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IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON
Respondent,
v.

ZACHERY K. MEREDITH,
Petitioner.

**AMICUS BRIEF OF SOUND TRANSIT, COMMUNITY
TRANSIT, KING COUNTY METRO & WSTA**

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I. INTRODUCTION

Citizen interactions with law enforcement present important issues under article I, section 7 of the Washington Constitution. Amici do not address whether the unique facts of this case present an illegal seizure of Zachary Meredith. Rather, Amici's concern is with the broad attack by Meredith on RCW 81.112.210 and RCW 81.112.220, which authorize transit agencies to collect and ensure riders pay their fares.

RCW 81.112.210 and RCW 81.112.220 vest Amici with the ability to walk bus-and-train aisles to ensure fares are paid.¹ Amici may request riders provide proof of payment; issue notices, warnings, and fines to passengers who have not paid; and expel those who fail to present proof-of-payment. RCW 81.112.210 and RCW 81.112.220, however, do not require transit agencies to contract with law enforcement to conduct fare enforcement or to seek criminal penalties for failure to pay fares.

¹ Metro and other agencies operate under similar laws, such as RCW 35.58.585, RCW 36.75A.230, and KCC 28.96.500.

Each transit agency has discretion to determine how it conducts fare enforcement.

Some Amici, for example, conduct fare enforcement with personnel who are not police officers, do not carry guns, and who—in addition to checking fare payment—educate and assist low-income riders with fare-assistance options, ensure rider safety, and collect ridership data with the goal of preventing inequitable effects that result from unpaid fines. Others use law-enforcement in situations deemed necessary for safety. Moreover, fare enforcement is critical as fare revenue significantly funds transit services throughout the state.

This case is poorly suited to a sweeping facial-challenge to Amici's fare-compliance authority. The Court should not treat this case as a facial challenge to RCW 81.112.210 and RCW 81.112.220. Regardless, Meredith fails to demonstrate RCW 81.112.210 and RCW 81.112.220 cannot be constitutionally implemented.

II. STATEMENT OF FACTS AND IDENTITY OF AMICUS CURIAE

Amici Central Puget Sound Regional Transit Authority (Sound Transit) and King County Metro (Metro) provide public transportation services. Sound Transit's services include Link light rail in Seattle and Tacoma, ST Express Buses, and Sounder commuter rail. *See* Declaration of Emily Walton ¶¶ 1–2. Sound Transit expects to pay \$126.4 billion to operate and expand its network through 2046. *Id.* ¶ 3. It expects to cover those obligations through voter-approved taxes, debt financing, government grants, and fare revenues. *Id.* ¶¶ 4–6. Fare revenues will cover 28% of Sound Transit's operating-and-maintenance costs through 2046. *Id.* Sound Transit's adopted budget for 2022 funds 100,100 light-rail service-hours of which fare revenue covers 29,000 hours. *Id.* ¶¶ 7–8. This generally tracks historical trends between 2009 and 2021. *Id.* ¶¶ 4–6

Those trends are based on Sound Transit's barrier-free payment-system. *Id.* That system allows passengers to pay via machines at each station and then freely enter the trains and buses

as opposed to paying and entering through turnstiles, gates, or other barriers. *See* Declaration of Don Billen ¶¶ 8–9. Such a system dramatically reduces costs by reducing the equipment and personnel needed to check fares. *Id.* ¶ 10.

Metro operates throughout King County. Metro, for example, provides RapidRide and Third Avenue Corridor bus service, connecting many communities every 10–15 minutes during most times of the day. Metro’s RapidRide and Third Avenue Corridor services are expanding, with two new lines opening within the next two years and additional lines in development. Also, like Sound Transit, Metro uses a barrier-free payment-system to scale efficiencies.

Community Transit operates throughout Snohomish County, connecting those living, working, or traveling through cities such as Everett, Mukilteo, and Bothell on 10-minute intervals during the weekdays, and on 15-minute or 20-minute intervals during the evenings and weekends. Like Sound Transit and Metro, Community Transit uses barrier-free payment-

systems when providing transportation aboard its Swift Buses. Swift Buses are Rapid Transit Buses that provide critical-and-efficient access to places such as Boeing's Everett Facility, as well as Everett's Paine Field.

Washington State Transit Association ("WSTA") is a nonprofit corporation, representing 31 public transit systems in the state and the WSDOT Public Transportation Division. WSTA's associate members include state and local agencies and organizations, as well as taxpayer vendors, consultants, and individuals. WSTA's mission is to promote and enhance public transit for the citizens of the State of Washington. WSTA's public transit agency members serve rural, small urban, urban and regional areas and provide 238 million passenger trips annually, including over 6 million trips by those with special transportation needs. Its members include Sound Transit, Metro, Community Transit and other agencies that use barrier-free payment-systems and rely on RCW 81.112.210 and like statutes for fare enforcement authority. Some members do not rely on

law-enforcement to enforce fare payment; others use law-enforcement as necessary and appropriate for safety of employees and passengers.

A. Barrier-Free Payment-Systems

Fare revenue is critical funding for the financial viability of public transit systems.² “For generations, the transit industry has had to balance the desire for faster service with the need to collect fares.”³ Traditionally, in order to ensure fare payment most bus systems utilized front-door boarding-and-operator fare-verification. Train systems utilized turnstiles and like barriers before entering the boarding area. Such systems are less efficient than barrier-free systems. They lengthen travel times by

²Since 2016, King County Metro has targeted fare revenues as providing 25% of bus operating costs. KING CNTY. METRO, FINANCIAL—ANNUAL: METRO BUS FAREBOX RECOVERY, <https://kingcounty.gov/depts/transportation/metro/about/accountabilitycenter/performance/financial/annual.aspx#metro-bus-farebox-recovery> (last visited Feb. 7, 2022).

³ S.F. MUN. TRANS. AGENCY (SFMTA), ALL-DOOR BOARDING EVALUATION—FINAL REPORT (2014) at 1, *available at* <https://www.sfmta.com/sites/default/files/agendaitems/2014/12-2-14%20Item%2014%20All%20Door%20Boarding%20Report.Pdf> (last visited Feb. 7, 2022).

extending boarding times at stops, and use scarce resources less efficiently. *Id.*

New rapid transit systems are designed to function with off-board ticketing and all-door loading-and-unloading to reduce costs and provide faster trips. “Application of off-board fare collection is one of the key quality-of-service considerations for [bus rapid transit] development in North America.”⁴ “As has been found for [light rail transit] operations, allowing for quick multidoor boarding and eliminating on-board fare collection can help shave significant time off a transit vehicle’s journey.” *Id.* Sound Transit, Metro, Community Transit, and other Washington agencies now utilize barrier-free payment-systems.

⁴ TRANSIT COOPERATIVE RESEARCH PROGRAM (TCRP) SYNTHESIS 96: OFF-BOARD FARE PAYMENT USING PROOF-OF-PAYMENT VERIFICATION (2012) at 11 *available at* https://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_syn_96.pdf (last visited Feb. 7, 2022).

B. Barrier-Free Proof-of-Payment Systems Enhance Efficiency, Promote Savings, and Help Ensure Ridership Safety.

The barrier-free payment-system on Link light rail, Tacoma Link, and Sounder trains is fundamental to Sound Transit's ability to provide faster travel times and fund its long-term financial-plan. *See, e.g.*, Billen Decl. ¶¶ 4–11; Walton Decl. ¶¶ 1–8. Barrier-free transit-systems can cost 20–30 times less than systems utilizing physical-entry barriers. Equally as important, barrier-free systems facilitate faster boarding times, and support increased ridership with fewer staff. *See* Billen Decl. ¶¶ 8–11.

Operators of barrier-free rail-lines check fare compliance by periodically asking passengers for proof-of-payment. *Id.* Such fare enforcement helps confirm that those who are able to pay their fares do so. *Id.* The barrier-free system has an added safety benefit. *Id.* ¶¶ 1–11. It disincentivizes riders from evading turnstiles (or other barriers) by walking on the tracks to board, thereby posing obvious safety risks. *Id.*

The efficiencies provided by barrier-free systems makes them particularly well suited for light rail, which have higher ridership than buses, but lower ridership than subways. *Id.* ¶¶ 8–11. An agent at every door to collect fares or confirm payment, for example, increases travel times and labor costs. All American operators of modern light-rail (*e.g.*, Denver, Dallas, Houston, Minneapolis, Phoenix, Portland, Sacramento, San Diego, San Francisco, San Jose, and Tucson) utilize similar barrier-free payment-systems. *Id.* ¶ 10.

C. Sound Transit’s Practices Are Different Than Those at Issue Here and are Reviewed to Eliminate Bias.

Sound Transit has strived for many years to remove unintentional bias from its practices, including in its fare-compliance efforts. For this reason, Sound Transit periodically updates its practices to ensure its transit services are safe, efficient and equitable.

Sound Transit’s fare-compliance efforts have for more than a decade relied on processes that are methodical,

nondiscretionary, and nearly automated in nature. Sound Transit hires non-law enforcement contractors for fare compliance. *See, e.g., Declaration of Kenneth Cummins* ¶¶ 1–11. Before 2019, after entering a train, contractors working in teams of two (or on occasion, in teams of three if a team member was still in training) announced their presence while diverging to opposite ends of the car. *Id.* ¶¶ 4–7. The officers then worked towards the middle, requesting proof-of-payment from every passenger. *Id.* If a passenger did not provide proof-of-payment, the rider was asked for identification. *Id.*

Before becoming aware that persons-of-color may have been disproportionately ticketed for fare evasion, riders who provided identification but were unable to provide proof-of-payment were warned for their first offense in a 12-month period, and fined \$124 for their second and third offenses. *Id.* ¶ 9. Sound Transit’s practices continued to evolve to ensure fare compliance is evenly carried out across Sound Transit’s network: Inspections occurred during all revenue service hours on all railway lines. *Id.*

¶ 4. So long as they posed no safety threat, riders were permitted to terminate any fare-enforcement encounter without first showing proof-of-payment or identification by simply leaving or stating their intention to leave the train. *Id.* ¶¶ 1–11.

In 2020, Sound Transit initiated a Fare Ambassador Program in response to community concerns. *See* Declaration of Sandee Ditt ¶¶ 1–4. Through that program, ambassadors talk with passengers on a consensual basis, educating them about how to purchase fare passes, how to obtain fare assistance, and the importance fares play in helping Sound Transit serve its constituents. *Id.* ¶¶ 1–9. The Ambassador Program also seeks to achieve these goals by reaching out to community groups and community leaders.

Sound Transit ambassadors also play a critical role in tracking ridership trends. The ambassadors request proof-of-payment to collect data to help Sound Transit consider new approaches to fare compliance. *Id.* ¶¶ 1–11. If a rider is unable to present proof-of-payment, the rider is asked to identify

themselves; if the rider provides identification, their identity is recorded solely for statistical purposes; if the rider refuses, the ambassador politely counsels the rider by providing an informal warning. *See id.* The ambassador then moves on to other passengers, but notes the refusal for statistical purposes. Ambassadors do not involve Sound Transit security or law enforcement in responding to matters of fare enforcement unless a rider presents a danger to themselves or to others. *See id.*

The ambassadors are professional, respectful, and assist passengers. *See id.* The ambassadors, for example, collectively speak eight languages, and each is knowledgeable in first aid, cardiopulmonary resuscitation, de-escalation, youth strategies, mental health, disability sensitivity, and anti-and-implicit biases. Sound Transit deploys its ambassadors across its network to benefit passengers. Passengers expressed appreciation for Sound Transit's Fare Ambassadors:

- “*Thank you all Fare Ambassadors for their work and patience as it is not always easy working with riders.*”

- *“He assisted my family on our adventure. [The Ambassador] was great at answering the many questions our sons had about trains. We like the program, and look forward to our sons seeing a friendly face on the trains.”*
- *“I did not know they were to check my fare. as it turned out, they helped educate me on the fare subject before I boarded the rail + helped me find the Orca reader machine”*
- *“The Ambassador boarded the train with two others and loudly and clearly introduced herself by name and why she was there. She gave an explanation of checking fare payment and answering questions about ORCA. She announced that they'd be starting at end of the cars and working their way in. She greeted each person on our end with a very friendly demeanor and answered a couple of ORCA/ticket questions along the way. She then greeted a family with a small child and stroller, giving the kids a couple of cute stickers....I felt very safe, comfortable and like she was there to help instead of confront people”*

D. Sound Transit’s Practices Enable Sound Transit to Connect Communities While Balancing its Need for Fare Revenue.

The Ambassador Program provided Sound Transit the opportunity to rethink its fare-compliance practices and resulted in recommendations Sound Transit’s Board of Directors is expected to soon adopt. *See id.* ¶¶ 12–19. The recommendations

seek to balance community concerns with the need to fund 28% of Sound Transit operating-and-maintenance costs with fare revenues.

If the recommendations are adopted, future non-paying adult-riders will be eligible to receive two warnings in a 12-month period; third-and-fourth fare-violations within 12-months results in \$50 and \$75 fines (respectively), but those fines can be resolved through several nonmonetary actions. *Id.* Four or more infractions in 12-months results in a \$124 citation, but will not be referred to law enforcement. *Id.* Sound Transit will not enforce its fare policies against riders under 18 or collect identifying information about them. *Id.*

E. Metro Has Adopted Barrier-Free Systems to Enhance Service Across RapidRide and Third Avenue Corridor Bus Lines.

Metro also widely utilizes barrier-free systems, primarily on its RapidRide lines. In order to reduce headway⁵ times and

⁵ Headway is the amount of time between when one bus arrives at a stop and when the next bus arrives.

provide fast and frequent service, RapidRide lines incorporate enhancements that conventional buses lack. These enhancements include self-service fare-payment, all-door passenger-boarding, efficient off-boarding, as well as specialized buses,⁶ well-spaced stops and station improvements including real-time arrival signs and information kiosks, and traffic signal prioritization. These innovations are designed to improve the speed, frequency and reliability of service. In contrast to traditional pay-on-board fare-collection, off-board payment and multi-door boarding reduces queuing and dwell times which helps to ensure short headway times, which is critical to preserving system efficiencies.

In addition, Metro has also made off-board fare-payment available for all buses using the Third Avenue transit corridor in downtown Seattle.⁷ Third Avenue is the busiest transit corridor

⁶ RapidRide buses typically have three doors—located in the front, middle and back of the vehicle—to enable passengers to get on and off the bus more quickly.

⁷ KING CNTY. METRO, TRANSIT CORRIDORS, PARKING & FACILITIES, THIRD AVE. IMPROVEMENTS, <https://kingcounty.gov/depts/transportation/metro/programs-projects/transit->

in Washington and in 2019 was used by more than 2,500 buses and 100,000 passengers every day. *Id.*

Because RapidRide lines and Third Avenue buses utilize off-board payment, all of the doors can be opened at each stop for simultaneous boarding and deboarding. Conversely, on bus routes requiring onboard payment passengers must board through the front door so that the operator can check every fare.

F. Metro’s RapidRide and Third Avenue Operations Rely on Proof-of-Payment Practices Different than Those at Issue Here.

Because RapidRide and Third Avenue buses use all-door boarding, Metro uses fare enforcement to prevent fare evasion. The standard procedure for Fare Enforcement Officers (FEOs) is to request proof of payment from each passenger.⁸ Metro FEOs are not law enforcement officers. *Id.* When a passenger offers no

corridors-parking-and-facilities/third-ave-improvements.aspx (last visited Feb. 7, 2022).

⁸ KING CNTY. METRO, SAFETY, SECURITY AND FARE ENFORCEMENT (SAFE) REFORM INITIATIVE SCOPING REPORT at 11 (Apr. 2021), *available at* <https://mkcclegisearch.kingcounty.gov/View.ashx?M=F&ID=9308039&GUID=966B0BA9-AA86-4190-A334-E67FE68460D6> (last visited Feb. 7, 2022).

proof of payment, the FEO talks with the passenger to determine the reason for non-payment. *Id.* The FEO may connect the passenger to staff who can provide information about reduced fare programs, or in some cases issue a warning or notice of violation. *Id.*

Since 2018, King County has worked to measure and reduce any disproportionate impact that fare enforcement may have on historically disadvantaged populations. On September 18, 2018, King County enacted an ordinance creating an internal process as an alternative to citing individuals for fare evasion. King County Ordinance 18789. Violations are handled without law enforcement or court intervention. The ordinance authorizes FEOs to issue warnings or notices and requires Metro to provide options on how to resolve violations without paying a fine. *Id.* The ordinance requires an annual report of fare enforcement activities, including demographics, in order to assess the enforcement impact on vulnerable communities. *Id.* Metro

utilized the fare enforcement program to identify ways to increase rider access to reduced fare programs.⁹

G. Proof-of-Payment Systems are Critical to the Efficiency and Success of Bus Rapid Transit Systems.

While Washington bus rapid transit systems are currently limited to the Puget Sound, Spokane Transit is constructing a six-mile electric bus route partly funded by a \$53.4 million grant from the Department of Transportation.¹⁰ Vancouver's C-TRAN is constructing a 9.9 mile rapid transit line with a \$24.9 million grant.¹¹

⁹ ANNUAL REPORT ON KING CNTY. METRO FARE ENFORCEMENT AND FARE VIOLATION PROGRAMS at 2, 5, 9 (Apr. 2019), *available at* <https://publicola.com/wp-content/uploads/2020/11/0053-REPORT-Annual-Report-on-King-County-Metro-Fare-Enforcement-Fare-Violation-Programs-1.pdf> (last visited Feb. 7, 2022).

¹⁰ SPOKANE TRANSIT, FTA ALLOCATES \$53.4M TO SPOKANE'S CENT. CITY LINE (Apr. 9, 2019), *available at* <https://cityline.spokane.com/wp-content/uploads/2021/03/Media-Release-FTA-Allocates-53.4M-to-City-Line.pdf> (last visited Feb. 7, 2022).

¹¹ FED. TRANS. ADMIN., U.S. DEPT. OF TRANS. ANNOUNCES \$24.9 MILLION GRANT AWARD FOR THE MILL PLAIN BUS RAPID TRANSIT PROJECT IN VANCOUVER, WASH. (Sept. 24, 2021), *available at* <https://www.transit.dot.gov/about/news/us-depart>

Improving efficiency is an important factor in obtaining federal funding that makes these projects possible. *See e.g.* 49 U.S.C. § 5309; 49 CFR 611.303 (listing mobility improvements, congestion relief and cost effectiveness as criteria). Barrier-free payment is an integral element for buses to achieve faster travel times. Without fare enforcement, transit agencies would be forced to decide whether systems that utilize barrier-free payment would remain financially viable. If variability cannot be maintained, the speed and frequency of service will decline, and it may be difficult to meet federal funding requirements.

For example, working with the City of Seattle, Metro is currently developing the new RapidRide G Line. The City of Seattle, as project sponsor, has been awarded \$59.9 million in Capital Investment Grant (CIG)/Small Starts program funding from the Federal Transit Administration (FTA) for the project.¹²

ment-transportation-announces-249-million-grant-award-mill-plain-bus-rapid (last visited Feb. 7, 2022).

¹² FED. TRANS. ADMIN., MADISON ST. BRT SEATTLE, WA SMALL STARTS PROJECT DEV. (Nov. 2020) at 2, *available at*

This represents almost 45% of the total development costs for the G Line project.

The FTA's CIG program funds transit infrastructure investments. To obtain funding, Metro must meet rigorous requirements, including defined service levels and short headways that ensure faster travel times.¹³

Part of the justification for proposed corridor-based bus rapid transit projects being awarded competitive discretionary federal CIG grants is the commitment to fast and efficient service as reflected in low headway times.¹⁴ Without off-board fare-payment, Metro would struggle with travel time requirements,

<https://www.transit.dot.gov/sites/fta.dot.gov/files/2021-05/WA-Madison-Street-BRT-Project-Profile-FY22.pdf>

¹³ FTA CIG program grant agreements require that the awarded project operate transit service at the level stated in the grant agreement for a defined period of performance. The CIG grant agreement for the RapidRide G line project includes a five-year service level commitment.

¹⁴ FED. TRANS. ADMIN., FINAL INTERIM POLICY GUIDANCE FED. TRANS. ADMIN. CAPITAL INVESTMENT GRANT PROGRAM (June 2016) at 3, *available at* https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FAST_Updated_Interim_Policy_Guidane_June%20_2016.pdf (last visited Feb. 7, 2022).

and federal CIG grant funding would likely be compromised. An off-board payment-system without fare enforcement would negatively impact the financial sustainability of Metro's RapidRide system and similar rapid lines across Washington.

H. Facially Invalidating Fare Enforcement Statutes Will Detrimentially Impact Sound Transit, Metro, Community Transit, and Other Washington Transit Agencies.

An opinion that facially invalidates the statutes authorizing the fare enforcement systems that Sound Transit, Metro, Community Transit, and others use will detrimentally impact their ability to fund current operations and planned expansions. One need only consider that ridership fares play a critical part in funding for public-transportation providers. For example, Sound Transit forecasts its ridership fares through 2046 will amount to approximately \$8.0 billion dollars. The facts and circumstances of this case do not warrant disruption to that revenue stream (or to the revenue stream benefitting Metro) since Meredith fails to establish RCW 36.57A.230–.235 and RCW

81.112.210–.220 are unconstitutional in all applications as discussed below.

III. ARGUMENT

A. Appellant is Making an “As-Applied” Challenge.

Statutes are presumed constitutional, and a defendant challenging the statute “has the burden to prove otherwise beyond a reasonable doubt.” *State v. Bassett*, 192 Wn.2d 67, 77, 428 P.3d 343 (2018). Constitutional challenges fall into two categories: “facial” challenges and “as-applied” challenges. To successfully make a facial challenge, a defendant must show no circumstances exist in which the statute, as currently written, can be constitutionally applied. The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative. *City of Redmond v. Moore*, 151 Wn.2d 664, 668–69, 91 P.3d 875 (2004).

An as-applied challenge to the validity of a statute is characterized by a party’s allegation that application of the statute in the specific context of the party’s action is

unconstitutional. *Id.* Put another way, a facial challenge asserts that the statute cannot be properly applied in any context, while an as-applied challenge requires analyzing the statute in light of the facts of the specific case before the court. *Id.*

The law favors as-applied challenges because they are more consistent with the goal of resolving concrete disputes and deferring as much as possible to the legislative process. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–51, 128 S. Ct. 1184, 170 L.Ed.2d 151 (2008). Facial challenges, on the other hand, should be used sparingly and only in exceptional circumstances. *See id.* This makes sense since an as-applied challenge ensures that courts do not make uncertain speculations about how a law operates outside of the facts generated by the controversy before it. *United States v. Treasury Employees*, 513 U.S. 454, 477–78, 115 S. Ct. 1003, 130 L.Ed.2d 964 (1995).

B. A “Facial” Challenge to RCW 81.112.210 Is Not Appropriate.

A facial challenge will only succeed if a litigant can establish no set of circumstances exists under which the statute would be valid. As described above, Sound Transit and Metro apply RCW 81.112.210 and RCW 36.57A.230, respectively, without involvement of law enforcement officers or like government agents, without imposing criminal penalties, and without detaining passengers to take fingerprints for identification purposes. Other agencies use law-enforcement as necessary for the safety of employees and passengers. No party alleges such applications contravene the federal or state constitution.

Whether a person is seized within the meaning of the Fourth Amendment or article 1, section 7 of the Washington Constitution, depends upon all of the circumstances surrounding the incident, which can include the presence of several law enforcement officers, the display of a weapon, and the use of language. *State v. Young*, 135 Wn.2d 498, 510–15, 957 P.2d 681

(1998). For this reason, a facial invalidation of the statutes at issue that precludes any fare enforcement regardless of the circumstances, as urged by Meredith, is not warranted.

RCW 81.112.210 authorizes regional transit authorities to establish a fare enforcement system. The statute does not create a law enforcement scheme. It allows for fare enforcement and, when appropriate, the imposition of fines not to exceed those imposed for class 1 infractions under RCW 7.80.120. *See* RCW 81.112.210(1). As part of the enforcement scheme, the statute grants limited powers and authority to private contractors hired as fare enforcement officers:

[P]ersons designated to monitor fare payment also have the authority to take the following actions:

(i) Request proof of payment from passengers;

(ii) Request personal identification from a passenger who does not produce proof of payment when requested;

(iii)

(A) Issue a notice of infraction for a civil infraction established in RCW 81.112.220.

...

(v) Request that a passenger leave the authority facility when the passenger has not produced proof of payment after being asked to do so by a person designated to monitor fare payment.

RCW 81.112.210(b). By its terms, the statute makes plain that persons enforcing fares do not have the powers or status of police officers. And the statute does not require the use of law-enforcement to enforce fares.

This Court examined RCW 81.112.210 in *State v. K.L.B.*, 180 Wn.2d 735, 328 P.3d 886 (2014). The Court concluded Sound Transit fare enforcement contractors are “not government employees, are not officers of government, and do not perform a governmental function, they are not ‘public servants’ as defined by the statute.” *Id.* at 737. The Court went on to explain:

It is true that Sound Transit contracted with Securitas to provide fare enforcement services in accordance with Sound Transit’s statutory authority. It is also true that under

RCW 81.112.210(2)(b), FEOs have the authority to (i) request proof of payment from passengers, (ii) request personal identification from a passenger who does not produce proof of payment when requested, (iii) issue a citation under RCW 7.80.070, and (iv) request that a passenger leave the facility when the passenger has not produced proof of payment. However, these statutory privileges do not transform Sound Transit FEOs (who in reality are Securitas employees) into public officers.

Id. at 743–44. Thus, Sound Transit and Metro’s use of non-police fare-enforcers presents a very different question under article 1, section 7 than the utilization of fully commissioned police officers. *Cf. State v. Graham*, 130 Wn.2d 711, 719–23, 927 P.2d 227 (1996).

How law enforcement officers are used for fare enforcement also implicates the scope of a passenger’s implied consent to a limited detention and questioning about proof of fare payment. The need to pay a fare is conspicuously posted and not contested. In a barrier-free system, the only way to confirm fare payment is by having a fare-enforcement person ask for proof-of-payment. And the only realistic expectation is that if you are

asked and have not paid you may be subject to a civil fine and/or a request to leave the train or bus. The issue of consent could be seen differently depending on facts of specific law enforcement officer involvement. Sound Transit and Metro inform passengers about what to expect when their fare is about to be checked and act in a way that should be deemed within a passenger's implied consent and expectation. Other agencies use law enforcement differently than at issue. The Court should not address the consent issue beyond the facts in this case.

C. Alternatively, this Court Should Seek Additional Briefing on Whether Use of Non-Law Enforcement Fare Enforcers is Consistent with a Special Needs Exception Under Article 1, Section 7.

If the Court is inclined to address this as a facial challenge, it should seek briefing on a “special needs” exception under article I, section 7. The United States Supreme Court has adopted a “special needs” exception under the Fourth Amendment. The federal special needs exception permits an otherwise unlawful search when “special needs,” beyond the normal need for law enforcement, make the warrant and probable-cause

requirement impracticable. *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L.Ed.2d 709 (1987). The government must show (1) a purpose outside of general law enforcement, (2) that this purpose makes obtaining a warrant or probable cause impracticable, and (3) that this purpose outweighs the privacy interest infringed. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619–21, 109 S. Ct. 1402, 103 L.Ed.2d 1371 (1980).

This Court has not explicitly recognized a special needs exception under article I, section 7. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 314, 178 P.3d 995 (2008). The Court has, however, occasionally upheld suspicionless searches in limited cases. *See id.* at 315.

For instance, in *State v. Meacham*, 93 Wn.2d 735, 612 P.2d 795 (1980), the Court upheld mandatory blood tests of putative fathers ordered “after full adversary hearings.” *Id.* at 739. Similarly, in *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 90–98, 847 P.2d 455 (1993), the Court upheld mandatory HIV testing of convicted sexual offenders, engaging solely in a federal

analysis. And in *State v. Surge*, 160 Wn.2d 65, 82, 156 P.3d 208 (2007), the Court held that DNA sampling of convicted felons did not violate article I, section 7.

Most recently, in *State v. Olsen*, 189 Wn.2d 118, 135, 399 P.3d 1141 (2017), the Court upheld suspicionless urinalysis testing of misdemeanor probationers. Rather than adopt a special needs exception, the Court relied upon a balancing test to evaluate whether there was “authority of law” to satisfy of article 1, section 7.¹⁵ The Court adopted a balancing test: “[N]arrowly tailored” searches to further a “compelling” state interest are permissible “because probationers have a reduced expectation of privacy.” *Id.* at 126 (noting that, with such reduced privacy expectations, “the State does not need a warrant, an applicable warrant exception, or even probable cause to search a probationer.”).

¹⁵ *Id.* at 134. The dissenting justices contended that the balancing test bore all the indicia of the federal special needs test. *See id.* at 138 (Madsen, J., dissenting).

Here, the parties have presented limited argument regarding the special needs exception and none about the balancing test in *Olsen*. If the Court is inclined to conduct a facial challenge, it should consider whether any circumstances exist in which the statute, as currently written, could satisfy the special needs exception under article 1, section 7, or the balancing test announced in *Olsen*, and it may wish to invite the parties to present additional briefing on this issue.

IV. CONCLUSION

Barrier-free entry provides significant service and safety benefits. Fare revenue provides essential funding to support frequent service. And authority to check fare payment is necessary to maintain service levels.

As Sound Transit and Metro demonstrate, RCW 81.112.210 and RCW 36.57A.230 provide discretion in how agencies enforce fare payment. Law enforcement is not required. Other agencies use law-enforcement in different ways than here. Criminal penalties are not allowed. Nor is detention

to obtain fingerprints. This case should be decided on its facts,
not as a facial challenge to fare enforcement statutes.

I certify that this memorandum contains 4,937 words, in
compliance with RAP 18.17.

Respectfully submitted this 8th day of February, 2022.

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