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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.

**STATE OF WASHINGTON'S RESPONSE TO AMICI CURIAE WE
THE GOVERNED, LLC AND SENATORS MICHAEL PADDEN
AND STEVE O'BAN**

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I. INTRODUCTION

The 2015 expansion of transportation districts taxing authority under RCW 81.104.160(1)¹ does not violate article II, section 37 of the Washington Constitution by amending chapter 82.44 RCW without setting it forth in full because the amendatory act makes clear on its face which depreciation schedule applies at specific times. The reasons Amici We the Governed, LLC, and Senators Padden and O’Ban offer to support Appellants’ challenge to RCW 81.104.160(1) fail to overcome the weight of Washington law.

The purpose of article II, section 37 of the Washington Constitution is to make sure the effect of new legislation is clear and “to avoid confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the same volume.” *El Centro De La Raza v. State*, 192 Wn.2d 103, 129, 428 P.3d 1143 (2018) (internal citations omitted). Article II, section 37 also ensures that “the legislature is aware of the legislation’s impact on existing laws.” *Id.*

Compliance with article II, section 37 is tested through a two-part test, informed by the underlying purposes of the constitutional provision. That test asks: (1) “whether the new enactment is such a complete act that

¹ Laws of 2015, 3rd Spec. Sess., ch. 44, § 319(1).

the scope of the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment” and (2) “whether a straightforward determination of the scope of rights or duties under the existing statutes would be rendered erroneous by the new enactment.” *Id.* (internal citations omitted).

RCW 81.104.160(1) as enacted in 2015 satisfies both parts of this test. RCW 81.104.160(1) is a complete act since it fully sets forth Central Puget Sound Regional Transit Authority’s (Sound Transit) authority to seek and impose a motor vehicle excise tax (MVET) for funding high capacity transportation service. And, it fully identifies impacts on existing laws through its plain text. This Court should uphold the Legislature’s prerogative to authorize a voter-approved MVET in the manner specified in RCW 81.104.160(1).

II. ARGUMENT

Both amicus briefs misconceive the issue of this case, but in two very different ways. Amicus We the Governed focuses on the claim that the 2015 amendment to RCW 81.104.160(1) surreptitiously amends RCW 82.44.035. We the Governed Amicus Br. at 2. But RCW 81.104.160 does no such thing; rather, it makes clear on its face that chapter 82.44 does not apply to the 2015 Act. Amici Senators Padden and O’Ban urge the court not to consider the legislative history of RCW 81.104.160(1). Senators Amicus Br. at 7-10. But

legislative history can be used to inform the court's analysis of article II, section 37.

A. RCW 81.104.160(1) Properly Incorporates the 1996 Depreciation Schedule and Does Not Surreptitiously Amend RCW 82.44.035, Contrary to the Position of We the Governed

RCW 81.104.160(1) provides:

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

We the Governed objects to RCW 81.104.160(1)'s application of the 1996 depreciation schedule to the .8 percent MVET newly authorized by RCW 81.104.160(1). This is the depreciation schedule already used for the .3 percent MVET that Sound Transit had previously received voter approval to collect.² *See Pierce Cty. v. State*, 159 Wn.2d 16, 23-24, 148 P.3d 1002

² The 1996 depreciation schedule, formerly codified at RCW 82.44.041, and the authority to impose a .3 percent MVET were repealed in 2002 by Initiative 776. Laws of 2003, ch. 1, § 5(6). But, in *Pierce County*, the Court held that Sound Transit's authority to levy the MVET could not be repealed until bonds secured by the MVET are fully paid. 159 Wn.2d at 51. Sound Transit accurately sets forth the history of amendments to RCW 81.104.160 as well as the impact of initiatives and legal challenges on it. Sound Transit Br. at 4-12.

(2006). Amicus argues the 2015 Act displaced and thereby amended a depreciation schedule found in a different chapter of the Revised Code of Washington, chapter 82.44 RCW, in violation of article II, section 37. We the Governed Amicus Br. at 3. This is incorrect because, by the express terms of RCW 81.104.160(1), RCW 82.44.035 does not apply to the MVET authorized by the 2015 legislation until a later date—after December 31st of the year in which a regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015. This is the import of the “notwithstanding” clause at the beginning of RCW 81.104.160(1).

They also object that RCW 81.104.160(1) cannot properly be called a “reference statute” or analyzed under article II, section 37, since it does not refer to existing law, make existing law applicable to a new law, or amend an existing statute. We the Governed Amicus Br. at 4-10. Rather, it incorporates text, the 1996 depreciation schedule formerly codified at RCW 82.44.041, that is not a current Washington law. *Id.* And, they assert even if it is a reference statute, it is not a complete act. *Id.* at 11-14. Instead, it amended RCW 82.44.035 in violation of article II, section 37. *Id.* at 14-19.

We the Governed is incorrect for three reasons. First, RCW 81.104.160(1) is a complete act. Second, RCW 82.44.035 does not apply, as made clear by the express terms of RCW 81.104.160(1). And third, RCW 81.104.160(1) is a reference statute.

1. RCW 81.104.160(1) is a complete act

The two-prong test for determining whether legislation violates article II, section 37 first asks whether the new enactment is a complete act. *El Centro*, 192 Wn.2d at 129. Here, RCW 81.104.160(1) is a complete act because there is no need to look to any other statute, including chapter 82.44 RCW, to understand the taxing power the Legislature was granting to Sound Transit. RCW 81.104.160(1) sets forth all the authority vested in regional transit authorities to levy the .8 percent and use the 1996 depreciation schedule until repayment of pre-existing bonds, then switch to the version of 82.44 RCW in effect when voters approve the new MVET. The purpose of this prong of the test is met because the effect of the new legislation is clear—Sound Transit can seek voter approval of an increased MVET, use the MVET for high capacity transportation service, and use the 1996 depreciation schedule for calculating both the existing and increased MVET until the statutory condition is met.

Just because RCW 81.104.160(1) incorporates a different depreciation schedule for calculating the MVET than what is in RCW 82.44.035 does not render it an incomplete act. To the contrary, the Legislature has the authority to structure regional transit authorities' taxing power, including adopting two depreciation schedules, and doing so made sense. The *Pierce County* decision requires that the 1996 depreciation

schedule apply until the authority to collect the .3 percent MVET ends. 159 Wn. 2d at 27. Thus, the Legislature’s decision to use the same depreciation schedule for any newly approved MVET under RCW 81.104.160(1) ensures the same schedule is used for the period in which Sound Transit collects both the .3 percent and the .8 percent MVET.

As Sound Transit correctly states, “[a]ll information needed to impose the tax—purpose, use, rate, and method of collection before and after December 31, 2020—can be determined solely by reading RCW 81.104.160(1).” Sound Transit Br. at 18. It is a complete act.

2. RCW 82.44.035 does not apply

The second prong of the article II, section 37 test asks whether “the Legislature was aware of the legislation’s impact on existing laws.” *El Centro*, 192 Wn.2d at 128-29. (quoting *Amalgamated Transit Union v. State*, 142 Wn.2d 183, 246, 11 P.3d 762 (2000)). This prong is met: the Legislature created statutory authority for Sound Transit’s MVET and did so by incorporating a long applied depreciation schedule. It was amending the statutory authority to impose the MVET in RCW 81.104.160(1), not the depreciation schedule set forth in RCW 82.44.035.

The 2015 amendatory act makes this clear on its face. RCW 81.104.160(1) states:

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

This does not specifically amend or modify any section of chapter 82.44, including RCW 82.44.035. Rather, it just renders the chapter inapplicable according to the terms of the statute.

This is what “notwithstanding” means when used in a statute. It means that the statute referred to does not apply to the subject matter of the statute in which it appears. Bryan A. Garner, *Black’s Law Dictionary*, 1231(10th Ed. 2009) (defining “notwithstanding” to mean “despite; in spite of” or “not opposing; not availing to the contrary”). There was accordingly no need for the 2015 act to amend RCW 82.44.035; it provided on its own terms that RCW 82.44.035 simply does not apply.

Existing case law makes clear that article II, section 37 is not violated just because the legislation impacts another existing statute by rendering it inapplicable to the subject of the new act. *State v. Thorne*, 129 Wn.2d 736, 756, 921 P.2d 514 (1996) (Initiative that did not include full text of other criminal statutes it impacted did not violate article II, section 37 where the effect on the existing statutes was readily apparent through use of notwithstanding clause.); *State v. Manussier*, 129 Wn.2d 652, 665 n.39,

921 P.2d 473 (1996) (same); *Retired Pub. Emps. Coun. of Wash. v. Charles*, 148 Wn.2d 602, 633-34, 62 P.3d 470 (2003) (A statute that suspended pension contribution rates and notice provisions in another statute through use of a notwithstanding clause did not violate article II, section 37 since it did not confuse legislators or interested citizens.). The same is true here. That RCW 81.104.160(1) makes the depreciation schedule in RCW 82.44.035 inapplicable does not mean it amended RCW 82.44.035 in violation of article II, section 37. The 2015 amendment to RCW 81.104.160(1) makes clear on its face what effect it has on RCW 82.44.035—the former statute says that the latter statute does not apply. This leaves RCW 82.44.035 literally unchanged. It applies to the same things in the same way after the 2015 act as it did before that act, except as to the Sound Transit MVET until its bond debt is repaid.

The focus under article II, section 37 is on the new statute, and whether it shows its effect on existing statutes. “The result of compliance with article II, section 37 should be that no other research is required to determine which sections are amended.” *Wash. Ass’n of Neighborhood Stores v. State*, 149 Wn.2d 359, 373, 70 P.3d 920 (2003). By its own terms, the 2015 act states that chapter 82.44 RCW does not apply other than in the circumstances the 2015 act sets forth. Amicus thus misreads article II, section 37, which “applies only to statutes which are revised or amended and

not affected statutes.” *Id.* A person reading RCW 81.104.160(1) “needs to look no further than the text to know” what depreciation schedule to use—the one referenced in the 2015 act itself. *Id.*

3. RCW 81.104.160(1) is a reference statute

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 ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 28, 200 P.2d 467 (1948). Reference statutes are not within the restrictions contemplated by article II, section 37 of the constitution. *Id.* Here, RCW 81.104.160(1) incorporates the 1996 depreciation schedule, formerly codified at RCW 82.44.041 but repealed by I-776 except as to Sound Transit, as the method of calculating the MVET.

We the Governed objects to RCW 81.104.160(1) being considered a “reference statute” for purposes of analysis under article II, section 37, since the statute adopts the 1996 depreciation schedule, rather than referring to existing law. We the Governed Amicus Br. at 4-8. We the Governed cites no case that prohibits the Legislature from using this method of incorporation. And the Legislature regularly references standards and materials lying outside the Revised Code of Washington. *See, e.g.*, RCW 19.27.031 (adopting by reference various components of the state building code from

privately published sources); RCW 19.94.150 (adopting by reference the standards for weights and measures published by the national institute of standards and technology). The purpose of article II, section 37 is not contravened by such an incorporation, because the reader of the new act will understand that it is the 1996 schedule that applies.

The reason why the 2015 act referenced the 1996 depreciation schedule makes this all the more clear. This Court previously invalidated the attempted repeal of that schedule on the basis that its repeal would impair the obligation of contract, with respect to certain existing Sound Transit bonds. *Pierce Cty.*, 159 Wn.2d at 51. It cannot be unconstitutional for the Legislature to adopt by reference the very same statute that this Court ruled must apply to repay bonds issued by the same taxing authority. In other words, contained in the printed statute books or not, the 1996 schedule remains the law for a related application.

B. Senators Padden and O’Ban Err in Contending that the Enrolled Bill Doctrine Precludes the Use of Legislative History

Amici Senators Padden and O’Ban rely upon the enrolled bill doctrine to contend that this Court may not examine the legislative history of the 2015 amendment to RCW 81.104.160(1). Senators Padden and O’Ban urge this court to reject any reference to RCW 81.104.160(1)’s legislative history or other extrinsic evidence as irrelevant and even if relevant, to reject

this evidence for constitutional and public policy reasons. Senators Amicus Br. at 7, 11. But this position ignores the proper role legislative history plays in evaluating conformity with substantive, as contrasted with procedural, constitutional provisions, including article II, section 37.

The enrolled bill doctrine would indeed preclude any examination of the legislative history of the bill in order to consider whether the Legislature followed proper procedures in enacting the amendment. The doctrine provides that “the courts will make no investigation of the antecedent history connected with [a bill’s] passage, except as such an investigation may be necessary in case of ambiguity in the bill for the purpose of determining the legislative intent.” *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 34, 377 P.2d 466 (1962) (quoting *State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 443, 249 P. 996 (1926)). But, there is no claim here that the Legislature failed to follow proper procedure when considering the 2015 act. Rather, the inquiry here is whether the amendatory act misled legislators as to the effect of the bill if enacted. *See Sound Transit Br.* at 31-32. Their reliance on the enrolled bill doctrine is misplaced.

The enrolled bill doctrine instructs that “once a bill has been certified by the legislature as having been passed, that certification is 'conclusive upon each of the other [branches of government],’ including the judiciary.” *Id.* at 596-97 (quoting *Brown v. Owen*, 165 Wn.2d 706, 723, 206 P.3d 310

(2009)). As this Court recently explained, “[t]he enrolled bill doctrine serves as a constitutional backstop that prevents the judiciary from overstepping its role.” *Eyman v. Wyman*, 191 Wn.2d 581, 596, 424 P.3d 1183 (2018) (lead opinion of Gordon McCloud, J.). Senators Padden and O’Ban do not rely on the enrolled bill doctrine to insulate the 2015 amendment from review; rather they seek to use it to *further an attack* on the Legislature’s action. Senators Amicus Br. at 14. But the doctrine is rooted in the constitutional separation of powers, serving the purpose of protecting the Legislature’s exercise of its prerogatives. *Eyman*, 191 Wn.2d at 596. It is not a weapon litigants may wield offensively to challenge the validity of an enacted law. *See id.*, 191 Wn.2d at 610-11 (Yu, J., concurring) (the enrolled bill doctrine is a check against judicial overreach); *id.*, 191 Wn.2d at 627 (Stephens, J., dissenting) (substantive analysis of legislation under the state constitution “does not implicate the enrolled bill doctrine”).

The enrolled bill doctrine does not apply in this case because there is no question of whether the Legislature properly followed procedures in amending RCW 81.104.160(1). The Legislature’s broad power to enact laws is limited only by the state and federal constitutions. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004); *Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007). Senators Padden and O’Ban correctly recognize this point. Senators

Amicus Br. at 12. The Legislature may authorize local government agencies such as Sound transit to propose a ballot measure for a local tax such as an MVET. Const. art. XI, § 12.³ The Legislature expressly authorized in RCW 81.104.160(1) an MVET for regional transportation authorities, including Sound Transit in a manner fully consistent with that authority.

Washington courts have historically considered extrinsic evidence and legislative history to consider an argument based on article II, section 37. *See, e.g., Flanders v. Morris*, 88 Wn.2d 183, 186, 558 P.2d 769 (1977); *Wash. Educ. Ass'n v. State*, 93 Wn.2d 37, 40, 604 P.2d 950 (1980) (both using legislative history to evaluate an argument based on article II, section 37). This Court may accordingly do so again here.

III. CONCLUSION

RCW 81.104.160(1) establishes the taxing authority and applicable depreciation schedule for Sound Transit's MVET and suffers no constitutional defect under article II, section 37. Its enactment falls within prior cases holding that acts with similar structure and effects are constitutional. The analysis of RCW 81.104.160(1) and article II, section 37

³“The Legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or on the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest the corporate authorities thereof, the power to assess and collect taxes for such purposes.”

advocated for by amici departs from precedent. This Court should affirm the judgment of the trial court.

RESPECTFULLY SUBMITTED this 27th day of August, 2019.

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PROOF OF SERVICE

I, Jennifer K. Bancroft, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 27th day of August 2019, I caused to be served a true and correct copy of **State of Washington's Response to Amici Curiae We the Governed, LLC and Senators Michael Padden and Steve O'Ban**, as follows:

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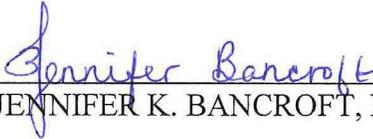
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE
LAWS OF THE STATE OF WASHINGTON that the foregoing is true and
correct.

DATED this 27th day of August 2019, in Seattle, Washington.



JENNIFER K. BANCROFT, Legal Assistant

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

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