

THE HONORABLE JAMES L. ROBART

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,	)	
	)	Case No. 2:12-cv-01282-JLR
Plaintiff,	)	
	)	<b>CITY ATTORNEY’S BRIEF RE SPD</b>
v.	)	<b>ACCOUNTABILITY SYSTEMS REVIEW</b>
	)	
CITY OF SEATTLE,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

The City of Seattle, through its attorney, City Attorney Pete Holmes, respectfully submits this brief concerning the Seattle Police Department accountability systems review, as ordered by the Court.

**I. OVERVIEW**

*Quis custodiet ipsos custodiet?*<sup>1</sup>

Federally mandated, monitored reform of the Seattle Police Department (SPD) is approaching a significant new phase necessitating coordination with the City’s legislative authority. While

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<sup>1</sup> Or, “Who will police the police?”, the Latin motto of the National Association for Civilian Oversight of Law Enforcement (NACOLE).

1 important work remains, the pace of reform over the past two years has quickened, and the City's  
2 elected leaders must look ahead to a time when the Parties and this Court agree that SPD has achieved  
3 and maintained compliance under the Consent Decree. The City seeks a framework for its elected  
4 officials to propose, debate and adopt institutional mechanisms that best ensure constitutional policing  
5 takes root and becomes self-perpetuating in Seattle.

6 The City submits that a fair, effective and efficient accountability system is the prerequisite  
7 to meaningful reform lasting long after the Consent Decree concludes, and that civilian oversight is  
8 central to any successful accountability system. As the Court has admonished, the Parties are taking  
9 the time necessary to address this critically important task. The City, reaffirming its commitment to  
10 the Consent Decree, now seeks to commence the indicated legislative process consistent with the  
11 ongoing federal reform process.

12 With the Court's approval, the City Attorney recently convened a working group of some 16-  
13 18 individuals who have been closely involved with the City's police reform program. The group  
14 included representatives of several City entities, including the Mayor's Office, SPD and the  
15 Community Police Commission ("CPC"), as well as counsel for the United States and members of  
16 the Monitoring Team. The working group's mission was to answer questions posed by the Court  
17 regarding SPD's current accountability system, and explore options for Seattle's ideal police  
18 accountability system. This brief: (1) reports on the working group discussions; and (2) seeks the  
19 Court's guidance in striking the proper jurisdictional balance in creating legislation for SPD  
20 accountability structures.

21 The City Attorney requests that the Court enter an order that recognizes the City's authority  
22 to legislate in the five subject matter areas addressed below that clearly implicate the terms of the  
23 Consent Decree. The City will submit any resulting accountability legislation to the Court for review,

1 so the Court may ensure consistency with the Consent Decree. To assist the Court in this process,  
 2 once the accountability system briefing has concluded the City anticipates that the Parties will submit  
 3 a proposed stipulated order to this effect.<sup>2</sup>

## 4 II. BACKGROUND

### 5 A. The Road to Seattle's Consent Decree

6 SPD's Office of Professional Accountability (OPA)—including the OPA Director, OPA  
 7 Auditor and OPA Review Board—constitute the City's police accountability structural *status quo*  
 8 when this Court entered the Consent Decree in 2012. OPA's origins thus provide historical context  
 9 for the working group sessions and frames answers to the Court's questions about SPD's present and  
 10 future accountability system.

11 Seattle's efforts in the last century first to address corruption within its police department, and  
 12 later to improve relations with its communities of color, produced at best incremental changes, while  
 13 SPD's police culture remained unchanged.<sup>3</sup> Usually in response to one or more high-profile incidents,  
 14 by the early 2000s many Seattle police chiefs had come and gone, leaving behind little evidence of  
 15 lasting change within the rank and file. (In just the past three years, SPD has had four different interim,  
 16 acting and permanent chiefs of police.)

17 Seattle's longest serving chief ever, Patrick Fitzsimons, was appointed in 1979 by Mayor  
 18 Charlie Royer and retired in 1994 after 15 years at the helm.<sup>4</sup> Norm Rice, the City's first African

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19  
 20 <sup>2</sup> City legislation typically takes effect 30 days following the Mayor's signature (or return without signature, or veto  
 21 override), but the Charter allows for longer periods before legislation becomes effective. We propose that any  
 22 legislation being submitted for Court review will have at least a 90 day window before it becomes effective, which  
 23 should provide sufficient time for the City to submit the legislation to the Court and the Court to review and issue any  
 necessary order.

<sup>3</sup> Works such as Seattle Justice: The Rise and Fall of the Police Payoff System in Seattle, by former King County  
 Prosecuting Attorney Christopher T. Bayley, and Seattle Vice: Strippers, Prostitutes, Dirty Money and Crooked Cops  
 in the Emerald City, by Rick Anderson, a retired journalist for both The Seattle Post-Intelligencer and The Seattle  
 Times, are recommended reading for compelling historical accounts of the Seattle Police Department.

<sup>4</sup> <http://community.seattletimes.nwsources.com/archive/?date=19930716&slug=1711387>

1 American mayor, then sought a cultural shift at the top in former San Diego assistant police chief  
2 Norm Stamper. Just two years into Stamper's watch, on October 1, 1996, SPD Detective Earl "Sonny"  
3 Davis Jr. reportedly stole \$10,000 in cash from a drug crime scene. Even more worrisome than the  
4 alleged corruption of a single detective, however, was the number of fellow police officers and  
5 prosecutors who apparently knew about the theft but failed to report it. Stamper proposed a "12 Point  
6 Plan" to address the protective police culture and advocated for FBI investigation of corruption cases,  
7 but his response fell flat as an answer to SPD's "Thin Blue Line", and was further criticized for failing  
8 to address growing concerns of racially biased policing.<sup>5</sup> A blue ribbon panel chaired by Judge  
9 Charles Johnson issued a Final Report on August 19, 1999, recommending civilianization in the  
10 leadership of SPD's Internal Investigations Section and the creation of the present OPA.<sup>6</sup> It would be  
11 the first of at least three such blue ribbon police panels to be convened by City officials over the next  
12 eight years.<sup>7</sup>

13 Less than three months after release of Judge Johnson's OPA report, Seattle hosted the 1999  
14 Ministerial Conference of the World Trade Organization (WTO). The ensuing riots became known  
15 as the "Battle in Seattle," leading to Chief Stamper's resignation and aborting a planned vote of no  
16 confidence in the embattled chief by Seattle's police unions.

17 Mayor Paul Schell appointed Gil Kerlikowske to succeed Stamper in July 2000. Chief  
18 Kerlikowske was still a relative newcomer when the second riot in three years descended upon  
19

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20 <sup>5</sup> See <http://www.thestranger.com/seattle/a-dubious-plan/Content?oid=1409>; <http://www.seattleweekly.com/1999-10-20/news/the-thick-blue-wall/>;  
21 <http://community.seattletimes.nwsourc.com/archive/?date=20000823&slug=4038456>.

22 <sup>6</sup> Chief Stamper and Mayor Schell subsequently endorsed the Johnson report's recommendations in their September  
21, 1999 SPD Accountability Action Plan.

23 <sup>7</sup> Besides Judge Johnson, members of the 1999 blue ribbon panel included former U.S. Attorney for the Western  
District of Washington Michael D. McKay and future U.S. Attorney Jenny A. Durkan, along with Judge Terrence  
Carroll.

1 Seattle—the racially-charged 2001 Mardi Gras riots in Pioneer Square—resulting in the death of Kris  
 2 Kime. Mayor Schell subsequently lost his own bid for a second term in the primary election, leaving  
 3 Kerlikowske’s fate to incoming Mayor Greg Nickels in 2002. The Seattle Police Officers Guild’s  
 4 (SPOG) prior threatened vote of No Confidence in Stamper was instead leveled upon the new chief,  
 5 citing in part Kerlikowske’s handling of the Pioneer Square riots. But Nickels ultimately decided to  
 6 stay the course with the new chief he had just inherited.

7 Legislation creating OPA, meanwhile, bridged the end of Stamper’s tenure and the start of the  
 8 Kerlikowske’s (and Nickels’) terms in office. The first civilian to be afforded a regular look inside  
 9 SPD’s internal discipline system, retired Superior Court Judge Terrence Carroll, had been appointed  
 10 Internal Investigations Auditor back in 1992.<sup>8</sup> In the 1999 OPA Ordinance, City Council created  
 11 OPA, recasting Judge Carroll’s position as the OPA Auditor and appointing a new civilian OPA  
 12 Director, Sandra “Sam” Pailca. Seattle’s very first civilian oversight body, the OPA Review Board,  
 13 came into existence not long after the 9/11 attacks.<sup>9</sup>

14 Prototypical OPARB essentially started from scratch. Among its accomplishments, OPARB  
 15 convinced OPA Director Pailca to end OPAs standard operating procedure of commencing  
 16  
 17

18 <sup>8</sup> <http://www.law.seattleu.edu/faculty/profiles/visiting-and-affiliated/terrence-carroll>

19 <sup>9</sup> Chief Stamper characterized OPA, created just after his departure, as follows:

20 Seattle has a generally weak, hybrid form of citizen oversight.... Established after I left (but responding to a  
 21 mess created on my watch, a theft and attempted cover-up), the city created an Office of Professional Accountability.  
 22 However, while the OPA is headed by a civilian employee who oversees internal investigations, she reports to the  
 23 chief of police. A new three-person “citizen review” body is confined to reviewing only completed, redacted, randomly  
 selected internal investigations, then reporting to the city council any “trends and patterns” it may find. Finally, there  
 is a citizen auditor position, which was in place when I arrived in 1994. Held then by retired Superior Court Judge  
 Terrence Carroll and now by former U.S. Attorney Kate Pflaumer, both highly respected in the community, the  
 auditor’s position is arguably the strongest of the constellation of “review” mechanisms. But, thanks to the  
 uncompromising opposition of the police union, Seattle’s approach to citizen oversight is scattered, inefficient, and  
 unsatisfying to many.

NORM STAMPER, BREAKING RANK: A TOP COP’S EXPOSE OF THE DARK SIDE OF AMERICAN POLICING 274-75 (Nation  
 Books 2006).

1 misconduct investigations with a criminal background check *of the complainant*.<sup>10</sup> Members  
 2 struggled in early years, however, with access only to heavily redacted, closed files, and continuing  
 3 concerns for personal liability over negative reports. When City Council finally permitted OPARB  
 4 access to unredacted case files and provided indemnity against union lawsuits in 2007, a particularly  
 5 high profile misconduct case was uncovered that exposed serious flaws in SPD's accountability  
 6 system. Subsequently, two blue ribbon panels were formed—one by Mayor Nickels (PARP) and a  
 7 second by the City Council. The former resulted in development of the “29 Points of Light.”

8 Chief Kerlikowske left to become President Obama's National Drug Czar in March 2009. By  
 9 the time Mayor Nickels had lost his own bid for a third term in the August 2009 primary, the  
 10 replacement search was already underway, with the only internal candidate, John Diaz, as interim  
 11 chief.<sup>11</sup> Sacramento Police Chief Rick Braziel and East Palo Alto Police Chief Ronald L. Davis  
 12 rounded out the rest of the final candidate pool at the end of 2009.

13 Seattle entered 2010 with both a new Mayor and a new City Attorney. While speculation  
 14 bubbled over what the new mayor would do, video went viral nationwide of an April 2010 South  
 15 Lake Union arrest in what became known as the infamous “Mexican piss” case. In early June 2010,  
 16 Chief Braziel withdrew his name from consideration. Rather than reopening the search, Mayor  
 17 McGinn tapped the internal candidate, John Diaz, later that same month.<sup>12</sup> Then, on August 30,  
 18 2010—the same month Diaz assumed the permanent Chief position—Seattle Police Officer Ian Birk  
 19 shot First Nations woodcarver John T. Williams to death. The Department found the shooting to be  
 20

21 <sup>10</sup> See OPARB's 2003 YE Report at 9  
 22 (<http://www.seattle.gov/Documents/Departments/Council/Issues/OPARB/reports/2003YEReport.pdf>).

23 <sup>12</sup> After losing out to Chief Diaz in the Seattle police chief search, Chief Davis became the Director of the COPS  
 Office in the Obama Justice Department. In 2015, Director Davis was tasked by President Obama to be the Executive  
 Director of the President's Task Force on 21<sup>st</sup> Century Policing.

1 unjustified, and Birk resigned before he could be fired.

2 By early 2011, both the Mayor and the City Attorney had joined in community calls for a  
3 federal “pattern or practice” investigation of SPD, commencing in March 2011. On December 16,  
4 2011, DOJ announced its findings that SPD officers used excessive force in violation of the Fourth  
5 Amendment to the U.S. Constitution, including evidence of racial biased policing.

6 Mayor McGinn, City Attorney Holmes and a group of three City Councilmembers began to  
7 meet weekly in January 2012 in the Mayor’s Office with the stated goal of addressing DOJ’s findings  
8 with the City’s own reform plan. Within a few months, however, and with no real progress toward a  
9 reform plan, all three Councilmembers withdrew from the mayoral meetings. Later that same week—  
10 one day before DOJ had promised to deliver its own proposed reform plan—the McGinn  
11 administration released its so-called “20/20” plan, outlining twenty reforms to be implemented within  
12 the next twenty months. Prepared in secret by a select few SPD Command Staff members, the  
13 McGinn administration asserted that 20/20 obviated the need for federal oversight and promised to  
14 fight DOJ and “make them prove their case.” DOJ insisted upon federally monitored reform, and  
15 criticized the 20/20 plan as lacking in substance.

16 Mayor and City Attorney differed sharply over the City’s best interests in litigation strategy.  
17 On the eve of threatened federal litigation, however, the City and the United States finally agreed to  
18 the terms of the Consent Decree, in July 2012. A separate MOU between the Parties outlined an 11-  
19 member Community Police Commission (CPC), with members to be appointed by the Mayor and  
20 confirmed by City Council. By subsequent ordinance, Council increased the CPC to 15 members.

21 Meanwhile, further disagreements between the Mayor and City Attorney ensued, first  
22 involving selection of the Monitor, and then over the Monitor’s budget and first year monitoring plan.  
23 Although City Council had ultimately sided with the City Attorney over the course of litigation, public

1 bickering between the Mayor and City Attorney did not cease until after the March 2013 status  
2 conference, following the Court's approval of the Monitor's first year monitoring plan. Three months  
3 later, in June 2013, Chief Diaz announced his retirement. Mayor McGinn named Assistant Chief Jim  
4 Pugel as interim chief, and police reform disputes between the Mayor and City Attorney appeared to  
5 fade for the rest of the year as both officials entered their respective reelection campaigns. The CPC  
6 began its work in earnest as the 2013 campaign picked up momentum. On July 1, 2013, Pierce  
7 Murphy, a past NACOLE president with over 14 years' experience in civilian oversight, was  
8 appointed to be Seattle's third OPA Director.

### 9 **B. A New Mayor, New Chief, and the Growing Nationwide Police Reform Movement**

10 Mayor McGinn lost his reelection bid to now Mayor Ed Murray in the November 2013  
11 general election. While the chief selection process was still underway, Mayor Murray replaced interim  
12 chief Pugel with retired Assistant Chief Harry Bailey. In April 2014, when CPC issued its  
13 recommendations for SPD's future accountability system, Mayor Murray's first term was only four  
14 months old. Four months later Mayor Murray appointed Kathleen O'Toole to the permanent Chief's  
15 position.<sup>13</sup> Before year's end, and relying upon recently enacted legislation under the Murray  
16 Administration, O'Toole had replaced the entire SPD Command Staff, including new assistant chiefs  
17 recruited from outside the department, along with a new civilian position, SPD's Chief Operating  
18 Officer. But while genuine reform seemed to finally be underway in Seattle, racially-charged police  
19 incidents elsewhere began to multiply.

20 On August 9, 2014, Michael Brown was shot to death by a police officer Darren Wilson in  
21 Ferguson, Missouri. Local protests expanded nationally, and although a grand jury declined to indict  
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23 <sup>13</sup> Mayor Murray removed interim Chief Pugel on January 8, 2014 and replaced him with retired Assistant Chief Harry Bailey, who served until Chief O'Toole took office.



1 Officer Wilson in the shooting, by March 2015 DOJ had found that the Ferguson Police Department  
2 discriminated against African Americans and applied racial stereotypes in a pattern or practice of  
3 unlawful conduct. Other instances of unarmed black males killed by police officers, including Tamir  
4 Rice in Cleveland, Freddie Gray in Baltimore and Eric Garner on Staten Island, New York, among  
5 others, fueled the national Black Lives Matter movement and prompted President Obama to appoint  
6 the President's Task Force on 21<sup>st</sup> Century Policing.

7 In the summer of 2015, in advance of the first anniversary of Michael Brown's death—and  
8 with collective bargaining about to begin between the City and SPOG—CPC requested Mayor  
9 Murray's Administration and Chief O'Toole to move forward with legislation adopting CPC's  
10 accountability system recommendations.<sup>14</sup> After a series of long meetings between SPD, the Mayor's  
11 Office, the City Attorney's Office and the CPC, a set of recommendations were negotiated. These  
12 negotiated recommendations were conveyed to the Monitoring Team and DOJ on June 15, 2015, with  
13 feedback requested four days later (by June 19), and were presented publicly by the Mayor's Office  
14 on June 29, 2015. Among the most notable recommendations were: (1) an enhanced role and  
15 increased support for the OPA Auditor; (2) OPARB's elimination; and (3) a new, permanent role for  
16 CPC as SPD's permanent community oversight body. On June 30, 2015, the Court held a status  
17 conference at which the Court expressed concerns about possible conflicts with the Consent Decree.

18 A subsequent status conference was held on August 26, 2015. At that conference, the Court  
19 heard from the Parties and ultimately instructed the Parties to, jointly or separately, provide by  
20 September 30, 2015 submissions concerning "an approach for the existence of review and  
21 accountability systems."<sup>15</sup> The Court further ordered that any responsive submissions by the OPA  
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23 <sup>14</sup> See <http://crosscut.com/2015/06/judge-slams-door-on-police-reform-legislation/>

<sup>15</sup> Transcript of the August 26, 2015 status conference, at p. 30, lns. 16-19.

1 Director, OPA Auditor and CPC be submitted by October 16, 2015.<sup>16</sup> Per the Court, the purpose of  
2 these submissions was “to use the results of this effort to create a better framework for the independent  
3 review of the various policies and creation of organizations that will monitor the performance of the  
4 Seattle Police Department regarding the process engaged in by the parties.”<sup>17</sup> These submissions were  
5 timely filed.<sup>18</sup>

6 The parties received further direction from the Court on January 13, 2016, when the Court  
7 proposed a series of questions that it believed would inform the process of deliberating on what was  
8 the proper accountability system for Seattle. At that time, the Court instructed the parties to take the  
9 necessary time to ensure that any proposal for Seattle’s accountability system “got it right.”

### 10 C. Accountability Systems Review Work Group Sessions

11 In furtherance of the Court’s direction and to help navigate the contours of federal jurisdiction  
12 while facilitating the City’s normal legislative process between the Mayor and City Council, the City  
13 Attorney proposed to convene a working group of a number of City participants along with counsel  
14 for the United States and the Court’s Monitor.<sup>19</sup> This proposal was endorsed by the Court on February  
15 25, 2016.<sup>20</sup> The objective of these meetings was to answer the questions articulated by the Court, as  
16 well as other issues raised by the City Attorney, thus seeking to identify possible consensus around  
17 Seattle’s optimal accountability system.

18 Consequently, a series of six weekly work group sessions comprised of representatives from  
19 SPD, the Office of the Mayor, OPA, the OPA Auditor, OPARB, the CPC, the United States Attorney  
20 for the Western District of Washington and the U.S. Department of Justice (together, DOJ), and the

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<sup>16</sup> *Id.* at p. 31, ln. 11 through p. 32, ln. 20.

22 <sup>17</sup> *Id.* at p. 32, lns. 12-15.

23 <sup>18</sup> See Dkt. #233-234, 238-241.

<sup>19</sup> See Dkt. #274.

<sup>20</sup> See Dkt. #275.

1 federal Monitor's team, commenced on March 9, 2016 and concluded on April 6, 2016. The sessions  
2 generally followed the format outlined in letters dated February 11 and February 22 from the City  
3 Attorney to session participants for five weekly meetings. Originally expected on April 12, the Court  
4 extended the City's deadline for submission of this brief to May 10, accommodating the sixth and  
5 final work group session on April 6—which had been added after the fifth and final session as  
6 originally scheduled. As explained more fully herein, the added sixth session proved to be especially  
7 productive.

8 As set forth above, the primary goal of the accountability systems review meetings was for  
9 the participants to work together to, where possible, collectively answer questions posed by the Court,  
10 attached as Exhibit B to the City's Attorney's February 11, 2016, letter.<sup>21</sup> Most of the accountability  
11 meetings were spent attempting to answer the Court's questions. Early on in the process, the  
12 participants realized that some of these questions simply could not be answered at this juncture.  
13 Consequently, the participants divided the questions into two categories: (1) Questions that were  
14 backwards or present looking; and (2) questions that were forward-looking. The backwards/present  
15 looking questions were answered. For the questions that were forward-looking, participants focused  
16 on identifying those areas in which there was consensus. Where consensus could not be reached after  
17 full deliberations, the participants flagged those questions and noted that answers would need to be  
18 developed after a full legislative process.

19 Discussion of the Court's questions, and later the questions posed by the City Attorney,<sup>22</sup>  
20 yielded robust, in-depth dialog. Although not all questions were answered definitively, the discussions  
21 developed the positions and ideas of the participants and are expected to assist the legislative process  
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23 <sup>21</sup> See Dkt. #274, Exh.1.B.

<sup>22</sup> See Dkt. #274, Exh.1.C.

1 going forward. A discussion of the Court's questions and the answers thereto is set forth in Section  
2 III(A), below. An overview of the discussion of the City Attorney's questions is contained in Section  
3 III(C).

4 Moreover, as discussed above, the added sixth session was incredibly helpful as during that  
5 session a previously contentious issue was resolved when the participants achieved consensus on  
6 those accountability system issues that plainly implicate the Court's jurisdiction, requiring, at a  
7 minimum, modification of the Consent Decree. These issues are set forth in Section III(B), below.

8 Lastly, also included in Section III(C) are a number of other possible characteristics of  
9 Seattle's new accountability system that were discussed by the work group, and that may be worthy  
10 of consideration by the City's legislative authority.

### 11 **III. ACCOUNTABILITY WORK GROUP FINDINGS**

#### 12 **A. Answers to the Court's Accountability System Questions**

13 As indicated above, certain questions posed by the Court simply could not be answered by  
14 the participants during the accountability work groups. The participants discussed those questions  
15 fully and ultimately agreed that they should be explored and answered through the legislative process.  
16 Those questions are clearly noted below. For all other questions, the participants endeavored to agree  
17 upon clear, concise, but thorough answers.

#### 18 **1. Questions Concerning OPA**

##### 19 **a. What Is OPA and What Does It and Its Director Do?**

20 OPA is a civilian led entity housed within SPD that investigates officer misconduct.  
21 Specifically, OPA has jurisdiction over any allegation of officer misconduct, whether referred  
22 from within the Department or initiated based on a civilian complaint. The OPA Director is a  
23 civilian who is appointed by the Mayor to a three-year term and approved by the City Council.

1 The OPA Director is responsible for overseeing the investigations conducted by OPA and for  
2 ultimately making recommendations as to the findings for each allegation.

3 **b. Where Do Complaints About Police Go?**

4 A complaint can come to OPA in a variety of manners. If a civilian initiates a complaint,  
5 it can be done so via email, telephone, letter, or by simply walking into OPA's offices and making  
6 a complaint in person to OPA staff. SPD employees can also refer complaints to OPA. In fact,  
7 SPD employees are required to report to OPA any misconduct that they observe or which is  
8 reported to them. (*See* SPD Policies 5.002 and 5.003.)

9 Presently, formal complaints alleging police misconduct fall under OPA's jurisdiction and,  
10 when made, begin to make their way through OPA's administrative and investigatory processes.  
11 Once a complaint has been received, it generally proceeds via the following procedure and  
12 timeline:

- 13 • 5 days after the complaint is initiated, notice is provided to the named employee;
- 14 • At that time the intake process and initial investigation is ongoing.
- 15 • The OPA Director, working cooperatively with the OPA Auditor, then reviews the  
16 preliminary investigation, ensures that the proper allegations are set forth, and decides the  
17 proper investigatory track.
- 18 • Once the review and classification process has been completed, the OPA Director issues a  
19 final classification. That final classification is sent to the named employee, and should be  
20 issued within 30 days of receipt of the complaint.
- 21 • OPA then begins to investigate the complaint. Once that investigation is completed, the  
22 OPA Director and OPA Auditor must certify it as complete.

- 1 • Once the investigation has been certified as complete, the OPA Director must make a  
2 recommended finding as to each allegation and issue a Director's Certification Memo  
3 ("DCM").
- 4 • As a general matter, the named employee must be notified of any DCM sustaining  
5 misconduct allegations and imposing discipline no later than 180 days after the complaint  
6 is "filed with OPA, or otherwise received by a Department sworn supervisor."
- 7 • The DCM is provided to the chain of command, which, in turn, has 10 days to submit  
8 comments to the Director.
- 9 • If allegations are recommended to be sustained by the Director, a discipline meeting is  
10 held. At that meeting, OPA staff discusses the investigation and findings with the named  
11 employee's chain of command. The substance of the meeting is communicated to the Chief  
12 of Police. After this meeting, a proposed Disciplinary Action Report ("DAR") is issued by  
13 the Department, which lists the rules at issue, OPA's disciplinary finding and the factual  
14 basis for that finding, and a recommended penalty.
- 15 • In certain circumstances, after the proposed DAR is issued and provided to the employee,  
16 the employee then has the opportunity to meet with the Chief to provide any additional  
17 information the employees would like the Chief to consider before a final disciplinary  
18 decision is made (the *Loudermill* hearing).
- 19 • The Chief then makes the ultimate decision as to what charges are sustained and what  
20 discipline, if any, is imposed. After the Chief's decision is made, a final DAR is issued  
21 and provided to the employee.

1 Other steps after the Chief’s final decision, include a two-track appellate process that is set  
2 forth, along with the process outlined above, in the OPA Manual.<sup>23</sup>

3 **c. What Types of Complaints Should Go to OPA?**

4 OPA presently retains jurisdiction over all complaints of misconduct, regardless of  
5 severity; however, OPA can classify minor complaints as a Supervisor Action (“SA”) and require  
6 that those matters be investigated within the Department’s chain of command. Not all complaints  
7 may be so classified—notably, complaints in which biased policing, excessive or unnecessary  
8 force and criminal conduct is alleged cannot be designated as SA. Instead, those, and all other non-  
9 minor complaints, must be fully investigated by OPA.

10 Expanding (or limiting) OPA’s jurisdiction was identified by the participants as a forward-  
11 looking question. While there was broad consensus that OPA should have jurisdiction over all  
12 misconduct, regardless of severity, there was less agreement on other questions of scope. The  
13 forward-looking questions concerning the scope of OPA’s jurisdiction, should be fully explored  
14 during the legislative process.

15 **d. Should the OPA Director Be a Civilian?**

16 While this was also identified as a forward-looking question, there was universal consensus  
17 that the OPA Director should remain a civilian.

18 **e. Composition of OPA’s Investigators**

19 A robust discussion during the work group sessions unfolded on the question whether  
20 OPA’s investigators—presently all sworn—should be civilianized and, if so, what proportion  
21 should be civilians versus sworn (i.e., 50/50, 100%, some lesser percentage). While the participants  
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<sup>23</sup> See Dkt. #256.

1 generally recognized the merits of having civilian investigators (i.e. engendering community trust  
2 in the accountability system, furthering disinterested civilian oversight over law enforcement),  
3 well-reasoned arguments were made against the total civilianization of OPA. Among other  
4 suggestions were that only OPA employees above the rank of sergeant should be replaced by  
5 civilians and/or that civilians could be utilized in other non-investigatory roles, such as “complaint  
6 navigators.” Whether OPA’s investigators should be civilianized and, if so, what portion is a  
7 forward-looking question that should be explored during the legislative process.

8 **f. How Should Investigators Be Selected?**

9 There was broad consensus that the OPA Director should have the ability to determine  
10 desired qualifications and make hiring decisions. While it was generally agreed that prospective  
11 hires should have investigatory experience, as indicated above there was not consensus on whether  
12 such individuals should be present or former law enforcement officers, or have, as a requirement,  
13 no law enforcement experience. This question was identified as a forward-looking question that  
14 should be left to the legislative process.

15 **g. How Else Could the Independence of OPA Be Bolstered?**

16 The participants discussed a number of ways in which OPA’s independence could be  
17 bolstered. Most notable was the suggestion that OPA be removed entirely from SPD’s operational  
18 structure, which appeared to be supported by all participants until the fifth session, when CPC and  
19 the OPA Auditor expressed concerns. Consequently, not all participants supported this proposal  
20 for a variety of reasons, including the concern that OPA’s access to information and law  
21 enforcement personnel could be hindered. Other safeguards surrounding the appointment and  
22



1 removal processes were discussed. This question was flagged as forward-looking and should be  
2 resolved during the legislative process.

3 **h. Protocol for Investigations**

4 The questions concerning protocol—namely, whether OPA should conduct a hearing, the  
5 criteria for decision making, and who the ultimate decision maker should be—were all identified  
6 as forward-looking questions.

7 With regard to conducting a hearing, there was some support for OPA holding public  
8 hearings, but a recognition that this may run afoul of present collective bargaining. There were no  
9 substantive arguments made concerning altering the present OPA criteria for decision making (i.e.  
10 preponderance of the evidence standard, except for dishonesty allegations where a clear and  
11 convincing standard is utilized), and ultimately doing so could also implicate collective bargaining  
12 concerns.

13 Some questioned whether the Director’s role in overseeing an investigation into  
14 misconduct should be bifurcated from the role of reaching a recommended finding and proposing  
15 discipline. Some contended that once the Director certifies the investigation of complete, OPA’s  
16 involvement should end. In this scenario, a recommended finding and proposed discipline would  
17 be the responsibility of an Auditor with expanded functions, or could be solely left to the discretion  
18 of the Chief of Police. Others proposed that OPA could recommend a finding but should not  
19 propose discipline. It was also posited that OPA could recommend a finding, but that any discipline  
20 should come from a “discipline matrix.”  
21  
22  
23

1                   **i. Who Should Investigate Minor Complaints Against SPD Employees?**

2                   As set forth above, there was general consensus that OPA should retain jurisdiction over  
3 all complaints of SPD employee misconduct, whether serious or minor. A more challenging  
4 question for the participants was whether OPA should continue to be allowed to refer certain  
5 complaints to the chain of command to investigate, and, if so, what complaints should OPA be  
6 permitted to delegate. There was no consensus that the status quo (OPA cannot refer to the chain  
7 of command allegations of biased policing, force or criminal violations) be changed.

8                   As a general matter, the participants recognized the merits in having line supervisors be  
9 responsible for certain misconduct. However, the scope of what line supervisors should in fact be  
10 able to review was identified as a forward-looking question that should be left to the legislative  
11 process.

12                   **j. Collective Bargaining Issues Implicated by OPA**

13                   A number of collective bargaining issues may be implicated by alterations to OPA, its  
14 scope of work and jurisdiction, and its staff. In engaging in the accountability systems review  
15 process, the participants looked at issues aspirationally—meaning, what would be the best or ideal  
16 accountability system for Seattle, both in terms of function and transparency. While the limitations  
17 of the current collective bargaining landscape were taken into account, they did not drive the  
18 discussions. However, civilianizing OPA, allowing OPA to conduct public hearings, altering  
19 and/or streamlining the appellate process, and expanding the scope of OPA’s jurisdiction, just to  
20 name a few of the discussed aspects of a prospective accountability system, could all implicate  
21 collective bargaining.  
22  
23

1                   **k. Relationship of other administrative reviews to OPA**

2                   As a general matter, SPD investigatory bodies, including the Force Investigation Team  
3 (“FIT”), the Force Review Unit (“FRU”), the Force Review Board (“FRB”) and the Collision  
4 Review Board, conduct internal administrative reviews of SPD conduct. FRU reviews all Type II  
5 uses of force. FRB, in turn, reviews all type III uses of force, a random sample of Type II uses of  
6 force, and those Type II uses of force that are referred to it by FRU. The Collision Review Board  
7 examines all collisions involving Department vehicles. Both boards evaluate incidents for  
8 opportunities to improve training, policy, equipment, tactics, and chain of command and officer  
9 performance. FIT reviews all Type III uses of force, and may be referred Type II cases from FRU.  
10 FIT callouts include a representative from OPA, and OPA has a defined oversight role as an  
11 observer to all FIT investigations of Type III uses of force.<sup>24</sup> All of these internal bodies are  
12 required to refer potential officer misconduct and/or suspected criminal behavior to OPA.

13                   During the accountability workgroups the intersections between OPA investigations and  
14 those conducted by other Department entities were discussed. Several important questions were  
15 raised. For example, should OPA have concurrent jurisdiction with FRB, FIT and any potential  
16 criminal investigations, or should OPA wait to commence its investigation until after these entities  
17 reach their conclusions? Another issue discussed was whether OPA should continue to be present  
18 and involved as an observer/advisor in FRB and FIT proceedings, or whether any oversight  
19 functionality of OPA should be bifurcated from its role to investigate misconduct and recommend  
20 discipline. These questions and issues were identified as forward-looking matters that should be  
21 more fully explored during the City’s legislative process.

22  
23 \_\_\_\_\_  
<sup>24</sup> OPA Manual, at p. 51, ¶ IV.

1           **2. Questions Concerning the OPA Auditor**

2           **a. What Is the Auditor and What Does It Do?**

3           The Auditor is a civilian with a legal/judicial background who is appointed by the Mayor  
4 to three-year terms and approved by the Council. The primary responsibility of the Auditor is to  
5 review the quality of OPA’s investigations and to decide whether further investigation is needed  
6 or if any reclassifications need to be made. If not, the Auditor is tasked with—in concert with the  
7 Director—certifying the investigation as complete. A secondary function of the Auditor is to  
8 conduct audits of OPA and all of its records, and to provide reports detailing the results of those  
9 audits semiannually to the Mayor and Council. The reports may contain recommendations on the  
10 timeliness, fairness and thoroughness of OPA investigations, and may also evaluate any other SPD  
11 or City policies relating to police accountability or police professional conduct.

12           In practice, however, the scope of the Auditor’s work has expanded, offering  
13 recommendations on systemic issues broader than those concerning OPA and the functioning of  
14 the accountability system and related policies.<sup>25</sup>

15           **b. What Role Should the Auditor or Another Entity Have In Investigations?**

16           There was a thorough discussion of what role the Auditor (or any successor entity) should  
17 have or, for that matter, not have in investigations. Arguments were made in support of maintaining  
18 the Auditor’s review function over OPA investigations, while recognizing the burden that this may  
19 place on both the Auditor and on the OPA Director. It was also suggested that the Auditor could  
20 take on the role of making the recommendation as to findings and discipline from the OPA  
21 Director. Moreover, another issue discussed by the participants was whether the Auditor should

22  
23           <sup>25</sup> See OPA Auditor Publications, “Special Topics,” available at <http://www.seattle.gov/opa/opa-reports>.

1 engage in real-time investigation review or simply be limited to a review of the investigation once  
2 it has been submitted as complete by OPA. This question, and its permutations, was identified as  
3 forward-looking and should be further examined during the legislative process.

4 **c. What Other Role Should the Auditor or Other Entity Have More  
5 Broadly?**

6 There was broad consensus that the auditor function should not be limited solely to a review  
7 of OPA investigations and accountability related policies and practices. The participants agreed  
8 that the auditor function should be expanded to encompass other areas including, but not limited  
9 to, review of general SPD policies, significant issues that may not have been identified as  
10 misconduct, and whether the Department is utilizing best practices. There was no consensus,  
11 however, as to what entity should actually do this and as to the exact scope of the responsibilities  
12 of this entity. The question remains whether it should be a strengthened Auditor, an Inspector  
13 General, or some other individual/entity operating out of the City Auditor's Office. This was  
14 identified as a forward-looking question that should be further developed during the City's  
15 legislative process.

16 **d. How Should the Auditor or Other Entity Be Selected?**

17 As with the OPA Director, there was consensus that the selection process should be set up  
18 in a way that ensures maximum independence of the Auditor and, to that point, safeguards  
19 surrounding the appointment and removal processes were discussed. However, the participants  
20 concluded that this was a forward-looking question that should be left to be resolved during the  
21 legislative process.  
22  
23

1           **e. Does the Auditor Have Sufficient Capacity and Resources?**

2           There appeared to be consensus that the Auditor was presently understaffed and under-  
3           resourced and that increased responsibilities would require an increased staff and budget. The  
4           participants discussed whether the Auditor could fall under the purview of the City Auditor's  
5           Office, or whether the Auditor should have its own distinct office, staff and budget.

6           The consensus was that this was a forward-looking question that should be resolved during the  
7           legislative process.

8           **3. Authority Questions**

9           **a. To Whom Should the OPA Director and Auditor Report?**

10           The participants discussed a number of possible scenarios, including having the Director  
11           and Auditor report to a community board/group, to both the Mayor and City Council, or to either  
12           the Mayor or Council separately. This question was identified as a forward-looking inquiry that  
13           should be answered during the legislative process.

14           **b. Who Should Be the Final Decision Maker?**

15           For matters of Department discipline, there was broad consensus that the Chief of Police  
16           should be the final authority on discipline.

17           **c. How Should a Reportee Agency Be Selected?**

18           As discussed above, there was not consensus as to what any reportee agency should be. As  
19           such, the participants did not reach consensus as to how any prospective reportee agency could or  
20           should be selected. Whether and how a reportee agency should be selected is a forward-looking  
21           question that should be left to the legislative process.  
22

1           **4. Questions Concerning OPARB**

2                   **a. What Is OPARB's Role?**

3           Presently, OPARB is a seven member board comprised of civilians appointed by the City  
4 Council. OPARB's purpose is to provide community oversight and awareness of SPD and its  
5 accountability system. In order to do so, OPARB independently reviews the quality of the  
6 accountability system, promotes public awareness of and full access to the system, surveys the  
7 community and police officers to obtain information and opinions on police practices and  
8 accountability, and advises the City on its police policies and accountability. In furtherance of this  
9 mission, OPARB reviews complaint forms and closed OPA files, and is required to provide reports  
10 on a semi-annual basis. Thus, OPARB oversees the quality and efficacy of the work of both the  
11 OPA Director and the Auditor.

12           Functionally, however, OPARB's anticipated role has been marginalized both by the public  
13 availability of OPA files and by the increased scope of the work being performed by the CPC. The  
14 CPC has taken on much of the public outreach efforts once viewed as within the purview of  
15 OPARB, and has also conducted its own inquiries into systemic issues, both concerning the  
16 accountability system and SPD writ large, through its review of closed OPA investigations and  
17 other issues of community concern.

18                   **b. Is OPARB the Only Entity through Which the Community Presently**  
19                   **Weighs In on Police Accountability?**

20           OPARB is no longer the sole avenue through which the community presently weighs in on  
21 police accountability. As discussed above, the CPC has taken on much of this role in its daily work.  
22 CPC commissioners attend a wide spectrum of community meetings, listening to concerns that are  
23 articulated. As discussed above, the CPC has conducted reviews of SPD actions and/or closed

1 OPA investigations in order to make systemic recommendations. For example, the CPC reviewed  
2 the hiring and firing of Mohamed Said with an eye towards making systemic recommendations to  
3 the Department. The CPC also looked into SPD's demonstration management policies in light of  
4 concerns flagged by community groups concerning the policing of protests. Most recently, the  
5 CPC has taken it upon itself to examine OPA's investigation of allegations stemming out of May  
6 Day 2015.

7 This expanded role that the CPC has been playing is not codified and is arguably at odds  
8 with language within the Consent Decree and Memorandum of Understanding that precludes CPC  
9 review of OPA files. However, the CPC views it as incumbent on themselves and the unique role  
10 that they play to respond to what it perceives to be the community's concerns about OPA, the  
11 accountability system, and SPD's policies, procedures and tactics, and identifies this as an area of  
12 shortcoming in the current accountability structure.

13 The Mayor's Office's community outreach programs and SPD's advisory councils serve  
14 to provide other valuable avenues for community input.

##### 15 **5. Questions Concerning Functional Assessments of the System**

16 The participants' consensus is that this portion of the Court's questions cannot be answered  
17 at this time. It is evident from the discussions during the accountability work group meetings that  
18 the legislative proposals outlined in the City's September 30, 2015 submission do not provide a  
19 fix for all of the shortcomings of the current system.

20 For example, it is clear that there is, in some quarters, a lack of community trust in SPD's  
21 internal processes that are in place to investigate significant incidents. There is no mechanism in  
22 the September 30<sup>th</sup> package that would fully address this. As another example, the participants  
23 globally agreed that the role of the Auditor (or some other entity that would encompass the auditing



1 function) should be expanded to include more than just overview of OPA investigations but also a  
2 broader audit and systemic review function. That is not a consideration in the September 30<sup>th</sup>  
3 package.

4 Moreover, as articulated in the Auditor's October 16, 2015 filing, one significant  
5 shortcoming of the present system is that there is no process in place to ensure the consideration  
6 and/or implementation of systemic reforms proposed by civilian oversight. The September 30<sup>th</sup>  
7 package does not change this status quo. Further, the participants discussed the need for sufficient  
8 checks and balances within the accountability system to ensure against the "bad actor" theory,  
9 where one inept part of the system causes the whole to cease functioning. The September 30<sup>th</sup>  
10 package simply does not provide the necessary checks and balances to protect against this.

11 While a vast range of ideas regarding how these shortcomings could be fixed were  
12 discussed during the accountability work groups, little consensus was reached. Instead, the  
13 consensus that was reached was that these questions should be answered through the City's  
14 legislative process with input from affected components of the City and the citizens of Seattle. The  
15 City believes that the Court's questions will be fully and comprehensively answered during the  
16 deliberations involved in developing a legislative package surrounding accountability.

#### 17 **B. Areas Identified As Requiring Consent Decree Amendment to Proceed**

18 In addition to answering the Court's and the City Attorney's questions, another primary  
19 focus of the accountability workgroups was to identify those areas of any potential accountability  
20 system for which alteration would require amendment of the consent decree.

21 Five items were identified by the working group as core accountability topics that plainly  
22 implicate the Court's jurisdiction. Thus, the sixth and final accountability meeting ultimately  
23 proved to be essential by allowing the participants to finally agree that the Parties must seek to

1 amend the Consent Decree, MOU, or both, to obtain the Court's approval for the City to enact  
2 relevant legislation concerning these items. In listing these items below, it is noted that there may  
3 be disagreement among City entities on whether some of these areas should be addressed through  
4 the City's legislative process and those disagreements are appropriately deferred to that process.  
5 The inclusion of all of these areas here is simply a recognition that changes in any of these areas  
6 implicates the terms of the Consent Decree.

7 The five items identified by the participants are as follows:

- 8 1. Modifications to the OPA Manual, and to related SPD Policies 5.002 and 5.003;
- 9 2. Moving OPA outside SPD;
- 10 3. Establishing SPD's permanent civilian oversight body;
- 11 4. Modifying or terminating OPARB's role or existence; and
- 12 5. Modification of other internal SPD accountability components called out in the Consent  
13 Decree, such as the FIT, FRB or EIS.

#### 14 **C. The City Attorney's Questions and Future Accountability System Innovations**

15 As referenced above, the workgroup sessions were also used to answer the series of  
16 questions that had been posed by the City Attorney. In evaluating these questions, the participants  
17 discussed whether OPA should be removed from SPD's organizational structure entirely and  
18 whether OPA should be civilianized either completely or in part or and/or continue to use sworn  
19 personnel as investigators. With regard to civilian oversight, the participants discussed whether  
20 CPC should be made permanent, whether OPARB should continue to exist or be merged into some  
21 other oversight body, and how the membership of a civilian oversight entity should be selected  
22 (for example, by area of expertise or based on demographic and/or geographic considerations).

1 The participants agreed that the entirety of the City Attorney’s questions were forward-looking  
2 and should be further developed through the legislative process.

3 While many of the questions posed throughout the accountability work group remained  
4 unanswered, a great deal of consensus was achieved. Importantly, consensus was reached on the  
5 basic functions that should exist in Seattle’s future accountability system; namely, a robust,  
6 independent investigatory body, an expansive audit function, and meaningful civilian oversight.

7 Based on the above discussions, and larger collective workgroup deliberations, the  
8 following are other options that the City’s legislative authority may wish to consider as part of  
9 Seattle’s future accountability system:

- 10 1. Moving OPA outside SPD;
- 11 2. Adding civilian investigators to OPA staff until at least 50/50 parity in civilian to sworn  
12 investigators;
- 13 3. Providing OPA investigators with the power to compel witness testimony and  
14 production of documentary evidence;
- 15 4. Morphing the OPA Auditor into an Inspector General, vested with authority to address  
16 policy issues and insignificant incidents beyond specific complaints of misconduct; and
- 17 5. Designing a selection process for any civilian board that ensures maximum legitimacy  
18 for community representation and input regarding Seattle policing, whether  
19 geographically (by Council District, for instance), demographically or by expertise  
20 “sector”, and whether or not to include current sworn personnel—or some combination  
21 of such factors.

1 **IV. NEXT STEPS**

2 As set forth in the Consent Decree:

3 If the City establishes or reorganizes a government agency or entity whose function  
4 includes overseeing, regulating, accrediting, investigating, or otherwise reviewing  
5 the operations of SPD or any aspect thereof, the City agrees to ensure these  
6 functions and entities are consistent with the terms of the Settlement Agreement  
and will incorporate the terms of the Settlement Agreement into the oversight,  
regulatory, accreditation, investigation, or review functions of the government  
agency or entity as necessary to ensure consistency.<sup>26</sup>

7 Consistent with the above, the Mayor intends to propose legislation for the Council to consider  
8 that comports with the letter and spirit of the Consent Decree. The City Attorney requests that the  
9 Court expressly recognize the City’s authority to legislate in the five areas referenced above that  
10 clearly implicate the Consent Decree.<sup>27</sup>

11 It is anticipated that the myriad issues discussed during the accountability workgroups will be  
12 become part of a robust legislative process, including the multiple complex conversations during  
13 committee briefings, at public hearings, and at the full Council. The City’s legislative authority will  
14 have the opportunity to answer the forward-looking questions identified during the work groups as  
15 well as have the final say as to which, if any, of the areas of consensus ultimately become part of the  
16 SPD’s future accountability system.

17 Throughout this process, the City anticipates engaging with DOJ and the Monitoring Team in  
18 order to fully take advantage of the collective expertise of these entities and to solicit and accept  
19 technical advice.

20 Once the City’s legislative process has been completed, the City will submit any resulting  
21 legislation to the Court for review. This will allow the Court to ensure that the legislation is consistent  
22

23 <sup>26</sup> Consent Decree, at p. 67, ¶ 219.

<sup>27</sup> This request is made consistent with ¶ 225 of the Consent Decree.

1 with the letter and spirit of the Consent Decree. Moreover, it will allow the Court to deliberate on and  
2 decide whether to approve legislative changes in any of the areas that would require modification of  
3 the Consent Decree. In order to facilitate review by the Court, the City Attorney proposes that any  
4 accountability legislation enacted by the City while the Consent Decree remains in place explicitly  
5 provide that it will not become effective until at least ninety (90) days from the date of passage.

6 Once the accountability system briefing has concluded (and no later than June 1, 2016), to  
7 assist the Court the City anticipates that the Parties will submit a proposed stipulated order consistent  
8 with the above, which shall only become effective following review and approval by the Court.

9 The City Attorney understands that the Court intends to schedule a status conference to further  
10 explore the issues covered in this brief and in any subsequent briefing. The City Attorney looks  
11 forward to answering any questions the Court may have concerning the substance of this brief, the  
12 work group discussions, and any other matters relating to police accountability.

13  
14 DATED this 10<sup>th</sup> day of May, 2016.

15 For the CITY OF SEATTLE

16 s/Peter S. Holmes

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 10, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system on the following counsel of record:

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DATED this 10<sup>th</sup> day of May, 2016, at Seattle, King County, Washington.

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