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COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

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TAYLOR BLACK, et al.

*Plaintiffs-Appellants,*

vs.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,  
STATE OF WASHINGTON

*Defendants-Respondents.*

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BRIEF OF APPELLANTS

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Joel B. Ard, WSBA #40104  
Ard Law Group PLLC  
P.O. Box 11633  
Bainbridge Island, WA 98110  
(206)-701-9243

Matthew C. Albrecht, WSBA #36801  
David K. DeWolf, WSBA #10875  
ALBRECHT LAW PLLC  
421 W. Riverside Ave., STE 614  
Spokane, WA 99201  
(509) 495-1246

Attorneys for Appellants Taylor Black, et al.

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Over decades, Washington has enacted, repealed, and re-enacted statutory authorization for locally imposed motor vehicle excise tax (“MVET”). Those statutes authorizing MVET always included the valuation schedule the local government had to use to calculate the residual value of vehicles subject to any imposed tax. Pursuant to MVET authorization enacted in the 1990s, Central Puget Sound Regional Transportation Authority (“CPSRTA”) began levying the tax in 1996. A voter initiative in 2002 repealed not only the CPSRTA MVET, but the entire statute authorizing every locally imposed MVET. The initiative also repealed the MVET valuation schedule. However, the Supreme Court ruled the repeal unconstitutional as to CPSRTA’s existing MVET on the grounds that ceasing to collect the tax would impair the bond contracts that CPSRTA had already issued, secured by MVET revenue. CPSRTA continued to collect MVET.

In 2006 the Legislature enacted new statutory authorization for locally imposed MVET, including a valuation schedule codified at RCW 82.44.035. That schedule reflected lower vehicle values for nearly any given vehicle age than did the schedule repealed just a few years earlier by initiative. The schedule also states that it presently applies to any locally imposed MVET.

In 2015 CPSRTA sought legislative approval for new and increased impositions of property tax, sales tax, and MVET. In drafting ESSB 5987 § 319(1),<sup>1</sup> CPSRTA did not use the valuation schedule found in existing RCW 82.44.035. It instead drafted the statute to temporarily apply the valuation schedule repealed by initiative in 2002 and replaced by the legislature in 2006. Even though ESSB 5987 thereby amended existing RCW 82.44.035, the legislature did not “set forth at full length” the text of the statute it amended. Nor did the legislation contain within itself a complete explanation of how it changed existing law. Instead, ESSB 5987 points a reader to the older, repealed valuation schedule as follows:

Notwithstanding any other provision of this subsection or chapter 82.44 RCW, a motor vehicle excise tax imposed by a regional transit authority before or after July 15, 2015, must comply with chapter 82.44 RCW as it existed on January 1, 1996, until December 31st of the year in which the regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015.

CPSRTA may have had any number of reasons for avoiding RCW 82.44.035.<sup>2</sup> But the undeniable effect of this language in ESSB 5987 was to

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<sup>1</sup> Chapter 44, Laws of 2015. Plaintiffs challenge only § 319(1) of ESSB 5987. This brief uses “ESSB 5987” to refer to the one challenged section, codified at RCW 81.104.160(1). The full text of that section is in the Appendix to this brief, together with the full text of Art. II § 37 and RCW 82.44.035.

<sup>2</sup> The Court below correctly disregarded such fact questions, focusing exclusively on the legal issue now before this court: Regardless of *why* CPSRTA and the legislature



amend RCW 82.44.035. Wash. Const. Art. II § 37<sup>3</sup> forbids the legislature from amending or revising an existing law by mere reference. Instead, the legislature must set forth the existing, amended statute “at full length.” Thus, this appeal asks whether ESSB 5987 violates Art. II § 37.

The Supreme Court applies Art. II § 37 by using a two-pronged test that reflects the two purposes of the constitutional provision. The first prong—asking whether the act is complete—reflects one purpose, namely “to make sure the effect of new legislation is clear.” *El Centro de la Raza v. State*, 428 P.3d 1143, 1156 (Wash. 2018). The second prong, which asks whether the act is amendatory, reflects a constitutional mandate “to ensure that [c]itizens or legislatures must not be required to search out amended statutes to know the law on the subject treated in a new statute.” *Id.* at 1157 (internal quotation marks omitted). ESSB 5987 fails both prongs of the test. First, ESSB 5987 is not complete. It provided inadequate guidance to legislators, voters, and future taxpayers of the taxes authorized by this statute. Second, ESSB 5987 left the text of RCW 82.44.035 intact, but rendered it erroneous. It does not apply to vehicle valuation for imposing

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preferred one valuation schedule over another, did they follow constitutional constraints in *how* they drafted ESSB 5987?

<sup>3</sup> “No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.” Wash. Const. Art. II § 37.

CPRSTA’s MVET, despite its explicit text stating that it does. Even if one knew that RCW 82.44.035 did not apply, even the most diligent search of the Revised Code of Washington could not reveal the amount of tax that ESSB 5987 authorized CPSRTA to impose.

## **II. ASSIGNMENTS OF ERROR**

- (1) The trial court erred in ruling that ESSB 5987 § 319(1) complied with Art. II § 37.
- (2) The trial court erred in granting CPSRTA’s motion for summary judgment.
- (3) The trial court erred in denying Plaintiffs’ motion for summary judgment.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- (1) Is ESSB 5987 § 319(1) a complete act?
- (2) Does ESSB 5987 § 319(1) incorporate existing law and thereby qualify as a “reference statute” exempt from Art. II § 37?
- (3) Is ESSB 5987 § 319(1) “amendatory,” in that it renders an existing statute erroneous?

## **IV. STATEMENT OF THE CASE**

### **A. Factual Background**

CPSRTA, a Washington municipal corporation, encompasses portions of King, Pierce, and Snohomish Counties. Under the constitution, municipal corporations cannot impose taxes unless authorized to do so by the Legislature. Wash. Const. Art. 7 § 9; *City of Spokane v. Horton*, 189 Wash. 2d 696, 406 P.3d 638 (2017). CPSRTA

has obtained authorization to levy three types of taxes: property tax, sales tax, and a motor vehicle excise tax. CP 84. Plaintiffs challenge the MVET authorized by ESSB 5987. CP 86. Pursuant to ESSB 5987 and subsequent voter approval, CPSRTA has levied a 0.8% MVET since approximately March 1, 2017. Each year an owner registers a car, the Department of Licensing calculates and collects the MVET, and remits it to CPSRTA. To calculate tax liability, CPSRTA multiplies the tax rate by the value of the vehicle. Each year, it determines the value of a vehicle by multiplying the purchase MSRP by a schedule that accounts for the reduction in value of motor vehicles over time.<sup>4</sup>

In levying this particular MVET, CPSRTA does not calculate the value of each vehicle based on a schedule found in the Act, because it does not recite any schedule. Nor does CPSRTA use the existing statutory valuation schedule found in the Revised Code of Washington, even though that schedule states, on its face, that it presently applies to any locally-imposed motor vehicle excise tax. Instead, CPSRTA calculates vehicle value using a law that was repealed sixteen years ago.

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<sup>4</sup> There are exceptions for starting value, but for most vehicles, the value on which the owner is taxed each year is MSRP times the scheduled percentage decline in value for the vehicle's age.

## 1. The History Of CPSRTA's MVET.

In 1990, the legislature enacted a valuation schedule for determining the value of a vehicle subject to MVET.<sup>5</sup> In 1996, CPSRTA received legislative authorization and voter approval to begin levying MVET, and used that schedule. CP 379. The legislature amended the depreciation schedule in 1998.<sup>6</sup> In 2002 a statewide ballot initiative, approved by the voters, repealed the entire MVET authorization statute, including the valuation schedule. CP 381. It no longer constitutes any part of the Revised Code of Washington.<sup>7</sup> The Washington Supreme Court subsequently held that the repeal of the MVET was unconstitutional as applied to the then-ongoing MVET to the extent that it impaired CPSRTA's contracts with bondholders.<sup>8</sup>

In 2006, the Legislature re-authorized locally imposed MVET, and in doing so, also enacted a valuation schedule. Codified at RCW 82.44.035, it establishes a schedule “[f]or the purpose of determining any locally imposed motor vehicle excise tax . . .”

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<sup>5</sup> Chapter 42, Laws of 1990, Sec. 303, formerly codified at RCW 82.44.041.

<sup>6</sup> Chapter 321, Laws of 1998, Sec. 4.

<sup>7</sup> See, e.g., <http://app.leg.wa.gov/RCW/dispo.aspx?cite=82.44> (RCW 82.44.041, titled “Valuation of Vehicles,” described as “Repealed by 2003 c 1 § 5 (Initiative Measure No. 776, approved November 5, 2002).”) (last visited January 15, 2019).

<sup>8</sup> *Pierce County v. State*, 159 Wash. 2d 16, 148 P.3d 1002 (2006).

RCW 82.44.035. The 2006 schedule differs significantly from the earlier, repealed schedule. Use of RCW 82.44.035 to calculate the tax base for MVET results in a different (usually substantially lower) vehicle value, or MVET tax base, compared to the repealed schedule. CP 381.

## 2. **The Challenged Act.**

In 2015, CPSRTA proposed, lobbied for, and secured passage of ESSB 5987, a significant transportation measure authorizing over \$54 billion in total revenue for CPSRTA. CP 1088. The revenue came from varied sources, including sales tax, property tax, and MVET. ESSB 5987 purported to authorize CPSRTA to seek voter approval to “levy and collect an excise tax . . . not exceeding eight-tenths of one percent on the *value, under chapter 82.44 RCW, of every motor vehicle* owned by a resident of the taxing district . . .” ESSB 5987 § 319(1) (emphasis added). Despite identifying “value” as governed by chapter 82.44 RCW, ESSB 5987 did not use the valuation schedule actually contained in Chapter 82.44 (RCW 82.44.035), nor did it even refer to it specifically. Instead it made an obscure reference to the chapter which once contained the long-since repealed schedule:

Notwithstanding any other provision of this subsection or chapter 82.44 RCW, a motor vehicle excise tax imposed by a regional transit authority before or after July 15, 2015, must comply with chapter 82.44 RCW as it existed on January 1, 1996, until

December 31st of the year in which the regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015.

ESSB 5987. Pursuant to ESSB 5987, in November 2016, CPSRTA sought and received voter approval via a ballot proposition for an MVET levy of 0.8%, which it has collected since about March 1, 2017. CP 1088.

### **3. Calculating Motor Vehicle Excise Tax Under ESSB 5987**

A taxpayer calculates motor vehicle excise tax liability by the following formula: (1) the starting value of the vehicle (usually MSRP) *multiplied by* (2) the statutory tax rate *multiplied by* (3) the percentage of starting value attributable to the vehicle based on its age, as found in a statutory value depreciation schedule. CP 308. The valuation schedule codifies the legislature's acknowledgement that the value of nearly any motor vehicle declines over time, and enacts into law the legislature's judgment of the rate of decline. In doing so, the legislature ensures that CPSRTA levies MVET against a close approximation of the actual value of the taxed property. In this, it is akin to the mandate that county assessors periodically re-assess real property value, to ensure that the tax base for annual property tax levies reflects the value of taxed property as

closely as possible.<sup>9</sup> Thus, whenever the legislature has authorized local governments to levy an MVET, it has ensured that the Revised Code of Washington contains both a tax rate and a valuation schedule. Today, RCW 82.44.035 contains the only valuation schedule in RCW. It explicitly states that “[f]or the purpose of determining *any locally imposed motor vehicle excise tax*, the value of a vehicle . . . shall be” calculated according to the schedules contained in that section. (Emphasis added.)

A vehicle owner wishing to assess tax liability needs three numbers, but the fewer than 300 words of ESSB 5987 provide only one. The owner would already know the starting value of the vehicle (the MSRP), and ESSB 5987 specifies the tax rate. However, the third number is missing. ESSB 5987 temporarily excludes the only valuation schedule in the Revised Code of Washington, and ESSB 5987 instead identifies a repealed schedule found in old volumes of Session Laws.

ESSB 5987 purports to switch between the repealed and the current schedule but gives the taxpayer no way to know whether CPSRTA had already pledged another MVET to repay bonds prior to

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<sup>9</sup> Of course, real property tends to increase in value, while motor vehicles almost uniformly decline.

December 31, 2015. If it had, she must identify whether those bonds remained outstanding during the calendar year for which she intends to calculate her liability.<sup>10</sup> If bonds existed and remained outstanding any time that year, she must then find the version of Chapter 82.44 RCW as it would have read in the statute books on January 1, 1996. If the local government had not issued such bonds, or has paid them off, then she instead may read the schedule in Chapter 82.44.

Because CPSRTA had issued bonds prior to December 15, 2015, and, at least as of today, has not paid them off, a taxpayer must attempt to find the January 1, 1996 version of Chapter 82.44 RCW, and any valuation schedule that had been in force that day. When CPSRTA elects to pay off those bonds, the taxpayer could then use the valuation schedule in RCW 82.44.035.

**B. Plaintiffs' Challenge and Proceedings Below.**

Plaintiffs live in CPSRTA's jurisdiction, own vehicles, and therefore pay the challenged MVET. Plaintiffs contended, on their own behalf and on behalf of all MVET payors, that ESSB 5987 is unconstitutional under Art. II § 37 because it amended an existing

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<sup>10</sup> It is not at all clear how any taxpayer could identify which schedule applied. CPSRTA itself admitted to the court below that even "the Legislature could [not] know the year in which CPSRTA would retire its bonds." CP 393:18-21.



statutory valuation schedule without setting forth that amended act at full length.<sup>11</sup> CPSRTA opposed the Plaintiffs’ motion and cross-moved for summary judgment that ESSB 5987 is constitutional.<sup>12</sup>

Plaintiffs asked the trial court to apply the two-pronged test required by the Supreme Court to evaluate whether a challenged enactment violates Art. II § 37. If an enactment amends an existing statute, but fails to set forth the amended statute “at full length,” is it subject to a recognized exception?<sup>13</sup> *El Centro de la Raza*, 428 P.3d at 1155. In the first prong, the court asks “whether the new enactment is such a complete act that the scope of the rights or duties created or affected by the legislative action can be determined without referring to

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<sup>11</sup> Plaintiffs sued both CPSRTA and the State because while CPSRTA levies the challenged MVET, the State of Washington is entitled to defend the constitutionality of a state statute. The State’s interest also extends to the relief requested by Plaintiffs, specifically, the return of all unlawfully collected taxes. The State objected to the relief requested (which was not at issue in the summary judgment motions) but deferred to CPSRTA with respect to the constitutionality of the statute. Consequently, this appeal focuses on the arguments raised by CPSRTA and the scope of the judgment granted by the trial court.

<sup>12</sup> All parties agreed to a resolution of the merits of the claim before addressing the class certification issue, consistent with the respect for judicial economy recognized in *Chavez v. Our Lady of Lourdes Hospital at Pasco*, 190 Wash. 2d 507, 515 n. 6, 402 P.3d 825 (2017).

<sup>13</sup> Here, no party disputes that ESSB 5987 did not set forth at full length existing RCW 82.44.035. Constitutionality therefore hinges on the outcome of the two-factor test.

any other statute or enactment.” *Id.* (internal citations and alterations omitted).

The plaintiffs pointed out that the Supreme Court has recognized only four forms of complete acts which do not set forth at full length an existing law, but nonetheless do not offend Art. II § 37. Those four categories are statutes that (1) repeal prior acts; (2) adopt by reference provisions of prior acts; (3) supplement prior acts; or (4) incidentally or impliedly amend prior acts. *Citizens for Responsible Wildlife Management v. State*, 149 Wash. 2d 622, 71 P.3d 644 (2003); *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 11 P.3d 762 (2000); *Fray v. Spokane County*, 85 Wash. App. 150, 931 P.2d 918 (Div. 3 1997). If legislation falls within one of these categories, it does not amend by reference and thus does not violate Art. II § 37.

CPSRTA argued below that if an act satisfies the first prong of the test, the second prong need not be considered. That position is incorrect. Subsequent to the summary judgment hearing, the Supreme Court decided *El Centro de la Raza*, which made clear that the court must consider both prongs. Even if a challenged statute is complete under the first part of the test, it may still violate Art. II § 37 if “a straightforward determination of the scope of rights or duties under the existing statutes

would be rendered erroneous by the new enactment.” *El Centro de la Raza*, 428 P.3d at 1156 (internal quotations omitted). Compliance with Art. II § 37 results in two distinct benefits. First, amendatory legislation drafted to “set forth at full length” the amended text insures that both the legislators who vote on it, as well as citizens who participate in the legislative process, receive full disclosure of proposed changes to the law, rather than obscuring a change by mere reference. Second, compliance avoids damage to the integrity of the Revised Code of Washington, which would result from failing to amend the text of the Code to match the change in its effect.<sup>14</sup> Plaintiffs argued (and *El Centro de la Raza* requires) that ESSB 5987 satisfy both prongs of the test to pass constitutional muster.

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<sup>14</sup> Art. II § 37 “was undoubtedly framed for the purpose of avoiding confusion, ambiguity and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the same volume. Such a provision, among other things, forbids amending a statute simply by striking out or inserting certain words, phrases or clauses, a proceeding formerly common, through which laws became complicated and their real meaning often difficult of ascertainment. The result desired by such a provision is to have in a section as amended a complete section, so that no further search will be required to determine the provisions of such section as amended.” *State ex rel. Gebhardt v. Superior Court for King County*, 15 Wash. 2d 673, 685, 131 P.2d 943, 949 (1942), quoted with approval in *State ex rel. Washington Toll Bridge Authority v. Yelle*, 54 Wash. 2d 545, 552, 342 P.2d 588, 593 (1959) and *Flanders v. Morris*, 88 Wash. 2d 183, 189, 558 P.2d 769, 773 (1977).

As to the first prong, CPSRTA contended in its briefs that ESSB 5987 is “complete,” and thereby satisfied Art. II § 37. CP 377. Plaintiffs disagreed. The five sentences of ESSB 5987, in total fewer than 300 words, do not explain how CPSRTA calculates the MVET, because they contain no valuation schedule. Instead, they instruct the reader to find, read, and use either the repealed schedule or statutory schedule, depending on whether CPSRTA has paid off certain bonds. Nonetheless, according to CPSRTA’s briefs, ESSB 5987 is complete because it is a “reference statute.” *See, e.g.*, CP 397:16-18; CP 399:6-8; CP 1431:16-24. According to CPSRTA, ESSB 5987 properly refers to, and thereby incorporates, the repealed valuation schedule. CPSRTA further argued that ESSB 5987 properly switches between use of the repealed and current statutory schedules based on when CPSRTA elects to repay the outstanding bonds. In this, according to CPSRTA, the legislature properly drafted ESSB 5987 as contingent legislation that makes use of external sources. RP 39. Importantly, every one of these defenses put forward by CPSRTA sought to show that ESSB 5987 is “complete” as a “reference statute” under the Supreme Court’s Art. II § 37 jurisprudence.

As noted above, CPSRTA argued that the court need not even apply the second step of the test, but that if examined, ESSB 5987 was

not amendatory of RCW 82.44.035, because ESSB 5987 “properly refers to two versions of chapter 82.44 RCW, is not amendatory in nature, and does not render a straightforward interpretation of existing law erroneous.” CP 401:10-13. Instead, it argued, “[a]t most, RCW 81.104.160(1) delays application of chapter 82.44 RCW until the bonds are repaid . . .” CP 400:6-7.

Plaintiffs demonstrated that each of these defenses fails. A proper reference statute can incorporate existing law. It can incorporate *existing law* because doing so only adds to that law, rather than amending it. But a new law that displaces existing law (by incorporating and thereby revitalizing a conflicting *repealed* law) does not qualify as a reference statute. CPSRTA attempted to qualify ESSB 5987 as a reference statute because the new law “refers to two versions of Chapter 82.44 RCW.” CP 401:10-11. Those “two versions” are the current law and a long-since repealed statute. Setting aside the absurdity of suggesting that a repealed law is simply a different “version” of the law that replaced it, this claim concedes that ESSB 5987 amended, rather than incorporated, RCW 82.44.035. It thereby disqualifies ESSB 5987 as a “reference statute.” Further, while in other contexts the Supreme Court has approved

inclusion of a contingency in otherwise valid legislation, it has never exempted such legislation from compliance with Art. II § 37.

Finally, as to the second prong of the two-part test, Plaintiffs showed that ESSB 5987 rendered the existing statute erroneous. A straightforward reading of RCW 82.44.035 says it applies to CPSRTA's new MVET, but ESSB 5987 displaces the 2006 valuation schedule with the earlier, repealed statute. Even if ESSB 5987 were complete (which it is not), by directly and substantially amending RCW 82.44.035, it violates Art. II § 37.

At oral argument, CPSRTA acknowledged that ESSB 5987 was not a proper reference statute, and that it amended RCW 82.44.035. First, it asserted that it did not defend ESSB 5987 as a reference statute:

We're not saying that our case is based on reference statutes here. That's not the case at all and that's not -- that's not a correct statement of the law. We're also not saying that RCW 82.44 in the 1996 version is incorporated into this statute. In fact, the purpose of the notwithstanding clause is to make clear and give notice that the current statute doesn't apply and that we're temporarily using the '96 version of a statute for a period of time . . .

RP 38:10-19. CPSRTA also conceded that ESSB 5987 did, in fact amend existing RCW 82.44.035, but asserted the amendment was merely "incidental." RP 33:10-14.

Despite CPSRTA's admissions and inconsistent positions, after oral argument, the trial court ruled in favor of CPSRTA. The court's ruling declined to resolve the "more complex arguments" presented by the parties. Nor did the court provide findings as to the two prongs of the established test for deciding Art. II § 37 cases. The court relied instead on a distinction found neither in previous cases nor in the parties' arguments: because ESSB 5987 only authorized a tax that would still require voter approval, it was not required to comply with Art. II § 37. No party had suggested this position in briefing, no Supreme Court jurisprudence supports it, and neither CPSRTA nor the plaintiffs proposed that ESSB 5987 could avoid Art. II § 37 scrutiny on that basis. Nonetheless, the Court ruled as follows:

Well, there are many aspects about this case that I think are way above my pay grade, and I have a feeling that there will be opportunities for those people with that pay grade to double-check my work. ¶ However, I do find that I need to deny Plaintiff's motion for summary judgment that the statute is unconstitutional. They have not carried their burden of beyond a reasonable doubt. ¶ On the contrary, I will grant Respondent's cross motion for summary judgment that, based on my reading of those other judges' law in the *Thorne* case, in the *Charles* case, in a number of the other cases, and dealing with the fact that I do believe that none of the cases deal with authorizing or enabling legislation like this, that that motion of constitutionality should be granted by me. ¶ I'm doing my best, under the precedent that I'm given, and like I say, we'll find out, I'm sure, whether or not some of the more complex arguments given here will carry the

day in a different forum. [¶] So, with that, I’m willing to sign the proposed order prepared by the defendant, Central Puget Sound.

RP 48:25 – 49:23. This appeal followed.

## V. ARGUMENT

Art. II § 37 of the state constitution requires that the legislature, when amending existing law, may not simply amend or revise “by mere reference,” but must set forth the amended or revised statute “at full length.” Enforcing this mandate, the Supreme Court has employed a two-prong test to determine if legislation complies with Art. II § 37. The first prong of the test asks whether the statute is a “complete act.” A complete act does not amend by reference, but instead contains within itself sufficient information such that “the scope of the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment.” *El Centro de la Raza*, 428 P.3d at 1156 (2018) (internal quotation marks omitted); *Amalgamated Transit Union*, 142 Wash. 2d 183, 11 P.3d 762 (2000). The second prong of the test asks whether or not “a straightforward determination of the scope of rights or duties under the existing statutes [would] be rendered erroneous by the new enactment.” *El Centro de la Raza*, 428 P.3d at 1156 (internal



quotation marks omitted). A statute must satisfy both prongs to comply with Art. II § 37.<sup>15</sup>

This constitutional challenge, like any, presents issues of law reviewed *de novo* by the appellate court. *El Centro de la Raza*, 428 P.3d 1146; *Sprague v. Spokane Valley Fire Dept.*, 189 Wash. 2d 858, 872, 409 P.3d 160 (2018). Because ESSB 5987 plainly fails to meet any established category of “complete act” excluded from Art. II § 37’s mandate, and because it also renders the existing statute erroneous without setting it forth at full length, there can be no doubt ESSB 5987 is unconstitutional.

**A. The First Prong: ESSB 5987 Is Not A “Complete Act” Under Art. II § 37.**

The Supreme Court has recognized four forms of “complete acts” which do not “set forth at full length” an existing law, but also do not trigger the constitutional mandate because these acts allow a determination of rights and duties “**without referring to any other statute or enactment.**” *El Centro de la Raza*, 428 P.3d at 1155

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<sup>15</sup> Because CPSRTA did not argue for or adopt the trial court’s proposed exception to Art. II § 37 (that statutes authorizing local taxation need not comply with Art. II § 37), plaintiffs will not address it further in this brief, but instead will address the arguments presented below. If on appeal CPSRTA embraces the trial court’s approach, plaintiffs will address it in reply.

(emphasis added; internal quotation marks omitted). Those four categories are statutes that (1) repeal prior acts; (2) adopt by reference provisions of prior acts; (3) supplement prior acts; or (4) incidentally or impliedly amend prior acts. *Citizens for Responsible Wildlife Management*, 149 Wash. 2d 622, 71 P.3d 644 (2003); *Amalgamated Transit Union*, 142 Wash. 2d 183, 11 P.3d 762 (2000).

The parties agree that ESSB 5987 neither repeals nor supplements a prior act. Instead, in its briefs addressing the motions for summary judgment, CPSRTA argued that ESSB 5987 was a complete act because it qualified as a reference statute.<sup>16</sup> At oral argument, CPSRTA abruptly changed course:

We're not saying that these statutes are -- that this statute is valid because it's a reference statute. . . We're not saying that our case is based on reference statutes here. That's not the case at all.

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<sup>16</sup> From CPSRTA's Opening Brief on summary judgment: "Plaintiffs assert that RCW 81.104.160(1) is an incomplete law because it refers to chapter 82.44 RCW. That argument directly contradicts 100-year old precedent. The references to chapter 82.44 RCW in RCW 81.104.160(1) render it a 'reference statute.'" CP 397:16-18. "RCW 81.104.160(1) is a complete law and a reference statute that properly incorporates the 1996 version of chapter 82.44 RCW and the version of chapter 82.44 RCW in effect when voters approve the MVET." CP 399:6-8. In their Reply Brief, CPSRTA doubled down on this position: "Plaintiffs further contend that RCW 81.104.160(1) is incomplete because it is not a 'reference statute.' . . . [¶] RCW *is* a reference statute based on the definition applied by the Supreme Court." CP 1431:16-24 (emphasis added).

RP 37:24-38:11. Regardless of CPSRTA’s position on appeal—whether it revives its argument that ESSB 5987 is a reference statute, or relies solely on the claim that ESSB 5987 constitutes an implied or incidental amendment to RCW 82.44.035—it can satisfy neither description of a “complete act.”

1. **ESSB 5987 Does Not Qualify As A Reference Statute Because It Does Not Incorporate Existing Chapter 82.44 RCW.**

Art. II § 37 explicitly **prohibits** amending by reference rather than setting forth the amendment at full length. A permissible “reference statute” does not amend existing law—and therefore does not violate Art. II § 37—precisely because it does not *amend*; it does not change the original statute, but merely borrows language from current, valid law to apply that law in a new context.<sup>17</sup> To its credit, in its briefs defending

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<sup>17</sup> In failed challenges to permissible reference statutes, challengers often assert that an original statute which applied to specific, identified topics or entities was amended when a new law incorporated it and applied it to new topics or entities. While recognizing that this use of an existing statute might result in “amendment” in a hypertechnical use of that term, the Supreme Court has found no violation of Art. II § 37 because the new law did not render the pre-existing incorporated law erroneous. The subject matter of a law which has been expanded to include new subjects is not changed by those new applications, and to force useless repetition of similar language in each new enactment would frustrate the purpose of Art. II § 37, to make the Revised Code of Washington more reliable and accessible, not to render it more voluminous and confusing.

ESSB 5987 as a reference statute, CPSRTA correctly stated the rule; but it then proceeded to ignore the application of that rule to this case:

Reference statutes are those statutes which refer to, and *by reference adopt* wholly or partially, pre-existing statutes, or which *refer to other statutes and make them applicable* to an existing subject of legislation . . . Reference statutes are treated as if they were incorporated into, and made a part of the referring act, just as completely as if they had been explicitly written therein.

CP 397:19-26 (internal citations and alterations omitted, emphasis added).

By its own description of the rule, CPSRTA effectively conceded that ESSB 5987 does not qualify as a reference statute.

While ESSB 5987 does “refer” to Chapter 82.44 RCW, reference by itself does not save a statute from the prohibition of Art. II § 37. Quite the contrary: the constitution **prohibits** amendment of a statute “by mere reference to its title.” A statute may permissibly refer to existing law, and thereby extend the unchanged existing law to a new subject. But it may not make a reference to existing law *for the purpose of amending the existing law*.

Thus, the Supreme Court found a perfect example of a legitimate “reference statute” in *State v. Rasmussen*, 14 Wash. 2d 397 (1942). There a chiropractor challenged his conviction for practicing without a license. He claimed that the 1921 statute upon which his conviction was based

did not comply with Art. II § 37. That statute had transferred the authority for licensing chiropractors from the Board of Chiropractic Examiners to the Director of Licenses. In doing so, the statute containing the existing authority of the Director of Licenses had not been set forth at full length, with amending language adding chiropractors to the list of regulated professions. The court rejected his argument that the transfer of unchanged existing authority constituted an “amendment” of the licensing statute, requiring the legislature to set it forth at full length. Redirecting the authority of the Board of Chiropractic Examiners to the Department of Licenses did not require the legislature to set forth every pre-existing licensing obligation of the Department in order to add regulation of the practice of chiropractic to the Department’s licensing authority. The new statute was properly characterized as a “reference statute.” *Rasmussen*, 14 Wash. 2d at 404.

The Court explained that, if courts did not permit “reference statutes” as a means of enacting legislation in compliance with Art. II § 37, the legislature would litter the Revised Code of Washington with needless repetition of statutory provisions that apply in a multitude of different contexts:

When in one statute a reference is made to an existing law, in prescribing the rule or manner in which a particular thing shall be

done, or for the purpose of ascertaining powers with which persons named in the referring statute shall be clothed, the effect generally is not to revive or continue in force the statute referred to for the purposes for which it was originally enacted, but merely for the purpose of carrying into execution the statute in which the reference is made.

*Rasmussen*, 14 Wash. 2d at 402. Because a proper reference statute does not alter the legal effect of the statute it refers to, but merely expands its reach to a new subject, it does not thereby trigger the requirement of Art. II § 37 that the existing statute be “set forth at full length.”

ESSB 5987 does not qualify as a reference statute under *Rasmussen* or any other case. ESSB 5987 does not *adopt* or *incorporate* RCW 82.44.035 or any other apt of that chapter, and make it applicable to the new enactment. Instead, ESSB 5987 does exactly the opposite. It refers to Chapter 82.44 RCW for the express purpose of making the existing, facially applicable valuation schedule inapplicable for a period of time. ESSB 5987 purports to make the existing governing law temporarily irrelevant as to CPSRTA. ESSB 5987 also does not repeal RCW 82.44.035, expressly or by implication, a step which would avoid the mandate of Art. II § 37.<sup>18</sup> CPSRTA concedes that RCW 82.44.035

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<sup>18</sup> Repeal of a statute does not implicate Art. II § 37. *See, e.g., Amalgamated Transit Union*, 142 Wash. 2d at 254 (“statutes must be set forth in full only when they are revised or amended, but not when they are repealed”).

remains part of the Revised Code of Washington, and would govern any other locally imposed MVET. CPSRTA also concedes, as it must, that at some point in the future, at its discretion, CPSRTA will use that section to calculate vehicle value and tax liability for this very MVET. But it asks this Court to permit ESSB 5987 to amend its effect, without following the constitutionally prescribed process.

ESSB 5987 does not “incorporate” anything in existing Chapter 82.44 RCW. It says so, on its face, when it informs the reader that nothing in RCW 82.44 governs the new MVET authorized by ESSB 5987, until further notice. This does not “incorporate” the referred-to statute as authorized by the Supreme Court in *Rasmussen* and other cases. The court below erred in adopting CPSRTA’s mischaracterization of the way in which the legislature may incorporate existing law into a “reference statute.” A reference statute, to be consistent with Art. II § 37, does not amend or revise an existing law, but instead *incorporates* law that already exists *elsewhere in the Revised Code of Washington*.

## **2. A Reference Statute Cannot Revive A Repealed Statute.**

CPSRTA repeatedly suggests that ESSB 5987 merely re-enacts or re-invigorates a previous “version” of 82.44 RCW. It argued, for example, that ESSB 5987 “properly refers to two versions of chapter

82.44 RCW.” CP 401:10-11; *see also* CP 390:25. But there are not “two versions” of Chapter 82.44 RCW, any more than there are “two versions” of RCW 26.04.010 (defining marriage). No one could claim that any person’s legal right to marry in Washington could be defined by RCW 26.04.010 as it existed prior to 2012, as simply an earlier but equally valid “version” of the marriage statute, on par with Washington’s recognition of same-sex marriages beginning on December 6, 2012. When a law is repealed and replaced, it does not survive as a “version” of the current law; it is no law at all.

A purpose of the first prong of Art. II § 37 is to “make sure the effect of new legislation is clear.” *El Centro de la Raza*, 428 P.3d at 1156. A taxpayer can only assess his tax liability under ESSB 5987 by applying a valuation schedule. Instead of expressly including a schedule, or referring to the existing one elsewhere in the Revised Code of Washington, ESSB 5987 displaces the only existing statute. For that reason, until oral argument CPSRTA defended ESSB 5987 as a reference statute. CPSRTA called it a statute that, by reference, incorporates the repealed statute. CPSRTA had to make this claim, because ESSB 5987 expressly excludes immediate application of the statutory schedule.



Without referring to and incorporating the repealed schedule, it has no schedule whatsoever.

But ESSB 5987 fails as a reference statute for this second, independent reason. The legislature cannot revitalize a repealed statute by reference, without restating the repealed text as a new enactment. CPSRTA cited no authority for this core element of its defense to the court below in favor of the constitutionality of ESSB 5987—the proposition that the legislature may revive a repealed act by reference, without reciting the text in full. CPSRTA offered no support for that proposition because none exists.

In fact, the Supreme Court has rejected an even more defensible argument: that if the legislature actually recites the full text of a repealed act in a new piece of legislation, it thereby revives the repealed act by implication. These cases represent the closest analogy in the Supreme Court jurisprudence to what the CPSRTA claims the legislature did in ESSB 5987, and the cases *explicitly reject* what CPSRTA argued below. “The Legislature does not give a previously repealed statute life by merely reciting it in an amendatory act.” *Local No. 497, Affiliated with Int’l Bhd. of Elec. Workers, AFL-CIO v. Pub. Util. Dist. No. 2 of Grant Cty.*, 103 Wash. 2d 786, 791 (1985).

At oral argument, CPSRTA dismissed *Local No. 497* and *State v. Sam*, 85 Wash. 2d 713 (1975), as irrelevant to Art. II § 37, just as it newly claimed that ESSB 5987 is not a reference statute. But for ESSB 5987 to be complete, and yet not use the valuation schedule of RCW 82.44.035 to calculate MVET liability, it must draw a valuation schedule from somewhere. CPSRTA admitted this at oral argument, as it must. RP 33:16-17. CPSRTA’s sole possible defense of ESSB 5987 is that it is a “complete act.” But if the legislature could not permissibly require reliance on the repealed valuation schedule as it attempted to do, then ESSB 5987 is not complete, because no valuation schedule applies. If it lacks a valuation schedule, it fails the first prong of the Art. II § 37 test.

Thus, the cases that plaintiffs cited to the trial court on this point are relevant, on point, and completely undermine CPSRTA’s position. For example, in *Local No. 497*, 103 Wash. 2d 786, the court made two relevant determinations: first, that the legislature had impliedly repealed an earlier statute, and second, that the later act did not revive the impliedly repealed act despite restating it in full. The court found that the legislature had impliedly repealed a “prevailing wage” statute applicable only to PUDs by the later enactment of a prevailing wage law applicable to all public works. While stressing that “repeals by implication are not

avored,” *id.* at 789, it applied the applicable two-prong test to find repeal.<sup>19</sup> Then, later in time, the legislature, “during a period of massive code revisions,” *id.* at 791, restated the PUD-specific language “as part of the amendment-revision of the entire section . . . initiated by the 1949 code revision.” *Local No. 497*, 103 Wash. 2d at 791. The Court held that this express recitation in full of the impliedly repealed statutory text did not thereby re-enact it. “Revival by implication following a repeal by implication is even less desirable as a principle of construction than repeal by implication alone. *It wreaks havoc with any orderly progression of statutory tracing. . .*” *Id.* at 790 (emphasis added). Further, “[t]he Legislature does not give a previously repealed statute life by merely reciting it in an amendatory act.” *Id.* at 791

In other words, the full, complete recitation of the entire repealed text, voted on by the legislature and signed by the governor, did not thereby re-enact the law. Yet here, CPSRTA argued that the legislature can revive a repealed valuation schedule without even reciting the

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<sup>19</sup> That test is whether “(1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction.” *Local No. 497*, 103 Wash. 2d at 786, quoting *Paulson v. County of Pierce*, 99 Wash. 2d 645, 650 (1983).

relevant text, and may do so by means of a reference that requires the reader to scour volumes of session laws to even find the referred-to valuation schedule.

The Supreme Court also forbade similar re-enactment by implication in *State v. Sam*, 85 Wash. 2d 713 (1975). There, the Court had earlier held that a later statute impliedly repealed an earlier one, just as in *Local No. 497*. In *Local No. 497*, the legislature later restated the entire impliedly repealed section in a series of amendments to the section containing it. In *State v. Sam*, just as in *Local No. 497*, despite the legislature's failure to expressly repeal the earlier statute (and the legislature's subsequent restatement of it), the Court refused to give it force. "Since an amendatory act alters, modifies, or adds to a prior statute, all courts hold that a repealed act cannot be amended. No court will give the attempted amendment the effect of reviving the repealed act." *State v. Sam*, 85 Wash. 2d at 717 (quoting 1A *Sutherland Statutory Construction* § 22.03 at 108 (4th Ed. C. Sands 1972)).

Here, of course, the situation is far worse. Because it is permissible to repeal a statute without setting it forth "at full length," courts have recognized repeal by implication, as they did in both *Local No. 497* and *State v. Sam*. Could there be a logical corollary—"revival

by implication,” if the Legislature recites the full statutory text of a repealed statute during re-codification? The Supreme Court identified the theoretical possibility of “revival by implication” only to reject it as a legal principle. The Supreme Court has thus twice rejected revival of a statute where the legislature restated the entire text. It has certainly never permitted the legislature to revive an *expressly* repealed statute by simply referring to its one-time prior existence. Yet CPSRTA claims the legislature did exactly that, and asks this court’s blessing on it. Indeed, at oral argument, CPSRTA insisted that *Local No. 497* and *State v. Sam* differ from this case only in that, in those instances, the legislature’s act was accidental, whereas here the legislature intended to do what it did. RP 39:15-24. Nothing in the text of Art. II § 37 or any of the Court’s jurisprudence under it suggest that constitutionality depends upon whether the legislature acted accidentally or intentionally, and CPSRTA cited no case for this principle. Indeed, because Art. II § 37 protects not only the legislature but the people as well, allowing any citizen to determine his rights and obligations under the law, it makes no difference whether the legislature acted intentionally or not. What matters is whether the legislation complied with Art. II § 37 by setting forth at full length any statute being amended or revised.

The one case cited by CPSRTA to support the supposed permissibility of incorporating repealed law into a “reference statute,” *Rosell v. Dep’t of Soc. & Health Servs.*, 33 Wash. App. 153, 652 P.2d 1360 (Div. 3 1982), provides no support to CPSRTA’s position. *Rosell* permitted a statute to incorporate a then-extant statute that was *later* repealed. It did not allow what ESSB 5987 did—”incorporate” an already-repealed statute into a new statute. In *Rosell* the legislature permissibly incorporated one statute into a later enactment. Then, later in time, it repealed the first statute. The question arose: did the later statute lose its power to incorporate the earlier statute, because the earlier statute had now been repealed? No, said the Supreme Court: the earlier statute was still a valid part of the later reference statute that had incorporated it.<sup>20</sup> Thus, CPSRTA has no precedent for incorporating an already repealed statute as part of a new reference statute.

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<sup>20</sup> *Rosell* was not an Art. II § 37 case. The decisive distinguishing feature of *Rosell*, compared to this case, is that in *Rosell* the Legislature incorporated an existing statute that was *later* repealed. Here, by contrast, ESSB 5987 refers to a statute that had long since been repealed *when ESSB 5987 was drafted*. The challenged statute in *Rosell* incorporated valid law when it was passed. ESSB 5987 purports to incorporate invalid, repealed law.

**B. The Second Prong: ESSB 5987 Renders Erroneous Any Straightforward Determination Of Duties Under RCW 82.44.035.**

The second prong of the test under Art. II § 37 asks whether or not “a straightforward determination of the scope of rights or duties under the existing statutes [would] be rendered erroneous by the new enactment.” *El Centro de la Raza*, 428 P.3d at 1156 (internal quotations omitted). As the Supreme Court made clear in *El Centro de la Raza*, even a complete act may violate Art. II § 37 if it fails the second part of the test. CPSRTA minimized this portion of the test in the court below, arguing that if it succeeded in showing that ESSB 5987 was a “complete act,” the analysis ended.<sup>21</sup> The Supreme Court’s most recent word on the subject holds otherwise. In *El Centro de la Raza*, the Supreme Court found the challenged act complete, but it nonetheless applied the second prong, finding that it required overturning the unconstitutional portion of the law. “Turning to the second part of the test, we ask whether a straightforward determination of the scope of rights or duties under the existing statutes would be rendered erroneous by the new enactment.” *El*

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<sup>21</sup> “Every court to determine that a law is complete under the first prong of the article II, § 37 test has held that the law did not violate article II, § 37 even if the law implicitly amended or rendered another statute erroneous. . . . Because RCW 81.104.160(1) is a complete law, it is exempt from article II, § 37 requirements.” CP 399:8-13 (citations omitted).

*Centro de la Raza*, 428 P.3d at 1156 (internal quotations omitted). Here, a straightforward determination of the scope of duties under the RCW 82.44.035 is rendered erroneous by ESSB 5987. Thus, ESSB 5987 fails Art. II § 37.

In *El Centro de la Raza* the legislature's authorization of charter schools included a provision that a charter school's employees could only form a bargaining unit consisting of employees of that charter school. This constituted an amendment to RCW 41.56.060(1), which granted broad authority to the Public Employment Relations Commission (PERC) to direct the formation of bargaining units that would include charter school employees: "[I]t is clear that charter school employees not covered by chapter 41.59 RCW would be covered by chapter 41.56 RCW because they are public employees." *El Centro de la Raza*, 428 P.3d at 1157. Because RCW 41.56.060(1) was amended by a statute that restricted its scope, Art. II § 37 required that the amending act set forth the change at full length. Because it did not, the court held the restriction invalid. *El Centro de la Raza*, 428 P.3d at 1157.

Similarly, absent ESSB 5987, RCW 82.44.035 would apply to any locally imposed motor vehicle excise tax, including CPSRTA's MVET. A taxpayer could determine his tax duty by multiplying his



vehicle MSRP times the tax rate times the relevant line in RCW 82.44.035's schedule for his vehicle age. But ESSB 5987 makes that determination wrong, because ESSB 5987 rendered RCW 82.44.035 erroneous. CPSRTA does not dispute that its MVET has never applied RCW 82.44.035. CP 381:25-382:1. CPSRTA collects MVET every business day, always calculated according to the repealed schedule, not according to RCW 82.44.035.

A parallel case, cited by CPSRTA in its own briefing, demonstrates the constitutional flaw in ESSB 5987, and the flaw in CPSRTA's interpretation of Art. II § 37. *Flanders v. Morris*, 88 Wash. 2d 183, 558 P.2d 769 (1977) invalidated a law under Art. II § 37 in practically identical fashion. Lois Flanders, a 28-year-old unemployed woman, qualified for public assistance under the law as it existed the day the supplemental appropriations bill for the 1975-77 biennium was passed. That appropriations bill included a provision that temporarily, for the two-year duration of the appropriation, restricted a single person's eligibility for public benefits to those over the age of 50. Because the appropriations statute changed how the state would grant benefits compared to existing law, the court held that Art. II § 37 required the statute to set forth the earlier statute at full length. Because the statute

failed to comply with this requirement, the court held it invalid. But by CPSRTA’s interpretation of Art. II § 37, the Supreme Court in *Flanders* was wrong. It should have affirmed the law, finding that the legislature hadn’t amended the public assistance law at all. It had just changed the *timing* of when the existing public assistance benefits law applied. In two years, the existing law would once again govern the plaintiff. Or, if the legislature just kept renewing the “temporary” suspension of the applicability of the law, *Flanders* would still be entitled to receive public assistance—when she turned 50! But of course the Supreme Court did not accept this evasion of Art. II § 37:

The new restriction is clearly an amendment to RCW 74.04.005, adding to the restrictions already enumerated there. However, the statute will never reflect this change but will continue to read as it always has, with no age restriction. One seeking the law on the subject would have to know one must look under an ‘appropriations’ title in the *uncodified* session laws to find the amendment. The fact that the budget bill is not codified strikes at the very heart and purpose of Const. art. 2, § 37.

*Flanders*, 88 Wash. 2d at 189 (emphasis in original). Here too, ESSB 5987 suspends the generally applicable governing statute, RCW 82.44.035, but it will “never reflect this change,” and instead will permit a repealed, uncodified, unrecited valuation schedule to govern the valuation of motor vehicles. This disrespect for the integrity of the

Revised Code of Washington “strikes at the very heart and purpose of Const. art. 2, § 37.”

The Supreme Court reached a similar result in *Washington Educ. Ass’n v. State*, 93 Wash. 2d 37, 604 P.2d 950 (1980) (“*WEA I*”). In an appropriations bill the Legislature had placed a limitation on school districts’ grants of salary increases. *WEA I*, 93 Wash. 2d at 40. That limitation conflicted with existing statutes that granted broad authority to school districts to fix employee salaries. “A straightforward reading of these statutes indicates that districts have the power to spend funds, from whatever source, as they choose on teacher salaries. The challenged limitation purports to amend this authority.” *WEA I*, 93 Wash. 2d at 41. The court therefore held that because the appropriations bill did not “fully set forth” the amendment to the existing statutes, the purported limitation in the appropriation bill was “unconstitutional and of no effect.” *Id.*

### **C. CPSRTA’s Additional Arguments are Unavailing**

#### **1. Art. II § 37 Does Not Inquire Into Legislators’ Actual Knowledge**

In its initial briefing before the trial court, CPSRTA attempted to demonstrate that the legislators who voted on ESSB 5987 knew perfectly

well what they were voting for, and that no deception occurred.<sup>22</sup> CPSRTA later abandoned this argument, for good reason.

As the Supreme Court emphasized in *El Centro de la Raza*, compliance with Art. II § 37 ensures that “[c]itizens or legislatures must not be required to search out amended statutes to know the law on the subject treated in a new statute.” *El Centro de la Raza*, 428 P.3d at 1157 (internal quotation marks omitted). An act that complies with Art. II § 37 plainly shows the proposed legislation’s “specific impact on existing laws in order to avoid fraud and deception.” *Washington Citizens Action of Washington v. State*, 162 Wash. 2d 142, 152, 171 P.3d 486, 491 (2007).

Because the protection against fraud and deception extends to citizens as well as legislators, inquiry into legislators’ personal knowledge has no bearing on the evaluation of a constitutional clause. Art. II § 37 is not simply a recommendation of “best practices” in legislative drafting. It is *mandatory*. *Gebhardt*, 15 Wash. 2d at 693. It limits legislative power to ensure that not only the legislators, but the

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<sup>22</sup> “[T]he statute’s plain language and its legislative history are explicit and consistent as to which depreciation schedule governs the ST3 MVET, and demonstrate that legislators understood the effects of the law.” CP 377:13-16.

people themselves, have full disclosure of the state of the law. Moreover, even if—perhaps especially if—every legislator knew and understood the effect of the legislation they voted on, it would not save a statute that did not comply with Art. II § 37, which as much protects the people from the legislature as it protects the legislators themselves.<sup>23</sup> By requiring that the legislature spell out changes to existing law “at full length,” Art. II § 37 ensures that legislators conduct business in the light of day, with full disclosure, rather than permitting them to pass laws whose implications only they will understand.<sup>24</sup> Because the legislature

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<sup>23</sup> Art. II § 37 was one of “a number of provisions that had been placed in other state constitutions after the Jacksonian revolution to ‘safeguard [the] new constitutional order by limiting the power of state legislatures.’ . . . These include . . . a bar to amendatory legislation without setting forth the changed section in full.” ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 10 (2d ed. 2013), quoting James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 *RUTGERS L.J.* 819, 834 (1991).

<sup>24</sup> One reason CPSRTA can cite no support for their extensive recitation of legislative history is that inquiry into the state of mind of individual legislators, even if this inquiry included every legislator, violates the enrolled bill doctrine:

The enrolled bill rule forbids an inquiry into the legislative procedures preceding the enactment of a statute that is properly signed and fair upon its face. . . . The court will not go behind an enrolled enactment to determine the method, the procedure, the means, or the manner by which it was passed in the houses of the legislature.

*Brown v. Owen*, 165 Wash. 2d 706, 723, 206 P.3d 310, 319 (2009). Just as legislation is impervious to attack based on the procedure leading up to it, for the same reason it cannot be defended from attack by that means. The language of the enactment—not the supposed intent of the legislators who voted for it—determines compliance or noncompliance with Art. II § 37.

disregarded the constitutionally mandated form in drafting ESSB 5987, it cannot be sustained.

**2. There Is No “Complete Act” Exception For Contingent Legislation**

In defending ESSB 5987 as a “complete act,” making it compliant with Art. II § 37, CPSRTA further justifies the uncertainty as to when the current “version”<sup>25</sup> of RCW 82.44.035 will apply. Although ESSB 5987 does not specify when the statutory valuation schedule will again become effective, CPSRTA characterized it as merely “contingent legislation,” which the Supreme Court has approved in other contexts. For this reason, too, ESSB 5987 fails the first prong of the Art. II § 37 test: “whether the new enactment is such a complete act that the scope of the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment.” It explicitly requires a reader to refer not only outside the statute itself, but to a source found nowhere in the Revised Code of Washington, namely, CPSRTA’s records of bond payments. The statute uses the continued existence of those bonds as the trigger for switching between the

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<sup>25</sup> In addition to its concession at oral argument that ESSB 5987 amends RCW 82.44.035, CPSRTA’s reference to different “versions” of Chapter 82.44 RCW also concedes that it amends current, existing RCW 82.44.035.

repealed valuation schedule and the amended, statutory one. CPSRTA defended this as permissible “contingent legislation.” But the Supreme Court has laid out four, and only four, types of complete acts that comply with the Art. II § 37 mandate. Contingent legislation is not one. While CPSRTA pointed to cases that have permitted contingent legislation, none of those cases presented an Art. II § 37 challenge. CPSRTA cites no authority, because none exists, that contingent legislation is a type of “complete act” that satisfies the constitutional requirements of Art. II § 37. Just as the trial court proposed an additional category of statutes that need not comply with Art. II § 37, CPSRTA proposes the additional category of contingent legislation as a “complete act.”

**3. CPSRTA’s Defense Based On *Thorne, Charles, And Gruen* Contradicts The Cases And Other Binding Precedent**

At the hearing on summary judgment, CPSRTA insisted that ESSB 5987 passed muster based on *Thorne, Gruen, and Charles*. Neither these nor other related cases support the constitutionality of ESSB 5987.

a. *Thorne and the Three Strikes Cases*

In the 3-strikes cases, *State v. Thorne*, 129 Wash. 2d 736, 921 P.2d 514 (1996) and *State v. Manussier*, 129 Wash. 2d 652, 921 P.2d 473 (1996), the court found that the new statute clearly spelled out when the State could sentence an offender to life imprisonment, even if the

offender committed a crime that prior law punished with a lesser maximum sentence. With only the text of the 3-strikes law, an offender (who knows his own criminal history) could determine what maximum sentence he faced. However, unlike the 3-strikes law, ESSB 5987 failed to disclose the tax liability that it authorized. Indeed, CPSRTA acknowledges as much, when it acknowledges that a person who knows his vehicle's starting value must nonetheless look outside the text of the act to find the required valuation schedule. ESSB 5987 is not complete within its own 300-odd words, and, as shown above, does not satisfy the requirements for an exemption.

b. Gruen Affirms Incorporation Of Existing Law

At the hearing on summary judgment, CPSRTA specifically argued that *Gruen v. State Tax Comm'n*, 35 Wash. 2d 1, 211 P.2d 651 (1949)<sup>26</sup> supported the constitutionality of ESSB 5987. As discussed above, that case, with many others, allows a new statute to incorporate an older, existing law by reference and make it applicable in new circumstances. Because here ESSB 5987 purports to dis-incorporate existing law and revive repealed law, *Gruen* does not avail CPSRTA. As

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<sup>26</sup> *Gruen* was overruled in part on other grounds in *State ex rel. Washington State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963).



the Court said in *Gruen*, finding the challenged statute constitutional, “[i]t appears to us that this is a reference statute—that is, it is a statute which refers to, and adopts by reference, the *pre-existing statutes*, and makes them applicable to this legislation.” *Id.* at 25 (emphasis added). That did not happen here.

c. *Charles Does Not Support ESSB 5987*

CPSRTA also emphasized *Retired Public Employees Council of Washington v. Charles*, 148 Wash. 2d 602, 62 P.3d 470 (2003) as providing support for ESSB 5987. It does not. In *Charles*, the challenged statute made a one-time change to the State’s retirement plans. That act set out every aspect of the change: all the new contribution rates, the start and end date, and (for this one-time change) an immediate effective date, even though existing statutes required a notice period. The challenged act explicitly overrode the delay and notice provision—by citation to the very clause. Within the confines of the new act in *Charles*, any person reading it would readily identify its effect. By contrast here, ESSB 5987 suspends the operation of an existing statute on an ongoing basis, for a stretch of time determined at CPSRTA’s sole discretion. It does so without identifying the suspended schedule except by reference to the

entire chapter, and purports to replace it with a repealed statute, not, for example, a schedule recited within the act itself.

Similar to *Charles*, in *Washington Educ. Ass'n v. State*, 97 Wash. 2d 899, 652 P.2d 1347 (1982) (“*WEA II*”), tenured faculty members complained that a statute permitting their contracts to be terminated in the case of financial exigency was unconstitutional because it did not set forth at full length existing statutory provisions for terminating a tenured faculty member’s contract. The court rejected the challenge, finding the new statute’s provisions regarding financial exigency complete in themselves. While they created an exception to the general rules allowing termination of a tenured faculty member’s contract, because a reader of that statute could readily determine his rights and duties from its text, the statute did not violate Art. II § 37. The court found that faculty members reading the statute would know how the new law would affect them. Even though existing law was subjected to a new exception for financial exigency, the new law was complete:

Undoubtedly, modification of existing laws by a complete statute renders the existing law by itself “erroneous” in a certain sense. Here SHB 782 “restricts the operation” of the existing provisions of RCW 28B.50 by providing special procedures for certain RIF dismissals. Nonetheless, **SHB 782 will be codified within RCW 28B.50 and its modification of the existing statute should be apparent.** Article 2, section 37 was designed to “protect the members of the legislature and the public against fraud and

deception; not to trammel or hamper the legislature in the enactment of laws.” *Spokane Grain & Fuel Co. v. Lyttaker*, *supra* 59 Wash. at 82, 109 P. 316; *see Yelle v. Bishop*, 55 Wash. 2d 286, 347 P.2d 1081 (1959). The purpose of SHB 782 is not hidden and, to the extent it fails to articulate how it relates to the rest of RCW 28B.50, its infirmities are not of constitutional magnitude.

*WEA II*, 97 Wash. 2d at 906 (emphasis added). Applying this standard to ESSB 5987, the effect on existing law (the temporary suspension of the valuation schedule contained in RCW 82.44.035) is not at all “apparent.” The new act does not incorporate the old, but expressly disregards it for a time, despite its facial, current applicability. Nor was the new law codified anywhere near the existing depreciation schedule, and the bond payoff trigger is, as admitted by CPSRTA, invisible even to the Legislature, never mind the public or the text of the Revised Code of Washington.

#### **4. ESSB 5987 Does Not Make Permissible Use of External Sources.**

CPSRTA has a further justification for “referring” to “RCW 82.44 as it existed on January 1, 1996.” After all, it claims, if a statute may incorporate the consumer price index, why can’t the legislation authorizing the collection of an MVET include a reference to a repealed statute? CP 397:3-8. The answer is simple: use of an external source of information does not violate Art. II § 37 if it does not amend existing

law. Here, ESSB 5987 fails Art. II § 37 not because of the mere fact of an “external reference,” but because the external reference operates to displace existing law on the same subject. By referring to “chapter 82.44 RCW as it existed on January 1, 1996” to displace RCW 82.44.035, ESSB 5987 amends existing law. To comply with Art. II § 37 the legislature must set forth at full length the statute it amended. ESSB 5987 fails to recite the existing schedule and show how ESSB 5987 changes the application of existing law to the MVET.

#### 5. **ESSB 5987 Is Not A Mere Incidental Amendment**

At oral argument, in addition to retreating from defending ESSB 5987 as a “reference statute,” CPSRTA, for the first time, claimed that ESSB 5987 satisfied the “incidental amendment” category of statute that need not comply with Art. II § 37:

This law wasn’t intended to amend the depreciation schedule in 82.44. It was to create the taxing authority for CPSRTA. It is a stand-alone, independent statute. *Its effect on 82.44 is, by definition, the incidental amendment because that’s not its purpose.* It’s why they said statutes which impliedly or incidentally amend other statutes. This statute is not enacted to deal with the depreciation schedule. It’s enacted to create taxing authority, and it has to designate depreciation schedule in order to implement it.

RP 33:7-17 (emphasis added). This new argument, raised by CPSRTA for the first time at oral argument, is wrong on the facts, wrong on the

law, and offers a key concession that ESSB 5987 is in fact unconstitutional.

First, CPSRTA misleads with its claim that ESSB 5987 “has to designate [a] depreciation schedule in order to implement it.” Because RCW 82.44.035 already existed, and already applied to any locally imposed MVET, merely securing authorization to “levy and collect an excise tax . . . not exceeding eight-tenths of one percent on the *value, under chapter 82.44 RCW, of every motor vehicle,*” ESSB 5987 (emphasis added) would have thereby designated the existing statutory depreciation schedule. By simply authorizing CPSRTA to impose a new MVET, the existing valuation schedule, by its own terms, would apply. The legislature *had already* designated it. No other schedule exists in the Revised Code of Washington. ESSB 5987 erred when it attempted to avoid this schedule without reciting the amendment.

CPSRTA also attempts to minimize ESSB 5987’s amendatory character by claiming that “[i]t was [intended] to create the taxing authority for CPSRTA. . . This statute is not enacted to deal with the depreciation schedule.” MVET taxing authority and depreciation schedules are inextricably linked. Calculating MVET requires use of a depreciation schedule, as CPSRTA concedes. RP 33:16-17. ESSB 5987

“deals with” the schedule specifically because CPSRTA did not want to use the existing statutory valuation schedule, and sought to avoid it. ESSB 5987’s amendment to RCW 82.44.035, rendering it facially incorrect by temporarily ignoring it, was not incidental or unintentional.

A similar argument could have been made in defense of the bargaining units amendment in the charter schools case, *El Centro de la Raza*. There, too, the State might have argued, the purpose of the statute was not to alter the scope of the Public Employment Relation Commission’s authority over public employees. Nonetheless, the Supreme Court held, *that was its effect*. *El Centro de la Raza*, 428 P.3d at 1157. Because the new statute rendered the existing statute on the topic erroneous, Art. II § 37 required that the amendment be set forth at full length. Art. II § 37 in no way limits the power of the legislature to apply its policy preferences in changing existing law. But it does prescribe the *manner* in which the legislature may effect such a change, and a failure to follow the prescribed procedure renders those changes ineffective, as demonstrated by *Flanders*, 88 Wash. 2d 183, *WEA II*, 97 Wash. 2d 899, and *El Centro de la Raza*, 428 P.3d 1143.

Thus, the amendatory effect on RCW 82.44.035 of ESSB 5987—finally admitted by CPSRTA at the summary judgment hearing—is

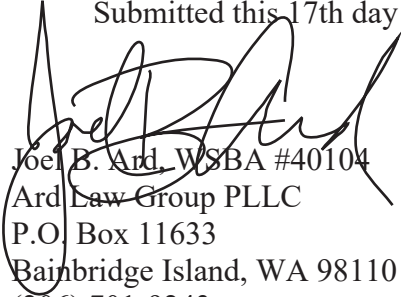
substantial and direct, not implied or incidental, as demonstrated by the discussion above regarding the second prong of the Art. II § 37 test.

## VI. CONCLUSION

Art. II § 37 protects the integrity of the legislative process. It ensures that when legislators (and citizens who contact them) consider whether to support or oppose pending legislation, the legislative text fully discloses the effect of the proposed measure. Legislative compliance with this drafting constraint creates no limit on the scope or content of any law. It does ensure that when the legislature amends any existing provision of the Revised Code of Washington, it makes the change apparent in the new legislation and the code itself. Any modification of the scope and effect of existing law will be incorporated into that law, rather than removed to some unrelated location in the Code, making the original law a trap for the unwary.

ESSB 5987 fails the two-pronged test most recently reaffirmed in *El Centro de la Raza*. It amends RCW 82.44.035 merely by referring to it, without explicitly stating the schedule that will replace it. It is not a complete act, but requires access to obscure records of a repealed law to determine its effect. It also leaves the text of RCW 82.44.035 intact, while in fact amending the existing law. Because ESSB 5987 was not drafted in a form compliant with Art. II § 37, this court should reverse the judgment below, and remand the cause for a determination of plaintiffs' remedies.

Submitted this 17th day of January 2018.



Joel B. Ard, WSBA #40104  
Ard Law Group PLLC  
P.O. Box 11633  
Bainbridge Island, WA 98110  
(206) 701-9243

s/David K. DeWolf  
Matthew C. Albrecht, WSBA #36801  
David K. DeWolf, WSBA #10875  
ALBRECHT LAW PLLC  
421 W. Riverside Ave., STE 614  
Spokane, WA 99201  
(509) 495-1246

Attorneys for Appellants



**APPENDIX**

**Washington Constitution, Article II § 37**

**REVISION OR AMENDMENT.** No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

**RCW 82.44.035**

Valuation of vehicles.

(1) For the purpose of determining any locally imposed motor vehicle excise tax, the value of a truck or trailer shall be the latest purchase price of the vehicle, excluding applicable federal excise taxes, state and local sales or use taxes, transportation or shipping costs, or preparatory or delivery costs, multiplied by the following percentage based on year of service of the vehicle since last sale. The latest purchase year shall be considered the first year of service.

YEAR OF SERVICE	PERCENTAGE
1	100
2	81
3	67
4	55
5	45
6	37
7	30
8	25
9	20
10	16
11	13
12	11
13	9
14	7
15	3
16 or older	0

(2) The reissuance of a certificate of title and registration certificate for a truck or trailer because of the installation of body or special equipment shall be treated as a sale, and the value of the truck or trailer at that time, as determined by the department from such information as may be available, shall be considered the latest purchase price.

(3) For the purpose of determining any locally imposed motor vehicle excise tax, the value of a vehicle other than a truck or trailer shall be eighty-five percent of the manufacturer's base suggested retail price of the vehicle when first offered for sale as a new vehicle, excluding any optional equipment, applicable federal excise taxes, state and local sales or use taxes, transportation or shipping costs, or preparatory or delivery costs, multiplied by the applicable percentage listed in this subsection (3) based on year of service of the vehicle.

If the manufacturer's base suggested retail price is unavailable or otherwise unascertainable at the time of initial registration in this state, the department shall determine a value equivalent to a manufacturer's base suggested retail price as follows:

(a) The department shall determine a value using any information that may be available, including any guidebook, report, or compendium of recognized standing in the automotive industry or the selling price and year of sale of the vehicle. The department may use an appraisal by the county assessor. In valuing a vehicle for which the current value or selling price is not indicative of the value of similar vehicles of the same year and model, the department shall establish a value that more closely represents the average value of similar vehicles of the same year and model. The value determined in this subsection (3)(a) shall be divided by the applicable percentage listed in (b) of this subsection (3) to establish a value equivalent to a manufacturer's base suggested retail price and this value shall be multiplied by eighty-five percent.

(b) The year the vehicle is offered for sale as a new vehicle shall be considered the first year of service.

YEAR OF SERVICE	PERCENTAGE
1	100
2	81
3	72
4	63
5	55
6	47
7	41
8	36
9	32
10	27
11	26
12	24
13	23
14	21
15	16
16 or older	10

(4) For purposes of this chapter, value shall exclude value attributable to modifications of a vehicle and equipment that are designed to facilitate the use or operation of the vehicle by a person with a disability.

**ESSB 5987 § 319(1), RCW 81.104.160(1)**

Regional transit authorities that include a county with a population of more than one million five hundred thousand may submit an authorizing proposition to the voters, and if approved, may levy and collect an excise tax, at a rate approved by the voters, but not exceeding eight-tenths of one percent on the value, under chapter 82.44 RCW, of every motor vehicle owned by a resident of the taxing district, solely for the purpose of providing high capacity transportation service.

The maximum tax rate under this subsection does not include a motor vehicle excise tax approved before July 15, 2015, if the tax

will terminate on the date bond debt to which the tax is pledged is repaid.

This tax does not apply to vehicles licensed under RCW 46.16A.455 except vehicles with an unladen weight of six thousand pounds or less, RCW 46.16A.425 or 46.17.335(2).

Notwithstanding any other provision of this subsection or chapter 82.44 RCW, a motor vehicle excise tax imposed by a regional transit authority before or after July 15, 2015, must comply with chapter 82.44 RCW as it existed on January 1, 1996, until December 31st of the year in which the regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015.

Motor vehicle taxes collected by regional transit authorities after December 31st of the year in which a regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015, must comply with chapter 82.44 RCW as it existed on the date the tax was approved by voters.

## CERTIFICATE OF SERVICE

I certify under oath and penalty of perjury of the laws of the State of Washington that I caused a copy of the foregoing brief to be served by on the 17th day of January 2019 by email as per the stipulation for electronic service to:

<p>Paul Lawrence paul.lawrence@pacificallawgroup.com Matthew Segal matthew.segal@pacificallawgroup.com Jessica A. Skelton jessica.skelton@pacificallawgroup.com Sydney Henderson sydney.henderson@pacificallawgroup.com Pacifica Law Group 1191 Second Avenue, Suite 2000 Seattle, WA 98101</p> <p>Desmond Brown desmond.brown@soundtransit.org Natalie Anne Moore natalie.moore@soundtransit.org Mattelyn Laurel Tharpe mattelyn.tharpe@soundtransit.org CPSRTA 401 S. Jackson St. Seattle, WA 98104 Attorneys for Defendant CPSRTA</p>	<p>Dionne Padilla-Huddleston dionnep@atg.wa.gov Jennifer Bancroft jenniferp4@atg.wa.gov Attorney General's Office Licensing &amp; Administrative Law Division 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 Attorneys for Defendant State of Washington</p>
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Signed on January 17, 2019 at Spokane, Washington.

  
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**ALBRECHT LAW PLLC**

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