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STATE OF WASHINGTON
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NO. 87823-4

SUPREME COURT OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER
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VICKI LEE ANNE PARKER and JAMES S. JOHNSON,

Appellants,

v.

KIM WYMAN, in her capacity as Thurston County Auditor, and
CHRISTINE SCHALLER-KRADJAN, MARIE CLARKE, and VICTOR
MINJARES,

Respondents.

And

MARIE C. CLARKE,

Appellant,

v.

KIM WYMAN, Thurston County Auditor, and
CHRISTINE SCHALLER- KRADJAN,

Respondents.

BRIEF OF APPELLANT MARIE CLARKE

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Appendix A: (*Schaller v. Reed*, No. 86650-3, Petition Against State
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 “unconstitutional”), at 10 (“Imposition of ... residency
 requirements for Superior Court candidates is unconstitutional.”);
 Reply To Answer To The Petition, at 2 (referring to RCW
 42.04.020 as “unconstitutional”); at 4 (“Thus, the Secretary cannot
 unconstitutionally compel, via the declaration of candidacy, any
 superior court candidate to be an elector of the county or
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Appendix B: QUENTIN SHIPLEY SMITH, ANALYTICAL INDEX TO THE
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I. INTRODUCTION

This appeal turns on a single issue: Whether RCW 42.04.020's 157 year-old requirement that all elected officials in Washington be residents of the communities they serve is unconstitutional as applied to Supreme Court Justices and Superior Court judges. The unambiguous, plain text of Washington's Constitution and RCW 42.04.020 conclusively demonstrates that this requirement is constitutional. This requirement was first passed by the Territorial Legislature in 1855, was ratified by Article XXVII, Section Two of Washington's Constitution in 1889, and has remained the law without any material changes ever since.

While this appeal arises in the context of a specific dispute—whether Christine Schaller-Kradjan, a Pierce County resident, is eligible to sit on Thurston County's Superior Court—Ms. Schaller's eligibility is the least significant issue to be decided in this case. If RCW 42.04.020 is unconstitutional, there is neither a Washington residency nor a United States citizenship requirement to sit on Washington's Supreme Court or Superior Courts. For this to be the case, it must be proven beyond a reasonable doubt that the framers of Washington's Constitution intended to permit (a) non-United States citizens to hold Supreme or Superior Court positions, (b) out-of-state attorneys to become members of Washington's bar through reciprocity and run for Supreme or Superior Court without

having ever stepped foot in Washington, and (c) well-financed attorneys from Pierce or King County to run for Superior Court positions in other counties with vacancies or incumbents deemed vulnerable. Given that this plainly could not have been the framers' intent, RCW 42.04.020's citizenship and state and county residency requirements are constitutional.

In reaching a contrary conclusion, the trial court made several fundamental errors. The trial court failed to even mention, much less apply, the requirement that the unconstitutionality of a statute be proven beyond a reasonable doubt. The trial court also failed to give effect to the unambiguous, plain text of Washington's Constitution and RCW 42.04.020 and, instead, immediately utilized inapplicable canons of construction to strain to find ambiguity in unambiguous laws. In short, the trial court erroneously presumed that RCW 42.04.020 was unconstitutional. Accordingly, Appellant Marie Clarke respectfully requests that this Court reverse the trial court, declare Ms. Schaller to be ineligible to sit on Thurston County's Superior Court, and thereby affirm Washington's 157 year-old residency and citizenship requirements for judges.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to presume that RCW 42.04.020 is constitutional and failing to require that Ms. Schaller and

Thurston County Auditor Kim Wyman prove that RCW 42.04.020 is unconstitutional beyond a reasonable doubt.

2. The trial court erred by failing to give effect to the unambiguous, plain text of Washington's Constitution and Revised Code that demonstrates that RCW 42.04.020 is constitutional.

3. The trial court erred by holding that RCW 42.04.020 does not apply to Supreme Court Justices and Superior Court judges, when that statute states that it applies to all elective officers, which includes judges.

4. The trial court erred by effectively holding that RCW 42.04.020 is unconstitutional as applied to Supreme Court Justices and Superior Court judges.

5. The trial court erred by denying Ms. Clarke's election challenge and petition for declaratory relief, writ of prohibition, and writ of mandamus.

III. STATEMENT OF THE ISSUES

1. Did the trial court err by holding that Washington's Constitution mandates that individuals be permitted to run for Supreme or Superior Court without regard to their county residency, state residency, or United States citizenship, unlike every other elected position in Washington's history? (Assignments of Error Nos. 1-5).

IV. STATEMENT OF THE CASE

Respondent Christine Schaller-Kradjan is a resident and registered voter of Pierce County.¹ Despite this, Respondent Thurston County Auditor Kim Wyman permitted Ms. Schaller's name to appear on the 2012 primary ballot for Thurston County Superior Court, Position Two. On August 21, 2012, Ms. Wyman certified the primary election results. Ms. Schaller finished first, James Johnson second, Marie Clarke third, and Victor Minjares fourth.²

On August 22, 2012, Appellant Marie Clarke initiated this action in Thurston County Superior Court, seeking to have Ms. Schaller declared ineligible because she is not a Thurston County resident and to have Ms. Wyman place the names of the top two eligible candidates on the general election ballot.³ On August 31, 2012, the trial court denied the relief sought and effectively held that RCW 42.04.020 is unconstitutional as applied to the Supreme Court and Superior Courts.⁴ On September 4, 2012, Ms. Clarke filed a timely Notice of Appeal.⁵ This Court accepted direct review.

¹ CP 70,75 (¶ 5, Ex. A).

² CP 70, 76-77 (¶ 8, Ex. B).

³ CP 63-98.

⁴ CP 107-117 (duplicate of CP 38-48). The Honorable Sally Olsen, a visiting judge from Kitsap County Superior Court, was designated to hear this election challenge, as well as a separate election challenge filed by Vicki Parker and James Johnson raising a similar challenge. See CP 92-94.

⁵ CP 104-106.

V. ARGUMENT

A. Standard of Review

The trial court's interpretations of Washington's Constitution and RCW 42.04.020 are issues of law that are reviewed de novo.⁶ Further, it is axiomatic that Ms. Schaller and Ms. Wyman face a heavy burden in seeking to have RCW 42.04.020 declared unconstitutional:

In Washington, it is well established that statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt....

[T]he "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution.... Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution. ...

A demanding standard is justified because we assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment.⁷

This heavy burden applies regardless of whether a party challenges a statute as unconstitutional on its face or *as applied* to specific

⁶ *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

⁷ *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605-06, 244 P.3d 1 (2010) (quotation marks omitted).

circumstances.⁸ Moreover, this Court has repeatedly applied this heavy burden even when considering the constitutionality of qualifications to hold elective, constitutional offices.⁹

B. The Unambiguous, Plain Text Of RCW 42.04.020 Requires Superior Court Judges To Be Residents Of The County They Serve.

Washington law could not be any clearer in its requirement that elective officials live in the communities they serve. RCW 42.04.020 states:

That no person shall be competent to qualify for or hold *any elective public office* within the state of Washington, or any county, district, precinct, school district, municipal corporation or other district or political subdivision, unless he or she be a citizen of the United States and state of Washington and an elector of such county, district, precinct, school district, municipality or other district or political subdivision.¹⁰

“Any elective public office” plainly includes Superior Court judges.¹¹ An

⁸ *Id.* at 607.

⁹ *Gerberding v. Munro*, 134 Wn.2d 188, 196, 949 P.2d 1366 (1998) (holding, in case regarding statute establishing term limits for constitutional offices, “the statute is presumed constitutional and parties challenging its constitutionality must demonstrate its unconstitutionality beyond a reasonable doubt”); *In re Bartz*, 47 Wn.2d 161, 163, 287 P.2d 119 (1955) (holding, in case regarding statute requiring justices of the peace to be attorneys, “All doubts as to whether or not a state legislature had the power to pass a given enactment must be resolved in favor of the legislature”).

¹⁰ RCW 42.04.020 (emphasis added). The one exception to the statute is that, as of 1993, a municipal court judge does not need to be a resident of the city he or she serves, but must be a resident of the county in which that city is located. RCW 3.50.057.

¹¹ The text of the Constitution confirms this. Wash. Const. art. I, § 33 (“Every elective public officer of the state of Washington expect [except] judges of courts of record...”); Wash. Const. art. XXX “Compensation of Public Officers”, § 1 (“The compensation of all elective and appointive state, county, and municipal officers who do not fix their own compensation, including judges of courts of record and the justice

“elector” is one who is qualified to vote.¹² County residency is required to be qualified to vote.¹³ As a result, the plain and unambiguous text of the law requires that Superior Court judges be residents of the county served,¹⁴ thus rendering Ms. Schaller ineligible to sit on Thurston County’s Superior Court.

1. Washington Law Has Required Elective Officials, Including Judges, To Be Residents Of The Communities They Serve Since Washington’s Creation.

Residency requirements for elective officials, including judges, are as old as Washington itself. The Organic Act, passed by Congress in 1853 to create Washington Territory, vested the Territory’s judicial power in “a supreme court, district courts, probate courts, and in justices of the peace.”¹⁵ The Act specified that there would be three Supreme Court justices, with each presiding over one of the Territory’s three district courts *and residing in the district served by their respective district court.*

courts...”). This Court’s precedent does as well. *See City of Everett v. Johnson*, 37 Wn.2d 505, 508, 224 P.2d 617 (1950) (“That a justice of the peace is a public officer is clear beyond question”).

¹² *Cedar County Comm. v. Munro*, 134 Wn.2d 377, 384, 950 P.2d 446 (1998) (“A ‘voter’ is one who has become eligible to vote by reason of registration, while an ‘elector’ is merely one who is qualified, by reasons, e.g., of age and citizenship, to vote.”).

¹³ Wash. Const. art. VI, § 1.

¹⁴ *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004) (“If the language is unambiguous, we give effect to that language and that language alone because we presume the legislature says what it means and means what it says.”); *State ex rel. Evans v. Bhd. Of Friends*, 41 Wn.2d 133, 145, 247 P.2d 787 (1952) (“It is a cardinal principle of judicial review and interpretation that unambiguous statutes and constitutional provisions are not subject to interpretation and construction.”).

¹⁵ The Organic Act, *available at* <http://www.leg.wa.gov/History/Territorial/Pages/territory.aspx>.

Thus, the Organic Act required judges of both the Supreme Court and district courts to reside in the communities they served.

The Organic Act left the qualifications of the Territory's probate court judges and justices of the peace to the Territorial Legislature, which wasted no time in establishing a residency requirement for those positions. In 1854, during the Territory's first legislative session, the Legislature enacted statutes requiring that both probate court judges and justices of the peace have the same qualifications as those voting for them, *including residency*.¹⁶ Further, during that same legislative session, the Legislature enacted a statute stating that an office would be deemed vacant when an official ceased being a resident of the community being served.¹⁷

The Legislature reaffirmed the importance of a residency requirement during its next legislative session the following year. That year, it enacted a statute that applied to *all elective offices*, requiring that to hold such an office an individual must have the same qualifications as an individual eligible to vote for the office, *including county residency*.¹⁸ This residency requirement remained in place throughout Washington's

¹⁶ CP 71, 80-83 (¶ 12, Ex. E)(Laws of 1854 at p. 223, §3, p. 309 §1, p. 64 §1). Washington's session laws dating back to 1854 are also available at http://www.leg.wa.gov/CodeReviser/Pages/session_laws.aspx.

¹⁷ CP 71, 84-85 (¶ 13, Ex. F)(Laws of 1854 at p. 74, §2).

¹⁸ CP 72, 86-87(¶ 14, Ex. G)(Laws of 1855 at p. 7, §1).

time as a Territory,¹⁹ and remains in place today in RCW 42.04.020 without any material changes.²⁰

2. Courts Have Repeatedly Affirmed The Importance Of Residency Requirements For Elective Officials.

In addition to being as old as Washington, residency requirements are supported by compelling policy considerations. In fact, these reasons are so compelling that the United States Supreme Court has held residency requirements, including in the context of state trial court judges, to satisfy “strict scrutiny” constitutional analysis, which requires a showing that a requirement be “necessary” to promote a “compelling governmental interest.”²¹ Washington courts have followed suit, agreeing that residency requirements for elective office are necessary to serve a compelling governmental interest.²²

These interests include “maintaining a responsive and responsible government through the democratic process” by ensuring that elective

¹⁹ CP 72, 88-89 (¶ 15, Ex. H) (Laws of 1881 at p. 530, §3050).

²⁰ CP 72, 90-91 (¶ 16, Ex. I). This statute has only been amended twice since 1889: once to make it gender neutral, Laws of 2012 c 117 § 94, and another time to simplify it to state that candidates for office must be electors (i.e., meet the qualifications to be eligible to vote) rather than its prior, unduly burdensome approach of identifying each specific qualification required to be an elector, Laws of 1919 c 139 § 1. Neither was a material change.

²¹ *Chimento v. Stark*, 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed.2d 39 (1973), *affirming*, 353 F. Supp. 1211 (D.N.H. 1973) (regarding residency requirement for governor); *Hadnott v. Amos*, 401 U.S. 968, 91 S.Ct. 1189, 28 L.Ed.2d 318 (1971), *affirming* 320 F. Supp. 107 (M.D. Ala. 1970) (regarding residency requirement for state trial court judge).

²² *Lawrence v. City of Issaquah*, 84 Wn.2d 146, 524 P.2d 1347 (1974); *Fischmaller v. Thurston County*, 21 Wn. App. 280, 287, 584 P.2d 483 (1978).

officials are exposed to the communities and people they represent, “thereby giving him [or her] familiarity with and awareness of the conditions, needs, and problems” of the population, “while at the same time giving the voters ... an opportunity to gain by observation and personal contact some firsthand knowledge of the candidates[.]”²³ Such requirements also “prevent frivolous candidacy by persons who have had little previous exposure to the problems and desires of the people” they seek to serve.²⁴

Further, it has been demonstrated that residency requirements encourage the election of minority candidates,²⁵ who are historically underrepresented in elective office, including in Washington.²⁶

Finally, an additional compelling reason must be noted. One might argue that qualifications are meaningless, and that voters themselves should be able to decide whether a certain characteristic warrants excluding a candidate from office. In addition to relying upon the questionable assumption that the electorate will make themselves fully informed as to the residency of all candidates, rather than simply relying upon county auditors to fulfill their legal obligation to place only county

²³ *Chimento*, 353 F. Supp. at 1215.

²⁴ *Id.*

²⁵ See *Romero v. City of Pomona*, 883 F.2d 1418, 1421 n.13 (9th Cir. 1989); *Collins v. City of Norfolk*, 816 F.2d 932, 939 (4th Cir. 1987).

²⁶ See *ACLU files lawsuit against Yakima City Council*, KNDO, Aug. 22, 2012, <http://www.kndo.com/story/19346669/aclu-files-lawsuit-against-yakima-city-council>.

residents on the ballot, this argument fails to recognize a fundamental tenet of our democracy. An elected official does not simply serve the people who voted for him or her. Rather, an elected official serves everyone in their community. Qualifications for elected office ensure that, even though a citizen might not have voted for an elected official, that citizen can at least be confident that the official is *qualified* to hold the position. With respect to judges, that means that the official is a member of the bar and lives in the community he or she serves, meaning he or she votes in the same elections, pays the same taxes, and experiences the same community conditions as the citizens whose disputes he or she adjudicates.

For all of these reasons, Washington courts have repeatedly enforced residency and other threshold requirements for elective office, even when a candidate has prevailed after a general election.²⁷

C. The Plain Text Of Article XXVII, Section Two Of Washington's Constitution Ratified RCW 42.04.020's Residency Requirements.

Despite the longevity of, and compelling reasons for, Washington's residency requirements, Ms. Schaller and Ms. Wyman seek

²⁷ See, e.g., *In re Contested Election of Schoessler*, 140 Wn.2d 368, 998 P.2d 818 (2000) (affirming annulment of Wenatchee mayoral election due to mayor-elect's failure to meet one-year residency requirement); *Freund v. Hastie*, 13 Wn. App. 731, 537 P.2d 804 (1975), *review denied*, 86 Wn.2d 1001 (1975) (holding sheriff-elect of Island County ineligible because he was not an elector of county); *In Re Bartz*, 47 Wn.2d 161, 169, 287 P.2d 119 (1955) (“[A]ppellant is ineligible to serve as justice of the peace...and his certificate of election must be revoked.”).

to establish that RCW 42.04.020 is unconstitutional by relying on an oversimplified reading of this Court’s decisions in *In re Bartz*²⁸ and *Gerberding v. Munro*.²⁹ Respondents argued, and the trial court agreed, that *Bartz* and *Gerberding* stand for the rule that statutes cannot add qualifications, such as RCW 42.04.020’s residency requirements, to offices created by Washington’s Constitution, such as Supreme Court Justices and Superior Court judges. Yet this argument mischaracterizes these cases, because *Bartz* and *Gerberding* held that Article XXVII, Section Two of Washington’s Constitution requires an exception to this general rule where statutory qualifications “can be traced to” Territorial Law,³⁰ as is the case with RCW 42.04.020’s residency requirement.

1. Ms. Schaller And Ms. Wyman Are Arguing, And The Trial Court Held, That RCW 42.04.020 Is Unconstitutional As Applied To Supreme Court Justices And Superior Court Judges.

Before explaining why Article XXVII, Section Two renders RCW 42.04.020 constitutional, it must be emphasized that the singular issue in this case is the constitutionality of RCW 42.04.020. Despite Ms. Schaller’s and Ms. Wyman’s efforts to confuse this issue—both deny that

²⁸ 47 Wn.2d 161, 287 P.2d 119 (1955).

²⁹ 134 Wn.2d 188, 949 P.2d 1366 (1998).

³⁰ *Gerberding*, 134 Wn.2d 188, 208-09; *see also Bartz*, 47 Wn.2d 161, 167 (“At the time the constitution was adopted, justices of the peace were required by law to be citizens of the United States and qualified electors. Laws of 1854, § 3, p. 223; Code of 1881, § 1691, p. 286. All laws then in force, not repugnant to the constitution were to remain in force until they expired by their own limitation, by virtue of Art. XXVII, § 2, of the constitution.”).

they are arguing that RCW 42.04.020 is unconstitutional and the trial court's 10-page order does not mention the word "unconstitutional"—it cannot be disputed that this case turns on RCW 42.04.020's constitutionality.

While the trial court's order states that "RCW 42.04.020 does not apply to the judiciary,"³¹ the trial court did not reach this result by means of the text of RCW 42.04.020 or by attempting to interpret the Legislature's intent underlying RCW 42.04.020 through other means. Rather, the trial court reached this result by holding that RCW 42.04.020 was "repugnant" to the Constitution because, due to this Court's decisions in *Bartz* and *Gerberding*, "the law forbids the legislature to add qualifications for a constitutional office."³² Both common sense and precedent as old as *Marbury v. Madison* dictate that the trial court's reasoning was premised upon RCW 42.04.020 purportedly being "unconstitutional."³³ Further, until Ms. Schaller and Ms. Wyman presented their arguments to the trial court, it had been generally accepted, including by this Court,³⁴ and Ms. Schaller that the validity of statutory

³¹ CP 110.

³² CP 111-115.

³³ *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803) (equating "repugnant to the constitution" with "unconstitutional").

³⁴ *Gerberding*, 134 Wn.2d at 191 (holding statutory term limits to be "unconstitutional" due to exclusivity of constitutional qualifications); *Bartz*, 47 Wn.2d at 162, 169 (affirming trial court's determination that statutory requirement that justices of

qualifications for constitutional offices is a matter of “constitutionality.”³⁵

Simply stated, it is apparent that for Ms. Schaller to be eligible to sit on Thurston County’s superior court, RCW 42.04.020 must be declared unconstitutional, and thus she faces the heavy burden of “demonstrat[ing] its unconstitutionality beyond a reasonable doubt.”³⁶

2. It Is Undisputed That The Trial Court’s Ruling Eliminates County Residency, State Residency, And United States Citizenship Requirements For Our Supreme Court And Superior Courts.

Further, the undisputed consequences of the trial court’s ruling must be noted. The trial court held that the Constitution’s age and bar membership requirements in Section 3(a) and 17 of Article of the Constitution are exclusive,³⁷ and thus all additional, statutory requirements are unconstitutional. Yet Article IV, Sections 3(a) and 17 pertain to Superior Court judges *and Supreme Court Justices*. Thus, the issue in this case is not limited to county residency requirements for Superior Court judges. Rather, it is undisputed that the issue in this case concerns the validity of *all* of RCW 42.04.020’s requirements—including but not

the peace be attorneys was “constitutional” because the rule of exclusivity of constitutional qualifications did not apply).

³⁵ Appendix A (*Schaller v. Reed*, No. 86650-3, Petition Against State Officer, at 2 (referring to RCW 42.04.020 as “unconstitutional”), at 10 (“Imposition of ... residency requirements for Superior Court candidates is unconstitutional.”); Reply To Answer To The Petition, at 2 (referring to RCW 42.04.020 as “unconstitutional”); at 4 (“Thus, the Secretary cannot unconstitutionally compel, via the declaration of candidacy, any superior court candidate to be an elector of the county or district.”)).

³⁶ *Gerberding*, 134 Wn.2d at 196.

³⁷ CP 110.

limited to state residency and United States citizenship—for Supreme Court Justices and Superior Court judges.

3. *Gerberding*, Rather Than Rendering RCW 42.04.020 Unconstitutional, Conclusively Demonstrates Its Constitutionality.

As indicated above, the “exclusivity” doctrine detailed in *Bartz* and *Gerberding* does not apply to RCW 42.040.020’s residency requirements, because these cases expressly emphasize that the exclusivity of constitutional qualifications does not apply to statutory qualifications that “can be traced” to Territorial Law. Responding to concerns that holding Constitutional qualifications to be exclusive would lead to absurd results, such as the Attorney General not being required to be an attorney, this Court stated in *Gerberding*:

Intervenors argue the qualifications listed in the Constitution are minimums which may be added to by statute, listing several statutory examples. These statutes do not support their position. RCW 43.10.010 requires the attorney general to be a qualified practitioner of the supreme court of this state. This qualification can be traced to Laws of 1887-88, § 3, at 7, which noted the “attorney general of this Territory shall be learned in the law and shall be a qualified practitioner before the supreme and district courts of this Territory.” This then existing qualification was recognized by the Washington Constitution upon its adoption in 1889 via art. XXVII, § 2, which recognized and retained all territorial laws then in effect. See WASH. CONST. art. XXVII, § 2; *In re Bartz*, 47 Wash.2d 161, 167, 287 P.2d 119 (1955); *State v. Estill*, 55 Wash.2d 576, 582, 349 P.2d 210, 89 A.L.R.2d 1251 (1960) (Mallery, J., concurring) (noting the provisions of

WASH. CONST. art. XXVII, § 2, and stating: “Territorial laws have a specific constitutional sanction and approval which subsequent state statutes do not have”).³⁸

This Court’s opinion in *Bartz* is in accord.³⁹

As a result, due to Article XXVII, Section Two, statutory qualifications for constitutional offices *are* valid when they (a) can be traced to Territorial Law, and (b) are not irreconcilable with the Constitution. Article XXVII, Section Two of our Constitution states, in relevant part:

All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature[.]⁴⁰

This provision, as is true for all provisions in the Constitution, is mandatory.⁴¹

As indicated above, RCW 42.04.020’s residency requirement was in force at the time the Constitution was enacted and has not been altered or repealed since that time. Nor is it inconsistent with the Constitution—nothing in the Constitution says that there is *not* a residency requirement

³⁸ 134 Wn.2d 188, 208-09.

³⁹ *Bartz*, 47 Wn.2d 161, 167 (“At the time the constitution was adopted, justices of the peace were required by law to be citizens of the United States and qualified electors. Laws of 1854, § 3, p. 223; Code of 1881, § 1691, p. 286. All laws then in force, not repugnant to the constitution were to remain in force until they expired by their own limitation, by virtue of Art. XXVII, § 2, of the constitution.”)

⁴⁰ Black’s Law Dictionary defines “repugnant” as “inconsistent or irreconcilable with.”

⁴¹ Wash. Const. art. I, § 29 (“The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”).

for Superior Court judges. Given that residency requirements for all elective officials, including judges, had been long-standing at the time the Constitution was enacted, express language prohibiting a residency requirement would be required to render this statutory requirement irreconcilable to the Constitution. As this Court stated in *Town of Tekoa v. Reilly*, 47 Wash. 202, 206-07, 91 P. 769 (1907), in upholding the constitutionality of a long-standing statute under Article XXVII, Section Two: “Had the framers of the Constitution been dissatisfied with the existing order of things, would we not expect to find some more satisfactory evidence of their discontent?”⁴² Thus, RCW 42.04.020’s residency requirement is constitutional and Ms. Schaller is ineligible to sit on Thurston County’s Superior Court.

This is where the analysis in this case should stop. Where the plain text of the law is unambiguous—as is the case with Washington’s Constitution and RCW 42.04.020—this Court has held that further inquiry is inappropriate:

This court does not subject an unambiguous statute to statutory construction and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it.

⁴² See also *Tekoa*, 47 Wash. at 208 (holding poll tax to be constitutional under Article XXVII, Section Two and contrasting Ohio’s constitution, which stated, “‘That the levying taxes by the poll is grievous and oppressive therefore the Legislature shall never levy a poll tax for county or state purposes.’ No such prohibition as this is contained in the Constitution of this state.” (quotation marks omitted)).

Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute. Thus, when a statute is not ambiguous, only a plain language analysis of a statute is appropriate.⁴³

Further, this Court has held that it is error to apply canons of construction to unambiguous laws in an attempt to find those laws to be ambiguous:

For a statute to be ambiguous, two reasonable interpretations must arise from the language of the statute itself, not from considerations outside the statute. It was error for the Court of Appeals to resort to outside interpretations of RCW 49.46.130(2)(g)(ii) without first considering whether the statute was ambiguous. As a result, it would be error for this court to consider the Court of Appeals' interpretation of the statute, which was based entirely on tools of statutory construction, as a basis for finding that RCW 49.46.130(2)(g)(ii) is ambiguous.⁴⁴

This fundamental rule of statutory construction applies with equal force to Washington's Constitution.⁴⁵ Thus, before Ms. Schaller and Ms. Wyman may even attempt to prove that RCW 42.04.020 is unconstitutional beyond a reasonable doubt through canons of construction that apply only to ambiguous laws they must, by definition, *prove beyond a reasonable doubt that those laws are, in fact,*

⁴³ *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (quotation marks and citations omitted).

⁴⁴ *Id.*, at 203-04.

⁴⁵ *State ex rel. Evans v. Bhd. Of Friends*, 41 Wn.2d 133, 145, 247 P.2d 787 (1952) ("It is a cardinal principle of judicial review and interpretation that unambiguous statutes and constitutional provisions are not subject to interpretation and construction.").

ambiguous.⁴⁶ Given that Ms. Schaller and Ms. Wyman cannot meet this burden, the trial court should be reversed.

D. Considerations Beyond The Plain Text Fall Far Short Of Proving RCW 42.04.020's Unconstitutionality Beyond A Reasonable Doubt And, Instead, Confirm Its Constitutionality.

Even if RCW 42.04.020 and Article XXVII, Section Two were ambiguous, which they are not, considerations outside their plain text affirm that RCW 42.04.020 is constitutional as applied to Supreme Court Justices and Superior Court judges. The keystone principle of constitutional construction is to give effect to the intent of the framers of the Constitution.⁴⁷ “The constitution must be construed in the sense in which the framers understood it in 1889. In other words, its meaning was fixed at the time it was adopted.”⁴⁸ Present circumstances, including those that relate to Ms. Schaller’s choice to reside outside of Thurston County, are wholly irrelevant to this analysis:

Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and therefore the courts should never allow a change in public sentiment to influence them in giving a construction to a written Constitution not

⁴⁶ *Cf. State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (holding that, to prove beyond a reasonable doubt that a defendant committed a crime, “[e]ach element of a crime must be proved beyond a reasonable doubt” (emphasis added)).

⁴⁷ *Boeing Aircraft Co. v. Reconstruction Fin. Corp.*, 25 Wn.2d 652, 659, 171 P.2d 838 (1946).

⁴⁸ *Id.* at 658.

warranted by the intention of its founders.⁴⁹

Thus, the inquiry is this: Has it been proven beyond a reasonable doubt that, in 1889, the framers intended to *mandate* that individuals be permitted to run for Supreme or Superior Court without regard to their county residency, state residency, or United States citizenship, unlike every other elected position in Washington's history? As common sense and the discussion below dictates, the answer is a resounding "No."

1. There Is No Apparent Reason Why The Framers Would Have Intended To Remove Residency Requirements For Supreme Court Justices And Superior Court Judges.

Given that the keystone of this inquiry is the intent of the framers, the obvious question that must be answered is *why* would the framers have intended to prohibit residency requirements for Supreme Court Justices and Superior Court judges? "Had the framers of the Constitution been dissatisfied with the existing order of things, would we not expect to find some more satisfactory evidence of their discontent?"⁵⁰ While there are compelling reasons for why the framers would have intended to *retain* a residency requirement for judges, Ms. Schaller, Ms. Wyman, and the trial court have not even articulated, much less cited "satisfactory evidence of," why the framers would have intended to *prohibit* this requirement.

⁴⁹ *State ex rel. Banker v. Clausen*, 142 Wash. 450, 454, 253 P. 805 (1927) (quotation marks omitted).

⁵⁰ *Town of Tekoa v. Reilly*, 47 Wash. 202, 206-07, 91 P. 769 (1907).

2. The Law In 1889 Required All Elective Officials, Including Judges, To Reside In The Communities They Served.

In construing the framers' intent, courts consider the law "as it existed at the time of the constitutions adoption in 1889."⁵¹ As repeatedly stated above, in 1889, Washington law required all elective officials, including judges, to reside in the communities they served.

Further, as originally enacted in 1889, Washington's Constitution prohibited non-citizens from *even owning land* in most circumstances.⁵² They also could not be attorneys,⁵³ one of the undisputed requirements for being a Supreme Court Justice or Superior Court judge. It is incomprehensible to believe that, given the state of the law in 1889, the framers would have intended to prohibit RCW 42.04.020 from providing reasonable citizenship and residency qualifications for the judiciary.

In fact, when this Court faced an argument by a party in *In re Bartz* that the framers "could not reasonably have intended[] the opening of the judiciary to aliens and transients,"⁵³ this Court did not disagree. Rather, this Court pointed to the fact that non-citizens could not be attorneys,⁵⁴ as well as to the fact that, *due to the operation of Article XXVII, Section Two,*

⁵¹ *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989).

⁵² Wash. Const. art. II, § 33 ("The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state ...").

⁵³ *Bartz*, 47 Wn.2d at 167; Laws of 1891 p. 96 Sec. 8.

⁵⁴ This did not change until the 1970s. See *Nielsen v. Wash. State Bar Ass'n*, 90 Wn.2d 818, 585 P.2d 1191 (1978).

Territorial Law requiring justices of the peace (the elected position at issue in that case) to be “qualified electors” *continued to be valid*.⁵⁵

Simply put, the law at the time the Constitution was enacted is strong evidence that the framers *intended* for the requirements in RCW 42.04.020 to continue to apply to the judiciary.

3. The Conditions In 1889 Demonstrate That The Framers Would Not Have Considered Non-Resident Judges A Plausible Option, Much Less Required That They Be Eligible To Serve.

Courts also consider “the practicalities of the situation which existed in 1889, when the constitution was adopted,” in determining the framers’ intent.⁵⁶ Washington law at that time, as it does today, required that Superior Courts “be always open, except on non-judicial days” and “hold their sessions at the county seats.”⁵⁷ Further, judges might be needed on short notice to sign warrants, issue injunctions, or hold preliminary hearings in criminal matters. Yet, in 1889, there were no mass-produced automobiles,⁵⁸ and airplanes had not yet been invented.⁵⁹ Simply put, the practicalities of the situation in 1889 would have required Superior Court judges to live in the communities they served. The idea of non-resident judges would not have entered the framers’ psyches as a

⁵⁵ *Bartz*, 47 Wn.2d at 167.

⁵⁶ *Troy v. Yelle*, 36 Wn.2d 192, 209, 217 P.2d 337 (1950).

⁵⁷ Laws of 1889-90 p. 343 Sec. 7.

⁵⁸ Wikipedia, *Automobile*, <http://en.wikipedia.org/wiki/Automobile>.

⁵⁹ Wikipedia, *Wright brothers*, http://en.wikipedia.org/wiki/Wright_brothers.

viable option, much less have been in their minds as a contingency they intended to *mandate* be allowed under the Constitution.

4. Contemporaneous Constructions Of The Law Confirm That Residency Requirements For Superior Court Judges Continued After The Enactment of The Constitution.

In construing the Constitution, this Court has also found contemporaneous constructions to be significant.⁶⁰ There are several such constructions that confirm the contemporaneous understanding that there was indeed a county residency requirement for Superior Court judges.

First, in 1895, this Court, in an opinion written by Justice Dunbar, a member of the committee that drafted the Constitution's judiciary article, and joined by Chief Justice Hoyt, who had been the President of the Constitutional Convention, decided a case concerning the authority of a visiting Superior Court judge.⁶¹ In describing the appellant's argument about the visiting judge, the Court referred to the visiting judge as "a judge who *resides out of the county where the cause is tried*,"⁶² thus indicating an understanding that a visiting judge, by definition, is one who does not reside within the county—unlike the judge they are substituting for.

⁶⁰ *State ex rel. Mason County Logging Co. v. Wiley*, 177 Wash. 65, 73-74, 31 P.2d 539 (1934).

⁶¹ *State v. Holmes*, 12 Wash. 169, 40 P. 735 (1895); QUENTIN SHIPLEY SMITH, ANALYTICAL INDEX TO THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 465 & 594 (Beverly Paulik Rosenow ed. 1998) (identifying Convention roles for Chief Justice Hoyt and Justice Dunbar) (attached to this brief as Appendix B).

⁶² *State v. Holmes*, 12 Wash. at 172 (emphasis added).

Second, less than twenty years after the Constitution was enacted, the Legislature passed a law permitting counties to divide into multiple Superior Court districts.⁶³ This legislation specifically addressed the residency requirement for Superior Court judges:

Whenever, in this state, any county shall be districted as hereinbefore provided, the judge or judges *may reside in any district in such county* that will best subserve the interests of the people therein.⁶⁴

If there were no existing requirement that Superior Court judges live in the communities they serve, there would have been no need for this language.

Third, only four years after the Constitution was enacted, the Legislature passed a law entitling visiting judges to reimbursement for:

the amount of his actual traveling expenses from his *residence* to the place where he shall hold such sessions, and on his return to *his residence*[.]⁶⁵

Yet, if there were no residency requirement for Superior Court judges, it would have been possible that the county the judge was “visiting” was the county he or she was a resident of, removing the necessity for reimbursement in such cases. Current reimbursement laws for Superior Court judges of multi-county judicial districts make this point even clearer:

⁶³ Laws of 1909 Ch. 49. This statute was ultimately declared to be an unconstitutional limitation on the jurisdiction of the Superior Courts, but not for any reason relating to the residence of judges. *State ex rel. Lyle v. Superior Court of Chehalis County*, 54 Wash. 378, 103 P. 464 (1909).

⁶⁴ Laws of 1909 p. 88 Sec. 23 (emphasis added).

⁶⁵ Laws of 1893 p. 69 Sec. 4 (emphasis added).

Whenever a judge of the superior court shall serve a district comprising more than one county, such judge shall be reimbursed for travel expenses in connection with business of the court in accordance with RCW 43.03.050 and 43.03.060 as now existing or hereafter amended for travel from his or her residence to the *other county or counties* in his or her district and return.⁶⁶

This language assumes that the judge's residence is in *one of the counties* in his or her judicial district, thus further reflecting an understanding that there is a residency requirement for Superior Court judges.

5. Washington's Longstanding General Acceptance That There Is A Residency Requirement Demonstrates Its Validity.

“Where a particular construction has been generally accepted as correct ... it is not to be denied that a strong presumption exists that the construction rightly interprets the intention.”⁶⁷ There is no evidence that any non-resident has ever been elected, or even *attempted* to be elected, to Washington's Supreme Court or Superior Courts. Further, RCW 42.04.020 was reenacted in 1919 and 2012 without any changes to exclude the Supreme Court or Superior Courts from its scope. In addition, the current Governor, who has authority to fill vacancies on the Supreme Court or Superior Courts, only appoints individuals who satisfy the

⁶⁶ RCW 2.08.115 (emphasis added).

⁶⁷ *Gerberding*, 134 Wn.2d 188, 223 n.13 (quotation marks omitted).

residency requirement.⁶⁸ This long-settled, general acceptance of the existence of a residency requirement is further evidence that such a requirement has existed since Washington's earliest days and continues to exist by operation of Article XXVII, Section Two.

6. Affirming RCW 42.04.020's Constitutionality Grants Flexibility To Washingtonians To Determine Desirable Qualifications For Supreme Court Justices And Superior Court Judges.

To the extent that Respondents or the People of Washington do not want a county residency, Washington residency, or United States citizenship requirement for their Supreme Court Justices or Superior Court judges, they have a readily available method for removing such requirements: legislation. As Article XXVII, Section Two expressly allows,⁶⁹ Washingtonians can change this statutory requirement through their elected representatives in the Legislature. In the last two years alone, the Legislature passed over 700 bills into law.⁷⁰

In contrast, should this Court hold that statutory residency requirements are unconstitutional, despite the clear mandate of Article XXVII, Section Two and the plain text of RCW 42.04.020, the method to

⁶⁸ CP 71, 79 (¶ 10, Ex. D). Further, there is no evidence that any prior Governor failed to acknowledge or enforce a residency requirement.

⁶⁹ Wash. Const. art XXVII, § 2 (stating that existing laws are valid until "altered or repealed").

⁷⁰ 2011 Bill Action, <http://governor.wa.gov/billaction/2011/default.asp>; 2012 Bill Action, <http://governor.wa.gov/billaction/2012/default.asp>.

change this result—a constitutional amendment—is difficult and burdensome. An amendment requires passage by a two-thirds supermajority of both houses of the Legislature and ratification by the voters at an election.⁷¹ In contrast to the frequency of general legislation, there have only been 104 amendments to Washington’s Constitution in its 123 year history.

E. The Trial Court Misapplied The Legal Principles And Canons Of Construction It Relied Upon.

In holding that the framers intended to prohibit residency requirements for Supreme Court Justices and Superior Court judges, the trial court relied upon four separate legal principles. The trial court, however, misapplied each of these four principles, thus further demonstrating that its ruling was in error.

1. Rather Than Requiring Ms. Schaller And Ms. Wyman To Prove RCW 42.04.020’s Unconstitutionality Beyond A Reasonable Doubt, The Trial Court Erroneously Placed The Burden On Ms. Clarke To Prove Its Constitutionality.

In its 10-page order, the trial court failed to even *mention*, much less *apply*, Ms. Schaller’s and Ms. Wyman’s “heavy burden” of proving that RCW 42.04.020 was unconstitutional beyond a reasonable doubt. Instead, the trial court applied the exact *opposite* burden, holding that

⁷¹ Wash. Const. art. XXIII.

there is a presumption of eligibility.⁷²

While there is a public policy in favor of eligibility, this Court has held that it is limited in scope:

Without doubt, a strong public policy exists in favor of eligibility for public office, and the constitution, where the language and context allows, should be construed so as to preserve this eligibility. *It does not follow, however, that, in the furtherance of this policy, we are permitted to give words or phrases an unnatural or uncommon construction or application, and thereby run in opposition to the public policy giving rise to the pertinent constitutional provision.*⁷³

In accordance with this limitation, this Court has expressly confirmed that the “heavy burden” of proving unconstitutionality “beyond a reasonable doubt” applies even when considering eligibility for elective office.⁷⁴ Accordingly, the trial court erred by failing to impose this burden upon Ms. Schaller and Ms. Wyman.

2. The Trial Court’s Conclusion That Article XXVII, Section Two Does Not Apply Because Superior Court Judges Did Not Exist During Territorial Times Is Contrary To This Court’s Holding In *Orrock v. South Moran*.

⁷² CP 110.

⁷³ *Oceanographic Comm’n v. O’Brien*, 74 Wn.2d 904, 914, 447 P.2d 707 (1968) (holding that individuals were ineligible for public office) (emphasis added and citations omitted).

⁷⁴ *Gerberding*, 134 Wn.2d at 196 (holding, in case regarding statute establishing term limits for constitutional offices, “the statute is presumed constitutional and parties challenging its constitutionality must demonstrate its unconstitutionality beyond a reasonable doubt”); *Bartz*, 47 Wn.2d at 163 (holding, in case regarding statute requiring some justices of the peace to be attorneys, “All doubts as to whether or not a state legislature had the power to pass a given enactment must be resolved in favor of the legislature”).

In effectively holding RCW 42.04.020 to be unconstitutional, the trial court principally focused upon the fact that Superior Court judges did not exist during territorial times.⁷⁵ According to the trial court, because the Constitution created the Superior Courts, there were necessarily no territorial laws that applied to them, and thus there was no residency requirement for Superior Court judges to be ratified by Article XXVII, Section Two.

Yet the trial court's reasoning overlooks the fact that Article XXVII, Section Two ratified all "laws now in force"—i.e., all then existing statutes⁷⁶—without regard to the possibility that such laws might apply to circumstances that did not exist during territorial times. In fact, in *Orrock v. South Moran Township*,⁷⁷ this Court expressly considered *and rejected* the trial court's reasoning.

In *Orrock*, South Moran township argued that it was sovereignly immune to personal injury claims because the statute that waived such immunity to such claims was passed during territorial times, when "townships" did not yet exist, and applied only to "any county, incorporated town, school district, or other public corporation of like

⁷⁵ CP 112-113.

⁷⁶ Black's Law Dictionary defines "law" in this context as "a statute."

⁷⁷ 97 Wash. 144, 165 P. 1096 (1917).

character.”⁷⁸ According to South Moran township, this meant that there was no “law now in force” regarding the waiver of sovereign immunity of townships, and thus Article XXVII, Section Two could not have ratified such a law.⁷⁹

Rejecting this formalistic argument, this Court held that Article XXVII, Section Two applied to this statute because, “It is a well-settled rule that a statute may include by inference a case not originally contemplated when it deals with a genus within which a new species is brought by a subsequent statute.”⁸⁰ Thus, this Court held that Article XXVII, Section Two ratified “statutes,” and it did not matter that the statute applied to circumstances that did not previously exist.⁸¹

Further, the trial court in the instant case failed to recognize that this residency requirement for judges was not a new circumstance at all. *All* of Washington’s territorial judges had to be residents of the communities they served,⁸² and Washington’s Superior Courts were

⁷⁸ 97 Wash. at 145-46.

⁷⁹ *Id.*

⁸⁰ 97 Wash. at 148 (quotation marks omitted).

⁸¹ *Id.* at 147-48.

⁸² Laws of 1854 p. 309 §1; The Organic Act, *available at* <http://www.leg.wa.gov/History/Territorial/Pages/territory.aspx>. The trial court’s statement that no “judges other than probate judges were, during Washington’s history as a territory, elected,” CP 112-113, is incorrect. Justices of the Peace were also elected and were similarly required to be residents of the counties they served. Laws of 1854 at p. 223, §§3-4.

simply created by combining its territorial district *and* probate courts.⁸³ In essence, what occurred in 1889 was a combination of courts and a name change to “Superior Court,” all while RCW 42.04.020 maintained the requirement that *all* elective officers reside in the communities they serve. There is *no evidence* that the framers of our Constitution intended this name change to void the existing residency requirements—much less sufficient evidence to prove such intent beyond a reasonable doubt.

3. The Debate At The Constitutional Convention Regarding Residency Requirements For Judges Demonstrates The Intent To Include Such Requirements.

The trial court also relied on the purported rejection of an amendment that would have required Superior Court judges and Supreme Court Justices to be “qualified electors.”⁸⁴ As an initial matter, it must be noted that the only evidence the trial court cited was a book regarding the Constitutional Convention, which in turn cited two 123 year-old newspaper articles.⁸⁵ It is highly unlikely that *anyone’s* intent can be proven beyond a reasonable doubt through reliance on newspaper articles, as opposed to an official journal of proceedings.

Further, even assuming that such an amendment was, in fact, rejected, this Court has repeatedly held that rejected amendments are not

⁸³ Wash. Const. art. XXVII, §§ 8 & 10.

⁸⁴ CP 114.

⁸⁵ CP 114 at n. 22.

evidence of legislative intent, because it is “pure speculation” to assign any particular intent to the rejection of an amendment.⁸⁶ But that is exactly what the trial court and Respondents did here—engage in pure speculation by concluding that rejection of a constitutional amendment was evidence of an intention to prohibit a residency requirement for judges.

This case is a prime example of the peril of such an approach. The page of the book cited by the trial court simply cites newspaper articles from the Tacoma Daily Ledger and the Seattle Times for the proposition that the above-referenced amendment was rejected, but it does not explain *why* the amendment was rejected. Yet an 1889 article published by the Spokane Falls Review regarding the proposed amendment *does* purport to answer that question. That article states, in relevant part:

Mr. Buchanan moved to insert “and have been a citizen thereof at least two years.” He didn’t think it would be right for a man to come to the state and be eligible as soon as he was admitted to the bar.

Mr. Turner thought some provision for eligibility to office might be desirable.

⁸⁶ *State v. Cronin*, 130 Wn.2d 392, 400, 923 P.2d 694 (1996) (“As a general principle, we are loathe to ascribe any meaning to the Legislature’s failure to pass a bill into law. [I]t is pure speculation ... that the Legislature’s failure to pass [a law] was an expression of the Legislature’s view on the issues before us.”); *see also City of Medina v. Primm*, 160 Wn.2d 268, 280, 157 P.3d 379 (2007) (“We decline to speculate on the reasons for the legislature’s failure to adopt the amendment to RCW 3.50.020. In the absence of a court decision holding that chapter 39.34 RCW does not confer the supplemental statutory authority referenced in RCW 3.50.020, nothing can be inferred from the legislature’s inaction on the proposed bill.”).

Mr. Dunbar thought the words “shall be a citizen of the state” would be sufficient.

Mr. Power, suggested the words “qualified elector” and Mr. Dunbar accepted that form.

Mr. Godman believed the committee on electors would arrange all these matters and the subject should be left to them.

Mr. Dunbar was entirely willing and had only made his amendment to avoid any chance of the two-year provision going in.

Mr. Dunbar’s motion was lost and so was Mr. Buchanan’s, and then Section 17 was adopted.⁸⁷

Thus, the purported rejection of the amendment was not indicative of any intent to *prohibit* a residency requirement at all. Rather, the discussion demonstrates the intent to *include* such a requirement. Unfortunately, there does not appear to be any indication as to why the Article VI (“Elections and Elective Rights”) committee did not include such a provision. Perhaps they considered adding it, but decided it would be redundant in light of existing law that required all elective officers to be qualified electors (i.e., RCW 42.04.020), which would be ratified by Article XXVII, Section Two. Or perhaps they were preoccupied with the debate then raging at the Convention regarding women’s suffrage and thus

⁸⁷ *Taking A Rest*, Spokane Falls Review, July 21, 1889, at 1, reprinted in WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889: CONTEMPORARY NEWSPAPER ARTICLES at 3-31 (Marian Gould Gallagher Law Library 1998) (attached to this brief as Appendix C).

it was simply overlooked.⁸⁸

Indeed, this demonstrates the brilliance of Article XXVII, Section Two—the framers knew that the Constitution would not, and could not, address all matters of consequence because either there was insufficient time or, because of human fallibility, some matters may be overlooked. The framers also understood the need for continuity, and thereby provided for the continuation of Territorial laws not irreconcilable with the newly enacted Constitution. In any event, as was the case with the requirement that the Attorney General be an attorney, it is clear that Article XXVII, Section Two, operated to ratify residency and citizenship requirements for judges.

Thus, the trial court erred by relying upon the rejection of the “qualified elector” amendment as evidence of an intent by the framers to prohibit such a requirement. And certainly, there is no evidence to prove such intent beyond a reasonable doubt. Rather, the only evidence we have regarding this debate—the article quoted above—demonstrates that the framers *did* intend for there to be a residency requirement.

4. The Trial Court Erroneously Concluded That Judges Are Not “Public Officers.”

⁸⁸ QUENTIN SHIPLEY SMITH, ANALYTICAL INDEX TO THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 at 633 (Beverly Paulik Rosenow ed. 1998) (“Petitions for women’s suffrage flooded the Convention, and a strong lobby followed every move of the elections committee.”) (attached to this brief as Appendix B).

The final fact the trial court relied upon is not clear, but it appears that the trial court believed that, because the Constitution distinguished between “state officers” and “judicial officers,” RCW 42.04.020 does not apply to “judicial officers.”⁸⁹ Yet RCW 42.04.020 expressly applies to all elective “public offices,” not “state officers.” The Constitution makes clear that judges are “public officers,”⁹⁰ and this Court has also held that judges are “public officers.”⁹¹ Thus, there can be no question that RCW 42.04.020 applies to the judiciary.

F. Formalistic Legal Doctrines And Arguments Should Not Be Applied At The Expense Of Common Sense.

In endeavoring to determine the framers’ intent, it must be remembered that common sense is not checked at the door upon entering a courtroom. As Justice Hale eloquently stated:

Surround most any straightforward proposition with enough sophistry and it will vanish--or become unintelligible. The law, like other intellectual disciplines, has tried to cope with the sophistry brought to bear upon it by applying common sense. This has, on occasion, proved to be the only mechanism available by which to dissipate the fog of rhetoric generated around some legal propositions--particularly principles of constitutional law. The Constitution of the United States declares that one of the great aims of free government is to insure domestic

⁸⁹ CP 115.

⁹⁰ Wash. Const. art. I, Sec. 33 (“Every elective public officer of the state of Washington expect [except] judges of courts of record...”); Wash. Const. art. XXX “Compensation of Public Officers”, Sec. 1 (“The compensation of all elective and appointive state, county, and municipal officers who do not fix their own compensation, including judges of courts of record and the justice courts...”).

⁹¹ *City of Everett v. Johnson*, 37 Wn.2d 505, 508, 224 P.2d 617 (1950).

tranquility. Common sense dictates that, without the assurance of domestic tranquility, the other great aims of free government will remain unachieved, and the individual rights upon which they depend will vanish. *There is nothing unconstitutional about common sense.*⁹²

This passage is precisely on point in this case. While Ms. Schaller and Ms. Wyman make various technical legal arguments about why RCW 42.04.020's residency requirement is unconstitutional, they do not dispute that a consequence of their arguments in seeking to void any county residency requirement is to open Washington's Supreme Court and Superior Courts to non-Washington residents and non-citizens. This Court "avoid[s] constructions that yield unlikely, absurd or strained consequences,"⁹³ yet this consequence is unlikely, absurd *and* strained. As common sense dictates, this cannot be the law.

VI. CONCLUSION

Respondents have failed to meet their heavy burden of proving that RCW 42.02.040 is unconstitutional beyond a reasonable doubt. Washington has *always* required that candidates for elective office, including judges, reside in the communities they serve and this fact is dispositive under the plain language of Article XXVII, Section Two of our Constitution. Respondents wholly fail to show why Washington's 157

⁹² *State v. Dixon*, 78 Wn.2d 796, 797-98, 479 P.2d 931 (1971) (emphasis added).

⁹³ *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

year-old residency and citizenship requirements for judges should be overturned now.

RESPECTFULLY SUBMITTED this 21st day of September, 2012.

A handwritten signature in black ink, appearing to read "Marie C. Clarke". The signature is written in a cursive style with a horizontal line underneath the name.

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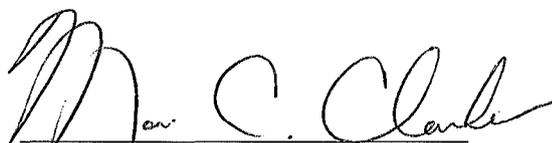
PROOF OF SERVICE

I hereby certify that on September 21, 2012, the original Brief of Appellant Marie Clarke was filed with the Clerk of the Supreme Court and, due to the expedited briefing schedule and agreement of the parties, a copy was served via email on September 21, 2012 to the following parties or counsel of record:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21st day of September, 2012, at Olympia, WA.


Marie C. Clarke

APPENDIX A

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BY RONALD R. CARPENTER

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON CLERK

NO. 86650-3

STATE EX REL CHRISTINE SCHALLER,

Petitioner

v.

SAM REED, SECRETARY OF STATE,

Respondent

PETITION AGAINST STATE OFFICER [RAP 16.2]

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PETITIONER:

Christine Schaller¹ cannot file a declaration for candidacy for Thurston County Superior Court due to the imposition of unconstitutional voter registration and residency requirements by the Secretary of State.

RELIEF SOUGHT:

Mandate that the Secretary of State, as the “chief election officer,”² “shall³ ensure”⁴ that unconstitutional voter registration and residency requirements not be imposed on superior court candidates. Specifically:

¹ Ex. A: Schaller Declaration

² RCW 29A.04.230 Secretary of state as chief election officer.

The secretary of state through the election division shall be the chief election officer for all federal, state, county, city, town, and district elections that are subject to this title. The secretary of state shall keep records of elections held for which he or she is required by law to canvass the results, make such records available to the public upon request, and coordinate those state election activities required by federal law. [Emphasis added]

³ "Shall" when used in a statute, is presumptively imperative and creates a mandatory duty unless a contrary legislative intent is shown. *Goldmark v. McKenna*, ___ Wn.2d. ___ (2011) [84704 (WASC)], citing *Phil. II v. Gregoire*, 128 Wn.2d 707, 713, 911 P.2d 389 (1996); *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

⁴ RCW 29A.04.235 Election laws for county auditors.

The secretary of state shall ensure that each county auditor is provided with the most recent version of the election laws of the state, as contained in this title. Where amendments have been enacted after the last compilation of the election laws, he or she shall ensure that each county auditor receives a copy of those amendments before the next primary or election. [Emphasis added]

RCW 42.04.020 Eligibility to hold office.

That no person shall be competent to qualify for or hold any elective public office within the state of Washington, or any county, district, precinct, school district, municipal corporation or other district or political subdivision, unless he be a citizen of the United States and state of Washington and an elector of such county, district, precinct, school district, municipality or other district or political subdivision.⁵

RCW 29A.20.021

Qualifications for filing, appearance on ballot.

(1) A person filing a declaration of candidacy for an office shall, at the time of filing, be a registered voter and possess the qualifications specified by law for persons who may be elected to the office.

....

(3) The name of a candidate for an office shall not appear on a ballot for that office unless, except as provided in RCW *3.46.067 and 3.50.057⁶, the candidate is, at the time the candidate's declaration of candidacy is filed, properly registered to vote in the geographic area represented by the office. For the purposes of this section, each geographic area in which registered voters may cast ballots for an office is represented by that office.....⁷

⁵ Emphasis added

⁶ "A judge of a municipal court need not be a resident of the city in which the court is created, but must be a resident of the county in which the city is located." [Emphasis added]

⁷ Emphasis added

this petition, because they involve significant and continuing matters of public importance that merit judicial resolution.²¹

CONCLUSION:

This case presents a question of fundamental and constitutional importance regarding the duties of the Secretary of State as the State's Chief Elections Officer who supervises all state and local elections.²² He has a constitutional duty²³ to "ensure" and "preserve the integrity of elections in Washington State."²⁴

Imposition of voter registration and residency requirements for Superior Court candidates is unconstitutional.

²¹See *Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983) (addressing challenge to state lottery even though plaintiff lacked standing); see also *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969).

²² RCW 29A.04.230

²³ RCW 43.01.020 The governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, commissioner of public lands, and insurance commissioner, shall, before entering upon the duties of their respective offices, take and subscribe an oath or affirmation in substance as follows: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the state of Washington, and that I will faithfully discharge the duties of the office of (name of office) to the best of my ability.

²⁴ <http://www.sos.wa.gov/office/office.aspx> [Agency Mission]

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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

NO. 86650-3

STATE EX REL CHRISTINE SCHALLER,

Petitioner

v.

SAM REED, SECRETARY OF STATE,

Respondent

REPLY TO ANSWER TO THE PETITION

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I. SUMMARY REPLY:

The Secretary of State dictates the form of the candidate declaration of filing. The Thurston County Auditor has no power to change the form.¹ As a practical matter, an action brought against the Auditor prior to the filing week² would not be ripe and one brought after filing would be moot resulting in irrevocable harm. Alternatively, if the Auditor allowed the filing, she would violate the unconstitutional statutes and her oath of office.

As a result, the relator is in a "Catch 22" – she cannot file the mandated declaration of candidacy because it would require her to violate statutes³ mandating residency⁴ and her oath.⁵ She

¹ See Petition at 3 citing RCW 42.04.02; RCW 29A.20.021; RCW 29A.24.031

² RCW 29A.24.050 "Except where otherwise provided by this title, declarations of candidacy for the following offices shall be filed during regular business hours with the filing officer no earlier than the first Monday in June and no later than the following Friday in the year in which the office is scheduled to be voted upon"

³ *Id.*

⁴ The relator would have to be a resident of Thurston County to be able to be registered to vote there.

⁵ The oath at the end of the Washington State Declaration of Candidacy states:

I declare that the above information is true, that I am a registered voter residing at the address listed above, that I am a candidate for the office listed above, and that, at the time of filing this declaration, I am legally qualified to assume office. I swear, or affirm, that I will support the Constitution and laws of the United States, and the Constitution and laws of the State of Washington.

WAC 434-215-012

“admitted to practice in the courts of record of this state, or of the Territory of Washington.” The Constitution states no other qualification for the office of superior court judge.⁹

Because of this admission and recognition of the prevailing law, the court must mandate the result petitioned for herein. Thus, the Secretary cannot unconstitutionally compel, via the declaration of candidacy, any superior court candidate to be an elector of the county or district.¹⁰

C. The Secretary prescribes the declaration, not the county auditor.

The Secretary of State is “the chief election officer.”¹¹

While the Secretary does not accept or process declarations of candidacy for Thurston County superior court judge, he does prescribe the Declaration of Candidacy Form used by candidates: *the form which must be used by all candidates.*¹²

⁹ Response at fn. 3 (emphasis added).

¹⁰ See Petition at 3 citing RCW 42.04.02; RCW 29A.20.021; RCW 29A.24.031

¹¹ RCW 29A.04.230 - Secretary of State as chief election officer.

¹² WAC 434-215-012.

APPENDIX B

Bowen, H. M. Lillis, Harrison Clothier, J. F. Van Name, Matt J. McElroy, Albert Schooley, J. T. Eshelman, H. C. Willison, Robert Jamieson, Louis Sohns, Thomas Hayton, A. A. Lindsley, Samuel H. Berry, J. J. Weisenburger, D. J. Crowley, P. C. Sullivan, J. T. McDonald, R. S. More, John M. Reed, Thomas T. Minor, Edward Eldridge, J. J. Travis, George Stevenson, Arnold J. West, Silvius A. Dickey, Charles T. Fay, Henry Winsor, Charles Coey, Theodore L. Stiles, Robert F. Sturdevant, James A. Burk, John A. Shoudy, T. M. Reed, John McReavey, Allen Weir, S. H. Manly, Hiram E. Allen, H. F. Suksdorf, Richard Jeffs.

Mr. Cosgrove moved that the Convention finally adjourn "Sine Die" at 9:30 p.m. Carried.

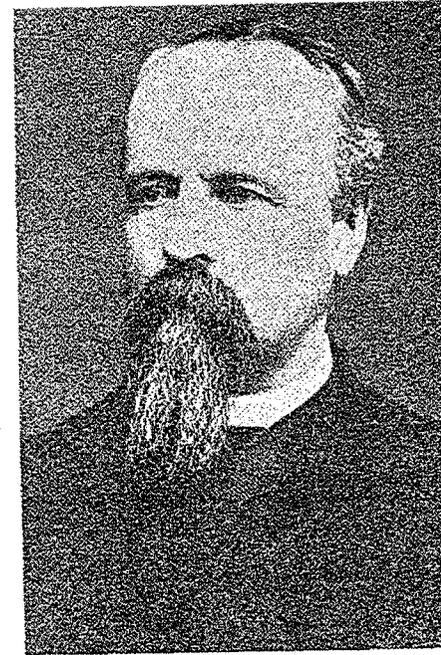
Mr. Turner introduced the following resolution and moved its adoption. It was unanimously adopted.

"Resolved, that the thanks of the Convention be, and the same hereby are tendered to the citizens of the city of Olympia for the generous hospitality with which they have entertained the members and officers, during the sitting of the Convention.

"Resolved, that a vote of thanks be and is hereby tendered to Delegate Henry, as the author of 'Old Settler' and to Ross G. O'Brien, for the pleasant manner in which he entertained this Convention at this time by singing 'The Old Settler.'" And it was unanimously adopted.

At 9:30 p.m. the President declared the Convention assembled, adjourned "Sine Die."

DELEGATES TO THE WASHINGTON CONSTITUTIONAL CONVENTION — JULY 4, 1889



John P. Hoyt

A Republican from the Twentieth District, the forty-seven year old lawyer and banker lived in Seattle.

Born in Ohio, Hoyt had taught school and served in the Union army. He was graduated from Ohio State and Union Law College in 1867 and served two terms in the Michigan legislature. He had been a supreme court judge in Washington from 1878 to 1887, and at the time of the Convention was manager of the Dexter Horton Bank and president of the Home Insurance Company.

Hoyt was elected president of the Constitutional Convention, having been nominated by Republican caucus after the withdrawal of Turner. He received forty votes, while his opponents, Warner and Cosgrove, received fifteen each. His election was made unanimous on motion of Warner seconded by Cosgrove.

number of Supreme Court judges; and (5) what the salaries of the judiciary were to be.

The issue of salaries was a recurrent one, arising later in the articles on executive and legislative branches. The salaries provided in the article on judiciary were neither high nor stringent in comparison with those of other states, and the fee system was almost entirely abolished. Satisfaction with the salary scale was not complete, however. A letter to the editor of the **Tacoma Daily Ledger** signed by a Knight of Labor protested that the high salaries provided in the Constitution would bankrupt the state. The **Walla Walla Weekly Statesman** had earlier charged that the only reason for the high salaries was that the delegates intended to seek these offices, and the **Washington Standard** asserted that salaries for state officers should be made to more closely correspond to those of the laboring class.⁴

It was chiefly the lawyers who debated the limitation on the judge's duty in instructing juries as expressed in Section 16. It has since been said that the section prevents judges from exercising effective control over the conduct of trials.⁵

The Committee on Judicial Department was appointed July 9 (p. 19)

Members: Turner, chairman; Dunbar, Gowey, Stiles, Godman, Sturdevant, Griffiths, Mires, Sharpstein, Jones, Kinnear, Weisenburger, and Crowley.

Section 1

Present Language of the Constitution:

JUDICIAL POWER, WHERE VESTED. The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Original language same as present.⁶

4. **Tacoma Daily Ledger**, September 9; **Walla Walla Weekly Statesman**, July 29; **Washington Standard** [Olympia, Wash.], July 19, 1889.

5. James L. Fitts, "The Washington Constitutional Convention of 1889," (unpublished Master's thesis, University of Washington, 1951), 50-1.

6. **Supreme Court, Inferior Courts:** Hill, *Prop. Wash. Const.*, Art. 6, sec. 1. [Identical except that Wash. drops words "in any incorporated city."]

Text as given in report of committee, July 16:

Same as final. (p. 99)

Consideration by committee of the whole, July 18:⁷

Motion: J. Z. Moore moved to strike the words following "justices of the peace."

Action: Motion withdrawn.

Discussion as follows:

For: Moore thought the Convention should frame a Constitution which would stand the test of time. He was opposed to probate courts and did not wish to have the Legislature have the power to create them.

Against: J. M. Reed and E. H. Sullivan took issue with the motion. The latter claimed that Section 12 could be amended to meet this objection. Crowley feared that striking the last clause would prevent the establishment of police courts.

Motion: Suksdorf moved to change the name "Superior" to "District."

Action: Motion lost.

Discussion as follows:

For: Suksdorf said that superior and supreme were synonymous and the people were used to the name District.

Against: Dyer stated that the United States courts would be called district courts, and to name the state courts the same would cause confusion. Turner informed the Convention that superior and supreme were not synonymous, the one being in the comparative, the other in the superlative. He and Griffiths explained that since the proposed courts would be different from district courts, it would be inconsistent to call them the same. Moreover, since they were adopting the California system, the same names should be used.

7. **Times, Review, Ledger, Tacoma Morning Globe**, July 19, 1889.

nevertheless, be liable to prosecution, trial, judgment and punishment according to law.

Original language same as present.³

Text as given in report of committee, August 5:

Same as final. (p. 226)

Section 3

Present Language of the Constitution:

REMOVAL FROM OFFICE. All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.

Original language same as present.⁴

Text as given in report of committee, August 5:

Same as final. (p. 226)

Passage of Article

Article on Impeachment approved by Convention, August 6 by a vote of 65 to 0. (p. 263)

Absent and not voting: Allen, Dallam, Gowey, Jeffs, and Stiles (The additional five members are not accounted for in the journal.)

3. Impeachable Offenses: Colo., Const. (1876), Art. 5, sec. 2; Nev., Const. (1864), Art. 7, sec. 2. [Identical except for a slight word change.] U. S. Const., Art. 1, sec. 3. [Similar.]

4. Removable from Office: Colo., Const. (1876), Art. 5, sec. 3. [Identical.]

ARTICLE VI ELECTIONS AND ELECTIVE RIGHTS

Petitions for women's suffrage flooded the Convention, and a strong lobby followed every move of the elections committee. The suffragettes were disappointed that Edward Eldridge, a strong believer in votes for women, was not made chairman of the committee.

Eldridge led a small, determined group of delegates who tried to include women's suffrage in this article, but the cause was hopeless. Too many members feared that a Constitution enfranchising women would be rejected by the voters. However, women were allowed to vote at school elections under the article as approved by the Convention.

The elections article for awhile included a section providing a separate article on women's suffrage. One plan was for it to be voted on at the first election of officers following the adoption of the Constitution. But when the elections article was passed by the Convention, the separate suffrage article was moved on the ballot with the Constitution.

The Judiciary Committee subsequently changed the wording of the section and incorporated it in Section 17 of the article on schedule. Mires wrote later that women's suffrage was rejected by a vote of 34,513 opposed and 16,527 favoring.¹

The Committee for Elections and Elective Rights was appointed July 9. (p. 19)

Members: P. C. Sullivan, chairman; J. Z. Moore, Dyer, Glascock, Travis, Burk, and Neace.

Section 1

Present Language of the Constitution:

QUALIFICATIONS OF ELECTORS. All persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; they shall

1. Austin Mires, "Remarks on the Constitution of the State of Washington," *Washington Historical Quarterly*, XXII (October, 1931), 282-3.

APPENDIX C

TAKING A REST.

After Adopting the Judicial Article the Convention Adjourned to Monday Afternoon.

The Olympia Board of Trade Invited the Delegates to a Clam-Bake on Tuesday.

There was a Motion Proposed for on the Invitation. None Voted "No."

OFFICIAL TELEGRAM TO THE REVIEW. OLYMPIA, Wash., July 23.—The convention met, the president in the chair. Prayer by Chaplain Thompson. Roll call, all present except T. M. Reed.

Records read and approved. Mr. Moore moved to go into committee of the whole to consider the judicial article but withdrew at the suggestion of Mr. Dunbar to talk.

REPORTS OF COMMITTEES

Mr. Edelman submitted an affidavit of K. D. Sutton to the effect that he had received petitions for woman suffrage signed by more than 25,000 persons, and that the same were burned in the Seattle Committee on elections.

Mr. McCroskey presented the petition of A. K. Bush and others for woman suffrage; also the petition of L. M. Ballard and others, George Cline and others and M. Lord and others, all for woman suffrage. Committee on elections.

On motion of Mr. Jones, then Joseph Kuhn was admitted to the privilege of the floor, and on motion of J. Z. Moore, the same privilege was extended to Messrs. A. M. Cannon, W. H. Calkins and S. C. Hyde.

On motion of Mr. Moore the convention went into committee of the whole to continue consideration of the judicial article and Mr. Cosgrove resumed the chair.

Section 18, which declares the supreme and superior judges to be ineligible to any other office or employment during their term except judicial employments, was adopted without discussion.

Section 19 says: "Judges shall not charge juries with respect to matters of fact nor comment thereon; they shall declare the law." Mr. Hudkorf moved to strike out the words "not comment thereon."

Mr. Crowley was very much opposed to this amendment. It is the duty of a judge to declare the law, and of a jury to decide the facts. Judges sometimes seem to desire to control the verdict and state the facts in a way in which they should not. Hence this provision, which is to keep distinct and separate the functions of court and jury.

Mr. Turner said he had stood by the committee report, when other members have been deserting, and he thought he should stand by it now. "I should not be sorry if the committee report were adopted. As it stood the section was likely to embarrass the judge. It is necessary to refer to the facts in order to make the law plain to the jury."

Mr. Hoyt advanced similar views and favored the amendment.

Mr. Dunbar proposed to stand by the report in spirit as well as in letter. He opposed the amendment, juries apparently seemed to try to get the opinion of the judge and go by that, which is all wrong. He did not believe judges would have any trouble in explaining the law of a case without commenting on the facts.

Mr. Dyer offered an amendment to the effect that judges may state the testimony as well as declare the law and this was accepted by Mr. Hudkorf.

Mr. Dunbar didn't know why the judge should state the testimony. The jury were there for that purpose.

Mr. Sullivan of Tacoma thought the last amendment worse than the first and opposed them both.

Mr. Moore favored the amendment. It was from the committee's situation and we were adopting.

Judges should be active factors, not mere figureheads, in the trial of English cases. They have always been active factors in the law, and they ought to do so to prevent litigation.

Mr. Sullivan of Whitman opposed the amendment. He didn't believe the judges had any business with the facts, or that a right-minded judge would attempt to influence juries as to them. After both attorneys have commented fully on the facts, the only effect of the judge being so to give him the last word, and to give one side the other an extra attorney's account to which side the judge happens to incline to. The juries are, and should be, the sole judges of the credibility of witnesses and the facts in the case.

Mr. Godman opposed the amendment. Facts and testimony were not necessarily the same. The judges may state the testimony under the present law, but we do not wish them to comment upon it.

The section is right as it stands.

Mr. Hudkorf said this amendment was in the interests of the case of the people who paid the costs of litigation.

Mr. Buchanan feared we were in danger of going too far, and thought the judge ought to be allowed to comment on facts juries might not be able to see.

Mr. Kinneer favored the section just as the committee had reported it, and wanted to keep judges and juries each to their functions.

Mr. Jones objected to allowing the judge to state the testimony, as he could only state it as it appeared to him.

Mr. Dunbar thought it better to comment on facts juries might not be able to see, or the judge might carry a case out of him.

Mr. Moore said the law had been before, and had been amended, and it was dangerous to commit crime that in any of the states owing to the efficiency of the enforcement of the law, and this he attributed very largely to the power enjoyed by judges under the federal statutes of committing on the testimony in order to assist juries to arrive at correct conclusions.

Mr. Griffiths believed that the gentlemen who opposed this amendment did so because from their own experience they were satisfied with the evil of allowing the judge to guide in the facts.

Mr. Turner did not remember a case where a judge had induced a jury to render an erroneous verdict, and what he knew of the facts, but he had known of many cases where a judge had induced a jury to get erroneous verdicts by false suggestions and had seen the judge lead the jury back to the true position by a calm statement of the facts afterward. He opposed the amendment and wished the section left as the committee had left it.

Mr. Dyer said the jury system had been established as a protection from

judges who attempted to carry out through the courts the corrupt desires of the King. This course here proposed was held wise and necessary in California and would be wise here.

Mr. Dyer's motion failed by aye 10, noes—too many to need counting in the opinion of the chair.

Mr. Moore moved that the word "allotted" be inserted, so that judges might be allowed to state the bearing of facts which were not disputed. Lost by a decided vote.

The section was adopted without amendment.

Section 17 requires candidates for judges to have been admitted to the bar of the state or territory of Washington.

Mr. Buchanan moved to insert "and have been a citizen thereof at least two years." He didn't think it would be right for a man to come to the state and be eligible to the supreme bench as soon as he was admitted to the bar.

Mr. Turner thought some provision for eligibility to office might be desirable.

Mr. Dunbar thought the words "shall be a citizen of the state" would be sufficient.

Mr. Dyer suggested the words "qualified elector" and Mr. Dunbar accepted that form.

Mr. Godman believed the committee members and the subject should be left to them.

Mr. Dunbar was entirely willing, and had only made his amendment to avoid any chance of the two-year provision going by.

Mr. Dunbar's motion was lost and so was Mr. Buchanan's, and then section 17 was adopted.

Sections 18 (Reports of the supreme court), 19 (No judge to practice law while on the bench), 20 (Causes to be decided within ninety days) and 21 (Publication of court opinions) were adopted without debate or amendment.

Section 22 provides that courts shall appoint their own clerks, but that the legislature may, if it chooses, provide for the election of such clerks.

Mr. Henry moved to strike out the provision about the legislature. He claimed that the relation between judges and clerks was of such a personal nature that the judge ought to select their own assistants in these offices. The clerk had often, the gentleman said, to almost build up an entire opinion on the skeleton of a few words which he couldn't read owing to the peculiar chirography of the judge.

The amendment was lost by aye 24, noes 21.

Mr. Lindsay moved to amend by providing that clerks should be paid by salary only. Carried, and the section was then adopted.

Section 21 provides for the selection of a number of the bar to sit with the court as judges under certain circumstances.

On motion of Mr. Weisenburger, and with the concurrence of Mr. Turner, who said it was unnecessary now that live judges had been provided for, the section was stricken out.

The next section, relative to court commissioners and their duties, etc., was adopted.

Mr. Sullivan of Tacoma submitted a new section, declaring that the superior court judges shall report each year in writing to the judges of the supreme court such defects and commissions as their experience observes in the laws, and the supreme judges in turn shall report to the governor with forms to suggest the defects, etc., in both laws and constitution.

Mr. Moore thought this offering of a new section was out of order, but the chair differed with him.

On motion of Mr. Govey the word "constitution" was stricken out.

Mr. Midgton thought the dates of such reports should be set. Discussion until we knew when the legislature was to meet.

Mr. Turner thought our law was in a struggling along with a good full of defects, which were not remedied because it had been nobody's business to remedy them. It was evidently proper for the judges to suggest these remedies from time to time.

Mr. Sullivan of Tacoma said the amendment proposed by him would bind no one, but only make it the duty of the judges to bring to the attention of the legislature in a proper form such

changes in the laws as seemed to them beneficial. Then the legislature would do as it pleased about

Mr. Govey approved the idea. Mr. Griffiths wanted to strike out the clause "requiring the judges to prepare the forms of bills embodying the deficiencies," because attention afterwards they would be called upon to prepare the validity of these very bills.

Mr. Crowley found this last suggestion and the convention adopted it, and subsequently adopted the section, to be numbered 23.

Mr. Prosser submitted a proposal to provide for the formation of boards of arbitration, and said he did so on behalf of that large body of people who dreaded the delay and expense of litigation, and also the interests of people who had large interests liable to certain plagues immediately and who should not be compelled to submit to the long delay of a law suit.

The committee evidently thought all these people could take their chances with the rest of the community and voted against the section.

Mr. Sullivan of Whitman introduced a section requiring judges to try cases and prohibiting the referring of cases to a referee except by consent of all the parties. He wanted the judges to do their work instead of shirking it and putting it upon the referees by the great delay and cost of the parties.

The section of Mr. Godman was modified so as simply to provide that no case shall be referred except by consent of all the parties.

Mr. Turner thought this was legislation and wholly unnecessary at this time. Referees could not be made now except in cases of accounts or when certain facts not appearing in the case were necessary to its proper decision.

Mr. Buchanan said that testimony had to be taken down to go with a case and that it was a waste of money to have it put in the legislature.

Mr. Sullivan agreed that this was properly a matter for the legislature. This section failed badly.

Mr. Sullivan also offered another section providing that no case should be referred to a referee unless the legislature provided otherwise.

Mr. Turner said the committee had already a section to cover this point and Mr. Sullivan withdrew his section.

Mr. McElroy offered a section requiring superior courts to be held at the respective county seats. Lost.

Section 20 making the county clerk the clerk of the superior court, 27 establishing the scale of process in the state of Washington, and 28 (relating to the oath of office of judges) were respectively read and adopted.

This concluding the article, the committee returned to section 2 and took up the supplementary reports of the judicial committee recommending the adoption of the following section 24.

The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which state officers are elected. The first election of judges of the supreme court shall be at the election which shall be held upon the adoption of this constitution, and judges elected thereafter shall be classified by lot so that two shall hold their office for