Court of Appeals File No. 52664-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

TAYLOR BLACK, et al.

Plaintiffs-Appellants,

vs.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,

STATE OF WASHINGTON

Defendants-Respondents.

REPLY BRIEF OF APPELLANTS

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.

TABLE OF CONTENTS

I. Introduction And Summary Of Argument 1

II. CPSRTA's "Counterstatement of Facts" 4

A. CPSRTA's Operations And Revenue Are Contested And Irrelevant 5

B. The Views Of Individual Legislators Are Contested And Irrelevant 6

III. Argument 6

A. The First Prong: ESSB 5987 Is Not A Complete Act 8

1. "Elements" Do Not Make A Complete Act 8

2. ESSB 5987 Is Not A "Reference Statute" 9

3. A "Complete Act" Does Not Contain Contingent Legislation 16

B. The Second Prong: ESSB 5987 Makes Existing Statutes Erroneous 17

1. Use Of 'Notwithstanding' Does Not Automatically Satisfy Art. II § 37 18

2. Art. II § 37 Applies To All Statutes, Not Only Those That Create Rights Or Duties. 19

3. Legislators' Knowledge Does Not Render RCW 82.44.035 Less Erroneous 20

IV. Conclusion 24

TABLE OF AUTHORITIES

CASES

Amal. Transit Union Local 587 v. State, 142 Wash. 2d 183 (2000) 6, 8

Citizens for Responsible Wildlife Mgmt v. State, 149 Wash. 2d 622 (2003) 7, 8

El Centro de la Raza v. State, 192 Wash. 2d 103 (2018) ..... passim

Gruen v. State Tax Comm'n, 35 Wash. 2d 1 (1949) 11

Pierce County v. State, 150 Wash. 2d 422 (2003) 14

Pierce County v. State, 159 Wash. 2d 16 (2006) 13, 14, 15

Retired Public Employees Council of Washington v. Charles, 148 Wash. 2d 602 (2003) 19, 22

Roehl v. Pub. Util. Dist. No. 1 of Chelan Cty., 43 Wash. 2d 214 (1953) 11

Rosell v. Dep't of Soc. & Health Servs., 33 Wash. App. 153 (1982) 13, 15

Rourke v. Dep't of Labor & Indus., 41 Wash. 2d 310 (1952) 12, 23

Spokane Grain & Fuel Co. v. Lyttaker, 59 Wash. 76 (1910) 22

State ex rel. Gebhardt v. Superior Court for King Cty., 15 Wash. 2d 673 (1942) 22

State ex rel. Washington Toll Bridge Auth. v. Yelle, 32 Wash. 2d 13 11

State v. Manussier, 129 Wash. 2d 652 (1996) 18

State v. Rasmussen, 14 Wash. 2d 397 (1942) 10, 11

State v. Tausick, 64 Wash. 69 (1911) 11

State v. Thorne, 129 Wash. 2d 736 (1996) 18

Steele v. State ex rel. Gorton, 85 Wash. 2d 585 (1975) 10

Tracfone Wireless, Inc. v. Wash. Dep't of Revenue, 170 Wash. 2d 273 (2010) 12

Washington Citizens Action of Washington v. State, 162 Wash. 2d 142 (2007) 21, 22

Washington Educ. Ass'n v. State, 93 Wash. 2d 37 (1980) 22

STATUTES

ESSB 5987 § 319(1), 2015 3rd sp.s. c 44 § 319(1), RCW 81.104.160(1) ..... passim

RCW 81.104.160, Session Laws of 1998 Chapter 321 § 35 15

RCW 82.44.035 ..... passim

RCW 82.44.041 (repealed) 1, 13, 14, 15

CONSTITUTIONAL PROVISIONS

WASH. CONST. Art. II § 19 13

WASH. CONST. Art. II § 37 ..... passim

I. INTRODUCTION AND SUMMARY OF ARGUMENT[1]

Plaintiffs' opening brief demonstrated why the trial court erred in granting summary judgment to CPSRTA instead of to Plaintiffs. It demonstrated how the trial court should have applied WASH. CONST. Art. II § 37's two-pronged test to ESSB 5987.[2] The first prong asks whether the challenged act is a "complete act." A statute is a complete act if it falls into one of four recognized categories—none of which applies to ESSB 5987.

Plaintiffs further demonstrated that even if the challenged act qualified as a complete act, it failed the second prong of the test, which asks whether "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 v. State*, 192 Wash. 2d 103, 129 (2018). By applying repealed RCW 82.44.041 in place of the existing statutory schedule, ESSB 5987 thereby amended RCW 82.44.035 without setting it forth at full length. This violated Art. II § 37 and it is therefore unconstitutional. Plaintiffs also showed that the application of the two-prong test presents a pure legal question, and that ESSB 5987's failure to comply with either prong of the test was so obvious that there is no possible doubt that it is unconstitutional.

---

[1] Because the State of Washington adopted the three main arguments of CPSRTA, and presented no independent argument of its own, this Brief will serve as a Reply to the State as well as CPSRTA.

[2] This Reply uses "ESSB 5987" as shorthand for the one challenged portion of 2015 3rd sp.s. c 44, ESSB 5987, namely § 319(1), codified as RCW 81.104.160(1).

Plaintiffs presented three reasons for rejecting the claim that ESSB 5987 was a "complete act." First, its effect cannot be "ascertained from the words of the statute alone," *El Centro*, 192 Wash. 2d at 129, because a reader must refer to "the law as it existed on January 1, 1996." Second, it is not a "reference statute," because it does not refer to existing Washington law as required. Third, ESSB 5987 also fails as a complete act because it refers to an external contingency, namely, the retirement of ST1 bonds. The Supreme Court has never sanctioned this under Art. II § 37.

Plaintiffs showed that ESSB 5987 does not satisfy the second prong because it renders RCW 82.44.035 erroneous. CPSRTA admits that until the ST1 bonds are retired, ESSB 5987 displaces RCW 82.44.035 with a repealed statute that can be found nowhere in the Revised Code of Washington. Like the "carve-out" of charter schools from the scope of the authority of the Public Employment Relations Commission in *El Centro*, the substituted depreciation schedule in ESSB 5987 renders RCW 82.44.035 erroneous.

CPSRTA's Response Brief often repeats arguments presented to the trial court, and addressed in Plaintiffs' Opening Brief. Plaintiffs' summary of CPSRTA's arguments below follows the two-pronged test for Art. II § 37, with each point addressed in detail in the Argument section.

Prong One: Is ESSB 5987 A Complete Act?	
CPSRTA Argument	**Plaintiffs' Rebuttal**
1. ESSB 5987 is a "complete act" because "all the elements necessary to be fully informed about the rights created or affected by RCW 81.104.160(1) can be learned from reading the bill." *See* Resp. Br. at 17.	Listing the elements is insufficient. A "complete act" discloses its effect in its words. If it refers to external material it is not complete unless it is an approved "reference statute."
2. A "reference statute" may contain a reference to any source, including a repealed statute. *See* Resp. Br. at 24.	"Reference statutes" for purposes of Art. II § 37 may only incorporate existing law.
3. [CPSRTA does not attempt to defend the contingent aspect of ESSB 5987.]	ESSB 5987 is not a complete act because contingent legislation is not a permitted mode under Art. II § 37.
Prong Two: Is ESSB 5987 Amendatory?	
CPSRTA Argument	**Plaintiffs' Rebuttal**
1. The Supreme Court has approved use of the word "notwithstanding" as satisfying the second prong of the test. *See* Resp. Br. at 19.	The Court has not sanctioned specific words as satisfying or failing the second prong. This statute fails the second prong regardless of word choice.
2. Art. II § 37 only prohibits amending by reference a statute that independently creates rights or duties. *See* Resp. Br. at 22.	Art. II § 37 prohibits amendment where the **scope** of the rights or duties under the existing **statutes** be rendered erroneous by the new enactment.
3. The second prong of the Art. II § 37 test is satisfied if the Legislature is "aware of the legislation's impact on existing laws." *See* Resp. Br. at 19.	The second prong asks about the actual *effect* on existing laws.

II. CPSRTA's "Counterstatement of Facts"

The trial court considered this case as involving only a pure issue of law, and consequently made no findings of fact in ruling on the motions for summary judgment. Nonetheless, CPSRTA spends one third of its Response on a "Counterstatement of Facts." They have no relevance here, as CPSRTA acknowledged in its Reply brief below.[3] Some of CPSRTA's "facts" are actually legal conclusions. Plaintiffs contested other asserted "facts" in the summary judgment briefing.

But decisively, the court below found (and no party disagrees[4]) that none of them were relevant to resolving the purely legal issues which are now presented to this Court. Although CPSRTA makes citations to the Clerk's Papers, many of the citations refer only to CPSRTA's submissions in support of its motion for summary judgment, many of which were contested by Plaintiffs and none of which were established as "facts" in the Court below.[5] As a result, by introducing "facts" that were not established as such at the trial court, CPSRTA's "Counterstatement of Facts" fails to

---

[3] *See* CP 1424 ("Sound Transit moves solely on legal grounds. No findings of fact are required to rule in Sound Transit's favor.")

[4] The order signed by the trial court was proffered by CPSRTA, and contained no findings of fact. Not surprisingly, CPSRTA has not appealed that order.

[5] Plaintiffs argued to the court below that the fact issues were irrelevant, but that if the court considered them it had to deny summary judgment for CPSRTA because of the fact dispute. The court granted summary judgment to CPSRTA without resolving any disputed facts, effectively agreeing to the irrelevance of the fact questions.

comply with RAP 10.3(a)(5) ("Reference to the record must be included for each factual statement"). This Court must reject CPSRTA's invitation that it rely on or consider matters outside the record: the value of CPSRTA's projects and the "drastic impact" applying Art. II § 37 would have on its operations, the subjective knowledge of legislators who voted on ESSB 5987, or the Code Reviser's involvement in the drafting of ESSB 5987.[6]

A. CPSRTA's Operations And Revenue Are Contested And Irrelevant

CPSRTA asserts that enforcing Art. II § 37 would have a "drastic impact" on its operations, and delay completion of its many construction projects. When CPSRTA first asserted this 'fact' to the court below, Plaintiffs responded with evidence challenging each of these points. CP 836-40. Just a few months ago, CPSRTA released a budget which appears to contradict the position it asserts to this Court.[7] True or not, however, the

---

[6] CPSRTA's attempt to use the testimony of Kyle Thiessen as though it supported its position is particularly egregious. Resp. Br. at 10-11. Thiessen testified at a 2017 Senate Committee hearing, long after the passage of ESSB 5987. His testimony was never made part of the record below. Thiessen made clear he expressed no opinion on the constitutionality of ESSB 5987, and that while the Code Reviser's office assists in drafting legislation, "we are very aware that in the end it is the members' bill." (20:08).

[7] *Compare* https://www.soundtransit.org/sites/default/files/20161005-proposed-2017-budget.pdf at p. 4 (2017 budget projected ST3 to generate $54 billion in tax revenue) *with* https://www.soundtransit.org/sites/default/files/2019-financial-plan-and-proposed-budget.pdf (2019 budget projecting ST3 to generating $63 billion in tax revenue) (both urls last visited March 13, 2019). Its 2019 projections show it will exceed two year old ST3 total tax revenue projections by $9 billion. Mandatory termination of a $7 billion unconstitutional MVET would leave it $2 billion ahead, hardly hampering operations. CPSRTA will contest this, but that is the very reason the court below disregarded the question, and why this Court cannot rely on contested so-called 'facts' in its analysis of the purely legal question this case presents.

question has no bearing on the drafting mandate of Art. II § 37. "Nor is it the province of the courts to declare laws passed in violation of the constitution valid based upon considerations of public policy." *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 206 (2000) (internal quote omitted). This Court should decline CPSRTA's invitation to consider its hotly contested "facts" and self-serving plea for extra-legal treatment.

B. The Views Of Individual Legislators Are Contested And Irrelevant

CPSRTA also asserts that the legislators who adopted ESSB 5987 fully understood its effect. When CPSRTA raised this issue at the trial court, Plaintiffs offered contrary evidence. CP 848. The trial court did not resolve this dispute, and CPSRTA did not ask it to do so. CP 1436-38. If this "fact" were material, CPSRTA's failure to establish it as undisputed would alone require reversal of the trial court's order. On the contrary, as Plaintiffs argued, no court applying Art. II § 37 has asked for evidence that individual legislators or the public were actually defrauded or deceived. Instead, the inquiry is based on the "words of the statute alone." *El Centro*, 192 Wash. 2d at 129. CPSRTA's reliance on this disputed "fact" only illustrates the weakness of its argument on the law.

III. ARGUMENT

CPSRTA's Response recites the two-pronged Art. II § 37 test, but does not accurately describe either prong. CPSRTA describes the first

prong as inquiring "if the new law is a complete act because all the elements necessary to be fully informed about the rights created or affected by RCW 81.04.160(1) can be learned from reading the bill." Resp. Br. at 17. But as more fully described below, the question is not whether the *elements* of the statute are present, but rather whether the effect of the statute is "'readily ascertainable from the words of the statute alone.'" *El Centro*, 192 Wash. 2d at 129, quoting *Citizens for Responsible Wildlife Mgmt v. State*, 149 Wash. 2d 622, 642 (2003). The difference between actually ***specifying*** the effect of the statute, rather than merely listing its ***elements***, is the difference between a complete act and one that violates Art. II § 37.

CPSRTA claims that "the focus of the second prong of the art. II, § 37 test turns on whether 'the Legislature [was] aware of the legislation's impact on existing laws.'" Resp. Br. at 19. This also misstates the applicable test, which asks "whether a straightforward determination of the scope of rights or duties under the existing statutes [would] be rendered erroneous by the new enactment." *El Centro,* 192 Wash. 2d at 129 (internal quotation omitted). The second prong does not inquire into the legislators' subjective beliefs when the challenged statute was passed, but rather asks whether passage of the new act resulted in damage to the reliability of the Revised Code of Washington. Art. II § 37 requires the legislature to set forth the amended statute "at full length" instead of rendering part of it "erroneous" while leaving its text intact.

The balance of this section takes each prong—as the courts have applied it, not as CPSRTA has represented it—and demonstrates that CPSRTA can satisfy neither prong.

A. The First Prong: ESSB 5987 Is Not A Complete Act

Plaintiffs demonstrated that the Supreme Court has sanctioned four, and only four, categories of "complete act" in its Art. II § 37 jurisprudence. Opening Brief at 20. As Plaintiffs showed, those four categories include **only** 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. *See, e.g.*, *CReW*, 149 Wash. 2d 622; *ATU Local 587*, 142 Wash. 2d 183. Because ESSB 5987 fails to satisfy any of the four categories, it is not a complete act.[8]

1. "Elements" Do Not Make A Complete Act

CPSRTA's Response does not recite the well-established categorization, nor identify which category ESSB 5987 satisfies. Instead, CPSRTA proposes a dramatically different test. CPSRTA argues that the new statute is "complete" if it contains all of the *elements* of the rights or

[8] In the briefs below, the parties only contested the "reference statute" category, agreeing that ESSB 5987 did not satisfy any other. At oral argument CPSRTA contended that ESSB 5987 was not a reference statute, but argued that it was an incidental amendment. On appeal, CPSRTA reverts to its "reference statute" argument, apparently abandoning its "incidental amendment" argument. Given that the displacement of RCW 82.44.035 with repealed RCW 82.44.041 increased taxpayers' liability by billions of dollars, it could hardly be considered "incidental."

duties which the new law modifies. Resp. Br. at 17. But the Supreme Court has never given the "complete act" exception such breadth, as though simple enumeration of the new law's changes to existing law could satisfy the constitutional requirement that amendments to existing law must set forth the changes "at full length." Only if the effect of the new statute is readily ascertainable **from the words of the statute alone,** *El Centro*, 192 Wash. 2d at 129, can a challenged statute survive challenge under Art. II § 37 as a "complete act."[9]

ESSB 5987 does not contain all the information needed to calculate MVET tax liability. It explicitly refers to external sources for the required valuation schedule. It is not "complete" because the Supreme Court's "reference statute" jurisprudence does not permits the reference it makes.

2. ESSB 5987 Is Not A "Reference Statute"

Plaintiffs showed that unless a statute satisfies the Supreme Court's definition of a "reference statute" as a complete act, its internal reference is explicitly forbidden by Art. II § 37: "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." (Emphasis added).

[9] The challenged statute at issue in *El Centro* exemplifies this: its three sentences exactly and completely described the new law governing bargaining units. The three sentences alone described charter school employees' rights to organize.

a. Reference Statutes Must Refer To Existing Law

As Plaintiffs demonstrated, the Supreme Court has carefully defined what constitutes a reference statute in the Art. II § 37 context. "Statutes which refer to other statutes and make them applicable to the subject of the legislation are called 'reference statutes.' Their object is to incorporate into the act of which they are a part the provisions of other statutes by reference and adoption." *Steele v. State ex rel. Gorton*, 85 Wash. 2d 585 (1975) (internal quotes omitted). To qualify for the Art. II § 37 exemption as a reference statute, an act must refer to, and thereby incorporate, ***existing law***.

CPSRTA denies that the "reference statute" category of complete acts may reference only existing law. It claims there is no such limitation and challenges Plaintiffs to cite case law that prohibits reference to a source other than the Revised Code of Washington.[10]

The "reference statute" cases that Plaintiffs cited in their opening brief routinely describe what a reference *is,* thereby making it clear what a reference statute *is not*. Because the Supreme Court has carefully defined the "reference statute" exception, it cannot be used to permit precisely what Art. II § 37 forbids—amendment by mere reference alone. For example, *State v. Rasmussen*, 14 Wash. 2d 397 (1942), the leading case, makes the limitation clear:

---

[10] "Black cites no case law either holding that only existing Washington statutes can be incorporated into valid reference statutes or precluding a repealed statute from being referenced in a valid reference statute." Resp. Br. at 24.

> 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 (emphasis added). *Rasmussen* carefully limits reference statutes to those statutes that refer to **existing law**. "Reference statutes" are made an exception to Art. II § 37's prohibition in recognition of the fact that reference statutes do not **amend** existing law, but simply **apply** or **extend** existing law to a new context. Thus, it would defeat the purpose of Art. II § 37 if a reference statute could include **any** reference to **any** source.

Cases discussing "reference statutes" routinely state that the reason for permitting the use of reference statutes is to avoid unnecessary restatement and repetition of the ***existing code***.[11] CPSRTA's failure even to

[11] *See, e.g.*, *State ex rel. Washington Toll Bridge Auth. v. Yelle*, 32 Wash. 2d 13, 28 (1948) ("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"); *State v. Tausick*, 64 Wash. 69, 82 (1911) ("It cannot be any objection to this law that, in order to ascertain powers granted to cities organized under it, it becomes necessary to refer to ***existing laws*** . . . The courts have repeatedly recognized the validity of reference statutes . . ."; *Gruen v. State Tax Comm'n*, 35 Wash. 2d 1, 25 (1949) ("It 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"); *Roehl v. Pub. Util. Dist. No. 1 of Chelan Cty.*, 43 Wash. 2d 214, 225–26 (1953) ("Reference statutes are those which refer to, and by reference adopt wholly or partially, ***preexisting statutes***, or which refer to other statutes and make them applicable to an existing subject of legislation. They

cite, much less discuss, *Rasmussen* is an acknowledgement that ESSB 5987 does not qualify as a reference statute as that category of "complete act" has been developed in the Art. II § 37 cases. Instead, CPSRTA asks this court to call ESSB 5987 a reference statute because it is a statute that contains a reference.

CPSRTA further misleads this court by citing *Tracfone Wireless, Inc. v. Wash. Dep't of Revenue*, 170 Wash. 2d 273, 284 (2010) as though it supported CPSRTA's claim. True, *Tracfone* approves of a statute with an internal reference, and the statute at issue refers to an external source, the federal Mobile Telecommunications Sourcing Act. But *Tracfone* is not an Art. II § 37 case. It uses the same words—"reference statute"—but it has nothing to do with the scope of exceptions to Art. II § 37 for "complete acts." If making any kind of external reference exempts a statute from Art. II § 37's "set forth at full length" mandate, the legislature could readily evade this constitutional mandate.

b. *Pierce County II* And Repeal Of RCW 82.44.041

CPSRTA shifts gears from its briefs below when it argues that ESSB 5987 permissibly referred to an existing statute because former

---

are frequently used to avoid encumbering the statute books by unnecessary repetition."); *Rourke v. Dep't of Labor & Indus.*, 41 Wash. 2d 310, 313 (1952) ("[T]his act is not a reference statute. . . It does not refer to and adopt by reference ***pre-existing statutes*** and make them applicable to this legislation") (emphasis added to all quotes).

RCW 82.44.041 was not repealed as of 2015. To the Court below, it baldly stated that "[t]he fact that RCW 81.104.160(1) refers to ***a statute that was repealed*** does not change the analysis." CP 398 (emphasis added). Now, it asserts that it was not repealed.[12] CPSRTA supports this with a legal argument misstating the holding in *Pierce County v. State*, 159 Wash. 2d 16 (2006) ("*Pierce County II*"). This legal argument has no bearing on the constitutional challenge to the drafting method the legislature employed in ESSB 5987 a decade later. Former RCW 82.44.041 is correctly described as repealed, while its continued use to calculate an old MVET is explained by *Rosell v. Dep't of Soc. & Health Servs.*, 33 Wash. App. 153 (1982).[13]

Most importantly, CPSRTA's discussion of former RCW 82.44.041 and *Pierce County II* has no bearing on the drafting choices the legislature made in ESSB 5987. Even if *Pierce County II* required the legislature to apply the valuation schedule of former RCW 82.44.041 to a new MVET, the Supreme Court did not excuse the legislature from complying with the drafting mandate of Art. II § 37, any more than it excused compliance with Art. II § 19's single subject rule. When the legislature sought to apply the valuation schedule of former RCW 82.44.041 to the new MVET, it had to

---

[12] *See, e.g.*, Resp. Br. at 2: "With respect to Sound Transit's MVET, the 1996 depreciation schedule was never repealed and remains valid and legally enforceable pursuant to the Supreme Court's decision in *Pierce Count v. State* . . . ."

[13] CPSRTA relied on *Rosell* in the court below, incorrectly describing the holding as permitting incorporation of repealed statutes.

draft a 2015 statute against the reality of the Revised Code of Washington as of that date. By 2015, the Code had changed: the legislature had earlier enacted RCW 82.44.035. The 2015 legislature had to draft any new statute in compliance with Art. II § 37, in light of RCW 82.44.035.

But *Pierce County II* did not require the legislature to apply the old schedule to a new MVET.[14] CPSRTA conceded to the court below that "Sound Transit does not argue that the additional 0.8% MVET had to be calculated using the same depreciation schedule as the previously authorized 0.3% MVET." CP 1427. This admission makes sense, because *Pierce County II* does not contain a single word about RCW 82.44.041. Neither does the predecessor opinion in the lawsuit, *Pierce County v. State*, 150 Wash. 2d 422 (2003). *Pierce County II* does not even require that CPSRTA continue levying MVET. Instead, the Supreme Court explicitly held that while the contract clause ***permitted*** the MVET as long as ST1 bonds remain outstanding, CPSRTA could elect to discontinue the MVET at any time. *Pierce County II*, 159 Wash. 2d at 51.

When it elected to continue the MVET, CPSRTA could continue to use the repealed RCW 82.44.041 schedule for calculating the tax because of

[14] CPSRTA argued to the court below that the legislature's decision to apply the valuation schedule of former RCW 82.44.041 to the new MVET was simply a policy preference, not mandatory. CP 393 ("the Legislature ***did not wish*** to have two statutory schemes and two depreciation schedules applied to the same vehicle each year in calculating the tax") (emphasis added). CP 1427.

the "precise rule of construction" discussed in *Rosell*: "Where a reference statute . . . incorporates the terms of one statute . . . into the provisions of another act . . . the two statutes coexist as separate distinct legislative enactments, each having its appointed sphere of action; and the alteration, change or repeal of the one does not operate upon or affect the other." *Rosell*, 33 Wash. App. at 159. Just as with the pattern of enactment and repeal in *Rosell*, RCW 81.104.160 had incorporated then-existing RCW 82.44.041 by reference, as permitted by Art. II § 37.[15] In *Pierce County II,* 159 Wash. 2d at 51, the Supreme Court held that CPSRTA could continue to rely on RCW 81.104.160. Because of the rule identified in *Rosell*, 33 Wash. App. at 159, it could also base MVET valuation on RCW 82.44.041 because that statute had been incorporated in RCW 81.104.160 for valuation of the ST1 MVET.

In other words, when the *Pierce County II* court allowed CPSRTA to elect to continue levying ST1's 0.3% MVET, the rule of *Rosell* also allowed it to use the repealed schedule which the legislature had incorporated by reference. That use does not change the fact that RCW 82.44.041 had been repealed, that it formed no part of the Revised Code of Washington in 2015, and that it could not be referred to in an authorized "complete act" under Art. II § 37.

---

[15] *See* Session Laws of 1998 Chapter 321 § 35 ("RCW 81.104.160 [is] reenacted and amended to read as follows: . . . regional transit authorities . . . may levy and collect an excise tax . . . **on the value, under Chapter 82.44 RCW**, of every motor vehicle . . .") (emphasis added).

3. A "Complete Act" Does Not Contain Contingent Legislation

Plaintiffs demonstrated that the Act fails as a complete act under Art. II § 37 for an independent reason. ESSB 5987 is contingent legislation. The Supreme Court has never classified contingent legislation as a permitted form of complete act under Art. II § 37. Opening Br. at 40-41. CPSRTA has failed to rebut this separate and dispositive argument. Instead, without explicitly identifying its extraordinary request, it asks this Court to create a fifth category of complete act under Art. II § 37, a category never endorsed, or even mentioned, in the Supreme Court's relevant jurisprudence.

Plaintiffs demonstrated that the Act is contingent legislation. To identify which schedule governs the MVET on a given date one must look not only to the text of the Act, but also to the continued existence of CPSRTA's earlier issued bonds. As CPSRTA itself admitted, "the Legislature could [not] know the year in which Sound Transit would retire its bonds and end the 0.3% MVET . . ." CP 393.

Just as with its argument regarding external sources, CPSRTA points to a legislative form allowed when Art. II § 37 is ***not*** implicated, and asks this Court to import it into the Art. II § 37 context. Plaintiffs have demonstrated that the court would create a fifth category of complete act under Art. II § 37 if it did. Opening Br. at 40-41. CPSRTA has no response.

B. The Second Prong: ESSB 5987 Makes Existing Statutes Erroneous

The second prong of the test asks "whether a straightforward determination of the scope of rights or duties under the existing statutes [would] be rendered erroneous by the new enactment." *El Centro*, 192 Wash. 2d at 129 (internal quotation marks omitted). It is obvious that RCW 82.44.035 has been rendered erroneous by delaying its application until the ST1 bonds are retired. On its face, it states that it applies to any locally imposed MVET. That plainly includes any newly authorized MVET after the date of its enactment.

Indeed, the 2006 legislature that enacted RCW 82.44.035 recognized that the act "establishe[d] a motor vehicle valuation scheme to be applied to local motor vehicle excise taxes authorized after the effective date of the bill." CP 1347. Because of the existing 0.3% MVET, as a result "[f]or King, Pierce and Snohomish County there would be the potential of future local tax bills calculated using two different valuation methods." CP 1347. This, of course, is entirely consistent with CPSRTA's arguments to the court below: the choice to use the repealed schedule was a policy decision, made because the 2015 legislature preferred not to follow the policy of the 2006 legislature. In making this entirely permissible choice, the legislature altered previous policy preferences that had been enacted into law. It amended that prior law, and had to draft its policy change consistent with Art. II § 37.

CPSRTA proffers three arguments in an attempt to satisfy the second prong. First, it argues that the Supreme Court has approved use of the word "notwithstanding" to satisfy the second prong of the test. Second, it claims that Art. II § 37 prohibits amending by reference only those statutes that independently create rights or duties. Third, it argues that the second prong of the test is satisfied if the Legislature is "aware of the legislation's impact on existing laws." Resp. Br. at 19. None of these three arguments have any support in the Supreme Court's cases.

1. Use Of 'Notwithstanding' Does Not Automatically Satisfy Art. II § 37

CPSRTA devotes five pages of its Response to the claim that "[t]he Supreme Court has repeatedly upheld the use of a notwithstanding clause as a valid means to comply with art. II, § 37." Resp. Br. at 19-23. Although the word "notwithstanding" has appeared in statutes that passed muster under Art. II § 37, the Supreme Court has never remarked on it, much less held that using the word satisfies or exempts a statute from the actual test: does the new act render existing statues erroneous?

For example, the companion cases *State v. Manussier*, 129 Wash. 2d 652 (1996) and *State v. Thorne*, 129 Wash. 2d 736 (1996) challenged the three strikes initiative on various grounds, including Art. II § 37. The court found that Initiative 593 was a complete act: "There is no need to go beyond the wording of the initiative to determine the penalty for engaging in certain

delineated recidivist conduct because the law states its applicability is independent of maximum sentences imposed by any other law." *Manussier*, 129 Wash. 2d at 664, 921 P.2d at 478. The Supreme Court never suggested that the word "notwithstanding" showed that the purpose and the effect of the law were clear, making it a complete act.

Similarly, in *Retired Public Employees Council of Washington v. Charles,* 148 Wash. 2d 602 (2003), the word "notwithstanding" never appears. The challenged statute contained the word "notwithstanding," but nothing in the court's opinion suggests that the use of that word affected the analysis or outcome. Here, as in the three cases cited by CPSRTA, the Court must apply the second prong of the test to evaluate whether existing law(s) have been rendered erroneous, regardless of which words or phrases are used in the challenged statute.

2. Art. II § 37 Applies To All Statutes, Not Only Those That Create Rights Or Duties.

CPSRTA claims a "second independent reason" for finding that ESSB 5987 satisfies Art. II § 37: according to CPSRTA, Art. II § 37 only prohibits amendment by reference of a statute that by itself creates rights or duties. They claim the legislature could amend RCW 82.44.035 without setting it forth at full length because "chapter 82.44 RCW alone does not grant 'rights or duties' that can be 'rendered erroneous' by adoption of . . . any statute otherwise granting MVET authority." Resp. Br. at 22.

This novel reading of Art. II § 37 has no support in any cases applying the two-pronged test. In fact, CPSRTA can only make this argument by failing to quote the second prong in full: the second prong asks whether "a straightforward determination of **the scope of** rights or duties under the existing **statutes** [would] be rendered erroneous by the new enactment." *El Centro*, 192 Wash. 2d at 129 (emphasis added, internal quotation marks omitted). If the **scope** of the rights and duties under the existing **statutes** (plural) are rendered erroneous by the new enactment, then Art. II § 37 requires that the legislature set forth the earlier statute at full length. ESSB 5987 replaced the depreciation schedule in RCW 82.44.035 with a different schedule found nowhere in the Revised Code of Washington, and thus changed the **scope** of the duty to pay an MVET. It rendered the existing statutes erroneous, but did not set forth the amended statute at full length.

3. Legislators' Knowledge Does Not Render RCW 82.44.035 Less Erroneous

In its motion for summary judgment to the trial court, CPSRTA claimed that it was unnecessary even to consider the second prong of the Art. II § 37 test: "Because RCW 81.104.160(1) is a complete law, it is exempt from article II, § 37 requirements." CP 399:8-13. To this Court, CPSRTA continues to ignore the independent significance of the second prong of the Art. II § 37 test, even though *El Centro* made clear that a complete act is unconstitutional under Art. II § 37 if it renders existing

statutes erroneous. CPSRTA argues: "Because RCW 81.104.160(1) is a complete act, the focus of the second prong of the art. II, § 37 test turns on whether 'the Legislature [was] aware of the legislation's impact on existing laws.'" Resp. Br. at 19. As noted above, this misstates the second prong. While the purpose of the first prong "is to make sure the effect of new legislation is clear," *El Centro,* 192 Wash. 2d at 129, the second prong asks "whether a straightforward determination of the scope of rights or duties under the existing statutes [would] be rendered erroneous by the new enactment." In other words, the second prong looks to the *effect* of the challenged statute on existing law, regardless of the *intent* or understanding of the legislators who voted for it.

In fact, the only Supreme Court case to consider an argument based on the enactors' knowledge of the act's effects decisively rejected this theory. In *Washington Citizens Action of Washington v. State*, 162 Wash. 2d 142 (2007), the state defended an initiative against an Art. II § 37 challenge. In that case, the text did not accurately set forth the existing law which it amended because of an intervening court decision. The state argued that even though the text may have violated the provision, the voters—who exercised the legislative power—all knew the effect of the new act because the voters' pamphlet laid it out in detail. The Supreme Court rejected this defense based on enactors' knowledge of the act's effect under the second prong of its test:

> [A]rticle II, section 37 does not simply require that notice of an amendatory initiative's impact on existing law be somehow available to voters. . . Nothing in the plain language of article II, section 37 or in our case law interpreting it suggests that information in the Voters' Pamphlet can cure the type of textual violation of article II, section 37 that occurred here, where the initiative's inaccuracy strikes at the substance of the amendment's impact.

Washington Citizens Action, 162 Wash. 2d at 155.

CPSRTA's exclusive focus on the legislature elides an important aspect of Art. II § 37 cases, which hold that the provision protects the public as well as the Legislature.[16] Art. II § 37 not only protects the people (as well as the legislature) from fraud or deception in the law-making process, but it also ensures that the existing code reflects existing law, protecting "the people" generally into the future. 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, scatted through different volumes or different portions of the same volume." *State ex rel. Gebhardt v. Superior Court for King Cty.*, 15 Wash. 2d 673, 685 (1942). "This provision of the constitution is mandatory and must be obeyed, so that statutes, upon

[16] *See, e.g.*, *Spokane Grain & Fuel Co. v. Lyttaker*, 59 Wash. 76, 82 (1910) ("The purpose of the constitutional provision was to protect the members of the Legislature ***and the public*** against fraud and deception"). *Washington Educ. Ass'n v. State*, 93 Wash. 2d 37, 39 (1980) ("***a citizen*** or legislator who is interested in an existing statute should be alerted when that statute is amended"); *Charles*, 148 Wash. 2d at 631 ("Section 37 is designed to protect the legislature ***and public*** from fraud and deception") (emphasis added to all quotes).

amendment, will express a complete statement of the law as amended." *Rourke*, 41 Wash. 2d at 313 (1952).

No evidence of legislative "awareness," however conclusive,[17] can satisfy Art. II § 37, which mandates a *procedure* the legislature must follow when it amends existing law. The legislature may not do so by mere reference to the title of the law to be amended, but *must* set forth the amendment or revision at full length. Because ESSB 5987 did not follow this mandatory constitutional process, the resulting law is unconstitutional.

ESSB 5987 fails the second prong of the Supreme Court's test, as Plaintiffs showed. Just as with the short statute at issue in *El Centro*, these few lines of a larger statute, serving a broader purpose, rendered erroneous the existing statute governing vehicle valuation for MVET levies. No person can rely on RCW 82.44.035 as the basis for calculating tax liability, one of the most significant rights and duties of any citizen. Because RCW 82.44.035 was rendered erroneous by ESSB 5987, the constitution required that the amendment be set forth "at full length." It was not. RCW 82.44.035 is simply wrong in light of ESSB 5987, which did not set it out in full.

[17] No trial court could resolve an evidentiary dispute questioning whether the legislature—not to mention the public—possessed sufficient "awareness" to satisfy the test proposed by CPSRTA. That is on reason why the determination of whether a statute complies with Art. II § 37 is based on the "words of the statute alone." *El Centro*, 192 Wash. 2d at 129.

IV. Conclusion

Art. II § 37 protects the integrity of the legislative process. It ensures that when legislators (and citizens who participate in the law-making process) consider whether to support or oppose pending legislation, the legislative text fully discloses the effect of the proposed measure on existing law. 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*. It amends RCW 82.44.035 merely by referring to "Chapter 82.44 RCW" 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 rendering it erroneous. Because ESSB 5987 was not drafted in a form compliant with Art. II § 37, this court should reverse the judgment below, and remand the case for a determination of Plaintiffs' remedies.

Submitted this 20th day of March 2019.

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

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 20th day of March 2019 by email as per the stipulation for electronic service to:

Paul Lawrence paul.lawrence@pacificalawgroup.com Matthew Segal matthew.segal@pacificalawgroup.com Jessica A. Skelton jessica.skelton@pacificalawgroup.com Sydney Henderson sydney.henderson@pacificalawgroup.com Pacifica Law Group 1191 Second Avenue, Suite 2000 Seattle, WA 98101 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	Dionne Padilla-Huddleston dionnep@atg.wa.gov Jennifer Bancroft jenniferp4@atg.wa.gov Attorney General's Office Licensing & Administrative Law Division 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 Attorneys for Defendant State of Washington

Signed on March 20, 2019 at Spokane, Washington.

Melanie Evans

ALBRECHT LAW PLLC

March 20, 2019 - 3:02 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52664-6
Appellate Court Case Title:	Taylor Black et al, Appellants v. Central Puget Sound Regional Transit Authority, Respondent
Superior Court Case Number:	18-2-08733-9

The following documents have been uploaded:

- 526646_Briefs_20190320145824D2447034_9137.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was Black v CPSRTA Reply Brief Div II.pdf

A copy of the uploaded files will be sent to:

- DionneP@atg.wa.gov
- Jessica.skelton@pacificalawgroup.com
- dawn.taylor@pacificalawgroup.com
- desmond.brown@soundtransit.org
- jenniferp4@atg.wa.gov
- joel@ard.law
- lalseaef@atg.wa.gov
- matt@albrechtlawfirm.com
- mattelyn.tharpe@soundtransit.org
- matthew.segal@pacificalawgroup.com
- mevans@trialappeallaw.com
- natalie.moore@soundtransit.org
- paul.lawrence@pacificalawgroup.com
- sydney.henderson@pacificalawgroup.com

Comments:

Sender Name: Melanie Evans - Email: melanie@albrechtlawfirm.com
Filing on Behalf of: David Knox Dewolf - Email: david@albrechtlawfirm.com (Alternate Email:)

Address:
421 W. Riverside Ave
Suite 614
Spokane, WA, 99201
Phone: (509) 495-1246

Note: The Filing Id is 20190320145824D2447034