596. It does not, however, undermine the clearly established law that an officer may not use deadly force against a fleeing suspect absent a sufficient risk to officers or bystanders. *See Lytle,* 560 F.3d at 417 18. *Thompson* is no different. Similar to *Plumhoff,* it holds that the officer's use of force to stop a high-speed chase was not clearly established as unreasonable where the fleeing suspect had stolen a car and kidnapped a woman, had evaded four attempts to stop the car with non-lethal force, and whose driving continued to pose a "tremendous risk" to the public and other officers. *Thompson,* 762 F.3d at 440, 2014 WL 3882460, at *6.

At the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a substantial and immediate threat, violated the Fourth Amendment. Because on this record, the immediacy of the risk posed by Leija cannot be resolved as a matter of law at the summary judgment stage, we affirm

the district court's denial of qualified immunity.[3]

III. Conclusion

For the foregoing reasons, we AFFIRM the denial of summary judgment.

KING, Circuit Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the district court's denial of qualified immunity to Chadrin Mullenix. The majority's decision conflicts, in several respects, with Supreme Court precedent and our court's recent decision in *Thompson v. Mercer,* No. 13 10773, 2014 WL 3882460, 762 F.3d 433 (5th Cir.2014). While it is a jury's responsibility to resolve material fact disputes, because no such fact dispute is present here, it is our responsibility as judges to decide whether Mullenix acted objectively unreasonably under the Fourth Amendment. Based on my review of the record, I conclude that Mullenix's use of force was not objectively unreasonable because the threat Israel Leija, Jr. posed to nearby officers, viewed in light of his culpability for that threat, was sufficiently grave to justify the use of a gun to shoot at Leija's vehicle.

---

[3] Mullenix makes a separate argument that the district court relied on inadmissible summary judgment evidence, specifically the OIG report concluding that Mullenix's actions were not justified. This report was later called into question by its author, who testified that it was not based on a full review of the incident. However, there is no indication in the district court's order that it relied on the OIG report in denying summary judgment, and we likewise do not rely on it. If there are questions as to its admissibility, the district court can resolve those in due course as the litigation proceeds.

The majority opinion is replete with the uncontradicted facts. It nevertheless purports to identify a single factual dispute precluding summary judgment, explaining: "whether Leija was posing a substantial and immediate risk of danger to other officers or bystanders, sufficient to justify the use of deadly force at the time of the shooting, is a disputed fact, and we must draw all inferences in favor of the plaintiff." But the "fact issue" referenced by the majority and referred to a jury is simply a restatement of the objective reasonableness test that applies to Fourth Amendment excessive force claims. As the Supreme Court and our circuit have held, the application of that test is a legal question to be decided by a judge.

In *Scott v. Harris,* decided in 2007, the Supreme Court explained, "[a]t the summary judgment stage . . . once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record, the reasonableness of [an officer]'s actions . . . is a pure question of law." 550 U.S. 372, 381 n. 8, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (internal citations and emphasis omitted). In clarifying this point, the Court was responding to Justice Stevens's argument, in dissent, that "[w]hether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury." *Id.* at 395, 127 S.Ct. 1769 (Stevens, J., dissenting).

This approach accords with our circuit's longstanding view that, under the Fourth Amendment, the determination of the reasonableness of a seizure is a conclusion of law. *See, e.g., Jimenez v. Wood Cnty.,* 621 F.3d 372, 376 (5th Cir.2010), *aff'd en banc,* 660 F.3d

841 (5th Cir.2011); *see also White v. Balderama,* 153 F.3d 237, 241 (5th Cir.1998) ("While it is true that the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application and that proper application of the Fourth Amendment objective reasonableness test requires careful attention to the facts and circumstances of each case, the ultimate determination of Fourth Amendment objective reasonableness is a question of law." (internal quotation marks, citations, and brackets omitted)). More recently, in *Thompson,* we cited *Scott* and rejected the plaintiffs' contention in that case that the question of reasonableness must be submitted to a jury. 762 F.3d at 441, 2014 WL 3882460, at *7 (citing *Scott,* 550 U.S. at 381 n. 8, 127 S.Ct. 1769).

In spite of *Scott* and our circuit's precedent, the majority without actually identifying any disputed facts repeatedly suggests that fact disputes remain. The majority's conclusion that summary judgment is inappropriate appears to be based on its belief that jurors could draw different "inferences," albeit based on the *undisputed* summary judgment evidence, about the reasonableness of Mullenix's actions. But the majority confuses factual inferences, which are for a jury to make, with legal conclusions, which are committed to a judge. *See Crowell v. Shell Oil Co.,* 541 F.3d 295, 309 (5th Cir.2008) ("A court is not required to draw legal inferences in the non-movant's favor on summary judgment review."). The majority points to a number of undisputed facts, such as the absence of heavy traffic near Leija, that might weigh against a conclusion that the risk Leija posed justified the level

of force used by Mullenix. That the question whether Mullenix's actions in this case were objectively reasonable is, in the majority's wording, "debatable," however, does not transform what otherwise would be a legal question into a factual question precluding summary judgment. *Cf. Gould v. Davis,* 165 F.3d 265, 269 (4th Cir.1998) ("While the district court is correct that different facts in evidence could be used to support different conclusions as to whether the officers deserve qualified immunity, this does not indicate a *factual* dispute, but rather, a question of law. The district court's order does not point to disputed questions of fact, but rather, disputed legal inferences that could be drawn from what is an undisputed factual record.").

The majority further cites to several decisions in support of its argument that this case should be sent to a jury. In these decisions, however, the courts identified concrete factual disputes precluding summary judgment. *See Tolan v. Cotton,* U.S. , , 134 S.Ct. 1861, 1868, 188 L.Ed.2d 895 (2014) (holding that there were fact disputes "with regard to the lighting, [the plaintiff's] mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting"); *Vaughan v. Cox,* 343 F.3d 1323, 1330 (11th Cir.2003) (holding that there were factual disputes as to whether the suspect intentionally rammed a police vehicle and whether the suspect made aggressive moves immediately before the officer fired); *see also Scott,* 550 U.S. at 380, 127 S.Ct. 1769 (explaining that whether the driver "was driving in such fashion as to endanger human life" was a "fac-

tual *issue,*" but that there was no genuine factual *dispute* in that case (emphasis added)); *Lytle v. Bexar Cnty.,* 560 F.3d 404, 412 13 (5th Cir.2009) (concluding that the direction and distance that the suspect's car was traveling at the moment the officer fired were disputed). No such disputed facts are present here. Accordingly, regardless of whether Mullenix's use of force was reasonable, as I believe, or excessive, this case is ripe to be decided in this appeal.

Given this, I turn next to the primary question presented here: whether, resolving any genuine fact issues[1] and drawing all factual inferences in the plaintiffs' favor, Mullenix's use of force against Leija was objectively unreasonable, as a matter of law, under the Fourth Amendment. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd,* U.S. ,

[1] As I see it, the sole disputed fact in this case is whether Mullenix heard the message relayed from his superior, Sergeant Byrd, that he should "stand by" and "see if the spikes work first." But this fact issue, though genuine, is not material. The uncontradicted testimony of Byrd and other officers was that, under department policy, it was the responsibility of the "officer on the scene" to make judgments about the use of force. Furthermore, Sergeant Byrd's opinion as to whether Mullenix should delay shooting at Leija's vehicle, at best, informs but does not decide whether Mullenix's use of force was objectively unreasonable in light of the risks posed by and to Leija. *See Scott,* 550 U.S. at 375 n. 1, 127 S.Ct. 1769 (observing that "[i]t is irrelevant to our analysis whether [the officer] had permission to take the precise actions he took" when he bumped the fleeing suspect off the road).

, 131 S.Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011) (internal quotation marks and citation omitted). The Supreme Court has explained that, in applying Fourth Amendment standards, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation." *Graham v. Connor,* 490 U.S. 386, 396 97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Whether the force used was reasonable is determined "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396, 109 S.Ct. 1865. In "weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing" a suspect, a court must "take into account not only the number of lives at risk, but also their relative culpability." *Scott,* 550 U.S. at 384, 127 S.Ct. 1769.

Applying these legal standards, and considering the facts as a whole, Mullenix's decision to fire at Leija's vehicle was not objectively unreasonable under the Fourth Amendment. As this court recognized in *Thompson,* a fleeing suspect's possession of a firearm presents an independent and grave risk to officers and civilians that may, under certain circumstances, justify firing at the suspect's vehicle, even when doing so poses a significant risk to the suspect's life. The plaintiffs in *Thompson* argued that the officer's actions were unreasonable because, at the time that the officer fired, the suspect "was driving on a 'lonely' rural road and his vehicle had already been disabled" by the

shots that struck its radiator. 762 F.3d at 439, 2014 WL 3882460, at *4. According to the plaintiffs, this showed that the "threat to the officers had already passed." *Id.* at 439, 2014 WL 3882460, at *5. We rejected this argument in no uncertain terms, noting that it "presumes that [the suspect] was only a threat to the extent that the truck was operational," when, in fact, it was "undisputed that [the suspect] was in possession of a stolen firearm and that [the officer] was aware of that fact." *Id.* While we "assume[d] for the purposes of summary judgment that [the suspect] did not" actually intend to use the gun, we concluded that "[the officer] was justified in assuming that there was an ongoing 'threat of serious harm to the officer or others,' even if [the suspect]'s vehicle was already disabled." *Id.* (quoting *Carnaby v. City of Houston,* 636 F.3d 183, 188 (5th Cir.2011)).

Our analysis in *Thompson* compels a similar holding in this case. If anything, the objective threat that Leija would fire at officers or the public was more serious than the threat posed by the suspect in *Thompson.* In *Thompson,* although there was a firearm in the suspect's vehicle, he never threatened to use it. *Id.* at 439, 2014 WL 3882460, at *5. Here, however, Leija twice called the Tulia Police Dispatch on his cell phone, during the pursuit, stating that he had a gun and that he would use it to shoot any law enforcement officers he saw. This information was conveyed to the officers involved in the pursuit, including Mullenix. Mullenix was also aware that there were several officers setting up tire spikes at various locations along the interstate, and that there was a police vehicle, with its lights on, parked underneath the bridge from which

he was planning to fire. Moreover, Leija was highly culpable for the risks he posed, a factor that *Scott* instructs us to consider. 550 U.S. at 384, 127 S.Ct. 1769. Thus, even if the risk of serious injury Mullenix posed to Leija by shooting at his vehicle exceeded the risk of serious injury Leija posed to the officers in this case, Mullenix's actions would not have been unreasonable under the Fourth Amendment.

The majority attempts to distinguish *Thompson,* in part, by pointing to the threat, in that case, posed by the suspect's vehicle during the chase. But that argument is a non sequitur. In concluding, in *Thompson,* that the risk posed by the suspect's possession of a firearm justified the officer's decision to fire at it, we assumed that the vehicle was no longer operational. *Id.* at 439, 2014 WL 3882460, at *5. The majority also points out that the suspect in *Thompson* was suicidal, had stolen a car, and had abducted a woman during the flight (who was released before he was shot). While these facts were, no doubt, relevant to our analysis of the risks in *Thompson,* it would be strange to conclude that the objective risk that Leija would use a gun was not equally great, given that Leija alone specifically indicated his intent to shoot at officers.

The majority further minimizes the risk that Leija posed to Ducheneaux and the other officers positioned along the road by citing several decisions in which a suspect was on foot or in a stopped vehicle.[2] *See, e.g.,*

[2] The majority also states that Mullenix "did not indicate that he perceived a threat to Ducheneaux from Leija" before firing at Leija's vehicle. Mullenix's subjective perception of a threat, how-

Ballard v. Burton, 444 F.3d 391, 402 03 (5th Cir.2006). In those cases, it was possible for the officers to observe the suspect's weapon, hands, or both, permitting the officers to react quickly before the suspect could use a weapon. *Id.* Here, however, Leija was traveling at high speeds and under cover of night, and Mullenix and the other officers could not see into Leija's vehicle. The officers would not have been able to wait to shoot until after Leija raised his gun (which would not have been visible), without jeopardizing their own lives. *See Larsen ex rel. Sturdivan v. Murr,* 511 F.3d 1255, 1260 (10th Cir.2008) ("A reasonable officer need not await the 'glint of steel' before taking self-protective action; by then, it is often ... too late to take safety precautions." (internal quotation marks and citation omitted)). Equally troubling is the majority's suggestion that, despite Leija's two statements to police dispatchers that he possessed a gun, a reasonable officer could not have concluded that he had a firearm because Leija was "not fleeing the scene of a violent crime" and "no weapon was ever seen." The ma-

---

ever, is not material to the objective reasonableness inquiry before us. *See Ashcroft,* 131 S.Ct. at 2080. Moreover, the majority is plainly incorrect on this point. The record reflects that Mullenix's actions were motivated by his belief that Leija would fire his weapon. Mullenix informed another officer over police radio that he was considering firing at Leija's vehicle because "this guy has a weapon and is willing to shoot." The majority asserts that "there is no evidence that any other officer from any of the law enforcement agencies involved in the pursuit ... decided to respond with deadly force." The record shows, however, that Mullenix discussed his plan to shoot at Leija's vehicle with two other officers involved in the pursuit—Rodriguez and Shipman—neither of whom made any effort to dissuade him.

jority's suggestion eviscerates the Supreme Court's requirement that we adopt the perspective of a reasonable officer on the scene and refrain from viewing the facts with "the 20/20 vision of hindsight." *Graham,* 490 U.S. at 396, 109 S.Ct. 1865.

Additionally, while officers should use "non-lethal alternatives" to deadly force, when available, Mullenix reasonably believed that deploying tire spikes along the highway posed a significant risk of harm to officers, including Ducheneaux. Although the officers were trained to protect themselves, to the extent possible, when deploying and operating spikes, such protection was necessarily limited by the officers' need to position themselves near the roadway and to maintain visual contact with oncoming traffic, so that they could use a rope attached to the spikes to pull them in front of the approaching suspect vehicle and then out of the way of approaching police (here, Rodriguez) and other vehicles. There is no evidence suggesting that the officers deploying road spikes could position themselves in a manner that would eliminate their exposure to gunfire from passing vehicles.

The majority notes that, in *Thompson,* the officers tried several alternative methods to stop the chase before the officer shot and killed the suspect. 762 F.3d at 438 39, 440 41, 2014 WL 3882460, at *4, *6. Yet one of these "non-lethal methods," as the majority refers to them, involved an officer firing a shotgun at the suspect's truck tires while that vehicle was in motion. *Id.* at 440 41, 2014 WL 3882460, at *6. It is hard to see how firing at a moving vehicle's tires is any less lethal than shooting at its engine block, given that both pose

a substantial risk that the driver will be unintentionally struck by a bullet. Moreover, the fact that tire spikes twice failed to stop the suspect's truck in *Thompson* only adds to the evidence presented in this case that tire spikes are often ineffective. The Fourth Amendment does not require that an officer have chosen what, in hindsight, appears to be the best course of action only that the officer's judgments be reasonable in light of the uncertainties inherent in police work. *See Graham,* 490 U.S. at 397, 109 S.Ct. 1865. Here, an objectively reasonable officer could have concluded, under the circumstances, that the risks posed to officers when deploying tire spikes outweighed their potential benefits.

I further question the majority's implication that Mullenix lacked sufficient knowledge to determine whether Ducheneaux was at risk. Mullenix knew that there was an officer below the bridge that he was standing on, that the officer's patrol lights were flashing (alerting Leija to the officer's presence), that the officer was likely operating tire spikes, and that officers operating spikes are often vulnerable to gunfire from passing vehicles. Mullenix also knew that tire spikes are not always effective in stopping vehicles and that there were additional officers located just minutes away along the highway. The risks at stake here were at least as particularized as in the Supreme Court's decisions in *Scott* and *Brosseau* and our decision in *Thompson,* where the officers employing force were not aware of the precise location or identity of the other officers and civilians they were acting to protect. *See Scott,* 550 U.S. at 384, 127 S.Ct. 1769 ("[R]espondent posed an actual and imminent threat

to the lives of any pedestrians who *might have been present*." (emphasis added)); *Brosseau v. Haugen,* 543 U.S. 194, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (granting qualified immunity to an officer who fired at a driver who had not yet driven his car in a dangerous manner to prevent possible harm to "other officers on foot who [she] believed were in the immediate area ... [and] any other citizens who might be in the area." (internal quotation marks and citation omitted)); *Thompson,* 762 F.3d at 439, 2014 WL 3882460, at *5 (holding that it was sufficient for the officer to reasonably believe there "might be other travelers on the road," even though the officer was not "aware of their presence"); *see also Pasco ex rel. Pasco v. Knoblauch,* 566 F.3d 572, 581 (5th Cir.2009) (recognizing that "the holding of *Scott* was not dependent on the actual existence of bystanders rather, the Court was also concerned about the safety of those who could have been harmed if the chase continued").

The majority also suggests that the harm Leija posed to the officers may have been insufficiently "immediate" to justify Mullenix's use of force. Yet it is difficult to conceive of a threat that is more immediate than the one Leija posed. At the moment Mullenix fired, Leija was seconds away from crossing the path of one of the officers he had threatened to shoot and minutes away from passing several other officers. *Cf. Thompson,* 762 F.3d at 440, 2014 WL 3882460, at *6 (noting that, at the time point the officer fired at the suspect driver, the next town the driver would reach was "approximately a mile away").

Finally, the majority implies that because Mullenix's original intent was to strike the engine block of Leija's vehicle, the lack of evidence that shooting at an engine block is an effective method for disabling a car is somehow relevant. But "Fourth Amendment reasonableness is predominantly an objective inquiry" that "regulates conduct rather than thoughts." *Ashcroft,* 131 S.Ct. at 2080 (internal quotation marks and citation omitted). As the Supreme Court clarified in *Scott,* "in judging whether [an officer]'s actions were reasonable, we must consider the *risk* of bodily harm that [the officer]'s actions posed to [the suspect]." 550 U.S. at 383, 127 S.Ct. 1769 (emphasis added); *see also id.* (explaining that the Fourth Amendment's objective reasonableness test does not depend on whether particular actions fall within the definition of "deadly force"); *Thompson,* 762 F.3d at 438, 2014 WL 3882460, at *4 ("There is no doubt that firing the assault rifle directly into the truck created a significant even certain *risk* of critical injury to [the suspect]. Under these circumstances, however, the *risk* was outweighed by 'the extreme danger to human life posed by' reckless vehicular flight." (emphasis added) (citation omitted)). Mullenix's actions would not violate the Fourth Amendment as long as he reasonably believed that the *risks* posed by Leija, viewed in light of Leija's culpability for those *risks,* exceeded the *risk* of harm to Leija from shots fired in the direction of his vehicle. *See Scott,* 550 U.S. at 383 84, 127 S.Ct. 1769.[3]

[3] It is worth noting that the probability of disabling Leija's car may not be as low as the plaintiffs and the district court presume. In *Thompson,* although the suspect was travelling at high speeds, an officer positioned at the side of the road aimed at and

In my view, Mullenix reasonably weighed these risks.

In conclusion, I recognize that this is a close case. Whether Mullenix is entitled to qualified immunity is debatable. Forced to decide, one or more of my colleagues in the majority might well conclude that Mullenix's actions violated clearly established Fourth Amendment law. While that would not be my conclusion, it would nevertheless be a fair, responsible decision. What we cannot do, on this record, is decline to decide the Fourth Amendment issue and, instead, effectively lateral that decision to a jury. The ultimate issue of objective reasonableness is purely legal, and there are no genuine and material factual disputes preventing us from deciding that issue in this appeal. For that reason, I dissent.

---

successfully shot the radiator of the fleeing suspect's vehicle. 762 F.3d at 436, 2014 WL 3882460, at *2.

Andy Oldham

From: Andy Oldham
Sent: Wednesday, July 12, 2017 2:59 PM
To: Berry, Jonathan (OLP)
Subject: Fwd: OSG email

I have one other option that I am exploring. I will let you know if it pans out. (Sylvia was my secretary in the AG's office.)

---------- Forwarded message ---------
From: Rosales, Sylvia [(b) (6)]
Date: Wed, Jul 12, 2017 at 11:54 AM
Subject: RE: OSG email
To: Andy Oldham [(b) (6)]

Hi Andy! I contacted our IT department and unfortunately there is no way to access those archived messages anymore. The account has been closed and deleted. Sorry. ☹

From: Andy Oldham [mailto[(b) (6)]
Sent: Wednesday, July 12, 2017 12:31 PM
To: Rosales, Sylvia <[(b) (6)]
Subject: OSG email

Sylvia:

Do you happen to know -- or can you find out -- whether I can get access to my archived emails from my time in OSG? Thank you!

Andy

Andy Oldham

From: Andy Oldham
Sent: Wednesday, July 12, 2017 4:04 PM
To: Berry, Jonathan (OLP)
Subject: Re: SJQ - latest draft

Oh, very interesting. [redacted] (b) (5) [redacted].

On Wed, Jul 12, 2017 at 12:59 PM Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

> Andy, [redacted] (b) (5) [redacted] ? Thanks! -Jon
>
> **From:** Berry, Jonathan (OLP)
> **Sent:** Wednesday, July 12, 2017 2:21 PM
> **To:** 'Andy Oldham' [redacted] (b) (6)
> **Subject:** RE: SJQ - latest draft
>
> Andy, this is looking great. I've given it a quick look and will dig in more soon.
>
> You had not sent me the Mullenix petn, so thank you for that.
>
> [redacted] (b) (5)
>
> Happy travels,
>
> Jon
>
> **From:** Andy Oldham [mailto[redacted] (b) (6)
> **Sent:** Wednesday, July 12, 2017 1:49 PM
> **To:** Berry, Jonathan (OLP) <jberry@jmd.usdoj.gov>
> **Subject:** SJQ - latest draft

[redacted] Duplicative Material

Andy Oldham

From: Andy Oldham
Sent: Wednesday, July 12, 2017 6:37 PM
To: Berry, Jonathan (OLP)
Subject: Re: FW: Quick call re: Andy Oldham

Shoot sorry about that -- [redacted (b) (6)]:

[redacted (b) (6)]

On Wed, Jul 12, 2017 at 3:26 PM Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

Andy, can you [redacted (b) (5)]? [redacted (b) (5)] [redacted]. Thanks!

-----Original Message-----
From: Mail Delivery Subsystem [mailto:MAILER-DAEMON@mailsc38.usdoj.gov]
Sent: Wednesday, July 12, 2017 6:16 PM
To: Berry, Jonathan (OLP)
Subject: Undeliverable: Quick call re: Andy Oldham

The original message was received at Wed, 12 Jul 2017 18:14:48 -0400 from pp-jdcw-1.doj.gov [10.222.1.76]

----- The following addresses had permanent fatal errors ----- [redacted (b) (6)]
(reason: 550-5.1.1 The email account that you tried to reach does not exist. Please try)

----- Transcript of session follows ----- ... while talking to gmail-smtp-in.l.google.com.:
>>> DATA
<<< 550-5.1.1 The email account that you tried to reach does not exist. Please try <<< 550-5.1.1 double-checking the recipient's email address for typos or <<< 550-5.1.1 unnecessary spaces. Learn more at <<< 550 5.1.1 https://support.google.com/mail/?p=NoSuchUser o190si3449498qkc.109 - gsmtp
550 5.1.1 [redacted (b) (6)]>... User unknown <<< 503 5.5.1 RCPT first. o190si3449498qkc.109 - gsmtp

Andy Oldham

From: Andy Oldham
Sent: Wednesday, July 12, 2017 10:13 PM
To: Berry, Jonathan (OLP)
Subject: Fwd:

[redacted] (b) (5)

---------- Forwarded message ---------
From: Adam J. White [redacted] (b) (6)
Date: Wed, Jul 12, 2017 at 7:06 PM
Subject: Re:
To: Andy Oldham [redacted] (b) (6)

Andy,

I am aware of no transcripts. I am looking into this and if I hear otherwise, I will let you know.

There is a recording of the April 20, 2016 teleforum. Here are links to the original brochure and the mp3 (I do not think they require ABA membership to access):

—
Brochure: https://www.americanbar.org/content/dam/aba/events/administrative_law/2016/03/brochure_march_24.authcheckdam.pdf

—
Audio: https://www.americanbar.org/content/dam/aba/administrative/administrative_law/us_texas_april_20_16.authcheckdam.mp3

As for the December 8 conference, I am aware of no recording. Here is the brochure: https://www.americanbar.org/content/dam/aba/events/administrative_law/2016/12/fall2016_brochure.authcheckdam.pdf

Best,
Adam

On Jul 12, 2017, at 1:19 AM, Andy Oldham [redacted] (b) (6) wrote:

Adam:

As you might recall, I spoke at these two ABA events last year:

December 8, 2016: Modern Trends in Administrative Law
April 20, 2016: ABA Teleforum re US v. Texas

As far as I'm aware, neither of those events was recorded, nor is there a transcript of my remarks. Can you please let me know if that's wrong?

Thank you in advance, and I hope to see you again soon.

Best, Andy

Andy Oldham

From: Andy Oldham
Sent: Thursday, July 13, 2017 1:51 PM
To: Berry, Jonathan (OLP)
Subject: Notes
Attachments: 0327_001.pdf; 0329_001.pdf; 0328_001.pdf

Jon -- I got to a scanner. Here are the old notes. I will flip the SJQ back to you ASAP. Best, Andy

Texas Plan

Overview

1. What it is
2. Why it is necessary
3. Why it is not "radical"

I. What it is

A. Article V provides two paths for amendments—Congress and States
B. Two-thirds of States must propose
C. Three-fourths of States must ratify

II. Why it is necessary

A. Washington is broken

a. Executive overreach
b. Congressional delegations
c. Supreme Court decisions—five justices can impose new constitutional decisions, but 38 States needed to overturn them

B. Benjamin Franklin—"a republic if you can keep it"

C. Then-Professor Scalia (1978) in endorsing convention: "I am not sure how long a people can accommodate to directives from a legislature it feels is no longer responsive and to directives from a life-tenured judiciary that never was meant to be responsive, without losing its will to control its own destiny."

III. Why it is not "radical"

A. Myth: Constitutional Convention of 1776 was a "runaway"

a. Annapolis convention
b. Federalist 40
c. Constitution could not have been adopted without Massachusetts Compromise

B. Myth: Delegates cannot be controlled

a. Delaware
b. New York
c. Modern examples—e.g., state constitutional conventions

C. Myth: States cannot propose issue-limited conventions

a. Founding-era practice from inter-state conventions
b. Ratification debates

Notes on Habeas Corpus

Overview:

1. Background
2. Procedural Analysis
3. Claim Analysis

I. Background

A. Meaning

B. History

a. England
b. Founding
c. Statutory history—pre-Civil War versus post

C. Application

a. Collateral attack
b. 2254
c. 2255
d. 2241

II. Procedural Analysis

A. COAs

a. Jurisdictional requirement
b. Gatekeeping

B. Successive petitions

a. Old claims (2244(b)(1))
b. New claims (2244(b)(2))

D. Statute of limitations

a. One year
b. When to begin counting?
c. When to stop counting?

E. Exhaustion

a. Why?

b. How?
c. Wrinkles?

III. Claim Analysis

A. State decisions

a. Procedural—and procedural default
b. Substantive—relitigation bar
c. Factual findings
d. Evidentiary hearings

B. Federal decisions

a. Constitutional violations
b. Jurisdictional defect
c. "Fundamental defect"

C. Teague puzzles

I want to go through three things with you today:

1. How I got into public service.
2. Why I fell in love with it.
3. Why I've stayed in it.

As I go through, I'll share some war stories. And I'll try to draw some morals from those stories. And I hope some of this is encouraging to y'all.

I. HOW I GOT TO PUBLIC SERVICE

Looking backwards versus looking forwards

Looking back, it's easy to focus the big victories—like fancy credentials or big case wins. After all, those are the things resumes are made of.

Looking forward, the future is scary and uncertain. If you're like me, fear of failure predominates over expectations of victory.

First moral: "failure" by the world's standard is different from "failure" by God's standards.

A couple of war stories.

First, clerkship hiring plan.

D.C. Circuit/Judge Sentelle

Going back to HLS. Buzz. Langdell. "Yikes—I'm sorry."

SCOTUS—failure.

Second, DOJ.

If I had gotten the SCOTUS clerkship straight out, I might never have gone into public service.

And here's proof that God has a sense of humor: I eventually got the SCT clerkship.

SAA interview—DOJ

Moral 2: things that look like "failures" might not be.

Moral 3: If you have a chance to try public service, DO IT.

II. HOW I FELL IN LOVE WITH PUBLIC SERVICE

The thing that hooked me on public service was the same thing that you hear lots of people say — cool experiences for young attorneys.

But that's not why I fell in love with public service.

What truly made me passionate about public service can be summed up in two words: Greg Abbott.

26 years old. Jogging. Lightning. Paralyzed.

Could have quit. Or felt sorry for himself.

Instead he came back stronger.

And he built the Texas Solicitor General's Office.

National reputation.

And the chance to work for the *public*.

I could tell you lots of stories. But one really sticks out.

In 2005, Colton Pitonyak murdered his on-again/off-again girlfriend, Jennifer Cave. Dismembered her body in his bathtub on the UT campus. And fled to Mexico with a young woman named Laura Hall.

Salacious case. Book, 60 minutes episode about it. All sorts of stuff.

Mr. Pitonyak hired some *very* fancy lawyers.

Jennifer's parents, on the other hand, had me. Just me.

I remember talking to Jennifer's mom.

They were very close.

Mom found Jennifer's decapitated body. Horrific.

There are not words to describe this woman's grief over losing her daughter.

And when Pitonyak challenged his conviction in federal habeas, he had the resources to hire some of the best lawyers money can buy. Jennifer and her mom had me.

After the oral argument, I was talking with Jennifer's mom and trying to help her understand how the process would go. I told her that I was optimistic that we'd win, which we did. And I told her that I would never stop fighting, even though I knew no amount of effort would bring Jennifer back.

She asked me if I had a daughter. I told her my wife is pregnant with a baby girl. And Jennifer's mom walked over, gave me a big hug, and whispered: "Love her. Love her every single day."

Moral 4: Find Godly, principled leaders like GA.

Moral 5: Don't ever forget that jobs like OSG are not great because you get to argue in front of the SCT or meet fancy people or get fancy credentials. Those jobs are great because they allow you to fight for folks like Jennifer and her parents.

III. WHY I STAYED IN PUBLIC SERVICE

Moral 6: The power of the rule of law.

Andy Oldham

From:	Andy Oldham
Sent:	Thursday, July 13, 2017 2:13 PM
To:	Berry, Jonathan (OLP)
Subject:	SJQ - most recent draft and update
Attachments:	SJC Questionnaire - 7.13.2017.docx; TAB Email.pdf; Bar Email.pdf; Dallas Fed Soc Email.pdf; UT Fed Soc Email.pdf

Jon:

Here's the updated draft in redline.

Also, (b) (5) [redacted] I will let you know as soon as I hear anything further on these fronts.

Best, Andy

Gmail Andy Oldha [redacted]

events question

Christian, William G. <WChristian@gdhm.com> Wed, Jul 12, 2017 at 9:54 AM
To: [redacted]
Cc: "marissa@austin.org" <marissa@austin.org>

Andy,

The Bar forwarded me your inquiry below about the recording of your past remarks to the Austin Bar Association.

As a member of the governing council of the Austin Bar's civil appellate section since 2012, I can confirm that the Bar did not record your and Evan's presentations on the U.S. Supreme Court to our section during those years and has no transcripts of them.

I don't know one way or the other about your 2015 remarks to the Bench Bar conference, because I have not been involved in that.

Please let me know if you have any questions or if I can be of further assistance.

Best regards,

Bill Christian

512-480-5704

From: Marissa Lara-Arebalo [mailto:Marissa@austinbar.org]
Sent: Wednesday, July 12, 2017 10:57 AM
To: Christian, William G.
Subject: FW: FW: events question

Hello William,

Please read below. Can you be of assistance to Andy?

Marissa Lara-Arebalo

Administrative Assistant

Austin Bar Association

816 Congress Ave., Ste. 700
Austin, Tx 78701
Ph 472 0279 ext.100
Fax 473 2720

From: Isabel Salazar [mail (b) (6)
Sent: Tuesday, July 11, 2017 7:28 PM
To: Marissa Lara-Arebalo <Marissa@austinbar.org>
Subject: Re: FW: events question

I would not know about civ app. They can contact chair. Only main event & a few others were recorded for bench bar. If she tells u time name of presentation, Kelli might be able to take a look at videos to figure it out.

On Jul 11, 2017 4:03 PM, "Marissa Lara-Arebalo" <Marissa@austinbar.org> wrote:

> How do I find out the answer to his question?
>
> **From:** Andy Oldham [mailt (b) (6)
> **Sent:** Tuesday, July 11, 2017 1:16 PM
> **To:** Austin Bar Email <AustinBar@austinbar.org>
> **Subject:** events question
>
> [Quoted text hidden]

Gmail

Andy Oldha [redacted]

Fed Soc event question

Kernodle, Jeremy <Jeremy.Kernodle@haynesboone.com> Wed, Jul 12, 2017 at 6:44 AM
To: Andy Oldha [redacted]

Don't think so, but I will try to confirm.

Hope this means some good news on your end!

From: Andy Oldham [mail [redacted]
Sent: Wednesday, July 12, 2017 12:25 AM
To: Kernodle, Jeremy
Subject: Fed Soc event question

Jeremy:

I hope this note finds you well. I have a quick and somewhat off-the-wall question. As you might recall, on October 16, 2015, I participated on a panel at the Belo entitled "The Second Amendment Today in Texas." It was a joint event, co-hosted by the Dallas Fed Soc and the ACS. As far as I'm aware, that event was not recorded, nor was there a transcript of my remarks. Can you please let me know if that's wrong?

Thank you in advance, and I hope to see you again soon.

Best, Andy

Re: TAB talk, January 17, 2017

Cathy S DeWitt <CDeWitt@txbiz.org>

Wed 7/12/2017 2:03 PM

To: Luke Bellsnyde [redacted]

Cc: Andrew Oldha [redacted];

TAB did not record the panel nor transcribe the discussion.

Cathy Stoebner DeWitt
Vice President, Governmental Affairs
Texas Association of Business
1209 Nueces Street
Austin, Texas 78701
512.637.7704 direct line

Sent from my iPhone

On Jul 12, 2017, at 11:59 AM, Luke Bellsnyde [redacted] > wrote:

> Cathy DeWitt, VP of Govt. Relations at TAB helped organize the panel.
>
> ---
>
> **From:** Andrew Oldham
> **Sent:** Wednesday, July 12, 2017 11:52 AM
> **To:** Luke Bellsnyde [redacted]
> **Subject:** TAB talk, January 17, 2017
>
> Luke
>
> Can you please forward the email below to the person who organized the TAB panel that I moderated on January 17th? Please call if you have any questions. Thank you!
>
> Andy
>
> * * *
>
> Andrew Oldham from Governor Abbott's office moderated a TAB panel on January 17, 2017. The panel was held at the Sheraton in downtown Austin, and it discussed recent administrative law cases affecting the business community. As memory serves, the panelists were from NAM and the US Chamber of Commerce. As far as we know, that panel was not recorded, nor was a transcript made of the panel discussion. Can you please let us know if that's mistaken?
>
> Thank you.

Gmail

Andy Oldha [redacted]

talks

Aaron Reit [redacted] Tue, Jul 11, 2017 at 4:01 PM
To: Andy Oldha [redacted]

Andy,

Received. I'll look into it right away.

Sincerely,

Aaron F. Reitz
Texas Law 2017
Cel [redacted]

On Jul 11, 2017, at 6:00 PM, Andy Oldham [redacted] wrote:

Aaron:

These are the two talks for which I do not have notes. Can you please let me know if you have a transcript or recording for them? Thank you -- and best of luck on the bar exam.

Best, Andy

September 10, 2015: Supreme Court Round-Up
September 8, 2016: Supreme Court Round-Up

Andy Oldham

From: Andy Oldham
Sent: Friday, July 14, 2017 12:24 AM
To: Berry, Jonathan (OLP)
Subject: Re: Hoo Knows

Jon- [redacted (b) (5)]

On Thu, Jul 13, 2017 at 9:18 PM Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

> Andy, [redacted (b) (5)] Thanks, Jon
>
> Jonathan Berry
>
> Office of Legal Policy
>
> U.S. Department of Justice
>
> 950 Pennsylvania Ave, N.W., Rm 4244
>
> Washington, DC 20530
>
> work: (202) 514-2160 | cell: [redacted (b) (6)]

Andy Oldham

From:	Andy Oldham
Sent:	Monday, July 24, 2017 12:42 PM
To:	Kingo, Lola A. (OLP)
Cc:	(b)(6) - AOUSC Email Address
Subject:	Re: Financials
Attachments:	SCAN_20170724113900.pdf

Lola: Thank you very much. My registration form is attached in soft copy, and I am driving to FedEx now to send you the original. I will do everything in my power to complete everything by one week from today.

Thank you.

Andy

On Mon, Jul 24, 2017 at 11:17 AM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:

> Dear Andy,
>
> (b) (5), I was hoping you could turn your attention to finalizing the financial documents that must be completed should you be nominated.
>
> First, please complete and sign the attached registration form, which will enable you to register for electronic filing of the Financial Disclosure Report. This Report is filed with the Administrative Office of the US Courts to ensure compliance with the Ethics in Government Act of 1978 and is also attached to your Senate Questionnaire. For the "Title," "Circuit," "District," and/or "Court" lines, please reference the court for which you are a candidate (and feel free to put "N/A" in those fields that are not applicable). For the remaining entries, please use your current office address and contact information. Once you have completed the form, **please email me a PDF** of the form and then **send the original by overnight delivery** (either FedEx or UPS) to me at the address in my signature block.
>
> Second, please complete a draft of the Financial Disclosure Report, which must be both filed with the Administrative Office of the U.S. Courts within five calendar days of your nomination and attached to your Senate Judiciary Questionnaire. You can access the software needed to generate the Financial Disclosure Report, as well as related documents, at https://fd-docs.uscourts.gov. Please use the following credentials to log-in to the website, where you may download the software, **User ID:** (b) (6) **Password:** (b) (6) Please note that both are case sensitive. I have attached Filing Instructions for completing the Financial Disclosure Report. If you have any questions about completing the Financial Disclosure Report, please contact Kristina Usry (copied) at (b) (6) —she knows everything there is to know about the Financial Disclosure Report and can walk you through any questions you have.
>
> Finally, please complete a Net Worth Statement. A blank Net Worth Statement as well as Net Worth Statement Guidelines are attached. If you have any questions about the Net Worth Statement, please do not hesitate to reach out to me.

If possible, please email me and Kristina your Registration Form, a draft of your Financial Disclosure Report and Net Worth Statement by the close of business on **Monday, July 31st.** We look forward to working with you. Thank you!

Lola A. Kingo
Senior Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(202) 514-1818 (o)
(b) (6) (m)
Lola.A.Kingo@usdoj.gov

FINANCIAL DISCLOSURE

Confidential Registration for Electronic Filing

This form shall be used to register for an account with the Financial Disclosure Online Reporting System. Registered filers and other participants will have privileges to submit documents electronically and to receive electronic notice of documents filed in their personal folders in the Financial Disclosure Online Reporting System.

NOTE: The Financial Disclosure Online Reporting System is a restricted Web site for official use only. Unauthorized entry or use or any use that attempts to circumvent access controls is prohibited and subject to prosecution under Title 18 of the U.S. Code. All activities and access attempts are logged and any prohibited actions may result in immediate withdrawal of access privileges and referral for prosecution.

The following information is required for registration:

First/Middle/Last Name: ANDREW STEPHEN OLDHAM

Title: CIRCUIT JUDGE

Circuit: FIFTH

District: N/A

Court: UNITED COURT OF APPEALS FOR THE FIFTH CIRCUIT

Court or Office Address: 1100 SAN JACINTO BLVD

Court or Office City, State and Zip Code: AUSTIN TEXAS 78701

Court or Office Voice Phone Number: (b) (6)

Court or Office Fax Number: 512 - 463 - 1932

Official Court or Office E-Mail Address: ANDREW. OLDHAM @ GOV. TEXAS. GOV
(address ending in ".gov" or ".org")

Secondary E-Mail Address: (b) (6)
(address ending in ".com," ".net," ".gov," or ".org")

Initial: ASO

By submitting this registration form, the undersigned agrees as follows:

1. This system is designed for filing with and records management by the Committee on Financial Disclosure. It may be used by individual filers only to file reports and other required documents and to view specific documents and notices contained within the filer's own financial disclosure records.

2. At this time, the requirements for filing, viewing, and retrieving case documents are: a personal computer running a standard platform such as Windows or Macintosh, an Internet provider using Point to Point Protocol (PPP), Internet Explorer 7 or higher or Mozilla Firefox 3.5.x, the current version of the FDR report preparation software, and software such as Adobe Acrobat Writer to convert supplemental documents from a word processor format to a portable document format (PDF).

3. In accordance with the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111), each financial disclosure document submitted shall be signed by the filer. The filer's log-in and the password, combined with his or her "s/typed name," serves as and constitutes the filer's signature. It is the responsibility of each filer to protect and secure the password issued by the Committee. If there is any reason to suspect that the password has been compromised in any way, or upon the resignation or reassignment of an individual with authority to use the password, it is the duty and responsibility of the filer immediately to change the password and notify the Committee at 202-502-1850.

4. It is the responsibility of the filer to keep all contact information current. Upon relocation and/or change of e-mail addresses, it is imperative that the filer update the information in his or her account. Electronic delivery of documents will be attempted to both e-mail addresses of record, but successful delivery need only be to one such address.

The undersigned agrees to abide by the Committee's Policies and Procedures Guide for Electronic Filing and all technical and procedural requirements set forth therein, and any updates or amendments.

Signature

Please return to: Committee on Financial Disclosure
One Columbus Circle, N.E., Suite 2-301
Washington, DC 20544

Andy Oldham

From: Andy Oldham
Sent: Wednesday, July 26, 2017 7:31 PM
To: Kingo, Lola A. (OLP)
Cc: (b)(6) - AOUSC Email Address
Subject: Re: Financials
Attachments: ASO Net Worth Statement.doc; FDR_NOM_Oldham-A-S [DRAFT].PDF

Attached is a draft of my net worth statement and a draft of my financial disclosure report.

On the FDR, (b) (5)

Please let me know how else I help. Thank you again.

Andy

On Mon, Jul 24, 2017 at 11:52 AM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:

> Confirming receipt. Thank you.
>
> **From:** Andy Oldham [mailto: (b) (6)]
> **Sent:** Monday, July 24, 2017 12:42 PM
> **To:** Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
> **Cc:** (b)(6) - AOUSC Email Address
> **Subject:** Re: Financials

Duplicative Material

Andy Oldham

From:	Andy Oldham
Sent:	Tuesday, September 05, 2017 2:28 PM
To:	King, Kara (OLP)
Cc:	Kingo, Lola A. (OLP)
Subject:	Re: ABA Evaluation and JEFS Registration
Attachments:	SCAN_20170905132515.pdf; SCAN_20170905132459.pdf; SCAN_20170905132448.pdf

Ms. King:

My signed and scanned forms are attached. As far as I know, I do not have a Box associated with this email account. Please let me know if there's anything else I can do to help.

Sincerely,

Andy Oldham
(b) (6) (c)

On Tue, Sep 5, 2017 at 11:32 AM, King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:

> Dear Mr. Oldham,
>
> Prior to your hearing before the Senate Judiciary Committee, the American Bar Association's Standing Committee on the Federal Judiciary will provide the Senate with an evaluation of your professional qualifications. To begin its evaluation, the ABA's Standing Committee requires the attached waiver. We ask that you please complete and sign the attached waivers, which we will submit to the ABA's Standing Committee on your behalf, along with a draft of the public portion of your Senate Questionnaire. Please email us back the signed copy of the waivers **(we do not need the originals)**.
>
> In the event you would like additional information about the ABA's evaluation process, please visit the following: http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09.authcheckdam.pdf.
>
> Additionally, under DOJ security policies, we need to register judicial nominees with the DOJ online file-sharing system ("JEFS") in order to exchange files larger than 10 MB (including our sending you the final assembled version of the Attachments to your Senate Questionnaire). On the attached form, please confirm your email address is listed correctly on the first page, and then sign the final

page of the User Agreement. Please physically sign in hard copy (do not e-sign). You should leave "Component and Sub-Component" blank. The User Agreement contains the Rules of Behavior for handling/receiving files securely from DOJ.

One final note: if you already have a Box account associated with the email address listed for you on page 1 of the attached, please let me know. We will need either to deactivate your account and re-register you, or use an alternate email address when registering you through DOJ.

Please email me back a scanned pdf of the last page of the JEFS containing your signature and the signed ABA waivers **by mid-day on Thursday, September 7th.** If you are able to get the paperwork to us earlier, that would be much appreciated.

Let me know if you have any questions!

Best,

Kara

Kara King

Nominations Researcher

Office of Legal Policy (OLP)

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Washington, DC 20530

Room 4234

Office: (202) 514-1607

Cell (b) (6)

you meet required security controls.[9]

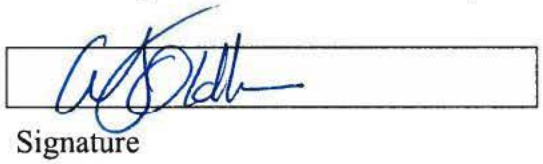
66. Disclose PII in accordance with appropriate legal authorities and the Privacy Act of 1974.

67. Dispose of and retain records in accordance with applicable record schedules, National Archives and Records Administration guidelines and Department Policies.[10]

68. Do not perform unauthorized querying, review, inspection, or disclosure of Federal Taxpayer Information.[11]

III. Statement of Acknowledgement

I acknowledge receipt and understand my responsibilities as identified above. Additionally, this acknowledgment accepts my responsibility to ensure the protection of PII that I may handle. I will comply with the DOJ IT Security ROB for General Users, Version 9, dated January 1, 2016.



Signature

Sept. 5, 2017

Date

ANDREW S. OLDHAM

Printed Name

Component and Sub-Component

Note: Statement of acknowledgement may be made by signature if the ROB for General Users is reviewed in hard copy or by electronic acknowledgement if reviewed online. All users are required to review and provide their signature or electronic verification acknowledging compliance with these rules. Users with privileged accesses and permissions shall also agree to and sign the ROB for Privileged Users. If you have questions related to this ROB, please contact your Help Desk, Security Manager, or Supervisor.

The Department has the right, reserved or otherwise, to update the ROB to ensure it remains compliant with all applicable laws, regulations, and DOJ Standards. Updates to the ROB will be communicated through the Department's ISES Team Lead and Component Training Coordinators.

JEFS is Strictly for DOJ Authorized Use Only.

Clear Form

Print Form

[9] For additional guidance on PII, please refer to *Information Technology Security, DOJ Order 2640.2F* (https://portal.doj.gov/sites/dm/dm/Directives/2640.2F.pdf).
[10] For disposal guidance, please refer to *Records Management, DOJ Order 2710.11* (http://dojnet.doj.gov/directives/canceled-orders/doj-2710-11.pdf).
[11] For additional information on disclosure of federal taxpayer information, please refer to *Internal Revenue Code Sec. 7213 and 7213A* (http://www.irs.gov/irm/part11/irm_11-003-001.html#d0e176).

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON THE FEDERAL JUDICIARY
WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with or in the possession of any governmental, judicial, disciplinary, investigative or other official agency, the State Bar of Texas—Chief Disciplinary Counsel, the Virginia State Bar Intake Office, the District of Columbia Office of Disciplinary Counsel, or any educational institution, or employer, and I hereby authorize a representative of the American Bar Association Standing Committee on the Federal Judiciary to request and to receive any such information.

Andrew S. Oldham
Typed or Printed Name

Signature

Dated: Sept. 5, 2017

U.S. Department of Justice

Certification of Identity

Privacy Act Statement. In accordance with 28 CFR Section 16.41(d) personal data sufficient to identify the individuals submitting requests by mail under the Privacy Act of 1974, 5 U.S.C. Section 552a, is required. The purpose of this solicitation is to ensure that the records of individuals who are the subject of U.S. Department of Justice systems of records are not wrongfully disclosed by the Department. Failure to furnish this information will result in no action being taken on the request. False information on this form may subject the requester to criminal penalties under 18 U.S.C. Section 1001 and/or 5 U.S.C. Section 552a(i)(3).

Public reporting burden for this collection of information is estimated to average 0.50 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Suggestions for reducing this burden may be submitted to Director, Facilities and Administrative Services Staff, Justice Management Division, U.S. Department of Justice, Washington, DC 20530 and the Office of Information and Regulatory Affairs, Office of Management and Budget, Public Use Reports Project (1103-0016), Washington, DC 20503.

Full Name of Requester [1] ANDREW STEPHEN OLDHAM

Citizenship Status [2] UNITED STATES Social Security Number [3] (b) (6) [redacted]

Current Address 1100 SAN JACINTO BLVD, FOURTH FLOOR, AUSTIN TX 78701

Date of Birth (b) (6) [redacted] Place of Birth (b) (6) [redacted]

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above, and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more than $10,000 or by imprisonment of not more than five years or both, and that requesting or obtaining any record(s) under false pretenses is punishable under the provisions of 5 U.S.C. 552a(i)(3) by a fine of not more than $5,000.

Signature [4] _____ **Date** Sept. 5, 2017

OPTIONAL: Authorization to Release Information to Another Person

This form is also to be completed by a requester who is authorizing information relating to himself or herself to be released to another person.

Further, pursuant to 5 U.S.C. Section 552a(b), I authorize the U.S. Department of Justice to release any and all information relating to me to:

ABA Standing Committee on the Federal Judiciary or its representative.

Print or Type Name

[1] Name of individual who is the subject of the record sought.

[2] Individual submitting a request under the Privacy Act of 1974 must be either "a citizen of the United States or an alien lawfully admitted for permanent residence," pursuant to 5 U.S.C. Section 552a(a)(2). Requests will be processed as Freedom of Information Act requests pursuant to 5 U.S.C. Section 552, rather than Privacy Act requests, for individuals who are not United States citizens or aliens lawfully admitted for permanent residence.

[3] Providing your social security number is voluntary. You are asked to provide your social security number only to facilitate the identification of records relating to you. Without your social security number, the Department may be unable to locate any or all records pertaining to you.

[4] Signature of individual who is the subject of the record sought.

Andy Oldham

From: Andy Oldham
Sent: Wednesday, September 06, 2017 1:02 PM
To: Berry, Jonathan (OLP)
Subject: Fwd: CD articles
Attachments: ATT00001.txt; IMG_0701.JPG; IMG_0700.JPG; IMG_0699.JPG; ATT00002.txt; ATT00003.txt

[redacted] (b) (5)

---------- Forwarded message ----------
From: **Selby, Barbara S. (Barbie) (bms8z)** <bms8z@virginia.edu>
Date: Wed, Sep 6, 2017 at 11:59 AM
Subject: CD articles
To: [redacted] (b)(6) - Andrew Oldham Email Address

Sent from my iPad

University Forum

Should the Jefferson Scholarship be independent of the Office of Financial Aid?

JOEL HOFFBAUER

Fight NCAA scholarship stipulations...

THE JEFFERSON Scholars Foundation's fundamental mission, according to its annual report, is "to attract the most promising students to the county and to give them sufficient financial support so that they are free to develop their talents and to use them for the good of the University community."

The program has had great success in finding students "who excel in a wide range of endeavors and who show promise of becoming tomorrow's leaders" and luring them away from Ivy League and other quality schools with an honor that some consider the most prestigious undergraduate scholarship in the world.

The Office of Financial Aid assists students "who cannot attend the University without financial assistance," and except for Athletic Grant-in-Aid, loan programs and a few specific scholarships, all aid granted to students is need-based.

Of course the two organizations should be independent. The two groups have completely goals, one based on recruiting scholars, the other enabling students to attend regardless of wealth.

Until recently, the Jefferson Scholars Foundation's system of awarding scholarships without the approval of the Office of Financial Aid has served the school well. Now, however, the NCAA has found Jason Morrell and me in violation of its regulations — we receive money from a non-University source. In order to be reinstated, we would repay the entire scholarship that we have been receiving for three years, or the Jefferson Scholars Foundation would choose to grant final decisions on scholarship recipients to the Office of Financial Aid.

While the organizations of supporters of the Jefferson Scholars Foundation would continue to allocate students based on academic merit, extracurricular and other qualifications, there is added bureaucratic layer to the process.

The Board of Directors of the Jefferson Scholarship Trust having waived all its decisions because of such intrusion by the Office of Financial Aid. The others merit scholarships, although different in their sources of funds, offer students their first choice would not affect the prestige of the scholarship and should not deter private donors from supporting the Jefferson Scholars Foundation.

Although the decision to institutionalize regulation the cause for discomfort, it should not be a permanent solution. Initially, I would like to see a stand temporarily to allow me to return to the sport I love. Also, if implemented immediately, it could have an effect on potential members of the Jefferson Scholars Class of 2004.

Even though I know the given consequences and several immediate benefits, I do not want the Jefferson Scholars Foundation to compromise its objectives permanently for the sake of a few students each year. Instead, I hope the Board will take action to appeal the NCAA's rule. The NCAA's goal "to maintain amateurism, guide athletics as an integral part of the educational program and the athlete as an integral part of the student body" shows that it did not implement the regulations in order to deny the best students from competing in athletics. The rules have been enacted to help ensure that fully funded teams like our football team do not offer extra benefits to entice more students to attend the school. Applied solely to prevent unfair recruiting, the regulation has validity.

We commend Jefferson Scholars playing varsity sports, the Jefferson Scholars Foundation has failed repeatedly if the rule is to maintain athletics. The NCAA should recognize the Jefferson Scholarship and similar scholarships as valid efforts to reward good students. Since the NCAA claims to care about the need for strong academic performance among athletes, it should be willing to revise its rules to enable students like Jason and me to play sports.

Although I know that bureaucracy could make our efforts futile, I have confidence that if enough people promote the NCAA, they might consider making a change. They have made concessions in the past. For example, I failed to pass through the NCAA Clearinghouse my first year because it did not consider one of my English classes in high school as acceptable. With pressure from the University's compliance office, however, the NCAA waived the requirement because it saw that its blanket rule to reject independent courses made an error in light of my other academic achievements. If the NCAA makes such concessions for individual athletes, it could certainly make a change for students engaged with the decision to end their sports careers prematurely or turn down an impressive academic scholarship.

Regardless of the decision of the Board this Friday, I plan to initiate action to appeal the NCAA regulation. I hope the Board finds the results of this issue as important as I do to the future of the Jefferson Scholars Foundation. They should do everything possible to resolve the issue both with the best interests of all student-athletes in mind and without permanently becoming dependent on the Office of Financial Aid.

Joel Hoffbauer is a third-year

Jason Borrel & Andy Oldham

Or encourage Board to forfeit power?

THOSE words from our University's founder, Thomas Jefferson, are emblazoned above the entrance to the APC. "Give about two hours a day to exercise, for health must not be sacrificed to learning. A strong body makes the mind strong," Jefferson recognized the relationship between mental and physical fortitude. Mr. Jefferson knew that healthy, youthful vigor could not be learned or learned either in the classroom or the playing field. In the spirit of the Enlightenment era of which he was a product, Thomas Jefferson proudly espoused the ambiguous of intellectual agility with athletic prowess in the lives of his students.

Likewise, the NCAA prides itself on the importance of its "student-athlete." The NCAA has spent millions of dollars promoting its view of the student-athlete and working through educational institutions to propagate the ideals inherent in athletic competition that spill over into America's classrooms. The NCAA, like our founder, unwaveringly believes in the unity of an active mind and body.

According to a recent ruling from the NCAA's governing board, all Jefferson Scholars are ineligible to compete in varsity sports because the scholarship monies comes from Alumni Hall — a source outside the University. Those student-scholars who earn a stipend bearing Mr. Jefferson's name at his University are being denied their opportunity to prove the validity of his statement that "a strong body makes the mind strong." In effect, the NCAA is asking Jefferson Scholars to choose between a scholarship to the University and the sport that they love.

The NCAA has ruled that if — and only if — the Jefferson Scholar Foundation agrees to institutionalize their scholarships (that is, the program must be administered through the Office of Financial Aid), then — and only then — will Jeff Scholar-athletes be allowed to compete in varsity sports. Due to the NCAA's unwillingness to compromise with the Athletic Compliance Office, the ball is now in the hands of the Board of Directors of the Jefferson Scholars Foundation. The Board has found itself in a Catch-22. On one hand, they risk the potential of losing some of their autonomy to the Financial Aid Office. On the other, they risk letting the NCAA restrict what type of student they have in their program by eliminating serious student-athletes from accepting the scholarship.

The prestige of the scholar-athlete is enshrined by the Rhodes Scholarship. Arguably the most prestigious scholarship program in the world, one of its requirements — beyond the highest academic standards — is a fondness and proficiency in sports. Like Thomas Jefferson, [illegible] Rhodes knew that a strong body and mind

The right course of action f[or] the Board is to institutiona[lize] the scholarship.

[illegible] This gives the NCAA's interrogators, [illegible] has been left with only one reasonable [illegible] right course of action for the Board is to [illegible] the scholarship. It is regrettable that the NC[AA] ing the University's brightest athletes by [illegible] scholarship funding, but it is in the best [interest] Jefferson Scholars program and the Univer[sity] to capitulate to the NCAA's demands.

In accordance with the standards by which [illegible] operated around the globe, undoubtedly [illegible] sound education should continue to be [illegible] learning at the University. The NCAA [illegible] restrict some student-athletes from [illegible] and meals, and the Jefferson Scholars [illegible] sensibility to the University and its [illegible] the importance of sports and scholastic [illegible] that the Jefferson Scholars Foundation, [illegible] ty, can afford to lose one or two [illegible] year until the program is reintroduced.

The Jefferson Scholars Foundation [illegible] who demonstrate excellence and [illegible] in the areas of leadership, scholarship [illegible] the scholarship is based on its [illegible] contributes to many different aspects [illegible] community. The NCAA would like [illegible] autonomy of the Jefferson Scholars [illegible] most well rounded student-athletes, [illegible] the Board, Jefferson Scholars can [illegible] deterred to distinguish themselves [illegible] both on and off the field.

Jason Borrel is a third-year [illegible] wrestler and Jefferson Scholar [illegible] third-year College student and

Oldham; 0711

Jen Blomberg

Fight NCAA scholarship stipulations...

THE JEFFERSON Scholars Foundation's fundamental mission, according to its annual report, is "to attract the most promising students in the nation and to give them sufficient financial support so that they are free to develop their talents and to use them for the good of the University community." The program has had great success in finding students "who excel in a wide range of endeavors and who show promise of becoming tomorrow's leaders" and luring them away from Ivy League and other quality schools with an honor that some consider the most prestigious undergraduate scholarship in the world.

The Office of Financial Aid assists students "who cannot attend the University without financial assistance," and except for Athletic Grants-in-Aid, loan programs and a few specific scholarships, all aid awarded to students is need-based.

Of course the two organizations should be independent. The two groups have unrelated goals, one based on recruiting scholars, the other enabling students to attend regardless of wealth.

Until recently, the Jefferson Scholar Foundation's system of awarding scholarships without the approval of the Office of Financial Aid has served the school well. Now, however, the NCAA has found Jason Bernd and me in violation of its regulations — we receive money from a non-University source. In order to be reinstated, we could repay the entire scholarship that we have been receiving for three years, or the Jefferson Scholars Foundation could choose to grant final decisions on scholarship recipients to the Office of Financial Aid.

While the repercussions of repaying our scholarships are obvious, institutionalizing the Jefferson Scholarship is a feasible solution, but only temporarily. The Jefferson Scholars Foundation could continue to choose students based on nominations, essays, interviews and other evaluations. Now it would be required to present its recommendations to the Office of Financial Aid.

The Board of Directors of the Jefferson Scholarship fears losing control of its decisions because of such reliance on the Office of Financial Aid. The other merit scholarships, although different in their source of funds, offer evidence that this change would not affect the prestige of the scholarship and should not deter private donors from supporting the Jefferson Scholars Foundation.

Although the decision to institutionalize simplifies the issue for everyone, it should not be a permanent solution. Selfishly, I would like to see it used temporarily to allow me to return to the sport I love. Also, if implemented immediately, it could have an effect on potential members of the Jefferson Scholars Class of 2004.

Even though I foresee few grave consequences and several immediate benefits, I do not want the Jefferson Scholars Foundation to compromise its objectives permanently for the sake of a few students each year. Instead, I hope the Board will take action to appeal the NCAA's rule. The NCAA's goal "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body" shows that it did not implement the regulations in order to deny the best students from competing in athletics. The rules have been enacted to help ensure that fully-funded teams like our football team do not offer extra benefits to entice more students to attend the school. Applied solely to prevent unfair recruiting, the regulation has validity.

We received Jefferson Scholarships for our scholarship, citizenship and leadership, not our athletic prowess. With only two of the 103 current Jefferson Scholars playing varsity sports, the Jefferson Scholars Foundation has failed miserably if its mission is to recruit athletes. The NCAA should recognize the Jefferson Scholarship and similar scholarships as valid efforts to recruit good students. Since the NCAA claims to care about the need for strong academic performance among athletes, it should be willing to reverse its rules to enable students like Jason and me to play sports.

Although I know that bureaucracy could make our efforts futile, I have confidence that if enough people pressure the NCAA, they might consider making a change. They have made concessions in the past. For example, I failed to pass through the NCAA Clearinghouse my first year because it did not consider one of my English classes in high school acceptable. With pressure from the University's compliance office, however, the NCAA waived the requirement because it saw that its blanket rule to reject independent courses made no sense in light of my other academic achievements. If the NCAA makes such concessions for individual athletes, it could certainly make a change for students strapped with the decision to end their sports careers prematurely or turn down an impressive academic scholarship.

Regardless of the decision of the Board this Friday, I plan to initiate action to appeal the NCAA regulation. I hope the Board finds the results of this issue as important as I do to the future of the Jefferson Scholars Foundation. They should do everything possible to resolve the issue both with the best interests of all student-athletes in mind and without permanently becoming dependent on the Office of Financial Aid.

(Jen Blomberg is a third-year Commerce student, Jefferson Scholar and rower.)

Jason Bernd & Andy Oldham

Or encourage Board to forfeit power?

THESE words from our University's founder, Thomas Jefferson, are emblazoned above the entrance to the AFC: "Give about two hours a day to exercise, for health must not be sacrificed to learning. A strong body makes the mind strong." Jefferson recognized the relationship between mental and physical fortitude: Mr. Jefferson knew that healthy, youthful vigor could not be limited or isolated either to the classroom or the playing field. In the spirit of the Enlightenment era of which he was a product, Thomas Jefferson proudly espoused the unification of intellectual agility with athletic prowess in the lives of his students.

Likewise, the NCAA prides itself on the reputations of its "student athletes." The NCAA has spent millions of dollars promoting its idea of the student athlete and working through educational institutions to propagate the ideals inherent in athletic competition that spill over into America's classrooms. The NCAA, like our founder, ostensibly believes in the unity of an active mind and body.

According to a recent ruling from the NCAA's governing board, all Jefferson Scholars are ineligible to compete in varsity sports because the scholarship money comes from Alumni Hall — a source outside the University. Those student-scholars who earn a stipend bearing Mr. Jefferson's name at his University are being denied their opportunity to prove the validity of his statement that "a strong body makes the mind strong." In effect, the NCAA is asking Jefferson Scholars to choose between a scholarship to the University and the sport that they love.

The NCAA has ruled that if — and only if — the Jefferson Scholar Foundation agrees to institutionalize their scholarships (that is, the program must be administered through the Office of Financial Aid), then — and only then — will Jeff Scholar-athletes be allowed to compete in varsity sports. Due to the NCAA's unwillingness to compromise with the Athletic Compliance Office, the ball is now in the hands of the Board of Directors of the Jefferson Scholars Foundation. The Board has found itself in a Catch-22. On one hand, they risk the potential of losing some of their autonomy to the Financial Aid Office. On the other, they risk letting the NCAA restrict what type of student they have in their program by eliminating serious student-athletes from accepting the scholarship.

The prestige of the scholar-athlete is reinforced by the Rhodes Scholarship. Arguably the most prestigious scholarship program in the world, one of its requirements — beyond the highest academic standards — is a fondness and proficiency in sports. Like Thomas Jefferson, Cecil Rhodes knew that a strong body and mind are inseparable. Not by coincidence, Jefferson Scholars have received three out of the last four Rhodes Scholarships awarded to University students. Though athletic ability is not a specific component in winning a Jefferson Scholarship, clearly the Jefferson Scholars Foundation, and the University, should seek to recruit students to whom physical and academic discipline go hand in hand.

It is unfair to both the students involved and the Jefferson Scholars Foundation that the NCAA is completely unwilling to consider a compromise to this situation. But given the NCAA's intransigence, the Board has been left with only one reasonable response. The right course of action for the Board is to institutionalize the scholarship. It is regrettable that the NCAA is forcing the University's brightest athletes to sacrifice their scholarship funding, but it is in the best interests of the Jefferson Scholars program and the University community to capitulate to the NCAA's demands.

The right course of action for the Board is to institutionalize the scholarship.

In accordance with the standards for student merit recognized around the globe, multifaceted and multidimensional education should continue to be a hallmark of learning at the University. The NCAA is threatening to restrict some student athletes from exercising their bodies and minds, and the Jefferson Scholars program has a responsibility to the University and its students to defend the importance of sports and scholastic excellence. Neither the Jefferson Scholars Foundation, nor the University, can afford to lose one or two scholar-athletes every year until the program is institutionalized.

The Jefferson Scholars Foundation chooses students who demonstrate excellence and exceptional potential in the areas of leadership, scholarship and citizenship; the scholarship is based on its recipients' abilities to contribute to many different aspects of the University community. The NCAA would like to impede upon the autonomy of the Jefferson Scholars Foundation and its most well rounded student-athletes, but with the help of the Board, Jefferson Scholars can and will continue undeterred to distinguish themselves and the University both on and off the field.

(Jason Bernd is a third-year Engineering student, wrestler and Jefferson Scholar. Andy Oldham is a third-year College student and Jefferson Scholar.)

Andy Oldham

From: Andy Oldham
Sent: Wednesday, September 6, 2017 1:27 PM
To: Berry, Jonathan (OLP)
Subject: Re: CD articles

Also, [redacted] (b) (5)

[redacted] (b) (5)

On Wed, Sep 6, 2017 at 12:09 PM, Andy Oldham <[redacted] (b) (6) > wrote:
[redacted] (b) (5)
.

On Wed, Sep 6, 2017 at 12:06 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
Thanks, Andy. [redacted] (b) (5)

Sent from my iPhone

> On Sep 6, 2017, at 1:03 PM, Andy Oldham [redacted] (b) (6) wrote:
>

[redacted] Duplicative Material

Andy Oldham

From: Andy Oldham
Sent: Wednesday, September 6, 2017 3:48 PM
To: Berry, Jonathan (OLP)
Subject: Re: SJQ updates
Attachments: SJC Questionnaire - 09.06.2017.docx; Gmail - Dallas Fed Soc event on Oct.pdf

Apologies for my delay. [redacted (b) (5)]

On Wed, Sep 6, 2017 at 8:08 AM, Andy Oldham <[redacted (b) (6)]> wrote:
[redacted (b) (5)]

> On Wed, Sep 6, 2017 at 8:02 AM Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
>
> Andy, [redacted (b) (5)] Thanks!

Gmail

Andy Oldha [redacted]

Dallas Fed Soc event on Oct. 16

Kernodle, Jeremy <Jeremy.Kernodle@haynesboone.com> Thu, Oct 1, 2015 at 5:00 PM
To: "Andy Oldha [redacted]

Andy—See below for the invitation sent by the Dallas Democratic Forum. It provides further information on the panelists and event.

Are you around next week for a call with the moderator/panelists to discuss the topic?

Thanks,

Jeremy

Fro [redacted] [mail [redacted]
Sent: Thursday, October 01, 2015 4:04 PM
To: Kernodle, Jeremy; njohnson@spectorjohnson.com
Subject: Fwd: "The Second Amendment Today in Texas," a debate and panel discussion, Friday, October 16, Forum Luncheon at the Belo Mansion, 11:30 am check in

Jeremy,

Here is a draft of our invitation.

Leslie Oschmann

Dallas Democratic Forum

972-416-2993

----Original Message----
From: Dallas Democratic Forum <dallasdemforum@sbcglobal.net>
To [redacted]
Sent: Thu, Oct 1, 2015 2:23 pm
Subject: "The Second Amendment Today in Texas," a debate and panel discussion, Friday, October 16, Forum Luncheon at the Belo Mansion, 11:30 am check in

DRAFT INVITATION FOR REVIEW

Like

[redacted] Oldham; 07 6

DALLAS DEMOCRATIC FORUM

Co-sponsoring with the Federalist Society, presents:

The Second Amendment:
What It Means Today in Texas

A debate and panel discussion with

Alan Gura

Shareholder, Gura & Possessky, P.L.L.C.

Oldham; 07 7

Carl Cecere

Shareholder, Cecere, PC

Marsha Fishman

Organizing for Action, Activist against Gun Violence

and

Andrew Oldham

Deputy General Counsel, Texas Governor Greg Abbott

moderated by:

Frederick C. Moss

Professor, SMU Dedman School of Law (Emeritus)

In light of recently enacted gun laws from the 84th Texas legislative session regarding "Open Carry" and "Campus Carry," a new reality exists in Texas today regarding the Second Amendment "right of the people to keep and bear Arms." Join us for a lively debate and discussion on the Second Amendment and the potential effects of these new laws on the public from a distinguished panel of constitutional experts and activists from various opposing points of view on these controversial issues.

Friday, October 16, 2015

The Belo Mansion -- Ross and Olive

2101 Ross Avenue, Dallas, TX 75201

11:30 am Registration/Buffet

12:00 Noon Program

Map to Belo Mansion

2015 Patron & Sustaining Members -- Free

Click below to pay for luncheon via Paypal

2015 Regular Members -- $25

Non Members -- $40

****Table of Up toTen - $300****

(Preferred seating and sponsorship recognition optional for full table purchases. Tables must be purchased *in advance* by clicking link above.)**

RSVP by Wednesday, October 14

You may renew your membership for 2016 today:

Regular	$ 75	1 reduced admission to each program
Sustaining	$ 250	1 paid admission to each program
Patron	$ 500	2 paid admissions to each program
Benefactor	$ 1,000	4 paid admissions to each program
Corporate	$ 1,500	6 paid admissions to each program

Or mail a check to Dallas Democratic Forum, P.O. Box 634, Dallas, TX 75221.

Thank you,

The Dallas Democratic Forum

p

Alan Gura

Oldham; 07 9

Alan Gura is a litigator practicing in the areas of civil litigation, appellate litigation and civil rights law at Gura & Possessky, P.L.L.C. in Virginia. He sucessfully argued two landmark constitutional cases on the Second Amendment before the U.S. Supreme Court,

District of Columbia v. Heller and *McDonald v. Chicago*.

In 2009, Legal Times named Gura to the list of "40 Under 40" of Washington D.C.'s rising legal stars. In 2013, the National Law Journal named him one of "The 100 Most Influential Lawyers in America."

Gura was born in Israel and came to California with his family at the age of 7. He graduated from Cornell University and the Georgetown University Law Center.

Gura began his career serving as a law clerk to the Hon. Terrence W. Boyle, U.S. District Judge for the Eastern District of North Carolina. Subsequently, as a Deputy Attorney General for the State of California, he defended the State of California and its employees in state and federal courts. Thereafter, he entered private law practice with the D.C. offices of Sidley & Austin. In February 2000, he left the firm to serve for a year as Counsel to the U.S. Senate Committee on the Judiciary, Subcommittee on Criminal Justice Oversight.

Carl Cecare

In 2013, Carl Cecere founded Cecere PC, an appellate litigation firm.

He has broad-based appellate experience, including cases involving constitutional law.

He has worked on a number of high-impact appellate cases before the U.S. Supreme Court and in multiple federal appellate courts, as well as all levels of Texas appellate courts. Notably, Carl served on a team of distinguished lawyers representing D.C. in *District of Columbia v. Heller*, the landmark Supreme Court case that established the scope of the protections provided by the Second Amendment.

Carl earned his undergraduate degree from Dartmouth College and his law degree, cum laude, from Southern Methodist University's Dedman School of Law, where he was on the Executive Board of the SMU Law Review and was elected to the Order of the Coif.

After law school, Carl clerked for the Honorable Mary Lou Robinson, U.S. District Court for the Northern District of Texas. Carl worked in the Supreme Court and Appellate Section of Akin Gump Strauss Hauer & Feld LLP, and then joined the Texas appellate boutique Hankinson LLP.

Carl frequently speaks and writes on issues of constitutional law and appellate advocacy. He is also a contributor to SCOTUSblog and the Huffington Post, where he has written on a variety of issues before the Supreme Court.

Marsha Fishman

Marsha Fishman lives in the Dallas area and has been active as a volunteer in gun violence prevention for 15 years. She is serves on the national board for Organizing for Action, a grassroots 501c4 organization, dedicated to supporting progressive issues.

Marsha has worked both locally and nationally to pass common sense gun legislation to make our communities safer. She has organized lobby days during Texas' legislative sessions to support common sense gun legislation and to oppose bills such as "open carry" and "guns on campus." She has also organized rallies and press conferences in the Dallas area to educate the public and rally support for a sensible legislative response to gun violence.

Marsha grew up in Ft Worth and attended the University of North Texas. She has been active in politics, supporting candidates who support sensible gun laws. She has worked to elect local, state and national candidates, serving as a national delegate for President Obama in 2012.

p

Andrew Oldham

Andrew Oldham is Deputy General Counsel to Texas Governor Greg Abbott. He previously served as Attorney General Abbott's Deputy Solicitor General where he argued dozens of cases in state and federal courts, including two cases before the U.S. Supreme Court.

Before moving to Texas, Mr. Oldham clerked for Justice Samuel A. Alito, Jr., at the U.S. Supreme Court and Judge David B. Sentelle at the U.S. Court of Appeals for the D.C. Circuit. Mr. Oldham also worked on a range of appellate and constitutional issues during his two-year tenure in the Office of Legal Counsel at the U.S. Department of Justice and while in private practice in Washington, D.C.

He is a graduate of Harvard Law School, Cambridge University (M. Phil.) and the University of Virginia (B.A.).

Moderated by: Frederick C. Moss

Fred Moss

Frederick C. Moss, Associate Professor in the Dedman School of Law, received his A.B. degree from Georgetown University, his J.D. from Villanova University School of Law and his LL.M. from Harvard Law School.

Before joining the faculty at the Dedman School of Law in 1978, he was an assistant U.S. attorney. At the SMU law school, Professor Moss has taught professional ethics, criminal law, evidence and trial advocacy, as well as constitutional and Texas criminal procedure. He also has served the law school as director of the Lawyering Program and associate dean for Lawyering Skills and Clinical Education.

Outside the law school, he has served as chair of the Dallas Bar Association's Ethics Committee and as an examiner for the Texas Board of Legal Specialization for 15 years. In the latter capacity, he wrote the evidence portion of the personal injury and civil trial law examinations. Professor Moss has lectured and written in the areas of evidence and professional ethics. In addition, he has served the National Institute for Trial Advocacy as director of its Southern Regional Basic Trial Skills Program, and currently serves as director of the Institute's Southern Deposition Program. He retired from SMU as Professor Emeritus of Law.

The Dallas Democratic Forum is a not for profit public issues group in its 38th year of operation. We look forward to seeing you at our next program.

Voicemail line: 214-855-7151

Email: wdgriggs@yahoo.com

Facebook:

www.facebook.com/DallasDemocraticForum

Website: DallasDemocraticForum.org

Dallas Democratic Forum | P.O. Box 634 | Dallas | TX | 75221

Oldham; 0723

Andy Oldham

From: Andy Oldham
Sent: Wednesday, January 31, 2018 3:04 PM
To: Berry, Jonathan (OLP)
Subject: Re: Monday?
Attachments: 2018 01 31 SJC Questionnaire.docx

Brother Berry -- edits attached. I will go through this again later tonight with a fine-tooth comb.

Andy

On Tue, Jan 30, 2018 at 7:39 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

> Awesome - thanks!
>
> Sent from my iPhone
>
> On Jan 30, 2018, at 8:18 PM, Andy Oldham [redacted (b) (6)] > wrote:
>
> > [redacted (b) (5)].
> >
> > On Tue, Jan 30, 2018 at 5:10 PM Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
> >
> > > Brother Oldham: [redacted (b) (5)].
> > >
> > > Sent from my iPhone

Andy Oldham

From: Andy Oldham
Sent: Thursday, February 01, 2018 4:03 PM
To: King, Kara (OLP)
Cc: Kingo, Lola A. (OLP); (b)(6) - AOUSC Email Address
Subject: Re: Financials
Attachments: ASO Net Worth Statement (Draft as of 02-01-18).doc; FDR_NOM_Oldham-A-S 02-01-2018.pdf

Kara, Lola, and Kristina -- Please find attached revised drafts of my net worth statement and my FDR. Best, Andy

On Tue, Jan 30, 2018 at 2:51 PM, Andy Oldham (b) (6) > wrote:

Hi Kara - yes of course. I will email those by the end of this week at the latest. Best, Andy

On Tue, Jan 30, 2018 at 3:42 PM King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:

> Hello Andy,
>
> Since you last gave us your financial information in July, we were hoping that you could send us some updated financial documentation in the next few weeks. I've attached your previous Net Worth statement and a copy of the net worth statement guidelines if you need them. Please also send us an updated FDR report, which you can access using the following credentials: **User ID:** (b) (6) **Password:** (b) (6) I have attached Filing Instructions for completing the Financial Disclosure Report. If you have any questions about updating the Financial Disclosure Report, please contact Kristina Usry (copied) at (b) (6) who can walk you through any questions you have.
>
> If possible, please email Lola, Kristina and I updated drafts of your Financial Disclosure Report and Net Worth Statement by the close of business on **Monday, February 12**. If you could get us the documents earlier, that would be much appreciated.
>
> Thank you!
>
> Kara

Nominations Researcher

Office of Legal Policy (OLP)

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Washington, DC 20530

Room 4234

Office: (202) 514-1607

Cell: (b) (6)

Andy Oldham

From:	Andy Oldham
Sent:	Monday, February 12, 2018 2:00 PM
To:	King, Kara (OLP)
Cc:	Berry, Jonathan (OLP)
Subject:	Re: Affidavit
Attachments:	SCAN_20180212125648.pdf

Kara -- notarized affidavit attached. I am driving it to FedEx now. Thank you very much.

Andy

On Mon, Feb 12, 2018 at 12:46 PM, King, Kara (OLP) <Kara.King2@usdoj.gov> wrote:

> Hello Andy,
>
> Please sign a copy of the last page of the Senate Questionnaire (the affidavit, attached) and have it notarized. (Please make sure there is no page number on the affidavit page.) Please scan a copy and e-mail to me. Then, please FedEx Overnight the original to me as soon as possible. Please note that OLP will send you a final PDF proof of your entire SJQ, with attachments, for your approval, before we submit anything on your behalf to the Senate, however, we are requesting the affidavit now to ensure that once everything is finalized, we can timely file.
>
> If you have any questions, please let me know. Thank you!
>
> Kara
>
> Kara King
>
> Nominations Researcher
>
> Office of Legal Policy (OLP)
>
> U.S. Department of Justice
>
> 950 Pennsylvania Avenue, NW

Washington, DC 20530

Room 4234

Office: (202) 514-1607

Cell: [redacted]

AFFIDAVIT

I, ANDREW STEPHEN OLDHAM, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

February 12, 2018
(DATE)

(NAME)

MARY BERNAL
NOTARY PUBLIC
State of Texas
Comm. Exp. 10-06-2019
NOTARY WITHOUT BOND

(NOTARY)

Andy Oldham

From: Andy Oldham
Sent: Tuesday, February 13, 2018 1:06 PM
To: Berry, Jonathan (OLP)
Subject: Fwd: FW: Designation Notice 12.20.17
Attachments: Texas Access to Justice Commission 12.20.17.pdf

Brother Berry -- re the appointment date for the Texas Access to Justice Commission, the appointment is dated December 20, 2017. I've attached it in case you need it for your records.

(b) (5)

Andy
---------- Forwarded message ----------
From: **Andrew Oldham** <Andrew.Oldham@gov.texas.gov>
Date: Tue, Feb 13, 2018 at 12:04 PM
Subject: FW: Designation Notice 12.20.17
To: Andrew Oldham (b) (6)

From: Jill Patterson
Sent: Wednesday, December 20, 2017 10:06 AM
To: trish.mcallister@texasbar.com
Cc: Cassie Daniel (b) (6) >; Andrew Oldham <Andrew.Oldham@gov.texas.gov>
Subject: Designation Notice 12.20.17

Good morning Ms. McAllister,

Attached is the Governor's ex officio member designation notice for the Access to Justice Commission. If you have any questions, please contact our office.

Thank you,

Jill Patterson

Governor's Appointments Office

P.O. Box 12428

Austin, TX 78711

Ph: (512) 463-1828 |Fax: (512) 475-2576

GOVERNOR GREG ABBOTT

December 20, 2017

The Honorable Nathan L. Hecht
Chief Justice
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Please be advised that I am making the following designation to the **Access to Justice Commission** for a term to expire at the pleasure of the Governor:

Ex Officio Member:
Andrew S. "Andy" Oldham
Acting General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711
Phone: 512-463-1788
Email: andrew.oldham@gov.texas.gov

Mr. Oldham is replacing James D. "Jimmy" Blacklock.

Sincerely,

Greg Abbott
Governor

GA:pv

Andy Oldham

From: Andy Oldham
Sent: Tuesday, February 13, 2018 9:27 PM
To: Berry, Jonathan (OLP)
Subject: Re: FW: Designation Notice 12.20.17
Attachments: SJC Questionnaire - 2.13.2018.docx

Brother Berry -- SJQ draft attached. My only open question - (b) (5) .

Best, Andy

On Tue, Feb 13, 2018 at 12:05 PM, Andy Oldham (b) (6) > wrote:

Duplicative Material

Andy Oldham

From: Andy Oldham
Sent: Wednesday, February 14, 2018 7:12 PM
To: Berry, Jonathan (OLP)
Subject: Re: FW: Designation Notice 12.20.17

[redacted] (b) (5)

On Wed, Feb 14, 2018 at 6:10 PM Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

> Thanks, Andy! [redacted] (b) (5)
>
> **From:** Andy Oldham [mailto: [redacted] (b) (6)]
> **Sent:** Wednesday, February 14, 2018 4:45 PM
>
> **To:** Berry, Jonathan (OLP) <jberry@jmd.usdoj.gov>
> **Subject:** Re: FW: Designation Notice 12.20.17
>
> Sorry for my delay, my friend. I'm having a day!
>
> On 1, [redacted] (b) (5) On 2, [redacted] (b) (5)
>
> Best, Andy
>
> On Wed, Feb 14, 2018 at 12:10 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
>
> > Thank you, Brother Oldham! Two quick things:
> >
> > 1. [redacted] (b) (5) ?

2. (b) (5) [redacted] ?

From: Andy Oldham [mailto (b) (6)]
Sent: Tuesday, February 13, 2018 9:27 PM
To: Berry, Jonathan (OLP) <jberry@jmd.usdoj.gov>
Subject: Re: FW: Designation Notice 12.20.17

Duplicative Material

Andy Oldham

From:	Andy Oldham
Sent:	Thursday, February 15, 2018 2:38 PM
To:	Kingo, Lola A. (OLP)
Cc:	King, Kara (OLP); (b)(6) - AOUSC Email Address
Subject:	Re: Finalizing Your Financial Disclosure Report
Attachments:	FDR_NOM_Oldham-A-S NOM.pdf

Kristina's colleague Dottie walked me through the e-filing process. And she confirmed that the AO has received the report.

Attached is a soft copy as well. Please let me know if there's anything else I can do to help.

And my deepest thanks again.

Andy

On Thu, Feb 15, 2018 at 12:54 PM, Andy Oldham (b) (6) > wrote:

> Thank you very much, Lola. I will update Boxes 3 and 5a and send a pdf to you.
>
> Kristina -- I don't recall how to file the report electronically. Might we discuss that when you have a moment? You can reach me at (b) (6)
>
> Thank you again very much for all that you have done and continue to do. I'm grateful.
>
> On Thu, Feb 15, 2018 at 12:43 PM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:
>
> > Dear Andy,
> >
> > Congratulations on your nomination today! We are all very happy for you.
> >
> > Now that you have been nominated, you should receive an email from the Administrative Office of the US Courts (AO) with information about accessing the Financial Disclosure Online (FiDO) Reporting System to file your Financial Disclosure Report. As a reminder, your nomination financial disclosure report is due **within five calendar days of your nomination**. Before you file your Financial Disclosure Report, please (1) input your date of nomination—February 15, 2018 (Box 5a) and, (2) update the date of the report (Box 3) to reflect the date that you file your Financial Disclosure Report. If you have any additional information to update since your paperwork was last reviewed by Kristina and/or me, please let us know. Otherwise, you may go ahead and file your Financial Disclosure Report once you update Boxes 3 and 5a. Should you run into any problems when filing your report, please contact Kristina at (b) (6) or the AO at 202-502-1850.

(b) (5)

If you have any questions, please don't hesitate to reach out. Once again, congratulations!

Lola A. Kingo

Chief Nominations Counsel

Office of Legal Policy (OLP)

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Room 4239

Washington, D.C. 20530

(202) 514-1818 (o)

(b) (6) (m)

Lola.A.Kingo@usdoj.gov

Andy Oldham

From: Andy Oldham
Sent: Friday, February 16, 2018 4:33 PM
To: Talley, Brett (OLP)
Subject: Re: Sen. Warren

(b) (5)

On Fri, Feb 16, 2018 at 3:22 PM, Talley, Brett (OLP) <Brett.Talley@usdoj.gov> wrote:

(b) (5)

From: Andy Oldham [mailto (b) (6)
Sent: Friday, February 16, 2018 4:19 PM
To: Talley, Brett (OLP) <btalley@jmd.usdoj.gov>
Subject: Sen. Warren

Brett--

(b) (5)

(b) (5)

Thank you again.

Andy

Andy Oldham

From:	Andy Oldham
Sent:	Friday, February 16, 2018 4:50 PM
To:	Burwell, Carter (Judiciary-Rep)
Cc:	Talley, Brett (OLP)
Subject:	Sen. Warren

Carter -- I talked with Brett, and he doesn't see a downside to at least reaching out to Sen. Warren. If you're comfortable reaching out to Stephanie, that's great. Otherwise, if you share her contact info with Brett, he's happy to coordinate. And either way, I'm obviously happy to fly up to DC anytime if that would be helpful.

Thank you both for everything. I am profoundly grateful.

Andy

Andy Oldham

From: Andy Oldham
Sent: Monday, February 26, 2018 11:32 AM
To: Berry, Jonathan (OLP)
Cc: Hudson, Andrew (OLP)
Subject: Re: Texas Tribune

Yes, I'd be happy to.

On Mon, Feb 26, 2018 at 11:27 AM Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

Thanks, Andy. [redacted (b) (5)] ? Thanks!

Sent from my iPhone

On Feb 26, 2018, at 10:24 AM, Andy Oldham [redacted (b) (6)] > wrote:

I meant to mention this to you on the phone. [redacted (b) (5)]

[redacted (b) (5)] ?

---------- Forwarded message ---------
From: Kellogg, Michael K. <mkellogg@kellogghansen.com>
Date: Mon, Feb 26, 2018 at 7:49 AM
Subject: FW: Texas Tribune
To: Andy Oldham [redacted (b) (5)]

Andy:

We received this query from a report at the Texas Tribune. I am more than happy to speak with her and sing your praises. But I don't want to tread on whatever media strategy the White House is planning. So please let me know if ok to go ahead.

It was great to see you last week.

Michael

From: Emma Platoff <eplatoff@texastribune.org>
Date: February 25, 2018 at 1:11:11 PM EST
To: media@kellogghansen.com
Subject: Texas Tribune

Hi there,

I'm a reporter with The Texas Tribune in Austin working on a story about Andrew Oldham, a recent nominee to the U.S. 5th Circuit Court of appeals and a former employee at Kellogg, Hansen, Todd, Figel & Frederick.

I'm wondering if someone in your office might be able to point me to the type of work Mr. Oldham did while there — either specific cases or a more general category if that's simpler. I'm particularly interested in what work, if any, he did with telecommunications litigation. Let me know what might be possible, and if someone is available to speak with me. You can reach me anytime at (b) (6)

Best,

Emma Platoff

--

Emma Platoff
Reporter

919 Congress, Sixth Floor
Austin, TX 78701
www.texastribune.org

M (b) (6) D (b) (6) F (512) 716-8601
@emmaplatoff

Andy Oldham

From: Andy Oldham
Sent: Monday, February 26, 2018 11:34 AM
To: Kellogg, Michael K.
Cc: Hudson, Andrew (OLP)
Subject: Re: FW: Texas Tribune

Michael - Thank you very much. I don't see any harm in responding to her. I met with DOJ this morning, and we are working on several angles, including letters and op-eds. But Emma has contacted several of my friends and colleagues, and she's clearly working on a big story.

I've also cc'd Drew Hudson, who's handling media for OLP.

Thank you again for everything. I'm profoundly grateful.

Best, Andy

On Mon, Feb 26, 2018 at 7:49 AM Kellogg, Michael K. <mkellogg@kellogghansen.com> wrote:

Andy Oldham

From:	Andy Oldham
Sent:	Monday, February 26, 2018 12:05 PM
To:	Berry, Jonathan (OLP)
Subject:	Fwd: Bio

This is the saccharine piece my lovely bride sent to the paper. [redacted (b) (5)]

---------- Forwarded message ---------
From: Heather Oldham [redacted (b) (6)]
Date: Mon, Feb 26, 2018 at 12:01 PM
Subject: Bio
To: Andrew Oldham [redacted (b) (6)]

https://www.washingtonpost.com/express/wp/2008/04/24/bio_a_vine_time_for_love/?utm_term=.a6dcbbd82ea6

Andy Oldham

From:	Andy Oldham
Sent:	Monday, February 26, 2018 12:41 PM
To:	Burwell, Carter (Judiciary-Rep); Talley, Brett (OLP)
Subject:	Fwd: Former Student Letter for Professor Warren
Attachments:	Letter from Former Students in support of Professor Warren.docx

Very interesting. I don't have this on my SJQ because I didn't write it. I just helped collect signatures from my class. In all events, the letter is attached.

---------- Forwarded message ---------
From: Porter, Katherine M (b) (6)
Date: Wed, Jul 28, 2010 at 11:37 PM
Subject: Former Student Letter for Professor Warren
To: Porter, Katherine M (b) (6)
CC: Adam J. Levitin (b) (6), Cassie Dick (b) (6)
Kwinick@clarktrev.com <Kwinick@clarktrev.com>, (b) (6) (b) (6)
(b) (6) (b) (6) >, (b) (6) < (b) (6)
bgrayson@mayerbrownrowe.com <bgrayson@mayerbrownrowe.com>, (b) (6)
(b) (6), Danielle D'Onfro (b) (6) >, Mike Simkovic
(b) (6) >, Chrystin Ondersma (b) (6)
lzimmermann@markuswilliams.com <lzimmermann@markuswilliams.com>, (b) (6)
(b) (6) >, (b) (6) (b) (6), laurab@summitlaw.com
<laurab@summitlaw.com>, (b) (6) < (b) (6) > (b) (6)
(b) (6), (b) (6) (b) (6),
(b) (6) (b) (6) (b) (6) (b) (6),
(b) (6) (b) (6) > (b) (6)
(b) (6), (b) (6) (b) (6)
(b) (6) (b) (6) mcummins@gibsondunn.com
<mcummins@gibsondunn.com>, (b) (6) (b) (6),
(b) (6) (b) (6) > (b) (6)
(b) (6), (b)(6) - Andrew Oldham Email Address (b)(6) - Andrew Oldham Email Address,
(b)(6) - Andrew Oldham Email Address (b)(6) - Andrew Oldham Email Address, (b) (6) (b) (6)
Lea Krivinskas Shepard (b) (6)) (b) (6) (b) (6)
(b) (6), (b) (6) (b) (6)
(b) (6), (b) (6), clayton@fr.com
<clayton@fr.com>, (b) (6) (b) (6)

Today, the letter from former students in support of Prof. Warren being nominated to serve as the Director of the Bureau of Consumer Financial Protection was mailed and emailed to the White House. I also sent a copy to EW, as I know your support will mean a great deal to her.

Thank you for your help in identifying and collecting signatories and proofreading the letter. I've attached a copy for you but because we had **162** signatories, I am not sending everyone a copy. But if you would like to send to anyone who signed and is not on this email, please feel free to do so.

If you have ideas on publicizing the letter in a particular way, please write to Dan Geldon at [redacted]--one of EW's former students--and run it by him. He's helping to coordinate the effort to have Prof. Warren be nominated.

Thanks, and so nice to meet (electronically) so many EW fans,

Katie Porter

ps If you were somehow left off this letter and indicated that you wanted to sign, please do tell me so I can apologize profusely. We did our very best to keep track of everyone.

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

July 28, 2010

Dear Mr. President,

We are graduates of Harvard Law School, the University of Pennsylvania Law School, and the University of Texas School of Law. We work in a variety of legal settings including private practice, government, nonprofit organizations, corporate legal departments, and universities.

We write to urge you to nominate Professor Warren to serve as Director of the Bureau of Consumer Financial Protection. This letter shares our observations of Professor Warren from thousands of cumulative classroom hours and other experiences as law students.

Professor Warren is a remarkable educator. Her core talents are an open and curious mind and a profound respect for serious analysis and honest debate. Professor Warren is tireless as a teacher because she herself truly loves to learn. She asks no easy questions and she accepts no easy answers. She pushes students, and herself, at every turn to sharpen their analytical abilities and their empirical knowledge. She has a first-rate intellect that is combined with an ability to discern and balance the competing concerns that shape law and policy.

Professor Warren creates and values an environment that invites active questioning of normative principles and empirical assumptions. She puts facts first and allows conclusions to follow. We have every confidence that as Director of the Bureau of Consumer Financial Protection Professor Warren would engage all parties (lenders, consumer advocates, and other regulators) in a rigorous debate in which hard data and superior analysis would triumph over ideology or politics.

To succeed in its mission, the Bureau of Consumer Financial Protection must communicate effectively with consumers in order to understand the need for regulation or enforcement and to implement those legal actions. We have witnessed Professor Warren's extraordinary ability to explain complex things in a simple way. As Director, she would take the concept of "open government" to a new level, making herself and consumer financial issues accessible to all Americans, not just the educated elite or the entrenched interests.

Finally, we ask you to note that this letter has 162 signatories, gathered in less than one week. Our commitment to supporting Professor Warren is tangible evidence of how she engages people with diverse backgrounds and views and treats them with courtesy and respect. This is a key quality of management and leadership, particularly for a new entity that will need to recruit talent and integrate staff from other agencies. She always brought care and attention to students, and we are confident that she would exhibit those same qualities as Director with regard to the Bureau's staff and the consumers who are under its protection.

Sincerely,

[The Undersigned]

Daniel Adams
Harvard Law School, Class of 2009
New York, NY

Joshua Anders
Harvard Law School, Class of 2007
New York, NY

Anthony Arnold
Harvard Law School, Class of 2007
Los Angeles, CA

Abbye Atkinson
Harvard Law School, Class of 2009
Oakland, CA

Akilesh Ayyar
Harvard Law School, Class of 2007
New York, NY

Amy C. Barker
Harvard Law School, Class of 2008
London, United Kingdom (U.S. Citizen living abroad)

Carrie Griffin Basas
Harvard Law School, Class of 2002
Durham, NC

Wendy Beetlestone
University of Pennsylvania Law School, Class of 1993
Wynnewood, PA

Maria Beguiristan
University of Pennsylvania Law School, Class of 1995
Miami, FL

Sarah Belton
Harvard Law School, Class of 2009
Columbus, OH

Adam Benforado
Harvard Law School, Class of 2005
Philadelphia, PA

Laura Bertin
Harvard Law School, Class of 1993
Seattle, WA

Bobbi J. Bierhals

Harvard Law School, Class of 2001
Chicago, IL

Jeremy Blachman
Harvard Law School, Class of 2005
New York, NY

Veenita Bhatia Bleznak
University of Pennsylvania Law School, Class of 1994
Philadelphia, PA

Edward Blume
University of Pennsylvania Law School, Class of 1994
Conshohocken, PA

Michael Blume
Harvard Law School, Class of 1996
Philadelphia, PA

Dana Carver Boehm
Harvard Law School, Class of 2005
Washington, DC

Jennifer Brandt
University of Pennsylvania Law School, Class of 1994
Philadelphia, PA

Sean Braswell
Harvard Law School, Class of 2007
Chapel Hill, NC

Anthony Calcagni
University of Pennsylvania Law School, Class of 1994
Portland, ME

Jamie Carroll
University of Pennsylvania Law School, Class of 1990
Atlanta, GA

Lesley Carroll
University of Pennsylvania Law School, Class of 1990
Atlanta, GA

Jesse R. Castillo
The University of Texas School of Law, Class of 1985
San Antonio, TX

Angela Chan
Harvard Law School, Class of 2005

San Francisco, CA

Patrick Childress
Harvard Law School, Class of 2009
New York, NY

Taj Clayton
Harvard Law School, Class of 2005
Dallas, TX

Andrew Cohen
University of Pennsylvania Law School, Class of 1990
Boston, MA

David Cohen
University of Pennsylvania Law School, Class of 1994
Morristown, NJ

Matthew Colman
Harvard Law School, 2009
Chicago, IL

Jessica Lynn Corsi
Harvard Law School, Class of 2010
Cambridge, MA

Jennifer Fox Crisp
University of Pennsylvania Law School, Class of 1994
Fairfield, CT

Jim Crowley
University of Pennsylvania Law School, Class of 1991
Still River, MA

Megan Cummins
Harvard Law School, Class of 2005
Brooklyn, NY

Katherine Currie
Harvard Law School, Class of 2009
New York, NY

Fernando Delgado
Harvard Law School, Class of 2008
Boston, MA

Birgitta Dickerson
University of Pennsylvania Law School, Class of 1994
Still River, MA

Jaime Dodge
Harvard Law School, Class of 2004
Cambridge, MA

Catherine K. Dick
Harvard Law School, Class of 2005
Chicago, IL

Joseph Dvorkin
Harvard Law School, Class of 2008
Chicago, IL

Mark Egerman
Harvard Law School, Class of 2009
Washington, DC

Christopher M. Egleson
Harvard Law School, Class of 2005
Brooklyn, NY

Allison Elgart
Harvard Law School, Class of 2005
San Francisco, CA

Kenneth Fabricant
University of Pennsylvania Law School, Class of 1994
Roslyn, NY

Marc Farris
Harvard Law School, Class of 2010
New York, NY

Amy Epstein Feldman
University of Pennsylvania Law School, Class of 1994
West Conshohocken, PA

Ariella Feldman (formerly Shkolnik)
Harvard Law School, Class of 2009
New York, NY

Jill Feldman
Harvard Law School, Class of 2002
Somerville, MA

Kimberly Kessler Ferzan
University of Pennsylvania Law School, Class of 1995
Camden, NJ

Anthony Forte
University of Pennsylvania Law School, Class of 1994
Philadelphia, PA

Andrew Friedberg
Harvard Law School, Class of 2005
Bellaire, TX

Jonathan Friedland
University of Pennsylvania Law School, Class of 1994
Chicago, IL

Vanessa Friedman
Harvard Law School, Class of 2009
Chicago, IL

Paul Gagnier
University of Pennsylvania Law School, Class of 1994
Amsterdam, The Netherlands (U.S. Citizen living abroad)

Jeffrey Garland
Harvard Law School, Class of 2009
Columbus, OH

Anthony Gay
University of Pennsylvania Law School, Class of 1994
Philadelphia, PA

Elissa Gelber
Harvard Law School, Class of 2001
Brooklyn, NY

Donna Gitter
University of Pennsylvania Law School, Class of 1994
New York, NY

Femi Giwa
Harvard Law School, Class of 2007
New York, NY

Joshua Glatter
University of Pennsylvania Law School, Class of 1994
Bloomfield, NJ

Andrea Goodrich
University of Pennsylvania Law School, Class of 1994
Schaffhausen, Switzerland (U.S. Citizen living abroad for work assignment)

Jared Gordon

University of Pennsylvania Law School, Class of 1994
Bala Cynwyd, PA

Barbara Grayson
Harvard Law School, Class of 2001
La Grange, IL

Christel Green
Harvard Law School, Class of 2009
Alexandria, VA

Julia Green
Harvard Law School, Class of 2003
Brooklyn, NY

John J. Grogan
University of Pennsylvania Law School, Class of 1993
Philadelphia, PA

Amy Gutman
Harvard Law School, Class of 1993
Cambridge, MA

Kurt Gwynne
University of Pennsylvania Law School, Class of 1992
Wilmington, DE

Barbara Habhab
University of Pennsylvania Law School, Class of 1990
Scottsdale, AZ

Aaron Halegua
Harvard Law School, Class of 2009
New York, NY

Robert Halpern
University of Pennsylvania Law School, Class of 1990
Shrewsbury, MA

David Halstead
Harvard Law School, Class of 2002
Cambridge, MA

Erin Hoffmann Harding
Harvard Law School, Class of 2002
Elkhart, IN

James Hart
Harvard Law School, Class of 2004

Chicago, IL

Racquel Henderson (formerly Whilby)
Harvard Law School, Class of 2009
Cambridge, MA

Mark Holloway
Harvard Law School, Class of 2007
New York, NY

Whitman L. Holt
Harvard Law School, Class of 2005
Los Angeles, CA

Evan Hudson
Harvard Law School, Class of 2007
Cold Spring, NY

Melissa Jacoby
University of Pennsylvania Law School, Class of 1994
Chapel Hill, NC

Patricia Jun
Harvard Law School, Class of 2009
Seoul, South Korea (U.S. Citizen)

Sanjay Kamlani
University of Pennsylvania Law School, Class of 1994
Miami Beach, FL

Peter Katz
University of Pennsylvania Law School, Class of 1994
Allentown, NJ

Joseph Kennedy
Harvard Law School, Class of 2009
Centerville, MA

Galit Kierkut
University of Pennsylvania Law School, Class of 1995
Millburn, NJ

Scott Kirwin
Harvard Law School, Class of 2001
North Reading, MA

Linda Kreem
Harvard Law School, Class of 2001
Denver, CO

Mindy Yoskin Kubs
University of Pennsylvania Law School, Class of 1994
Birmingham, AL

Sophia Lai
Harvard Law School, Class of 2009
Oakland, CA

Jessica Lee
Harvard Law School, Class of 2007
Chicago, IL

Matthew Lesnick
University of Pennsylvania Law School, Class of 1994
Santa Monica, CA

Adam J. Levitin
Harvard Law School, Class of 2005
Chevy Chase, MD

Andrew Lindsay
Harvard Law School, Class of 2006
New York, NY

Angela K. Littwin
Harvard Law School, Class of 2002
Austin, TX

Kevin LoVecchio
Harvard Law School, Class of 2007
Arlington, VA

Mary Makary
Harvard Law School, Class of 2009
Mesquite, TX

Brandon L. Maslov
Harvard Law School, Class of 2009
Arlington, VA

Devon Merling
Harvard Law School, Class of 2009
Cincinnati, OH

Daniel Michael
Harvard Law School, Class of 2007
New York, NY

Ted Mills
Harvard Law School, Class of 1993
Princeton, NJ

Christopher Mirick
Harvard Law School, Class of 1998
Wellesley, MA

Douglas Moll
Harvard Law School, Class of 1994
Houston, TX

Lee Morlock
Harvard Law School, Class of 2004
Chicago, IL

Ancela Nastasi
University of Pennsylvania Law School, Class of 1989
New York, NY

Michael Negron
Harvard Law School, Class of 2007
Washington, DC

Andrew Oldham
Harvard Law School, Class of 2005
Arlington, VA

Chrystin Ondersma
Harvard Law School, Class of 2007
Brooklyn, NY

John Paschke
Harvard Law School, Class of 1997
Boise, ID

David Perla
University of Pennsylvania Law School, Class of 1994
New York, NY

Katherine Porter
Harvard Law School, Class of 2001
Cambridge, MA

Read Porter
Harvard Law School, Class of 2005
Washington, DC

John A. E. Pottow

Harvard Law School, Class of 1997
Ann Arbor, MI

Jayne Ressler
University of Pennsylvania Law School, Class of 1994
New York, NY

Morgan Ricketts
Harvard Law School, Class of 2009
Los Angeles, CA

April Rinne
Harvard Law School, Class of 2004
San Francisco, CA

Ashley Riveira
Harvard Law School, Class of 2006
Washington, DC

Christopher T. Robertson
Harvard Law School, Class of 2007
Tuscon, AZ

Gretchen Passe Roin
Harvard Law School, Class of 2006
Boston, MA

Guy P. Roll
University of Pennsylvania Law School, Class of 1994
Tempe, AZ

David Rose
University of Pennsylvania Law School, Class of 1994
New York, NY

Salvatore G. Rotella, Jr.
University of Pennsylvania Law School, Class of 1993
Philadelphia, PA

Carla Rothenberg
Harvard Law School, Class of 2005
New York, NY

Eric Rothschild
University of Pennsylvania Law School, Class of 1993
Philadelphia, PA

Ilana Rubel
Harvard Law School, Class of 1997

Boise, ID

Jason W. Rubin
University of Pennsylvania Law School, Class of 1994
Philadelphia, PA

Robert Scheinbaum
University of Pennsylvania Law School, Class of 1994
Montclair, NJ

David Sclar
Harvard Law School, Class of 2007
New York, NY

Jasmin Sethi
Harvard Law School, Class of 2007
Arlington, VA

Coral Shaw
Harvard Law School, Class of 2007
Washington, DC

Britton Schwartz
Harvard Law School, Class of 2007
Berkeley, CA

Richard Silverstein
University of Pennsylvania Law School, Class of 1994
Chicago, IL

Michael Simkovic
Harvard Law School, Class of 2007
Great Neck, NY

Ganesh Sitaraman
Harvard Law School, Class of 2008
Cambridge, MA

Joseph Smalls
Harvard Law School, Class of 2009
Columbia, SC

Cole Smith
Harvard Law School, Class of 2010
Lake St Louis, MO

Jessica Richman Smith
Harvard Law School, Class of 2005
New York, NY

Sharmila Sohoni
Harvard Law School, Class of 2005
Brooklyn, NY

Jeffrey Spector
University of Pennsylvania Law School, Class of 1994
Bethesda, MD

Thomas Speranza
University of Pennsylvania Law School, Class of 1990
Villanova, PA

Jason Spitalnick
Harvard Law School, Class of 2007
New York, NY

Glen Summers
University of Pennsylvania Law School, Class of 1994
Denver, CO

Keith Swisher
Harvard Law School, LL.M Class of 2007
Phoenix, AZ

Mark Tashkovich
University of Pennsylvania Law School, Class of 1994
New York, NY

Jennifer Taub
Harvard Law School, Class of 1993
Northampton, MA

Philip Tedesco
Harvard Law School, Class of 2009
Somerville, MA

Robert Tintner
University of Pennsylvania Law School, Class of 1994
Philadelphia, PA

Kathryn (Kayt) Tiskus
Harvard Law School, Class of 2009
Brooklyn, NY

Lan Tran
Harvard Law School, Class of 2005
New York, NY

Travis Troyer
Harvard Law School, Class of 2007
New York, NY

Jessica Tucker-Mohl
Harvard Law School, Class of 2007
Davis, CA

Rory Van Loo
Harvard Law School, Class of 2007
Minneapolis, MN

Christy Von der Ahe
Harvard Law School, Class of 2007
San Francisco, CA

Adam Francois Watkins
Harvard Law School, Class of 2006
Boston, MA

Erika V. Wayne
University of Pennsylvania Law School, Class of 1994
Los Altos, CA

Ellen Weis
Harvard Law School, Class of 2008
Washington, DC

Christine Boness Whitman
University of Pennsylvania Law School, Class of 1994
Boston, MA

Murph Willcott
Harvard Law School, Class of 1993
Austin, TX

Kimberly S. Winick
The University of Texas School of Law, 1985
West Hollywood, CA

Lynne Helfand Wolfberg
University of Pennsylvania Law School, Class of 1994
Winnetka, IL

Michael Zabelin
Harvard Law School, Class of 2010
Boston, MA

Ming Zhu

Harvard Law School, Class of 2009
Washington, DC

Linda M. Zimmerman
University of Pennsylvania Law School, Class of 1992
Park City, UT

Raymond J. Zolekhian
Harvard Law School, Class of 2006
Los Angeles, CA

Andy Oldham

From: Andy Oldham
Sent: Monday, February 26, 2018 3:32 PM
To: Berry, Jonathan (OLP)
Cc: Will Consovoy
Subject: Letters etc

Brother Berry - I talked to Will today, and he's all in. He and I will put our heads together to come up with some letter ideas, and we'll shoot it your way soon. Great to catch up today. Best, Andy

Andy Oldham

From: Andy Oldham
Sent: Tuesday, February 27, 2018 12:41 PM
To: Berry, Jonathan (OLP)
Subject: Re: While you're on email

Happy to continue our chat whenever you're free. [redacted] (b) (5)

On Tue, Feb 27, 2018 at 8:37 AM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

> Brother Oldham, [redacted] (b) (5)
>
> - [redacted] (b) (5)
> - [redacted] (b) (5)
> - [redacted] (b) (5)
> - [redacted] (b) (5)
>
> We can also discuss more [redacted] (b) (5) when you call. Thanks!
>
> Jonathan Berry
>
> Office of Legal Policy
>
> U.S. Department of Justice
>
> 950 Pennsylvania Ave, N.W., Rm 4244
>
> Washington, DC 20530
>
> work: (202) 514-2160 | cell: [redacted] (b) (6)

Andy Oldham

From: Andy Oldham
Sent: Tuesday, February 27, 2018 3:16 PM
To: Berry, Jonathan (OLP)
Subject: Fwd: writing sample
Attachments: 2015 09 24 Governor Brief [final].pdf

FYI.

---------- Forwarded message ----------
From: **Andy Oldham** [redacted (b) (6)]
Date: Tue, Feb 27, 2018 at 2:13 PM
Subject: Re: writing sample
To: Peter Bennett <pbennett@thebennettlawfirm.com>

Peter -- I've attached a relatively recent and representative writing sample. During Governor Abbott's first legislative session, he exercised his line item veto power to strike several appropriations from the state budget. Those line item vetoes were challenged in a request for an Attorney General opinion submitted by the Comptroller. The Comptroller's challenge created a landmark legal dispute over the Governor's constitutional powers, and it resulted in a voluminous briefing docket because this was an issue of first impression in Texas's constitutional history. I wrote the attached brief to defend the Governor's vetoes. And the Governor prevailed entirely.

The Comptroller's opinion request can be found here. And the opinion upholding all of the Governor's vetoes can be found here.

Please let me know if you need any additional information, a different kind of writing sample, or anything else that might facilitate your review.

Best, Andy

On Mon, Feb 26, 2018 at 7:37 AM, Peter Bennett <pbennett@thebennettlawfirm.com> wrote:

> No need to rush today. The earliest I can read anything is Wednesday and more likely this weekend.
> Peter
>
> **From:** Andy Oldham [mailto:[redacted (b) (6)]
> **Sent:** Monday, February 26, 2018 8:36 AM
> **To:** Peter Bennett <pbennett@thebennettlawfirm.com>
> **Subject:** Re: writing sample

Peter - yes of course. I am traveling today, but I'll be back in Austin early tomorrow morning. If it doesn't screw up your schedule, I can send you a sample tomorrow. If you'd prefer it today, I can call my assistant and ask her to navigate through my files.

Best, Andy

On Mon, Feb 26, 2018 at 8:29 AM Peter Bennett <pbennett@thebennettlawfirm.com> wrote:

> Andy,
>
> Good moming. Would you be able to send me copies of any articles or briefs that you have authored either alone or without considerable input from others. If this is going to result in a mountain of paper then please send me any articles and some legal briefs but try to keep the total to 100 pages of material.
>
> Peter

Peter Bennett, Esquire

51 Melcher Street

Boston, MA 02210

The Bennett Law Firm

Labor Relations and Employment Law Representing Management

Primerus Member

Martindale-Hubbell AV PREEMINENT Peer Rated for Highest Level of Professional Excellence 2018

bio vcard www.thebennettlawfirm.com

Secured over **TLS** by Cloudstar powered by OneWorld

** THIS EMAIL IS ENCRYPTED TO PROTECT YOUR NON PUBLIC INFORMATION **

GOVERNOR GREG ABBOTT

Memorandum

To: Virginia K. Hoelscher, Chair, Opinion Committee, Office of the Attorney General

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

Re: RQ-0047-KP

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

Each of Governor Abbott's line-item vetoes of the 84th Legislature's General Appropriations Act easily satisfies that simple legal test. This easy-to-apply, bright-line test minimizes the incentive for gamesmanship by either the Legislature or the Executive and appropriately balances the powers of the coordinate branches over the State's expenditures. The contrary view, championed by the director of the Legislative Budget Board ("LBB") and described in the Comptroller's opinion request, openly encourages legislative word-games designed to thwart the Governor's constitutional role in the budget process. That view is not based on legal authority written by objective arbiters such as courts. It is based on faulty conventional wisdom that has somehow come to be relied upon as if it were law by the staff of the LBB, who of course have an institutional interest in minimizing the Governor's veto authority. We have been unable to identify any source of actual legal authority from this State or any other State that casts doubt on the legality of Governor Abbott's line-item vetoes of the 84th Legislature's General Appropriations Act.

It is telling that the Governor's critics cannot point to a case from any court, an attorney general opinion from any State, or even a law review article embracing the view that budget writers can take away the Governor's constitutional power to veto a budget item by merely *changing the label* they use to describe the item. In the view of the Governor's critics, the only relevant question is whether legislative budget writers intended for an item to be veto-eligible. Under that view, the LBB staff not the Texas

Constitution unilaterally determine which budget items are eligible for veto. That gets the law exactly backwards. The Texas Constitution not the legislative staff who write the budget determines the scope of the Governor's veto power. And under all the relevant legal authority interpreting the Texas Constitution and similar constitutional language in other states, the question courts ask is never whether budget writers intended an item to be veto-eligible. The question courts ask is whether budget writers intended to (1) set aside a sum of money (2) for a particular purpose.

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

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

The first part of this memorandum defends the Governor's understanding of the Texas Constitution's line-item veto provision. The second part explains that the Governor's view is not only compelled by all the relevant legal authorities but is also essential to the Constitution's careful balance and separation of powers. Attached to this memorandum is an Appendix, which provides answers to each of the many questions posed in the Comptroller's opinion request (Tab A).

BACKGROUND

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

While the text of the line-item veto clause is simple, the budget drafters' efforts to circumvent it are elaborate. Those efforts are motivated by two principal goals. First, the LBB staff want to maximize their control over the spending of every penny of the taxpayers' money. And second, they want to minimize the extent to which their work can be checked and vetoed by the Governor.

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

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

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

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

"Rider," "Informational Listing," and "Capital Budget." These labels are used variably to describe the detailed language that makes up the real guts of the budget. Again, none of these terms is mentioned anywhere in the Constitution. But the LBB staff understands them to be "conditions on an appropriation." WRITING THE BUDGET, *supra*, at 6. Sometimes a "rider" or "informational listing" is phrased in terms of actual conditions or directions. For example, a rider in article IX of the 2016-2017 budget provides, "The funds appropriated by this Act may not be expended [for travel] unless the travel and the resulting requests for payment or reimbursement comply with the conditions and limitations in this Act, Chapter 660, Government Code, and the Comptroller's Rules."[1]

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

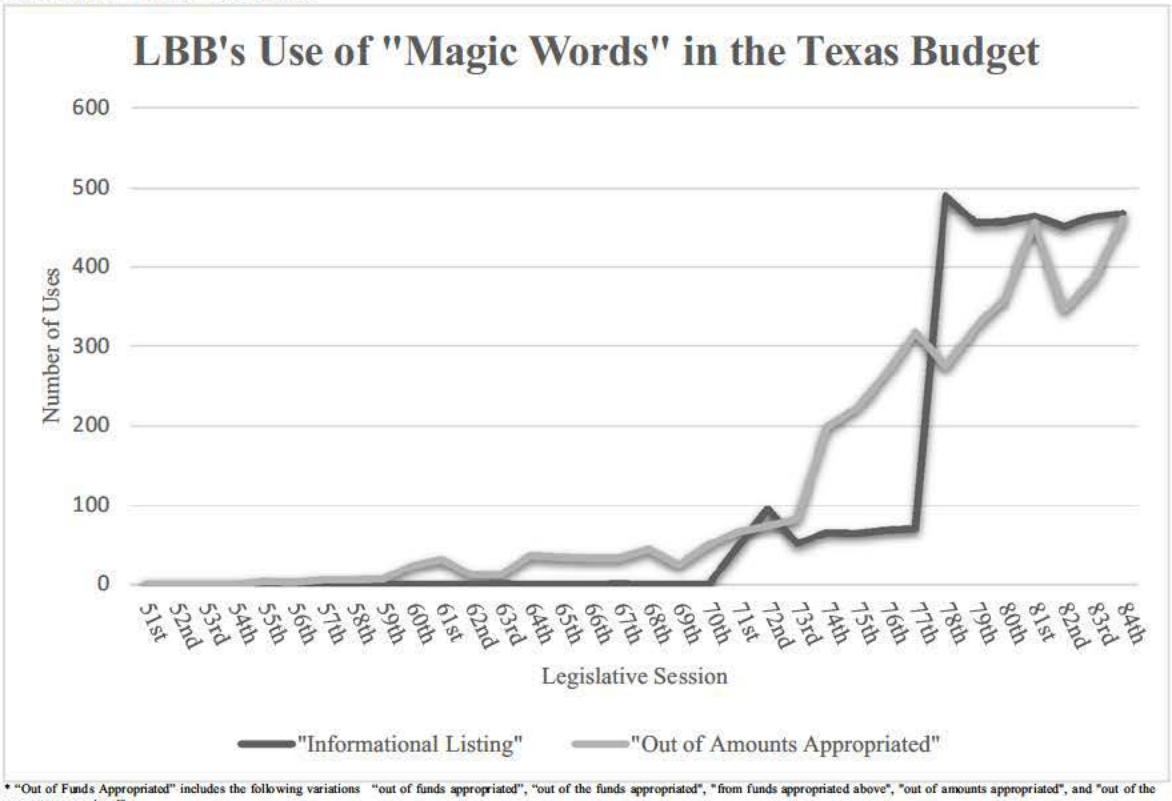
> "Out of funds appropriated above in Strategy A.1.2, Diversion Programs, $6,500,000 in fiscal year 2006 and $6,500,000 in fiscal year 2007 in discretionary grants shall be made to the Harris County Community Supervision and Corrections Department for the continued operations of the Harris County Community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

Id. at 11. The LBB director does not dispute that this rider is the *functional equivalent* of a vetoable item of appropriation because it forces a particular state agency (TDCJ) to spend a particular sum ($6.5 million per year) on a particular thing (a jail in Harris County). Rather, the LBB director argues that the TDCJ rider is "veto-proof" because it combines two magical phrases. *Ibid.*; *see also* LBB Staff Memo at 5. First, the LBB staff labeled it a "rider," and they believe this mere label controls whether an item of appropriation is vetoable. *E.g.*, LBB Staff Memo at 6. Again, however, the LBB staff's reliance on the label "rider" is only half-hearted because they are forced to concede that *some* of their "riders" are vetoable notwithstanding their labels. *See id.* at 5 (conceding "on occasion riders" are vetoable). Second, and most importantly, the rider is prefaced

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

by the phrase, "Out of funds appropriated above in Strategy A.1.2." In the LBB director's view, the mere invocation of those words establishes conclusively that the *strategy* is the item of appropriation and that the *rider* is not an item of appropriation. *See* LBB Staff Memo at 5-6; WRITING THE BUDGET at 11.

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



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

"Bill Pattern." All of the terminology explained above combines to form the "bill pattern." Each agency or institution of higher education has its own bill pattern. A small entity might have one goal, two strategies, and 10 riders or informational listings; a larger entity obviously will have many more. And the bill patterns for related entities

(like colleges and universities) will often closely resemble one another. The key import of the bill pattern, though, is that the LBB staff believe they can accomplish *substantive* changes in the vetoability of an agency's budget while leaving in place all the requirements on agencies to spend sums of money on specific purposes solely by tinkering with the bill pattern. The following hypothetical illustrates the point:

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

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

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

[2] *See, e.g.*, 2002-2003 General Appropriations Act at III-52, *available at* http://www.lrl.state.tx.us/scanned/ApproBills/77 0/77 R ALL.pdf (appropriating $157,000 for FY 2002 and $159,500 for FY 2003 to Strategy C.4.1: Southern Regional Education Compact).

DISCUSSION

I. THE GOVERNOR'S INTERPRETATION OF THE LINE-ITEM VETO CLAUSE COMPORTS WITH JUDICIAL DECISIONS AND THE CLAUSE'S MEANING

The items vetoed in the 84th Legislature's General Appropriations Act easily qualify as "items of appropriation" under the line-item veto clause in Article IV, Section 14. That is so for two reasons. First, the vetoes comport with *Jessen* and *Fulmore*, which are the Supreme Court of Texas's two leading cases interpreting the Governor's veto power. Second, the critics' contrary arguments are unpersuasive and should be rejected.

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

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

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

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

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

The Court held that the Governor's veto in *Jessen* was invalid because he struck a rider that did not set aside or dedicate funds for any purpose. Rather, the Governor attempted to veto a rider that merely "authorized" the Board of Regents to spend "bond proceeds," and "to accept gifts" and "grants," for building alterations and additions at the Law School. 531 S.W.2d at 597. That language constituted "legislative approval" of

construction projects at the Law School; but because the rider did not set aside a sum of money for that purpose, it did not constitute a vetoable "item of appropriation." *Id.* at 600. *Nowhere* did the Court even suggest that the applicability of the label "rider" or the absence of the label "item of appropriation" mattered to the outcome of the case.

Jessen's key teaching is that the Constitution's line-item veto clause draws a bright line between two concepts: (1) budget provisions that set aside money for particular purposes (and hence are vetoable), and (2) budget provisions that allow the agency flexibility to accomplish the Legislature's instructions. The Legislature gets to choose the level of granularity at which it uses the budget to control an agency's spending. Where the Legislature chooses a broad level of generality, as in *Jessen*, the Governor is powerless to use a line-item veto. But the more the Legislature restricts the agency by directing it to use specific dollar amounts for specific things, the more its instructions constitute "the setting aside or dedicating of funds for a specified purpose" and hence trigger the line-item veto power. *Jessen*, 531 S.W.2d at 599.

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

"Attorney General's Department.

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

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

140 S.W. at 407. The Governor struck through the number $83,160 because he determined it was "excessive," and he also struck the sum of $41,580 for the second year of the biennium. *Id.* at 408. The Governor explained in his veto proclamation that he intended to reduce the Attorney General's appropriation by half that "[b]y striking out the lump appropriation and the words describing the same, and the appropriation of $41,580.00 for the second year, the sum of $41,580.00 is left subject to the use of the Attorney General for the maintenance of his department for the two fiscal years named . . . ." *Ibid.* The Governor further explained that the $41,580 "is available for use [by the Attorney General] until exhausted, and may be applied during both of the fiscal years ending August 31, 1912, and August 31, 1913." *Id.* at 411.

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

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

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

"appropriate[ ]" $83,160, and it was irrelevant that each of the $41,580 sums came out of funds "appropriated" above.

B. The "Magic Words" Test Has No Basis in Law

1. The principal argument made by the Governor's critics is as sweeping as it is unprecedented. In the critics' view, the *only* thing that matters is whether budget drafters label something an "item of appropriation" or otherwise use the term "appropriate" to describe what they are doing. For example, the LBB director argues: "the [General Appropriations Act] itself specifically identifies such items, and each agency bill pattern contains the line, 'Items of Appropriation' immediately preceding the" provisions the budget writers want to make vetoable. LBB Staff Memo at 5; *compare, e.g.*, Comptroller Request at 5 (suggesting LBB staff's usage of different magic words "may demonstrate that the Legislature uses different terms to specify when a rider makes an appropriation and when a rider refers to an appropriation made elsewhere"). The LBB director believes that these labels ("Items of Appropriation") are "deliberately chosen and used consistently throughout the GAA" wherever budget drafters elect, apparently in their sole discretion, to give the Governor an opportunity to exercise his constitutional powers. LBB Staff Memo at 5.

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

Of course, the Court did no such thing. It examined the *substance* of the legislature's action, not the *label* placed on it by budget writers. And as far as our research reveals, every court to consider the magic-words theory of the line-item veto has emphatically rejected the notion that legislative staff can change the vetoability of budget language by changing its label or the bill pattern. For example, in *Fulmore*, the Supreme Court of Texas held it was irrelevant that the Legislature changed the bill pattern it used for the Office of the Attorney General. Only one member of the *Fulmore* Court Justice Ramsey agreed with the LBB staff that bill patterns and labels matter, and his dissenting view unquestionably is *not* the law.

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

Attorney General's Department.

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

Id. at 420 (Ramsey, J., dissenting in part). But the enacted budget did not look like that. Rather, through a committee substitute, the Legislature adopted a budget for the Attorney General that "grouped all of the 18 separate and distinct items contained in the original bill and made but one entire item of them all." *Id.* at 421 (Ramsey, J., dissenting in part); *see supra* at 8 (reprinting the final appropriation). Moreover, Justice Ramsey observed that the Attorney General's budget deviated from the bill pattern that the Legislature used for the other state agencies. *See ibid.* (Ramsey, J., dissenting in part) ("This is the only department of the state government in respect to which such a measure was passed."). In Justice Ramsey's view, the Legislature's (1) deviation from the bill pattern, (2) its use of different labels, and (3) its effort to "roll-up" the 18 individual entries in the original bill into a single lump-sum appropriation of $83,160 "evidences a clear and unequivocal intention to make a specific, clear, unambiguous, and *single appropriation* for the two years of $83,160," which would have rendered the Governor's veto unconstitutional. *Ibid.* (emphasis added).

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

That is why courts across the country like the Supreme Court of Texas in *Fulmore* and *Jessen* look behind the Legislature's labels to the *substance* of the Legislature's act.[3] Take, for example, the Arizona Supreme Court's decision in *Fairfield v. Foster*, 214 P. 319 (Ariz. 1923); *see Jessen*, 531 S.W.2d at 599 (relying on *Fairfield*). Like the Texas Constitution, the Arizona Constitution gives the Governor the power to

[3] Both *Jessen* and *Fulmore* instruct that the meaning of an "item of appropriation" under our Constitution should be understood in light of decisions "by courts in other jurisdictions with similar constitutional provisions." *Jessen*, 531 S.W.2d at 599; *see also Fulmore*, 140 S.W. at 511.

line-item veto a bill "contain[ing] several items of appropriation." In *Fairfield*, the Legislature appropriated $72,880 to the Corporation Commission, of which $53,880 should be used for employees' "salaries and wages." 214 P. at 154. Then, out of the sums appropriated for employees' salaries and wages, the Legislature specified: "For the following positions, not to exceed the annual rates herein specified: **** 1 rate clerk. $2,100 per annum." *Ibid.*

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

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

Id. at 157 (emphasis added).

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

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

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

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

Id. at 156-57 (emphasis added); *see also, e.g.*, *Colton v. Branstad*, 372 N.W.2d 184, 189 (Iowa 1985) (holding "[i]t is clear from these decisions that the section 12 sentence in issue does not qualify as a condition on the appropriation in section 4(6)," even though section 12 expressly said "*As a condition of the appropriation under section 4, subsection 6*" (emphasis added)); *cf.* TEX. GOV'T CODE § 311.024 ("The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.").

Similarly, the Supreme Courts of California, Washington, and Illinois have disregarded attempts to disguise "items of appropriation" as mere "provisos" (or "riders"). In *Wood v. Riley*, 219 P. 966 (Cal. 1923), the California Supreme Court looked behind the label of a budgetary "proviso" to determine whether it substantively "fill[s] all the requirements of a distinct item of appropriation of so much of a definite sum of money as may be required for a designated purpose connected with state government." *Id.* at 971. That "the Legislature attempted, by the inclusion of the proviso in the bill, to make such additional appropriation for such a purpose *under the guise of an*

administrative allotment" could not evade the line-item power of the Governor. *Ibid.* (emphasis added). Rather, "looked at in the light of what it was intended to accomplish, and what it would have accomplished if allowed to stand, one cannot escape the conviction that it worked an appropriation." *Ibid.* And to hold otherwise would allow the Legislature to "defeat the purpose of the constitutional amendment giving the Governor power to control the expenditures of the state, when it could not accomplish that purpose directly or by an express provision in appropriation bills." *Ibid.*

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

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

Ibid.

Finally, take Illinois. Like the Texas Constitution, the Illinois Constitution gives the Governor the power to "not approve any one or more of the items" of an appropriations bill. *See Fulmore*, 140 S.W. at 511 (relying on Supreme Court of Illinois). In *People ex rel. State Board of Agriculture v. Brady*, 115 N.E. 204 (Ill. 1917), the Illinois Legislature passed an act "making an appropriation in aid" of several state agencies, including the Board of Agriculture. The Act provided "[t]o the State Board of Agriculture the sum of $153,150 . . . to be used as follows," and what followed were a list of 44 purposes, with each purpose given a specified dollar amount. 115 N.E. at 204. The

Governor vetoed 7 of the purposes. The veto message included, for example, "In section 1, paragraph (a), I veto the item 'For Forage, $720 per annum" and "In section 1, paragraph (a), I veto the Item 'For construction of permanent and sanitary eating houses, $10,000." *Id.* at 205.

The Board challenged the validity of the vetoes and demanded payment of each of the specified amounts from the state auditor. The Board argued the vetoes were invalid "on the ground that the only distinct item of appropriation was the whole amount of $153,150, and what followed was only an apportionment of that item or a direction how it should be used." *Id.* at 206. The Supreme Court of Illinois agreed with the governor. The Court held that construing the budget as one lump-sum appropriation followed by a series of veto-proof riders "would be to nullify the power given by the Constitution to the Governor to withhold his approval from distinct items." *Id.* at 206-07. The Court continued: "The word 'item' is in common use and well understood as a separate entry in an account or a schedule, or a separate particular in an enumeration of a total which is separate and distinct from the other particulars or entries, and the items vetoed by the Governor come within that meaning." *Id.* at 207. "The Governor had power to veto the particular items in the bill in question in this case, and, having done so, the items vetoed did not become any part of the law." *Ibid.*

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

There are several more cases from around the country making the same point. The bottom line is that the LBB cannot set aside money for a particular purpose and then claim that its efforts are anything other than an "item of appropriation" subject to the Governor's line-item veto. As far as we are aware, there is no court in the country that ever has embraced the LBB's arguments to the contrary.[4]

[4] To the extent there are contrary authorities, they arguably embrace an *even more capacious* definition of "item" than do *Jessen* and *Fulmore*. For example, like the Texas Constitution, the Iowa Constitution provides: "'The governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill; and the part approved shall become a law.'" *Turner v. Iowa State Highway Comm'n*, 186 N.W.2d 141, 143 (Iowa 1971); *see Jessen*,

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

Again, that is specious. Here, as with the LBB director's other articulation of the magic-words test, there are two distinct questions: (1) whether a particular part of the budget makes an appropriation, and (2) whether the budget writers put the label "appropriation" on that same part of the budget. The LBB director's entire legal argument is an attempt to conflate those questions and pretend that appropriations only happen when budget language is adorned with certain labels. By now it should be painfully clear, however, that the fixation on labels over substance is misguided.

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

Likewise in *Fulmore*, only the dissenter, Justice Ramsey, found it probative of the Legislature's intent that the budget said "there is hereby *appropriated* [$83,160]" to the Attorney General. 140 S.W. at 421 (Ramsey, J., dissenting in part) (emphasis added). For the other 60 departments of state government, the Legislature simply said at the beginning of the budget that the following sums were "appropriated," and it did not

---

531 S.W.2d at 599 (relying on *Turner*). And the Iowa Supreme Court has rejected the notion that an "item" must set aside money: "Either by circumstance or design, our item veto amendment makes no reference to appropriations 'of money' in its provisions which enable a governor to approve appropriation bills in whole or in part, and permits the disapproval of any 'item' of an appropriation bill." *Turner*, 186 N.W.2d at 149; *see also Colton*, 372 N.W.2d at 189 ("permit[ting] item veto of appropriation bill language that does not, itself, appropriate a sum of money").

repeat that word for each individual agency. Justice Ramsey agreed with the LBB director that the repetition of the word "appropriation" in the Attorney General's budget item was legally significant because it removed a single sum of $83,160 from the Treasury. *See ibid.* But the *Fulmore* majority emphatically disagreed:

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

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

Second, courts in other States likewise have rejected the notion that "appropriation" is a magic word. Take, for example, Florida. *See Jessen*, 531 S.W.2d at 599 (relying on Florida Supreme Court). Its Supreme Court "has not required the use of the word 'appropriate' to constitute a valid appropriation." *Republican Party of Florida v. Smith*, 638 So. 2d 26, 28 (Fla. 1994); *see also Thompson v. Graham*, 481 So.2d 1212, 1214 (Fla. 1985) (the phrase "authorizing and funding" is another way of saying "appropriating"); *State ex rel. Bonsteel v. Allen*, 91 So. 104, 106 (Fla. 1922) ("Statutes setting apart or designating public moneys for special governmental purposes have been held to be appropriations, notwithstanding the word 'appropriation' is not used."); *State v. Southern Land & Timber Co*., 33 So. 999, 1003 (Fla. 1903) (finding an "appropriation" where legislature did not use that word).

Third, the LBB director is wrong to contend that the word "appropriation" in the Texas Constitution *always* must be interpreted to mean the same thing even when used "in different ways" and in different "circumstance[s]." LBB Staff Memo at 3. "In law as in life, . . . the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015). As the Supreme Court of the United States recently held, "'the meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise.'" *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932)). It is not obvious and the LBB director does not explain why the word "appropriation" nonetheless must have a universal meaning in contexts as disparate as the Comptroller's financial-statement obligations

(TEX. CONST. art. III, § 49a(b)) and the Governor's power to veto "items of appropriation" (TEX. CONST. art. IV, § 14). And in all events, even if *the Texas Constitution* uses the word "appropriation" to mean the same thing in every context, it does not follow that *the budget writers'* invocations of that word have any legal significance at all.

Fourth, the LBB director does not apply her own magic-words test consistently. The LBB Staff Memo argues that on the one hand, "use of the word 'appropriation' is both meaningful and deliberate." LBB Staff Memo at 6. But on the other hand, it concedes that the "contingency rider" for H.B. 14 *did* make an appropriation (and thus was validly vetoed), even though it omits the allegedly meaningful "appropriation" word. *See* LBB Staff Memo at A-5. And it argues that Rider 9 for the University of Texas at Austin *did not* make an appropriation, even though it includes the allegedly meaningful "appropriation" word. *See id.* at A-4.

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

GA-0776 stands for the proposition that transferring an appropriation from one agency to another does not create an independent appropriation. It does not even remotely support the proposition that legislative labels are all that matters when determining the veto eligibility of budget language. The opinion does find it *probative* that the legislature used the word "transfer" rather than "appropriate" to describe its actions, but that is just one factor among many the opinion considers. The opinion's overriding concern is with the substance of the legislature's action. And if the opinion had focused solely on the labels, it would have conflicted with *Jessen* and *Fulmore*,

which make abundantly clear that the touchstone in this analysis is the substantive effect of the legislature's actions, not the labels chosen.[5]

In short, there is not a shred of legal support for the proposition that an "item of appropriation" is vetoable *only if* the budget writers label it as such in the bill pattern. In budgets as in all statutes the courts will look behind legislative labels to ascertain the substance of the disputed item. The Governor explained all of this including, in particular the speciousness of the LBB staff's magic-words test in a lengthy letter to the Comptroller on June 26, 2015, much of which is reproduced herein. The Comptroller's opinion request does not include a single counter-argument to the authorities cited above.

C. The Governor's Higher-Education And Capital-Budget Vetoes Prove The Baselessness Of The "Magic Words" Test

The Appendix (*see* Tab A) includes detailed, item-by-item answers to each of the Comptroller's questions about the Governor's vetoes. But two categories of those vetoes namely, higher education and capital budget provide particularly vivid illustrations that the Governor's legal position is correct, and the "magic words" test is wrong.

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

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

---

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

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

This session, the Governor vetoed five items of appropriation at five institutions of higher education. Each one of them is analogous in every material respect to the items Governor Clements vetoed for the 1980-81 biennium. In all five instances, the General Appropriations Act dedicated a sum of money for a specific purpose at a specific institution and in doing so, it created an "item of appropriation" that implicated the Governor's veto power. And even if the "informational listing" label somehow rendered the vetoed strategies non-binding and therefore non-vetoable, the budget writers doubled down on all five of these items by including them as riders as well. Both the strategy and the rider would have to be non-vetoable for these five items to escape the reach of the Governor's veto pen. In any event, the *only* difference between 2015 and 1979 is that the budget drafters *labeled* the 2015 items as something other than "items of appropriation." But the Governor's critics can point to no source of legal authority much less can they find anything in the Constitution that suggests the labels matter. And given that Governor Abbott's vetoes are materially identical to those by Governor Clements, the LBB director cannot accurately describe Governor Abbott's as "unprecedented." LBB Staff Memo at 1.

After Governor Clements's vetoes, the 70th Legislature enacted Subsection 61.059(k) of the Education Code, but that provision of general law does nothing to cast doubt on Governor Abbott's vetoes. It reads: "The legislature shall promote flexibility in the use of funds appropriated to institutions of higher education by appropriating base funding as a single amount that is unrestricted to use among the various funding elements of the formula used to determine base funding." TEX. EDUC. CODE § 61.059(k)(1). *If* the Legislature appropriated all of the universities' funds as a "single amount that is unrestricted to use," then it might be argued that only that single amount is an "item of appropriation" and that *only* that single amount is vetoable. But Subsection 61.059(k)(1)'s direction that the Legislature "shall" do something does not mean that the

84th Legislature *actually did it*. Indeed, it is well established that one Legislature cannot "bind its will upon subsequent legislatures." *San Antonio Conservation Soc., Inc. v. City of San Antonio*, 455 S.W.2d 743, 746 (Tex. 1970). And even where the Legislature's obligations come from preexisting constitutional restrictions which are obviously even stronger than statutory ones the Legislature sometimes violates them in drafting the budget. *See, e.g.*, *Strake v. Court of Appeals for First Supreme Judicial Dist. of Texas*, 704 S.W.2d 746, 748-49 (Tex. 1986) (holding one provision of the GAA violated the Texas Constitution's emoluments clause, TEX. CONST. art. III, § 18).

Moreover, Subsection 61.059(k) does not apply on its own terms. That provision applies only to *base funding*: "The legislature shall promote flexibility in the use of funds appropriated to institutions of higher education by appropriating *base funding* as a single amount that is unrestricted to use among the various funding elements of the *formula used to determine base funding*." TEX. EDUC. CODE § 61.059(k)(1) (emphasis added). But the Governor did not veto any base funding; all five of his higher-education vetoes affected only "special items," which are by definition separate and apart from base funding. *See, e.g.*, LEGISLATIVE BUDGET BOARD, FINANCING HIGHER EDUCATION IN TEXAS: LEGISLATIVE PRIMER 9 (5th ed. 2013) (differentiating "special items" from the "formulas" used to determine base funding) (hereinafter "HIGHER ED PRIMER"). And Subsection 61.059(k) says nothing to require the inclusion of "special items" in a single lump-sum appropriation. To the contrary, the fact that the Legislature suggested that base funding should be appropriated in a lump sum implicitly suggests the Legislature did *not* want similar treatment for non-base funding (like special items). *See, e.g.*, *United Servs. Auto. Ass'n v. Brite*, 215 S.W.3d 400, 403 (Tex. 2007) (applying maxim *expressio unius est exclusio alterius*); *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 493 n.7 (Tex. 1993) (same).

Indeed, the Legislature *itself conceded* that the higher-education strategies vetoed by Governor Abbott are not merely "informational." That is because the Legislature had to adopt resolutions to suspend the rules of the House and Senate to add the vetoed special items to the budget. And in the plain text of those resolutions, the Legislature admitted that the strategies Governor Abbott vetoed are "items of appropriation." All emphases in the following table are added.

Legislative References To Higher Ed Strategies As Items Of Appropriations		
Item	**House Resolution**	**Senate Resolution**
Texas A&M University International Summer Law Course	Page III-25 of HR 3315 (84-R): "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.1.1. Strategy: INTERNATIONAL SUMMER LAW COURSE"	Page III-25 of SR 1019 (84-R): "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.1.1. Strategy: INTERNATIONAL LAW SUMMER COURSE"

Legislative References To Higher Ed Strategies As Items Of Appropriations		
Tarleton State University Center for Anti-Fraud, Waste and Abuse	Page III-27 of HR 3315 (84-R): "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.2. Strategy: CENTER FOR ANTI-FRAUD"	Page III-27 of SR 1019 (84-R): "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.2. Strategy: CENTER FOR ANTI-FRAUD"
Stephen F. Austin University Waters of East Texas Center	Page III-37 of HR 3315 (84-R): "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.4. Strategy: WET CENTER"	Page III-37 of SR 1019 (84-R): "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.3.4. Strategy: WET CENTER"
Del Mar College Maritime Museum	Page III-57 of HR 3315 (84-R): "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: O.2.1. Strategy: MARITIME MUSEUM"	Page III-57 of SR 1019 (84-R): "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: O.2.1. Strategy: MARITIME MUSEUM"
University of Texas at Austin Center for Identity	Page III-23 of HR 2700 (83-R): "Suspend House Rule 13, Section 9b (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.2.8. Strategy: IDENTITY THEFT AND SECURITY"	Page III-23 of SR 1055 (83-R): "Suspend Senate Rule 12.04 (5) to allow the Conference Committee **to add an item of appropriation** that is not in either version of the bill to read as follows: C.2.8. Strategy: IDENTITY THEFT AND SECURITY"

The LBB likewise has conceded that the vetoed strategies are not merely "informational," but rather are "special items" that the budget writers have singled out and *directed* the universities to implement. In its "primer" for financing higher education, the LBB explains that these "special items" as "*direct appropriations* to institutions for projects that are not funded by formula but are *specifically identified by the legislature as needing support*." HIGHER ED PRIMER at 9 (emphasis added).

Moreover, even if the LBB staff could use magic words (like "Informational Listing") to make the higher-education *strategies* veto-proof, the same magic trick could not veto-proof the higher-education *riders*. And far from suggesting that higher-

education riders are non-binding, the higher-ed bill patterns all say that the funds appropriated to the universities are "subject to the special and general provisions of this Act," which can only mean the riders. *E.g.*, GAA at III-65 (University of Texas at Austin). The plain text of those riders proves that they are vetoable items of appropriation because they set aside sums of money for particular purposes. Remarkably, the riders often concede that the Legislature appropriated money in the vetoed strategies; they often use the allegedly magic word "appropriation"; and they all use some variation of mandatory language to ensure that the universities set aside the sums for the specified purposes. All italics in the following table are added.

Vetoed Rider	Text
University of Texas A&M, Rider 4	"**International Law Summer Course**. Out of funds *appropriated* to Texas A&M University in Strategy C.1.1, International Law Summer Course, $137,577 in General Revenue in fiscal year 2016 and $137,577 in General Revenue in fiscal year 2017 *will be used* for the International Summer Course."
Tarleton State University, Rider 6	"**Center for Anti-Fraud, Waste and Abuse**. Out of funds *appropriated* to Tarleton State University in Strategy C.3.2, Center for Anti-Fraud, Waste and Abuse, $1,000,000 in General Revenue in fiscal year 2016 and $1,000,000 in General Revenue in fiscal year 2017 *will be used* for the Center for Anti-Fraud, Waste, and Abuse."
Stephen F. Austin State University, Rider 4	"**Waters of East Texas Center**. Out of funds *appropriated* to Stephen F. Austin State University in Strategy C.3.4, Waters of East Texas Center, $500,000 in General Revenue in fiscal year 2016 and $500,000 in General Revenue in fiscal year 2017 *will be used* for the Waters of East Texas Center."
Del Mar College, Rider 26	"**Del Mar College - Maritime Museum**. Out of funds *appropriated* above in Strategy O.2.1, Maritime Museum, $100,000 in General Revenue for fiscal year 2016 and $100,000 in General Revenue for fiscal year 2017 *shall be used* for a maritime museum."
University of Texas at Austin, Rider 9	"***Appropriation* for Identity Theft and Security**. Amounts *appropriated* above include $5,000,000 in General Revenue for the 2016-17 biennium to provide research and education in the areas of identity management, protection, security, and privacy, and to develop solutions to identity problems for businesses, adults, and children at The Center for Identity at The University of Texas at Austin."

In fact, the only text in any of the vetoed riders that even arguably supports the Governor's critics is the phrase "out of funds appropriated above." As explained in detail above, however, that phrase is legally irrelevant and cannot come close to bearing the weight that the LBB staff and its supporters want to place on it. *See* Part I.B., *supra*.

The legality of Governor Abbott's higher-education vetoes is further confirmed by the structure of the universities' bill patterns. Each of the Governor's five higher-ed vetoes included both a strategy and a separate and independent rider; but the LBB staff and the Legislature included many other strategies without including corresponding riders. That suggests legislative intentionality namely, that the Legislature included the rider because it wanted to provide unequivocal direction to the university to set aside money for the specified purpose. The Legislature is obviously free to identify particular purposes that "need[ ] support" from the taxpayers, and it is obviously free to "direct appropriations" toward those purposes. When the Legislature chooses to direct the universities in that way, however, it necessarily implicates the Governor's line-item veto power. *See* Part I.B., *supra*.

Nor can the Governor's critics claim that the riders like the strategies are purely "informational," non-binding, and hence not-vetoable.[6] First, the Legislature applied the "informational listing" label *only* to the universities' strategies so even on the terms of the critics' own magic-words argument, it is nonsensical to suggest that the riders are equally "informational." And second, everyone has to concede that some of the universities' riders are binding (and thus far from merely "informational"). For example, one rider that applies to every institution of higher education provides: "None of the educational and general funds appropriated by this Article may be expended by institutions of higher education for the support or maintenance of alumni organizations or activities." GAA art. III, § 12. Surely no one would think that the universities are nonetheless free to ignore that rider and use their appropriations to support and maintain alumni organizations. *See, e.g.*, *Jessen*, 531 S.W.3d at 599 (holding Legislature may use riders to "qualif[y] or direct[ ] the use of appropriated funds"); *Dodson*, 11 S.E.2d at 127 (noting "where conditions [or riders] are attached, they must be observed"). It would be equally absurd to suggest that universities are free to ignore some riders like the ones that Governor Abbott vetoed while remaining bound by others like the one that bans support for alumni organizations.

And as a matter of fact, the universities do not pick and choose which riders they obey. To the contrary, the higher-ed institutions routinely follow *all* of the riders that the Legislature includes in the GAA. That approach makes sense given that riders presumably mean *something*; the universities should not lightly assume that the Legislature included meaningless words in the GAA. *See, e.g.*, *Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 784 (Tex. App. Austin 2012) ("A cardinal rule of statutory construction is that the legislature is never presumed to do a useless or meaningless act."

[6] The inquiry under the Constitution and *Jessen* does not turn on whether the item is "binding." All that matters under Article IV, Section 14 and the Supreme Court's interpretation of that constitutional provision is that the Legislature set aside a sum for a particular purpose. *See Jessen*, 531 S.W.2d at 599. Where the Legislature accomplishes that set-aside using a binding legislative directive, that is certainly sufficient to create an "item of appropriation." *See ibid.* The fact that it is sufficient, however, does not make it necessary.

(citing *Hunter v. Fort Worth Capital Corp*., 620 S.W.2d 547, 551 (Tex. 1981))). But when the Legislature puts meaningful strings on the funds it appropriates, it necessarily implicates the Governor's line-item veto authority. *See* Part I.B., *supra*. And there is no reason to think that the Governor's power applies differently when those strings are binding in fact versus binding as a matter of law.

Finally, it is irrelevant that institutions of higher education generally have unrestricted use of their formula funding. Under *Jessen* and the myriad legal authorities discussed above, all that matters is that the Legislature set aside a sum of money for a particular purpose. *See* 531 S.W.2d at 599-600; *see also* GAA art. IX, § 6.04 ("Funds appropriated by this Act shall be expended, as nearly as practicable, for the purposes for which appropriated."). The fact that the agency can later redesignate some or all of that money for other purposes does not retroactively nullify it as an "item of appropriation." Indeed, the general rule is that *all* state agencies (not just the universities) can redesignate up to 20% of their appropriations for purposes other than the ones specified in the GAA. *See* GAA art. IX, § 14.01(a). If that were enough to veto-proof the Legislature's original appropriations, it would remove almost all of the budget's items from the Governor's veto pen.

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

Samples Of Facility Construction Vetoes (FY 1964 – FY 2017)			
Budget	**Governor**	**Capital Appropriations Vetoed**	**Vetoed Spending**
1964-1965	John B. Connally, Jr.	To the Building Commission for "construction of a new state finance building"	$3,600,000
1970-1971	Preston Smith	To the Department of Public Safety "For the construction of subdistrict headquarters building"	$262,717
1976-1977	Dolph Briscoe	To the State Building Commission for the construction of "two parking garages" in the Capitol Complex Area To the State Board of Control to "Construct Services Building in Capitol Complex Area"	$6,973,527
1980-1981	William P. Clements	To the State Board of Control for a "New State Office Building" and for a "Parking Garage" to be located in the "Capitol Area"	$33,113,772

Samples Of Facility Construction Vetoes (FY 1964 – FY 2017)			
2014-2015	Rick Perry	To the Facilities Commission for two "office buildings" and one "parking structure" split between the Capitol Complex and North Austin Complex	$325,586,000
2016-2017	Greg Abbott	To the Facilities Commission for the replacement of the "San Antonio State Office Building," a "New Parking Garage" in Houston, and the "Acquisition and Relocation of Department of Motor Vehicles Headquarters"	$215,995,000

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

The Governor's critics nonetheless claim that the budget writers "intended" to veto-proof these construction projects by labeling them "capital budget" items. That contention is fallacious for two reasons. First, to the extent "legislative intent" matters,[7] it matters only whether the Legislature "intended" to set aside a sum of money for a particular purpose. *See, e.g.*, *Jessen*, 531 S.W.2d at 599. It emphatically does *not* matter whether the Legislature "intended" for its efforts to be veto-proof. If the Legislature

[7] Some or all of the confusion from the Governor's critics might stem from a misunderstanding of the term "legislative intent." First, people have intentions; multi-member collections of people do not. *See, e.g.*, Hon. Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813 (1998) ("Collective intent is an oxymoron. Congress is not a thinking entity; it is a group of individuals, each of whom may or may not have an 'intent' as to any particular provision of the statute. But to look for congressional intent is to engage in anthropomorphism—to search for something that cannot be found because it does not exist."). And second, "intentions" are not tantamount to laws. As Justice Scalia has explained, "[t]o be governed by legislated text rather than legislators' intentions is what it means to be 'a Government of laws, not of men.'" *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 119 (2007) (emphasis added) (Scalia, J., dissenting); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 570 (2005) (finding a "disclaimer of intent" irrelevant where it conflicts with statutory text); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. It is said that one of emperor Nero's nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress.").

could veto-proof the budget by including magic words signaling its intention to that effect, then the Legislature could wholly defeat the Governor's constitutional prerogatives simply by saying so. That's not how the separation of powers works. *See also* Part II.C, *infra*.

Second, the LBB director misreads *Jessen* to conclude that the phrase "capital budget" can turn an otherwise-vetoable item into a veto-proof non-item. In *Jessen*, the Education Code required the Coordinating Board or the Legislature to approve any new construction at the University of Texas Law School. *See* 531 S.W.2d at 596-97 (quoting TEX. EDUC. CODE § 61.058). In the budget for the 1976-1977 biennium, the Legislature provided that approval when it "authorized" the Board of Regents to use grants, gifts, and bond proceeds for unspecified alterations and additions to the Law School. The Supreme Court held that the rider was not vetoable because it merely provided the legislative approval not an appropriation for construction projects at the law School. *See* 531 S.W.2d at 600.

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

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

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

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

Moreover, it does not matter that the budget itself creates an approval process of construction projects that do not bear the "capital budget" label. Were it otherwise, the LBB staff could insulate the entire budget from line-item vetoes simply by designating special approval processes for items that are unadorned by an arbitrary list of magic words. That would be a dramatic expansion of the LBB's powers, and it would run directly contrary to *Jessen* and the constitutional provision for the Governor's line-item veto authority. It also would run contrary to long, well-established practice under which previous Governors have vetoed "capital budget" items without objection from anyone. *See* Appendix Tab D, *infra*.

In short, the Governor's critics cannot claim that the Governor's vetoes of building projects are "unprecedented," just as they cannot claim that his higher-education vetoes are "unprecedented." The only question is whether the LBB staff can use labeling games to turn previously vetoed "items of appropriation" into "veto-proof" non-items without giving up any of its power over the details of those expenditures. The Constitution's line-item veto clause, an unbroken line of judicial decisions from the Supreme Court of our State and many other States, and as explained below, the separation of powers all foreclose the LBB director's attempt to insulate the budget process from executive oversight.

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

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

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

The separation of powers is arguably the most foundational principle in Texas constitutional law. Indeed, the very first provision of the 1836 Constitution of the

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

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

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

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

> universally accepted, and debate over their desirability is almost nonexistent.[8]

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

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

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

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

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

> What this security ought to be, is the great problem to be solved. Will it be sufficient to mark, with precision, the boundaries of these departments,

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

> in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government. *The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.*

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

The solution that Madison and his fellow Framers devised is to empower the other branches to effectively check encroachments by the Legislature. *See* THE FEDERALIST NO. 51 at 322-23. Madison's views are equally insightful today, and they form the basis for modern separation-of-powers cases striking down legislative overreach. *See, e.g.*, *Myers v. United States*, 272 U.S. 52 (1926); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). They also are echoed by scholarly analyses of the line-item veto power. *E.g.*, McNamee, *Executive Veto*, 9 REGENT U. L. REV. at 12 ("These alarms are no mere phantasms of a Founder caught in the paranoia of revolution, but they are threats that continue today.").

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

Of course, the Governor's critics have not, as of the date of this memorandum, so much as mentioned the separation of powers or the original meaning of either the Texas or United States Constitutions. Rather, they have simply asserted that the Legislature has "plenary power . . . to legislate." LBB Staff Memo at 6; *see also id.* at 2, 7, A-1 (repeatedly characterizing its power as "plenary"). That position should be rejected for three reasons.

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

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

BRADEN, *supra*, at 333-34 (emphasis added). Indeed, the Supreme Court of Texas has repeatedly held that "[t]he veto power, when exercised, is a legislative and not an executive function." *Fulmore*, 140 S.W. at 411 (citing, *inter alia*, *Pickle v. McCall*, 24 S.W. 265 (Tex. 1893)). The Attorney General also has recognized that the Governor's line-item veto power gives him a substantial role to play in the legislative process. *See, e.g.*, Op. Tex. Att'y Gen. Nos. M-1199, M-1141 (1972). Thus, it cannot be said that the Legislature's power is "plenary." *See also* McNamee, *Executive Veto*, 9 REGENT U. L. REV. at 20 (rejecting the argument that the Legislature's budgetary power is plenary because "[t]he ability to delete specific appropriations allows the Governor to intervene in the budgetary process and ultimate allocations of state funds").

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

> [The Framers] used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.

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

Third, the Supreme Court of Texas already has rejected the notion that *the Legislature* gets to define the scope of the Governor's role in the legislative process. In *Fulmore*, the Court held: "In exercising this function [i.e., the line-item veto], while he is not confined to rules of strict construction, [the Governor] nevertheless must look to *the Constitution* for the authority to exercise such power." 140 S.W. at 411; *see also Field v. People*, 3 Ill. 79, 80-81 (Ill. 1839) (quoted favorably in *Fulmore*) ("In deciding this question, recurrence must be had to the Constitution. That furnishes the only true rule by which the court can be governed. That is the character of the Governor's authority. . . . The Constitution is a limitation upon the powers of the legislative department of the government, but it is to be regarded as a grant of powers to the other departments.").

Thus, it is the Constitution and not the LBB staff's views about "plenary powers" that controls the outcome here. When the LBB staff assert that their bill patterns and magic-word choices should somehow be cloaked in "plenary power" sufficient to trump the Governor's constitutional powers, they have plainly overstepped their bounds.

* * *

The scope of the Governor's line-item veto authority flows from the Texas Constitution and the People who ratified it not from the labeling decisions of the legislative branch. The Governor's understanding of his line-item veto authority is consistent with the text of the Constitution, the purpose of the line-item veto power, and the relevant Texas Supreme Court decisions. It is also consistent with the multitude of state supreme court decisions from other states whose constitutions are similar to Texas's. The Attorney General should advise the Comptroller that a court is likely to view this matter just as all previous courts have: Regardless of legislative labels, budget language may be vetoed if it (1) sets aside a sum of money (2) for a particular purpose. If that simple, bright-line rule is applied, each of the Governor's vetoes of the 84th Legislature's General Appropriations Act will be upheld.

APPENDIX

Tab	Description
A	Item-by-Item Response to Comptroller's Questions
B	LBB Staff Memo
C	Higher Education Precedents
D	Capital Budget Precedents
E	Contingency Rider Precedents

TAB A

Item-by-Item Response to Comptroller's Questions

The foregoing discussion is sufficient to sustain the Governor's veto proclamation in its entirety. The legitimacy of each challenged veto flows ineluctably from the legal principles explained above. The Comptroller, however, has asked 60 specific questions, spread across 11 categories, about the legality of the proclamation. Although the Attorney General is under no obligation to follow the elaborate structure of the Comptroller's request, for the Attorney General's convenience, this portion of the Appendix explains point-by-point how all of the Comptroller's questions should be answered.

A. Texas Facilities Commission

The Comptroller asks 10 questions about the Governor's vetoes of the Texas Facilities Commission's budget. Those questions can be broken into two categories. The first pertains to several buildings that the Governor vetoed in the Commission's "capital budget" rider. The second pertains to two bond-issuance riders that the Governor vetoed. All of the vetoes are valid.

1. The "capital budget" rider

The Governor lawfully vetoed the portions of the "capital budget" rider that would have appropriated money for the G.J. Sutton building replacement, the new parking garage for the Elias Ramirez State Office Building, and the acquisition and relocation of the Department of Motor Vehicles headquarters. That is so for two reasons.

First, as explained above, it does not matter whether the budget writers "intended" to "veto-proof" those projects. *See* Part I.C., *supra*. All that matters is whether the Legislature "intended" to set aside a sum of money for a particular purpose. *See, e.g.*, *Jessen*, 531 S.W.2d at 599. If the Legislature could veto-proof the budget by including magic words signaling its intention to that effect, then the Legislature could wholly defeat the Governor's constitutional prerogatives simply by saying so. That's not how the separation of powers works. *See* Parts I.C & II.C, *supra*.

Second, the critics' contrary argument that budget writers can veto-proof construction projects by labeling them "capital budget" items depends on a misreading of *Jessen*. *See* Part I.C., *supra*. It also runs contrary to long, well-established practice under which previous Governors have vetoed "capital budget" items without objection from anyone. *See* Appendix Tab D, *infra*.

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

1.a. What is the effect of the Governor's veto of the Texas Facilities Commission Rider 3 Capital Budget items: G.J. Sutton Building Replacement, Elias Ramirez State Office Building New Parking Garage, and Acquisition and Relocation of Department of Motor Vehicles Headquarters?

The vetoes are valid because Rider 3 sets aside sums of money for specified purposes. The sums set aside in Rider 3 and vetoed by the Governor are no longer appropriated to the agency.

1.b. What is the effect of the Governor's veto of the unexpended balance appropriations for the Texas Facilities Commission Capital Budget items: G.J. Sutton Building Replacement, Elias Ramirez State Office Building New Parking Garage, and Acquisition and Relocation of Department of Motor Vehicles Headquarters?

The veto of the entire dollar amount appropriated for fiscal year 2016 means that those funds are no longer appropriated to the Commission. Because there is no money appropriated for FY 2016, there can be no unexpended balance remaining in FY 2017. The Governor's strike of the "UB" appropriation simply clarifies that no funds are appropriated in either year of the biennium for the stated purpose.

1.c. If Rider 3 reappropriates funds, does that reduce the amount in Strategy A.2.1, or some other strategy?

This is more of an accounting question than a legal one. The items of appropriation contained in Rider 3 are best thought of as "sub-items" within a larger strategy. *See Jessen*, 531 S.W.2d at 599 (recognizing that budget language may be an item of appropriation "even though it may be included in a larger, more general item."). When a sub-item is vetoed, whichever budget strategy the funds would have been part of had they not been vetoed is reduced by the amount of the vetoed items. In this case, the funds associated with the G.J. Sutton building and the DMV headquarters are explicitly tied to Strategy A.2.1 in Riders 20 and 22. The funds for the Elias Ramirez building would presumably have come from the same strategy if they had been spent instead of vetoed. Indeed, the LBB decision document used by the conference committee to approve the buildings expressly links all three buildings to Strategy A.2.1.

Agency/Item	House 2016	House 2017	Senate 2016	Senate 2017	Biennial Difference	Explanation
A.2.1 FACILITIES DESIGN AND CONSTRUCTION	$ 30,394,072	$ 4,394,072	$ 830,059,072	$ 4,394,072	$ 799,665,000	House provides $26,000,000 in General Revenue to construct a new parking facility near the Elias Ramirez Building.
					HOUSE	
						Senate provides 13.0 FTEs and $825,665,000 in Revenue Bond Proceeds for the construction of the following:
					SENATE	a. Building and parking facility in North Austin Complex ($186,446,464 and 3.0 FTEs);
					SENATE	b. Capital Complex underground tunnels and infrastructure ($71,335,306 and 4.0 FTEs);
					SENATE	c. Several buildings and parking facilities in the Capital Complex ($509,888,230 and 6.0 FTEs); See also Senate Rider #19
					SENATE	d. Acquisition and construction of new Department of Motor Vehicles Headquarters ($57,995,000); See also Senate Rider #20.

303 Facilities Commission

Legislative Budget Board
5/20/2015 10:38 AM

Page 37 of 103

Ultimately, how the Comptroller accounts for the kind of sub-items contemplated by the Supreme Court in *Jessen* is a question for the Comptroller to decide. The legal question for the Attorney General is whether these three sums, each dedicated by the Legislature for expenditure on particular building projects, are items of appropriation.

1.d. If the veto is effective, does that veto reduce the amount of the Facilities Commission's Strategy A.2.1, or some other strategy?

See the answer to question 1.c. The Governor's veto is effective, and it unquestionably reduces the amount of the Facilities Commission's appropriation by the vetoed amount. Which strategy the funds should be taken from is an accounting question that may be answered explicitly in the budget as in Riders 20 (DMV headquarters) and 22 (G.J. Sutton building) or may have to be derived from legislative history and context, as with the Elias Ramirez building. To the extent the strategy to be reduced is ambiguous, the source of that ambiguity is the budget, not the Governor's veto. The Governor cannot be faulted for the budget drafters' failure to tie every item of appropriation to a strategy. We suggest the Comptroller determine which strategy the vetoed funds would have come from had they been spent and reduce that strategy accordingly. This may require consultation with the agency.

In any event, it cannot be the case that an appropriating rider's lack of explicit connection to a particular strategy calls into question the veto-eligibility of the rider. Nothing in the case law supports that view. And if that were the rule, budget drafters could insulate all appropriating riders from veto by declining to specify the strategy from which funds dedicated in the rider should be taken.

1.e. If the veto is effective, does the veto prohibit the use of Strategy A.2.1 funds for the vetoed projects? Or, would such a prohibition exceed the Governor's purely negative veto power?

If other legal authority exists to expend other funds on the purposes specified in the vetoed items, the agency retains discretion to exercise that authority. In other words, the veto does not affect the agency's ability to use other lawful means, if they exist, to achieve the purposes stated in the vetoed item. As a practical matter, state agencies will be hesitant to search for creative ways to circumvent the Governor's wishes.

2. Bond-issuance riders

Riders 20 and 22 set aside sums of general revenue ($57.995 million and $132 million, respectively) for particular purposes (the DMV headquarters and the G.J. Sutton Building, respectively). Both of them therefore constitute items of appropriation under *Jessen* and are subject to the Governor's line-item veto power.

Moreover, the plain text of Riders 20 and 22 expressly make "appropriations," which further confirms that they fall within the Governor's line-item veto power. In particular, both riders include the following sentence: "Any unexpended balances *in the appropriations made herein* and remaining as of August 31, 2016, *are appropriated* for the same purposes for the fiscal year beginning September 1, 2016." (Emphasis added.) The LBB's budget writers thus confirmed that appropriations are "made herein" that is, in the riders themselves and then further made unexpended-balance "appropriations" for the following fiscal year. The Attorney General already has concluded that such unexpended-balance clauses constitute items of appropriation. *See* Op. Tex. Att'y Gen. No. MW-51 at 160-161.[1] And for good reason they set aside sums of money for specified purposes.

The fact that the general revenue for both purposes comes from bond proceeds is irrelevant for four reasons. First, neither *Jessen* nor any other source of law suggests the

[1] And previous Governors have vetoed them without objection. To take just two recent examples, *see* Proclamation by the Governor of the State of Texas at 1, 79th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/79/SB1.pdf ("5. Unexpended Balances within the Biennium. Any unexpended balances in appropriations made to Strategy A.1.2, Arts Education Grants, remaining as of August 31, 2006, are hereby appropriated to the Commission on the Arts for the fiscal year beginning September 1, 2006, for the same purpose." Governor Perry vetoed this rider, stating: "This veto deletes the ability to carry grant fund balances from year to year. The agency should award and make grants in the year funds are appropriated."); Proclamation by the Governor of the State of Texas at 2, 78th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/78/HB1.pdf ("Rider 31. Border Faculty Loan Repayment Program. The Higher Education Coordinating Board may allocate additional funds from Strategy B.1.11., TEXAS Grant Program, to the Border Faculty Loan Repayment Program, and any unexpended balances on hand at the end of the fiscal year 2004 are hereby appropriated for the same purposes in fiscal year 2005." The veto struck only the final portion of the rider addressing unexpended balances.).

Governor's constitutional power appears and disappears based on whether the Legislature sets aside general revenue raised from taxes versus general revenue raised from bonds. Indeed, the contrary result would allow the Legislature to circumvent the Governor's constitutionally prescribed role in the budget process simply by funding its items of appropriation with bond proceeds.

Second, rider 125 in article V of the 1991 General Appropriations Act does not suggest a different result. That rider unlike the ones at issue here did not purport to set aside money for a purpose. Rider 125 in 1991 merely said that the TPFA "may issue" bonds sufficient for an unspecified building at an "estimated cost of $10,000,000." That is a far cry from Riders 20 and 22 in 2015, by contrast, which specifically direct the TPFA to issue bonds ("shall issue") *and then direct the Facilities Commission to use specified sums from those bonds for specified purposes*. Moreover, it is inaccurate to say that "the Attorney General found" that the 1991 rider was not an item of appropriation. Comptroller Request at 7. Rather, a member of the Attorney General's staff made that conclusion in dicta in a letter opinion that the Attorney General did not sign.

Third, if Riders 20 and 22 are *not* "items of appropriation," then they are unconstitutional as general law. As the Supreme Court of Texas has explained, "[a] rider which attempts to alter existing substantive law is a general law which may not be included in an appropriations act." *Strake v. Court of Appeals for First Supreme Judicial Dist. of Texas*, 704 S.W.2d 746, 748 (Tex. 1986) (citing TEX. CONST. art. III, § 35); *see also Jessen*, 531 S.W.2d at 600. Here, the Comptroller suggests that "Riders 20 and 22 for the Texas Facilities Commission serve the function of authorizing the Texas Public Finance Authority to issue bonds." Comptroller Request at 6. But preexisting substantive law prohibits the Texas Public Finance Authority from issuing any bonds until approved by *the Bond Review Board*. *See* TEX. GOV'T CODE § 1232.112(a). Thus, it would be unconstitutional for the LBB to *mandate* the issuance of bonds by the TPFA, as the Comptroller suggests. *See Strake*, 704 S.W.2d at 748.

Fourth and finally, previous Governors have vetoed similar bond-issuance riders without objection. To take one example, just last session, Governor Perry vetoed a bond-issuance rider that is virtually identical to Riders 20 and 22. *See* Proclamation by the Governor of the State of Texas at 1-2, 83rd Legislature, Regular Session (attached as Appendix Tab E). Apparently neither the LBB staff nor the Comptroller thought they had any basis to challenge Governor Perry's veto then, nor do they have any basis to challenge Governor Abbott's veto now.

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

2.a. What is the effect of the Governor's veto of the Texas Facilities Commission Riders 20 and 22: Acquisition and Relocation of Department of Motor Vehicles Headquarters and G.J. Sutton Building Replacement?

The vetoes are valid because Riders 20 and 22 set aside sums of money for specified purposes. The sums set aside in these riders and vetoed by the Governor are no longer appropriated to the agency. In the case of the DMV headquarters (Rider 20) and the G.J. Sutton building (Rider 22), the vetoed funds are the same funds as those vetoed by the corresponding strikes in Rider 3. The Rider 3 vetoes and the Rider 20 and 22 vetoes together accomplish the Governor's veto of the funds set aside by the Legislature for the DMV headquarters and the G.J. Sutton building.

2.b. What is the effect of the Governor's veto of the unexpended balance appropriations for the Texas Facilities Commission Riders 20 and 22: Acquisition and Relocation of Department of Motor Vehicles Headquarters and G.J. Sutton Building Replacement?

The veto of the entire dollar amount appropriated for fiscal year 2016 means that those funds are no longer appropriated to the Commission. Because there is no longer any money appropriated for FY 2016, there can be no unexpended balance remaining in FY 2017. The Governor's strike of the "UB" appropriation simply clarifies that no funds are appropriated in either year of the biennium for the stated purpose.

2.c. If Riders 20 and 22 reappropriate funds, do they reduce the amount in the Facilities Commission Strategy A.2.1?

See the answer to question 1.c., *supra*. Riders 20 and 22 explicitly identify Strategy A.2.1 as the source of the funds they appropriate. The veto of these riders therefore reduces the amount available in that strategy.

2.d. If the veto is effective, does that reduce the amount in Strategy A.2.1?

Yes. See the answer to question 1.d., *supra*.

2.e. If the veto is effective, does the veto prohibit the use of Strategy A.2.1 funds for the vetoed projects?

Not necessarily. See the answer to question 1.e., *supra*.

B. Department of State Health Services

The Governor vetoed the words "in each fiscal year of" in Rider 70 of the Department of State Health Services' budget ("Jail-Based Competency Restoration Pilot Program"). As explained in the Governor's veto proclamation, the consequence is that DSHS receives only one appropriation of $1,743,000 for the 2016-2017 biennium, rather than one appropriation of $1,743,000 in 2016 and another appropriation of $1,743,000 in 2017.

The lawfulness of Governor Abbott's veto follows directly from *Fulmore*. In *Fulmore*, the General Appropriations Act gave the Attorney General $83,160 for the biennium split evenly into one appropriation of $41,580 for 1912 and one appropriation of $41,580 for 1913. The Governor line-item vetoed one of the entries for $41,580 and the total for the biennium ($83,160) and explained in his veto proclamation that he wanted to cut the Attorney General's budget in half. *See* 140 S.W. at 408-11. And the Court held that the Governor's veto was valid. *See id.* at 410 (opinion of Dibrell, J.) ("[I]t must be concluded indubitably" that the Legislature appropriated "two separate and distinct sums of $41,580 each."); *id.* at 413 (opinion of Brown, C.J.) (similar); *id.* at 1083 (opinion of Brown, C.J., denying rehearing) (similar).

So here. As in *Fulmore*, the Governor vetoed one fiscal year of the agency's appropriation for the biennium. As in *Fulmore*, that veto was lawful.

It does not matter that Governor Abbott vetoed only part of Rider 70. On that score, a Florida Supreme Court decision is instructive. Like the Texas Constitution, the Florida Constitution gives the Governor the power to veto any "'item or items of any bills making appropriations of money embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void.'" *Green v. Rawls*, 122 So. 2d 10, 13 (Fla. 1960); *see Jessen*, 531 S.W.2d at 599 (relying on *Green*). In *Green*, the Legislature appropriated $579,344 to the Florida Division of Corrections and $4,576,831 to the Florida Board of Forestry. 122 So. 2d at 12. The Legislature labeled the first appropriation "Item 13," and it labeled the second appropriation "Item 23." *Ibid.* Then the Governor attempted to veto one sub-part of each "item"; the Governor's line-item vetoes are depicted by underlining added by the Florida Supreme Court in item 13(a)(1) and item 23(a):

"13. Corrections, Division Of		
"a. General office		
"1. Salaries—including salary of $12,000 per annum for the director and salaries of 25 employees...	$ 143,580	$ 143,580
"2. Expenses	53,739	53,779
"3. Operating capital outlay	12,816	7,100
"4. Special—discharge pay of inmates in an amount not exceeding $15 per inmate and transportation at not exceeding $25 per inmate, as provided by law	78,930	85,850
"Subtotal (a)	$ 289,035	$ 290,309"
(Underscoring added.)		
"23. Forestry, Florida Board of		
"a. Salaries—including salary of $10,000 per annum for the state forester and salaries of 890 employees in 1959/60 and 891 employees in 1960/61	$1,014,794	$1,005,004
"b. Expenses	952,013	921,542
"c. Operating capital outlay	466,704	216,774
"Total of Item No. 23.....	$2,433,511	$2,143,320"
(Underscoring added.)		

Ibid.

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

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

3.a. What is the effect of the Governor's veto of the Department of State Health Services Jail-Based Competency Restoration Pilot Program funds?

The veto is valid because the rider sets aside a sum of money for a particular purpose. The sum vetoed is no longer appropriated to the agency. The ultimate effect of the Governor's veto is that DSHS has been appropriated $1,743,000 for a jail-based competency program for all of FY 2016 and 2017.

Because Rider 70 contains two appropriations (one for each fiscal year) and the Governor vetoed only one of those, the practical effect of the veto requires explanation. *Fulmore* teaches that the effect of the Governor's veto must be discerned by interpreting the Governor's proclamation in light of the entire budget. The Court explained: "The veto message being expressed in plain language, we must derive the meaning and effect of the veto from the language used by the Governor." 140 S.W. at 1083 (opinion of Brown, C.J., on rehearing). Interpreting the Governor's proclamation against the backdrop of the entire budget, including the portions that he did not veto, the Court determined that the effect of his veto was to cut the agency's budget in half. *See ibid.*

So here. The Governor explained his intention in vetoing one of the two years for the jail-based competency program: "In order to minimize the spending of limited taxpayer dollars, funding is reduced for this item. I therefore object to and disapprove of one year of this appropriation." Although the Governor did not specify which year should be eliminated, the Governor's proclamation makes his intentions clear. The Governor left in DSHS's budget one sum of $1,743,000 that can be used under Strategy B.2.3 for a jail-based competency program throughout the biennium. That result is accomplished by virtue of a separate provision of the budget namely, Rider 39 in

DSHS's bill pattern which gives the agency the discretion to spread the money in Strategy B.2.3 across the two years of the biennium. The Governor did not veto Rider 39 in whole or in part.

So interpreting the text of Rider 70 (which the Governor vetoed in part), the text of the Governor's veto proclamation, and the text of Rider 39 (which the Governor left fully intact), the result is that DSHS is appropriated $1,743,000 for FY 2016 with UB authority for FY 2017. In other words, DSHS has a total of $1,743,000 over the biennium to use for a jail-based competency program.[2]

3.b. If the veto is effective, does it eliminate $1,743,000 for fiscal year 2016, or for fiscal year 2017? Or does it convert the appropriation into a single sum of $1,743,000 for the biennium?

See above. The veto should be construed as eliminating the appropriation for 2017. The result is that DSHS's UB authority allows it to spread one FY 2016 appropriation of $1,743,000 over the entire biennium. *See also* n.2, *supra*.

3.c. If Rider 70 reappropriates funds, does it reduce the amount in the Department of State Health Services Strategy B.2.3?

See the answer to question 1.c., *supra*. Rider 70 explicitly identifies Strategy B.2.3 as the source of the funds it appropriates. The veto of this rider therefore reduces the amount available in that strategy. How the Comptroller accounts for Rider 70 is a decision for the Comptroller to make.

3.d. If the veto is effective, does that reduce the amount in Strategy B.2.3?

Yes. See the answer to question 1.d., *supra*.

3.e. If the veto is effective, does the veto, or the lack of a specific appropriation, prohibit the use of other available funds for the vetoed projects?

Not necessarily. See the answer to question 1.e., *supra*.

---

[2] There is nothing remarkable about that result. Numerous provisions of the GAA direct the Comptroller to allocate a single sum of money for the biennium without directing him on whether or how that single sum should be split between the two fiscal years. To take just one example, Rider 67 in the Texas Education Association's bill pattern directs the Comptroller to "allocate $2,000,000 in the 2016-17 biennium" for the "FitnessGram Program." GAA at III-19. The Comptroller presumably understands how to that, and the same result would obtain for DSHS's jail-based competency program.

C. Texas Education Agency

Governor Abbott vetoed Rider 61 in the Texas Education Agency's budget. That rider set aside a sum of money ($193,000) for a particular purpose (membership fees to the Southern Regional Education Board). The Comptroller questions that veto but does so only through the same "magic words" arguments discredited at length above.

Although the Comptroller does not mention it, the Director of the LBB previously challenged this veto because it "estimated" the cost of membership dues. *See* LBB Staff Memo at A-3 to A-4. If that argument was correct, to prevent a future Governor from vetoing all appropriations in the entire budget, all the LBB staff would need do is put the word "estimate" in front of appropriation amounts throughout the budget. Further, the Attorney General has specifically rejected the argument that use of words like "estimate" can thwart the Governor's constitutional veto authority. *See* Op. Tex. Att'y Gen. No. GM-3685, at 2 (June 18, 1941) ("No particular form, or method, or verbiage, is required to constitute an item of appropriation. A provision in an appropriation bill which does not list positions or contain specified items may none the less be sufficient as an item of appropriation. It may constitute a sufficient appropriation although *it does not name a certain sum or a maximum sum*." (emphasis added; citing *National Biscuit Company vs. State*, 135 S.W.2d 687, 693 (Tex. 1940))).

Indeed, previous Governors have vetoed appropriations when the amount that would be spent could range from $0 to $2.5 million.[3] Further, the LBB staff are wrong to claim that it matters whether the item identifies the "source of funds." *See National Biscuit*, 135 S.W.2d at 693. Moreover, the specific "source of funds" is not identified in the budget for each strategy. Nonetheless, the LBB agrees strategies can be vetoed. *See* LBB Staff Memo at 5.

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

---

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

4.a. What is the effect of the Governor's veto of the Texas Education Agency Southern Regional Education Board funds?

The veto is valid because Rider 61 sets aside a sum of money for a specified purpose. The amount set aside in Rider 61 and vetoed by the Governor is no longer appropriated to the agency.

4.b. If Rider 61 reappropriates funds, does it reduce one or more of the Texas Education Agency Strategies?

See the answer to question 1.c., *supra*. Rider 61 does not explicitly identify a strategy from which the funds it appropriates should be taken. That ambiguity is an aspect of the budget, not a result of the Governor's veto. The veto of the rider reduces the overall amount appropriated to TEA. How the Comptroller accounts for Rider 61 is a decision for the Comptroller to make.

4.c. If the veto is effective, does that reduce one or more of the Texas Education Agency Strategies?

Yes. While the strategy to be reduced is ambiguous, there is no question that the veto reduces the overall amount appropriated to TEA. We suggest the Comptroller consult TEA to determine which strategy the SREB dues would have come from had they been spent. See the answer to question 1.d., *supra*.

4.d. If the veto is effective, does the veto, or the lack of a specific appropriation, prohibit the use of funds to pay membership fees to the Southern Regional Education Board?

Not necessarily. See the answer to question 1.e., *supra*.

D. Water Development Board

Governor Abbott vetoed Rider 20 in the Texas Water Development Board's budget, which set aside $1,000,000 for water conservation education grants. The Comptroller questions that veto but does so only through the same "magic words" arguments extensively discredited above.

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

5.a. What is the effect of the Governor's veto of the Water Development Board Water Conservation Education Grant funds?

The veto is valid because Rider 20 sets aside a sum of money for a specified purpose. The amount set aside in Rider 20 and vetoed by the Governor is no longer appropriated to the agency.

5.b. What is the effect of the Governor's veto of the unexpended balance appropriation for the Water Development Board Water Conservation Education Grants?

The veto of the entire dollar amount appropriated for fiscal year 2016 means that those funds are no longer appropriated to the Board. Because there is no money appropriated for FY 2016, there can be no unexpended balance remaining in FY 2017. The Governor's strike of the "UB" appropriation simply clarifies that no funds are appropriated in either year of the biennium for the stated purpose.

5.c. If Rider 20 reappropriates funds, does it reduce Water Development Board Strategy A.3.1 by $1,000,000 in fiscal year 2016?

See the answer to question 1.c., *supra*. Rider 20 explicitly identifies Strategy A.3.1 as the source of the funds it appropriates. The veto of this rider therefore reduces the amount available in that strategy. How the Comptroller accounts for Rider 20 is a decision for the Comptroller to make.

5.d. If the veto is effective, does that reduce Strategy A.3.1 by $1,000,000 in fiscal year 2016?

Yes. See the answer to question 1.d., *supra*.

5.e. If the veto is effective, does the veto, or the lack of a specific appropriation, prohibit the use of funds for Water Development Board Water Conservation Education Grants?

Not necessarily. See the answer to question 1.e., *supra*.

E. Higher Education

The Comptroller next challenges the Governor's vetoes for five institutions of higher education. As explained in greater detail above, *see* Part I.C., *supra*, all five vetoes are lawful. And as explained in Appendix Tab C, *infra*, all five vetoes are rooted in decades of historical precedent.

1. University of Texas at Austin Identity Theft and Security

The Governor vetoed $5 million appropriated for the "Center for Identity" at the University of Texas. That money was appropriated in Strategy C.2.8 ("IDENTITY THEFT AND SECURITY"), which split the money into two sums of $2,500,000 (one for 2016 and another for 2017). The Governor struck Strategy C.2.8 in its entirety. The appropriation was restated in Rider 9, which is titled "***Appropriation* for Identity Theft and Security**." (Emphasis added.) Rider 9 explained that "Amounts appropriated above

include $5,000,000 in General Revenue" for the identity center. The Governor struck Strategy C.2.8 and Rider 9 in their entireties.

The Governor's line-item veto of $5 million for the "Center for Identity" is lawful for three reasons. First, based on both the strategy and the rider, there is no question the Legislature set aside a sum of money ($5 million) for a particular purpose (the "Center for Identity"). Indeed, the Legislature admitted as much in its "outside the bounds" resolution. *See* Appendix C, *infra*, at C-4. That is all that the Constitution and *Jessen* require for an "item of appropriation." *See Jessen*, 531 S.W.2d at 599.

Second, the Governor's critics cannot successfully attack the higher-education vetoes by suggesting that every institution of higher education receives a single, string-free, lump-sum appropriation and that every other word in the higher-ed bill pattern has no legally binding effect. For each institution of higher education, the budget includes a heading that reads: "**1. Informational Listing of Appropriated Funds**." Some critics (like the Texas Legislative Council) seem to think that the strategies following that heading are merely non-binding suggestions.[4] But the budget itself says otherwise. In the very next sentence following the bolded heading, those who wrote the budget explain what an "**Informational Listing**" is: it "include[s] *the following amounts for the purposes indicated*." *E.g.*, GAA at III-65 (University of Texas at Austin) (emphasis added). That is, the strategies set aside "the following amounts for the purposes indicated" which, again, is the very definition of a vetoable item of appropriation. *See Jessen*, 531 S.W.2d at 599. Budget drafters cannot write the budget to set aside sums of money for specified purposes and then pretend that neither the sums nor the indicated purposes have any meaning at all.

The Attorney General need not reach the question of the nature of higher-education strategies, however. That is because all five of the higher-education items vetoed by the Governor appear in both a strategy *and* a rider. The five riders that accompany these five allegedly non-binding strategies make clear that the colleges and universities are not free to ignore the Legislature's instructions. The riders do not appear under the "informational listing" heading. They appear just like any other rider in any agency's budget. And the budget writers made crystal clear that all higher education appropriations "are subject to the special and general provisions of this Act." *E.g.*, GAA at III-65 (University of Texas at Austin). The "special and general provisions of this Act" surely include Rider 9. So even if the "informational listing" strategies are non-binding and therefore not vetoable, a doubtful proposition, that does not account for the separate riders that independently appropriate sums for specific purposes. For example,

[4] It is not clear why the LBB and the Legislature would go through the effort of promulgating dozens of pages of (seemingly) binding instructions for institutions of higher education if those instructions were in reality not worth the paper they are printed on. Indeed, it would be inappropriate for the Attorney General or a court to presume that the Legislature went through the effort to developing and enacting mere meaningless musings. *See, e.g.*, *Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 784 (Tex. App.—Austin 2012) ("A cardinal rule of statutory construction is that the legislature is never presumed to do a useless or meaningless act." (citing *Hunter v. Fort Worth Capital Corp*., 620 S.W.2d 547, 551 (Tex. 1981))).

Rider 9 for the University of Texas plainly appropriates $5,000,000 for the Center for Identity. Rider 9 even calls itself "**Appropriation for Identity Theft and Security.**" The veto of that rider is plainly valid irrespective of the legal effect of the associated strategy.

Finally, even if it were true that every word in the higher-education bill pattern beyond the lump-sum appropriation is meaningless, then the institutions are free to ignore *the entire budget* not just the six provisions that the Governor vetoed. Either way, the University of Texas has no obligation to spend $5 million on the "Center for Identity."

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

6.a. What is the impact of labeling the strategies as "informational"?

As explained above, neither the Supreme Court of Texas nor any other source of legal authority ever has countenanced a magic-words test that would give legal significance to the labels placed on budget language. The budget's plain text indicates that the higher-education strategies dedicate "the following amounts for the purposes indicated." They are therefore items of appropriation. Nevertheless, the Attorney General need not reach this question because, for all five of the Governor's higher-education vetoes, the associated riders independently appropriate sums of money for specific purposes. The rider vetoes accomplish the Governor's intended purposes irrespective of the legal effect of strategies labeled "informational."

6.b. Are the strategies and the columns of dollar amounts for each fiscal year appropriations that set aside or dedicate funds for a specified purpose? Or are they riders that qualify an appropriation or direct the method of its use, and, therefore, not items of appropriation?

According to the budget's plain terms, each line item under the "**Informational Listing**" heading including the strategies and the columns of dollar amounts referenced in this sub-question set aside specific "amounts for the purposes indicated." *E.g.*, GAA at III-65 (University of Texas at Austin). That is an item of appropriation, *see Jessen*, 531 S.W.2d at 599, and is therefore subject to the Governor's line-item veto power. On the other hand, if the strategies following the "**Informational Listing**" are *not* items of appropriation, then they are merely non-binding suggestions that can be freely ignored. Either way, the vetoed higher-education strategies have no legal effect.

Again, regardless of how higher-education strategies are characterized, all the higher-education strategies vetoed by the Governor have associated riders that independently appropriate the funds in question. The Governor's veto of those riders accomplishes the lawful veto of the funds in question. That is the case no matter what the strategies mean.

6.c. What is the effect of the Governor's veto of the University of Texas at Austin, Identity Theft and Security funds in Strategy C.2.8 and Rider 9?

The veto is valid because Strategy C.2.8 and Rider 9, both independently and together, set aside a sum of money for a specified purpose. The amount set aside in Strategy C.2.8 and Rider 9 and vetoed by the Governor is no longer appropriated to institution of higher education.

6.d. Does Strategy C.2.8 create a legally binding limitation, or is it merely guidance?

See the answers to questions 6.a and 6.b., *supra*.

6.e. Does Rider 9 create a legally binding limitation, or is it merely guidance?

See the answer to question 6.a and 6.b., *supra*. While higher-education strategies are nominally distinct from other agencies' strategies in that they fall under the label "informational listing" rather than the label "items of appropriation," higher-education riders appear to be identical to other agencies' riders. Rider 9 unquestionably sets aside $5,000,000 for the Center for Identity. It even calls itself "Appropriation for Identity Theft and Security." And the budget makes clear that the budgets of institutions of higher education "are subject to the special and general provisions of this Act," such as Rider 9. GAA at III-65 (University of Texas at Austin). Rider 9 is therefore a vetoable item of appropriation under article IV, section 14 of the Texas Constitution and *Jessen*.

6.f. If the University of Texas at Austin Strategy C.2.8 reappropriates funds, does it reduce the University of Texas at Austin's lump sum appropriation by $2,500,000 in fiscal year 2016 and by $2,500,000 in fiscal year 2017?

The Governor's veto of $5,000,000 for the Center for Identity reduces the overall amount appropriated to the University of Texas at Austin by $5,000,000. Whether the vehicle for that reduction is Strategy C.2.8, Rider 9, or both, the result is the same. The Governor's critics would have to show that neither Strategy C.2.8 nor Rider 9 is an item of appropriation in order to avoid the effect of the veto.

2. Texas A&M University International Law Summer Course

Rider 4 specifically says that the Legislature "appropriated" "funds" to Texas A&M in Strategy C.1.1. *See* Comptroller Request at 11. The Governor vetoed both Rider 4 and Strategy C.1.1 in their entireties. Rider 4 and Strategy C.1.1 set aside a sum of money ($137,537 in each fiscal year) for a particular purpose (the international law summer course). Indeed, the Legislature admitted as much in its "outside the bounds" resolution. *See* Appendix C, *infra*, at C-4. They create an item of appropriation that was validly vetoed by the Governor.

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

7.a. What is the effect of the Governor's veto of the Texas A&M University International Law Summer Course funds?

The veto is valid because Strategy C.1.1 and Rider 4, both independently and together, set aside a sum of money for a specified purpose. The amount set aside in Strategy C.1.1 and Rider 4 and vetoed by the Governor is no longer appropriated to the institution of higher education.

7.b. Does Strategy C.1.1 create a legally binding limitation, or is it merely guidance?

See the answers to questions 6.a and 6.b., *supra*. The already tenuous argument that higher-education strategies are not items of appropriation is even weaker in this case, because Rider 9 explicitly says that the funds at issue are appropriated in Strategy C.1.1.

7.c. Does Rider 4 create a legally binding limitation, or is it merely guidance?

See the answer to questions 6.a and 6.b., *supra*. While higher-education strategies are nominally distinct from other agencies' strategies in that they fall under the label "informational listing" rather than the label "items of appropriation," higher-education riders appear to be identical to other agencies' riders. And the budget makes clear that the budgets of institutions of higher education "are subject to the special and general provisions of this Act," such as Rider 4. GAA at III-86 (Texas A&M). Rider 4 unquestionably sets aside $137,537 in each fiscal year for the international law summer course. It is therefore a vetoable item of appropriation under article IV, section 14 of the Texas Constitution and *Jessen*.

7.d. If the Texas A&M University Strategy C.1.1 reappropriates funds, does it reduce Texas A&M University's lump sum appropriation by $137,577 in fiscal year 2016 and by $137,577 in fiscal year 2017?

The Governor's veto of $137,537 for each fiscal year for the international law summer course reduces the overall amount appropriated to the Texas A&M by $137,537 for each fiscal year. Whether the vehicle for that reduction is Strategy C.1.1, Rider 9, or both, the result is the same. The Governor's critics would have to show that neither Strategy C.1.1 nor Rider 4 is a vetoable item of appropriation in order to avoid the effect of the veto.

7.e. If the veto is effective, does that reduce the Texas A&M University's lump sum appropriation by $137,577 in fiscal year 2016 and by $137,577 in fiscal year 2017?

The veto reduces the overall amount appropriated to Texas A&M by that amount. Whether the vetoed amount comes from a "lump sum" appropriation or from Strategy C.1.1, the amount is not available to Texas A&M.

7.f. If the veto is effective, does the veto, or the lack of a specific strategy or rider, prohibit the use of the university's lump sum appropriation for an International Law Summer Course?

Not necessarily. See the answer to question 1.e., *supra*.

3. Tarleton State University Center for Anti-Fraud, Waste and Abuse

Rider 6 specifically says that the Legislature "appropriated" "funds" to Tarleton State University in Strategy C.3.2. *See* Comptroller Request at 12. The Governor vetoed both Rider 6 and Strategy C.3.2 in their entireties. Rider 6 and Strategy C.3.2 set aside a sum of money ($2,000,000) for a particular purpose (the Center for Anti-Fraud, Waste and Abuse). Indeed, the Legislature admitted as much in its "outside the bounds" resolution. *See* Appendix C, *infra*, at C-4. Rider 6 and Strategy C.3.2 create an item of appropriation that was validly vetoed by the Governor.

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

8.a. What is the effect of the Governor's veto of the Tarleton State University Center for Anti-Fraud, Waste and Abuse funds?

The veto is valid because Strategy C.3.2 and Rider 6, both independently and together, set aside a sum of money for a specified purpose. The amount set aside in Strategy C.3.2 and Rider 6 and vetoed by the Governor is no longer appropriated to the institution of higher education.

8.b. Does Strategy C.3.2 create a legally binding limitation, or is it merely guidance?

See the answers to questions 6.a and 6.b., *supra*. The already tenuous argument that higher-education strategies are not items of appropriation is even weaker in this case, because Rider 6 explicitly says that the funds at issue are appropriated in Strategy C.3.2.

8.c. Does Rider 6 create a legally binding limitation, or is it merely guidance?

See the answer to questions 6.a and 6.b., *supra*. While higher-education strategies are nominally distinct from other agencies' strategies in that they fall under the label "informational listing" rather than the label "items of appropriation," higher-education riders appear to be identical to other agencies' riders. And the budget makes clear that the budgets of institutions of higher education "are subject to the special and general provisions of this Act," such as Rider 6. GAA at III-93 (Tarleton State University). Rider 6 unquestionably sets aside $1,000,000 in each fiscal year for the Center for Anti-Fraud, Waste and Abuse. It is therefore a vetoable item of appropriation under article IV, section 14 of the Texas Constitution and *Jessen*.

8.d. If the Tarleton State University Strategy C.3.2 reappropriates funds, does it reduce Tarleton State University's lump sum appropriation by $1,000,000 in fiscal year 2016 and by $1,000,000 in fiscal year 2017?

The Governor's veto of $1,000,000 for each fiscal year for the anti-fraud center reduces the overall amount appropriated to the Tarleton State by $1,000,000 for each fiscal year. Whether the vehicle for that reduction is Strategy C.3.2, Rider 6, or both, the result is the same. The Governor's critics would have to show that neither Strategy C.3.2 nor Rider 6 is an item of appropriation in order to avoid the effect of the veto.

8.e. If the veto is effective, does that reduce the Tarleton State University's lump sum appropriation by $1,000,000 in fiscal year 2016 and by $1,000,000 in fiscal year 2017?

The veto reduces the overall amount appropriated to Tarleton State by that amount. Whether the vetoed amount comes from a "lump sum" appropriation or from Strategy C.3.2., the amount is not available to Tarleton State.

8.f. If the veto is effective, does the veto, or the lack of a specific strategy or rider, prohibit the use of the university's lump sum appropriation for the Center for Anti-Fraud, Waste and Abuse?

Not necessarily. See the answer to question 1.e., *supra*.

4. Stephen F. Austin State University Waters of East Texas Center

Rider 4 specifically says that the Legislature "appropriated" "funds" to Stephen F. Austin State University in Strategy C.3.4. The Governor vetoed both Rider 4 and Strategy C.3.4 in their entireties. Rider 4 and Strategy C.3.4 set aside a sum of money ($1,000,000) for a particular purpose (the Waters of East Texas Center). Indeed, the Legislature admitted as much in its "outside the bounds" resolution. *See* Appendix C, *infra*, at C-4. Rider 4 and Strategy C.3.4 create an item of appropriation that was validly vetoed by the Governor.

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

9.a. What is the effect of the Governor's veto of the Stephen F. Austin University Waters of East Texas Center funds?

The veto is valid because Strategy C.3.4 and Rider 4, both independently and together, set aside a sum of money for a specified purpose. The amount set aside in Strategy C.3.4 and Rider 4 and vetoed by the Governor is no longer appropriated to the institution of higher education.

9.b. Does Strategy C.3.4 create a legally binding limitation, or is it merely guidance?

See the answers to questions 6.a and 6.b., *supra*. The already tenuous argument that higher-education strategies are not items of appropriation is even weaker in this case, because Rider 4 explicitly says that the funds at issue are appropriated in Strategy C.3.4.

9.c. Does Rider 4 create a legally binding limitation, or is it merely guidance?

See the answer to questions 6.a and 6.b., *supra*. While higher-education strategies are nominally distinct from other agencies' strategies in that they fall under the label "informational listing" rather than the label "items of appropriation," higher-education riders appear to be identical to other agencies' riders. And the budget makes clear that the budgets of institutions of higher education "are subject to the special and general provisions of this Act," such as Rider 4. GAA at III-130 (Stephen F. Austin University). Rider 4 unquestionably sets aside $500,000 in each fiscal year for the Waters of East Texas Center. It is therefore a vetoable item of appropriation under article IV, section 14 of the Texas Constitution and *Jessen*.

9.d. If the Stephen F. Austin University Strategy C.3.4 reappropriates funds, does it reduce Stephen F. Austin University's lump sum appropriation by $500,000 in fiscal year 2016 and by $500,000 in fiscal year 2017?

The Governor's veto of $500,000 for each fiscal year for the Waters of East Texas Center reduces the overall amount appropriated to Stephen F. Austin by $1,000,000. Whether the vehicle for that reduction is Strategy C.3.4, Rider 4, or both, the result is the same. The Governor's critics would have to show that neither Strategy C.3.4 nor Rider 4 is an item of appropriation in order to avoid the effect of the veto.

9.e. If the veto is effective, does that reduce Stephen F. Austin University's lump sum appropriation by $500,000 in fiscal year 2016 and by $500,000 in fiscal year 2017?

The veto reduces the overall amount appropriated to Stephen F. Austin by that amount. Whether the vetoed amount comes from a "lump sum" appropriation or from Strategy C.3.4, the amount is not available to Stephen F. Austin.

9.f. If the veto is effective, does the veto, or the lack of a specific strategy or rider, prohibit the use of the university's lump sum appropriation for the Waters of East Texas Center?

Not necessarily. See the answer to question 1.e., *supra*.

5. Del Mar College Maritime Museum

Rider 26 specifically says that the Legislature "appropriated" "funds" to Del Mar College in Strategy O.2.1. The Governor vetoed both Rider 26 and Strategy O.2.1 in their entireties. Rider 26 and Strategy O.2.1 set aside a sum of money ($200,000) for a particular purpose (a maritime museum). Indeed, the Legislature admitted as much in its "outside the bounds" resolution. *See* Appendix C, *infra*, at C-4. Rider 26 and Strategy O.2.1 create an item of appropriation that was validly vetoed by the Governor.

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

10.a. What is the effect of the Governor's veto of the Del Mar College Maritime Museum funds?

The veto is valid because Strategy O.2.1 and Rider 26, both independently and together, set aside a sum of money for a specified purpose. The amount set aside in Strategy O.2.1 and Rider 26 and vetoed by the Governor is no longer appropriated to the institution of higher education.

10.b. Does Strategy 0.2.1 create a legally binding limitation, or is it merely guidance?

See the answers to questions 6.a and 6.b., *supra*. The already tenuous argument that higher-education strategies are not items of appropriation is even weaker in this case, because Rider 26 explicitly says that the funds at issue are appropriated in Strategy O.2.1.

10.c. Does Rider 26 create a legally binding limitation, or is it merely guidance?

See the answer to questions 6.a and 6.b., *supra*. While higher-education strategies are nominally distinct from other agencies' strategies in that they fall under the label

"informational listing" rather than the label "items of appropriation," higher-education riders appear to be identical to other agencies' riders. And the budget makes clear that the budgets of institutions of higher education "are subject to the special and general provisions of this Act," such as Rider 26. GAA at III-198 (Del Mar College). Rider 26 unquestionably sets aside $100,000 in each fiscal year for a maritime museum. It is therefore a vetoable item of appropriation under article IV, section 14 of the Texas Constitution and *Jessen*.

10.d. If the Del Mar College Strategy O.2.1 reappropriates funds, does it reduce Del Mar College's lump sum appropriation by $100,000 in fiscal year 2016 and by $100,000 in fiscal year 2017?

The Governor's veto of $100,000 for each fiscal year for a maritime museum reduces the overall amount appropriated to Del Mar College by $100,000 for each fiscal year. Whether the vehicle for that reduction is Strategy O.2.1, Rider 26, or both, the result is the same. The Governor's critics would have to show that neither Strategy O.2.1 nor Rider 26 is an item of appropriation in order to avoid the effect of the veto.

10.e. If the veto is effective, does that reduce the Del Mar College's lump sum appropriation by $100,000 in fiscal year 2016 and by $100,000 in fiscal year 2017?

The veto reduces the overall amount appropriated to Del Mar College by that amount. Whether the vetoed amount comes from a "lump sum" appropriation or from Strategy O.1.2, the amount is not available to Del Mar College.

10.f. If the veto is effective, does the veto, or the lack of a specific strategy or rider, prohibit the use of the college's lump sum appropriation for the Maritime Museum?

Not necessarily. See the answer to question 1.e., *supra*.

F. Securities Board

Governor Abbott vetoed Rider 3 in Security Board's bill pattern. That Rider would have set aside $557,352 in fiscal year 2016 and $636,688 in fiscal year 2017 for salary increases. It thus purported to set aside sums of money for specific purposes, and hence constituted a vetoable item of appropriation. *See Jessen*, 531 S.W.2d at 599. The only contrary argument is that it matters whether the Legislature prefaces an item of appropriation with the allegedly magic phrase, "Out of sums appropriated above." This erroneous premise has been extensively repudiated above.

The Attorney General should feel no obligation to answer each of the sub-parts of the Comptroller's multi-part questions. If you nonetheless decide to address those questions in all of their pieces, answers are provided below.

11.a. What is the effect of the Governor's veto of Securities Board Rider 3, Contingency for H.B. 2493?

The veto is valid because Rider 3 sets aside a sum of money for a specified purpose. The amount set aside in Rider 3 and vetoed by the Governor is no longer appropriated to the agency.

11.b. If Rider 3 reappropriates funds, does it reduce one or more of the Securities Board Strategies by $557,352 in fiscal year 2016 and $636,688 in fiscal year 2017?

See the answer to question 1.c., *supra*. Rider 3 does not explicitly identify a strategy from which the funds it appropriates should be taken. That ambiguity is an aspect of the budget, not a result of the Governor's veto. The veto of the rider reduces the overall amount appropriated to the Securities Board. How the Comptroller accounts for Rider 3 is a decision for the Comptroller to make.

11.c. If the veto is effective, does that reduce one or more of the Securities Board Strategies by $557,352 in fiscal year 2016 and $636,688 in fiscal year 2017?

Yes. While the strategy to be reduced is ambiguous, there is no question that the veto reduces the overall amount appropriated to the Securities Board. See the answer to question 1.d., *supra*.

11.d. If the veto is effective, does the veto, or the lack of a specific appropriation, prohibit the Securities Board from using its appropriations for merit salary increases?

Not necessarily. See the answer to question 1.e., *supra*.

TAB B

LBB Staff Memo

LEGISLATIVE BUDGET BOARD

Robert E. Johnson Bldg.
1501 N. Congress Ave. - 5th Floor
Austin, TX 78701

512/463-1200
Fax: 512/475-2902
http://www.lbb.state.tx.us

MEMORANDUM

TO: The Honorable Glenn Hegar
Comptroller of Public Accounts

FROM: Ursula Parks
Director

DATE: July 21, 2015

SUBJECT: HB 1 Veto Proclamation

I am writing to provide you with LBB staff analysis on the validity of certain appropriations contained in House Bill 1, the General Appropriations Act (GAA), for the 2016–17 biennium in light of the contents of the Proclamation issued by Governor Greg Abbott with respect to that Act.

The Proclamation from June 20, 2015 seeks to veto the appropriation for a number of purposes and programs contained in House Bill 1. However, in nearly all instances the Proclamation does not veto the actual appropriation but rather seeks either to veto non-appropriating rider language or informational items. As it is the case that the Governor may only veto items of appropriation, for the reasons outlined below I believe that many of the items in HB 1 referenced in the Proclamation remain valid provisions.

In our analysis, most of the actions in the Proclamation have the effect neither of actually reducing agency or institution appropriations, nor indeed of eliminating legislative direction on the use of funds.

The Proclamation seeks to go beyond what is authorized in the Texas Constitution, is in many respects unprecedented, and is contrary to both practice and expectation since adoption of the Texas Constitution in 1876.

Giving effect to these objections would be a significant expansion of the power of the Governor with respect to amending or abridging not only legislative appropriations but also non-

appropriation provisions of legislative intent and direction. Ample case law makes clear that the Legislature's power to legislate is plenary, while the Governor's veto power is limited and specific; deference should therefore be afforded to the Legislature in determining the form and terminology it employs. The actions in the Proclamation are thus contrary to the authority provided in the Constitution and also to interpretation afforded through both Texas Supreme Court and Attorney General Opinion.

The Texas Constitution, Article 4, Section 14 states: *If any bill presented to the Governor contains several items of appropriation he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and no item so objected to shall take effect.*

The Texas Constitution provides very specific and limited power to the Governor with respect to vetoing appropriations. The significant power to veto "items of appropriation" is afforded, but not the authority to amend or edit appropriations, or to veto legislative direction or intent.

It is noteworthy that Governor Abbott stated in his 2016–17 Governor's Budget that one of his budget principles was "providing the Governor with expanded line-item veto authority to ensure prudent and sensible spending solutions" and specifically noted that passage of a constitutional amendment granting "reduction" line-item authority to the Governor would provide a tool to "reduce spending without having to remove entire appropriations." The implication in this statement supports the analysis that the Constitution currently provides limited and specific authority in this area; authority that the Proclamation seeks to extend.

With respect to identifying items in the GAA that are subject to veto, the salient phrase is "items of appropriation." Supported by the case laid out below, an "item of appropriation" is, if nothing else, an appropriation of funds. An "item of appropriation" cannot be a statement of legislative intent, direction, or condition on the use of appropriated funds. In the furtherance of clarity in this area, we offer the following:

Texas Constitution

The Texas Constitution makes a number of references to appropriations, the relevant sections are excerpted in Attachment B. It is clear from reading the language in Article III and Article VIII that appropriations describe the act of authorizing the removal of funds from the Treasury (Art VIII, Sec 6) and then also the sum total of those authorized amounts (Arts III, Sec 49a and VIII, Sec 22). It is critical that all involved parties clearly and reliably identify those amounts authorized to leave the Treasury; those amounts are, per the language in the Constitution, appropriations. Once the definition of "appropriation" is understood as authorizing funds to leave the Treasury, the language in Article IV Section 14 describing "*items of* appropriation" may clearly be understood in the same way. The use in Art IV of "item" simply makes clear that the Governor may veto a subset of the statewide appropriation; the power nevertheless is solely to veto appropriations, and not the direction of an appropriation. If the constitution is read consistently, "appropriation" also means in Article IV what it means in Articles III and VIII

which is the action by law of authorizing the removal of funds from the Treasury. Such removal does not happen in riders that are directing the use of funds that are appropriated elsewhere; the removal action is in the appropriation itself, not in the explanation of it.

It is not reasonable to construe the meaning of "items of appropriation" in different ways depending on circumstance. To have one definition of "items of appropriation" that exists solely for the purpose of allowing the Governor to make a line-item veto under Texas Constitution, Article 4, Section 14, but which does not make an appropriation for purposes of the Comptroller totaling the spending of the state under Texas Constitution Article 3, Section 49a(b) and the Legislative Budget Board in doing so for Article 8, Section 22 (and all other budget documents, including those adopted by the Legislature) would be inconsistent and a detriment to the efficient execution of those constitutional duties.

Legal Precedent

In 1911, the Texas Supreme Court delivered an opinion with respect to Fulmore v. Lane, 104 Tex.499, 140 S.W. 405, a case in which the Governor sought to veto a portion of an appropriation, as well as directive language with respect to the appropriation. The court found that the Governor's veto authority was limited by the Texas Constitution ("the rights of veto must depend upon a grant of power on the Constitution…") and that such authority is limited to that found in Article 4 Section 14.

Later cited in *Jessen* (a discussion of which follows) is the following from Fulmore that remains pertinent: "The executive veto power is to be found alone in section 14, art. 4, of the Constitution of this state. By that section he is authorized to disapprove any bill in whole, or, if a bill contains several items of appropriation, he is authorized to object to one or more of such items. Nowhere in the Texas Constitution is the authority given the Governor to approve in part and disapprove in part a bill. The only additional authority to disapproving a bill in whole is that given to object to an item or items, where a bill contains several items of appropriation. It follows conclusively that where the veto power is attempted to be exercised to object to a paragraph or portion of a bill other than an item or items, or to language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his objection to such paragraph, or portion of a bill, or language qualifying an appropriation, or directing the method of its use, becomes noneffective." (140 S.W. at 412).

As subsequently supported by Attorney General opinions, a veto attempt is void if the action in question seeks to veto something that is not an item of appropriation.

Jessen v. Bullock, 531 S.W.2d 593 (Tex. 1975) is helpful in defining the difference between an appropriation and a directive rider. *Jessen* centered on whether the Governor could veto a rider authorizing expenditure. The Texas Supreme Court found that the rider was not eligible for veto: "In reaching this conclusion, we hold that a rider to the latest General Appropriations Act[1] was not subject to the veto of the Governor. The Governor has the power to veto an entire

appropriations bill; but his power to veto part of an appropriations bill is limited to vetoing "items of appropriation." This rider, authorizing the construction of certain enumerated projects without the consent of the College Coordinating Board, was not intended by the Legislature to appropriate funds, and therefore was not an "item of appropriation" which was subject to veto apart from the remainder of the bill."

A distinction between actual appropriations, and rider language that "qualifies or directs the use of appropriated funds" is critical not only to this question but to the overall accountability of state fiscal management. If one accepts that a directive rider that specifies the use of "funds appropriated above" is also an item of appropriation, then it must be true that the rider is specifying an amount in addition to the appropriations made above, and thus total appropriations must be treated as well in excess of the total amount shown in the GAA, and that the Legislature's use of a phrase such as "out of funds appropriated above" in these riders is meaningless. Such an interpretation of the GAA would be chaotic, would not be in keeping with a plain or reasonable reading of the GAA, and would not allow the Comptroller or the LBB to fulfill constitutional responsibilities in a consistent and precise manner.

Note as well that *Jessen* is also a defense of the right of the Legislature to provide direction and intent to state agencies. As none of the items in question constitute a statement of intent on the part of the Legislature to increase spending (one of the tests articulated in *Jessen*) and are instead a statement of legislative direction, they are not subject to veto.

The Texas Supreme Court also found that, "It can be said then that the term "item of appropriation" contemplates the setting aside or dedicating of funds for a specified purpose. This is to be distinguished from language which qualifies or directs the use of appropriated funds or which is merely incidental to an appropriation. Language of the latter sort is clearly not subject to veto." The riders in question do not definitively set funds aside for a sole purpose, since again, they are not an appropriation and further, as the GAA contemplates re-purposing funds; the riders in question certainly still fall in the latter category of qualifying or directing the use of an appropriation.

This reading of *Jessen* has also been supported by Attorney General opinion; for example, Opinion GA–0776 issued on May 21, 2010 states in reference to a rider that directed a transfer of funds from one agency to another: "The Legislature's express use of the phrase *"transfer* to the Department of Motor Vehicles all funds ... *appropriated* to [TxDOT]" suggests that, in enacting section 17.30(b), the Legislature was merely qualifying or directing the use of funds that it expressly appropriated to TxDOT elsewhere in the Act. General Appropriations Act, art. IX, Section 17.30(b), at 5379 (emphasis added). Thus, under the plain language of Section 17.30(b) and the test announced by the Texas Supreme Court in *Jessen,* a court would likely conclude that section 17.30(b) does not constitute an appropriation to the DMV. Rather, Section 17.30(b) would likely be construed as language that merely directs the use of funds appropriated elsewhere in the 2010–11 General Appropriations Act."

While the riders below do not direct transfers, the fact that they direct the use of funds already appropriated makes opinion GA–0776 relevant to this discussion.

The test established in *Jessen* was also applied in Attorney General Opinion MW–51 issued on August 31, 1979 which discusses a rider that directs the use of funds to construct a state office building and provides legislative intent as to the specifics of construction: "These two paragraphs (a reference to the text of the rider) do not constitute an "item" of appropriation under the test established in Jessen. They do not set aside or dedicate funds. Instead, the language directs and qualifies the use of funds appropriated elsewhere."

Both *Fulmore* and *Jessen*, in addition to providing clarity on the distinction between appropriations and direction, also gives strong support to the importance of legislative intent. Fulmore states, citing Chief Justice Hemphill in an earlier case, "Among the most important of these rules are the maxims that the intention of the legislature is to be deduced from the whole and every part of a statute, when considered and compared together that the real intention, when ascertained, will prevail over the literal import of the terms...." If it is not the intent of the legislature to make an appropriation (to authorize the removal of funds from the Treasury) and is therefore not an item of appropriation, then it is not subject to veto by the Governor.

When the Legislature states "out of funds appropriated elsewhere" it is making clear the intent that the direction is not a new appropriation, but merely directing an appropriation already made.

General Appropriations Act: Appropriations

As noted, the Governor's line item veto authority extends solely to items of appropriation: (1) to strategies for state agencies, (2) to lump sum appropriations to institutions of higher education, or (3) to appropriating riders. General riders, which provide direction on the use of an appropriation, are not subject to veto. To that end, the GAA itself specifically identifies such items, and each agency bill pattern contains the line, "Items of Appropriation" immediately preceding the listing of strategies. This phrase is deliberately chosen and used consistently throughout the GAA in each agency's bill pattern to directly speak to the language in the Constitution. With respect to higher education, the GAA identifies a lump-sum appropriation to each institution; for these entities the strategies are strictly informational (and described as such in the GAA), and not items of appropriation.

In addition to the items found in the strategy listing, on occasion riders that make appropriations in addition to these amounts are included in the GAA. As is required by the Texas Constitution, Article 8, Section 6, the language of these riders is specific that they also make an appropriation. These riders are also capable of standing alone; they are specific, they contain a time frame for the appropriation, the source of funds, and use the words "are appropriated" to make clear the legislative intent that the action of appropriation is happening within the rider itself. Therefore, a rider that clearly makes an appropriation by use of the phrase "in addition to amounts

appropriated above, there is appropriated $XXX for the purpose of..." are also items of appropriation, as they are plainly making an appropriation, which is to say they are authorizing the setting aside funds from the Treasury for a specific purpose, period, and use by a state entity (authorizing removal).

The GAA is an act of the Legislature, and has the force of law; the form and structure of that Act has meaning. As noted above, the plenary power of the Legislature to legislate is relevant; the legislature determines the form, structure, and language of the GAA. The very clear intent of the Legislature is to define appropriations as those actions that specifically discern an amount of money to be withdrawn from the Treasury to the credit of a state entity. The use of the word "appropriation" is both meaningful and deliberate.

Appropriations may be made by the Legislature and may also be vetoed by the Governor; the power of the veto is to prohibit a withdrawal of funds from the Treasury. It does not extend to vetoing the Legislature's intent and direction.

General Appropriations Act: Directive Riders

Directive riders, such as the capital budget rider or other riders that reference appropriations made elsewhere in the Act are not themselves items of appropriation. These riders direct the use of funds, but do not in themselves authorize the withdrawal of from the Treasury for a purpose. Instead, they identify funds "appropriated above" to the agency in question, and provide direction for their use.

As these riders are not in themselves items of appropriation, and as only items of appropriation may be vetoed, it is our opinion that directive riders in themselves cannot be vetoed. Hence, it is the opinion of the LBB staff that none of the riders contained in the Proclamation, save for certain of the contingency riders that actually make appropriations, are subject to veto.

Note as well that these riders in most cases do not completely restrict an appropriation. For example, the Capital Budget rider for the State Facilities Commission contains text that says "None of the funds appropriated above may be expended for capital budget items except as listed below. The amounts shown below shall be expended only for the purposes shown and are not available for expenditure for other purposes." However:

- The rider language specifically notes that the funds are "appropriated above" and are not appropriated by the capital budget rider itself.
- Article IX, Section 14.03 specifically provides direction on how the funds identified in the capital budget may be used for other projects, as well as direction for modifying the amount of appropriations to which capital budget restrictions apply, with approval of the LBB and the Governor's Office.

The fact that the GAA in many cases contemplates (and provides direction for) re-purposing of appropriations described by directive riders implies that simply being identified in the capital

budget or other rider does not fully constrain the funds to the rider's purpose. It follows that even if elimination of a directive rider or certain text in a rider could occur it would not also eliminate the appropriation, as the GAA contemplates repurposing the appropriation. Therefore, in the case of the capital budget, the appropriation supporting a project is not eliminated by simply eliminating a project. Indeed, on occasion there is need to change capital budget projects during the interim; in those cases the appropriation supporting the project remains valid and the agency is afforded some latitude in spending those funds and may apply to the LBB and the Governor to use them for such projects as it deems necessary.

The same logic holds for other directive riders; the GAA allows a 20% transfer of funds from one strategy to another (limited in certain cases). The GAA clearly contemplates re-purposing of funds identified via rider; again, it is regularly the case that a state agency comes forward in the interim seeking to change the use of funds identified in directive riders, and the GAA provides such a mechanism. If it were the case that such riders could be vetoed (which, again, we dispute) striking the direction of a rider does not eliminate the appropriation (again, the funds are "appropriated above") it simply eliminates direction.

The total amount of an item of appropriation represents a statement of the Legislature's judgment as to how much each entity should be provided for a particular purpose. Riders read in the context of both the appropriation they are directing and the repurposing provisions of Article IX, function together as a body of work that communicates the Legislature's intent to both direct agencies and provide those agencies with the means to address changing circumstances. Eliminating directive riders–or portions of riders–is not only contrary to the Texas Constitution but also diminishes the Legislature's plenary ability to provide direction while preserving flexibility.

Higher Education Appropriations

With respect to higher education institutions, the Proclamation seeks to veto a portion of the total lump sum appropriation, as the strategies identified in the Proclamation are informational, and do not in the case of higher education constitute items of appropriation. As previously noted, only items of appropriation may be vetoed, and only in their entirety. The Proclamation seeks to amend the item of appropriation, a power not afforded by the Texas Constitution.

Out of Bounds Resolutions

Note as well that both chambers of the Texas Legislature at the outset of each session adopt rules for their own operation. Within these rules are provisions for documentation to be included in the Conference Committee Report (CCR) for each piece of legislation. Both the House and Senate require that the CCR include a specific discussion of how differences between the two chambers are resolved, and provide that each chamber must adopt that such an "out of bounds resolution" before the CCR may be adopted.

With respect to appropriations bills, both chambers lay out rules for how differences between "items of appropriation" are to be discussed. The rules for how items of appropriation are shown

in the resolution differ from how differences in text are to be shows; this distinction is very specific in the rules: for the 84th Legislature, the House rule is Rule 13 Section 9 and in the Senate is Rules 12.03 and 12.04.

The LBB staff prepare the out of bounds resolution for appropriations bills. In constructing the resolution, "items of appropriation" are defined as strategy amounts and as riders specifically making an appropriation. We are very clear that directive riders are subject to the text rules, not to the appropriation rules.

Each session, both full chambers adopt the resolution prepared thusly; this supports the contention that it is the intent of the Legislature that directive riders not be considered items of appropriation.

Conclusion

Ensuring a common understanding of what constitutes appropriations is important constitutionally and for providing efficient and effective state oversight of agency expenditures. We welcome further discussion on this matter, and are at your disposal for any analysis you may find helpful.

/up

cc: Lt. Governor Dan Patrick
Senator Jane Nelson
Logan Spence
Mike Morrissey
Shannon Ghangurde
Mike Reissig
John McGeady
Julie Ivie
Central Files

Speaker Joe Straus
Representative John Otto
Jesse Ancira
Andrew Blifford
Hunter Thompson
Phillip Ashley
Sarah Keyton
Michael VanderBurg
Amy Borgstedte

Attachment A: Summary of Criteria for Validity Determination

The Constitution directs that only "items of appropriation" are subject to veto by the Governor: The Texas Constitution, Article IV, Section 14, states: *If any bill presented to the Governor contains several items of appropriation he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and no item so objected to shall take effect.*

The power of the Texas Legislature to legislate is plenary, and the power of the Governor to veto is both limited and specific. The Governor may not veto legislative intent or direction.

Is the provision an "item of appropriation?"
An "item of appropriation" is if nothing else also an "appropriation" of funds. Per the Texas Constitution, an appropriation is the means by which the legislature authorizes the withdrawal of funds from the Treasury; further, the Supreme Court in *Jessen v Bullock* found that "It can be said then that the term "item of appropriation" contemplates the setting aside or dedicating of funds for a specified purpose. This is to be distinguished from language which qualifies or directs the use **of appropriated funds** or which is merely incidental to an appropriation. Language of the latter sort is clearly not subject to veto." (emphasis added).

Attorney General opinions support this distinction; the following two are but examples that are relevant to this discussion:

- Opinion GA-0776 issued on May 21, 2010 states in reference to a rider that directed a transfer of funds from one agency to another: "The Legislature's express use of the phrase *"transfer* to the Department of Motor Vehicles all funds ... *appropriated* to [TxDOT]" suggests that, in enacting Section 17.30(b), the Legislature was merely qualifying or directing the use of funds that it expressly appropriated to TxDOT elsewhere in the Act. General Appropriations Act, Article IX, Section 17.30(b)...Thus, under the plain language of Section 17 .30(b) and the test announced by the Texas Supreme Court in *Jessen,* a court would likely conclude that Section 17.30(b) does not constitute an appropriation to the DMV. Rather, Section 17.30(b) would likely be construed as language that merely directs the use of funds appropriated elsewhere in the 2010–11 General Appropriations Act."
- Opinion MW-51 issued on August 31, 1979 which discusses a rider that directs the use of funds to construct a state office building and provides legislative intent as to the specifics of construction: "These two paragraphs (a reference to the text of the rider) do not constitute an "item" of appropriation under the test established in Jessen. They do not set aside or dedicate funds. Instead, the language directs and qualifies the use of funds appropriated elsewhere."

A helpful test for whether a rider is an "item of appropriation" might be to determine whether the rider would have an effect in the absence of the supporting appropriation. If a rider would lose

effect-which is to say, it would not authorize the withdrawal of funds from the Treasury—if appropriations made elsewhere were vetoed, or for some other reason did not exist, then the rider itself is not an item of appropriation.

The **General Appropriations Act** itself defines "items of appropriation" as strategies for state agencies, and as an identified lump-sum appropriation for institutions of higher education. Further, a rider that clearly makes an appropriation by use of the phrase "in addition to amounts appropriated above, there is appropriated $XXX for the purpose of..." are also items of appropriation, as they are plainly making an appropriation, which is to say they are authorizing the setting aside funds from the Treasury for a specific purpose, period, and use by a state entity. These appropriating riders do pass the test above, as they can have full effect as stand-alone appropriations; they do not rely on an appropriations made elsewhere to take effect.

A distinction between actual appropriations, and rider language that "qualifies or directs the use of appropriated funds" is critical not only to this question but to the overall accountability of state fiscal management.

It is not reasonable to construe the meaning of "items of appropriation" in different ways depending on circumstance. To have one definition of "items of appropriation" that exists solely for the purpose of allowing the Governor to make a line item veto under Texas Constitution, Article IV, Section 14, but which does *not* make an appropriation for purposes of the Comptroller totaling the spending of the state under Texas Constitution Article III, Section 49a, and the LBB in doing so for Article VII, Section 22, (and all other budget documents) would be inconsistent.

Such a consistent definition has long been presented by both the Comptroller and the Legislative Budget Board. The Comptroller in providing a cost-out of each version of the GAA is assiduous in making determinations of what portions of the bill do and do not make appropriations; directive riders are not included in the Comptroller's or LBB's costing analysis.

An "item of appropriation" is by definition an appropriation; therefore only actual appropriations are subject to veto. Further analysis accompanies each item below.

Analysis of Veto Proclamation by Agency

Commission on the Arts

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

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

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

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

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

Texas Education Agency
Rider 61, Southern Regional Education Board. The rider does not make an appropriation; it directs the agency to allocate funds to pay an estimated (not specific) amount of dues. The rider

does not specify the source of funds. There is no reduction in appropriation authority, and the direction provided in the rider remains valid.

Institutions of Higher Education
The Proclamation seeks to eliminate the following informational strategies:

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

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

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

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

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

The following items in the Proclamation do make appropriations and are therefore subject to veto. All of these bills either did not pass or were themselves vetoed:

Section 18.15, Contingency for HB 2466
Section 18.26, Contingency for SB 424
Section 18.34, Contingency for HB 14
Section 18.42, Contingency for HB 1799
Section 18.47, Contingency for HB 2703
Section 18.51, Contingency for HB 3481
Section 18.52, Contingency for SB 12
Section 18.61, Contingency for SB 309
Section 18.68, Contingency for HB 1552

Attachment B: Constitutional References

Article III, Section 49a(b): ...no appropriation in excess of the cash and anticipated revenue of the funds from which such appropriation is to be made shall be valid. No bill containing an appropriation shall be considered as passed or be sent to the Governor for consideration until and unless the Comptroller of Public Accounts endorses his certificate thereon showing that the amount appropriated is within the amount estimated to be available in the affected funds. When the Comptroller finds an appropriation bill exceeds the estimated revenue he shall endorse such finding thereon and return to the House in which same originated. Such information shall be immediately made known to both the House of Representatives and the Senate and the necessary steps shall be taken to bring such appropriation to within the revenue, either by providing additional revenue or reducing the appropriation.

Article IV, Section 14: If any bill presented to the Governor contains several items of appropriation he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and no item so objected to shall take effect.

Article VIII, Section 6: No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years.

Article VIII, Section 22: In no biennium shall the rate of growth of appropriations from state tax revenues not dedicated by this constitution exceed the estimated rate of growth in the state's economy...

TAB C
Higher Education Precedents

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

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

STEPHEN F. AUSTIN STATE UNIVERSITY

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

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

[1] *See, e.g.*, 1988-1989 General Appropriations Act at III-75, *available at* http://www.lrl.state.tx.us/scanned/ApproBills/70 2/70 2 ALL.pdf.

[2] *See, e.g.*, 1990-1991 General Appropriations Act at III-105, *available at* http://www.lrl.state.tx.us/scanned/ApproBills/71 0/71 R ALL.pdf.

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

STEPHEN F. AUSTIN STATE UNIVERSITY

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

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

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

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

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

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

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

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

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

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

TAB D

Capital Budget Precedents

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

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

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

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

[3] 1963 Proclamation.

[4] *Ibid.*

[5] Proclamation by the Governor of the State of Texas at 2, 59th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/vetoes/59/hb12.pdf; General Appropriations Act (H.B. 12), 59th Legislature, Regular Session, *available at* http://www.lrl.state.tx.us/scanned/ApproBills/59 0/59 0 HB12 article03.pdf.

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

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

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

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

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

[10] *Ibid.*

[11] *Ibid.*

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

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

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

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

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

---

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

[14] *Ibid.*

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

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

[17] *Ibid.*

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

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

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

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

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

TAB E

Contingency Rider Precedents

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

Andy Oldham

From: Andy Oldham
Sent: Tuesday, February 27, 2018 3:24 PM
To: Berry, Jonathan (OLP)
Subject: Re: While you're on email

(b) (5), (b) (5), (b) (6)

On Tue, Feb 27, 2018 at 2:23 PM, Andy Oldham (b) (6) wrote:

(b) (5) (b) (5), (b) (6)

(b) (5)

(b) (5)

(b) (5).

(b) (5)

On Tue, Feb 27, 2018 at 8:37 AM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

Duplicative Material

Andy Oldham

From: Andy Oldham
Sent: Tuesday, February 27, 2018 9:03 PM
To: Berry, Jonathan (OLP)
Cc: Hudson, Andrew (OLP)
Subject: Re: Foubert

(b) (5) (b) (5), (b) (6)

On Tue, Feb 27, 2018 at 6:58 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

(b) (5)

Thanks!

Sent from my iPhone

Andy Oldham

From: Andy Oldham
Sent: Wednesday, February 28, 2018 7:05 PM
To: Berry, Jonathan (OLP)
Subject: SJQ
Attachments: Oldham SJQ 2.28.2018.docx; Temple Bar Scholar Report--Andrew Oldham (2).pdf

TEMPLE BAR SCHOLAR REPORT
Andrew Oldham
December 1, 2009

Nestled somewhere inside the Royal Courts of Justice stands an extraordinary sculpture of Lord Harry Kenneth Woolf, who was the former Master of the Rolls, the former Lord Chief Justice of England and Wales, and perhaps most importantly, a leading voice in the debates over legal reforms in the United Kingdom for more than 20 years. David Mach made the sculpture entirely out of nickel-plated coat hangers, arduously bending and welding each one so that the hangers' hooks create a halo around Lord Woolf's visage. The final product is a startling and striking testimony to the power of perspective close up, it looks like little more than a massive jumble of silver iron; from ten feet away, it is an unmistakable immortalization of a legal giant.

Just as perspective can turn a pile of wire into a work of art, so too does a sense of perspective seem to color one's perception of the legal reforms that Lord Woolf and others have wrought in recent years. During our month in London, we talked to dozens of judges, barristers, and solicitors, many of whom had wildly differing viewpoints on the significance and desirability of the structural changes that Parliament has recently unleashed upon the legal industry.

For example, there are some who think that the Constitutional Reform Act of 2005 which established the new Supreme Court of the United Kingdom is a metaphorical tempest in a teapot. At one cocktail party, we met a practitioner who described the Court's creation as the "most expensive facelift in the history of the United Kingdom." In a time of fiscal austerity and economic crisis, the critic argued, surely Parliament could find a better use for the £50 million or so that it cost to refurbish the Court's new digs (the former Middlesex Guildhall in Parliament Square). We heard similar concerns from one peer at an All Party Parliamentary Group meeting that we attended in the House of Lords. And we talked to others who claimed that the Act was a purely cosmetic measure, the only substantive effect of which was to resolve the internecine political battles between former Home Secretary David Blunkett and former Lord Chancellor Lord Irvine.

On the other hand, we met many people who thought that the creation of the new Supreme Court was an extremely important and significant reform. For example, we enjoyed tea and crumpets in the House of Lords with Lord Woolf, who famously delayed his retirement as the Lord Chief Justice of England and Wales until the Constitutional

Reform Act was revised to afford additional protections for judicial independence. We also listened to a lecture by Lord Bingham, who put into perspective the costs of creating the new Supreme Court by pointing out that (a) the National Health Service spends more than £50 million in a single week, and (b) few things are more important to a free society than a judiciary that is effectively and visibly separated from the legislative branch of government.

And we met still others who thought that all the hubbub over the Constitutional Reform Act simply distracted from the real issues confronting the legal industry today. For example, the folks we met at the Bar Council and the Law Society were much more concerned by the continued convergence of the legal profession, the ever-decreasing rates that the government pays for legal aid, and the relatively dim professional prospects confronting many young lawyers. Indeed, after a monthly meeting of the Young Bar Committee, we met several barristers who told us that only 10% or so of those who pass the bar vocational course are able to secure private-sector pupilages. The remainder are forced to compete for an ever-dwindling allocation of government jobs, or to shift professions altogether. Talk about putting things into perspective in the face of such an astronomical unemployment rate, one can certainly understand the viewpoint that the challenges and changes facing the new Supreme Court are not the most important aspect of legal practice in the UK today.

Still, from the perspective of an American interloper, it was an amazing opportunity to bear witness to the new Supreme Court's first days. Coming from a country that considers nineteenth-century buildings *really* old, I have always been deeply impressed by the longevity of England's legal institutions: The Old Bailey was built on

the premises of a second-century Roman prison gate in the London Wall; Westminster Hall housed the King's Bench almost three hundred years before Christopher Columbus landed in the West Indies; and King Charles I granted the land for Middle Temple and Inner Temple almost two hundred years before the United States was born. All (or nearly all) of America's legal institutions, rules, and traditions can find their roots in Mother England's history books yet our Supreme Court preceded its British counterpart. And I was there when the latter breathed its first breaths.

One of the most fascinating facets of that experience was the difference between supreme-court litigation on either side of the Atlantic. During my clerkship at the United States Supreme Court, I was blessed by the opportunity to watch scores of oral arguments by the best advocates our nation has to offer. Those arguments typically lasted about an hour, after which the Justices would retire to deliberate and determine the law of the land. In London, I also saw two of the greatest advocates in the UK (Lord Pannick QC and Dinah Rose QC) but that is where the similarities ended. The oral argument in *R v. JFS* lasted three days, and whichever party loses before the UK Supreme Court may seek recourse before a higher appellate authority on the European continent. Obviously, relative age and 3,000 miles of ocean are not the only things that separate our Supreme Courts. The perspectives I gleaned from experiencing those differences are as priceless as they are fascinating.

Yet the best parts of the program, hands down, were the discussions (legal and otherwise) that we had over dinner with the Justices of the UK Supreme Court, over dinner and drinks with the judicial assistants, over lunch with our hosts at the Inns of Court, over tea with our barristers in chambers, and over cigars and in pubs with fellow

Temple Bar Scholars. In particular, I am profoundly grateful to Lord Brown of Eaton-under-Heywood; Chris Knight, Joe Barrett and, indeed, all of the JAs; Jeffrey Gruder QC of 20 Essex Court; and Danny Jowell and Sarah Love of Brick Court Chambers. Theirs are the perspectives that, I trust, will remain with me for a lifetime.

And, of course, none of it would have been possible without the generosity of the American Inns of Court, all four of the British Inns of Court, and Combar. Nor could the Temple Bar program succeed without the diligence of people like Cindy Dennis and Carmen Castillo. I cannot thank you enough.

Andy Oldham

From: Andy Oldham
Sent: Wednesday, February 28, 2018 7:20 PM
To: Berry, Jonathan (OLP)
Subject: Re: Talking points

(b) (5)

(b) (5)

(b) (5)

On Tue, Feb 27, 2018 at 6:13 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

(b) (5) – please review this version instead. Thanks.

From: Berry, Jonathan (OLP)
Sent: Tuesday, February 27, 2018 7:11 PM
To: 'Andy Oldham' (b) (6)
Subject: Talking points

Andy, (b) (5) . Thanks!

Jonathan Berry

Office of Legal Policy

U.S. Department of Justice

950 Pennsylvania Ave, N.W., Rm 4244

Washington, DC 20530

work: (202) 514-2160 | cell: (b) (6)

Andy Oldham

From:	Andy Oldham
Sent:	Wednesday, February 28, 2018 8:01 PM
To:	Berry, Jonathan (OLP)
Subject:	Fwd: FW: State of Texas v. U.S. Environmental Protection Agency
Attachments:	State of Texas v US Environmental Protection Agency.pdf

---------- Forwarded message ---------
From: Scott Keller [redacted (b) (6)]
Date: Wed, Feb 28, 2018 at 6:44 PM
Subject: Fwd: FW: State of Texas v. U.S. Environmental Protection Agency
To: Andy Oldham <[redacted (b) (6)]

---------- Forwarded message ----------
From: "Keller, Scott" <Scott.Keller@oag.texas.gov>
Date: Feb 28, 2018 6:44 PM
Subject: FW: State of Texas v. U.S. Environmental Protection Agency
To: '[redacted (b)(6) - Scott Keller Email Address]
Cc:

From: Frederick, Matthew
Sent: Wednesday, February 28, 2018 6:28 PM
To: Keller, Scott
Cc: Barker, Cam; Rosales, Sylvia
Subject: FW: State of Texas v. U.S. Environmental Protection Agency

Is this it?

-----Original Message-----
From: Westlaw@westlaw.com [mailto:Westlaw@westlaw.com]
Sent: Wednesday, February 28, 2018 6:28 PM
To: Frederick, Matthew <Matthew.Frederick@oag.texas.gov>
Subject: State of Texas v. U.S. Environmental Protection Agency

Matthew Frederick sent you content from Westlaw.
Please see the attached file.

Item: State of Texas v. U.S. Environmental Protection Agency
Citation: 2013 WL 5203630
Sent On: Wednesday, February 28, 2018
Sent By: Matthew Frederick
Client ID: RD PEREZ

Note:

2013 WL 5203630 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

STATE OF TEXAS, et al., Petitioners,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.

No. 12-1269.
September 13, 2013.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Reply Brief for Petitioners

Greg Abbott, Attorney General of Texas.

Daniel T. Hodge, First Assistant Attorney General.

J. Reed Clay, Jr., Senior Counsel to the Attorney General.

Jonathan F. Mitchell, Solicitor General Counsel of Record.

Michael P. Murphy, James P. Sullivan, Assistant Solicitors General, Office of the Attorney General, P.O. Box 12548 (MC 059), Austin, Texas 78711-2548, jonathan.mitchell@texasattorneygeneral.gov, (512) 936-1700.

Luther Strange, Attorney General of Alabama.

Pamela Jo Bondi, Attorney General of Florida.

Samuel S. Olens, Attorney General of Georgia.

Gregory F. Zoeller, Attorney General of Indiana.

James D. "Buddy" Caldwell, Attorney General of Louisiana.

Bill Schuette, Attorney General of Michigan.

Jon Bruning, Attorney General of Nebraska.

Wayne Stenehjem, Attorney General of North Dakota.

E. Scott Pruitt, Attorney General of Oklahoma.

Alan Wilson, Attorney General of South Carolina.

Marty J. Jackley, Attorney General of South Dakota.

Herman Robinson, Executive Counsel of the Louisiana, Department of Environmental Quality.

***1** EPA contends that the Article III standing issues should prevent this Court from granting certiorari in this important case. *E.g.*, EPA BIO at 43-47; States BIO 15; Environmentalists BIO 40-42. That tactic failed in *Massachusetts v. EPA,* 549 U.S. 497, 505-506 (2007), and it should fail here as well.

EPA believes that Texas and its fellow petitioners lack standing to challenge the Tailoring Rule because a decision vacating the Tailoring Rule would only impose *more* regulation of stationary-source greenhouse-gas emissions. EPA BIO 43-45. If that is true, one wonders why environmental organizations have appeared in this Court to defend the legality of the Tailoring Rule. Environmentalists BIO 40-42; see also *id.* at 45 (applauding EPA's ***2** increased regulation of "a dangerous form of air pollution"). Those environmental organizations' defense of the Tailoring Rule can only be premised on their understanding that neither Congress nor the agency would abide the absurd level of regulation that would be required absent the Tailoring Rule. Texas Pet. 15-16, 26-28.

But even if EPA were correct to cast Texas as an unwitting environmental crusader, *Massachusetts* removes any doubt surrounding the State's standing. Texas Pet. 16, 22-26. If EPA is prepared to disavow its Endangerment Finding to rebut petitioners' *Massachusetts*-based counterargument, cf. EPA BIO 46-47, then this Court can GVR in Nos. 12-1152, 12-1153, 12-1253, 12-1268, and 12-1272 in light of the confession of error. Otherwise, EPA cannot deny that Texas has suffered Article III injury under *Massachusetts.* EPA apparently believes that Texas cannot assert standing under *Massachusetts* unless it openly admits that greenhouse-gas emissions endanger public health. See EPA BIO 46-47; see also Environmentalists BIO 41-42. But a litigant's sincerity has nothing to do with whether Article III injury exists; it is an empirical question that turns on whether an actual injury in fact has occurred. See, *e.g., United States v. Windsor,* 133 S. Ct. 2675, 2686 (2013) (holding that "the United States retains a stake sufficient to support Article III jurisdiction," even though "the Executive may welcome this order to pay the refund if it is accompanied by the ***3** constitutional ruling it wants"); *Hollingsworth v. Perry,* 133 S. Ct. 2652, 2662 (2013) ("We have repeatedly held that such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing."); *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 225-226 (1974) ("We have no doubt about the sincerity of respondents' stated objectives and the depth of their commitment to them. But the essence of standing is not a question of motivation ***." (internal quotation mark omitted)).

EPA also argues that stare decisis forecloses reconsideration of *Massachusetts*, noting that the doctrine carries "special force" in cases of statutory interpretation and that this Court relied on *Massachusetts*'s holding in *American Electric Power Co. v. Connecticut,* 131 S. Ct. 2527 (2011) (*AEP*). EPA BIO 34; Environmentalists BIO 27-29. But stare decisis is not an inexorable command, even in cases of statutory interpretation,[*] and a previous decision of this Court is no reason to foreclose consideration of the regulatory absurdities that follow from classifying carbon dioxide as an "air pollutant" under the PSD and Title V programs. ***4** Neither *AEP* nor *Massachusetts* considered the problems that arise from treating greenhouse gases as "air pollutant[s]," and neither decision appeared even to be aware of the radical implications that would follow from the Clean Air Act's permitting requirements. This case presents an appropriate occasion for the Court to reconsider *Massachusetts* in light of the near-ridiculous permitting thresholds that would be established for carbon dioxide emissions.

[*] This Court has often overruled precedents involving the interpretation of federal statutes, even when Congress has declined to enact legislation in response to the Court's earlier decision. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,* 551 U.S. 877, 900 907 (2007) (collecting authorities).

Conclusion

The petition for a writ of certiorari should be granted.

End of Document

Andy Oldham

From: Andy Oldham
Sent: Wednesday, February 28, 2018 8:01 PM
To: Berry, Jonathan (OLP)
Subject: Fwd: McGowan
Attachments: 12-5354_McGowen BIO.pdf

---------- Forwarded message ---------
From: Scott Keller [redacted (b) (6)]
Date: Wed, Feb 28, 2018 at 6:45 PM
Subject: McGowan
To: Andy Oldham [redacted (b) (6)]

---------- Forwarded message ----------
From: "Keller, Scott" <Scott.Keller@oag.texas.gov>
Date: Feb 28, 2018 6:44 PM
Subject: FW: Reply brief in SCOTUS Texas v. EPA
To: '[redacted (b)(6) - Scott Keller Email Address]
Cc:

From: Barker, Cam
Sent: Wednesday, February 28, 2018 6:29 PM
To: Keller, Scott; Frederick, Matthew; Rosales, Sylvia
Subject: RE: Reply brief in SCOTUS Texas v. EPA

Found the McGowan folder. Here is the BIO.

NO. 12-5354

In the Supreme Court of the United States

ROGER WAYNE MCGOWEN, PETITIONER

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

ANDREW S. OLDHAM
Deputy Solicitor General
Counsel of Record

JAMES P. SULLIVAN
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
andy.oldham@texasattorneygeneral.gov
(512) 936-1700

October 2012

CAPITAL CASE

QUESTIONS PRESENTED

Roger Wayne McGowen confessed in a written statement to police that he murdered Marion Pantzer while attempting to rob her bar in 1986. More than twelve years later, in a time-barred and successive state habeas application, McGowen argued for the first time that he received ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), because his trial lawyers relied on his written confession (along with McGowen's other statements regarding his own guilt) instead of mounting an independent investigation into his potential innocence. McGowen's conditional cross-petition thus presents the following questions:

1. Whether a certificate of appealability should issue as to McGowen's potential-innocence claim.

2. Whether a certificate of appealability should issue as to McGowen's procedurally defaulted *Strickland* claim.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

In the Supreme Court of the United States

NO. 12-5354

ROGER WAYNE MCGOWEN, PETITIONER

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Fifth Circuit (Pet. App. 1a-32a) is reported at 675 F.3d 482. The opinion of the district court is reported at 717 F. Supp. 2d 626. The opinion of the Texas Court of Criminal Appeals ("CCA") is unreported. Both the district court's and the CCA's opinions are reprinted in the appendix to the certiorari petition by Rick Thaler, Director of the Texas Department of Criminal Justice, Correctional Institutions Division ("the Director"), in *Thaler* v. *McGowen*, No. 12-82.

JURISDICTION

The court of appeals entered its judgment on March 19, 2012. A petition for rehearing en banc was denied on April 18, 2012. On July 17, 2012, the Director timely filed a certiorari petition under 28 U.S.C. §§ 1254(1), 2101(c). See Pet. for Cert., *Thaler* v. *McGowen*, No. 12-82. McGowen did not file his cross-petition for

certiorari, however, until July 18, 2012 more than 90 days after the denial of rehearing. Cf. *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990) (holding that § 2101(c)'s "90-day limit is mandatory and jurisdictional"); Sup. Ct. R. 13.2 (same).

Accordingly, McGowen's cross-petition is jurisdictionally out of time and cannot be granted unless the Court grants the Director's timely petition in No. 12-82. See Sup. Ct. R. 13.4 (an otherwise-untimely cross-petition "will not be granted unless another party's timely petition for a writ of certiorari is granted"); Eugene Gressman et al., *Supreme Court Practice* 488 (9th ed. 2007) (same).

STATEMENT

A. Factual Background

1. In March 1986, McGowen shot and killed a woman named Marion Pantzer while attempting to rob a bar that she owned in Houston, Texas. He confessed to police, and a jury convicted him of capital murder after a one-day trial.

McGowen was represented at trial by two lawyers: Ron Mock and George Godwin. Mock and Godwin mounted a vigorous defense on McGowen's behalf. Among other things, they retained a private investigator to interview witnesses and collect facts about the crime, see 1.SHCR.169; CR.40-41;[1] they pursued aggressive pretrial discovery against the State, see, *e.g.*, CR.43-49; and they consulted a firearms-and-ballistics expert who testified about the various guns and bullets collected from the crime scene, see 33.RR.156-172.

---

[1] "SHCR" refers to the state habeas corpus transcript filed in the CCA, see *Ex parte McGowen*, App. No. 64,992 (Tex. Crim. App.), preceded by the volume number and followed by page number(s). "RR" refers to the reporter's record filed in the convicting court, see *Texas* v. *McGowen*, Cause No. 448450 (339th Judicial Dist., Harris County, Texas), preceded by the volume number and followed by page number(s). "CR" refers to the Clerk's Record in the same cause.

Mock and Godwin also tried to shield the jury from evidence of McGowen's guilt. They attempted to suppress McGowen's confession. See CR.57-58. They also attempted to suppress evidence that the police collected from McGowen's apartment following his arrest. See CR.153-154. But the trial court denied both motions in written findings of fact and conclusions of law. See CR.168-171.

Mock and Godwin discussed the crime at length with their client and their retained private investigator. Throughout that investigation and those extensive conversations, McGowen neither recanted his confession nor told his lawyers anything to suggest that anyone other than McGowen killed Marion Pantzer. As Mock later testified, "in light of [McGowen's written] confession, my discussions with [McGowen], and my investigation of the case, I could not have presented an alibi defense without suborning perjury." 1.SHCR.170; see also 1.SHCR.166 (Godwin's testimony) ("[McGowen] never denied the allegation that he shot [Pantzer], and he never furnished me with an alibi witness.").

The jury convicted McGowen of capital murder on May 18, 1987. 33.RR.215. After a twelve-day sentencing hearing the details of which are recounted in the Director's petition for certiorari in No. 12-82 the jury sentenced McGowen to death on June 1, 1987. 35.RR.592.

2. McGowen exhausted his direct appeals, exhausted his state habeas proceedings, and, as far as the record reveals, never said anything to anyone to suggest that he was innocent. It was not until August 31, 1998 twelve years after the murder, more than eleven years after the end of his trial, and in a

successive and untimely state habeas application that McGowen's lawyers first suggested that someone else might have murdered Pantzer.

And even then, McGowen's potential-innocence claim was highly equivocal. He asserted only that "[t]here is evidence which questions [McGowen's] guilt" and that "[McGowen] was possibly with his family at the time of the murder." 1.SHCR.54-56. To support his "possibl[e]" alibi, McGowen submitted an affidavit from a fellow inmate named Joe Williams. Williams averred that Roger McGowen's brother, Charles, also got into "a shootout" while attempting to rob a bar in the Montrose area of Houston, Texas (the same neighborhood where Roger McGowen robbed and murdered Marion Pantzer). 1.SHCR.114. But Williams could not testify regarding the time, place, or manner of Charles's "shootout," nor could he provide any other detail to suggest that Charles's "shootout" was the one that led to Pantzer's death. See *ibid.*[2]

McGowen's sister, Rose Ayers, also submitted an affidavit in support of his belated and successive habeas application but she offered an inconsistent theory of who really killed Pantzer. Ayers averred that "I do not believe that Roger committed the murder. He does not have it in him." 1.SHCR.135. She also stated that on March 11, 1986, the day of Pantzer's murder, McGowen came over to Ayers's house for a birthday dinner. See *ibid.* Ayers could not testify, however, regarding Roger's whereabouts at 12:45 a.m. when Pantzer was murdered nor could Ayers testify regarding Roger's whereabouts in the several hours immediately

[2] Charles is a convenient fall guy. In March 1987, while Roger McGowen was awaiting trial for capital murder, Charles stole a .357 service revolver from a Harris County police officer, shot the officer, and was gunned down by police while fleeing the scene. See 1.SHCR.117 (Charles's autopsy).

before and after the murder. See *ibid.* And instead of fingering Charles McGowen for the murder, Ayers expressed her suspicion that her cousin, Kerwin Kindle, did it. See *ibid.* Ayers based her suspicion on what she "read in a Houston newspaper" and on the allegation that "[o]nce Kerwin told me he robbed a woman and took her money." *Ibid.* Ayers also stated that she attempted to relay her suspicions to McGowen's trial lawyers, but "Ron Mock never contacted me." *Ibid.*

The state trial court ordered McGowen's trial counsel, Mock and Godwin, to respond to the allegations in the successive and untimely habeas application. Mock testified that McGowen's post-hoc evidence was premised on falsehoods:

> I am aware of the allegations made in the [successive] writ application that the applicant's family members . . . attempted to contact me with regard to an alibi defense. These allegations are false. No one ever told me that the applicant was at a birthday party during [Pantzer's] murder, nor did anyone give me any other evidence which could have supported an alibi defense. In fact, in light of [McGowen's] confession, my discussions with [McGowen], and my investigation of the case, I could not have presented an alibi defense without suborning perjury.

1.SHCR.169-170 (Mock affidavit). Godwin's testimony is materially identical. See 1.SHCR.165-167 (Godwin affidavit).

B. Procedural Background

1. The state trial court found as a matter of fact that Mock's and Godwin's testimony was credible. 2.SHCR.393-394. And it "f[ound] incredible the applicant's alibi assertion, made for the first time on [a successive] habeas [application], in light of the applicant's statement [confessing to the crime], the evidence presented at trial, and the credible affidavits of trial counsel." 2.SHCR.395. The court further issued conclusions of law rejecting McGowen's

Strickland claim; it held that Mock and Godwin did not perform deficiently, nor did their performance prejudice McGowen's defense. 2.SHCR.402-403.

On appeal, the CCA dismissed McGowen's successive habeas application. See *Ex parte McGowen*, Nos. WR-64992-01 & WR-64992-02, 2006 WL 2615541 (Tex. Crim. App. Sept. 13, 2006) (per curiam). It held that McGowen presented his *Strickland* claim in an untimely and subsequent state-habeas application, "and, thus, we dismiss this subsequent application as an abuse of the writ." *Id.* at *1.

McGowen applied for federal habeas relief on October 6, 2006. Shortly thereafter, however, McGowen moved to stay and abate the federal proceeding so he could return to state court and exhaust still more claims in a third successive state-habeas application.

In his third application, McGowen proffered additional equivocal and hearsay-laden affidavits from friends and family. The affidavit by McGowen's sister, Valerie Foote, is illustrative. She testified: "I have heard that Charles committed this crime and not Roger, but I don't know. I can only tell you that Roger did not seem the type, and Charles was a robber, not Roger." 3.SHCR.275. The CCA dismissed McGowen's third state habeas application as an abuse of the writ. See *Ex parte McGowen*, No. 64992-03, 2008 WL 5050080 (Tex. Crim. App. Nov. 26, 2008).

2. The district court held that McGowen's *Strickland* and potential-innocence claims were procedurally defaulted and barred from review on federal habeas because the CCA dismissed them under a state-law procedural rule

namely, the abuse-of-the-writ doctrine. *McGowen* v. *Thaler*, 717 F. Supp. 2d 626, 649 (S.D. Tex. 2010); see also *Dretke* v. *Haley*, 541 U.S. 386, 392 (2004) ("The procedural default doctrine, like the abuse of the writ doctrine, . . . has its roots in the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds."). And because McGowen's claims are procedurally defaulted, jurists of reason could not debate whether those claims are "adequate to deserve encouragement to proceed further." *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). Accordingly, the district court denied McGowen's request for a certificate of appealability ("COA").

3. The Fifth Circuit likewise refused to issue a COA for McGowen's *Strickland* and potential-innocence claims. It held that McGowen could overcome his procedural default only if he could make "a truly persuasive demonstration of [his] actual innocence." Pet. App. 29a (quoting *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993) (internal quotation marks omitted)). And it held that McGowen's post-hoc evidence which it described as resting on "particularly suspect" affidavits, filled with "hearsay" and "inconsistencies" fell far short of the *Herrera* standard. *Id*. at 30a (internal quotation marks omitted).

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

McGowen's conditional cross-petition presents a splitless and fact-bound plea for error-correction with no error apparent, and it does so in a COA posture. Another petitioner might argue those vehicle problems are no obstacle to an actual-innocence claim. But McGowen offers a more tepid suggestion his friends and family think he *might* be innocent, notwithstanding McGowen's signed and still-unrecanted confession to the crime. McGowen places so little stock in his own potential-innocence argument that he raises it only in a conditional cross-petition, suggesting that he would be just as happy to spend the rest of his life in prison rather than consume any judicial resources debating his innocence. The conditional cross-petition should be denied.

A. McGowen's Potential-Innocence Claim Does Not Warrant A COA

1. Time and again, this Court has "ma[de] clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404. And the Court has emphasized that "the threshold for any hypothetical freestanding innocence claim [is so] 'extraordinarily high'" that no one ever has satisfied it. *House* v. *Bell*, 547 U.S. 518, 555 (2006) (quoting *Herrera*, 506 U.S. at 417); see also *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 71-72 (2009); *Herrera*, 506 U.S. at 400-401, 416-417. Regardless whether anyone can satisfy that standard, McGowen cannot he confessed in writing to the murder, did not recant that confession, lived silently on death row for twelve years, and then managed only to

muster equivocal, contradictory, and hearsay-laden affidavits from friends and family who speculate that one of two other men might have committed the murder.

2. Indeed, McGowen cannot even come close to satisfying the lesser standard for a "gateway" claim under *Schlup* v. *Delo*, 513 U.S. 298, 319-322 (1995). The *Schlup* Court held that a prisoner asserting innocence as a gateway to some other defaulted claim must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. Even such gateway showings, the Court emphasized, must be reserved for "truly extraordinary" cases. *Ibid.* (internal quotation marks omitted). To establish "extraordinary" circumstances, the prisoner must present "new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial." *Id.* at 324. Gateway claims "based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations." *Herrera*, 506 U.S. at 417. Claims premised on hearsay-laden affidavits are even more disfavored because their foundations are "inherently suspect." *Ibid.*

Not only is McGowen's claim premised entirely on twelve-years-after-the-fact hearsay affidavits,[3] but the affidavits themselves are contradictory. One of Roger McGowen's sisters suspected Kerwin Kindle as the murderer; another sister suspected Charles McGowen. Compare 1.SHCR.135 (Ayers affidavit), with 3.SHCR.275 (Foote affidavit). One sister (Ayers) first stated that she "never" spoke with McGowen's defense counsel, see 1.SHCR.135 ("Ron Mock never contacted me."); she then changed her mind and stated that she both talked to the defense lawyers and attended the trial, see 3.SHCR.232 ("I went to Roger's trial. . . . I spoke with Ron Mock."). The other sister (Foote) both talked to McGowen's defense counsel and actually testified at his trial. See 35.RR.522-528. Yet neither woman attempted to explain why she would let her brother sit on Texas's death row for twelve years before expressing her doubts to anyone about whether Roger murdered Pantzer. Whatever else can be said about those affidavits, their infirmities and inconsistencies cannot be dismissed as "minor." Pet. 5; compare *id.* at 4 (arguing Charles committed the murder), with *id.* at 5 (arguing that Kindle committed the murder).

3. McGowen premises his counterargument on two unsupported assertions. First, he asserts that this Court's one-paragraph transfer order in *In re*

---

[3] Some of the affidavits include double- or triple-hearsay. For example, a family friend named Martha Jackson averred: "I was playing cards one night with some of my relatives. Linda Faye Allen and I started talking about Roger Wayne McGowen being locked up for murder. Linda Faye Allen told me that Roger did not do the murder." 1.SHCR.139. Allen did not submit an affidavit, but she allegedly spoke to an investigator retained by McGowen's habeas team. The investigator, in turn, averred: "When I interviewed Linda Allen, she indicated to me that her excessive drug use has affected her memory to the extent that she is unable to remember many things from her life. However, she stated that, if Martha Jackson remembers [Allen] making any such statements . . ., she probably made the statements." 1.SHCR.133.

Davis, 130 S. Ct. 1 (2009), sub silentio reached the question that the Court so studiously avoided in *Herrera*, *House*, and *Obsorne*, and held that "an actual innocence claims [sic] are . . . cognizable as a stand-alone claims [sic]." Pet. 10. *Davis* held no such thing, and surely this Court would not resolve such a monumental question in a single paragraph that said nothing about Davis's claims, this Court's precedents, or innocence. Cf. *Shalala* v. *Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority sub silentio.").

Second, without citing any authority or evidence, McGowen claims that his written, signed, and twenty-six-year-old confession is unreliable. Pet. 9. It is noteworthy, however, that McGowen himself never has recanted his confession. McGowen's failure to do so is all the more remarkable because he had an opportunity to recant on the record during a pretrial hearing on Mock's motion to suppress the confession and McGowen did not do so. See 32.RR.79-112 (McGowen's testimony). In any event, McGowen already litigated the admissibility of his confession on direct appeal; he lost, and this Court denied certiorari. See *McGowen* v. *State*, No. 69,855 (Tex. Crim. App. Dec. 2, 1992), *cert. denied*, 510 U.S. 913 (1993) (mem.). He offers no reason to believe that decision was wrong,[4] much less that it is subject to relitigation under AEDPA twenty years later.

[4] McGowen's references to "DNA cases" and "DNA exonerations" (Pet. 8-9, 18 n.5) are particularly odd given that he never has claimed that this case involves any DNA evidence, much less that such non-existent evidence would exonerate him. And even if such exculpatory evidence existed, Texas provides one of the most generous postconviction-DNA-access regimes in the United States. See Tex. Code Crim. Proc. ch. 64. McGowen never has availed himself of those procedures.

B. McGowen's *Strickland* Claim Does Not Warrant A COA

1. McGowen also claims that his trial lawyers (Mock and Godwin) were constitutionally ineffective because they relied on his written confession to the murder rather than mounting an independent investigation into his potential innocence. That claim does not warrant a COA for three reasons.

First, the claim is procedurally defaulted because McGowen failed to present it to the state courts either on direct appeal or in his first state habeas application. See *Ex parte McGowen*, 2006 WL 2615541, at *1 (dismissing McGowen's *Strickland* claim as an untimely and successive abuse of the writ). Accordingly, the federal courts are barred from reviewing it. See *Coleman* v. *Thompson*, 501 U.S. 722, 750-752 (1991); *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). It does not matter whether McGowen is asserting his defaulted *Strickland* claim as "cause" for his default of another claim (such as his standalone potential-innocence claim). See *Edwards* v. *Carpenter*, 529 U.S. 446, 453 (2000) ("[A]n ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted.").

Second, McGowen cannot come close to overcoming the doubly deferential review that applies to trial counsel's performance in an AEDPA case. See *Harrington* v. *Richter*, 131 S. Ct. 770, 788 (2011) ("Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. . . . Establishing that a state court's application of *Strickland* was unreasonable under [28 U.S.C.] § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem,

review is doubly so." (internal quotation marks and citations omitted)). Faced with a written confession and conversations with their client that confirmed his guilt, trial counsel reasonably could (and ethically must) choose not to suborn perjury by attempting to present an alibi. See 1.SHCR.170. And after attempting (unsuccessfully) to suppress McGowen's confession, trial counsel reasonably chose to focus their pretrial resources on other potential defenses. See *Richter*, 131 S. Ct. at 789 ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."); accord *Knowles* v. *Mirzayance*, 556 U.S. 111, 126-127 (2009).

The reasonableness of trial counsel's performance is confirmed by the number and caliber of attorneys who have worked on this case without doubting McGowen's confessions regarding his guilt. See *Strickland,* 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). Between March 1986 (when McGowen shot Pantzer) and August 1998 (when McGowen first asserted his potential innocence), McGowen had six different lawyers.[5] And given the high profile of this case, McGowen's lawyers included some of the most talented members of the Houston legal community. For example, George Godwin who second-chaired McGowen's defense team at trial went on to become a state court judge. And McGowen's direct appeal counsel

[5] Mock and Godwin represented McGowen from 1986 to 1988. Brian Wice represented McGowen from 1988 to 1992. Doug O'Brien represented McGowen during his first state-habeas proceeding, from 1992 to 1997. Stephen Taylor took over the state-habeas proceedings in 1997. In 1998, Gary Taylor filed an untimely and successive habeas application after he "was retained by European supporters of McGowen." Mot. for Appt. of Counsel at 2, *McGowen* v. *Quarterman*, No. 4:06-mc-410 (S.D. Tex. Oct. 5, 2006). Gary Taylor was the first to assert McGowen's potential innocence.

Brian Wice is an award-winning criminal-appellate specialist who has represented televangelist Jim Bakker, former Houston Rockets basketball player Vernon Maxwell, and former Speaker Tom DeLay. See, *e.g.*, Best Criminal Defense Attorney, Houston Press (2009), available at http://j.mp/TDc0Gm (visited Oct. 22, 2012). Wice filed a 164-page appellate brief on McGowen's behalf and raised 26 issues regarding both the guilt and punishment phases of McGowen's trial. See Br. for Appellant, *McGowen* v. *Texas*, No. 69,855 (Tex. Crim. App. July 27, 1988). Yet neither Godwin nor Wice nor anyone else who represented McGowen between 1986 and 1998 ever asserted his potential innocence. Accordingly, McGowen cannot prove that his trial counsel were deficient for not investigating his potential innocence without also proving that all of his attorneys over the twelve years following the murder also were deficient. McGowen never has done so, nor could he.

Third, McGowen cannot demonstrate prejudice. Even if Mock and Godwin had the benefit of every post-hoc affidavit that McGowen has assembled in the twenty-five years following his capital-murder conviction, and even if Mock and Godwin had chosen to present those affidavits to the jury (notwithstanding their professional obligations not to suborn perjury, see 1.SHCR.170), there can be no doubt that the result would have been the same. McGowen's friends and family would have faced devastating cross-examination if they had attempted to testify at trial. See *Wong* v. *Belmontes*, 130 S. Ct. 383, 386 (2009) (per curiam) ("In evaluating [the prejudice] question, it is necessary to consider *all* the relevant evidence that the jury would have had before it if [defense counsel] had pursued the

different path not just the . . . evidence [defense counsel] could have presented."). For example, Ayers's affidavit admits that she is bipolar, hears voices, and is heavily medicated to mitigate her suicidal tendencies but she believes that her memory of "hear[ing] that Charles had committed the [murder]" was real and not a by-product of her mental disease. 3.SHCR.231-232.[6] Another affiant admitted "that her excessive drug use has affected her memory to the extent that she is unable to remember many things from her life." 1.SHCR.133. Williams was McGowen's fellow inmate and thus had suspicious motivations for signing an affidavit on McGowen's behalf. 1.SHCR.114. And Foote had the audacity to aver that McGowen was not "a robber" notwithstanding that it took the State twelve days to present the evidence of McGowen's hundreds of armed robberies, see Pet. for Cert., *Thaler* v. *McGowen*, No. 12-82, at 8-10 (summarizing the robberies), not one of which Foote disputes, see 3.SHCR.275.

Moreover, the various affiants contradict each other (some fingering Charles McGowen and others Kerwin Kindle), yet none of them alleges a non-hearsay basis to believe that anyone other than Roger McGowen committed the murder. *E.g.*, 3.SHCR.275 (Foote affidavit) ("I have heard that Charles committed this crime and not Roger, but I don't know."). Against those equivocal, inconsistent, and inexplicable assertions of McGowen's potential innocence, the State had McGowen's

[6] The details of that mental disease, which Ayers recounts in her affidavit, would have given pause to any reasonable jury asked to credit her testimony. For example, Ayers averred: "A few years ago, I started hearing voices, and I told my children. One of the voices was telling me to kill myself, the dominating one, the other voice made fun of me, sometimes there were more than one, calling me names and stuff like that. . . . It's weird to realize that you have a part of your brain, memories, that are there, but you don't see them, until it's like a damn [sic] bursting and it all comes floating back to you, things you knew, but forgot." 3.SHCR.231.

written and signed confession, which he made shortly after he murdered Pantzer. There can be no doubt how the jury would have weighed that evidence, even if McGowen had presented all of the testimony that he now offers through uncrossed affiants.

2. McGowen's sole counterargument is an unsubstantiated and ad hominem attack against Ron Mock, one of two defense counsel at McGowen's trial, who McGowen describes as "notorious for his death penalty representation." Pet. 12. But McGowen's sole example of Mock's "infamy" is his representation of Gary Graham in 1981. *Ibid.* McGowen does not explain what Mock did ineffectively in Graham's case. Cf. *Graham* v. *Collins*, 506 U.S. 461 (1993) (rejecting Graham's habeas claims). Nor is it clear how Mock's representation of Graham would make Mock (and all five of his fellow defense counsel) ineffective for failing to raise a potential-innocence claim on McGowen's behalf.

C. McGowen's Ineffectiveness-of-State-Habeas-Counsel Claim Does Not Warrant A COA

Finally, McGowen claims that his state habeas counsel "was clearly guilty of the most gross misconduct" and that "McGowen sought to substitute his woefully inadequate state post conviction [sic] counsel." Pet. 23-24. But that is not what McGowen said during his state-habeas proceeding. In 1995, shortly after the Texas Legislature statutorily extended State-funded habeas counsel to all capital prisoners, the state court convened a status hearing to determine whether McGowen needed or wanted a new lawyer. See Factual Inquiries Conducted at Ellis I Unit, Huntsville, Texas (Aug. 2, 1995), *McGowen* v. *Texas*, Cause No. 448450

(339th Judicial Dist., Harris County, Texas). Prior to that hearing, the State provided two lawyers to advise McGowen and capital prisoners like him about their new statutory rights. *Id*. at 2-3. And at the hearing, after consulting with independent third-party counsel, McGowen did not attempt to replace his state-habeas lawyer rather, he stated that he was happy with his attorney and wanted to keep him. *Id*. at 5-6.

Even if McGowen wanted to challenge the effectiveness of his state-habeas attorney, McGowen failed to exhaust that claim before the state courts. Cf. 28 U.S.C. § 2254(b)(1)(A) (requiring exhaustion). Moreover, McGowen failed to raise any such claim in *federal* court before filing his conditional cross-petition. The fact that his claim is both unexhausted and forfeited is reason alone to deny his conditional request for a COA. *E.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (certiorari is precluded where question was not "pressed or passed upon" below).

And even if McGowen's ineffectiveness-of-state-habeas-counsel claim was cognizable for the first time here, it is meritless. Insofar as McGowen asserts a standalone Sixth Amendment right to state-habeas counsel, this Court consistently has rejected his claim. See *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1320 (2012); *Coleman*, 501 U.S. at 752; *Murray* v. *Giarratano*, 492 U.S. 1, 12 (1989) (plurality op.); *Pennsylvania* v. *Finley*, 481 U.S. 551, 556-557 (1987). And insofar as McGowen seeks an equitable exception to the doctrine of procedural default, cf. *Martinez*, 132 S. Ct. at 1319-1320, it serves no principle of equity to reward a prisoner who praises

his state habeas counsel in one breath before damning him in the next, who sleeps on his alleged potential-innocence claim for twelve years, and who raises that claim only in a conditional cross-petition without recanting his twenty-six-year-old written confession.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

October 2012

ANDREW S. OLDHAM
Deputy Solicitor General
Counsel of Record

JAMES P. SULLIVAN
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Andy.Oldham@texasattorneygeneral.gov
(512) 936-1700