NO. 101375-2

SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT SNAZA, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

STATE OF WASHINGTON'S REPLY TO BRIEF OF RESPONDENTS

ROBERT W. FERGUSON
Attorney General

Jeffrey T. Even, WSBA 20367
Deputy Solicitor General
Kate S. Worthington, WSBA 47556
Alexia Diorio, WSBA 57280
Assistant Attorneys General
OID No. 91087
PO Box 40100
Olympia, WA 98504
jeffrey.even@atg.wa.gov
kate.worthington@atg.wa.gov
alexia.diorio@atg.wa.gov

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I. INTRODUCTION

The Sheriffs' response brief offers an unworkable standard refuted by their own concessions in this case, common sense, and decades of precedent. The Sheriffs contend that by requiring pre-approval for their use of tear gas, the Legislature has unconstitutionally impinged on their "core function" of riot suppression. But they concede that the Legislature could ban tear gas outright, can impose a variety of other restrictions on use of tear gas, can limit police use of force in a range of ways that affect riot suppression, and can authorize other agencies (such as local police and the State Patrol) to engage in riot suppression. Given these necessary concessions, there is no plausible argument that RCW 10.116.030's preapproval requirement uniquely deprives Sheriffs of their core functions.

The Washington Constitution vests in the Legislature—not in individual sheriffs—the role of prescribing the duties of county officers (Const. art. XI, § 5) and determining how best to protect the public peace, health, and safety (Const. art. II, § 1).

And under this Court's precedent, the constitution precludes the Legislature only from depriving sheriffs of "core functions," a narrow limitation that does not extend so far as to invalidate a generally applicable statutory requirement for the deployment of a dangerous chemical such as tear gas. *See State ex rel. Johnston v. Melton*, 192 Wash. 379, 389, 73 P.2d 1334 (1937). This Court should reverse the trial court's decision invalidating this law.

II. ARGUMENT

A. RCW 10.116.030 Does Not Deprive the Sheriffs of Any Core Function of Their Offices

1. Article XI, section 5, of the Washington Constitution expressly grants the Legislature authority to define the duties of county officers

The Sheriffs base their challenge to RCW 10.116.030 on article XI, section 5 of the Washington Constitution. That provision fails to support their assertion that sheriffs enjoy sweeping independence from state statutes. To the contrary, that section reads: "The legislature, by general and uniform laws, shall provide for the election . . . of . . . sheriffs . . . and shall prescribe their duties . . . ." Const. art. XI, § 5. This textual grant

of legislative authority to define the duties of county officers cannot be simply omitted from consideration.

The constitutional provision specifies two things: first, every county will have an elected sheriff (among other officers); and second, the Legislature will prescribe the sheriff's duties. Const. art. XI, § 5. This Court has held that naming the officers in the constitution implies that the Legislature may not deprive them of their core functions by creating appointive officers discharging the same functions, because the people have the right to elect those who perform county governmental functions. *Johnston*, 192 Wash. at 389. But no authority supports the proposition that the constitutional grant of authority to the Legislature to define that office's duties is meaningless. *See State v. Daniel*, 17 Wash. 111, 119, 49 P. 243 (1897) (constitutional provisions, like statutes, are not to be read to render any portion meaningless). Certainly the Legislature may exercise its general legislative authority to protect public peace, health, and safety, and to that end any restriction on legislative authority implied by

article XI, section 5 must be narrowly construed. *See* Opening Br. at 23-28, 36-41.

Yet the Sheriffs suggest that the concept of a "core function" equates to anything that either a territorial statute or the common law provided a sheriff could do. But to say that an officer had a certain function at common law does not mean that the function is perpetually enshrined in the constitution, particularly when those common law functions changed over time. *See* Opening Br. at 4-8. And it would be additionally odd to conclude that a territorial statute became the source of a constitutional rule.

Most fundamentally, if every duty or power sheriffs have historically had is a core function, then there is no longer any distinction between what is "core" and what is not. The Sheriffs claim that an office's core functions include any "merely incidental and casual" duties of an office. Br. Resp'ts at 11 (quoting *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 181, 385 P.3d 769 (2016)). But if this were the case, this Court

certainly would never have described the limited category of functions constitutionally vested in sheriffs as *core* functions. Indeed, as long ago as *Johnston* this Court described article XI, section 5 as protecting only "*important* powers and functions which *from time immemorial* have belonged to the office of sheriff." *Johnston*, 192 Wash. at 389 (emphasis added). The doctrine that forms the very basis of the Sheriffs' claim has therefore, from the beginning, been limited to functions that are *both* "important" and vested in the sheriff "from time immemorial."[1] *Id.* Or, as this Court phrased it more recently, the Legislature cannot interfere with "fundamental and inherent" duties of a county office, but this does not mean that the legislature is powerless to change any duty at all. *State v. Rice*, 174 Wn.2d 884, 905-06, 279 P.3d 849 (2012).

[1] *See* the State's Opening Brief, at pp. 4-8, for a discussion of the historical evolution of the powers and duties of sheriffs since the dawn of the common law.

The Sheriffs' description of *State ex rel. Banks v. Drummond* erroneously states that the case established that a court does not look to the nature of the function at issue in determining whether it constitutes a "core function." Br. Resp'ts at 11. Rather, according to the Sheriffs, the Court should look to whether a territorial statute or the common law assigned the function to the sheriff at the time of statehood. But the passage they cite merely rejects an argument that the core function of the county prosecutor to provide legal advice only applied if the advice concerned a topic already addressed in statute by 1889. *Banks*, 187 Wn.2d at 181-82. It is axiomatic that a prosecutor's role of providing legal advice does not depend on when the topic of the advice first arose. *Id.* at 182. *Banks* accordingly fails to support the Sheriffs' position.

It thus does not suffice for the Sheriffs to merely assert that because the law authorizes sheriffs to suppress riots, not only is riot suppression a core function, but also all things related to riot suppression are core functions, including the tactics used to

suppress riots. In reality, as the Sheriffs effectively concede, the Legislature may impose a range of public-policy-driven checks on the use of a particular type of force against the public, and such check may apply uniformly no matter which uniform a law enforcement officer wears—that of a sheriff's office, municipal police, or the Washington State Patrol.

2. A public safety restriction on the use of tear gas does not transfer the function of riot suppression from the sheriff to another officer

The Sheriffs go so far as to argue that by interposing a public safety check on the *use of tear gas*, RCW 10.116.030 transfers *the entire function of riot suppression* to the county commissioners.[2] They assert that, "[i]n this case, the board

[2] RCW 10.116.030 merely requires the approval of the *chair* of the board of county commissioners for the use of tear gas in specified situations, not the whole board of county commissioners as a body. RCW 10.116.030(4)(b). The Sheriffs sometimes describe the approval role as being vested in the entire board, but this is not so. *See, e.g.*, Br. Resp'ts at 37-39. The complaint below included a claim that by singling out the chair as the "highest elected official" of the jurisdiction, the statute impeded the authority of the other commissioners. CP 3. The superior court granted summary judgment in favor of the State on that claim, and the Sheriffs did not appeal. RP 17:7-14.

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." Br. Resp'ts at 39. RCW 10.116.030 does no such thing. It grants no authority to the board of county commissioners to quell riots; nor does it deprive the sheriff of that authority. Both before and after the enactment of RCW 10.116.030, the duty of riot suppression remains with the sheriff, who requires no approval from anyone prior to suppressing a riot. RCW 36.28.010(6). If tear gas is to be used, it is still the sheriff, not the chair of the board of county commissioners, who would deploy it. All that RCW 10.116.030 adds is the check that the highest elected official of the jurisdiction approve the use of a potentially dangerous chemical agent against the public. No power is "detached" (to use the Sheriffs' term) from the sheriff and transferred to someone else.

The function at issue is riot suppression; tear gas is, at most, merely one of a range of tactics that might be used in performing that function. Indeed, law enforcement suppressed

riots by other means before the mid-twentieth century application of tear gas to non-military uses. *See* Opening Br. at. 41-42. The Sheriffs point this out themselves, telling the story of riot suppression involving an 1891 incident in what is now Issaquah. Br. Resp'ts at 18-19 (discussing *Chapin v. Ferry*, 3 Wash. 386, 28 P. 754 (1891)). Their discussion highlights that sheriffs could, and did, work to suppress riots without tear gas, undermining their broader contention that a check on the use of tear gas deprives the sheriff of a core function.

On appeal, the Sheriffs claim for the first time that, by placing a check on such dangerous actions as deploying tear gas against the public, RCW 10.116.030 impedes the sheriff's role as "chief executive officer" of the county. Br. Resp'ts at 37. Their summary judgment briefs included no such argument. CP 23-37, 52-60. Thus, this Court should decline to consider it because arguments not raised in the trial court are generally not considered on appeal. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002).

But even if a claim based on a sheriff's role as "chief executive officer" were properly before the Court, it would not aid the Sheriffs' case. All the term "chief executive officer" means in this context is that the sheriff exercises certain delegated powers. *See Goldmark v. McKenna*, 172 Wn.2d 568, 576, 259 P.3d 1095 (2011) ("every office under our system of government, from the governor down, is one of delegated powers"); *see also Stevens County v. Stevens Cnty. Sheriff's Dep't.*, 20 Wn. App. 2d 34, 59, 499 P.3d 917 (2021) (Fearing, J., dissenting) (citing RCW 36.28.010). As this Court has explained:

> The sheriff is made *by statute*[3] the chief executive officer and conservator of the peace of the county. *By statute* also it is made his duty to keep the public peace, and to arrest and confine all persons who commit violations of the law, and especially is it made his duty to execute all process issued to him by a court of justice.

State v. Gorham, 110 Wash. 330, 331, 188 P. 457 (1920) (emphasis added; footnote added). There is no reason to claim

[3] The printed Washington Reports uses the word "statute" here. The Westlaw version misprints it as "state."

that this status flows from the constitution and therefore exempts the sheriff from generally-applicable state laws that apply to all law enforcement agencies. The concept of the sheriff as chief executive officer alone does not determine what those powers are, and so it does not add anything to the analysis.

The Sheriffs' newly-asserted reliance on this term suggests that at root the Sheriffs actually envision a far-reaching independence from general state laws. *See* Br. Resp'ts at 37-40. But like other public officers, sheriffs are subject to the strictures of general laws. *See, e.g.*, *Green v. Cowlitz Cnty. Civ. Serv. Comm'n*, 19 Wn. App. 210, 213-14, 577 P.2d 141 (1978) (applying law regarding a county civil service commission to a sheriff's office). Sheriffs are not above the law. The Sheriffs, in fact, claim superiority over all other law enforcement agencies, but offer no authority for that proposition. Br. Resp'ts at 44.

The Kansas decision upon which the Sheriffs' rely, *Kansas v. McCarty*, 104 Kan. 301, 179 P. 309 (1919), provides them no support because in Kansas the sheriff is not a

constitutional officer and simply exercises those powers granted by statute. *Couser v. Gay*, 959 F.3d 1018, 1026 (10th Cir. 2020) (citing Kan. Stat. Ann. § 19-801a et seq.). This is all their cited authority discusses. *McCarty*, 179 P. at 311-12.

The Sheriffs' sweeping claim of discretion regarding riot control would seem to admit no limits, perhaps even regarding general laws restricting law enforcement's use of force more generally. *See, e.g.*, RCW 10.120.020 (limiting a peace officer's use of physical force). Yet the Sheriffs concede that the Legislature may prohibit the use of tear gas by law enforcement altogether. CP 32. If the Legislature cannot restrict the sheriffs' discretion to use tear gas against the public in specific situations, then the basis on which the Legislature could prohibit tear gas altogether becomes elusive. It is an odd argument indeed—and a fatal concession—to agree that the Legislature may restrict law enforcement discretion while challenging merely an approval requirement that applies a check on the sheriffs' use of dangerous tactics against the public without prohibiting those tactics. This

is particularly so when sheriffs are treated by a general law the same as other law enforcement agencies.

Similarly, if *sharing* any core function with another public official or employee impinges upon the Sheriffs' authority, one must ask the glaring question of whether the Legislature can create the Washington State Patrol and authorize municipal police departments at all—vesting in them all the authority of sheriffs, including riot suppression. RCW 43.43.030 (Washington State Patrol); RCW 35.23.161 (second class cities); RCW 35.27.240 (towns); RCW 35A.21.030 (code cities). Indeed, *Johnston* invalidated a law allowing for the appointment by county prosecuting attorneys of investigators who held the same powers as the sheriff to make arrests and serve warrants and other processes issued by a court but were not themselves elected. *Johnston*, 192 Wash. at 380, 389. The mere sharing of authority with other offices cannot be decisive, or article XI, section 5 would preclude the Legislature from providing comprehensively for the methods, means, and manner of

enforcing the law. This would include regulating sheriffs' exercise of discretion as part of the Legislature's authority to set standards for the public peace, health, and safety.

3. RCW 10.116.030 does not implicate the separation of powers doctrine

The Sheriffs assert that the Legislature violated the separation of powers by enacting a statute, RCW 10.116.030, to regulate the use of force by law enforcement. Br. Resp'ts at 8-10. It is, of course, in the nature of legislative authority to enact laws. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 301, 174 P.3d 1142 (2007). The duties of public officers and agencies are generally defined by such statutes. *Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 404, 377 P.3d 199 (2016) ("Administrative agencies have only those powers expressly granted by statute or are necessarily implied from the legislature's statutory delegation of authority."); *Fleetwood v. Rhay*, 7 Wn. App. 225, 227, 498 P.2d 891 (1972); *State v. Heaton*, 21 Wash. 59, 61, 56 P. 843 (1899); *Osborn v. Grant*

County by & through Grant Cnty. Comm'rs, 130 Wn.2d 615, 626, 926 P.2d 911 (1996).

The enactment of a statute that affects the authority of sheriffs, as executive officers, thus hardly poses a separation of powers problem. It merely illustrates the common occurrence of statutes defining the role of executive officers. Such statutes are entirely consistent with separation of powers doctrine, which "serves mainly to ensure that the fundamental functions of each branch remain inviolate." *In re Disciplinary Proc. Against Petersen*, 180 Wn.2d 768, 781, 329 P.3d 853 (2014); *see, e.g.*, *Burrowes v. Killian*, 195 Wn.2d 350, 459 P.3d 1082 (2020) (elected county clerk had delegated statutory authority to determine format of court documents maintained in conflict with local civil rule); *see also Rice*, 174 Wn.2d at 906-07 (article XI, section 5 precludes the Legislature from depriving a county prosecutor of only those "core functions that make them 'prosecuting attorneys' in the first place"). The Sheriffs cannot suggest that any statute violates the separation of powers simply

because the Legislature did what the Legislature does—enacted a statute defining the functions of an executive officer. Const. art. II, § 1.

4. Cases discussing statutory functions sheriffs *may* perform do not establish that the constitution grants them those functions in perpetuity

The Sheriffs cite several cases describing historical functions of sheriffs, but none of those cases remotely suggest that the use of tear gas is a "core function" or that "core functions" cannot be shared with others.

The Sheriffs' point to *Chapin* as an "early case discussing the duties of the sheriff," Br. Resp'ts at 18, and *Chapin* does include a description of a sheriff's efforts to quell a riot. *Chapin*, 3 Wash. at 387-89. Sheriffs cite to the *Chapin* Court's recognition that "it has always been the duty of peace officers to preserve the public peace," Br. Resp'ts at 19-20, but fail to themselves acknowledge the full relevance of the Court's recognition to the instant case. The *Chapin* Court actually wrote that "[i]t has always been the duty of *magistrates and* peace

officers to preserve the public peace." *Id.* at 392 (emphasis added). *Chapin* therefore serves as a 131-year-old reminder that the duty of sheriffs to preserve the public peace has "always" been shared with other public servants, and that these other public servants include both magistrates and the officers of other law enforcement agencies. This was true well before using tear gas as a tactic for riot suppression was an option. And sheriffs are, with or without the ability to use tear gas, able to take action using other available tools, tactics, methods, and training at their disposal to disperse a riot. *See* Opening Br. at 46-47.

The Sheriffs rely on this Court's description of the statute at issue in *Chapin* as "merely the reenactment of the common law," and as the law of the territory. Br. Resp'ts at 19; *Chapin*, 3 Wash. at 392. But noting that the sheriffs had this authority is not the same as holding that the constitution guaranteed it, for no constitutional guarantee was at issue in *Chapin*. *Chapin* therefore actually undermines the Sheriffs' argument, both by setting forth

a statutory source of their duty to suppress riots and by illustrating their authorization to do so without tear gas.

As for *Kusah v. McCorkle*, 100 Wash. 318, 170 P. 1023 (1918), that decision discussed the duties owed by the sheriff to prisoners "both by statute and at common law." *Id*. at 321-25. While the *Chapin* and *Kusah* Courts did make references to common law derivation of statutes relating to sheriffs, it is unclear how these references relate to the question before this Court. Noting that certain officers had certain authority at common law does not amount to a holding that those functions are enshrined in the Washington Constitution. Similarly, the Court's reference in *State v. Knight*, 79 Wn. App. 670, 904 P.2d 1159 (1995), to its determination that Washington law is in accord with the common law and laws of other states with regard to the geographical extent of a sheriff's jurisdiction, *id.* at 680-81, sheds no light on the question before this Court as to what limitation article XI, section 5 places on legislative authority.

Common law, by its very nature, is subject to change over time. The Sheriffs suggest that the state of the common law in 1854 is the ultimate authority on the core functions of sheriffs. The Sheriffs, however, have also asserted that "the framers would have been aware of the common law principles governing the office of the sheriff and their application to the Constitution." Br. Resp'ts at 12 (internal citations omitted). Extending that logic, then, the framers should also have been aware that the common law evolves, and that would have informed their understanding of the intent and reach of constitutional and statutory enactments. This is why noting that a principle existed at common law is not the same as enshrining it in the constitution.

B. The Naming of an Office in the Constitution Does not Mean That the Office Is Immune From Statutory Changes

1. The Sheriffs' broad reading of "core functions" would impede statewide legislative authority and lead to absurd results

The Sheriffs essentially argue that the Legislature cannot restrict any powers that sheriffs historically exercised or grant any part of those powers to others. This argument would dramatically limit the Legislature's power without any constitutional basis—and in fact in derogation of an express grant of authority to the Legislature—and would lead to bizarre consequences. In effect, it would mean that the Legislature has no power to regulate actions of sheriffs, even though it can regulate municipal police, the Washington State Patrol, and law enforcement officers of charter counties. Br. Resp'ts at 41-44. And because sheriffs have countywide jurisdiction, it would also effectively preclude legislative authority within municipal boundaries because the Sheriff could always exercise authority within city or town limits without regard to municipal views. *See*

Opening Br. at 50-55; *see also* Op. Att'y Gen. 322, at 3 (1952); Op. Att'y Gen. 25, at 6 (1961); Op. Att'y Gen. 4, at 3 (1990).

Municipal police are vested with the exact same authority as sheriffs to suppress riots. RCW 35.23.161 (the "police chief shall have the same authority as that conferred upon sheriffs for the suppression of any riot" in second class cities); RCW 35.27.240 (the "marshal shall have the same authority as that conferred upon sheriffs for the suppression of any riot" in towns); RCW 35A.21.030 ("every officer of a code city shall perform . . . duties . . . which are imposed by state law on officers of every other class of city"). Officers of the Washington State Patrol enjoy "throughout the state, such police powers and duties as are vested in sheriffs and peace officers generally," which would also include riot suppression. RCW 43.43.030.

The Sheriffs point out that the Legislature can statutorily limit the authority of municipal police and state law enforcement agencies because those agencies are purely creatures of statute and are not constitutional officers. Br. Resp'ts at 41-45. This is

precisely the State's point. A ruling that RCW 10.116.030(3) unconstitutionally interferes with a core function of the sheriffs of general law counties would result in a rule that the Legislature may enact such provisions with regard only to municipal police, state law enforcement agencies, and the sheriffs of charter counties. Opening Br. at 54-55. This would produce an absurd side-by-side disparity in which use-of-force protections afforded the public would depend on the uniform worn by law enforcement and not upon any generally-applicable standards for the public peace, health, and safety.

Additionally, the sheriff's countywide jurisdiction would effectively preclude the Legislature from legislating as to law enforcement conduct *anywhere* in the state. All parties acknowledge that a given sheriff's authority extends throughout the county. RCW 36.28.010; Opening Br. at 39; Br. Resp'ts at 41-42. Three prior formal Opinions of the Attorney General so conclude. Op. Att'y Gen. 322, at 3 (1952); Op. Att'y Gen. 25, at 6 (1961); Op. Att'y Gen. 4, at 3 (1990). Practically speaking,

this means that if a municipal police department decided against using tear gas to suppress a riot—either on its own or for lack of approval by the mayor—the sheriff's office could take it upon itself to enter the city and use tear gas against the public of its own accord. This would effectively result in a complete eradication of legislative authority to meaningfully provide any checks or parameters for law enforcement conduct, because any sheriff willing to disregard municipal judgments could simply do so.

Respect for the authority of the Legislature, elected statewide to provide general laws for the State, therefore compels a narrow construction of the category of "core functions" of sheriffs that are protected by article XI, section 5. It can scarcely be contemplated that the drafters of the constitution or the voters who ratified it intended to supplant state lawmaking powers to the degree argued by the Sheriffs merely through the listing of sheriffs in the constitution. This is all the more so given that the same sentence in the constitution explicitly assigns authority to

that very legislature to prescribe the sheriffs' duties. Const. art. XI, § 5; *see also Burrowes*, 195 Wn.2d at 358, 361, 363 (citing Const. art. XI, § 5 and explaining that provision delegated the task of defining the county officer's duties to the Legislature).

Nor is this point a mere "policy argument," as the Sheriffs' characterize it. Br. Resp'ts at 47. The constitutional grant of legislative authority to the Legislature is one of the foundational constitutional principles of state government. *Farm Bureau*, 162 Wn.2d at 290 n.4. The concept that the voters elect representatives and senators to legislate for the whole state forms the underpinning of our republican form of government. *See* Const. art. II, § 2. In construing article XI, section 5, this Court must consider not only that provision in isolation, but the constitutional allocation of powers as a whole. *Cf. State ex rel. Edelstein v. Foley*, 6 Wn.2d 444, 449, 107 P.2d 901 (1940). The effect of an overly broad construction of only one facet of article XI, section 5 would be a corresponding restriction of the ability

of the Legislature to address tactics and procedures of law enforcement under article II, section 1.

2. The powers and duties of *both* county officers and state officers are subject to statutory limitations

The State previously noted the tension between, first, holding that the mere mention of *county* officers in the Washington Constitution implicitly restricted legislative authority regarding their duties and, second, holding that the mention of *state* officers in the Washington Constitution implies no such restriction. Opening Br. at 33-36 (contrasting *Johnston*, 192 Wash. at 390, with *Goldmark*, 172 Wn.2d at 576). The State urged the Court not to exacerbate this tension by adopting a broad reading of "core functions" that would leave the Legislature powerless to regulate county officers.

The Sheriffs attempt to reconcile *Johnston* with *Goldmark* by offering a misleading incomplete version of history. The Sheriffs say that the "attorney general has no common law powers because, when it was created in 1888, the powers of the

office were enumerated by statute." Br. Resp'ts at 26. Indeed they were, but so were those of sheriffs. Act of Jan. 28, 1888, Laws of 1887, ch. VII, § 6, page no. 8 (creating the Attorney General's Office); Act to Create and Regulate the Office of Sheriff, Laws of 1854, § 4, page no. 434. There is no distinction between state and local officers on this score.

The Sheriffs argue that the office of sheriff discussed in *Johnston* differs from the office of attorney general discussed in *Goldmark* because the office of sheriff can trace its existence to an earlier territorial statute than can the attorney general. They suggest no reason why that point would be relevant, since both statutes existed when the constitution was ratified. Regardless, their argument does not present the complete historical picture. The federal Organic Act creating Washington Territory in 1853 created the office of territorial attorney as a matter of federal law. Act to Establish the Territorial Government of Washington, 10 Stat. 172, 176 (§ 10) (1853) (reprinted in Volume 0 of the Revised Code of Washington). Obviously, there was no need for

a territorial statute regarding the attorney general until later in the territorial period. By contrast, the Organic Act simply carried forward in office those sheriffs who previously served under Oregon territorial law. *Id.* § 16.

Just as the current office of county sheriff derived from the common law of England, so did the attorney general. "The position of attorney general in state government is firmly rooted in seven hundred years of Anglo-American history." NAAG, Lynne M. Ross, *State Attorneys General: Powers and Responsibilities* 3 (1990). That history began with the appointment of a lawyer to represent the King's interests in the mid-thirteenth century. *Id.* at 4 (citing John Llewelyn Jones Edwards, *The Law Officers of the Crown* 14-16 (1964)). The attorney general's history can thus trace through English common law and the colonial period in much the same way as the sheriff's history. *Id.* at 3-8; *see also* Opening Br. at 4-8.

The Sheriffs cite an early case for the proposition that the attorney general has no common law powers. Br. Resp'ts at

26-28 (discussing *State ex rel. Winston v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 68 P. 946 (1902)). This Court did, indeed, there conclude that historical derivation from an English office of the same name did not mean the incorporation of common law powers. *Winston*, 28 Wash. at 495-96. The problem for reconciling the cases is that everything this Court said in *Winston* about the attorney general could also have been said 35 years later about the sheriff in *Johnston*. Both the attorney general and the sheriff derived from offices historically developed in England, but by the same token, both were also mentioned in the Washington Constitution. *Compare* Const. art. III, § 21 (creating the office of attorney general) *with* Const. art. XI, § 5 (creating the office of sheriff). And in both cases, the constitutional context for their mention included providing for their election. *Compare* Const. art. III, § 1 (providing for the election of statewide officers) *with* Const. art. XI, § 5 (providing for the election of county officers). And constitutional provisions governing both offices refer to the Legislature's power to define their duties.

Compare Const. art. III, § 21 (the attorney general "shall perform such other duties as may be prescribed by law"), *with* Const. art. XI, § 5 (the Legislature "shall prescribe their duties").

The result in *Winston* actually undermines the Sheriffs' position here when considered in context. The attorney general had commenced a *quo warranto* action against a gas company regarding the use of Seattle's city streets. *Winston*, 28 Wash. at 493-94. A statute vested authority in county prosecutors to bring such cases, but the attorney general claimed common law authority to do so as well. This Court acknowledged that both the attorney general and the prosecutor were constitutional officers, but held that the statute conferred *quo warranto* authority only on the prosecutor. *Winston*, 28 Wash. at 495. The Court rejected any notion of implied authority stemming from the historical powers of the attorney general. *Id.* at 495-96; *see also id.* at 499-501. *Winston* thus does not help reconcile *Johnston* with *Goldmark*; *Winston* is consistent with *Goldmark* but inconsistent with *Johnston*. And the Court ultimately resolved *Winston* based

on a statute, while the Sheriffs here ask this Court to invalidate a statute.

The Sheriffs also liken their power to that of a county prosecuting attorney. Even if that office's creation in our state pre-dates the creation of the attorney general, that fact also does not advance the Sheriffs' position. As this Court has recognized, county prosecuting attorneys are elected county officers whose "powers are limited to those expressly granted by statute." *Osborn v. Grant County by & through Grant Cnty. Comm'rs*, 130 Wn.2d 615, 626, 926 P.2d 911 (1996). Same too with sheriffs.

3. Upholding RCW 10.116.030 need not entail overruling any prior decision of this Court

The resolution of this case turns upon a line of cases that begins with *Johnston* and extends through more recent decisions in *Rice* and *Banks*. As explained above, *supra* pp. 25-30, and in the State's Opening Brief at pages 33-36, the *Johnston* line of cases sits uneasily beside the line of cases that commenced with *Winston* and extended more recently to *Goldmark*. *Winston* and

Goldmark should emphasize just how narrow the inquiry is under *Johnston*.

This case does not provide a vehicle for overruling either line of cases because RCW 10.116.030 does not deprive county sheriffs of any core function, and no duties of statewide officers are at issue. Article XI, section 5 at most relates only to the utter core of the sheriffs' functions. A constitutional passage that expressly authorizes the Legislature to define the duties of county officers should not be read broadly to prohibit the very thing it authorizes.

III. CONCLUSION

For these reasons and those expressed in the State's Opening Brief, this Court should reverse the decision below and uphold the constitutionality of RCW 10.116.030(3) as applied to the sheriffs of general law counties.

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RESPECTFULLY SUBMITTED this 29th day of March 2023.

ROBERT W. FERGUSON
Attorney General

s/ Jeffrey T. Even
JEFFREY T. EVEN, WSBA 20367
Deputy Solicitor General
Kate S. Worthington, WSBA 47556
Alexia Diorio, WSBA 57280
Assistant Attorneys General
OID No. 91087
PO Box 40100
Olympia, WA 98504
jeffrey.even@atg.wa.gov
kate.worthington@atg.wa.gov
alexia.diorio@atg.wa.gov

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served on all parties of record, according to the Court's protocols for electronic filing and service.

DATED this 29th day of March 2023 at Olympia, Washington.

s/ Stephanie N. Lindey
STEPHANIE N. LINDEY
Legal Assistant

SOLICITOR GENERAL OFFICE

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Filing on Behalf of: Jeffrey Todd Even - Email: jeffrey.even@atg.wa.gov (Alternate Email:

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Address:
PO Box 40100
1125 Washington St SE
Olympia, WA, 98504-0100
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