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No. 97195-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TAYLOR BLACK, ANNE BLACK, JERRY KING, RENE KING,
ROGER STRUTHERS, MARY LOUISE STRUTHERS, and SID
MAIETTO, Individually and on Behalf of a Class of Persons Similarly
Situated,
Appellants,

v.

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

**RESPONDENT CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY'S RESPONSE TO AMICUS BRIEFS**

PACIFICA LAW GROUP LLP

Paul J. Lawrence, WSBA #13557
Matthew J. Segal, WSBA #29797
Jessica A. Skelton, WSBA #36748

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY

Desmond L. Brown, WSBA #16232
Natalie A. Moore, WSBA #45333
Mattelyn L. Tharpe, WSBA #53743

Attorneys for Respondent Central Puget Sound Regional Transit Authority

PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
(206) 245-1700

SOUND TRANSIT
401 S. Jackson Street
Seattle, WA 98104
(206) 398-5017

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT 3

 A. RCW 81.104.160(1) does not violate art. II, § 37..... 3

 1. RCW 81.104.160(1) is a complete act that satisfies the first prong of art. II, § 37..... 3

 2. The notwithstanding clause is a valid means to comply with art. II, § 37..... 9

 B. Actual Legislative history is relevant to determine compliance with art. II, § 37. 11

 1. The enrolled bill rule has no bearing on this case. 11

 2. The Senators’ personal “findings and conclusions” are irrelevant. 14

III. CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Washington Cases

<i>Amalgamated Transit v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000).....	5, 9, 11
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	13
<i>Citizens for Responsible Wildlife Mgmt. v. State</i> , 149 Wn.2d 622, 71 P.3d 644 (2003).....	3, 7
<i>Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.</i> , 159 Wn.2d 292, 149 P.3d 666 (2006).....	12
<i>Dunbar v. State Bd. of Equalization</i> , 140 Wash. 433, 249 P. 996 (1926).....	13
<i>El Centro De La Raza v. State</i> , 192 Wn.2d 103, 428 P.3d 1143 (2018).....	3, 7, 9
<i>Eyman v. Wyman</i> , 191 Wn.2d 581, 424 P.3d 1183 (2018).....	11
<i>Flanders v. Morris</i> , 88 Wn.2d 183, 558 P.2d 769 (1977).....	10
<i>Gruen v. State Tax Comm'n</i> , 35 Wn.2d 1, 211 P.2d 651 (1949).....	6
<i>Holzman v. City of Spokane</i> , 91 Wash. 418, 157 P. 1086 (1916).....	7
<i>In re Restraint of Lord</i> , 123 Wn.2d 296, 868 P.2d 835 (1994).....	6
<i>Pierce Cty.v. State</i> , 159 Wn.2d 16, 148 P.3d 1002 (2006).....	8
<i>Rel. Hodde v. Superior Court</i> , 40 Wn.2d 502, 244 P.2d 668 (1952).....	13

<i>Retired Pub. Emp. Council of Wash. v. Charles</i> , 148 Wn.2d 602, 62 P.3d 470 (2003).....	7, 9
<i>Snow’s Mobile Homes, Inc. v. Morgan</i> , 80 Wn.2d 283, 494 P.2d 216 (1972).....	14
<i>State Toll Bridge Auth. v. Yelle</i> , 32 Wn.2d 13, 200 P.2d 467 (1948).....	6
<i>State v. Evans</i> , 177 Wn.2d 186, 298 P.3d 724 (2013).....	12
<i>State v. Jones</i> , 6 Wash. 452, 34 P. 201 (1893).....	13
<i>State v. Manussier</i> , 129 Wn.2d 652, 921 P.2d 473 (1996).....	9
<i>State v. Thorne</i> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	7, 9
<i>Steele v. State ex rel. Gorton</i> , 85 Wn.2d 585, 537 P.2d 782 (1975).....	5, 6
<i>Washington Educ. Ass’n v. State</i> , 97 Wn.2d 899, 652 P.2d 1347 (1982)	5
<i>Washington State Farm Bureau Fed’n v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007).....	13
<i>Yelle v. Bishop</i> , 55 Wn.2d 286, 347 P.2d 1081 (1959).....	11

Federal Cases

<i>Blakely v. Wash.</i> , 542 U.S. 296, 1245 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	7
<i>Cherry v. Steiner</i> , 716 F.2d 687 (9th Cir. 1983)	12

Washington Constitutional Provisions

Const. art. II, § 37 passim

Washington Statutes

RCW 10.95.020 6

RCW 19.31 5

RCW 81.104.160(1)..... passim

RCW 82.44 passim

Washington Rules

RAP 10.6(b) 4

I. INTRODUCTION

RCW 81.104.160(1) is a complete act that complies fully with the requirements of art. II, § 37 of the Washington Constitution. The Act sets forth all the information necessary for regional transit authorities to authorize a new motor vehicle excise tax (“MVET”): the purpose of the tax, the voter approval process, the maximum rate, and the specific motor vehicle depreciation schedules to be used at different times. The Act also clearly explains how it relates to existing law (chapter 82.44 RCW). And in accord with this Court’s decisions, the explanation is provided through the use of a “notwithstanding” clause, which the Court has approved as an appropriate tool to describe a new act’s impact on an existing act. Because RCW 81.104.160(1) is a complete act and clearly explains its relationship to other effected statutes, it satisfies the two-prong test established by this Court to determine compliance with art. II, § 37.

Amici We the Governed, LLC (“WTG”) and Washington State Senators Michael Padden and Steve O’Ban (“Senators”) attempt to detract from this straight-forward analysis by mischaracterizing and misstating Respondent Central Puget Sound Regional Transit Authority’s (“Sound Transit”) arguments and the applicable legal standards. WTG points to three “consecutive errors,” in Sound Transit’s position. But the alleged

errors are actually mischaracterizations of Sound Transit's position and reflect WTG's misunderstanding of the applicable law.

Senators, who personally oppose Sound Transit's voter-approved project to complete the light rail system from Everett to South Tacoma, expand the commuter rail to DuPont, and build a bus rapid transit system ("ST3"), improperly attempt to carry that personal disagreement from the political arena into the legal one. They argue, incorrectly, that the enrolled bill rule prevents the Court from considering legislative history in this matter. The enrolled bill rule only forbids inquiry into the legislative procedures preceding the enactment of a statute; it does not prevent the Court from considering legislative history when determining legislative intent in interpreting a statute or in assessing the constitutionality of a statute. Then, Senators submit irrelevant personal opinions and inadmissible hearsay under the guise of "committee findings" regarding the constitutionality of the Act for the Court's consideration.

Accordingly, Amici's arguments do not undermine the conclusion that RCW 81.104.160(1) complies with art. II, § 37.

II. ARGUMENT

A. RCW 81.104.160(1) does not violate art. II, § 37.

1. RCW 81.104.160(1) is a complete act that satisfies the first prong of art. II, § 37.

RCW 81.104.160(1) is a complete act that sets forth all the information necessary to be fully informed about the rights and duties created or affected by the statute. *See El Centro De La Raza v. State*, 192 Wn.2d 103, 128-29, 428 P.3d 1143 (2018). The statute authorizes regional transit to impose a MVET; provides the process for local voters to approve the MVET, the maximum tax rate, and the purpose for which the MVET can be used; and identifies the depreciation schedules that list the vehicle value on which the MVET calculation relies. *See* RCW 81.104.160(1); *see also* Sound Transit Respondent’s Brief (“ST Brief”) at 17-19. The statute adopts two depreciation schedules: the 1996 depreciation schedule applies until Sound Transit pays off bonds to which a MVET was pledged before July 15, 2015, after which the MVET depreciation schedule in effect when the new MVET was authorized applies.¹ All of the information needed to impose the tax can be determined solely by reading RCW 81.104.160(1). *See El Centro*, 192 Wn.2d at 129 (citing *Citizens for*

¹ The depreciation schedule adopted in 2016 was the schedule in effect at the time of voter approval and will apply after the bonds are paid off.

Responsible Wildlife Mgmt. v. State, 149 Wn.2d 622, 642, 71 P.3d 644 (2003)).

WTG does not dispute that this information is contained in RCW 81.104.160(1). Nor does WTG argue that RCW 81.104.160(1)'s reference to the 1996 schedule is an improper form of legislative drafting. As WTG concedes the "Act's drafting forms — such as use of external sources, referring to existing law, and using contingencies — are all permissible" WTG Brief at 2. Instead, WTG creates a strawman argument based on a fundamental mischaracterization of Sound Transit's position.

Specifically, WTG asserts Sound Transit's legal argument is that because RCW 81.104.160(1) properly references the 1996 valuation schedule, it per se satisfies art. II, § 37. But that is not Sound Transit's argument.

Sound Transit properly asserts, and WTG does not dispute, that RCW 81.104.160(1) is a reference statute in that it references and incorporates the 1996 valuation schedule. Sound Transit then argues that RCW 81.104.160(1) does not violate art. II, § 37 simply because the referenced statute (the 1996 valuation schedule) was not set forth in full. This distinction between Sound Transit's actual position and WTG's mischaracterization was explained in Sound Transit's Brief, which WTG was required by rule to read. *See* ST Brief at 28-29; *see also* RAP 10.6(b). WTG's strawman argument, which underlies both its first and second

claimed errors, should be rejected as irrelevant and outside the scope of the issues presented by the parties on appeal.

Sound Transit's position that failure to set forth a referenced statute in full does not render an act incomplete is fully supported by numerous cases. *See Washington Educ. Ass'n v. State*, 97 Wn.2d 899, 904, 652 P.2d 1347 (1982) (references to incorporate implementing provisions from other statutes are not the kind that make a statute incomplete). In *Steele v. State ex rel. Gorton*, the Court specifically rejected an argument that incorporation of enforcement provisions from the Consumer Protection Act into the Employment Act rendered the latter act incomplete under art. II, § 37: "In the instant case, we are satisfied that RCW 19.31 is a complete act. Since it simply adopts by reference the provisions of the Consumer Protection Act, it has not violated Wash.Const. art 2, s 37." 85 Wn.2d 585, 592, 537 P.2d 782 (1975); *see also Amalgamated Transit v. State*, 142 Wn.2d 183, 251, 11 P.3d 762 (2000) (identifying complete acts which adopt by reference provisions of prior acts).

WTG further mischaracterizes Sound Transit's argument as viewing RCW 81.104.160(1) as amending/reviving the 1996 depreciation schedule instead of RCW 82.44 for purposes of the analysis. But the purpose of referencing the 1996 schedule was not to amend the 1996 schedule but to provide a method to implement RCW 81.104.160(1). Sound Transit

recognizes that by adopting the 1996 schedule by reference RCW 81.104.160(1) changes or modifies RCW 82.44.

It is black letter law that a statute incorporated by reference into new legislation to provide a method of implementing the new legislation does not have to be reprinted in full. *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 23-24, 211 P.2d 651 (1949), *overruled in part by State ex rel. Washington State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963) (new legislation providing that new tax should be collected “in the manner provided” by a statute incorporated by reference does not violate art. II, § 37). “It is well established that Const. art. 2, § 37 is not violated when a complete act adopts by reference provisions of prior acts.” *In re Restraint of Lord*, 123 Wn.2d 296, 325, 868 P.2d 835 (1994) (quoting *Steele*, 85 Wn.2d at 591) (adoption by reference of the first degree murder statute into RCW 10.95.020 does not violate art. II, § 37 because that statute is not being amended); *see generally State ex rel. State Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 200 P.2d 467 (1948). Put another way, because the 1996 valuation schedule is not being amended, it does not have to be reprinted in full in RCW 81.104.160(1).

These decisions also make clear that even if RCW 81.104.160(1) incidentally changes or amends RCW 82.44, this does not automatically violate art. II, § 37. *El Centro* is the most recent case to reject WTG’s

overly formalistic application of art. II, § 37. *El Centro*, 192 Wn.2d at 128. There, this Court restated its prior holding that “while nearly every legislative act of a general nature changes or modifies some existing statute, either directly or by implication, that does not necessarily mean that the legislation is unconstitutional.” *Id.* (internal quotation marks omitted); *Holzman v. City of Spokane*, 91 Wash. 418, 426, 157 P. 1086 (1916)); *Citizens for Responsible Wildlife Mgmt.*, 149 Wash. 2d at 642 (“Complete acts which . . . incidentally or impliedly amend prior acts, are excepted from section 37.”).

Indeed, RCW 81.104.160(1)’s incidental amendment or modification of RCW 82.44 is analogous to the statutes in *State v. Thorne* (initiative displaces maximum sentences in other statutes), and *Retired Public Employees Council of Washington v. Charles*, (temporarily substitute different statutory notice provisions than required by statute). *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996), *abrogated on other grounds by Blakely v. Wash.*, 542 U.S. 296, 1245 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Retired Pub. Emp. Council of Wash. v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003). In those cases, the Court agreed that the new legislation did “restrict the effect of” or “suspend” existing statutes, but did not violate art II, § 37. *See Thorne*, 129 Wn.2d at 756; *see also Charles*, 148 Wn.2d at 633-634.

WTG also repeats the argument that reference to the 1996 depreciation schedule is improper because it “reenacts” a repealed statute. The 1996 depreciation schedule, however, was not repealed as to Sound Transit and remains valid and legally enforceable pursuant to the Supreme Court’s decision in *Pierce County v. State*, 159 Wn.2d 16, 51, 148 P.3d 1002 (2006) (I-776 had “no legal effect” with respect to attempted repeal of Sound Transit statutory authority under RCW 81.104.160(1)). RCW 81.104.160(1) does not “reenact” the 1996 depreciation schedule, but rather references a schedule that has been used by Sound Transit since 1997. The 1996 depreciation schedule is not a repealed statute, but an existing one. *See* ST Brief at 24-25.

In summary, WTG’s first and second errors are based on substantial misstatements of Sound Transit’s position. RCW 81.104.160(1)’s incorporation by reference of the 1996 valuation schedule is not a violation of art. II, § 37. Nor does that conclusion end the art. II, § 37 analysis. Under the first prong of the art. II, § 37 analysis, RCW 81.104.160(1) is a complete act that uses accepted forms of legislative drafting to establish all the elements of the ST3 MVET.

2. The notwithstanding clause is a valid means to comply with art. II, § 37.

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.” *El Centro*, 192 Wn.2d at 129 (quoting *Amalgamated Transit Union*, 142 Wn.2d at 246)). WTG’s claimed third error is that allegedly Sound Transit omits this second prong. But again, WTG simply mischaracterizes Sound Transit’s briefing. Sound Transit expressly argued that the use of a “notwithstanding” clause to signify RCW 81.104.160(1)’s impact on RCW 82.44 satisfied the second prong of the art. II, § 37 test. ST Brief at 19-23.

This Court has repeatedly held that the term of art, “notwithstanding,” accompanied by an explicit explanation of the new legislation’s effect on existing statutes is an appropriate way to show that the Legislature both describes and understands a statute’s impact on existing laws. *See State v. Manussier*, 129 Wn.2d 652, 664, 921 P.2d 473 (1996); *Charles*, 148 Wn.2d at 633-634; *Thorne*, 129 Wn.2d at 756. While this structure impliedly or implicitly amends or suspends portions of existing statutes without reprinting them in full, the Court has held that using an appropriately drafted “notwithstanding” clause fully explained the law enacted and disclosed its impact on existing law such that no one would be

confused or misled. WTG ignores the function of the “notwithstanding” clause and the cases holding its use complies with art. II, § 37.

WTG’s suggestion that a taxpayer would not understand his or her legal obligations regarding the Sound Transit MVET is not well-taken. The taxpayer looking at RCW 81.104.160(1) is directed to look at the 1996 valuation schedule for the term of the MVET until Sound Transit’s bonds are paid, and then to RCW 82.44. The Legislature transparently identified the valuation schedules to be used and demonstrated its understanding of the impact of RCW 81.104.160(1) on RCW 82.44. That conclusion is especially compelling because only RCW 81.104.160(1) grants authority for and describes all the essential elements of the tax. RCW 82.44 does not identify or grant any authority for the adoption of any MVET. A person reading RCW 82.44 would not know that the Sound Transit MVET or any other MVET exists. It makes no sense to look first at a motor vehicle valuation schedule and then scour the RCW’s for MVETs to which it may apply. There was full disclosure to both the Legislature and the taxpayers.

B. Actual Legislative history is relevant to determine compliance with art. II, § 37.

1. The enrolled bill rule has no bearing on this case.

This Court has often looked to legislative history to assess whether a statute complies with art. II, § 37. *See Flanders v. Morris*, 88 Wn.2d 183, 184-186, 558 P.2d 769 (1977); *see also Yelle v. Bishop*, 55 Wn.2d 286, 301, 347 P.2d 1081 (1959); ST Brief at 31-32. The purpose of art. II, § 37 is to ensure that “legislators are aware of the nature and content of the law which is being amended and the effect of the amendment upon it.” *Amalgamated Transit Union*, 142 Wn.2d at 246. Sound Transit offered legislative history found in the official legislative record of ESSB 5987 to rebut Black’s claim, repeated by the Senators, that the legislature was not transparent and that the Legislature did not fully understand RCW 81.104.160(1)’s operation.² Sound Transit does not rely on legislative history to show the intent or opinion of individual legislators, but to demonstrate that the Legislature fully understood the new law’s operation and that the legislative process satisfied both the letter and spirit of art. II, § 37. The Senators argue in response that the enrolled bill rule precludes

² Sound Transit did not, as the Senators contend, offer the opinions of individual legislators. Any declaration testimony introduced below was submitted solely to rebut factual misrepresentations made by the Senators and Black.

consideration of such legislative history. But the Senators' argument is not supported by either the purpose of the rule or the case law applying it.

The purpose of the enrolled bill rule is to ensure that the judiciary does not infringe on the independence of the legislative branch by examining the process by which a bill was passed. *See Eyman v. Wyman*, 191 Wn.2d 581, 596–97, 424 P.3d 1183 (2018); *see also Cherry v. Steiner*, 716 F.2d 687, 693 (9th Cir. 1983) (“The enrolled bill rule is intended to forestall judicial inquiry into procedural irregularities occurring prior to the enactment of bills, not inherent defects in bills as enrolled.”). All the cases cited by the Senators, concern challenges about the Legislature’s compliance with constitutionally required **procedures** for adoption of legislation. Senators’ Brief at 9, 14. None hold that a court is precluded from considering legislative history in discerning the Legislature’s intent when interpreting a statute or considering a **substantive challenge** to its constitutionality. *See State v. Evans*, 177 Wn.2d 186, 199-203, 298 P.3d 724 (2013) (citing floor debate as to bill’s meaning); *Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 305-306, 149 P.3d 666 (2006) (citing TVW audio recording of floor debate and bill reports to determine legislative intent).

No one has alleged any impropriety or irregularity in the process through which RCW 81.104.160(1) was adopted. Sound Transit cited

legislative history to demonstrate that the floor debate, proposed amendments, and bill reports are all consistent with RCW 81.104.160(1)'s plain meaning. The enrolled bill rule is irrelevant in this case.³

Similarly irrelevant are the cases cited by the Senators under the heading "Separation of Powers." Senators' Brief at 12-13. Neither *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 306, 174 P.3d 1142 (2007) nor *State v. Jones*, 6 Wash. 452, 460, 34 P. 201 (1893), suggest in any way that the courts are precluded from considering legislative history in addressing the constitutionality of a statute. Sound Transit's use of legislative history is appropriate and not an effort to disrupt or circumvent the legislative process.

Confusingly, the Senators then offer the "findings and conclusions" from their own purported "legislative investigation." As demonstrated below, this evidence is not legislative history and should be disregarded as irrelevant and inadmissible.

³ The Senators amusingly misattribute a quote in their brief to *State ex. Rel. Hodde v. Superior Court*, 40 Wn.2d 502, 244 P.2d 668 (1952) instead of to *Dunbar v. State Board of Equalization* 140 Wash. 433, 249 P. 996 (1926). See Senators' Brief at 9. Senators then copy verbatim a block of this Court's decision in *Brown v. Owen*, 165 Wn.2d 706, 722, 206 P.3d 310 (2009), without proper attribution. See Senators' Brief at 12-13. Neither *Hodde* nor *Dunbar* supports the Senators' argument.

2. The Senators’ personal “findings and conclusions” are irrelevant.

Senators are the now-former chair and now-former vice-chair of the Senate Law and Justice Committee (“Committee”). Senators’ Brief at 2-4. While they did participate in an **unofficial** “investigation” of ST3, they significantly mischaracterize what occurred. Senators disingenuously portray the “findings and conclusions” set forth in a letter signed only by them as belonging to a majority of the Committee. They further ignore that the Committee’s minority members were never given an opportunity to review and provide feedback on any findings before they were adopted by Senators O’Ban and Padden. *See Clerk’s Papers (“CP”) 810-11 (Frockt Decl. ¶¶ 2-5).*

The Committee never voted to adopt the Senators’ “findings and conclusions.” Nor did the Committee follow established rules of parliamentary procedure. *See Reed’s Parliamentary Rules, Chapter 7, Rule 79* (requiring committee action to “be taken at a regular meeting duly called” and that “[n]o action can be taken by members not in meeting assembled”); *see also id.*, Rule 81 (explaining that committee reports “which are themselves intended to express the opinions” of the committee requires a “simple motion to adopt the report”). Rather, the “Committee’s” findings are those of Senators O’Ban and Padden alone.

The “findings and conclusions” that the legislation at issue was “unconstitutionally drafted,” bear no relevance to whether the legislation at issue complies with art. II, § 37. *See* Senators’ Brief at 6; CP 266-272 (O’Ban Decl., Ex. B). First, it is for the judiciary, not the legislature, to determine the constitutionality of statutes. Second, “statements and opinions of individual legislators generally are not considered by the courts.” *See Snow’s Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216 (1972). That the Senators do not like Sound Transit and the effect of RCW 81.104.160(1) is not a valid basis for overturning the voter-approved MVET under art. II, § 37. Regardless, the Court should reject the Senators’ attempt, on the one hand, to cast valid and official legislative history as improper legislative opinions, while on the other hand, to offer their individual opinions in the guise of an “investigation.”

III. CONCLUSION

Black has failed to prove that RCW 81.104.160(1) is unconstitutional beyond a reasonable doubt. RCW 81.104.160(1) does not violate art. II, § 37. Neither Amici present arguments that change that conclusion. WTG relies on a strawman mischaracterization of Sound Transit’s argument and ignores this Court’s cases upholding the use of an appropriately drafted “notwithstanding” provision as a valid legislative tool to explain RCW 81.104.160(1)’s relationship to RCW 82.44. Senators

rely on the enrolled bill rule, which has no bearing on the claims here. And then they falsely characterize their collective personal conclusion about the constitutionality of RCW 81.104.160(1) as the findings of a Senate Committee. It is this Court's role to determine the constitutionality of a statute, not a senate committee, let alone two individual legislators masquerading as a committee. The trial court's decision granting Sound Transit's motion for summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of August, 2019.

PACIFICA LAW GROUP LLP

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY

By: s/ Paul J. Lawrence
Paul J. Lawrence, WSBA #13557
Matthew J. Segal, WSBA #29797
Jessica A. Skelton, WSBA #36748

By: s/ Desmond L. Brown
Desmond L. Brown, WSBA #16232
Natalie A. Moore, WSBA #45333
Mattelyn L. Tharpe, WSBA #53743

Attorneys for Respondent Central Puget Sound Regional Transit Authority

PACIFICA LAW GROUP

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- jwmaynard2003@yahoo.com
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- lalseaef@atg.wa.gov
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- mattelyn.tharpe@soundtransit.org
- matthew.segal@pacificallawgroup.com
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- sydney.henderson@pacificallawgroup.com

Comments:

Sender Name: Dawn Taylor - Email: Dawn.taylor@pacificallawgroup.com

Filing on Behalf of: Paul J. Lawrence - Email: paul.lawrence@pacificallawgroup.com (Alternate Email: dawn.taylor@pacificallawgroup.com)

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Seattle, WA, 98101
Phone: (206) 245-1700

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