**101375-2**

SUPREME COURT
OF THE STATE OF WASHINGTON

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ROBERT SNAZA, *et al.*, RESPONDENTS

v.

STATE OF WASHINGTON, APPELLANT

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# BRIEF OF RESPONDENTS

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## I. INTRODUCTION

The United States Constitution and the Constitution of Washington are the supreme authorities of this state. The sheriff is named in the constitution, but because the powers and duties of the office are not specifically enumerated, this Court has recognized protections for the core functions of the office. In determining the core functions of a Constitutional office, this Court has examined what powers and duties were possessed by the office in the years leading up to the adoption of the Constitution in 1889.

RCW 10.116.030 unconstitutionally delegates core functions of the sheriff to the chair of the board of county commissioners. This Court should hold RCW 10.116.030 violates the sheriff's core functions, violates separation of powers and affirm the lower court's decision granting summary judgment by finding the statute unconstitutional.

## II. ISSUES PRESENTED

Does article XI, section 5 of the Washington Constitution prohibit the Legislature from requiring the sheriff to receive the authorization of the chair of the board of county commissioners, prior to deploying tear gas outside of a correctional facility in order to quell a riot?

## III. STATEMENT OF THE CASE

The Sheriffs and County Commissioners (Sheriffs and Commissioners) instituted this action against the State asserting two provisions of Engrossed Substitute H.B. 1054 were unconstitutional. CP 1-13; Laws of 2021, ch. 320, § 4; codified as RCW 10.116.030.

The Sheriffs of these seven non-charter counties challenged one provision of the law as unconstitutional. CP 5-13. The provision at issue requires the Sheriff to obtain authorization from the "highest elected official" of the

jurisdiction prior to deploying tear gas to quell a riot. RCW 10.116.030(3). The "highest elected official" in non-charter counties is the chair of the county legislative authority ("board"). RCW 10.116.030(4)(b).

The Sheriffs challenged granting the chair of the board the power to authorize or deny using tear gas, in the case of suppressing a riot, represents an unconstitutional delegation of the core functions of the sheriff. CP 7.

Additionally, the Sheriffs and Commissioners also argued that RCW 10.116.030 impermissibly vests singular decision-making authority in the chair of the board, rather than in the commissioners as a legislative body. CP 11.

After filing cross motions for summary judgment, the trial court granted the Sheriffs' and Commissioners' motion regarding the delegation of the Sheriff's power to the highest elected official, finding this action to be an unconstitutional

interference with the core functions of the sheriff. CP 73-74. The trial court granted the State's motion regarding the power of the chair of the board to act alone. CP 73-74. The trial court found that the legislature did not violate the constitution in designating one commissioner the ability to act alone. CP 91.

The State appealed the trial court's decision as it related to the core functions of the Sheriffs. CP 70-72.

## IV. ARGUMENT

### A. STANDARD OF REVIEW

This Court reviews summary judgment rulings and constitutional issues de novo. *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 167, 385 P.3d 769 (2016). Statutes are presumed constitutional and the challenger must show, beyond a reasonable doubt, that the statute is unconstitutional. *Island Cnty. v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998).

## B. THE WASHINGTON STATE CONSTITUTION PROTECTS THE CORE FUNCTIONS OF OFFICERS NAMED IN ARTICLE XI, SECTION 5.

### 1. The core functions of the sheriff's office are protected because it is a constitutional office.

The Constitution protects the core functions of the sheriff because that office is named in article XI, section 5. *State ex rel. Johnston v. Melton*, 192 Wash. 379, 388, 73 P.2d 1334 (1937) (citing *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 414, 7 Am.Rep. 84 (1870)). Article XI, section 5 provides, in part: "The legislature, by general and uniform laws, shall provide for the election in the several counties of … sheriffs." "In naming the county officers in section 5, article 11 of the Constitution, the people intended that those officers should exercise the powers and perform the duties then recognized as appertaining to the respective offices which they were to hold." *Id.* Accordingly, interfering with the powers and duties of officers named in the constitution, violates the right of the people to elect the persons

responsible for performing county governmental functions, and thwarts the will of the framers. *Melton*, 192 Wash at 389-90 (citing *Ex parte Corliss*, 16 N.D. 470, 114 N.W. 962, 964 (1907)).

The people expressly surrendered much of their "sovereignty to the state government when they adopted the constitution," but they expressly reserved their right to choose their county officers. *See Amalgamated Transit v. State*, 142 Wn.2d 183, 238, 11 P.3d 762 (2000).

Even where a law is agreed upon and thought to be beneficial, the Legislature, acting alone, has no power to change the constitution absent a constitutional amendment. *State ex rel. Hamilton v. Troy*, 190 Wash. 483, 486-487, 68 P.2d 413 (1937) (invalidating statute which purported to change the name of the prosecuting attorney to district attorney).

By comparison, other American jurisdictions that have limited the authority of the sheriff or removed the office of the sheriff, have done so by constitutional amendment or departing from a constitutional interpretation of the office. James Tomberlin, "*Don't Elect me": Sheriffs and the Need for Reform in County Law Enforcement*, 104 Va. L. Rev. 113, 147-48 (2018). Missouri removed the sheriff's office by constitutional amendment. *Id.* at 151. Kansas law allowed the removal of the sheriff's office without constitutional amendment because the sheriff was not named in the constitution. *Id.* at 151 n.213. Connecticut abolished the office of the sheriff by constitutional amendment. *Id.* at 144.

Similarly, a California court has declared the sheriff is not constitutionally protectable by being named in its constitution. *Beck v. Cnty. of Santa Clara*, 204 Cal. App. 3d 789, 796, 251 Cal. Rptr. 444 (Cal. Ct. App. 1988). Yet, the court recognized

that the weight of authority holds that where the office of the sheriff is specifically named in a state constitution, it is a "constitutional office." *Id.* at 795 (citing collected cases and treatises). To the extent the State utilizes California's interpretation of its constitution to urge this Court to depart from its own precedent holding the sheriff's office is a constitutional office, the State fails to offer any reason why the prior precedent is incorrect and harmful. *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 343, 217 P.3d 1172 (2009); *see* Br. at 35. This Court will not abandon prior precedent absent such a showing. *Koenig,* 167 Wn.2d at 343.

2. A violation of the core functions of a constitutional office may violate separation of powers.

A separation of powers violation occurs when the "activity of one branch threatens the independence or integrity or invades the prerogatives of another branch." *State v. Chavez*, 163 Wn.2d 262, 273, 180 P.3d 1250 (2008) (citing *Spokane Cnty. v. State*,

136 Wn.2d 663, 677, 966 P.2d 314 (1998)). However, some interplay between branches is allowed. *Id.* at 273.

A separation of powers violation *"*accrues *directly* to the branch invaded." *See State v. Rice*, 174 Wn.2d 884, 906, 279 P.3d 849 (2012) (citations omitted). Yet, "the underlying purpose of the doctrine is" to protect the electorate. *Id.*

In numerous cases, this Court has examined the core function doctrine and separation of powers simultaneously. *Rice,* 174 Wn.2d at 906 (prosecuting attorney cannot cede a core function to the legislature by consent and a law abrogating prosecutor's discretion would violate separation of powers); *Burrowes v. Killian*, 195 Wn.2d 350, 362, 459 P.3d 1082 (2020) (superior court rule usurping clerk's core functions, defined by the legislature, violated separation of powers); *Melton*, 192 Wash. at 391-92 (granting of core functions to appointive

officers was also unconstitutional under separation of powers doctrine).

The Sheriffs reason that a consequence of interfering with the core functions is a violation of the separation of powers. *Cf. Burrowes*, 195 Wn.2d at 363; *Rice,* 174 Wn.2d at 906.

Because the sheriff is an officer named in article XI, section 5, both the separation of powers doctrine and the core functions doctrine protect the sheriff from interference with their constitutional powers and duties.

### C. THE CORE FUNCTIONS OF THE SHERIFF ARE THE POWERS AND DUTIES THAT WERE RECOGNIZED AS A PART OF THE OFFICE WHEN THE CONSTITUTION WAS ADOPTED.

Washington case law has long recognized that the core functions of an office named in article XI, section 5, are those powers and duties that were assigned to the office in the years leading up to the adoption of the constitution. *Melton*, 192 Wash. at 388.

This Court has said that the term "core functions" is construed "according to a given office's historical usage." *Drummond*, 187 Wn.2d at 180. Unlike other jurisdictions, Washington has not adopted the position that some duties are "merely incidental and casual, and without relation to the characteristics" of a particular office. *Drummond,* 187 Wn.2d at 181.

However, the State's argument that the sheriff's duties may have differed in medieval England, is irrelevant, because, as stated in *Melton*, this Court looks to the duties as understood in the years preceding the adoption of the constitution. *See* Br. at 4-6; *see Melton*, 192 Wash. at 388.

Statutory law, code enactments, case law, and the common law all demonstrate that the sheriff's powers and duties have changed little since before the Washington Constitution was adopted. The common law is relevant to understanding the

powers and duties of the sheriff at the time the constitution was adopted. *See Chapin v. Ferry*, 3 Wash. 386, 392-93, 28 P. 754 (1891); *Kusah v. McCorkle*, 100 Wash. 318, 322, 170 P. 1023 (1918).

When the Constitution was adopted, the framers would have been aware of the common law principles governing the office of the sheriff and their application to the Constitution. *Cf. Brunst*, 26 Wis. at 414-15; Thomas M. Cooley, *Constitutional Limitations* 73 (5th ed. 1883) (discussing the maxim that a State constitution shall be understood and construed with the common law in view). Accordingly, the common law (and contemporary treatises which discuss it) provides appropriate support for describing the powers and duties of the sheriff at the time the constitution was adopted.

The modern sheriff's powers and duties can be categorized two ways; executory or ministerial. *See* John A. Fairlie, *Local Government in Counties, Towns and Villages* 109 (1906).[1]

There are approximately ten powers and duties of the sheriff that were historically associated with the office. These powers and duties include: 1) keeper of the peace; 2) chief executive officer;[2] 3) officer of the sovereign; 4) possession of authority over the whole county; 5) enforcer of the law; 6) *posse*

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[1] A copy of *Local Government in Counties, Towns and Villages* can be found online at:

https://books.google.co.ug/books?id=w7Y3AAAAMAAJ&pg=PA109#v=onepage&q&f=false (last visited 1/28/23).

[2] The Sheriffs use the term "chief executive officer" throughout this brief to mean the sheriff's ultimate authority as the highest peacekeeping officer in the county, since this is how authorities describe the power. RCW 36.28.010; Op. Att'y Gen. 61-62 at 3 (citations omitted); *see also* Op. Att'y Gen. 51-53 No. 332 at 3; *State v. McCarty*, 104 Kan. 301, 311, 179 P. 309 (1919). The Sheriffs make this distinction to avoid confusion with the business term of chief executive officer. *Chief Executive Officer* BLACK'S LAW DICTIONARY (11th ed. 2019).

*comitatus*;[3] 7) executor of process; 8) officer of the court; 9) appointment of inferior officers; and 10) keeper of the county jail. The State concedes the sheriff has exercised many of these historically, including the jail. Br. at 10-11.

> Since 1854, it has been the sheriff's duty:
>
> > to keep and preserve the peace in their respective counties, and to quiet and suppress all affrays, riots, unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they may call to their aid such persons, or power of their county, as they may deem necessary.

Laws of 1854, § 4, p. 434. This statute has seen many historical recodifications without change. *See e.g.* Rem. Rev. Stat. § 4168.

[3] A group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations. — Often shortened to *posse. Posse Comitatus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

A similar provision, governing unlawful assemblances and riots, was also passed in 1854. Laws of 1854, § 65, p. 87. The law authorized sheriffs and other governmental officials to disperse unlawful assemblances and use force if necessary. Laws of 1854, § 65, p. 87. Later, this section was repealed and redefined the meaning of a riot. *See* Laws of 1975, 1st Ex. Sess., ch. 260 § 9A.84.010.

Analogous duties to both 1854 laws appeared in another law passed shortly after statehood in 1891:

> The sheriff is the chief executive officer and conservator of peace of the county. In the execution of his office it is his duty—
>
> 1. To arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses.
>
> 2. To defend his county against those who by riot or otherwise endanger the public peace or safety.
>
> 3. To execute the process and orders of the courts of justice or judicial officers, when delivered to him for that purpose, according to the provisions of this code or other statutes.

> 4. To execute all warrants delivered to him for that purpose by other public officers, according to the provisions of particular statutes.
>
> 5. To attend the sessions of the courts of record held within his county, and to obey their lawful orders or directions.
>
> The county is not responsible for the acts of the sheriff.

Laws of 1891, ch. 45, § 1, p. 83. Like the preceding statutes, section 1 experienced several historic codifications. *See e.g.* Rem. Rev. Stat. § 4157.

The final, modern, form of this law appeared in 1963. There, the Legislature recodified both the Laws of 1854 and Laws of 1891 into a single section of the code.[4] Laws of 1854, § 4, p. 434; Laws of 1891, ch. 45, § 1, p. 83; Laws of 1963, ch. 4, § 36.28.010.

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[4] The only subsequent history came in 1965 (removing the final line indemnifying the county for acts of the sheriff, Laws of 1965, ch. 92, § 1) and in 2009 (including female pronouns, Laws of 2009, ch. 549, § 4050).

The 1963 code revision thus appended the earlier 1854 law to the end of the 1891 law. RCW 36.28.010; *see also* Laws of 1854, § 4, p. 434; Laws of 1891, ch. 45, § 1, p. 83. These combined session laws are what comprise today's general duties of the sheriff, RCW 36.28.010.

However, RCW 36.28.010 is not exhaustive of the powers and duties of the sheriff. For instance, at the time the Constitution was adopted, the sheriff was also responsible for the jail. Laws of 1877, § 5, p. 303; *see Melton,* 192 Wash. at 389 (discussing the dilution of the powers of the sheriff if the legislature were to pass a law appointing someone other than the sheriff from operating the county jail); *Kusah*, 100 Wash. at 321 (discussing the sheriff's standard of care relating to people held in his custody; and also his duty to "have charge of the county jail").

However, Washington has passed a law permitting cities and counties to create a department of corrections to take charge

of the jail. RCW 70.48.090(4) ("A city or county primarily responsible for the operation of a jail or jails may create a department of corrections to be in charge of such jail and of all persons confined therein by law, subject to the authority of the governing unit").[5] Operating the county jail is just one example of a duty not enumerated under RCW 36.28.010 that fits the criteria for being a core function.

In addition to the previously mentioned legislative enactments, case law also examines the historic powers and duties of the sheriff. An early case discussing the duties of the sheriff is *Chapin*.

In June 1891, a large group of armed men riotously assembled in the town of Gilman (now Issaquah) at a large and

[5] The Sheriffs note that this Court does not have to resolve this apparent conflict between a core function of the sheriffs and the legislature's enactments delegating that function to an appointive office to determine this case.

valuable coal mine. *Chapin*, 3 Wash. at 387-89. The riotous assemblage spread to three towns in King County. *Id.* The mine manager, the sheriff, deputy-sheriff, and a colonel of the Washington National Guard, made requests to the governor to deploy the Guard to quell the riots. *Id*.

Ultimately, at issue was whether the troops of the National Guard of Washington, who came to aid in quelling the riots, were to be paid out of the military fund. *Id.* at 391-92. It was argued that the troops were called upon as the sheriff of King County's *posse comitatus,* and that they were not in the service of the state. *Id.*

This Court recognized that the Code of 1881 § 860, insofar as authorizing the preservation of the peace using armed assistance, was merely the reenactment of the common law. *Id.* at 392-93; Laws of 1854, § 4, p. 434; codified as Code of 1881 § 860. Second, the Court recognized it has always been the duty

of peace officers to preserve the public peace, even to the extent of calling the people of their jurisdiction to their aid. *Chapin*, 3 Wash. at 392-93; Laws of 1854 § 65, p. 87; codified as Code of 1881, § 2769. And finally, at common law, such peace officers are indictable for not doing so. *Chapin*, 3 Wash. at 392-93.

This Court determined that when the militia is ordered out by the governor, at the sheriff's request, they are not *posse comitatus*. *Id.* at 394-95. Importantly, this Court also recognized, that "it is in behalf of the state that all measures are taken to preserve the peace and execute the laws." *Chapin*, 3 Wash. 395.

The next case describing the sheriff's duties was *Kusah*. The sheriff's duty to command the jail, the standard of care to people in their custody, and the authority to deputize were all discussed. *Kusah,* 100 Wash. at 321-22. At issue was whether the sheriff was civilly liable on his bond for the negligence of a deputy in the performance of his duties. *Id*. at 321.

This Court held that Section 8499 was a common law reenactment of the sheriff's duty to command the county jail, and the persons confined within it. *Kusah*, 100 Wash. at 322; Laws of 1877, § 5, p. 303; codified as Rem. Code § 8499. Similarly, section 8500, describing the sheriff's duties to persons in his custody, was also a reenactment of the common law. *Kusah*, 100 Wash. at 322; Laws of 1877, § 6, p. 303; codified as Rem. Code § 8500.

Section 3990 was also held to be a reenactment of the common law. *Kusah*, 100 Wash. at 322. Section 3900 included the sheriff's power to appoint deputies, revoke their appointments, and the sheriff's responsibility for those deputies. Laws of 1854, § 2, p. 434; Laws of 1877, §1, p. 110; Code of 1881, § 2767; codified as Rem. Code § 3990.

Lastly, this Court held that, "both by statute and at common law," the sheriff owes a direct duty to a prisoner in his

custody and that he may be held liable on his bond for any breach of that duty. *Kusah*, 100 Wash. at 325.

In summary, when interpreting earlier territorial laws, this Court found those statutes were reenactments of the common law. *Id.* at 322. Additionally, a sheriff can be liable, both by statute and common law, for failing to perform his duty of care to prisoners in his custody. *Id.*

The sheriff's extensive authority over the county is also recognized in Washington, despite the State's assertion to the contrary. *Compare e.g. State v. Knight*, 79 Wn. App. 670, 681, 904 P.2d 1159 (1995) (recognizing the sheriff's authority over municipalities in their jurisdiction) *with* Br. at 7 ("[m]any sheriffs are now without law enforcement power") (quoting Frank Richard Prassel, *The Western Peace Officer: A Legacy of Law and Order* 72 (1972)).

In *Knight*, the Court of Appeals analyzed the jurisdiction of a drug task force created pursuant to RCW 39.34. *Knight,* 79 Wn. App. at 674; *see also* RCW 36.28.190 (empowering sheriffs to enter inter-local agreements and provide policing services for municipalities). There, the court found that the task force had jurisdiction over the City of Stevenson because the Sheriff of Skamania County had joined the task force agreement. *Knight*, 79 Wn. App at 680. Importantly, the City of Stevenson had not even joined in the task force agreement. *Id.*

The Court reasoned that the common law, and the law of other states support that the sheriff has the authority to enforce state criminal law anywhere in the county, regardless of whether it is incorporated. *Id.* The Court, relying on *Melton*, stated "when [the sheriff] joined the agreement, he intended to vest the task force with jurisdiction as broad as that which he possessed." *Id.* at 681-82.

At least three Attorney General Opinions are also in accord and have discussed the expansive authority of the sheriff, how the sheriff's jurisdictional authority is distinguished from other law enforcement, and how the authority of other peace officers does not diminish the powers of the sheriff. Op. Att'y Gen. 51-53 No. 322 at 2; Op. Att'y Gen. 61-62 No. 25; Op. Att'y Gen. 1990 No. 4 at 4-5.

Other states' decisional law supports distinctions between the sheriff and other peace officers. An early Kansas case discusses the sheriff's authority of the sovereign and the sheriff's authority as chief executive officer and conservator of peace of the county. *McCarty,* 104 Kan. 301. *McCarty* has also been relied upon by the Attorney General. *See* Op. Att'y Gen. 51-53 No. 322 at 2.

Four men were tried for interfering with the sheriff's arrest of a man named Van Wormer. *McCart*y, 104 Kan. at 311. The

men argued that when acting as deputized constables, they possessed lawful custody of Van Wormer to prove that they did not interfere with the sheriff; and second, even if they did, their actions were justified because they were deputized. *Id*.

The Kansas Supreme Court disagreed, recognizing that the men had no right to interfere with the sheriff because the State's interests were paramount. *Id*. Additionally, the Court noted the men were not of equal authority to the sheriff. *Id.* Despite sharing powers of the same *general character*, even if the constable himself had been present, the sheriff, as chief executive officer and conservator of peace of the county, represented the sovereignty of the state, and had no superior in the county. *Id.* The paramount interests of the state in *McCarty*, also reflect similar ideas from *Chapin,* 3 Wash. at 392-93, 395.

In conclusion, *McCarty* illustrates the significance of the sheriff's authority both as chief executive and conservator of

peace of the county, and as acting with the power of the sovereign.

This Court has also analyzed another constitutional office, the attorney general, under article XI, section 4. *State v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 495, 68 P. 946 (1902). At issue, was whether the attorney general possessed common law powers. *Id.* There, this Court stated that when construing the powers of the attorney general, the constitution and the statutes should be examined, not the common law, because Washington is a state of delegated powers. *Id.* at 495-96.

The attorney general has no common law powers because, when it was created in 1888, the powers of the office, were enumerated by statute. *Seattle Gas*, 28 Wash. at 496; Laws of 1888, § 6, p. 8. By comparison, the prosecuting attorney was prescribed the common law powers of discretion to initiate a suit by the legislature. *Seattle Gas*, 28 Wash. at 503-04; *see also*

*Goldmark v. McKenna*, 172 Wn.2d 568, 576, 259 P.3d 1095 (2011).

Here, the powers of the sheriff are tantamount to the prosecuting attorney. First, both the sheriff and the prosecuting attorney were created far earlier than the attorney general. *Compare* Laws of 1854, § 1, p. 416 (creating the prosecuting attorney's office); Laws of 1854, § 4, p. 434, *with* Laws of 1888, § 6, p. 8. Many statutory powers of the sheriff, like those of the prosecutor, find their origins in the common law. *Chapin*, 3 Wash. at 392-93; *Kusah,* 100 Wash. at 322, *Knight*, 79 Wn. App. at 680.

Several of the sheriff's powers more closely resemble the open-ended power of the prosecutor. This includes peacekeeping powers, the authority as chief executive and conservator of peace, and his authority over the whole county.

The sheriff's duties also require a more fluid interpretation of the office's powers. The sheriff's duties of peacekeeping, acting as chief executive officer and conservator of peace of the county, necessarily grant the sheriff discretion in how those duties are carried out. The meaning of the sheriff's power as chief executive, is also not delineated by the statute, but case law, like *McCarty*, is descriptive of how that power is affected. This contrasts with the attorney general, which is a position of specifically enumerated powers.

Regardless, the analysis of *Seattle Gas* parallels that in *Melton* because both cases analyze *the powers and duties* of the offices at issue when the constitution was adopted. *Compare Seattle Gas*, 28 Wash. at 496 to *Melton,* 192 Wash. at 389. The holding in *Melton* states that the framers intended county officers possess, "*the powers and … duties then recognized*." 192 Wash. at 389. (emphasis added). Therefore, if common law powers

were recognized, as used by that office, then the powers would be incorporated into the office, similar to the prosecuting attorney. *Id.*

*Seattle Gas*, in conjunction with *Chapin, Ferry, Knight,* and *Melton*, supports a conclusion that the sheriff is imbued with common law powers, through statute, in order to affect his duties.

### D. HISTORICAL TREATISES ENUMERATE THE SHERIFF'S CORE FUNCTIONS AT COMMON LAW; MANY OF THOSE CORE FUNCTIONS HAVE BEEN CODIFIED AND RECOGNIZED BY CASE LAW.

During the territorial era, the ten historic powers and duties of the sheriff were largely unchanged from how they were described, in a single passage, by Blackstone.[6] A leading contemporary treatise during the time before the Washington Constitution was adopted also describes these powers and duties.

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[6] 1 Blackstone's Commentaries 332 (1st Ed. 1765) A copy of which can be found online at:

https://archive.org/details/BlackstoneVolumeI/page/n347/mode/2up (last visited 1/28/23).

William L. Murfree, Sr., *A Treatise on the Law of Sheriffs and Other Ministerial Officers* (1st ed. 1884).[7] Where the duty is enumerated by statute, the Sheriffs have included a reference to the most current codification.

The first and most principal duty of the sheriff is to act as keeper of the peace in the sheriff's county. Murfree, at §§ 2, 1160; RCW 36.28.010(1), (6). Second, "[t]he sheriff is the chief executive officer and conservator of the peace [in] the county." RCW 36.28.010; Murfree, at §§ 1, 1160.

Third, an important aspect of the sheriff is that the nature of their office derives its power directly from the sovereign. Murfree, at §§ 41-42. Although no statutory provision codifies

[7] A number of other treatises describing the powers of the sheriff have existed since the territorial days, each generally ascribes the same duties to the sheriff. *See generally* Richard Clark Sewell, *A Treatise on the Law of Sheriff* (1845); W.H. Watson, *A Practical Treatise on the Law Relating to the Office and Duties of Sheriffs* (2d ed. 1848); Walter H. Anderson, *A Treatise on the Law of Sheriffs, Coroners, and Constables* (1941).

this power, this Court has recognized the sheriff's powers represent the authority of the State when he acts. *Cf. Chapin,* 3 Wash. at 396 (keeping the peace is done through power of the State). A Washington Attorney General Opinion also expresses this view. Op. Att'y Gen. 51-53 No. 322 at 2; *Cf.* Op. Att'y Gen. 61-62 No. 25; Op. Att'y Gen. 1990 No. 4.

Fourth, the sheriff's authority extends throughout the entire county. Murfree, at § 114; RCW 36.28.010. Fifth, the sheriff's duties and powers as a peace officer also require the sheriff to enforce the law, arrest felons and breachers of the peace, and take them into the sheriff's custody. Murfree, at § 1160; RCW 36.28.010(1), (2), (4).

Sixth is the sheriff's power of *posse comitatus*. Murfree, at §§ 40, 154. The sheriff's authority to summon the power of the county remains codified today. RCW 36.28.010(6); *see also Chapin*, 3 Wash. at 392. Seventh, unlike other peace officers, the

sheriff's powers and duties encompass other ministerial and executive functions; including executing process. Murfree, §§ 100, 1160; RCW 36.28.010(3).

Eighth, (and another vital feature that distinguishes the sheriff from other peace officers) is that the sheriff has also historically acted as an officer of the Court and continues to do so today. Murfree, at § 428; RCW 36.28.010(5).

Ninth, the sheriff has always had the power to appoint inferior officers. Murfree, at § 14; RCW 36.28.020. Tenth, and finally, the sheriff has historically been responsible for keeping the county jail. Murfree, at § 1160.

Therefore, the office of the sheriff has always included acting as the chief executive officer and conservator of peace of the county and wielding the power of the state in their county. Additionally, the sheriff's functions can be divided between executive functions and ministerial functions. Ministerially, the

sheriff represents and attends the courts and executes process. The sheriff's remaining executive powers and duties include keeping the peace, quelling riots, summoning the *posse comitatus*, making arrests, and keeping the county jail.

The legislature would be granted the ability to take away any of the above powers and duties if this Court were to find they are not core functions of the sheriff. The ability to take executive (peacekeeping) powers from the sheriff diminishes the sheriff's executive functions. *See* Fairlie, at 109 ("The most general powers of American sheriffs may be considered in two classes: as conservators of the peace, and as ministerial agents for executing the decrees of the courts of justice"); *Drummond*, 187 Wn.2d at 181 (holding that Washington has *not* adopted the position that some duties are incidental and casual to a constitutional office). Under such a scenario, the legislature would be free to designate these functions, like the power to quell

riots, to any other county office, such as the clerk or the treasurer. This Court should ensure the sheriff's executive functions remain intact to avoid this absurd result.

## E. RCW 10.116.030 IS UNCONSTITUTIONAL BECAUSE IT INTERFERES WITH THE CORE FUNCTIONS OF THE SHERIFF.

### 1. An action is unconstitutional if it grants authority of a constitutional office to another office; detaches and transfers away a core function on a constitutional office; or seeks to usurp a core function of a constitutional office.

Because altering the core functions of a constitutional office requires a constitutional amendment, any other State action which grants, detaches and transfers away, or usurps the core functions of a constitutional office is an unconstitutional interference. *Melton,* 192 Wash. at 389; *Drummond,* 187 Wn.2d at 182; *Rice*, 174 Wn.2d at 903, 905-06; *Burrowes*, 195 Wn.2d at 363-64; *Brunst*, 26 Wis. at 414; *see also McCarty*, 104 Kan. at 311 (holding that constables could not interfere with the superior power of the sheriff).

The first recognized type of interference with core functions is when an action grants a power or duty held by a constitutional office to another entity. In *Melton*, this Court held that the exercise of the sheriff's duties by persons appointed by the prosecuting attorney violated the constitution. 192 Wash. at 389*; see also Ex parte Corliss*, 114 N.W. at 964 (unconstitutional for enforcement commissioner to appoint deputies with same powers as sheriffs). In *Drummond*, this Court held that a board of county commissioners could not appoint private counsel to represent the board over the objection of the prosecuting attorney when he was willing and able to execute his duties. 187 Wn.2d at 182.

The second recognized type of interference occurs when a core function is "detached" from a constitutional office and transferred away. For instance, it was unconstitutional for the sheriff's control of the jail to be detached and transferred away

from him. *Brunst*, 26 Wis. at 414; *see also Melton*, 192 Wash. at 389. In *Rice,* a criminal statute setting forth mandatory sentencing enhancements was not an interference with the core functions of the prosecuting attorney because the law was directory, but it would have been unconstitutional if it had taken away the prosecuting attorney's discretion and vested it in the legislature. 174 Wn.2d at 897-98, 906-07.

The third type of unconstitutional interference with a constitutional office's core functions occurs when an action usurps the powers of the office. For example, it was unconstitutional for a superior court to adopt a court rule usurping a clerk's discretion to keep electronic files. *Burrowes*, 195 Wn.2d at 363; *see also Rice*, 174 Wn.2d. at 906 (prosecuting attorney cannot agree to usurpation of a core function to the legislature).

2. RCW 10.116.030 is unconstitutional because it interferes with the core functions of the sheriff in each of the three ways outlined above.

RCW 10.116.030 (4)(b) is unconstitutional because it interferes with the core functions of the constitutional office of the sheriff. It requires that when a sheriff seeks to use tear gas to quell a riot occurring outside a correctional facility, they must first receive the authorization of the chair of the board of county commissioners in a non-charter county. RCW 10.116.030(3), (4)(b).

The statute unconstitutionally grants authority to the board to keep the peace and quell riots. Further, the statute detaches and transfers away the sheriff's discretionary authority to decide the manner in which a riot should be quelled, and further still, their core function as the chief executive officer and conservator of peace of the county. Third, where the chair of the board exercises

discretion to permit or disallow use of tear gas, the chair usurps the core functions of the sheriff.

There is an important distinction between the *transfer* of the sheriff's core functions and the *discretion* in how to accomplish that core function. In one instance, the sheriff's authority as chief executive officer and conservator of the peace, and duty to quell riots are possessed by the board; in the other, the sheriff's choice in how to quell the riot is taken away.

The first instance is represented by the case of *Melton*. There, the prosecuting attorney appointed investigators that did not interfere with the sheriff's ability to carry out their powers. 192 Wash. at 385. But, because the investigators were granted, "the same authority as the sheriff of the county," the law was unconstitutional. *Id*.

Similarly, in *Ex parte Corliss*, the legislature had established enforcement commissioners, who were responsible

for deciding if the sheriff and state attorney were discharging their duties with reference to enforcing prohibition laws. 114 N.W. at 965. There, the enforcement commissioners were granted the *same authority* as a sheriff, but the sheriff was still able to carry out the sheriff's duties. *Id.* at 964.

In this case, the board possesses the same authority as the sheriff because the legislature has assigned the ultimate authority to the board and has given the board the authority to quell riots.

The second instance involves the assignment of the sheriff's discretion. The State argues that RCW 10.116.030 does not impede the sheriff's ability to quell riots. Br. at 26. Yet, this assertion is not true because a circumstance could arise where tear gas is required or is the most effective means for quelling a riot.

Additionally, requiring advance authorization is precisely *why* the law violates the sheriff's core functions. In order to quell

the riot, which is the sheriff's *duty*, the sheriff *must* get the board's approval prior to acting. *See Matter of Recall of Snaza*, 197 Wn.2d 104, 112, 480 P.3d 404 (2021) ("The sheriff is bound by their oath of office and the legislature to enforce the law").

This Court has previously addressed the discretion of the sheriff carrying out their duties. In *Chapin,* this Court acknowledged that the sheriff would have the discretion of determining the necessary level of arms required for those called on to assist in the peacekeeping of the county. *Chapin*, 3 Wash. at 393. "That the force thus called out should be armed in some way would seem to go without saying, if the body of disturbers were large enough or defiant enough to require it." *Id.*

In *Burrowes*, where the superior court sought to usurp the clerk's discretion of how to keep its files, this Court held that the interference was unconstitutional. *Burrowes*, 195 Wn.2d at 361-63. Here, when the chair of the board is called upon to exercise

discretion to authorize or disallow the use of tear gas, that individual usurps the sheriff's function as chief executive officer and keeper of the peace, the sheriff's duty to keep the peace and quell riots, and the sheriff's discretion to decide the most effective manner to keep the peace. By charging the board with discretion in quelling riots, even in this limited form, the law violates the sheriff's core functions.

3. This Court should uphold the Constitution and reject the State's policy arguments that the general and uniform laws would be violated.

The State argues that the principle of "general and uniform laws" prohibits a system where municipal police departments and the Washington State Patrol (WSP) become subject to different policing standards. Br. 37-38, 54-55. This argument ignores that the sheriff's position, as a peace officer, is established by the constitution and is therefore protected from legislative interference, unlike statutorily created peace officers.

The State also admits this important constitutional distinction. Br. at 37-38, 54-55.

Municipal peace officers and the WSP are inferior officers. City police departments are directed and controlled by a chief of police who is in turn "subject to the direction of the mayor." RCW 35.23.161. Under a mayor-council plan, the chief law enforcement officer is appointed. RCW 35A.12.020. In towns, the department of police are directed and controlled by a town marshal and subject to the mayor's direction. RCW 35.27.240. Officers of the WSP are under the direction of the chief of the WSP. RCW 43.43.010; 43.43.020. In addition, the chief of the WSP is appointed by the governor, "with the advice and consent of the senate," and may be removed at will. RCW 43.43.020; *see also* RCW 43.06.270 (granting the governor the authority to direct the WSP to assist local officials to restore order when necessary).

Washington statutes formerly authorized constables. Laws of 1854, §§ 13-18, p. 225. Those positions were eliminated in 1984. Laws of 1984, ch. 258, § 81. Since constables were never constitutional officers, they were not entitled to the same protections as the office of the sheriff, and the legislature was able to remove them. Const. art. XI, § 5.

Municipal officers, and the WSP are statutorily created; therefore, they cannot enjoy the same protections as constitutional officers. The legislature could eliminate all municipal officers and the WSP, absent some other restriction.

The distinction between sheriffs and statutorily created peace officer does not end here. The sheriff operates with the supreme authority of the state in their county when carrying out their powers and duties, and is therefore fundamentally different in the authority they possess.

Like in *McCarty*, it is immaterial if statutory peace officers exercise powers of the same *general* character as the sheriff—they are fundamentally different. *See* Op. Att'y Gen. 61-62 No. 25; Op. Att'y Gen. 1990 No. 4. First and foremost, statutorily created peace officers are all inferior to the sheriff because the sheriff is the chief executive officer and keeper of peace in their county. *McCarty*, 104 Kan. at 311-12.

Second, their authority is different. Municipal officers authority is limited to their respective jurisdictions, except when pursuing violators of city ordinances. RCW 35.23.161; RCW 10.93.020(1). In the case of the WSP, their jurisdiction is the state, not the county, and their powers are of a general nature. RCW 43.43.030 ("throughout the state, such police powers and duties as are vested in sheriffs and peace officers *generally*") (emphasis added). By comparison, the sheriff's authority is particularly over the whole county. *Knight*, 79 Wn. App. at 681.

This distinction extends also to the State's assertion that limited authority Washington law enforcement agencies demonstrate a trend in the decline of the sheriff's authority. Br. at 15. The addition of new law enforcement officers to cover expanding administrative regulations and laws does not diminish the character of the core functions of the sheriff.

With respect to the State's claim that riot suppression is also a municipal function, the Sheriffs argue it is of the same *general* character as other peace officers and that the sheriff in acting with the sovereignty of the State his authority is superior anyway because municipalities are subunits of the State subject to the general laws of the legislature. *See* Const. art. XI, § 10.

By similar analogy, city prosecutors, and even the attorney general share their authority to enforce the law and charge crimes with the prosecuting attorney. *Compare* RCW 35.23.111; Spokane Municipal Code 03.01A.230; RCW 43.10.030 *with*

RCW 36.27.020. Sharing this authority does nothing to diminish the powers and duties of the prosecuting attorney nor does it make the ability to enforce the law and charge crimes non-core functions of the prosecutor's office. *See Rice*, 174 Wn.2d at 905-06.

Incidentally, the State's argument also raises serious questions about the application of RCW 10.116.030(4)(b). The statute requires that, "in the case of cities and towns, [the highest elected official] means the mayor." RCW 10.116.030(4)(b). If a riot were to occur within city limits, to whom would the sheriff make a request to use tear gas—the chair of the county board, or the mayor of the city, or both? If the two elected officials disagree, what is the sheriff to do?

Many of the State's arguments are rooted in policy. *E.g.* Br. 37-55. Indeed, the legislature may not, on the basis of policy

or public interest, subvert the constitution. *See Melton*, 192 Wash. at 388.

As part of its policy arguments, the State argues RCW 10.116.030 cannot be unconstitutional because it would subvert the legislature's ability to provide for a uniform system of county government and yield disparate application of the law. Br. at 22-23, 38, 40, 50, 51.

The State argues, (1) that the legislature has the authority to establish a uniform system of county government, Br. at 22-23; and (2) that holding the law unconstitutional would result in a disparate application of the law between peace officers, levels of jurisdiction, and differing classes of counties, Br. at 38, 40, 50; 51.

Collectively, these points suggest in order to maintain a uniformity of laws across Washington, the Legislature may ignore other constitutional provisions that protect county officers

from interference, but somehow leave the core functions intact. Br. at 23. And, as a result, ruling the law unconstitutional would shatter this uniformity, and presumably by extension, somehow violate the constitutional provisions that require a uniform set of laws across Washington. Br. at 38, 40, 50, 51.

Separately, the State acknowledges that the Constitution authorizes local variance in government structure. Br. at 51-52 ("[the Constitution] authorizes counties to adopt local home rule charters in order to permit local variance in governmental structure" citing Const. art. XI, § 4).

The State's contentions support the Sheriffs' position, rather than its own. The State neglects to discuss that article XI, section 4 is limited by the use of the term, "except as hereinafter provided." Const. art. XI, § 4. The "uniform system" contemplated by article XI, section 4, means "an organized plan or scheme that applied equally to everyone once put under a

specific category within that scheme." *Spokane Cnty. v. State*, 196 Wn.2d 79, 86, 469 P.3d 1173 (2020).

Additionally, general laws are said to be, "one which applies to all persons or things of a class." *State v. Schragg*, 159 Wash. 68, 70, 292 P. 410 (1930). In this case, the classes are charter versus non-charter counties. As a result, no conflict can arise in this case because the uniform system is expressly conditioned on the later constitutional provision that authorizes the establishment of charter counties. That provision contemplates a system where the duties of county officers are vested in the legislative authority of the county unless expressly specified otherwise. Const. art. XI, § 4. The State agrees with this construction. Br. at 53.

Even if the duties of those county officers derive from the county charter, the charter is *still* inferior to the Constitution and laws of the state. *Snohomish Cnty. v. Anderson*, 123 Wn.2d 151,

158, 868 P.2d 116 (1994) (quoting Const. art. XI, § 4); *see also* Br. at 53-54. "[C]ounty Home Rule was intended to further self-governance in 'purely local affairs … so long as [those exercising their rights to self-governance] abided by the provisions of the constitution and did not run counter to considerations of public policy of broad concern, expressed in general laws.'" *Anderson*, 123 Wn.2d at 158-59 (alterations in original) (citations omitted). By adopting charters, authorized by the Constitution, charter counties establish county offices that are subject to interference by the Legislature because charter documents are subject to general laws when they do not deal with matters purely of local governance.

The limitations of article XI, section 5, only apply to the legislature's ability to classify counties by general laws *based on population. Spokane Cnty.,* 196 Wn.2d 79, 89 ("the legislature may classify counties by population for any purpose under

article XI, section 5, so long as these purposes do not violate other constitutional provisions."). The law at issue is both a general law, as discussed above, and contains no mention of population, so there is no conflict with section 5's restriction.[8]

There is nothing about the uniformity of laws that requires charter counties or non-charter counties to have the same outcome. *Spokane Cnty.*, 196 Wn.2d at 86.

The State asks this Court to ignore the constitution in order to reform the system of checks and balances placed on the sheriff. Br. at 36-37. Notwithstanding the constitutional problems with the legislature interfering with the sheriff's core functions, the State's perspective ignores the many checks and balances already embedded in the office.

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[8] Furthermore, if the State's contention were true, RCW 10.116.030 itself, would violate the uniformity of laws because subsection (b) requires different outcomes for the highest elected official depending on whether it is a charter or non-charter county, or the WSP.

For example, if the public is dissatisfied with the actions of the sheriff, they have other options including recall, or electing a new sheriff. *See Drummond,* 187 Wn.2d at 179, n.9 (discussing elections as an appropriate measure for the public to determine if they agree with decisions of elected officials); *Matter of Recall of Snaza*, 197 Wn.2d at 110, (discussing the constitutional right of voters to recall an elected official under malfeasance or misfeasance and when they violate their oath of office).

Besides this, the sheriff is also responsible on their bond, both for their own actions and the actions of their deputies. *See* RCW 36.16.050; RCW 36.28.020; RCW 36.28.030; *Kusah,* 100 Wash. at 325.

Criticisms about general policing practices represent only one part of a broader governmental structure. The effects of policing are the most direct and immediate and thus easily scrutinized in public debate. However, it is through the concert

of the legislature, judiciary, and executive that the machinations of government are performed. *C.f.* Bruce R. Huber, *The Durability of Private Claims to Public Property* 102 GEO. L.J. 991, 1020-21 (2014) (discussing the top-down role that social and political institutions play in creating property rights).

The effects of policing on communities are attributable to a phenomenon in which the sheriff only plays one part. Expanding access to mental health resources; creating unarmed peace officers; and funding community-based efforts are all alternatives that the legislature has explored in order to tackle society's most complex and sensitive issues. However, interfering with the Washington State Constitution and interfering with the sheriff's core functions are not an available tool to address these social issues.

## V. CONCLUSION

This Court should affirm the decision of the trial court granting summary judgment in favor of the Sheriffs because RCW 10.116.030 is unconstitutional and it grants, detaches and transfers away, and usurps the core functions of the constitutionally protected office of the sheriff.

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Dated this 6th day of February 2023, in Spokane, Washington.

/s/ Marvin S. Andrews
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# SPOKANE COUNTY PROSECUTOR

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