NO. D1DC14-100139

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	OF TRAVIS COUNTY
	§	
JAMES RICHARD "RICK" PERRY	§	390TH JUDICIAL DISTRICT

APPLICATION FOR PRETRIAL WRIT OF HABEAS CORPUS

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TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, APPLICANT, JAMES RICHARD "RICK" PERRY, by and through his counsel of record, David L. Botsford,[1] and pursuant to Texas Code of Criminal Procedure, articles 11.05 *et seq.*, presents this Application For Pretrial Writ of Habeas Corpus, and as grounds therefor would respectfully show this Honorable Court the following:

I.

NATURE OF RELIEF SOUGHT

This is a pretrial application for writ of habeas corpus seeking to bar the prosecution of Applicant, Governor James Richard "Rick" Perry, on multiple constitutional grounds.

Some of these grounds relate to defects apparent on the face of the statutes upon which this indictment was based, and they could be raised by any person charged with an alleged violation of their terms. As Applicant will demonstrate, Section 36.03(a)(1) of the Texas Penal Code is fatally vague and overbroad, failing to give reasonable notice to any official about what is permissible conduct on the one hand and what is felonious conduct on the other. For these reasons, the relief sought in this application should be granted and the indictment dismissed as to Count II, regardless of whether Section 36.03(a)(1) is vague or overbroad as to Governor Perry in particular. *See Ex*

[1] For purposes of this petition, David L. Botsford is acting as the petitioner. *See* Tex. Code Crim. Proc., art. 11.12, 11.13, and 11.14.

parte Weise, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001) (defendant is entitled to file for pretrial habeas relief when he alleges "that the statute under which he or she is prosecuted is unconstitutional on its face; consequently, there is no valid statute and the charging instrument is void").

In addition, *both* Section 36.03(a)(1) and Section 39.02(a) are vague and overbroad as applied to this case, and that is true regardless of whether they might pass constitutional muster in some other circumstances. The statements and actions alleged in the indictment, if made, were made in Governor Perry's official capacity. Forcing Texas' head of state to stand trial on charges of violating provisions that are clearly unconstitutional as applied to any Governor would have the same deleterious impact on the efficient operation of state government, now and in the future, as forcing him to stand trial on charges based on statutes that are unconstitutional in all instances. Thus, for reasons of constitutional magnitude, including the separation of powers doctrine fundamental to our democratic system of government, Governor Perry should have the same opportunity for relief through habeas corpus in this case if the provisions are merely void as applied as he would have if they were facially unconstitutional.

Even if the statutes under which the Governor is indicted were not unconstitutional on their face or as applied, the facts alleged by the State still fail on their face to set forth any violation of those statutes. Those arguments will not be addressed now, because pretrial habeas corpus is not the remedy for factual inadequacy, even when that inadequacy is as blatant as it is here. Rather, if this case were to go forward, they will be raised in a motion to quash the indictment. This application, therefore, assumes for purposes of securing immediate relief that the facts that are alleged in the indictment did occur, but nothing in this application should be construed as an admission (1) that Governor Perry did in fact commit such acts, or (2) that proof beyond a reasonable doubt that he

committed some or all of such acts would constitute any evidence that any law of this State had been violated.

II.

WHAT IS AT STAKE IN THIS CASE

Texans deserve what their State's constitution guarantees: a Governor with the power to approve or disapprove of bills, or disapprove of certain items of appropriated funds, based on his considered judgment of what best serves the public interest. The exercise of this veto power is perhaps the key limitation on legislative power; indeed, the veto power is an integral component of the checks and balances that assure our freedom by limiting the powers of each department of government. Subjecting any sitting Governor to a criminal prosecution and injecting the judiciary into a political dispute would be an unprecedented assault on this cherished separation of powers, and would impose an intolerable and incalculable chilling effect on the free exercise of legitimate constitutional powers by future governors. By seeking to criminalize not merely the veto itself, but the Governor's *explanation* for it as well, this prosecution also violates the Governor's rights under the Free Speech Clauses of the United States and Texas Constitution and the Speech or Debate Clause of the Texas Constitution. These violations are contrary both to Texas' commitment to open, transparent government and to the People's right to be fully informed about their Governor's though processes in fulfilling one of his core governing duties. Accordingly, the relief sought in this application is urgent, necessary, and entirely warranted, and the Court should grant it forthwith.

III.

JURISDICTION AND RESTRAINT

This Court has jurisdiction over the subject matter of this writ by virtue of the authority

vested in the district courts of the State by Article V, Section 8 of the Texas Constitution and Chapter 11 of the Texas Code of Criminal Procedure. Governor Perry is under restraint by virtue of the indictment returned on August 15, 2014, and by the bond set by this Court. *See* Tex. Code Crim. Proc. art. 11.22. Copies of both are attached as **Exhibit 1**.

IV.

CLAIMS FOR RELIEF

Governor Perry is indicted under Section 39.02(a)(2) (Count I) and Section 36.03(a)(1) (Count II) of the Texas Penal Code. The full text of these statutes, together with the definitions relating thereto from other sections of the Texas Penal Code, are attached as **Exhibit 2**. These particular provisions are unconstitutional on their face and, given the facts alleged in the indictment, unconstitutional as a matter of law as applied to Governor Perry. The indictment must be dismissed as fatally defective and void, and the prosecution barred for these or the other reasons set forth herein:

A. As to Count I of the Indictment:

1. Section 39.02(a)(2) violates the Fifth and Fourteenth Amendments to the Constitution of the United States as applied because its prohibition of "misuse" of "government property . . . that has come into the [Governor's] custody or possession" is unconstitutionally vague as a matter of law if extended to a mere gubernatorial veto of any appropriation of State funds.

2. Section 39.02(a)(2) violates Article I, Sections 10 and 19 of the Texas Constitution as applied because its prohibition of "misuse" of "government property . . . that has come into the [Governor's] custody or possession" is unconstitutionally vague as a matter of law if extended to a mere gubernatorial veto of any appropriation of State funds.

3. Section 39.02(a)(2) is unconstitutional as applied because it infringes upon the Governor's absolute constitutional right and duty to approve or disapprove "items of appropriation" under Article IV, Section 14 of the Texas Constitution.

4. Section 39.02(a)(2) is unconstitutional as applied because it violates the separation of powers between the various departments of government that is guaranteed to the People by Article II, Section 1 of the Texas Constitution.

5. Because a governor acts in a constitutionally-prescribed legislative capacity in vetoing legislation, Section 39.02(a)(2) is unconstitutional as applied because it violates the protection afforded by the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

6. Because the Governor was acting in a legislative capacity in vetoing the appropriation at issue, Count I of the indictment is void because it is necessarily based on evidence privileged by the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

7. Because the Governor was acting in a legislative capacity in vetoing the appropriation at issue, trial on Count I of the indictment is barred as a matter of law because the State could only sustain its burden, if at all, by introducing evidence privileged by the Speech or Debate Clause of Article III, Section 21 of The Texas Constitution.

8. Section 39.02(a)(2) is unconstitutional as applied because Governor Perry had the right to do any and all acts of which he is charged in the exercise of his rights under the Free Speech guarantee of the First Amendment to the Constitution of the United States.

9. Section 39.02(a)(2) is unconstitutional as applied because Governor Perry had the right to do any and all acts of which he is charged in the exercise of his rights under the Free Speech guarantee of Article I, Section 8 of the Texas Constitution.

B. As to Count II of the Indictment:

1. Section 36.03(a)(1) violates the First and Fourteenth Amendments to the United States Constitution because, as enacted into law, it is unconstitutionally overbroad on its face.

2. Section 36.03(a)(1) violates Article I, Section 8 of the Texas Constitution because, as enacted into law, it is unconstitutionally overbroad on its face.

3. Section 36.03(a)(1) violates the First and Fourteenth Amendments to the United States Constitution because, as enacted into law, it is unconstitutionally vague on its face.

4. Section 36.03(a)(1) violates Article I, Section 8 of the Texas Constitution because, as enacted into law, it is unconstitutionally vague on its face

5. Section 36.03(a)(1) violates the First, Fifth, and Fourteenth Amendments to the United States Constitution because it is unconstitutionally vague as applied.

6. Section 36.03(a)(1) violates Article I, Sections 8, 10, and 19 of the Texas Constitution because it is unconstitutionally vague as applied.

7. Section 36.03(a)(1) violates the First, Fifth, and Fourteenth Amendments to the United States Constitution because it is unconstitutionally overbroad as applied.

8. Section 36.03(a)(1) violates Article I, Sections 8, 10, and 19 of the Texas Constitution because it is unconstitutionally overbroad as applied.

9. Section 36.03(a)(1) is unconstitutional as applied because it infringes upon the Governor's absolute constitutional right and duty to approve or disapprove "items of appropriation" under Article IV, Section 14 of the Texas Constitution.

10. Section 36.03(a)(1) is unconstitutional as applied because it violates the separation of powers between the various departments of government that is guaranteed to the People by Article II, Section 1 of the Texas Constitution.

11. Section 36.03(a)(1) is unconstitutional as applied because it violates the Speech or Debate Clause of Article III, Section 21 of the Texas Constitution.

12. Count II of the Indictment is void as a matter of law because, contrary to requisites of Section 2.02(b) of the Penal Code, it makes no attempt to negate the statutory exception set forth in Section 36.03(c) for "a member of the governing body of a governmental entity," which includes Governor Perry's actions as a member of the Legislative Department with regard to his actions in approving or disapproving of "items of appropriation" under Article IV, Section 14 of the Texas Constitution.

Because Section 39.02(a)(2) and Section 36.03(a)(1) are unconstitutional, either on their face or as applied, or both, the indictment against Governor Perry must be dismissed and the prosecution barred. Additionally, as to Count II, the failure to negate the exception contained in Section 36.03(c) renders it fatally defective. The relief sought should be granted, the indictment dismissed, and the prosecution barred.

V.

PROCEDURAL HISTORY

The State filed this two-count indictment on August 15, 2014. *See* **Exhibit 1**. In a nutshell, the two counts collectively allege that on or about June 10 through 14, 2013, Governor Perry threatened to veto funding that had been appropriated by the Texas Legislature for continued operation of the Public Integrity Unit (PIU) of the Travis County District Attorney's Office unless Rosemary Lehmberg resigned her office as District Attorney, and that he did veto that funding. Despite being convicted of driving under the influence with a blood alcohol level of almost three times the legal limit, engaging in egregious post-arrest conduct disrespectful of law enforcement, pleading guilty and being sentenced to 45 days in jail, she did not resign, either before or after the Governor in fact exercised his veto on June 14, 2013. *See* **Exhibit 3** (Proclamation, reflecting Veto and Veto Statement). Indeed, Lehmberg remains in office today.

According to Count I of the indictment, the mere act of the veto violated Section 39.02(a)(2) because Governor Perry "intentionally or knowingly misused" over $200,000 of government funds by "dealing with such property contrary to an agreement under which [he] held such property or contrary to the oath of office he took as a public servant." *See* **Exhibit 1**. But, as a matter of law, Governor Perry never had "custody or possession" of any of property, let alone the funds which the Legislature appropriated during the legislative session. As defined by Section 1.07(a)(39) of the Texas Penal Code, "possession" is "actual care, custody, control, or management." At no point during the appropriations process do funds appropriated by the Legislature come into the Governor's care, custody, control, or management. Indeed, as this Court can judicially notice, a budget does not even exist until the Governor approves and signs it, and even then, it does not become effective until

months later (in this case, on September 1, 2013), when funds are eligible for disbursement by the Texas Comptroller. It defies logic, reason and common sense to allege that Governor Perry misused "funds" that he did not have and, indeed, could not have had. Moreover, even if Governor Perry had somehow exercised "control or possession" over the State's funds, there is no allegation, as in many prosecutions of public officials, that he ever exercised or intended to exercise personal control over such funds, direct them to an illicit purpose, or commit any kind of illegal or unwarranted act with regard to the funds.

Rather, the gravamen of Count I is that the Governor exercised his veto power over one of "several items of appropriations." Tex. Const., art. IV, § 14. But the Constitution gives any Governor the absolute, untrammeled right to do just that. *Id.* Moreover, Governor Perry cannot have "misused government property" as the indictment alleges; he did not "deal[] with such property . . . . contrary to an agreement," (since, as this Court can take judicial notice of, no such "agreement" exists, as a matter of law), nor did he act "contrary to his oath of office," which promises only that he "will faithfully execute the duties of the office of Governor of the State of Texas, and will to the best of [his] ability, preserve, protect, and defend the Constitution and laws of the United States and of this State, so help [him] God." Tex. Const., art. XVI, § 1.

According to Count II of the indictment, the "threat[]" by Governor Perry to veto legislation unless Lehmberg resigned from her official position as elected District Attorney was an effort to "influence or attempt to influence Lehmberg" in a "specific performance of [her] official duty," thus allegedly violating Section 36.03(a)(1).

Although the facts alleged in the indictment are sparse, for purposes of this application only and without waiving any legal ground or future objection, Applicant will assume the truth of these

allegations: that Governor Perry determined to veto the funding of the PIU; that at least one member of his staff communicated that intention to State Senator Kirk Watson, whose district includes a portion of Travis County; that a reporter, after learning of that intention on or about June 10, 2013, published a story that same evening that the Governor had allegedly "threatened" to veto the funding unless Lehmberg resigned, *see* **Exhibit 4**; and that on June 14, 2013, Governor Perry exercised his constitutional power and vetoed the line-item appropriation for the PIU. Even taking each of these allegations as true, both counts of the indictment violate the United States and Texas Constitutions.

VI.

THE INDICTMENT VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS

Both counts of the indictment are void under Article II, Section 1 of the Texas Constitution, which provides:

> 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.

Under this provision, "any attempt by one department of government to interfere with the powers of another is null and void." *Meshell v. State,* 739 S.W.2d 246, 252 (Tex. Crim. App. 1987) (quoting *Ex parte Giles,* 502 S.W.2d 774, 780 (Tex. Crim. App. 1974)).

In *Ex parte Lo*, 424 S.W.3d 10, 28 (Tex. Crim. App. 2014), the Court of Criminal Appeals recognized that Article II, Section 1 is "generally susceptible to violation in one of two ways:"

> (1) when one branch of government assumes or is delegated a power more properly attached to another branch, or
>
> (2) when one branch unduly interferes with another branch so that the other branch

cannot effectively exercise its constitutionally assigned powers.

By requiring the judiciary to scrutinize a gubernatorial veto, this prosecution unduly interferes with the constitutionally-assigned powers of another branch, thus violating the Texas Constitution's explicit separation-of-powers guarantee. The power to veto, including the line-item veto of appropriations, is one of the core duties assigned to a Texas Governor by the Constitution. Article IV, Section 14 provides in part:

> 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 IV, Section 14 imposes no limits on the Governor's right and duty to veto; he exercises unbounded discretion in exercising his veto power, subject only to the legislature's right to override that veto. As one scholar noted: "The veto, particularly the item veto, is perhaps the most significant of the Texas governor's constitutional powers . . . . [B]ecause 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." 1 George D. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 339 (1977).

For over 100 years, it has been established that in exercising his veto power, the Governor is acting in a *legislative* capacity, and thus as a member of a governing body. *See Jessen Assocs., Inc. v. Bullock,* 531 S.W.2d 593, 598 (Tex. 1976) (Governor's "veto power is a legislative function and not an executive function"); *Fulmore v. Lane,* 140 S.W. 405, 411 (Tex. 1911); *Pickle v. McCall,* 24 S.W. 265, 268 (Tex. 1893). The veto power is also characterized as a legislative act by federal law, *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998), and by the laws of other states. *See, e.g., Homan*

v. Branstad, 812 N.W.2d 623, 629 (Iowa 2012).[2]

Nothing in the Texas Constitution or laws permits the judicial department to scrutinize Governor Perry's political decision to veto the PIU's funding. This is, indeed, the type of "political question" that Courts, including the Supreme Court of the United States, have traditionally declined to review as nonjusticiable. *See generally Nixon v. United States,* 506 U.S. 224 (1993); *Goldwater v. Carter,* 444 U.S. 996 (1979); *Coleman v. Miller,* 307 U.S. 433 (1939); *Luther v. Borden*, 48 U.S. 1 (1 How. 1) (1849). As explained in *Baker v. Carr,* 369 U.S. 186, 217 (1962), the Supreme Court has generally recognized the doctrine in cases with

> a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Texas courts have had little need to articulate the concept as thoroughly as the United States Supreme Court, but they have likewise consistently declined to decide cases that raise political questions. The Court of Criminal Appeals has held that the Governor's revocation of pardons and

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[2] *See also, e.g., Barnes v. Secretary of Admin.*, 586 N.E.2d 958, 961 (Mass.1992) ("it is for the Legislature...to determine finally which social objectives or programs are worthy of pursuit, the Governor may properly use his veto power to accomplish legislative-type goals); *State ex rel. Cason v. Bond*, 495 S.W.2d 385, 392 (Mo. 1973) ("[W]hen the Governor takes part in appropriation procedures [by vetoing legislation], he is participating in the legislative process . . . ."); *State ex rel. Dickson v. Saiz*, 308 P.2d 205, 211 (N.M. 1957) ("when the Governor exercises his right of partial veto he is exercising a quasi-legislative function"); *Spokane Grain & Fuel Co. v. Lyttaker*, 109 P. 316, 320 (Wash. 1910) ("In approving and disapproving laws, in the exercise of his constitutional prerogative, the executive is a component part of the Legislature."); *State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 391 (Wisc. 1988) ("The partial veto power in this state was adopted...to make it easier for the governor to exercise what this court has recognized to be his `quasi-legislative' role, and to be a pivotal part of the `omnibus' budget bill process.").

paroles raises political, not judicial, questions. In *Ex parte Ferdin*, 183 S.W.2d 466, 467-68 (Tex. Crim. App. 1944), it refused to entertain jurisdiction over a complaint about "what is in effect an appeal from the act of the Governor in revoking the parole," because courts lack "power over the acts of the Governor so long as he is within the law and the matter involved is one of his judgment and discretion in the performance of his duty assigned to him by the Constitution . . . . Whether or not his acts are harsh, ill advised, and arbitrary, is not a matter for this court to decide . . . ." *See also Ex parte Pitt*, 206 S.W.2d 596, 597 (Tex. Crim. App. 1947) ("The sole arbiter of the wisdom of the revocation [of the Governor's conditional pardon] is the Governor"); *Ex parte Meza*, 185 S.W.2d 444, 445 (Tex. Crim. App. 1945) (same).

The Texas Constitution reposes the check on a Governor's veto power not in the judiciary, but in the Legislature and the people. Should either deem veto decisions to be erroneous or improper, the Texas Constitution provides them a legislative or political countermeasure. The Legislature may, if it remains in session, override a gubernatorial veto. Tex. Const., art. IV, § 14. If the Legislature concludes that the governor's actions are sufficiently reprehensible, the House may impeach and the Senate may try and, upon conviction, remove him or her from office. Tex. Const., art. XV, §§ 1-5. And voters can defeat at the next election a Governor with whose policy choices they disagree, or they can elect legislators who will join in sufficient strength to override unpopular vetoes. Allowing a criminal prosecution of a political decision where there is no allegation of bribery or demonstrable corruption undermines the basic structure of state government.

The indictment conflicts and interferes with Article II, Section 1 and Article IV, Section 14 of the Texas Constitution. It must be dismissed.

VII.

THE INDICTMENT VIOLATES THE "SPEECH OR DEBATE" CLAUSE

Article III, Section 21 of the Texas Constitution provides that "[n]o member shall be questioned in any other place for words spoken in debate in either House." This is Texas' Speech or Debate Clause, which is similar to Article I, Section 6, Clause 1 of the United States Constitution.[3] On the few occasions when Texas courts have considered the state Speech or Debate Clause, they have indicated that it has the same scope as the federal clause. *See Canfield v. Gresham*, 17 S.W. 390, 392-93 (Tex. 1891) (*citing Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)); *Bowles v. Clipp*, 920 S.W.2d 752, 758 (Tex. App.—Dallas 1996, writ denied); *see also Tenney v. Brandhove*, 341 U.S. 367, 375 (1951) (noting common purpose of Texas and federal Speech or Debate Clauses).

The Clause is "read broadly to effectuate its purposes," *Doe v. McMillan*, 412 U.S. 306, 311 (1973), which are "[t]o prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *id.* at 316, and to "free[] the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel v. United States*, 408 U.S. 606, 618 (1972). The Clause originated as a response to the British Crown's use of criminal prosecution to harass political opponents in Parliament. *See United States v. Johnson*, 383 U.S. 169, 181 (1966).

Borrowing from federal analyses, Texas courts have derived from the Clause a broad doctrine of legislative immunity. *See In re Perry*, 60 S.W.3d 857, 859 (Tex. 2001). Not only are oral speech and debate protected, but so are written reports and legislative votes. *See Canfield*, 17 S.W. at 392-93 (*citing Kilbourn*, 103 U.S. at 204); *McMillan*, 412 U.S. at 311. In fact, the Clause protects all

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[3] Article I, Section 6, Clause 1 of the U.S. Constitution states in relevant part that "for any Speech or Debate in either House [Senators and Representatives] shall not be questioned in any other Place."

communications that are "an integral part of the deliberative and communicative processes" involved in a legislative act, including communications with or among aides. *Gravel*, 408 U.S. at 625; *see also In re Perry*, 60 S.W.3d at 860-61.

The Clause also protects any government official, even members of the executive branch, insofar as they engage in "legitimate legislative activity." *Tenney*, 341 U.S. at 376; *see also In re Perry*, 60 S.W.3d at 860 (holding that the Attorney General, Comptroller, and Land Commissioner enjoy legislative immunity for "legitimate legislative functions" performed while serving on the Legislative Redistricting Board). Legislative activity includes budgetary and appropriations matters. *See Bogan*, 523 U.S. at 55-56 (affording legislative immunity to city mayor for "introduction of a budget and signing into law an ordinance," a "discretionary, policymaking decision implicating the budgetary priorities of the city" and "formally legislative, even though he was an executive official"); *Shade v. U.S. Congress*, 942 F. Supp. 2d 43, 48 (D.D.C. 2013) (appropriation of funds is "a core legislative function"). As already shown in Section VI above, legislative activity includes exercises of the Governor's veto power. *See Jessen*, 531 S.W.2d at 598.[4]

Any criminal prosecution based on this protected legislative activity is barred. "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular

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[4] To be sure, the protection of the Clause and its accompanying immunity has limits. It does not apply to actions that are "no part of the legislative process or function," even if performed by legislators. *United States v. Brewster*, 408 U.S. 501, 526 (1972). For example, a legislator who takes a bribe may be prosecuted because "acceptance of the bribe is the violation of the statute, not performance of the illegal promise," thus making it "unnecessary to inquire into how [the legislator] spoke, how he debated, how he voted, or anything he did in the chamber or in committee." *Id.* at 527. *See also Mutcher v. State*, 514 S.W.2d 905, 914-15 (Tex. Crim. App. 1974) (affirming a state legislator's conviction for bribery; holding that the criminal statute, Article 159, was authorized by Article XVI, Section 41 of the Texas Constitution and that Article XVI, Section 41 was not in conflict with the Article III, Section 21 of the Texas Constitution; and rejecting Speech or Debate Clause protection based on *United States v. Brewster*).

course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972). Thus, legislative acts may not themselves be criminalized. *See United States v. Helstoski*, 442 U.S. 477, 488 (1979). Nor may a prosecution proceed if it necessarily depends upon evidence of legislative acts or the motives for them. *See Johnson*, 383 U.S. at 184-85. In fact, evidence of a legislative act may not even be introduced into evidence in an otherwise permissible prosecution. *Helstoski*, 442 U.S. at 488. Nor can officials be required to testify about their legislative activities. *In re Perry*, 60 S.W.3d at 858, 861.[5]

This protection is not eviscerated even by allegations of a bad motive. A charge that legislative conduct was "improperly motivated" is "precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *Johnson*, 383 U.S. at 180. Otherwise, immunity would be held hostage to "a conclusion of the pleader" or "a jury's speculation as to motives." *Bogan*, 523 U.S. at 54 (observing that the Court had applied immunity even when a legislator "singled out the plaintiff for investigation in order to intimidate and silence the plaintiff

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[5] Other States provide similar protection in civil, criminal, and quasi-criminal matters. *See, e.g., State v. Dankworth*, 672 P.2d 148, 151 (Alaska Ct. App. 1983) (even in a criminal case, "[o]nce it is determined that [a] legislative function . . . was apparently being performed, the propriety and the motivation for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry" (quoting *United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973))); *D'Amato v. Superior Court*, 167 Cal. App. 4th 861 (2008) ("The district attorney acknowledges the principles of legislative immunity . . . but contends immunity applies only to civil suits, and does not extend to criminal prosecutions. We disagree."); *State v. Neufeld*, 926 P.2d 1325, 1337 (Kan. 1996) ("Congressmen . . . are immune from liability for their actions within the legislative sphere . . . even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." (internal quotation marks omitted)); *State v. Holton*, 997 A.2d 828, 851 (Md. Ct. Spec. App. 2010) ("we hold that, as a matter of common law, local legislators may invoke that same privilege in a criminal prosecution"); *Irons v. R.I. Ethics Comm'n*, 973 A.2d 1124, 1131 (R.I. 2009) ("as long as [a legislator's] challenged actions, stripped of all considerations of intent and motive, were legislative in character, the doctrine of absolute legislative immunity protects them from such claims" — there, an ethics agency enforcement action).

and deter and prevent him from effectively exercising his constitutional rights" (citing *Tenney*, 341 U.S. at 377)). "[I]t is `not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *In re Perry*, 60 S.W.3d at 860 (quoting *Bogan*, 523 U.S. at 55). Simply put: "The claim of an unworthy purpose does not destroy the privilege." *Tenney*, 341 U.S. at 377. The remedy for those who disagree with a veto, no matter how earnestly, is political, not judicial.

For these reasons, attempts to convert inescapably political disputes into criminal complaints must be foreclosed at once without further judicial proceedings. A number of federal cases have required dismissal of a grand jury indictment premised on privileged Speech or Debate materials, thus barring a trial that would require the government to introduce evidence of privileged Speech or Debate materials. For example, in *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), a former congressman was prosecuted for committing perjury before a grand jury. *Id.* at 1534. The central allegation was that he lied to the grand jury about his knowledge of various money-launderings statutes. *Id.* at 1535-37. To prove his knowledge, the prosecution introduced evidence before the grand jury and at trial about the congressman's activities in Congress, including his activity on a banking committee. *Id.* at 1539-40. The court of appeals reversed the congressman's conviction and held that the prosecution violated the Speech or Debate Clause for two reasons: (1) "the AUSA[] question[ed] [the congressman] before the grand jury about his committee memberships" in an effort to show his knowledge of money-laundering statutes, and (2) "reference [was] made to [the congressman's] committee memberships both in the grand jury proceedings and at trial." *Id.* at 1543. The court held that "the remedy for the violations of the privilege is dismissal of the affected counts." *Id.* at 1543. *See also Johnson*, 383 U.S. at 185 (holding that Speech or Debate material was improperly presented to the grand jury and thus ordered a new trial "purged of

elements offensive to the Speech or Debate Clause"); *Brewster*, 408 U.S. at 526-27 (holding that, only because a conviction in that case could be sustained without "inquir[y] into the [legislative] act or its motivation," could an indictment of a congressman which referred to legislative acts stand, as "[t]o make a prima facie case under this indictment, the Government need not show any act of [Brewster] subsequent to the corrupt promise for payment," i.e., a bribe).

These principles require immediate dismissal of the indictment against Governor Perry. Count I is predicated upon a legislative act of Governor Perry — the veto — and Count II involves the Governor's alleged discussions with his staff regarding the anticipated legislative act and its announcement. Thus, the indictment necessarily seeks to impose criminal liability for, and compel evidence related to, acts that are privileged by the Speech or Debate Clause and legislative immunity. The broad shield erected by the Speech or Debate Clause and legislative immunity cannot be pierced by the indictment. Should the face of the indictment not be sufficient to sustain this assertion, the Court should review the transcripts of the grand jury testimony *in camera*. But in either event, the indictment must be dismissed and the prosecution barred.

VIII.

SECTION 36.03(a)(1) IS UNCONSTITUTIONAL ON ITS FACE

Count II of the indictment alleges that Governor Perry violated Section 36.03(a)(1) of the Texas Penal Code by "threatening" to veto funding for the PIU if Lehmberg did not resign her post as District Attorney. For the reasons discussed below, Section 36.03(a)(1) is facially unconstitutional, the Governor's indictment for its alleged violation is therefore void, and Count II must be dismissed.

As articulated in the separate opinion of four judges in *Karenev v. State*, 281 S.W.3d 428

(Tex. Crim. App. 2009) (Cochran, J., concurring), "[a] facial challenge is based solely upon the face of the penal statue and the charging instrument" and "considers only the text" of the statute and "not its application to the particular circumstances of an individual." *Id.* at 435 (quoting in part 16 C.J.S. Constitutional Law § 113, at 149 (2005)). Thus, a party making a facial challenge "seeks to vindicate not only his own rights, but also those of others who may be adversely impacted by the statute in question." *Id.* (footnote omitted). *See also Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437-438 (Tex. 1998).

Section 36.03(a)(1) is unconstitutional on its face. It is overbroad and void for vagueness, as those terms have been articulated by the United States Supreme Court, the Court of Criminal Appeals, and many other courts in Texas and across the nation.

A. Section 36.03(a)(1) is Unconstitutionally Overbroad.

The First Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, *Virginia v. Black*, 538 U.S. 343, 358 (2003), provides that "Congress shall make no law . . . abridging the freedom of speech." Statutes regulating the content of protected speech or expression are subject to "strict scrutiny," meaning that to avoid being declared invalid, such regulations must constitute the "least restrictive means" of effectuating a "compelling [state] interest." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564 (2002).[6]

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[6] The First Amendment "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *Ashcroft v. Am. Civil Liberties Union*, 542 US. 656, 660 (2004); *Ex parte Lo*, 424 S.W.3d 10, 15 (Tex. Crim. App. 2014), *reh'g denied* (Mar. 19, 2014). "A speech regulation is content-based if it defines the regulated speech by reference to its content." *Rangra v. Brown*, 566 F.3d 515, 521 n.15 (5th Cir. 2009) (citing Supreme Court opinions); *Ex parte Lo*, 424 S.W.3d at 15 n.12. A regulation or statute is content-based "[i]f it is necessary to look at the content of the speech in question to decide if the speaker violated the law." *Ex parte Lo*, 424 S.W.3d at 15 n.12; *Rangra*, 566 F.3d at 521 n.15;. Since here it is necessary to look at the content of the speech — the alleged "threat" that the indictment asserts to be "coercion" — Section 36.03 is a content-based restriction on First Amendment speech.

Core political speech, such as the veto and alleged veto threat at issue in this case, lies at the very heart of First Amendment protection. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 347 (1995) (a court must apply "exacting scrutiny" to any law burdening core political speech); *Meyer v. Grant*, 486 U.S. 414, 422 (1988) (First Amendment protection is "at its zenith" when applied to core political speech, and statutes burdening such speech are subject to "exacting scrutiny").

To succeed in a typical facial attack, a defendant must establish "that no set of circumstances exists under which [the statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Stevens*, 559 U.S. at 472. However, in the context of the First Amendment, the Supreme Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n.6 (2008) (internal quotation marks omitted)). Thus, a statute is facially unconstitutional and violative of the overbreadth doctrine if "it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008).

The overbreadth doctrine "seeks to strike a balance between competing social costs." *Id.* (citing *Virginia v. Hicks,* 539 U.S. 113, 119-120 (2003)). On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional — particularly a law directed at conduct so antisocial that it has been made criminal — has obvious harmful effects. In order to maintain an appropriate balance, the Supreme Court has vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only

in an absolute sense, but also relative to the statute's plainly legitimate sweep. *See Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 485 (1989); *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973). A law that is overbroad cannot be validly applied against any individual. Lawrence H. Tribe, American Constitutional Law § 12-32, 1036 (2d ed. 1988).

Section 36.03(a)(1) makes it an offense for an individual to, "by means of coercion . . . influence[] or attempt to influence a public servant in a specific exercise of his official power or a specific performance of his official duty or [to] influence[] or attempt[] to influence a public servant to violate the public servant's known legal duty." Under Section 1.07(a)(9) of the Penal Code, "coercion" is defined as "a threat, however communicated:"

> (A) to commit an offense;
>
> (B) to inflict bodily injury in the future on the person threatened or another;
>
> (C) to accuse a person of any offense;
>
> (D) to expose a person to hatred, contempt, or ridicule;
>
> (E) to harm the credit or business repute of any person; or
>
> (F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

Some applications of Section 36.03(a)(1) and 1.07(a)(9) are clearly legitimate. For example, criminalizing the coercion of a public official through the threat of violence raises no serious First Amendment concerns, since a state may criminalize "true threats" — that is, "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" — without violating the First Amendment. *Virginia v. Black,* 538 U.S. 343, 359 (2003); *Watts v. United States,* 394 U.S. 705, 707-08 (1969) ("[w]hat is a threat must be distinguished from what is constitutionally protected speech" because of the "profound national

commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

As written and invoked in the indictment, however, Section 36.03(a)(1) also criminalizes a substantial amount of constitutionally protected speech, including the veto "threat" purportedly made by Governor Perry. Given the definition of "coercion" contained in Section 1.07(a)(9)(F), it may well be a crime under Section 36.03(a)(1) for a Governor or a member of his staff to negotiate with a legislator or a legislative sponsor for changes in a pending bill by informing the legislator or legislative sponsor that, as currently drafted, the Governor would veto the pending bill. Similarly, it also could be a crime for a Governor or a member of his staff to inform a legislator or a legislative sponsor that unless that pending bill were amended in a particular manner — either deleting language or inserting language — the Governor would veto it.

Moreover, the literal words of the statute would routinely subject legislators to criminal exposure merely for engaging in their essential legislative functions. If a legislator had successfully advocated, or even unsuccessfully advocated, a cut in PIU funding because Lehmberg had not voluntarily left office, that would presumably be just as felonious an act as Governor Perry's "threat" of a veto. The criminalization of such statements, ubiquitous in the legislative process from the colonial beginnings of the nation and inherent in governing, cannot possibly withstand even cursory constitutional scrutiny, let alone "strict scrutiny." Otherwise, the definition of "coercion" would subject members of the House and Senate to criminal exposure when they negotiate with each other in resolving differences at conference committee meetings?[7] The normal "give and take" of the

[7] The "exception" within Section 36.03(c) arguably would cover negotiations between members of the House and Senate. However, the Special Prosecutor has attempted to negate even that

legislative process in dealings with the departments and agencies of state government, and in dealing with members of the other legislative branch, would, were this law to be applied as written, give way to a rigid, silent formalism in the legislative process — cast your votes, yea or nay, without complaint, explanation, or negotiation, or else risk going to prison. Because the literal words of Section 36.03(a)(1) prohibit a substantial amount of constitutionally protected political speech, and the State cannot sustain its burden to prove that this presumptively unconstitutional, content-based statute satisfies "strict scrutiny," it is overbroad on its face and cannot be validly applied to any individual. Count II must be dismissed.

B. Section 36.03(a)(1) is Void for Vagueness

A statute is void for vagueness if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application." *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971); *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

Overwhelming case law demonstrates that criminal laws must be sufficiently clear in at least three respects. First, a person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. *Grayned v. Rockford,* 408 U.S. 104, 108 (1972); *Kramer v. Price*, 712 F.2d 174, 180 (5th Cir. 1983), *rehearing en banc granted*, 716 F.2d 284 (5th Cir. 1983), *grant of relief affirmed*, 723 F.2d 1164 (5th Cir. 1984); *State v. Markovich*, 77 S.W.3d 274, 279 (Tex. Crim. App. 2002); *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1991). Second, the law must establish determinate, explicit guidelines for law enforcement to prevent arbitrary enforcement. *Grayned*, 408

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exception by alleging that Governor Perry and Lehmberg "were not members of the *same* governing body of a governmental entity," *see* **Exhibit 1** at page 2 (emphasis added), thus reflecting an interpretation quite different from the literal language of the exception.

U.S. at 108-109; *Kramer,* 712 F.2d. at 176-177; *Markovich*, 77 S.W.3d at 279; *Long*, 931 S.W.2d at 287. Finally, where First Amendment freedoms are implicated, as here, the law must be sufficiently definite to avoid chilling protected expression. *Grayned,* 408 U.S. at 109; *Markovich*, 77 S.W.3d at 279; *Long*, 931 S.W.2d at 287. "When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness 'demands a greater degree of specificity than in other contexts.'" *Kramer,* 712 F.2d at 177 (citations and quotation omitted). Greater specificity is required to preserve adequately the right of free expression because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned,* 408 U.S. at 109 (internal ellipsis and quotation marks omitted). Moreover, when a vagueness challenge involves First Amendment considerations, a criminal statute may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct. *Gooding v. Wilson,* 405 U.S. 518 (1972); *Kramer,* 712 F.2d at 176 n.3.[8]

As illustrated below, Section 36.03(1)(a) fails to give fair notice of the prohibited conduct and lacks definite guidelines for enforcement, given the definition of "coercion" contained in Section 1.07(a)(9)(F). Therefore, it is unconstitutionally vague.

1. The vagueness of the statute is highlighted by the fact that a threat to do a legal act does not constitute duress or coercion.

Section 36.03(a)(1) makes it an offense for an individual to, "by means of coercion ...influence[] or attempt to influence a public servant in a specific exercise of his official power or a specific performance of his official duty or [to] influence[] or attempt[] to influence a public servant to violate the public servant's known legal duty." The indictment alleges that Governor Perry

[8] This is, of course, contrary to the normal hierarchy of burdens, as an "as applied" challenge is normally considered easier to sustain than a "facial" challenge.

violated Section 36.03(a)(1) and 1.07(a)(9)(F) by "threatening" to veto funding for the Public Integrity Unit unless Lehmberg agreed to resign. Even assuming (for purposes of argument only) that Governor Perry did in fact "threaten" a veto in this case, and even assuming that Lehmberg had resigned under a such threat, Texas courts have repeatedly held that resignation under such circumstances does not constitute "duress."

In *Crouch v. Civil Service Commission of Texas City*, the court noted that, if a public official is actually forced to resign from office under duress, that resignation "may, of course, be withdrawn or avoided." 459 S.W.2d 491, 494 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.) (*citing Willborn v. Deans*, 240 S.W.2d 791, 793 (Tex. Civ. App.—Austin 1951, writ ref'd n.r.e.)). However, where a party "threatens" to remove a public official from office by doing what the party has a legal right to do, the public servant's resignation cannot constitute duress. *Willborn*, 240 S.W. 2d at 795 ("[A] threat to do what one has a legal right to do, as bringing suit in court to enforce a claimed civil right, cannot constitute duress."); *see also Dannelly v. Bard*, 62 S.W.2d 301, 308 (Tex. Civ. App.—Beaumont 1933, writ ref'd) (citing additional cases).

In *Willborn*, two individuals (Mr. Montgomery and Mr. Whitehead), acting at the specific request of the county judge, the county attorney and the district attorney, attempted to procure Willborn's resignation as the Sheriff of McCulloch County. In doing so, Montgomery and Whitehead urged Willborn to resign as Sheriff. They stated that if he refused to do so, legal proceedings would be brought to remove him from office. Willborn did resign, but he subsequently brought legal proceedings to recover his office, claiming his resignation had been induced by duress. The court of appeals affirmed the trial court's denial of relief on the basis that there was no duress as a matter of law because the requesting official had a legal right to bring such proceedings.

Pursuant to *Willborn*, since Governor Perry had the lawful right to veto funding for the PIU, even if he had in fact "threatened" to veto the funding unless Lehmberg resigned (and even if Lehmberg had resigned in response thereto), her resignation would not have been under "duress." Moreover, under *Willborn*, Governor Perry also could have told Lehmberg, "I am going to veto funding for the PIU, and unless you resign, I will personally file a lawsuit to have you removed from office based on your DWI arrest, your post-arrest conduct, and your plea of guilty." These types of statements would not have constituted "duress," because "a threat to do what one has a legal right to do cannot constitute duress." *Willborn*, 240 S.W.2d at 795 (quoting *Dannelly*, 62 S.W.2d at 308).

Additionally, *Van Arsdel v. Texas A&M University*, 628 F.2d 344 (5th Cir. 1980), is instructive. Van Arsdel, an employee of Texas A&M University, learned from his department head, Dr. Joham, that a female employee had lodged sexual harassment charges against him. *Id.* at 345. Dr. Joham informed Van Arsdel of the nature of the charges brought by the complaining female, her identity, and the fact that the University would bring dismissal proceedings against him unless he resigned. *Id.* Van Arsdel subsequently tendered his resignation, but before the effective date attempted to rescind it. *Id.* When the University refused to accede to his attempted rescission, Van Arsdel brought suit, claiming that he had resigned under duress. *Id.* The federal district court issued a preliminary injunction, requiring the University to reinstate Van Arsdel with back pay until it complied with its established procedures for dismissal, concluding that the resignation was not voluntarily submitted because he had resigned under duress. *Id.* On appeal, the Fifth Circuit reversed, disagreeing "with the district court's conclusion that duress is present whenever a party is confronted with a dilemma." *Id.* at 345-36. According to the Fifth Circuit, "Dr. Joham's 'threat' consisted merely of delineating the options available to [Van Arsdel] and to the University." *Id.* at

346. Because Van Arsdel "made a reasoned choice between two validly imposed alternatives, duress was absent as a matter of law." *Id.* (citing *Willborn v. Deans*, *supra*; *Molinar v. Western Electric Co.*, 525 F.2d 521 (1st Cir. 1975); *Cosby v. United States*, 417 F.2d 1345 (Fed. Ct. 1969); and *Autera v. United States*, 389 F.2d 815 (Fed. Ct. 1968)).

2. Section 36.03(a)(1)'s lack of scienter requirement renders it vague.

The language of Section 36.03(a)(1) and Section 1.07(a)(9)(F) (defining "coercion") reflects that the statutes do not require a culpable mental state. The language also reflects that they do not plainly dispense with a culpable mental state. These omissions heighten the unconstitutional vagueness of Section 36.03(a)(1). The indictment's assertion that Governor Perry in fact had two culpable mental states reveals that the prosecutor recognized the statute's defect, but his effort to cure the vagueness by imposing his own opinion of what mental states the provisions actually require cannot save Section 36.03(a)(1).

Section 6.02 of the Texas Penal Code provides in subsection (a) that a person does not commit an offense unless he engages in conduct with one of four culpable mental states. Subsection (b) provides that "if the definition of an offense does not prescribe a culpable mental state, one is nevertheless required unless the definition plainly dispenses with any mental element." When a culpable mental state is required, Section 6.02(c) provides that "intent, knowledge, or recklessness suffices to establish criminal responsibility." These three culpable mental states are defined in Section 6.03(a) in terms of "nature of conduct," "circumstances surround the conduct," and/or "result of conduct." The precise issues raised by this indictment — whether Section 36.03(a)(1) requires a culpable mental state, as mandated by Section 6.02(a) and as defined by Section 6.03, and if so, whether it relates to the nature of the conduct, the circumstances surrounding the conduct, and/or the

result of the conduct — have not been decided by any appellate court in Texas.

The lack of clarity regarding the culpable mental state required for a violation of Section 36.03(a)(1) supports the proposition that it is unconstitutionally vague. "[T]he constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." *Colautti v. Franklin,* 439 U.S. 379, 394 (1979) (Act's vagueness was "compounded by the fact that the Act subjects [a party] to potential criminal liability without regard to fault"); *Morissette v. United States*, 342 U.S. 246 (1952) (requiring scienter except in public welfare offenses). According to the United States Supreme Court, the standard presumption in favor of a scienter requirement — a culpable mental state — should apply to each statutory element that criminalizes otherwise innocent conduct in order to comply with due process. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994); *Staples v. United States*, 511 U.S. 600, 618 (1994); *Morissette v. United States*, 342 U.S. 246, 270 (1952). The absence of a culpable mental state supports the proposition that the statute is void for vagueness, as it fails to give a person fair notice of what conduct is prohibited by the statute (and allows for completely arbitrary enforcement of the statute), coupled as it is with the absence of any requirement that the "coercion" be unlawful.

3. The vagueness of Section 36.03(a)(1) is further illustrated by other statutes in the same chapter of the Texas Penal Code.

The language of two other statutes in Chapter 36 of the Texas Penal Code should be compared to Section 36.03(a)(1), given the indictment's utilization of the definition of "coercion" in Section 1.07(a)(9)(F). Section 36.04 (improper influence) and 36.06 (obstruction or retaliation) both contain limiting language which does not appear in Section 36.03(a)(1). First, Section 36.04 requires that the accused act "with an intent to influence the outcome of the proceeding on the basis of considerations *other than those authorized by law*." (Emphasis added). Considerations "other than

those authorized by law" equate to "unlawful" considerations. Second, Section 36.06 requires that the accused "harms or threatens to harm another by an *unlawful act*." In other words, Section 36.03, stripped as it was in 1994 of the requirement that "coercion" be "unlawful," stands in stark contrast to Sections 36.04 and 36.06, which both require "unlawful" conduct.[9]

Section 36.03(a)(1), given the definition of "coercion" in Section 1.07(a)(9)(F) upon which Count II is based, is unconstitutionally vague on its face. Count II must be dismissed.

IX.

SECTION 36.03(a)(1) IS UNCONSTITUTIONAL AS APPLIED

A. An As-Applied Challenge is Appropriate, Given the Circumstances of this Case.

In addition to being unconstitutional on its face, Section 36.03(a)(1) is unconstitutional as applied, given the definition of "coercion" in Section 1.07(a)(9)(F). An "as applied" challenge, in contrast to a facial challenge, "depends upon the evidence adduced at a trial or hearing," as applied to the party's particular circumstances. *Karenev v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009)(Cochran, J., concurring). Typically, an "as applied" challenge to the constitutionality of a statute cannot be raised in a pretrial habeas application. *Ex parte Weise*, 55 S.W.3d 617, 619-620 (Tex. Crim. App. 2001). This general rule of practice must give way in this case because of the *constitutional* concerns reaching the very heart of our governmental structure.

A full blown "as applied" challenge — typically available only after the evidence has been adduced at a hearing or at trial — is not necessary, because the facts reflected in the indictment are sufficient to demonstrate that the statute is unconstitutional as applied. A pretrial writ is the only

[9] Section 1.07(a)(48) of the Texas Penal Code defines "unlawful" as "criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege."

adequate remedy to rectify the serious constitutional deficiencies in the current indictment. *See Smith v. Flack*, 728 S.W.2d 784, 792 (Tex. Crim. App. 1989) (orig. proceeding) ("In some cases, a remedy at law may technically exist; however, it may be nevertheless so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate."). Unlike in the ordinary case, the mere pendency of judicial proceedings is what imperils the constitutional principles at stake; the separation of powers is not threatened by a *conviction*, but by injecting judicial scrutiny into a political dispute.[10] Likewise, the Free Speech implications for this and future Governors turn on whether criminal proceedings can even be brought, not on what their ultimate result might be. This Court should address these substantive constitutional rights on the merits in order to conserve judicial resources. A merits review would also be consistent with the prinicple, well established in federal constitutional law, that the overbreadth doctrine should not be applied to a statute under attack if that statute is unconstitutional as applied to the individual challenging the statute. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-485 (1989); *Stevens*, 559 U.S. at 484 (Alito, J., dissenting) (citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 462 n. 20 (1978)).

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[10] A trial without pretrial review of these serious constitutional issues would be a denial of the very rights sought to be vindicated. It is for this reason, for instance, that the Supreme Court has created exceptions allowing pretrial appeals of denials of bail, *Stack v. Boyle*, 342 U.S. 1, 6 (1951), denials of motions to dismiss on double jeopardy claims, *Abney v. United States*, 431 U.S. 651, 659 (1977), and denials of motions to dismiss under the Speech or Debate Clause. *United States v. Helstoski*, 442 U.S. 477, 500 (1979). The rationale of these exceptions is simple: the right to bail would become moot if there was no pretrial appeal, and both *Abney* and *Helstoski* involved the right *not to be tried,* which could not be vindicated after a trial. Because Governor Perry's "as applied" challenges under the Texas Constitution focus primarily upon the right not to be tried, he is in effect challenging the trial court's power to proceed. *See Weise*, 55 S.W.3d at 620. Accordingly, this Court should hold that each of these claims are cognizable in this pretrial writ and address them on the merits, as opposed to postponing their consideration in connection with a motion to quash, which is only immediately appealable by the State if the Court were to grant them.

B. Section 36.03(a)(1) is Unconstitutional As Applied to the Circumstances of this Indictment.

Over twenty year ago, in *State v. Hanson*, 793 S.W.2d 270 (Tex. App.—Waco 1990, no writ), the court of appeals found Section 36.03(a)(1) unconstitutional as applied to circumstances very similar to those at issue in the indictment. Hanson, a constitutional county judge, was indicted for words she allegedly spoke to other public officials. *Id.* at 271. Specifically, the county judge was accused of intentionally and knowingly threatening to "terminate the county's funding of the salaries of a deputy district clerk and an assistant district attorney in an attempt to coerce the district judge into firing the county auditor and the county attorney into revoking a misdemeanant's probation." *Id.* at 271. The court of appeals affirmed the trial court's dismissal of two misdemeanor indictments alleging that Judge Hanson had coerced a public servant, and held that Section 36.03(a)(1) was unconstitutionally vague as applied to Judge Hanson's alleged conduct.[11]

The court began its analysis by noting that a criminal statute that seeks to punish threats must "clearly distinguish between an actionable or true threat and protected speech." *Id.* at 272. The definition of "coercion" at the time of Judge Hanson's conduct, then set forth in Section 36.01(a)(1), is identical to the current definition in Section 1.07(a)(9), discussed above. Because Section 36.01(a)(1) failed to distinguish between lawful and unlawful threats, "Judge Hanson "had to guess at the meaning of section 36.03(a)(1) and its application to her official conduct." *Id.* The court

[11] In *Hanson*, the State exercised its right to appeal from the order dismissing the indictments under Article 44.01 of the Code of Criminal Procedure and the court of appeals therefore had jurisdiction to rule upon the "as applied" challenge before judicial resources were needlessly consumed on a trial.

Applicant intends to file a motion to quash the instant indictment in the near future. That motion to quash will include claims that are clearly not cognizable via a pretrial writ. Out of an abundance of precaution, however, it will also include claims from this application that ultimately may be determined to be non-cognizable via pretrial writ.

concluded that, in light of the "impermissibly vague definition of `coercion,'" "these penal provisions violated due process because they did not give the county judge fair notice of what type of threat was prohibited, failed to provide a clear, objective standard by which those charged with enforcement could assess her alleged conduct for its legality, and had a potential of inhibiting the exercise of her protected free expression as a public official." *Id.* at 273.

Beyond finding the statute unconstitutionally vague, the court noted that Judge Hanson's alleged "threat" was protected by the First Amendment. As the court stated, "[c]oercion of a lawful act by a threat of lawful action is protected free expression." *Id.* at 272. "Assuming the allegations were true, Judge Hanson could have lawfully taken the actions threatened, and the district judge and county attorney, had they acted as she desired, would have acted lawfully." *Id.* at 272. Although the court declined to explicitly address the question of whether the statute was overbroad, the court's discussion clearly indicates that, as applied to the judge's alleged conduct, the statute prohibited protected speech in contravention of the First Amendment.

Importantly, the *Hanson* court also noted that effective September 1, 1989, the legislature had made three amendments to the statute, although those amendments were not then an issue before the court. First, the legislature amended the definition of the term "coercion" in Section 36.01, limiting it to "threats however communicated . . . to *unlawfully* take or withhold action as a public servant, or to cause a public servant to *unlawfully* take or withhold action." (Emphasis added).[12] In addition,

[12] Section 1.07(a)(48) of the Texas Penal Code defines (both in 1989 and presently) the term "unlawful" as "mean[ing] criminal or tortious or both and includes what would be criminal or tortious but for a defense *not* amounting to justification or privilege." While of little consequence to this application for writ of habeas corpus, it is well worth noting that Governor Perry's "defense" to the indictment includes the justification of "public duty" contained in Section 9.21 of the Texas Penal Code, because he "reasonably believes" his conduct was "required or authorized" by law, including but not limited to Article IV, Section 14 of the Texas Constitution.

the legislature amended Section 36.03 to add subsection (c), which stated:

> "It is an exception to the application of Subsection (a)(1) of this section that the person who influences or attempts to influence a public servant is a member of the governing body of a governmental entity, and that the action that influences or attempts to influence the public servant is an official action taken by the member of the governing body. For purposes of this subsection, the term "official action" includes deliberations by the governing body of a government entity.

The current version of Section 36.01 was, in 1994, stripped of the 1989 amendment to the definition of "coercion" that required a threat to *"[u]nlawfully* take or withhold action as a public servant or to cause a public servant to *unlawfully* take or withhold action." (Emphasis added). And the current version of the definition of "coercion" contained in Section 1.07(a)(9)(F) does not require an *unlawful* threat. The deletion of the requirement that there be a threat of *unlawful* action and conversely that the threat be "*unlawful*" is fatal to the constitutionality of the current version of Section 36.03(a)(1) where the indictment relies upon the definition of "coercion" contained in Section 1.07(a)(9)(F).

Indeed, the now-current statutory scheme — Section 36.03(a)(1) defining the offense and Section 1.07(a)(9)(F) defining the term "coercion" — is virtually identical to the version that was declared unconstitutionally vague and violative of the First Amendment in *Hanson.* While the 1989 statutory exception is still present, that does not solve the vagueness and free speech ramifications that led the *Hanson* court to declare the pre-1989 version unconstitutional.

The current version of Section 36.03(a)(1) cannot satisfy the strict scrutiny test. Section 36.03(a)(1) regulates speech in a manner not as narrowly drawn as the 1989 version. Only by outlawing "*unlawful*" threats — threats which are not protected by the First Amendment and Article I, Section 8 — could the statute be construed as "narrowly drawn" and hence potentially constitutional. While the State of Texas clearly has an interest in prohibiting people from "coercing"

public servants, "coercion" that is not *unlawful*, but rather that is authorized by the Governor's veto power under the Texas Constitution, cannot be rendered criminal.[13] If "threatening" a public servant with action that can be taken lawfully is somehow rendered illegal in Texas, then certainly Section 36.03(a)(1), as applied to the Governor's alleged conduct, is not only violative of free speech, but is also devoid of the type of notice necessary to withstand vagueness challenges. Count II of the indictment must be dismissed.

X.

SECTION 39.02(a)(2) IS UNCONSTITUTIONAL AS APPLIED

In contrast to Section 36.03(a)(1), Section 39.02(a)(2) may not be void on its face. It is a seemingly tightly-worded statute with graduated penalties for escalating levels of wrongdoing. But it has no discernible relationship to any conduct alleged in the indictment against Governor Perry. Hence, if the statute is read to apply to the facts as alleged, the provision is either void for vagueness or unconstitutionally overbroad, or both. If either is true, the petition should be granted, for the reasons discussed in regard to Count I above.

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[13] The Texas Supreme Court has interpreted Article I, Section 8 of the Texas Constitution and indicated that, at least in some respects, it may be "broader" or afford "greater" protection of speech than the First Amendment, while in other respects it may be less protective. *See Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116 (Tex. 2000) ("we have recognized that the Texas Constitution's free speech guarantee is in some cases broader than the federal guarantee"); *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 434 (Tex. 1998) ("This Court has recognized that 'in some aspects our free speech provision is broader than the First Amendment.'"); *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 402 (Tex.1988) ("it is quite obvious that the Texas Constitution's affirmative grant of free speech is more broadly worded than the first amendment's proscription of Congress from abridging freedom of speech"). Because the Texas Governor's right to veto is broader than the President's, while in other areas the Governor exercises less authority in a state government of divided executive power than the President does as a unitary executive of federal government, the constitutional protection of the Governor's veto-related speech should be just as strong, and perhaps stronger, under the Texas free-speech guarantee than under its federal analog. To undermine the Governor's veto authority would, as has been discussed, violate the Separation of Powers Clause and the Speech or Debate Clause of the Texas Constitution.

The law as applied to Governor Perry is unconstitutionally vague in several respects. First, he could not have had "fair notice" that his actions would "intentionally or knowingly" violate "a law relating to the public servant's office or employment," as nothing in the Penal Code would have put any governor on notice that exercising a line-item veto was in any way illegal. Second, neither Governor Perry nor any other governor could have had "fair notice" that he was "misus[ing] government property" by vetoing a line-item appropriation, the effect of which was to keep funds *in* the State treasury rather than allowing funds to be transferred to Lehmberg at some date after September 1, 2013. Third, no one in Governor Perry's position could have had "fair notice" (nor is it really conceivable they could understand it even now) that disapproving the expenditure of money, so that it remained with the State, was in fact bringing that money "into the public servant's custody or possession by virtue of the public servant's office or employment." A Texas Governor is not Augustus traversing his realm with a portable mint and an imperial treasure in tow; he no more has custody or possession of the State's general revenue funds than does any Texan. No governor can say of his or her state what Sun King said of France: "L'état, c'est moi." If Section 39.02(a)(2) does criminalize the Governor's veto, it is indeed one of the vaguest provisions in the entire body of American laws. In essence, the special prosecutor's interpretation of Section 39.02(a)(2) would take the Rule of Lenity — the principle that unclear criminal statutes should be construed in favor of the defendant, *Cuellar v. State*, 70 S.W.3d 815, 819 n.6 (Tex. Crim. App. 2002) — and turn it on its head.[14]

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[14] Indeed, prosecution of Governor Perry under Section 39.02(a)(2) violates all three related manifestations of the fair warning requirement. *See United States v. Lanier*, 520 U.S. 259, 266 (1997). First, the vagueness doctrine would be violated because there was no fair warning that Governor Perry's act of vetoing funding for the PIU would violate that section. Second, the rule of lenity would be violated by an interpretation of this statute to the effect that Governor Perry's veto fell within the umbrella of coverage. Third, it would allow for an entirely novel construction of these

Conversely, if the provision is not vague, then manifestly it is unconstitutionally overbroad. The governor has express, explicit, and untrammeled authority to issue a line-item veto of an appropriation. Yet, as the special prosecutor reads this law here, any veto of appropriated funds is a criminal act. If the governor vetoes a very small line-item, the punishment range may be no greater than that which Lehmberg faced for her egregious conduct. But if he effects any substantial savings by his veto, anything over $1,500, he faces felony charges ranging up to life imprisonment. The Legislature cannot criminalize any function constitutionally assigned to the governor, much less his veto power, which is "perhaps the most significant of the Texas governor's constitutional powers" and the "primary method by which [the Governor] exercises some control over the amounts and purposes of state expenditures." 1 George D. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 339 (1977).

XI.

CONCLUSION

Continued prosecution of Governor Perry on the current indictment is unprecedented, insupportable and simply impermissible. This Court should not hesitate to dismiss both counts of the indictment and bar the prosecution, immediately if not sooner. It is no fault of the Court that it has been asked to intrude on a political dispute; dismissal is the proper way to ensure that the judiciary plays no part in the separation-of-powers attack described in this application. The State can seek an expedited appeal to the Third Court of Appeals if it seriously believes that its continued prosecution does not offend these core constitutional provisions. Judicial resources should not be needlessly consumed and the Texas Constitution so grievously assaulted. Indeed, this Court has the

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criminal statutes that neither the statutes nor any prior judicial decision had fairly disclosed to be within their scope.

duty to ensure that the Texas Constitution is followed and that the special prosecutor's unprincipled assault does not inflict any additional damage.

XII.

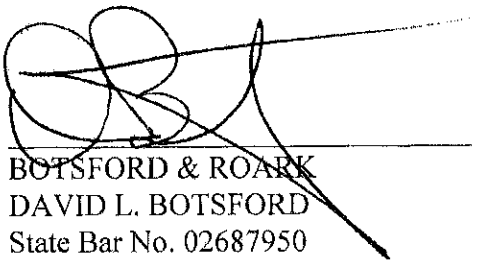
PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Governor Perry respectfully prays that his Honorable Court issue a writ of habeas corpus and, after due consideration and a hearing on each of the claims contained in this application, dismiss the indictment and bar any further prosecution of Governor Perry.

Respectfully submitted,

THE BUZBEE LAW FIRM
Anthony G. Buzbee
State Bar No. 24001820

BAKER BOTTS L.L.P.
Thomas R. Phillips
State Bar No. 00000102

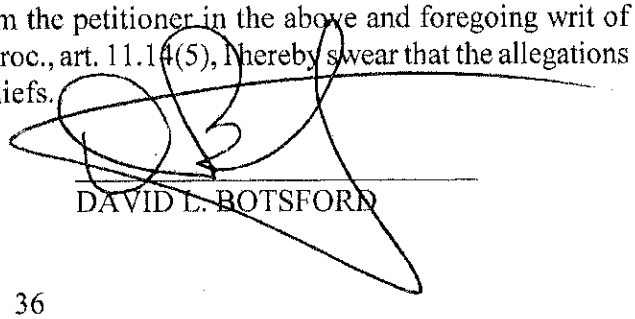


BOTSFORD & ROARK
DAVID L. BOTSFORD
State Bar No. 02687950

XIII.

VERIFICATION

My name is David L. Botsford and I am the petitioner in the above and foregoing writ of habeas corpus. Pursuant to Tex. Code. Crim. Proc., art. 11.14(5), I hereby swear that the allegations of the application are true, according to my beliefs.



DAVID L. BOTSFORD

XIV.

CERTIFICATE OF SERVICE

This is to certify that on August 25, 2014, a true and complete copy of this document, including all exhibits, has been emailed to Mr. Michael McCrum at michael@McCrumlaw.com.

DAVID L. BOTSFORD

EXHIBIT 1

Indictment & Redacted Personal Bond

Filed in The District Court
of Travis County, Texas

AUG 15 2014
5:30 A.M.
Rodriguez-Mendoza, Clerk

No. D1DC14100139

The State of Texas v. James Richard "Rick" Perry

INDICTMENT

Count I - Abuse of Official Capacity 39.02 DPS 23990064
Count II - Coercion of Public Servant 36.03 DPS 13990027

In the 390th Judicial District Court of Travis County, Texas

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY for the County of Travis, State of Texas, duly selected, empanelled, sworn, charged, and organized as such at the January 2014 Term, A.D., of the 390th Judicial District Court for said County, upon its oath presents in and to said Court at said term, that in Travis County, Texas, and anterior to the presentment of this indictment, James Richard "Rick" Perry, committed the following offenses:

Count I

On or about June 14, 2013, in the County of Travis, Texas, James Richard "Rick" Perry, with intent to harm another, to-wit, Rosemary Lehmberg and the Public Integrity Unit of the Travis County District Attorney's Office, intentionally or knowingly misused government property by dealing with such property contrary to an agreement under which defendant held such property or contrary to the oath of office he took as a public servant, such government property being monies having a value of in excess of $200,000 which were approved and authorized by the Legislature of the State of Texas to fund the continued operation of the Public Integrity Unit of the Travis County District Attorney's

Office, and which had come into defendant's custody or possession by virtue of the defendant's office as a public servant, namely, Governor of the State of Texas.

Count II

Beginning on or about June 10, 2013, and continuing through June 14, 2013, in the County of Travis, Texas, by means of coercion, to-wit: threatening to veto legislation that had been approved and authorized by the Legislature of the State of Texas to provide funding for the continued operation of the Public Integrity Unit of the Travis County District Attorney's Office unless Travis County District Attorney Rosemary Lehmberg resigned from her official position as elected District Attorney, James Richard "Rick" Perry, intentionally or knowingly influenced or attempted to influence Rosemary Lehmberg, a public servant, namely, the elected District Attorney for Travis County, Texas, in the specific performance of her official duty, to-wit: the duty to continue to carry out her responsibilities as the elected District Attorney for the County of Travis, Texas through the completion of her elected term of office, and the defendant and Rosemary Lehmberg were not members of the same governing body of a governmental entity, such offense having been committed by defendant, a public servant, while acting in an official capacity as a public servant.

AGAINST THE PEACE AND DIGNITY OF THE STATE OF TEXAS.

Della M. Tyus
Foreperson of the Grand Jury

Master# | MNI# | Booking# | F / M

Name	Perry (Last)	James (First)	Richard "Rick" (Middle)
Address			
City/State	Austin	Zip 78701	
Ph	Phone 2	Type	
How L.	County: Travis		
Mailing Address	City/State/Zip		
Nearest F	Relationship	Phone	
Address	City/State/Zip		
Employer	State of Texas	Position Governor	How Long: 14 years
Address	City/State/Zip		
Phone	Cellular		
Interviewed by	Recommendation		
Attorney of Record	David Botsford	Phone 512-479-9030	

Date 8/18/14

Cause No. D1DC14 / 100139

Charge Abuse of Official Capacity/Coercion

Bond 25,000

I CZ

SS

DL

Record No.

Bkg Date:

Other Charges

TRAVIS COUNTY PRETRIAL SERVICES

P.O. BOX 1748
AUSTIN, TX 78767
(512)854-9381

THE STATE OF TEXAS
COUNTY OF TRAVIS

PERSONAL BOND

KNOWN ALL MEN BY THESE PRESENTS

CAUSE NO. D1DC14 / 100139

THAT I, James Richard "Rick" Perry (Official Misconduct & Coercion) charged with the offense of a (Misdemeanor) (Felony), to wit,

am held and firmly bound unto the State of Texas in the penal sum stated below for the payment of which sum well and truly to be made, and in addition all necessary and reasonable fees and expenses that may be incurred by peace officers in rearresting me in the event the conditions of this bond are violated, I do bind myself, executors and administrators, jointly and severally by these presents.

The condition of the above obligation is that I swear that I will appear before the 390th Judicial Dist Court at the Blackwell - Thurman Criminal Justice Center, 509 W. 11th Street, Austin, Travis County, Texas, on the 29th (BR 22nd) day of August, 2014, at 9:00A M, or pay to the Court the principal sum of $ 25,000 plus all necessary and reasonable expenses incurred in any arrest for failure to appear.

I further swear that I will appear before any court or magistrate court before whom this cause may hereinafter be pending at any time and place as may be required.

Now if I shall well and truly make said appearance before the said Court, and there remain from day to day and term to term of said Court, until discharged by due course of law, then and there to answer said accusation against me, and further shall well and truly make my personal appearance in any and all subsequent proceedings that may be had relative to said charge in the course of the criminal action based on said charges, this obligation shall become void; Otherwise to remain in full force and effect.

I further understand that all or part of the information collected in the Pretrial Services Report is available to persons associated with law enforcement, criminal justice, and other agencies including, but not limited to, the Judge or Magistrate hearing the case, the District Attorney's Office, and the defense attorney of record in this case.

Fee=$20/$_____(3% of bond fee if Ignition Interlock Required)

☐ See attached Conditions Order form

Note: PR granted by agreement between State and Defense.

James R Perry
Signature of Defendant

SWORN TO AND SUBSCRIBED BEFORE ME,

this _____ day of _____, 20____

_____
NOTARY PUBLIC IN AND FOR TRAVIS COUNTY, TEXAS

THIS PERSONAL BOND IS APPROVED, effective only after arresting agency has completed its booking process, and the defendant at such time is ordered released on the conditions of this bond.

I certify that I am the attorney of record representing this defendant in this matter:

David L. Botsford TX 02667950
Signature / Print *SBN*

APPROVED this 18 day of August, 2014

Judge Bert Richardson by assignment
Magistrate/Judge

Revised 8/2013 White – Original Yellow – Defendant Copy Pink – Pretrial Services Copy

EXHIBIT 2

Relevant Statutory Provisions

RELEVANT TEXAS PENAL CODE PROVISIONS

§1.07. Definitions

(a) In this code:

(9) "Coercion" means a threat, however communicated:

(A) to commit an offense;

(B) to inflict bodily injury in the future on the person threatened or another;

(C) to accuse a person of any offense;

(D) to expose a person to hatred, contempt, or ridicule;

(E) to harm the credit or business repute of any person; or

(F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

(48) "Unlawful" means criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege.

§36.01. Definitions

In this chapter:

(1) "Custody" means:

(A) detained or under arrest by a peace officer; or

(B) under restraint by a public servant pursuant to an order of a court.

(2) "Party official" means a person who holds any position or office in a political party, whether by election, appointment, or employment.

(3) "Benefit" means anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest.

(4) "Vote" means to cast a ballot in an election regulated by law.

§36.03. Coercion of Public Servant or Voter

(a) A person commits an offense if by means of coercion he:

(1) influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty or influences or attempts to influence a public servant to violate the public servant's known legal duty; or

(2) influences or attempts to influence a voter not to vote or to vote in a particular manner.

(b) An offense under this section is a Class A misdemeanor unless the coercion is a threat to commit a felony, in which event it is a felony of the third degree.

(c) It is an exception to the application of Subsection (a)(1) of this section that the person who influences or attempts to influence the public servant is a member of the governing body of a governmental entity, and that the action that influences or attempts to influence the public servant is an official action taken by the member of the governing body. For the purposes of this subsection, the term "official action" includes deliberations by the governing body of a governmental entity.

§39.01. Definitions

In this chapter:

(1) "Law relating to a public servant's office or employment" means a law that specifically applies to a person acting in the capacity of a public servant and that directly or indirectly:

(A) imposes a duty on the public servant; or

(B) governs the conduct of the public servant.

(2) "Misuse" means to deal with property contrary to:

(A) an agreement under which the public servant holds the property;

(B) a contract of employment or oath of office of a public servant;

(C) a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property; or

(D) a limited purpose for which the property is delivered or received.

§39.02. Abuse of Official Capacity

(a) A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly:

(1) violates a law relating to the public servant's office or employment; or

(2) misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor.

(c) An offense under Subsection (a)(2) is:

(1) a Class C misdemeanor if the value of the use of the thing misused is less than $20;

(2) a Class B misdemeanor if the value of the use of the thing misused is $20 or more but less than $500;

(3) a Class A misdemeanor if the value of the use of the thing misused is $500 or more but less than $1,500;

(4) a state jail felony if the value of the use of the thing misused is $1,500 or more but less than $20,000;

(5) a felony of the third degree if the value of the use of the thing misused is $20,000 or more but less than $100,000;

(6) a felony of the second degree if the value of the use of the thing misused is $100,000 or more but less than $200,000; or

(7) a felony of the first degree if the value of the use of the thing misused is $200,000 or more.

(d) A discount or award given for travel, such as frequent flyer miles, rental car or hotel discounts, or food coupons, are not things of value belonging to the government for purposes of this section due to the administrative difficulty and cost involved in recapturing the discount or award for a governmental entity.

(e) If separate transactions that violate Subsection (a)(2) are conducted pursuant to one scheme or continuing course of conduct, the conduct may be considered as one offense and the value of the use of the things misused in the transactions may be aggregated in determining the classification of the offense.

(f) The value of the use of a thing of value misused under Subsection (a)(2) may not

exceed:

(1) the fair market value of the thing at the time of the offense; or

(2) if the fair market value of the thing cannot be ascertained, the cost of replacing the thing within a reasonable time after the offense.

EXHIBIT 3

Governor's Veto And Statement

PROCLAMATION

BY THE

Governor of the State of Texas

TO ALL TO WHOM THESE PRESENTS SHALL COME:

Senate Bill No. 1, having been duly certified by the Comptroller of Public Accounts pursuant to Article III, Section 49a of the Texas Constitution, has been presented to me for review and action. I hereby object to and disapprove the following items from Senate Bill No. 1, and include a statement of my objections to each of those items.

Article I – General Government

Bond Review Board

3. Contingency for Legislation Related to a Local Annual Debt Report. ~~Contingent on enactment of legislation by the Eighty-third Legislature, Regular Session, 2013, requiring the Bond Review Board to produce an annual Local Debt Report, included in the amounts appropriated above in Strategy B.1.1, Local Bond Debt, is $125,573 from General Revenue and 1.5 full-time equivalents each fiscal year of the 2014-15 biennium to implement the provisions of the legislation.~~

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

Article II – Health and Human Services

Department of Family and Protective Services

37. Contingency for House Bill 969. ~~Included in the amounts above, and contingent on passage of House Bill 969, or similar legislation relating to a student loan repayment assistance program for certain child protective services workers, by the 83rd Legislature, Regular Session, the Department of Family and Protective Services is appropriated $500,000 in fiscal year 2014 in General Revenue Funds and $500,000 in fiscal year 2015 in General Revenue Funds to transfer to the Higher Education Coordinating Board for implementing the provisions of the legislation.~~

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

Article III – Education

Texas Education Agency

75. Contingency for SB 1718. ~~Contingent on passage and enactment of Senate Bill 1718, or similar legislation relating to state interventions and sanctions against public school campuses with unacceptable performance and the establishment of the Texas Achievement School District for educating students at certain low-performing campuses, by the Eighty-third Legislature, Regular Session, 2013, the Texas Education Agency is hereby appropriated $250,000 in General Revenue funds in each fiscal year to implement the provisions of the legislation. In addition, the "Number of Full-Time Equivalents (FTE)" indicated in the agency's bill pattern is hereby increased by 2 FTEs in each fiscal year.~~

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

Higher Education Coordinating Board

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
_____O'CLOCK
JUN 14 2013

C.1.3. Strategy: ~~WATER AQUIFER RESEARCH $1,500,000 $1,500,000 Houston Area Research Council Water Aquifer Research.~~

60. **Aquifer Research.** ~~Out of funds appropriated above in Strategy C.1.3, Water Aquifer Research, $1,500,000 in general revenue for fiscal year 2014 and $1,500,000 in general revenue for fiscal year 2015 shall be transferred to the Houston Area Research Council.~~

Legislation and appropriations passed by the Eighty-third Legislature, Regular Session, enhance the structure of the Texas Water Development Board and its programs, and provide funding to the agency for demonstration projects related to water reuse, aquifer storage and recovery, and other innovative water storage approaches. Now, as always, the Water Development Board is the appropriate entity to maintain centralized, long-term water planning for Texas, and the best place to devote taxpayer dollars used for this purpose. I therefore object to and disapprove of this appropriation.

Article IV – The Judiciary

Judiciary Section, Comptroller's Department

D.1.4 Strategy: ~~PUBLIC INTEGRITY UNIT, TRAVIS CO $3,742,829 $3,830,597 & UB Public Integrity Unit, 53rd Judicial District.~~

Despite the otherwise good work the Public Integrity Unit's employees, I cannot in good conscience support continued State funding for an office with statewide jurisdiction at a time when the person charged with ultimate responsibility of that unit has lost the public's confidence. This unit is in no other way held accountable to state taxpayers, except through the State budgetary process. I therefore object to and disapprove of this appropriation.

Article V – Public Safety and Criminal Justice

Department of Criminal Justice

67. **Contingency for SB___/HB___ : Windham School District Appropriations and Funding Oversight Transfer.** ~~Contingent on enactment of SB___ or HB___, or similar legislation relating to the transfer of the Windham School District's (WSD) appropriations and funding oversight from the Texas Education Agency (TEA) to the Texas Department of Criminal Justice (TDCJ), by the Eighty-third Legislature, Regular Session:~~

~~a. reduce TEA's Foundation School Fund No. 193 – General Revenue Funds by $52,500,000 in fiscal year 2014 and $50,500,000 in fiscal year 2015;~~

~~b. eliminate TEA's Strategy B.2.4, Windham School District;~~

~~c. move all WSD performance measures referenced in TEA's rider number 1 entitled "Performance Measures Targets" to TDCJ's rider number 1 entitled "Performance Measures Targets";~~

~~d. delete the following TEA riders:~~
~~"6. Windham Schools."~~
~~"55. Windham School District: Pilot Programs."~~

FILED IN THE OFFICE OF THE SECRETARY OF STATE
_____O'CLOCK
JUN 14 2013

~~e. add a funding strategy entitled "C.2.6, Windham School District" within TDCJ's Goal C, Incarcerate Felons;~~

~~f. appropriate Foundation School Fund No. 193 – General Revenue Funds to TDCJ in Strategy C.2.6, Windham School District in the amounts of $52,500,000 in fiscal year 2014 and $50,500,000 in fiscal year 2015;~~

~~g. delete the following rider from TDCJ's bill pattern:~~
~~"29. Expenditure Limitation – Windham School District."~~

~~h. add the following new rider to TDCJ's bill pattern:~~

~~___. Windham School District. The use of appropriated funds to the Texas Department of Criminal Justice (TDCJ) for the Windham School District (WSD) shall be governed by the specific limitations included in this rider.~~

~~a. None of the funds provided to WSD through TDCJ shall be expended unless the Texas Board of Criminal Justice has approved an annual operating budget for WSD prior to the expenditure of any funds. The TDCJ shall file a copy of the WSD's operating budget with the Governor, the Legislative Budget Board, and the appropriate legislative oversight committees at the beginning of each fiscal year.~~

~~b. The funds appropriated above in Strategy C.2.6, Windham School District, are to be expended only for academic and vocational educational programs approved by the Texas Education Agency. TDCJ shall allocate funds to WSD based on contact hours for the best 180 of 210 school days in each year of the biennium. The contact hour rates for the 2014-15 biennium are the following: $4.47826 for academic education, $3.67445 for vocational education. WSD shall use funds appropriated above to serve those students whose participation will help achieve the goals of reduced recidivism and the increased success of former inmates in obtaining and maintaining employment. To achieve these goals, younger offenders with the lowest educational levels and the earliest projected release or parole eligibility dates should receive high priority. This policy shall not preclude WSD from serving other populations according to needs and resources. For students who successfully complete WSD's program during the 2012-13 biennium, the WSD shall report to the Eighty-fourth Legislature on the following: recidivism rates, employment rates, and attainment of GEDs, high school diplomas, professional certifications, associate's degrees, and adult education literacy levels.~~

~~c. From funds appropriated above in Strategy C.2.6, Windham School District, TDCJ shall identify amounts to be set aside by WSD and expended for a pilot in computer-adaptive intensive math and reading intervention programs that address individual needs and develop skills from elementary levels through high school, and a pilot in virtual learning options that allow a student to earn a high school diploma, high school equivalent certification, certification and/or college credit. WSD shall produce a final report for the Eighty-fourth Legislature on the implementation and effectiveness of these pilot programs.~~

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

Article IX – General Provisions

Sec. 18.25. Contingency for HB 2824. ~~Contingent on the enactment of House Bill 2824, or similar legislation relating to the Texas High Performance Schools Consortium, by the~~

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
_____O'CLOCK

JUN 14 2013

~~Eighty-third Legislature, Regular Session, 2013, the Texas Education Agency is hereby appropriated $1,137,761 for fiscal year 2014 and $1,137,761 for fiscal year 2015 from the General Revenue Fund to implement the provisions of the legislation. In addition, the "Number of Full-Time Equivalents (FTE)" indicated in the agency's bill pattern is hereby increased by 9.0 FTEs in each fiscal year.~~

~~The Texas Education Agency shall cover, at a minimum, the costs of the appropriations made in this rider, as well as the "other direct and indirect costs" associated with those functions appropriated elsewhere in this Act. The Texas Education Agency is hereby appropriated all fees generated by the Texas High Performance Schools Consortium above the sum of: (1) the amount appropriated by the first paragraph of this rider and, (2) the "other direct and indirect costs" of the agency related to the Texas High Performance Schools Consortium, to implement the provisions of the legislation. In the event that the actual and/or projected fee revenue collections are insufficient to offset program costs, the Legislative Budget Board may direct that the Comptroller of Public Accounts reduce the appropriation authority provided herein to be within the amount of fee revenue expected to be available.~~

This veto deletes a contingent rider for a bill that I vetoed.

Sec. 18.49. Contingency for SB 1340.

a. ~~Contingent on the enactment of Senate Bill 1340, or similar legislation relating to the temporary operation of a race track extension location, by the Eighty-third Legislature, Regular Session, 2013, the Racing Commission is appropriated $17,500 in GR-Dedicated Texas Racing Account No. 597 funds during each fiscal year of the 2014-15 biennium for each new race track that begins the temporary operation of an extension location for the first time during the biennium (estimated to be two race tracks in fiscal year 2014 and two additional race tracks in fiscal year 2015) to implement the provisions of the legislation. This appropriation is also contingent on the Racing Commission assessing or increasing fees sufficient to generate, in addition to revenue requirements elsewhere in this Act, during the 2014-15 biennium, $21,411 for fiscal year 2014 and $21,411 for fiscal year 2015 for each new race track that begins temporary operation of an extension location during the 2014-15 biennium in excess of $7,965,000 in fiscal year 2014 and $7,979,000 in fiscal year 2015 (Object Codes 3188, 3189, 3190, 3193, 3194, and 3197) contained in the Comptroller of Public Accounts' Biennial Revenue Estimate for fiscal years 2014 and 2015. Also, the "Number of Full-Time Equivalents (FTEs)" indicated in the agency's bill pattern shall be increased by 0.3 FTEs in each fiscal year for each new race track that begins temporary operation of an extension location during the biennium, contingent upon the agency meeting the above revenue target. The Racing Commission, upon completion of necessary action to assess or increase such additional fees, shall furnish a copy of the Racing Commission's minutes and other information supporting the estimated revenues to be generated for the 2014-15 biennium under the revised fee structure to the Comptroller of Public Accounts. If the Comptroller finds the information sufficient to support the projection of increased revenues, a finding of fact to that effect shall be issued and the contingent appropriations shall be made available for the intended purposes. For informational purposes, the amount of increased revenue identified above reflects amounts sufficient to cover direct appropriations of $35,000 and other direct and indirect costs (estimated to be $7,822) for the 2014-15 biennium.~~

b. ~~Contingent on the enactment of Senate Bill 1340, or similar legislation relating to the temporary operation of a race track extension location, by the Eighty-third Legislature, Regular Session, the Racing Commission is appropriated in Strategy A.2.1, Texas Bred Incentive Program, revenue set aside by the Texas Racing Act pursuant to VTCS, Article 179e §6.08 (j) for the Texas Bred Incentive Program~~

~~that is collected by the agency from each additional race track that begins temporary operation of an extension location during the 2014-15 biennium in an amount not to exceed $92,000 from the GR-Dedicated-Texas Racing Commission Account No. 597 each year for each new race track that begins temporary operation of an extension location. Any appropriations from revenue collected by the agency from new race tracks temporarily operating extension locations for the Texas Bred Incentive Program during the 2014-15 biennium may be used only for that purpose and are not transferable to any other strategy.~~

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

Sec. 18.54. Contingency for SB 1554. ~~Contingent on the enactment of SB 1554, or similar legislation relating to the establishment of a matching grant program for community development in certain municipalities and counties by the Eighty-third Legislature, Regular Session, there is hereby appropriated to the Texas Department of Agriculture out of the General Revenue Fund in Strategy F.1.1, Rural Community and Economic Development, $1,071,514 in fiscal year 2014 and $1,071,513 in fiscal year 2015 to administer a Community Development Matching Grant Program to fund public infrastructure for economic development objectives in certain municipalities and counties. Additionally, the "Number of Full-Time Equivalents (FTE)" is increased by 1.0 FTE in each fiscal year of the 2014--15 biennium.~~

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

Sec. 18.55. Contingency for SB 1680. ~~Contingent on enactment of SB 1680, or similar legislation relating to new requirements related to state agency contracting, by the Eighty-third Legislature, Regular Session, 2013, the Comptroller of Public Accounts is appropriated $60,000 in General Revenue for each fiscal year of the 2014-15 biennium to implement the provisions of the legislation. In addition, the "Number of Full-Time Equivalents (FTE)" is increased by 1.0 in each fiscal year of the 2014-15 biennium.~~

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

I have signed Senate Bill No. 1 together with this proclamation stating my objections in accordance with Article IV, Section 14 of the Texas Constitution.

Since the Legislature by its adjournment of the Regular Session has prevented the return of this bill, I am filing this bill and these objections in the office of the Secretary of State and giving notice thereof by this public proclamation according to the aforementioned constitutional provision.

IN TESTIMONY WHEREOF, I have signed my name officially and caused the Seal of the State to be affixed hereto at Austin, this 14th day of June, 2013.

Rick Perry

RICK PERRY
Governor of Texas

FILED IN THE OFFICE OF
SECRETARY OF STATE
_____O'CLOCK

JUN 14 2013

ATTESTED BY:

JOHN STEEN
Secretary of State

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
_____O'CLOCK

JUN 14 2013

Secretary of State

EXHIBIT 4

Austin American Statesman Article June 10, 2013

EXCLUSIVE: PUBLIC INTEGRITY UNIT

Resize text A A A

Officials: Perry vows veto of state funding unless Lehmberg resigns

Move seeks to force Lehmberg out after after drunken driving conviction

Posted: 10:10 p.m. Monday, June 17, 2013

BY MIKE WARD - AMERICAN-STATESMAN STAFF

Gov. Rick Perry is vowing to veto funding for the state's Austin-based ethics-enforcement unit unless Travis County District Attorney Rosemary Lehmberg resigns, officials confirmed Monday.

Perry has until Sunday to veto bills passed by the Legislature during its regular session that ended in May, including the state budget that contains about $7.5 million to fund the Public Integrity Unit for the next two years.

The officials confirmed that Perry intends to exercise his line-item veto on the appropriation for the unit unless Lehmberg steps down in the wake of a drunken driving charge, something she has steadfastly refused to do so far. She pleaded guilty after her April 12 arrest in northern Travis County, served a 45-day jail sentence and entered a treatment program.

While Perry's office would not discuss specifics, spokesman Rich Parsons said, "we're going through the budget line by line. (The governor) has very deep concerns about the integrity of the Public Integrity Unit."

Asked whether Lehmberg has been advised of Perry's veto intentions, Parsons would say only that "our position has been communicated very clearly today to Sen. (Kirk) Watson."

Previous coverage

- With DWI saga behind her, District Attorney Rosemary Lehmberg begins new chapter
- Judge allows Rosemary Lehmberg to remain district attorney
- District Attorney Rosemary Lehmberg testifies she is working to overcome alcohol problems
- Civil trial explores medical, family history of Travis County District Attorney Rosemary Lehmberg
- Prosecutor on the defense: Travis County District Attorney Rosemary Lehmberg goes on trial for her job

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New policy aims to stop discrimination against tenants with housing vouchers

Wendy Davis again faces ethics questions

Watson, D-Austin, called it "very unfortunate if the governor is going to do this."

"If he does, this should be Rosemary's decision," he said. "If she decides to (resign), I will do whatever I can to make sure whoever might replace her represents the interests of Travis County."

As the senator who represents most of Austin, Watson has some sway over whom Perry would appoint to replace Lehmberg, should she resign. Her term ends in 2016, and Perry could appoint a replacement quickly and call a special election later this year.

Lehmberg could not be reached for comment, though she has said several times previously that she had no plans to resign. She is expected to return to work this week, officials said Monday.

Since her arrest and conviction, partisan scuffling has continued on her job status. A Republican-led petition drive to force her ouster has failed so far, and Democrats have been pushing hard for her to stay in office – since Perry is a conservative Republican and Lehmberg is a Democrat.

Lehmberg, 63, was arrested for drunken driving by Travis County deputies after they responded to a report that a Lexus sedan was driving erratically near RM 2222 and FM 620.

Deputies found a bottle of vodka on the passenger seat of her car, and an analysis of a blood sample later showed her blood-alcohol level was nearly three times the legal limit for driving.

She subsequently pleaded guilty to a first offense, and in addition to the jail time, she paid a $4,000 fine and had her drivers license revoked for 180 days – punishment that her attorney David Sheppard called "the harshest sentence anybody has ever received for a first offense for a DWI in the history of this county."

Her travails were the subject of several unsuccessful attempts by some Republican leaders in the Texas House to cut funding to the Public Integrity Unit or to transfer its operations to the Attorney General's Office.They insisted that her arrest and conviction were more than enough reason she should not continue serving as the district attorney in Texas' capital city.

According to the proposed budget, the Public Integrity Unit is slated to receive about $3.7 million in state funding in the 2014 fiscal year and $3.8 million in 2015. That pays for more than 30 employees who at present have more than 400 active cases, ranging from motor-fuels tax fraud to ethics enforcement.

It was not clear who would prosecute those types of cases in the future or what would happen to pending cases if Perry vetoes the state funding.

Over the years, the Public Integrity Unit has prosecuted a variety of public officials, including lawmakers and statewide elected officials.

Faced with conservative opposition, lottery commission delays bingo vote

Sister Mary Rose McPhee, an Austin icon in health care and spirituality, dies

The county spends about $16 million on the overall operations of the District Attorney's office, according to Gregg Cox, the unit's director.

Former Travis County Attorney Ken Oden, a close friend of Lehmberg, said Perry's apparent veto threat "gets into very dicey territory" of making an untoward demand on an elected official. He also said it would not remove the authority of Lehmberg's office to investigate official wrongdoing.

It also receives about $14 million in funding from Travis County for items such as office space, computer servers and other similar costs, though Gregg Cox, the unit's director, said that money does not pay for personnel.

CORRECTION: This story has been updated to correct that Travis County spends about $16 million on the overall operations of the District Attorney's office. Also, an earlier version of this story said that Travis County District Attorney Rosemary Lehmberg's term ends next year. Her term ends in 2016.

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Report

So... coyote Rick has blown his cool, eh? Guess he figures that he can do whatever he wants since he's 'boss man'... But hey coyote Rick... she was elected and what you're doing is wrong. Dead wrong no matter how proud you're feeling about yourself...

Blatant political posturing is never a good idea because people remember it... just another rock thrown on the pile of dead weight known as Perry politics.

10:32 p.m. Jun. 10, 2013