☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: October 18, 2019
Time: 9:00 AM
Judge: Hon. Jack Nevin
Department 6

State Of Washington
Pierce County Superior Court

Taylor Black, Anne Black, Jerry King, Rene King, Roger Struthers, Mary Louise Struthers, and Frank Maietto, individually and on behalf of a class of all persons similarly situated,

*Plaintiffs*,

v.

Central Puget Sound Regional Transit Authority, and State Of Washington,

*Defendants*.

No. 19-2-11073-8

Reply To CPSRTA
In Support of Motion For
Preliminary Injunction



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## Introduction

CPSRTA admits that it is not following RCW 82.44.035, the only statute specifying vehicle valuation for purposes of a locally imposed motor vehicle excise tax ("MVET"). CPSRTA offers four excuses, but none of its justifications are legally sufficient. In the companion case now pending before the Supreme Court, CPSRTA claimed that it had statutory authority—a "technical amendment" to RCW 81.104.160, adopted in 2010—to continue using a repealed statute to calculate the MVET. Consequently, Plaintiffs' motion for a preliminary injunction focused on the constitutional defects in that "technical amendment."

Significantly, CPSRTA **now explicitly disclaims reliance on the one statute that would allow it to avoid compliance with RCW 82.44.035.** To be clear: CPSRTA **does not** defend the constitutionality of the challenged sentence, now codified in RCW 81.104.160(3), under either Wash Const. Art. II §§ 19 or 37. **Not at all.** Instead, CPSRTA (not Plaintiffs) claims that a 13-year-old statute, which CPSRTA has never previously challenged in court, cannot be applied to it because it is unconstitutional, a result supposedly determined in a case submitted for decision before that statute was ever passed. In addition to the constitutional challenge to RCW 82.44.035 that CPSRTA raises as an opposition to the Motion, it offers three other excuses for its conduct.

**First**, CPSRTA argues that *Pierce County v. State,* 159 Wash. 2d 16 (2006) (*"Pierce County II*") gave it permission to disregard RCW 82.44.035. But this is clearly anachronistic. *Pierce County II* was submitted to the Supreme Court for decision before RCW 82.44.035 was introduced in the Legislature. *Pierce County II* did not address either the repeal of RCW 82.44.041 or the enactment or applicability to the 0.3% ST1 MVET of RCW 82.44.035.

**Second**, CPSRTA argues that RCW 82.44.035 was not "intended" by the enacting legislature to govern the 0.3% ST1 MVET. This Court will not ignore clear statutory language in favor of statements of legislative intent that were never incorporated into the statute.

**Third**, CPSRTA asserts that the "technical amendment," enacted in 2010 and restated in 2015, "codified" *Pierce County II*. It does not, and even if it did, it would only be effective if CPSRTA could defend the constitutionality of this statute. It has chosen not to.



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**Fourth and finally**, CPSRTA asserts that the legislature's 2006 enactment of RCW 82.44.035 as applied to its 0.3% MVET, which it pledged to its Series 1999 bonds, unconstitutionally impairs those contracts. **Wrong:** No court has ever held such, or even entertained the question. Neither any bondholder nor CPSRTA has ever challenged the statute in any court, state or federal. Instead CPSRTA has taken the judicial function into its own hands and simply refuses to follow the law. It has not challenged the statute because it cannot meet the high burden of demonstrating an actual, factual, impairment. As a result, CPSRTA neither follows nor defends any law governing its 0.3% MVET.

## Statement Of Relevant Facts

CPSRTA justifies its current MVET schedules as authorized, and indeed, required, by *Pierce County II*. It neither uses, relies on, nor defends any existing statute to excuse its non-compliance with RCW 82.44.035. Plainly, the parties' views on *Pierce County II* represent the point of divergence, and the reason that Plaintiffs' Motion should be granted. A detailed review of the MVET history was presented in detail in the Motion. This summary, identifying the point of fundamental disagreement, should assist the Court:

| Year | Event | Plaintiffs' View | CPSRTA's View |
|---|---|---|---|
| 1996 | RCW 81.104.160 authorizes MVET and uses value schedule in chapter 82.44 RCW, then 82.44.041 | Tax based on value under RCW 82.44.041 | Tax based on value under RCW 82.44.041 |
| 1999 | Ref. 49 amends 82.44.041 | Tax based on value under amended .041 | Tax based on value under amended .041 |
| 2002 | I-776 repeals .041 and amends to remove tax authority | No effect pending court challenge | No effect pending court challenge |
| 2006 | RCW 82.44.035 enacted; *Pierce County II* decision | 81.104.160 is restored; 82.44.041 is not, therefore tax is based on value under 82.44.035 | 81.104.160 ***and*** 82.44.041 are restored; tax based on value under 82.44.041 as amended in 1999 |
| 2010 | "Technical amendment" | Unconstitutional; tax is based on value under 82.44.035 | Irrelevant; *Pierce County II* allows use of 1999 vers. of 82.44.041 |
| 2015 | Restatement of technical amendment | Unconstitutional; tax is based on value under 82.44.035 | Irrelevant; *Pierce County II* allows use of 1999 vers. of 82.44.041 |



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## Argument

CPSRTA never quite comes out and asserts that the Supreme Court restored RCW 82.44.041 in the *Pierce County II* decision, but its entire argument rests on that false premise. Its assertion that it does not rely on the 2010 technical amendment for tax authority; its claims that it cannot change schedules again after 1999; its simple refusal to even bother defending the challenged Act—these all result from its premise that the *Pierce County II* decision specifically held unconstitutional I-776 § 5's repeal of the valuation schedule statute, RCW 82.44.041. Without that, all its arguments fail. As shown in the Motion and below, the Court did not hold that I-776 § 5 was unconstitutional, and therefore did not restore the valuation table of RCW 82.44.041. CPSRTA never sought clarification of the narrower holding, which only addressed I-776 § 6. Because it incorrectly reads *Pierce County II* as granting it authority to rely on the repealed and unrestored statute, CPSRTA concludes that the actual law doesn't govern it. It relies on legislative history instead of explicit text to find that the legislature didn't intend for RCW 82.44.035 to govern the 0.3% MVET. It ignored the flaws in the 2010 "technical amendment" because it assumed the statute "codified" CPSRTA's unique understanding of *Pierce County II*. That unique understanding extends so far as to conclude that the Supreme Court gave CPSRTA authority to ignore statutory valuation tables it doesn't want to use, without having to challenge their constitutionality. The fundamental flaw in all of CPSRTA's arguments is the actual text of the *Pierce County II* decision.

### *Pierce County II* Did Not Address Either RCW 82.44.041 or 82.44.035.

As detailed in the Motion, the decision in *Pierce County II* did not address either the repeal of RCW 82.44.041, found in I-776 § 5, or the enactment of RCW 82.44.035. The explicit holding of *Pierce County II* is that I-776 § 6, not § 5, is unconstitutional as applied to CPSRTA.[1] No word of that opinion addresses I-776 § 5 or the repeal of RCW 82.44.041. If CPSRTA thought the opinion was too narrow or in any way incorrect, it had the opportunity to seek clarification, rehearing, reconsideration, or any other extension or modification of *Pierce County II*. It did nothing, but now

[1] *See* Plaintiff's Motion for Preliminary Injunction, 9:21-10:1.



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asks this Court to disregard the explicit text of the opinion to expand its holding. That expansion, according to CPSRTA, should extend not only to redrafting 1996 RCW 81.104.160 to tie it to a specific year's valuation schedule, but also to find that the Supreme Court adjudicated the constitutionality of RCW 82.44.035, even though it did not even exist as a statute when *Pierce County II* was submitted for decision. That decision cannot shield CPSRTA from the application of RCW 82.44.035.

**Perception Of The Legislature's Intent Does Not Rewrite RCW 82.44.035.**

CPSRTA quotes some snippets of legislative history in an attempt to show that the legislature did not intend RCW 82.44.035 to govern its MVET. CPSRTA Oppo. at 5-6. But where the "plain language" of a statute is clear, it is "unnecessary to employ legislative history or other aids to statutory construction." *Federal Home Loan Bank of Seattle v. Credit Suisse Securities (USA) LLC*, -- P.3d.--, 2019 WL 4877437, at *4 (Wash. Oct. 3, 2019). The plain language of RCW 82.44.035 is clear. It governs "any locally imposed motor vehicle excise tax." If the legislature did not want it to govern CPSRTA, it would have said so in the statute, just as it did, as detailed below, when it excluded exemptions of RCW 82.08.820 from CPSRTA so it could continue to tax those items. Legislative history cannot displace RCW 82.44.035.

**RCW 81.104.160(3), First Enacted In 2010, Did Not "Codify" *Pierce County II*.**

CPSRTA also calls the challenged 2010 Act a "codification" of *Pierce County II*. CPSRTA Oppo. 6:6. The undeniable fact is that the sentence not only purported to restore a statute repealed by I-776 § 5 (and not touched by the decision), it also effectively repealed Ref. 49, which had reduced the valuation of two- and three-year-old vehicles. Because the 2010 Act repealed Ref. 49's amendments, it raised taxes as compared to CPSRTA's then-current conduct, and violated the single-subject rule of Art. II § 19. It also thereby amended existing RCW 82.44.035, and violated the "full-length" requirement of Art. II § 37. In response to Plaintiffs' Motion, CPSRTA says nothing about the constitutional defects of the challenged sentence in RCW 81.104.160(3). Instead, it explicitly disclaims reliance on the 2010 amendment: "The 2010 Amendment is Not the Authority for the ST MVET." CPSRTA Oppo. at 14. Plainly, it finds its authority elsewhere, in



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*Pierce County II*. But that decision only restored 1996 RCW 81.104.160, and not RCW 82.44.041. Its 0.3% tax authority comes from *Pierce County II*, but with value under Chapter 82.44, now found at RCW 82.44.035.[2]

**No Court Has Held That RCW 82.44.035 Impairs Any Contract.**

CPSRTA has never sought a judicial declaration that RCW 82.44.035 impairs any contract, and no court has held RCW 82.44.035 unconstitutional as applied to CPSRTA.[3] Nonetheless, CPSRTA ignores that governing law. It asserts that the legislature didn't really mean for it to apply to the 0.3% MVET, and that its application would violate the contracts clause. But CPSRTA cannot ignore the law without someone first bringing a lawsuit challenging that law and meeting its burden of proof as to impairment. A party must challenge the law, overcome the State's defense, and secure a final judicial order of unconstitutionality.[4] That has never happened. Moreover, in claiming constitutional infirmity under Art. I § 23, CPSRTA fails to present even the basic elements of a claim alleging an unconstitutional impairment of contracts. Whether procedurally or substantively, CPSRTA's constitutional challenge to RCW 82.44.035 fails.

**The Government Must Assess Value Under RCW 82.44.035.**

The 1996 version of RCW 81.104.160 requires use of whatever valuation schedule is in Chapter 82.44 RCW. *Pierce County II* allows continued use of 1996 RCW 81.104.160, but did not alter its meaning. CPSRTA's Series 1999 Bonds could not and did not amend it. I-776 did not validly amend it, as confirmed in *Pierce County II*, which confirmed its use but did not amend it.

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[2] CPSRTA also seems to claim that it need not defend the challenged statute because Plaintiffs only challenge it as unconstitutional from between 2010 and 2015, but no longer infirm. Not so; the text was unchanged when restated and suffers the same infirmities. CPSRTA's misreading is perhaps based on the Motion electing to define the challenged sentence as "the 2010 Act" to aid the Court in distinguishing it from among the many iterations of RCW 81.104.160 over the past 20 years, all discussed in detail in the Motion. *See* Motion at n. 1-9 and definition at 5 n. 10.

[3] CPSRTA has never and likely will never file this challenge because it would almost certainly fail. The legislature is permitted to alter the valuation schedules, just as it alters the sales and use tax basis, discussed below. No party can meet the burden to prove that the change of RCW 82.44.035 substantially impairs the 1999 bond contracts.

[4] CPSRTA is likely not the proper plaintiff in such a challenge, as it would lack standing. Its bondholders might properly assert such a claim, but are in all likelihood not injured and would not bother.



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Therefore, in 2006, RCW 81.104.160 as restored by *Pierce County II* required use of RCW 82.44.035. CPSRTA never challenged application of that law. The later 2010 "technical amendment" pointing to a 1996 schedule, as restated in 2015, is constitutionally invalid, and CPSRTA does not defend the 2010 Act. Today, the only constitutionally valid enactment authorizing the 0.3% MVET is 1996 RCW 81.104.160, which requires the government to tax based on "value, under chapter 82.44 RCW," or RCW 82.44.035. No party has ever challenged RCW 82.44.035 as unconstitutional when applied to CPSRTA and its 0.3% MVET. Unless and until a party institutes and succeeds in such a challenge, CPSRTA must follow that law. It does not, and plainly only this Court's injunction will compel its compliance.

**1996 RCW 81.104.160 Requires Use Of Current Chapter 82.44.**

The 1996 version of RCW 81.104.160 requires use of any current schedule in chapter 82.44 RCW. If that statute were to require use of a schedule from a specific date, it would be drafted differently, by explicitly pointing to the date of the schedule or adopting it with reference to its current state. The legislature that authorized the 0.3% MVET did not bind that levy to any particular schedule. CPSRTA knew this once, and because the legislature allowed schedule variations, it promptly changed schedules when required by Ref. 49. Years later, when CPSRTA decided it did not want to follow then-current chapter 82.44 but could not succeed in a constitutional challenge to RCW 82,44,035, it decided the meaning of the statute had shifted. It had not. When *Pierce County II* allowed continued use of that authorization, it did not thereby also alter the meaning to bind it to a certain date. CPSRTA also could not alter the meaning of the authorizing statute by the simple expedient of issuing bonds.

There is yet further proof that 1996 RCW 81.104.160 did not purport to forbid any change to the referred-to chapter of RCW, chapter 82.44, and further proof that changes to that chapter do not automatically violate the contracts clause. Pursuant to RCW 81.104.170, CPSRTA collects a sales tax that it has pledged to the same bonds as the 0.3% MVET. That statute is also phrased with the same form of reference to a chapter in Title 82. It authorizes a levy to "be collected from those persons who are taxable by the state **pursuant to chapters 82.08 and 82.12 RCW** upon the



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occurrence of any taxable event . . .” RCW 81.104.170(2) (emphasis added). Just as the legislature may amend chapter 82.44, it has routinely amended chapters 82.08 and 82.12, with no complaint from CPSRTA that any such changes are impermissible because it pledged the revenue to bonds. The legislature’s changes to those two chapters demonstrate **both** that 1996 RCW 81.104.160 did not bind future legislatures to the then-extant valuation schedule, **and** that the legislature knows exactly how to make changes to Title 82 that are inapplicable to CPSRTA. It did not exempt CPSRTA from RCW 82.44.035, and that statute therefore governs the 0.3% MVET.

As a few examples, SB 6375, Laws of 2008 Ch. 260 added a section to Chapter 82.08, 82.08.0203, exempting trail grooming services from the excise tax. That exemption governs CPSRTA’s tax collections. HB 3188, Laws of 2008 Ch. 237 adds a section to Chapter 82.08, 82.08.0205, exempting sales of waste vegetable oil for personal biodiesel use, and governing CPSRTA’s tax. But by contrast, when the legislature wants to exempt certain items from sales tax, but allow CPSRTA to continue to tax them, it does that explicitly. Thus, SSB 6170, Laws of 2009 Ch. 469, exempts solar and biomass generating equipment from sales and use tax. It specifically excludes some of those new exemptions from CPSRTA’s sales tax authority, so that CPSRTA can still tax them. As a result, RCW 81.104.170(3) reads:

> (3)(a) The exemptions in RCW 82.08.820 and 82.12.820 are for the state portion of the sales and use tax and ***do not extend*** to the tax authorized in this section. (b) The exemptions in RCW 82.08.962 and 82.12.962 are for the state and local sales and use taxes and ***include*** the tax authorized by this section. (c) The exemptions in RCW 82.14.532 are for the local sales and use taxes and ***include*** the tax authorized by this section.” (Emphases added.)

Plainly, the legislature’s grant of sales tax authority, just like its grant of MVET authority, was subject to later alteration of the relevant chapter of Title 82. And when the legislature wanted to exempt a change to part of Title 82 from governing CPSRTA, it knew exactly how to do so. With respect to chapter 82.44 and RCW 82.44.035, it did not. That section governed the 0.3% MVET in 2006 when it was enacted.



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**[redacted]The 2010 Act, Restated In 2015, Violates Art. II §§ 19 and 37.**

As shown in the Motion, and unchallenged by CPSRTA, the 2010 enactment of the challenged sentence, called "the 2010 Act" in the Motion, violated Art. II §§ 19 and 37. It was a tax hike in a "technical amendments" bill, violating § 19. It amended RCW 82.44.035 without restating it, because that statute would not longer govern "any local imposed motor vehicle excise tax," as stated on its face. Restating the sentence in 2015 could not and did not cure the Art. II § 37 problem. CPSRTA presents no defense to this challenge.

**[redacted]RCW 81.104.160(3) Requires Use Of RCW 82.44.035.**

From 2006 to 2010, the only valuation schedule in Chapter 82.44 RCW was at 82.44.035—just as it is today. From 2006 to 2010, CPSRTA ignored that law but did not challenge its constitutionality or seek any reconsideration of the ruling in *Pierce County II* that did not reinstate RCW 82.44.041. From 2010 to 2015, the sentence that pointed to 1996 schedules was invalid, a violation of Art. II §§ 19 and 37. Restating the same mistake in 2015 did not cure the improper amendment of Art. II § 37. The sentence—always ignored by CPSRTA—is now and always has been invalid, leaving only RCW 82.44.035 to govern the 0.3% MVET.

**[redacted]Plaintiffs Are Entitled To Injunctive Relief**

In addition to challenging Plaintiffs' demonstration of a "clear legal or equitable right," CPSRTA objects to the motion for a preliminary injunction on the ground that the Plaintiffs have failed to demonstrate a substantial injury, and that granting the equitable relief would be contrary to the public interest.

The evaluation of the second and third prongs of the test for a preliminary injunction depend upon the strength of the Plaintiffs' satisfaction of the first prong. With respect to whether the Plaintiffs have demonstrated a "clear legal or equitable right," this case differs from many requests for a preliminary injunction in that there are no disputed issues of fact; whether the defendants are required to comply with RCW 82.44.035 is a pure question of law. If the Court finds that the defendants are required to comply with RCW 82.44.035, then there is no countervailing interest that would outweigh the Plaintiffs' right to have the law enforced. As a corollary, there is no burden



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on the defendants resulting from compliance with the law that can offset the right of the Plaintiffs to have the law enforced.

Plaintiffs acknowledge, particularly in light of the State's Opposition, that the exact scope of this Court's remedy will require additional proceedings. However, at this stage of the litigation, it is entirely proper for the Court to determine that some form of equitable relief is justified. The difficulties of conforming their behavior to the law, or the impact on a public service such as public transportation, is no reason to permit non-compliance.

## Conclusion

CPSRTA has offered no adequate reason for its failure to comply with RCW 82.44.035. Three of its reasons for non-compliance—that *Pierce County II* explicitly authorized its immunity from RCW 82.44.035; that the statute's text should be ignored in favor of legislative history; and that the 2010 Act "codified" *Pierce County II*—are plainly inadequate. The remaining reason—the claimed constitutional infirmity of RCW 82.44.035—would require a judicial determination that Plaintiffs do not seek, that CP{SRTA has never sought, has never been made, and could not be made on the record CPSRTA has presented. Plaintiffs therefore respectfully request prompt equitable relief to insure a proper, legal limit to CPSRTA's taxing authority.

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October 16, 2019.


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## Certificate Of Service

I certify under penalty of perjury under the laws of the United States of America that on October 16, 2019, I served the foregoing via email per agreement between the parties on the following:

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