

Supreme Court 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 FRANK
MAIETTO, individually and on behalf of a class of all persons similarly
situated,

Plaintiff,

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, and
STATE OF WASHINGTON

Defendants.

**BRIEF OF AMICUS CURIAE SENATORS MICHAEL PADDEN
AND STEVE O'BAN**

SENATOR STEVE O'BAN
WSBA No. 17265
1575 S Seashore Dr
Tacoma, WA 98465-1019
(253) 312-1688

Attorney for Amicus Curiae

Table of Contents

I. INTRODUCTION 4

II. IDENTITY AND INTEREST OF AMICUS CURIAE..... 5

III. ISSUE OF INTEREST TO AMICUS CURIAE..... 7

IV. ARGUMENT..... 7

 A. Legislative history is not relevant to determine compliance with art. II, sec. 37..... 7

 B. This Court should not use extrinsic evidence of whether legislators were misled to determine compliance with art. II, sec. 37.. 11

 a. Discovery of that evidence is impractical; violates separation of powers, other pertinent legislative rights and prerogatives, and the enrolled bill doctrine..... 11

 b. If the Court is inclined to consider that evidence, then it should allow admission of evidence provided in the Appendix of this brief. 15

 c. If the Court deems Sound Transit’s Counterstatement of Facts Material, they are disputed requiring reversal of Summary Judgment in this case..... 15

TABLE OF AUTHORITIES

Cases

<i>Baldwin v. Sisters of Providence in Wash., Inc.</i> , 112 Wn.2d 127, 132, 769 P.2d 298 (1989)	16
<i>Citizens for Clean Air v. Spokane</i> , 114 Wn.2d 20, 38, 785 P.2d 447 (1990)	16
<i>Commodity Futures Trading Comm'n v. Schor</i> , 478 U.S. 833, 851, 92 L.Ed.2d 675, 106 S.Ct. 3245 (1986)	12
<i>Derby Club, Inc. v. Becket</i> , 41 Wash.2d 869, 882, 252 P.2d 259 (1953)	14
<i>El Centro DeLa Raza v. State</i> , 192 Wash. 2d (2003)	8
<i>Hartley v. State</i> , 103 Wn.2d 768, 774, 698 P.2d 77 (1985)	15
<i>In re Juvenile Director</i> , 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976)	12
<i>Lamon v. McDonnell Douglas Corp.</i> , 91 Wash.2d 345, 349, 588 P.2d 1346 (1979)	16
<i>Morris v. McNicol</i> , 83 Wash.2d 491, 494-95, 519 P.2d 7 (1974)	16
<i>Morrow v. Henneford</i> , 182 Wash. 625, 47 P.2d 1016 (1935)	8
<i>State ex rel. Bugge v. Martin</i> , 38 Wash.2d 834, 232 P.2d 833 (1951)	9
<i>State ex rel. Citizens Against Tolls v. Murphy</i> , 151 Wash.2d 226, 248, 88 P.3d 375 (2004)	12
<i>State ex rel. Dunbar v. State Bd. of Equalization.</i> , 140 Wash. 433, 249 P. 996 (1926)	9, 10
<i>In State ex rel. Hodde v. Superior Court</i> , 40 Wash.2d 502, 507, 244 P.2d 668 (1952)	9
<i>State ex rel. Reed v. Jones</i> , 6 Wash. 452, 460, 34 P. 201 (1893)	13

<i>State ex rel. Wash. Toll Bridge Auth. v. Yelle</i> , 61 Wash.2d 28, 377 P.2d 466 (1962).....	9
<i>State v. Evans</i> , 298 P.3d 724 (2013).....	10
<i>State v. Osloond</i> , 60 Wn. App. 584, 587, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991).....	12
<i>State v. Owen</i> 206 P. 3d 310 (2013).....	9, 14
<i>Schwarz v. State</i> , 85 Wash.2d 171, 175, 531 P.2d 1280 (1975).....	14
<i>Washington v. Citizens Action of Washington</i> , 162 Wash. 2d 142 (2007) ..	<i>passim</i>
<i>Washington Education Assoc. v. State</i> , 93 Wn.2d 37 (1980).....	8
<i>Wash. State Farm Bureau v. Gregoire</i> , 162 Wash.2d at 306, 174 P.3d 1142 (2007).....	12
<i>Wash. State Grange v. Locke</i> , 153 Wash.2d 475, 499-500, 105 P.3d 9 (2005).....	14

Statutes

Art. II, sec. 16, <i>Washington State Constitution</i>	13
Art. II, sec. 17, <i>Washington State Constitution</i>	13
Art. II, sec. 37, <i>Washington State Constitution</i>	<i>passim</i>

Other Authority

Bill Report for SB 5789 (2015).....	10
-------------------------------------	----

I. INTRODUCTION

This action puts at issue whether legislation drafted by and for the benefit of a powerful and well-financed regional entity must comply with the plain meaning of the state constitution, namely, Article II, section 37, which demands that “[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length” In its brief, Defendant-Respondent Central Puget Sound Regional Transit Authority (“Sound Transit”) provides a “Counterstatement of Facts” containing allegations about the passage of SB 5987 purporting to be legislative history. It presents these allegations in furtherance of the claim that “[l]egislative history is relevant to determine compliance with art. II, s. 37.” Brief of Respondent Sound Transit at pp. 8-11 and 31, respectively.

Amici maintain that it is impractical, illegal, and unconstitutional to take the opinions of individual legislators and staff into account when considering whether a particular bill violates Art. II, sec. 37. Instead, the Court should confine its analysis to the text of the bill. To do otherwise risks conflicting with the enrolled bill doctrine, separation of powers, as well as other significant constitutional legislative rights and privileges. In the alternative, if the Court is inclined to consider evidence of the

circumstances that led to the passage of a bill, Amici have provided in the appendix to this brief a summary of the results of an investigation conducted by the Senate Law and Justice Committee. The results show that legislators were misled about key aspects of the legislation. This will assist the Court to consider Sound Transit's "Counterstatement of Facts" in proper context.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Amici are current Washington State Senators. During 2017, Senator Padden was the chair of the Senate Law and Justice Committee and Senator Steve O'Ban was the vice-chair. That year, the Senate Law and Justice Committee investigated the legislation and authorization for Sound Transit 3 (ST3), a 2016 general-election ballot proposition from Sound Transit about the expansion of mass transit in King, Pierce and Snohomish counties. A letter sent to the Committee by Senators Steve O'Ban and Dino Rossi prompted the investigation. See Appendix A, Exhibit A, May 11, 2017 Letter to Attorney General Ferguson. The letter requested that the Committee consider three issues:

1. Whether the ST3 authorization legislation was unconstitutionally drafted in violation of Article II, Section 37 of the Washington State Constitution, which prohibits amending provisions of law by reference;
2. Whether Sound Transit, in 2015, misled legislators as to the amount it sought in the authorization; and

3. Whether Sound Transit improperly participated in and misled voters in the promotion of ST3.¹

During its investigation, the Committee obtained and examined over 7,000 pages of Sound Transit documents, and interviewed nine Sound Transit witnesses. At the request of Sound Transit, a court reporter transcribed each witness interview.

As a part of the investigation, the Committee held two investigative public work sessions and questioned some fifteen witnesses over 53 exhibits. After the investigation, Sens. Padden and O'Ban reached findings and conclusions and transmitted them by letter dated October 23, 2017 to the Chairs of the Transportation Committees of the House and Senate. See Appendix A, Exhibit B, October 23, 2017 Letter to Sen. King, et al. Based on the factual findings, attached as Appendix A, the Committee concluded:

- SB 5987 is unconstitutionally drafted. The reference to the schedule as it existed in 1996 prior to repeal is improper and constitutionally defective.
- Sound Transit deliberately misled lawmakers as to the dollar amount of the authorization for which it was seeking legislative approval.

¹ The first issue was originally raised in a letter from Sens. O'Ban and Rossi on March 2, 2017 to the Attorney General in a request for an advisory opinion. The Attorney General declined the request in a letter on March 17, 2017. The third issue is not relevant to this case and will not be addressed further in this brief.

Amici have a direct interest in ensuring legislation complies with Art. II, Sec. 37, and especially SB 5987, the subject of the Committee's extensive investigation and specific findings and conclusions. Amici also have an interest in ensuring that members of the legislature and staff are not subjected to discovery for litigation over constitutional issues. Finally, Amici have an interest in ensuring that the Court has an accurate and complete picture of the circumstances leading to the passage of SB 5987 in contrast to the "Counterstatement of Facts" in Respondent Sound Transit's Brief.

III. ISSUE OF INTEREST TO AMICUS CURIAE

- 1) Whether legislative history is relevant to determine compliance with art. II, sec. 37.
- 2) Whether this Court should use extrinsic evidence that legislators were misled to determine compliance with art. II, sec. 37.

IV. ARGUMENT

- A. Legislative history is not relevant to determine compliance with art. II, sec. 37.

Sound Transit makes the extremely troubling contention that the Court should peel back the curtain behind lawmaking to determine whether individual legislators (or legislative staff)² were misled on a bill before it

² Perhaps most alarming for reasons that will be explained later is Sound Transit's reference to advice from "staff counsel of the Senate Research Center['s]" advice to a committee chair as justification for finding no violation of art. II, sec. 37.

finds a violation of art. II, section 37. This Court defined relevant evidence in Rule 401 which provides: “[r]elevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

This Court has held consistently for four decades that the purpose of the constitutional provision is prophylactic and that a party alleging a violation should not have to demonstrate actual misleading of the public or legislature. *See, e.g., El Centro De La Raza v. State*, 192 Wash. 2d 103 (2018) (Second prong is whether the effect of new legislation is clear) *Washington v. Citizens Action of Washington*, 162 Wash. 2d 142 (2007) (Voter’s pamphlet does not cure textual violation of art. II, sec. 37) *Washington Education Assoc. v. State*, 93 Wn.2d 37 (1980)(Two part test not reliant on proof of actual confusion or deception of voters or legislators.)

Because the Court is acting as gatekeeper in assisting the public and legislators in avoiding the harm of being misled, evidence of subjective understanding is not “of consequence to the determination of the action” and is in other words irrelevant. Courts simply do not need to look to legislative history to determine whether a statute is ambiguous to

determine a violation of Art. II, sec. 37 because legislative intent is irrelevant, much less the knowledge of individual legislators.

As noted in *State v. Owen* 206 P. 3d 310 (2013), “[w]e have declined to examine the history of a bill even where the petitioner claimed that constitutionally mandated procedures were not followed. See *State ex rel. Dunbar v. State Bd. of Equalization.*, 140 Wash. 433, 249 P. 996 (1926) (whether bill not properly authenticated); *Morrow v. Henneford*, 182 Wash. 625, 47 P.2d 1016 (1935) (whether bill passed after expiration of legislative session); *State ex rel. Bugge v. Martin*, 38 Wash.2d 834, 232 P.2d 833 (1951); *Roehl*, 43 Wash.2d at 214, 261 P.2d 92 (whether amendment changed scope and object of bill). We have refused to determine whether members of the senate were deceived by the title of a bill. *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wash.2d 28, 377 P.2d 466 (1962).

This Court has declined to examine the investigations of legislative committees. In *State ex rel. Hodde v. Superior Court*, 40 Wash.2d 502, 507, 244 P.2d 668 (1952) the Court held, “[w]here an act of the legislature had been properly certified, courts had no authority to inquire into any prior proceedings on the part of the legislature to ascertain whether the mandatory provisions of the constitution had been complied

with.” *Dunbar*, 140 Wash. at 443-44, 249 P. 996 (quoting *Parmeter v. Bourne*, 8 Wash. 45, 56, 35 P. 586 (1894)).

Even if relevant, some of the evidence from legislators submitted by Sound Transit in support of its position is simply not legislative history. In construing whether a statute was ambiguous, courts have looked to legislative history in the form of text of a bill as well as “various relevant and probative committee hearings and floor debates concerning these enactments.” *State v. Evans*, 298 P.3d 724 (2013) Courts have also looked to bill reports to determine legislative intent even though most current bill report contain language to that they should not be used for this. *See, e.g.*, Bill Report for SB 5789 (2015) “This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.”

While Sound Transit’s “Counterstatement of Facts” does contain text, amendments, and floor debates that may be fairly considered legislative history, Sound Transit has provided as a part of the record in the case affidavits of some members of the legislature who claim they were not misled. These should be stricken or ignored as irrelevant and not legislative history.

- B. This Court should not use extrinsic evidence of whether legislators were misled to determine compliance with art. II, sec. 37.
 - a. Discovery of that evidence is impractical; violates separation of powers, other pertinent legislative rights and prerogatives, and the enrolled bill doctrine.

1. Practical barriers

Even if such evidence were relevant, there are strong constitutional and public policy reasons for disallowing it. The only way to determine the legislators' subjective understanding of a particular piece of legislation would be to depose and call as witnesses at trial all 49 senators and 98 members of the house of representatives. Given that their districts are literally scattered throughout the state the coordination and cost associated with their depositions would be prohibitive. In addition some legislators from 2015 are no longer in office and a few are deceased. If, as Respondent Sound Transit suggests, the subjective opinions of legislative staff and the advice provided to members were also relevant, then deposing the hundreds of legislative staff employed in Olympia would also be necessary. Again, this would make the cost of litigating constitutional violations of art. II, sec. 37 virtually impossible and render it a dead letter.

2. Separation of Powers

Even if possible, such a process would violate several constitutional principles rooted in separation of powers. One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments and that each is separate from the other. *State v. Osloond*, 60 Wn. App. 584, 587, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991). Washington's constitution, much like the federal constitution, does not contain a formal separation of powers clause. Nonetheless, the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine. See *In re Juvenile Director*, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976). The maintenance of a separation of powers protects institutional, rather than individual, interests. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851, 92 L.Ed.2d 675, 106 S.Ct. 3245 (1986).

Based on separation of powers concerns, this court has traditionally abstained from considering internal legislative functions surrounding the passage of a bill. “The legislature has plenary power to enact, amend, or repeal a statute, except as restrained by the state and federal constitutions.” *Wash. State Farm Bureau v. Gregoire*, 162 Wash.2d at 306, 174 P.3d 1142 (2007) (citing *State ex rel. Citizens Against Tolls v. Murphy*, 151

Wash.2d 226, 248, 88 P.3d 375 (2004)). Just as the legislature may not go beyond the decree of the court when a decision is fair, the judiciary will not look beyond the final record of the legislature when an enactment is facially valid, even when the proceedings are challenged as unconstitutional. *State ex rel. Reed v. Jones*, 6 Wash. 452, 460, 34 P. 201 (1893). In allowing parties to subpoena, depose, and require to testify at trial members of the legislature, the Court would do great injury to that institution and violate the doctrine of separation of powers

3. Legislative rights and prerogatives

The legislature enjoys several constitutional privileges and rights that are specifically designed to insulate it from those who would use the executive or judicial branches to further political interests. These rights also mitigate against subjection of individual members or their staff to discovery or service of process in a particular suit. For example two provisions of Article II of the Washington state constitution apply to this scenario:

SECTION 16 PRIVILEGES FROM ARREST.

Members of the legislature shall be privileged from arrest in all cases except treason, felony and breach of the peace; they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement of each session.

SECTION 17 FREEDOM OF DEBATE. No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate.

These immunities from civil and criminal process (which ostensibly would extend to the contempt power of the court to enforce a subpoena) are necessary to prevent a party from using the courts to disrupt or circumvent the legislative process and undermine the legislative branch.

4. Enrolled bill doctrine

“The enrolled bill rule forbids an inquiry into the legislative procedures preceding the enactment of a statute that is ‘properly signed and fair upon its face.’” *Wash. State Grange v. Locke*, 153 Wash.2d 475, 499-500, 105 P.3d 9 (2005) (quoting *Schwarz v. State*, 85 Wash.2d 171, 175, 531 P.2d 1280 (1975)). “The court ‘will not go behind an enrolled enactment to determine the method, the procedure, the means, or the manner by which it was passed in the houses of the legislature.’” *Id.* (quoting *Derby Club, Inc. v. Becket*, 41 Wash.2d 869, 882, 252 P.2d 259 (1953) (Hill, J., concurring)). *State v. Owen* 206 P. 3d 310 (2013).

In presenting the Court with evidence of subjective impressions, Sound Transit is asking the Court to look behind the plain text of the bill and attempt to divine not only what members intended in passing a bill but whether they were misled in that effort. This is an absurd and unnecessary exercise and creates an impossible burden for any party seeking to have legislation evaluated for constitutional compliance.

- b. If the Court is inclined to consider that evidence, then it should allow admission of evidence provided in the Appendix of this brief.

Amici strongly contend that the state constitution, prior case law of this Court, and common sense preclude the Court's consideration of legislators' subjective impressions. It is a fool's errand. If the Court does consider such material, Amici respectfully submit the attached Amicus brief, filed at the trial court, that contains detailed facts and conclusions drawn from the formal Senate Law and Justice Committee investigation. The investigation and evidence from the Committee's hearings were selectively highlighted in Respondent Sound Transit's brief. When viewed in its entirety, contrary conclusions must be reached. For example the investigation summary concluded that Sound Transit did in fact intentionally mislead legislators about key aspects of the package. We offer these for the Court consideration and to provide context for Sound Transit's erroneous conclusions.

- c. If the Court deems Sound Transit's Counterstatement of Facts and Affidavits material, they are disputed requiring reversal of Summary Judgment in this case

It is black letter law that in a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper. *See Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). The burden is

on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 349, 588 P.2d 1346 (1979) (citing *Morris v. McNicol*, 83 Wash.2d 491, 494-95, 519 P.2d 7 (1974)). The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion. *Lamon*, 91 Wash.2d at 350, 588 P.2d 1346 (citing *Morris*, 83 Wash.2d at 494-95, 519 P.2d 7). The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party. *E.g.*, *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990). An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party. *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986).

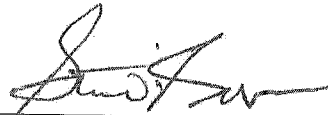
It is important to note that the trial court made no factual findings in the signed draft order prepared by Sound Transit or in the judge's oral ruling. Petitioner's brief at 17 and 18. Sound Transit has attempted to supplement the record with affidavits and a "Counterstatement of Facts" that runs afoul of established case law requiring such information to be considered by the trial court. Even if allowed at this late stage of the

proceedings, Sound Transit's version of the facts must be viewed in the light most favorable to the Petitioners and any doubts must be resolved against Sound Transit and requires reversal of the trial court's summary judgment in this case. If this Court is inclined to permit post-trial court introduction of fact evidence in support of a Motion for Summary Judgment, then it should also consider Petitioners' facts and the supportive evidence attached to this Amicus brief as rebuttal.

V. CONCLUSION

Art. II, Sec. 37 imposes a critical duty to fully disclose the legal impact of proposed legislation and ballot propositions. This Court should decline Sound Transit's invitation to require evidence of subjective intent of legislators as a legal prerequisite to ensuring that critical duty is followed.

Respectfully Submitted,



SENATOR STEVE O'BAN
WSBA No. 17265
1575 S Seashore Dr
Tacoma, WA 98465-1019
(253) 312-1688

Attorney for Amicus Curiae

Certificate of Service

I certify that I caused this document to be served by email on the following counsel of record on July 26, 2019, who have consented in writing to service in this manner:

<p>Joel B. Ard Joel@Ard.law Matthew C. Albrecht matt@albrechtlawfirm.com David K. DeWolf <u>david@albrechtlawfirm.com</u> Attorneys for Taylor Black et al.</p> <p>Paul Lawrence paul.lawrence@pacificallawgroup.com Matthew Segal matthew.segal@pacificallawgroup.com Jessica A. Skelton jessica.skelton@pacificallawgroup.com Sydney Henderson sydney.henderson@pacificallawgroup.com Pacifica Law Group 1191 Second Avenue, Suite 2000 Seattle, WA 98101</p> <p>Desmond Brown desmond.brown@soundtransit.org Natalie Anne Moore natalie.moore@soundtransit.org Mattelyn Laurel Tharpe mattelyn.tharpe@soundtransit.org CPSRTA 401 S. Jackson St. Seattle, WA 98104 Attorneys for Defendant CPSRTA</p>	<p>Dionne Padilla-Huddleston dionnep@atg.wa.gov Jennifer Bancroft jenniferp4@atg.wa.gov Attorney General's Office Licensing & Administrative Law Division 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 Attorneys for Defendant State of Washington</p>
--	--



Sen. Steve O'Ban

ATTACHMENT

A

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,

Plaintiff,

v.

**CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY, and STATE OF
WASHINGTON**

Defendants.

No.: 18-2-08733-9

**BRIEF OF AMICUS CURIAE
SENATORS MIKE PADDEN AND
STEVE O'BAN**

I. INTRODUCTION

This action puts at issue whether legislation drafted by and for the benefit of a powerful and well-financed regional entity must comply with the plain meaning of the state constitution, namely, Article II, section 37, which demands that “[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.” According to Art. II § 37, any legislation, and certainly ESSB 5987 (creating broad taxing authority for its author and beneficiary, Sound Transit) must fully disclose changes to existing law. ESSB 5987 § 319(1) (“SB 5987” or “the Act”) clearly failed to comply with the full disclosure requirement. The Act does not disclose that it amends the existing statutory vehicle valuation schedule, RCW 82.44.035, much less “set forth at full length” that section. In fact, it makes no reference to the existing statutory valuation schedule at all.

Not only is it vital that legislation clearly disclose its legal impact on existing law so that the people's representatives are fully informed, but the people themselves must be able to clearly understand that legal impact for themselves in order to determine whether to support proposed legislation and effectively communicate that support, or opposition, to their representatives.

Amici, State Senators Mike Padden and Steve O'Ban, have a direct interest in ensuring that the full disclosure requirement is preserved and applied equally regardless of the relative power of the legislation's sponsor and beneficiary. Moreover, Senator O'Ban has a direct interest as a co-author of the letter alleging the Act violated Art. II § 37 and urging the Senate Law and Justice Committee ("Committee") to investigate, *inter alia*, the circumstances surrounding the passage of SB 5987. The Complaint alleges that a portion of the 2015 bill (SB 5987) that purportedly authorized Central Puget Sound Regional Transit Authority¹ ("Sound Transit") to collect a new motor vehicle excise tax (MVET) was drafted in violation of Art. II § 37 of the Washington State constitution and is therefore invalid.

Sen. Mike Padden and Sen. Steve O'Ban were chair and vice-chair, respectively, of the Committee and led the investigation of Sound Transit in the summer and fall of 2017. The Committee concluded that Sound Transit drafted the language in question and later inserted it into SB 5987, that it violated the state Constitution, and that Sound Transit misled lawmakers about several material elements of the legislation and ballot initiative, discussed in detail below.

¹ Sound Transit is a Regional Transit Authority authorized under Chapter 81.112 RCW.

II. DESCRIPTION OF AMICI

Amici are current Washington State Senators. During 2017, Senator Padden was the chair of the Senate Law and Justice Committee and Senator Steve O'Ban was the vice-chair. That year, the Senate Law and Justice Committee conducted an investigation regarding the legislation and authorization for Sound Transit 3 (ST3), a 2016 general-election ballot proposition from Sound Transit concerning the expansion of mass transit in King, Pierce and Snohomish counties. A letter sent to the Committee on May 11, 2017 by Senators Steve O'Ban and Dino Rossi prompted the investigation.² The letter requested that the Committee consider three issues:

1. Whether the ST3 authorization legislation was unconstitutionally drafted in violation of Article II, Section 37 of the Washington State Constitution, which prohibits amending provisions of law by reference;
2. Whether Sound Transit, in 2015, misled legislators as to the amount it sought in the authorization; and
3. Whether Sound Transit improperly participated in and misled voters in the promotion of ST3.³

In the course of its investigation, the Committee obtained and examined over 7,000 pages of Sound Transit documents, and interviewed nine Sound Transit witnesses. At the request of Sound Transit, a court reporter transcribed each witness interview.

As a part of the investigation, the Committee held two investigative public work sessions and questioned some fifteen witnesses over 53 exhibits. At the conclusion of the investigation, Sens. Padden and O'Ban reached findings and conclusions and

² See Exhibit A, May 11, 2017 Letter to Attorney General Ferguson.

³ The first issue was originally raised in a letter from Sens. O'Ban and Rossi on March 2, 2017 to the Attorney General in a request for an advisory opinion. The Attorney General declined the request in a letter on March 17, 2017. The third issue is not relevant to this case and will not be addressed further in this brief.

transmitted them by letter dated October 23, 2017 to the Chairs of the Transportation Committees of the House and Senate. ⁴ Based on the factual findings, discussed in detail below, the Committee concluded in pertinent part::

- SB 5987 is unconstitutionally drafted. The reference to the schedule as it existed in 1996 prior to repeal is improper and constitutionally defective.
- Sound Transit deliberately misled lawmakers as to the dollar amount of the authorization for which it was seeking legislative approval.

Amici have a direct interest in ensuring legislation complies with Art. II, Sec. 37, and especially SB 5897, the subject of their Committee's extensive investigation and specific findings and conclusions. Importantly, the members noted in a recommendation for further action on the issue of unconstitutionality, "[t]he appropriate remedy can only be achieved in the courts, which may include a determination of the validity of ST3-related bonds."

III. FACTS PERTAINING TO PASSAGE OF SB 5987

In late 2014, in the months leading up to the 2015 legislative session commencing in January, Sound Transit began to lay the groundwork for seeking new legislative authorization for a construction program which came to be commonly known as ST3.⁵ Sound Transit's General Counsel, Desmond Brown, drafted legislation to authorize funding of ST3, relying on three new sources of revenue: a new property tax, a substantial increase in new motor vehicle excise tax, and an increase in the sales tax.⁶ Moreover, this expansive taxing authority is open-ended. Nothing in the Act imposes a limit on the duration or amount of revenue that may be raised. Sound Transit may continue to levy the ST3 taxes in perpetuity.

⁴ See Exhibit B, October 23, 2017 Letter to Sen. King, et al.

⁵ See Exhibit C, Statement of Desmond Brown, p. 30-40.

⁶ Id.

Mr. Brown testified that he was aware of the constitutional law governing the statutory construction and interpretation of taxing provisions. He had been an attorney for Sound Transit for 20 years, culminating in his current role as General Counsel for Sound Transit, and had been extensively involved in litigation over the schedules for the MVET and subsequent attempts to change it by initiative and legislation.⁷

Mr. Brown acknowledged that he drafted the language that purported to allow Sound Transit to nearly quadruple the MVET by imposing a new 0.8% MVET, separately and in addition to the 0.3% MVET still being collected.⁸ He provided the language to legislative staff including the Office of Code Reviser. Mr. Brown acknowledged that he could have drafted the provision differently, but refused to explain why he failed to set forth the existing MVET valuation statute in full, asserting that he was not at liberty to disclose the reasons he chose the language he used nor any alternatives he considered, due to attorney-client privilege. Mr. Brown's language, which made its way into the final bill unchanged, reads as follows:

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. SB 5128 (2015)

Sound Transit's language purported to resurrect a 1996 taxing schedule that had been repealed, twice by initiative, but was significantly less favorable than a more recently passed 2006 schedule.

⁷ Ibid at p. 8-11, and Testimony before Law and Justice committee hearing September 26. <https://www.tvw.org/watch/?eventID=2017091061>

⁸ See Exhibit C, Statement of Desmond Brown, p. 30-40 and Testimony before Law and Justice committee hearing September 26. <https://www.tvw.org/watch/?eventID=2017091061>

The Code Reviser has statutory responsibility for drafting legislation.⁹ The Code Reviser at the time the language was submitted in 2014 was Kyle Thiessen. ¹⁰ Mr. Thiessen did not personally review the language provided by Mr. Brown and would not for confidentiality reasons disclose whether his office provided feedback on this particular bill, including whether it offered alternative ways which would have avoided the violation of Article II, section 37.¹¹ Mr. Thiessen testified, however, that it is the practice of the office to do so and to advise bill drafters how to draft bills in accordance with the state constitution as well as demonstrating best practices as provided in the Bill Drafting Guide.¹² The Bill Drafting guide notes the constitutional requirement that amended provisions of law "set forth in full length" the act revised or amended.¹³ Tellingly, the textbook example of an incorrectly drafted provision violating Art. II § 37 in the Bill Drafting Guide is virtually identical in form to the provision drafted by Sound Transit's General Counsel and at issue in this case. Following is the guide's example of an incorrectly drafted section:

NEW SECTION. Sec. 1. A new section is added to chapter 43.21A to read as follows: Notwithstanding the provisions of RCW 15.54.480, fertilizer inspection must be deposited into the water quality account.

The language at issue in this case suffers from the same defect as in the Code reviser's textbook example of a constitutional violation. It is impossible to determine which MVET schedule SB 5987 uses as the basis for the new tax. To determine how the proposed legislation would change existing law, members of the public and legislature

⁹ RCW 1.08.013.

¹⁰ Testimony before Law and Justice committee hearing September 26.
<https://www.tvw.org/watch/?eventID=2017091061>

¹¹ Id.

¹² Id.

¹³ http://leg.wa.gov/CodeReviser/Pages/bill_drafting_guide.aspx

would have to locate a copy of the repealed 1996 statute – if they could even find it – as well as identify what bond debt Sound Transit had outstanding, whether Sound Transit had pledged MVET revenue to certain bonds, and when those bonds would be paid off, just to hazard a guess at which schedule governed the calculation of vehicle valuations. This confusion and misdirection in a provision drafted by Sound Transit's General Counsel is exactly the harm Art. II § 37 was designed to avoid.

Despite these constitutional flaws, the language provided by Mr. Brown was incorporated without alteration into SB 5128 (2015). That bill's prime sponsor was Sen. Marco Liias and the co-sponsor was Sen. Steve Hobbs. Senators Hobbs and Liias were the ranking member and vice-ranking member, respectively, of the Senate Transportation committee.¹⁴

To build support for the legislation, Sound Transit embarked on a public relations and lobbying effort. Like the enabling legislation, Sound Transit's public statements were misleading about its intention to resurrect the twice repealed 1996 schedule and the amount of authority they planned to seek from voters. The Democrat Chair of Transportation, State Rep. Judy Clibborn, who negotiated the final language of Transportation Revenue Package, told the News Tribune after the fact that it hadn't even occurred to her that Sound Transit would use the older method to calculate car-tab fees, which lawmakers long ago decided was unfair. "Sometimes if you don't think to ask the question, you make an assumption, because it's not even on your radar screen," said Clibborn, D-Mercer Island.¹⁵

¹⁴ See Bill Report of SB 5128

<http://apps2.leg.wa.gov/billsummary?BillNumber=5128&Year=2015&BillNumber=5128&Year=2015>

¹⁵ <https://www.thenewstribune.com/news/politics-government/article144829234.html> (last reviewed, July 16, 2018).

When she learned Sound Transit planned to seek from voters more than the \$15 billion they told lawmakers was the maximum they would ask voters to approve in ST3, she stated that if Sound Transit had said "[w]e're going to bond this and we're going to ask for \$54 billion,' it would have not gone anywhere . . . Nobody was going to do that. . . Everybody was having this \$15 billion in front of them."¹⁶

On February 16, 2015, the Senate introduced a package of bills that reflected a negotiated compromise and included SB 5987 (2015).¹⁷ The provision from SB 5128 regarding the MVET schedule, authored by Sound Transit General Counsel Brown, was included in Section 319 of SB 5987.

The bill was heard in the Senate Transportation committee on February 18, 2015 and was voted out of committee the following day.¹⁸ The bill report for SB 5987 offered a single sentence to describe the effect of the legislation regarding a depreciation schedule. "The depreciation schedule remains the same as the MVET schedule in effect for the existing MVET until the bonds are repaid and then the schedule switches to the schedule that is in effect at the time the MVET is approved by the voters."¹⁹ This terse description would not provide any guidance to members or the public as to which schedule was in effect and would be used to calculate car tabs. In addition, it does not identify either MVET valuation schedule, or the MVET bonds whose terms supposedly govern the switch between schedules.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

During the floor debate in the Senate, Sen. Doug Ericksen introduced an amendment that would have changed the MVET references in SB 5987.²⁰ Sound Transit has placed a great deal of significance on the Ericksen floor amendment in support of its contention that the legislature was fully aware of the change to the existing statutory MVET depreciation schedule made by the bill, notwithstanding its fatal drafting errors.²¹ Even if subjective understanding of legislators were relevant (and it is not), a review of the amendment language and floor debate demonstrates that the amendment shed little light on the constitutional defects of the underlying legislation. The effect statement of the amendment in its entirety provides:

EFFECT: Removes the provision that Sound Transit must use the depreciation schedule that is currently used for the motor vehicle excise tax that is collected in the Sound Transit District. Modifies the base value and depreciation schedules upon which a vehicle's value is based when calculating a motor vehicle excise tax.²²

Sen. Ericksen's amendment would have had the effect of changing the MVET depreciation schedule in the bill by removing the unconstitutional language, and instead substituting a valuation based upon the sale price of each vehicle. The language in the effect statement above neither indicates which schedule was "currently used" nor was this clear in the text of the amendment itself. Although his amendment would have changed the language regarding the schedule it would not have remedied the failure of SB 5897 to fully disclose the intent to resurrect and use the repealed schedule. In other words, the amendment was not about whether the repealed 1996 or existing 2006 value

²⁰ See Bill History for SB 5987 and Bill Report.

<http://apps2.leg.wa.gov/bills/summary?BillNumber=5987&Year=2015&BillNumber=5987&Year=2015>

²¹ Of course a violation of the full disclosure requirement of Art. II, Sec. 37 does not depend on a showing that legislators were deceived or confused; the standard is objective. *Washington Education Assoc. v. State*, 93 Wn.2d 37 (1980)(Two part test not reliant on proof of actual confusion or deception of voters or legislators.)

²² *Id.*

depreciation schedule should be used, both of which were based on MSRP, but rather whether valuation should be based on the actual sale price of each vehicle within the Regional Transit Authority (RTA).

Nothing in the debate on the amendment indicated that the members understood that the question concerned which schedule was the "current schedule." Rather, the question the amendment presented was whether to eliminate MSRP entirely as a starting point for calculating value. The following is a full transcript of the seven-sentence explanation provided by Sen. Ericksen on the floor for his amendment:

ERICKSEN: Thank you Mr. President this amendment deals with the motor vehicle excise tax collections in the Sound Transit area. Under the current bill as written the MVET will be based upon an MSRP of a vehicle. This is a problem we had before when the state had a statewide motor vehicle excise tax. The amendment would change it from MSRP to market value of the individual automobile. I think this would go a long ways to helping people to accept this tax, those who are willing to. But the big issue before is that when you go to buy a car and the tab fees are based upon your MVET are based upon a higher value than you actually paid for the vehicle that you took home. So this amendment would address this particular issue and I offer it up to the legislature today.²³

Two other members spoke on the amendment. Sen. Lias first rose in opposition. He claimed that the MVET calculations have been updated so that "it will be based upon the market value of the vehicle in the future." He noted that Sound Transit sold bonds according to the "old table" so the bill would allow them to use that until the bonds are paid off for ease of collection. Sen. Lias did not identify which table was the "old table." Sen. King also rose in reluctant opposition but said simply he hoped in the future that as new bonds were sold that the new valuation system would be used.²⁴

²³ <https://www.tw.org/watch/?eventID=2015021398> (Debate on the amendment starts at the 4 hour mark)

²⁴ Id.

The amendment was voted down on a voice vote. The entire debate of the amendment including voting took two minutes and thirty-seven seconds.²⁵ The Senate's consideration of this amendment only illustrates the confusion created by the fact that the underlying bill had failed to use constitutionally required language to clearly identify the valuation schedule to be used for the new MVET authorization. This is precisely the harm that Art. II § 37 was designed to avoid.

SB 5987 passed on July 3, 2015 and was signed by the Governor on July 15, 2015.²⁶ Sound Transit began immediately making plans to finalize ST3 and bring it to a vote. The Sound Transit Board approved a final package for voters that ballooned the funding to \$54 billion over 25 years – much larger than the \$15 billion authorization it had repeatedly claimed was the maximum it was seeking for ST3. In November of 2016, voters approved ST3 despite failing overwhelmingly in Pierce County and barely passing in Snohomish County.²⁷ The Department of Licensing started to collect the newly authorized MVET in March of 2017, during the legislative session.

Members of the legislature were immediately inundated with letters, emails and phone calls from constituents complaining about the size of their car tab bills. Sound Transit became the subject of work sessions in the House and Senate transportation committees. In 2017, two separate measures were passed in the Senate and House that sought to change the depreciation schedule to a more reasonable measure, and back

²⁵ *Id.*

²⁶ See Bill History for SB 5987 and Bill Report.

<http://apps2.leg.wa.gov/billsummary?BillNumber=5987&Year=2015&BillNumber=5987&Year=2015>

²⁷ <https://www.thenewstribune.com/news/politics-government/article144829234.html> (last reviewed, July 16, 2018.)

date that alteration to the onset of the new MVET by providing tax credits.²⁸ These measures were ultimately unsuccessful. As noted above, in the fall of 2017, the Senate Law and Justice committee held two investigatory work sessions regarding the ST3 authorization and Sound Transit.²⁹

The Committee made the following key findings:

- *The 2015 statute is unconstitutionally drafted. The reference to the schedule as it existed in 1996 prior to repeal is improper and constitutionally defective.*
- *In indirectly resurrecting a schedule used prior to its repeal in 2006, the 2015 law had the effect of dramatically increasing the Motor Vehicle Excise Tax as was demonstrated by the chart Prof. DeWolf provided with his testimony. This has the effect of increasing the cost to tax payers in the district by as much as 64%.*

(RCW 81.104.160) 1996 Schedule		(RCW 82.44.035) 2015 Schedule		% increase	
YEARS OF SERVICE	%AGE	YEARS OF SERVICE	%AGE	0.85	
1	100	1	100	85	18
2	95	2	81	68.85	38
3	89	3	72	61.2	45
4	83	4	63	53.55	55
5	74	5	55	46.75	58
6	65	6	47	39.95	63
7	57	7	41	34.85	64
8	48	8	36	30.6	57
9	40	9	32	27.2	47
10	31	10	27	22.95	35

- *Once it is determined that a statute meets the factors identified by prior court decisions as representing a violation of the constitution, there is no need to prove actual confusion of voters or legislators.³⁰*

²⁸ <http://apps2.leg.wa.gov/billsummary?BillNumber=2201&Year=2017&BillNumber=2201&Year=2017> and <http://apps2.leg.wa.gov/billsummary?BillNumber=5893&Year=2017&BillNumber=5893&Year=2017>

²⁹ Testimony before Law and Justice committee hearing September 26, 2017. <https://www.tvw.org/watch/?eventID=2017091061> and October 5, 2017 <https://www.tvw.org/watch/?eventID=2017101001>

³⁰ See Exhibit B, October 23, 2017 Letter to Sen. King, et al.

The second issue considered by the committee was whether the Legislature was misled about Sound Transit's 2015 request for \$15 billion in authorization in light of its 2016 request, via Proposition No. 1, of \$54 billion in authority. The committee heard from nine witnesses including four Sound Transit employees.³¹ The chair and vice chair made the following findings on this issue:

- *The message that Sound Transit repeated from November 2014 through July 2015 was that Sound Transit needed "the full authority for \$15 billion." (Exhibit 31) In press releases, talking points, communications one-pagers, draft letters to legislators, and internal emails, the \$15 billion figure was used again and again. When pressed, Sound Transit's government relations director and spokesman were unable to point to a single piece of paper from Sound Transit during this period that clearly and unambiguously indicated that Sound Transit might seek more than \$15 billion.*
- *It is understandable that numerous legislators feel misled. Sen. Steve O'Ban has described Sound Transit's emphasis on \$15 billion in taxing authority as a "bait and switch." Rep. Judy Clibborn, chair of the House Transportation Committee, has said that if Sound Transit had said "[w]e're going to bond this and we're going to ask for \$54 billion,' it would have not gone anywhere . . . Nobody was going to do that. . . Everybody was having this \$15 billion in front of them." Sen. Bob Hasegawa similarly accused Sound Transit of "false advertising."*

Amici, Sens. Padden and O'Ban, provided a summary of the key findings and recommendations in a letter dated October 23, 2017, attached as Exhibit B.

IV. LEGAL ISSUES

A. SB 5987 was unconstitutionally drafted.

The primary legal issue considered by the Committee was whether the ST3 authorization provisions in SB 5987 (2015) violated Art. II § 37, which provides:

³¹ Testimony before Law and Justice committee hearing September 26, 2017. <https://www.tw.org/watch/?eventID=2017091061> and October 5, 2017 <https://www.tw.org/watch/?eventID=2017101001>

SECTION 37 REVISION OR AMENDMENT. No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

The statute at issue was RCW 81.104.160(1) which provides in pertinent part:

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.

It is clear that the SB 5987 violates the state constitution. The ST3 authorization section referenced a repealed statute without setting forth the provision amended in full. The purpose of the constitutional requirement to set forth in full the provisions that are amended is to avoid misleading legislators and the public. In *Washington Education Assoc. v. State*, 93 Wn.2d 37 (1980), the court held invalid provisions in temporary budget acts that conflicted with codified statutes. Similarly, in *Weyerhaeuser v. King County*, 91 Wn.2d 721 (1979), the court considered an amendment to the forest practices act, chapter 76.09 RCW, that limited the application of the shoreline management act, chapter 90.58 RCW. The amendment was held invalid because it altered "the scope and effect of the SMA, but did not set out those provisions of the SMA which were affected. . . . The test to be applied, as stated above, is whether it changes the prior act in scope and effect." In the 1980 *W.E.A.* case, the court expressed the issue in terms of two questions:

(A) Is the new enactment such a complete act that 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?

(B) Would a straight-forward determination of the scope of rights or duties under the existing statutes be rendered erroneous by the new enactment?

If an amendment is a "complete act" under the first question and will be codified within the same RCW chapter that is being modified by the new enactment, the supreme court may find the violation of Art. II § 37 of the state Constitution to be a mere technicality that does not invalidate the enactment.³²

The provision in question is not a complete act because in order to determine which depreciation schedule would be in effect under the bill would require a member of the public or legislator to obtain a copy of the provision repealed in 2006. It also fails the second prong because a straight-forward determination of the scope of new rights or duties is not possible under the new enactment.

B. The Legislature is in a position to assist the court and parties to fashion a remedy to this case.

In the event the parties reach a settlement or the court is in a position to order a remedy in this case, the court should be aware of a number of mechanisms that allow for the return of funds by agencies if such funds were collected without legal authority. For example, RCW 43.88.170 allows for refunds of erroneous or excessive payments. The provision provides that "refunds may be made or authorized by the agency which collected the fees or payments of all such amounts received by the agency in consequence of error, either of fact or of law." The court could invoke this provision to order Sound Transit to return funds to taxpayers.

³² The legal argument here is drawn directly from the 2017 Code Reviser Guide section on drafting to avoid violating Article II, section 37.

In addition, courts have allowed legislatures to fashion remedies in circumstances where a taxing authority is determined to be unconstitutional. In the case *Digital Equipment Corp. v. Department of Revenue*, 129 Wash.2d 177 (1996) the United States Supreme court struck down a B&O tax as unconstitutional and the state supreme court upheld a 1987 statute that was intended to provide retroactive relief to taxpayers.

The legislature has recently considered MVET tax relief that would have provided retroactive relief to taxpayers in the form of a "market value adjustment program" that allowed for a retroactive tax credit to be applied based upon the difference in value from current law from the 2006 valuation schedule.

HB 2201 passed the House and, according to the bill report, provided the following relief:

- *Requires a regional transit authority (RTA) that includes portions of a county with a population of more than 1.5 million persons, if it imposes a motor vehicle excise tax (tax) of up to 0.8 percent first authorized in July 2015, to implement a market value adjustment program, under which a credit is allowed against tax due in an amount equal to the tax due under current law less the tax otherwise due based on the vehicle valuation schedule adopted in 2006, if the net result is positive.*
- *Requires the RTA to implement the program in a manner that allows the delivery of the system and financing plan approved by the RTA's voters in 2016 to the extent practicable and, if the RTA is unable to meet the terms of the plan as originally adopted, the RTA is required to identify savings and cost reductions in a specified priority order.*
- *Requires the RTA to submit annual reports to the transportation committees of the Legislature on the status of the delivery of the plan approved by the voters.*
- *Requires the Department of Licensing, if contracting with the RTA for the collection of the tax, and after the RTA implements the market value adjustment program, to clearly indicate to taxpayers of the amount owed under current law, the amount of any credit applied, and the net result.³³*

SB 5893 passed the Senate and contained similar provisions:

- *Requires a Regional Transit Authority (RTA) to establish a motor vehicle excise tax (MVET) market value adjustment program (MVAP).*

³³ <http://apps2.leg.wa.gov/billsummary?BillNumber=2201&Year=2017&BillNumber=2201&Year=2017>

- *The amount of a credit under the MVAP is the difference between the current MVET and an assumed MVET of 0.5 percent based on base model Kelley Blue Book values or National Automobile Dealers Association (NADA) values, whichever is lower.*
- *Requires Department of Licensing (DOL) to only contract with an RTA for collection of an MVET if it has implemented a MVAP, and any contract with an RTA must provide DOL with full cost recovery.³⁴*

Again, these bills are noted as examples of a framework for potential resolution of this matter that could enjoy bi-cameral and bi-partisan support in the Senate that involve a mechanism for returning funds to the taxpayers that have been held constitutional by the state supreme court in other contexts.

V. CONCLUSION

Art. II, Sec. 37 imposes a vitally important duty to fully disclose the legal impact of proposed legislation and ballot propositions. Its mandate enables legislators and the public to understand the meaning and import of proposed laws that will alter their legal obligations, particularly legislation such as SB 5897 that grants such broad, open-ended authority to tax the public, including the overwhelming majority in Pierce County, and nearly half in Snohomish County, who strongly opposed it. The trial court should grant Plaintiffs' motion for summary judgment.

Respectively submitted,

s/ Sen. Steve O'Ban
WSBA No. 17265

³⁴ <http://apps2.leg.wa.gov/billsummary?BillNumber=5893&Year=2017&BillNumber=5893&Year=2017>

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I served a true and correct copy of the foregoing document via electronic mail upon the following:

Joel B. Ard
Immix Law Group PC
701 5th Avenue, Suite 4710
Seattle, WA 98104
Joel.ard@immixlaw.com

David DeWolf
ddewolf@trialappeallaw.com

Paul Lawrence
Paul.lawrence@pacificalawgroup.com

Matt Segal
Matt.segal@pacificalawgroup.com

Jessica Skelton
Jessica.skelton@pacificalawgroup.com

Dawn Taylor
Dawn.taylor@pacificalawgroup.com

Sydney Henderson
Sydney.henderson@pacificalawgroup.com

Katie Dillon
Katie.dillon@pacificalawgroup.com

Steve Barlow
Steve.barlow@pacificalawgroup.com

Desmond Brown
desmond.brown@soundtransit.org

Mattelyn Tharpe
Mattelyn.Tharpe@soundtransit.org

Natalie Moore
Natalie.Moore@soundtransit.org

Ruby Fowler
ruby.fowler@soundtransit.org

Dionne Padilla-Huddleston
dionnep@atq.wa.gov

Jennifer Bancroft
jenniferp4@atq.wa.gov

Seattle LAL EF Inbox
lalseaef@atq.wa.gov

DATED this 25th day of July 2018.

s/ Sen. Steve O'Ban
WSBA No. 17265



Ex. A

Legislative Building
Olympia, WA 98501-0182

Washington State Senate

Phone: (360) 786-7550
FAX: (360) 786-1999

May 11, 2017

The Honorable Curtis King
PO Box 40414
Olympia, WA 98504-0414

The Honorable Mike Padden
PO Box 40404
Olympia, WA 98504-0404

Dear Senator King & Senator Padden:

As you are both aware, the legislature has been very concerned about the impact that the collection of the motor vehicle excise tax (MVET) by Sound Transit has had on taxpayers in our districts. Early in the regular session, we introduced legislation to address the inflated schedule and the rate that Sound Transit uses to calculate the tax, and we urged the legislature to address the systemic governance issue that has led to overcharging taxpayers and its lack of overall accountability to voters, i.e., that a single individual appoints a majority of the board members of Sound Transit. The Senate took leadership in hearing and passing effective legislation to address these issues. We remain committed to finding a legislative fix during the special session that will resolve these matters in a way that creates real relief for taxpayers.

However, as more information has emerged in the media, and as we have delved more deeply into Sound Transit's practices, it is clear that legislation may not be enough. We are concerned that Sound Transit may have engaged in a systematic effort to confuse and misrepresent the impact and cost of the ST3 authorization to legislators and the public. Senator Padden's suggestion during a floor debate as quoted in a recent media report that "the attorney general of the state ought to be investigating Sound Transit for consumer fraud" was not lost on us. Although we still have outstanding public records requests to Sound Transit, here is what has come to light to date:

1. Unconstitutional MVET authorization language. Sound Transit promoted a version of a bill in 2015 that was unconstitutionally drafted in such a way as to resurrect a twice-repealed MVET schedule in violation of Article 2, Section 37 of the Washington State Constitution. As outlined in our letter to the Attorney General, the purpose of this constitutional restriction to drafting statutes by reference is to "prevent mischief" and "to protect the Legislature and public from fraud and deception and to avoid confusion, ambiguity and uncertainty."¹ The unconstitutionally drafted legislation was included in the ten or so bills that made up the 2015 Connecting Washington transportation revenue package.

¹ *State v. Tessema*, 139 Wash. App. 483 (2007) *rev. denied* 163 Wash. 2d 1018 (Wash. 2007)

According to a recent news article, the language was so opaque that Rep. Judy Clibborn, the chairwoman of the House Transportation Committee and deeply involved in forming and negotiating the package, said it hadn't even occurred to her that Sound Transit would use the older

method to calculate car-tab fees, which lawmakers long ago decided was unfair. "Sometimes if you don't think to ask the question, you make an assumption, because it's not even on your radar screen," said Clibborn, D-Mercer Island.² Similarly, Senator King in the same article stated that he "was focused on the difference in rates in negotiations not the rate increase."³ We believe the misleading and unconstitutional provision may have been intentional.

2. *Unclear length of authorization.* The same news story cited above indicates that Sound Transit may have misled lawmakers about the total time period for the package for which they sought authorization. At a committee hearing in 2015, Sound Transit board members repeatedly spoke of needing the Legislature to authorize "the full \$15 billion" in taxing authority if the agency was to extend light rail to Tacoma and Everett.⁴ According to the article, several lawmakers said those kinds of statements led them to think they were approving only \$15 billion in taxes for Sound Transit — not the nearly double in amount, or \$28 billion that with bond revenue increased to a \$54 billion package that Sound Transit sought later in the ST3 measure.

Rep. Clibborn was quoted as saying that she is not sure lawmakers would have signed off on Sound Transit 3 if they had known how big the tax proposal would become. "I think if you had said, 'We're going to bond this and we're going to ask for \$54 billion,' it would not have gone anywhere," Clibborn said. "Nobody was going to do that. ... Everybody was having this \$15 billion in front of them."⁵ The bottom line is that the reason that legislators relied on Sound Transit's representations in committee testimony was that the total authorization was \$15 billion over a 16-year time period. Based upon that testimony, they had no reason to limit the time period of the authorization.

3. *Sound Transit's Improper Participation in Prop. 1 Election.* RCW 42.17A.555 prohibits any official or employee of a public agency from using any of the facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for the promotion of any ballot proposition. There are strong indications that Sound Transit may have directly or indirectly participated in the public campaign to support the ballot measure.

First, Sound Transit conducted a public-outreach survey distributed by the agency in 2016 that sought feedback about Sound Transit's planned expansion and at least one question gauged whether voters would be willing to vote for the ballot measure. After the Public Disclosure Commission said the poll likely ran afoul of state law that bars public agencies from supporting political campaigns, Sound Transit pulled the question from the survey.⁶ Second, a few months later, Sound Transit illegally provided the email addresses of ORCA cardholders to a political

² <http://www.theolympian.com/news/politics-government/article144829399.html>

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ <http://www.seattletimes.com/seattle-news/sound-transit-pulls-survey-question-that-may-break-state-law/>

campaign in favor of Prop. 1.7 Third, Sound Transit spent \$7.8 million in 2016 on “marketing, lobbying, communications and neighborhood outreach” (including \$858,379 on a “ribbon cutting”

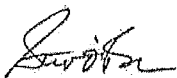
party to celebrate the long-delayed opening of Capitol Hill and UW stations) which coincided with the campaign to support ST3.⁸ According to Sound Transit's own budgeting documentation, this represented an increase in its communications and external affairs budget of almost \$2 million from 2014 to 2016 - a 25% increase that was implemented during the budgeting process at the time the legislature was considering and passing the Connecting Washington package.⁹ Fourth, Sound Transit downplayed the actual cost of ST3 to taxpayers, evidenced by the intensity of taxpayer outrage from every corner of the RTA, including many who voted for ST3. For example, Sound Transit led people to conclude that the combined taxes (sales, property and MVET) they would pay would be about \$169 per adult per year or roughly \$14 a month - a figure that clearly was misleading.¹⁰

At a minimum, the actions described above require scrutiny from the Legislature. We are requesting that, as chairs of the Senate Transportation and Law and Justice Committees, respectively, one of you conduct investigatory work sessions and/or hearings on these matters. As we receive and review more Sound Transit documents as they are produced to us over the next number of weeks, it is certainly possible additional issues may surface and we will apprise you of the same on a timely basis.

As you are aware, committees of the legislature have overlapping jurisdiction. The Senate Transportation Committee has already had one work session on concerns regarding Sound Transit and has heard and passed legislation aimed at remedying them. The Senate Law and Justice Committee has oversight on constitutional matters as well as issues that pertain to public records, criminal and civil law, and the consumer protection act. Either committee would be an appropriate venue for allowing further public scrutiny in an effort to resolve the allegations above.

On behalf of our constituents, taxpayers, and the citizens of our state, please consider our request.

Sincerely,



Senator Steve O'Ban
28th Legislative District



Senator Dino Rossi
45th Legislative District

⁷ <http://www.seattletimes.com/seattle-news/politics/sound-transit-improperly-gave-173000-orca-cardholders-info-to-ballot-measure-promoters/>

⁸ <http://www.seattletimes.com/seattle-news/transportation/party-at-uw-capitol-hill-light-rail-stations-cost-taxpayers-858k/>

⁹ <https://www.soundtransit.org/sites/default/files/Adopted%202016%20Budget.pdf>

¹⁰ [https://st32.blob.core.windows.net/media/Default/Document%20Library%20Featured/July 2016/ST3TaxImpactMemo070716.pdf](https://st32.blob.core.windows.net/media/Default/Document%20Library%20Featured/July%202016/ST3TaxImpactMemo070716.pdf); <http://www.thenewstribune.com/news/local/news-columns-blogs/matt-driscoll/article145358024.html>



Ex. B

Washington State Senate

October 23, 2017

Senator Curtis King
Chair, Senate Transportation Committee

Senator Mark Miloscia
Chair, Senate State Government Committee

Representative Judy Clibborn
Chair, House Transportation Committee

Representative Zack Hudgins
Chair, House State Government, Elections,
& Information Technology Committee

Dear Senators and Representatives,

The Senate Law and Justice Committee has concluded an investigation regarding the legislation and authorization for Sound Transit 3 (ST3), a 2016 general-election ballot proposition from Sound Transit (a regional transit authority) concerning the expansion of mass transit in King, Pierce and Snohomish counties. A letter sent to the committee on May 11, 2017 by Senators Dino Rossi and Steve O'Ban prompted the investigation. The letter requested that the committee consider three issues:

1. Whether the ST3 authorization legislation was unconstitutionally drafted in violation of Article II, Section 37 of the Washington State Constitution, which prohibits amending provisions of law by reference;
2. Whether Sound Transit, in 2015, misled legislators as to the amount it sought in the authorization; and
3. Whether Sound Transit improperly participated in and misled voters in the promotion of ST3.

The investigation consisted of the review of documents produced by Sound Transit and other agencies pursuant to three public records requests. Staff had the opportunity to examine over 7,000 pages of documents. Following review of those documents and at the direction of committee members, nine Sound Transit witnesses were identified and interviewed over the course of three days. The interviews were conducted by a panel of non-partisan Senate Law and Justice and caucus staff. A court reporter was present and transcripts were created at the request of Sound Transit of each witness interview.

As a part of the investigation, the Senate Law and Justice Committee met in two separate work sessions solely devoted to the Sound Transit Investigation, on September 26 in Kent and on October 5 in Everett. Over the course of a total of five hours of testimony and questions, fifteen witnesses testified and members reviewed a notebook with 77 exhibits, including constitutional and statutory provisions, nine transcripts of witness statements, newspaper articles, court cases, emails, press releases, talking points, and other relevant documentation.

The following is an executive summary of some of the testimony and documents from the investigation. It is intended to answer the three questions posed above, as well as provide key findings and a list of recommendations for potential legislation or other action.

EXECUTIVE SUMMARY

I. Whether the authorizing legislation was unconstitutionally drafted. The first issue considered by the committee was whether the ST3 authorization provisions in SB 5987 (2015) violated Article II, Section 37, which provides:

SECTION 37 REVISION OR AMENDMENT. No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

The statute at issue was RCW 81.104.160(1) which provides in pertinent part:

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.

The ST3 authorization provisions referenced a repealed statute without setting forth the provision amended in full. The purpose of the constitutional requirement to set forth in full the provisions that are amended is to avoid misleading legislators and the public. The committee heard from the state code reviser, who testified about the general requirements that have been established to avoid drafting errors. The committee also heard from David DeWolf, Professor Emeritus at Gonzaga University School of Law. He gave extended testimony and legal analysis of this issue (a copy of which is attached to this letter). Tim Eyman and Sound Transit attorney Desmond Brown also provided testimony.

KEY FINDINGS:

- *The 2015 statute is unconstitutionally drafted. The reference to the schedule as it existed in 1996 prior to repeal is improper and constitutionally defective.*
- *In indirectly resurrecting a schedule used prior to its repeal in 2006, the 2015 law had the effect of dramatically increasing the Motor Vehicle Excise Tax as was demonstrated by the chart Prof. DeWolf provided with his testimony.*

(RCW 81.104.160)		(RCW 82.44.035)		% Increase	
1996 Schedule		2015 Schedule			
YEARS OF SERVICE	%AGE	YEARS OF SERVICE	%AGE	0.85	
1	100	1	100	85	18
2	95	2	81	68.85	38
3	89	3	72	61.2	45
4	83	4	63	53.55	55
5	74	5	55	46.75	58
6	65	6	47	39.95	63
7	57	7	41	34.85	64
8	48	8	36	30.6	57
9	40	9	32	27.2	47
10	31	10	27	22.95	35

- *Once it is determined that a statute meets the factors identified by prior court decisions as representing a violation of the constitution, there is no need to prove actual confusion of voters or legislators.*

RECOMMENDATIONS:

1. No recommendation for legislative action on this item. The appropriate remedy can only be achieved in the courts, which may include a determination of the validity of ST3-related bonds.

II. Whether Sound Transit misled legislators as to the amount of authorization. The second issue considered by the committee is whether the Legislature was misled about Sound Transit's 2015 request for \$15 billion in authorization in light of its 2016 request, via Proposition No. 1, of \$54 billion in authority. RCW 42.17A.635 prohibits lobbying by state agencies. Agencies are generally restricted to providing information, communicating, and advocating the official position of the agency to public officials and employees of other agencies. The committee heard from nine witnesses including four Sound Transit employees.

KEY FINDINGS:

- *Sound Transit provided money to outside organizations and then coordinated testimony by those organizations before the Legislature. The records reviewed for the committee include a list of "dues" paid to non-profit organizations, including \$35,000 a year to Transportation Choices Coalition (TCC). (Exhibit 49)*

- Although Sound Transit's witnesses claimed that these dues were for policy work and efforts to increase ridership, the internal memoranda accompanying the justification for the dues to TCC indicates the organization was paid for "**support for ST efforts to secure grants, additional revenue, and other funding.**" [emphasis added] (Exhibit L) In 2015 the only significant measure to increase Sound Transit's revenue was to obtain authorization for ST3. TCC, which never registered as a lobbyist for Sound Transit, publicly took credit in multiple media reports for its role in achieving legislative authorization.
- In an email that included Futurewise, TCC, and the Snohomish Economic Alliance, Sound Transit's lobbyist referenced a "coordination meeting" conducted in Olympia to prepare for testimony at hearings (Exhibit 51). All of these groups were receiving thousands of dollars in "dues" from Sound Transit while they were testifying before legislators. A number of emails sent and received by Sound Transit's lobbyist and government affairs director demonstrates extensive coordination of testimony and messaging.
- All of this coordination, in such close proximity to the payment of "dues," ran counter to the letter and the spirit of the statutory prohibition on lobbying described above. Somewhat ironically, Sound Transit's own employees testified that they understood they were restricted to providing information to legislators. Sound Transit's own lobbyist noted in one email that they "[c]annot ask others to advocate." (Exhibit 31)
- The message that Sound Transit and these outside organizations repeated from November 2014 through July 2015 was that Sound Transit needed "the full authority for \$15 billion." (Exhibit 31) In press releases, talking points, communications one-pagers, draft letters to legislators, and internal emails, the \$15 billion figure was used again and again. When pressed, Sound Transit's government relations director and spokesman were unable to point to a single piece of paper from Sound Transit during this period that clearly and unambiguously indicated that Sound Transit might seek more than \$15 billion.
- It is understandable that numerous legislators feel misled. Sen. Steve O'Ban has described Sound Transit's emphasis on \$15 billion in taxing authority as a "bait and switch." Rep. Judy Clibborn, chair of the House Transportation Committee, has said that if Sound Transit had said "'[w]e're going to bond this and we're going to ask for \$54 billion,' it would have not gone anywhere . . . Nobody was going to do that. . . Everybody was having this \$15 billion in front of them." Sen. Bob Hasegawa similarly accused Sound Transit of "false advertising."

RECOMMENDATIONS:

1. In order to increase accountability, consider legislation that makes Sound Transit's board directly elected.

2. Because Sound Transit misled legislators and the public on the size of the authorization as well as the cost of ST3, consider legislation that gives taxpayers substantial and meaningful tax relief.
3. Consider legislation that clearly prohibits non-profit organizations that receive public funding from lobbying the Legislature.
4. Clarify restrictions on when a state or local government can "coordinate" with other entities on legislation designed to give additional tax authority so that tax dollars are not spent to pursue more tax dollars.
5. Refer the relationship between Sound Transit and TCC to the Public Disclosure Commission (PDC) or other appropriate authority to investigate whether they engaged in lobbying activity in violation of state law.

III. Whether Sound Transit improperly participated or misled voters in the promotion of ST3.

The final issue the committee considered was whether Sound Transit improperly participated in promoting the Proposition 1 initiative and misled voters about the \$54 billion ballot measure. RCW 42.17A.55 prohibits a state agency from using facilities or employees to directly or indirectly support a public initiative.

KEY FINDINGS:

- *Sound Transit prepared a survey question that the PDC deemed was illegally in support of the ballot measure. Sound Transit withdrew the question.*
- *Sound Transit responded to a public-records request by disclosing email addresses of its 173,000 One Regional Card for All (ORCA) cardholders; those email addresses were used by Transportation Choices/Mass Transit Now in the campaign in support of Proposition No. 1. There is evidence from both testimony in witness statements and before the committee that Sound Transit employees knew that the requestor was affiliated with Transportation Choices and involved in the campaign. The credibility of these employees is compromised because they all admitted to either donating money to the campaign, participating in events, or volunteering at a phone bank.*
- *Sound Transit's so-called investigation that purported to clear itself was flawed in three ways:*
 1. *The legal firm hired to do the investigation, MFR Law Group (MFR) had a long-standing relationship with Sound Transit's legal office and had likely done thousands of dollars' worth of prior investigations, and most importantly, employed the wrong legal standard.*
 2. *MFR was instructed by Sound Transit's legal office to hurry the investigation.*

3. *MFR allowed Sound Transit's legal office to review a draft of the report and incorporated at least one suggested change, thereby compromising the independence of the investigation.*
- *No employees of Sound Transit were disciplined in any manner as a result of the internal investigation despite its finding that the email addresses were improperly disclosed.*
 - *In public statements, Sound Transit has relied heavily on the PDC's decision in the weeks prior to the passage of Proposition 1 not to fine Sound Transit for campaign violations. However, the PDC's determination was based upon the internal investigation that was flawed for the reasons outlined above. Moreover, the internal report did not absolve Sound Transit of wrongdoing but acknowledged that its actions were improper. Finally, the PDC's determination that Sound Transit acted unintentionally is legally dubious since it effectively inferred an intent requirement into violations of the state's Public Records Act and campaign law. This is a new standard not extended to legislators, candidates for public office or previous ballot measures.*
 - *While finding Sound Transit improperly disclosed the personal emails, MFR concluded, nonetheless, without legal support that ST was exculpated because the records custodian did not know the TCC/Mass Transit Now campaign had requested them. First, the knowledge of management level employees that the campaign requested the emails is legally imputed to Sound Transit. Second, intent is not even required under RCW 42.46.330 and RCW 42.17A.635. No one, not even its investigator, argues Sound Transit lawfully disclosed the emails. That it arguably did not intend to do so, even though its key employees clearly did, is irrelevant.*
 - *Sound Transit significantly increased its advertising budget in the years leading up to ST3, in part by spending almost a million dollars on a single ribbon-cutting for a new facility in 2016. Sound Transit's explanation that the bulk of those dollars were for "crowd control" is not credible.*
 - *Sound Transit misled voters in the "Mass Transit Guide," mailed to each registered voter in the Sound Transit taxing district prior to the ST3 vote, by failing to identify that the valuation schedule for the calculation of the new Motor Vehicle Excise Tax (MVET) tax associated with ST3 was based on MSRP (Manufacturer's Suggested Retail Price) from a tax schedule repealed in 2006.*
 - *Sound Transit misled voters regarding use of the tax calculator it supplied online. Because it depended on the previous year's RTA (Regional Transit Authority) tax and made reference to "motor vehicle value," voters were easily misled or confused as to how much they might pay.*

- *The executive director of Transportation Choices testified that her non-profit was reimbursed by the campaign for the leave incurred by that organization's advocacy director while working on the campaign. Given that Transportation Choices was receiving funds from Sound Transit, and apparently from the political campaign as well, it may be worth further investigation as to whether this was legal.*
- *In addition to ORCA email accounts, testimony was received that a Rideshare Online account was also given to the campaign. Further investigation should reveal how this occurred.*

RECOMMENDATIONS:

1. Consider legislation that limits the political activities of employees of any local or state agency in a campaign that directly benefits that agency.
2. Consider legislation that freezes or limits advertising budgets of state or local agencies concerning ballot initiatives that could increase revenue to the agency, so as to avoid indirect use of public funds to support a ballot initiative.
3. Refer the issue of whether Transportation Choices violated restrictions on political activities by non-profits. One issue that could be investigated further is whether TCC should have allowed the ST3 campaign to reimburse TCC for the time spent on leave by its campaign manager. It should also be considered whether Sound Transit's funding of TCC in light of this arrangement served to circumvent the restrictions on indirect use of public funds to support a ballot initiative. This question could be referred to an appropriate authority such as the Attorney General, State Auditor, the PDC or King County prosecutor's office.
4. Refer the issue of whether Rideshare Online emails were improperly disclosed to the Transportation Choices/Mass Transit Now campaign to an appropriate authority such as the Attorney General, State Auditor, the PDC or King County prosecutor's office.

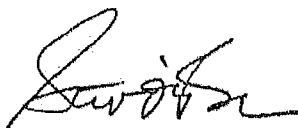
CONCLUSION

We entrust this executive summary for each of you and your respective committees' review. Thank you in advance for your consideration of these very serious matters.

Sincerely,



Sen. Mike Padden
Chair, Senate Law & Justice Committee



Sen. Steve O'Ban
Vice-Chair, Senate Law & Justice Committee

Ex. C

Witness Interview of

Desmond L. Brown

August 17, 2017

In Re: Senate Law & Justice Committee Investigation



Byers and Anderson, Inc.
Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

scheduling@byersanderson.com
www.byersanderson.com

One Union Square: 600 University Street, Suite 2300 Seattle, WA 98101-4128
Seattle: **206 340-1316** Toll Free: **800 649-2034**
Old Town District: 2208 North 30th Street, Suite 202 Tacoma, WA 98403-3360
Tacoma: **253 627-6401** Fax: **253 383-4884**

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

In Re:)
Senate Law & Justice Committee)
Investigation)
)
)
)
)

WITNESS INTERVIEW OF DESMOND L. BROWN

August 17, 2017

Seattle, Washington

Byers & Anderson, Inc.

Court Reporters/Video/Videoconferencing

One Union Square	2208 North 30th Street, Suite 202
600 University St.	Tacoma, WA 98403
Suite 2300	(253) 627-6401
Seattle, WA 98101	(253) 383-4884 Fax
(206) 340-1316	scheduling@byersanderson.com
(800) 649-2034	www.byersanderson.com

Serving Washington's Legal Community Since 1980

Desmond L. Brown
August 17, 2017

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES

For the Washington State Senate Majority
Coalition Caucus:

Jackson W. Maynard, Jr.
Staff Counsel
Washington State Senate Majority
Coalition Caucus
211 Irv Newhouse Building
PO Box 40462
Olympia, Washington 98504-0462
360.786.7299
360.786.7527 Fax
jackson.maynard@leg.wa.gov

Alicia Eyler
Staff Counsel
Washington State Senate Majority
Coalition Caucus
215 Irv Newhouse Building
PO Box 40462
Olympia, Washington 98504-0462
360.786.7539.
alicia.eyler@leg.wa.gov

For Sound Transit and the Witness:

Amy J. Pearsall
Sound Transit
Union Station
401 South Jackson Street
Seattle, Washington 98104-2826
206.903.7133
206.398.5222 Fax
amy.pearsall@soundtransit.org

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES (Continuing)

Also Present:

Melissa Van Gorkom
Research Analyst
Washington State Senate
State Government and Law & Justice
Law & Justice Committee
Senate Committee Services
458 John A. Cherberg Building
PO Box 40466
Olympia, Washington 98504-0466
360.786.7491
melissa.vangorkom@leg.wa.gov

Hannah W. McCarty
Policy Counsel
Washington State Senate
Senate Democratic Caucus
361 John A. Cherberg Building
PO Box 40464
Olympia, Washington 98504-0464
360.786.7330
hannah.mccarty@leg.wa.gov

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INTERVIEW INDEX

INTERVIEW BY:	PAGE NO.
Mr. Maynard	5

EXHIBIT INDEX

EXHIBIT NO.	DESCRIPTION	PAGE NO.
Exhibit No. 48	4-page session laws of passage of 5987.	33

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

1 BE IT REMEMBERED that on Thursday,
2 August 17, 2017, at 401 South Jackson Street,
3 Seattle, Washington, at 11:37 a.m., before JOHN M.S.
4 BOTELHO, Certified Court Reporter, appeared DESMOND
5 L. BROWN, the witness herein;

6 WHEREUPON, the following
7 proceedings were had, to wit:

8

9

<<<<<< >>>>>>

10

11 DESMOND L. BROWN was interviewed as follows:

12

13

INTERVIEW

14

BY MR. MAYNARD:

15

Q Mr. Brown, my name is Jackson Maynard. I'm senior
16 counsel with the Washington State Senate Majority
17 Coalition Caucus staff. With us as well -- and I
18 know we did introductions; I'm just kind of getting
19 this on the record -- is Melissa Van Gorkom. She's
20 with nonpartisan staff with the Senate Law & Justice
21 Committee. Also with us is Hannah McCarty with the
22 Senate Democratic Caucus. She's my counterpart.

23

And I also have Alicia -- not Herman, sorry;

24

maiden name Herman -- Eyler with the Majority

25

Coalition Caucus. She will be kind of taking notes

1 and making sure I don't forget anything while I'm
2 asking questions and kind of working through the
3 documents.

4 We're here because the chair of the Senate Law &
5 Justice Committee has indicated that he would like to
6 hold investigatory work sessions or hearings related
7 to some matters regarding the Sound Transit 3
8 legislation and authorization. And Sound Transit has
9 provided about six to seven thousand pages of
10 documents. We've had a chance to review those
11 documents with our members, and they had some
12 questions they wanted us to ask related to them.

13 I know I've stressed in e-mail correspondence
14 with you that these are not depositions. You're not
15 under oath. You're free to answer or not answer any
16 question. And I mentioned to Ms. Pearsall, when I
17 was talking to her during her statement, that, you
18 know, I understand that it's a little unusual for
19 attorneys to be asked questions. But these are
20 informal meetings. And I certainly want to be
21 sensitive, as I've said to you, to any communications
22 you may or may not have had with Sound Transit
23 employees that you feel are attorney-client
24 privilege. So if I'm kind of veering in that area, I
25 hope you'll let me know. And I certainly am not

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

1 interested in those specific statements. But to the
2 extent that you can convey general information about
3 the legal position or provide information without
4 revealing those statements, that would be helpful.

5 A summary of your statement will be generated.
6 We'll be circulating that with staff. And you'll
7 have an opportunity to review that, make corrections.
8 And then members will use those statements in
9 determining whether or not to call you as a witness,
10 or if you decline to answer a question, they may use
11 that as a reason to try to use a more formal process
12 to get the information.

13 Do you have any questions for me, sir, before we
14 begin?

15 **A No.**

16 **Q** Okay. Could you please state your name for the
17 record?

18 **A Desmond Brown.**

19 **Q** Mr. Brown, what is your profession?

20 **A I'm an attorney.**

21 **Q** Where do you work?

22 **A Sound Transit.**

23 **Q** How long have you been an attorney with Sound
24 Transit?

25 **A Little over 20 years.**

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

1 Q What is your position at Sound Transit?

2 A I'm general counsel.

3 Q How long have you held that position?

4 A A little over 20 years.

5 Q When did you graduate law school?

6 A 1986.

7 Q Are you barred in the state of Washington?

8 A Yes.

9 Q Could you please describe your duties as general
10 counsel of Sound Transit?

11 A I am responsible for advising the board and staff on
12 legal issues regarding the agency and managing the
13 legal staff of the agency.

14 Q How many legal staff are there?

15 A I think there are currently 12 attorneys and -- how
16 many -- there's fewer than 20, but there's Q'Deene,
17 Allison, Cathy, Ruby...

18 (Interruption by reporter.)

19

20 THE WITNESS: So I think that
21 there's -- there's 17 full-time staff now, and we
22 have temporaries that work there periodically.

23 Q (By Mr. Maynard) Is Q'Deene Nagasawa one of your
24 staff members?

25 A Yes.

1 Q What is your understanding what is allowed or
2 restricted in terms of lobbying by employees of Sound
3 Transit?

4 A Well, we follow the state statute, which specifies
5 that lobbying is not permitted except to the
6 legislature and in the course of representing our
7 interest to them. And so that's what we do, and then
8 file a quarterly report with the legislature to state
9 what we've done.

10 Q How are these legal restrictions communicated to
11 staff at Sound Transit or employees of Sound Transit?

12 A Well, we tell the -- well, we have a person who is
13 responsible for governmental affairs in Olympia, and
14 we go over those with them.

15 Q Who's the person responsible for governmental affairs
16 in Olympia?

17 A So the staff person who goes down there is named Alex
18 Soldano. I'm not sure if I'm pronouncing his name
19 correctly.

20 Q I know Alex. And you are?

21 Other than communicating with Alex Soldano, are
22 there any other steps that the legal office takes to
23 communicate to employees of Sound Transit what is
24 appropriate or not appropriate under the statute
25 regarding lobbying by State agency?

1 A Well, we're not a State agency.

2 Q True. Lobbying by government agency.

3 A Well, Alex is part of a department. So Ann McNeil
4 heads that department. So those are really the
5 people who contact the -- so those are the people we
6 would talk to, that do initiatives from the staff
7 level.

8 Q Is there any training generally of Sound Transit
9 employees related to lobbying or do you primarily --
10 sounds like you primarily communicate with the Sound
11 Transit employees that are engaged in lobbying as to
12 what's permitted or not?

13 A Yeah, because their -- their other people don't do
14 that.

15 Q Okay.

16 A So they wouldn't have occasion to.

17 Q They wouldn't need to.

18 What about with regard to what is permitted in
19 the use of facilities directly or indirectly to
20 promote an initiative or legislation? First of all,
21 can you tell me your understanding of what is allowed
22 or not allowed with regard to promotion of an
23 initiative and use of State facilities for that?

24 A That's illegal. So it's absolutely prohibited.

25 Q Okay.

1 A And that's not allowed. So...

2 Q How is that legal restriction communicated to Sound
3 Transit employees by the legal office?

4 A Well, when there is -- and I guess it happens when
5 we're -- there's going to be a ballot measure. We --
6 at least as -- we had one in 2007, 2000 -- since I've
7 been here, 2007, 2008, and 2016. So we -- and -- my
8 memory, I think the last time I was directly involved
9 in doing it was probably 2007, maybe 2008.

10 But we prepare a memo that goes out to everyone
11 that says, you know, there's going to be an election.
12 Here are the rules about that. Here's what you
13 cannot do. Don't do those things. If you have any
14 questions about that, come see us and we will answer
15 those questions.

16 And that's -- and so we have either myself or
17 another person, who -- actually another person who
18 gets -- in our office who is designated to get --
19 what is designated -- who gets all the questions that
20 come in about the issue and answers them as they come
21 up about whether -- if people have a question about
22 what they can do.

23 Q Could I obtain a copy of that memo?

24 A I'm sure you can.

25 Q Okay.

1 **A** I don't have it.

2 **Q** No, no, no, I understand. If I could get a copy,
3 that would be great.

4 **A** And I don't know if -- there is an orientation that
5 all employees go through when they join Sound
6 Transit. And I don't know if it would cover
7 election year in the years where there's not an
8 election, so -- but it covers, like, because we have
9 people who haven't worked in the government before,
10 and so there -- we go over lots of things, so ethics
11 is one of those things.

12 **Q** And in 2016 -- I think you may have covered this in
13 your prior answer, but I just want to be clear.

14 In 2016, was that memo communicated to Sound
15 Transit employees?

16 **A** I believe so.

17 **Q** Okay. How was that communicated, or do you know?

18 **A** Well, I -- I presume it was sent out by e-mail.

19 **Q** Okay.

20 **A** I don't know if -- I don't think we do hard copies
21 anymore because there's so many employees, but I
22 would believe it's...

23 **Q** We've been struggling with hard copies the last day
24 or so, so I understand why that can be cumbersome.

25 Are there any restrictions on personal political

1 activities when a ballot measure is coming for Sound
2 Transit employees in terms of their time? Are they
3 encouraged or discouraged to participate in -- in
4 ballot measures by Sound Transit or is Sound Transit
5 neutral on the subject?

6 **A** They are neither encouraged or discouraged. That is
7 not permitted. We do not discuss with employees
8 that -- other than if someone asks us, "Can I do
9 this?" And we do say, I think, in the memo that what
10 you do in your -- unrelated to Sound Transit is not
11 our concern but that we don't -- we don't express a
12 view about that and what people should do.

13 **Q** Do you know Abigail Doerr?

14 **A** I do not.

15 **Q** Have you heard of Transportation Choices Coalition?

16 **A** Yes.

17 **Q** How do you know Transportation Coalition -- Choices
18 Coalition?

19 **A** So this might give you some context.

20 **Q** Mm-hmm.

21 **A** Because I've been here for 20 years. I cannot --
22 over the years, I have just heard of different names
23 of organizations, and they may be in slight
24 variations of it. I know that there's an
25 organization called Transportation Choices Coalition.

1 How long they have been in that name, I do not know.

2 I really don't deal with them, so --

3 Q Okay.

4 A -- when you say how I know -- I know that they are a
5 transportation advocacy group. And I know -- now,
6 and this may be -- I may have this being wrong about
7 the name, but I know that many years ago -- we are a
8 member of -- this may be the organization which we
9 are a member of. There is a organization that a
10 number of transit agencies are a member of that
11 engages in some activities related to transit,
12 information and whatnot.

13 And many years ago, there was an issue about the
14 propriety of paying dues to that organization. And I
15 know at that time we established some criterion and
16 guidelines to make sure that because -- that we could
17 be a member, we could pay dues to it, but that that
18 dues had to be specifically accounted for and not
19 used for political purposes and only for appropriate
20 transportation information that was not in a -- that
21 was not used by the -- for any sort of political
22 advocacy.

23 And that's -- and so it may be -- that may be the
24 organization and which was the impetus for us for my
25 being familiar with them and establishing some

1 guidelines. But that was many years ago. It was --
2 we formalized sort of, like, these are the criteria.
3 Like, when you decide whether we can be a part of an
4 organization, we need to ascertain these things and
5 we need to establish what our funds are used for.

6 And you need to meet those, follow those guidelines.

7 Q Are you familiar with Mass Transit Now?

8 A When you say familiar with them, what do you mean?

9 Q Have you heard of an organization with the name of
10 "Mass Transit Now"?

11 A Yes.

12 Q Okay.

13 A I represented the agency when there was a public
14 disclosure complaint related to an e-mail disclosure
15 in response to a public disclosure request. And I
16 think Mass Transit -- I think Mass Transit Now is the
17 organization that received that. And that's how I
18 became aware of them.

19 Q Okay. Have you ever donated money either to
20 Transportation Choices or Mass Transit Now?

21 A I do not -- well, so this is over a 20-year period.

22 Q Sure.

23 A And you would have to check that. I don't have any
24 recollection of ever -- I don't believe so for Mass
25 Transit Now. Transportation Choices Coalition, many

1 years ago I may have. I don't know.

2 Q Okay. You mentioned a request. I think you
3 identified it as being records given to Mass Transit
4 Now.

5 I'm going to show you what's been previously
6 marked as Exhibit 1. And it's a request from March
7 28th from Abigail Doerr.

8 Do you recognize this document or have you seen
9 it before?

10 A So I represented the agency in the PDC issues before
11 them.

12 Q Okay. And I'll just sort of jump ahead. I think
13 that this is the request that you were referring to
14 related to --

15 A Right. But, I mean --

16 Q -- Mass --

17 A Let me clarify --

18 Q Sure. Sure.

19 A -- in timing-wise.

20 Q Sure.

21 A So I would have not seen this when it was submitted
22 to Sound Transit. I would have seen this -- and
23 I'm -- so let me be clear about this.

24 Q Yeah.

25 A I don't have a specific memory of seeing this.

1 Q Okay.

2 A But I would say that when the PDC complaint came in,
3 I would do what a lawyer would do, which is say, Get
4 me all the records that we have to -- to take a look
5 at as to what happened.

6 Q Okay.

7 A This would probably have been one of those records.

8 Q One of the records, the original request. Sure. No,
9 that makes sense.

10 Prior to the PDC complaint, did you or anyone
11 from the legal office review the request from
12 Ms. Doerr?

13 A So I did not.

14 Q Okay.

15 A And I -- what time was this here? This was -- have
16 been -- so Q'Deene Nagasaki (phonetic) would have --
17 I mean, I can tell you in the context of -- of a
18 business records answer and not in a question. So
19 Q'Deene Nagasaki (phonetic) is in the legal
20 department.

21 Q Mm-hmm.

22 A Public disclosure requests come to her.

23 Q Mm-hmm.

24 A So, you know, this would have been where a public
25 disclosure request coming through the -- would go to

1 her.

2 Q Right.

3 A So that would be the person it would go to.

4 Q Okay. There was some indication, I think, from
5 Mr. Davison with Sound Transit that he and Ms. Dice
6 had a conversation once Q'Deene had kind of sent this
7 request up to him and they were looking at it. And
8 they expressed concerns, as I understand it from
9 him -- and I'm somewhat summarizing and paraphrasing
10 his testimony based on my notes, so I'm not -- I'm
11 not trying to put words in his mouth. But, you know,
12 we've got a stenographer here.

13 But it was words to the effect that they were
14 concerned about sending out e-mails to -- in response
15 to a public disclosure request; that they had
16 concerns about the legality of that and kind of the
17 ethics of that.

18 I believe he indicated as well that he may have
19 had a conversation with the legal department about
20 that. This would have been around March 28th. And
21 he did not have a specific recollection, but he said,
22 You know, I think we discussed it with someone in
23 legal.

24 Do you recall any conversation about that time
25 with Mr. Davison or Ms. Dice about whether it was

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

1 legal for Sound Transit to provide e-mail addresses
2 in response to a public disclosure request?

3 **A** No.

4 **Q** Okay. I understand that this --

5 **A** Now, let me -- let me --

6 **Q** Sure. Sure.

7 **A** -- clarify something.

8 **Q** Of course.

9 **A** Because I am not the person in the department on the
10 staff who would -- that question would have been
11 addressed to.

12 **Q** Mm-hmm.

13 **A** If he did -- so Ms. Pearsall is now that person.

14 **Q** Right.

15 **A** But you weren't working here, so that would have been
16 Robin. So if, in fact, if he has a recollection of
17 that, he -- you know, if it went to an attorney
18 directly, or if it got to an attorney, it would have
19 probably -- the person who would have been handling
20 that matter at the time is the person named Robin
21 Murphy.

22 **Q** Does Robin still work with your office?

23 **A** She does.

24 **Q** Well, since we're talking about it, I'll -- I'm going
25 to show you what's been previously marked as Exhibit

1 10. I've got extra copies, so I'll just give one to
2 you and Ms. Pearsall.

3 And I'll just summarize it quickly and then give
4 you a chance to review. There's a particular passage
5 that I'm interested in asking you about. But it's an
6 e-mail string from Beth Anderson and a customer
7 support representative of GovDelivery. And on the
8 second page, she's talking about a public records
9 request and she says, "The request came through our
10 legal department. A lot of other folks on the team
11 were concerned about the possibility of malicious
12 use, but as a public agency, we're subject to public
13 records requests, and our customers sign in on what
14 [sic] they interact with us, unfortunately."

15 Are you aware of any review by the legal
16 department, other than Q'Deene processing it,
17 processing the request, related to folks being
18 concerned about malicious use?

19 **A** So, first, let me read this.

20 **Q** Yeah, of course.

21 **A** Is this a -- a complete history of the e-mail?

22 **Q** What do you mean by "a complete history"?

23 **A** Well, what I mean is, I'm having -- I'm trying to
24 figure out the order in which to read it, I guess.

25 **Q** Yes, sir. It's an e-mail string, so I think the

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

1 older e-mails are in the back and the more recent
2 ones kind of go forward.

3 **A** So what's your question?

4 **Q** Sure. My question was: On Page 2.

5 **A** Right.

6 **Q** Second paragraph, there's a reference that, "The
7 request came through our legal department. A lot of
8 other folks on our team were concerned about the
9 possibility of malicious use, but as a public agency,
10 we're subject to public records requests and our
11 customers sign on for that when they interact with
12 us, unfortunately."

13 In reference to the request coming through the
14 legal department, other than Q'Deene, are you aware
15 of any other review by the legal department of the
16 concerns that are referenced in this e-mail, that the
17 e-mails could be used -- the e-mails addresses that
18 were being provided could be used possibly for
19 malicious use?

20 **A** So I was not aware of this e-mail. And as I said
21 before, I would not have been the person that this
22 would have come to. I do not know -- and you would
23 need to ask Q'Deene or Robin -- whether it was
24 discussed between them about what this person meant
25 by that and what -- what is stated in this e-mail.

1 Q Okay. I'm going to show you what's been previously
2 marked as Exhibit 12.

3 A Okay.

4 Q Okay. So I want to direct your attention to the
5 e-mail from Craig Davison on Page 1, sent Monday,
6 August 22nd, 8:32 a.m., where he says, "That's a
7 question for legal. Also it isn't technically
8 correct." It appears he is responding to Jon
9 Highland's e-mail directly below, asking the
10 question, "Are we able to provide that we gave these
11 addresses to Mass Transit Now?"

12 My question is: Did legal ever get asked this
13 question, the question of -- Mr. Highland's question,
14 "Are we able to provide that we gave these addresses
15 to Mass Transit Now?" Are you aware of any review by
16 the legal office of that question?

17 A I am not personally aware of it. But again, this --
18 and when I say that, I want to clarify a couple
19 things.

20 Q Mm-hmm.

21 A One is that these kinds of questions would have been
22 going -- if they contacted the legal department
23 directly, which we said that's a question to legal,
24 it would have gone either to Q'Deene or to Robin to
25 respond to.

1 investigatory file.

2 THE WITNESS: Okay.

3 MR. MAYNARD: So if you'll note,
4 there's an MFR code at the bottom of it.

5 THE WITNESS: Okay.

6 MR. MAYNARD: But I'll double-check
7 that, and if we need to supplement the record with a
8 better copy, I'm happy to do that.

9 THE WITNESS: Okay.

10 Q (By Mr. Maynard) I want to jump ahead to the MFR
11 investigation that I understand was initiated by the
12 Sound Transit legal office.

13 Did you have any role in the MFR, selection of
14 MFR, or in the investigation that they conducted?

15 A Well, I would have approved them to do the
16 investigation.

17 Q So you approved MFR --

18 A Yes.

19 Q -- to do the investigation?

20 A Yes.

21 Q How did you base your decision to select them as the
22 entity that would do the investigation?

23 A Well, I don't have a specific memory of it other than
24 they have done other investigations for us in the
25 past. I've been impressed with their work. We

1 wanted to get something done quickly. We wanted to
2 be absolutely impartial and independent. And I don't
3 know if -- if I thought of them or whether Robin
4 thought of them as someone who we could bring in
5 quickly and also probably, you know, had an earlier
6 dealings with so that it would be logistically
7 something if they were available to -- to move rather
8 quickly to do.

9 Q How many other investigations in the past had MFR
10 done for Sound Transit?

11 A I do not know.

12 Q Do you know approximately, prior to this
13 investigation, how much MFR had been paid by Sound
14 Transit?

15 A I don't.

16 Q You said it was important to move quickly. Sometimes
17 if you move in haste, you can make mistakes,
18 especially with regard to an investigation. Why was
19 it so important to move quickly as opposed to make
20 sure that the investigators had the time to be
21 thorough?

22 A Implicit in your question is a notion that you cannot
23 conduct an investigation quickly.

24 Q Okay.

25 A The reason that I wanted it to be done promptly was

1 because the PDC had -- and I don't know the -- they
2 had -- they had indicated that they believed that we
3 had violated the public disclosure or campaign laws.
4 And I don't know if they had provided a deadline for
5 us to respond.

6 Q Okay.

7 A But in order to give a response to them in their
8 timeline was -- was fairly short. So I needed to get
9 the information that we could get within the time
10 frame to respond to the Public Disclosure Commission.

11 Q Did you or anyone from your office review the final
12 report provided by MFR before it was made public?

13 A I'm sure that I did.

14 Q Okay. What's the purpose of that review? If the
15 investigation is to be independent, why would Sound
16 Transit legal office need to review the report before
17 it's made public?

18 A To see if we -- to see if we thought it was
19 consistent with our understanding of the facts as
20 well or if there was anything in it that might be, we
21 thought was erroneous factually.

22 Q Okay. Let me show you what's been marked as Exhibit
23 47. If you could please review that, sir, and just
24 let me know when you're done reviewing.

25 A I'm done.

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

1 Q What is the reference to the keen eyes and the
2 clarification regarding Q'Deene in this e-mail from
3 Marcella Fleming Reed to you and Ms. Pearsall?

4 A I do not know.

5 Q Okay. Do you recall making any clarification to
6 Ms. Fleming Reed regarding references in the report
7 to Q'Deene?

8 A I don't recall anything -- well, I don't recall
9 anything substantive. You know, so the answer is,
10 no, I don't -- I did not have and I have no
11 recollection of having any substantive -- I believe
12 that the report interviewed the people involved and
13 contained a summary of their -- their interviews. So
14 I don't -- I don't know. You might ask Amy whether
15 she -- given my -- I think it is highly likely that
16 Amy would have been the person that would have caught
17 something as opposed to me.

18 Q Fair enough.

19 A If it was.

20 Q That's good. I just want to -- that makes sense. I
21 just want to ask the question to make sure I haven't
22 missed anything.

23 I want to ask kind of a general question. How
24 would you respond to members that I represent who may
25 have concerns about the independence of the

1 investigation if Sound Transit legal has a
2 opportunity to review the report before it's
3 released?

4 **A** Can you elaborate on your question?

5 **Q** Sure.

6 If the investigation is independent, but Sound
7 Transit legal has some review to make corrections or
8 changes, that would seem to indicate that the
9 investigation would not be independent, that Sound
10 Transit would effectively be investigating itself.

11 **A** Well, you may not intend to, but your question has in
12 it some assumptions that are not correct.

13 **Q** Okay. Tell me where I'm going astray.

14 **A** We did not exercise any -- or assert any ability with
15 regard to the substance of the report or what it said
16 or whether it was -- the review was simply, I think,
17 in the same way -- or maybe I would put it this way.
18 You indicated to me that you're going to take
19 summaries of this and let us review it.

20 **Q** Mm-hmm.

21 **A** Why are you going to do that?

22 **Q** To allow you the opportunity to make corrections or
23 changes --

24 **A** Right. Right.

25 **Q** -- if you feel that we've -- we've made mistakes in

1 our summary of your testimony.

2 A Right. So we don't -- the purpose of our review was
3 not to that extent. It was simply, I think -- and we
4 never would ever assert the right to say this is what
5 goes in the report or not. It was merely, I think,
6 a, Here are my findings. Are there any factual
7 errors that you wish to raise with me? or say, you
8 know, just look at it to say, and I think -- and I
9 don't know what this reference is to the keen eyes
10 there, but it was not -- there was no substantive
11 review ever asserted about what was in the content of
12 the report.

13 I suspect this was, you know, looking at -- I
14 mean, that wasn't why the report was reviewed by us.
15 It wasn't -- it wasn't for substantive. It was just,
16 Do you -- I think here is the factual information I
17 have. Do you have any input? And by "input," I
18 don't mean changes to it, but comment on it. And
19 whatever this was keen eyes, I guess it reflected
20 whatever that was. I don't know what that was.

21 But, I mean, you can tell them that Sound Transit
22 did not assert and did not implement any input to the
23 substantive content of that report. I wanted her --
24 we wanted something -- someone to just gather the
25 facts and to present the facts of -- of what they

1 found.

2 Q Okay. Sir, I want to back up a little bit to 20 --
3 probably 2014. I understand that you may have had a
4 role in drafting the authorizing language that became
5 a part of, I believe it's House Bill 1180, and later
6 was included within the legislation that passed with
7 the Connecting Washington package, 50 -- House --
8 it'd be Senate Bill 5987.

9 Do you recall drafting some language
10 connecting -- connected with the Sound Transit
11 authorization legislation?

12 A With the caveat, I make no representation about the
13 accuracy of the bill citations. I can -- I can tell
14 you that, yes, I did work on a draft to be submitted
15 to -- related to granting us additional taxing
16 authority, or granting us the -- to increase the
17 rates and -- for which we could ask voters to approve
18 taxes. And so, yes.

19 Q Approximately when did you draft this legislation?
20 Obviously it was prior to the 2015 session. Do you
21 remember -- I think that we have a press release from
22 November of 2014 announcing the legislation. So I
23 assume it was prior to that time.

24 A You know, that would just have to be -- I mean,
25 obviously it was, you know -- it was -- it was the

1 time immediately before the time that the folks at
2 that -- said, you know, We need you to give us a
3 draft of what you want by this time, so it would have
4 been immediately before then.

5 Q So it would have been in response to deadlines set by
6 the code revisor, someone connected with the
7 legislative process?

8 A All -- yeah, all those folks there.

9 Q And I want to be careful too. I don't want to ask
10 you about any particular conversations or e-mails
11 with legislators. Those are protected by legislative
12 prerogative, so I don't want to -- I don't want to
13 ask you about if a particular member asked you to
14 draft a bill a particular way.

15 How did you go about drafting the legislation?
16 Did you reference the bill drafting guide? You know,
17 can you walk me through your process about how you
18 went about drafting a bill?

19 A So I don't know if you've ever drafted legislation.

20 Q Unfortunately, I have.

21 A Well, you probably know that, depending upon the
22 legislation and depending on its complexity, it's a
23 rather nerve-racking endeavor because you don't want
24 to get it wrong.

25 Q Mm-hmm.

1 A So I had drafted two earlier pieces of legislation.
2 The, shall we say rather complex Joint Roads &
3 Transit Ballot in 2007, and also the 2008 draft of --
4 that increased our taxing authority that the
5 legislature -- well, wait. That's not right.
6 Because they didn't have to do it in 2008. I don't
7 think they -- they didn't have to do it then. So
8 strike that.

9 Q Sure.

10 A But I simply -- this legislation originated in 1992.
11 And the -- my role was simply to -- to -- I viewed it
12 in some ways as a technical exercise to simply change
13 the tax rates to increase them to -- you know, it
14 gives you taxing authority of up to a maximum of X
15 for sales tax and these things.

16 So they were going to -- proposal was to increase
17 those rates, and so that was a simple matter of
18 just -- so basically I adhered to the existing
19 legislation as much as possible with the aim of
20 making minimal changes to what existed, to make the
21 changes that were needed.

22 And so that's really what I did. It was not a --
23 without discussing it. Suffice it to say, this was
24 treated by me more as a technical exercise as -- and
25 not a -- not a policy matter, as it were, that --

1 that required, you know, a lot of input from other
2 people. It was, we want to increase the tax rates,
3 they wanted to add a -- the property tax, and that
4 that was a -- I didn't -- I didn't do that part.
5 There was another lawyer in our office, who's no
6 longer with us, who did that.

7 And that was pretty -- that was actually the part
8 that was most complicated, because we had not done a
9 tax -- property tax. And then there was a question
10 of these things I do not understand of whether we're
11 going to -- what lien -- or taxing status we're going
12 to have vis-à-vis others, and the limits, and there
13 was a lot of things related to getting that set up as
14 a technical matter.

15 But it was just really taking the existing
16 statute and modifying it. And so that's what we did.
17 That's what I did.

18 (Exhibit No. 48 marked for
19 identification.)

20
21 Q (By Mr. Maynard) Now showing you what I've marked as
22 Exhibit 48. Hopefully you recognize this language.
23 So on the second page of Exhibit 48, on Line 14 of
24 what's listed here as Page 69 -- and this was taken
25 from the session laws of the passage of 5987.

1 So starting on Line 14 -- and I'll just kind of
2 read it into the record -- "Notwithstanding any other
3 provision of this section or Chapter 82.44 RCW, a
4 motor vehicle excise tax imposed by a regional
5 transit authority before or after the effective date
6 of this section must comply with Chapter 82.44 as it
7 existed on January 1st, 1996, until December 31st of
8 the year in which the regional transit authority
9 repays bond debt to which a motor vehicle excise tax
10 was pledged before the effective date of this
11 section."

12 Did you draft this provision? Does it look
13 familiar to you?

14 A Well, the answer is, I can't speak to how the code
15 revisor people change the language. But --

16 Q Okay.

17 A -- the -- and I think that -- I know that they made
18 some changes to the things that we sent to them. And
19 I can't tell you which. But in substance, the
20 section you wrote was something that I would have
21 originated, yes.

22 Q Okay. Great.

23 There has been a bit of criticism that you might
24 have heard from Senators Rossi and O'Ban in how this
25 was drafted. I think they sent a letter to the

1 Attorney General's Office, criticizing the approach.
2 And that the issue that they've raised is that the
3 part of it on Line 17, the RCW as it existed on
4 January 1st, 1996, and the argument is, because that
5 provision of law was no longer existing in current
6 statutes, in order to figure out which schedule was
7 in place, you would have had to find a copy of the
8 code from 1996 to look it up.

9 How would you respond to that criticism?

10 A So I'm not sure -- well, the statute as it existed
11 before this amendment was amended by the legislature
12 I believe in 2010 to make the reference to that '96
13 schedule.

14 Q Mm-hmm.

15 A To codify it. The -- the supreme court decision
16 related -- earlier related to our, I think it was
17 Initiative 776, provided that Sound Transit was
18 entitled to continue to collect the MVET tax approved
19 in 1996 until its bonds were repaid.

20 Through some discussions with the Attorney
21 General's Office, the parties agreed that, as part of
22 that obligation to comply with the supreme court
23 ruling and with Article 1, Section 23, that the
24 depreciation schedule that was used at the time -- at
25 that time continued to be tied to those. And so --

1 and that was not codified at the time that that --
2 but in -- and I don't know why they did it, but we
3 were not involved in that in 2010, I think it was,
4 the legislature codified the 1996 reference.

5 And so this was a reference both to reflect that
6 the -- constitutionally the original tax and vehicle
7 tax under it until those bonds had -- were repaid
8 needed to have that depreciation schedule applied to
9 them. And so that's where the language -- it was --
10 it was a continuation of -- or at least I would say,
11 a -- the technical amendment related to what was
12 already there in the reference in the statute about
13 the 1996 schedule.

14 Q Wouldn't it have been easier, just from a drafting
15 standpoint, to bring in the new schedule that you
16 intend to use for the new authority that you're
17 requesting from the legislature, the new depreciation
18 schedule, and say, "After this date, use this
19 depreciation schedule," so that everyone would know
20 which schedule you're talking about? Wouldn't that
21 have been an easier way to draft it?

22 A I can't answer that question 'cause I don't fully
23 understand it.

24 Q Okay.

25 A So...

1 Q Rather than referencing -- let me try it a different
2 way then. I'll rephrase my question.

3 Rather than referencing the RCW that has the
4 depreciation schedule as it existed from 1996, why
5 wouldn't you just bring into this legislation a new
6 depreciation schedule that mirrors the one from '96
7 and say, "After this date, use this schedule"? Why
8 would you refer back to the repealed statute?

9 A You're asking me to speculate about something that --
10 I can't answer your question because -- as to why I
11 didn't do it a different way. And you're asking
12 me --

13 Q Well, you're the one that drafted the legislation.

14 A Right. I know I drafted it.

15 Q I'm just asking why -- it seems like it would be
16 easier and clearer to do it the way I'm suggesting,
17 which is to just bring in the new schedule and say
18 the authorization after this point.

19 A So this was a fairly technical issue. And I can't
20 tell you, sitting here now -- and I'm not willing to
21 and not going to try and recreate all the thinking
22 that, even if I could remember it, that went into why
23 I did it that way or the implications of doing it the
24 way you're talking about now.

25 You know, I spent a good deal of time thinking

1 about how to do this in a way that worked, the best
2 way to do it. I don't know if the way you're
3 suggesting, what I would have thought about it or
4 would I have thought whether it would have worked. I
5 can't speak to that. I can just say that at the
6 time, I thought a good deal about how do you do this,
7 and this was the way I thought was the best way to do
8 it.

9 Q Okay. Was there any intent to create the statute in
10 a way that was misleading or less clear so that folks
11 who were either voting on the bill or citizens who
12 were reviewing the legislation would not know what
13 type -- what schedule Sound Transit was intending to
14 use for the new authority?

15 A Absolutely not.

16 Q Okay.

17 A And I want to be clear about something there.
18 Because that implication, I think, suggests that I
19 was trying to deceive someone.

20 The legislature -- as I said, the Attorney
21 General's Office agreed back in -- I don't know,
22 after -- after the supreme court made its ruling that
23 the repeal of the general MVET -- or the Sound
24 Transit MVET tax could not prevent collection of our
25 tax because it was bonded until the bonds are repaid.

1 The question then is: All right. That -- that
2 initiative repealed also the depreciation schedule
3 that was applicable. And so we said -- we had to
4 sort of, all right, we have to -- the supreme court
5 has preserved this tax and said you collect it.
6 Attorney General's Office and we agreed that it
7 preserved it as it was.

8 The legislature in 2010, I think it was, put --
9 codified that and said 1996 is the schedule. So this
10 was simply an attempt to say, All right, we're gonna
11 have -- we're adding taxing authority, and that
12 applies to this new taxing authority as well. And
13 that when that tax expires, or at least the original
14 tax expires when the bonds are repaid, then that's
15 when that repeal occurs of that, and that's what
16 happens. I would assume that, you know, we got -- I
17 don't know how many, but there were questions from
18 staff about what X meant or Y meant.

19 Q Mm-hmm.

20 A So I would assume that if anyone didn't have any --
21 didn't under -- this was intended to be a fairly
22 straightforward thing that said, We're using a
23 depreciation schedule that was in effect back then.
24 We'll continue to use that depreciation schedule
25 until those bonds are retired and that tax goes away,

1 and then we'll use whatever depreciation schedule is
2 in effect going forward.

3 That's what -- it was intended to be, in my
4 attempt, the simplest way and clearest way to explain
5 this. And I suppose, sitting here, one can ponder
6 different ways of doing it. But if you're the person
7 who has to draft this and you're trying to make this
8 work and make it clear, that's what my intent was.
9 And the -- no one from the -- seemed to indicate
10 that there was -- at least we didn't receive any
11 questions about that issue or there being any
12 question about it.

13 MR. MAYNARD: Okay. Sir, I don't
14 think I have any further questions. Does anyone else
15 have any questions?

16 Thank you very much for your time.

17 (Proceedings concluded at
18 12:38 p.m.)

19
20
21
22
23
24
25

Byers & Anderson Court Reporters/Video/Videoconferencing
Seattle/Tacoma, Washington

1 STATE OF WASHINGTON) I, John M.S. Botelho, CCR, RPR,
2 County of Pierce) ss a certified court reporter
3 do hereby certify:

4
5 That the foregoing witness interview of DESMOND L.
6 BROWN was taken before me and completed on August 17, 2017,
7 and thereafter was transcribed under my direction; that the
8 transcript is a full, true and complete transcript of the
9 interview of said witness;

10 That I am not a relative, employee, attorney or
11 counsel of any party to this action or relative or employee
12 of any such attorney or counsel and that I am not
13 financially interested in the said action or the outcome
14 thereof;

15 That I am herewith securely sealing the said
16 transcript and promptly delivering the same to
17 Desmond L. Brown, Sound Transit.

18 IN WITNESS WHEREOF, I have hereunto set my hand
19 and affixed my official seal this 13th day of September,
20 2017.



21 John M.S. Botelho
22 John M.S. Botelho, CCR, RPR
23 Certified Court Reporter No. 2976
24 (Certification expires 5/26/17.)

25 Byers & Anderson certifies that court reporting fees,
arrangements, terms of payment, costs, and/or services are
being offered to all parties on equal terms, and that if
there is an agreement between Byers & Anderson and/or its
court reporters and any persons and/or entities involved in
this litigation, and/or any third party agreements relevant
to this litigation, Byers & Anderson shall disclose the
agreement to all parties.

