

No. 97195-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TAYLOR BLACK, et al.,
Appellants,

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,
STATE OF WASHINGTON
Respondents.

**Brief of We the Governed, LLC as Amicus Curiae in Support of
Appellants**

JACKSON WILDER MAYNARD, JR.
PRO BONO COUNSEL
WSBA No. 43481
111 21ST AVE SW
OLYMPIA, WA 98501

Counsel for Amicus Curiae

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Identity and Interest of Amicus

We the Governed, LLC is an independent, nonpartisan organization dedicated to exposing corruption in government, encouraging transparency in all levels of government, and encourages journalistic investigation of all aspects of government finances, taxation, and administrative law. Glen Morgan is the principal and founder of We the Governed, and has been working on similar issues of public policy and good government for nine years.

Wash. Const. Art. II § 37 demands transparency in the legislative process. By requiring that amendments to existing law be spelled out, the constitution ensures fully informed, robust public debate on important new policies such as transportation policy and taxation in support of those policies. Art. II § 37 also ensures that the law as stated in the Revised Code of Washington is a reliable guide to conduct, and that citizens can find the tax laws that govern them, rather than being subject to exceptions and qualifications in a different part of the Code, or that are not codified at all. Amicus submits this brief to ensure that the constitution's mandate of complete clarity on alterations to policy, especially tax policy, during the legislative process continue to be enforced.

Introduction

Art. II § 37 embodies in our state’s progressive Constitution a procedural constraint when the legislature amends laws. It imposes no limitation on policy choices, but dictates the drafting mode for amending existing law. Like the Constitution’s single subject and subject-in-title rules, Art. II § 37 does not exclude any topic from legislative attention, nor prevent any change in existing policy. Art. II § 37 requires proposed legislation to disclose its future effects. Then, post-passage, the Revised Code of Washington correctly reflects the current state of the law.

ESSB 5987 § 319(1) (the “Act”) violates this provision because it directly and unequivocally amends pre-existing RCW 82.44.035. The Act established a motor vehicle excise tax, an area of policy that was already exhaustively addressed in existing statutes, including RCW 82.44.035. That 2006 statute established a valuation schedule for this and any other new MVET. The Act instead allowed a different valuation schedule to govern the new tax, by incorporating another schedule by reference. The Legislature attempted to suspend RCW 82.44.035, by incorporating a contradictory schedule and using a trigger to switch later in time to the statutory schedule.

The Act’s drafting forms—such as use of external sources, referring to existing law, and using contingencies—are all permissible in a statute

that complies with all constitutional provisions including Art. II § 37. The policy choice as to valuation schedule was fully within the legislature’s plenary power. However, by temporarily displacing the existing statute on the subject, the legislature thereby amended it, and rendered erroneous that existing law: RCW 82.44.035. Because the legislature did not restate the amended statute in full, the Code does not contain the valuation schedule governing taxpayer liability under the Act, while the existing schedule in RCW is rendered erroneous. This is the very error that Art. II § 37 prevents.

Argument

Central Puget Sound Regional Transit Authority (“CPSRTA”) defends the challenged Act with three consecutive errors:

1. The Act adopts an outside text by reference, and is therefore an Art. II § 37 reference statute.
2. Because the Act is a reference statute, it is therefore a complete act, and is exempt from Art. II § 37.
3. Because the Act is exempt from Art. II § 37, the reviewing court does not question whether or not the Act amends **any** existing statute.

CPSRTA acknowledges that the Act actually amended RCW 82.44.035, but claims that direct and unmistakable amendment is exempt from judicial oversight under Art. II § 37. CPSRTA misapplies the first part of this Court’s Art. II § 37 test, then asserts—against all authority—that the Court should discard the second part.

If the Court adopts the blanket exemption rules invented by CPSRTA, the Legislature and citizen initiative drafters will have carte blanche to amend any existing statute without showing the text of the amendment through the simplest of work-arounds: amend an existing statute by referring to an amendatory text previously published elsewhere. Next, make the change contingent on an external trigger. Now, the existing RCW appears unchanged and facially applicable, but actually does not govern conduct in Washington. The Constitution and this Court have continually prevented such hidden statutes. The Court has never excluded any new statutes from review or compliance with Art. II § 37, and should not offer the legislature a roadmap to avoiding compliance.

I. The First Error: The Claim That A Statute Adopting Any Text By Reference Is An Art. II § 37 Reference Statute.

CPSRTA's defense of the act begins with this error:

The Act, which adopts an outside text by reference, is therefore an Art. II § 37 reference statute.

The Act is not a reference statute, as this Court uses that term in Art. II § 37 cases. Reference statutes refer to *existing law*, and thereby adopt, incorporate, and make *existing law* applicable to a new law. Doing so does not amend the *existing statute* that it adopts. Here, in challenged part, the Act adopts and makes immediately applicable something completely

different than existing law: a long-repealed statute. The Court's reference statute rule, expressed in *State v. Rasmussen*, 14 Wash. 2d 397 (1942) and other cases, shows that the legislature did not thereby "amend" the adopted text. Of course, while in the reference statute cases the rule confirms the Legislature's ability to use the drafting form, in this case the conclusion has no significance. After all, it does not matter whether or not the Legislature "amended" a repealed statute. The constitutional provision only governs amendment of existing statutes, not amendment of any other text the Legislature might adopt by reference.

This case, therefore, raises a different question than the question raised in all the Court's "reference statute" cases. Those cases asked: by virtue of adopting and making an existing law presently applicable to a new law, does the new law amend the existing law? This case *does not* ask that question. It asks instead: by virtue of adopting and making the old (and repealed) law presently applicable to a new law, does the new amend something *other than* what it adopted, namely, RCW 82.44.035?

A. The Correct Rule: Incorporating A Statute By Reference Does Not Amend That Statute.

This Court's "reference statute" rule applies a common-sense description of a normal pattern used to draft many kinds of legal documents: If a drafter incorporates an earlier text by reference, the

second text reads as though the first text were re-typed into it. This does not change or alter the meaning of the earlier text. The second text may apply the first text in a new way, but that does not constitute editing, altering, or amending the first text. This rule applies in myriad contexts.¹ This rule would only take on Constitutional significance if the Court treated legislation *differently* than every other legal document. Instead, it has been applied to legislation by this Court in the Art. II § 37 context in exactly the same manner. The Court has repeatedly held that incorporating an existing statute does not normally amend the pre-existing statute. *See, e.g., Pacific First Federal Sav. & Loan Ass'n v. Pierce County*, 27 Wash. 2d 347, 355 (1947) (“Courts are unanimous concerning the primary legal effect of the statutory reference whenever an act of the legislature brings into itself, by reference, the terms of another act. The precepts and terms to which reference is made are to be considered and treated as if they were

¹ *See, e.g., Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 7 P.3d 861, 865, 102 Wash. App. 488, 494 (Wash. App. Div. 2, 2000) (“[i]ncorporation by reference allows the parties to ‘incorporate contractual terms by reference to a separate ... agreement to which they are not parties, and including a separate document which is unsigned’”) (quoting 11 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 30:25, at 233-34); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash. 2d 781, 801 (2009) (“If the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract”); *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wash. 2d 619, 634 (1993) (WAC expressly allows environmental documents to be incorporated by reference, which “means the inclusion of all or part of any existing document in an agency’s environmental documentation by reference”); RCW 11.12.255 (“A will may incorporate by reference any writing in existence when the will is executed if the will itself manifests the testator’s intent to incorporate the writing and describes the writing sufficiently to permit its identification”).

incorporated into, and made a part of the referring act, just as completely as if they had been explicitly written therein”).

To hold otherwise would create a unique rule for statutory drafting that applies in no other legal context, with the result of littering the statute books with pointless reiterations of statutory text. This is one of the reasons for the Court’s reference statute jurisprudence. “Reference statutes are of frequent use to avoid encumbering the statute books by unnecessary repetition, and they have frequently been recognized as an approved method of legislation, in the absence of constitutional restrictions.” *State ex rel. Washington Toll Bridge Authority v. Yelle*, 32 Wash. 2d 13, 29 (1948) (internal citation omitted).

For Art. II § 37, the question of whether incorporation by reference also amends the adopted text is only relevant when an existing statute is adopted. After all, the Constitution only constrains the legislature’s drafting style for statutory amendment, and only requires restating the amended text in full when a *statute* is amended. And, equally obviously, incorporating anything by reference necessarily means that the referred-to text is *not* restated in full. Thus, the Art. II § 37 “reference statute” rule simply means that the Legislature may employ the common drafting style of incorporation by reference, even as to existing statutes, without concern that the later in time incorporating act is thereby rendered unconstitutional

by the mere act of incorporation. Importantly, and as discussed in detail below, the rule says nothing about whether the complete new act, read with its incorporated text, thereby amends another, non-incorporated statute.

B. Art. II § 37 Reference Statute Cases Apply To Acts Which Incorporated Existing, Active Law.

In “reference statute” cases under Art. II § 37, the Court reviews a claim that it should void a new law on the grounds that the new law had amended an existing law *by virtue of incorporating it by reference* and applying it to new subject matter. In light of the Court’s routine application of the rule of incorporation to legislation just as in other contexts, the results are unsurprising: in nearly all cases, if the Legislature incorporates an existing, active law into a new enactment, it does not automatically void the new act under Art. II § 37 because it “amends” the adopted statute.² In short, the Court’s “reference statute” jurisprudence, as

² See, e.g., *Washington Educ. Ass’n v. State*, 97 Wash. 2d 899 (1982) (plaintiffs alleged that 1981 SHB 782 amended, *i.a.*, RCW 28B.50.863 that it incorporated by reference); *Steele v. State ex rel. Gorton*, 85 Wash. 2d 585, 588 (1975) (statute incorporating with the language “This chapter shall be considered in conjunction with chapters 9.04 and 19.86 RCW, as now or hereafter amended” did not thereby amend Chapter 19.86 RCW); *Rourke v. Department of Labor and Industries*, 41 Wash. 2d 310, 311–12 (1952) (statute incorporating “all the provisions of law relating to contributions and to the compensation and medical and surgical care of injured workmen” thereby amended those statutes); *Gruen v. State Tax Commission*, 35 Wash. 2d 1 (1949) (act incorporating and reallocating revenue from “Title XII (sections 82 to 95, inclusive), chapter 180, Laws of 1935” did not thereby amend that law); *Yelle*, 32 Wash. 2d 13 (addressing claim that adding a section to an existing law constituted amendment of that law requiring full restatement); *Rasmussen*, 14 Wash. 2d 397 (arguing that an act transferring duties of the board of chiropractic examiners to the department of licensing amended the DOL enacting

it has noted since as early as 1911, holds that this “common and approved method of legislation,” *State v. Tausick*, 64 Wash. 69, 82 (1911), was not forbidden by Art. II § 37.

C. Art. II § 37 Does Not Question Whether A Non-Statutory Text Is Amended, Whether By Incorporation Or Any Other Means.

Bridging its first and second fundamental errors, CPSRTA claims constitutional significance—and in fact, a constitutional exemption—because of the Act’s incorporation of a text other than an existing statute. CPSRTA describes the repealed, 1996 valuation schedule as an “external source” that the Legislature may incorporate just like it might incorporate a widely published interest rate or building code. Though true, the statement is irrelevant in any Art. II § 37 context, including this case. Art. II § 37 only limits the method by which the Legislature amends an existing statute. Thus, as detailed above, Art. II § 37 reference statute cases only examine whether an act that incorporates an existing statute was void *ab initio* because it amended the older statute by incorporating it instead of restating it. The Court’s answer: Probably not. The Legislature may use this common legal drafting form. The constitution does not mandate mindless retyping.

statute); *State v. Tausick*, 64 Wash. 69 (1911) (act applying “[a]ll existing laws governing cities of the second class” to newly organized cities did not thereby amend laws governing cities of the second class).

Here, by focusing on an adopted text that is not an existing statute, CPSRTA attempts to distract the Court from the Act's amendatory effect by asking a question with no constitutional significance: Did adoption amend a repealed statute? "Amending" a repealed statute is legally meaningless, just as the Constitution does not care if the legislature 'amends' the consumer price index by adopting it, *see* RCW 85.24.080, or 'amends' the international building code by adopting it in RCW 19.27.031. Indeed, the authors of the International Wildland Urban Interface Code might think that the Legislature did amend it by adopting only portions of that code. *See* RCW 19.27.031(4) and RCW 19.27.560. True or not, that has no constitutional significance, and this Court would not entertain a challenge to application of any adopted portion of that adopted code on the grounds that partial adoption meant amendment of the whole. Amending anything other than an existing, active Washington statute is simply irrelevant to the state constitutional constraint on statutory drafting. Thus, CPSRTA's invocation of "reference statutes" to cover the adoption of a non-statute asks this Court to answer a question no one has ever asked: did the legislature amend a text that is not a current Washington law?

II. Error Two: The Scope Of Non-Amendment By References.

As shown, in relevant part the Act is not a “reference statute” for purposes of Art. II § 37. Even if it were, however, CPSRTA proceeds to a second fundamental error: Because the Act is a reference statute, it is therefore a complete act, and is exempt from Art. II § 37.

The Court has never held that whenever the legislature incorporates any text by reference into a new law, it thereby exempts the act entirely from Art. II § 37 review. In fact, incorporating another text by reference, especially a non-statutory text, creates a heightened risk of amending an existing statute on the same topic, as this Act did. For that reason, the Court has never read the Constitutional constraint as including the blanket exemption suggested by CPSRTA. Doing so would invent a loophole big enough to amend any part of the Revised Code of Washington without constitutional compliance.

A. Statutes Incorporating Other Statutes Can Violate Art. II § 37.

CPSRTA argues for a blanket waiver from Art. II § 37 merely because of the incorporation of another text into the Act. However, it has no support in Art. II § 37 or this Court’s cases applying that provision. Quite the opposite: This Court has often held that statutes which incorporate other statutes may nonetheless violate Art. II § 37. In *Flanders v. Morris*, 88 Wash. 2d 183 (1977), the challenged act explicitly

incorporated an existing statute.³ Nonetheless, the Court concluded that the new act in fact amended the very statute that it incorporated. *Id.* at 190. Similarly, the Court invalidated the challenged statute in *Weyerhaeuser Co. v. King County*, 91 Wash. 2d 721 (1979), despite that the act incorporated by reference RCW 76.09.060 and Chapter 90.58 RCW. *See* Laws of 1975, ch. 200, Section 11. In *Yelle*, 32 Wash. 2d 545 (1959), the challenged act incorporated another enactment, *id.* at 548, but nonetheless resulted in amending a third statute, one that was not incorporated into the act. In *Rourke*, 41 Wash. 2d 310 (1952), the challenged act sought to apply to a new category of workers “all provisions of law relating to contributions to and the compensation and medical and surgical care of injured workmen . . .” Laws of 1951, ch. 246. The Court concluded that despite this language, the act amended the referred-to, pre-existing Workmen’s Compensation Act. *Id.* at 313.

Thus, this Court has always considered that even an act that incorporates an existing statute may nonetheless amend a different statute.

³ “General assistance for unemployed, employable persons may be provided in accordance with eligibility requirements and standards established by the department to an applicant who: (a) Meets the eligibility requirements of RCW 74.08.025 . . .” House Bill 1624 § 17 (Laws of 1975, 2nd Ex.Sess., ch. 133, p. 472).

No “reference statute” case has ever simply exempted from review the question of whether something other than the adopted text is amended.⁴

B. Acts Which Refer To And Adopt Text Other Than Existing Law Must Also Comply With Art. II § 37.

As noted above, it is an unremarkable truth that the Legislature may adopt external, non-statutory sources into laws. CPSRTA attempts to stretch this to cover re-enacting repealed law without restating it, calling it a “reference statute,” and shutting off any question of whether the ensuing Act amended something else. But the question always remains: did the use of an external source of information amend another statute? If so, the amended statute must be restated in full. This Act violates Art. II § 37 because the use of an external reference amends existing law on the same subject, RCW 82.44.035.

Thus, a new law that calls for use of the CPI-U, or Consumer Price Index for All Urban Consumers,⁵ might amend RCW 85.24.080, which calls for use of CPI-W, or CPI “for wage earners and clerical workers.” *Id.* A new law that limits the rate of increase of judicial salaries to CPI might amend RCW 2.04.092, which invests salary discretion in the Washington

⁴ The challenge presented to the Court in most “reference statute” cases is that the new act amended the incorporated, referred to statute, not a different statute. Where a new act incorporates an old act but thereby amends a third act, the Court overturns it, but usually does not call the voided act a “reference statute,” because the term is most often used as a convenient shorthand for that specific type of Art. II § 37 challenge.

⁵ See, e.g., <https://www.bls.gov/opub/hom/pdf/cpihom7.pdf> (detailing difference between CPI-U and CPI-W) (last accessed July 23, 2019).

citizens' commission on salaries for elected officials. In neither case is the Legislature forbidden to adopt that external source, but in both instances, if it thereby amends existing law it must set forth the amended law in full. Particularly by adopting a repealed or prior version of an existing statute, an act almost certainly amends the current, in force version. If a repealed law had the exact text and exact policy of current law, why incorporate anything other than current law? But by purporting to re-enforce repealed law, whether by reference or any other way, the Legislature changes the meaning of current law.

III. Error Three: Omitting The Second Prong Of Review.

CPSRTA's third error asks the Court to terminate review of the Act upon finding any reference in it, eliminating the second prong of the Court's Art. II § 37 test:

Because the Act is exempt from Art. II § 37, the reviewing court does not question whether or not the Act amends *any* existing statute.

As shown above, the Court has invalidated even true Art. II § 37 reference statutes for amending the act they internally adopted, and for amending other, non-adopted acts. The Court has not always explicitly stated in doing so that it reaches the second step of its Art. II § 37 test. But it has recently reaffirmed that the second step in the Art. II § 37 test is mandatory, to confirm whether even a "complete act" (including a

reference statute) amends another act. It is readily apparent that an act might adopt an outside text by reference and thereby amend a non-adopted, different statute. This is true whether it adopts an existing act, or a non-statutory outside source, but especially where it adopts and incorporates a repealed statute.

A. The Second Prong Of The Test Ensures Compliance With Art. II § 37

In *El Centro de la Raza v. State*, 192 Wash. 2d 103 (2018) the Court re-affirmed that even a “complete act” can amend another statute. To determine whether it did so, after concluding that it is a complete act, the Court emphasized that the statute must be reviewed for amendment under the second prong of the Art. II § 37 test. The Court 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*, 192 Wash. 2d at 129 (internal citation and alteration omitted).

The Court reviewed the section challenged under Art. II § 37 in *El Centro de la Raza* and found that it was complete.⁶ When it moved on to the mandatory second prong, it found that the section amended an earlier

⁶ Notably, and rebutting CPSRTA’s first errors, the Court did not review the challenged section as a “reference statute,” because the challengers did not assert that it amended the referred-to RCW 41.56.020. Because it amended a different statute, one not mentioned within the text of the challenged act, the Court’s reference statute cases were simply irrelevant in *El Centro de la Raza*, as they are here.

existing statute by altering the authority of PERC to set bargaining units. Because that amended statute was not set forth in full, the new act rendered the existing code erroneous, and the Court struck it down.

B. Applying The Second Prong Shows The Actual Amendment Of RCW 82.44.035 Resulting From This Act.

The second step of the Art. II § 37 test shows that the Act amends RCW 82.44.035. When the Act was drafted, RCW 82.44.035 said that it applied to any new locally imposed MVET. Tax liability, according to then-existing code, should be determined by multiplying vehicle value times the tax rate times the appropriate line in RCW 82.44.035's schedule. CPSRTA does not use RCW 82.44.035 for its new MVET. The existing statute does not apply. But it said that it would, and still says that it does, because it was amended but not restated as required. That amendment violates Art. II § 37.

Flanders v. Morris, 88 Wash. 2d 183 (1977) is practically identical to this case. In that case, a new law incorporated the standards for public assistance by reference, but also temporarily changed some of them. The Court did not spot the incorporation by reference and therefore end its review. It instead paid attention to the change in the effect of the existing law that resulted from the new law. Because the new law changed whether

the plaintiff could get benefits compared to existing law, the Court found that it amended, and that Art. II § 37 applied:

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). Just as in *Flanders*, here the Act suspends a generally applicable governing statute, RCW 82.44.035. Just as in *Flanders*, the existing law will “never reflect this change.” Just as in *Flanders*, a person who wants to understand legal obligations must scour uncodified session laws to find the schedule that applies. Worse yet, the person must try to determine where in years of old session laws to find the specific version of the schedule that was in force on January 1, 1996, and cannot readily know when that particular schedule was enacted. Notably, even the record in this case does not ever identify the valuation schedule that was in force on January 1, 1996.

C. Art. II § 37 Applies to All Statutes, Not Just Those That “Grant Rights or Duties”

CPSRTA also seeks a blanket exemption from Art. II § 37 for the Act because RCW 82.44.035 did not “grant ‘rights or duties’ that can be ‘rendered erroneous’ by the adoption of RCW 81.104.160(1) . . .”

Respondent's Brief at 22. In this, CPSRTA argues that Art. II § 37 simply does not apply to a statute that affects the rate of taxation, but did not by itself impose a tax. This further plea for a new blanket exemption has no support in the Court's jurisprudence or the constitution.

Art. II § 37 calls for restatement of any amended statute, without limitation. This Court has never sought to put itself and the state judiciary in the position of determining first whether a new statute is important enough to be subject to the disclosure rule, and only then test for undisclosed amendment. It should decline CPSRTA's request for an exemption.

In any event, the "right and duty" of a taxpayer is not merely to be taxed, but to be taxed at a particular rate and, with respect to excise taxes, like real property taxes, on a specific property value. The public is acutely aware of the importance of changing valuation schedules. Indeed, the public debate about MVET valuation schedules has continued in full force in this state for as long as the MVET has existed. The details of that schedule, of which RCW 82.44.035 represents the most recent Legislative statement, has been perhaps the most hotly contested feature of the MVET taxation system. Protecting the integrity of the method by which property is valued cannot be separated from the authority to collect the tax itself. CPSRTA's argument limiting the protections of Art. II § 37, and seeking

to allow alterations of the all-important valuation schedule to be done without public disclosure, must be decisively rejected.

IV. This Act Is The Antithesis Of Proper Disclosure.

This Act created a tax schedule that no taxpayer can find in the Revised Code of Washington, and resulted in a Revised Code of Washington that expressly governs the tax but is not ignored. These are in defiance of the Legislative process and RCW result of proper disclosure of amendments, in exactly the manner that Art. II § 37 prevents. Transit in the Puget Sound region—what it should look like and how it should be funded—has been a topic of vigorous debate and changing policy for over 30 years. It will no doubt be a topic of vigorous debate and changing policy for the next 30 years as our region grows and changes.

The only way for people to have confidence in the debates, and for meaningful public participation and agreement in the outcome of those debates even for those who disagree with the ensuing policy, is to ensure that the debates and outcomes are done in the open, for all to see. Art. II § 37 is a vital part of the constitutional structure that protects fully informed debate and ensures public knowledge of and confidence in our laws. The Legislature's blatant violation of the requirement that it show how it amends existing law has resulted in the very opposite of proper disclosure, with a tax code hidden from public view, and an expired,

superseded, discarded policy choice continued in use without any publication of that tax schedule. The Court must overturn the Act and return to the Legislature the task of making its transportation policy elections in the fully open, transparent method required by the Constitution.

Conclusion

The Court should reverse the Superior Court's judgment and enter judgment in favor of Appellants.

Respectfully submitted this 26th day of July, 2019,



JACKSON WILDER MAYNARD, JR.
PRO BONO COUNSEL
WSBA No. 43481
111 21ST AVE SW
OLYMPIA, WA 98501
(360) 352-7800
jacksonm@biaw.com

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<p>Joel B. Ard Joel@Ard.law Matthew C. Albrecht matt@albrechtlawfirm.com David K. DeWolf <u>david@albrechtlawfirm.com</u> Attorneys for Taylor Black et al.</p> <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 & Administrative Law Division 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 Attorneys for Defendant State of Washington</p>
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July 26, 2019

/s/Jackson Maynard, Jr.

